



USIPeace Briefing

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Transitional Justice in Nepal: A Look at the International Experience of Truth Commissions

Amid the run-up to the Constituent Assembly elections scheduled for November, Nepal's government has prepared a Truth and Reconciliation Commission Act, as required by the November 2006 Comprehensive Peace Agreement between the government and the Communist Party of Nepal-Maoist (CPN-M). The Truth and Reconciliation Commission (TRC) is the most prominent of several commitments made during the peace process to promote transitional justice following Nepal's more than 10-year civil war—along with a committee to investigate disappeared persons and a commission to investigate abuses of the armed forces and police during democracy protests in 2006. But transitional justice—or the process of fairly confronting the legacy of past crimes committed during the armed conflict—is only beginning to be discussed in the general public in Nepal. Consequently, there is little understanding outside a small circle in the capital of what options there are to provide truth and accountability for atrocities and rights abuse that occurred during Nepal's conflict or what other countries have done to cope with similar issues.

In response to the need for more information on international practices and experiences about transitional justice, the United States Institute of Peace organized a series of roundtable sessions from July 10–17, 2007 to discuss transitional justice options pursued by other countries after conflict. Each roundtable included a presentation on various mechanisms to address past abuses, the showing of a new documentary, *Confronting the Truth: Truth Commissions and Societies in Transition*, produced by York Zimmerman Inc., in association with USIP and the International Center on Nonviolent Conflict (ICNC), and a discussion on the prospects for transitional justice in Nepal. USIP Rule of Law Advisor Scott Worden, conflict resolution specialist Karon Cochran-Budhathoki, and consultant Shobakhar Budhathoki met with representative groups from civil society, victims of the 10-year armed conflict, the media,



Civil society leaders watch the watch the truth commission film *Confronting the Truth* in Nepalganj, Nepal.

and government and political party representatives. These roundtable sessions took place in Nepal's capital of Kathmandu, as well as in Banke, Bardiya, and Dang Districts in the mid-western region, the most affected region during the conflict.

This USIPeace Briefing provides background on the Nepal conflict; an update on the ongoing process of transitional justice in Nepal; and an overview of the sessions, responses to the documentary and expressed needs and expectations of victims of the conflict. It also summarizes the initial commentary on the current draft of the TRC law.

Justice and Reconciliation Needed After a 10-Year Armed Insurgency

For more than 10 years Nepal underwent a violent conflict between national army and police forces and an insurgent Maoist political movement led by the CPN-M. Fought primarily in poor, rural districts away from the capital, the conflict claimed more than 13,000 lives and caused thousands of "disappeared"—those who were abducted or killed without a trace and whose fates are still unknown to their families. In fact, Nepal topped the UN Working Group on Enforced and Involuntary Disappearances list of countries with the most disappearances in 2003-2004. Torture has debilitated thousands more. Mass killings have been reported from the mid and far Western regions of the country, and international agencies such as the UN Office of the High Commissioner for Human Rights reported on illegal detentions and mass killings of detainees , as well as rapes and murders of female civilians.

This violent conflict stems from the Maoist insurgency that began in 1996 and grew out of accumulated resentment over Nepal's feudal system. For more than 300 years, Nepal was ruled as a Kingdom. A form of democracy emerged in 1990 after the "Jana Andolan" political movement was launched by an alliance of democratic political parties. This led King Birendra Bir Bikram Shah to allow the creation of a constitution that placed him in the position of a constitutional monarch who retained significant legislative and judicial power, as well as full command over the army. This nascent democracy, which lasted until King Birendra was murdered in his Royal Palace in 2001, saw more than one dozen prime ministers heading the government, with several serving more than once. Political infighting, corruption, and slow progress quickly led to dissatisfaction among the general public. Economic stagnation, high unemployment, poor education, impoverishment, continuing discrimination, and an ever-increasing gap between the elite in Kathmandu and the rest of the country provided fertile ground for discontent. In opposition to the government the CPN-M launched the "people's war" on February 13, 1996 with the main objectives of abolishing the monarchy and establishing a republic.

