

Briefing note

on the recent political developments in Nepal leading to a lack of access to justice for victims of gross human rights violations and international humanitarian law

Introduction

This briefing note aims to highlight how the recent dissolution of Nepal's Constituent Assembly (CA) and Legislature-Parliament and subsequent political instability will negatively impact the rights to truth, justice and redress of victims of gross human rights violations and international humanitarian law.

Our concerns are based on the failure of successive governments to hold perpetrators accountable for these serious violations. The government has evaded all efforts by victims and civil society by pointing to the prospect of a future transitional justice mechanism. Our concern is that the state might use an interim ordinance to enact a weak law to provide amnesty. On the other hand, if a strong ordinance is brought in, it will be revoked once an elected assembly is in place.¹ In either case, justice will once again be held to ransom by the culture of impunity in Nepal. According to government sources, the ten-year-long armed conflict between the Communist Party of Nepal-Maoist (CPN-M) and the security forces claimed the lives of more than 16,000 people. Research undertaken by local human rights organizations found that: "The majority were killed by the security forces, but the CPN-M was also responsible for several thousand killings, including hundreds of civilians they suspected of being 'enemies of the people' or providing information to the security forces. Both parties were responsible for the indiscriminate killing of civilians during attacks or armed 'encounters' between them".² There are allegations of systematic and widespread violations of international human rights law and international humanitarian law, such as enforced disappearances, torture and extrajudicial killings. To date, hardly any of these violations has been adequately investigated by police. Nor have the perpetrators been brought to justice before a civilian court to be judged and sanctioned. Impunity prevails despite strong evidence provided by victims and their families in their complaints to the police. No comprehensive programme to guarantee prompt, adequate and fair compensation as well as other forms of reparation for the harm suffered by the victims and their families has been adopted.

Since the conclusion of the ten-year internal conflict in 2006, victims' groups from the conflict – with the support of organisation like Advocacy Forum-Nepal and other national and international human rights organisations and the UN Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) – have fought tirelessly for truth, justice and reparations for themselves and their family members. These efforts have been waged primarily through filing complaints with police to trigger investigations and prosecutions under the criminal justice system and through advocacy for the establishment of inclusive and effective transitional justice (TJ) mechanisms.

¹ Article 88 (2) of the interim Constitution requires that "every such Ordinance: (a) shall be laid before the meeting of the Legislature-Parliament held after the promulgation, and if not passed by such meeting, it shall *ipso facto* cease to be effective; (b) may be repealed at any time by the President; and (c) shall, unless rendered ineffective or repealed under Sub clause (a) or (b), *ipso facto* cease to have effect at the expiration of sixty days from the holding of the meeting of the Legislature-Parliament.

² Advocacy Forum – Nepal and Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict* (2008), p. 3. Available at <http://www.advocacyforum.org/downloads/pdf/publications/waiting-for-justice-sep-10.pdf> (accessed 6 June 2012).

Transitional Justice Mechanisms

There were explicit provisions within the Comprehensive Peace Accord (CPA) of November 2006 and the Interim Constitution of January 2007 to establish a Truth and Reconciliation Commission. The Supreme Court issued a directive on June 2007 to establish a Commission of Inquiry into enforced disappearances. Efforts have been slow, and the prospect of any effective mechanisms materializing in the immediate future is now even more remote because of the dissolution of the Legislative Parliament in May 2012.

On the other hand, despite their fractious relations, the political and security establishment have little interest in pursuing justice and holding themselves to account. There is thus the threat that a TJ mechanism may be established through ordinance, i.e. without any consultation with civil society and without transparent debate. If the ordinance is effective, that is, if it enables the identification and investigation of perpetrators, it can be stalled because under the Interim Constitution, any ordinance needs to be endorsed by the Parliament within six months from the date at which it is reconvened. If the TJ mechanism(s) set up through such an ordinance end up functioning well, the Nepal Army and senior politicians, who could be implicated in their investigations, would simply not confirm the law. As a consequence, the ordinance would lapse and leave the whole TJ process in doubt. Alternatively, and perhaps a likely scenario, is that the ordinance would establish a weak commission (possibly with the power to grant amnesty or similar measures to those who are alleged to have committed gross human rights violations during the conflict) which also would make the whole TJ project unsatisfactory and contrary to international standards.

