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# NEGOTIATING PEACE IN NEPAL

Implications for Justice

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# NEGOTIATING PEACE IN NEPAL: IMPLICATIONS FOR JUSTICE

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## ACRONYMS

<b>AMA</b>	Arms Management Agreement
<b>CPA</b>	Comprehensive Peace Agreement
<b>CPN (M)</b>	Communist Party of Nepal – Maoist
<b>CPN (ML)</b>	Communist Party of Nepal – Marxist-Leninist
<b>CPN (UML)</b>	Communist Party of Nepal – United Marxist Leninist
<b>DDR</b>	Disarmament, Demobilisation, Reintegration
<b>DfID</b>	UK Department for International Development
<b>HLPC</b>	High Level Peace Committee
<b>ICTJ</b>	International Center for Transitional Justice
<b>ICC</b>	International Criminal Court
<b>NA</b>	Nepal Army
<b>NC</b>	Nepali Congress Party
<b>NGOs</b>	Non-governmental organisations
<b>NHRC</b>	National Human Rights Commission
<b>NTTP</b>	Nepal Transition to Peace Initiative
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>PLA</b>	People's Liberation Army
<b>RNA</b>	Royal Nepal Army
<b>SPA</b>	Seven Party Alliance
<b>TADO</b>	Terrorist and Disruptive Activities (Control and Punishment) Ordinance
<b>TRC</b>	Truth and Reconciliation Commission
<b>UNMIN</b>	UN Mission in Nepal
<b>USAID</b>	United States Agency for International Development

## EXECUTIVE SUMMARY

In April 2008 historic elections to Nepal's Constituent Assembly led to a political watershed: former Maoist guerrillas surprised everyone by coming out ahead, suggesting that a new era had come to Nepal. In its first sitting, the Constituent Assembly declared Nepal a republic and brought an end to the 250-year-old monarchy.

Earlier, in April 2006, an extraordinary “people's movement” had forced the king to retreat from the political sphere and restore democracy. The people's movement also marked an end to the ten-year civil war between the Maoists and the government – which had included serious rights abuses on both sides – and allowed peace negotiations to begin in earnest.

The Comprehensive Peace Agreement (CPA), completed in November 2006, laid down the basic framework for the country's political transition. Nepal's unique peace process has been applauded both nationally and internationally. However, the process has also been criticized, particularly on the basis of the government's inability to implement the agreement's commitments on justice and accountability.

Among the many issues covered by the CPA were its provisions for a Disappearances Commission and a Truth and Reconciliation Commission. A previous ceasefire agreement had also included a vaguely worded pardoning provision. While the inclusion of these mechanisms indicated some commitment on the part of the political actors to account for past violations, many see their inability to form either of these commissions in the two years after the agreement as evidence of limited political commitment to a serious accountability process. Ad hoc compensation measures have also done little to provide relief to the families of victims. Perhaps most difficult, there has yet to be serious consideration of reforming the armed forces or removing those complicit in past abuses.

Impunity remains a considerable challenge. The Nepali army continues to evade any form of accountability for abuses that it committed during the conflict. As an institution, it still remains largely above civilian control. Similarly, those individuals within the Maoist ranks who were responsible for serious violations have not been held to account for their crimes in any manner.

After the conclusion of this paper, in February 2009 the government promulgated an ordinance to form a Disappearances Commission to investigate enforced disappearances during the conflict. The Disappearances Ordinance has been embroiled in controversy, however, mostly due to the non-consultative executive order that introduced it. In a landmark judgement of June 2007, the Nepali Supreme Court ordered the government to criminalise disappearances and form a commission to investigate them, which would respect international standards. Given the failure of the government to implement recommendations of the past commissions of inquiry, it remains to be seen if a Disappearances Commission will be effective in challenging impunity.

Creating a “new Nepal” will require much more than political statements and formal agreements. It will require serious political commitment. It will mean committing to the principle of the rule of law and challenging a long-standing culture of impunity. Lessons emerging from the Nepali peace process suggest that better preparation, clarity in the implementation process and approaching these challenges with a long-term view may be most effective at attaining some measure of success.<sup>1</sup>

**Keywords:** Transitional justice, Nepal, impunity, civil society, Disappearance Commission, Comprehensive Peace Agreement, Truth and Reconciliation Commission, peace process

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1 This report covers events up until December 2008.

## INTRODUCTION

On 26th September 2008, Prime Minister Pushpa Kamal Dahal, widely known as “Prachanda”, addressed the UN General Assembly in New York, welcoming the historic opportunity presented to him as the first prime minister of this ‘newest republic of the world’. It was an extraordinary moment. After ten years at the head of a Maoist insurgency that to many outsiders seemed an anachronism in the 21st century, he promised to lead the people of Nepal forward ‘with conviction and sincerity’ toward sustainable peace and equitable development. In doing so, he stressed Nepal’s commitment to the protection and promotion of human rights and to ending its ‘environment of impunity’.<sup>2</sup>

The prime minister spoke at a critical juncture for Nepal. Almost two years after the signing of a Comprehensive Peace Agreement (CPA), significant steps had been taken to stabilise the peace. But in the same period, the agreement’s shortfalls and inconsistencies had become more evident, even as many of its central concerns remained outstanding. This was particularly true on the questions of accountability for serious human rights crimes and the integration and rehabilitation of the large fighting forces that remained after the conflict ended.

Nepal has experienced a profound political transformation. After years of war, when the Maoist guerrilla movement had been opposed by the sometimes abusive “counter-terrorist” tactics of the national army and an armed police force, Nepal’s difficulties worsened in February 2005 when the king staged a political coup and claimed absolute power to himself.

In a remarkable series of events triggered by King Gyanendra’s seizure of power, a “people’s movement” put hundreds of thousands of protesters on the streets in April 2006, challenging the country’s long history of feudal monarchy and forcing the king to step aside. Peace talks between the country’s major political parties and the Maoists began quietly in the wake of the king’s coup and concluded in November 2006 in the Comprehensive Peace Agreement. This led to the election of a Constituent Assembly in April 2008, when the Maoist party stunned the political class by winning the most votes. In a dramatic move after three years of political upheaval, the Constituent Assembly at its first seating abolished the monarchy and declared the country a federal democratic republic.

Nepal’s peace process has been nationally led and owned, but it also has relied on significant international support, including from India, which has multiple interests in Nepal and influence on Nepali actors. The United Nations was present first through an Office of the UN High Commissioner for Human Rights (OHCHR) and later in a specialised political mission (UNMIN). However, neither the UN nor the other external actors supporting the peace process ever fulfilled a formal role of mediation.<sup>3</sup> Established in May 2005, the OHCHR was mandated to monitor the human rights situation and advise the government on the promotion and protection of human rights. In January 2007 the UN Security Council authorised the UN Mission in Nepal (UNMIN) to monitor arms, armies and ceasefire arrangements and to offer technical support for free and fair Constituent Assembly elections.<sup>4</sup>

The signing of the CPA represented a significant achievement. However, the agreement left many critical issues unresolved, including reform of the security sector, and was sorely lacking in mechanisms to ensure

2 Address by Rt. Hon. Mr. Pushpa Kamal Dahal (“Prachanda”) to the General Debate of the Sixty-Third Session of the United Nations General Assembly, New York, 26th September 2008. Available at <http://www.un.int/wcm/content/lang/en/pid/6592>.

3 For discussion of the contribution of outside actors to Nepal’s peace process, see Swiss Peace Policy (2008), *Nepal*; and T. Whitfield (October 2008), *Masala peacemaking: Nepal’s peace process and the contribution of outsiders*. New York: Center on International Cooperation, New York University. Available at <http://www.nyu.edu/>.

4 UN Security Council Resolution 1740, 23rd January 2007. Available at <http://www.un.org/News/Press/docs/2007/sc8942.doc.htm>.



the monitoring of its implementation. With regard to human rights, it emphasised the roles of the OHCHR and National Human Rights Commission but did not bind the parties to abide by their advice. Meanwhile, two factors threatened to overwhelm the peace process: the swift erosion of the consensus that the CPA represented and the rapid emergence of new major national challenges. Issues that were not addressed by the CPA took centre stage, in particular the grievances voiced by groups long discriminated against or excluded from Nepali political life, such as people of the Madhes, *janajatis* (indigenous peoples) and *dalits* (considered “untouchable” by the caste system). In the early months of 2007 the Madhesis, who constitute about one-third of Nepal's population, expressed their dissatisfaction in a Madhesi *Andolan* (“struggle”), which challenged the fundamentals of the Nepali state and rocked the peace process to the core.<sup>5</sup>

A last-minute understanding between the Nepali Government and Madhesi representatives allowed the Constituent Assembly elections to take place, almost a year later than had originally been planned. The Maoists emerged as the single largest party within the 601-member Constituent Assembly. After several weeks of tense, difficult negotiations, a coalition government – headed by Maoist leader Dahal but not including the influential Nepali Congress party – finally emerged in late August 2008.

This report is written at a critical moment. The new government, the Constituent Assembly and an international community committed to supporting the country's peaceful development represent immense opportunities. Yet significant problems remain. Among them, justice issues loom large.

Because of the ongoing political transition, this report will inevitably reflect a work in progress. It nevertheless attempts a preliminary assessment of the extent to which justice provisions have been reflected in the peace process, with a particular focus on the transitional justice mechanisms that were included in – or left out from – the agreements reached between the parties. Given that emphasis, it asks: To what extent were justice concerns relevant in shaping peace? Were there any opportunities with regard to justice that were lost? What lessons can be learned from Nepal that may be relevant elsewhere?

