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## Quality Control in Fact-Finding

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## **Witness Sensitive Practices in International Fact-Finding Outside Criminal Justice: Lessons for Nepal**

**Chris Mahony\***

### **10.1. Introduction**

This chapter considers the security implications of quality control in fact-finding, particularly with regard to truth commissions in transitional justice contexts. It addresses the lessons offered by variant levels of quality control in fact-finding commissions for the proposed Commission on Investigation of Disappeared Persons, Truth and Reconciliation in Nepal. In doing so, I draw on research conducted in Kenya and South Africa funded by the Institute for Security Studies and the Special Court for Sierra Leone, as well as upon my experience working at Sierra Leone's Truth and Reconciliation Commission in 2003, and Special Court in 2008. I also draw on research conducted for the International Centre for Transitional Justice in Nepal in 2011. The chapter considers the difference in threat to witnesses and to wider communities of commissions employing variant quality control in fact-finding under circumstances of uneven political, economic and social risk. I analyse in particular the impact of a commission's mandate and capacity upon the quality of fact-finding, especially practices relating to the security of persons that a commission interacts with. In doing so, I consider how a potential Nepali truth commission might balance the physical and psychological security of witnesses and

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sources, as well as the threat of further instability, with the imperative to find facts and to respect the rights of implicated persons to their reputations. Leading civil society elements in Nepal have called for prosecution of crimes committed during the conflict. However, they have not articulated the level of fact-finding quality control required for independent investigation and prosecution that does not jeopardise witness security.

There are a number of critical variables that inform the consideration of the need to establish a historical record, as well as the potential implications of doing so. Unlike the peace versus justice debate that considers a criminal process,<sup>1</sup> a fact-finding exercise may have no punitive function and does not need to accord the same level of rights to accused or implicated persons. It may therefore employ anonymity throughout and may decline to attribute individual responsibility. This chapter considers how and when a Nepali Commission might apply various investigative and reporting practices, given the lessons of commissions elsewhere – and reflects on the question: what is the appropriate level of ‘quality control’ for fact-finding in Nepal?

#### **10.1.1. Nepal’s Proposed Commission on Investigation of Disappeared Persons, Truth and Reconciliation**

In July 2007, Nepal’s Ministry of Peace and Reconstruction (‘MoPR’) proposed legislation that would establish a Truth and Reconciliation Commission (‘TRC’) in Nepal. The Government also proposed separate legislation calling for the establishment of a “high-level independent commission” to investigate and submit a report on disappearances during Nepal’s armed conflict.<sup>2</sup> The then-proposed commissions constituted the proposed response to human rights abuses that occurred during Nepal’s civil conflict, including 13,000 deaths at the hands of the Royal Nepal Army (‘RNA’), the Armed Police Force, and the Maoist People’s Liberation Army (‘PLA’)<sup>3</sup>. Both bills were tabled before Parliament in 2010, but

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<sup>1</sup> Sriram, Chandra and Pillay, Suren (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville, University of KwaZulu Natal Press, South Africa, 2009.

<sup>2</sup> Section 10(1), Act of Disappearing a Person (Crime and Punishment) Bill, (2066 B.S.) 2011 (‘Disappearances Bill’).

<sup>3</sup> Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal’s Armed Conflict*, September 2008, p. 3, available at [http://www.hrw.org/sites/default/files/reports/nepal0908web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/nepal0908web_0.pdf), last accessed on 10 October 2011.

did not progress. In November 2011, a political agreement was reached establishing a task force comprising politicians from Nepal's three main political parties – United Communist Party of Nepal (Maoist), Nepali Congress, and United Marxist-Leninist. The task force recommended prioritising reconciliation over truth-seeking by incorporating an amnesty for crimes committed during the conflict.<sup>4</sup> In March 2013, the four main political parties dispensed with the separate bills and passed an Ordinance, without allowing victims or stakeholders to see it.<sup>5</sup> The Ordinance created a single Commission on Investigation of Disappeared Persons, Truth and Reconciliation.<sup>6</sup> The Ordinance provides the Commission power to grant amnesty, but also to recommend prosecution to the Attorney-General.<sup>7</sup>

Prominent human rights bodies and organisations criticised the Disappearances Bill and the TRC Bill for failing to comply with international law and standards, particularly pertaining to amnesty for serious crimes.<sup>8</sup> Similar criticism has been leveled against the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, which Nepal's Supreme Court issued an order against.<sup>9</sup> Civil soci-

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<sup>4</sup> TRIAL, Written information for the adoption of the List of Issues the Human Rights Committee with regard to Nepal's Second Periodic Report, CCPR/C/NPL/2, April 2013, p. 13, available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/TRIAL\\_Nepal\\_HRC108.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/TRIAL_Nepal_HRC108.pdf), last accessed on 30 June 2013.

<sup>5</sup> *Ibid.*, p. 14.

<sup>6</sup> Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2069 (2012), 14 March 2013, Ordinance number 8 of 2012/13, Nepal Gazette, (Unofficial translation by ICTJ, 2 April 2013). Purported version is also available at <http://www.simonrobins.com/missing/wp-content/uploads/2013/02/Nepal-TRC-Ordinance.pdf>, last accessed on 8 October 2013.

<sup>7</sup> *Ibid.*, sections 23 and 25.

<sup>8</sup> United Nations Office of the High Commissioner for Human Rights, OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill, Press Release, 3 August 2007, available at [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year2007/AUG2007/2007\\_08\\_03\\_HCR\\_TRCB\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year2007/AUG2007/2007_08_03_HCR_TRCB_E.pdf), last accessed on 10 June 2011; Amnesty International, Nepal Disappearances Law must meet international standards, 2 September 2009, available at <http://www.amnesty.org/en/news-and-updates/news/nepal-disappearances-law-must-meet-international-standards-20090902>, last accessed on 10 June 2011; ICTJ Nepal, Selecting Commissioners for Nepal's Truth and Reconciliation Commission, briefing paper, March 2011, available at <http://ictj.org/sites/default/files/ICTJ-Nepal-Selecting-Commissioners-2011-English.pdf>, last accessed on 10 April 2011.

<sup>9</sup> BBC News, *Nepal Court blocks civil war truth commission*, 1 April 2013, available at <http://www.bbc.co.uk/news/world-asia-21996638>, last accessed on 2 April 2013; United Nations Office of the High Commissioner for Human Rights, *OHCHR Comments on the Nepal "Commission on Investigation of Disappeared Persons, Truth and Reconciliation*

ety groups have also been dissatisfied with the extent to which the proposed fact-finding facilitates witness protection.<sup>10</sup> The willingness of witnesses to co-operate with the Commission will be instructed by witness-sensitive quality control of its fact-finding, namely, its perceived independence, efficacy, capacity to affect punitive processes, and ability to provide witness protection. One victim described the anticipated inability of the previously proposed commissions to investigate abuses by stating: “if there is not protection, we cannot find the truth”.<sup>11</sup> This comment is representative of feedback from Nepali victims, witnesses, civil servants and civil society actors. They anticipate that witnesses will be reluctant to co-operate with investigations perceived as causing more security harm than truth-seeking good. Witness apprehension is instructed by police failure to adequately investigate voluminous alleged incidents of extrajudicial killings, enforced disappearances, torture and other abuses.<sup>12</sup> No one has been successfully prosecuted.

#### 10.1.2. Nepal’s Political Background

In 2005, the PLA’s political wing, the Communist Party of Nepal (Maoist) (‘CPN-M’), joined anti-Government demonstrations and pro-democracy political parties in a united front of opposition to the Monarchy. The main pro-democracy parties included the Communist Party of Nepal (United Marxist-Leninist) (‘CPN-UML’), and the Nepali Congress (‘NC’). The conflict ended in November 2006 with the signing of the Comprehensive Peace Agreement (‘CPA’) by the CPN-M and the Gov-

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*Ordinance – 2069 (2013)*”, 3 April 2013; TRIAL, Written information the adoption of the List of Issues the Human Rights Committee with regard to Nepal’s Second Periodic Report, CCPR/C/NPL/2, April 2013, p. 13, available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/TRIAL\\_Nepal\\_HRC108.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/TRIAL_Nepal_HRC108.pdf), last accessed on 30 June 2013; Amnesty International, “Nepal: ‘Disappearances’ Law Must Meet International Standards”, available at <http://www.amnestynepal.org/campaigns/ai-nepal-activities/nepal:-%E2%80%9CDisappearances%E2%80%9D-law-must-meet-international-standards.html>, last accessed on 30 June 2013.

<sup>10</sup> The author conducted field research in Nepal in November 2011, in which he interviewed numerous civil society actors.

<sup>11</sup> Victim speaking at a meeting with victims and victim representatives, 22 November 2011, Kathmandu.

<sup>12</sup> Human Rights Watch, *Indifference to duty: Impunity for crimes committed in Nepal*, December 2010, p. 2.

ernment.<sup>13</sup> The CPA called for the establishment of a TRC “to probe those involved in serious violations of human rights and crimes against humanity”, and to foster “reconciliation in society”.<sup>14</sup> The CPA also placed PLA combatants in cantonment camps without their arms, dissolved parallel Maoist structures, and required the creation of an interim constitution and parliament (Constituent Assembly (‘CA’)) to negotiate a new constitution and government. The CPN-M won elections in 2008. In January 2009, it formed the Unified Communist Party of Nepal – Maoist (‘UCPN-M’), after joining with the CPN (‘Unity Centre-Masal’).

The UCPN-M held control of the Government in a coalition with the CPN-UML party until 4 May 2009. Political instability has followed. Various coalitions have been formed and collapsed after failing to agree to a new constitution and security sector reform.<sup>15</sup> The Madhesi parties

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<sup>13</sup> The CPN-M had already agreed terms with the main political parties. Article 1(4), Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist), 21 November 2006, available at [http://www.brookings.edu/fp/projects/idx/Nepal\\_PeaceAgreement.pdf](http://www.brookings.edu/fp/projects/idx/Nepal_PeaceAgreement.pdf), last accessed on 13 May 2011.

<sup>14</sup> Article 5(2)(5), Comprehensive Peace Agreement, November 2006.

<sup>15</sup> The Maoists were then in opposition until 3 February 2011 when CPN-UML led a coalition government with support from the Nepali Congress (‘NC’) and 21 other parties. The third government was led by CPN-UML again in coalition with Maoists. On 29 May 2011, Parliament extended the deadline for a constitution by three months for the first time. On 28 August 2011, Maoist Vice-Chairman Baburam Bhattarai was elected Prime Minister and granted a new deadline of 30 November 2011. In January 2011, the United Nations Mission in Nepal (‘UNMIN’) departed without significant security implications indicating Maoist ‘buy-in’ to the political process. Agreement on the part of the Maoists to disarm the PLA and integrate former combatants signaled cautious optimism given the rhetoric of some Maoist figures prior to the agreement. The CPN-UML, the CPN-M and the NC formed the two-thirds majority agreement required to extend the CA but failed to form an inclusive government. The Madhesi Front also refused to participate in the government. The deal, which extended the CA by three months, required Maoist handover of arms, integration of Maoist combatants and completion of the first draft of the Nepali constitution. After the coalition failed to implement the deal, the Prime Minister resigned. A previous coalition had agreed to address Madhesi Front demands without specifying the demanded autonomous Madhesi region and a separate national army unit of 10,000 Madhesi youths. A diversity of previously excluded groups has emerged with espoused aspirations of self-determination that could provide sources of ethnicised future instability. See Anand Verma, *The Crisis of the Constituent Assembly in Nepal*, Tehelka, 27 May 2011, available at [http://www.tehelka.com/story\\_main49.asp?filename=Ws270511GUEST.asp](http://www.tehelka.com/story_main49.asp?filename=Ws270511GUEST.asp), last accessed on 10 June 2011; International Crisis Group, “Nepal’s Fitful Peace Process”, in *Asia Briefing 120*, Kathmandu/Brussels, 7 April 2011, p. 1; NDTV, 29 May 2011. Jason Miklian, “Nepal’s Terai: Constructing an Ethnic Conflict”, *PRIO South Asia Briefing Paper 1*, Peace Research Institute Oslo, 20 July 2008, p. 4; Rebecca Crozier and Zuleika Candan, *Participation and Obstruction: Justice and Security Sector Reform in Nepal*,

represent groups formerly outside of government. The Madhesi parties formed a 2011 coalition government with the UCPN-M.<sup>16</sup> The four-point UCPN-M/Madhesi agreement provided a general amnesty to the Maoist insurgency, the Madhesi movement, and all other actors apart from the Nepal Army and the police.<sup>17</sup> That coalition, along with those subsequent, failed to achieve constitutional reform. The result is an ethnicised federalist system supported by the Maoists and the Madhesi parties, but opposed by the UML and Nepali Congress parties.<sup>18</sup> While parties have taken steps toward compromise and inclusivity, the extent to which internal party politicking drives compromise on substantive issues, such as security sector reform and constitutionality, remains unclear.<sup>19</sup> These and other disagreements may cause instability around the scheduled November 2013 Elections.<sup>20</sup> Any witness protection entity accompanying a commission must be completely cognisant of savvy political actors' capacity to misuse investigative and protective functions. Misuse might include implicating and marginalising political opponents. Therefore, ensuring safe and authentic testimony *via* a high level of fact-finding quality control is critical to a Nepali Commission's integrity and credibility, particularly given the historical tendencies of local actors to target witnesses.<sup>21</sup>

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International Alert, November 2010, p. 13.

<sup>16</sup> Gani Ansari, "Maoists, Madhesi ink four-point deal", *Republica: Political Affairs*, 29 August 2011, available at [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=35296](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=35296), last accessed on 30 August 2011.

<sup>17</sup> *Ibid.*

<sup>18</sup> International Crisis Group, "Nepal's Constitution: The Expanding Political Matrix", in *Asia Report*, 27 August 2012, no. 234, available at <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/234-nepals-constitution-ii-the-expanding-political-matrix.aspx>, last accessed on 10 June 2013.

<sup>19</sup> In an earlier Constituent Assembly coalition for example, the Nepali Congress conceded many 10-point pre-conditions, including the Prime Minister's resignation, immediate return of Maoist seized property and Young Communist League dismantling. The Maoists also conceded to handing over arms. However, local observers allege the UCPN-M and UML leadership worked together to marginalise respective internal opposition. See Anand Verma, 27 May 2011, *supra* note 15; International Crisis Group, 7 April 2011, p. 8, *supra* note 15; Interview with justice sector donors, 23 November 2011, Kathmandu; International Crisis Group, 2012, *supra* note 18.

<sup>20</sup> Hou Qiang, "News Analysis: Security still main concern in Nepal's 19. November elections", Xinhua News Agency, 28 August 2013, available at [http://news.xinhuanet.com/english/indepth/2013-08/28/c\\_132670555.htm](http://news.xinhuanet.com/english/indepth/2013-08/28/c_132670555.htm), last accessed on 28 August 2013.

<sup>21</sup> United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,

### 10.1.3. Three Key Witness-Oriented Elements Distinguishing Fact-Finding Commissions from Courts

There are three key elements regarding witnesses that distinguish fact-finding commissions from courts: (1) they do not need to have punitive consequences (directly or indirectly); (2) witnesses do not need to be cross-examined in accordance with accused rights; and (3) they are less vulnerable to the inducement of inauthentic witness testimony.

