Nepal's comprehensive peace agreement: human rights, compliance and impunity a decade on

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On 21 November 2006, the government of Nepal and the Communist Party of Nepal—Maoist (CPN-M) signed a comprehensive peace agreement (CPA). After more than a decade of violent conflict during which approximately 15,000 people had been killed, more than 1,400 had disappeared, and numerous other human rights violations had been perpetrated, the agreement was heralded in Nepal and around the world as a promising step forward for the Nepalese peace process.[1] At the United Nations, Secretary-General Kofi Annan welcomed the CPA as a great 'opportunity' for Nepal to 'build lasting peace in an inclusive democracy', while others applauded the deal, not only for its success in securing peace, detailing an interim power-sharing arrangement and paving the way for democratic elections, but for promising to bring an end to impunity for human rights violations committed during the conflict.[2]

At the centre of the CPA stands a 'commitment' to 'impartial investigations' into human rights violations perpetrated by both sides during the insurgency, coupled with an agreement that 'impunity will not be tolerated'.[3] This commitment, and the conspicuous absence of an amnesty from the peace agreement, indicated that Nepal was willing to embrace globally accepted anti-impunity norms, abide by the UN's 1999 policy prohibiting its staff from offering amnesties to perpetrators of human rights violations during peace negotiations, and bring an end to impunity for human rights crimes in Nepal once and for all.[4] To achieve these ends, the CPA also made provisions for the establishment of a Truth and

[1] Ram Kumar Bhandari, 'Transitional justice in Nepal: the perspective of the victims', *Justiceinfo.net*, 6 Oct. 2015, http://www.justiceinfo.net/en/component/k2/2384-transitional-justice-in-nepal-the-perspective-of-the-victims.html. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 17 Jan. 2017.) For statements of support from the US, UN, India, China, UK, Japan, Switzerland and Norway, see http://www.nepalmonitor.com/2006/11/world_reactions_we_hope_it_will_work_for_you.html.

[2] Statement attributable to the spokesperson for the Secretary-General on Nepal, 22 Nov. 2006, http://un.info.np/Net/NeoDocs/View/825; Warisha Farasat and Priscilla Hayner, *Negotiating peace in Nepal: implications for justice* (New York: International Centre for Transitional Justice, June 2009), p. 7, https://www.ictj.org/sites/default/files/ICTJ-IFP-Nepal-Negotiating-Peace-2009-English.pdf.

[3] Comprehensive peace agreement (CPA) between the government of Nepal and the Communist Party of Nepal (Maoist), 22 Nov. 2006, sec. 7.1.3, http://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf.

[4] Office of the United Nations High Commissioner for Human Rights, *Rule of law tools for post-conflict states: amnesties* (New York: UN, 2009), p. 22; Mark Freeman, *Necessary evils: amnesties and the search for justice* (Cambridge: Cambridge University Press, 2009), pp. 89–90.

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Reconciliation Commission (TRC) 'to investigate truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliation in the society'.[5]

Despite these promising commitments, however, in the decade that has followed the signing of the CPA, impunity for human rights violations has continued to be the prevailing norm in Nepal. Successive post-conflict governments have not only attempted to legislate in favour of the introduction of amnesty laws but have failed to criminalize key human rights violations, including torture and disappearances. The TRC, once heralded as the means of facilitating accountability and uncovering the truth about Nepal's violent past, is widely viewed not as an instrument of truth but as a political tool wielded by the powerful to guarantee their continuing impunity. In particular, the inclusion of an amnesty provision in the Act of Parliament establishing the TRC has led victims, local civil society groups and international organizations, such as the UN, to challenge the TRC's credibility and ultimately withdraw support for its activities.[6]

This article examines why and how Nepal has failed to comply with its own commitment to end impunity for human rights violations. It considers both optimistic accounts of human rights compliance, which argue that compliance failure occurs when good intentions are thwarted by unfavourable conditions for achieving compliance, and pessimistic accounts, which attribute compliance failure to a lack of good intentions from the very start. In doing so, it argues that while unfavourable circumstances for compliance, including political instability, judicial and legislative incapacity, the withdrawal of crucial international support, and a natural disaster have all contributed to the persistence of impunity in Nepal, the government's failure to comply with anti-impunity norms can be more readily attributed to the absence of a genuine commitment to end impunity from the outset. That is, it argues that in Nepal bad intentions coupled with poor circumstances have severely hampered attempts to uphold anti-impunity norms in the post-conflict period.

The article begins by providing a brief overview of the international normative context in which the CPA was negotiated and introducing the underlying principles and theoretical arguments that led the UN to radically change its policy on peace negotiations, from supporting amnesties as a means of achieving settlements to prohibiting its negotiators from offering them for human rights crimes. The next section outlines the two dominant theoretical accounts of human rights compliance failure: the optimistic 'good intentions, bad circumstances' account, and the pessimistic 'bad intentions, bad circumstances' account. The third section then provides an overview of the Nepalese peace negotiations and the CPA that resulted from them and, in doing so, provides an assessment of the intentions of the key actors engaged in the negotiations. It argues that the key signatories of the CPA included anti-impunity measures in its terms, not because they were committed to their implementation, but to avoid criticism from the international

[5] CPA, sec. 5.2.2.

[6] 'Victims initiate unofficial truth-telling activities', *My Republica*, 25 March 2016, http://www.myrepublica.com/feature-article/story/39403/victims-initiate-unofficial-transitional-justice-activities.html.

actors present during the negotiations and to ensure the perceived legitimacy of the final agreement. The fourth section then examines how and why Nepal has failed to comply with its commitment to end impunity for human rights violations. It argues that a lack of intention to comply on the part of key political actors has been exacerbated by the limited capacity of those institutions that could provide some measure of accountability and, in particular, by the withdrawal of UN support for their activities. That is, it argues that the UN's decision to withdraw support for the TRC in response to Nepal's failure to comply with anti-impunity norms has itself further reduced its capacity to achieve compliance, thus limiting the effectiveness of the UN's own anti-amnesty campaign.

Amnesties and impunity in peace processes

The international context in which the CPA was negotiated was one in which rapid and pronounced normative change was taking place. Prior to the beginning of the twenty-first century, amnesties providing immunity from prosecution for perpetrators of a range of conflict-related crimes, including human rights violations, were routinely accepted as a 'necessary evil', a pragmatic means of bringing warring parties to the negotiating table, securing peace agreements, and neutralizing potential spoilers in the post-conflict period.[7] Thus peace agreements signed in the early 1990s to end conflicts in Mozambique, Angola and Haiti all included amnesties for human rights violations, with broad acceptance, endorsement and even encouragement from the UN. In Nepal, wide-ranging amnesties were offered to Maoist insurgents willing to lay down their arms in 1998, 1999 and 2003.[8] Although these amnesties were not offered in the context of formal peace negotiations, their intention was the same: to encourage the Maoists to the negotiating table and bring an end to their insurgency.

In 1999, however, the UN announced a dramatic change in its policy regarding peace negotiations: in a reversal of past practice, it now prohibited its negotiators from offering amnesties for serious crimes under international law, even when the signing of a peace agreement was at stake. This move was heralded as a 'watershed for the UN Secretariat's position on amnesties and ultimately mutated into the public baseline of the United Nations' position'.[9] It represented an overt attempt, not so much to institute a new norm, but to replace the longstanding practice of granting amnesties to secure peace agreements with its exact opposite, a norm prohibiting amnesties in peace agreements.