While the CPN-M combatants were initially few in number, historically disenfranchised groups began to join the CPN-M's People's Liberation Army (PLA) as the CPN-M promised gender equality, land reform, socio-economic progress, and elimination of the caste system. Others were compelled to join due to intimidation and forced conscription or to high unemployment and severe poverty. The CPN-M organized community programs to build roads and bridges, banned gambling and drinking with the intent of decreasing domestic violence, and provided opportunities to the disadvantaged. Simultaneously, they destroyed state infrastructure, targeted and killed civilian police, abducted individuals for ransom or large numbers of people in order to participate in their "information programs," violating international humanitarian laws, and extorted money from all levels of society.

The Nepal Police were initially charged with combating the insurgency, but in 2001 the Armed Police Force was formed and deployed for counter-insurgency operations. The conflict quickly escalated, with many civilians caught in the middle. After failed negotiations in 2001, the Royal Nepal Army was deployed as part of a "unified command" structure in which the army, with the King as supreme commander, was at the top of the chain of command over the police and armed forces. Again, the conflict escalated, resulting in reported disappearances, rape, torture, and extrajudicial killings. Army barracks were allegedly used as arbitrary detention centers where both Maoist combatants and suspected Maoist sympathizers were tortured. Those deemed "sympathizers" were in many cases civilians from the lower castes, from impoverished communities, or those who had been forced to provide food, shelter or money to PLA combatants.

In 2002, the Nepalese Parliament was dissolved and King Gyanendra sacked the elected prime minister, resulting in a succession of King-appointed governments. After a ceasefire in 2003, a new round of negotiations took place, but failed. After the talks dissolved, the country saw a rise in the brutality of the conflict, with state security forces using increased force in their anti-insurgency campaign, while the PLA gained control of an estimated 75% of the countryside. On February 1, 2005 the King declared a state of emergency, suspended Parliament, and deployed the Royal Nepal Army to take control of all state institutions, as well as private media houses and telecommunications outlets to silence possible voices of dissent. Even after the lifting of the state of emergency in 2006, the King's regime continued to suppress political and civil rights, including strict censorship and restrictions on the freedom of expression and information, movement, and assembly. Measures included the arbitrary detention and arrest of cadres of the main political parties as well as members of civil society.

Peace Agreement Calls for Truth and Reconciliation

As opposition to the King's rule increased, the CPN-M and an alliance of seven political parties began a series of talks that led to a "12-point understanding." They joined together in growing peaceful protest against the King's regime, eventually culminating in April 2006 in the King yielding to the seven party alliance and restoring the parliament. The new government and CPN-M continued to hold talks, leading to a ceasefire, code of conduct, and eventually the November 2006 Comprehensive Peace Agreement (CPA). In January 2007, the interim constitution and parliament came into operation, and an interim government, which includes the CPN-M, was established in April 2007.

In addition to commitments for permanently ceasing hostilities, and moving former PLA into cantonments and the army into their barracks, the CPA calls for three bodies to address abuses that took place during the 10-year conflict:

1. Article 5.2.5 of the CPA specifically calls for a Truth and Reconciliation Commission to be established in order to "probe about those involved in serious violation of human rights and crime against humanity...and develop an atmosphere for reconciliation in society."
2. Article 5.2.4 of the CPA calls for a National Peace & Rehabilitation 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."

3. Article 5.2.3 states "both sides also agree to make public within 60 days of signing of the agreement the real name, caste and address of the people made 'disappeared' or killed during the conflict and inform the family members about it." Although this provision does not specifically call for a commission, in July 2007 the government announced the formation of a Commission on Disappearances, to make public the whereabouts or the circumstances of victims' deaths.

Beyond these broad mandates, however, the CPA contains no detailed guidance for how to form each of these investigative bodies or what should be their specific mandate. The Truth and Reconciliation Commission is in many ways the most ambitious of the three commissions, and responsibility for conceiving and implementing it has been given to the Peace & Reconstruction Ministry.

