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Seeking Options for the Right to the Truth in Nepal

Summary

In the six years since the end of the armed conflict in Nepal, the government has failed to comply with its basic duties to provide effective remedy to victims of gross human rights violations. Impunity reigns,¹ and the truth remains hidden. This failure hurts victims, erodes peace, and undermines rule of law.

In May 2012, the dissolution of the Constituent Assembly (Legislature-Parliament) put an abrupt end to the process of establishing a Truth and Reconciliation Commission (TRC)² and a Commission of Inquiry on the Disappearance of Persons (COID).³ The pending bills had serious flaws in their design, including apparent problems of overlapping functions; however, they represent five years of painstaking discussion by legislators and civil society, and their derailment represents a significant setback.

In August 2012, the cabinet submitted for signature to the Nepali president an ordinance in which the TRC and COID were merged into a single entity,⁴ thus eliminating certain redundancies. However, the proposal incorporated the same critical problems from the original bills and in some aspects, like the amnesty provision, worsened them. Moreover, in the absence of political consensus, the ordinance would probably not survive future legislative action.⁵ Meanwhile, victims—particularly relatives of the disappeared—continue to experience an inhumane situation of uncertainty.

Consultation by policymakers and civil society should determine the most sustainable process by which to create institutions devoted to implementing the right to the truth. If the authorities do not show a willingness to move forward, civil society should consider what options may be available for achieving effective processes of truth-seeking and documentation, not as an alternative to official mechanisms, but to provide strong visibility

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¹ On the situation of impunity and extensive international recommendations to Nepal, see UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nepal, A/HRC/17/5, March 8, 2011.

² Nepal Secretariat of the Legislature-Parliament, A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission (unofficial translation), Registered December 2009 (hereinafter TRC Bill).

³ Nepal Secretariat of the Legislature-Parliament, Disappearances of Persons (Crime and Punishment) Bill, 2066 (unofficial translation), Registered July 2009 (hereinafter COID Bill).

⁴ Ordinance Providing for a Commission on Investigation of Disappeared persons, Truth and Reconciliation 2069 (unofficial translation), August 2012 (hereinafter COID-TRC Ordinance). The merger of the TRC and COID bills was agreed on by major political parties in May 2012, before the dissolution of the Legislature-Parliament.

⁵ In February 2009, the Nepalese government introduced the COID legislation as an ordinance when the Legislature-Parliament was in recess. However, the ordinance did not receive parliamentary endorsement and consequently expired.

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to victims' demands and rights. The international community must unequivocally support the rights of victims and Nepalese society to know the truth and to demand that government takes decisive action.

This briefing paper sets out the obligations of the state and international best practice with respect to the right to truth, both as a key element of a transitional justice strategy and as a critical component of providing effective remedy to victims of gross violations of human rights and grave breaches of humanitarian law. It reiterates ICTJ's long-standing belief that a truth commission is necessary in Nepal and that the search for the disappeared is an urgent obligation. The creation of effective truth-seeking policies and instruments is important due to elements of the 2006 Comprehensive Peace Agreement and obligations contained in the 2007 Interim Constitution; but above all, it is essential as a means to realize the right to the truth. However, for truth-seeking to be successful, the instrument or instruments established to realize it must ensure its effectiveness. This paper examines the main weaknesses of the earlier TRC and COID bills and analyzes the extent to which they have been resolved, reproduced, or made worse in the more-recent ordinance.

1. Knowing the Truth Is Not a Matter of Expediency, But a Human Right

Knowledge of the truth about serious human rights violations is not an issue of political expediency, but a universally recognized right.⁶ Victims of serious human rights violations have the right to receive accurate information about the violations suffered, the causes that gave rise to such violations, the identification of those responsible, and, in the case of enforced disappearances, information on the ultimate fate or whereabouts of the disappeared. Honoring the dead is also a basic human need, universally recognized in all cultures and regions of the world. Denying relatives of the disappeared the basic consolation of learning the ultimate fate of their loved ones is an inhumane act. International law recognizes that the anguish inflicted on relatives of the disappeared is a form of torture.⁷

The right to the truth is not limited to individuals who were victimized and their families, but rather includes their societies: knowing the facts is part of the historic heritage of each nation, and it is a powerful tool to expose structures and patterns of abuse, honor victims, educate future generations, and prevent crimes from being repeated.⁸

The right to the truth is not subject to conditions or trade-offs. Victims cannot be forced to waive their right to pursue justice and reparations or to accept an apology in order to obtain the truth. On the contrary, the right to the truth is complementary to all other aspects of an effective transitional justice strategy, such as judicial action and reparations.