Underpinning the UN's new anti-amnesty policy were three anti-impunity norms. The first is the obligation to prosecute and punish perpetrators of human rights violations—an obligation established in numerous international legal instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture and Other Cruel, Inhumane or

[7] Freeman, *Necessary evils*.
[8] Renée Jeffery, *Amnesties, accountability and human rights* (Philadelphia: University of Pennsylvania Press, 2014), p. 105.
[9] Freeman, *Necessary evils*, pp. 89–90.

Degrading Treatment or Punishment. Although absolute consensus on the obligation to prosecute has not yet been reached, its acceptance as a customary norm has grown considerably since the early 1990s and, with this, its legitimacy has become significantly less contested.[10] The second is the right to a remedy and reparations set down in the van Boven Report commissioned by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of Human Rights Law and Serious Violations of Humanitarian Law. Accompanying this norm is the widely held view that in 'situations where impunity has been sanctioned by the law or where de facto impunity prevails with regard to persons responsible for gross violations of human rights', victims are effectively prevented from 'seeking and receiving redress' in accordance with their rights.[11] The third norm is that of individual criminal accountability, first established in the Charters of the International Military Tribunals at Nuremberg and Tokyo, and more recently enshrined in the Rome Statute of the International Criminal Court. It was this suite of anti-impunity norms that the UN's new anti-amnesty policy attempted to uphold by prohibiting activities that might jeopardize or prevent their realization.

At the same time, the UN's peace negotiation policy also reflected a significant shift in prevailing perceptions of and theoretical arguments about the relationship between peace and justice in the study and practice of transitional justice and peacebuilding. During the democratic transitions that took place from the 1970s to the 1990s, amnesties were widely conceived of as instruments of peace that sat in direct opposition to prosecutions and punishment in the so-called 'peace versus justice' dichotomy. By the late 1990s, however, scholars and practitioners alike were beginning to question the utility and, indeed, accuracy of conceiving peace and justice in a dichotomous relationship. Growing acceptance of restorative approaches to justice, acknowledgement of the idea that accountability was no longer the exclusive preserve of criminal trials but could be achieved by truth and reconciliation commissions, and the increasing integration of transitional justice and peacebuilding all contributed to the collapse of the dichotomous model. With this came widespread recognition that 'the choice is seldom simply "justice" or "peace" but a complex mixture of both'.[12] This move had significant implications for amnesties. If peace and justice were no longer opposed, it made no sense to continue justifying amnesties on the basis of their supposed contribution to peace. Instead, combining elements of transitional justice with peacebuilding, a new movement suggested that peace and justice were mutually dependent and

[10] Diane F. Orentlicher, 'Settling accounts: the duty to prosecute human rights violations of a prior regime', *Yale Law Journal* 100: 8, 1991, p. 2585.

[11] Theo van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, final report submitted to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th session, E/CN.4/Sub.2/1993/8 (2 July 1993), p. 51, http://www.refworld.org/docid/3b00f4400.html.

[12] Chandra Lekha Sriram, 'Transitional justice and peacebuilding', in Chandra Lekha Sriram and Suren Pillay, eds, *Peace versus justice? The dilemma of transitional justice in Africa* (Scottsville: University of KwaZulu-Natal Press, 2009), p. 1.

mutually constitutive elements of large-scale peace processes. This was a view expressed in explicit terms in a 2004 report of the UN Secretary-General, which stated that: 'Justice, peace and democracy are not mutually exclusive objectives but rather mutually reinforcing imperatives.'[13]

The natural extension of this argument suggested that as justice was a necessary component of peace, amnesties were no longer necessary tools during peace negotiations or unavoidable components of the peace agreements that followed them. Instead, Secretary-General Kofi Annan called for transitional justice processes to include a wide range of transitional justice measures, including 'prosecutions, reparations, truth-telling, institutional reform, vetting and dismissals', and for negotiators, UN staff and representatives to 'ensure that peace agreements and Security Council resolutions and mandates … reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity'.[14] These alternative measures, he implied, would be more likely to result not only in the establishment of democracy and the rule of law, but in the achievement of consolidated peace.

Since 1999, UN negotiators, facilitators, mediators and observers have thus focused their efforts on ensuring that peace agreements do not include amnesties for human rights violations. The result has been that very few peace agreements negotiated in the presence of UN officials since 1999 have made provisions allowing amnesties for human rights crimes.[15]

The problem of compliance

Gaining agreement on human rights principles, norms and laws is one thing; achieving compliance is another matter entirely.[16] This is especially the case where those principles are embedded in peace agreements, owing in part to the ambiguous status of peace agreements in international and domestic law.[17] While some peace agreements have the status of non-binding political instruments, others 'create obligations under international law', for example by referring to existing human rights treaties and obligations.[18] It is widely acknowledged by scholars and practitioners alike that 'reaching a peace agreement is a beginning and not an

[13] UN Security Council, *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 (New York, 23 Aug. 2004).

[14] UN Security Council, *Report of the Secretary-General on the rule of law*, paras 4, 25, 26, 64(c).

[15] For example, between 2000 and 2009, peace agreements negotiated in the presence of UN officials in Burundi (2000), Angola (2002), Democratic Republic of Congo (2003), Côte d'Ivoire (2003, 2007), Central African Republic (2008), Kenya (2008) and Madagascar (2009) excluded human rights violations from the terms of their amnesty provisions. An exception is the Birao Accord, signed by the Central African Republic in 2007, which included a wide-ranging amnesty. Although this agreement was negotiated in the presence of UN officials, the UN was not a signatory and, as the situation was already under investigation by the International Criminal Court, it was clear that any amnesty provision would have no real effect.

[16] Klarissa Cloward, 'False commitments: local misrepresentation and the international norms against female genital mutilation and early marriage', *International Organization* 68: 3, 2014, p. 515.

[17] Scott P. Sheeran, 'International law, peace agreements, and self-determination: the case of South Sudan', *International and Comparative Law Quarterly* 60: 2, 2011, p. 436; Christine Bell, 'Peace agreements: their nature and legal status', *American Journal of International Law* 100: 2, 2006, p. 373.

[18] Sheeran, 'International law', p. 439.

end' of a post-conflict peace process.[19] Achieving implementation 'depends on the voluntary, ongoing assent of the parties' to the agreement, and so even the inclusion of references to binding international legal obligations in a peace agreement is no guarantee of compliance.[20]

As Jana von Stein notes, 'compliance is defined as … the degree to which state behavior conforms to what the agreement prescribes or proscribes'.[21] Within contemporary scholarship concerned with explaining how and why states fail to comply with their own normative commitments, two main sets of arguments dominate: the first is an optimistic account of normative change, while the second is pessimistic in its disposition and assessment. Compliance optimists, most of whom are constructivists and international lawyers, start from the assumption that states sign up to agreements with good intentions.[22] That is, they argue that states intend to comply with the agreements they sign and focus their efforts on the means by which individual actors, such as moral entrepreneurs, civil society and international organizations, work to persuade states to adopt new norms and then comply with their terms.[23]

