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PhD in International Relations and European Integration

Doctoral Thesis

**How Truth Commissions Promote  
Accountability:  
An Evaluation of Impact of the Commissions  
Established in Nepal and Sri Lanka**

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## Abstract

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Most studies assess impacts of truth commissions (TCs) in pre-conceived outcomes, such as democracy or human rights, without considering how a TC process affects that outcome. This research attempts to evaluate the impact of TCs as processes and how these processes influence the ultimate outcomes. A focus on process entails considering public participation in TCs and the relationships and interactions that a TC generates among the various affected groups within society. Accountability provides a framework to evaluate whether the relationships a TC generates empower people in front of the state, allowing us to link process and outcome.

The theory of change presented suggests that TCs as processes generate vertical accountability relationships between the state and civil society and horizontal accountability relationships within the state. These accountability relationships take place prior to the establishment of a TC, during their work and as a result of the recommendations compiled in the final report. To prove the existence of accountability relationships, I devise a framework consisting of fourteen evaluative criteria. Next I evaluate the impact of the commissions established in Nepal and Sri Lanka in the 1990's. The results show that while these commissions produced much answerability the recommendations compiled in the final report, in most cases, were not implemented. Lack of implementation shows limited empowerment of people in front of the state. Unpacking these commissions in light of the accountability framework helps identify the challenges governing regimes face at the time of implementation. The framework also helps recognize lack of civil society mobilization could be linked to close relations with political parties prior to the establishment of a commission. The accountability framework presented allows us to link process and outcome. Process wise, the accountability relationships TCs generate are causal relations that generate impact. Outcome wise, it is the previous definition and operationalization of accountability what allows us to understand whether a TC has contributed overall to promote accountability as the ultimate outcome.



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## Acronyms

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COI	Commission of Inquiry
CIRI	Cingranelli and Richards Physical Integrity Rights Index
DC	Departmental Committees
DIU	Disappearances Investigation Unit
EC	Evaluative Criteria
FOPHUR	Forum for Protection of Human Rights
HURON	Human Rights Organization Nepal
ICTJ	International Center for Transitional Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRO	International human rights organization
JVP	Janatha Vimukthi Peramuna (People's Liberation Front)
MPU	Missing Persons Unit
NC	Nepali Congress
NGO	Non-Governmental Organization
NSSP	Nava Sam Samaja Party
OHCHR	Office of the High Commissioner for Human Rights
OPFMD	Organization of the Parents and Family Members of the Disappeared
PA	People's Alliance
PTS	Political Terror Scale
RC	Royal commission
SLFP	Sri Lanka Freedom Party
TC	Truth Commission
TJ	Transitional Justice
TJM	Transitional Justice Mechanism
TRC	Truth and Reconciliation Commission
UF	United Front
ULF	United Left Front
UN	United Nations

UNP United National Party

UNSG United Nations Secretary General

## Preface

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### Defining the problem

The central aim of this research is to examine the impact of truth commissions (TCs). TCs are mechanisms that have been established during transitions from autocratic to democratic regimes and from internal armed conflict to peace. Post-authoritarian and post-conflict societies face almost insurmountable challenges. To start with there is a confrontation between the old system, that wants to keep its power and influence, and the new regime that attempts to take power away from the old in order to establish more democratic structures of power.

Over the last forty years, since processes of democratization started in Southern Europe and Latin America in what came to be known as the third wave of democratization, one of the questions that transitional societies have had to deal with is what to do with those whose rights were violated. Relatives of people who were disappeared or killed, and survivors of torture have a legitimacy to ask for answers to what happened, why and who was responsible. At a broader level, state and societies need to take measures to prevent atrocities from happening again. The way states have dealt with this situation has varied enormously, from not doing anything to establishing a variety of mechanisms to deal with their past.

TCs have become a recurrent mechanism for states to deal with and address past human rights violations in transitional justice (TJ) periods. According to academic literature, TJ experts and the UN Secretary General, more than forty TC have been established in different countries and regions since the first commission was set up.<sup>1</sup> TCs are believed to have the potential to be of great benefit in helping post-conflict societies and post-authoritarian regimes establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms (Secretary-General, 2004: para. 50).

Notwithstanding these claims, some have raised doubts regarding the impacts of TCs, stressing the lack of serious empirical research. As a response, both quantitative

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<sup>1</sup> Some argue Uganda was the first case in 1974 while others see the 1983 in Argentina as the initial TC.



and qualitative researches have been carried out to assess what are the effects of TCs. This thesis fits within studies that assess impacts at a state-societal level, although it approaches the topic from a new perspective. Through the review of literature assessing the effects of TCs, I have identified a disconnection between process and outcome. Assessment has targeted the impacts of TCs in preconceived outcomes, above all, democracy and human rights, without taking into account how a TC process affects that outcome. This research attempts to evaluate the impact of TCs as processes and how these processes influence the ultimate outcomes.

### **Origin of this research and personal motivations**

The original idea at the basis of this research, the accountability relationships that TCs generate, came as a result of my observations during the time I worked in post-conflict Nepal, from 2008 to 2012. During this period I was a witness to the interactions among various actors, such as victim groups, members of parliament (MP), and the government prior to the establishment of a TC. In 2011, working on TJ with the Office of the United Nations High Commissioner for Human Rights (OHCHR), I became engaged in these interactions. We organized various regional workshops to explain to the victims of the conflict the content of the bills to establish a TC and a commission of inquiry (COI) on disappearances. At the end of the program, victims would submit their consensually agreed amendments to the MPs working in the committee tasked with finalizing the bills. We also tried to facilitate dialogue between senior political party MPs and victims, civil society and human rights organizations. Later on, we provided technical assistance to the parliamentary committee tasked with reaching consensus on key aspects of the bills.

In perspective, I realize my years working in Nepal led me to change from a purely legal to a more socio-political approach to TJ. My initial legal position was linked to my background as a practicing lawyer for over seven years. Thus the first dissertation I wrote in 2006 for my Masters in international relations dealt with the impact the International Tribunal for the Former Yugoslavia had in TJ. Working with the OHCHR in Nepal I would define my approach to TJ as 'an ongoing battle against impunity

rooted in human rights discourse' (Bell, 2009: 13). As a matter of fact, our main work on TJ vis-à-vis the State was to advocate prosecutions in conflict related human rights violations. However, prosecutions were not taking place, which led me to realize the limitations of international law in post-conflict settings. More importantly, I realized from a purely legal perspective there was no alternative path to take the process further: we were advocating but the state was not prosecuting.

In parallel there was the ongoing debate on the setting up of a TC and a COI on disappearances. Again the bone of contention regarding the legislation to establish these commissions was the question of amnesty.<sup>2</sup> On one side, the two former warring sides during the armed conflict, the Nepali Congress, in the government, and the former Communist Party of Nepal (Maoist) guerrilla turned political party, along with the security forces, in particular the Nepal Army, wanted to incorporate an amnesty provision. On the other side, a strong community of local human rights organizations, along with the United Nations OHCHR largest human rights field mission, advocated to prevent an amnesty to remove criminal liability of perpetrators. This tension, present during the years of negotiation to establish truth-seeking mechanisms, continued after the law was enacted in 2014.<sup>3</sup> Although the United Nations has chosen a peace through justice approach, the tension between amnesty and prosecutions was, and continues to be, very present in Nepal.

I believe fostering the participation of victims in the drafting of the bills on a TC and COI on disappearances, and facilitating dialogue between them, the MPs working in the bills committee and senior political party leaders was a step towards a more socio-political understanding of the process. Although this professional experience and the

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<sup>2</sup> I have written about the prosecutions versus amnesty debate, in *The transitional justice process in Nepal*, available at:

[http://icip.gencat.cat/web/.content/continguts/publicacions/documents\\_i\\_informes/arxiu/transnational\\_justice\\_in\\_nepal.pdf](http://icip.gencat.cat/web/.content/continguts/publicacions/documents_i_informes/arxiu/transnational_justice_in_nepal.pdf) [Accessed 28 August 2014].

<sup>3</sup> In 2014, the *Investigation of Disappeared Persons, Truth and Reconciliation Commission Act* incorporated a provision allowing for amnesties for violations of international human rights law. Even though the Supreme Court of Nepal ruled against such an amnesty, on the grounds of contravention to Nepal's international legal obligations, the law was not amended and the commissions were established. As a result, a section of human rights defenders appealed to boycott the commissions (Bhandari, 2017). In spite of this appeal, during the initial two years of their mandate, which formally ended on 10 February 2017, the TRC collected over 58,000 complaints and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) close to 3,000.

observation of interactions among various actors in a TJ setting are not part of the evaluation of impact undertaken in this research, they are nonetheless the basis upon which I have developed the idea of accountability relationships.

### **Research question, aim and objectives of this study**

My research question, *what have been the impacts of the TCs established in Nepal and Sri Lanka during the 1990's in promoting accountability*, stems from my own interest in knowing what are the consequences of establishing a TC. At the bottom of this inquiry lays a suspicion about what these institutions can accomplish and why they are set up in the first place. My initial observation was they were established to avoid prosecutions. Consequently, I wanted to assess their impact in accountability in its traditional meaning of criminal accountability within the human rights literature. However, after doing a preliminary review of the literature on accountability, I realized the assessment of impact should go beyond a narrow approach limited to criminal accountability. As a matter of fact TCs are primarily ad-hoc mechanisms of accountability.

The aim of this research is to establish a framework to assess the impact of TCs on accountability. Through assessing the impact of TCs as processes, I expect to understand the causal mechanism generating accountability. A focus on the process should allow me to isolate the impact generated by a TC from other factors outside a TC but within a transitional context. Concrete objectives include a critical examination of how current TJ literature frames the analysis of TC's impact and how to enhance this analysis. Second, to define and operationalize the concept of accountability to use it as a frame to evaluate the impact of TCs. This entails developing an understanding of accountability and an effective methodology to measure it. Third, a review of the Commonwealth tradition of setting up COI and what are their linkages to TCs. Fourth, a study of the evolution of civil society in transitional contexts with a special focus on relations between civil society, victims and political parties prior to the transition. Finally, applying the accountability framework to the commissions established in Nepal and Sri Lanka to examine their impacts in promoting accountability.

## Research Methodology

The ontological position I maintain within this research is that of moderate constructionism, that is, I consider the social world, not as absolutely independent of our knowledge, but constructed, partially, by each of us.<sup>4</sup> In my interest for studying institutions, such as the state or TCs, I consider them as social constructs, dependent of contexts and ideas of persons and communities involved. These institutions are the result of interactions among people, sharing of ideas, language, meanings and understandings. These social constructs carry different meanings for each of us, as our understanding of them varies.

As my ontological position is that the social world and the meanings of it are being constructed by social actors, it follows that I adhere to an interpretivist approach in seeking knowledge, in a moderate sense: perhaps there is a world out of us that we get to know through our social interactions.<sup>5</sup> Hence, what we see and hear is not straightforwardly accepted or acknowledged as knowledge. As the social world is constructed by each of us, it has different meanings to each of us. Thus, if conflict is socially constructed and the mechanisms to deal with it are also a social construction, it will be necessary to engage with the reflections and perceptions of those who have participated in it and those who have tried to understand or to deal with it. In interpretivism it is in these interactions between people, in these relations where

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<sup>4</sup> Questions of social ontology, difficult meta-theoretical choices, revolve around the nature of what there is or what exists in the social world and whether this social world 'can and should be considered objective entities that have a reality external to social actors or whether they can and should be considered social constructions built up from the perceptions and actions of social actors' (Bryman, 2008: 18). We call the former ontological position objectivism and the later constructivism. While 'objectivism implies that social phenomena and their meanings have an existence that is independent of social actors', constructionism asserts that 'social phenomena and their meanings are continually being accomplished by social actors' (Bryman, 2008: 19).

<sup>5</sup> Epistemology is 'the study of our knowledge of the world and how do we know about the world that we have defined ontologically' (Thomas, 2009: 87). The two main paradigms to seek knowledge about what exists out there are positivism and interpretivism. For positivists 'knowledge about the social world can be obtained objectively: what we see and hear is straightforwardly perceived and recordable without too many problems' (Thomas, 2009: 74). It follows that positivists try to be as objective and neutral as possible, watching from outside as disinterested observers. Interpretivism brings a completely different approach to the way to seek knowledge. In interpretivism the social world is constructed by each of us in a different way. It is not straightforwardly perceivable because it is different for each of us, with words and events having a different meaning (Thomas, 2009: 75).

knowledge is situated. It follows that, in trying to discover this knowledge, the researcher takes a central role in interpreting these interactions and interrelations.

It is in the interpretation of these interactions and interrelations that questions of positionality come straight to the fore, as the researcher becomes a participant in its own research trying to understand as an insider. In my case it is my own experience what determines the aim of my study, how I approach it and how I try to understand it as an insider. My years working as a lawyer as well as my experience working on human rights in post-conflict Nepal determines my positionality in this research. This positionality will undoubtedly affect the nature of my observations and the interpretations I make. Far from watching from outside as an observer, I try to understand as a participant. And far from hiding my credentials, I explain my background prior to carrying out interviews.

A related issue is the bias this positionality can bring to the research and the measures I shall adopt to mitigate it. Prior to this research, I had been working closely with victims and advocating for their rights. I had also been collaborating with human rights practitioners, advocating for the state to take steps to prosecute perpetrators of human rights violations. With this background, my approach to this research could be prejudiced, affecting the data I decide is important to collect and possibly leading to preconceived conclusions. The initial stage to mitigate my researcher bias was to be aware of its existence. Through this self-awareness, I attempt to limit the impacts of my bias on an impartial research. As a result, since very early in the process, I decided to put aside my lenses of human rights officer and look through the eyes of a social scientist.

I was particularly confronted with this dual approach, human rights officer versus social scientist, the day I interviewed a police officer that had been named in a report for having used excessive force against unarmed demonstrators in Nepal. I approached this meeting through making clear my aim was not to re-examine facts, as the commission had already reached a conclusion. Rather, I wanted to hear how he saw the process of the commission as a police officer, how the commission carried out the inquiry on the incident in which he was named, and once the report was published, how the fact that he was named affected him. The feeling of being confronted with my human rights background would reappear in many other interviews, both in Nepal and

Sri Lanka, involving members of the police, the army, state officials, or members of the attorney general's office. Hence, I mitigated this bias through making clear my interest to collect data related to the interactions among the various groups, rather than being perceived as re-examining the factual information already available. Furthermore, I tried to conduct as many interviews as possible with representatives of the security forces, the governing regime and the state apparatus. In fact, most of the interviewees who declined meeting with me came from these groups.

As for the selection of the case studies, both Nepal and Sri Lanka established in the 1990's a commission that has been recognized internationally as a TC. In fact, these two cases represent the only South Asian experiences of internationally recognized TCs.<sup>6</sup> The main reason to select Nepal was my professional experience working on TJ and the fact that I had access to the main actors. Another important aspect was the research gap. Although the 1990 TC in Nepal appeared in every other list of TCs, the information available was very scarce. Even to locate the commission's report became a difficult task. Moreover, the report was available only in Nepali. Due to my work in Nepal, I had former colleagues who could support with translating documents and assist as interpreters in meetings. As for Sri Lanka, it was the other South Asian country to have established a TC. Although I had never visited this country prior to doing the fieldwork for this thesis, there was a lot of information available in English on the 1994 three Zonal Commissions.

South Asia remains an under researched region regarding the work of its TCs as opposed to other regions, such as Latin America and sub-Saharan Africa. Latin American best-known TCs were established in Argentina, Chile, El Salvador or Guatemala to confront human rights violations committed after internal armed conflict or authoritarian rule. In sub-Saharan Africa, the South African truth and reconciliation commission continues to be the most researched TC. Other *illustrative* TCs in sub-Saharan Africa include those established in Ghana, Sierra Leone, Liberia, Togo and

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<sup>6</sup> Sri Lanka also established the Lessons Learnt and Reconciliation Commission in May 2010 although to my knowledge it has not been included in any list as a TC. Nepal established in February 2015, a Truth and Reconciliation Commission and a Commission of Investigation on Enforced Disappeared Persons. Their work was ongoing at the time of this writing.

Kenya.<sup>7</sup> Through this research I hope to examine TJ processes in South Asia and understand how the region's specificities also contributed to shaping these processes.

### **Planning and thesis structure**

I have written this thesis following the opening out model sequence of chapters (Dunleavy, 2003: 59-60). Instead of drafting the chapters on theory first and going from the general to the concrete, I wrote my thesis from the concrete to the general. After a short preliminary literature review, I drafted chapter two on the accountability relationships and the framework to evaluate the impacts of TCs. In parallel, I drafted the chapter on methodology and travelled to the field to carry out interviews. I fed the data collected from the interviews to improve the evaluation framework while, at the same time, I incorporated theoretical developments in the framework to the criteria to select interviewees and the line of inquiry for semi-structured interviews.

Only after drafting the accountability framework, the methodology chapter and the evaluation of impacts of the commissions in Nepal and Sri Lanka, I started opening out to the broader literature. In going from the core to the whole, I found it more logical to zoom out one step at a time. Thus, the initial step was to draft the review of literature on impact assessment of TCs. Next, I drafted the sections on TCs within the broader TJ and peacebuilding area of study. Drafting the thesis following the opening out model allowed me to narrow down the literature review and only focus on the materials readers need to know to appreciate the contribution of this research to the field of study of impacts of TCs. Dealing with the main research task initially also allowed me more time to analyze and interpret the findings, moving from initial outcomes that were difficult to understand to presenting results and their implications in an organized way.

Drafting the thesis from the core to the whole further allowed me to submit initial drafts for publication and to present my findings in academic conferences, while writing the thesis. I submitted a preliminary draft, from November 2014, that was published by the International Catalan Institute for Peace as a working paper. The *Asian Journal of Peacebuilding* published a more elaborated version in November 2015. As for

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<sup>7</sup> I call these commissions illustrative following Hayner influential book, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*.

academic conferences, in September 2015 I presented the paper “Truth commissions and the accountability relations they generate: A new framework to evaluate their impact” at the European Consortium for Political Research (ECPR) General Conference (GC) in Montreal. In July 2016, I presented the paper “Assessing the impact of truth commissions on accountability: The 1994 Presidential Commissions in Sri Lanka” at the 24th IPSA World Congress of Political Science in Poznan, Poland. In August 2016, I presented the paper “Truth commissions as peacebuilding infrastructures: the 1994 Zonal COI in Sri Lanka and its implications” at the conferences *Post-Conflict Peacebuilding and Democratization in Asia* organized by the Seoul National University. In September 2016, I presented the paper “Truth Commissions as processes: Encouraging civil society-state reengagement. The 1990 Mallik Commission in Nepal” at the ECPR GC in Prague. An advantage of these presentations is that I started encapsulating parts from various chapters in single papers. In doing so, I started making connections of topics across chapters at an early stage, which resulted in a more systematic and integrated thesis. In any case the current version of this thesis has not been published. I turn now to the structure of the thesis.

The first part of this thesis devises the accountability framework. It consists of three chapters: the first chapter reviews the literature on the main topics of this study; chapter two presents the accountability framework; and chapter three, on methodology, elaborates on the way I have carried out my research. Chapter one presents an evolution of the TJ discipline since initial studies of democratization in Latin America to current approaches that take into account a peacebuilding framework of analysis. In parallel to this evolution, the chapter also presents how civil society interaction with processes of transition has also changed over time. It is in this context that TCs have emerged as a mechanism that allows for greater participation from the public. The chapter then moves to presenting studies of impact of TCs and presents the argument that what is needed is an assessment of impact that takes into account a TC process and how this process influences the outcome. Finally I examine TCs as processes, which entails a focus on public participation and on interactions among various groups within society. Chapter two first contextualizes accountability broadly within the TJ field and more narrowly



within TCs. Then it defines and operationalizes accountability so that this concept can be properly used in an evaluation of impact of TCs. Third, I present the accountability relationships that TCs generate. Finally, chapter two establishes a framework consisting of fourteen criteria to evaluate the impact of TCs in promoting accountability. Chapter three details the practical conducting of this research. First, I examine the analytical and design frame of the research, including theory based impact evaluation, as the method to evaluate the impact of TC's processes, and case study research. Then the chapter presents literature review and elite agent interviews as the techniques to collect data and explains how I analyzed this data. Finally, I examine ethical and gender considerations in conducting this research.

Part two includes chapters four and five in which I undertake the evaluation of impact of the commissions established in Nepal and Sri Lanka. Both chapters follow the same structure. I first present the background and the context in which the transitions unfolded in each country. Following up on the role of civil society in transitional contexts presented in chapter one, I examine what were the relations between political parties and civil society and, in the case of Sri Lanka, also between political parties and victim groups. Then I present an overview of the commissions, their findings and recommendations. On Nepal, I examine the Mallik Commission and the Committee on Disappearances, two separate commissions established during the 1990 transition. As for Sri Lanka, I examine the three Zonal Commissions set up in 1994 to inquire into disappearances. Next I evaluate the impact of these commissions in promoting accountability. For Nepal, I assess independently the impact of the Mallik Commission and the Committee on Disappearances. For Sri Lanka, I assess the overall impact of the three Zonal Commissions, as they shared the same mandate although being organized around geographical areas. The assessment of impact follows the framework established in chapter two, consisting of fourteen evaluative criteria.

Part III, chapter 6, concludes the research. First I present the thesis conclusions and findings, bringing together the partial conclusions from each chapter. Then I put forward the implication of the findings in this thesis and open out the results into the wider literature. Finally, I explain the use of the accountability framework, what it helps to identify, and open the study to future research.

## Acknowledgments

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In submitting this thesis I want to acknowledge people who have supported me in many ways. I am especially grateful to the people whom I interviewed both in Nepal and Sri Lanka, as without them it would not have been possible to do this research.

In Nepal, I would also like give special thanks to Hikmat Khadka, who supported me since the very beginning, locating the reports of the Mallik Commission and the Committee on Disappearances, translating long parts of these reports, and interpreting in interviews. I am grateful to Hikmat for opening his house to me, and for the time we shared cooking *dal bhat*. I am grateful to Bhaba Thami who also supported me with interpretation while carrying out interviews. My thanks and appreciation also goes to Subodh Pyakhurel, Mandira Sharma, Hari Phuyal, and Raju Chapagain who provided contacts of people who had played a key role when the commissions were established, at the time of the people's movement and the broader transition to multiparty democracy. Last but not least, to Rup Lal, Nirajan, Nisith and Sarika for welcoming me in your homes and sharing unforgettable evenings and delicious food. I am sure our friendship will continue beyond the dimensions of time and space.

Including Sri Lanka as a case study presented a big challenge. As opposed to Nepal, I had never visited the country before doing this research and lacked any connection. I am very grateful to people who provided me with contacts, and who also warned me about the security situation and the problems of doing research under the Rajapaksa regime at a very sensitive time. I am especially grateful to Ambika Satkunanathan for the great support. Also to Sascha Müller, Mike Hayes, and Sophie Bowd who connected me to people in country. In Sri Lanka, I am grateful to Mario Gomez, Chulani Kodikara, Niran Anketell, Gehan Gunatilleke, Balasingham Skanthakumar, and Kalana Senaratne. I am very thankful to the people at the Nadesan Centre for Human Rights, the Center for the Research of Human Rights, the Law and Society Trust and the International Center for

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I am also grateful to people who have provided comments to preliminary drafts. Feedback becomes a good measure to determine whether the text meets the reader's expectations. Chronologically, I am grateful to Richard Bowd who provided comments to my initial research plan. One of the advantages in drafting initially the core of this thesis, the accountability chapter, is that I have received feedback from people who I consider experts in the field of truth commissions and impact assessment. I am grateful to Mark Freeman, who commented on an early draft; Hugo Van der Merwe for his review of a very preliminary draft that I submitted to the *International Journal of Transitional Justice*, and for his encouragement 'to continue working on this important line of inquiry'. One just realizes how important it is to receive positive feedback to continue thinking and writing, day after day. I am also thankful to Simon Robbins who pointed out the need to differentiate the interests of victims to that of human rights organizations and broader civil society.

The idea at the core of this thesis was conceived in Nepal during my time working at the Office of the United Nations High Commissioner for Human Rights. It was developed and put into words in Thailand, where I started working on my thesis. Much of the work was done in Bangkok, at the United Nations Economic and Social Commission for Asia and the Pacific library, between March 2013 and July 2015. Also during this time I conducted and completed the fieldwork in Nepal and Sri Lanka, taking advantage of the relatively close distance from Bangkok. Since August 2015 to February 2017, I have further developed and finished this thesis while living in Seoul, South Korea.

I would also like to acknowledge the crucial support of the people with whom I walk in this life, my wife Yu, my son Sora and my daughter Saia. The reason for moving from Nepal to Thailand and to South Korea has been as a result of Yu's work at the Office of the United Nations High Commissioner for Human Rights. I am very grateful to Yu for her continuous support; for buying me a round ticket Bangkok-Colombo much earlier

than I would have decided to go; for encouraging me to present my research at an international conference, long before I would have thought me ready to do so. To my son Sora, who supported me entering bibliographic references into a database and who has become a young man during this last four years. And to Saia, who was born in May 2013, two months after I registered to do this PhD, and to whom I have devoted most of my time, in addition to writing this thesis.

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Finally to my supervisor Rafael Grasa who has helped make this work what it finally is through his comments and feedback, support and encouragement.

To all those mentioned, and all those not mentioned but who influenced in some way the process of writing this thesis, I offer my thanks.

Seoul, South Korea

Thursday 23 February 2017

## Declaration

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I declare that this thesis is entirely my own work. Various presentations have been given using the results in this research and have been referenced where appropriate. The copyright of this thesis rests with the author.

Quotation is permitted provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent.

## **PART I**

# **DEVISING THE FRAMEWORK: TRANSITIONAL JUSTICE AND THE IMPACT OF TRUTH COMMISSIONS IN ACCOUNTABILITY**



The first part of this thesis establishes a framework to evaluate the impacts truth commissions (TCs) have in promoting accountability. The framework is the result of three main realizations. First, that in considering the impacts of TCs, it is important to pay attention to TCs as processes rather than considering exclusively their impacts on preconceived outcomes. A focus on process entails considering public participation in TCs and the relationships and interactions that a TC generates among the various affected groups within society. Second, accountability provides a framework to evaluate whether the relationships a TC generates empower people. This empowerment arises when state agencies are responsive to a new governing regime established in a post-conflict or post-authoritarian setting and when a governing regime is responsive to the citizens. Citizens' empowerment is important because it connects the grassroots level with high-level political processes of negotiation, filling what Lederach has called the 'vertical gap', the most significant weakness often present in peacebuilding processes. Third, to evaluate the impacts that a TC process has in promoting accountability requires an explanation of how a TC should logically work to produce a specific impact. This entails putting forward a theory of change that explains how TCs should work to make change happen.

These three realizations need to be properly contextualized for a better comprehension. That is what I do in the three chapters in part one. The first chapter gives an overview of transitional justice (TJ) discipline, starting in the democratization processes in Latin America and until recent approaches as part of a peacebuilding discipline. It then examines the evolving interaction of civil society with TJ processes and TCs as the mechanism at the center of this research. Section three presents a review of studies of impacts of TCs. Section four suggests and justifies the need to consider TCs as processes in an assessment of impact.

Chapter two presents the framework to assess the impacts of TCs in promoting accountability. It contextualizes accountability within the TJ field, specifically in connection to TCs. Section two defines and operationalizes accountability on the basis of its two dimensions - answerability and enforcement - and the two levels of interaction - horizontal and vertical accountability. Building on this twofold distinction, section three



presents the argument that TCs generate horizontal and vertical accountability relationships and that it is within these relationships that accountability, in its answerability and enforcement dimensions, is produced. To operationalize the previous argument for the purpose of assessing the impacts of TCs, section four presents a framework consisting of fourteen evaluative criteria.

Chapter three elaborates on how I carried out this research. I present theory based impact evaluation as a method to evaluate the impacts of a TC process. Then I explain the reasons for selecting the commissions established in Nepal and Sri Lanka as case studies. The second section deals with the collection and analysis of data through literature review and elite agent interviews. For elite agent interview, I present the three groups in which I divide the pool of interviewees, the line of inquiry followed, and the method used to analyze the resulting data. Finally, I examine ethical and gender considerations I had to confront while conducting this research.

## Chapter 1

# Transitional justice and peacebuilding: Assessing the impacts of truth commissions as processes

*‘Try to focus on materials that readers “need to know” to appreciate your research contribution, and no more’ (Dunleavy, 2003: 61).*

### Introduction

Opening this study, section one traces the evolution of transitional justice (TJ), from early studies on democratization in Latin America to recent approaches as part of the broader peacebuilding area of study. Section two, actors and instruments of TJ, examines the evolution of civil society in TJ processes and truth commissions (TCs) as the mechanism at the center of this research. Section three presents an overview of studies of impacts of TCs. It presents both quantitative as well as qualitative studies that target the impacts of TCs at a societal and state level. Finally, section four explores the need to take into account a focus on TCs as processes in an assessment of impact.

## 1.1 From transitions to democracy in Latin America to transitional justice as a process of peacebuilding

This section presents a general overview of the evolution of TJ since its origins in processes of democratization from authoritarian rule in Latin America to current approaches that situate the discipline as part of the broader peacebuilding area of study.