Either way, the option of the establishment of TJ mechanism(s) through ordinance is highly problematic and risks undermining the rule of law principles which the country aims to consolidate. It is therefore strongly opposed by most human rights organizations and victims' groups.

It is important to highlight that while the situation created by the dissolution of the assembly affects the possibility to create transitional justice mechanisms, impunity could also extend to victims of violations committed after the conflict and would not prevent future violations from being committed.

The Issue of Amnesty

Just before the Constituent Assembly and Legislative Parliament were dissolved in May 2012, the government decided to withdraw two pending Bills for the establishment of a Truth and Reconciliation Commission and a Commission of Inquiry into Disappearances. According to government officials, the government had planned to issue an ordinance to establish just one TJ mechanism, which would be given wide powers to provide amnesty to perpetrators, including those who had committed gross human rights violations amounting to crimes under international law. However, the draft ordinance was never made public.

Any proposed amnesty provision in a Truth and Reconciliation Commission Bill would prevent alleged perpetrators of gross violations of international human rights law from being held to account for their crimes. The exemption from any criminal proceedings or sanction of such perpetrators would be contrary to Nepal's international obligations. In the current context, victims and their families are

therefore arguably further away than ever before from seeing their fundamental rights to truth, justice, reparations and guarantees of non-recurrence secured.

Lack of Progress in Criminal Investigations and Prosecutions

Concerns about the possible adoption of TJ mechanism(s) which include amnesty clauses is rooted in the overall situation of impunity in Nepal. For several years, successive governments have evaded delivering justice and accountability for gross human rights violations by promising a TJ mechanism. This despite the clear decision rendered in June 2007 by the Supreme Court of Nepal³ and the views issued by the UN Human Rights Committee in *Giri v. Nepal* (Communication 1761/2008) and *Sharma v. Nepal* (Communication 1469/2006) that TJ mechanism(s) must not replace the normal criminal justice system but rather should be complementary to it.⁴

Given the delays in the establishment of TJ mechanisms, both local and international NGOs have continued to urge the government to take all necessary measures to tackle impunity, in line with Nepal's international obligations, notably by proceeding with investigations and prosecutions of cases that are already under investigation or where charges have been filed, such as in the case of Maina Sunuwar, where murder charges are pending before Nepalese courts since 31 January 2008. In this case, as in others, the Nepalese Army has provided *de facto* impunity to the perpetrators by refusing to hand them over to the Nepalese police or otherwise cooperate with the ordinary (civilian) criminal justice system.⁵

Withdrawal of Pending Criminal Cases

As one of the measures to normalise the situation at the end of the conflict, the Maoists and the government agreed in the CPA 'to withdraw political accusations, claims, complaints and cases under-

³ *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007. In this landmark ruling on a number of enforced disappearance cases including 80 habeas corpus writs, the Supreme Court of Nepal issued directive orders, *inter alia*, for the Government to enact legislation consistent with international law that would criminalise enforced disappearance; establish a high level 'Investigation Commission for Disappeared People' for inquiry into past enforced disappearances in compliance with international criteria on such commissions on inquiry; require investigations and prosecutions of persons responsible for disappearances and provide interim relief to the families of the victims without prejudice to the final outcome of these cases. At the time, the decision was welcomed by victims and human rights organisations.

⁴ See Human Rights Committee (HRC), Case *Yasoda Sharma v. Nepal*, views of 28 October 2008, para. 7.10 "[...] The Committee attaches importance to the States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its General Comment No. 31 which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before it indicates that the author did not have access to such effective remedies [...]" and Case *Giri v. Nepal*, views of 24 March 2011, para. 7.10 "[...] The Committee reiterates the importance which it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights, even during a state of emergency. The Committee further recalls that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant [...]". See also *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007.