This paper draws on extensive interviews in Nepal and internationally to examine the roles played in defining and promoting the justice agenda throughout the peace process by various stakeholders, including political actors, international and donor communities, civil society and victims' groups.<sup>6</sup> The following section provides a brief overview of the background and context of the conflict in Nepal and the emergence of human rights issues in the political discourse. A third section outlines the dynamics of the peace process initiated in response to the February 2005 royal coup, with a particular focus on the extent to which issues related to justice were – or were not – significant to its evolution. The fourth section pays more specific attention to the mechanisms incorporated in the peace process to address past human rights violations, while the fifth covers implementation of the commitments in the various agreements. A final section offers some preliminary conclusions and seeks to extract the lessons learned from Nepal's experience.

5 For a detailed discussion of the Madhesi issue, see International Crisis Group (9th July 2007). ‘Nepal's troubled region’, *Asia Report No. 136*.

6 ICTJ undertook interviews for this research under an agreement of anonymity.

## THE CONTEXT OF THE PEACE TALKS

### NEPAL'S CONFLICT AND HUMAN RIGHTS

Nepal's modern history has been marked by Kathmandu-centric politics and the systemic exclusion of much of its population on the basis of ethnicity, caste, class, gender and geography. Since the end of the Rana rule in 1951, Nepal has witnessed a continuous struggle between forces that favour multiparty democracy and those that favour the monarchy. In this process the monarchy's traditional bulwark was the Royal Nepal Army (RNA), which maintained its primacy in the political affairs of the country through its close ties to the king.

In 1990 a first people's movement (*Jana Andolan I*) successfully overthrew the 28-year-old partyless Panchayat system, under which absolute powers were vested in the monarch, and introduced a multiparty system of governance.<sup>7</sup> A new constitution guaranteeing fundamental rights was drafted, and subsequent governments ratified major human rights instruments. However, the king retained substantial powers under the constitution, and the institutional underpinnings of the country's emerging democratic culture remained vulnerable.<sup>8</sup>

Once legalised, the Nepali Congress party (NC) and the Communist Party of Nepal (United Marxist Leninist, or UML) emerged as the country's major political parties,<sup>9</sup> although the RNA retained its considerable influence. Progress in dismantling the previous regime's discriminatory structures was slow, and individual politicians came to be perceived as opportunistic and corrupt. The opening for democracy made possible by the people's movement began to shrink, and opposition from forces on the left rose. In early 1996, the Maoists embarked on a "people's war" against the government. Gradually their influence spread to the countryside beyond the mid-western districts of Rolpa and Rukum, which had been their early bastions of support.<sup>10</sup>

As the conflict intensified, so did the state response to it. On 26th November 2001, after the failure of a first attempt at peace talks, the government declared a state of emergency and promulgated the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO). This declared the Maoists to be terrorists and provided the security forces with extraordinary powers of arrest and detention. Until 2006, TADO was consistently reaffirmed, first as an act adopted by the Parliament in 2002, and then from 2004 onward in the form of successive royal decrees.<sup>11</sup> Initially only the police were deployed to respond to the Maoist threat. But in November 2003, under a unified command, the armed police force and the army joined forces with the police. Human rights violations increased significantly after the deployment of the armed police force, and intensified further after the army was brought in.

Over a ten-year period the conflict claimed over 13,000 lives; more than 8,000 of them the victims of government forces, and the majority civilian.<sup>12</sup> Human rights violations were committed by both sides and included extrajudicial

7 B. Adhikari (2003). 'The context of conflict and human rights violations in Nepal: Some preliminary observations', in B. Adhikari (Ed.), *Conflict, human rights and peace challenges before Nepal*. Kathmandu: National Human Rights Commission.

8 Constitution of the Kingdom of Nepal 2047 (1990), available at <http://asnic.utexas.edu/asnic/countries/nepal/nepalconstitution.html>. See also International Crisis Group (15th June 2005). 'Towards a lasting peace in Nepal: The constitutional issues', *Asia Report No. 99*.

9 The Nepali Congress (NC) party, formed in 1947 with the goal of establishing democracy in Nepal, was instrumental in removing the hereditary Rana prime ministers from power. In 1962 King Mahendra adopted the new constitution, which banned all political parties including the NC, initiating the Panchayat or partyless period. The NC leadership were either imprisoned or in exile until the restoration of democracy in 1990. In 1990 seven different communist parties came together to launch a struggle against the Panchayat system. In January 1991, after the establishment of the multiparty system, CPN (M-L) and CPN (M) were unified as the Communist Party of Nepal (Unified Marxist Leninist) (CPN-UML).

10 J. Whelpton (2005). *A history of Nepal*. Cambridge: Cambridge University Press.

11 Available at <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2005&c=NPL>.

12 Available at [http://news.bbc.co.uk/2/hi/south\\_asia/2707107.stm](http://news.bbc.co.uk/2/hi/south_asia/2707107.stm).

executions and other unlawful killings, abductions, torture and extortion. The security forces were accused of widespread disappearances and extrajudicial killings.<sup>13</sup> Maoist rebels were also accused of extrajudicial killings and charged with serious human rights violations, such as abductions and the recruitment of children into the People's Liberation Army (PLA).<sup>14</sup>

Certain conditions exacerbated the conflict's abuses, including social fissures related to caste, ethnicity and economic inequality. These continue to inform the complex legacy of injustice the country faces today. The abuses took place in a context of deep impunity. Royal patronage of the army ensured that it was above civilian control. Numerous reports by the National Human Rights Commission (NHRC), local human rights groups and international organisations, including those written by the UN Special Rapporteur on Torture and the UN Working Group Against Involuntary Disappearances, documented the failure to hold the security forces and/or the Maoists accountable for serious human rights violations during the conflict.<sup>15</sup>

Nepali civil society – comprised of independent-minded individuals, professional organisations and non-governmental organisations (NGOs) – played a critical role in monitoring human rights violations and advocating accountability in national and international forums. Despite threats and repression, civil society actors disseminated information about the deteriorating human rights situation through their transnational advocacy networks. Meanwhile, the physical presence of human rights activists at events such as public rallies frequently prevented abuses.

The NHRC worked closely with human rights groups to monitor and report violations. It had been constituted as a statutory body under the Human Rights Commission Act of 1997, but it was only in 2000 that commissioners were finally appointed.<sup>16</sup> In its initial two years, the NHRC was under-resourced and received little cooperation from the government. Under the leadership of some strong commissioners, however, it was gradually able to gather force, fielding fact-finding missions and submitting reports to the government and Maoists alike on the increasing human rights violations.<sup>17</sup>

## FAILED PEACE TALKS IN 2001 AND 2003

In the early stages of the conflict, talk of dialogue with the Maoist insurgents was all but taboo. Yet individual contacts – whether through informal channels, backdoor diplomacy or, from 2000 on, the active engagement of external actors in efforts to encourage dialogue – ensured that the Maoists were never completely isolated from political developments in Kathmandu. These initial contacts provided the basis for the first formal peace talks, which were held in 2001 after both sides had declared a ceasefire. Spearheaded by the government, the talks did not manage to institutionalise a peace process. Analysts attributed that failure to a lack of preparation by both parties and to the wide gulf separating them on the Maoists' core demands: a constituent assembly and republic.<sup>18</sup>

In 2002 Prachanda declared that the Maoists would respect and work within the parameters of International Humanitarian Law and the Geneva Conventions.<sup>19</sup> Although both sides continued to violate human rights, the declaration was significant, not least because it indicated the Maoists' interest in engaging with the international community on human rights issues. This became evident in two ways in the following years. First, human rights featured more prominently in the peace talks conducted in 2003. And second, those international NGOs and others (including, from 2003, UN representatives) that began to interact with the Maoists found that they had a genuine curiosity about international principles and instruments related to human rights.<sup>20</sup>

13 Human Rights Watch (1st March 2005). 'Clear culpability: "Disappearances" by security forces in Nepal'. 671 people were allegedly disappeared by the state security forces, and 299 abducted by the Maoists. National Human Rights Commission (30th August 2008), 'Report on the situation of forcefully disappeared people during the period of armed conflict in Nepal'.

14 The PLA was the military wing of the CPN(M) during the "people's war". Human Rights Watch (7th October 2004). 'Between a rock and a hard place: Civilians struggle to survive in Nepal's civil war'.

15 'Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', Manfred Nowak, *Mission to Nepal*, E/CN.4/2006/6/Add.5, 9th January 2006; UNHCHR, 'Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal', E/CN.4/2005/65/Add.1. Also, see UN document E/CN.4/2001/9/Add.2, para.59.

16 Available at [www.nhrcnepal.org](http://www.nhrcnepal.org). The Interim Constitution of Nepal 2007 made the NHRC a constitutional body.

17 Nepal National Human Rights Commission, 'On the spot investigation and the report of the Investigation Committee: Doramba Incident, Ramechhap', 2003, available at [http://www.nhrcnepal.org/publication/doc/reports/Reprot\\_Doramba\\_R.pdf](http://www.nhrcnepal.org/publication/doc/reports/Reprot_Doramba_R.pdf). Amnesty International, *Nepal: A deepening human rights crisis*, 19th December 2002, ASA 31/072/2002.

18 B. R. Upreti (2006). *From armed conflict to the peace process*. New Delhi: Adroit Publishers.

19 A. Roy (2008). *Prachanda – The unknown revolutionary*. Kathmandu: Mandala Book Point.

20 Telephone interview, December 2008.

The 2003 talks had only flimsy government legitimacy. In October 2002, King Gyanendra had dismissed the elected government and replaced it with one of his own choosing. As in 2001, there was no coherent framework for negotiations, and the negotiators did not have the requisite technical expertise. The talks collapsed in August 2003, with the government quite unprepared to consider the Maoists' demands.<sup>21</sup> However, there were several notable differences from the earlier effort. These included greater attention to human rights, more direct involvement by civil society and some early support from international actors.