The right to the truth can be implemented through complementary policies and instruments. Judicial procedures can reveal the truth about specific cases and lead to the conviction of those responsible for violations. Legislation on state transparency and freedom of information can

⁶ See UN Human Rights Council, Declaration on the Right to the Truth, U.N. Doc E/CN.4/2005/L.10/Add.17, April 2005. See also UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 2, U.N. Doc. E/CN.4/2005/102/Add.1, February 8, 2005 (hereinafter Updated Principles to Combat Impunity).

⁷ See UN Human Rights Committee Communication 540/1993, *Celis Laureano v. Peru*; Communication 542/1993, *Katombe L. Tshishimbi v. Zaire*; Communication 440/1990, *Youssef El-Megreisi v. the Libyan Arab Jamahiriya*; Communication 449/1991, *Mojica v. Dominican Republic*. See also Inter American Court of Human Rights, *Blake v. Guatemala*, Decision (January 24, 1998). Also, European Court of Human Rights, *Kurt v. Turkey*, Decision, May 25, 1998. See also UN General Assembly, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, July 2011.

⁸ See Updated Principles to Combat Impunity, principles 2–4.

open governmental archives, including those of security forces, revealing facts about human rights violations. Searching for the missing and disappeared, in order to identify them and return their remains to their relatives, is another fundamental action to uncover the truth.

Nonjudicial inquiries like truth commissions are also an instrument to implement the right to the truth.⁹ They can determine officially the facts, causes, and consequences of human rights violations that took place on a large scale over a prolonged period of time. By giving special attention to the testimony of victims, they provide victims with recognition, often after prolonged periods of official denial of events and public stigmatization and skepticism. Truth commissions can contribute to prosecutions and reparations through their findings and recommendations, assist divided societies to overcome a culture of silence and distrust, and help identify institutional reforms to avoid new violations.

Truth commissions do not stand in opposition to courts of law; on the contrary, clarifying the facts can aid a society to understand the need for justice and provide critical information to the judicial system. The difference between courts of law and truth commissions is that courts are focused on determining the criminal responsibility of the accused, testing the evidence according to preestablished rules of due process, and dictating punishment. Truth commissions are centered on verifying the facts and establishing patterns of violations; they focus on the testimony and restoration of victims, validating their experiences, honoring them, and contributing to their rights. The findings of a truth commission are not an establishment of guilt leading to sentencing, and the rules of treatment of evidence in a truth commission are less stringent than those of a court of law.

Truth commissions are also different from institutions for the search of the missing and disappeared. They typically are short-lived institutions that do not have the technical capacity to see through the long, complex process of locating and identifying human remains. They typically do not focus exclusively on one type of violations, but include multiple conducts and patterns. Institutions dedicated exclusively to the search for the missing and disappeared generally work over long periods of time, sometimes extending over decades. These longer time frames are necessary due to the time-consuming processes required both to locate the remains of the disappeared and ensure their identification with the purpose of restoring remains to relatives. In many cases, the work can also contribute to criminal proceedings through forensic evidence collected during the exhumation and examination process.

2. Weaknesses of the TRC and COID Bills

Civil society organizations and victims' groups in Nepal have made consistent demands for justice, including effective instruments to establish an authoritative record of human rights violations and, specifically, to search for and identify the missing and disappeared. Regrettably, the legislative process has been long and inefficient; victims' suggestions and international standards have been ignored or included in a piecemeal fashion.¹⁰ As a result,

⁹ OHCHR, Rule-of-Law Tools for Post-Conflict States: Truth Commissions (New York and Geneva: OHCHR), HR/PUB/06/1, 2006.