*Truth commissions are by nature not punitive bodies.* This is significant for the threat to witnesses because it is the threat posed to perpetrators of prosecution that ordinarily stimulates the greatest threat. Truth commissions can stimulate that threat. Unlike criminal trials, truth commissions enjoy discretion on whether or not to name names and/or attribute individual command responsibility for abuses.<sup>22</sup> When commissions decide to investigate command responsibility, as well as the number and nature of abuses, procuring insider testimony or statements becomes more important. Insider witnesses hold information about who ordered abuses and who knew they occurred. Insider witnesses are often sparse, and easily identified by the information within a report asserting individual command responsibility. Insider witnesses cannot be protected through provisions of anonymity (providing testimony or statements anonymously), particularly where criminal proceedings are likely to follow. Often they require formal witness protection – defined as relocation with their families (permanent or non-permanent) and, in some instances, identity change. Unless relocation is undertaken of one's own volition, these measures require a great deal of finance, institutional independence and operational sophistication. If a fact-finding commission does not exhibit these qualities, the interests of witnesses' physical and psychological security demand that commissions limit themselves to investigating the scale and nature of abuses, and not those with command responsibility for them. Ambiguity as to subsequent criminal proceedings increases the threat.

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Ambeyi Ligabo, A/HRC/7/14/Add.1, 25 February 2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/112/10/PDF/G0811210.pdf?OpenElement>, last accessed on 10 June 2011.

<sup>22</sup> Some Nepali civil society actors believed the commissions would name names. Interview with Civil Society actor, Kathmandu, 2 December 2011.

At commissions, many abuses can be established and corroborated using many different evidential sources, including anonymous witness testimony and statements. One evidential advantage over criminal processes, from the perspective of witness security, is that commissions may rely more heavily on anonymous statements. Witnesses do not have to appear to give testimony. The consequence of greater reliance on witness statements is that witness narratives are not held up to the same level of interrogation as in an adversarial or inquisitorial criminal process.

Consideration of a witness protection and witness-sensitive practices programme at Nepal's proposed Commission must plan for the possibility that punitive consequences may flow from the Commission, and that Commission witnesses may be called to testify in criminal proceedings. This chapter identifies a witness protection framework based on best practices, and a level of capacity sufficient to provide both formal witness protection and anonymity, while maintaining a credible evidential basis. The importance of protecting witnesses and ensuring the integrity of facts found is elevated by the seriousness of alleging mass human rights abuse.

Truth commissions, by design, are devoid of adversarial parties vulnerable to inducing witness testimony that preferences one narrative over another. Unlike an adversarial criminal justice process, the systemic nature of a truth commission's investigative work is to ascertain a historical truth without pressure to implicate particular parties or persons. The material benefits of witness protection, therefore, are less likely to be misused through inducing inauthentic testimony. This does not totally dispel the potential for witnesses to pursue witness protection's material benefits by constructing false narratives that imply a significant threat. Similarly, it does not preclude the possibility that actors with interests in implicating groups or individuals may attempt to infiltrate a commission and skew fact-finding for political purposes. Balancing protection with evidential authenticity requires evaluation, not only of the protective measures available and adopted, but also of the witness-oriented practices and their inter-dependence, across all organs of the commission, and within a State's security, political and socio-economic context.

## **10.2. Nature and Scale of the Threat to Witnesses**

The safety of witness participation at a truth commission is instructed by three elements:

1. The threat to witnesses:
  - a. Prosecution threat to implicated persons (increases their interest in impeding testimony);
  - b. Commission independence (decreases public sympathy for implicated persons);
  - c. The threat of local or State-wide stigmatisation of implicated persons.
2. Likelihood of the threat being carried out:
  - a. Security: adherence to the rule of law of the population (particularly the armed);
    - i. Politics, security sector reform, economic and social conditions;
  - b. Influence or capacity of the implicated persons.
3. Commission capacity to protect participants:
  - a. Anonymity;
  - b. Other *ad hoc* measures;
  - c. Formal protection.

#### 10.2.1. Security Sector Reform

At the Sierra Leone TRC ('SLTRC'), the deployment of a large UN peacekeeping force, a conclusive victory for one party to the conflict, the democratic election of that party, amnesty for all but the 13 most responsible for crimes, and security sector reform diminished the threat to witnesses and its likelihood of being carried out.<sup>23</sup> A de-politicised and professionalised security sector poses a far smaller threat to witnesses. Although security sector reform may not dissolve the politicisation of combatants totally, it can be used to incentivise combatants in such a way as to mitigate their inclination towards intimidating witnesses. Wherever possible, security sector reform should be prioritised ahead of politically sensitive investigations.

In Nepal, the Army, the police and the PLA have proven unwilling to allow investigation of abuses, ready to intimidate those that might testify to abuses, and adept at leveraging their clout in the political class to

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<sup>23</sup> Combatant induction into the army was conditional upon combatant adherence to conditions of service.

secure impunity.<sup>24</sup> The PLA and the NA retain clout amongst the UCPN-M and the other political parties respectively. Despite the transfer of authority over the Nepal Army from the former King to the President, the Army retains its own independence, antipathy towards reform, and history of intimidating witnesses.<sup>25</sup> Making a commission the pre-eminent arbiter of alleged wartime criminality elevates the Army and PLA's interest in manipulating Commission investigations, including access to witnesses.

The Army's pre-eminent security position, including arbitrary discretion to clamp down on expression of civil discontent, increases its political clout.<sup>26</sup> Similarly, ethno-regional discontent within the Army provides ethnicised political parties with an enthusiastic instrument to deploy against witnesses depicted as ethno-regionally biased.<sup>27</sup> The Army's utility for non-UCPN-M parties lends it relative impunity.<sup>28</sup>

Like the non-UCPN-M parties with the Army, the UCPN-M has an interest in protecting PLA combatants, including its political leadership, from prosecution or public condemnation. The PLA has not been used in

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<sup>24</sup> Despite 56 percent of donor-supported security and justice sector reform focusing on State and civilian oversight, the NA and the PLA have refused to co-operate with investigations into crimes allegedly committed by their combatants. Both armed groups have argued that alleged crimes will be dealt with by transitional justice mechanisms. Victims and victim representatives cited multiple incidents of witness intimidation, including targeted killings. See Crozier and Candan, November 2010, p. 7, *supra* note 15; Human Rights Watch, December 2010, pp. 8–9, *supra* note 12; Victim speaking at a meeting with victims and victims representatives, 22 November 2011, Kathmandu, *supra* note 11.

<sup>25</sup> The Army Act 2006 provided control over the Army to the representatives of the people and the Interim Constitution (Article 144) provides the President of the Republic of Nepal as Supreme Commander in Chief of a Nepal Army that is democratic, ethno-regionally inclusive and trained in human rights and democratic values. See: Narahari Acharya, "The Nepalese Army", in Bishnu Sapkota (ed.), *The Nepali Security Sector: An Almanac*, 2009, Brambauer Publishers, Hungary, p. 123; International Crisis Group, 7 April 2011, p. 16, *supra* note 15. For an example of the threat posed by the Nepal Army to witnesses of its abuse, see United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14/Add.1, 25 February 2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/109/89/PDF/G0810989.pdf?OpenElement>, last accessed on 10 June 2011, p. 125.

<sup>26</sup> The Government security policy mandates the army to put down "destructive activities", "activities against the national interest", and other incidents of which engaging in political discussion or protest could be interpreted. See International Crisis Group, 7 April 2011, p. 18, *supra* note 15.

<sup>27</sup> International Crisis Group, 7 April 2011, p. 16, *supra* note 15.

<sup>28</sup> *Ibid.*, p. 17.

political action since its confinement to cantonments<sup>29</sup> under the 2006 peace agreement and their subsequent integration into the armed forces.<sup>30</sup> Demobilisation may render some disenfranchised PLA or Army elements vulnerable to actors seeking to direct them against witnesses. Perceived impunity mitigates the threat perpetrators pose.<sup>31</sup> Similarly, investigating abuses during the vetting of combatants for inclusion in the army heightens the threat those combatants pose to witnesses that might implicate them, and diminishes their chance of army inclusion.<sup>32</sup>

### 10.2.2. Potential for Further Instability (Emerging Socio-Economic and Political Threats)

A plethora of dynamics threatens Nepal's ongoing security. Outbreaks or continuation of instability provide savvy actors, particularly those within the political establishment, the means to pursue persons perceived as likely to co-operate with a commission. The police may employ heavy-handed methods already directed at armed groups, against witnesses of police abuse.<sup>33</sup> Similarly, inter-party violence, tempered by 2010 political inclusion, could flare again.<sup>34</sup> Narcotics and other organised-crime-related violence in the Terai region are allegedly linked to political parties and increasingly attractive to disenfranchised youths.<sup>35</sup> These youths might

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<sup>29</sup> Semi-permanent barracks.

<sup>30</sup> Ekantipur.com, "One step closer: Integration of ex-combatants in the army is over, the peace process is not", 28 August 2013, available at <http://ekantipur.com/2013/08/28/editorial/one-step-closer/377121.html>, last accessed on 28 August 2013.

<sup>31</sup> Interview with Civil Society actor, 16 November 2011, Kathmandu.

<sup>32</sup> The National police human rights section also vets combatants for deployment to UN missions. This also constitutes a motive for combatants to impede any investigation of their own role in abuses. Interview with member, Nepal Police, 22 November 2011, Kathmandu; Interview with Civil Society actor, 20 November 2011, Kathmandu.

<sup>33</sup> Crozier and Candan, November 2010, p. 16, *supra* note 15.

<sup>34</sup> Political violence surrounding Maoist protests predominantly involving clashes between CPN-M and UML affiliates, including indiscriminate bombings, killings and kidnappings, was particularly prevalent during the 13 months prior to Madhav Kumar Nepal's 30 June 2010 departure from the Prime Minister's office. See International Crisis Group, 7 April 2011, p. 8, *supra* note 15.

<sup>35</sup> A 2009 Home Ministry report noted that only 23 of the 109 armed groups active in Nepal were political or political/criminal. Victims and their representatives cite the cost of hiring someone to carry out a targeted execution along the border region with India as being 5000 rupees or USD \$60. Victim speaking at a meeting with victims and victims' representatives, 22 November 2011, Kathmandu. Crozier and Candan, November 2010, pp. 13–14, 20, *supra* note 15.

prove attractive as proxy instruments of intimidation for political and security sector elites. Similarly, elites may employ other political or apolitical armed groups not involved in the conflict, as disassociated instruments of witness intimidation.<sup>36</sup>

The Maoist threat is predominantly located in Nepal's rural geography, where they exercise monopoly control over decision-making *via* armed Maoist youths and an absent State.<sup>37</sup> The integration of over 1,400 PLA combatants into the Army, and the reintegration of most combatants into communities, significantly diminishes the threat the Maoists posed when in containment.<sup>38</sup>

### **10.2.3. The Role of Perceived Prosecution in Exaggerating or Mitigating the Threat to Witnesses**

The increased threat posed to witnesses in a longer criminal process is further exaggerated in the instance of a preceding truth commission, particularly one with inadequate protective capacity. Those that pose a threat to witnesses are not necessarily attempting to seek revenge, but are often attempting simply to kill a process: prosecution. When the level of witness-oriented quality control in fact-finding is inadequate proportionate to the threat, the consequences for actual and perceived witnesses and sources can be severe. For example, the commission of inquiry into post-election violence in Kenya, where the threat of subsequent ICC or domes-

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<sup>36</sup> Such groups include the Kirati Janabadi Workers Party ('KJWP') and Royalist or Hindu far-right parties. Political actors also employ Village Development Committee budgets to provide patronage for armed youth enforcement of subversive activities such as general economic shutdowns. See International Crisis Group, 7 April 2011, p. 14, *supra* note 15; Crozier and Candan, November 2010, p. 16, *supra* note 15.

<sup>37</sup> Geographical factors, such as elevation and forest, explained 25 percent of the conflict intensity variation, while pre-conflict poverty is also a significant predictor of conflict intensity. The rural and relatively isolated Dang district, for example, is particularly vulnerable to 30,000 Young Communist League and 10,000 Youth Force foot soldiers that have often violently clashed and are easily manipulated by political actors. Fringe political groups such as the Kirati Janabadi Workers Party ('KJWP') continue to pose a peripheral security threat in rural areas. In March 2011, the KJWP burned down a village development committee office in Udaipur in Nepal's East where public sentiment appears ripe for civil disobedience and protest. See Crozier and Candan, 7 April 2011, pp. 2, 4, *supra* note 15; Quy-Toan Do and Lakshmi Iyer, Geography, Poverty and Conflict in Nepal, in *Journal of Peace Research*, 2010, vol. 47(6), pp. 735–748, 736, 740.

<sup>38</sup> Elements within UCPN-M have previously threatened to recruit in response to potential NA expansion. See Crozier and Candan, November 2010, p. 12, *supra* note 15; Ekantipur.com, 28 August 2013, *supra* note 30.

tic prosecutions was clear, cited senior leaders of the two main political parties as responsible for the 1,133 people killed.<sup>39</sup> Exaggerating the threat further was the fact that Kenyan efforts to reform the security sector and to disarm non-State armed groups did not precede national and international fact-finding. Targeted killing of witnesses followed, before and after the Commission's presiding Judge handed the ICC the names of persons requiring criminal investigation.<sup>40</sup> Even after the Kenya National Commission on Human Rights and after the Waki Commission of Inquiry witnesses began to be targeted, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, visited Mt. Elgon, where police crimes occurred, to carry out enquiries. Police followed Special Rapporteur Alston, and witnesses were subsequently intimidated.<sup>41</sup> Alston's behaviour constituted a grave miscalculation of the level of witness-sensitive quality control required in the Kenyan situation. In Nepal, targeted killings of witnesses have already occurred in cases reported to the police.<sup>42</sup> Public denouncements have procured witness intimidation.<sup>43</sup>

Like the Kenyan Commission of Inquiry, South Africa's Truth and Reconciliation Commission ('SATRC') relied on prior investigative reports by local non-governmental organisations that failed to adequately

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<sup>39</sup> The inquiries were carried out by the Kenyan National Commission on Human Rights ('KNCHR') and the Commission of Inquiry into the Post-Election Violence ('CIPEV'), commonly known as 'the Waki Commission'. Republic of Kenya, Commission of inquiry into the post-election violence chaired by Justice Waki (the Waki Commission), pp. vii, 305.

<sup>40</sup> A police driver turned KNCHR insider witness provided testimony to 58 alleged murders of arrested persons by Kenyan police officers. He was murdered outside a safe house he had been placed in by the KNCHR, which had no background in protective practices. The Kenyan government passed witness protection legislation. However, remarks from Kenyan officials and the legislation's designing personnel indicated the programme's capacity, and the capacity of Kenyan criminal justice, would only facilitate protection in politically expedient cases in the short to medium term. See Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, Institute for Security Studies, Pretoria, 2010, pp. 117, 121 and 129.

<sup>41</sup> Electronic communication from a civil society actor accompanying the visit to Mt. Elgon, 26 May 2010; see also Mahony, 2010, *supra* note 40.

<sup>42</sup> Interview with Civil Society actor, 16 November 2011, Kathmandu.

<sup>43</sup> *Ibid.*

protect witness anonymity.<sup>44</sup> However, the threat to witnesses was severely diminished with a witness protection programme and State reluctance to prosecute abuses that the SATRC reported.<sup>45</sup> Were prosecutions to have been pursued by the South African State, the threat to witnesses testifying before the SATRC would have been exaggerated.<sup>46</sup> At Sierra Leone's Truth and Reconciliation Commission ('SLTRC'), the ambiguity of the Commission's relationship with the Special Court for Sierra Leone deterred many potential witnesses, particularly perpetrators, from testifying. However, the SLTRC's amnesty for all but 13 prosecuted by the Special Court, combined with the security circumstances described above, mitigated perpetrator incentives to carry out threats to witnesses.<sup>47</sup>

#### 10.2.4. Naming Names: Attributing Individual Responsibility

At Guatemala's Commission for Historical Clarification ('CEH'), the conflict's primary perpetrators, the State and State security forces, vehemently opposed naming names or prosecution.<sup>48</sup> The State also refused to

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<sup>44</sup> Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa", in *Human Rights Quarterly*, November 2003, vol. 25(4), pp. 1117–1149, 1123.