Before the talks took shape, Nepali human rights groups had begun systematically highlighting human rights violations – in particular disappearances and abductions committed by both parties. Meanwhile, in response to the deteriorating human rights situation in the country, the NHRC, with the assistance of international actors, prepared a draft human rights accord that they presented during the talks. It was not agreed to, but the draft did lay down non-negotiable human rights principles that both the Maoists and the political parties could access later. The draft was widely publicised by the NHRC, and human rights issues would remain at the core of any discussion of the conflict's settlement.<sup>22</sup>

All efforts to maintain the faltering peace talks were abandoned after the RNA arrested and killed 19 alleged Maoist cadres in Doramba on 17th August 2003 – an incident that marked a turning point in the history of human rights in Nepal. Deeply shocking for what it revealed about the army's practices, it nevertheless enabled the NHRC to establish its credibility and independence as an institution by conducting a thorough and impartial investigation and publishing a report.<sup>23</sup>

Moreover, civil society was able to organise around the 2003 peace talks to an extent that indicated a new focus and potential. Whereas individual human rights organisations had worked separately before, there was now a broader civil society coalition incorporating civil society actors from outside Kathmandu.<sup>24</sup> In this period civil society networks concentrated on three different approaches. First, they demanded that both parties respect human rights. To back this up, whenever there was an incident, local human rights teams went to the location to investigate and report on the violation. They also publicly condemned the Maoist practice of destroying infrastructure, which they argued harmed Nepali citizens and not the government. Second, they organised large peace rallies to put pressure on the king to conduct peace talks. Third, they gained access to and opened channels of communication with the Maoists.

No formal governmental structures supported the peace talks of 2001 or 2003. However, in 2004 Sher Bahadur Deuba became prime minister of a coalition government at the head of a splintered faction of the NC, the NC (Democratic), claiming that a negotiated solution to the conflict was a high priority. He established both a High Level Peace Committee (HLPC) to assist the government negotiation team and a peace secretariat to support the HLPC. Deuba's efforts were fundamentally flawed by the king's evident lack of interest in any peace settlement. However, the peace secretariat was funded by the UK's Department for International Development (DfID), USAID and the Swiss government and gradually enhanced its capacity to serve as a resource centre, functioning as a formal means for the government to engage with donors on a host of conflict-related issues.

21 For a more detailed discussion on the 2001 and 2003 peace talks see International Crisis Group (22nd October 2003). 'Nepal: Back to the gun', *Asia Briefing Paper*; B. R. Upreti (2006). *From armed conflict to the peace process*; and T. Whitfield (2008). *Op.cit.*

22 Interview, Kathmandu, October 2008.

23 Cited above. Interviews, Kathmandu, September 2008.

24 Among the more than 200 organisations that came under the umbrella of Civic Solidarity for Peace were teachers' associations, the Nepal Bar Association and the Chamber of Commerce. From 2002 to 2003 they organised peace rallies in Kathmandu.

# NEGOTIATING JUSTICE IN NEPAL'S PEACE PROCESS: 2005–2006

## MAKING WAY FOR PEACE: A FRAMEWORK AGREEMENT, AND THE "PEOPLE'S MOVEMENT"

The royal takeover on 1st February 2005 worsened the situation in a country already torn by the decade-long Maoist insurgency.<sup>25</sup> However, it also precipitated a profound restructuring of Nepal's political forces: what had been a triangular deadlock between the palace, the political parties and the Maoists shifted into a situation in which the political parties, Maoists and civil society were all aligned against the king. Immediately after the coup, most leaders of the political parties were either imprisoned by the royal government or forced into exile. This prompted them to reflect on the shortcomings of the past two decades, leading first to gradual realignment of the major political parties into the Seven Party Alliance (SPA) and then to direct talks with the Maoists. The international opprobrium heaped on the king for his February coup and India's tacit support of the contact between the SPA and the Maoists were important underpinnings for this movement.

One of the most immediate results of enhanced international attention was the establishment of an Office of the UN High Commissioner for Human Rights (OHCHR) in May 2005.<sup>26</sup> In many respects this was a surprising development given Nepali – and Indian – sensitivity to international involvement. It was triggered by concern in the wake of the February 2005 coup, but it also reflected advocacy that long predated the coup.<sup>27</sup> The office was mandated to monitor the observance of human rights and international humanitarian law throughout the country, to advise the Nepal authorities on the formulation and implementation of policies, programmes and measures for the promotion and protection of human rights in Nepal, and to provide advisory services and support to the NHRC, representatives of civil society, human rights NGOs and individuals.<sup>28</sup> Ian Martin, who has extensive experience in human rights and UN peace operations (and had most recently served as vice-president of the International Center for Transitional Justice in New York), was appointed as its head.

Many of the talks between the Maoists and the SPA took place in New Delhi, India. They gained in intensity before concluding in November 2005 with a 12-point agreement that was recognised as a "road map" for peace and democracy.<sup>29</sup> The 12-point agreement's primary objective was to end Nepal's violent conflict; it looked forward to the Maoists' suspension of armed struggle, participation in a peaceful democratic movement and commitment to respect human rights norms. It bound the SPA and the Maoists to launch a joint struggle against the king and called upon civil society, professional organisations and others to boycott municipal elections announced by the king and to actively participate in a peaceful movement. It also specifically referred to outside supervision of the armed Maoist force and the RNA during the electoral process, led by the UN 'or a reliable international supervision'.<sup>30</sup>

25 Human Rights Watch (24th February 2005). 'Nepal: Civil war atrocities follow royal takeover'; Human Rights Watch (1st March 2005). 'Clear culpability: "Disappearances" by security forces in Nepal'.

26 Nepal's agreement to establish the OHCHR was endorsed by the UN Human Rights Commission on 30th April 2005, and the OHCHR Nepal office was deployed in May 2005.

27 For further information and background, see T. Whitfield (2008). *Op.cit.*

28 Available at <http://nepal.ohchr.org/en/index.html>.

29 The Maoists feared that the political parties would not agree to a republic, and the political parties were concerned that the Maoists would not respect a multiparty system of democracy.

30 Twelve Point Agreement, 22nd November 2005, available at <http://peace.gov.np/admin/doc/12-point%20understanding-22%20Nov%202005.pdf>.

The strong presence of human rights provisions in the 12-point agreement (points 4 and 8) was driven at least in part by the major political parties' interest in ensuring a change in the Maoists' behaviour.<sup>31</sup> Civil society – whose individual members, some working through the Nepal Center in New Delhi, had been actively involved in supporting the dialogue – played a critical role in ensuring this prominence of human rights concerns.<sup>32</sup> However, the ambivalence about accountability present throughout the process was reflected in point 12, with its vague assertion that 'in the context of misconducts carried out by the parties in the past, a common commitment has been made to carry out investigation regarding the incidents objected to by a certain party, demanding investigation into, and in case of anyone found guilty, to take action against him/her and make such information public'.

The increasing organisation of the civil society movement, and the fact it enjoyed greater credibility with the Nepali public than the political parties, allowed it to play a prominent role in mobilising opposition to the municipal elections proposed for early 2006. This effort intensified in late January and early February 2006, when more than 3,000 political party and human rights activists were arrested. Certain sections of civil society, such as some business and trekking associations, did support the monarchy. But other members of the business community and the professional associations representing lawyers, teachers and journalists joined the democratic movement, encouraging the participation of large numbers of the general public.<sup>33</sup>

In late March the SPA and the Maoists jointly declared "the people's movement", or *Jana Andolan II*. Hundreds of thousands of people took to the streets demanding an end to the repressive royal regime and the restoration of democracy. The prospect of mass violence loomed over the protests: in the end, a total of 19 people were killed before King Gyanendra was forced to relinquish state control, on 24th April 2006.

The April protests led to dramatic changes. Parliament was reinstated. It moved quickly to strip the monarchy of all its executive powers, declared Nepal a secular state and brought the Royal Nepal Army – now to be known as the Nepal Army (NA) – under the authority of the Council of Ministers. Girija Prasad Koirala, a veteran NC politician, became prime minister of the new government, which also included other members of the SPA. The government announced that there would be elections to form a Constituent Assembly, which would determine the future of the monarchy and rewrite the country's constitution. The Maoists declared a three-month ceasefire, which the government soon reciprocated.

## PROGRESS IN THE PEACE TALKS IN 2006

Conditions were ripe for political negotiations, and the parties moved quickly through a series of agreements in advance of the Comprehensive Peace Agreement of November 2006. These agreements included a ceasefire code of conduct, signed on 25th May; an 8-point understanding that established the general objectives of the political transition, reached on 16th June; letters transmitting an agreed-upon request to the UN on 8th August; and the Baluwatar agreement of 8th November 2006, which unblocked a deadlock in the talks and anticipated both the CPA and an interim constitution, a draft of which the parties agreed to on 16th December 2006.

The peace secretariat fully supported the peace talks. Its members had developed personal contacts with the political leadership on both sides during the conflict, and after the people's movement, the government formally asked the peace secretariat to provide technical support to the Maoists as well. The Maoists did not see the secretariat, a government-run organisation, as a fully neutral actor. However, both parties drew on the expertise offered by both its Nepali staff and international advisors.

As negotiations on a code of conduct for the ceasefire got under way, the government and the Maoists each appointed three-member negotiation teams led, respectively, by Krishna Prasad Sitaula (NC) and Krishna

31 *Id.* Point 4 stated: 'Making public its commitment, institutional in a clear manner, towards the democratic norms and values like the competitive multiparty system of governance, civil liberties, fundamental rights, human rights, principle of rule of law etc., the CPN (Maoists) has expressed its commitment to move forward its activities accordingly', And Point 8: 'The commitment has been made to fully respect the norms and values of the human rights and to move forward on the basis of them, and to respect the press freedom in the context of moving the peace process ahead'. Interview, December 2008.