¹⁰ A bill was tabled to amend Nepal's national legal code (comprising Civil and Criminal Law) to allow for the criminalization of the offence of causing disappearance and abduction in the Legislature-Parliament in May 2007. It has been withdrawn and reintroduced on five different occasions: November 2008 as a bill, February 2009 as an executive ordinance, July 2009 as a bill, and February 2010 and April 2010 as bills. In each case, its provisions failed to reflect input from civil society, victims' organizations, and the international community that would have corrected serious weaknesses. The TRC Bill was originally tabled in July 2007; after criticism and numerous meetings with national and international experts and victims, it was resubmitted in February 2010.

the TRC and COID bills, which appeared to be ready for legislative passage in May 2012 before the Legislature-Parliament was dissolved, contain significant flaws.

The legislative process envisioned the creation of two separate instruments, the TRC and the COID, with partially overlapping competences, creating the risk of confusing procedures and insufficient guarantees for the rights of victims. The TRC looked similar to some truth commissions around the world in that it would investigate and report on serious human rights violations, but it included problematic provisions on interpersonal reconciliation, amnesty, and prosecutorial discretion. The COID was proposed as another investigative commission, quite similar in procedure to the TRC, but restricted to enforced disappearances, thus creating potential redundancies and uncertainty in procedures. While some issues relating to the overlapping jurisdiction and functions of the two commissions might have been resolved through the drafting of clear procedures on cooperation, ICTJ believes that further reflection on their modalities is necessary and that this should be done in close consultation with civil society stakeholders.

The search for the disappeared is clearly urgent and necessitates specific institutions that are focused on highly specialized tasks, such as: obtaining premortem information from relatives, identifying sites of interment, searching for remains, establishing the custody of evidence, establishing the identities of the disappeared, and returning human remains to relatives. While the proposal to create a specific commission to address the issue of disappearances may have reflected concern for victims' families, unfortunately, the COID Bill did not provide for an institution designed to undertake these necessary and specialized functions. Moreover, although the term of the COID was not established under the bill, but was rather left to the discretion of the government,¹¹ it is not clear that the COID was intended as a mechanism that could take the long-term approach necessary to perform the tasks described above.

The bills established an onerous process for relatives of the disappeared

Since disappearances fell under the jurisdiction of both the TRC and the COID, relatives could have been subject to redundant processes. Both institutions could investigate cases at the same time, with similar procedures, thereby potentially duplicating efforts while leading to findings and recommendations that could be different, compounding families' condition of uncertainty. Victims could, for example, participate in public hearings under the work of the truth commission,¹² while participating in confidential activities under both the TRC¹³ and the COID.¹⁴ Witnesses could seek protection from both the TRC¹⁵ and the COID,¹⁶ without any clarity regarding cooperation between the two bodies. Cases could lead to interpersonal "reconciliation events" under the TRC,¹⁷ putting victims in the presence of perpetrators, when the work of both institutions could lead to recommendations to prosecute.¹⁸

The bills established a confusing timeline for complaints and justice

Both the TRC¹⁹ and the COID²⁰ bills authorized the commissions to initiate an investigation

¹¹ COID Bill, section 36.

¹² TRC Bill, section 19.

¹³ TRC Bill, section 20 (2).

¹⁴ COID Bill, section 20.

¹⁵ TRC Bill, section 18.

¹⁶ COID Bill, section 19.

¹⁷ TRC Bill, section 23.

¹⁸ TRC Bill, sections 24, 27 (1) d, e; COID Bill, Section 23.

after the presentation of a complaint by the victim(s) or to investigate of their own accord in the absence of such a complaint. At the same time, the COID Bill established an arbitrary time limit to lodge complaints for criminal investigations: in general, complaints were required to be lodged six months after knowledge of the disappearance. However, for disappearances that took place before promulgation of the COID Bill (i.e., all disappearances that occurred during the armed conflict), the time limit was six months after promulgation of the law.²¹ Given the seriousness of forced disappearances, their continued effects over time, and the imprescriptible rights of victims, there should be no time limit for the presentation of complaints.

The bills also sowed confusion regarding the recommendation of prosecutions against perpetrators. Under both the COID and TRC bills, the commissions could recommend prosecution at any time during its investigations or at the conclusion of its report.²² The TRC had a term of two years to complete its report, so a prosecution recommendation would occur only within that period of time. However, because the COID Bill did not specify a timeframe for its work—depending on the term ultimately decided by the government—relatives of the disappeared would be subject potentially to more waiting, contingent on the work plans and research priorities of two different institutions.