### 1.1.1 Transitional justice background

We can situate the background of TJ in the contexts of human rights violations and consequent democratizations in Latin America along with the academic studies on transitions to democracy. Enforced disappearances in Latin America led to case law by the Human Rights Committee and the Inter-American Court of Human Rights to recognize the right of the families of victims to know what happened to their relatives and the duty of the State to investigate and inform the families (Human Rights Committee, *Almeida de Quinteros v. Uruguay*, 1983). In 1988, the Inter-American Court of Human Rights found that all states have an obligation to take reasonable steps to prevent human rights violations, to conduct a serious investigation of violations when they occur, to impose punishment on those responsible and to ensure reparation for the victims of the violations (Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, 1988). Around the same time, TCs established in Argentina and Uruguay, to find out about the fate of those who had disappeared during years of military rule, released their reports in September 1984 and November 1985 respectively.<sup>8</sup>

In parallel to these developments, academic studies, such as the 1986 compilation on transitions from authoritarian rule, examined processes of democratization in Southern Europe and Latin America. In its tentative conclusions, the authors argued that instead of burying a recent past of human rights violations, reinforcing a sense of impunity, the new regime should ‘muster the political and personal courage to impose judgment upon those accused of gross violations of human

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<sup>8</sup> In Argentina, the National Commission on the Disappearances of Persons (CONADEP) submitted its final report on 20 September 1984 and in Uruguay, the Investigative Commission on the Situation of Disappeared People and its Causes, on November 1985.

rights' (O'Donnell and Schmitter, 1986: 30). This reasoning pointed to the core of TJ: what justice measures need to be taken during a transitional period.

The post-Cold War context led to many transitions from authoritarian regimes to democracy and from armed conflict to peace. Central in these transitions was the question of impunity and how to balance the demand of oppressors from the old regime to relinquish power in exchange for official or *de facto* amnesties and the victims' quest for justice (Sub-Commission on the Promotion and Protection of Human Rights, 1997: Introduction). The global response was to push human rights high on the agenda. In June 1993, the World Conference on Human Rights adopted the Vienna Declaration and Program of Action, by consensus of 171 states. The declaration was endorsed by the General Assembly in December (resolution 48/121). The Vienna Declaration called on states to abrogate legislation leading to impunity for those responsible for grave violations of human rights; recommended the General Assembly to consider establishing the position of a High Commissioner for Human Rights for the promotion and protection of all human rights; and called on the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue of impunity of perpetrators of human rights violations (UN General Assembly, 1993). The Office of the United Nations High Commissioner for Human Rights (OHCHR) would later on become the lead entity within the UN system in the area of TJ (Secretary-General, 2006: para.13).

Around the same time, the world also witnessed the humanitarian disasters resulting from the wars in former Yugoslavia and Rwanda. As a consequence, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute those responsible for serious violations of international humanitarian law in May 1993, and the International Criminal Tribunal for Rwanda to judge those responsible for the Rwandan Genocide and other serious violations of international law in November 1994. Prosecution of those responsible for violations of international humanitarian and human rights law led to a recognition of the victims' rights to prosecute and set the stage for a more retributive approach to TJ. The consequent adoption of the Rome Statute of the International Criminal Court in 1998, which entered into force in July 2002, established a permanent international

tribunal with jurisdiction over the crimes of genocide, crimes against humanity and war crimes.

In 1997, the then UN Commission on Human Rights endorsed the *Set of principles for the protection and promotion of human rights through action to combat impunity*. The principles articulated a set of guiding principles for the fulfillment of the victims' right to know, right to justice, and right to reparations, as well as a series of measures aimed at guaranteeing the non-recurrence of violations (Sub-Commission on the Promotion and Protection of Human Rights, 1997). The three victims' rights to truth, justice and reparations along with the measures to avoid repetition became the TJ "mantra", a toolbox to apply in contexts of transition. They were further unpacked and analysed in consequent UN resolutions and other instruments of soft law. In 2004, the United Nations Secretary General issued the report *The rule of law and transitional justice in conflict and post-conflict societies* in which he defined TJ as comprising,

The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (Secretary-General, 2004: para. 8).

This definition incorporates the main instruments in a TJ process: prosecutions, truth seeking, reparations, institutional reform and other measures to deal with state official's individual responsibility, such as vetting and dismissals. Criminal prosecutions entail bringing those responsible for violations of human rights and international humanitarian law to justice. While the international tribunals for the former Yugoslavia and Rwanda paved the way for trials, other mixed tribunals followed, such as the Extraordinary Chambers in the Courts of Cambodia, in 2001; the Special Court for Sierra Leone in 2002; or the War Crimes Chamber of the Court of Bosnia and Herzegovina, in 2005. From a TJ perspective, prosecutions at a domestic level are generally preferable, as they strengthen national capacities and allow for better access to victims, witnesses and evidence (Freeman and Saini, 2007: 65). Nevertheless, where domestic courts are unable or unwilling to carry out prosecutions, international and hybrid tribunals 'have proved

that it is possible to deliver justice and conduct fair trials effectively' (Secretary-General, 2004: para. 40).

Truth seeking mechanisms include TCs and other commissions of inquiry. They are non-judicial mechanisms set up to establish the facts, root causes and consequences of past violations of human rights. As non-judicial bodies, they do not prosecute alleged perpetrators. Once they finish their work, TCs submit a report compiling their findings and making recommendations. These recommendations are a response to the violations committed. They are aimed mainly at repairing the harm done to the victims, establishing individual and/or institutional responsibility for the violations, dealing with the causes of the violence and recommending institutional and legal reforms to avoid repetition.

Reparations are measures intended to redress victims as a result of past abuses. Reparation programs include compensation payments along with privileged access to some public or private services, such as health, education, pensions or other services (Freeman and Saini, 2007: 67). Institutional reform is another tool that can be implemented in societies transitioning out of armed conflict or authoritarianism. The reform of state institutions responsible for committing violations, or for failing to avoid them, attempts to prevent repetition. Only a reformed police, prosecutor's office or judiciary will be in a position to contribute to domestic criminal accountability (OHCHR, 2006b: 3). Linked with institutional reform is the vetting of public service. Vetting the public service entails screening out individuals associated with a past of abuses in order to enhance the legitimacy of state structures, restore the confidence of the public and build the rule of law (Secretary-General, 2004: para. 52-3).

Following the 2004 Secretary General report, other UN documents of soft law substantiated the content of these TJ tools in terms of the rights of victims and corresponding state duties. In 2005, independent expert Diane Orentlicher submitted the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (UN Commission on Human Rights, 2005). The Updated Set of Principles emphasized the state obligation to investigate violations, ensure perpetrators are prosecuted, tried and punished; provide victims with effective reparations and fulfill their right to know the truth about violations and take steps to avoid recurrence of

violations. In 2006, the OHCHR submitted its study on the right to the truth (UN Commission on Human Rights, 2006) and, in 2006, the General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN General Assembly, 2006).

Furthermore, these various principles and guidelines expanded the prohibition of amnesties to perpetrators of gross violations of human rights. Initially, in 1999, the Office of the UN Secretary General (UNSG) issued a confidential cable to all UN representatives around the world attaching the “Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution”. The Guidelines stated that the UN could not condone amnesties for war crimes, crimes against humanity or genocide, in line with the Rome Statute establishing the ICC (Freeman, 2009: 89). The UNSG made this position public and clear in the 2000 report to the Security Council on the establishment of a Special Court in Sierra Leone, when he stated that ‘the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law’ (Secretary-General, 2000: para.22). Soon after, the 2004 UNSG report expanded that restriction to gross violations of human rights (Secretary-General, 2004: para. 10). This position would be later on confirmed in the Updated Principles to Combat Impunity that defined serious crimes under international law as encompassing gross violations of human rights and declared that perpetrators of these crimes could not benefit from amnesties (UN Commission on Human Rights, 2005: principle 24). Since then, this has been the UN position on amnesties, which the UNSG has repeatedly confirmed in following guidance notes and reports (Secretary-General, 2010: 4, Secretary-General, 2011: para.67).

This joint and unprecedented effort to punish perpetrators and end impunity was not the only tendency in TJ. In 1995, South Africa established a Truth and Reconciliation Commission (TRC) to deal with its own transition out of the violent conflict and repressive rule. The TRC became to be known worldwide for its amnesty in exchange for truth scheme. The amnesty for truth covered gross violations of human rights, an option that would have been against the UN position on amnesties after 2004.

What the TRC highlighted was a contradiction between a condemnation of amnesties and the success of a transition in which conditional amnesties were used. This contradiction also highlighted a tension between international criminal law and TJ: tolerance for amnesty was receding just as the interest in TJ, as a justice with constraints as illustrated in South Africa, was increasing (Freeman, 2009: 3). Many in the field of TJ, especially human rights organizations, came to see the South African model in a negative light (Freeman, 2009: 3). Even though no other commission had the power to grant amnesties for serious crimes, the South African model gave rise to amnesty laws being introduced before, at the same time, or after the establishment of TCs. According to scholar Louise Mallinder, TCs are more commonly established in a span of time of plus-minus five years of the amnesty law and, most commonly, amnesties are introduced at the same time as TCs (Mallinder, 2008: 22-3). Notwithstanding the amnesty issue, now linked to truth seeking processes, the field evolved.

The TJ discipline went from considering TCs as an alternative to prosecutions to understanding both processes as complementing each other; in other words, it went from a truth *versus* justice debate to a truth *and* justice approach (Roht-Arriaza, 2006: 8). The realization was that the choice was not anymore between prosecutions or impunity. Rather the TJ field had expanded and now was considering other socio-political aspects during a transitional context. In seeking a holistic approach (Boraine, 2006), encompassing truth, justice, reparations and institutional and legal reform the field expanded temporarily and to other disciplines. The discipline expanded in time, as the different TJ mechanisms needed to be implemented in sequence. Establishing a TC at the beginning allowed for designing a program of reparations suitable to the victims of different violations. Similarly, a TC could analyze the root causes behind the armed conflict or behind a repressive regime and recommend changes in legislation or state institutions to avoid repetition. Finally, a TC could undertake a thorough investigation and recording of violations that could lead to prosecutions years later when those responsible were not holding positions of power anymore. A holistic approach also led to expanding the field to other disciplines, in other words, to cut TJ free 'from its roots in law and the legalization of its dilemmas' (Bell, 2009: 21). In seeking to fulfill other goals



beyond prosecutions, the discipline expanded to other related fields such as conflict resolution, democratization, development, or peacebuilding.

Specifically in relation to peacebuilding, there have been attempts to approach TJ as part of a broader strategy to build peace in post-conflict settings. The next section examines the evolution of peacebuilding and explores its links with TJ.

### 1.1.2 Transitional justice as an integral part of peacebuilding

In 1992, then UNSG Boutros Boutros-Ghali introduced the concept of postconflict peacebuilding, defining it as an 'action to identify and support structures which will tend to strengthen and solidify peace in order to avoid relapse into conflict' (Secretary-General, 1992: para. 21). In 1995, he expanded the concept emphasizing the 'creation of structures for the institutionalization of peace' (UN General Assembly, 1995: para. 49).

Following John Paul Lederach,

[Peacebuilding] is understood as a comprehensive concept that encompasses, generates, and sustains the full array of processes, approaches, and stages needed to transform conflict towards more sustainable, peaceful relationships. The term thus involves a wide range of activities that both precede and follow formal peace accords. Metaphorically, peace is seen not merely as a stage in time or a condition. It is a dynamic social construct (Lederach, 1997: 20).

The more elaborated definition by Lederach points at the need to transform relationships during a period of time that goes well beyond the formalization of peace. Hence, the signing of a peace accord by former warring parties or a political agreement between an authoritarian regime and a new pro-democratic movement does not end conflict. As recognized by many, the end of violence, a situation of negative peace as formulated by Galtung (Galtung, 1967), does not bring about the end of conflict. Lederach points out that when violence ends 'the conflict has been placed within a newly defined context where it can be pursued by other, hopefully nonviolent means' (Lederach, 2005: 47).

The 2000 "Report of the Panel on United Nations Peace Operations", also known as the "Brahimi Report", defined peacebuilding as incorporating the following functions;

Reintegrating former combatants into civilian society, strengthening the rule of

law (for example, through training and restructuring of local police, and judicial and penal reform); improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict resolution and reconciliation techniques (UN General Assembly, 2000: para. 13).

The previous functions have been classified in four main areas of peacebuilding intervention, which include (1) governance and security, (2) democratization and political participation, (3) socio-economic recovery and economic liberalization, and (4) transitional justice (Mateos-Martin, 2011: 27-44).<sup>9</sup> This line of peacebuilding intervention reflects the idea that to maintain peace, there is a need to intervene in various areas, which include institutionalizing democracy, development, free market economy, human rights and strengthening civil society. They also reflect a consensus on a liberal project that seeks 'to build peace within and between states on the basis of liberal democracy and market economics' (Newman, Paris and Richmond, 2009: 7). This liberal bias in peacebuilding has been criticized, not only for not eliminating the root causes of the conflict, but for 'rekindle the conditions for conflict' (Barnett, Kim, O'Donnell and Sitea, 2007: 51).

TJ has gained importance within the peacebuilding field because of the increase in the number of peace processes around the world. At the basis of their relation lies the belief that addressing the legacies of past violence and abuses is necessary to avoid recurrence of conflict and build sustainable peace. Defenders of this approach argue that 'it takes into account the expectations of conflict participants, as well as the links between dealing with the past and building peace for the future' (Lambourne, 2009: 29). Thus, because of its 'future-oriented approach to the past, an ultimate aim of transitional justice is to create the conditions for a sustainable peace, and in this sense it is an intrinsic part of peacebuilding' (Gready and Robins, 2014: 350). Some talk about the *peacebuilding functions* of TJ which include: establishing a historical record and countering denial; ensuring accountability and ending impunity; and fostering reconciliation and socio-political reconstruction (International Association for Humanitarian Policy and Conflict Research).

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<sup>9</sup> I take the classification established by Oscar Mateos after he reviews the criteria used by different actors, including academic literature, International NGOs and governmental aid organizations.

The fact that TJ has become part of peacebuilding entails that it is subject to similar flaws and criticism that has surrounded the liberal peacebuilding consensus. Critics have argued liberal peacebuilding pushes in a democratization process at an early stage, which might have destabilizing consequences. Echoing this critique, Sriram has argued that 'transitional justice processes are often linked explicitly to democratization and that, like democratization, they may destabilize post-conflict countries' (Sriram, 2007: 586). Destabilization might result from a TJ focus at dealing with both the past and the future. Backward looking accountability mechanisms such as trials or TCs, which put the justice part of TJ at the center, might destabilize and undermine the building of peace. Forward-looking measures, which favor the transition side, such as reforming the judiciary and security forces might be destabilizing by generating competition over the ownership of the process. They might also be perceived as taking the control of these institutions away from still powerful elites (Sriram, 2007: 591). Criticism to the liberal peacebuilding model has also focused on its exogenous character that does not take into account local realities (Mateos-Martin, 2011: 135-44). Similarly TJ has been criticized as being externally imposed based on a western understanding of legal justice without taking into account local traditional justice mechanisms.

### 1.1.3 Summary conclusion

The previous analysis shows both TJ and peacebuilding fields have adapted to each other. As we have seen, the roots of TJ are found in the context of transitions from authoritarian to democracy in Latin American countries in the 1980's. The legal foundation of the TJ field gained traction in the 1990's with the global fight against impunity and the establishment of international tribunals. But TJ is a discipline in which concept and field are essentially contested, where the study and development of the concept diverged from what was happening in the field where transitions unfolded. The South African TC exemplified this tension. At a moment when international criminal justice was showing prominence, the conditioned amnesty offered by the South African TC situated the idea of TJ as a justice with constraints at the center. The expansion of the

filed, from prosecutions to truth, reparations and measures intended to avoid repetition was also an expansion to other disciplines beyond the legal framework.

Peacebuilding fits well with a broader approach to TJ beyond prosecutions and criminal justice. Two issues are critical to this broader approach. The first is the role of civil society in processes of transition and peacebuilding. Another issue is the role of TCs in expanding the TJ field beyond prosecutions. This is the object of analysis in the next section.

## **1.2 Actors and instruments of transitional justice: civil society and truth commissions**

This section looks into actors and instruments, particularly civil society in TJ and TCs as the mechanism at the center of this research.

### 1.2.1 Civil society in transitional justice processes

Similarly to the analysis of TJ in the previous section, the study of the role of civil society in TJ also demands a brief examination of its evolution. Civil society played a key role in some of the transitions to democracy during the third wave of democratization. O'Donnell and Schmitter refer to the 'popular upsurge', a particular moment during the transition when various layers of society, trade unions, grass-roots movements, religious groups, intellectuals, writers, professional associations unite in the streets in a 'greater whole which identifies itself as "the people"' (O'Donnell and Schmitter, 1986: 54). This popular upsurge is not a constant and while it happened in Portugal in 1974 and, in a lesser scale, in Brazil in 1984, there is little evidence of its occurrence in Spain or Greece (O'Donnell and Schmitter, 1986: 54). Of the two cases examined in this thesis, Nepal and Sri Lanka, the 1990 transition to democracy in Nepal shows this popular upsurge. Thousands of people demonstrated on the streets during two months in what came to be known the *jana andolan* or people's movement.

But what are we talking about when we refer to civil society? And, more specifically, what is civil society in TJ? According to Diamond, civil society is

*The realm of organized social life that is voluntary, self-generating, (largely) self-supporting, autonomous from the state, and bound by a legal order or set of shared rules. It is distinct from "society" in general in that it involves citizens acting collectively in a public sphere to express their interests, passions, and ideas, exchange information, achieve mutual goals, make demands on the state, and hold state officials accountable (emphasis as it appear in the original, in Diamond, 1994: 5).<sup>10</sup>*

Civil society is autonomous from any political system. While it may form alliances with political parties at specific moments, such an alliance risk that civil society gets captured by political parties (Diamond, 1994: 7). Both case studies in this thesis show this vulnerability. In Nepal, many civil society activists became political activists after a ban on political parties was lifted. In Sri Lanka, the political party in the opposition captured victim organizations and, once this opposition became the ruling government, victim organizations vanished.

The relationship with the state is key to understand the role of civil society. In a context of transition from authoritarian to democratic regimes, civil society mobilizes in the belief that changing the nature of the state is beneficial for the public good (Diamond, 1994: 6). Crocker refers to the antigovernmental model where civil society unites against a government that has violated human rights or permitted their violations. In this case civil society 'opens space to criticize and undermine state oppression and to build a different kind of society' (Crocker, 1998: 501). Through democratizing an authoritarian state, civil society limits the state power (Diamond, 1994: 7). Civil society mobilization is a major means of exposing abuses and undermining the legitimacy of authoritarian regimes. Civil society actors, such as human rights organizations and victims have traditionally played a key role in contexts of transition. Even before the transition starts, human rights defenders and relatives of political prisoners or those who have been tortured or killed are often the first to raise their voices against the authoritarian regime, when severe repression is still ongoing and while other social actors choose to ignore the regime's atrocities (O'Donnell and Schmitter, 1986: 51). Both case studies in this thesis reflect on the role of local human rights defenders and victim actors. In Nepal, human rights activists played a key role in exposing the police in their use of torture against detained demonstrators and the use of

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<sup>10</sup> I leave out the theoretical debate starting with Hegel about civil society and focus here in operational definition that is used in transitional justice and peacebuilding studies.

outlawed dum-dum bullets against peaceful protesters. In Sri Lanka, victim organizations, especially the Mothers' Front, were instrumental to protest against a government responsible for thousands of disappearances. These protests and public demonstration of anger by the relatives of the missing also opened a space for the resurgence of oppositional politics.

Civil society support and involvement in pro-democracy movements can lead to some of its more important figures becoming part of the new government or the new structures and institutions of the state. Similarly, those who play an influential role during peace negotiations risk being absorbed in the new government as ministers of justice, heads of human rights commissions or TCs (Hovil and Okello, 2011: 336). The 1990 Nepali transition from autocratic Panchayat regime to multiparty democracy saw two of the civil society leaders becoming ministers in the one-year transitional government. In Sri Lanka, a leading human rights lawyer eventually chaired one of the zonal commissions established to investigate disappearances. On the other hand, Grodsky discusses cooption as an evident risk when former NGO leaders are appointed to hold positions in government. He differentiates between *de facto* cooption, when new political elites bring NGO leaders in the government, but gives them little power. Another option is when NGO heads accept positions and a share of state resources in exchange for silence. Still in other cases NGO leaders remain determined to make a difference, but find obstacles in making decisions to influence outcomes (Grodsky, 2012: 1688). The Nepal transition shows civil society leaders being silenced as they joined political parties, falling under the discipline of the parties. In Sri Lanka lawyers from NGOs who supported the commission established in 1994 were appointed to work for the National Human Rights Commission. As Grodsky suggest, integration of former civil society leaders in the government may not necessarily be positive as it may obstruct, rather than facilitate, relations when NGOs continue taking on their watchdog role and criticizing the government (Grodsky, 2012: 1689).

Diamond discusses the second dimension in a civil society function to limit state power. That is to restrain the state exercise of power once the regime becomes democratic (Diamond, 1994: 7). However, Diamond does not consider the role of civil society during the 'transitional process'. It is a third dimension in a civil society function

to limit state power, between democratizing an authoritarian state and containing the power of democratic governments. Developments in the implementation of TJ mechanisms allow civil society to limit state power during the TJ period. This leads to analyzing civil society actors in TJ settings, including how this relation between the state and civil society has evolved.

### *Civil society actors in transitional justice*

Some argue that international human rights organizations (IHROs) are the civil society actors engaged in TJ that have received more attention from practitioners and scholars (Boesenecker and Vinjamuri, 2011: 359). IHROs advocate for justice and criminal accountability in global networks and locally work in conflict and post-conflict settings to diffuse these norms (Boesenecker and Vinjamuri, 2011: 359). These organizations expanded during the 1990s, partly as a result of the setting up of the ICTY to prosecute perpetrators of mass atrocities. In fact, some of these organizations, such Human Rights Watch, were instrumental for the establishment of the ICTY (Boesenecker and Vinjamuri, 2011: 359). The 1990s also saw the establishment of the OHCHR, to become the UN lead agency on TJ. Its legal approach to TJ, based on international human rights law and international humanitarian law, coincides with that of other IHROs. The International Center for Transitional Justice (ICTJ) was founded in 2001 as an international non-profit organization specializing in the field of TJ.

The work of traditional IHROs and the ICTJ has tended to converge over the last years. Central to this intersection is the UN position on the prohibition of amnesties for genocide, crimes against humanity, war crimes and gross violations of human rights. As a result, IHRO and the ICTJ positions have aligned in advocating the states not to grant amnesties for such crimes. However, while IHROs, and their local partners, have continued to stress on the duty of the states to prosecute perpetrators, the ICTJ has also advocated for the establishment of TCs in transitional settings. Consequently, the work of these organizations has tended to converge when pursuing similar interests. An area of such convergence has been advocacy to amend legislation establishing TCs in accordance with international human rights law. In Nepal, in the transitional context

after the signing of the 2006 peace agreement, IHROs such as Human Rights Watch, Amnesty International, the International Commission of Jurists, ICTJ and the OHCHR sided with local human rights organizations to denounce the government attempts to pass an amnesty for perpetrators of human rights violations and war crimes through legislation establishing a TC (Fernandez-Torne, 2013: 71-92).

There are differences between the work of human rights organizations (HRO) and the work of TJ organizations, because of their different approaches. Notably, HROs would typically adopt a more confrontational approach in their work vis-à-vis the state while TJ organizations would tend to seek collaboration and to work with the state, victims and broader citizens. As some recognize, civil society organizations working on TJ have the potential to ensure a broad participation of citizens in TJ processes through their various advocacy strategies and activities (Hovil and Okello, 2011: 333). As a result, those working on TJ start being identified as TJ practitioners as opposed to human rights activists. A 2010 workshop report on civil society and TJ in Africa, organized by the Center for the Study of Violence and Reconciliation, a leading NGO in the field of TJ, reflected on this new reality,

Workshop participants spoke about being identified as transitional justice practitioners, as opposed to human rights researchers and activists, for example, and not recalling exactly when and how this shift occurred or knowing whether they are comfortable with the narrowness of the identification, given what they perceive as the broader import of their work. Most participants have been members of civil society for years, advocating for peace and human rights protection at the domestic and international levels (Brankovic, 2010: 4).

Different approaches by HROs and TJ organizations are also applicable to the work with victims. Current literature on victims raises concerns on the role of HROs, which tend to take the agency from victims. For example, examining the relationship between victims and human rights practitioners in Nepal, some contend that,

One result of the human rights discourse as it is articulated in Nepal is that rights have become something claimed on behalf of victims by experts largely based in Kathmandu, with agency lying only with those who have access to the discourses that are used (Robins and Bhandari, 2012).

HROs here were advocating for the fulfillment of the rights of victims situating them as passive recipients rather than active claimants. The empowering human rights discourse was used at the expense of situating the victims as disempowered. Some strongly



criticize the international human rights movement, as part of a TJ industry that produces disempowered victims (Madlingozi, 2010: 212-3). As opposed to traditional HROs working on behalf of victims, TJ organizations tend to work more closely with victims and citizens, situating the agency and empowerment of victims at the center of their work.

The conditions to working more closely with victims and citizens become more favorable when TCs are established. TCs are mechanisms that provide a space for victims' participation and foster civil society engagement. As opposed to prosecutions, which depend on evidence and testimony, TCs are potentially amenable to public participation (Backer, 2003: 301). Beyond fostering public participation, a TC becomes a very suitable mechanism for civil society to exercise control and limit state power through promoting state responsiveness and accountability. The next section examines TCs as an instrument of TJ.

### 1.2.2 Truth commissions as an instrument of transitional justice

This section examines what are the criteria TC's definitions share as an instrument of TJ. It then situates current TCs as an evolution of Commonwealth commissions of inquiry (COI), specifically royal commissions and departmental committees, with origins in the United Kingdom. Through the insightful work of Cartwright, the section compares TCs and COIs highlighting their similarities in core characteristics, functions and the fact that both emerge as unique mechanisms allowing for public participation.

Much study has been undertaken on what are TCs and the requirements they need to fulfill to be considered one. This section will examine three of such studies. For Freeman a TC is,

An ad-hoc autonomous *victims centered* commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating *and reporting* on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention (Freeman, 2006: 18).

Dancy et al. advance the following criteria as part of a TC: (1) the mechanism was a newly established and temporary commission; (2) it was officially sanctioned by the

state; (3) its mandate includes investigative powers; (4) it actually began operating; (5) it investigated a pattern of abuses to personal integrity rights that occurred over a period of time, some of which were perpetrated by state actors' (Dancy, Kim and Wiebelhaus-Brahm, 2010: 49). Hayner defines a TC as a mechanism incorporating the following characteristics: (1) It is focused on the past, rather than ongoing, events; (2) it investigates a pattern of abuses committed over a period of time; (3) it engages directly and broadly with the affected population, gathering information on their experiences; (4) it is a temporary body, with the aim of concluding with the submission of a report; and (5) it is officially authorized or empowered by the state under review (Hayner, 2002: 14, Hayner, 2011: 11-2). Freeman provides the narrowest definition of a TC and counts 28 commissions that qualify as TC until the 2005 TC in Liberia. Dancy et al. also finish their list with Liberia, but their use of a broader definition increases the number to 37. Hayner counts 33 TCs until Liberia. All these authors include the 1990 Committee on Disappearances in Nepal and the 1994 three Zonal Commissions of Inquiry into Disappearances in Sri Lanka, the case studies considered in this thesis, as TCs.

Despite the differences, the three definitions share a few common criteria. First, a TC is a mechanism established anew and for a specific task, which determines its temporary, non-permanent existence. Second, a TC examines only past events. Third, a TC's power or right to be is given by the state in which the violations occurred. The third criterion is explicitly mentioned in Freeman who refers to the violations as being committed in the 'sponsoring state' and Hayner who refers to the empowerment by the state under review. While not specifically mentioned by Dancy et al., it is understood this is also the case. Fourth, a TC is established to investigate. Freeman and Hayner also refer to the commissions' purpose of reporting absent in Dancy et al. Freeman moreover describes what should be reported as the principal causes and consequences of the violations that were committed. Fifth, a TC investigates a pattern of infringement of rights over a period of time, where at a minimum, the state was one of the perpetrators. Freeman includes the fact that TCs focus on severe acts of violence or repression, whereas Dancy et al. refer to abuses of personal integrity rights and Hayner refers to abuses. The requirement of a state being a perpetrator is clearly stated by Dancy et al. It is also understood in the discussions by Freeman and Hayner, although not mentioned

directly in their definition. Freeman refers to severe acts of violence or repression, such as arbitrary detention, torture, enforced disappearance or summary executions. All of them are international crimes that involve the state as a perpetrator (Freeman, 2006: 14). Hayner refers to 'politically motivated or politically targeted repression that was used as a means to maintain or obtain power and weaken political opponents' (Hayner, 2002: 17).

Other defining criteria appear mainly in Freeman's definition. He refers to the autonomous character of a TC, in terms of operating relatively independent from the state – a requirement none of the two others consider. He also talks about the context in which such acts of violence occur, that is a period of abusive rule or armed conflict. Freeman also refers to the purpose of a TC to make recommendations to redress the causes and consequences of the violence. Finally, Freeman and Hayner's definitions also refer to the specific role victims play in the investigation as providers of information. Freeman defines this victim-centrism as a focus primarily on victims, as opposed to witnesses and perpetrators (Freeman, 2006: 17). Dancy et al. definition does not consider any specific role for victims.