⁵ See Advocacy Forum-Nepal and Human Rights Watch, *Waiting for Justice*, 2008, *Still Waiting for Justice*, 2009, *Indifference to Duty*, 2010 and *Adding Insult to Injury*, 2011, all available at <http://www.advocacyforum.org/publications/impunity-reports.php>. For details on the Maina Sunuwar case, see Advocacy Forum-Nepal, *Maina Sunuwar. Separating Fact from Fiction*, available at <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>

consideration against various individuals'.⁶ In October 2008, the Maoist-led government decided to withdraw 349 criminal cases against numerous political party cadres, including two senior members of the Cabinet.⁷ The government claimed these to be necessary steps to promote the peace process and fully implement the CPA. As opposed to political charges, however, the most frequent offences alleged in the cases are murder and attempted murder, rape and mutilation. They include numerous incidents reported well after the signing of the CPA in 2006.⁸ Successive governments continued appointing leaders belonging to different political parties to ministerial positions despite the fact that some of them had criminal charges pending against them, thus drawing wide condemnation from victims' groups and national and international human rights organisations.⁹ At the same time, a number of security personnel accused of gross human rights violations, instead of being suspended and prosecuted, were promoted.¹⁰

In August 2011, the United Communist Party Nepal – Maoist (UCPN-M) and the United Democratic Madhesi Front (UDMF) reached a four-point agreement, paving the way for the formation of the present government. One point of the agreement called for the withdrawal of criminal cases against individuals affiliated to the two groups, and declared a general amnesty which included serious crimes and human rights abuses.¹¹ After being publicly called to clarify this issue, Prime Minister Baburam Bhattarai stated that he would withdraw only "politically motivated" cases, but failed to clarify the basis for determining a politically motivated case.¹² Furthermore, in November 2011, in a seven-point agreement, the leaders of the main political parties committed to endorse a legislation establishing TJ mechanism(s) 'in a spirit of reconciliation' thus leaving ample space for provisions that could relate to a blanket amnesty for conflict-related crimes.¹³

⁶ Comprehensive Peace Agreement, 21 November 2006, Art. 5.2.7.

⁷ The procedure to withdraw cases is set out in Section 29 of the State Cases Act 1992 which provides that cases can be withdrawn on the basis of a deed of reconciliation between the parties involved (not a formal withdrawal of charges), or if a court agrees to the Government's proposal. On 17 August 1998, the Government approved the "Procedures and Norms to be Adopted While Withdrawing Government Cases-1998" ("1998 Standards") clarifying the nature of the criminal cases qualifying for withdrawal and the process to be followed.

⁸ The Kathmandu Post, *Op-ed: Serious Crimes* (23 June 2011), available at <http://www.ekantipur.com/the-kathmandu-post/2011/06/23/oped/serious-crimes/223221.html> (accessed 6 June 2012).

⁹ Republica, *Amnesty International, International Commission of Jurists urge PM to reconsider Agni Sapkota appointment* (24 May 2011), available at http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=31651 (accessed 6 June 2012); The Kathmandu Post, *Op-ed: In Cold Blood* (9 November 2011), available at <http://www.ekantipur.com/the-kathmandu-post/2011/11/09/oped/in-cold-blood/228036.html> (accessed 6 June 2012).

¹⁰ UN OHCHR-Nepal, *UN concerned over recent Government decisions to appoint alleged perpetrators of human rights violations* (10 November 2011), available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/November/2011_11_10_PR_Dhunge_I_pardon_E.pdf (accessed 6 June 2012); Ekantipur, *Toran Singh appointment draws rights body's wrath* (25 October 2009), available at <http://www.ekantipur.com/2009/10/25/top-story/toran-singh-appointment-draws-rights-bodys-wrath/301951/> (accessed 6 June 2012); Advocacy Forum – Nepal, *SC orders to continue investigation* (12 July 2011), available at <http://www.advocacyforum.org/news/2011/07/sc-orders-to-continue-investigation-on-aig-rana-case.php> (accessed 6 June 2012).

¹¹ This is in addition to the 349 criminal cases withdrawn by the UCPN-M –led government in 2008.

¹² The Kathmandu Post, *Op-ed: Nepal's elusive justice* (16 September 2011), available at <http://www.ekantipur.com/the-kathmandu-post/2011/09/15/oped/nepals-elusive-justice/226358.html> (accessed 6 June 2012).