Yet even compliance optimists must confront the empirical reality that many states sign up to agreements with which they then fail to comply. In doing so, they attribute compliance failure to poor circumstances for the implementation of new norms. Proponents of managerialist approaches put non-compliance down to 'ambiguity, incapacity and change in circumstances'.[24] They maintain that 'non-compliance is often inadvertent and conditioned by a state's ability to implement treaty terms'.[25] That is, optimists argue that states want to uphold their commitments but are unable to do so because they lack the capacity to implement them; because a change in circumstances, such as regime change or the election of a new government, has made them untenable; or because an unforeseen catastrophe, such as a natural disaster, has forced them to divert resources to other, more immediate, needs. That said, thoroughgoing compliance optimists maintain that even compliance failure can be envisaged in terms of positive normative change. They note that normative socialization is often an incremental process in which resistance is to be expected, and maintain that 'even cheap talk may be the first sign of genuine change'.[26]

[19] Christine Bell, *Negotiating justice? Human rights and peace agreements* (Geneva: International Council on Human Rights Policy, 2006), p. 1.
[20] Bell, 'Peace agreements', p. 384.
[21] Jana von Stein, 'International law: understanding compliance and enforcement', in *International Studies Compendium Project* (New York and Oxford: Wiley Blackwell and International Studies Association, 2010), p. 1.
[22] Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human rights in a globalizing world: the paradox of empty promises', *American Journal of Sociology* 110: 5, 2005, p. 1377.
[23] Kathryn Sikkink, *The justice cascade: how human rights prosecutions are changing world politics* (New York: Norton, 2011); Margaret E. Keck and Kathryn Sikkink, *Activists beyond borders* (New York: Cornell University Press, 1998).
[24] Stein, 'International law', p. 8; Abram Chayes and Antonia Chayes, 'On compliance', *International Organization* 47: 2, 1993, pp. 175–205; George W. Downs, David M. Rocke and Peter N. Barsoom, 'Is the good news about compliance good news about co-operation?', *International Organization* 50: 3, 1996, pp. 380–81.
[25] Wade Cole, 'Mind the gap: state capacity and the implementation of human rights treaties', *International Organization* 69: 2, 2015, p. 405.
[26] Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The power of human rights: international norms and domestic change* (Cambridge: Cambridge University Press, 1999); Cloward, 'False commitments', p. 524.

These arguments are also reflected in the literature on peace agreements. In this context, optimists maintain that the inclusion of provisions that 'create obligations under international law' constitutes a clear signal of intent to comply.[27] Here too they maintain that compliance failure can be attributed to a lack of state capacity; but they add a further dimension to the equation, namely third-party intervention or support.[28] States and other parties negotiating the ends of civil wars often do so with explicit guarantees of support in achieving implementation from third parties, or on the implicit assumption that such support will be forthcoming. Indeed, in contexts in which state capacity has been eroded by conflict or remains underdeveloped, the implementation of key components of peace agreements, including human rights provisions, may be reliant on third-party support, either to facilitate implementation or to 'build local capacity'.[29] Where that support is not forthcoming or is rescinded, compliance failure becomes increasingly likely.

By contrast, compliance pessimists argue that states make agreements without genuinely intending to comply with their terms. They cite, in particular, the fact that 'nation-states with very negative human rights records tend to sign and ratify human rights treaties at rates similar to those of states with positive records', and that few, if any, improvements in their human rights practice are recorded after ratification.[30] According to Hafner-Burton, Tsutsui and Meyer, the main reason they do this is to benefit from the legitimizing effects of signing human rights agreements.[31] Not only do states face 'strong external pressures … to commit themselves to human rights norms', but formally accepting human rights standards enhances the perceived legitimacy of the state.[32] For states with poor human rights records this is an easy way of improving their international standing, although there is considerable disagreement in the literature on the precise effect that reputation has on norm acceptance and compliance.[33] Either way, pessimists maintain that the acceptance of human rights norms and agreements is often a matter of 'window dressing', of making 'empty promises' states have no real intention of fulfilling.[34]

Parties engaged in peace negotiations face similar pressures to include human rights provisions in the agreements they construct. In large part, the force of this expectation is reflected in the proliferation of 'references to human rights' in

[27] Sheeran, 'International law', p. 439.

[28] Karl DeRouen, Mark J. Ferguson, Samuel Norton and Ashley Streat-Bartlett, 'Civil war peace agreement implementation and state capacity', *Journal of Peace Research* 47: 3, 2010, pp. 333–46; Zeynep Taydas, Dursun Peksen and Patrick James, 'Why do civil wars occur? Understanding the importance of institutional quality', *Civil Wars* 12: 3, 2010, pp. 195–217.

[29] Stephen Stedman, *Implementing peace agreements in civil wars: lessons and recommendations for policymakers*, IPA Policy Paper Series on Peace Implementation (New York: International Peace Academy, 2001), p. 2; Bell, *Negotiating justice?*, p. 43.

[30] Emilie Hafner-Burton, Kiyoteru Tsutsui and John W. Meyer, 'International human rights law and the politics of legitimation: repressive states and human rights treaties', *International Sociology* 23: 1, 2008, p. 115.

[31] Hafner-Burton, Tsutsui and Meyer, 'International human rights law', p. 115.

[32] Hafner-Burton, Tsutsui and Meyer, 'International human rights law', p. 117.

[33] Lisa L. Martin and Beth Simmons, 'International organizations and institutions', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, eds, *Handbook of international relations* (Los Angeles: Sage, 2013), p. 333; George W. Downs and Michael A. Jones, 'Reputation, compliance and international law', *Journal of Legal Studies* 31: 1, 2002, p. 95.

[34] Hafner-Burton and Tsutsui, 'Human rights in a globalizing world', p. 1373.

recent peace agreements.[35] Yet here too, scholars emphasize the importance of third-party engagement to prevent or overcome the problem of credible commitment, and ensure implementation and compliance.[36]

The second part of the equation, of course, concerns how states manage to avoid complying with human rights agreements. As pessimists note, in most cases these are low-cost commitments made in the context of weak agreements with weak monitoring and enforcement mechanisms.[37] At the domestic level, states engage in high-level decoupling, separating commitments from policies to avoid voter backlash or public accountability over their compliance failures. In international terms, effective enforcement mechanisms for most human rights commitments are almost non-existent. Where the UN's anti-amnesty policy is concerned, the only real penalty it can impose for recidivism is withdrawal of UN support, in rhetorical and in material terms. Yet even that tactic plays into the hands of those who favour impunity, by reducing both material support for accountability measures and the state's capacity to implement them effectively. As we will see shortly, this is part of what took place in Nepal.

Indeed, as the following sections demonstrate, Nepal's peace process was marked by both bad intentions and poor circumstances for compliance. While UN negotiators, human rights activists and civil society actors were able to persuade the signatories to agree to anti-impunity measures in the CPA, the nature and extent of the political compromise this entailed suggest that the key parties did not intend to uphold those commitments. In the post-conflict period, the intentional actions of powerful individuals interested in maintaining a culture of impunity have combined with a lack of judicial capacity, competing financial priorities, the reduced influence of the international community and the removal of UN support for key transitional justice institutions to contribute to compliance failure.