Freeman's definition also refers to a TC being a commission of inquiry (COI). Indeed commonwealth COIs, which originated in the United Kingdom, are the precedent to TCs. Freeman has correctly pointed out the significant influence and similarities between COIs and TCs. Some of those COI established by Commonwealth member states, such as Uganda (1974 and 1986), Zimbabwe (1984), Nepal (1990), Sri Lanka (1994), and Nigeria (1999) are characterized by Hayner as TCs (Freeman, 2006: 23). In other Commonwealth countries, such as South Africa and Sierra Leone, TCs were established under special legislation, but the drafting of such legislation was influenced by the COI legislation (Freeman, 2006: 23-4). It is relevant to explore more in-depth the COI precedent as both commissions examined in this research were established on the basis of commonwealth COI legislation, in Nepal the 1969 COI Act and in Sri Lanka the 1948 COI Act.<sup>11</sup>

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<sup>11</sup> Sri Lanka is a former British Colony but not Nepal. In fact, although Nepal is not even a Commonwealth member state, its legislation is based on the British Common Law due to the special historical influence.

*Commissions of inquiry, the precedent to truth commissions*

Commissions of inquiry (COIs) were not called as such in the United Kingdom, where they originated. They were called royal commissions (RCs) and departmental committees (DCs), a specific type of ad hoc advisory committee appointed by virtue of non-statutory powers of the Crown and its ministers respectively (Cartwright, 1975: 1).<sup>12</sup> On the contrary, RCs and DCs were called COIs in former British dominions where they were, and continue to be, appointed under specific legislation (Cartwright, 1975: 41). For example, in Australia there is the Royal Commissions Act, 1902, in New Zealand, the Commissions of Inquiry Act, 1908, and in Canada the Inquiries Act, 1952. However, there was no such legislation in the United Kingdom until the Inquiries Act, 2005. Freeman refers to the Tribunal of Inquiry Act, although this legislation only gave ad-hoc tribunals of inquiry specific powers, similar to those vested in the High Court (Tribunals of Inquiry (Evidence) Act, 1921).<sup>13</sup> Although these powers were later on adopted by COI legislation, such as the 1948 COI Act in Sri Lanka or the 1969 COI Act in Nepal, tribunals of inquiry and COI differ from each other in one important feature: tribunals may have powers to make decisions while COIs do not have such powers. As a result ministers cannot disclaim all responsibility for the actions of tribunals in Parliament, which they can do for COIs (Cartwright, 1975: 12).

RCs and DCs have the same characteristics as COIs. They are distinct from all other types of committees. As opposed to standing committees, they are both ad-hoc, appointed for a limited and temporary purpose and automatically come to an end when that purpose is accomplished (Cartwright, 1975: 15). They are both advisory committees and not internal committees or tribunals. This entails that their members are normally

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<sup>12</sup> Cartwright argues that advisory committees, can be assumed to have existed at least as far back as the eleventh century, when William I appointed some of his barons and justices to make the inquiries which resulted in the Domesday Book of 1086. A century later, in 1176 the Inquest of Sheriffs, a Royal Commission involving panels of justices, was commissioned by the Crown to inquire into allegations of abuse and injustice by sheriffs and other local officials.

<sup>13</sup> With regards to taking evidence, powers include some of those attributed to COI in legislations, such as enforcing attendance of witnesses, compelling the production of documents as well as the possibility of the proceedings being public. It is the case of Sri Lanka and Nepal where legislation on COI provide for such powers.

drawn from outside of the civil service, they usually conduct their activities openly, issue public reports of their findings, and ministers are not responsible for and need not to accept their recommendations (Cartwright, 1975: 12). The main difference between RCs and DCs is that while the Crown appointed RCs, ministers appointed DCs (Cartwright, 1975: 23). Both could call for evidence, hold public hearings, and undertake research although the tendency was for RCs to take, on average, longer time (Cartwright, 1975: 25). RCs enjoy more prestige because they tend to be identified with the government as a whole, while DCs are linked to specific ministers or departments (Cartwright, 1975: 27). Cartwright review finds 24 royal commissions and 358 departmental committees established in the UK from 1945 to 1969.<sup>14</sup> These characteristics shed some light on the basic characteristics and functions of current TCs.

RCs and DCs also have the same features as TCs. When comparing the characteristics outlined for a RC or DC with the common criteria of the three definitions of a TC, we find that they are all mechanisms established anew for a specific task, which determines its non-permanent character. Second, both RCs/DCs and TCs examine past events. Third, their existence is sanctioned by the state 'under review'. Fourth, in both cases, they are established to investigate. The main difference is that RCs or DCs are not founded to investigate a pattern of infringement of human rights over a period of time, where the state was one of the perpetrators. However, this is a difference in the substance (what TCs investigate) and not in the formal aspects (the structure of TCs). If we further compare with the additional defining criteria by Freeman, we see RCs or DCs are also autonomous from the state. Similarly, like TCs, they are established with the purpose of making recommendations in a final report.

Freeman identifies other differences between traditional Commonwealth COIs and current TCs. First, a TC usually conducts itself in a victim-centered manner; second, the investigation of TCs usually cover thousands of individual cases committed over long periods of time, as opposed to COIs that usually focus on a specific event, institution or theme that is engulfed in public controversy; third, TCs often face higher

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<sup>14</sup> An example is the "East Africa Royal Commission", 1953-1955, set up by the British government to review issues of economic development in British colonies across British East Africa. An example of a departmental committee is the "Allegations of Ill-Treatment of Prisoners in Her Majesty's Prison, Liverpool" set up in 1958.

security risks, as they are established in times of political or postconflict transition; and fourth, while commissioners in TCs are usually appointed with public participation, COIs are presided by a judge, normally selected by the executive branch (Freeman, 2006: 124-5). Again, none of these differences relate to defining criteria to conclude COIs and TCs are formally different mechanisms. I turn next to compare the purpose of RCs and DCs as outlined by Cartwright in 1975 with those in Freeman's 2006 definition of a TC.

The functions of RCs and DCs also coincide with those of TCs. Freeman provides that,

TCs are set up for the primary purposes of, (1) investigating and reporting on the principal causes and consequences of (...) patterns of severe violence or repression (...), and (2) making recommendations for their redress and future prevention (Freeman, 2006: 18).

According to Cartwright, RCs and DCs are established for three main purposes. First, to obtain information, in the sense of fact-finding; second, for formulating policy, in the sense of 'inventing, developing, and analyzing possible courses of action', the *design* activity; third, for proposing specific action, in terms of 'selecting a particular course of action from those available', the *choice* activity (Cartwright, 1975: 101-2). We find overlaps when comparing Cartwright and Freeman's description of purposes. TC's purpose of investigating by Freeman coincides with that of RCs/DCs to obtain information by Cartwright. Similarly, the purpose of making recommendations in Freeman's definition relates to the purpose of proposing specific actions in Cartwright. The other purposes in Cartwright's definition, formulating policy, does not appear in Freeman's definition, mainly because TCs do not need to invent, develop, and analyze possible courses of action. Rather, suitable options are already foreseen on the many international human rights instruments as well as previous experiences and practices of other TCs regarding types of reparations for victims, the duty of the state to investigate violations, and legislative and institutional measures intended to avoid re-occurrence. TCs need to choose and propose specific action among policies already available.

Cartwright finds over 1/3 of the 24 royal commissions and 358 departmental committees established in the UK from 1945 to 1969, were appointed to obtain information, formulate policy, and to propose specific action. Another 1/3 were appointed to gather information and advise the government on a specific course of

action. The other 1/3 falls evenly in two categories: either purely fact-finding bodies or fact-finding and to develop and analyze possible courses of action, that is, to formulate policy. Cartwright finds a 98% of RCs and DCs (all 24 royal commissions and all of the departmental committees but 5) were fact-finding bodies with the common purpose of obtaining information (Cartwright, 1975: 103-4). This coincides with the main investigative functions of TCs.

There is a fundamental characteristic both RCs and DCs share with TCs. Cartwright argues RCs and DCs provide a unique kind of mechanism for public participation in government and that 'at no other point is there a comparable opportunity for private individuals or interest groups to take part in the making of public policy' (Cartwright, 1975: 6). I argue this analysis still holds for public engagement in today's TCs, specifically for victims and civil society, but also for other actors such as state bureaucrats, security forces officers and Commissioners, usually respected persons in society. Like in the case of TCs, the opportunity for public participation in RCs and DCs is built in both their structure and operations. In their structure, members of RCs and DCs are, totally or partially, selected from outside of the civil service. Likewise, members of TCs are also chosen from outside of the civil service. Even judges, usually appointed as commissioners in commonwealth COIs are not considered part of the civil service. Non-commonwealth TC have been more inclined to appoint renowned people from different backgrounds, including politicians, jurists, or writers as commissioners.

As for the opportunity for the public to participate in their operations, RCs and DCs encourage people with special knowledge of the question to give evidence. They issue invitations to solicit evidence on some or all aspects of their terms of reference. RC/DCs hold public hearings with witnesses coming forward to express their views, unless exceptional circumstances justify holding them in private (Cartwright, 1975: 126-35). As Cartwright writes,

By systematically taking evidence on a specific problem from almost anyone who wants to give it, these committees provide a unique opportunity for the views of the various interests in society to be injected efficiently into the decision-making process (Cartwright, 1975: 126).

Likewise, TCs solicit evidence from the public, particularly from victims who suffered violations and witnesses. TCs also try to collect evidence from those who are accused of having perpetrated those violations, specially the state security forces, army, police etc. TCs also hold public hearings. Traditionally, only TCs established in Commonwealth states held public hearings, with the exception of the commission established in Germany in 1992. After the 1995 South African TRC and its popular broadcasted public hearings, TCs established in non-commonwealth states, such as Peru, Timor-Leste, Morocco and Paraguay, also held public hearings (Freeman, 2006: 24).

Finally, another commonality RCs and DCs share with TCs is the criticism of their limited impact related to the poor implementation of their recommendations. As Cartwright mentions 'the more popular belief seems actually to be that committee recommendations are, if anything, automatically ignored' (Cartwright, 1975: 203). This has also been a criticism of TCs. However, this criticism seems misguided as these mechanisms cease to exist once they submit their final report. They make recommendations, but it is for the respective government to implement them. As Cartwright puts it, 'the fate of their recommendations lies in hands other than their own' (Cartwright, 1975: 206). Furthermore, Cartwright notes that RCs and DCs have been criticized for being unnecessary and that their appointments were a substitute to more positive action and *prima facie* evidence of a failure to govern (Cartwright, 1975: 210). Similarly TCs have been criticized for being a substitute to what the normal course of action should be; to prosecute those responsible for committing crimes. The next section turns to the assessment of impacts of TCs.

### **1.3 Assessing the impacts of truth commissions: the state of the art**

In this section, I start considering some of the challenges when assessing impacts in TJ. I then examine quantitative and qualitative studies that target the impacts of TCs at a societal and state level, with special attention to two qualitative studies. I finalize with an overview of the gaps this research will attempt to fill.



### 1.3.1. The broader picture: transitional justice impacts

TJ has been questioned on whether or not it works. To start with, it is often not clear for whom TJ is intended, whether the focus should be mainly on the survivors, those who were victimized during a previous regime, or rather should be to consolidate a new-born democratic regime. Neither it is clear what should be the goals of TJ. According to Bell,

Research on whether TJ works has two main thrusts. The first is conceptual, involving the attempt to conceptualize the link between TJ and a range of other goals such as rule of law, democratization, reconciliation...Research in this area has drawn in disciplines closely associated with the asserted 'goal': for ex. Political science in discussions of democratization (Bell, 2009: 10).

A fundamental problem when conceptualizing these links is that it is not clear yet what is the goal of TJ, 'transitional justice for what and for whom' (Dancy, 2010: 361). This comes down to not knowing the aim of establishing TJ mechanisms (TJMs), such as TCs. Thus, TJMs lack clearly defined goals (Hugo van der Merwe, 2009: 121). Some attribute this lack of clear aims to the fact that TJ is in its 'early days of theory building and a number of the hypothesis that underpin TJ initiatives are either untested or inconclusive' (Duggan, 2010: 320). Beyond the lack of clarity on what TJ is for, the goals themselves, such as democracy, human rights and peace, are broad and vague without clear delimitation. Moreover these outcomes are not operationalized to account for the change, to identify any difference a TJM makes. If these goals are not clearly defined and operationalized, their measurement 'becomes a subjective assessment' (Wiebelhaus-Brahm, 2010: 17).

Continuing with Bell, the second thrust of research on whether TJ works is empirical:

It aims to determine how we can measure whether TJ delivers on the goals to which it lays claim. Emerging empirical work attempts to study TJ through qualitative research methods while also increasingly trying to quantify the relationship between TJ and its asserted goals (Bell, 2009: 11).

A key challenge here is that it is not clear "how" a TJM works, that is, how they are going to achieve the goal they are set to do. In this context, TJ studies assessing impacts

lack references to how change is meant to take place in any given society. As Robins points out,

Creating a practice that can be led by its presumed impacts leads directly to asking “how” TJ works. Implicit in any understanding of TJ is a theory or theories of change that by addressing past violations, future respect for HR will be enhanced. (...). The theories of change that underpin the discourse remain implicit. (...). Surprisingly, little of the massive literature of TJ proves such theories of change or even seeks to make them explicit (...) If a mechanism for impact can be postulated, it can be tested, potentially revealing the process by which social and political change occurs in transition (Robins, 2015: 185).

A theory of change would explain how things should work to produce a desired change, a common practice when evaluating the implementation of peacebuilding projects. A theory of change would allow verifying if a TJM produces the intended results. However, as pointed out by Robins, the TJ literature does not make these theories of change explicit, let alone attempts to prove them. As a result, we are not able to understand what is the process that leads to changes in societies in transition. Knowing what is the goal a TJM has set to achieve and how it is going to achieve that goal would also make it easier measuring whether a TJM has succeed. We could evaluate the success of a TJM on the basis of its expected impacts on an anticipated and clearly defined goal. With these preliminary considerations regarding the impacts of TJ and TJMs, the next section reviews the current literature on impact assessment of TCs.

### 1.3.2 Impact studies on truth commissions

TCs have become a recurrent mechanism for states to deal with and address past human rights violations in the aftermath of conflict or state repression under authoritarian rule. TJ experts and the UN estimate that more than forty TCs have been established in different countries and regions in the past forty years. Often these commissions are established with high expectations. They are expected to help post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms (Secretary-General, 2004: para. 50).

Despite these expectations, literature of the past decade has raised doubts regarding the impacts of TCs, pointing at the need for more empirical research (Brahm, 2007, Mendeloff, 2004, ParisRon and N.T. Thoms, 2010). In his critique of peace promoting benefits of formal truth telling and truth seeking mechanism in the aftermath of wars, Mendeloff writes,

The literature has done a poor job of specifying the logic of truth-telling arguments, defining and clarifying key concepts, operationalizing key variables, indicating the conditions under which proposed relationships hold, providing compelling empirical evidence to support core assumptions, and testing claims systematically against competing explanations. Assertions are frequently presented as empirical fact when they are merely untested hypotheses. In short, truth-telling advocates claim more about the power of truth telling than logic or evidence dictates (Mendeloff, 2004: 356).

While this critical analysis was addressed to both trials and TCs as producers of truth, TCs were at the center of this attack. Since then, empirical research has targeted the assessment of impacts of TCs.

Studies that assess the impacts of TCs have tended to organize their review around certain parameters. Thoms et al. review the empirical literature on impacts of trials and TCs on institutions and policy processes at the state level, thus without examining sub-state, community or individual level (Paris, Ron and N.T. Thoms, 2010: 2). To organize the review, they differentiate between single-case studies, small to medium samples and large-samples of comparative studies. Brahm organizes differently the review of studies that attempt to evaluate a TC experience. He differentiates between two strategies, each with a different goal in mind: first those studies that ask whether a certain TC was a success, and second, studies that explore what effects a TC had (Wiebelhaus-Brahm, 2010: 8). In the case of success, studies would focus on what a commission produced as a result of its investigation, the deliverables. As for evaluating the effects, studies would treat the TC as an independent variable examining the consequences of the investigations on individuals and societies.

As opposed to Brahm, in her review of studies that have assessed impacts of TCs, Melish does not differentiate between studies that examine success versus those that explore effects of a TC. Rather, she refers to success for every category in which she organizes the literature on TCs' impacts. Thus, quantifiable truth would define a TC's

success on the basis of how much TC is able to reveal (Melish, 2012: 12). This approach corresponds to Brahm's first strategy, the studies that focus on the commission's deliverables. The other three approaches Melish presents correspond to Brahm's second type of studies that explore what effects TCs had, treating TCs as the independent variable. Broadly, Brahm refers to individual and societal level depending on whether studies examine impacts on individuals or on the society (Wiebelhaus-Brahm, 2010: 10-2). Hence, Melish's second approach (victim perception) evaluates success at an individual level, depending on how a TC and its operations are perceived by the target audience. A third approach, which Melish calls formal political rights, examines impacts at the societal level, focusing on those quantitative studies that have sought to assess impacts on democracy, human rights and peace. She, however, does not examine qualitative studies that attempt to assess impacts also in these same outcomes. Melish's last approach, also attempts to assess success of TCs at a societal level, shifting the focus to economic and social rights to explore redistributive reforms (Melish, 2012: 23).

In light of this overview, I will examine both quantitative and qualitative studies that assess impacts of TCs as well as those that assess impacts of TCs along with other TJMs, usually trials. Second, I will focus on the impacts of TCs understood as the effects of their work and not in terms of the deliverables they produced. Taking into account my own assessment, I will concentrate on those studies that analyze the impacts of TCs at a societal and state level. Therefore, I will not review individual level studies dealing with victims' perceptions of TC's experiences. I present first quantitative and then qualitative studies.

#### *Quantitative studies assessing the impact of TCs*

Quantitative studies have assessed the impacts of TCs, along with other TJMs, in dependent variables such as post-conflict peace duration, democracy, human rights and repression. Lie. et al. study of impacts of TJMs on post-conflict peace duration concludes that military victory is the strongest explanation for peace duration and none of the post-conflict justice variables, which include trials, TCs, purges and reparations, have

significant influence (Lie, Malmin, Binningsbø and Gates, 2007: 14). However, when the study limits the analysis to post-conflict democratic societies, the results show that non-retributive measures, such as TCs and reparations, prolong peace in post-conflict societies irrespective of how the conflict ended (Lie, Malmin, Binningsbø and Gates, 2007: 16).

Quantitative studies assessing the impacts of TJ in general, and TCs in particular, have used widely accepted measures of democracy and human rights. Specifically, they use Polity IV and Freedom House when assessing impacts on democracy and the Cingranelli and Richards Physical Integrity Rights Index (CIRI) and the Political Terror Scale (PTS) when assessing impacts on human rights. Both CIRI and PTS index focus on physical integrity rights. As one analyst has pointed out, measures of democracy and human rights have figured prominently in justifications of TCs projects and there is a rich empirical literature on democracy and human rights from which to draw (Wiebelhaus-Brahm, 2010: 17). Because of availability of datasets and the fact that these measures appear as justifying TCs, both democracy and human rights have become the most used outcome of reference when assessing their impact.

One of the earliest quantitative studies attempts to assess whether TCs, established in post-authoritarian regimes in Latin America since 1979, have had any positive impact on electoral democracy as measured in Polity IV, Freedom House Political Rights and the UNDP's Electoral Democracy Index. Although the study does not claim to prove that TCs strengthen subsequent democracy, it does find a significant positive relationship between having had a TC and the level of electoral democracy (Kenney and Spears, 2005: 22).

Olsen et al. arrive to very different conclusions when they assess the impacts of trials, TCs and amnesties on democracy and human rights. As the previous study by Kenney and Spears, they only examine transitions from authoritarianism to democracy, although they include data for all countries in the world between 1970 and 2004. With regards to TCs, they find no evidence of a statistically significant relationship between TCs and democracy as measured in Polity IV and Freedom House and the relationship is significantly negative with human rights as measured by CIRI and PTS. Neither trials nor amnesties have a statistically significant relationship with democracy or human

rights, but the relationship is positive on both democracy and human rights when combining trials and amnesties or combining trials, amnesties and TCs (Olsen, Payne and Reiter, 2010a: 998). This leads the authors to consider a justice balance 'between accountability provided by trials and stability guaranteed by amnesty' (Olsen, Payne and Reiter, 2010a: 997). In a later study dealing only with the impacts of TCs on human rights, Olsen et al. suggest TCs may play an important role by fortifying the balance of accountability and stability, specifically by 'enhancing accountability and maintaining stability' (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 470). Thus, even when the study suggests that TCs alone have a negative impact on human rights measures, the authors advocate for their use in conjunction with trials and amnesties (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 476).

Kim and Sikkink reach divergent results to those by Olsen et al. Kim and Sikkink's study assesses the impact of human rights trials and TCs in "repression", defined as torture, summary execution, disappearances, and political imprisonment. Their findings suggest that the use of human rights prosecutions and TCs contribute to lessening repression. While the deterrent effect of prosecutions would be linked to the punishment, the fact that TCs also have a positive impact suggests that the influence on human rights 'also respond to processes that provide information and communicate norms' (Kim and Sikkink, 2010: 954). One of the differences between Olsen et al. and Kim and Sikkink, which might explain their disagreement, is that Kim and Sikkink do not assess the impact of TCs as a standalone mechanism. Olsen et al. do so and show negative effects on human rights measures.

On the other hand, the results in the study by Olsen et al. coincide with those of the quantitative research by Brahm. His impact assessment of TCs on democracy and human rights also finds that TCs have had negative consequences on human rights and they do not have a statistically significant impact on democracy (Wiebelhaus-Brahm, 2010: 138-40). The negative effects on human rights are consistent for both the CIRI and PTS index. They were also found in country cases with ongoing TCs and in those that had a TC in the past that produced a final report (Wiebelhaus-Brahm, 2010: 138). However, Brahm uses a multi-method approach that leads to contradictory conclusions.

His qualitative study of impacts in four case studies suggests a positive contribution of TCs to human rights practices.

The previous analysis shows strong disagreement among several of the studies. An explanation of such divergence could highlight the use of different dependent variables and the use of different measures to examine the same outcome. As one observer points out, 'quantitative findings may be contradictory in part because they are asking slightly different questions' (Wiebelhaus-Brahm, 2010: 131). However, as we have seen, some of the studies use the same measures and still their results differ and even contradict with each other. A recurrent explanation in the literature is the diverse universe of cases under scrutiny due to the lack of consensus on what constitutes a TC (Brahm, 2009: 2, Dancy, Kim and Wiebelhaus-Brahm, 2010: 47). While Olsen et al. account for 68 TCs between 1970 and 2007 (Olsen, Payne and Reiter, 2010b: 35), Kim and Sikkink refer to 28 for both postconflict and post authoritarian, more or less the same list as Brahm who counts 29. However, Brahm arrives to similar results with Olsen et al., but reaches contradictory results with Kim and Sikkink who use almost the same TCs as he does.

Another reason the literature highlights to explain contradictory results are differences among the relevant variables that quantitative studies consider. Bakiner argues that the incorporation of amnesty laws in the statistical model in Olsen et al. can turn the previous explanation by Kim and Sikkink of a justice cascade (unprecedented human rights accountability), into a justice balance. Bakiner contends that 'given the extremely complex nature of causal relations among relevant variables, statistical analyses of large-n datasets are particularly prone to the omitted variable bias' (Bakiner, 2014: 11). Having reviewed quantitative studies of impacts of TCs, the analysis turns next to qualitative studies.

#### *Qualitative studies assessing the impact of TCs*

Qualitative studies have also researched the impacts of TCs on democracy and human rights. Barahona de Brito et al. find no direct correlation between TCs and trials, as backward looking accountability measures, and democratic improvement. However,

they do find forward-looking institutional reform, especially that of the police military and judiciary, as improving democratic prospects (Barahona de Brito, Gonzalez-Enriquez and Aguilar, 2001: 312-3). They also assert that regimes undertaking measures of truth, justice and rehabilitation that follow due process and respect legal guarantees are perceived as more legitimate. Conversely, the old ideology is discredited and former regime elites lose their legitimacy and prestige (Barahona de Brito, Gonzalez-Enriquez and Aguilar, 2001: 313). Another study finds that 'TCs contribute to democratic consolidation only when a prodemocracy coalition holds power in a fairly well institutionalized state' (Snyder and Vinjamuri, 2004: 20). It also claims that TCs are most likely to be useful 'when they provide political cover for amnesties and when they help a strong, reformist coalition to undertake the strengthening of legal institutions' (Snyder and Vinjamuri, 2004: 31). The authors claim both El Salvador and South Africa fulfill these requirements.

In his assessment of TCs' impacts on democracy and human rights in South Africa, Chile, El Salvador, and Uganda, Brahm finds that TCs are relatively ineffectual in promoting democracy although they have positive influence on human rights in the four cases. While the results in his quantitative and qualitative studies agree on the impacts on democracy, they disagree with regards to the impacts on human rights. One explanation he puts forward is that the four cases, selected partly because of their prominence in the TC literature, might be the best 'in terms of examples that have influenced the course of human rights practices' (Wiebelhaus-Brahm, 2010: 141).

As is the case with quantitative studies, there are disagreements among the qualitative studies reviewed. An explanation of such divergence is that the assessment of impact has been traditionally focused on a 'handful of the most well-known and well-regarded TCs' (Wiebelhaus-Brahm, 2010: 8). A related problem to assess impacts of TCs is that most studies end with the immediate aftermath of the release of the commission's final report and hence we have little sense of the longer term effects of TCs (Wiebelhaus-Brahm, 2010: 8). Studies focusing on the commission itself, rather than on the goal TCs claim they achieve, tend to have this result. These studies treat the end of a commission as the end of its impacts. To address these shortcomings, recent qualitative studies have started focusing on tracing the implementation record of TCs' recommendations.



Another challenge qualitative studies face is how to isolate the effects of TCs from an ongoing transition, given the fact that TCs themselves are the result of a transitional negotiation (Brahm, 2007: 28). They are usually established in a context where there is a balance between the previous regime and the new democratic forces. According to Snyder and Vinjamuri, 11 out of the 13 TCs they examine for the period between 1989 to 2003, were established in the context of a civil war that ended through negotiated settlement (Snyder and Vinjamuri, 2004: 31). As a result, it is not clear whether it is the TC itself or antecedent conditions that produces the effects on the outcome of interest (Wiebelhaus-Brahm, 2010: 17). In short, the same result would have been produced even if the TC had not existed. With democratic development from an authoritarian to a democratic regime, a decrease in human rights violations is expected without a TC intervention. Recent studies have attempted to trace causality between a TC and its alleged impacts. In particular, two qualitative studies have approached the challenge from two different perspectives.

Brahm study attempts to assess the impacts of TCs on an outcome of reference, democracy and human rights. The recommendations of a TC are the causal chain linking a TC and the variation in democracy or human rights. Brahm traces implementation of recommendations to prove that causality. On the other hand, Bakiner attempts to assess the impacts of the causal mechanisms that result from a TC process. Because these are two of the few studies of impact devoted entirely to TCs and because each study approaches TCs' impacts from different perspectives, I examine both in the next section.

### 1.3.3 In-depth analysis of two complementary qualitative studies

In his qualitative study, Brahm assesses impacts of TCs through tracing the causal chain that connects a TC recommendation to his outcomes of interest, which are democratic development and human rights practices. To establish a TC's responsibility to have produced the effects, Brahm suggests to do case study research as they 'allow the researcher to chronicle the extent to which the truth commission's findings have been acted upon' (Brahm, 2007: 28).

Brahms study attempts to uncover the conditions under which a TC is most likely to contribute to promote democracy and human rights. To that end, he suggests that a TC contributes to promote democracy through encouraging reforming the judiciary. Then, he traces the causal chain that connects a TC's recommendation to reform the judiciary and the effective reform of the judiciary. He then argues that this causality is evident enough to justify the TC's contribution to promoting democracy. Brahm's study puts forward evidence to suggest the commission caused the reform of the judiciary, but it does not explain how reforming the judiciary contributes to promoting democracy. He establishes a similar type of inferences when he argues that through prosecution or dismissal of perpetrators from institutions, TCs remove enclaves of authoritarian power, hence contributing to promote democracy; or that through trials and purges, TCs promote accountability of perpetrators, hence contributing to promote human rights; or that through pointing out weaknesses in laws that should be changed to prevent abuses, TCs contribute to promote human rights (Wiebelhaus-Brahm, 2010: 23).

The problem of such inferences is that if democracy and human rights are the measures suggested, they need to be clearly defined and operationalized so that they can be empirically tested. However, as the study recognizes, 'the transitional justice literature has tended not to define what is meant by human rights and democracy, which complicates assessing claims of impact' (Wiebelhaus-Brahm, 2010: 29). Neither does Brahm operationalize the concepts of democracy or human rights. Without conceptualizing *democracy* or *human rights*, we cannot evaluate the impact TCs have on them because we lack pre-established criteria against which to assess value.

Instead of trying to proof causation between a TC and an outcome of reference, such as democracy or human rights, Bakiner's study assesses the impacts of the causal mechanisms that result from a TC process (Bakiner, 2014). The study refers to the need of a 'theoretically informed process-tracing approach to generate and assess theories of impact' (Bakiner, 2014: 15). The framework to trace the process of how impact is generated and how it can be assessed includes five causal mechanisms and the evidence of such an impact. They include (1) direct political impact, through the implementation of recommendations by a government; (2) indirect political impact, through civil society

mobilization; (3) vetting or removing perpetrators from public office; (4) positive judicial impact, by contributing to human rights accountability; and (5) negative judicial impact, by promoting impunity. The author contends that it is through these mechanisms that TCs influence political, judicial and societal processes.

Rather than generating and assessing a theory of impact, the processes-tracing approach presented differentiates between causal mechanisms that use the same causal processes. On the basis of the process that causes impacts, the five causal mechanisms presented by Bakiner could be reduced to two, 'direct political impact' and 'indirect political impact through civil society mobilization'. Direct political impact refers to impacts due to a government's incorporating the findings and recommendations of a TC's final report into policy, for example, by implementing reparations recommended by the commission. Indirect political impact refers to the adoption by decision makers of the recommendations as a result of civil society pressure (Bakiner, 2014: 20-3). For example, reparations recommended by a commission could be implemented because of civil society pressure. Still, Bakiner's paper presents other causal mechanisms that follow the same causal process as direct political impact. For instance, vetting is presented as a third causal mechanism. However, its causal process is the same with direct political impact, a recommendation for vetting being implemented by a government.