32 Interviews, Kathmandu, September–October 2008.

33 For further description of these dynamics, see International Crisis Group (10th May 2006). 'Nepal: From people power to peace', *Asia Report No. 115*.

Bahadur Mahara (CPN-M).<sup>34</sup> The somewhat skeletal form of the code of conduct, signed on 25th May, reflected the parties' belief that a shorter document would facilitate consensus among the politicians. However, some within the peace secretariat, including its international advisors, had suggested fleshing out specific mechanisms in the document to help resolve possible future disputes.<sup>35</sup>

These talks, like those that followed, were largely unstructured. The government organised most of the meetings and managed their logistics. They were generally conducted without recorded minutes or even a formal chair – although Prime Minister G.P. Koirala presided over the meetings that he attended. Some of the negotiators acknowledged that the absence of a mediator was a weakness of the Nepali peace process; others reflected that the presence of a moderator or mediator might have challenged the Nepalis' authority to determine their own future – and raised concerns about confidentiality.

In June 2006, five representatives of civil society were invited to act as observers for the peace talks.<sup>36</sup> The team included Padma Ratna Tuladhar and Daman Nath Dhungana, both of whom had served as facilitators for the talks held in 2001 and 2003. As in previous rounds of talks, no women were included on the negotiation teams. While the observers' formal function was limited, informally they were able to provide substantive input and sometimes play a role in breaking deadlocks.<sup>37</sup> Yet the structure of the peace talks was far from democratic: decision-making involved only the NC, UML, and Maoists, and only the "top leaders" played a prominent role.

Point 17 of the ceasefire code of conduct contained a clear commitment 'to disclose, as soon as possible, the whereabouts of the citizens who have been disappeared'.<sup>38</sup> This provision confirmed that disappearances were the most prominent of human rights abuses arising from the conflict. Over the years, committed individuals had successfully built up a network for victims' families. While many members of this group were Maoist cadres, the group itself was not directed by Maoist leadership, considered to be less than enthusiastic about accountability. The victims found support from the human rights community and OHCHR, which began to push actively for the creation of a commission to address the disappearances. In May 2006, the OHCHR released a report on the disappearance of at least 49 people allegedly perpetrated by the RNA's Bhairabnath Battalion in its Maharajgunj barracks in Kathmandu, which generated renewed attention to the subject.<sup>39</sup>

Meanwhile the Maoists demanded that individuals who were involved in human rights violations, especially the killing of protestors during the April people's movement should be held accountable. Since neither the SPA nor the Maoists had been perpetrators during this time, this was a safe issue to pursue in political terms, and in May 2006 the government established the Rayamajhi Commission to carry out an investigation and identify the individuals responsible.

As the year progressed, however, discussions of accountability were supplanted by lengthy negotiations on political issues. When the Rayamajhi Commission submitted its final report in November 2006, no action was taken against the individuals it named. This was sadly consistent with the relative neglect of justice during this period, as well as with what one former member of OHCHR described as the parties' tacit agreement that conflict-related human rights abuses be given 'a blanket amnesty – or a fudged process that would not look like a blanket amnesty'.<sup>40</sup> A senior member of the government delegation recalled that negotiators did not spend

34 The other members of the negotiating teams were Ramesh Lekhak NC (D) and Pradip Gyawali (UML), representing the government, and Dev Gurung and Dinanath Sharma of the Maoists. Neither team included any women.

35 Interview, Kathmandu, September 2008. One participant recalled, 'The political mood was so heated at that time that if anyone suggested long-term things, then they could be suspected of destabilizing the process'.

36 The five civil society observers were Laxman Prasad Aryal, Dr. Devendra Raj Pandey, Daman Nath Dhungana, Padma Ratna Tuladhar and Dr. Mathura Shrestha.

37 Interview, Kathmandu, September 2008. According to one observer, civil society demands at the time were that the 'Maoists should leave arms before CA' and that the 'political parties should leave the king'.

38 Point 17, The Code of Conduct for Ceasefire Agreed between the Government and the CPN (Maoists), 25th May 2006, available at <http://www.unmin.org.np/downloads/keydocs/25-point%20agreement%20on%20COC%2025%20May,%202006.pdf>.

39 OHCHR-Nepal, Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004, May 2006, available at [http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/Pages%20from%202006\\_05\\_26\\_OHCHR-Nepal.Report%20on%20Disappearances%20linked%20to%20Maharajgunj%20Barracks\\_Eng.pdf](http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/Pages%20from%202006_05_26_OHCHR-Nepal.Report%20on%20Disappearances%20linked%20to%20Maharajgunj%20Barracks_Eng.pdf). The report contained a devastating account of the army's conduct. But the army whitewashed the allegations by setting up an internal task force that was unable to find evidence of torture or disappearance. UN Office of the High Commissioner for Human Rights (December 2008), 'Conflict-related disappearances in Bardiya district', Kathmandu, pp.78-79.

40 Another international representative closely involved with the peace process also had the impression that 'both parties wanted blanket amnesty from the start'. Interviews, November and December 2008.

more than about 5 percent of their time discussing justice issues. Electoral and constitutional issues were the priority of the moment.<sup>41</sup>

## INTERNATIONAL SUPPORT AND ASSISTANCE

From 2000 on, the international community supported and provided assistance to efforts to enhance negotiation in Nepal. Principal among them were the Swiss-based NGO the Centre for Humanitarian Dialogue, which promoted dialogue between 2000 and 2006; the UN, whose participation in OHCHR and UNMIN was preceded by the quiet but direct engagement of a New York political official in the context of “good offices” first offered by the UN Secretary-General in 2002; the Carter Center, whose conflict resolution programme engaged with Nepal from 2004 to 2006; the government of Switzerland, whose special advisor for peacebuilding arrived in the country in mid-2005 and was closely involved in the process thereafter, being based in Kathmandu; and a South African consultant contracted by USAID who worked closely with the peace secretariat from 2004.<sup>42</sup> In addition to these specific initiatives, bilateral support and encouragement were provided by a number of states, including the UK (which for a time engaged a special envoy to Nepal), Denmark and Norway as well as the European Union.

India's influence necessarily dwarfed that of any other outside actor. (Nepal's other giant neighbour, China, has traditionally taken a relatively low profile in Nepal's internal affairs.) From 1990 to the mid 2000s, India's policy toward Nepal rested on the “twin pillars” of constitutional monarchy and multiparty democracy. This policy helped sustain the status quo even when Nepal's institutional failings became more evident in the early 2000s. India was fundamentally shaken, however, by the February 2005 coup and the April 2006 people's movement. Forced to modify its position, India provided implicit support and encouragement to the talks in Delhi in 2005 and to the negotiations that took shape in 2006. With a clear interest in developments in the terai region or *Madhes*, an area adjacent to its open border with Nepal, it also became directly involved in efforts to calm the tensions that threatened Nepal's Constituent Assembly elections in 2007 and 2008.

In the aftermath of the 2005 coup, most donors withdrew their support from the peace secretariat. The US, however, continued to provide support through the Nepal Transition to Peace (NTTP), an initiative conceived not only as a resource for the political parties on the peace process, but also as a negotiating space for the different stakeholders.<sup>43</sup> At the centre of the NTTP effort was Hannes Siebert, a South African with experience of peace processes elsewhere, most recently in Sri Lanka. Over time, Siebert began to work closely with Günther Baechler, the peacebuilding advisor dispatched to Nepal by Switzerland in mid-2005. Because Switzerland had close ties with Nepal and a history of development assistance there, Baechler was able to position himself as a resource to, and informal facilitator between, the different groups engaged in dialogue.<sup>44</sup>

As part of this work Baechler, like Siebert, played a role in a task force affiliated with the Nepali government and the peace secretariat. This group, consisting mainly of national facilitators but also including representatives of the political parties as well as some of the talks' observers, developed into a forum for some of the critical issues the peace process would face, including transitional justice. Indeed it was the task force that developed the idea that different commissions should address the troubling substantive issues of the peace process: it encouraged the creation not only of the Commission on Disappearances, advocated by the human rights community, but also of a Truth and Reconciliation Commission.<sup>45</sup> International expertise was particularly sought on matters related to federalism – a potential but by no means straightforward solution to Nepal's multicultural identity.

As the political process moved in fits and starts toward the signing of the CPA, Baechler and Siebert increasingly engaged with the UN, which dispatched a “pre-assessment mission” to Nepal in late July to help reach an understanding between the government and the Maoists on the UN's future role. This was later spelled out in

41 Interview, Kathmandu, October 2008.

42 For a more detailed discussion of the role of the internationals see T. Whitfield (2008). *Op.cit.*

43 Further information on the NTTP is available at <http://www.peace.gov.np/eng/programs.asp?info==NTTP&id=13>. Several civil society representatives expressed concern that the NTTP had not operated transparently and had failed to engage with local civil society on many issues, including justice and accountability.

44 Günther Baechler, 'Adapt facilitation to changing contexts', in *Swiss Peace Policy, Nepal*, pp.14-50.

45 Interview, December 2008.



identical letters sent by the government and the Maoists to UN Secretary-General Kofi Annan on 9th August, requesting continued human rights monitoring, monitoring of the ceasefire, management of arms and armed personnel on both sides, and assistance in the electoral process.<sup>46</sup> In response, Annan named Ian Martin as his personal representative in Nepal, taking him from his position as in-country head of OHCHR, and authorised a small team of advisors to help follow up on the Nepalis' request. One negative consequence of Martin's transfer to this new role was that it left OHCHR weakened at a critical juncture in the peace process. With only an acting head until November, OHCHR assumed a low profile throughout discussions of the CPA, and indeed it never regained the prominence it had in the early months of its existence.<sup>47</sup>

Talks between the parties stalled in early September 2006. A deteriorating law-and-order situation was rapidly eroding public confidence in the process; human rights abuses by the Maoists had persisted after the ceasefire was declared.<sup>48</sup> While high-level meetings between Koirala and Prachanda calmed the situation, international actors had limited ability to influence the process. Baechler, Siebert and a small number of others had access and offered input on the drafts that would become the CPA, but many substantive draft texts emerged much the weaker after consideration by the parties' senior leaders.<sup>49</sup> Several Nepali political actors directly involved in the negotiations recalled that while international participants helped them clarify certain specific issues, they also created some confusion. The Nepalis' impression was that international contributions were focused mostly on the importance of "process" and did not necessarily relate to, or indeed fully comprehend, the country's political forces and situation.