The comprehensive peace agreement

By most accounts, the CPA is a remarkable agreement. Not only did it pave the way for the inclusion of the Maoist 'rebels in mainstream politics', but it provided for fresh democratic elections, a new constitution, an interim power-sharing arrangement, and the determination by the new constituent assembly of the fate of Nepal's monarchy.[38] Perhaps even more remarkable is its apparent commitment to human rights. As Rawski and Sharma argue: 'From a human rights perspective, the CPA is an extraordinary expression of intent.'[39] Even so, like all peace agreements, it is a multilayered compromise, the result of negotiations, bargaining

[35] Bell, *Negotiating justice?*, p. 1.
[36] Barbara F. Walter, *Committing to peace: the successful settlement of civil wars* (Princeton: Princeton University Press, 2001).
[37] Hafner-Burton and Tsutsui, 'Human rights in a globalizing world', p. 1378.
[38] International Crisis Group, 'Nepal's peace agreement: making it work', 15 Dec. 2006, p. i, https://d2071andvipowj.cloudfront.net/126-nepal-s-peace-agreement-making-it-work.pdf.
[39] Frederick Rawski and Mandira Sharma, 'A comprehensive peace? Lessons from human rights monitoring in Nepal', in Sebastian von Einsiedel, David M. Malone and Suman Pradhan, eds, *Nepal in transition: from people's war to fragile peace* (New York: Cambridge University Press, 2002), p. 183.

processes and concessions across a wide range of issues. Nowhere is this more apparent than in the provisions pertaining to human rights: the anti-impunity and accountability measures included in the CPA were the results of a process that sought to balance the competing demands of three main sets of actors and their differing views on how best to address human rights violations committed during the conflict.

International human rights advocates

Although not designated as official mediator or facilitator of the CPA, the UN, through the auspices of the good offices of the Secretary-General and the Office of the High Commissioner for Human Rights (OHCHR), played an active role in the negotiations. The UN's presence in Nepal in a human rights monitoring capacity began in 2005 in response to increasing concerns that as the civil conflict wore on, the perpetration of gross violations of human rights was becoming increasingly prevalent. Disappearances, in particular, had become the 'defining violation of the conflict', perpetrated by both sides but used more frequently by state forces as part of a 'deliberate strategy' to eliminate 'those perceived to be part of the Maoist threat'.[40] Accordingly, in April 2005 Louise Arbour, UN High Commissioner for Human Rights, established an office of the OHCHR in Nepal, headed by Ian Martin, to 'monitor the observance of human rights and international humanitarian law' in the context of the continuing conflict'.[41] The immediate result of the UN presence in Nepal was a reduction in violations, with both sides making a concerted effort to avoid targeting civilians in their operations. In August 2006 Kofi Annan appointed Martin as his special representative in Nepal. In his two UN roles, Martin 'travelled far and wide and used his good offices … to advocate against massive human rights violations during the war years'.[42] In doing so, he and the OHCHR 'brought human rights discourse into [the] public [domain]' and created a space in which many civil society organizations focused on human rights issues could flourish.[43]

Throughout the peace process, the position of the UN Secretariat and the OHCHR was clear: granting 'amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes contravenes principles under international law'. For this reason, as the OHCHR recalled in its 2012 report on Nepal, the UN had adopted a 'policy that prevents it from supporting any national processes that run counter to its position on amnesties'.[44] This was the position that the OHCHR and other UN representatives advocated in Nepal. Its impact was substantial. An independent mid-term review found that the 'OHCHR

[40] Simon Robins, 'Towards victim-centred transitional justice: understanding the needs of families of the disappeared in postconflict Nepal', *International Journal of Transitional Justice* 5: 1, 2011, p. 82.
[41] 'UN High Commissioner for Human Rights appoints chief for Nepal monitoring operation', press release, 29 April 2005, http://www.un.org/press/en/2005/hr4832.doc.htm.
[42] Hanja Eurich, *Factors of success in UN mission communication strategies in post-conflict settings: a critical assessment of the UN missions in East Timor and Nepal* (Berlin: Logos, 2010), p. 340.
[43] Eurich, *Factors of success*, p. 340.
[44] OHCHR, *The Nepal conflict report* (Geneva, 2012), p. 14.

mission in Nepal can be credited with having directly contributed to reducing the general climate of impunity in the country'.[45] In particular, during the peace negotiations the OHCHR 'made recommendations regarding transitional justice mechanisms', both as an independent actor and as a chair of the Peace Support Working Group established in June 2006.[46]

In addition, several foreign governments sent expert representatives to work as advisers, facilitators and mediators during the peace negotiations. Among the most prominent of these was Günther Baechler, the founding director of the Swiss Peace Foundation and head of the Conflict Transformation Division at the Swiss Agency for Development and Cooperation.[47] USAID hired Hannes Siebert, who had served as a director in South Africa's National Peace Secretariat during the country's transition from apartheid to democracy. Siebert, in particular, has been credited with and criticized for promoting an approach to transitional justice in Nepal based on the South African model. As Farasat and Hayner note, as 'part of a taskforce affiliated with the Nepali government and the peace secretariat' of which Baechler was also a member, Siebert 'encouraged the creation not only of the Commission in Disappearances, advocated by the human rights community, but also of a Truth and Reconciliation Commission'.[48]

Together, the UN and key human rights advocates sought to promote two key principles. First, in accordance with anti-impunity norms, they made strong representations regarding Nepal's international obligations concerning human rights crimes, in particular the obligation to prosecute and punish. Second, coupling anti-impunity norms with the right to the truth, they also advocated establishment of a Truth and Reconciliation Commission on the South African model. Although their efforts had a significant influence on the final contents of the CPA, there was some tension, with a widely held view in Nepal that international involvement in the peace process was not entirely welcome. In particular, some sectors of the Nepalese establishment resented what they saw as the international community's interference in the peace process, on at least one occasion branded it as 'conflict tourism', and signalled an intention to push back against international expectations.[49]

Nepali civil society

Nepali civil society also played a key role in raising awareness about human rights norms in Nepal. Campaigning for perpetrators of human rights violations to be held accountable for their actions, and shaping the human rights provisions

[45] ECORYS Research and Consulting, 'Mid-term review of OHCHR mission to Nepal', Jan. 2007, in OHCHR, *Annual Report 2006* (Geneva, 2006), p. 62.
[46] OHCHR, *Annual Report 2006*, p. 63.
[47] Günther Baechler, 'Switzerland's peace promotion in Nepal: commitment, discreteness, flexibility', in Susan Allen Nan, Zachariah Cherian Manipilly and Andrea Bartoli, eds, *Peacemaking: from practice to theory* (Santa Barbara, CA: Praeger, 2011), pp. 18–35.
[48] Farasat and Hayner, *Negotiating peace in Nepal*, p. 16.
[49] Teresa Whitfield, 'Masala peacemaking: Nepal's peace process and the contributions of outsiders', Conflict Prevention and Peace Forum, Oct. 2008, p. 26, http://web.archive.org/web/20120426040457/http://www.cic.nyu.edu/staff/docs/whitfield/whitfield_masala_peacemaking.pdf.

included in the CPA, local civil society groups often acted as a conduit for international anti-impunity norms in Nepal during the negotiations, although many of their earlier activities were undertaken without significant international support. From the early 2000s, local civil society groups, defenders of human rights and other activists began the process of documenting and making public the nature and extent of human rights violations committed by both sides in Nepal's civil conflict. By 2003 they had organized themselves into a 'broader civil society coalition incorporating civil society actors from outside Kathmandu' along with those working in the capital, they had begun hosting 'seminars and workshops on … human rights and impunity', and had started engaging in regular meetings between 'senior civil society representatives … leaders of the political parties and the Maoists'.[50]