Publicity of the TRC and COID reports was not ensured by the bills

Both the TRC and COID bills directed the commissions to submit their final reports to the government,²³ which would present them to the Legislature-Parliament at a later date, which the bills failed to define.²⁴ No provision was made regarding the public dissemination of the report. This was potentially fatal, as it gave the Executive, and at a later stage the Legislature-Parliament, full control over the release of the commissions' findings and recommendations; and it did not make any provision for the integrity of their texts. Nothing in the bills would have guaranteed that the citizens of Nepal would have had the opportunity to receive the complete report in a timely manner, without obstructions due to political considerations or expediency.

The COID Bill conflated the criminalization of enforced disappearances and the establishment of a commission

In August 2007, a Supreme Court decision directed the government to provide compensation to a group of relatives of the disappeared, criminalize enforced disappearances, form an investigation commission, and prosecute those responsible. To comply, the government could have compensated the relatives directly; it could have legislated an addition to the Criminal Code or separate legislation on disappearances; it could have ensured that the TRC Bill included enforced disappearances; and it could have directed the attorney general to investigate enforced disappearances under the laws—national and international—applicable to Nepal at the time of the commission of offenses. However, conflating all of the directives of the Supreme Court into the COID Bill has, despite the best

¹⁹ TRC Bill, section 14.

²⁰ COID Bill, section 16.

²¹ COID Bill, section 26 (1) & (2): "Complaints shall be lodged within six months from the date a person is known to have disappeared . . . For those persons who disappeared before the commencement of this Act, the complaints shall be lodged within six months from the date of promulgation of this Act." This provision has been criticized before by national and international human rights organizations. See Accountability Watch Committee et al., "Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill," Human Rights Watch, www.hrw.org/news/2009/08/31/nepal-joint-memorandum-disappearances-persons-crime-and-punishment-bill.

²² TRC Bill, sections 24, 27 (1) d, e; COID Bill, Section 23.

²³ TRC Bill, section 27 (1); COID Bill, Section 24 (1)

²⁴ TRC Bill, section 27 (3); COID Bill, Section 24 (3)

efforts of civil society, resulted in a confusing instrument. The negotiation of such an omnibus bill distracted attention away from the complexities of a solid definition of the crime. Further, as enforced disappearances also fell under the jurisdiction of the TRC, it is unclear whether that commission would have been able to investigate those cases without prior passage of the COID Bill.

The COID Bill defined enforced disappearances as a crime and prohibited it,²⁵ established forms of criminal authorship or complicity,²⁶ and established penalties.²⁷ Regrettably, the proposed definition was insufficient for criminal prosecution, as it described only the material elements of a disappearance but lacked any mention of the mental element required from the perpetrator.²⁸ In this connection, it is also relevant that a provision that placed the burden of proof on the accused was inappropriate for judicial purposes.²⁹ In essence, the drafters envisioned a nonjudicial inquiry that would make recommendations to the attorney general, but provided the attorney general with no appropriate legal instrument with which to prosecute. It, therefore, failed to fulfill the Supreme Court's mandate. Moreover, the provision adjudicating punishment to those found guilty compounded the weaknesses of the bill by establishing low penalties.³⁰

The TRC Bill included the possibility of amnesties for serious violations of human rights

One of the most problematic issues in the TRC bill discussions was the question of possible amnesties for perpetrators. Initial versions of the TRC Bill included provisions authorizing the commission to recommend amnesties to perpetrators of any violations under the mandate. Strenuous civil society advocacy led to a legislative understanding that such provisions violated Nepal's international obligations to investigate and prosecute serious violations of human rights.