¹³ South Asia Analysis Group, *Nepal: political parties sign a historic agreement* (4 November 2011), available at <http://www.southasiaanalysis.org/%5Cnotes7%5Cnote639.html> (accessed 6 June 2012).

Conclusions

The lack of adoption of TJ mechanisms (the *status quo* in Nepal for over six years now) or their possible adoption in ways that do not conform to international standards have the same effect -to deny access to truth, justice, reparations and guarantees of non-recurrence- to victims of gross violations of human rights and international humanitarian law and their relatives. This amounts to an ongoing violation of several of Nepal's obligations under international law, among them:

- ✓ the obligation to promptly, thoroughly, impartially, independently and *ex officio* **investigate alleged violations of human rights** and to criminally prosecute and punish those deemed responsible for such violations.¹⁴ This obligation is strengthened and the State's responsibility aggravated vis-à-vis crimes against humanity and war crimes.¹⁵
- ✓ the obligation to **establish and disclose the truth** regarding the circumstances of cases of enforced disappearance, the progress and results of relevant investigations, as well as the fate and whereabouts of the disappeared persons. In the event of the death of a disappeared persons, the obligation to locate, identify respect and return their mortal remains to the family".¹⁶ This right has been recognized as an autonomous and non-derogable right and thus, amnesty can never be used to limit, deny or impair it.¹⁷

¹⁴ Among others, the HRC held that "Where the investigations [...] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6)", see General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 16. See also the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN doc. E/CN.4/2005/102.Add.1, Principles 1 and 19.

¹⁵ Under customary international law, the principle of individual responsibility for war crimes extends to non-international armed conflicts, thus including the armed conflict in Nepal, see Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, International Committee of the Red Cross (Cambridge University Press), March 2005, Rule 151. Crimes against humanity are also part of customary international law. Systematic or widespread practice of enforced disappearance against the civilian population is also recognized as a crime against humanity as expressed in article 7(1)(i) of the Rome Statute for the International Criminal Court. The HRC has also affirmed that the ICCPR requires punishment of such crimes, see General Comment No. 31 (2004), para. 18.

¹⁶ The HRC affirmed that the practice of enforced disappearance gives rise to such obligations, see Case *María del Carmen Quinteros et al. v. Uruguay*, views of 21 July 1983, para. 16. "[...] responsibility for the disappearance of Elena Quinteros falls on the authorities of Uruguay and that, consequently, the Government of Uruguay should take immediate and effective steps: (a) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release; (b) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations do not occur in the future." These standards are further developed in the UN Declaration on the Protection of all Persons from Enforced Disappearance (1992) and the International Convention for the Protection of all Persons from Enforced Disappearance (2007). Both instruments were adopted by consensus resolutions of the UN General Assembly, although Nepal has yet to ratify the Convention.

¹⁷ See *inter alia*, "Study on the right to the truth" doc. E/CN.4/2006/91 of 8 February 2006, summary and para. 60; Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, doc. E/CN.4/2005/102/Add.1 of 8 February 2005, principles 2, 4 and 5. See also WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, 2010, available at: http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf; and Human Rights Council, *Right to the Truth*, doc. A/HRC/5/7 of 7 June 2007.

- ✓ the obligation to **provide an effective remedy and reparations** to victims of gross human rights violations and serious violations of international humanitarian law and, where applicable, to their families.¹⁸
- ✓ the obligation to **prevent instances of recurrence of human rights violations**, which also constitutes a form of reparation.¹⁹

TRIAL (*Swiss Association against Impunity*), the International Center for Transitional Justice (ICTJ), Advocacy Forum – Nepal, the International Commission of Jurists (ICJ) and Human Rights Watch among several national organisations also subscribing this note,²⁰ have been working to assist victims of gross violations of international human rights law in Nepal obtain justice through domestic and international legal mechanisms. In view of the political changes that have recently occurred in the country and their potential negative impacts on victims' enjoyment of their fundamental rights, the organisations submitting this briefing note urge the Special Rapporteur to take any action he deems appropriate to ensure that the government of Nepal upholds its international obligations to provide truth, justice and reparation to victims of gross human rights violations and abuses that took place during and in the aftermath of the conflict.