The two causal mechanisms presented for judicial impact (accountability and amnesty) cannot be considered as causal mechanisms on their own. Rather, the causal mechanism leading to prosecutions based on a commission's report is again dependent on the government's will to implement. In contexts of political transition, as those presented by Bakiner, the causal process is not generated by judges and prosecutors using a TC's findings in the judicial proceedings, as the study hypothesizes. Rather, after the publication of the report, and in the ensuing short term, prosecutions depend on the government. Consequently, the article finds that 'a TC's judicial impact is typically delayed and even the preliminary investigation for prosecutions takes place several years after the publication of the final report' (Bakiner, 2014: 27). With perpetrators still powerful, the decision to prosecute does not rest with the judiciary alone. On the other hand, in the long term, when perpetrators are not powerful any

more, prosecutions can take place through the normal process within the judiciary without much interference by the governing regime.

With regards to the negative judicial impact, Bakiner's study examines whether or not there was an amnesty incorporated with the TC's legislation, promulgated along or as a result of the TC. The timing of the amnesty usually determines its nature. If an amnesty is part of the TC's legislation, as in South Africa, it is part of the negotiation on the type of TC the old and new regime want to establish. If it is legislated as a result of the TC final report, the amnesty is not the causal mechanism that promotes impunity. The causal mechanism is again the government decision to remove the criminal liability of perpetrators through passing an amnesty law or not to prosecute simply by adopting a *de facto* amnesty. Bakiner acknowledges this fact when he states, 'the failure to prosecute results less from amnesty laws accompanying truth commissions than other factors, such as the unwillingness of the judiciary or political pressures' (Bakiner, 2014: 28). To sum up, while Bakiner refers to five causal mechanisms to explain TCs' impacts, I argue they could be reduced to two: direct political impact, through government action, and indirect political impact through civil society mobilization.

Having examined Bakiner's study of impacts from 2014, I analyze now the new ideas this author presents in his recent book published in 2016. Bakiner acknowledges the importance of direct and indirect political impact over the other causal mechanisms, when he explain the variation in TCs' impacts. He distinguishes between TCs where the creation process is undertaken solely by the government, which he calls exclusionary, as opposed to participatory commissions in which civil society, politicians as well as commissioners and staff are able to 'exercise agency with respect to the commission's goals, procedures, and methodology' (Bakiner, 2016: 116). He contends that exclusionary commissions may produce a report more in line with the government's expectation that can lead to high direct political impact, or low if the government decides to ignore it. He also contends that exclusionary TCs reduce the likelihood of civil society mobilization around them. Conversely, participatory commissions will produce a report more critical of the government with more challenging recommendations. They might not produce direct political impact but are more likely to produce indirect political impact as civil society actors who participated in the process

will mobilize around their recommendations (Bakiner, 2016: 116). His argument 'points to the coexistence of path dependence and independent agency before, during, and after a commission's operation' (Bakiner, 2016: 117).<sup>15</sup> Interestingly, Bakiner only explains variation in direct and indirect political impact, and not in the other causal mechanisms he examined, such as vetting, and positive and negative judicial impact. This indicates the pre-eminence he attributes to direct and indirect political impact over other causal mechanisms.

#### 1.3.4 The need to connect process and outcome in impact studies of TCs

I have identified a disconnection between process and outcomes in studies that assess the impacts of TCs. Most of the studies assess the impacts of TCs on pre-determined outcomes without considering how a TC process affects such outcomes. Conversely, the only study that assesses the impacts of TCs as processes, does not examine the relation between the process and outcomes. I examine here some of the reasons why studies have failed to link the process and outcomes.

First, the studies that analyze the impacts of TCs at a societal and state level need to explain the impacts they are assessing in terms of the TC's goal. If the studies assess the impacts of TCs on democracy and human rights, there is an assumption that one of the goals of TCs is to contribute to the promotion of democracy or human rights. However, the literature does not link impacts of a TC with its goals. Linking TC's impact and goal first requires explaining the process through which a TC generates any impact. It further requires explaining how such impacts affect the pre-determined goal or outcome of reference. In other words, to link a TC's impacts and goal entails linking its process and the outcome of that process.

Of all the studies I reviewed, only Bakiner explains the process through which a TC generates any impact. He focuses on the causal mechanism through which a TC generates impacts and the observable implications of such impacts. As discussed, those

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<sup>15</sup> This is the first time I read a formulation in terms of before, during and after a TCs' operation that coincides with my formulation in chapter 2. My formulation in chapter 2 is included in the working paper, "Accountability, a New Framework to Assess the Impact of Truth Commissions", published by the International Catalan Institute for Peace, in June 2015.

mechanisms can be reduced to two: direct political impact, when a government incorporates a TC's findings and recommendations into policy; and indirect political impact, when decision makers adopt a TC's recommendations because of civil society pressure. However, the question that remains unaddressed by Bakiner is what does the implementation of recommendations, either through the government or civil society, change in the society. What social or political change takes place as a result of implementing or not implementing a TC's recommendations? Bakiner's focus on the process misses the interaction between the process and the outcome.

On the other hand, Brahm does not trace the process through which a TC generates an impact. Instead he focuses on the impacts of TCs' recommendations in two outcomes of reference, democracy and human rights. The problem in Brahm's study is that he does not define and operationalize his outcomes of reference so that they account for the changes the TC has produced. His strategy is to produce evidence to suggest a commission's recommendation caused, for example, the reform of the judiciary. However, the strategy misses to explain how reforming the judiciary contributes to promotion of democracy. The lack of definition and operationalization of the outcomes of reference, democracy and human rights, makes it impossible to explain it. We might suspect the reform of the judiciary contributes to promoting democracy when judges at the highest level had publicly supported a previous autocratic regime. However, without a clear conceptualization of democracy that operationalizes judiciary reform as one of its building blocks, we can only speculate one serves the other.

Having identified a disconnection between the process and the outcome as an area where this research could contribute to, the next section turns to the analysis of TCs as processes. An analysis of TCs as a process is necessary to understand how this process generates any impact. A focus on TCs as a process entails examining the public participation in this process. Such participation is the key to examine these mechanisms as platforms (Lederach, 2005) capable of generating relationships and interactions among the various groups within society that were affected by the armed conflict.

## 1.4 Assessing impact of TCs as a processes

This section explores the need to focus on TCs as a process in the assessment of their impacts. A focus on the process entails a closer examination of the public participation in TCs. Then I argue that as mechanisms that allow for public participation, TCs become instruments to enable interactions among various groups within the society.

### 1.4.1 A focus on TCs' process entails a focus on the public participation

The first question is whether or not to consider TCs as a process. In peacebuilding, the idea of process is central as it approaches the signing of a peace agreement not as a stage in time (the end of the conflict) but rather as the beginning of a whole new range of negotiations, often more arduous and difficult (Lederach, 2005: 47). As Lederach points out, 'metaphorically, peace is seen not merely as a stage in time or a condition. It is a dynamic social construct' (Lederach, 1997: 20). Beyond the formal peace accord, proposed and controlled by the signatories, mostly political and military elites, peacebuilding promotes multiple processes of change that cut across the levels and populations affected by the conflict (Lederach, 2005: 48). Whether we can consider TCs as such a process is a different question.

I disagree that TCs are events and sustain they are processes. Gready and Robins argue that trials and TCs 'are events, not processes, and they fail to engage substantively and over time with those most affected by the violations they seek to address on their own terms' (Gready and Robins, 2014: 357). However, if we examine TCs as processes, we can clearly distinguish three different stages. First, even before a TC is established, there are discussions over what mandate it should have, who should be the commissioners, what period of time the commission should look into, or for how long it should operate. These discussions can take months or even a few years before a commission is effectively established, as when new legislation needs to be adopted. The second stage would encompass the time since the commission starts its work and up to the submission of its final report, when it ceases to exist. The third and last stage is the

period after the submission of the commission's final report and the implementation of its recommendations. This period can easily last many years.

The question of whether TCs are processes or events is important as it determines how the public engages with them. If we consider TCs as processes, the public engagement could be sustained over time. Over the last years, some scholars have advocated for a change from transitional to transformative justice. Transformative justice would propose, among other measures, 'a focus on civil society participation in the design and implementation of transitional justice mechanisms' (Lambourne, 2009: 28). For Gready and Robins,

Transformative justice and transformative participation require more focus on process, on the interface between process and outcomes and on mobilization, and less focus on preconceived outcomes. Such mobilization can take place around court proceedings, truth commissions or reparations advocacy, or simply around the needs of victims and citizens. It can seek to support, shape or contest such mechanisms (Gready and Robins, 2014: 358).

I argue TCs are processes that allow such mobilization and participation from victims and broader civil society. Mobilization and participation presuppose two different types of engagement. While participation entails 'being part of' and participating in a process, in this case a TC, mobilization entails mobilizing around a TC, outside the process, maybe in favor or against it. I understand TCs provide space for civil society participation in a TC and mobilization around a TC. As we have seen in Cartwright's extensive analysis of Commonwealth commissions of inquiry, which we could consider as antecedent to TCs (Freeman, 2006: 23), royal commissions and departmental committees provide a unique kind of mechanism for the public participation in the government and that 'at no other point is there a comparable opportunity for private individuals or interest groups to take part in the making of public policy' (Cartwright, 1975: 6). I argue that this analysis still holds for public engagement in today's TCs, specifically for victims and civil society, but also for other actors, such as state bureaucrats, security force officers and Commissioners who are usually respected persons in society.

The public participation in and mobilization around a TC can be easily integrated within the three stages in a TC process, each stage presenting different degrees of engagement. The first stage, the period leading to the setting up of a TC,



would include the roles of civil society. The first such role is to take the initiative to establish a TC unless it is the result of a negotiation between the old and new regimes. Second, civil society input to framing the essential aspects of the TC, such as the mandate and appointment of commissioners. Consultations with victims and civil society on the characteristics of a future TC has been a persistent aim of the UN and human rights organization working in transitional contexts to channel their voices. Such a consultation is now a common practice compiled in policy documents, including the *Updated Set of Principles* (UN Commission on Human Rights, 2005) and the OHCHR *rule of law tools for post-conflict states on TCs and national consultations*, among others (OHCHR, 2006a, OHCHR, 2009).

Much less explored in the literature is the public engagement with a TC during the two following stages. During the time of operations, a TC interacts not only with victims and representatives from civil society, but also with state officials. The third stage, the period after the submission of a TC's final report also allows civil society mobilization to pressure the government to implement the recommendations of a TC. In chapter two, I will examine more in-depth how each of these stages allows the public engagement. Being a mechanism that enables the public participation, TCs become instruments with the capacity to generate relationships among groups within society that were affected by the armed conflict. This is the topic of the next section.

#### 1.4.2 Truth commissions as generators of relationships

The impacts of TCs can be examined from a peacebuilding perspective if we take TCs as structures with the capacity to promote relationships and interactions among groups within society that were affected by the armed conflict. Lederach has developed the idea of infrastructures for peace. He first referred to them as 'institutions' in *Building peace* (Lederach, 1997) and later as 'platforms' in *The Moral Imagination* (Lederach, 2005). Lederach also refers to smart flexible platforms which are able to generate new responses to emerging challenges as opposed to social institutions that 'bureaucratize and in the process focus on self-perpetuating behavior, independent of their original purpose' (Lederach, 2005: 126).

Lederach suggests that to deal with the remaining conflict in the post peace accord period, there is the need to create and sustain platforms that allow permanent dialogue and engagement at multiple levels of the affected society (Lederach, 2005: 49). These dialogue and engagement are at the basis of what Lederach calls 'constructive social change'. It is a change to move from the cycle of destructive relational patterns to the cycle of relational dignity and respectful engagement (Lederach, 2005: 181). As Lederach points out, in building a constructive social change, it is the invisible web of relationships what holds the social fabric together (Lederach, 2005: 75-6). These relationships should 'permit people to feel they are participants in, not just observers and recipients of, the process' (Lederach, 2005: 57). According to Lederach, the most significant weakness in sustaining platforms for genuine change, during the post-agreement phase, is the lack of authentic engagement in the public sphere. Individuals and communities need to be provided access to and need to be engaged so that this engagement creates a sense of ownership, participation and genuine commitment (Lederach, 2005: 60).

As structures dealing with the past to create conditions for a sustainable peace in the future, TCs are peace infrastructures. Specifically, they have been conceptualized as components for advanced infrastructures for peace that 'can help pave the way for a new culture of listening, better mutual understanding of the past, for providing minimum justice to the victims and their families, and for exploring the ground for living together in peace' (Berghof Foundation, 2016: 14). Similarly to platforms, TCs are not bureaucratic forms of organization established to respond to preconceived challenges. Rather, they are flexible and adaptive to the functions assigned in their mandates.<sup>16</sup> Also, similarly to platforms, TCs can link individuals who are not like-minded and not situated in a similar context. Lederach points out that 'the most significant components that shaped processes were those where a small but strategically connected set of people worked for change with an instinctive knack for web thinking' (Lederach, 2005: 98).

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<sup>16</sup> Cartwright also refers to the remarkable degree of flexibility and adaptiveness of royal commissions and departmental committees due to the fact that they are not bureaucratic forms of organization CARTWRIGHT, T. 1975. *Royal Commissions and Departmental Committees in Britain*, Great Britain, Hodder and Stoughton.

TCs processes potentially provide a platform where 'strategically connected people', from different groups, work for change. Such connected people include representatives of the state apparatus, including members of a transitional government, and members of state agencies such as security, judicial and civil servant sectors. Such connected people also include representatives of victims' associations, civil society and human rights groups and for commissioners who are usually chosen among respected individuals within the society. Through interactions of these people, a TC becomes a platform capable to generate relationships among various groups within the society that were affected by the armed conflict. A particularly important relation generated by a TC is that of victims and civil society with the governing regime. Lederach identifies the lack of connection between grassroots and high-level political processes of negotiation, what he calls the vertical gap, as the 'single most significant weakness in peacebuilding process' (Lederach, 2012: 9). A TC can fill this gap by empowering people in their interaction with state representatives and generating meaningful relationships. This entails the need for the governing regime to be responsive to the citizens while the state agencies need to be responsive to the new governing regime. The transition from the old regime, which has lost legitimacy, to the new regime, entails opening up the state apparatus to the citizens, specifically to those who suffered violations from the state. It is in this context that accountability provides a framework to evaluate whether the relationships TCs generate empower people in their interaction with states representatives.

## 1.5 Conclusions

This chapter has presented the main themes in this research. The first section has dealt with the concept of TJ, its evolution and expansion beyond the legal discipline. I have argued this expansion has been the result of developments in the real world, the contexts where transitions unfold. Specifically, the South African TC and its conditioned amnesty situated at the center of TJ resulted in the idea of a justice with constraints. Peacebuilding fits well with a conceptualization of TJ that goes beyond the binary

justice-impunity and encompasses the broader links between dealing with the past and building peace in the future.

The chapter has also shown the evolution of civil society dealing with TJ issues. The chapter moved from the initial idealized conception of human rights defenders as those at the forefront in the fight against authoritarian regimes to current debates about human rights organizations taking the agency from survivors and rendering them as disempowered victims. In a context of postconflict or post authoritarianism, the establishment of a TC situates those who have suffered violations at the center, potentially providing them with their own voice and agency. The analysis of TCs has linked their origin with Commonwealth commissions of inquiry. The comparison with COI enhances our understanding of TCs as unique mechanisms that allow the public participation.

The chapter further examined the question of TCs' impact assessment. First it reviewed the obstacles in assessing impacts TJ. These challenges include a lack of clearly defined goals for TJ and the absence of explanations on how TCs, or other TJMs, are to achieve such goals. The review of impact studies, specially the in-depth analysis by Brahm and Bakiner, leads to identifying a disconnection between studies that assess impacts of TCs as processes as opposed to an impact of TCs on outcomes of reference. Examination of TCs as processes, is currently lacking in the current literature on impact studies.

A focus on TCs as processes entails an emphasis on the public participation. Specifically, we can distinguish three different stages of TC's process with a different degree of public participation. Before a TC's establishment, civil society can play a very important role in advocating for it or for a certain mandate, appointment of commissioners or other relevant aspects. During the time of operations, victims, representatives from civil society and state officials interact with the TC providing information. After the submission of a TC's final report, civil society can lobby the government to implement the TC's recommendations. Being a mechanism that allows public participation, TCs have the ability to generate relationships and interactions among diverse groups within society; particularly, among the various groups within society that were affected by the armed conflict. In this regard, TCs are platforms able to

generate new responses to emerging challenges in the transition period. This ability lies at the heart of what Lederach calls constructive social change, to move from cycles of destructive relational patterns to cycles of relational dignity and respectful engagement. The relationships TCs generate should allow a broad range of participants to feel being part of a process and not just observers. Accountability provides a framework to evaluate whether the relationships TCs generate empower people in their interaction with states representatives. The next chapter explores accountability as a framework to assess the impacts of TCs.

## Chapter 2

# Accountability, a new framework to evaluate the impacts of truth commissions<sup>17</sup>

### Introduction

This chapter presents a framework to assess the impacts of TCs in promoting accountability. The first section contextualizes accountability within the transitional TJ field and within TCs. Section two defines accountability on the basis of its two dimensions of answerability and enforcement and examines the horizontal and vertical levels of interaction in which accountability takes place. Building on this twofold distinction, section three presents the argument that TCs generate horizontal and vertical accountability relations and that it is within these relations that accountability, in its answerability and enforcement dimensions, is produced. To operationalize this argument for the purpose of assessing the impacts of TCs, section four establishes a framework consisting of fourteen evaluative criteria.

### 2.1 Contextualizing accountability within the transitional justice field

In TJ literature, accountability commonly refers to criminal accountability which is prosecutions of those responsible for violations of international human rights or humanitarian law either in domestic or international courts. Criminal accountability

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<sup>17</sup> A preliminary draft, from November 2014, was published by the International Catalan Institute for Peace as a working paper. A second draft, was published by the *Asian Journal of Peacebuilding*, in November 2015.

emphasizes the *justice* side of TJ which has been conceptualized as a “maximalist approach” to TJ (Olsen, Payne and Reiter, 2010b: 16-9). From this perspective, accountability for past violations, to punish perpetrators, is necessary to avoid re-occurrence of violations and as a way to deter possible other perpetrators. Nevertheless, beyond trials, the TJ literature also refers to other “mechanisms of accountability”, such as administrative vetting, civil sanctions, and TCs. While administrative vetting and civil sanctions would relate to non-criminal sanctions, TCs are considered to provide historical accountability (Kritz, 1997).

TCs also establish accountability through undertaking an official investigation, publicly exposing the harm inflicted and condemning human rights violations. Through disclosing information of violations and state institutions responsible for them, TCs hold former authoritarian regimes accountable to the past violations (Olsen, Payne and Reiter, 2010b: 22). TCs also establish accountability through the public exposure and condemnation of perpetrators for their past violence. Beyond naming perpetrators, TCs can also ‘compel or entice perpetrators to confess to past violence. In so doing, perpetrators subject their past violence to public scrutiny’ (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 460). Moreover, TCs put victims at the center of their process while documenting past abuses. Commissions collect information from the victims and listen to their stories, providing a ‘victim-centered process of accountability that balances political constraints with justice demands’ (Olsen, Payne and Reiter, 2010b: 23). In offering a forum for victims and their relatives to explain their stories, they contribute to a certain level of societal acknowledgement of their loss (Kritz, 1997: 141). Through documenting individual cases of violations, TCs usually establish a formal basis for subsequent compensation of victims and, in some cases, for the punishment of perpetrators.

These functions and goals could also be accomplished through trials, to a certain extent. Trials also document violations, attribute individual responsibility to perpetrators, and provide a forum for victims that contribute to societal acknowledgement. Beyond punishing perpetrators, some judicial proceedings also offer compensation to victims. Nevertheless, as opposed to trials, TCs also provide an opportunity for dealing with the broader context in which violations took place, beyond

individual cases and perpetrators. To this end, TCs also examine the structural elements that made violations possible and propose institutional and legal measures to reform them. A recent study highlights the importance of analyzing the structures that enable human rights violations and entrench impunity if TJ processes are to have any meaningful impact (Nesiah, 2016: 36). The study concludes that the legitimacy and effectiveness of TJ processes has been compromised when they have left structures of impunity intact and that what is needed is to 'open up hierarchies of power to accountability' (Nesiah, 2016: 5, 50).

Central to the establishment of accountability is the transfer of what has been disclosed, the new truth, to the public sphere. This can be done through a commission's interim or final reports, through victims' testimonies or perpetrators' confessions. The final report will make the result of the fact-finding by the commission public. It is through the report that facts and evidence are explained and violations revealed, possibly leading to a public recognition of the victims' suffering. It is through the report that the previous regime is held accountable based on the acknowledgement that state agencies and institutions were responsible for committing violations. Finally, it is also the report that exposes perpetrators through naming and shaming. The transfer of this new truth to the public domain is also important to favor reconciliation within the society.<sup>18</sup>

Although all these objectives could be evaluated, based on the extent a TC has contributed to promoting accountability, accountability has been approached as a means to some other goals, rather than as a goal in itself. According to Brahm, it is through exposing the gruesome details of the past that TCs help usher in a new democratic era and advance the cause of human rights. According to him, TCs may fulfill these aims,

By publicly shaming the institutions (and sometimes the individuals) responsible for past crimes and producing recommendations that are designed to ensure

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<sup>18</sup> Although reconciliation is an important aim of TJ and it has been included in the title of some of the TCs, I don't deal with it in this thesis. The main reason is because reconciliation is the wishful aim after having implemented the various elements during a TJ process. Hence although a TC might contribute to promote reconciliation, TCs would be only one of the elements aimed at promoting reconciliation. As the Special Rapporteur has expressed, 'meaningful reconciliation requires, in addition to truth, the implementation of the remaining three elements: justice, reparation and guarantees of non-recurrence. Thus truth commissions on their own cannot achieve reconciliation, and the inclusion of the term in their titles likely generates expectations that cannot be satisfied' (Special Rapporteur on the Promotion of Truth, 2013: para.47).



such conditions do not occur in the future. Publicity surrounding the commission's work also may generate pressure for institutional reform. In addition, the commission may tarnish elites associated with war crimes and, as a result, erode their political power (Wiebelhaus-Brahm, 2010: 12).

Following this logic, it is the disclosure of violations, the exposure of institutions and perpetrators responsible by a TC, and the transfer of this truth to the public domain, that might contribute to promote democracy and to advance human rights. The promotion of accountability is approached as a means to fulfill other ends. Nevertheless, if we consider promoting accountability as a goal in itself rather than as a means, we can evaluate to what extent a TC has achieved that goal. We can evaluate to what extent a TC has produced accountability as an outcome. The question then becomes how to determine whether or not a TC has promoted accountability. Doing so entails, first of all, conceptualizing and operationalizing accountability so that we can use it to evaluate TCs' impacts. This is the purpose of the next section.

## **2.2. Conceptualizing and operationalizing accountability**

This section examines accountability in its two dimensions of answerability and enforcement. It further operationalizes the concept through the distinction between vertical and horizontal accountability.

### **2.2.1 The meaning of accountability**

Accountability is a broad concept. The concept goes back to "accounting" in the literal sense of bookkeeping. Dubnick traces the term's origins to the reign of William the Conqueror, the first Norman King of England. In 1085, the King ordered the compilation of a survey of the landholdings. All the property holders were required to 'render a count of what they possessed (Bovens, 2007: 448). In the last decades, the word has spread beyond finance and bookkeeping to other fields, such as democratic governance or human rights. In democratic governance, those who govern are required to be accountable to those who elect them. In the human rights arena, calls for accountability express the need to punish perpetrators of human rights violations. As Bovens notes, the

accounting relationship has reversed: it is not anymore the sovereign holding the subjects accountable but the other way around (Bovens, 2007: 448).

In a broad sense, accountability today refers to the processes of holding public officials responsible for their actions. The idea is to restrain those who hold power. In this sense, Schedler defines accountability as having two dimensions, *answerability* and *enforcement*.

#### *Answerability dimension of accountability*

There is a general agreement in the literature about the meaning of “answerability” in discussing accountability. Answerability is understood as encompassing the obligation of officials to *inform* about a decision and to *explain* the reasons behind taking that decision. Schedler defines the informational dimension as comprising the right of accounting agencies to receive information and the corresponding obligation of accountable actors to release all necessary details. In this informational dimension, the exercise of accountability involves elements of monitoring and oversight, finding facts and generating evidence. The explanatory dimension of accountability implies the right of accounting agencies to receive an explanation and the corresponding duty of accountable actors to justify one’s conduct. Here the norm of accountability subjects the exercise of the power to the logic of the public reasoning (Schedler, 1999: 15).

Fox refers to answerability understood as ‘the fundamental right to call those in authority to justify their decisions’ (Fox, 2007b: 668). For Fox, answerability is the *soft face* of accountability. For Bovens, accountability has a close semantic connection to answerability because in an accountability relation, a forum can interrogate an actor; the actor has the obligation to explain and justify his conduct; and the forum can question the information provided or the legitimacy of the conduct (Bovens, 2007: 451). After a review of the existing literature, Lindberg finds a general agreement in what constitutes the *core* of accountability. He argues that it includes an agent or institution who is to give an account; an area, responsibilities, or domain subject to accountability; a principal to whom the agent is to give account; and the right of the principal to require the agent to inform and explain decisions with regard to the area or domain (Lindberg, 2009: 9).

Although he does not refer explicitly to answerability, Lindberg's definition includes the agent's obligation to inform and to explain decisions.

The literature reviewed shows a general agreement in the content of what Schedler calls the *answerability* dimension of accountability. This agreement is lacking in what he refers to as the *enforcement* dimension.

#### *Enforcement dimension of accountability*

There is no agreement in the literature on whether the enforcement dimension of accountability entails punishment exclusively or it encompasses other measures. For Schedler, enforcement implies the idea that accounting agencies punish improper behavior and that those held to account suffer the consequences (Schedler, 1999: 15). He contends that the destruction of reputation through public exposure is one of the main tools of accountability. However, when it comes to illegal behaviors, such as corruption or human rights violations, he advocates for appropriate legal sanctions (Schedler, 1999: 16-7). Similarly, Fox discusses the *hard face* of accountability which includes answerability and the possibility of sanctions (Fox, 2007b: 668). As Schedler, Fox sustains that the argument of the public exposure fails 'when the gap between the transgression and the 'answerability' process is very large' (Fox, 2007a: 5). Nevertheless, Fox definition of *hard* accountability also includes compensation and/or remediation besides sanctions (Fox, 2007b: 669). Similarly, Bovens considers the term *sanction* as excluding redress or reparation. Instead, he refers to the possibility that the one being held accountable 'may face consequences' (Bovens, 2007: 452). For him it is precisely these consequences that differentiate accountability from non-committal provision of information (Bovens, 2007: 451). These consequences may be formal, such as 'fines, disciplinary measures, civil remedies or even penal sanctions, (...) or informal, such as the very fact of having to render account in front of television cameras' (Bovens, 2007: 452). Further, Bovens sustains that the accounting agency does not need to be the one enforcing those consequences, but the enforcement could be left to another agency (Bovens, 2007: 452).

Bringing in another perspective, Lindberg sustains that accountability only needs the right to sanction for failure to provide information or to justify a decision and not for the content of the decision and its consequences (Lindberg, 2009: 9). The sanction is for the accounting agency's failure to fulfill the answerability dimension, the obligation to inform and explain a decision, rather than for the conduct carried out. In other words, the enforcement dimension would cease to exist as a response to improper behavior or redress or compensation for a harm done. This argument raises the question of whether both dimensions need to exist to describe a relation as one of accountability.

*Do both answerability and enforcement dimensions need to be present to qualify as an accountability relation?*

Schedler's understanding of accountability as a *radial* concept accepts that acts of accountability can exist without one or two of its dimensions, be it the informational or explanatory dimension that form answerability, or be it punishment as part of the enforcement dimension. As a radial concept, the three dimensions of information, justification and punishment,

Do not form a core of binary 'defining characteristics' that are either present or absent and that must be present in all instances we describe as exercises of accountability. They are continuous variables that show up to different degrees, with varying mixes and emphases (Schedler, 1999: 17).

Schedler concludes that accountability 'must be regarded as a "radial" concept whose "subtypes" or "secondary" expressions do not share a common core but lack one or more elements that characterize the prototypical "primary" category' (Schedler, 1999: 17). If we consider accountability as a radial concept, only one of its dimensions, be it answerability, either as information or justification, or enforcement would be enough. Another issue which is left unaddressed in the literature is how much information, justification or enforcement would be required to conceive that someone is being rendered accountable. Or as Fox says "how much answerability or what kinds of sanctions are 'enough' in any given case to 'count'" (Fox, 2007a: 3).

Schedler refers to the Chilean and South African TCs as agencies of accountability that have considered it mainly as answerability and that have relied on a

*soft* form of punishment which was the public exposure of criminal action (Schedler, 1999: 17). Conversely, Schedler describes elections as an activity where accountability is exclusively a matter of sanctions. Through the ballot, voters hold politicians accountable, punishing past behavior 'even if between elections incumbents may continually disclose their actions and justify them' (Schedler, 1999: 18).

Beyond this conceptual understanding of being composed of answerability and enforcement, accountability exists within a relation in which at least one side represents the state. The next section operationalizes this concept through the distinction between vertical and horizontal accountability. Only then we will have all the elements to delve into the relation between accountability and TCs.