<sup>45</sup> The SATRC was reluctant to invoke subpoena powers and the South African State was unwilling to prosecute even those not provided amnesty by the SATRC. Quinn and Freeman, November 2003, p. 1126, *supra* note 44.

<sup>46</sup> At the inception of the SATRC, it was not clear if accused persons would be prosecuted or not. Witness protection availability and wide media coverage lent witness participation public legitimacy, emboldening victim and insider witness participation. At the SATRC, because of non-prosecution of perpetrators (particularly those that did not testify before the SATRC), perpetrators were threatened more commonly than witnesses. Quinn and Freeman, November 2003, p. 1123, *supra* note 44.

<sup>47</sup> A last-minute reservation by the United Nations delegate stated that the UN did not recognise amnesty in cases of international criminal law allowing the Special Court's jurisdiction over these crimes. Section 7(3) *Sierra Leone Truth and Reconciliation Commission Act*, 23 February 2000, Sierra Leone Gazette, vol. cxxxi, no. 9, allows the TRC to withhold incriminating evidence from criminal processes; Article XXVI, *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front*, Signed at Lome, 7 July 1999; United Nations Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, 5.

<sup>48</sup> They committed 93 percent of documented abuses (including 200,000 killed) during the 1960–1996 civil war. Negotiations surrounding the mandate to name perpetrators delayed the Commission's creation by three years. The rebel Unidad Revolucionaria Nacional Guatemalteca ('URNG') committed only three percent of abuses. See Priscilla Hayner, *Unpeakable Truths: Transitional justice and the challenge of truth commissions*, 2nd ed.,

provide information, documentation or other evidential co-operation. It refused to establish a witness protection programme, despite targeted killings carried out by police and criminal groups linked to State security forces.<sup>49</sup> Where names are not named and prosecution appears less certain, linking targeted killings to witness co-operation can be difficult.<sup>50</sup> This means that where investigations have already taken place, where prosecution is perceived as imminent and where witnesses are widely known, their targeted killing can more easily be attributed to their co-operation with a commission's investigations. Where conflict persists or where witness or perpetrator identities are not publicly known (as in Guatemala), drawing a connection between targeted killings and witness co-operation becomes more difficult.<sup>51</sup> Focusing investigations only on the scale and nature of the abuses and not on individual responsibility (naming names) diminishes the threat, whilst making it more difficult to identify particular incidents, and therefore witnesses.

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Routledge, New York, 2011, pp. 32, 34; Quinn and Freeman, 2003, p. 1122, *supra* note 44.

<sup>49</sup> Hayner, 2011, p. 35, *supra* note 48; Immigration and Refugee Board of Canada, *Guatemala: Protection available to witnesses of murder and for victims of violent crime (1998–1999)*, 22 February 2001, available at <http://www.unhcr.org/refworld/docid/3df4be388.html>, last accessed on 10 June 2011.

<sup>50</sup> The incremental threat of justice sector reform and prosecution of abuses comparative to the eminence of punitive consequences in Kenya makes linking targeted killings to perceived witness co-operation in civil war cases more difficult. Guatemalan State reluctance to prosecute after the presentation of the Commission's report was evident in its refusal to extradite Guatemalan President of the Congress, Jose Efraín Ríos Montt to Spain to face war crimes charges and the fact only three of the 626 documented massacres were prosecuted by 2009. Hayner, 2011, p. 35, *supra* note 48.

<sup>51</sup> Guatemala's ability to prosecute civil war abuses and other politically sensitive crimes required formal witness protection capacity to avoid police and other army affiliates targeting key insider witnesses. The recent prosecution of four former soldiers for a 1982 massacre and the arrest of a former General on charges of genocide and crimes against humanity signal the incremental steps toward formal criminal justice for civil war abuses in Guatemala. Immigration and Refugee Board of Canada, 22 February 2001; United States Department of State, Internal Cable, ID: 146476, 19 March 2008, Embassy Guatemala, available at [http://www.elpais.com/articulo/internacional/Cable/EE/UU/explica/muerte/chica/manos/policias/despues/les/denunciara/robo/elpepuint/20110215elpepuint\\_22/Tes](http://www.elpais.com/articulo/internacional/Cable/EE/UU/explica/muerte/chica/manos/policias/despues/les/denunciara/robo/elpepuint/20110215elpepuint_22/Tes), last accessed on 10 June 2011; Amnesty international, *Guatemalan former soldiers sentenced to 6,060 years for massacre*, 3 August 2011, available at <http://www.amnesty.org/en/news-and-updates/guatemalan-former-soldiers-sentenced-6060-years-massacre-2011-08-03>, last accessed on 3 August 2011.

### 10.2.5. An Ambiguous Punitive Deterrent in Nepal

In Nepal, ongoing political negotiations appear to place questions surrounding investigation and prosecution of abuses at an ambiguous periphery. Because of the already overwhelmed nature of an under-resourced State prosecution (250 lawyers throughout 75 districts already dealing with over 50,000 cases), only a select few, with greatest responsibility, could feasibly be prosecuted.<sup>52</sup> The Ordinance provides for cases to be referred to the Attorney-General for prosecution.<sup>53</sup> The Ordinance does not indicate whether a special entity to investigate crimes will be established, or if the police will carry out that function (even if they are investigating police or army crimes). The Prime Minister appoints and may dismiss the Attorney-General.<sup>54</sup> He might use this leverage, like Nepali politicians have in the past, to impede or interfere in criminal investigations.<sup>55</sup> Even where the Commission does not provide amnesty, the Government may employ *de facto* amnesty by pressuring the Attorney-General to abstain from prosecuting amnestied cases. It is hoped that a new constitution will establish a State prosecution independent of the executive and the Attorney-General.<sup>56</sup> If the Commission provided cases to an independent prosecuting entity, a significant mode of political interference would be removed. Political interference in attempted prosecutions of Army and police personnel has proven immovable over the previous two decades.<sup>57</sup>

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<sup>52</sup> The Attorney-General's office claims they are currently attempting to pursue all cases despite their limited capacity (the court system's budget is less than one percent of the budget. Interview with member Attorney-General's office, 22 November 2011, Kathmandu.

<sup>53</sup> Section 25(3), *supra* note 6.

<sup>54</sup> Section 134(1), Interim Constitution of Nepal, 2007. The negotiated Constitution of Nepal may revise this provision to provide the Attorney-General greater security of tenure or establish greater prosecutorial independence for State counsel across Nepal.

<sup>55</sup> Crozier and Candan, November 2010, pp. 19–20, *supra* note 15.

<sup>56</sup> Interview with justice sector donors, 22 November 2011, Kathmandu, *supra* note 19.

<sup>57</sup> Both the Army and the police have historically employed targeting of witnesses as well as political interferences to impede investigations. United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Ambeyi Ligabo, A/HRC/7/14/Add.1, 25 February 2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/112/10/PDF/G0811210.pdf?OpenElement>, last accessed on 10 June 2011, pp. 125–127. Mandira Sharma, "Criminal Justice System in Nepal", in Bishnu Sapkota, *The Nepali Security Sector: An Almanac*, Brambauer Publishers, Hungary, 2009, pp. 277, 281.

Ambiguity also surrounds the number of persons that might be cited as most responsible, were naming of names and/or prosecutions to occur. The number would instruct how senior a person liable to be prosecuted might be. If those fearing prosecution believe that they can leverage political clout to dissuade the Attorney-General from prosecuting, or the police from effectively investigating, they may well employ that more subtle manipulative option rather than target witnesses. Unless amendments to the Ordinance protect witnesses and compel prosecution, civil society actors view the likely security consequences for witnesses as outweighing the Commission's truth-seeking capacity.<sup>58</sup> In such a situation, some civil society actors think that names should not be named, unless a clearer prosecutorial and protective capacity and mandate is provided.<sup>59</sup>

### **10.3. Considering a Formal Protection Programme: Financial Security and Political Parameters**

The cost of providing formal witness protection has been prohibitive for most truth commissions. Ensuring methods of investigation that maintain witness anonymity are employed is critical to procuring information without jeopardising witnesses' psychological or physical security.<sup>60</sup> These methods may not procure the same level of information required to establish command responsibility for alleged crimes. However, a commission's capacity to provide protection may preclude those investigations. In Nepal, restrained investigations would diminish the threat a commission poses to senior military, PLA or political figures and the threat that they, in turn, pose to witnesses.

In the event that the commission decides to name names and pursue insider witnesses, the requirements in law, structural independence, fiscal outlay and personnel need to be considered.

#### **10.3.1. A Legal Framework for Witness Protection**

In order to evaluate the adequacy of a commission's capacity to respond to the implications of sensitive investigations for witness security, one

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<sup>58</sup> Interview with Civil Society actor, 16 November 2011, Kathmandu; Interview with Civil Society actors, Kathmandu, 2 December 2011.

<sup>59</sup> Interview with Civil Society actor, 16 November 2011, Kathmandu.

<sup>60</sup> For a discussion of these techniques see the section on investigation under pre-testimony protection.

must consider the legal framework. This includes domestic legislation, international law and the consideration of the legal mandate at other truth commissions. There is no present witness protection legislation in Nepal. Only the Human Trafficking Act provides for *ad hoc* protection.<sup>61</sup> However, a draft criminal code provides for unspecified and unchallengeable security ‘arrangements’ and a Witness Protection Bill, providing formal witness protection, has been drafted.<sup>62</sup> The Witness Protection Bill leaves the proposed programme vulnerable to fiscal intimidation by Parliament, provides for normative audit procedures that compromise practice and therefore security, and provides several authorities access to sensitive information.<sup>63</sup> Perhaps most concerning is the Bill’s provision of decentralised admission authority to committees comprised of the Chief District Police Officer, District Public Attorney and a Chief District Officer designate in each district.<sup>64</sup> Given the extent of political interference in the criminal justice system, particularly at district level,<sup>65</sup> a fact-finding commission should refrain from using or co-operating with a national witness protection programme empowered by the proposed Bill. The Bill requires revision to reflect the independence and capacity of the commission-specific programme this report proposes. The Bill’s decentralised nature is purportedly due to the remote and semi-autonomous nature of many Nepali districts.<sup>66</sup>

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<sup>61</sup> It provides for providing for security during travel, temporary police protection, access to rehabilitation centres and in camera court proceedings. It also criminalises dissemination of confidential information, allows persons reporting trafficking to “remain unnamed” and admits victims’ statements as evidence without the victim appearing as a witness for cross-examination. Section 5(2), 6(3), 25–27, Human Trafficking and Transportation (Control) Act, 2064, 24 July 2007.

<sup>62</sup> Sections 3(2), 5, 8, 11–16, Draft Bill made for the Protection of Witnesses, United Nations Office of the High Commissioner for Human Rights translation tr/nt/SA; Section 114, Draft Criminal Procedure Code and Criminal Offences (Offence and Implementation) Act 2067, as cited in Informal Sector Service Centre (‘INSEC’), *Witness Protection: A Study Report*, Office of the United Nations High Commissioner for Human Rights, June 2011, p. 37.

<sup>63</sup> Sections 61, 61(5), 45(2), Draft Nepal Witness Protection Bill.

<sup>64</sup> Section 17, Draft Nepal Witness Protection Bill.

<sup>65</sup> See section 10.4. of this chapter on State Co-operation.

<sup>66</sup> Interview with member, Ministry of Peace and Reconstruction, 20 November 2011, Kathmandu.

International legal obligations, while demanding more (including formal protection),<sup>67</sup> place an ambiguous burden on the extent to which a protection programme is required, or what constitutes adequate fulfillment of State obligations in its absence.<sup>68</sup> The reality is that obligations are only triggered when a threat is considered adequately serious. How that discretion should be exercised remains unclear under international law.

There also exists a need for commission-specific witness protection legislation. One critical element that distinguishes South Africa's TRC from Kenya's Waki Commission is that it had its own Witness Protection Programme and held public hearings.<sup>69</sup> The SATRC's 100 percent protection success rate facilitated many findings and a richer historical narrative. Kenya's Commission of Inquiry lacked witness protection capacity and mandate, despite a precarious security situation. Indiscreet investigative methods of contacting and maintaining contact with witnesses exacerbated the threat those witnesses faced.

The Nepal Commission Ordinance provides for a three-person committee, made up of a former chief justice and a civil society actor appointed by the Government and a member of the National Human Rights

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<sup>67</sup> The specific instruments include the Organized Crime Convention (the protection of victims and/or witnesses is also explicitly addressed in the Convention's protocols on Trafficking in Persons, and Smuggling of Migrants) and the United Nations Convention against Corruption. Article 24, 26, United Nations Convention against Transnational, Organized Crime, General Assembly Resolution 55/25, Annex II, Articles 6 and 7, signed by the Government of Nepal, 12 December 2002; United Nations Office on Drugs and Crime, *Good practices for the protection of witnesses in criminal proceedings involving organised crime*, United Nations, New York, 2008, available at <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>, last accessed on 10 June 2008, p. 2, 25; Nepal ratified the Convention Against Corruption on 31 March 2011. The convention encourages States parties to sign witness protection co-operation agreements with one another. See United Nations Convention against Corruption, UNCAC Signature and Ratification Status as of 1 May 2011, available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, last accessed on 25 May 2011; Articles 32, 33, 37, para. 4, *United Nations Convention against Corruption*, United Nations General Assembly Resolution 58/4, 31 October 2003.

<sup>68</sup> Under Article 9, Paragraph 1 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee found that the State is obligated to take adequate action to protect witnesses where a formal protection programme is absent. United Nations, Human Rights Committee – *Lalith Rajapakse v. Sri Lanka* (Decision), CCPR/C/87/D/1250/2004, 26 July 2006, 87th session, 10–28 July 2006, para. 9.7.

<sup>69</sup> Section 35, Promotion of National Unity and Reconciliation Act, 34 of 1995, 19 July 1995.

Commission.<sup>70</sup> The Committee will recommend five Commission members to the Government and those Commissioners shall have discretion to ‘make appropriate arrangements’ for protection.<sup>71</sup> Leaving the discretion in the hands of the Commissioners will inevitably cause their capacity and independence to instruct the level of protection provided.

Historically, given political inclination to interfere in politically sensitive investigations, interpreting the Bill’s provision of discretion to request Government of Nepal assistance in protecting witnesses<sup>72</sup> as compelling Commission/Government co-operation would be ill-advised. Rather, the terms ‘the Commission shall’ could be interpreted as providing the Commission sole discretion over the level of protection provided.<sup>73</sup> However, sole discretion requires the Commission to retain its own capacity including security and intelligence personnel.

Another concerning absence in the legislation is the weakness of whistleblower protection. The Ordinance provides for the shifting of personnel to other agencies or regions.<sup>74</sup> While the Ordinance prohibits legal action against persons providing testimony or information to the Commission,<sup>75</sup> it does not protect the careers or work environment of whistleblowers.<sup>76</sup> Whistleblower protection is critical to procuring insider witness co-operation and identifying command responsibility. In circumstances of a high threat of political interference, fact-finding commissions should interpret their legal mandate, from both international and domestic instruments, as providing discretion to themselves to provide sovereign psychological and physical protection to witnesses.

### 10.3.2. Funding

As already stated, the cost of naming names, investigating chain of command, and protecting insider witnesses is significantly higher than that of limiting investigations to the scale and nature of abuses, particularly

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<sup>70</sup> Section 3, *supra* note 6.

<sup>71</sup> Section 17(1), *supra* note 6.

<sup>72</sup> Section 17(3), *supra* note 6.

<sup>73</sup> See the section on the protection program’s location.

<sup>74</sup> Section 17(2), *supra* note 6.

<sup>75</sup> Section 17(4), *supra* note 6.