Progress was made in October on the difficult issues of transitional power-sharing, arms management and the future of the monarchy, paving the way for the signing of the CPA. This committed the parties to forging an interim constitution, forming an interim assembly and government, both of them including Maoists, and moving toward Constituent Assembly elections, which were to take place by mid-June 2007. In terms of negotiating process, one exception was made to the various agreements signed in 2006: the Arms Management Agreement (AMA), signed on 8th December after a process of formal third-party facilitation by the UN.<sup>50</sup>

## CIVIL SOCIETY'S STRUGGLE FOR JUSTICE

Nepal civil society played an important role in promoting human rights and justice. In addition to its engagement in the effort to establish a Nepal office of the OHCHR, at the international level, some commissioners of the NHRC and human rights groups petitioned the US Congress to stop all military aid to Nepal.<sup>51</sup> And in 2004, Congress did indeed adopt legislation making military aid contingent on the RNA's adherence to human rights and general cooperation with the NHRC in resolving cases of disappearances.<sup>52</sup> At the national level, though civil society played a central role in the 2006 people's movement, its prominence thereafter declined. One journalist remarked that civil society ceded space to the political parties after having 'nurtured the flame' of opposition to royal rule.<sup>53</sup>

Nonetheless, civil society continued to engage with justice issues during the peace process, focusing on a relatively narrow set of concerns, primarily the need to prosecute human rights violators. Senior civil society representatives met regularly with leaders of the political parties and the Maoists. They attracted interest from

46 The Nepali actors resisted the concept of DDR (disarmament, demobilisation and reintegration). They preferred the homegrown idea of "arms management".

47 This problem was compounded by the fact that Martin had been absent from his post in Kathmandu for much of May, June and July as he was temporarily deployed to Timor-Leste as the Secretary-General's special envoy to address the crisis that had developed there in April and May. Martin was replaced at OHCHR by Swedish diplomat Lena Sundh, who arrived in Kathmandu in early November 2006.

48 OHCHR Nepal, Human Rights Abuses by the CPN-M, Summary of Concerns, September 2006. Available at [http://www.child-soldiers.org/library/CPN-M\\_Summary\\_of\\_Concernsfinal11\\_Septrev22Sept.pdf](http://www.child-soldiers.org/library/CPN-M_Summary_of_Concernsfinal11_Septrev22Sept.pdf).

49 Interview, December 2008.

50 Under this agreement, thousands of Maoist fighters were to be confined to the seven main camps under UN supervision and monitored by a joint coordination committee comprising the government, the Maoists and the UN. The accord provided that equal numbers of Maoist and Nepal Army weapons be registered, locked and monitored by the UN.

51 In particular Sushil Pyakurel, one of the NHRC commissioners at the time, with others was actively lobbying the US Congress.

52 International Crisis Group, 'Nepal: Dealing with a human rights crisis', *Asia Report No. 94*, 24th March 2005. More specifically, the 2004 law restricted military aid to Nepal unless it cooperated with the NHRC by providing unimpeded access to investigating allegations of disappearance and complied with court orders.

53 Interview, Kathmandu, September 2008.

Nepali media – both print and radio – in disseminating information and engaging public debate. They organised numerous seminars and workshops on issues ranging from constitutionalism to human rights and impunity. In all their efforts, national human rights organisations put forward two primary demands: holding individuals accountable for human rights abuses (or removing them from public office even without trial) and ensuring that the government ratified the Rome Statute of the ICC.<sup>54</sup>

Yet as the political transition unfolded, fissures within civil society, which had been united in its opposition to the king, became more evident. With regard to justice issues, some individuals and groups favored reconciliation while others focused on criminal accountability; the two approaches were generally perceived as irreconcilable. Moreover, the allegiance or affiliations of various sectors with the mainstream political parties or with the Maoists kept civil society divided and undermined its overall efficiency. Some asserted that civil society was limited in general by its focus on Kathmandu and that it failed to reach out sufficiently to groups beyond the capital.

Advocating for criminal accountability was particularly difficult, as the fate of the Rayamajhi Commission demonstrated. When a delegation of noted human rights activists met with the prime minister in September 2006 to voice opposition to Nepal's prevailing culture of impunity, the prime minister told them that no action would be taken against individuals accused of serious human rights violations.<sup>55</sup> Several actors in the negotiations reported their clear understanding that, when the king relinquished power in April 2006, the army had received similar assurances from India. Moreover, at no point did the SPA government, led by the NC, show any inclination to take on serious prosecutions. On the contrary, the appointment of General Rukmangat Katuwal as acting chief of the army staff on 14th August 2006 – a move the human rights community vehemently protested on the basis of his prior human rights record and alleged suppression of the April 2006 protests – confirmed that the army was set to remain above civilian control.<sup>56</sup> Many observers felt that there was never a real threat of prosecution, especially against members of the army. It was in this environment that justice issues were discussed at the official peace talks.

Officially, the government involved civil society in the peace process both through the appointment of the five observers and through the creation of a national monitoring commission on the ceasefire code of conduct, headed by respected academic Birendra Mishra. The observers' role, as noted above, was constructive but limited, while the commission was hindered by its members' lack of monitoring experience as well as their political differences. The commission's impact was therefore less than many had hoped, and it was dissolved in November 2006.

Nepali human rights activists, involved peripherally in the peace process, had no way to ensure that their priorities would be reflected in the ultimate agreement. Reflecting back on the experience, several individuals admitted that civil society might have missed an opportunity by not paying more sustained attention to justice issues. Like their political counterparts, they had focused their attention primarily on core political issues, including forming the Constituent Assembly and a republic. One senior Nepali advisor to the peace talks had a more pragmatic assessment, however, suggesting that tension between human rights groups and the parties to a peace process will always exist and that compromises will always be necessary. 'Human rights activists may be unhappy with certain things, as they want a perfect agreement', he noted. 'However, we must remember that this is a peace agreement'.<sup>57</sup>

54 Interviews, human rights activists, Kathmandu, September-October 2008.

55 Interviews, Kathmandu, September 2008.

56 Press release, 'Human rights community of Nepal protests the appointment of Rukmangat Katuwal as acting Chief of the Army Staff', 16th August 2008. Available at <http://74.125.153.132/search?q=cache:9Pu8y8JapGgJ:www.ahrchk.net/pr/mainfile.php/2006mr/373/%3Fprint%3Dyes+Human+rights+community+of+Nepal+protests+the+appointment+of+Rukmangat+Katuwal+as+acting+Chief+of+the+Army&cd=1&hl=en&ct=clnk&gl=in>. An alternative arrangement would have passed control of the army to a defence ministry, or even the prime minister's office.

57 Interview, Kathmandu, October 2008.

# JUSTICE PROVISIONS IN THE PEACE AGREEMENT AND INTERIM CONSTITUTION

## COMMISSIONS OF INQUIRY

Despite the inclusion of justice commitments, a general overview of successive agreements reveals a lack of coherence, minimal provisions for implementation and monitoring, and conflicting reinterpretations of central issues. The Baluwatar agreement of 8th November 2006 contains the first formal commitment to establish mechanisms addressing human rights violations, providing for 'a high-level commission to investigate and publicize the whereabouts of citizens that were alleged to be disappeared by the state and the Maoists', a Truth and Reconciliation Commission and compensation for victims' families.<sup>58</sup>

The CPA, signed only two weeks later, gives a little more detail on the formation of a TRC: 'Both sides agree to constitute a High-level Truth and Reconciliation Commission through the mutual agreement 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 reconciliations in the society'.<sup>59</sup> The CPA provided for a National Peace and Reconciliation Commission to 'carry out works ... to normalize the adverse situation arising as a result of the armed conflict, maintain peace in the society and run relief and rehabilitation works for the people victimized and displaced as a result of the conflict'.<sup>60</sup> However, with regard to disappearances, the parties committed only to 'make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days'.<sup>61</sup> A separate, uncontroversial provision addressed relief for victims of the conflict and included a (somewhat uncertain) commitment to 'ensure that impunity shall not be encouraged'.<sup>62</sup>

The interim constitution was drafted alongside the CPA and the parties agreed to it on 16th December 2006, less than a month after the CPA was signed. In a notably more consultative process, the 15-member committee that drafted the interim constitution received nearly 4,000 submissions on issues such as fundamental rights, federalism and social discrimination. In its penultimate version, the drafters incorporated a clause that would have enabled the government to promulgate retrospective laws on crimes against humanity.<sup>63</sup> However, the government and Maoists together insisted that the clause be removed from the final text. Nevertheless the interim

58 Section I clause (2), Section IV. On management of the victims of conflict:

'1. Provisions will be made for providing proper relief, honor and rehabilitation of the family members of the people who were killed during the conflict and for those who have been disabled by injury in this course.

'2. Provision for relief to the victimized family members of those who have been disappeared on the basis of the report presented by the investigation commission shall be made.

'3. Special programmes to rehabilitate the people who have been displaced in course of the conflict, to provide relief in case of destruction of private and public properties, and to reconstruct the destroyed infrastructures shall be carried out.