Furthermore, the undersigned organisations respectfully request the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-recurrence to:

- Remain seized of the political situation in Nepal leading to the dissolution of the Constituent Assembly and thus to the perpetuation of impunity for perpetrators of gross human rights violations committed during the conflict period;

¹⁸ The UN 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 (General Assembly resolution 60/147), agreed by all States including Nepal requires that States provide remedy and reparation for the violations identified above. Included is cessation of the violations, as well as, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Principles 15-23). This obligation is also established pursuant to Article 2.3 of the ICCPR. The HRC has deemed that States must ensure that “[...] individuals also have accessible and effective remedies to vindicate those rights” see General Comment No. 31 (2004), para. 16. Regarding reparations, the HRC has also established that “Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged [...] the Covenant generally entails appropriate compensation [...] where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations” see General Comment No. 31 (2004), para. 16.

¹⁹ The HRC established that the obligation to prevent instances of recurrence is integral to Article 2 of the ICCPR. Such measures go beyond victim-specific remedies and often entail changes in a State Party's laws or practice. Moreover, the Committee stated that “the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations [...] Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [...]” see General Comment No. 31 (2004), paras. 17 and 18.

²⁰ See Annex I. Nepal Society of Families of the Disappeared and Missing (NEFAD); Conflict Victims Society for Justice-Nepal (CVSJ-Nepal); Informal Sector Service Centre for Human Rights and Social Justice (INSEC); Conflict Victims Committee – Bardia (CVC); Rina Arpan Dalit Uplift Forum (RADUC); Society of Terror Victim Orphans (OTV-Nepal) and; Conflict Victims National Society (ConViNS).

- Remind the government of Nepal of its obligations with regard to justice and fighting impunity, including, *inter alia*, of its obligations to adopt TJ mechanisms which address the accountability, including the prosecution of individuals who may be criminally responsible for crimes against humanity or gross violations of human rights; guarantee the victims' rights to effective remedies and reparations; guarantee the victims' and society's right to know the truth about established violations; and ensure that TJ mechanisms are adopted in such a way as to guarantee these rights without perpetuating the original violations; and
- **Give serious consideration to requesting the government of Nepal to invite the Special Rapporteur to conduct an official country visit to Nepal.**

BACKGROUND NOTE 1: Brief Summary of the Development of the Transitional Justice Process in Nepal: Tracing the ‘Evolution’ of the Truth and Reconciliation Commission and Commission of Inquiry into Disappearances bills

Between November 2006 and June 2007, the government of Nepal publicly committed itself to establishing two TJ mechanisms: a Truth and Reconciliation Commission (TRC) and a Commission of Inquiry into Disappearances (Disappearances Commission).

The November 2006 CPA between the government of Nepal and the United Communist Party Nepal – Maoist (UCPN-M) explicitly provides for the establishment of a high-level TRC “[...] in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliation[s] in the society”.²¹ The CPA also stipulates that both parties to the conflict agree to make public the names and addresses of all those who were subjected to enforced disappearance and killed during the course of the conflict.²²

The January 2007 Interim Constitution concretises these commitments and reaffirms that the State has a legal responsibility to constitute a high-level TRC and to provide relief to the families of victims of enforced disappearance based on the report of an inquiry commission.²³ The latter refers to the establishment of a Disappearances Commission. In fact, in June 2007 a landmark decision of the Supreme Court of Nepal issued a directive order to the government to “enact an Act for the protection of the disappeared persons, making provision for an Inquiry Commission [...] to carry out an in-depth and comprehensive inquiry of the said persons and [...] accomplish a criminal investigation on the basis of the report and [...] prosecute concerned persons”.²⁴