Although the different members of the civil society coalition held a variety of positions on human rights and transitional justice, they had in common a focus on ending impunity for human rights violations. In particular, several prominent civil society groups argued strongly that perpetrators of human rights violations should be prosecuted and punished for their crimes, and campaigned for the government of Nepal to ratify the Rome Statute of the International Criminal Court.[51] Others, however, held different priorities, and with prosecutions diminishing as the peace process wore on they shifted their focus to the pursuit of reconciliation and truth, particularly regarding disappearances. The result was that the civil society coalition became increasing fractured and, some have argued, as a consequence did not exert the influence over the CPA it might have done had it remained unified. Despite this observation, and the fact that civil society groups were largely kept at the margins of the formal negotiations, when it came to the final provisions included in the CPA, the demands of civil society 'simply couldn't be ignored'.[52]

The signatories

For both the primary signatories of the CPA, the Maoists and the government of Nepal, acceptance of international accountability norms and an expectation of impunity for human rights crimes sat in tension with one another throughout the peace process. Both sides, but especially the Maoists, began to appeal to international human rights norms well before the rounds of formal negotiations began. In 2002, for example, the Maoist leader Prachanda announced that from then on the Maoists would respect international humanitarian law and the Geneva Conventions. This declaration 'was significant' because although 'both sides continued to violate human rights … it indicated the Maoists' interest in engaging with the international community on human rights issues'.[53] The result, as Farasat and

[50] Farasat and Hayner, *Negotiating peace in Nepal*, pp. 12, 17, 18.
[51] Tazreena Sajjad, *Transitional justice in South Asia: a study of Afghanistan and Nepal* (London: Routledge, 2013), p. 39.
[52] Author's interview, civil society activist, Kathmandu, May 2016.
[53] Farasat and Hayner, *Negotiating peace in Nepal*, p. 11.

Hayner note, was that 'international NGOs and others that began to interact with the Maoists found that they had a genuine curiosity about international principles and instruments related to human rights'.[54] In a straightforward sense, then, expressing a verbal commitment to human rights norms lent immediate legitimacy to their cause.

By the time the twelve-point agreement, which paved the way for formal peace talks, was signed in 2005, the Maoists had made a commitment to 'fully respect the norms and values of human rights and to move forward on the basis of them'.[55] What is more, they also agreed that 'inappropriate conduct' would be investigated and that action would be taken again guilty individuals.[56] For their part, the major political parties were keen to promote a human rights agenda in the hope that it would inspire the Maoists to modify their behavior.[57] Yet, despite these commitments, the twelve-point agreement was extremely vague about the nature of those misdeeds or the precise actions that would be taken in response to them.[58] Indeed, as Farasat and Hayner argue, 'at no point' did the Nepalese government 'show any inclination to take on serious prosecutions'.[59] Rather, both sides seem to have assumed that although the final peace agreement would make reference to international human rights and accountability norms, they would ultimately be afforded some form of impunity, whether in the form of an amnesty or in the failure to pursue prosecutions.[60] That is, from the very start the signatories indicated a distinct lack of intent to comply with the anti-impunity measures to which they would ultimately agree.

Later, in the aftermath of the 2006 People's Movement, which along with ousting the king resulted in the deaths of 25 protesters, both sides agreed that those responsible for the killings should be held accountable for their actions. Although the initial demand for accountability had come from the Maoist side, the Seven Party Alliance agreed, largely because neither it nor the Maoists seemed to be implicated in the killings. That is, the 2006 killings provided a further context in which both sides could profess a commitment to human rights norms and thereby legitimize their claims without worrying that they might be held accountable for their actions. The result was the establishment of the Rayamajhi Commission, headed by the former Supreme Court judge Krishna Jung Rayamajhi. The commission's report, submitted in November 2006, 'recommended action against 202 people', including three royal government ministers.[61] Like the Mallik Commission, established in 1990 to 'locate people who had disappeared' and examine 'allegations of human rights violations during the autocratic *Panchayat*

[54] Farasat and Hayner, *Negotiating peace in Nepal*, p. 11.
[55] '12-point understanding reached between the seven political parties and Nepal Communist Party (Maoists)', 22 Nov. 2005, Point 8, http://peacemaker.un.org/sites/peacemaker.un.org/files/NP_051122_12%20Point%20Understanding.pdf.
[56] '12-point understanding', point 12.
[57] Farasat and Hayner, *Negotiating peace in Nepal*, p. 14.
[58] Farasat and Hayner, *Negotiating peace in Nepal*, p. 14.
[59] Farasat and Hayner, *Negotiating peace in Nepal*, p. 18.
[60] Author's interview with human rights lawyer, Kathmandu, May 2016.
[61] Sajjad, *Transitional justice in South Asia*, p. 37.

system' by which Nepal was governed from 1960 to 1990, these recommendations were never implemented.[62] With this, the Rayamajhi Commission joined the long sequence of commissions of inquiry that have been established in Nepal in response to allegations of human rights violations but which have had 'little power' and have been 'open to political influence'.[63] As we will see, these criticisms have also plagued Nepal's TRC and Commission of Investigation on Enforced Disappeared Persons (CIEDP).

The compromise

In the end, a compromise solution was devised that took into account the positions of the international community, civil society, and the primary parties to the agreement. The CPA committed both parties to the protection of human rights and promised to uphold Nepal's obligations under international law to end impunity. Section 7 of the agreement thus declares that: 'Both sides reconfirm their commitment to the respect and protection to [*sic*] human rights and commitment to international humanitarian law and accept that nobody should be discriminated on the basis of color, gender, language, religion, age, race, national or social origin, wealth, disability, birth or other stand, ideology or faith.'[64] It then goes on to state that: 'Both sides express the commitment that impartial investigations and action would be carried according to law against people responsible [for] creating obstructions to the exercise of the rights envisaged in the letter of agreement and ensure that impunity will not be tolerated.'[65] With this, the CPA signatories appeared to accept responsibility to investigate allegations of human rights violations.

In the last section of the agreement, the underlying commitment to principles of international humanitarian and human rights law is reiterated with the statement that, although the 'accord can be revised at any time with the consent of both parties', amendments must not 'fall below the minimum standards of accepted international human rights and humanitarian law'.[66] For Nepal, those accepted standards include the Geneva Conventions (accession in 1964), the Genocide Convention (accession in 1969), the Convention on the Rights of the Child (signed 1990), the Torture Convention, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (accession to all three in 1991). They do not, however, include the Rome Statute of the International Criminal Court or the International Convention for the Protection of All Persons from Enforced Disappearance, to neither of which Nepal is a party.

Despite these favourable references to international human rights and anti-impunity norms, however, the CPA did not specifically mandate prosecutions,

[62] Sajjad, *Transitional justice in South Asia*, p. 37.
[63] Rawski and Sharma, 'A comprehensive peace?', p. 199.
[64] CPA, sec. 7.1.1.
[65] CPA, sec. 7.1.3.
[66] CPA, sec. 10.3.

in large part because both sides were concerned that trials would be used to effectively limit the influence of their leaders. Instead, it included an agreement that both sides would 'make public within 60 days of signing of the agreement information about the real name, caste and address of the people "disappeared" or killed during the war and to inform the family about it'.[67] It also proposed the establishment of a TRC as the mechanism by which truth would be sought, accountability achieved and reconciliation fostered in Nepal. That is, just as the South African TRC was conceived as a '"third way", a compromise between the extreme of Nuremberg trials and blanket amnesty or national amnesia', so too was Nepal's TRC a straightforward compromise between the need to simultaneously avoid both overt impunity and full criminal accountability.[68] This was no coincidence: Siebert is widely credited with advocating the South African model, while both the UN and civil society groups supported the idea of a TRC.[69] Civil society groups in particular, sensing that criminal justice was highly unlikely to be achieved, began to view a TRC as the means by which the truth about past human rights violations might be uncovered and as a vehicle for reparations.