The bill as it stood when the Legislature-Parliament was dissolved forbade the possibility of recommending amnesties for six specific conducts: 1) murder committed after taking control of a victim, 2) murder of an unarmed person, 3) torture, 4) rape, 5) disappearance, 6) abduction and hostage taking.³¹ However, the mandate of the TRC was not limited to these crimes. Rather, it would investigate "incidents of gross violations of human rights,"³² including "any type of inhumane acts under international human rights or humanitarian law, or other crimes against humanity."³³ It speaks to reason that by excluding only six conducts from the possibility of amnesty, the bill would have left the door open to amnesty recommendations for a wide array of atrocities, both those explicitly mentioned in the mandate of the commission and those not mentioned, such as different forms of sexual violence, forced displacement, recruitment of children, etc.

²⁵ COID Bill, sections 2, 3.

²⁶ COID Bill, sections 4, 5.

²⁷ COID Bill, section 6.

²⁸ The Rome Statute of the International Criminal Court (Art. 7 (2) i) states: "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, *with the intention of removing them from the protection of the law for a prolonged period of time.*" (Our italics).

²⁹ COID Bill, section 28

³⁰ COID Bill, Section 6 (1) establishes a maximum punishment of seven years of imprisonment and a fine of up to 500,000 Nepalese Rupees (about \$USD 5,800 at the time of publication).

³¹ TRC Bill, section 25 (2).

³² TRC Bill, section 3 (1).

³³ TRC Bill, section 2 (j) (9).

As part of a genuine truth-seeking process, there is little rationale for the inclusion of an amnesty provision. It is unnecessary as a practical instrument to entice perpetrators to speak, as the TRC Bill already provides the commission with strong investigative powers.³⁴ As a legal instrument it is inappropriate because it denies victims of human rights violations the right to effective legal remedy.

The TRC Bill included a mechanism of reconciliation that was potentially compulsory

Under the TRC Bill, the commission could take the initiative to “mutually reconcile” victims and perpetrators through different activities, including the presentation of apologies, “reasonable” compensation, or the performance of memorialization events. The bill gave the commission the capacity to undertake reconciliatory functions, even without a request from the perpetrator or the victims.³⁵

The procedure to carry out these activities was fraught with inconsistencies. An act of interpersonal reconciliation is intrinsically a free decision and cannot be initiated without the clear desire of the parties. The capacity to initiate the process by TRC decision was apparently contradictory with another provision indicating that no reconciliation could be made without the victims’ consent.³⁶ This seemed to indicate that the drafters reduced the concept of reconciliation to a mere nonjudicial settlement that could be initiated by the TRC and mediated towards an arrangement to which the victim agrees.

Under the TRC Bill, reconciliation procedures could lead to cessation of judicial action against perpetrators of serious crimes within the mandate of the TRC, creating another avenue toward an amnesty.³⁷ The exceptions to such a scenario, contained in the article devoted to amnesties, were insufficient, as this study has already argued. More broadly, the notion that interpersonal settlements can resolve the legacy of impunity is profoundly mistaken. At best, the TRC would have identified and encouraged reconciliation with the most immediate perpetrator: a low-ranking agent, acting at the behest of others. At worst, the procedure would cause enormous frustration and risk: some perpetrators may never be located and high-level perpetrators would hide or not be identified as such and be relieved of any consequences for their actions. The difficulties for a truth commission to implement such an exercise and the potential to distract the commission from its core truth-seeking functions cannot be exaggerated, nor can the severe psychological strain such a mechanism would impose on victims.

Under the TRC, prosecutorial power would be exercised discretionarily, without explicit grounds

Under the TRC Bill, the commission could recommend the prosecution of a person found to be involved in serious human rights violations.³⁸ The ultimate decision on whether to prosecute belonged to the attorney general or public prosecutor designated by him “after necessary investigation.”³⁹ The TRC Bill did not require any explanation from the attorney general or prosecutors if they decided not to prosecute; clearly such a procedure would not build trust in institutions or provide avenues of recourse for victims who hoped to prosecute.

³⁴ TRC Bill, section 15.

³⁵ TRC Bill, section 23 (1).

³⁶ TRC Bill, section 23 (6).

³⁷ TRC Bill, section 23 (7).

³⁸ TRC Bill, section 24 (1).

³⁹ TRC Bill, section 29 (1).

These deficiencies persisted in the TRC and COID bills up until the moment of dissolution of the Legislature-Parliament. While some damaging elements had been somewhat blunted by the tireless action of advocacy groups, the integrity of the truth-seeking process was still greatly compromised. Later, the ordinance proposed by the cabinet after the dissolution of the Legislature-Parliament reproduced the original weaknesses in the bills and, in some aspects, worsened them.