On the basis of provisions contained in the CPA and Interim Constitution and following the Supreme Court’s June 2007 directive order, draft bills for the establishment of a TRC and a Disappearances Commission were made public in July 2007 and November 2008 respectively by the newly established Ministry of Peace and Reconstruction (MoPR). The draft bills were drawn up without consulting victims’ groups, civil society organisations or the OHCHR-Nepal and were widely condemned for failing to meet international human rights standards. More specifically, the draft TRC bill was criticised for its lack of independence from political influence, inadequate witness protection mechanisms, and a proposal to grant it the power to recommend amnesty for perpetrators of serious human rights violations. The draft Disappearances Commission bill was similarly criticised for, *inter alia*, the would-be Commission’s lack of political independence, for failing to employ a definition of enforced disappearance consistent with international law, and for potentially failing to recognise enforced disappearance as a crime against humanity.²⁵

²¹ Comprehensive Peace Agreement, 21 November 2006, para. 5.2.5.

²² *Ibid.*, para. 5.2.3.

²³ Interim Constitution of Nepal (15 January 2007), Section IV, para. 33 (q) and (s).

²⁴ *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007, p. 41.

²⁵ International Commission of Jurists, *Disappearances in Nepal: Addressing the Past, Securing the Future*, March 2009, available at http://www.icj.org/IMG/Briefing_paper_on_Nepal_Enforced_Disapp_-_FINAL.pdf.

After the two draft bills were made public, consultations with some victims' groups, civil society organisations and the OHCHR-Nepal were held and recommendations issued on a rolling basis to the MoPR. Nonetheless, the process was criticized for not pursuing wider consultation. Although the MoPR made substantial improvements to the two draft bills prior to their tabling in the Legislature-Parliament, a number of contentious issues remained, including provisions linking reconciliation with amnesty, definitions of human rights violations and victim/witness protection mechanisms. The draft Disappearances Commission bill was approved by the Council of Ministers in October 2009 and tabled in the Legislature-Parliament in May 2010. The draft TRC bill was approved by the Council of Ministers in February 2010 and tabled in the Legislature-Parliament later that month. Both draft bills were forwarded to the Legislative Committee for further discussion in May 2010. The Legislative Committee examined the draft bills on a clause by clause basis for almost one year, but was ultimately unable to resolve the contentious issues highlighted above. A five-member sub-committee established in April 2011 to resolve problematic clauses and finalise the Disappearances Commission bill was therefore expanded in May 2011 to include an additional two members with the aim to finalise both bills within a ten-day period. In spite of several extensions, the sub-committee was unable to fulfil its mandate and finalise the draft bills.²⁶

The Legislative Committee and sub-committee's failure to finalise the draft bills is strongly linked to the politicisation of the drafting process and the vested interests of a number of key players, including two of the main political parties and the military, in prioritising one bill over the other. While the UCPN-M pushed for the swift finalisation of the Disappearances Commission bill as large numbers of victims of conflict-related enforced disappearance were affiliated to the party, the Nepali Congress (NC) sought to prioritise the TRC as it viewed the bill as a mechanism for addressing the expropriation of property during the conflict. The combination of a fundamental lack of trust between the UCPN-M and the NC and political one-upmanship resulted in the stalling of the two draft bills for several months.

On 1 November 2011, a seven-point agreement between the political parties aiming to end the political deadlock and, *inter alia*, form the TRC and Disappearances Commission within one month was signed and a Task Force comprising of three high-level politicians from each of the main parties (UCPN-M, NC and the CPN-United Marxist-Leninist) mandated to facilitate the finalisation of the two draft bills was formed shortly after.

In December 2011, political leaders proposed that the two bills would prioritise reconciliation over truth-seeking and that the TRC bill would incorporate a provision granting broad amnesty to alleged perpetrators of gross human rights violations, including crimes under international law such as torture and enforced disappearance.

In January 2012, the Task Force submitted a summary paper of suggestions in regards to the two bills to the Legislative Committee. Although the Task Force highlighted that 'amnesty should be ruled out in some incidents of serious nature' and also that 'general amnesty cannot meet the expectations of

²⁶ With the dissolution of the Constituent Assembly, the sub-committee was automatically also dissolved.

victims', it also confusingly proposed 'to adopt the ways of seeking truth by the TRC and Disappearances Commission and granting amnesty'.²⁷

Amid extremely vocal criticism of proposed general amnesty provisions from national and international human rights organisations, in May 2012 the government submitted a motion to withdraw the draft bills reportedly to be replaced by one consolidated bill to establish a single TJ mechanism with wide powers to grant amnesty. However, the motion is yet to be adopted by the Parliament. Following the dissolution of the Legislature Parliament in May 2012, there is now a threat that this legislation will be promulgated as an ordinance.