'4. A high level Truth and Reconciliation Commission shall be formed to conduct investigation about those who have committed serious violation of human rights at the time of the conflict and about those who were involved in crime against humanity during the conflict and to create an environment for social reconciliation'. Understanding between the SPA and CPN (Maoists), 8th November 2006, available at <http://peace.gov.np/admin/doc/Decisions%20of%20Top%20leader%20meeting%20of%208%20Nov,%202006.pdf>

59 Section 5.2.5, CPA, 21st November 2006, available at [http://peace.gov.np/admin/doc/CPA\\_eng-ver-corrected.pdf](http://peace.gov.np/admin/doc/CPA_eng-ver-corrected.pdf).

60 Section 5.2.4, CPA, 21st November 2006.

61 Section 5.2.3, CPA, 21st November 2006.

62 Section 7.1.3, CPA, 21st November 2006. 'Both sides express the commitment that impartial investigation and action shall be carried out in accordance with law against the persons responsible for creating obstructions to exercise the rights envisaged in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure rights of the victims of conflict and torture and the family of disappeared persons to obtain relief'.

63 Interviews, Kathmandu, September-October 2008.

constitution includes among the responsibilities of the state the adoption of a political system 'which fully abides by the universally accepted concept of fundamental human rights' and the maintenance of 'good governance by eliminating corruption and impunity'. It also specifically refers to an 'Investigation Commission constituted to investigate the cases of disappearance made during the course of the conflict' and the government's formation of a high-level TRC in accordance with the language of the CPA.<sup>64</sup> Both of these commissions are explained in greater depth below.

### COMMISSION ON DISAPPEARANCES

Given the large number of alleged disappearances and the unwavering commitment shown by victims' families, establishing the whereabouts of the disappeared became a rallying point for those supporting accountability for gross human rights violations. Their demands, which were supported by international actors such as the OHCHR, the International Commission of Jurists and the International Committee of the Red Cross, gathered new strength after the end of hostilities as the climate of fear prevalent during the conflict began to diminish and new information regarding disappearances began to emerge. In May 2006 the Home Ministry established a one-person "committee" consisting of Joint Secretary Baman Prasad Neupane to clarify the status of 776 persons reported as disappeared (including 570 named by the NHRC and others by human rights organisations and relatives). Neupane reported in July 2006 that 602 persons remained unaccounted for because of the inherent weaknesses of the "committee" and the army's lack of cooperation. He urged the creation of an "all-powerful" commission of inquiry.<sup>65</sup>

The Neupane Committee's failure underlined the urgency of the issue of disappearances in Nepal. This concern would find expression in the parties' decision at Baluwatar to create a dedicated commission to address the problem. Curiously, however, the CPA, which was signed only a few days later, makes no mention of this commission. A senior advisor to the peace secretariat indicated that this omission reflected a general understanding that investigating allegations of disappearances would be assumed within the mandate of the TRC.<sup>66</sup> Political actors soon realised, however, that publishing the names of the disappeared within 60 days and referring investigations to the TRC was not feasible, nor would it satisfy victims' families and human rights groups. An investigative commission equipped with adequate resources and comprehensive powers was necessary to establish the truth about disappeared persons – and a provision for such, as described above, appeared in the interim constitution.<sup>67</sup>

### TRUTH AND RECONCILIATION COMMISSION

The genesis of the Truth and Reconciliation Commission is less clear. Some fairly close observers were surprised to see the provision for a truth commission in the CPA, not having heard of extensive discussion on the subject. Moreover, a senior advisor to the peace secretariat noted that there was no mention of a TRC in the first four drafts of the CPA. However, national members and international advisors to the peace secretariat recalled that forming a TRC had been informally discussed by both the peace secretariat and its task force. This discussion was initially fuelled by the interest of NC members of the government in forming a long-term mechanism to address past violations – which they assumed had been largely committed by the Maoists. In the beginning, the Maoists did not easily accept the suggestion to form a TRC, maintaining that the names of the disappeared should first be published.<sup>68</sup>

As the discussions moved forward, it emerged that the primary goal of any truth commission would be reconciliation. In the Nepali context – where many actors maintain a degree of denial that large-scale, systematic human rights violations occurred – uncovering the truth or providing justice to the victims was of lesser importance. One official involved in drafting the CPA recalled that one of its versions had referred to a "Truth, Justice and Reconciliation Commission". However, the political parties had insisted that the word 'justice' be omitted, while "truth" and "reconciliation" were to remain.<sup>69</sup>

64 See Part IV, Article 33, of the interim constitution.

65 Kiran Chapagain, '602 people still missing: Govt. report "Form all-powerful commission"', *Kathmandu Post*, 27th July 2006.

66 Interview, Kathmandu, September 2008.

67 Interview, Kathmandu, October 2008.

68 Interview, Kathmandu, October 2008.

69 Interview, bureaucrat, Peace Ministry, Kathmandu, October 2008.

South Africa's experience with a TRC dominated the discussion for a number of reasons. The South African Truth and Reconciliation Commission's emphasis on reconciliation and its amnesty provisions were attractive to Nepali actors, for whom the formation of a truth commission was a more attractive option than one that might allow criminal accountability for past violations.<sup>70</sup> The South African experience was also readily available, through the presence of Hannes Siebert and as a consequence of visits to South Africa by politicians and others both prior to and during the peace process as well as visits to Nepal by several South African experts. Over time, and with the involvement of Günther Baechler, other cases also received attention, notably that of Peru. In early 2007, the NTTP supported visits to Peru and South Africa by representatives of the SPA and Maoists, which Siebert facilitated and led. However, these visits did not mitigate the overwhelming primacy of the South African example.

In retrospect, while the South African case study was clearly useful as a means of explaining concepts of transitional justice, it also limited the scope of discussion on these issues in Nepal.<sup>71</sup> A broader range of comparative experience on transitional justice and more wide-ranging consultation on the design of any mechanism might have overcome the dynamics by which the TRC emerged within a CPA narrowly based on the need to move forward in the peace process. Notably absent at this stage and in the discussions that preceded the draft TRC bill (released in June 2007, as discussed below) was a national debate among the various stakeholders regarding the scope and relevance of a TRC for Nepal.

## UNDERSTANDING THE PARDONING PROVISIONS

During the conflict, the security forces detained hundreds of Maoists and others on a host of charges, including assault, kidnapping and murder. By early May 2006 approximately 700 Maoist cadres had been charged but never tried and were languishing in prisons in various parts of Nepal.<sup>72</sup> In the wake of the April people's movement, attention to the plight of political detainees became a pressing concern. The Maoist leadership claimed that the government had wrongfully accused and imprisoned their cadres. They addressed the issue directly in a memorandum to Prime Minister Girija Prasad Koirala on 5th May 2006 that requested the detained rebels be immediately released, that the ordinance on the control of terrorist and disruptive activities be rescinded, and that all war crimes be legally addressed.<sup>73</sup> The government moved quickly to release the prisoners, and on 25th May 2006 it freed 467 Maoists. On that same day, in point 16 of the ceasefire code of conduct, the parties agreed to 'withdraw the accusation, prosecution and cases induced against various individuals by both the parties and release the detainees gradually'.

The speedy release of prisoners reflected a broad consensus that further progress of the peace talks depended on pardoning combatants for actions undertaken in the course of the conflict. But clarity as to the scope of the pardoning was never really established, and ambiguous pardoning provisions were included in both the Baluwatar agreement<sup>74</sup> and the CPA. The parties guaranteed in the CPA 'to withdraw accusations, claims, complaints, and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately'.<sup>75</sup>

The context for the CPA pardoning provision explains its ambiguity: it was in essence a goodwill gesture to further the peace process, not a clear commitment to an amnesty provision. A senior politician recalled a desire at the

70 A TRC was established in South Africa in December 1995 to investigate and establish the truth about the crimes that occurred during the apartheid era. Many people involved in the Nepal talks, as well as civil society members active at the time, were not aware of the existence of truth commissions around the world other than the South African example. For an analysis of comparative experience with truth commissions see Priscilla Hayner (2002). *Unspeakable truths: Facing the challenge of truth commissions*. New York: Routledge.

71 There were several questions raised by relying mainly on the South African example. Many wonder how a truth commission might entice perpetrators to speak – and if not, how could a truth commission be effective? But most truth commissions globally depend largely on victim and witness accounts and on independent investigations and documentation, not first-person accounts by perpetrators. It cannot be assumed that those who committed abuses will feel compelled to come forward with their stories.

72 Available at [http://www.outlookindia.com/pti\\_news.asp?id=382758](http://www.outlookindia.com/pti_news.asp?id=382758).

73 Ibid. Press, Trust of India, 'Nepal begins releasing jailed Maoists', Kathmandu, 6th May 2006, available at <http://www.expressindia.com/fullstory.php?newsid=67259>.

74 Point 4 of the Baluwatar agreement commits the parties to make public announcements regarding the 'withdrawal of all accusations and allegations charged by the State and CPN (Maoist) against the political leaders and the cadres and to release all political prisoners from both the sides'.

75 Section 5.2.7, CPA, 21st November 2006.

time that there be no witch-hunting or revenge after the CPA was signed.<sup>76</sup> Confirming this view, a negotiator described the provision's intention as being to withdraw pending cases, not future ones, and to facilitate the release of individuals who had been arrested for political activism.<sup>77</sup> A senior UN official recalled that he and others had considered the provision 'sufficiently vague to let it go', not least because they feared any challenge to it would most likely have solidified the idea of an amnesty that might explicitly cover human rights violations.<sup>78</sup> However, the implications of the provision were unclear to those negotiating the agreement, and many have misunderstood the clause as offering a broad amnesty.