3. The Ordinance on an Integrated Commission on the Investigation of Disappearances, Truth and Reconciliation

The demise of the Legislature-Parliament inflicted a severe blow to civil society efforts to establish mechanisms for truth-seeking. In spite of the weaknesses of the TRC and COID bills, civil society regarded legislative action as the most legitimate and viable way to establish such mechanisms. The proposal by the cabinet to merge and create both institutions in one ordinance was received with dismay, not only due to substantive weaknesses in the ordinance, but also because there is a widely held view that executive branch action would provide lesser legitimacy to the proposed commission.

In international experience truth commissions have been established both by legislative procedure and through executive action.⁴⁰ Appreciation of the proper political processes to establish a truth commission belongs to each society. The failure or success of a commission is not directly contingent on the means by which it is created, but is the result of a delicate confluence of several factors, including levels of political will, local capacities, and societal mobilization. In the context of Nepal, agreement on the appropriate route must be reached in consultation with civil society and victims, on broader issues around the content of the legislation.

The main problem with the proposed ordinance is less its origin but rather its reproduction of original flaws in the TRC and COID bills and—in the case of the amnesty provision—a deepening of the original flaw. Without addressing these flaws, the proposed mechanism will not be effective, independent, or fair, regardless of how it is established.

The ordinance merges the TRC and COID, potentially simplifying the process, but does not fix inadequacies in the search for the disappeared

The original COID was designed, in essence, as a one-issue truth commission, with a mandate that overlapped with the competencies of the TRC, creating the possibility of confusion and onerous procedures for victims. By merging both bills, the ordinance avoids a redundancy, but the original flaws of vision and design for the COID Bill remain, revealing a lack of understanding of the specialized functions and sustained process required in the search for the disappeared. The two-year term of service envisioned in the ordinance (copying the TRC Bill) is inadequate. For an effective search for the disappeared, governments are required to commit resources for as long as it takes to recover and identify remains.

⁴⁰ Several very effective truth commissions have been established by executive action or even by direct agreement between the parties of a conflict, without any legislative intervention. See Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Chapter 4, (New York, Routledge), 2011. Hayner underlines five TRCs as the “strongest” global experiences: South Africa, Guatemala, Peru, Timor-Leste, and Morocco. In this list, only South Africa’s TRC was created by legislative action.. Additionally, legislative procedure has not always produced timely, effective truth commissions.

It is also notable that the ordinance preserves the definition of the act of enforced disappearance contained in the original COID Bill, which is usable for the purposes of a commission of inquiry but not for criminal action. The government, therefore, has yet to comply with the Supreme Court's August 2007 decision to criminalize enforced disappearances.⁴¹

The political viability of establishment by ordinance is uncertain

Legislative discussion regarding the two bills has lasted five years, and progress has been halting. Even at the time of the dissolution of the Legislature-Parliament, both bills had significant flaws and set up a confusing and ineffective model. Action and agreement is urgently needed on a viable process for correcting the original weaknesses of the TRC and COID bills. While in some countries an executive ordinance may be viable, in Nepal an institution established by an ordinance requires the positive endorsement of the Legislature-Parliament when it reconvenes or else the institution lapses. There is already experience on this issue: in February 2009, the government passed an ordinance trying to establish the COID, but the instrument lapsed before it was endorsed by the Legislature-Parliament.

The ordinance mostly reproduces the flawed reconciliation mechanism included in the original TRC Bill

The ordinance reproduces most of the language of the original TRC Bill,⁴² establishing a potentially forced reconciliation mechanism by which the commission could initiate direct encounters between victims and perpetrators, expecting that apologies and reparations will result in forgiveness. There are two differences with the original TRC Bill: the ordinance does not include an opt-out mechanism for victims who do not want to participate, nor does it specify the consequences of an act of reconciliation. The first omission allows the commission to carry out "reconciliation" ceremonies that force the victim to participate. It is easy to see that, in practice, this would result in unacceptable pressure on victims and the ultimate failure of proceedings. The second omission introduces further elements of uncertainty since it is unclear what, if any, consequences would derive from such encounters. Together, both omissions make the entire exercise both ineffective for meaningful reconciliation and unacceptable in relation to international best practices.