USIP Consultations on Transitional Justice

Against this backdrop, USIP's consultations focused on general themes of transitional justice and on specific techniques employed by truth commissions in other countries emerging from war. The principal aim was to raise awareness among different stakeholders—including civil society organizations, victims groups, political parties, government representatives, and the media—about what the key issues are for establishing a credible and effective transitional justice process and to encourage informed discussion on the issues.

In each session, USIP presented an overview of international practices and transitional justice options, and screened the documentary *Confronting the Truth: Truth Commissions and Societies in Transition*¹, which showcases the workings of truth commissions in four countries: South Africa, Peru, East Timor, and Morocco. The presentation to participants included a brief look at victim-focused and perpetrator-focused transitional justice mechanisms, including trials, truth commissions, vetting mechanisms, reparations, and memorialization of a conflict. The hour-long documentary *Confronting the Truth* focused exclusively on truth commissions. It includes footage of victim and perpetrator testimony, as well as commentaries from members and staff of the commissions on the challenges and successes of the four countries profiled. Key themes relevant to Nepal were discussed, including how each country attempted to ensure diverse representation on the Commission, avoid political interference, and maintain transparency and openness in the commissions' work, as well as the vital role that civil society played in supporting the commissions' work. The film also focuses on the process for gathering victim testimony and conducting public hearings, with dramatic footage of victim testimony that was a feature of each commission's success.

Civil Society and Victims' Views -- Because the CPA calls specifically for a TRC, discussion after the viewing was focused on components of truth commissions, including the importance of the independence of such commissions, the number and profile of the commissions' members, the need for strong investigative powers, and possible links to and coordination with judicial proceedings.

¹ Available for purchase at <http://bookstore.usip.org/books/BookDetail.aspx?productID=171689>.

While many participants had limited awareness of transitional justice, there was limited awareness on the role that each group could play in forming a commission, during the commission's work, and after the commission's report was published.

Victims, the human rights community and the media were particularly concerned about being sidelined during the process of developing a TRC in Nepal. While the Peace & Reconstruction Ministry has held

consultations in Kathmandu and plans one consultation in each of the five development regions of the country, most participants were unaware of this plan and felt alienated from the process.



Civil society representatives and victims attend a consultation in Dang District.

Members of civil society were particularly encouraged by seeing the example of Peru in the documentary in which volunteers went to conflict-affected communities to gather testimony, and knowing that civil society in Nepal could have a key role in both civic education regarding the transitional justice process, as well as information gathering for the commission. Those participating in the media roundtable were especially interested in the way that the media reported on the commissions' work and were a link between the commission's hearings and the general public, as displayed in the South Africa, Peru and East Timor examples in the documentary. Civil society identified victim testimony during the commissions' work in the documentary as courageous, and further stated that the documentary should be shown to more communities in Nepal both to understand the workings of commissions, but also to illustrate the importance of victim testimony.

Concerns About Justice and Public Participation -- The amnesty component of the South African TRC—under which perpetrators could formally apply for amnesty in exchange for a full confession of their crimes—stimulated a good deal of discussion and concern, with some participants directly stating that amnesty for perpetrators of atrocities should not be an option in Nepal's context. Relating amnesty to the larger theme of achieving a balance between learning the truth about Nepal's conflict and achieving accountability for perpetrators, most participants agreed that truth was not a substitute for justice. That said, some victims expressed a higher desire for compensation—in the form of reparations payments as well as social services and regional development programs—while others thought that compensation would be hollow without first holding accountable those that had killed or caused disappearances.

Participants also consistently expressed concerns over the potential composition of the Nepal TRC, keeping in mind that a process for selection has not yet been determined. Reflecting on themes in the film, South Africa provided an example of a large, diverse

commission that represented all aspects of South African society, while Peru's commission had much less diversity. Morocco's inclusion of a victim as the head of the commission began a discussion during several roundtables on concerns of ensuring a composition of commissioners that truly represented Nepal's people.