²⁷ *Suggestions made by the Task Force regarding the Truth and Reconciliation Bill and Commission on the Disappeared Bill* (January 2012), para. 4.2.

BACKGROUND NOTE 2: Brief Summary of Broader Political Developments in Nepal Leading to the Dissolution of the Constituent Assembly on 27 May 2012

After the historic signing of the CPA on 21 November 2006, the ten year old conflict in Nepal was formally ended and a new political process for peace and reconciliation begun. After several compromises between political parties and additional agreements for the establishment of a federal republic, the election for the Constituent Assembly was finally held on 10 April 2008. The UCPN-M emerged as the largest party in the Constituent Assembly and *Madesh*-based parties emerged as the fourth strongest political force wielding significant sway in the new political equation.²⁸ On the first meeting held on 28 May 2008, the Constituent Assembly overwhelmingly voted to declare Nepal a democratic republic, setting 28 May 2010 as the deadline for the adoption of a new constitution. Key issues to be resolved through additional negotiations were the rehabilitation of former Maoist army combatants and the integration of some of them into the Nepalese Army as well as the precise nature of the federal State structure.

Another worrying development during this period was that the government refused to extend the mandate of the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) beyond 9 December 2011. The OHCHR-Nepal had been invited to monitor the human rights situation in Nepal in 2005 when the conflict was at its peak. The government's move to kick the OHCHR out of Nepal clearly indicates its unwillingness to establish accountability for past human rights violations.

In the run-up to the deadline of the Constituent Assembly on 28 May 2012, the victims' agenda for truth and justice remained largely ignored amidst heated political debate and negotiation focussed on which federal model would be incorporated into the new constitution. The months of April and May 2012 witnessed a series of strikes, demonstrations, rallies and protests by different ethnic and regional groups all over Nepal. Political parties failed to forge consensus on these contentious issues before midnight on 28 May 2012. The Constituent Assembly was automatically dissolved. The dissolution of the Constituent Assembly was the result of a previous Supreme Court ruling prohibiting the government from extending its term by another three months.²⁹

Shortly before the dissolution of the Constituent Assembly, the Prime Minister called an election for the Constituent Assembly to be held on 22 November 2012. With the Constituent Assembly and the Legislature Parliament dissolved, there are diverse opinions about the legitimacy of the present government and its call for new Constituent Assembly elections. On 29 May 2012 a writ petition was filed in the Supreme Court against this allegedly unconstitutional step by advocate Santosh Basnet. This case remains pending at the time of writing. The Nepali Congress (NC), United Marxist-Leninist (UML) and several other political parties oppose the government's move and are pressing for the formation of a consensus government headed by 'democratic forces'.

Political parties remain bitterly divided on fundamental political and legal issues. The current political, constitutional and legal vacuums threaten to push Nepal towards further uncertainty and instability.

²⁸ The '*Mades*' delineates the fertile plains in the south of the country. The majority of the population in the *Mades* have strong socio-linguistic linkages with India and have historically been discriminated against by the high-caste, Nepali-speaking political elite.

²⁹ The Hindu, *Supreme Court stay CA extension plan* (25 May 2012), available at <http://www.thehindu.com/news/international/article3452847.ece> (accessed 6 June 2012)

Human rights issues, including the quest for truth, justice and reparations of victims of gross human rights violations during the conflict and their families have been relegated to the back of the political agenda and will remain so for the foreseeable future.

It is also clear that even if a TJ process is set in motion, the experience of previous commissions of inquiry in Nepal demonstrate that, the prospect that ensuing recommendations to investigate and prosecute are actually implemented is limited.³⁰

³⁰ International Commission of Jurists, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, June 2012.

Annex I - Contact Details of the Organisations Subscribing this Note

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