<sup>76</sup> Whistleblower protection includes criminalisation of subtle forms of intimidation such as job loss, career stagnation or similar methods deployed against witness family members.

where threat levels are high. In Kenya, despite limited resources and a high threat level, the Waki Commission investigated the chain of command behind abuses, causing witnesses to be targeted and in some instances killed. In Sierra Leone, the same approach, despite limited means, was adopted. The SLTRC's total budget was five million dollars. For purposes of impartiality, the Commission's funds were administered by the United Nations Development Program. It was only empowered to 'take into account' victims and witnesses' 'interests' when inviting them to give statements, including security and anonymity related concerns. The SCSL was expected in 2003 to cost around USD 400 million on the basis that proceedings would conclude in 2009.<sup>77</sup> However, the threat level had diminished due to the detention of persons to be held criminally accountable and the reintegration and rehabilitation of other combatants. South Africa had a comparatively large budget that allowed for witness protection in an environment in which the accused still wielded influence over State security forces. Protective capacity accompanied with a low threat of prosecution, allowed the SATRC to investigate the chain of command.<sup>78</sup> The South African TRC was endowed with over 300 personnel and a budget of USD 18 million per year for two and a half years (and a reduced budget for its concluding three years). The financial burden of providing further protection to witnesses has been cited as one justification for the non-prosecution of cases arising from SATRC testimony. The Commission's capacity constraints left witness protection vulnerable to infiltration by former State security sector elements seeking to impede witness testimony. In the case of Guatemala, a meager budget and a high threat level meant that the Guatemalan Commission did not name names. The success for witness security has been difficult to ascertain. The Guatemalan Commission had a USD 11 million budget and up to 200 person-

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<sup>77</sup> Interview with former member, Registry, Special Court for Sierra Leone, Cheltenham, United Kingdom, 19 April 2007; Interview with former member, Registry, Special Court for Sierra Leone, Freetown, 2 April 2007; Section 7(4) Truth and Reconciliation Commission Act no. 9 (2000), 10 February 2000, Sierra Leone Gazette CXXXI.

<sup>78</sup> Quinn and Freeman, November 2003, p. 1121, *supra* note 44; Interview with former member, *National Prosecuting Council* – Kwazulu Natal, Pretoria, South Africa, 1 April 2008; Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission", in *Journal of International Affairs*, 1999, vol. 52(2), pp. 647–667, and 653.

nel for 18 months of operation but did not have a formal protection programme, effectively prohibiting public hearings.<sup>79</sup>

Taking statements from witnesses is the lowest cost a fact-finding commission will bear. Employing anonymity in reporting and encouraging witnesses to tell of the socio-economic impact of a conflict will minimise the cost of identifying and approaching witnesses discreetly. This is because it will be difficult for perpetrators to ascertain who gave testimony about abuses and who simply spoke of a diminished standard of living. Given the small size of Nepal's economy, such an approach may be the most fiscally sensible option.

Provision of psychosocial support is a significant cost but facilitates greater witness psychological security and openness, driving a richer historical narrative. This cost can be mitigated with comprehensive psychosocial training of statement takers, or (where witnesses are comfortable with their presence) collaboration with local State actors or NGOs that work with victims or in public health.

Testimony may also pose a significant cost for commissions, including witness transportation, food, discreet arrival and departure, as well as technical measures to maintain anonymity.<sup>80</sup>

Formal protection is the most costly available method.<sup>81</sup> Post-testimony protection costs at truth commissions may be higher where testimony is required in a subsequent prosecution. This is because that case may take a long time to begin and conclude – extending the most costly period of protection (pre-testimony).<sup>82</sup> If a formal protection programme is created, costs will instruct the number of witnesses the programme is able to admit and the consequent admission criteria it employs – a low-

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<sup>79</sup> Hayner, 2011, p. 33, *supra* note 48; Quinn and Freeman, 2003, p. 1122, *supra* note 44.

<sup>80</sup> These measures include video link with voice distortion – video link from isolated locations to avoid transport costs. Section 17(5) of the Ordinance provides for reimbursement of reasonable testimony related travel, lodging and food expenses.

<sup>81</sup> Costs include set-up costs, temporary protection or relocation, relocation, personnel, travel, witness allowances, psychological assessments and counseling, additional prison costs, and social sustenance allowances. Allowances need to be suitable to sustain the person and comparable to previous legitimate income until a new life and job can be established. United Nations Office on Drugs and Crime, 2008, p. 50, *supra* note 67.

<sup>82</sup> Subsequent meetings with investigators require transportation to neutral locations and testimony before the courts require repatriation to Nepal. A less efficient criminal process may be protracted and require multiple meetings with investigators.

budget programme would likely focus on high-value insider witnesses. The number of incidents commissions have jurisdiction to investigate primarily drives cost. The cost of living in Nepal, and its neighbours, is relatively inexpensive. Providing safe accommodation and establishment costs for witness protection could further be mitigated through working with foreign partners able to assist with post-relocation employment.<sup>83</sup> Where investigation of command structures discloses not only abuses, but also economic crimes, the seizure, freezing and confiscation of criminal proceeds can justify witness protection expenditure.<sup>84</sup>

While seizure of assets may mitigate costs, sourcing financing to cover protection operations often prohibits the creation of protection capacity. The extent to which Nepal's Commission is viewed as independent may determine who provides its funding. Donors appear unwilling to support a programme perceived to be vulnerable to political manipulation, despite expressions of support for the importance of witness protection for long-term justice sector reform.<sup>85</sup> A recent review suggested that donors

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<sup>83</sup> Getting witnesses into employment as soon as possible divests responsibility for post-relocation witness maintenance. Interview with former prosecution member, 2008, *supra* note 78.

<sup>84</sup> This practice is already enshrined in law relating to criminal cases of human trafficking that provides 10 percent of the fine levied against a convicted accused to the person or persons who reported the offence. See Section 19, Human Trafficking and Transportation (Control) Act, 2064, 24 July 2007, *supra* note 61. The TRC's mandate: to investigate "the truth of incidents" and "persons involved" in the conflicts abuses, empowers investigation. Section 3(1) TRC Bill; Interview with former prosecution member, 2008, *supra* note 78; Standard Times Newspaper, "Fake gold, diamond dealers threaten to kill American citizen", 9 June 2008, Freetown Sierra Leone, p. 1.

<sup>85</sup> Donors view justice sector reform as requiring planning that looks at the entire justice system in all its inter-relatedness over at least a five-year period. Donors have cited the continuing shift in the political economy of justice sector reform, in tandem with continued changes in the political configuration and justice sector leadership (police chief and Attorney-General). This causes donor apprehension as to assistance for reforms that may carry no effect or for commissions that may cause further instability. While most UN agencies appear apprehensive about Nepal's proposals, the UN Office of the High Commissioner for Human Rights has invested a lot of time in creating commissions and may be more willing to assist. One donor cited potential and perceived dilemmas: "If 450 people get amnesty overnight and the Minister has been accused of murder, should we continue to provide justice sector funding?". At the same time, witness protection is constantly cited as an integral requirement of a reformed justice system capable of addressing impunity. Interview with justice sector donors, 23 November 2011, Kathmandu; Interview with justice sector donors, 22 November 2011, Kathmandu, *supra* note 19; Security, Justice and Rule of Law Donor Coordination Group, *Preliminary Mapping, Rule of Law/Security and Access to Justice in Nepal*, October 2010, p. 9; United Nations Office of the High Commis-

might be willing to support witness assistance measures (including training on witness sensitive investigations), but not formal witness protection.<sup>86</sup> They appear unwilling to finance legislative, procedural and institutional reform.<sup>87</sup> If the Nepali State is solely responsible for financing the Commission and protection, fiscal intimidation may be a concern.<sup>88</sup> For formal protection, commissions require fiscal sovereignty and a guaranteed budget tied to inflation and energy price fluctuations that accounts for post-commission protection.<sup>89</sup> Fiscal failure or the threat thereof may leave witnesses unprotected or unwilling to co-operate. The justice system's underfunding does not suggest that the commissions will be a financial priority.<sup>90</sup> The Maoists have already suggested that individual perpetrators pay reparations.<sup>91</sup>

Auditing of the commissions must weigh competing values of financial accountability and witness security.<sup>92</sup> High-level personnel vetted by intelligence sources and the commission should conduct audits.<sup>93</sup>

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sioner for Human Rights, OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill, Press Release, 3 August 2007, available at [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year\\_2007/AUG2007/2007\\_08\\_03\\_HCR\\_TRCB\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year_2007/AUG2007/2007_08_03_HCR_TRCB_E.pdf); Security, Justice and Rule of Law Donor Coordination Group, *Review of International Community Support to Access to Security and Justice and Rule of Law*, 31 August 2011.

<sup>86</sup> Security, Justice and Rule of Law Donor Coordination Group, *Review of International Community Support to Access to Security and Justice and Rule of Law*, 31 August 2011, p. 36.

<sup>87</sup> *Ibid.*, p. 46.

<sup>88</sup> Fiscal intimidation of investigative bodies is a concern in Nepal as it is elsewhere. Interview with former member *Ministry of Justice and Constitutional Affairs*, Kampala, Uganda, 8 April 2008; Interview with member, *National Prosecuting Authority of South Africa* – Pretoria, South Africa, 29 March 2008; Interview with member, *Office of the Attorney General* – Nairobi, Kenya, 4 April 2008.

<sup>89</sup> The budget must account for contingency funds. The transport-intensive nature of protecting and assisting witnesses demands that budgets account for fluctuations in the cost of this critical area of protective function.

<sup>90</sup> Interview with members, Nepal Police, 22 November 2011, Kathmandu; Interview with member, Attorney-General's office, 22 November 2011, Kathmandu; Interview with justice sector donors, 23 November 2011, Kathmandu.

<sup>91</sup> Interview with justice sector donors, 23 November 2011, Kathmandu, *supra* note 19.

<sup>92</sup> The proposed auditing under the witness protection bill fails to account for witness security.

<sup>93</sup> Their identity should remain top secret, key expenses aggregated, and reports classified and provided to the Minister of Peace and Reconstruction with witness names excluded. Cash should be used to pre-empt hacking of banks or other records. Interview with former

### 10.3.3. Programme's Institutional Location

A protection programme that determines protection provision independent of investigators and politicians best protects report integrity and witness security from:

1. The provision of protection benefits in exchange for inauthentic and politically informed testimony and;
2. Political interference to intimidate witnesses providing politically sensitive testimony.

At the Special Court for Sierra Leone, for example, prosecution personnel provided key insider witnesses with non-protection, material inducement (including trips to seaside resorts). Concerns about Kenyan political interference, on the other hand, caused programme design at the cutting edge of structural independence. Perception is also important. South Africa's criminal justice programme functions independently, but is located at the National Prosecuting Authority, undermining perceived independence. The ICC has found that investigative conflict of interest in providing protective measures, rather than an independent protection programme, may 'unnecessarily create an increased risk' of investigators inducing inauthentic testimony.

The Nepali Commission's enacting Ordinance is ambiguous as to the structure of potential commission protection. The Ordinance provides discretion to the commissioners to establish, and therefore design a protection programme, by using its power to form 'Sub-committees' or 'Task Forces'.<sup>94</sup>

In order to ensure consistent application of admission criteria and mitigate vulnerability to malicious interference, admission decisions should be centralised in the hands of the programme's chief witness protection officer.<sup>95</sup> Decisions to temporarily relocate or protect witnesses

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prosecution member, 2008, *supra* note 78; Interview with former National Prosecuting Authority member, 2008, *supra* note 88; United Nations Office on Drugs and Crime, 2008, p. 58, *supra* note 67.

<sup>94</sup> Sections 17(1) and 31, *supra* note 6.

<sup>95</sup> In the event the Chief Witness Protection Officer is absent, the Deputy Chief Witness Protection Officer should assume the Chief Protection Officer's responsibilities.

may be made by case officers. Temporary protection should not exceed two weeks.<sup>96</sup>

#### **10.3.4. The Residual Question (When a Commission Concludes)**

Preserving witness security and having a plan to preserve security at a commission's conclusion is critical to convincing witnesses that their information and security will not fall into the hands of personnel or institutions they do not trust. Dissolution provisions provide the proposed Nepali Commission's archives to the Ministry of Peace and Reconstruction.<sup>97</sup> The Chief Protection Officer should be provided a continuing role within the Ministry to retain exclusive residual archive access so witnesses that distrust the Government will not fear disclosure of their information. Pseudonyms should be provided in other archives. The Special Court for Sierra Leone has taken provisional steps to provide residual protection responsibility for its witnesses to Sierra Leone's justice system, an entity distrusted by many Sierra Leoneans. A conclusive decision has not yet been made in Sierra Leone.<sup>98</sup>

#### **10.3.5. Personnel**

The personnel that staff a protection programme are critical to its success. Where personnel will be sourced, how personnel integrity will be ensured, the diverse skills a protection programme requires and the sensitivity of other commission personnel to witnesses' physical and psychological security are all important considerations for a protection programme.

The Ordinance requires the Government to provide personnel, in consultation with the Commission, which may also contract personnel from elsewhere.<sup>99</sup> The Bill also limits remuneration and benefits of personnel to that reflecting their Government equivalents.<sup>100</sup> While these conditions present little incentive for Government personnel to leave permanent positions, the absence of State witness protection may provide scope for flexible interpretation of what equivalent Government condi-

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<sup>96</sup> Within that period the Chief Witness Protection Officer should conclude a decision on admission.

<sup>97</sup> Section 36(3), *supra* note 6.

<sup>98</sup> Mahony, 2010, p. 93, *supra* note 40.

<sup>99</sup> Section 11, *supra* note 6.

<sup>100</sup> Section 11(3), *supra* note 6.

tions constitute. Attractive conditions of service are required to attract foreign or local high-caliber personnel for this historically significant task. The absence of State witness protection in Nepal means some foreign expertise may be required for a formal protection programme.

Because of the need for a sub-committee to be appointed, constituting a protection programme, Commissioners will likely drive personnel procurement. At the TRC, a maximum of seven Commissioners are to be selected from among human rights practitioners that are not political party members. The commissioner appointment process places great power in the hands of the Constituent Assembly Chairperson and the Government.<sup>101</sup> As a consequence, some observers believe that major parties will make appointments that ensure their interests are pursued.<sup>102</sup> The absence of civil society appointed posts has prompted criticism.<sup>103</sup> A key indicator of the Commissioners' independence will be the authority, impartiality and integrity of the appointed Chief Witness Protection Officer, as at the SATRC. South Africa's TRC protection programme head was commonly viewed as the leading witness protection professional in the country. Macadam had previously directed the *ad hoc* programme in the KwaZulu Natal province. He focused the TRC programme on high-profile cases where a threat was originally anticipated, securing 100 percent success in protecting witnesses' physical security. The SATRC's success in avoiding previous experiences of programme infiltration by criminal elements was in no small part due to attractive employment conditions and effective vetting practices. Compromised protection officers at *ad hoc* State pro-

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<sup>101</sup> A selection committee will comprise the Constituent Assembly ('CA') Chairperson, a CA Chairperson appointed human rights commissioner and a government appointed civil society member. The poorly supported National Human Rights Commission also exposes its personnel to political manipulation. The NHRC was scaled back after foreign donor support declined and Government of Nepal responsibility for funding increased. See Sushil Pyakurel, National Human Rights Commission, in Bishnu Sapkota, *The Nepali Security Sector: An Almanac*, Brambauer Publishers, Hungary, 2009, p. 302; Section 4, TRC Bill 2011.

<sup>102</sup> As a consequence, Madhesi, Maoist, UML, and NC commissioners are likely to be appointed. Interview with member, National Human Rights Commission, Kathmandu, 20 November 2011; Interview with Civil Society actor, 20 November 2011, Kathmandu.