### 2.2.2 Making accountability work: horizontal and vertical accountability

To operationalize accountability, we have to look at the two levels of interaction at which accountability takes place: horizontally between state agencies and vertically between non-state and state actors. Horizontal accountability is,

The existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful (O'Donnell, 1999: 38).

On the other hand, vertical accountability refers to the state being held to account by non-state agents, mainly by citizens and their associations (Goetz and Jenkins, 2002: 7). Elections would be the example of citizens holding accountable those in office. For some, electoral accountability would be the only instance of vertical accountability. The reason being that it is the only relationship that gives citizens formal authority of oversight and/or sanction over public officials. However, as Fox points out, this narrow definition excludes many of the processes that are not based on formal authority, but still generate political accountability in practice (Fox, 2007a: 7). Thus vertical accountability would also include 'processes through which citizens organize themselves into associations capable of lobbying governments, demanding explanations and threatening less formal sanctions like negative publicity' (Goetz and Jenkins, 2002:

7). These processes can take place against those who occupy positions in state institutions, regardless of whether or not they have been elected. O'Donnell includes social demands to denounce wrongful acts of public authorities, helped by a reasonably free media, as dimensions of vertical accountability (O'Donnell, 1999: 29-30). Other authors refer to these processes as societal accountability, a third way of holding governments accountable (Ackerman, 2003: 449). These processes bring new issues into the public agenda and/or activate the operation of horizontal agencies. What differentiates these demands in a relationship of vertical or societal accountability is that the state is compelled to respond. If there is no state answerability, the actions of citizens' associations, movements and media are *voiced* understood to describe 'how citizens express their interests, react to governmental decision-making or the positions staked out by parties and civil society actors, and respond to problems in the provision of public goods' (Goetz and Jenkins, 2002: 9).

While horizontal accountability relationships are built on the basis of state agencies legally enabled to scrutinize actions by other state agencies, vertical accountability relationships between non-state and state actors are more ambiguous. For a relationship to qualify as vertical accountability, the state needs to be rendered accountable to civil society. In the next section, the relationship between TCs and accountability will be examined, in light of its answerability and enforcement dimensions and the horizontal and vertical levels of interaction.

### **2.3 Accountability relationships as a result of a truth commission?**

This section presents the argument that TCs generate horizontal and vertical accountability relationships and that it is within these relationships where accountability, in its answerability and enforcement dimensions, is produced.

#### **2.3.1 Horizontal accountability relationships**

TCs are ad hoc mechanisms established to inquire about state sponsored violations following periods of state repression under authoritarian rule or in the aftermath of an

armed conflict. In post-conflict scenarios, TCs can also inquire about excesses perpetrated by non-state actors, usually members of a politically motivated, non-state armed group responsible for conflict-related international crimes. I have already referred to Freeman's definition of a TC as:

An ad-hoc autonomous victims centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention (Freeman, 2006: 18).

As mechanisms set up by the state, TCs are vested with formal authority. They are legally enabled and empowered by the executive or legislative branch.<sup>19</sup> In other cases they are authorized by a peace agreement<sup>20</sup> or domestic legislation expanding the terms of reference under a peace agreement.<sup>21</sup>

In his definition, Freeman differentiates between two primary purposes of TCs: (1) to investigate and report, and (2) to make recommendations. He distinguishes between what TCs can effectively do and what they cannot do, but can only recommend to do. Similarly, the UN special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence used the terms *actual functions* and *potentialities* to differentiate between functions a commission can carry out on its own and those for which it can only make recommendations (Special Rapporteur on the Promotion of Truth, 2013: para.38).

Actual functions by TCs include fact-finding and victim tracing. Through fact-finding, TCs try to clarify the facts surrounding violations and the identity of perpetrators. Victims tracing entails discovering the fate of individual victims when their whereabouts are unknown. In some cases, TCs have taken responsibility for identifying burial sites and even for undertaking exhumations. While carrying out their investigation, TCs rely on victims, witnesses, civil society, human rights organizations or religious groups to collect information and evidence about past violations. Such

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<sup>19</sup>In Latin America usually through presidential decree such the TCs in Bolivia (1982), Argentina (1983), Chile (1990), Uruguay (2000), Panama (2001), and Peru (2001). In South Africa (1995), Ghana (2002) and Kenya (2009) through the legislative branch.

<sup>20</sup> Truth commissions in El Salvador (1992) and Guatemala (1997).

<sup>21</sup> Like in Sierra Leone (2002), Democratic Republic of Congo (2004), and Liberia (2006).

information supports the commission in its interaction with state agencies, such as security forces or the judiciary, among others. It is within this interaction with state agencies that a relationship of horizontal accountability takes place. This relationship of horizontal accountability is framed by the mandate and powers of the commission. The TC's mandate and powers also shape the extent of the obligation of state officials to inform about a decision and to explain the reasons behind taking that decision. It is through holding state officials horizontally accountable that TCs generate answerability. And because TCs are authorized by the state, the truth disclosed becomes state answerability in front of society.

Potentialities of TCs refer to the recommendations in their final report. They are a consequence of the fact-finding and a proposal to redress the harm done and to avoid repetition. Recommendations usually include the design of reparation programs; measures to address individual responsibility, such as removal of perpetrators from public office and/or prosecutions; and measures to reform institutions and legislation.<sup>22</sup> The implementation of these recommendations, especially those related to measures of

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<sup>22</sup> Here I deviate from the classification made by the Special Rapporteur (SR). In its report, the SR refers to "victim redress" and "preventive" functions as potentialities while "contributing to prosecutorial efforts" and "reconciliation" as additional functions. In my case, I consider "contributing to prosecutions" as a potentiality and I don't include "reconciliation" as a function of TCs. I deviate from the SR because he examines mandates of TCs and functions they have increasingly been given over time. Thus he doesn't discuss whether "contributing to prosecutorial efforts" is a potential function or not but rather explains it is an additional function TCs have been given overtime. I have decided to include it as a potentiality because "contributing to prosecutorial efforts" is also a recommendation TCs can include or not in their final report. As in the case of victim redress and prevention of further violations, contributing to prosecution is a recommendation to be implemented by another state agency.

Conversely, I don't consider "reconciliation" as a potential function. Although some TCs reports also put forward recommendations for "reconciliation" they consist of recommendations to fulfill other functions, such as victims redress. For instance, the El Salvador TC recommendations for reconciliation are essentially measures to provide material and moral compensation. Instead, I consider reconciliation more as a goal of TJ than a function of TCs. In this spirit, the Guatemalan TC considers in its recommendations that 'truth, justice, reparations and forgiveness are the bases of the process of consolidation of peace and national reconciliation' (La Comisión para el Esclarecimiento Histórico, 1999: 49). Similarly, as I have already mentioned, the SR stresses that 'meaningful reconciliation requires, in addition to truth, the implementation of the remaining three elements: justice, reparation and guarantees of non-recurrence. Thus truth commissions on their own cannot achieve reconciliation, and the inclusion of the term in their titles likely generates expectations that cannot be satisfied' (Special Rapporteur on the Promotion of Truth, 2013: para.47).



individual and institutional responsibility, emerges as a guarantee to avoid repetition of the violations committed.

Once a commission submits these recommendations it finishes its work. Consequently, the commission ceases to exist at a point when the implementation has yet to begin. Thus, when the Argentinian National Commission on the Disappeared (CONADEP, following the commission's name in Spanish) recommends in its final report that, 'the courts process with the utmost urgency the investigation and verification of the depositions received' (National commission on the disappearances of persons, 1984) it raises the question of who is responsible for implementing the recommendations. Is it for the courts or the President to whom the final report has been submitted? If all the actors were to follow the script, the governing regime would follow through with the implementation because it was the state that established the commission in the first place. Through the recommendations, the commission is handing over to the governing regime a list of measures. The governing regime assumes the role of the accounting agency and the various state institutions towards which the recommendations are directed become the accountable actors. At this point, the governing regime has the authority to compel the state agencies, towards which the recommendations are directed, to implement them.

This course of action does not fully capture the complexity of transitions and the fact that the state institutions asked to implement the TC's recommendations are the same institutions responsible for violations or for failing to investigate and punish perpetrators. Those same institutions may still be under the control of officers and civil servants from the previous regime, some of them responsible for violations and even named in the commission's final report. The implementation of recommendations might derail an already frail transition. For some, this raises concerns about the destabilizing nature of TCs in dealing with a recent past of violations. For others, it shows the inefficiency of TCs as agencies of accountability when the time to implement recommendations arrives.

If implemented, these recommendations produce accountability in its enforcement dimension, as defined by Fox and Bovens. Fox calls this enforcement dimension *hard accountability* which includes sanctions and also compensation or

remediation (Fox, 2007b: 669). Bovens refers to the enforcement dimension of accountability as the possibility that those held to account *may face consequences*, including fines, disciplinary measures, civil remedies or even penal sanctions (Bovens, 2007: 452). Further, as Bovens maintains, the accounting agency does not need to be the one enforcing those *consequences*. In the case of TCs, recommendations will need to be implemented by other state agencies (Bovens, 2007: 452).

In the absence of accountability in its enforcement dimension, due to the lack of implementation of the TC's recommendations, they can still generate answerability if the state agencies towards which the recommendations are directed are compelled to justify their decision not to implement them. This would be the case when an attorney general fails to implement recommendations to prosecute, but provides a justification for the inaction. Without this justification, the interaction between the governing regime and the state agency will not produce any accountability.

**Table 1.** Horizontal accountability relationships

Accountability relationships		Horizontal accountability
TC's Primary purposes		
Actual functions	Fact finding	Truth commission – State agencies: produces answerability
	Victim tracing	
Potentialities (Recommendations)	Victim redress	Governing regime – State agencies: produces enforcement (or answerability)
	Prosecutorial	
	Preventive	

Source: Author.

Table 1 shows that while carrying out fact-finding and victims tracing functions, TCs generate horizontal accountability interactions with state agencies. It is within this interaction that answerability is produced. The recommendations made in the final report may also generate horizontal accountability interactions between the governing regime and the state agencies. It is within this interaction that enforcement, or answerability, is produced. However, beyond these horizontal accountability interactions, TCs also generate vertical accountability relationships between civil society and the governing regime.

### 2.3.2 Vertical accountability relationships

Vertical accountability relationships are generated not generated *by* the commission, but *because of* it. Vertical accountability relationships occur at two different stages: before the establishment of the commission and as a result of the commission's recommendations in the final report.

Before its establishment, the prospect of setting up a TC renders the governing regime answerable to civil society. The interaction between civil society and the governing regime will depend on the context and the dynamics leading to the establishment of a commission. If the decision is the result of the negotiation of a peace agreement between two former warring parties, the chances are it is taken at an elite level with little participation from civil society. Still, civil society can play an active role during the peace negotiations. For example, in the peace negotiations between the Guatemalan government and the Guatemalan National Revolutionary Union, 'the Assembly of Civil Society was uniquely responsible for getting the peace negotiators to tackle the root causes of the conflict and the outlines, at least, of some remedies' (Crocker, 1998: 503). Conversely, in post-authoritarian contexts, it can be a compromise between a previous oppressive regime and political parties pushing for a new democratic regime. In this case civil society engagement in the decision could be higher.

Vertical accountability relationships also occur because of the recommendations in a TC's final report. These recommendations are not only intended for the governing regime, but also directed to the victims and broader civil society. If the governing regime remains inactive and does not hold the state agencies horizontally accountable, civil society can assume the role of accounting agency from the governing regime. In such a context, the civil society becomes the new accounting agency, while the accountable actors are not the state agencies that committed violations or failed to prevent them anymore. The accountable actor, answerable to the civil society, is the governing regime as it has the power to act upon the recommendations of the commission. At such a point, civil society is in a position to push the governing regime to implement the recommendations in the final report. In this context, the governing regime becomes vertically accountable to civil society. In this regard, Fox highlights that

agencies of horizontal accountability, such as TCs, 'rarely have sufficient institutional clout to be able to act on their findings, whether by proposing mandatory sanctions, policy changes, protection from violations, or compensation for past abuses' (Fox, 2007b: 666). For Fox, to address these issues of *hard accountability*, it is necessary to 'deal with both the nature of the governing regime and civil society's capacity to encourage the institutions of public accountability to do their job' (Fox, 2007b: 669).

Civil society capacity to pressure the governing regime to implement the recommendations presents various challenges. First, because of the circumstances in postconflict or post-authoritarian settings, civil society is likely weak as freedom of expression and other political rights might have been curtailed. Second, civil society often is not prepared for the moment when mobilization to implement a TC's recommendations arrives. Transitions are long-term processes that need continuous active participation from civil society. The stage to mobilize around the implementation of a TC's recommendations is a long-term goal, which can easily take more than five years since civil society initial engagement in a TC process. Ideally, advocacy for implementation of a TC's recommendations should be considered as a part of the transition and strategized for at the beginning of the process (Brankovic, 2010: 14). Third, even in the case civil society emerges as a key actor to mobilize around the implementation of recommendations, the method to pressure the government for the implementation is often not clear. Traditional forms of human rights advocacy and lobbying vis-à-vis the state might be evolving to new types of mobilization. As a workshop report puts it, 'TJ practitioners may not have tailored their lobbying strategies to the [TJ] field, which might not be surprising as most civil society practitioners are human rights activists' (Brankovic, 2010: 13). Instead, new forms of mobilization from below might be capturing that space. Specifically, 'reparations campaigns usually evolve over time, from below, as a result of civil society and victim/survivor mobilization and in the face of official opposition' (Gready and Robins, 2014: 358). Notwithstanding all these challenges, civil society role to implement de recommendations is crucial. As the special rapporteur has pointed out, '[i]n the end, the fate of recommendations depends to a large extent on the leadership, advocacy and

persistence of civil society organizations (Special Rapporteur on the Promotion of Truth, 2013: para.73).

**Table 2.** Vertical accountability relationships

Accountability Relationships		Vertical accountability relationships
TCs process		
Before establishing a TC		Civil society – governing regime: produces answerability
As a result of the recommendations in the final report (Potentialities)	Victim redress	Civil society – governing regime: produces enforcement (or answerability)
	Prosecutorial	
	Preventive	

Source: Author.

The two stages of the process, before its establishment and as a result of the recommendations in the final report, are presented in Table 2. In both stages, TCs tend to indirectly generate vertical accountability relationships between civil society and the governing regime. But while prior to the establishment of the TC the vertical accountability relationship generated during the pre-establishment period produces only answerability, that generated as a result of the recommendations in the final report may also produce enforcement. The following table 3 merges both horizontal and vertical accountability relationships.

**Table 3.** Horizontal and vertical accountability relationships.

Accountability Relationships		Horizontal accountability relationships	Vertical accountability relationships
TC's process			
Before establishing a TC			Civil society – governing regime: Produces answerability
During the work of the commission (Actual functions)	Fact finding	Truth commission – State agencies: Produces answerability	
	Victim tracing		
As a result of the recommendations in the final report (Potentialities)	Victim redress	Governing regime – State agencies: Produces enforcement (or answerability)	Civil society – governing regime: Produces enforcement (or answerability)
	Prosecutorial		
	Preventive		

Source: Author.

Following table 3, before their establishment, TCs *indirectly* generate vertical accountability relationships between civil society and the state that produce answerability. During the period between the establishment and the submission of the report, TCs hold state agencies horizontally accountable, producing answerability. As a result of the recommendations in the final report, TCs generate, first, a relationship of horizontal accountability between the governing regime and the state agencies towards which the recommendations are directed. Second, TCs also lead to a relationship of vertical accountability between the civil society and the governing regime. In both cases, these relationships can produce enforcement or, in its absence, answerability. Building on the above accountability relationships, the next section establishes a framework within which to evaluate the contribution of TCs to promoting accountability.

## **2.4 A framework to evaluate the impact of TCs in promoting accountability**

In this section, I put forward fourteen criteria to evaluate the production of answerability or enforcement. The criteria presented follow the three stages in which I divide a TC process, before the establishment of the commission, during the period between its establishment and the submission of the report, and as a result of the recommendations in the final report.

### **2.4.1 Answerability as a result of vertical accountability relationships before a TC**

The previous section concluded that, before their establishment, TCs generate vertical accountability relationships between civil society and the governing regime and that these relationships produce answerability. In analyzing what must happen in order for a TC to make the governing regime answerable to civil society demands, I suggest two evaluative criteria (EC). The first criterion is whether or not the *pressure from civil society leads the governing regime to establish a TC* (EC-1). Chile provides an example of a TC established by a governing regime being held vertically accountable by elections. The Rettig Commission, the Chilean National Commission for Truth and Reconciliation, was established on 25 April 1990, less than one and a half month after the newly elected

President Patricio Aylwin took office. Issues related to human rights, truth, justice and reparations had been central to the election campaign. The Concertación de Partidos por la Democracia program of government referred to the need to establish the truth regarding human rights violations committed after 11 September 1973, the day of the coup d'état by General Augusto Pinochet (Documentos La Época, 1989). Thus the setting up of the Rettig Commission came as a result of the citizens voting for a political party with a program to establish the truth about human rights violations committed under the previous regime. As President Aylwin wrote, three days before the establishment of the Rettig Commission, 'the moral conscience of the nation demanded that I establish the truth...however painful that might be' (La Epoca, 22 April 1990, in Barahona de Brito, 1997: 155). Thus the Rettig Commission was established as a result of the new governing regime becoming answerable to citizens due to electoral accountability.

The second criterion to assess whether the governing regime is rendered answerable is whether or not *the pressure from civil society leads the governing regime to make changes to the mandate, powers, and appointment of commissioners or any other relevant aspect of the commission* (EC-2). The need for new legislation to establish a TC provides an avenue for civil society organizations to be involved by participating in the drafting of the law and advocating for the compliance with international standards and best practices. Civil society can engage through working with the government to draft the legislation or through preparing a draft and presenting it to the government for its consideration. In Kenya, the "Multi-Sectoral Task Force on the Truth, Justice, and Reconciliation Commission", a coalition of civil society organizations and the Kenya National Commission on Human Rights, worked with the government to draft the legislation, while in Sierra Leone, the NGO Truth and Reconciliation Working Group drafted legislation and presented it to the government (Brankovic, 2010: 7-8).

In South Africa, the need to enact new legislation to establish the South Africa Truth and Reconciliation Commission (SATRC) opened a space for civil society, the NGO sector, and the public to participate in the drafting process.<sup>23</sup> As a result, 'a wide

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<sup>23</sup> Among the reasons why the Minister of Justice decided to put the drafting process outside the official justice structures and leave it to civil society organs, Van der Merwe et al. point out the reluctance to push for legislation that might have upset the relation between the African National

range of political and civil society organizations were involved in the discussions leading to the final draft that was approved to go before the parliament' (Van Der Merwe, Dewhirst and Hamber, 1999: 57). Once the legislation was made public, NGOs mobilized to raise their concerns. Proposed amendments included providing victim-offender mediation, restricting amnesties to the least possible instances, strengthening victims' role in the TC process, guaranteeing their right to reparations, demanding all hearings be made public, and providing punitive measures against perpetrators (Van Der Merwe, Dewhirst and Hamber, 1999: 59). As the legislation approved did not provide for the process to select commissioners, NGOs drafted a selection process proposal that was accepted by the Justice Minister Dullah Omar with only minor changes (Van Der Merwe, Dewhirst and Hamber, 1999: 59). Thus, in South Africa, the prospect of establishing a TC generated state answerability in response to demands from victims and civil society.

National consultations are another way of promoting engagement by victims and civil society in the process of establishing a commission. Even if a government only hold such consultations to give the appearance of listening to victims' concerns, they become a real channel to pressure the government concerning the new legislation. The scope of the terms of reference of a TC, the process for selecting commissioners, or the exclusion of amnesty clauses can become a trigger for engagement by victims and civil society. In Timor-Leste, a steering committee was formed with representation from civil society, including human rights groups, groups representing women and youth, as well as religious groups.<sup>24</sup> This committee conducted community consultations to gain an understanding of East Timorese attitudes towards reconciliation. The results led to an expansion of the mandate of the Commission for Reception, Truth and Reconciliation, to include a reconciliation process, using community traditional practices as well as the need for the commission to examine widespread enforced famine (OHCHR, 2009: 6).

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Congress and the National Party, partners in the Government of National Unity. Another reason pointed out is the lack of suitable expertise within the Department of Justice.

<sup>24</sup> The Steering Committee also included representatives from the National Congress for Timorese Reconstruction, the Commission for justice and peace of the Catholic Church, the association of ex-political prisoners, the National Armed Forces for the Liberation of East Timor, and also the United Nations Transitional Administration in East Timor and the Office of the United Nations High Commissioner for Refugees.



These examples show that governing regimes are rendered vertically accountable by changes being introduced into the legislation as a result of civil society pressure. Table 4 incorporates evaluative criteria 1 and 2 to the vertical accountability relationship between civil society and the governing regime before establishing a TC. The criteria show two instances when a governing regime is rendered answerable in the face of civil society demands.

**Table 4.** Criteria for evaluating answerability before the establishment of a TC

Accountability Relations TCs process	Vertical accountability relationship
Before establishing TC	<p><i>Civil society – governing regime: produces answerability</i></p> <p><b>Evaluative criteria showing the governing regime is being rendered answerable as a result of civil society demands:</b></p> <p>EC-1: Pressure from civil society leads the governing regime to establish a TC.</p> <p>EC-2: Pressure from civil society leads the governing regime to make changes to the mandate, powers, and appointment of commissioners or any other relevant aspect of the commission.</p>

Source: Author.

#### 2.4.2 Answerability as a result of horizontal accountability relationships during a TC

I propose seven criteria, EC-3 to EC-9, to show that state agencies are being rendered answerable due to horizontal accountability relationships during the period a commission undertakes its work. During the period between its establishment and the submission of the report, TCs undertake their fact-finding and victims tracing functions. This fact-finding and victims tracing is done at two different levels. First, they do so through collecting information and evidence from victims, witnesses, and broader civil society; second, through collecting information from state agencies.

In interaction with victims, witnesses and broader civil society, state answerability is produced when a TC discloses evidence supporting human rights violations committed by the state. This usually happens with the publication of the report, but it could also take place with the publication of interim reports or public

hearings where state-sponsored violations are exposed. For the state to be rendered answerable, in the first place, *victims, witnesses, and/or civil society organizations can access and provide information to the commission* (EC-3). This access requires the commission to reach out to victims, witnesses, and civil society organizations, and to ensure that the environment is conducive for victims, witnesses, and civil society to come forward and provide information. Latin American TCs have collected information from victims and organizations working closely with victims, such as human rights or religious groups. CONADEP, the Argentinian TC, compiled 7,000 statements documenting 8,960 persons who had been disappeared. Most human rights organizations in the country assisted the inquiry providing information on the disappeared (Hayner, 2011: 45-6). In Chile, the National Commission on Truth and Reconciliation took testimonies from families of those disappeared or killed on the basis of extensive records of non-governmental and religious organizations. Crocker refers to the ecumenical Comité de Cooperación Para la Paz en Chile and the Roman Catholic Church Vicaria de la Solidaridad that collected thousands of judicial transcripts concerning disappearances that were 'invaluable for the investigation of the presidentially-appointed National Commission on Truth and Reconciliation, which had to complete its work in only eighteen months' (Crocker, 1998: 505). The Commission on the Truth for El Salvador relied on victims, national and international human rights groups to document human rights violations. It received more than 22,000 complaints of serious acts of violence that took place between January 1980 and July 1991. Seven thousand were reported by victims and witnesses at the commission's offices while the rest were received through governmental and non-governmental organizations (Commission on the Truth for El Salvador, 1993). The Guatemalan Commission for Historical Clarification also incorporated data from non-governmental organizations. The commission used the databases from the Recovery of Historical Memory Project of the Catholic Church's Human Rights Office and the Centro Internacional para Investigaciones en Derechos Humanos to help estimate the number of people killed or disappeared and to confirm overall patterns (Hayner, 2011: 33-4). In South Africa, NGOs also submitted records of human rights violations to the SATRC, which were entered into a national database (Van Der Merwe, Dewhirst and Hamber, 1999: 65). During the work of the commission, many SATRC staff requested

research assistance from NGOs as they realized the wealth of information these organizations had readily available (Van Der Merwe, Dewhurst and Hamber, 1999: 67).

At the second level, state answerability is produced within the horizontal accountability relation between the commission and the state agencies. Here the commission will use the information collected from victims and civil society to interact with state agencies. The nature of this horizontal accountability interaction between the commission and the state agencies depends on the powers the commission wields. TCs hold state officials answerable when empowered to summon and interrogate them, order the submission of documents and other evidence, or ask for the release of necessary details and the reasons behind their actions. It is through holding state officials horizontally accountable that TCs generate answerability. For the state agencies to be rendered answerable, *the commission has to have access to state/non-state actors and these actors have to be answerable to the commission* (EC-4).

Notwithstanding the nature of TCs as ad-hoc mechanisms of horizontal accountability, previous experiences show little access to state/non state actors. Even in cases where commissions have been legally empowered to interrogate these actors, they have rarely complied. Latin American TCs have not had the power to access the security forces. In Argentina or Chile, TCs lacked any power to subpoena military officers or to order the submission of documents from military institutions. In both cases, the commissions received little cooperation from the armed forces (Hayner, 2011: 45-8). In El Salvador, the commission had the right to enter any office or compound in search of documents, but it could find little documentation available (Hayner, 2011: 227). As opposed to Latin American commissions, the SATRC had a wide range of important investigative powers, such as those to subpoena, search and seizure and to provide witness protection. However, the commission exercised such powers only a handful of times (Hayner, 2011: 28). The reason for the limited use might be the SATRC collected information through public hearings. Those who had committed politically motivated crimes, including gross violations of human rights, could be granted amnesty in exchange for the disclosure of the whole truth in relation to those crimes. Perpetrators were answerable not only to the commission, but also to the victims. According to Hayner, 'despite the difficulties and frustration, it seems clear that significant and

detailed information emerged from the amnesty process that contributed to the broader goal of revealing the truth' (Hayner, 2011: 30).

As a result of the fact-finding and victim tracing, TCs generate new *truth*, which is disclosed mainly through the publication of the final report. This *truth* could also be disclosed through interim reports or through public hearings. I will focus here in the publication of the final report as it compiles the findings of the commission. Through making the report public, the governing regime is transferring the outcome of the fact finding and victim tracing done by the commission to the public domain. Because of the nature of a TC as an ad-hoc mechanism of horizontal accountability authorized and empowered by the state, what the final report discloses is state answerability. It is the governments and state agencies that become answerable to victims, witnesses and the broader civil society. While most governing regimes that have received TCs' reports have published them, those in Uganda, Nepal, Haiti, and Nigeria have not done so. Therefore, one criterion to evaluate the impacts of the commission in promoting horizontal accountability should be whether or not *the final report is made public* (EC-5).

Governments decide not to make the commissions' report public because they disclose sensitive information about violations committed and evidence supporting those violations. Reports usually attribute some degree of responsibility to state institutions, such as security forces and the judiciary, and in some cases, they name perpetrators. Sometimes they can also attribute responsibility to non-state actors, often members of politically motivated non-state armed groups responsible for conflict related international crimes. The extent of the information compiled in a TC's report renders the state/non-state actors more or less accountable to victims, witnesses and the broader civil society. Thus, once the report is made public, we can evaluate the extent of the state answerability comparing the content of the report against evaluative criteria. Here I propose four evaluative criteria. Evaluative criteria 6 and 7 evaluate the extent to which the report discloses new facts and evidence surrounding violations committed. Evaluative criteria 8 and 9 the extent to which TCs attribute institutional and personal responsibility for the violations committed.

*If the report discloses new facts and evidence surrounding violations committed*, (EC-6), it follows that the state is rendered answerable. For instance, the Argentinian TC

documented around 9,000 people who had been disappeared, compiled information on torture centers, and collected testimonies from former detainees who explained the methods of torture used. In El Salvador, the commission thoroughly investigated over thirty cases illustrative of patterns of violence. For each of these cases, the commission established the degree of certainty on which the findings were based. The degree provided whether there was full, substantial or sufficient evidence (Commission on the Truth for El Salvador, 1993). The commission used these standards of evidence to establish the facts surrounding violations committed. With regards to commissions investigating cases of enforced disappearances, a specific criterion for assessing disclosure of evidence surrounding violations is whether or not *the commission has identified burial sites* (EC-7). For instance, the Peruvian TC registered 4,644 burial sites throughout Peru, carried out three exhumations and preliminary verifications of their existence in 2,200 sites (Truth and Reconciliation Commission, 2003: 344).

Attribution of institutional or personal responsibility in the final report indicates the extent to which the state/non-state is being rendered answerable. If *the report acknowledges that state agencies and/or non-state actors committed violations of human rights* (EC-8), it is exposing these state agencies or non-state actors, producing more answerability. In Chile, the report attributed 95 per cent of the crimes it documents to the military. According to Hayner, this attribution debunked the military's central argument that the country had faced an "internal war" (Hayner, 2011: 48). The TC in El Salvador attributed 85 per cent of the human rights violations to agents of the state, paramilitary groups allied to them and death squads while five per cent of the complains registered accused the guerrilla (Commission on the Truth for El Salvador, 1993). The Guatemalan Commission for Historical Clarification attributed 93 per cent of the violations documented to the state, three per cent to the guerrilla, and four per cent to non identified actors.

If *the report attributes individual responsibility through naming perpetrators* (EC-9), the TC has produced more answerability. In El Salvador, the commission named those responsible based on its investigation. Among them were members of the armed forces implicated in crimes documented, members of the civil and judicial service who failed to investigate such crimes, and members of the insurgent armed group implicated in

committing violent acts (Commission on the Truth for El Salvador, 1993). This commission used the standards of evidence to ascertain whether there was full, substantial or sufficient evidence to name individuals as perpetrators. Table 5 summarizes evaluative criteria during the work of a commission.