The documentary also briefly highlighted the importance of the commissions' reports and that these reports typically identify systemic, historical, and institutional patterns that led to conflict and human rights violations, and recommend specific reforms of the security, judicial, and education systems. A number of participants, including some government and political party representatives, responded that these goals of identifying causes and recommending reforms should be an objective of Nepal's TRC. Participants strongly suggested that the documentary be dubbed in Nepali (the version screened included Nepali subtitles), as well as Hindi to reach some of the Terai (plains) areas, for wider viewing and better understanding by policymakers and the public about commission proceedings in other countries. USIP, together with York Zimmerman and ICNC, will pursue the development of a Nepali language version of the film.

Applying Lessons Learned to the TRC Law

In the same week as the USIP consultations, the Ministry of Peace and Reconciliation released a draft Truth and Reconciliation Act that attempted to fulfill the CPA mandate. The Peace Ministry has said that it will conduct a series of consultations with civil society on the draft law, and that it is open to comments. Prominent critics—including the UN Office of the High Commissioner for Human Rights², Human Rights Watch³, and the International Center for Transitional Justice—have quickly responded that there are significant flaws in the current draft, including a controversial amnesty provision, that do not meet international standards for truth commissions. There is also concern that the commissioners will not be representative of all peoples and regions of the country, and that civil society groups, the public and victims will not have a meaningful say in how the law is revised or how the Commission performs its work.

Proposed TRC Mandate: The current draft law calls for a seven member commission—to be appointed on the recommendation of a panel of political party representatives—to execute the TRC's two year mandate to "create a conducive environment for reconciliation and seek truth about those persons involved in human rights violations and crimes against humanity during the period of armed conflict." In the draft, the TRC has the authority to investigate "human rights violations and crimes against humanity that occurred during the period of armed conflict" that are reported to it from any source—provided, however, that the case of abuse has not been "finalized in accordance with existing laws" or is not the subject of ongoing court proceedings. Thus it is unclear what authority the TRC would have over complaints that have been lodged with prosecutors but have not been effectively investigated. For new cases, the draft law gives the TRC full court powers to conduct its investigations, including subpoena authority and the ability to fine individuals or organizations that refuse to cooperate with an order of the Commission.

² See "OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill," OHCHR Press Release, August 3, 2007; available at <http://nepal.ohchr.org/en/pressrelease.html#030807>.

³ See "Nepal: Truth Commission Bill Disregards Victims' Rights", Human Rights Watch, August 22, 2007; available at hrw.org/english/docs/2007/08/22/nepal16720.htm.

The draft law is also unclear about whether the TRC will explore the larger patterns of violence that perpetuated the conflict, or only individual cases that victims are bold enough to present. In fact, most successful truth commissions focus much more on the overall causes and conduct of violence at the higher levels rather than the individual acts of everyday fighters.

The TRC law focuses much of the Commission's powers on reconciliation. Based on its findings, the TRC may facilitate reconciliation between a perpetrator and victims and may order compensation to be paid by those responsible for abuses, as well as recommend that the government provide financial compensation or services to victims. The TRC is also authorized to hold a series of public events to encourage reconciliation among opposing groups and it must submit a report with recommendations for follow on reforms to the Parliament—although it is unclear whether this report must be public. The TRC may also recommend that the government prosecute individuals that the Commission has found responsible after its investigation, but only if there has been no formal reconciliation between the perpetrator and victim. This appears to underline the message that this is a reconciliation commission rather than a judicial accountability mechanism.

The most controversial provision in the draft law is its provision that the TRC is authorized to "recommend that the Government of Nepal give amnesty to those persons who are found responsible for human rights violation and crimes against humanity in the course of carrying out their duty and the achievement of political objectives." Amnesty does not apply to "inhumane killings," murders that occurred after a victim was in the perpetrator's "control," "inhumane and cruel torture," and rape. But it is up to the Commission to decide what criteria determine acceptable or unacceptable 'inhumanity.' This provision has raised the most concern among analysts because while general amnesty for low-level soldiers, including killing in the course of battle, is generally allowed, providing amnesty for serious crimes—as they are defined by international law and not an individual commission—conflicts with generally accepted international standards of transitional justice.