<sup>103</sup> The International Center for Transitional Justice cites civil society nomination and consultation, as well as transparent vetting as best practice for appointment of Commissioners elsewhere. See, for example, International Centre for Transitional Justice Nepal, *Selecting Commissioners for Nepal's Truth and Reconciliation Commission*, Briefing, March 2011, pp. 2–4.

grammes assisted criminals seeking to avoid prosecution by placing them in protection programmes. Other criminals provided false testimony to infiltrate a South African programme and pursue protected witnesses.<sup>104</sup>

A witness protection programme requires a diversity of skills. They include intelligence, criminal investigation, law, psychology, gender-specific and youth counselling, cultural and linguistic fluency, as well as security expertise.<sup>105</sup> These personnel should also constantly monitor commission-wide witness-oriented practices. They should train personnel and provide best practice where necessary. Personnel not directly involved in witness protection, particularly investigative personnel, are also important to witnesses' physical and psychological security. Given the historical tendency of the Government of Nepal to manipulate investigations of combatant abuse,<sup>106</sup> investigator and statement-taker training and vetting is essential to impede the planting of biased investigative personnel or the misinterpretation of witnesses. The SATRC had problems with inadequate writing skills of statement takers causing commissioner confusion as to what witnesses were trying to say. Statement takers were scarce and predominantly comprised volunteer human rights and social science personnel. Miscommunication may inaccurately inform investigations and threat assessments, with serious consequences for witness risk and the integrity of a commission's final report. Empathy is a critical statement-taker attribute that facilitates uninhibited witness dialogue. Another cited inadequacy relating to SATRC statement-taker training concerned knowledge of available State services to which witnesses may be referred.<sup>107</sup>

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<sup>104</sup> South Africa Press Association, *Deputy A–G appointed Truth Commission's witness protector*, South Africa Prosecuting Authority, 4 April 1996; Mahony, 2010, p. 102, *supra* note 40; Interview with former National Prosecuting Authority member, 2008, *supra* note 88; Interview with former prosecution member, 2008, *supra* note 78.

<sup>105</sup> Independent intelligence and investigatory capacity is required to design protective strategy based on analysis of the capacity and willingness of hostile actors to carry out threats. Legal personnel are also required to ensure witnesses fully understand the implications of testifying and signing an admission memorandum of understanding. The programme will require psychologists, particularly gender and child specialists, to evaluate, provide counseling and explain commission practices and procedures. United Nations Office on Drugs and Crime, 2008, pp. 47–49, *supra* note 67; Interview with former National Prosecuting Authority member, 2008, *supra* note 88; Interview with former prosecution member, 2008, *supra* note 78.

<sup>106</sup> Human Rights Watch, December 2010, pp. 3–4, 6.

<sup>107</sup> Quinn and Freeman, November 2003, p. 1135, *supra* note 44.

Personnel throughout the Commissions, particularly witness protection personnel, require thorough vetting. Thorough vetting and sporadic re-vetting for potential conflicts of interest, breach of conditions of service, psychological vulnerabilities or prior abuses is essential to maintaining programme confidentiality.<sup>108</sup> Working with and protecting psychologically vulnerable or former criminal witnesses causes psychological repercussions for personnel, who need to have counselling available.<sup>109</sup>

The police and the Army are not currently trained specifically in witness sensitive practices.<sup>110</sup> International personnel provide a useful source if commissioners determine local personnel to be too vulnerable to compromise.<sup>111</sup> However, localised knowledge of Nepali political and security elements critical to threat and protective evaluation will also be required to inform a Chief Protection Officer's threat assessment. Similarly, culture, language and gender-specific psychosocial personnel may best be sourced from local civil society.<sup>112</sup>

#### 10.4. State Co-operation

##### 10.4.1. A Culture of State Non-Cooperation

One donor I spoke with in Nepal told me:

In Achham I had meetings with the district court judge and lawyer. I asked if to get away with rape and murder, the go-

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<sup>108</sup> Witness protection personnel will require intimate knowledge of Nepalese security dynamics. Former security sector personnel will require particularly rigorous vetting given their historical vulnerability to political coercion. Coercive methods include leverage over individual officers' careers. Conditions of service should require complete transparency of personnel (and family's) financial affairs. The NHRC has not established proposed guidelines for personnel appointment. Crozier and Candan, November 2010, pp. 19–20, *supra* note 15; Interview with former National Prosecuting Authority member, 2008, *supra* note 88; The NHRC has not established proposed guidelines for personnel appointment.

<sup>109</sup> Counselling provides an outlet for discussing traumatic issues that they are prohibited from discussing with loved ones.

<sup>110</sup> Govinda Thapa, "The Nepal Police and the Armed Police Force", in Bishnu Sapkota, *The Nepali Security Sector: An Almanac*, Brambauer Publishers, Hungary, 2009, p. 166.

<sup>111</sup> Some civil society actors are concerned that personnel seconded from the security or intelligence apparatus will not be independent. Interview with Civil Society actor, 16 November 2011, Kathmandu.

<sup>112</sup> Even if all protection personnel and investigators were to be sourced from foreign States, those personnel would still require local translators and an intimate understanding of local security dynamics. Interview with former prosecution member, 2008, *supra* note 78.

ing rate is \$10,000 (as I had heard). Rather than deny this possibility, they discussed whether the rate in Achham district is higher or lower than elsewhere.<sup>113</sup>

States have proven adept at co-operating with truth commission and criminal processes so as to shape historical narratives and prosecution case selection.<sup>114</sup> Diminishing the Nepali Commission's need for State co-operation will lend them greater independence and legitimacy. Maoist, Nepal Army and political refusal to co-operate with investigation of abuses, in some cases directing investigations to be discontinued, provides impunity and tacit approval to personnel carrying out or ordering witness intimidation or elimination.<sup>115</sup> Like commissions elsewhere, the Nepali Commission would likely disproportionately rely on witness statements

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<sup>113</sup> Even the Attorney-General's office note unorthodox pressures on their under-capacitated staff. Interview with member, Attorney-General's office, 22 November 2011, Kathmandu; Interview with justice sector donors, 23 November 2011, Kathmandu.

<sup>114</sup> For example, the Rwandan government refused to provide to the International Criminal Tribunal for Rwanda, documentation and witness access incriminating ruling party personnel, bringing court proceedings to a standstill and forcing the court's prosecutor to be replaced. While non-punitive commission investigations might not solicit such a belligerent response, interested parties may still employ cooperative methods, including witness tampering, to skew the content of a commission's report. At the SLTRC many government witnesses did not testify or did so in a particularly sparse fashion. A report perceived as applying disproportionate focus on one party to the advantage of another elevates discontent amongst persecuted groups, elevating the threat to witnesses. United Nations Security Council, 29 July 2003. Letter dated 28 July 2003 from the Secretary-General addressed to the President of the Security Council, S/2003/766, available at <http://www.undemocracy.com/S-2003-766.pdf>, last accessed on 10 November 2010; Carla Del Ponte, 2009, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir*, Other Press, New York; Lars Waldorf, *A Mere Pretence of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, in "Fordham International Law Journal", April 2010, vol. 33, p. 1221.

<sup>115</sup> Where public pressure for investigation of abuses has required placation, investigative committees and military proceedings producing flawed outcomes that are not acted upon are employed. Implicated personnel, in some instances, are promoted, in a recent case to a ministerial position. The Nepal Army's has previously refused to follow orders of the Nepalese judiciary, the Prime Minister or UN and Human Rights Commission to surrender accused Army personnel and the government has recently ordered an amnesty and a pardon for a conflict related murder. Human Rights Watch, December 2010, 2–4, 8–9; Crozier and Candan, November 2010, p. 19, *supra* note 15; The Kathmandu Post, Monday Interview, 13 November 2011, available at <http://www.ekantipur.com/the-kathmandu-post/2011/11/13/oped/monday-interview/228180.html>, last accessed on 17 November 2011.

and testimony because the State withholds documentary or other corroborating evidence.<sup>116</sup>

State non-cooperation with politically sensitive inquiries and criminal inquiries is founded in Nepali law.<sup>117</sup> The Commission's power to demand documentation and co-operation may have to be contested before the courts, as the Ordinance implies that the Commission may only have power to write and request the removal of non-compliant Government personnel.<sup>118</sup> Where elements of the State threaten witnesses, the State may refrain from providing protection despite the law. Were Nepal's Commission not to be provided with adequate finance for a Commission-located independent protection programme, they would be left dependent upon co-operation they appear unable to compel.

The Government and the armed forces' reluctance to co-operate with investigations instructs the difficulty Commission investigators are likely to encounter in procuring witness co-operation from security sector personnel. Government co-operative obligations should be incorporated, through focal point personnel, into Security Sector reform that assists attitudinal change towards co-operation.<sup>119</sup>

#### 10.4.2. Foreign Co-operation

There is also a global power dynamic to internal Nepali politics that may inform variance in protection assistance from Nepal's neighbours and other States – depending on a witness' perceived affiliation. The Maoists, allegedly viewed by the US and India as agents of Chinese influence,

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<sup>116</sup> The Commission of Historical Clarification in Guatemala was able to employ vast databases compiled by local NGOs as well as US documentation secured *via* a freedom of information request, to compliment 7,338 non-public testimonies. Ordinary police investigations are already disproportionately dependent upon witness testimony due to technological, training and equipment incapacity. See Hayner, 2011, p. 33, *supra* note 48; Quinn and Freeman, November 2003, p. 1122, *supra* note 44; Mandira Sharma, 2009, p. 281, *supra* note 57.

<sup>117</sup> The Evidence Act prohibits disclosure of unpublished confidential government documents and prevents compulsion of testimony from public officials when contrary to the public interest. Section 43–44, Evidence Act no. 24 of 2031, 21 October 1974.

<sup>118</sup> S14, Section 11(3), *supra* note 6.

<sup>119</sup> Thoroughly vetted focal point personnel, of sufficient seniority to command immediate and unquestioned cooperation from their colleagues, should be established within State parastatals. Focal points need not be provided witness' original identity and may instead use pseudonyms.

have been included on US Terror and Blocked Persons lists.<sup>120</sup> China reportedly holds a primary interest in procuring Nepali co-operation in securing the Tibet/Nepal border.<sup>121</sup> India (a US regional ally) was a long supporter of Nepal's former monarchy, the Nepali Congress and most Madhesi parties, but has recently sought Maoist rapprochement.<sup>122</sup> These

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<sup>120</sup> The US has also blocked visa applications by implicated Maoist personnel. The US and its regional ally, India, have expressed their enthusiasm in supporting the transit of Tibetan refugees through Nepal to India, an issue to which the former Monarchical government was also non-committal. Upon receiving persistent requests from the US Ambassador that Nepal assist in providing safe passage for Tibetan refugees, the then Foreign Minister under the King remained ambiguous. The US intimated a "special, close relationship" with Nepal contingent upon the Royal Government's action on Tibetan refugees. See: Human Rights Watch, December 2010, p. 3; United States Department of State Cable, Ambassador James F. Moriarty, *Crunch Time in Nepal?*, 22 September 2006, Kathmandu 002587, available at <http://wikileaks.org/cable/2006/09/06KATHMANDU2587.html>, last accessed on 10 June 2011; United States Department of State Cable, Ambassador James F. Moriarty, FM Pandey Seeks Special, Long-Term Relationship with US. 14 December 2005, Ref A. Kathmandu 2565 B. Kathmandu 2209 C. State 223674 D. Kathmandu 2568, available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/47745> last accessed on 10 June 2011.

<sup>121</sup> China has engaged King Gyanendra as well as the Maoists in strengthening border control and preventing safe passage for Tibetan refugees to India. Maoist favouring of China as its principal external patron is instructed as much by previous US/Indian military support to the Royal Nepalese Army, as by Chinese patronage. The United States cited its military support to the Royal Government as having a "disproportionately influential role in persuading Maoist leaders to agree to a cease-fire and negotiations with the Government of Nepal", see International Crisis Group, 7 April 2011, p. 15, *supra* note 15; Laxmanlal Karna, Border Security and Management in Bishnu Sapkota, *The Nepali Security Sector: An Almanac*, Brambauer Publishers, Hungary, 2009, p. 178; Jayshree Bajoria, "Engaging Nepal's Maoists", Analysis Brief, Council on Foreign Relations, 9 July 2008, available at <http://www.cfr.org/democracy-and-human-rights/engaging-nepals-maoists/p16723>, last accessed on 10 June 2011; United States Department of State Cable, Deputy Chief of Mission, Robert K. Boggs, *US-Indian Cooperation and Military Assistance to Nepal*, EO 12958, Kathmandu 000280 Ref A.A.02 New Delhi 6938 B.B. New Delhi 267 C.C. New Delhi 641.

<sup>122</sup> The UCPN-M and the UML distrust the Indian government as a result. The extent to which Madhesi propogation of anti-Hindu sentiment resonates with New Delhi is unclear. India has long feared a Maoist government in Nepal would support the Naxalites, a Maoist insurgency in India. India lobbied the Security Council to remove UNMIN based upon the dubious notion that it was impeding the peace process. New Delhi concerns surrounding border disputes, renegotiation of the 1950 Indo-Nepal Peace and Friendship Treaty and China's growing clout in Kathmandu means that Nepal re-engages India from a position of strength. China recently unveiled a planned three billion dollar tourism, pilgrimage and education center at the Buddha's acknowledged Nepali birthplace. China also increased, though not to the levels of Indian assistance, its military aid to Tibet. See Jason Miklian, 20 July 2008, *supra* note 15; Anand Verma, 27 May 2011, *supra* note 15; Council on For-

external interests instruct the threat posed to witnesses, vicarious support for elements that may threaten witnesses, methods of protection and in particular, territories for relocation given witness affiliation.<sup>123</sup> Nepal's Commission will require MOUs with its neighbors. However, this does not surmount the problem of convincing States to accept witnesses viewed as unsavoury.<sup>124</sup>

Ideally, a TRC programme should be sufficiently capacitated so as not to require State co-operation. Where sufficient capacity is not forthcoming, Commissions need to wield discretion as to what constitutes 'necessitating' Government assistance. Security sector reform, if possible, should precede investigations and focal points of clout and integrity should be established within State institutions.

#### **10.5. Commission and Justice System Efficacy, Efficiency and Interdependence**

Justice sub-sectors "are inexorably linked one to the other and are best understood in the context of the interactive complexities of the entire Sector".<sup>125</sup> An assessment of an entire criminal justice system is required to

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eign Relations, *Engaging Nepal's Maoists*, 9 July 2008, available at <http://www.cfr.org/nepal/engaging-nepals-maoists/p16723> last accessed 10 October 2011; International Crisis Group, 7 April 2011, p. 2, 15, *supra* note 15; United States Department of State Cable, Amb. Michael E. Malinowski, Ambassador relays concerns about activities of Indian intelligence agents, Ref Kathmandu 2282 B. Kathmandu 2298, available at <http://wikileaks.org/cable/2003/12/03KATHMANDU2366.html>, last accessed on 10 June 2011; Indian express, Prachanda seeks to 'turn over a new leaf' in ties with India, 10 November 2010, available at <http://www.indianexpress.com/news/prachanda-seeks-to-turn-over-a-new-leaf-in/705641/>, last accessed on 10 June 2011; Council on Foreign Relations, 9 July 2008; Ananth Krishnan and Prashant Jha, Chinese foundation plans \$3 billion project in Nepal, The Hindu, 17 July 2011, available at <http://www.thehindu.com/news/international/article2233492.ece>, last accessed on 17 July 2011.

<sup>123</sup> The inherent danger in making judgments as to States' interests is their potential fluidity, particularly during periods of instability or transition. These obstacles elevate the importance of ensuring robust and detailed relocation agreements between States.

<sup>124</sup> Witnesses may have committed or been party to serious international crimes. States, which may have to amend legislation requiring prosecution of a witness, are often apprehensive about accepting witnesses that may threaten their citizens. Amending international crimes legislation attracts domestic attention that may alert hostile elements to a witness's potential destination country. Interview with member, ICC Office of the Prosecutor, 8 June 2009, The Hague, The Netherlands.