**Table 5.** Criteria for evaluating answerability during the work of a TC

Accountability Relationships TCs process	Horizontal accountability relationships
During the work of the commission (Actual functions)  Fact-Finding  Victim tracing	<i>Truth commission – State agencies: produces answerability</i> <b>Evaluative criteria showing state agencies are being rendered answerable</b>  EC-3: Victims, witnesses, and/or civil society organizations can access and provide information to the commission EC-4: The commission has access to state/non-state actors and these actors are answerable to the commission. EC-5: The final report is made public. EC-6: The report discloses new facts and evidence surrounding violations committed. EC-7: In case of disappearances, the TC has identified burial sites. EC-8: The report acknowledges state agencies and/or non-state actors committed violations of human rights. EC-9: The report attributes individual responsibility through naming perpetrators.

Source: Author.

The fulfillment of the previous evaluative criteria indicates that state agencies or non-state actors when applicable, are rendered answerable. While criteria 3, 4, and 5 deal with formal aspects that need to be fulfilled for a commission to produce answerability, evaluative criteria 6 to 9 deal with the substance its report needs to disclose to do so.

#### 2.4.3 Enforcement as a result of horizontal and vertical accountability relationships after the recommendations

In their final reports, TCs make recommendations susceptible of generating two more accountability relations. The first is a horizontal relationship between the governing regime and the state agencies towards which the recommendations are directed. The second is a vertical one as civil society pushes the governing regime to implement the

recommendations made in the commission's final report. The implementation of these recommendations by the governing regime produces enforcement. Such implementation can also lead to answerability if the state agencies which received the recommendations are compelled to justify their decision not to implement them. In assessing the conditions to conclude that the recommendations have produced enforcement aspects of accountability, I have created five criteria, EC-10 to EC-14.

*Enforcement as a result of horizontal accountability relationships*

In most cases, TCs have recommended measures to provide redress for victims, such as reparations, for the violations documented. Only early commissions, such as those in Uganda, Nepal, and Chad, have not recommended reparations (Bakiner, 2014). While TCs usually recommend reparations, they do not award them. This is logical as reparations are long-term programs that outlast a commission's life. The implementation of reparations entails fulfilling the enforcement dimension of accountability. Consequently, an evaluative criterion should be whether or not *reparation programs have been implemented* (EC-10). For example, in Chile, the Reparations Law was adopted 'to coordinate, execute and promote the necessary actions to comply with the recommendations contained in the National Commission for Truth and Reconciliation report' (Aylwin Azocar, 1992). The law targeted 7,000 people for reparations, provided monthly stipends of US\$380, and health and educational benefits to each family affected by disappearances or death as a result of human rights violations (Barahona de Brito, 1997: 153). A specific criterion, whether or not *exhumations have been carried out* (EC-11), should be applied to those commissions specifically investigating enforced disappearances. The Peruvian TC's recommendations presented the "National Plan for Forensic Anthropological Interventions" to effectively deal with the exhumations and identifications of victims (Truth and Reconciliation Commission, 2003).

With regards to individual responsibility, there is enforcement if *alleged perpetrators are prosecuted* (EC-12). Although commissions have recommended for prosecutions, implementation has not always followed due to unwillingness of the

prosecutorial agencies and/or a weak judicial system. In South Africa, despite the SATRC handed over a list of 300 cases with the names of specific perpetrators to the National Prosecuting Authority, not a single person on the list was prosecuted (Hayner, 2011: 101-2). In other cases, there were prosecutions, although not to the extent recommended by the commissions. The Peruvian TC had a special unit tasked with preparing cases for prosecution. In its final report, the commission handed over dossiers of cases to the Office of the General Prosecutor. However, the prosecutorial agencies questioned the evidence collected by the commission and the validity of the testimonies. Over the following years, perpetrators were tried, but most of them were acquitted (Hayner, 2011: 96).<sup>25</sup>

Another measure concerning individual responsibility which indicates enforcement is whether or not *perpetrators have been removed from public office* (EC-13). This process, usually referred to as vetting, involves the identification and removal of individuals responsible, especially from the police, prisons, the army and the judiciary (Secretary-General, 2004: para. 52). Here, we look at processes which occur as a result of the recommendations in a commission's final report. Bakiner's study finds little evidence of vetting as a result of TCs' recommendations. While TCs in Chad, El Salvador, East Timor, and Liberia recommended the removal of alleged perpetrators from their offices, only in El Salvador, did the government partially met this demand (Bakiner, 2014: -25).

TCs also make recommendations aimed at reforming state agencies or existing legislation. Recommendations to reform state agencies have generally targeted security forces responsible for violations, but they have also targeted the judiciary in some cases. For instance, the TC in El Salvador called for reforms of the Supreme Court to reduce the concentration of functions in its President, which had undermined the independence of lower court judges and lawyers (Commission on the Truth for El Salvador, 1993). However, in the following years, the Supreme Court saw few limitations imposed on its

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<sup>25</sup> Hayner points out that 52 were acquitted and 12 convicted in the years that follow the submission of the commission's report. And in 2008-2009, there were only 2 convictions out of 31 verdicts, and the Supreme Court overturned one of them. Hayner mentions the refusal by the courts that violations constituted crimes against humanity and the rejection of the command responsibility doctrine, as reasons for the lack of convictions.



power. As a result, the Supreme Court continues to have significant authority, including the power to fill lower court vacancies (Wiebelhaus-Brahm, 2010: 90). Recommendations have also been aimed at reforming legislation to better protect the human rights of citizens. Following its TC's recommendations, Chile reformed its criminal procedures to ensure the constitutional guarantee of due process and respect for human rights, including the right to a defense (Wiebelhaus-Brahm, 2010: 67). Similarly, in Chile, the post of ombudsman was established as a result of its TC's recommendations. A specific criterion, whether or not recommended *institutional or legal reforms to prevent future violations have been adopted* (EC-14), should be used to assess the production of enforcement.

The implementation of the recommendations produces accountability in its enforcement dimension. However, at this point, the governing regime can decide not to actively implement recommendations or do so only with those non-controversial. The way in which the governing regime deals with the situation at this key juncture often depends on the response from civil society.

#### *Enforcement as a result of vertical accountability relationships*

The role of civil society is key to the fate of the recommendations in a TC's final report. Civil society can use the commission's recommendations to hold the government accountable. It is through civil society advocacy, leadership and persistence that the commission's recommendations could eventually be implemented even when the governing regime lacks the will or the political clout to do so.

Civil society and victims play a decisive role even when a TC's final report foresees the establishment of a body to oversee the implementation of recommendations or when such implementation is mandatory. Even when a monitoring body is established, such a mechanism is still accountable to the civil society. In fact, civil society is usually part of this mechanism. In Guatemala, the TC's final report recommended the establishment of the *Fundación por la Paz y la Concordia*, to support, promote and monitor the observance of the recommendations with representation from the state and the civil society (La Comisión para el Esclarecimiento Histórico, 1997-1999). However this

mechanism was rejected and never established. Civil society still plays a key role when the implementation of the recommendations is mandatory, as their obligatory nature does not guarantee the implementation. The implementation of the Commission on the Truth's recommendations in El Salvador was mandatory with the United Nations Mission in the country pushing 'for the implementation of those outstanding' (Hayner, 2011: 191). However, many of these compulsory recommendations were never implemented.

The types of recommendations often determine the degree of civil society mobilization around them. In his study, Bakiner refers to two measures to account for civil society mobilization: non-governmental initiatives to publish and/or disseminate the commission's final report when the government fails to do so; and lobbying or advocating for the implementation of recommendations concerning reparations (Bakiner, 2014: 22). With regards to the first, he finds that in Nepal, Sri Lanka and Haiti, it took domestic and/or international human rights organizations several years to get the government to publish the TC's final report, and in Nigeria, a private initiative led to the publication.<sup>26</sup> As for the second measure, he finds that in South Africa, Guatemala, Peru, Sierra Leone, and Timor-Leste, civil society mobilization led to the implementation of reparation programs recommended in the TC's final report.

Reparations emerge as an area for victims to mobilize and rally around. In Sierra Leone's, organizations dealing with the TC, such as the Truth and Reconciliation Working Group, focused on the Special Fund for War Victims as this was a recommendation with a time frame that the government failed to implement (Brankovic, 2010: 13). Similarly in South Africa, the Western Cape branch of Khulumani Support Group, a victims group, 'also began working with its civil society partners to push the state on reparations only once the government had failed to follow the TRC's recommendations' (Brankovic, 2010: 8). Although the visibility of the implementation of recommendations on reparations as a result of victims and civil society mobilization might be the result of data available, recommendations on other measures could also be implemented thanks to civil society mobilization. For example, Bakiner acknowledges

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<sup>26</sup> However, I disagree with the case of Nepal and Sri Lanka. In Nepal the report of the truth commission he refers was actually never published. And in Sri Lanka, the three zonal commission's report were submitted in September 1997 and made public in January 1998.

that significant civil society mobilization, both from domestic and international actors, was a major factor in all cases where TCs contributed to prosecutions (Bakiner, 2014: 25, footnote 72).

To identify enforcement due to vertical accountability, I suggest using the same evaluative criteria as I previously suggested for the horizontal relationship. Thus, I assume enforcement could occur either due to the horizontal accountability relationship between the governing regime and state institutions or the vertical accountability between civil society and the governing regime.

**Table 6.** Criteria for evaluating enforcement as a result of the recommendations in the final report of a TC.

Accountability Relations TCs process	Horizontal accountability relations	Vertical accountability relations
As a result of recommendations in the final report (Potentialities)	<p><i>Governing regime – State agencies: Produces enforcement (or answerability)</i></p> <p><b>Evaluative criteria for demonstrating production of enforcement by the governing regime</b></p> <p>Victim redress EC-10: Reparation programs have been implemented. EC-11: In cases of disappearances, exhumations have been carried out. Prosecutorial EC-12: Alleged perpetrators are prosecuted. EC-13: Perpetrators have been removed from public office. Preventive EC-14: Institutional or legal reforms to prevent future violations have been adopted.</p>	<p><i>Civil society – Governing regime: Produces enforcement (or answerability)</i></p> <p><b>Evaluative criteria for demonstrating production of enforcement by civil society</b></p> <p>One or more of the previous criteria (EC-10 to 14) has been implemented as a result of civil society mobilization.</p>

Source: Author.

The table shows criteria for evaluating the production of enforcement as a result of horizontal and vertical accountability relationships. While criteria 10 and 11 concern victims' redress, criteria 12 and 13 deal with measures concerning individual responsibility and criterion 14 deals with measures regarding institutional or legal reform. These criteria for evaluating the situation surrounding the implementation of a

commission's recommendations may be used to assess the production of enforcement in the short (one year), medium (five years), or long term (ten years or more).

## 2.5 Conclusions

Accountability as a concept allows us to link the impacts of a TC process and how these impacts affect accountability as an outcome. Concerning the process itself, I have argued that TCs generate horizontal and vertical accountability relationships and that it is within these relationships that accountability, in its answerability and enforcement dimensions, is produced. With regards to the outcome, it is the previous definition and operationalization of accountability as a concept that allows us to understand whether a TC has contributed to promote accountability. If a TC produces answerability or enforcement as a result of accountability relationships it has generated, we can confirm that it has contributed to promote accountability as an outcome. The evaluative criteria presented in this chapter are intended to show whether answerability or enforcement have been produced, hence proving the existence of accountability relationships.

Following the framework presented, I have argued that before their establishment, TCs generate *indirectly* vertical accountability relationships. They do so indirectly insofar these relations are generated not *by* the commission, but *because of* it. The prospect of establishing a TC generates vertical accountability relationships between civil society and the governing regime. Specifically, the pressure from civil society to establish a TC or to adopt certain changes in the mandate, powers, the process to appoint commissioners or any other relevant aspect of the commission, produces answerability when the state is compelled to follow through.

During the period between the establishment of the commission and the submission of its report, TCs carry out fact-finding and victim tracing. These are the two actual functions TCs are able to undertake by themselves. In conducting these functions, TCs interact with victims, NGOs, and broader civil society as well as with state agencies. The nature of these interactions is completely different, depending on with whom the TC is interacting. The interaction with civil society is not based on a relation of horizontal accountability. Victims, witnesses, human rights organizations and broader

civil society are a source of information to establish facts and to collect evidence. The interaction with other state agencies, including the state security forces, is framed within a relation of horizontal accountability and is based on the powers the commission wields. TCs use these powers to summon officials, request them to release information, to submit documentation and other evidence. This relation of horizontal accountability generates answerability.

Because of the nature of TCs as ad-hoc mechanisms of horizontal accountability authorized and empowered by the state, the *truth* disclosed by making the final report public becomes state answerability. The publication of the final report transfers the outcome of the fact finding and victim tracing by the commission to the public domain. The government and state agencies become answerable in front of victims, witnesses and the broader civil society. I have proposed evaluative criteria to assess when state agencies, and when applicable, non-state actors, are rendered answerable. Evaluative criteria to assess the extent of the answerability produced include disclosure of new facts and evidence, acknowledgement that state agencies and/or non-state actors committed violations of human rights, and attribution of individual responsibility through naming perpetrators.

In their final report TCs make recommendations to be implemented by state agencies. These recommendations usually include a set of measures to provide redress to victims, to contribute to prosecutions of perpetrators of violations, and to prevent further violations. TCs cease to exist with the submission of their final report, despite the implementation of recommendations is yet to begin. The paper examines two more accountability relations as a result of the recommendations of the TC in their final report. The first is a relationship of horizontal accountability between the governing regime and the state agencies which received the recommendations. At this point, the governing regime has the obligation to compel the state agencies to implement these recommendations, producing accountability in its enforcement dimension. If the governing regime does not implement these recommendations, civil society can pressure it to do so. This vertical accountability relationship between civil society and the governing regime produces enforcement if the recommendations are implemented as a result of social mobilization. Evaluative criteria to assess the production of

enforcement include whether or not reparations, prosecutions, removal of perpetrators from their public offices, and institutional or legal reforms were undertaken as a result of horizontal or vertical accountability relationships.

Based on the two initial chapters, the next chapter presents the analytical framework and methodology to effectively evaluate the impacts of TCs on accountability in specific case studies.



## Chapter 3

### Analytical framework and methodology for case studies

*'Theory is about the common sense of how things are connected, how they influence each other, and how they may relate to desired change. Theory is our best speculation about how complex things work'*  
(Lederach, 2005: 125)

#### Introduction

This chapter elaborates on how I have undertaken this research. The first section examines the design frameworks used. I present theory based impact evaluation as a method to evaluate the impacts of TCs processes. Subsequently, I explain the reasons for selecting the commissions established in Nepal and Sri Lanka as case studies. The second section discusses the collection and analysis of data through literature review and elite agent interviews. For elite agent interview, I present the three groups in which I divide the pool of interviewees, the line of inquiry, and the methods to analyze the resulting data. Finally, I examine ethical and gender considerations I had to confront while conducting this research.



### 3.1 The analytical and design framework

The purpose of this section is to detail the practical conducting of this study. I refer to analytical and design frame as the superstructure that supports the framework that connects the research question with the ways in which data can be collected (Thomas, 2009: 99). The analytical and design frame for this investigation includes evaluation of impact and case study research. The section first presents theory based impact evaluation as a method to examine the impacts of TCs. Next, I justify the selection of the commissions established in Nepal and Sri Lanka as case studies.

#### 3.1.1 Evaluation of impact through theory based impact evaluation

I have referred to the concepts 'impact' and 'evaluation' in the previous chapters. In chapter one, I have examined studies that assess the impact of TCs. In chapter two, I have proposed my own accountability framework to assess impact. As for 'evaluation', in chapter two, I have referred to the criteria to evaluate the production of answerability or enforcement and to demonstrate the existence of accountability relationships. However, I have not defined these concepts yet. In this section, I first examine the meaning of evaluation and impact. Then, I consider that to assess the impact of TCs as processes, it is necessary to use a different approach and methodology from those to assess the impact of TCs on preconceived outcomes.

Evaluation encompasses two steps: first, to collect evidence to conclude that something is the case; and, second, to judge these conclusions against pre-established criteria. Fournier has defined evaluation as

An applied inquiry process that collects and synthesizes evidence that culminates in conclusions about the state of affairs, value, merit, worth, significance or quality of a program, product, person, policy, proposal or plan. Conclusions made in an evaluation encompass both an empiric aspect (that something is the case) and a normative aspect (judgment about the value of something) (Fournier, 2005: quoted in Duggan, 2010: 318).

Similarly, Duggan refers to the use of the data collected to assess the value against a set of criteria, noting that without this comparison, there would be no evaluation, but only analysis of information (Duggan, 2010: 318). Referring to this comparison to pre-

established criteria, Bryman states that ‘the essential question that is typically asked by such studies is: has the intervention achieved its anticipated goals?’ (Bryman, 2008: 42). In this study, I understand evaluation as this two-step process of reaching conclusions to compare against pre-established criteria.

As opposed to the definition of “evaluation”, there is a serious and persistent debate regarding the meaning of “impact” in the literature. In the guidance on evaluating conflict prevention and peacebuilding activities, the Organization for Economic Co-operation and Development defines “impact” as, ‘positive or negative, primary and secondary effects produced by an intervention, directly or indirectly, intended or unintended’ (OECD, 2008: Annex 1). White argues that ‘any evaluation which refers to impact (or often outcome) indicators is thus, by definition, an impact evaluation’ (White, 2009: Controversies and confusions). Outcome monitoring, understood as the collection of data on the short and medium-term effects, is also a part of impact evaluation. Impact assessment, which relies largely on qualitative approaches, is similarly a part of impact evaluation. A second approach to the meaning of “impact”, understands a proper analysis of impacts requires a counterfactual evaluation of what the outcomes would have been in the absence of the intervention (White, 2009: Controversies and confusions). Through a comparison group, which should be identical to the group to which the intervention has been practiced except for the absence of this intervention, we are able to assign observed changes to it. It is through identifying this counterfactual that we are able to attribute changes in the group subjected to the intervention. Using this definition of “impact”, outcome monitoring is not impact evaluation, but a description of the factual.

In dealing with an intervention, such as a TC established 20 to 25 years ago, it is not possible to establish a counterfactual, in the sense of an identical comparison group that we decide not to expose to the intervention. Nonetheless, one could examine countries that went through similar transitions without establishing a TC, acknowledging the important limitation of such approach given that each transition develops its unique features. While assessing the impacts of the TCs established in Chile, El Salvador, and Uganda on democracy and human rights, Brahm uses Brazil, Nicaragua and Ethiopia, respectively, as a counterfactual. As this author recognizes, in

most cases, similarities between nations are far outweighed by each country's unique path of development. However, Brahm also notes that 'considering countries that have faced similar post-transition challenges can provide hints as to how truth commission cases may have fared had the course of transitional justice taken a different path' (Wiebelhaus-Brahm, 2010: 30).

Notably, there is a fundamental difference between Brahm's assessment of impacts and this study. While Brahm assesses impacts of TCs on two outcomes of reference, human rights and democracy, I assess impacts of a TC process, specifically the accountability relationships a TC generates, and how these accountability relationships produce answerability or enforcement as an outcome. Brahm assesses impacts in two variables that are, *a priori*, disconnected from the TC's processes. He then establishes a causal chain that links a TC recommendation with human rights and democracy. In assessing how TCs contribute to promote accountability, I examine impacts as a result of a TC process. My focus is on the results of the accountability relationships TCs generate between civil society and the governing regime on one hand and those between a TC and state agencies. This impact as a result of a TC process can only take place when a TC exists. If there is no TC, there cannot be vertical or horizontal accountability relationships attributable to a TC. Consequently, I assess whether these accountability relationships produced answerability or enforcement as an outcome.

Studies focusing on impacts on preconceived outcomes, such as Brahm's, attempt to respond to a type of questions that allow for a counterfactual as opposed to studies with a focus on the impacts of the process. Counterfactual impact evaluation tries to respond to questions such as 'does a treatment make a difference?', and if so, 'how much difference does it make?' (European Commission, 2013: 48). Through answering these questions, it intends to provide empirical evidence that *the difference* observed in the outcome after the implementation of the intervention is caused by the intervention itself (European Commission, 2013: 48). For my research, I am not asking the type of question that needs a counterfactual. Instead, what I try to understand is how change happens. In other words, how the process works. This approach raises different types of questions than one that focuses on results. In the context of examining impacts of TCs, it is important to examine how a TC generates a specific impact. More

specifically, the focus should be on how a TC should logically work to generate a specific impact and why a TC worked; under what conditions, a TC produces effects, both intended or unintended. In this study, the way the process works indicate how TCs promote accountability. Why a TC worked entails examining under what conditions a TC contributes to promoting accountability. The answer to these questions entails putting forward an explanation of impact, an evaluation of impact based on a theory of change preferred, as a result of an explicit choice, which explains *how* and *why* TCs contribute to promote accountability. That is, to bring to the TJ field of impact evaluation what in peacebuilding and development programs is referred to as theory based impact evaluation.

Theory based impact evaluation (TBIE) is based on the idea that the essential ingredient is not a counterfactual, *how things would have been without*, but rather a theory of change, *how things should logically work to produce the desired change* (European Commission, 2013: 49). TBIE tries to respond to questions such as ‘why an intervention works or why it does not work; why a set of interventions produces effects intended as well as unintended, for whom and in which context’ (European Commission, 2013: 47). Theory-based evaluation has a conceptual and an empirical component.

Conceptually, theory-based evaluations articulate a policy or program theory. Empirically, theory-based evaluations seek to test this theory, to investigate whether, why or how policies or programs cause intended or observed results (European Commission, 2013: 52).

TJ is a field in which the conceptual component, the theory of change that underpins the discourse, remains implicit. As pointed out by others, little of the massive literature of TJ proves such theories of change or even seeks to make them explicit (Robins, 2015: 185). But as Robins points out,

If a mechanism for impact can be postulated, it can be tested, potentially revealing the process by which social and political change occurs in transition. What the [TJ] field needs to demonstrate its impact is a theoretical, rather than purely normative, basis and empirical research that uses observation to accumulate evidence for or against that theory (Robins, 2015: 185).

In the next section I present the conceptual and analytical framework to examine impacts of TCs, the theory of change that explains how TCs should work to make change. Second, I present the empirical component which is the evaluative criteria to

test this theory of change. Both conceptual and analytical framework and the empirical component have been theoretically developed in chapter two.

*A theory of change: How truth commissions generate accountability relationships*

TCs generate vertical accountability relationships between the state and civil society and horizontal accountability relationships within the state. These accountability relationships produce accountability in its answerability and enforcement dimensions.

Before their establishment, TCs indirectly generate vertical accountability relationships between civil society and the governing regime; this vertical relationships produces answerability. During the period between the establishment of TCs and the submission of their reports, TCs hold state agencies horizontally accountable. This horizontal relationships produces answerability. Moreover, because TCs are authorized by the state, the truth they disclose in their reports becomes state answerability in the presence of testimonies of violations. In their final reports, TCs make recommendations susceptible of generating two more accountability relationships. First, a relationships of horizontal accountability between the governing regime and the state agencies towards which the recommendations are directed; second, a relationships of vertical accountability between the civil society and the governing regime. In both cases, these relationships are susceptible of producing enforcement, or, in its absence, answerability. These accountability relationships are summarized in the table below.

Table 7- Horizontal and Vertical Accountability Relationships (Table 3 in chapter 2)

Accountability Relationships		Horizontal accountability relationships	Vertical accountability relationships
TC's process			
Before establishing a TC			Civil society – governing regime: Produces answerability
During the work of the commission (Actual functions)	Fact finding	Truth commission – State agencies: Produces answerability	
	Victim tracing		
As a result of the recommendations in the final report (Potentialities)	Victim redress	Governing regime – State agencies: Produces enforcement (or answerability)	Civil society – governing regime: Produces enforcement (or answerability)
	Prosecutorial		
	Preventive		

Source: Author

The table organizes the process of a TC and accountability relationships. Values of the row variable relate to the three stages of a TC: before its establishment, during its work and as a result of the recommendations in the final report. Values on the column variable refer to the two types of accountability relationships: vertical and horizontal. Crossing of two variables show the accountability relationships generated at each stage of the process and whether or not these relationships produce answerability and/or enforcement. To explain the framework in a testable way, next section presents criteria to evaluate a TC intervention.

*Testing the theory: Criteria to evaluate answerability and enforcement*

I have devised fourteen evaluative criteria to test the theory of change I discussed in the previous section. The aim is to probe the existence of accountability relationships as a result of a TC. If I can demonstrate the production of accountability, either in its answerability or enforcement dimension, I will be validating the existence of accountability relationships a TC has generated. The fourteen criteria presented follow the three stages in which I divide a TC process: two criteria for before the establishment of a commission; seven for the period between the establishment of a TC and the submission of the final report; and five criteria for the period after the recommendations in the final report.

As mentioned in the previous section, even before it is established, a TC generates a vertical accountability relationship between civil society and the governing regime and this accountability relationship produces answerability. In analyzing what has to happen to conclude that the prospect of a TC renders the governing regime answerable to civil society, I propose two evaluative criteria (EC); first, if *pressure from civil society leads the governing regime to establish a TC* (EC-1) and, second, if *pressure from civil society leads the governing regime to make changes to the mandate, powers, and appointment of commissioners or any other relevant aspect of the commission* (EC-2). The fulfillment of any of these two criteria leads to the assumption that a governing regime has been rendered answerable to civil society demands.

During the period between its establishment and the submission of the final report, a TC holds state agencies horizontally accountable. This horizontal accountability relationships produces answerability. In analyzing what has to happen to know that the state agencies are rendered answerable, I propose seven criteria. Three of these criteria deal with formal aspects that need to be fulfilled for the commission to produce answerability, while it undertakes the fact-finding and victim tracing functions. Specifically, *victims, witnesses, and/or civil society organizations can access and provide information to the commission* (EC-3). This entails, first, the TC reaching out to victims, witnesses and civil society, and second, the environment conducive for them to come forward and provide information. This criterion results in the TC being able to document complains and violations through receiving inputs from the public. The second criterion is whether or not *the commission has access to state/non-state actors and these actors have to be answerable to the commission* (EC-4). This criterion examines the capacity of a TC to interrogate state security forces, and other state agencies, as well as non-state actors, usually members of a politically motivated, non-state armed group responsible for conflict-related international crimes. At the same time, the criterion also examines the power of the commission to access documentation belonging to these actors to undertake fact finding and victims tracing functions. The final criterion is whether or not *the final report is made public* (EC-5). Such publicity is critical to transfer the answerability produced and contained in the report to the public domain. Evaluative criteria 6 to 9 deal with the substance of what the report needs to disclose to produce answerability. Particularly, the extent to which *the report discloses new facts and evidence surrounding violations committed* (EC-6) and, *in case of disappearances, the TC has identified burial sites* (EC-7). Evaluative criteria 8 and 9, assess the extent to which a TC attributes institutional and personal responsibility for the violations committed. Particularly, whether or not *the report acknowledges that state agencies and/or non-state actors committed violations of human rights* (EC-8) and whether or not *the report attributes individual responsibility through naming perpetrators* (EC-9).

In its final report, a TC makes recommendations susceptible of generating two more accountability relationships. First, a relationship of horizontal accountability between the governing regime and the state agencies towards which the

recommendations are directed. However, if the governing regime remains inactive and does not hold the state agencies horizontally accountable, civil society can intercede and push the governing regime to implement these recommendations. Such mobilization leads to a relationship of vertical accountability. The implementation of recommendations as a result of any of these horizontal or vertical relationships produces accountability in its enforcement dimension. Here I suggest five criteria. Two of the five deal with measures intended to redress victims, whether or not *reparation programs have been implemented* (EC-10) and, in case of disappearances, whether or not *exhumations have been carried out* (EC-11). Two more criteria deal with issues of individual responsibility, whether or not *alleged perpetrators are prosecuted* (EC-12) and *perpetrators have been removed from public office* (EC-13). The final criterion is whether or not *institutional or legal reforms to prevent future violations have been adopted* (EC-14). These fourteen evaluative criteria are summarized in the table below.

Table 8 – Criteria to evaluate answerability and enforcement, on the basis of chapter 2.

Accountability Relationships TCs process	Horizontal accountability relationships	Vertical accountability relationships				
Before establishing TC		<p><i>Civil society – governing regime: produces answerability</i></p> <p><b>Evaluative criteria showing the governing regime is being rendered answerable as a result of civil society demands:</b></p> <p>EC-1: Pressure from civil society leads the governing regime to establish a TC.</p> <p>EC-2: Pressure from civil society leads the governing regime to make changes to the mandate, powers, and appointment of commissioners or any other relevant aspect of the commission.</p>				
During the work of the commission (Actual functions) <table border="0" style="margin-left: 20px;"> <tr> <td style="border-bottom: 1px solid black;">Fact-Finding</td> <td></td> </tr> <tr> <td>Victim tracing</td> <td></td> </tr> </table>	Fact-Finding		Victim tracing		<p><i>Truth commission – State agencies: produces answerability</i></p> <p><b>Evaluative criteria showing state agencies are being rendered answerable</b></p> <p>EC-3: Victims, witnesses, and/or civil society organizations can access and provide information to the commission</p> <p>EC-4: The commission has access to</p>	
Fact-Finding						
Victim tracing						



	<p>state/non-state actors and these actors have to be answerable to the commission.</p> <p>EC-5: The final report is made public.</p> <p>EC-6: The report discloses new facts and evidence surrounding violations committed.</p> <p>EC-7: In case of disappearances, the TC has identified burial sites.</p> <p>EC-8: The report acknowledges that state agencies and/or non-state actors committed violations of human rights.</p> <p>EC-9: The report attributes individual responsibility through naming perpetrators.</p>	
<p>As a result of recommendations in the final report (Potentialities)</p> <p>Victim redress</p> <p>Prosecutorial</p> <p>Preventive</p>	<p><i>Governing regime – State agencies: produces enforcement (or answerability)</i></p> <p><b>Evaluative criteria for demonstrating production of enforcement by the governing regime</b></p> <p>EC-10: Reparation programs have been implemented.</p> <p>EC-11: In cases of disappearances, exhumations have been carried out.</p> <p>EC-12: Alleged perpetrators are prosecuted.</p> <p>EC-13: Perpetrators have been removed from public office.</p> <p>EC-14: Institutional or legal reforms to prevent future violations have been adopted.</p>	<p><i>Civil society – Governing regime: produces enforcement (or answerability)</i></p> <p><b>Evaluative criteria for demonstrating production of enforcement by civil society</b></p> <p>Was any of the previous, EC-10 to 14, implemented as a result of civil society pressure?</p>

Source: Author.