## THE MISSING COMMITMENTS ON JUSTICE AND ACCOUNTABILITY

Political conditions allowed consensus on forming the Rayamajhi Commission to investigate excesses committed during the April 2006 people's movement. But otherwise there has been limited interest in accounting for conflict-related human rights violations in Nepal. Rather, key political actors' responsibility for serious violations, combined with a political and cultural environment that has provided an extraordinary degree of protection to Nepal's army, has made it difficult, perhaps impossible, to challenge the long-standing impunity enjoyed by state forces. This reality is reflected in both the provisions and mechanisms that were included in the peace agreements as well as those commitments on justice that were left out.

A reluctance to include rigorous provisions on justice and accountability in a peace agreement is certainly not unique to Nepal. As in other transitional situations, the most contentious issue has been criminal accountability or prosecution for serious human rights violations, on which the CPA is silent. The obstacles to moving toward the prosecution of serious crimes are many: a weak judiciary, the multilayered protection of the army as a consequence of its close ties to the royal family, support from India and some elements of the NC party, and an entrenched reluctance on the part of many Nepali elite to challenge the status quo. This was reflected in the Kathmandu media's generally muted response to well-documented reports of serious human rights abuses by the army, such as OHCHR's May 2006 report on disappearances from the Maharajgunj barracks.<sup>79</sup>

In other post-conflict situations, the vetting or screening of public officials for human rights violations has proved a critical tool of transitional justice as well as a means to help strengthen new and reformed institutions.<sup>80</sup> In Nepal, where UN peacekeeping has long represented a vital source of income for the RNA/NA, the High Commissioner for Human Rights on several occasions has called for certain persons to be excluded from participation in UN peacekeeping operations on the grounds of human rights violations.<sup>81</sup> However, vetting received almost no attention during the drafting process for the CPA. Instead, discussion of the management of arms and armies focused on establishing ways to confine Maoist combatants to cantonments and NA soldiers to their barracks and to monitor their weapons.

Resistance to screening public officials runs deep in Nepal's political and military establishment. The classic argument produced in defence of the security forces' conduct during the conflict is that army and police personnel were following orders to protect the country from the Maoist threat. It would be unfair, some argue, to hold them accountable in any way, even through nonjudicial measures such as vetting, and would bring down their morale. Besides, the army maintains that court-martial or military tribunals are adequate to investigate conflict-related cases.<sup>82</sup> Meanwhile, despite the new Army Act of 2006, which placed the military under civilian authority, there has been little exercise of such authority over General Katuwal, and the army continues to evade accountability for past actions.

<sup>76</sup> Interview, Kathmandu, October 2008.

<sup>77</sup> Interview, Kathmandu, September 2008.

<sup>78</sup> Interview, Kathmandu, September 2008.

<sup>79</sup> This was also true two years later, when little media coverage was given to OHCHR's report 'Conflict-related disappearances in Bardiyaj district', released in December 2008.

<sup>80</sup> Alexander Mayer-Rieckh & Pablo De Grieff (Eds.) (2007). *Justice as prevention, vetting public employees in transitional societies*. New York: Social Science Research Council. Vetting is an important category of transitional justice measures, often employed by transitioning countries. El Salvador and Bosnia/Herzegovina are examples of two countries where important vetting mechanisms were developed during the political transition.

<sup>81</sup> Report to the General Assembly of 16th September 2005 (A/60/359) and Report to the UN Commission of Human Rights of 16th February 2006 (E/CN.4.20060107). See also the recommendations of OHCHR's Bardiyaj report.

<sup>82</sup> Interview, Kathmandu, October 2008.

## AFTER THE AGREEMENT: CHALLENGES TO JUSTICE IN THE IMPLEMENTATION STAGE

The year 2007 was fraught with complications, and in many respects it was a lost year with regard to implementing peace. The elections, originally due to be held by mid-June, were rescheduled for November, and then for the following April. With human rights violations and insecurity on the rise across the country, the Maoist members of the interim government resigned in September, demanding that a republic be declared. The peace process appeared to be back on track only at the end of the year, after talks between the government and the Maoists concluded in an agreement on 23rd December that committed the parties to implementing outstanding elements of the CPA and to declaring Nepal a republic at the first seating of the Constituent Assembly.<sup>83</sup>

Slow and uneven implementation of the CPA and related agreements can be attributed to several different factors, among them problems inherent in the CPA itself, most notably its failure to provide for the creation of any monitoring mechanism. The CPA was also undermined by the agitation and fragmentation of Madhesis and other traditionally marginalised groups, who felt that their rights and interests had not been sufficiently recognised during the peace process. Finally, the Ministry of Peace and Reconciliation created to oversee the peace process in the early months of 2007 was weak. The role of this “peace ministry” was complicated by its politicisation, particularly during the interim government when it was headed by Ram Chandra Poudel, a senior member of the NC party in whom the Maoists had little confidence. The ministry’s impact on transitional justice was also weakened by a piecemeal approach rather than one that promoted complementary laws and policies.

The piecemeal approach to transitional justice was evident in the separate paths taken to establish the TRC and the Commission on Disappearances. Impelled by the peace minister’s desire for an early truth-seeking process that might put pressure on the Maoists, in May 2007 the Ministry for Peace and Reconstruction formed a five-person committee to draft legislation for a TRC. A draft bill was finalised in July after inadequate consultation with civil society and posted on the ministry’s website with an invitation for comments and suggestions.<sup>84</sup> These were quick in coming as local and international human rights groups expressed their concern, both with the process by which the bill had been prepared and with its content, particularly the extent to which it proposed to provide amnesty for gross human rights violations and crimes against humanity.<sup>85</sup>

OHCHR played a role in keeping the international diplomatic community abreast of developments with regard to the draft bill. Statements of concern and practical comments were issued by OHCHR and other actors as well as by Amnesty International, the International Commission of Jurists and the International Center for Transitional

83 Further upheavals came in January 2007 when a broad alliance of Madhesis excluded from the December talks launched a new wave of protests and strikes. The path to the April 2008 elections was assured only after India’s direct intervention and the signing of an agreement with the Madhesis in late February.

84 ‘Bill made for making provisions relating to Truth and Reconciliation Commission’, available at <http://www.peace.gov.np/admin/doc/TRC-English.doc>.

85 Critics believed that political actors had come to understand the limitations of /the CPA’s pardoning provision and had therefore sought reassurance in an amnesty.

Justice.<sup>86</sup> Denmark and the UK were particularly active in supporting local transitional justice initiatives and advocating for an inclusive and participatory TRC process. After a national consultation in Kathmandu and three regional consultations, revised drafts of the TRC bill were published in January and June 2008. But the bill still fell far short of international standards: a number of serious crimes, including disappearances, abductions and crimes against humanity, continued to qualify for amnesty.<sup>87</sup> The government continued consultations on the TRC draft bill, and it will be again revised once these consultations are complete. On 17th and 18th December 2008, the Ministry of Peace and Reconstruction organised the fourth regional consultation on the TRC bill in Dhangadi in the far west, and additional consultations were promised.<sup>88</sup>

In the meantime, the Commission on Disappearances had received direct encouragement from a landmark judgement of the Supreme Court delivered on 1st June 2007 in response to petitions of habeas corpus submitted for dozens of disappearance cases. The ruling had determined that the government should form a commission of inquiry on conflict-related disappearances in line with international standards, enact a law to criminalise enforced disappearances, prosecute those responsible for disappearances and provide compensation to victims' families.<sup>89</sup> The government responded to the Supreme Court with some speed, and on 21st June announced the formation of a commission. However, there was widespread criticism that the commission would not be in compliance with either the Supreme Court ruling or international standards – which had been spelled out in criteria prepared by OHCHR and endorsed by the Supreme Court – and the government abandoned that specific commission.

The public debate on the two commissions highlighted the lack of discussion on the fundamental questions that needed to be answered to achieve a durable solution for Nepal's security sector. The two armies remained confined to barracks or cantonment, under the observation of UNMIN, with no clear plan for their integration or disbandment. The CPA (4.4) had mandated a special committee 'to carry out monitoring, adjustment and rehabilitation of the Maoist combatants'. However, the committee met just once, in July 2007, before the installation of the Constituent Assembly in May 2008.

On 25th June 2008, as part of the discussions on the new government's formation, the parties reached agreement on the resolution of some key elements of the peace process.<sup>90</sup> They committed to establishing several commissions within a month, including the Commission on Disappearances and the Truth and Reconciliation Commission, and to reconstituting the special committee on the integration and rehabilitation of the Maoist combatants. On 19th November 2008, in an encouraging development, the Council of Ministers approved draft legislation on disappearances that included the establishment of a commission.

Meanwhile, in October 2008, the government finally constituted a five-person special committee to address the integration and rehabilitation of Maoist combatants. Its progress has been limited, however, by intense polarisation. Senior army officials, including the chief of army staff, oppose the mass integration of the Maoists into the army. As of late December 2008, the army has also ensured the absence of any discussion of vetting or accountability for past violations.

These developments provide grounds for some cautious optimism – “cautious” because neither of the two critical transitional justice mechanisms promised by Nepal's peace agreements two years ago has been formed. And

86 Amnesty International, 'Nepal draft Truth and Reconciliation Commission Bill risks undermining justice', AI Index: ASA 31/007/2007 (Public), 14th August 2007. Available at <http://www.amnesty.org/en/library/asset/ASA31/007/2007/en/dom-ASA310072007en.html>. International Commission for Jurists, 'Nepal- Truth Commission Bill disregards victims' rights: Draft Bill fails to meet international human rights standards', 23rd August 2007. Available at [http://www.icj.org/news.php3?id\\_article=4201&lang=en](http://www.icj.org/news.php3?id_article=4201&lang=en). International Center for Transitional Justice, 'Comments on the Draft Truth and Reconciliation Bill', Nepal, August 2007. Available at [http://www.ictj.org/static/Asia/Nepal/ICTJ\\_NPL\\_CommentsTRC\\_cm2007.pdf](http://www.ictj.org/static/Asia/Nepal/ICTJ_NPL_CommentsTRC_cm2007.pdf). Press release, 'OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill', 3rd August 2007. Available at [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/AUG2007/2007\\_08\\_03\\_HCR\\_TRCB\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/AUG2007/2007_08_03_HCR_TRCB_E.pdf).