<sup>125</sup> Security, Justice and Rule of Law Donor Coordination Group, *Review of International Community Support to Access to Security and Justice and Rule of Law*, 31 August 2011.

ascertain whether independent criminal proceedings can successfully occur as a consequence of a Commission's investigations. If not, the consequences of pursuing sensitive investigations and reporting sensitive findings must be weighed. The Security, Justice and Rule of Law Donor Coordination Group adopted this premise in its analysis of the political economy, institutional capacity, cross-sub-sector relations, social, economic and gender issues that contextualise Nepal's greater criminal justice system. It concluded that criminality and impunity, fuelled by political parties' leverage over law enforcement and justice institutions, undermines the legitimacy of the law and the State.<sup>126</sup>

#### **10.5.1. Statement Taking and Other Investigatory Practices**

When commissions decide not to name names, not to investigate the chain of command, and not to attribute individual responsibility, investigators may be limited to discreet methods of contacting witnesses and taking statements (see the following section on anonymity). In conducting those investigations, witness co-operation may be assisted with assurances (if the Government grants the commissions permission to do so) that witnesses will not be required to provide that testimony in a criminal trial.

The Nepali Commission Ordinance places the burden of proof upon the person who "arrested or took control of" the disappeared person in question.<sup>127</sup> Placing the burden of proof on these actors places them in a dilemma between co-operating and implicating their superiors, or attempting to undermine investigations, including by targeting witnesses. Security sector personnel are unlikely to co-operate unless they perceive protection to be available and prosecution to be likely.<sup>128</sup>

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<sup>126</sup> This problem is exacerbated by patronage power structures, poverty, unemployment, rising inflation and discrimination that deepen divisions amongst the citizenry and the political parties (including within those parties). They are mitigated by some progressive elements within the police and the Supreme Court is cited as being at the forefront of driving change. Security, Justice and Rule of Law Donor Coordination Group, *Review of International Community Support to Access to Security and Justice and Rule of Law*, 31 August 2011.

<sup>127</sup> Section 2(k), *supra* note 6.

<sup>128</sup> For ICC investigators, their capacity to assure witnesses of protection (both security protection and protection from prosecution) greatly assisted procurement of witness co-operation. Interview with Civil Society actor, Kathmandu, 16 November 2011; Mahony, 2010, p. 33, *supra* note 40.

As a consequence of the high threat level to insider witnesses in particular, Commission investigators have an obligation to inform witnesses of the ambiguity surrounding criminal consequences of their co-operation. Those consequences include the Government's legal and bureaucratic power not to make the submitted TRC report public; to refuse to prosecute cases referred by either Commission; to prosecute a cooperating witness for admitted criminal acts or for providing a fake fact; and to demand that witnesses are interviewed by police investigators in the presence of the accused.<sup>129</sup> The Ordinance obligates the Commission to provide details of investigated complaints to the Government.<sup>130</sup> Investigators should inform witnesses as to what those details would include, what identity protections will be used and what protections are and are not available in subsequent investigations. Repealing legislation is required to remove these obstacles to witness participation. The Commission's regulations should include these and other witness sensitive practices.

Given the unpredictability of the political process and the inefficient nature of the criminal justice system in Nepal, it is difficult to foresee expeditious criminal processes taking place as a consequence of investigations conducted by the Commission. Investigators should also bring to the attention of witnesses the fact that, were their testimony required in a criminal case, the period of greatest threat is the period prior to testifying in court. The Commission's investigations prolong that period because subsequent criminal investigations would have to occur after those of the Commission. Expediting statements or testimony of threatened witnesses limits the period of greatest danger to witnesses.

#### **10.5.2. Investigating on the Basis of Naming Names**

Were names to be named, the Commission should assert its right to refer cases to the Attorney-General prior to submitting its report.<sup>131</sup> The report

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<sup>129</sup> Under the Evidence Act, Nepalese witnesses may not be excused from answering any question in a criminal case, even if they may incriminate themselves in doing so. That testimony may not be used in another case but may prompt an investigation. Section 28(2), Government Cases (Second Amendment) Act, 2049, 23 December 1992; Section 47, Evidence Act no. 24 of 2031, 21 October 1974; Rule 143 and 156 of the Civil Code, 2020, as cited in Informal Sector Service Centre ('INSEC'), *Witness Protection: A Study Report*, Office of the United Nations High Commissioner for Human Rights, June 2011, p. 35.

<sup>130</sup> Section 27, Commission Ordinance.

<sup>131</sup> Section 25(3), 27 (1), Commission Ordinance.

could then include criticism of cases not pursued. Citing constitutional equality before the law,<sup>132</sup> the National Human Rights Commission ('NHRC') could, under its implementation-monitoring role,<sup>133</sup> advocate on behalf of witnesses. Were the NHRC to fulfill this function, it may mitigate the potential for selective prosecution, the perception of which often exaggerates the threat to witnesses. However, the police have previously ignored many NHRC disappearance case referrals, despite being compelled under law "as soon as possible, [to] investigate and collect evidence".<sup>134</sup>

Commissions also have other bargaining chips at their disposal. Plea-bargaining methods of engaging with witnesses are critical to procuring witness co-operation. Nepal's Commission may, for example, discreetly contact, as quickly as possible, those that carried out crimes, in order to negotiate their co-operation against senior personnel in return for amnesty.<sup>135</sup> Commissioners may agree to criteria with the Attorney-General, which can be employed to waive or reduce sentence in return for witness co-operation, particularly since Commission discretion to provide amnesty is very wide.<sup>136</sup> Clear criteria allow Commission investigators and protection programmes to provide witnesses an indication of the likely reduction in punitive consequence for full witness co-operation.<sup>137</sup> Outreach and other forms of information dissemination of criminal case selection criteria would be of particular assistance in soliciting insider witness co-operation and lending legitimacy to pursued cases.

Implementation of security sector reform processes present opportunities to identify potential insider witnesses who may have diminished allegiance to former superiors. Methods of engaging insider witnesses during security sector reform must ensure their rehabilitation or reintegra-

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<sup>132</sup> Section 13(1) Interim Constitution of Nepal, 2007.

<sup>133</sup> Section 30 Commission Ordinance.

<sup>134</sup> Interview with member, National Human Rights Commission, Kathmandu, 20 November 2011; Section 7, Government Cases (Second Amendment) Act, 2049, 23 December 1992.

<sup>135</sup> Courts may also mitigate sentence by 25 percent for first-time, non-principal trafficking offenders who co-operate with the police, prosecution and the Court. Section 21, Human Trafficking and Transportation (Control) Act, 2064, 2007, *supra* note 61; Section 4(3), Disappearances Bill.

<sup>136</sup> Section 23 (1), Commission Ordinance.

<sup>137</sup> Criteria should also articulate interpretation of persons giving orders or directions (command responsibility).

tion experience does not arouse suspicion.<sup>138</sup> Donors can assist Commissions by making rehabilitative provision conditional on full co-operation with the Commission investigations.

### 10.5.3. Psychosocial Protection and Assistance

Trauma associated with witness co-operation is an issue common to Truth Commission investigations elsewhere. At the SATRC, ‘briefers’ were employed to provide psychological support before, during and post-testimony; as well as to ensure witnesses understood the testimony’s procedures and implications.<sup>139</sup> However, the number and training of briefers was inadequate, requiring professionals to volunteer in some communities.<sup>140</sup> The SLTRC’s enabling Act required it to:

[...] implement special procedures to address the needs of such particular victims as children or those who have suffered sexual abuses, as well as in working with child perpetrators of abuses or violations.<sup>141</sup>

Special hearings, closed sessions, safe interview environments, witness anonymity, and trained psychosocial personnel were employed in collaboration with reintegration programmes and organisations already

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<sup>138</sup> A security sector reform strategy into which protection of co-operating witnesses is integrated, poses threats to witness security. Insider combatant or officer witnesses benefitting from cooperation with investigators may be identified based on the rehabilitation packages they receive. The difficulty of maintaining anonymity in these circumstances may require temporary or permanent relocation and identity change. However, recommended security sector reform practices, such as engagement of informal security mechanisms including community-, youth- and gender-oriented policing, may also present an opportunity for investigators to discreetly identify potential witnesses. PLA and NA personnel marginalised by security sector reform and subsequently, their former political patrons, might also provide fertile sources of witness cooperation, rather than fertile sources of future instability. Crozier and Candan, November 2010, pp. 8 and 15, *supra* note 15.

<sup>139</sup> Glenda Wildschut and Paul Haupt, “I’ll Walk Beside You: Providing emotional support for testifiers at the South African Truth & Reconciliation Commission, *New Tactics in Human Rights*”, 2004; Interview with Interview with former National Prosecuting Authority member, 2008, *supra* note 88; Interview with former prosecution member, 2008, *supra* note 78.

<sup>140</sup> Only 14 Briefers were on staff. Quinn and Freeman, November 2003, p. 1133, *supra* note 44.

<sup>141</sup> Section 7(4), Truth and Reconciliation Commission Act no. 9 (2000), 10 February 2000, Sierra Leone Gazette CXXXI.

working with victims (including perpetrators).<sup>142</sup> These methods placed witness interests ahead of testimony volume. These methods were helpful, but were also impeded by a number of Commission and non-Commission elements. They included confusion surrounding prosecution, absence in some districts of child protection agencies ('CPAs'), fear of stigmatisation and re-traumatisation, and expectation of material support.<sup>143</sup> The SLTRC experience highlights the need for earlier organisation of key elements before investigations begin. These elements include:

1. public sensitisation to jurisdiction, goals and processes;
2. multi-lingual, gender sensitive, and human rights trained statement takers;
3. psychosocial support structures able to assist throughout the Commission process;
4. assessment and identification of ceremonies and rituals to be made available;
5. child- and gender-oriented advocacy of recommendation implementation; and
6. capacity to provide anonymity.

The Commission Ordinance provides for 'special arrangements' to ensure children's dignity and security.<sup>144</sup> Psychosocial assistance should be made available to all psychologically vulnerable witnesses. The Commission Ordinance provides for psychosocial assistance for women and children.<sup>145</sup> Counsellors should accompany investigators when contacting

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<sup>142</sup> The UN mission to Sierra Leone and UNICEF, which identified child participants through its child protection and reintegration program, developed these methods. The SLTRC developed a framework for Child Protection Agency ('CPA') identification and support of child statement givers, using a designated district CPA social worker that prioritised statement quality and child well-being over pursuit of voluminous child accounts. While some NGOs prevented children from participating because of child absence in designing participatory processes, the framework included progressive child participation principles. They included the child's best interests, voluntary participation, safety and security, physical, spiritual and psychological well-being, anonymity, gender sensitive and one-on-one statement taking by trained personnel, and availability of psychosocial support. The principles were supported by a vulnerability and safety checklist that ensured the psychological capacity and willingness of child witnesses to co-operate before they were allowed to do so. Saudamini Siegrist, "Children's participation: Truth and Reconciliation Commission for Sierra Leone", paper presented at Expert Discussion on Transitional Justice and Children, 10–12 November 2005, UNICEF Innocenti Research Centre, pp. 51, 53–54, 59.

<sup>143</sup> Saudamini Siegrist, 2005, p. 54.

<sup>144</sup> Section 17(7) Commission Ordinance.

<sup>145</sup> Section 17(7) Commission Ordinance.

or interviewing potentially vulnerable witnesses. The gender and institutional background of the investigator and counselor should also be considered on a case-by-case basis in the context of each witness' particularities. Witness sensitive reporting stations and economic provision to facilitate witness travel should be provided.<sup>146</sup> Prior to witnesses testifying before the Commission, programme regulations should be created that require full briefing of witnesses on the anticipated nature of testimony and questioning, practices and procedures, as well as employed and alternative protective and support measures (psychosocial and economic). Regulations should also provide for protection and assistance post-Commission, were testimony to be required in subsequent court cases.<sup>147</sup>

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<sup>146</sup> An absence of financial means to attend court is commonly found by district attorneys to prove prohibitive for many witnesses' ambitions to participate. Some donors including DFID, UNICEF and the Supreme Court, which has a large action plan and is seeking donor support, have advocated special buildings or rooms with psychosocially trained police officers. In addition, there is a joint programme between UNICEF Para-Legal Committees ('PLCs'), UNFPA (Health workers) and UNIFEM (law enforcement) to make interventions on GBV. UNFPA has recently commissioned a study to track GBV in national response systems. Interview with justice sector donors, 23 November 2011, Kathmandu; Security, Justice and Rule of Law Donor Coordination Group, *Preliminary Mapping, Rule of Law / Security and Access to Justice in Nepal*, October 2010, p. 5. Interview with member, Attorney-General's office, 22 November 2011, Kathmandu.

<sup>147</sup> Evidence Act provisions requiring the presence of all parties, do not necessarily prohibit the use of screens, voice distortion and pseudonyms to protect witness identity. A proposed criminal procedure bill, allowing admission of written or video witness testimony without cross-examination, appears to contradict the accused right to cross-examine a witness. Nepali law also provides *ad hoc* anonymity in some circumstances. The Human Trafficking Act for example, criminalises disclosure of a victim's identity and provides for in camera court proceedings. The Supreme Court of Nepal has held that confidentiality may be provided to protect highly personal information which may attach stigma or prevent a person from doing their job, and which is not essential for a specific legal purpose. The court found that the right to privacy has its own significance for women and children when read in the constitutional context of their physical and mental safety. The court found that protection of a witness or party to the conflict's privacy should be assessed on its necessity and appropriateness without prohibiting defence questioning, in an in-camera session, of the witness. The Supreme Court's decision, given the clear legislative preference for the right of counsel to cross examination in the Evidence Act, indicates that physical and psychological wellbeing should be given weight by Commissioners when determining the rights of the implicated. While the provision of financial compensation for testimony-related expenses (travel, food, *etc.*) is provided for in the Commissions' bills, it should also be brought to witnesses' attention that the travel expenses for testimony in subsequent criminal proceedings is also provided for by the States Cases Regulation. However, under the proposed national protection programme the police anticipate only a small stipend being provided. See Section 38–35, 49, Evidence Act no. 24 of 2031, 21 October 1974; A

Unfamiliar and formal environments can be intimidating for those witnesses that testify rather than provide witnesses statements. Local and international CPAs or gender-oriented NGOs<sup>148</sup> should be consulted whenever a witness or their guardian is considering co-operating in a way that may disclose their co-operation or cause trauma.<sup>149</sup> Investigators should err on the side of anonymity when interpreting witness vulnerability to stigmatisation, age and the capacity to adequately consider the medium to long-term repercussions of co-operating. Distinguishing between the absence of witness apprehension to testify and vulnerability to psychological or other post-testimony harms requires careful consideration of the witness's testimony and psychological condition. Psychosocial officers or, where appropriate, family members should sit with vulnerable witnesses.<sup>150</sup> Accompanying persons should be provided discretion to alert commissioners to particular sensitivities prior to as well as during testimony. Accompanying persons should ensure that witnesses understand their rights, clarify questions, and ensure witnesses are granted time to gather their emotions and thoughts. Fears of stigmatisation on the part of perpetrator or victim witnesses also instruct their participation, which may be inflammatory, particularly if the process is poorly managed. Tim Kelsall provides the most prominent empirical evidence of the an-

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Bill Made to Amend and Consolidate Prevailing Laws in relation to Criminal Cases, 2067 (2010); Section 25, 27, Human Trafficking and Transportation (Control) Act, 2064, 2007, *supra* note 61; *Sapana Pradhan and others v. Office of the Prime Minister*, Supreme Court Division Bench, Writ 3561 of 2063 (2006); Citing Article 20(3) of the Constitution. *Sapana Pradhan and others v. Office of the Prime Minister*, 2063 (2006); Rule 15(3) State Cases Regulation 2055 (1999) cited in Informal Sector Service Centre ('INSEC'), *Witness Protection: A Study Report*, Office of the United Nations High Commissioner for Human Rights, June 2011, p. 35; Interview with member, Nepal Police, 22 November 2011, Kathmandu.