The table expands the previous one (Table 7). This table includes now the evaluative criteria showing when answerability and enforcement are produced. Evidence collected, comparing the impacts of a TC, will have to be compared against this set of pre-established criteria.

### 3.1.2 Case study: A justification of Nepal and Sri Lanka

To undertake the actual evaluation, I have chosen to do case study research. To decide to conduct a case study, 'is not a methodological choice but a choice of what is to be studied' (Stake, 2005: 443, quoted in Thomas, 2011: 9). The important difference between case study and other research is that we choose to investigate one case, or a small number of cases, and to collect a big amount of data for each of the cases. In this section, I justify the selection of the commissions established in Nepal and Sri Lanka.

In this research, the case studies presented are instrumental to better understand how TCs contribute to promoting accountability. The commissions established in Nepal

and Sri Lanka in 1990 and 1994 respectively, fulfill a minimum of necessary requirements to be included in this research. First, reports from international organizations as well as TJ experts consider them as “truth commissions” (Amnesty International, 2010, Backer, 2009, Bakiner, 2014, Brahm, 2009, DancyKim and Wiebelhaus-Brahm, 2010, Freeman, 2006, Hayner, 2002, Hayner, 2011). In fact, they are the only two TCs established so far in South Asia.<sup>27</sup> Second, in both cases, the commissions were established during a period of transition: in Nepal, from authoritarian Panchayat regime to multiparty democracy; and in Sri Lanka from seventeen years of the elected United National Party government which turned extremely repressive to counteract two armed insurgencies to a new elected government under the Sri Lanka Freedom Party. In both cases, the new government established the commissions to investigate state sponsored violence by the previous regime. Finally both cases were established during the 1990’s. Their establishment, more than 20 years ago, allows assessing their impacts in the short, medium and long run. I turn now into the specificities of each of the cases.

#### *Case study: Nepal*

I classify Nepal as a local knowledge type of case study (Thomas, 2011: 76). It was my special knowledge about Nepal that led me to make the choice. I lived in Nepal from 2008 to 2012, working on human rights and TJ. I knew that Nepal had gone through a transition from authoritarianism to multiparty democracy in 1990 and that, during that time, it had established a commission to investigate disappearances that occurred between 1960 and 1990. TJ experts considered the commission as a “truth commission”. However, this commission was completely unknown in Nepal. The information available about it was very scarce. The final report, which was extremely difficult to find, was only available in Nepali. When I finally went through it with the support of an interpreter, I realized the little information available in the literature about this commission was wrong. To start with, it was not a “commission of inquiry”, but a

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<sup>27</sup> In February 2015, Nepal established the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission established, whose work was ongoing at the time of this writing.

committee – the *Committee to investigate persons disappeared in the course of restoration of democracy*.<sup>28</sup> The difference in the title is important as only commissions of inquiry can be established under the 1969 Commission of Inquiry (COI) Act with the corresponding powers. The other little information available, on the publication of the report and the process of the appointment of commissioners was also inaccurate. In fact, the information available confused the committee with another mechanism, the Mallik commission established also in 1990.

The Mallik Commission was established two months before the Committee on Disappearances under the COI Act. Known as the Mallik commission, after the name of its chairperson (Appeal Court judge Janardan Mallik) the formal name was the *Commission formed to investigate the damage inflicted to life and property as a consequence of the various incidents that occurred throughout the nation in the course of the Jana Andolan*. It was established to investigate the violence during the two months of protests that ended the Panchayat system.<sup>29</sup> This commission seemed more known to the people I met in April 2013, while visiting the country to locate the reports and assess the viability to undertake the research about the Committee. It had been established as a result of the civil society pressure on the 1990 interim government to act in front of state sponsored violence. I decided to examine both the Committee on Disappearances and the Mallik Commission despite the later not being formally considered a TC, by most TJ experts. The examination of these two bodies would provide an interesting counter example to evaluate an internationally recognized and domestically unknown TC against an internationally almost unknown, but domestically popular COI.

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<sup>28</sup> See for instance Hayner calls it “Commission of inquiry to find the disappeared persons during the Panchayat Period” in *Unspeakable truths: Facing the Challenge of Truth Commissions*, 2002, pg. 57; and the updated version *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2011, pg. 244-45.

<sup>29</sup> Among transitional justice experts, only Priscilla Hayner refers to the Mallik commission while describing the committee on disappearances. Interestingly she refers to the Mallik Commission in the 2011 publication of her book *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* and not in the previous 2002 edition.

*Case study: Sri Lanka*

The choice of Sri Lanka was a logical decision as the other country to have established a TC in South Asia. In 1994, Sri Lanka set up the 1994 three Zonal COIs to investigate into disappearances occurred between 1988 and 1994, under the previous United National Party government. In 1998, the then President established a follow-up commission, the All-Island Disappearances Commission, to investigate cases the previous commissions were not able to examine. Although I only assess the impacts of the 1994 commissions, I also refer to the 1998 All-Island to better understand the work done by the former.

The reason to establish three COIs was due to the large numbers of people who had disappeared, estimated to be 50,000. Each of the three Zonal COIs looked into a different geographical area. They divided the national territory in the Central, North Western, North Central and UVA Provinces (Central commission); the Northern and Eastern Provinces (North East commission); and the Western, Southern and Sabaragamuwa Provinces (Southern commission). Each had its own commissioners and staff and decided the way to undertake their work.

As opposed to Nepal, the Sri Lankan commissions' reports were available in English. There were publications available examining their work.<sup>30</sup> Documentation concerning the period of violence and state repression was readily available in libraries and research centers, in Colombo.<sup>31</sup> All these factors helped me to study about a country that I had never visited before initiating this research. I first traveled to Sri Lanka in September 2013.

*Comparative remarks*

It is important to identify disparities and similarities between the two case studies. While the starting transitional point was very different between the two countries, both

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<sup>30</sup> Kishali Pinto Jayawardena has written about the work of these commissions. Her work has been published by the Law and Society Trust and the International Commission of Jurists.

<sup>31</sup> The *Nadesan Center for Human Rights Through Law* has valuable documentation and reports on disappearances during the 1980's and 1990's. On the other hand, the libraries at the *Law and Society Trust* and the *International Center for Ethnic Studies* have many publications documenting state repression and civil society response to it.

decided to use a similar mechanism to investigate past excesses. Both countries established these commissions on the basis of legislation on COI that goes back to British Common Law.<sup>32</sup> Sri Lanka created its Zonal Commissions to probe disappearances on the basis of the 1948 COI Act, while Nepal established the Mallik Commission based on its 1969 COI Act. Comparing similar commissions is important as one of the main problems when assessing impacts of TCs is the diversity of mechanisms considered as such. Not only we are comparing similar mechanisms, but we are also applying the same framework and the same criteria to evaluate the impacts of both mechanisms.

Once I execute the evaluation of how the commissions in Nepal and Sri Lanka contributed to promoting accountability, I plan to compare the results. The comparison could provide potential explanations for the differences in the results. I anticipate differences in the background and composition of the Nepali and Sri Lankan civil society account for a different degree of mobilization to implement each TC's recommendations. Comparison of these two cases should contribute to a better understanding of the conditions under which commissions work better and that of the variation of their impacts.

Having examined the design frameworks, the following section turns to the techniques used to collect and analyze data.

### **3.2 Collecting and analyzing data**

I collected data through an extensive literature review and in-depth elite agent interviews. The aim was to collect enough evidence to support the evaluative criteria that demonstrate the existence of vertical and horizontal accountability relationships. In this section, I review each of the two techniques used to collect and analyze the data.

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<sup>32</sup> Sri Lanka is a former British Colony but not Nepal. In fact, although Nepal is not even a Commonwealth member state, its legislation is based on the British Common Law due to the special historical influence.

### 3.2.1 Literature review

I conducted three phases of literature review which led to the accountability framework and the evaluation of impact. The initial phase led me to frame the interactions among the various groups within the society as accountability relationships that can be generated at three stages of a TC's process: before the setting up of a TC, during its work and as a result of the recommendations in the final report. In a second phase, I analyzed previous TCs' processes while considering whether or not they had generated accountability relationships. Through unpacking previous processes, I was able to construct fourteen criteria to assess production of accountability in its answerability or enforcement dimensions. In the third phase, I attempted to collect evidence, suggesting the fulfillment of evaluative criteria at two different levels, from previous experiences of TCs and for each of the case studies.

Data collected on other TC processes supported that collected for the case studies and vice versa. Literature reviewed to gather evidence on other TCs' processes included primary sources, including commissions' final reports, and secondary sources, including articles and other documents narrating and analyzing TCs' experiences. The evidence collected suggested other TCs' processes had generated vertical and horizontal accountability relationships. Literature review for Nepal and Sri Lanka included primary sources, such as the commission's final reports and government resolutions. In the case of Nepal, digitalized English newspapers from 1990 to 1995 were also reviewed.<sup>33</sup> Case study literature review also included secondary sources, such as publications from local civil society organizations, and NGOs and reports from international human rights organizations.

In Nepal, most of the documentation concerning the commissions was in Nepali, including their reports, publications dealing with their findings, and interim government decisions. For the translation, I hired a translator-interpreter, a former Nepali colleague at the OHCHR who worked with the team that prepared the Nepal Conflict Report. He translated around 60,000 words, evenly split between the Mallik

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<sup>33</sup> I consider these newspapers to be a primary source as they are factual accounts that record the events as they happened at the time.

Commission and the Committee on Disappearances. As for Sri Lanka, literature available on the work of the commissions and the state violence under the former regime was already available in English. Documentation available was more extensive than in Nepal, with many publications from civil society organizations, particularly from the International Center for Ethnic Studies and the Law and Society Trust.

### 3.2.2 Elite agents' interview

The second technique used to collect data was elite agents' interview. A main feature of elite agents' interview is that the interviewee introduces his or her notions of what he or she regards as relevant to a considerable extent, instead of relying upon the investigator's notions of relevance. Dexter contrasts elite to standardized interview in the following manner,

In standardized interviewing the investigator defines the question and the problem; he is only looking for answers within the bounds set by his presuppositions. In elite interviewing the investigator is willing and often eager to let the interviewee teach him what the problem, the question, the situation, is—to the limits of course, of the interviewer's ability to perceive relationship to his basic problems (Dexter, 1970: 19).

In this regard, I tried to approach the interview more as a discussion, although this first stage of conversation would often quickly turn into a quasi-monologue by the interviewee. As Dexter puts it, I tried to handle the interviews as a discussion of 'two reflective [persons] trying to find out how things happen, but the less informed and experienced one (the interviewer) deferring to the wiser one and learning from [him or her]' (Dexter, 1970: 54).

#### *Elaborating the sample*

My interviewees are people who played a specific role within the TC's process or broader transition. I interviewed them because of who they were and the role they played. To select them, I first searched for names in the commissions' reports and had preliminary meetings to gauge whom to meet. In other cases, some of the interviewees advised me to meet specific people who had played a key role. In the case of Nepal, it

was relatively easy to have access to people who played a key role at the time of the commissions, such as ministers from the interim government and key political leaders at the time of the transition. Because the commissions had been established twenty to twenty-five years ago, in some cases people had passed away or were of an advanced age and not willing to meet. In other cases, their age played an advantage as they felt liberated of any burden of secrecy and would speak very openly and frankly.

I call the people I interviewed sample because they are potentially representatives of the groups to which they belong to in any given transitional context. The sample is divided in three main groups: a) former members of the TCs; b) representatives of the governing regimes; c) and victims and broader civil society. These correspond to the three groups among which vertical and horizontal accountability relations can be generated. Former members of the TCs include commissioners and also secretaries. In the case of Sri Lanka, this group also includes two lawyers from a civil society organization, who supported the commission in taking statements from victims. Representatives of the governing regimes include members in the governments, leaders of political parties with representation in the governments, and members of the security forces, the civil service and the attorney general offices. Civil society was a diverse group, encompassing activists working in human rights organizations, victims and people working with victims at the time of the violations, and broader civil society. Although I interviewed a large proportion of the people I planned to, in some cases prospect interviewees were not willing to meet in spite of my insistence.

#### Box 1 - Interviewees composition Nepal and Sri Lanka 2014-15

<b><u>Total interviews: 47 (24 Nepal – 23 Sri Lanka)</u></b>		
<b><u>Number of interviewees by groups</u></b>		
Former commissioners and committee members:		11
Commissioners, Secretaries	(8)	
Supporting the commission	(3)	
Governing regime		11
Former Ministers in interim government	(3)	
Political Party members in Government	(3)	
Civil Service	(1)	



Attorney General Office	(1)	
Security forces	(3)	
Civil society, victims		26
Human rights practitioners	(10)	
Victims	(3)	
People working with victims	(4)	
Political Party members not in Government	(1)	
Broader civil society	(8)	
(Includes lawyers, Independent MP, media, teacher, doctor, student)		

Source: Author

A majority of the interviewees played a direct role at the time of the commissions. In some cases, people were interviewed for their roles in the broader transition. In two cases, the interviews were conducted for their knowledge of what happened, although they were not directly involved at the time.

Elite interviewees usually do not receive anonymity as they form a group that may provide influential data and it is difficult to substantiate this data if their names and positions are not revealed. In this research, quotes from interviewees or references to their opinions will be referenced by their surname or the complete name when a surname is repeated.

#### *Practical conducting of the interview and Line of inquiry to collect evidence*

I would start the interview introducing myself, and my previous work as a lawyer and human rights officer. I would then explain what the research was about linking it with the person I was about to interview. At this point, I would ask my preference in recording the interview and whether the interviewee had any objection to it. In two occasions, I did not record as I felt conditions were not appropriate. In four cases, interviewees indicated their preference not to be recorded. The remaining 41 interviews were all recorded. Most of the interviews (33) lasted between 45 and 75 minutes with 10 interviews lasting less than 45 minutes. In four cases, the interviews went over 90 minutes. I only used an interpreter in two of the interviews in Nepal and conducted all of them in English in Sri Lanka.

In conducting the interviews, I followed a list of issues to cover or line of inquiry.<sup>34</sup> The line of inquiry attempted to encourage discussion on the interactions between civil society, the state, and the TC, following the three chronological stages in a TC process: before the commission was established, during its work, and after the report was submitted. After raising a point for discussion, I would let the interviewee focus on the aspects he or she considered more relevant. Interviewees would usually be more knowledgeable about one or two of the three different stages and drive the discussion towards that period. To collect evidence in support of evaluative criteria demonstrating the existence of vertical accountability relationships before the establishment of the commission, I would focus in the interactions between civil society and the leaders of political parties who became part of the government when the transition unfolded. Specifically I would inquire about the role of civil society, human rights organizations and the media in establishing the commission and in forcing changes in the proposed mandates and other aspects of the commission, for evaluative criteria 1 and 2 (EC-1, 2). While the pre-commission period would end with its establishment, the interviewees sometimes would go back to earlier stages in the transition or pre-transitional period. In these cases, I would inquire about the interactions among the various groups at that time. As a result, I incorporated a focus on the relationships between civil society and particularly human rights practitioners with political parties prior to the transition in this study.

To examine the horizontal accountability relationships during the period between the establishment of the commission and the submission of the final report, I would encourage the interviewees to discuss interactions among various actors. First, I would inquire the interactions between victims and the TC, asking about issues, such as victims' access to the commission, whether or not and how the commission took statements from victims (EC-3). At this point, I would also focus on the interaction between civil society, media and the TC. Particularly, the focus would be whether or not civil society supported the commission in its fact-finding and victim tracing functions, for instance through providing evidence and linking the commission with victims. As for the relation with the media, I would inquire whether it covered the activities of the

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<sup>34</sup> Line of inquiry included as Appendix 1.

commission and gave publicity through broadcasting and dissemination and whether the TC generated public debate and dialogue during its operational period at a societal level. I would also explore the relation between the commission and the state agencies, specifically whether it had access to main actors implicated in violations and if not, what were the reasons. In case the commission had interrogated state officials, the questions were asked, what was the context in which they were carried out and how security forces and the state bureaucracy saw this exercise (EC-4). As for the final report (EC-5), I would inquire about the social context at the time of the release, whether there were any obstacles to the report being made public, and reactions from the people in general and specifically from elements of the previous regime. I would also examine if civil society had any role in its release and coverage by the media. With regards to the report, I would ask whether the interviewee had read it and whether they recall the report disclosing any fact unknown until that moment (EC-6), including identification of burial sites (EC-7), whether or not the report acknowledged state or non-state agencies responsible for violations and the identity of alleged perpetrators (EC-8, 9).

Finally, I would collect evidence for evaluative criteria to demonstrate the existence of horizontal and vertical accountability relationships as a result of the recommendations in the final report. To show horizontal accountability relationships, I would inquire about interactions between the governing regime and state agencies, such as security forces, attorney general's office or the civil service and also whether these agencies had suffered any change or they had remained unchanged throughout the transition. I would also inquire about the interactions between the governing regime and elements of the previous regime. Specifically, I would inquire about the levels of implementation of recommendations concerning reparation for the victims (EC-10), prosecution of perpetrators (EC-12), their removal from office (EC-13), and institutional or legislative reform to avoid reoccurrence (EC-14). As for the vertical accountability relationships generated after the submission of the report, I would examine interactions between civil society and the governing regime and between civil society and political parties. Particularly, I would inquire whether civil society had pushed for the implementation of recommendations and about changes in its relationships with political parties under the new regime.

*Analysis of data resulting from the interviews*

For each case study, the transcripts of the interviews extended to around 40,000 words. The method I used to analyze the information consisted of the following steps. First, I would read the transcripts, identify and classify the important information following a double hierarchy; the division in three stages (before the commission, during its work and as a result of the recommendations) and interactions among actors within each stage. Once this was done for each of the interviews, I had reduced the amount of the information to 60 per cent of the initial data. Second, I would create a grid organized with this double hierarchy (the three stages and the specific interactions) and would insert all the data from each interview, noting who said what in a separate column. Finally, I would allocate this data under the corresponding evaluative criteria. At this point, I would start the evaluation comparing the data collected against the pre-established evaluative criteria. Through assessing whether or not these criteria had been fulfilled, I was able to determine the existence of accountability relationships.

Elite interviews helped me to further refine the evaluative criteria. The data collected through interviews also supported the data collected through literature review. As a result, I used the evidence collected through both techniques to assess whether or not the evaluative criteria were fulfilled to corroborate the existence of accountability relationships.

**3.3 Ethical and gender considerations**

While conducting the research, I was confronted with ethical and gender considerations. Ethical considerations revolved around the need to meet with victims, survivors of the conflict. In chapter two, I have adopted Freeman's definition of a TC, as a victim-centered commission of inquiry. Consequently, victims should have a central role in this research. The problem is that I am studying processes that happened twenty to thirty years ago. It does not seem appropriate to approach victims and stir their memories of family members disappeared or killed. On the other hand, I also wished to listen to their experiences, including how they perceived the establishment of these commissions and

whether or not they felt any relief. Thus, I decided to limit interviews with those victims who are, or have been, advocating for their rights and the rights of other victims. Victim activists are regarded as more resilient because they are used to share their stories. They often feel empowered, as they have transformed their plight in a reason to fight for.

A related issue was to gauge the role of victims in the accountability relationships driving this research. My preliminary assessment was that victims played a prominent role neither in Nepal nor Sri Lanka, although the two cases presented important differences. The main difference was the number of victims: while in Nepal the Committee on Disappearances examined 35 cases and the Mallik Commission inquired into 45 people killed, in Sri Lanka the three Zonal Commissions collected over 30,000 applications and found enforced disappearance or murder in over 17,000 cases. As I will justify in the chapters dealing with each case, neither in Nepal nor Sri Lanka, victims became actors in interactions with the governing regime, either before the establishment of the commission or after the submission of the final report. Rather, in these interactions, they were represented by civil society and political party leaders and their role was limited to provide the commission with factual information about the violations they had suffered.

Taking into account my self-imposed limitation to meet only victim activists along with my preliminary observation that victims were not actors in the accountability interactions driving this research, I only interviewed three victims; two in Nepal and one in Sri Lanka. In Nepal, the two victims were running their own non-governmental organizations. One of them was the brother of a political activist disappeared, whose case was investigated by the Committee on Disappearances. The second victim was the son of a political activist killed by security forces in 1980 whose case was not reviewed by either of the commissions. However, his organization was advocating for the rights of victims killed or disappeared during Panchayat regime, including for 43 victims included in Mallik report and 35 cases in the disappearances report. The victim interviewed in Sri Lanka had his brother forcefully disappeared. This victim was the secretary general of the largest victim group in Sri Lanka, the Organization of Parents and Family Members of the Disappeared (OPFMD). In Sri Lanka, I also interviewed four people who were supporting victims at the time of the commissions, including one

Jesuit Father, a local activist, a representative of a victim's organization and a political leader who was a patron of the OPFMD.

Regarding gender considerations, out of 47 interviewees, only six are women. In Nepal, only one interviewee was a female. I interviewed her along with her husband, as both were activists at that time and knew about the Committee on Disappearances. Nepal is still today a male centered society, although the gender inequality was probably much worse in 1990. As a consequence, in neither of the commissions, there were female commissioners. Neither I could find women who had worked with either of the two bodies. There was only one woman in the 1990 interim government, Sahana Pradhan, from the United Left Front, who became Minister of Commerce and Supplies. She had also been one of the representatives from political parties in the negotiation of the transition with the Palace. However, she was already very old by the time I did the first round of interviews in April 2014 and passed away in September that same year. Other groups I was interested in, such as political parties, the Nepal Police and the civil service also lacked female representatives. As for civil society, there are female activists currently leading NGOs and civil society organizations and I met some of them during my first exploratory field trip. However, all the contacts I got on the 1990 transition were males. In Sri Lanka, the situation was different. One of the women interviewed was the chairperson of the Southern Zonal Commission. Moreover, 3 out of 10 civil society representatives interviewed are female. One of four people in the victims group is a woman who worked with victims of the conflict who engaged with the North East Zonal Commissions. In total 5 out of 23 interviewees are female. Although this ratio is better than in Nepal, it is still not balanced.

I will conclude this section, noting that the male bias is due to the nature of this research reflecting a lack of female presence in the state apparatus and organisms of representation of civil society. In the case of Nepal, the bias reflects a complete lack of women participation in the process. However, interviews with women in Sri Lanka were crucial to understand the scope of work of the Zonal Commissions. In any case, in terms of the quality of interviews with women and the consideration given to women and their role in the Commissions' process, I believe there is a gender balance within the study.

### 3.4 Concluding remarks

The chapter has elaborated on how I conducted this research. There are a few ideas that should be emphasized to link the chapter with the second part of the study which evaluates the impacts of the commissions established in Nepal and Sri Lanka. First, a focus on the impact of TCs as processes, rather than exclusively on their impact on preconceived outcomes, requires an explanation of how a TC should logically work to produce a specific impact. This entails developing a theory of change that explains how TCs should work to make a change. In this research, this means explaining how TCs generate accountability relationships. Second, in order to empirically test this theory of change or to probe the existence of accountability relationships, I have devised evaluative criteria to show when answerability and enforcement are produced. Third, through literature review and elite-agent interviews, I have collected critical data to devise the evaluative criteria and to present evidence in their support. This evidence confirms the production of answerability and/or enforcement. Finally, through probing the production of answerability and/or enforcement, I can validate the existence of accountability relationships that a TC has generated. This means I can validate my theory of change that TCs generate accountability relationships before they are established, during their work and after the submission of the final report.

With the conviction that the first part of this thesis has presented a solid foundation sustaining the accountability framework and the methodology used to evaluate the impact of TCs, the second part of this thesis turns to the proper evaluation, whether the commissions established in Nepal and Sri Lanka contributed to promoting accountability.

## **PART II**

# **IMPLEMENTING THE FRAMEWORK: AN EVALUATION OF IMPACT OF THE COMMISSIONS ESTABLISHED IN NEPAL AND SRI LANKA**





The second part of this thesis, chapters four and five, evaluates the impact of the commissions established in Nepal and Sri Lanka. Both chapters follow the same structure. The first section examines the context in which the transition and the establishing of the commissions unfolded. It incorporates an analysis of the relation between political parties and civil society. In the case of Sri Lanka, the section also analyses the relation between political parties and victim groups. This analysis was not done in Nepal, as the victims did not play any significant role in the transition and in relation to the commissions.

In section two of both chapters, I present an overview of the commissions, their findings and recommendations. In the chapter on Nepal, I examine the Mallik Commission and the Committee on Disappearances, two different commissions established during the 1990 transition. The Mallik Commission was set up to investigate excessive use of force by the state security forces during the two months of the People's Movement for democracy in 1990. On the other hand, the Committee on Disappearances was established to investigate the cases of disappeared persons during the *Panchayat* regime, between 1960 and 1990. In the chapter on Sri Lanka, I examine the three Zonal Commissions set up in 1994 to inquire into disappearances resulting from two different armed conflicts, the Janatha Vimukthi Peramuna insurrection from 1987 to 1989 and the armed conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam, ongoing during the time the commissions undertook their work. The availability of more information on the commissions in Sri Lanka translates into a longer analysis of the commissions, their findings and recommendations, than that of the commissions in Nepal.

Subsequently, in both chapters, I assess the impact on accountability of the commissions. While in Nepal, I independently assess the impact of the Mallik Commission and the Committee on Disappearances, in Sri Lanka, I assess the overall impact of the three Zonal Commissions. This is because the three Zonal Commissions shared the same mandate, although they were organized around separate geographical areas. The assessment of impact follows the framework established in chapter two. The 14 evaluative criteria are divided in 4 accountability relationships. Criteria 1 and 2 refer

to answerability as a result of vertical accountability relationships before the establishment of a TC. Criteria 3 to 9 correspond to the answerability as a result of horizontal accountability relationships during the work of the Commissions. Finally criteria 10 to 14 correspond to enforcement as a result of horizontal and vertical accountability relationships after the submission of the final reports of the Commissions.

## Chapter 4

### Truth commissions in Nepal: the impact of the Mallik Commission and the Committee on Disappearances

*'Transition means finalizing one's attitude towards the period of transforming movement. There was People's Movement in 1990; what is the attitude of political parties, civil society, and government towards that movement after its completion? It defines a transition. What is crime and what is not crime? If movement [is] not successful those who waged the struggle should have been thrown to prison, and treated as criminals'. Nilambar Acharya, former minister of law and justice during the 1990 interim government in Nepal (personal interview).*

*'Civil society should act on behalf of the people, not like leaders of the political parties. Politicians, leaders can join civil society movement, but once in the civil society movement, they must rise above their political agenda. The civil society's job is to raise the voice of the people and to make the people aware of the dangers of something that is happening against the transformation'. Mathura Prasad Shrestha, doctor, human rights activist, civil society leader, and former Minister for Public Health in the 1990 interim government in Nepal (personal interview).*

## Introduction

In this chapter, I present the first case study on two commissions established in 1990 in Nepal as a result of the transition from the *Panchayat* regime to multiparty democracy. The Committee on Disappearances investigated disappearances committed during the Panchayat regime from 1960 to 1990. As already mentioned, it is internationally recognized as a TC. The Mallik Commission was established in 1990 to deal with the violence as a result of the People's Movement, the *Jana Andolan* in Nepali language. It is not considered as a TC in the literature.

Section one examines the changes of regimes in Nepal up to the 1990 multiparty democracy. It examines the autocratic *Panchayat* regime and the People's Movement launched to restore democracy. The analysis of the People's Movement delves into the role that human rights and civil society organizations played and how civil society leaders that emerged from this movement became ministers in the interim government and members of the commissions established. Section two presents an overview of the Mallik Commission and the Committee on Disappearances, examining their origins, mandates, powers and the commissioners. Furthermore, the section explores the main finding and recommendations of the reports and issues related to their publication. The section further examines the confusion between these two inquiry mechanisms in the literature on TCs. Finally, the section presents an overview of the people interviewed. Sections three and four assess the impact of the Mallik Commission and the Committee on Disappearances. These sections examine whether evidence collected from semi-structured interviews and documentary sources fulfill the fourteen evaluative criteria proposed to determine whether the commissions contributed to promoting accountability.

### 4.1 Context: The 1990 transition from *Panchayat* to multiparty democracy

This section presents the changes of regimes in Nepal up to the 1990 multiparty democracy. It starts examining the pre-*Panchayat* transition from the Rana government

to a constitutional monarchy in 1951. After a royal coup in 1960, King Mahendra established the partyless *Panchayat* system, banning any political party and activity. This *Panchayat* regime would last until 1990 when a peaceful a non-violent mass movement led to the restoration of democracy.