More broadly, concerns have also been raised that the Commission members, as nominees of the political parties, will not fully represent the interests of the victims outside Kathmandu (although Commission members are to come from different fields and may not be political party members themselves). Critics note that this fits a familiar pattern in Nepal, where since 1990 the government has created several high level investigation commissions to look into politically motivated violence—including the Malik Commission that was charged with investigating brutality surrounding the 1990 Jana Andolan democracy movement. But in each of these cases the commission members have been politically influential, have failed to win victims' trust, and the findings have either not been implemented or have not been released. There is a fear therefore that the TRC will follow this pattern rather than the more public and independent models of truth commissions that were successful in countries like South Africa and East Timor.

Justice in Nepal

Apart from the operation of the TRC, it is important to consider the overall picture of transitional justice in Nepal, which goes beyond truth telling and includes judicial accountability and reparations. During roundtable sessions, particularly with victims of the conflict, much of the discussion focused on what justice for victims and families of victims would look like in the Nepalese context. Concern was expressed regarding the heavy focus

on reconciliation without an equally important justice component. Because the parties to the conflict are the parties now in power, many felt that reconciliation was being stressed as an attempt to maintain impunity, and that justice and accountability for past abuses would not easily be achieved. Many victims and families of victims stated that the political parties and the government have not recognized the trauma of victims, their families, or communities, which has partially been demonstrated from their perspective by not consulting with victims prior to drafting the TRC legislation.

Compensation and reparations programs were viewed as being of high priority, especially since the majority of victims are from the most disadvantaged groups in the country. According to victims and their families in Bardiya District, which saw one of the highest disappearance rates in the country, the first priority should be to disclose the whereabouts of disappeared persons. A judicial process that included prosecutions would be a sufficient second step, followed by compensation and reparations programs. However, compensation was generally agreed to be worthless without prosecutions. The recommended compensation and reparations programs included social recognition, economic support and development, employment opportunities, and memorials. Victims of the conflict in other communities stressed financial compensation programs in addition to skills training and education for victims and their families, as well as return of land and property confiscated during the conflict, and installation of health facilities in their communities.



Victims of the conflict whose family members were killed or disappeared talk about their needs in Bardiya District.

While many participants emphasized the necessity for a public judicial process that pursued prosecutions in conjunction with a TRC, several concerns were raised. First, some victims did not believe that prosecutions or any form of justice was feasible due to the government being comprised of the parties to the conflict. This concern over the parties to the conflict being in power even extended to victims' hesitating to speak during the roundtable session. Another concern raised by roundtable participants was regarding the questionable independence and capacity of the national courts. This unease was reinforced by the inability of previous Nepalese commissions to function independently and the lack of implementation of their recommendations. While a few roundtable participants believed that a hybrid national-international special court (similar to those established in Sierra Leone, Bosnia and Cambodia) would best serve justice, they did not believe that the courts or the government would agree to any international judges. One participant raised the suggestion of forming a special court of national judges, but with international advisors and technical assistants. For many, reconciliation was not considered possible without prosecutions.

Conclusion: Participant Recommendations

As the process moves forward for a Truth and Reconciliation Commission in Nepal, there are several requirements or needs that should be met to ensure its success, according to participants of these sessions.

1. Political will for an independent and victim-centered process must be increased.
2. The Disappearance Commission and TRC should be able to share information and provisions for coordination should be established.
3. These commissions should fit within a broader transitional justice process that would include a judicial aspect, possibly a special court to pursue prosecutions.
4. In the process of forming the TRC, victims and civil society should be widely consulted. Similarly, public awareness programs should be carried out to inform communities of the transitional justice process and the workings of the TRC and Disappearance Commission.
5. Social and economic support and development, including skills and employment, as well as memorials and other forms of recognition should be given to conflict-affected communities.
6. Truth seeking commissions, such as the TRC and the Disappearance Commission, should be comprised of commissioners that broadly represent Nepalese society and should maintain their independence.
7. These commissions should not only seek the truth, but also look at the root causes of the conflict, and make recommendations for needed reform.

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