<sup>148</sup> Often there are many NGOs working on the same issue that may require coordination with all programs – co-ordination that may assist subsequent justice sector reform initiatives. In some instances there are 25 or so NGOs or INGOs working on the same issue, stated one donor. Interview with justice sector donor, 23 November 2011, Kathmandu; Security, Justice and Rule of Law Donor Coordination Group, *Preliminary Mapping, Rule of Law / Security and Access to Justice in Nepal*, October 2010.

<sup>149</sup> Para-legal committees of 15–20 women already set up and trained to advise vulnerable complainants may also be consulted. These committees have faced the obstacle of the absence of a formal justice system perceived as safe because many female victims fear that upon reporting rape, police officers may also rape them and refrain from taking the case seriously. Interview with justice sector donor, 23 November 2011, Kathmandu.

<sup>150</sup> Protection personnel should assess the suitability of witness appointed family members where witnesses prefer that form of support.

tagonising and inflammatory role community ‘truth-telling’ can play. At SLTRC hearings in Tonkolili district, contested truths provided by former combatants prompted such disharmony that physical altercations almost broke out.<sup>151</sup> Local cultural and religious leaders may also be used to calm audiences and witnesses and, where appropriate, give local hearings legitimacy. Antagonisms, argues Kelsall, were only overcome when the Commissioners stepped aside and allowed local elders to conduct rituals where combatants asked for forgiveness without admitting specific crimes. The TRC Act allowed the Commission to call upon local chiefs and elders to step in and facilitate healing and reconciliation. These ceremonies inevitably compromised witness anonymity and were commonly reserved for perpetrators, but may have been considered for known former child combatants or victims where indigenous processes were available.<sup>152</sup> Travel to and appearance at commissions should ensure anonymity, discretion and psychological well-being.<sup>153</sup>

#### 10.5.4. Anonymity

The Commission provides for, at witnesses’ discretion, the most effective method of witness protection: anonymity (confidentiality of information that might identify a witness).<sup>154</sup> Vetting and corroboration of testimony instructing the Commission’s report or case referral to the Attorney-General becomes more important where anonymity is at the witness’ discretion. Maintaining witness anonymity will be challenging in an environment where persons are often rightly or wrongly perceived by their communities to be co-operating witnesses.<sup>155</sup>

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<sup>151</sup> Tim Kelsall, “Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone”, in *Human Rights Quarterly*, 2005, vol. 27, no. 2, pp. 361–391.

<sup>152</sup> See Section 7(2), Truth and Reconciliation Commission Act no. 9 (2000), 10 February 2000, Sierra Leone Gazette CXXXI; Tim Kelsall, Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone, *Human Rights Quarterly*, Vol 27, No 2, 2005, pp. 361–391.

<sup>153</sup> Immediately prior to testimony, witnesses should be kept with psychosocial personnel in a room. They should be taken to testify *via* a discreet route so as to avoid encountering persons other than the accompanying protection personnel.

<sup>154</sup> Anonymity is also provided for under the Human Trafficking Act. Section 17(6) Commission Ordinance. Section 20, Human Trafficking and Transportation (Control) Act, 2064, 2007, *supra* note 61.

<sup>155</sup> Interview with Civil Society actor, 20 November 2011, Kathmandu.

Truth commissions distinguish themselves from ordinary criminal investigations by their ability to collect and aggregate information corroborated from a wide variety of sources. When investigations focus on a large number of incidents of abuse, human rights and other civil society reports and sources can be used to direct investigations and to corroborate witness testimony. Building public confidence in the professionalism and independence of both Commissions' investigatory apparatus is critical to soliciting witness co-operation. It is particularly important for those familiar with the experience of making first information reports to police.<sup>156</sup>

The availability of anonymity, investigative intent to maintain anonymity, and discreet methods witnesses should employ in contacting the Commissions must be clearly communicated to the public through easily accessible mediums. Like Sierra Leone, South Africa sought to develop institutional legitimacy and witness confidence by sensitising the population to the availability of witness protection and anonymous testimony. At the SLTRC, anonymity was important in ensuring witnesses' physical security. However, in instances where anonymity was compromised, witnesses commonly attracted community stigmatisation. Demonstrating that witnesses could provide anonymous testimony and avoid the stigma of perceived community betrayal may have been as attractive as maintaining one's security, and is often a significant source of encouragement for persons considering providing a statement or testimony. The SLTRC, like the SATRC, used public dissemination of selected witness testimony and availability of anonymity to encourage participation. Radio constituted the primary medium for disseminating information about the TRC (including testimony) that Hayner cites as explaining a 10 percent increase in perpetrator testimony. A poll conducted by a local non-governmental organisation, the Campaign for Good Governance ('CGG'), found that 60 percent thought it was beneficial, 58 percent were willing to testify, and 49 percent thought it should be mandatory for people to testify. However, 83 percent understood the SLTRC partially or not at all, 60 percent believed it would not, or were unsure if it could, provide security and confidentiality to witnesses and only 43 percent thought the commission would be independent.<sup>157</sup> Similarly, a Nepali Commission should also communicate

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<sup>156</sup> Victim representative speaking at a meeting with victims and victim representatives, 22 November 2011, Kathmandu.

<sup>157</sup> See South Africa Press Association, 4 April 1996; Campaign for Good Governance, *Opinion Poll Report on the TRC and Special Court*, 2002, available at <http://www.siearra.org>

the level of anonymity achieved and maintained by investigating institutions such as the NHRC that refer cases to it. Commissions should also ensure that witnesses understand the possibility that the State will have to disclose their identity to an accused, if the witness is required to repeat testimony in a criminal trial.<sup>158</sup>

The capacity of a commission to maintain witness anonymity during the commission process is largely dependent upon the quality control of adopted fact-finding practices. These practices are more important in the context of Nepal's socio-political networks.<sup>159</sup> Use of private, one-on-one interviews or statement taking, as well as anonymity of investigative personnel and intermediaries facilitates greater discretion in witness contact. At the ICC, psychosocial assessment and approval by protection programme personnel is required before investigators may approach vulnerable witnesses. In the court's infancy, when investigators elevated the need to quickly contact witnesses above witness security, local populations were alerted to investigators' identities. Revised ICC practices employ local intermediaries to discreetly contact witnesses and set up meetings in secure locations during routine witness departure from communities or work places. At these meetings, protection personnel evaluate witness capacity to testify and endure protective measures, as well as the security implications of witness co-operation. ICC investigators conduct an assessment of the evidential value the witness' testimony will likely provide. Investigation of witnesses' place and nature of residence as well as the number of witnesses' dependents is then carried out. The SLTRC primarily used third party or local investigator methods of contacting and maintaining contact with witnesses. Private one-on-one interviews were the most common form of testimony. As anonymity was established and

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leone.org/Other-Conflict/CGG-0303.html, last accessed on 9 January 2009; Hayner, 2011, p. 59, *supra* note 48.

<sup>158</sup> In Nepal, State attorneys are bound to make full disclosure to the accused within 25 days of indictment. These institutions may include both the police and the National Human Rights Commission, in which civil society actors hold little faith as to the extent to which such institutions are able to conduct investigations that preserve anonymity. The NHRC investigators are not trained in witness sensitive practices and would hand over around 1,000 already investigated cases to the commissions, were they created. Interview with Civil Society actors, Kathmandu, 2 December 2011; Interview with member, Attorney-General's office, 22 November 2011, Kathmandu; Interview with member, National Human Rights Commission, Kathmandu, 20 November 2011.

<sup>159</sup> Interview with Civil Society actor, Kathmandu, 2 December 2011.

maintained, witnesses became more confident about providing sensitive information and less fearful that incriminating evidence would be provided to and acted upon by the Special Court. Nonetheless, combatants were prevented from co-operating due to the Court's close geographic proximity to the TRC, as well as a prosecution statement being the only guarantee of Court/TRC's non-cooperation.<sup>160</sup> Ensuring all precautions are taken should not be subordinated to the interests of speedy access to information, which can have disastrous consequences. Kenya's failure to put appropriate protective measures in place prioritised investigations above its witnesses' physical and psychological well-being. The subsequent killing of co-operating human rights activists and whistleblowers prompted other witnesses to publicly disassociate themselves from their evidence. The possibility that targeted killings in Guatemala are linked to the infiltration of the CEH or co-operating NGOs' databases, like Kenya, exemplifies the importance of anonymity and the danger of utilising witnesses previously employed by NGOs, or by other investigations.<sup>161</sup>

*Anonymity during testimony* requires a discussion of international legal obligations. A contestation of public goods occurs when the rights of an accused, or in the case of a commission, the right to personality and reputation, confronts witnesses' rights to protection. In contesting implicated persons' rights to avoid defamation or unsubstantiated accusation (particularly relating to international crimes), conflicting bodies of jurisprudence have emerged. In law, the right to examine, or have examined, a witness testifying against you was held as subordinate to a witness's right to anonymity before the International Criminal Tribunal for the Former Yugoslavia and the European Court of Human Rights.<sup>162</sup> However, the

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<sup>160</sup> The author formerly worked at the TRC in 2003. See Mahony, 2010, pp. 32–34, *supra* note 40; Human Rights Watch, "Courting History: The Landmark International Criminal Court's First Years", 2008, p. 56, available at <http://www.hrw.org/en/node/62135/section/1>, last accessed on 10 January 2009.

<sup>161</sup> Nzau Musau, Witnesses targeted over Waki envelope, Nairobi Star, 13 July 2009, available at <http://multimedia.marsgroupkenya.org/?StoryID=260720&p=Mutula+Kilonzo>, last accessed on 14 July 2009.

<sup>162</sup> The ECHR held that the accused's right to interrogate the authenticity of testimony including witness credibility outweighed the need to mitigate an organised criminal threat. The European Convention on Human Rights covers both adversarial and inquisitorial systems (Section 8, 35(3)(i)). International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Decision on the prosecutor's motion requesting protective measures for victims and witnesses, Trial Chamber, UN Doc. IT-94-1-T, 10 August 1995; European Court of Human Rights. *Kostovski v. The Netherlands*, European Court of Human Rights,

ICC allows judges to weigh the threat with the right to a fair trial.<sup>163</sup> In Nepali law, legal provisions protect witness identity and security, particularly for women and children.<sup>164</sup> A proposed Criminal Code would allow testimony *via* video link for security reasons.<sup>165</sup>

The consequences of witness anonymity are less severe for persons implicated by testimony before a commission of inquiry than a criminal proceeding. A scarcity of jurisprudence exists that considers how the absence of criminal implications instructs re-evaluation of the balance between witness rights to security and the rights of implicated persons. If the commissions decide not to name names or hold public hearings that implicate individuals, this issue will not require consideration. The SATRC's Act barred Commission testimony from admission in criminal

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10/1988/154/208, 11454/85, 166 Series A, 20 November 1989, p. 43, available at <http://www.juridischeuitspraken.nl/19891120EHRMKostovski.pdf>, last accessed on 10 January 2009.

<sup>163</sup> The place, time and date of prosecution meetings with witnesses may be redacted from witness statements provided to defence counsel if the threat outweighs the right to a fair trial. International Criminal Court, Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v. Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-trial Chamber I entitled "First decision on the prosecution request for authorization to redact witness statements", Appeals Chamber, Case No. 01/04-01/07, 13 May 2008, p. 36, available at <http://www.icc-cpi.int/iccdocs/doc/doc492175.PDF>, last accessed on 10 January 2009.

<sup>164</sup> Under the Human Trafficking Act, victim's certified statements are admissible "even if the victim does not appear" and the statement assert facts the defence cannot cross-examine. As discussed below under 'psychosocial support', the Supreme Court of Nepal favours anonymity where women and children appear as witnesses. The in camera hearing guidelines prepared by the National Judicial Academy with support from UNIFEM have been adopted. They are being disseminated widely at central and district level among judges and law practitioners. Compromising accused rights in adjudicating serious criminal cases suggests Nepali law leans toward the witnesses' security rather than the accused's rights. For example, Section 51 of the Evidence Act (no. 24 of 2031, 21 October 1974) provides that counsel should not ask questions that unnecessarily insult or annoy the witness. Section 6(3), Human Trafficking and Transportation (Control) Act, 2064, 2007, *supra* note 61; Article 4, The Procedural Directives on Maintaining Secrecy of the Parties in the Cases of Special Nature, 2064, Supreme Court of Nepal, available at [http://www.supremecourt.gov.np/download/Gopaniyata\\_Nirdesika.pdf](http://www.supremecourt.gov.np/download/Gopaniyata_Nirdesika.pdf), last accessed on 10 June 2011; Security, Justice and Rule of Law Donor Coordination Group, *Preliminary Mapping, Rule of Law/Security and Access to Justice in Nepal*, October 2010, p. 5.

<sup>165</sup> Section 109 of Draft Criminal Procedure Code and Criminal Offences (Offence and Implementation) Act 2067 as cited in Informal Sector Service Centre ('INSEC'), *Witness Protection: A Study Report*, Office of the United Nations High Commissioner for Human Rights, June 2011, p. 36.

proceedings.<sup>166</sup> The High Court held that the witnesses' right to privacy and security<sup>167</sup> outweighed an implicated person's right to disclosure of the witness's identity. However it did require that implicated persons have reasonable time to make representation and give information about the implicating incident. The Court held that where witness identity or security would be compromised, disclosure of "witness statements or other relevant documentation" went too far. It also held that "reasonable and timeous" notification allows implicated parties to be present or provide legal representation at the hearing and if able and willing, to contest the evidence and, if permitted, to cross-examine the witness. What constituted "sufficient evidence" would "depend upon the facts of each individual case".<sup>168</sup> Witness anonymity and closed hearings have been the norm in South and Central American Commissions. However, the absence of public cross-examination of witnesses is problematic for a commission seeking to make factual claims in its report about a chain of command or command responsibility. Naming names under circumstances of broad use of anonymity would best be avoided where witnesses are not cross-examined.

#### **10.5.5. Post-Testimony Protection (Formal or Advised)**

If a Nepali Commission were to provide formal protection and investigate individual criminal responsibility, uncertainty surrounding subsequent punitive processes may complicate the admission of insider witnesses. Because of the identifiable nature of insider witness testimony, formal protective measures (relocation and identity change) are more often required. Focusing protection on insider witnesses also mitigates cost by keeping admission numbers low. The SATRC adopted this model, admitting approximately 150 of 23,000 witnesses.<sup>169</sup> Crime scene witnesses are often either not known to the implicated person or are so numerous that

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<sup>166</sup> Unless testimony is willfully false, misleading, or prompts a question of law. Section 31(3), *Promotion of National Unity and Reconciliation Act 34 of 1995* citing 39(d)(ii) of the said Act and Section 319(3) of the Criminal Procedure Act 51 of 1977.

<sup>167</sup> See Section 11 on the Commission's victim related governing principles. *Promotion of National Unity and Reconciliation Act*.

<sup>168</sup> *Du Preez and Van Rensburg v. Truth and Reconciliation Commission*, 18 February 1997, Case no 426/96 Supreme Court of South Africa, pp. 39, 42–46.

<sup>169</sup> Paul van Zyl, 1999, p. 656, *supra* note 78; Quinn and Freeman, November 2003, p. 1121, *supra* note 44.

testimony rarely identifies them. In establishing individual command responsibility, few episodes of abuses, where orders or knowledge can be proven, might be focused on to limit the number of formally protected witnesses. A small number of most responsible persons could still be targeted under such circumstances.