In short, it seems that the TRC provision was included in the CPA to assuage the concerns of some human rights activists and to ensure the perceived legitimacy of the final agreement.[70] Among accounts of the CPA negotiations there is little evidence of any demand for or substantive commitment to a TRC from either of the primary parties to the agreement. Rather, the signatories appear to have accepted that alongside their undertaking to end impunity for human rights violations, the institution of an accountability mechanism would also be expected by some key members of the international community, including the UN. Within the standard transitional justice 'toolkit', a TRC was deemed not only the most palatable option but the option that provided the most room for avoiding the practical implementation of anti-impunity measures. In particular, given Nepal's long history of failed commissions of inquiry, the signatories could be forgiven for thinking that little would eventuate from any new commission. In fact, at the time of signing 'the parties appear to have had little idea about the long-term implications of the TRC'.[71] As one prominent human rights lawyer remarked, the issue of the TRC was resolved relatively quickly during the final negotiations without any real 'debate about the nitty-gritty'—details about how it would function, what its mandate would be, and what powers it would hold.[72] The result is that these very issues have become the new battleground in the fight against impunity in Nepal.

[67] CPA, sec. 5.2.3.
[68] Desmond Tutu, *No future without forgiveness* (New York: Random House, 1999), p. 30.
[69] Author's interview, Kathmandu, May 2016.
[70] It is notable that not all human rights advocates were happy with the TRC provision, precisely because of the possibility that amnesty would play an eventual role in its processes.
[71] Aditya Adhikari and Bhaskar Gautam, *Impunity and political accountability in Nepal* (New York and Washington DC: Asia Foundation, 2014), p. 61.
[72] Author's interview with human rights lawyer, Kathmandu, May 2016.

Bad intentions, poor circumstances

Although some observers cautiously hoped that the CPA would mark a turning-point in the fight for accountability in Nepal, more than a decade later impunity for human rights violations remains as deeply entrenched as ever. While poor circumstances have certainly contributed to this state of affairs, key individuals have not only thwarted attempts to implement the CPA's anti-impunity measures but have actively and intentionally hampered attempts at compliance.

Shortly after the CPA was signed, the 'political ground' in Nepal 'shifted substantially, and the post-CPA period proved hostile to human rights advocacy, in particular to calls for holding accountable the perpetrators of conflict related violations'.[73] Human rights activists had to fight for attention to be given to the issue of accountability for human rights violations within a crowded agenda dominated by other more immediate post-conflict priorities. In particular, tensions associated with the demobilization of Maoist forces and their reintegration into the Nepali Army, unrest in the Madhesi-dominated Terai region, disagreements over the future role of the monarchy, constitutional issues concerning the type of republic to be instituted in Nepal, the prolonged delays in organizing Nepal's first post-conflict democratic election and the severe political instability that followed it left justice for past human rights violations a marginal issue. That is, in line with optimistic accounts of compliance failure, changes in circumstances, competing priorities and political instability were all significant impediments to compliance. Many of these impediments continued throughout the post-conflict process; and in 2015 their effects were compounded by an unforeseen disaster in the form of a major earthquake. With much of Nepal left in ruins, key transitional justice processes were put on hold and significant funds diverted away from justice programmes to focus instead on the rebuilding and humanitarian effort.

In the early post-conflict years, however, supporters of anti-impunity norms also had to contend with growing demands for impunity from increasingly powerful members of the political elite who now bore legislative powers. The result was that any sense that accountability for past human rights violations might be possible in the post-conflict period was rapidly diminished. This became readily apparent during the convoluted process through which successive governments of Nepal have attempted to establish the TRC promised by the CPA.[74]

Entrenching impunity in the TRC

In May 2007, the Ministry for Peace and Reconciliation established a working group 'mandated to draft legislation necessary to establish a TRC'.[75] The draft bill was tabled in June 2007. It included provisions granting the TRC the 'power

[73] Rawski and Sharma, 'A comprehensive peace?', pp. 182–3.

[74] This is not to imply that successive governments have held identical positions on the TRC, but rather to suggest that the general trend across the period has been one marked by a lack of commitment to accountability for human rights crimes.

[75] Amnesty International, 'Nepal: reconciliation does not mean impunity—a memorandum on the Truth and Reconciliation Bill', 13 Aug. 2007, http://www.refworld.org/pdfid/46c2d54e2.pdf.

to recommend amnesty for those perpetrators who committed gross violations of human rights or crimes against humanity "in course of abiding by his/her duties or with the objective of fulfilling political motives"'. Excluded from this provision were perpetrators accused of 'any kind of murder committed after taking under control or carried out in a inhumane manner … inhumane and cruel torture' and rape.[76] The bill also proposed that, while the TRC would have the power to recommend amnesty, the 'final decision with respect to the granting of amnesty will be taken by the government of Nepal'.[77]

Unsurprisingly, the bill came under sustained fire from human rights groups for its amnesty provision, its failure to define what constituted crimes against humanity or gross violations of human rights, and the insufficient involvement afforded to civil society groups in the drafting process. Human rights and civil society groups also raised concerns over the TRC bill's failure to make provisions for prosecutions to follow from its proceedings, or to protect the commission from political interference. However, these criticisms did not halt the progress of the bill. Rather, intervening political matters meant it was not passed. In particular, national elections for the constituent assembly, originally scheduled for 7 June 2007 but then postponed, first until 22 November the same year and then to 10 April 2008, halted the passage of the bill. When the elections finally took place, the result defied almost everyone's expectations: the Maoists won 220 of 601 seats and, after a tortuously slow process that lasted almost four months, a new transitional government was formed with the Maoist leader Prachanda as the prime minister. During this drawn-out process, the major political parties reached an agreement to move forward on the establishment of the TRC and the Commission of Inquiry into Disappearances, but owing to delays in forming the government this was never put into practice.[78]

By the time the next draft TRC bill was tabled before parliament, in November 2009, Prachanda had resigned as prime minister and Nepal was in the midst of a period of political instability so severe that it took 17 attempts to elect his replacement. The 2009 draft TRC bill addressed some of the criticisms levelled at the previous draft by including in its preamble a commitment to 'end the state of impunity' and by limiting amnesties to exclude 'serious human rights violations including rape'.[79] However, as 'serious human rights violations' were never defined and the statute of limitations on allegations of rape stretched to just 35 days, the chances of actually prosecuting perpetrators of these crimes were nil.