87 'Bill made for making provisions relating to Truth and Reconciliation Commission', available at <http://peace.gov.np/admin/doc/Satya%20Nirupan%20Bill-%202064-9-26.pdf>.

88 The Ministry of Peace and Reconstruction previously held consultations in Palpa, Dhankuta and Nepalgunj, in addition to the consultation in Kathmandu mentioned above.

89 Finding that the existing Inquiry Commission Act, 1969, was not sufficient basis for the conduct of commissions of inquiry related to disappearances, the Supreme Court ordered the enactment of a law that would include provisions for establishing a commission on disappearances.

90 The 'Agreement between the political parties to amend the Constitution and take forward the peace process' is described in *Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process*, S/2008/454, 10th July 2008.



to date the government has conducted no credible, competent and impartial investigation into disappearances or other human rights violations perpetrated during the conflict. If, as is to be hoped, both the Commission on Disappearances and the TRC are established, Nepal would be the first post-conflict country to form two such bodies of inquiry with overlapping mandates to investigate human rights violations. This would entail its own challenges, most obviously the need to clarify each body's mandate and role and the potential overlaps between the two to ensure that they complement each other's work.

Moreover, Nepal has a chequered history with regard to commissions of inquiry. These have regularly been created to investigate human rights violations and political violence but have rarely – if ever – delivered on that promise.<sup>91</sup> The failure to implement the recommendations of past commissions has undermined public confidence in full implementation of agreements entered into by Nepal's political actors – a situation exacerbated by the problems with implementation in the current peace process.

A related issue is that of reparations. In general, there has been broad consensus among political actors on the desirability of distributing reparations to victims of the conflict. Yet the government has so far failed to develop a coherent policy on reparations. In May 2008 the World Bank committed US\$50 million to support reparation efforts.<sup>92</sup> This does not appear to be tied to either of the commissions and their possible recommendations, which could provide a useful policy framework. The World Bank grant has not yet been fully disbursed, and clear policies and procedures should be established before further relief is distributed, ensuring that international standards on reparations are respected and that measures are put in place to make certain the reparations policy complements other transitional justice initiatives. Most recently, the November 2008 decision of the Council of Ministers with regard to disappearances included a provision for interim relief (of 100,000 rupees, or approximately US\$1,300) to all families of the disappeared. However, it remains to be seen whether the decision will be implemented, and whether it will complement a broader reparations programme.

As Nepal looks ahead, impunity threatens to remain a major obstacle to meaningful peace and stability. In this regard the international community, OHCHR, NHRC and local civil society should continue to coordinate their advocacy efforts, applying sustained pressure for action in their reports and pushing for accountability through a range of judicial and nonjudicial measures. Beyond a few notable exceptions, civil society has had a largely muted response to issues of justice, as evidenced by the silence on the OHCHR report on disappearances in Bardiya, and this is cause for concern for groups struggling to achieve justice.

Finally, if the political parties are committed to the peace process, they must engage seriously with commitments to justice and adhere to the promises made in the CPA and in later agreements and public statements.

91 C. K.Lal, 'From Mallik to Rayamajhi – History has repeated itself as a farce', *The Nepali Times*, 10th-16th August 2007. Available at <http://www.nepalitimes.com.np/issue/2007/08/10/StateOfTheState/13826>; G. Pradhan, 'Politics of impunity', *Kathmandu Post*, 29th May 2008. Available at <http://www.kantipuronline.com/kolnews.php?&nid=148466>.

92 'World Bank grants US\$127 m to Nepal for various projects', 8th May 2008. Available at <http://www.nepalnews.com/archive/2008/may/may08/news07.php>.

## PRELIMINARY CONCLUSIONS AND LESSONS IDENTIFIED

Building a “new Nepal” based on human rights principles and the rule of law, a goal the prime minister proclaimed in his speech at the UN Security Council in September 2008, remains a considerable challenge. Indeed the commitments on transitional justice in the peace agreements and their uneven implementation to date reveal a fundamental tension between Nepal's stated wish to end impunity and its clear reluctance to introduce the measures that would be required to make this change.

The following preliminary conclusions are offered as observations gleaned from the trajectory of Nepal's peace process. They have implications both for Nepal as it enters a critical stage of its transition and for other countries, which may stand to learn from Nepal's experience.

**Outside advisors can be critical in providing an international perspective on justice. However, they should offer a broad range of experience.**

Many of the decisions pertaining to justice made in the course of Nepal's peace process were not well informed. The parties lacked basic knowledge about the international experience, appropriate aims and the variety of models for mechanisms and policies, including truth commissions, disappearance commissions, vetting of security forces, a possible amnesty and reparations. This lack of information meant that elements of the CPA were confusing: the intention of the parties, the appropriate process for clarifying terms of reference and whether the parties' aims could be met through the mechanisms indicated.

One clear cause of confusion was the narrow frame of reference for transitional justice, based to a considerable extent on the TRC in South Africa but without a critical understanding of the South African experience. The parties – and many in civil society – did not have sufficient knowledge of other transitional justice examples at the time the talks were under way. This was particularly true in relation to the agreement for a truth commission.

In countries where negotiations are foreseen, it is important that a wide array of international experiences and examples be presented to those who may be involved in talks, both the official parties and civil society members lobbying from the outside. An honest portrayal of the advantages as well as disadvantages of these mechanisms – their strengths and weaknesses – should be offered.

**Too limited of a role for civil society can weaken a peace process.**

Civil society in Nepal was minimally involved in the peace talks. Although several civil society representatives attended the negotiations as observers, they could not contribute directly to the official talks; instead they provided input at informal side meetings. It is unclear how much information these representatives brought back to civil society organisations, and how many ideas from civil society they brought to the table.

Generally, a civil society that had demonstrated great strength during the people's movement of April 2006 played a weak role in the transitional negotiations immediately afterward. This might have been changed if civil society had taken a more proactive stance, by putting forward position papers, publishing op-eds on issues under discussion, and so on. However, the negotiating parties' apparent reluctance to open the talks up for more robust civil society participation represented a significant obstacle.

One explanation for civil society's limited engagement on some of these issues is that the concept of transitional justice itself was new to Nepal, and few had any experience with the various approaches beyond national prosecutions. Indeed, in 2006 only a handful of individuals or NGOs had even heard of the term "transitional justice", which naturally limited the internal capacity to engage with a wide range of justice options in the peace process. In retrospect, international donors and NGOs – which showed more interest in transitional justice after the signing of the CPA than before – might have been able to contribute at an earlier stage by facilitating transitional justice-related exchanges and providing information to their Nepali partners.

Overall, the experience of Nepal suggests that when political party leadership dominates negotiations, they are likely to result in narrow agreements that largely preserve the parties' self-interest. This approach may exclude important opportunities for creative and proactive justice measures.

### **Lack of clarity and foresight in the implementation stage can result in missteps.**

The decision to implement the agreement quickly – in particular to move forward with the TRC – resulted in confusion, concern and time lost. There was no consultation before the initial TRC draft bill despite considerable differences of opinion between the drafters (and perhaps the parties) and civil society and the international community.

Transitional justice initiatives are perhaps different from many other policies because of the strong presumption that consultation and public input are required for them to be effective and legitimate. Indeed, public legitimacy is what allows such programmes to succeed, as they generally require public engagement as well as investment of time and assistance by civil society.

After early resistance to public input, the Nepal authorities eventually embraced a plan for broad public consultation on the TRC. However, at about the same time they put forward the disappearances draft bill on a rushed time line for approval, with little understanding that civil society and public consideration and comment were also critical to its success.

Negotiators can begin to address this challenge by signaling in an agreement that later consultation is needed for the details of justice mechanisms to be developed. Further, the post-agreement phase would be strengthened if very early input – in the first weeks after the signing – was provided on international experiences of process and consultation methodologies. This would help prevent hasty, perhaps well-intentioned initiatives from weakening rather than strengthening the post-agreement transitional justice process.

### **In some cases, it can be premature to address certain justice matters in the context of peace talks.**

While the Nepal talks did not closely address many justice issues – and failed completely to touch on others – observers generally agree that this would not have been the best time to address accountability in much more depth.

Most say, for example, that the Nepal talks would have been unable to address the question of vetting the armed forces. Raising this issue during the talks might have reduced the prospect of proactive measures in the future. Indeed, two years later Nepal is struggling to institute a mechanism to integrate the national and Maoist armies; any deeper reform or human rights-related vetting must follow, not lead, the key framework decisions on the integration of the armed forces.

The CPA also largely left open the question of amnesty. On some level the parties assumed that the TRC would provide amnesty, relying on their understanding of the South African model. The unstructured nature of the talks would not have allowed a more in-depth treatment of this challenging issue; specific language on amnesty might have risked promises of impunity that would have been difficult to undo later.

**Post-agreement developments are more likely to strengthen than weaken the possibilities for justice; thus, some flexibility in the language of the agreement is useful.**

The consultation and implementation process can effectively improve on the original language. The Supreme Court decision of June 2007, six months after the CPA was signed, set out clear terms for a commission of inquiry on disappearances. And national and international public and civil society reaction to the first draft TRC bill resulted in a much stronger model over time.

These observations highlight the elasticity of the peace process in a complex environment like Nepal's. They also introduce a somewhat cautionary note on content: while all efforts should be made to ensure that peace agreements are consistent with international best practices, in the end the agreements will be judged by their implementation as it plays out over time. To a large extent, broad-based ownership of the process – both at the elite level and by society at large – will determine whether an agreement and the initiatives that grow out of it prove a durable framework for a country's long-term peace and stability.



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