How wide a net a prosecutorial phase casts, poses other protective dilemmas for fact-finding commissions. The amnesty in the Nepali Ordinance does not appear to have a particular threshold in terms of culpability. Were those of command responsibility to be pursued for prosecution, the immediate subordinates of those persons could be targeted as potential witnesses. However, if the scope and exercise of discretion is greater, those insider witnesses may also be required to serve protected prison time. Prison time requires temporary relocation for the witness' family before release and, if required, permanent relocation. Witnesses likely to encounter this predicament should be avoided, where alternative evidence is available.

Temporary relocation may need to be immediately arranged upon initial contact with a witness, when a threat is reported or perceived.<sup>170</sup> During temporary protection,<sup>171</sup> the programme can collate information and decide on admission to the formal programme or adoption of alternative methods.<sup>172</sup> Alternative methods include temporary relocation for three to four weeks before and after testifying, ensuring witnesses are able to contact protection personnel, regular investigator-witness contact, protection personnel follow up and periodic evaluation of the threat and protective measures.<sup>173</sup> Where a Nepali Commission refers cases to the Attorney-General, the arrest of the accused may also allow for bail condi-

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<sup>170</sup> A period of two weeks was used by the SATRC. Interview with former prosecution member, 2008, *supra* note 78.

<sup>171</sup> As was employed at the South African TRC.

<sup>172</sup> This period of protection should also be employed to build trust by taking victim impact statements, and sensitise witnesses as to the modalities and consequences of various forms of protection.

<sup>173</sup> Continued temporary relocation should cease when the threat has diminished, allowing repatriation and use of other alternative police and programme monitoring measures. These measures are similar to those available under the Human Trafficking Act. The Act provides for any or all protection measures, including: security during travel to and from a case, temporary police protection and access to a rehabilitation center. Interview with former prosecution member, 2008, *supra* note 78; Section 26, Human Trafficking and Transportation (Control) Act, 2064, 2007, *supra* note 61.

tions that mitigate the threat. Under such circumstances, the Commission programme, in co-operation with police, should closely monitor the enforcement of bail conditions.

The criterion to admit witnesses to formal protection is also ambiguous under the Commission Ordinance.<sup>174</sup> The Ordinance lends arbitrary admission power to the Commission that may lead to unprotected witnesses that merit protection, and inefficient allocation of resources protecting witnesses that do not require it. In creating a witness protection programme, Commissioners should construct admission criteria to be employed by the Chief Protection Officer, including:

1. Availability and effectiveness of alternative protective methods, including anonymity.
2. The threat to the witness as a consequence of co-operation:
  - a. Capacity of the implicated person(s) and affiliates to execute the threat.<sup>175</sup>
  - b. Willingness of the implicated person(s) and affiliates to execute the threat.<sup>176</sup>
3. The importance of the witness' testimony (substance, credibility and possibility of alternatives):
  - a. Psychological capacity to provide credible testimony.
4. The ability of the witness and family/dependents to temporarily or permanently relocate:
  - a. The families' cultural and economic adaptability.
  - b. The threat the witness or accompanying persons may pose to their new community.
  - c. Psychological capacity to adjust to protective measures.<sup>177</sup>

The Ordinance asserts protection 'as prescribed'.<sup>178</sup> However, best testimony outcomes are achieved through equitable and clearly under-

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<sup>174</sup> Section 17 provides that the Commission "shall make appropriate arrangements" Commission Ordinance.

<sup>175</sup> Including the clout of the implicated person/s as assessed by programme intelligence personnel.

<sup>176</sup> Including the likelihood of effective criminal proceedings against implicated person(s), independence of the criminal justice system, and other implications (including the political, social, economic) of testimony.

<sup>177</sup> Based on counsellor and psychologist reports as well as witness and victim impact statements.

stood obligations under a memorandum of understanding ('MOU').<sup>179</sup> Where the number of accompanying persons asserted by the witness is high, the protection officer must assess relations before deciding to negotiate an MOU.<sup>180</sup> Commissions should also provide a mechanism for appeal of admission or termination decisions that protects anonymity during that process.<sup>181</sup>

In Nepal, the issue of relocation is complicated by its diversity, distinctiveness and community oriented society.<sup>182</sup> External relocation is

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<sup>178</sup> Section 17(8) Commission Ordinance.

<sup>179</sup> A detailed negotiation of the admission MOU reduces the likelihood of subsequent disagreement. MOU should include protective measures, conditions of material and counseling provision, the identity of accompanying persons, the witness' testimony and other obligations, the witness' voluntary participation and termination conditions. Where neighbouring or co-operating States have protection programs, MOU's should seek to replicate, as far as is equitable, those States' MOUs. The MOU should also make clear the conditions instructing sanction or termination as a consequence of witness failure to fulfill obligations. This should include conditions under which the witness' identity would be disclosed (for re-engagement in serious criminality for example). Most conditions revolve around the threat subsiding.

<sup>180</sup> Determining accompanying persons' admissibility requires weighing of social, cultural, economic and political elements instructing relations with the witness. In Nepal, where cousins are often referred to as brothers and sisters, the conception of family is wider than in western culture. Negotiations with witnesses must make clear that, unless exceptional circumstances dictate otherwise, only immediate, and not extended family or loved ones may relocate. While some States legislate to specifically allow witness' 'family', 'associate', 'household', or person 'in a close relationship' to accompany witnesses, it only allows, rather than obligates programs to include those persons. Section 1(1)(xx), Republic of South Africa, Witness Protection Act (Act 112 of 1998), Government Gazette, Cape Town, 19523. Interview with Civil Society actors, 5 July 2011.

<sup>181</sup> Kenyan legislation includes a witness protection appeals tribunal on which a high court judge and two other presidential and ministerial appointees sit. In Nepal, three commissioners could sit on an *ad hoc* appeals tribunal. This may be done under the Provision allowing for sub-committees to be established. Commissioners should be appointed, based on their capacity to evaluate threat, testimony value, and witness (and their family's) ability to relocate. Section 3(U), Witness Protection Act 2006 (Act 16 of 2006), Kenya Gazette 3513, Nairobi; Section 31, 34 TRC Bill.

<sup>182</sup> Whilst Nepal's relatively high population density indicates internal relocation may be appropriate, the diversity of over 100 ethnicities and over 90 languages and dialects assists identification of relocated persons in a particular area or community. In the early 1990s various groups organised to defend cultures and practices that distinguished some groups from others. Nepali society also instructs a level of neighborly inquisition unfamiliar to persons from western metropolitan centres. External co-operation in relocation has been a source of frustration for many witness protection programs. In the United States, for example, numerous metropolitan areas with diverse ethnic and cultural populations make internal relocation a particularly viable option. In Sierra Leone, internal relocation is more

therefore preferable to the risk of neighbourly or community suspicion or detection. However, external relocation relies on consistent external co-operation and is expensive, particularly if witnesses are required to testify in subsequent criminal proceedings.<sup>183</sup> Advised relocation (where witnesses bear relocation costs and the protection programme has no official role) may provide a cost-effective alternative.<sup>184</sup>

## 10.6. Conclusion

Fact-finding commissions investigating core international crimes instruct us that quality control must be shaped by the security dynamics of the circumstances in which fact-finding occurs. Relocation may be prohibitively expensive for many crime scene witnesses. However, using relocation to protect a small number of high-level insider witnesses from each party to the conflict, can obtain information beyond the reach of orthodox investigative practice. Many of the variables instructing the safety of witness co-operation with Nepal's proposed Commission remain unclear or in a con-

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difficult where only two major metropolitan centres exist and commerce and social interaction is commonly based on ethno-regional relations. External relocation, for many States, is the only viable option in cases where a high level of post-testimony threat persists. In Nepal, large metropolitan centres are sparse and an inquisitorial culture readily identifies persons according to their ethno-regional background, through language and accent. See Jason Miklian, 20 July 2008, p. 4, *supra* note 15; Interview with Civil Society actors, ICTJ, 5 July 2011.

<sup>183</sup> Investigator interviews and court testimony may require trips travel back to Nepal. The gap between Commission testimony and criminal proceedings may be exaggerated by an incapacitated investigative, prosecutorial or judicial system, or political interference in criminal processes. Longer processes bear both financial programme cost and psychological burdens for witness. Co-operation with external authorities, or permission to relocate witnesses into other sovereign territories, will be of critical importance. Establishing focal point personnel within the co-operating State's intelligence and security apparatus is essential to responsive and confidential co-operation. Like Nepali government focal points, their authority to make decisions without impediment is critical. Crozier and Candan, November 2010, p. 19, *supra* note 15.

<sup>184</sup> The availability of multiple forms of assisted relocation, including assisted application for asylum or other migrant status, may significantly reduce relocation costs comparative to formal programme protection. Witnesses and accompanying persons should be thoroughly briefed on self-deployable methods that obstruct detection by hostile elements. In the context of only 30 of the previously 250 industries operating in the Morang-Sunsari industrial corridor driving Nepali migration to India, economic migration is unlikely to arouse suspicion. The laxity of Nepal's security on both the Chinese and Indian borders facilitates voluntary relocation without ordinarily prerequisite State co-operation. Crozier and Candan, November 2010, p. 8, *supra* note 15.

stant state of flux. Witness safety requires careful consideration of the merits of sensitive investigations.

The security dynamics instructing quality control is instructed by the sequence of critical elements of post-conflict peacebuilding. Engaging in fact-finding before stabilising processes, such as disarmament, demobilisation and other security sector reform initiatives, increases the threat to witnesses and the wider community, elevating the required level of fact-finding quality control. In Nepal, the interests of witness security would be enhanced by the sequencing of post-conflict peace-building that placed constitutional reform and security sector reform before the sensitive investigation of abuses. This position must be balanced with the harms of delayed (and potentially denied) justice.<sup>185</sup> The Commission and the Government shall have to weigh the integrity and extent of their historical narratives with the security of the witnesses the Commission hopes to engage. The Ordinance, in its current form, does not provide adequate certainty as to subsequent prosecutorial action (or inaction) or ensure adequate protection for witnesses, given the current security dynamics. The threat to witnesses, therefore, may outweigh the benefit of investigating individual command responsibility. The cause of safely addressing impunity is dependent upon security sector reform, justice sector reform, constitutional reform (establishing a department of public prosecution independent from the executive) and revisions to the Ordinance establishing the Commission that provides independence, capacity and power to compel co-operation.

Five key elements determine the effective function of witness protection programmes and adequate witness-sensitive quality control in fact-finding. The first is the financial, security and political parameters within which protection functions. In Nepal, the recent provision of an ambiguous amnesty lends political, financial and security uncertainty for the Commission's investigative mandate and for witness security. Donors may be willing to fill the financial gap for protection left by a potentially unwilling or unable State. However, a process perceived as established to selectively prosecute or to placate justice pressures could turn donors away.

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<sup>185</sup> A report of victims' remains being moved appears to diminish the availability of forms of evidence other than witnesses. Interview with member, National Human Rights Commission, Kathmandu, 20 November 2011.

Political dynamics and donor clout are also instructive as to the second element: programme independence. Donor leverage may be employed to dissuade political pressure on Commissions to use national protection programmes, run by low-level personnel and prone to political manipulation. Commissioners' willingness to establish an independent programme will be critical to the Commission's capacity to protect witnesses, procure authentic testimony, and construct a legitimate and objective historical record. A programme structure with clear admission criteria, exclusive admission discretion located in the Chief Protection Officer's hands (an appointee of impeccable integrity), would significantly advance witnesses' physical and psychological security.

The third element: capacity to procure State and non-State co-operation is instructed, in theory, by the Commission's proposed founding documents. The Ordinance compels State co-operation, with caveats of personnel working within their obligations. Security sector elements have proven intransigent in complying with investigations into abuses, a trend potentially exaggerated under the provided amnesty. The effectiveness of security sector reform is a critical prerequisite to the sector's co-operation with investigations, as well as the State's capacity and willingness to apprehend accused in subsequent criminal processes. Commissions perceived as independent and legitimate would instruct non-State, particularly civil society groups', willingness to co-operate. Early engagement of these stakeholders increases the chances of their co-operation.

The Nepal Commission's protection programme will be dependent upon the efficacy and efficiency of the justice system as a whole. This critical fourth element instructs the amount of time witnesses will likely spend under protection before testifying in subsequent criminal cases. This factor also dictates the likely success of attempted prosecution, the cases that are pursued, and the witnesses that are protected.

The final element instructing a protection programme's effective function is the nature and scale of the threat to witnesses. The Commission's diminished punitive consequences and the criminal justice system's uncertain capacity to independently prosecute politically sensitive cases mitigate a historically severe threat from the security sector, the political class and affiliated criminal groups. It is very concerning that elements within the political elite have called for a national programme controlled by the security sector, elements of which pose the greatest threat to poten-

tial Commission witnesses.<sup>186</sup> These concerns require the immediate attention of donors, local and international civil society groups and all stakeholders hoping to safely learn the truth about abuses during Nepal's civil conflict.

Nepal appears to have two broad options before it. One option is to refrain from naming names. If the security and political situation remains precarious, it is unlikely that naming names or investigating and reporting on the chain of command is in the interests of witness security. The best investigative and psychosocial practices should ensure anonymity, and prioritise the interests of vulnerable witnesses. Those practices should be made known to the public through a sensitisation campaign that allows potential witnesses to make the best informed decision as to their own participation. A commission providing amnesty should attempt as best as is possible to facilitate community and indigenous reconciliatory processes that mitigate antagonisms and localised potential for future instability.

The second option is to investigate the chain of command and to name names. Were this approach to be taken, ambiguity relating to amnesty must be clarified. If the Government intends to go forward with prosecutions, Nepal's criminal justice system will require witness sensitive reform as well as reforms enabling capacity to prosecute international crimes cases. The Commission will also require formal protective capacity. The Commission would have to sensitise the broader public, as well as individual witnesses, as to the likelihood of their testimony being used in a subsequent prosecution, the potential consequences for their security, and the available capacity to provide protection should related prosecutions occur. This approach may require significant external support.

Current Nepali capacity and political will does not provide for a level of fact-finding quality control sufficient for safe investigation and prosecution of persons most responsible for crimes during the conflict. Nepali civil society actors must be more transparent about the associated risks of pursuing, in the near term, criminal accountability or even the naming of names for those most responsible for crimes. An over-zealous approach, reproducing witness security outcomes similar to those in Kenya, risks further undermining Nepali faith in government fact-finding

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<sup>186</sup> Moves towards this programme have slowed recently. Interview with member, Ministry of Peace and Reconstruction, 20 November 2011, Kathmandu.

and alienating would-be witnesses from future investigations. That scenario would undermine, not advance, the fight against impunity.

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## **Quality Control in Fact-Finding**

Morten Bergsmo (editor)

This book discusses how fact-finding mechanisms for alleged violations of international human rights, humanitarian and criminal law can be improved. There has been a significant increase in the use of international, internationalised and domestic fact-finding mechanisms since 1992, including by the United Nations human rights system, international commissions of inquiry, truth and reconciliation commissions, and NGOs. They are analysed and assessed in detail by 19 authors under the common theme 'Quality Control in Fact-Finding'. The authors include Richard J. Goldstone, Martin Scheinin, LIU Daqun, Charles Garraway, David Re, Simon De Smet, FAN Yuwen, Isabelle Lassée, WU Xiaodan, Dan Saxon, Chris Mahony, Dov Jacobs, Catherine Harwood, Lyal S. Sunga, Wolfgang Kaleck, Carolijn Terwindt, Ilia Utmelidze and Marina Aksenova. Serge Brammertz has written the Preface, and LING Yan a Foreword.

The book emphasises quality awareness and improvement in non-criminal justice fact-work. This quality control approach recognises, inter alia, the importance of leadership in fact-finding mechanisms, the responsibility of individual fact-finders to continuously professionalise, and the need for fact-finders to be mandate-centred. It is an approach that invites the consideration of how the quality of every functional aspect of fact-finding can be improved, including work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organise, present, and disseminate facts. The book also considers regulatory approaches to enhance quality and professionalisation.

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