In 2010, two separate bills, one each to establish the TRC and the CIEDP, were submitted to the bill commission, where they remained pending for two years. In March 2012, the government agreed to finalize the TRC and CIEDP bills by recombining them into a single bill, but the constituent assembly was dissolved and an election called before it had been passed. Although originally scheduled for 22 November 2012, the election did not take place until 19 November 2013. The

[76] Draft TRC Bill, June 2007, sec. 25 (4).
[77] Amnesty International, 'Reconciliation does not mean impunity', sec. 28(2)(a).
[78] UN Security Council, *Report of the Secretary-General*, S/2008/454, 10 July 2008.
[79] Sec. 23(b); see Adhikari and Gautam, *Impunity and political accountability in Nepal*, p. 64.

result was a resounding victory for the Nepali Congress Party, which won 105 of 240 seats in the constituent assembly and installed its leader, Sushil Koirala, as prime minister. By contrast, the CPN-M won just 26 seats.

In the meantime, on 13 March 2013, a combined TRC–CIEDP ordinance was promulgated while the government was in caretaker mode. The Ordinance on the Formation of a Commission for Truth and Reconciliation was the result of a political deal struck between the major political parties that was 'designed, at least in part, to ensure that those alleged to have been responsible for gross human rights violations and crimes under international law, committed over the course of Nepal's decade long internal armed conflict, would effectively avoid accountability'.[80] Section 23(1) of the ordinance states: 'In case the Commission deems it appropriate to grant amnesty to the perpetrators while investigating under this Ordinance, it shall make recommendation to Government of Nepal, showing adequate reasons or bases', although these are never specified. Section 23(2) goes on to add that 'the Commission shall not make recommendation for granting amnesty to the perpetrators engaged in serious crimes including rape for which there are no adequate reasons and bases for granting amnesty from inquiry of the Commission'; but, as it never specified either what those serious crimes entailed or what constituted an adequate reason or basis for granting amnesty, the ordinance made amnesties entirely possible, even in cases where gross violations of human rights had been committed. Dismayed at several provisions included in the ordinance, including a blanket amnesty, a 'coalition of victims' groups assisted by the International Commission of Jurists, lodged two separate petitions' challenging its constitutionality.[81] The Supreme Court agreed that the ordinance required further examination by the courts and issued an interim order blocking its implementation.

In the aftermath of the election the Supreme Court released its ruling on the case of *Madhav Kumar Basnet* v. *the Government of Nepal* on 2 January 2014. It ruled that the TRC ordinance contravened international human rights law and that its amnesty provision failed to uphold the victims' fundamental right to justice. In doing so, the Supreme Court made four recommendations. First, it argued that two separate commissions, a TRC and a CIEDP, must be established through separate acts of legislation. Second, the Supreme Court 'directed the Government to ensure that any new laws unequivocally exclude the possibility of granting amnesty for serious human rights violations'.[82] Third, it encouraged the government to make efforts to criminalize a range of human rights crimes, including enforced disappearances, torture, crimes against humanity and war crimes, and, in doing so, reiterated elements of its judgment in *Rajendra Prasad Dhakal* (2007), which had also directed the government to criminalize enforced disappearances.[83] Fourth, the government was also directed to take expert advice in the process of redrafting the TRC bill.

[80] International Commission of Jurists, *Justice denied: the 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act* (Geneva, May 2014), p. 4, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf.

[81] International Commission of Jurists, *Justice denied*, p. 4.

[82] International Commission of Jurists, *Justice denied*, pp. 4–5.

[83] International Commission of Jurists, 'Nepal: end impunity for enforced disappearances', press release, 29 Aug. 2014, http://www.icj.org/nepal-end-impunity-for-enforced-disappearances/.

In response to the Supreme Court's recommendations, the government established an expert task force of government officials, human rights lawyers, victims and conflict experts to assist in the drafting of a new TRC bill.[84] However, several members of the task force have expressed dismay at the extremely short timeframe they were given for completion of their work, bemoaned the fact that the final deadline for submissions was changed with less than 24 hours' notice, and voiced disappointment that, despite their manifest efforts, their recommendations had little effect on the final bill, which was tabled before parliament on 10 April 2014.[85] The bill not only included an amnesty, but failed to define what 'serious violations of human rights' or the 'act of disappearing a person' meant with reference to international law.[86] What is more, it also gave the commission the power to enact reconciliations without the consent of the victim, and gave the government the power to select the commissioners, thereby raising further serious questions about just how independent and impartial the commission would actually be. Despite objections from senior human rights activists, the bill was passed on 26 April and signed into law on 11 May 2014. On 26 February 2015, the Supreme Court struck down the act's amnesty provision for the second time, arguing once again that it contravened Nepal's constitution and its obligations under international law.

More than a year later, a new revised TRC bill has not appeared before parliament. The TRC is up and running and, although its commissioners are adamant that they will not recommend amnesties, impunity remains a possible, perhaps even likely outcome of their processes.[87] At the heart of the problem is an overt unwillingness among the current political leadership to implement the Supreme Court's 2015 ruling or comply with the terms of the CPA. In particular, 'all the major parties are unanimous in their opposition to prosecutions' and have 'adopted a highly reactive stance' that seeks to 'block and deflect all attempts toward prosecution'.[88] Some have argued that 'war crimes cannot be prosecuted through the criminal justice system' but must only be dealt with by the TRC, while others have admitted that the TRC, in their view, exists for the precise purpose of ensuring impunity.[89]

Further challenges to ending impunity

Unsurprisingly, the TRC Act has faced significant criticism both from the human rights community within Nepal and from members of the international community. In response to the act, the OHCHR issued a technical note which argues that the 'TRC Act does not conform to Nepal's international legal obligations,

[84] Alison Bisset, 'Transitional justice in Nepal: the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014', Bingham Centre Working Paper 2014.07 (London: Bingham Centre for the Rule of Law, Sept. 2014), p. 4.
[85] Interviews with member of task force, Kathmandu, May 2016.
[86] Bisset, 'Transitional justice in Nepal', p. 4.
[87] Interviews with TRC staff member, Kathmandu, May 2016.
[88] Adhikari and Gautam, *Impunity and political accountability in Nepal*, p. 68.
[89] Adhikari and Gautam, *Impunity and political accountability in Nepal*, p. 69.

including in that it allows for amnesty for crimes committed under international law', a view echoed by experts for the UN Human Rights Council, and by the International Commission of Jurists.[90]

This persistent support for amnesties among the political elite has been coupled with the perpetual failure of successive governments to criminalize key human rights violations in Nepalese law. The 2007 Interim Constitution of Nepal 'guarantees the right to be free from torture and mandates that torture should be punishable by law'.[91] Similarly, the 2015 constitution states in article 22(1) that 'no person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment' and that any such act 'shall be punishable by law'.[92] Yet, despite this, the fact that Nepal is a party to the Torture Convention, and the registration of a bill to criminalize torture at the Parliamentary Secretariat in 2012, it remains the case that no law criminalizing torture exists in Nepal.[93] Similarly, enforced disappearances remain without criminal sanction in Nepal, despite a Supreme Court directive ordering the government to criminalize disappearances as part of the process of establishing the CIEDP. In February 2016, the CIEDP drafted its own disappearances bill and presented it to parliament. As the chairman of the commission, Lokendra Mallick, said: 'We waited for the government to draft the act. When it did not draft even in almost a year, we decided to prepare it ourselves even if it was not in the mandate of the commission.'[94] As yet, however, no law on disappearances has been passed by parliament, and Nepal has not signed or ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

While torture and enforced disappearances are not criminalized in Nepal, the statute of limitations on allegations of rape is so short that it prevents sexual violence crimes committed during the civil conflict from being prosecuted. As noted above, until recently 'a 35-day statute of limitations on reporting sexual violence' existed in Nepal.[95] In November 2015, however, the statute of limitations was extended to 180 days. While many human rights lawyers agreed that this was 'a step forward', they also argued that 'there should not be statutes of limitations for heinous crimes like rape'.[96] In particular, increasing the statute of limitations has no impact on the access to justice of victims who suffered sexual violence

[90] Human Rights Watch, 'Nepal: fix flawed truth, Reconciliation Act: UN rights bodies call for fundamental overhaul' (New York, 8 July 2014), https://www.hrw.org/news/2014/07/08/nepal-fix-flawed-truth-reconciliation-act.