The ordinance worsens the original TRC amnesty provisions

The ordinance again reproduces most of the language of the original TRC Bill,⁴³ allowing the commission to recommend amnesties for persons involved in serious violations of human rights. However, the ordinance excludes the provision of the TRC Bill that prohibited the recommendation of amnesty for several serious human rights violations that may not be amnestied under international law.⁴⁴ The result is the inclusion of a provision that had already been widely debated and rejected. The provision would constitute a violation of Nepal's international duty to investigate and punish the most serious violations of human rights.

The ordinance removes the authority of the TRC to recommend cases for prosecution

The ordinance no longer provides for the authority of the TRC to recommend directly to the attorney general, on the basis of its inquiries, that criminal investigations be initiated into

⁴¹ A draft criminal code tabled in the Legislature-Parliament in February 2008 includes a provision for the criminalization of enforced disappearances. Concerns about the compatibility of the provisions with Nepal's international obligations have been raised by NGOs.

⁴² COID-TRC Ordinance, section 22.

⁴³ COID-TRC Ordinance, section 23.

⁴⁴ TRC Bill, section 25 (2).

the conduct of suspects. Instead, recommendations for criminal investigation can be made only by the Ministry of Peace and Reconstruction, thereby introducing an unacceptable risk of political interference in deciding whether cases should proceed. The ordinance maintains a situation by which a politically appointed attorney general will have discretionary powers to decide whether to prosecute after necessary investigation.⁴⁵ The only difference with the original bill in this respect is that the ordinance requires the attorney general to state the ground for his or her decision,⁴⁶ which makes this specific clause marginally better than the one in the earlier TRC Bill, under which decisions required no explanation.

The ordinance keeps provisions ensuring political control of the final report

The ordinance reproduces verbatim the language of the TRC and COID bills regarding dissemination and timelines,⁴⁷ ensuring that the merged commission will submit its report to government, which in turn will submit it on an unspecified date to the Legislature. There is no provision to secure the widest-possible, transparent, and timely dissemination of the TRC's full report to the citizenry of Nepal.

4. Envisioning a Way Forward for Truth-seeking in Nepal

While the ordinance presented by the cabinet has several critical flaws, it must be clear that the original TRC and COID bills were also extremely weak, and in many fundamental aspects they did not reflect international standards or lessons learned on forms to ensure strong truth-seeking institutions. It is hardly imaginable that a simple return to the 2012 bills would substantively improve the bleak scenario on the right to truth in Nepal.

The piecemeal and partial approach to correcting the proposed legal instruments was the result of the unwillingness of political leadership to incorporate many of the proposals made by Nepalese civil society to overcome weaknesses and may indicate a lack of commitment to an effective and independent inquiry. If the basic problem is lack of political will, there is little certainty that partial “fixes” will result in an improved mechanism or that such an instrument will gain the endorsement of the Legislature-Parliament when it is reconvened, assuming that such an event takes place in the near future.

Nepalese stakeholders—government and civil society—and their international supporters should assess realistically the current impasse and take the opportunity to reopen a discussion on the most basic elements of a holistic, effective, sustainable right-to-the-truth policy. Such a process would include the integral revision of a truth commission mechanism, immediate attention to the issue of the missing and disappeared, a robust policy of engagement with civil society and victims' organizations, and a commitment to government transparency and access to information.

Revisiting a truth commission legislation

In spite of the failure of the legislative process, Nepal must not abandon the work toward establishing a fair, independent and effective truth commission. However, the government should ground the commission in rights and international best practice, not political expediency, so that it can contribute effectively not only to clarification of the truth, but also serve as an instrument of victims' empowerment and societal transformation. Achieving this

⁴⁵ COID-TRC Ordinance, section 28.

⁴⁶ COID-TRC Ordinance, section 28 (2).