[91] Asian Human Rights Commission, 'Torture in Nepal' (Hong Kong, n.d.), http://www.humanrights.asia/countries/nepal/torture-in-nepal.

[92] Asian Legal Resource Centre, 'NEPAL: torture and ill-treatment in Nepal—anti-torture law, impunity, and the UPR' (Hong Kong, 3 Nov. 2015), http://www.alrc.asia/nepal-torture-and-ill-treatment-in-nepal-anti-torture-law-impunity-and-the-upr.

[93] Association for the Prevention of Torture, 'Anti-torture law before Nepalese Parliament' (Geneva, 8 May 2012), http://www.apt.ch/en/news_on_prevention/anti-torture-nepal/#.Vod_Rlzlf8s, accessed 30 May 2016.

[94] Dewan Rai, 'CIEDP bill will criminalise disappearances', *Kathmandu Post*, 2 Feb. 2016, http://www.kathmandupost.ekantipur.com/printedition/news/2016-02-02/ciedp-bill-will-criminalise-disappearances.html.

[95] Human Rights Watch, 'Nepal: conflict-era rapes go unpunished' (New York, 23 Sept. 2014), https://www.hrw.org/news/2014/09/23/nepal-conflict-era-rapes-go-unpunished.

[96] 'Statute of limitations on rape extended to 180 days', *Kathmandu Post*, 30 Nov. 2015, http://www.kathmandupost.ekantipur.com/news/2015-11-30/statute-of-limitations-on-rape-extended-to-180-days.html.

in the war years 1996–2006. Thus, although the TRC Act prevents amnesties from being granted in cases of rape, no legal mechanism exists by which perpetrators of rape can be prosecuted for their crimes.

In response to the inclusion of an amnesty in the TRC Act and other concerns over Nepal's failure to uphold its international human rights obligations, on 16 February 2016 the OHCHR announced that the UN could not support either the TRC or the CIEDP. It stated: 'In the absence of steps by the Government of Nepal to ensure that the enabling law and procedures of the CIEDP and TRC are in compliance with its international legal obligations, the United Nations is unable to provide support for these institutions.'[97] Only if the government of Nepal amends the act 'so that it is fully consistent with Nepal's obligations under international law', it continued, will the UN 'consider supporting the work of the two Commissions'.[98]

Yet these very institutions, despite their enabling laws, are both at the forefront of the fight against impunity. As noted above and, as senior officials from both the TRC and the CIEDP made clear when interviewed in 2016, both institutions have petitioned the government to amend the law to allow for the prosecution of perpetrators of human rights violations. In addition, officials from both institutions emphasized their strong anti-impunity positions, stating unequivocally that although they have the power to recommend amnesties, they will not perform that function.[99] Indeed, as the chairman of the TRC, Surya Kiran Gurung, has argued: 'The UN position on the TRC and CIEDP is not different from what we have been demanding.'[100]

The UN has thus removed support for two institutions whose staff are committed to achieving compliance with Nepal's international human rights obligations and are working to provide victims with some measure of accountability. In doing so, the already limited capacities of the TRC and the CIEDP have been further stretched and their abilities to fight impunity further limited. As a spokesperson from the CIEDP remarked, this institution requires 'foreign experts, support in setting up a forensic lab, as well as financial help, in order to investigate into the cases of enforced disappearances'.[101] Both the CIEDP and the TRC are significantly underresourced and rely on international support, including help that they expected to receive from the UN, in order to function effectively. It is thus somewhat ironical that the UN's response to compliance failure on the part of the Nepalese government has not helped the campaign against impunity, but rather exacerbated a set of poor circumstances in which the consequences of poor intentions are proving extremely difficult to overturn.

[97] OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission', 16 Feb. 2016.
[98] OHCHR, 'Nepal'.
[99] Author's interviews with CIEDP staff member, Kathmandu, May 2016.
[100] 'Republica: OHCHR stance no different from our own: TRC chair Gurung', *Nepal Monitor*, 5 March 2016.
[101] Lekhanath Pandey, 'Can't support CIEDP, TRC; Act faulty: United Nations', *Himalayan Times*, 3 March 2016.

Conclusion

The signing of the CPA in 2006 was accompanied by real hope that post-conflict Nepal would move away from a culture of impunity towards one in which accountability for human rights crimes could be exercised. In the decade that has followed, however, that normative transformation has not occurred. Despite the best efforts of civil society groups, human rights activists and international NGOs, Nepal has failed to comply with the human rights provisions contained in the CPA. The result is that a culture of impunity remains as deeply embedded as ever in Nepal.

An optimistic interpretation of Nepal's failure to uphold international anti-impunity norms might attribute compliance failure to a set of poor post-conflict circumstances, many of which have been beyond the control of the Nepalese government. That is, it might suggest that the case of Nepal is simply one in which good intentions met with bad circumstances to produce an unfavourable set of outcomes. Yet, in the case of Nepal, a more pessimistic interpretation is warranted. In particular, little evidence exists to suggest that the signatories of the CPA were committed in any meaningful way to achieving accountability for human rights crimes in the post-conflict period. On the contrary, the anti-impunity provisions of the agreement appear to have been included in response to pressure from international actors, including the UN, to render the CPA legitimate in the eyes of the international community. Indeed, the very means by which the agreement included anti-impunity measures, leaving room for impunity to be achieved by other means, indicates that this was the intention from the very start.

In the post-conflict period, the intention of achieving impunity by other means has persisted, with the Nepalese political elite engaging in a two-pronged approach to avoid accountability for human rights violations committed during its civil conflict. First, at every opportunity it has sought to institutionalize formal amnesties through acts of legislation, despite multiple rulings from the Supreme Court declaring such acts to be unconstitutional and in contravention of Nepal's duties under international law. Second, through its continual failure to criminalize particular human rights violations, the government of Nepal has served as a direct impediment to the pursuit of accountability. That is, despite an overt commitment to upholding their obligations under international law, successive Nepali governments have used their legislative powers to further entrench Nepal's culture of impunity.

This is not to say that contemporary Nepali society is devoid of any real commitment to pursue accountability for human rights violations. On the contrary, key individuals, activists and institutions are continuing the fight against impunity, even though in doing so they face an uphill battle. Among those institutions are the TRC and the CIEDP, which despite their enabling laws have vowed not to allow impunity for human rights crimes. Yet these are the very institutions that the UN has sought to punish for the government's decision to legislate in favour of amnesties; and, in doing so, it has reduced their capacity to fight against impunity.

In particular, the UN has taken a political stand against impunity for human rights violations at the expense of support for tangible efforts to bring some measure of accountability to the victims of Nepal's civil conflict. That is, in its effort to persuade Nepal to accept and comply with its anti-amnesty policy, the UN has contributed to a situation in which poor circumstances have allowed bad intentions and their consequences to flourish.