⁴⁷ COID-TRC Ordinance, section 26.

requires reconsideration of the ordinance. It may also require further capacity building on truth commission mandates and a plural task force with a view to producing an effective instrument with the shortest delay. The key principles of such an exercise would be to:

- Affirm clearly that the creation of a truth commission responds to the need to comply fully with the internationally recognized right of victims and society to know the truth about the most serious human rights violations committed during the conflict.
- Ensure that the center of the commission's work is to receive respectfully the experience of victims and their relatives and to strive to provide them and society as a whole with answers about the facts, causes, and responsibilities behind violations suffered, including enforced disappearances.
- Discard any notion of using the commission as an instrument to weaken the responsibility of perpetrators, in particular, by unburdening the commission from ineffective and counterproductive tasks such as conducting reconciliation procedures or recommending amnesties that would contravene the legal duties of the state to investigate and take action against those allegedly responsible for serious human rights violations in accordance with domestic and international law.
- Ensure that the process for selecting commissioners guarantees their selection on the basis of their competence, integrity, and moral authority and not because of any political allegiances they may have.
- Ensure that the commission will have strong investigative powers and protections for its members, staff, and collaborators.
- Ensure that the commission will have specific provisions to reflect the experiences of marginalized and vulnerable groups, such as women, children, indigenous groups, and minorities, and respond to their needs.
- Ensure that the report of the commission will be publicly released at the same time that it is submitted to all the branches of government in Nepal and that the commission will have appropriate time and resources to ensure its widest dissemination.
- Ensure that the mandate of the commission will contribute to other measures of transitional justice, such as prosecutions, reparations, and institutional reforms, but that action on those fronts is not contingent on the work of the commission.

The design of a mechanism to establish the commission is best pursued through building consensus

Complying with Nepal's international obligation to fulfill the right to the truth is not the exclusive task of one branch of the government, but a national duty, incumbent on all parts of the state and society. The design of and path to the establishment of the commission must be clearly agreed on by political actors and civil society. Stakeholders could, for example, explore the possibility of a plural taskforce by civil society and policymakers to forge a consensual instrument, taking into account the conclusions of consultations undertaken on the previous TRC and COID bills, to then be submitted for legal passage.

Civil society does not need to wait for official action to implement truth-seeking, documentation, and memorialization

Civil society, and victims' organizations in particular, should consider the creation of unofficial truth-seeking processes at the national or local level. There is extensive

international experience on effective unofficial truth-seeking from which Nepal could gather inspiration.⁴⁸ Such unofficial truth processes can provide victims with opportunities to find support in their local communities and take their demands to the national agenda. Unofficial processes do not conflict with the creation of a national truth commission, nor diminish the state's duties with regard to the right to truth; on the contrary, they can help foster the establishment of an official truth commission and serve as a useful form of cooperation when one is finally created.

Ensuring the criminalization of enforced disappearances and the continued search for the missing and disappeared

The criminalization of enforced disappearances in Nepal's legal system must not be subordinated to the creation of a truth commission. The government of Nepal should act immediately to ratify the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED).

Nepal should also immediately act to criminalize enforced disappearance, specifying the elements of the crime, guarantees of due process, and severe penalties that are proportional to the gravity of the offense. The definition of the crime should be based on international standards, as contained in the ICCPED and the Rome Statute of the International Criminal Court. In consequence, because disappearances are defined as a continuous crime, there should be no legal measure barring investigations due to the failure by families or any other interested party to file a complaint.

Similarly, the delay in the creation of a truth commission should not paralyze Nepal's work to compile pre-mortem information from families, identify and protect sites of interment, and conduct exhumations as a permanent policy of state. The way to conduct these activities could be through a specialized institution, not a "small truth commission" but an actual search group led by forensic experts.

Creating a legal framework to facilitate access to information

Nepal should amend the Right to Information Act of 2007 to expand its scope to ensure full government transparency, including the declassification of and public access to records pertaining to human rights violations committed in the past. The constitutional process as it is reinitiated should give significant attention to enshrining freedom of information in the constitution. No reasons of state security should be accepted as grounds for the denial of information on human rights violations, and Nepal should commit adequate resources for the effective preservation and use of archives.



The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. To learn more, visit www.ictj.org

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⁴⁸ See Louis Bickford, "Unofficial Truth Projects," *Human Rights Quarterly* 29:4 (November 2007).