#### 4.1.1 Background: pre-*Panchayat* political history

Nepal emerged as a nation-state during the second half of the 18<sup>th</sup> century, under Prithwi Narayan Shah. The Shah Kings ruled with absolute authority until 1846, when the power passed to Jang Bahadur Rana who initiated the Rana rule which lasted until 1951. The Rana family exercised their authority as prime ministers concentrating all the powers and relegating the monarchy to a formal and powerless institution.

In January 1947, Nepalese living in India formed a political organization, the Nepali National Congress, which managed to mobilize the people around the country against the Rana (Parajulee, 2000: 38). The Nepali National Congress merged with the Nepal Democratic Congress, established in August 1948, to form the Nepali Congress (NC). On 11 November 1950 when King Tribhuvan Bir Bikram Shah fled to India, the NC liberation army, the *Mukty Sena*, attacked Birganj, a city in the Terai plains and started an armed revolution against the Rana regime (Amatya, 2004: 238). The armed struggle was a brief episode with few serious encounters between the Rana regime and the NC army (Joshi and Rose, 1966: 79).

The role of India was crucial in the negotiations leading to the peaceful transfer of power from the Rana family to the new regime. In fact, India seemed to have acted more as a party in the negotiation than a simple mediator. The first round of negotiations which started on 28 November 1950 was held between Rana representatives sent to New Delhi and the officials of the Indian government without the presence of King Tribhuvan or the NC (Amatya, 2004: 293, Joshi and Rose, 1966: 76). On 25 December 1950, the second round of talks started again without the King or NC representatives participating. On 7 January 1951, the Nepalese Parliament accepted the Indian memorandum in toto (Amatya, 2004: 297). This included the restoration of King Tribhuvan to the throne; the elections to form a constituent assembly by 1952; an interim

cabinet until the formation of a government under the new constitution, with half of its members being representatives of the people; and an amnesty to political prisoners (Joshi and Rose, 1966: 78). The final round of negotiations, which started on 1 February 1951 included the King, the Ranas and the NC and led to the Delhi Compromise of 12 February. The three parties accepted a constitutional monarchy with the King acting on the advice of the ministers, a half of them to be appointed from NC candidates and another half from Rana nominees, with the incumbent Rana Prime Minister as the Prime Minister (Amatya, 2004: 303). Arguably, this was a transition decided at the elite level between the officials of the Indian government and the outgoing Rana regime with limited participation of the King and political parties. As a result, the brokered agreement did not last long.

The interim period, from 1951 to 1959, started with the NC-Rana coalition government lasting less than a year, from February to November 1951. The unnatural and unworkable coalition broke down, paving the way for popular forces to come to power (Parajulee, 2000: 40). In the following years, inter-party and intra-party conflicts weakened the position of the political parties and allowed the King to consolidate his position and power (Parajulee, 2000: 41). Following the death of Tribhuvan, his son Mahendra became the King in March 1955. Uncertainty continued, as short and weak governments continued succeeding one after another. The period between 1955 and 1958 marked the struggle between the King and the political forces led by the NC (Parajulee, 2000: 42). After pressure from political parties, King Mahendra announced general elections to be held in February 1959. The NC clearly won the elections with 74 seats out of 109. In May 1959, the NC formed the first elected government under Bishweshwar Prasad (B.P.) Koirala. On 15 December 1960, King Mahendra dissolved the Parliament and dismissed the NC government in what has been called a royal coup. One of the main reasons behind the coup might have been the King's dissatisfaction with the 'relegation of the Crown to a comparatively minor role in the governmental structure after the installation of the NC government' (Joshi and Rose, 1966: 386). The coup marked the reestablishment of a period of direct rule by the King. In 1962, King Mahendra established the partyless *Panchayat* system, banning any political party and activity.

#### 4.1.2 The *Panchayat* regime

After the royal coup, King Mahendra formed a council of ministers in which former political party members were predominant and assigned them the task of establishing a new political order (Lok Raj Baral, 1977: 48-9). At the same time, the King passed several decrees to detect and suppress any opposition to the regime. As in any police state, these measures created mistrust and suspicion, compelling the people to acquiesce in the newly established order (L.S. Baral, 2012: 201). Similarly, newspapers were asked to avoid publishing anything of a political nature (L.S. Baral, 2012: 203). Claiming that parliamentary democracy was a foreign import not suited to Nepal, King Mahendra vowed to establish a system appropriate to Nepali history and level of development. Two years later, the *Panchayat* system was officiated through the December 1962 constitution.

In its original form, the *Panchayat* system was based on traditional local bodies called *panchayats* or councils. It was organized as a pyramid with four levels: at the bottom, the village and town *panchayats*; at the second level, district *panchayats*; at the third level, zonal *panchayats* and at the top, the *Rashtriya Panchayat*, the National Legislature. Direct elections were held to elect only village and town *panchayats*, the lowest level. Those elected were in charge of selecting the representatives in the upper level. This electoral system led to the blossoming 'of a new political generation which strengthened the King's position more than ever before' (L.S. Baral, 2012: 234).

At the time of the *panchayat* elections to the various levels during 1962 and 1963, senior leaders of the main political parties were either in prison or had sought refuge in India. Nonetheless, a large number of those elected to various *panchayat* units were former members of banned political parties. One fifth of the 125 members elected for the National Legislature were former members of the NC and the Communists increased their seats to 18 from 4 seats won in the 1959 general elections. Their election was not related to their former party ideology, since they were contesting on an individual basis within the new order established by the King. Rather, they were elected for being well-known in their respective villages (L.S. Baral, 2012: 245). They were opportunists who saw the only way to participate in the political life was to work within the new order



(Brown, 1996: 48). Still, the NC, the worst hit among the parties by the King, did not approve members of their party participating in the *panchayat* elections (L.S. Baral, 2012: 247).

The palace further tried to weaken the political parties by dividing them. Because the NC was the main threat, the King tried to cultivate understanding with the communist forces (Dangol, 1999: 97). Consequently while the campaign against the NC was repressive, the communist parties were allowed limited opportunities to expand their influence as a political force to deviate support from the NC (Brown, 1996: 49). In 1968, when the palace decided there was a need to balance the growing influence of the communists, the NC leader B.P. Koirala was released from prison (Brown, 1996: 49). He went to India and adopted a confrontational approach to overthrow the *Panchayat* system (Parajulee, 2000: 56). In 1972, King Mahendra died, making way for Crown Prince Birendra to become the new King. During the period from 1962 to 1980, the opposition was ineffective in challenging the *Panchayat* system (Parajulee, 2000: 55). This trend would change after the King's decision to hold a referendum as a result of the student agitation in 1979.

During the *Panchayat* regime which banned political parties, student activities became more visible and significant (Parajulee, 2000: 58). The student community was initially divided along party lines, with the democrats closer to the NC and the progressives closer to the Nepal Communist Party (Parajulee, 2000: 58). The trigger for the 1979 student agitation was the execution of Zulfikar Ali Bhutto, Pakistan's former Prime Minister. However, the students were also protesting against the government of Nepal for the execution of two men convicted of the 1974 attempt on the King's life earlier that year and more broadly against the system of government (Brown, 1996: 90). The agitation spread to other parts of the country, culminating in a nationwide political movement supported by the general public (Dangol, 1999: 125). On 24 May 1979, King Birendra announced a referendum to be held on 2 May 1980 in which people were asked to choose between a multiparty system and a reformed *Panchayat* system. The royal decision to hold a referendum brought freedom to express political views. Both supporters of *panchayat* and those of multiparty democracy accepted the challenge to win the support of the general public and to win the referendum (Parajulee, 2000: 60).

The *panchayat* forces won the referendum with 55 per cent of the vote. The multiparty opposition denounced electoral fraud and refused to accept the results, but they also waited to see the extent of the reforms. Rather than being the last word, the political conflict between those supporting a reformed *panchayat* and the proponents of a multiparty system continued to widen during the 1980s (Parajulee, 2000: 61). The promised reforms led to the constitutional amendment of December 1980 which introduced features of a parliamentary democracy. As a result, members of the National Legislature became to be chosen through the popular vote. The National Legislature would select the prime minister who would form the cabinet Both the prime minister and the cabinet would be accountable to the National Legislature and not to the King (Parajulee, 2000: 61).

On 23 May 1985, the NC, under the leadership of Ganesh Man (G.M.) Singh who assumed the role after B.P. Koirala's death in 1982, launched a non-violent civil disobedience movement or *satyagraha* with the support of some factions of the NCP. The protest demanded the government to lift the ban on political parties and to restore the respect for fundamental rights. It gained widespread support especially in the urban areas. Even though the top leaders of the NC were detained, the movement continued over the following weeks. On 20 and 21 June 1985, a series of bomb explosions targeting the monarchy hit Kathmandu and various other cities. In Kathmandu, bombs exploded at the southern and western gates of the royal palace, the reception hall of Hotel Annapurna owned by the royal family and at the main gate of the National Panchayat Secretariat. As a result of these explosions, the NC cancelled the *satyagraha*. Massive arrests were made. On 25 August 1985, the then Minister of Home Affairs acknowledged that 1,750 people had been detained for questioning (Amnesty International, 1992: 14). At least seven people disappeared after being in detention. The 1990 *Committee to investigate persons disappeared in the course of restoration of democracy* (the Committee on Disappearances) whose impact is assessed in this chapter investigated the disappearances during the *Panchayat* regime with a specific focus on those disappeared as a result of the 1985 bombings.

Two main obstacles hindered the anti-*panchayat* forces during 1980's. The first was the NC's belief that it could bring democracy to Nepal by itself. The second was

division within the leftist camp (Brown, 1996: 99). In fact, the communist parties were divided and splitting into new political parties. In the non-violent civil disobedience movement in 1985, some factions of the NCP had joined the NC. In September 1989, the NC organized a successful *Political Awakening Week* across the country that saw the participation and arrest of leftist leaders (Parajulee, 2000: 76). This led the NC leaders, G.M. Singh and Krishna Prasadh (K.P.) Bhattarai, to consider cooperating with the leftist forces when they began advocating for a People's Movement to restore multiparty democracy in October 1989 (Parajulee, 2000: 76). At the same time, leaders of different factions within the NCP, such as Mana Mohan Adhikari and Radha Krishna (R.K.) Mainali, pledged support to the NC movement to restore democracy (Parajulee, 2000: 77). As the same R.K. Mainali expressed, 'G.M. Singh was the first one to realize that without the joint effort of both leftist and NC, we would not succeed' (interview Mainali, 2015). This led 7 of 12 communist parties to join hands and to form the United Left Front (ULF) under the leadership of Man Mohan Adhikari. Padma Ratna Tuladhar, a leftist member selected to the National Legislature through the direct popular vote after the 1980 constitutional amendment, played the role of mediator among the various communist factions (Ogura, 2001: 3). Several small radical communist parties remained outside of the ULF and later joined to form the United National People's Movement, a coalition party, which would also participate in the People's Movement (Brown, 1996: 115).

On 18 January 1990, the NC held a three-day national conference at the residence of G.M. Singh. 3,500 delegates and 1,500 observers from all over the country, including party delegates of both the NC and the communist forces, attended the opening session. Other attendants included human rights activists, journalists, and international guests, such as representatives of political parties in India and diplomats of the American and West German embassies (Dangol, 1999: 131). At the end of the conference, the leaders decided to launch a peaceful and non-violent mass movement for the restoration of democracy on 18 February 1990. The date chosen, *Democracy Day*, commemorated the return of King Tribhuvan to Nepal in 1951 which ended the Rana regime.

#### 4.1.3 The People's Movement: 50 days + 8 days of *Jana Andolan*

In this section, I examine the 1990 People's Movement. I first review the relation between political parties and human rights organizations during this period. Then, I analyze the People's Movement and the role of civil society groups in the context where most of the political party leaders were underground or in prison. I divide the People's Movement in two stages. The first stage was from the beginning of the movement and until the political parties ended it, following the agreement to delete the term "partyless" from the constitution. The second stage started with civil society assuming a leading role in the process and until the abolition of the *Panchayat* regime and establishment of multiparty democracy under a new interim government.

##### *Political parties and human rights organizations relations*

Regarding the factors that encouraged the People's Movement, some argue that the increase of international attention on human rights empowered those who were already advocating for political and social change (Adams, 1998: 84). Human rights organizations had become important in Nepal as they were allowed to exist at a time when political parties were banned. Since their emergence in the mid 1980's, they were closely linked to political parties. Two organizations, the Human Rights Organization Nepal (HURON) and the Forum for Protection of Human Rights (FOPHUR) would play a central role during the People's Movement. While FOPHUR was closer to the leftist parties, HURON was supported by the NC and others. Most of the human rights activists in these organizations had also been active party members. As Professor Kapil Shrestha, a human rights activist of HURON, put it, 'we used to have dual identity; we could neither give up political identity, nor we could give up new found identity as human rights activists' (interview Kapil Shrestha, 2014). As a result of this close relationship between human rights organizations and political parties, the latter also incorporated the human rights discourse in their strategy against *panchayat*. In short, it was a time 'of close relationship and partnership between democratic parties and human rights defenders' (INSEC, 2013: 1).

Two leaders of HURON and FOPHUR played a key role during the People's Movement. Dr. Mathura Prasad Shrestha, professor of public health at the Institute of Medicine of Tribhuvan University, was the founder and the president of FOPHUR. He later became the Minister of Public Health in the 1990 interim government established to handle the transition from *panchayat* to a new multiparty democracy.<sup>35</sup> Devendra Raj Panday was the founding vice chairperson of HURON and the coordinator of Professional Solidarity Groups, groups of citizens organized according to their profession during the People's Movement. Mr. Panday had been the permanent secretary of finance in the *panchayat* regime, but resigned in protest against the use of public resources for partisan politics in the 1980 referendum. He became the Minister of Finance in the 1990 interim government. Other leading activists, Kapil Shrestha of HURON and Prakash Kafle, the general secretary of FOPHUR, were appointed as civil society representatives to the commissions examined in this chapter. I turn now into the analysis of the People's Movement to restore democracy.

#### *50 days of People's Movement*

On 18 February 1990, the *Jana Andolan* started with demonstrations in Kathmandu and other cities, such as Jhapa, Biratnagar, Bharatpur, Pokhara and Palpa among others. Even before the movement started, many political leaders were detained and others went underground to avoid arrest. In Kathmandu, thousands of the NC and ULF supporters demonstrated defying a 30-year-old ban on political parties (Parajulee, 2000: 82). At this stage, political leaders were leading the struggle while civil society activists were trying to provide any support possible. A civil society activist from Jhapa recalls the relation between civil society and political leaders during the movement;

Civil society, we were not at the forefront, but they [the political party activists] were. We used to discuss about how to make our role more efficient and effective with journalists and social workers. We would meet with leaders of political parties who were underground to get information on what they are deciding, what they are doing and what they expect from us (interview Prasai, 2015).

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<sup>35</sup> Dr. Shrestha had been involved in human rights work since long before the *Jana Andolan*. In 1976 he helped form a doctor's group of Amnesty International to investigate the situation of political prisoners in Nepal.

The police resorted to suppress the popular movement and to detain protesters to maintain the status quo. On 19 February 1990, a general strike was observed in the Kathmandu valley and other major cities. As the confrontation escalated, the police opened fire against demonstrators, killing five people in Bhaktapur, a small town near Kathmandu. Relatives were not allowed to receive the bodies of those killed and turned to civil society leaders for help. As a result of this incident, the Professional Solidarity Group, a civil society group, was formed also on 19 February and started meeting regularly at Devendra Raj Panday's home to examine the various incidents (interview Adhikari, 2015). Professional Solidarity Groups had an inter-disciplinary nature with doctors, lawyers, economists, university teachers, engineers, and human rights activists as its members. Beyond supporting the people, they engaged in activism in their professional environment. For example, lawyers boycotted legal proceedings at various courts to protest against the police violence against pro-democracy supporters (Parajulee, 2000: 83). Among these activists, medical professionals played a key role.

After examining the post-mortem reports and x-rays of the bodies of the five people killed in Bhaktapur, doctor Mathura Prasad Shrestha determined that the police were using a type of *dum-dum* bullets prohibited by the Geneva Convention. Further, the bullets had been altered so that they would explode inside the victim's body (Adams, 1998: 90). As a result, on 23 February 1990, doctors organized a black armband silent protest strike of two hours at the Teaching Hospital in Kathmandu. 'Many felt that this initial strike was the most important catalyst for the revolution because it legitimized protest for the public at large' (Adams, 1998: 93). During the People's Movement, medical professionals also protected political leaders from arrest by placing them under hospital bed rest.

Increased demands to respect human rights as a response to the atrocities committed by security forces redefined the movement (Adams, 1998: 104). The struggle was not about allowing political parties in the system anymore, but about prevailing injustice committed by a repressive regime. With the conflict reframed, the role of human rights organizations, civil society leaders and activists became central. Following another crackdown on 25 February 1990, the movement continued to draw supports from human rights activists, professionals and intellectuals. On 25 February, Nepali

human rights organizations condemned excessive use of force in the name of maintaining peace and demanded a judicial investigation and action against those responsible (Final Report of the Mallik Commission, 1990: preface). Professors and students boycotted their classes in protest against the government repression. Similarly, on 1 March, the Nepal Medical Association issued a press release condemning the government's use of banned bullets against unarmed citizens and torture and inhuman behaviors against protesters in detention centers. They further demanded an independent judicial inquiry and appealed the government to stop the oppression against peaceful demonstrators and slaughter of unarmed citizens and to seek a political and peaceful solution to the political problems (Adams, 1998: 97). On 5 March, the Nepal Bar Association held a black armband strike to protest human rights violations (Adams, 1998: 105). On 13 March 1990, 48 writers and poets issued a joint press statement expressing their rage at the inhuman suppression, torture and cruel murder and demanding an impartial investigation of these incidents (Final Report of the Mallik Commission, 1990: preface).

The Professional Solidarity Groups organized a conference at the Tribhuvan University campus in Kirtipur, Kathmandu on 20 March 1990. Around 800 intellectuals, doctors, lawyers, engineers, journalists and student leaders attended the conference. When Dr. Mathura Mathura Prasad Shrestha was nearing the end of his speech, police officers entered the venue with the order to stop the program. All participants were detained and released on the following day except main organizers, including Devendra Raj Panday and Dr. Shrestha who remained detained in different jails (Ogura, 2001: 85). According to various authors, the Kirtipur conference and the subsequent detention of all participants generated a much needed publicity for the movement when the public attention was decaying (Adams, 1998: 109, Ogura, 2001: 86, Parajulee, 2000: 87). On 24 March, the Nepal Medical Association issued a press release condemning the arrest of all participants, demanding the release of all health personnel still in jail or police custody. The Association also called for the closure of all medical services in Kathmandu valley starting on 28 March, if their demands were not met (Adams, 1998: 115-6). As arrested health personnel were not released, the doctors carried out the strike on 28 March. On 29 March, Dr. Mathura Prasad Shrestha and others were released.

Nevertheless, hospitals remained closed to protest continued detention of several other health personnel. Another significance of the press release on 24 March was the fact that it was signed by the president of the Nepal Medical Association, Dr. Sachche Kumar (S.K.) Pahari, for the first time. Dr. Pahari was the King's physician. '[T]hat the royal physician would shift his allegiance indicated that the tide was turning, that support for the movement was reaching to the inner circle of the palace' (Adams, 1998: 117).

By this time, most of political leaders and activists had either been arrested or gone underground. The last stage of the movement saw the support and participation of ordinary people. In three major towns in the Kathmandu valley (Bhaktapur, Patan and Kirtipur), ordinary people, including women and children, defied the government's order to prohibit any protest on the street, shouted against the oppressive regime and fought with the police. They erected barricades to block the police. Patan and Kirtipur declared themselves as liberated areas, as the government had completely lost the control of these cities (Parajulee, 2000: 88). Organizers sought ways to involve ordinary people in the movement without putting them at much risk. New actions included banging of pans and blackout which involved turning the light out and leaving streets completely dark. Popular opposition to the *Panchayat* grew in geometric proportions in early April 1990. More and more people observed the general strike and participated in demonstrations, protesting against the *panchayat* regime (Parajulee, 2000: 89-90).

The mounting protest led the King to take some measures to calm the situation. At 6.45 am on 6 April 1990, the King read a proclamation, broadcasted through radio Nepal. Through the proclamation, he dissolved the government and appointed Lokendra Bahadur (L.B.) Chand, a moderate member of the *Panchayat* regime, as the prime minister to form a new council of ministers. The King also declared the establishment of a constitutional reform commission to recommend for political reforms and the creation of a commission to investigate the incidents in different parts of the country which involved the loss of lives and properties (Ogura, 2001: 151). On the same day, L.B. Chand appointed a commission of inquiry to investigate the incidents during the People's Movement with Supreme Court judge Prachanda Raj Anil as its chairperson (Final Report of the Mallik Commission, 1990: preface). On that same morning, Devendra Raj Panday, in detention since his arrest at the conference at



Tribhuvan University on 20 March, , was put in a jeep, driven to the office of the new prime minister and asked to join the new cabinet. He rejected the offer. In response, L.B. Chand requested him to ask NC leader G.M. Singh to begin negotiations. G.M Singh, at the time under hospital bed rest, refused to accept the offer unless the multiparty system was restored. Panday was taken back to detention facility (Ogura, 2001: 158-60).

On 6 April 1990, around 300,000 people gathered at the open-air theater in the center of Kathmandu, chanting slogans against the regime (Adams, 1998: 127). After the program, some of the people started marching towards the palace, breaking through the two lines of the police (Brown, 1996: 128). Behind the police, army soldiers 'had positioned themselves in combat lines, lying down in the street and taking aim to mow the protestors down with gunfire' (Adams, 1998: 128). When they were 300 meters from the palace, security forces opened fire on the demonstrators. While official figures put the death toll on nine persons (Dangol, 1999: 138), others claim half of all those 'martyred' during the People's Movement were killed on this day in Kathmandu (Brown, 1996: 148). A curfew was imposed in the capital after the shooting and a process to reach a compromise was initiated by the government.

The Chand government prepared a proposal for political reform for the consideration of political party leaders, focusing on two main points: first, the term "partyless" would be deleted from the constitution and a constitution amendment committee would be formed; second, the ban on political parties would be lifted (Ogura, 2001: 179). At this point, the NC leaders were divided. K.P. Bhattarai and G.P. Koirala had agreed to the conditions in the draft proposal and also to meet with the King. Nevertheless, G.M. Singh wanted the King to publicly declare the restoration of multiparty system, prior to initiating any conversation (Ogura, 2001: 184). At the end, a meeting with the King was agreed to be held on 8 April 1990 with K.P. Bhattarai and G.P. Koirala from the NC and Sahana Pradhan and R.K. Mainali from the United Left Front. In an interview, R.K. Mainali explained the three issues discussed in the meeting to me. They were first, to end *panchayat* and bring in multiparty democracy; second, to punish perpetrators; and third, to draft a new constitution. The King agreed to end the partyless system and install multiparty democracy. As for the punishment of

perpetrators and the new constitution, the King accepted to discuss them at a later stage (interview Mainali, 2015).

Despite these developments, the thorny issue left unaddressed was whether or not to end the ban on political parties and introduce a multiparty system, entailed abolishing the National Legislature and, more broadly, overthrowing the whole *Panchayat* regime. Just after the 8 April meeting, the four pro-democracy leaders were interviewed in a special program on Nepal television where they declared the end of the People's Movement. Despite this official end of the movement by the political parties, negotiations continued behind the scenes. At this juncture, the role of civil society became critical to abolish the *Panchayat* regime, install multiparty democracy and establish a new interim government.

#### *8 more days of the People's Movement*

Devendra Raj Panday was astounded to hear from the political leaders that an agreement had been reached to end the popular movement, given that neither the abolition of the *Panchayat* institutions nor the formation of a new government was mentioned. Panday reportedly said so in a phone call to G.P. Koirala immediately after the 8 April TV announcement. 'I'm quite disappointed with you people. You have compromised by ignoring the people. You know this is treachery against them' (Ogura, 2001: 198). He explained his concerns at that time to me as the following:

Probably L.B. Chand would have continued at the time with the NC and Baan Morcha [United Left Front] joining in; possibly; we were very afraid of that. Negotiations went on. It took quite some time for them to agree that a new cabinet were to be formed; not continue the old one as an interim government, as interim you know, interim means why not L.B. Chand? That was the idea in the *Panchayat* side (interview Panday, 2014).

Similarly, Dr. Mathura Prasad Shrestha mentioned the fear that existed among the civil society at the time that political parties would agree to ending party-les-ness and stop transformation there. He stressed that,

[I]t is the job of politicians to make political transformation; the civil society's job is to raise the voice of the people and to make the people aware of the dangers of something that is happening against that transformation (interview Mathura Prasad Shrestha, 2014).

In the middle of this confusion with political parties distancing themselves or re-interpreting the mandate of the people, civil society leaders articulated the people's will. On 11 April 1990, the Professional Solidarity Group issued a statement signed by Dr. Mathura Prasad Shrestha and Devendra Raj Pandey, in which they criticized the communiqué issued by the Royal Palace on 8 April along with the comments of the leaders of the NC and ULF. They appealed to the representatives of the NC and ULF to take a firm stand in their talks with the Monarch in respect of (1) the immediate formation of an interim government with representatives of various political parties; (2) the dissolution of all units of the *Panchayat* system and drafting of a new constitution to ensure the dominant position of the people; (3) honoring of and compensation to the families of those killed and provision of full and free medical attention to those injured; (4) investigation into the killings and repression perpetrated during the movement and punishment of those guilty (Adams, 1998: 134-5). At the same time, the Nepal Medical Association released a second statement declaring that the doctors would start a hunger strike on 15 April until a new interim government was formed with the aim of drafting a new constitution for a true democracy (Adams, 1998: 135-6).

G.M. Singh began putting pressure on the palace threatening to resume the movement at any time (Ogura, 2001: 201). Finally on 15 April 1990, a week after the movement was ended several thousand people surrounded the venue where Prime Minister Chand was meeting with leaders of the NC and ULF and kept the negotiators virtually under siege for several hours. Prime Minister Chand subsequently resigned (Parajulee, 2000: 93). On the morning of 16 April, King Birendra announced the dissolution of the National Legislature and other *Panchayat* structures, officially abolishing the *Panchayat* regime. Finally, on 19 April, the King invited K.P. Bhattarai of the NC to form a new government. The interim government included 11 members: Prime Minister K.P. Bhattarai, three members from the NC and three from the ULF; two members nominated by the King; and two from independent citizens, Devendra Raj Panday as the Finance Minister and Dr. Mathura Prasad Shrestha as the Minister of Public Health. Talking about his appointment, Dr. Shrestha explained,

I was made Minister without my consent. I disagreed to join the Ministry, but Man Mohan Adhikari and then Prime Minister Bhattarai came and they said: *for*

*good or bad we decided with the believe that you would agree (...) But if you don't join people may not trust us, they will ask questions and we will have problems, we may have some crises. I joined without actually liking to join (interview Mathura Prasad Shrestha, 2014).*

The move to include these two civil society leaders was to make the new government more legitimate to the people. As R.K. Mainali observed,

[Prime Minister] Bhattarai was clever to take them [Dr. Shrestha and Panday] in the interim government. Not only with the Mallik commission, but civil society would have been agitating against the Bhattarai government on other different issues as well, if they had not been in the cabinet. He was a clever politician (interview Mainali, 2015).

Through taking them on board, Prime Minister Bhattarai was placing the people's leaders on the government's side. Nevertheless, calls to punish those responsible for the killing of unarmed civilians during the People's Movement continued to mount in an extremely tense environment. On 23 April 1990, four days after the formation of the new interim government, a furious mob killed six police officers by dragging them in a trolley on the streets of Kathmandu. The new interim government had an immense task ahead. Backward looking Backward looking measures, such as the need to investigate the killings during the movement and punish perpetrators, needed to be undertaken simultaneously with the drafting of a new constitution to establish a constitutional monarchy and to prepare for the first parliamentary elections since 1959. The next section examines the two inquiry mechanisms established by the new interim government, the Mallik commission and the Committee on Disappearances.

#### **4.2 The corpus for exam: the Mallik Commission and the Committee on Disappearances**

In this section, I present an overview of the Mallik Commission and the Committee on Disappearances. Next, I look at the confusion in the literature regarding two commissions. Finally, I present an overview of the people interviewed.

#### 4.2.1 An overview of the Commissions

I present here an overview of the Mallik Commission and the Committee on Disappearances. I examine their establishments, mandates, powers and commissioners and committee members. I also examine the main findings and, where applicable, the recommendations they made. Finally, I refer to the submission of their reports and whether or not it was made public.

##### *The Mallik Commission*

On 6 April 1990, during the People's Movement, the King dismissed Prime Minister Marich Man Singh and appointed a new government led by L.B. Chand from the *Panchayat* ranks. On that same day, the new Chand government established a COI with the mandate 'to investigate into the damage inflicted by the recent incidents in the nation and to submit a report with [the Commission's] opinions on the matter' (Final Report of the Mallik Commission, 1990: preface). Supreme Court judge Prachanda Raj Anil was appointed to chair the commission. On 19 April 1990, a new interim government was formed with an agreement between the political parties and the palace this time. On 30 April 1990, faced with the absence of public support to the Anil Commission, the interim government appointed two human rights practitioners, Prakash Kafle, a representative from the human rights organization FOPHUR, and Professor Kapil Dev Shrestha, from HURON as commissioners. This appointment was intended to give some legitimacy to the Anil commission. Nevertheless, both representatives refused to be involved in the commission's work, calling it undemocratic and immediately resigned. Professor Shrestha explained that 'we were members of a commission formed under the 1962 constitution we had fought' (interview Kapil Shrestha, 2014). Similarly, members of political parties and the Professional Solidarity Groups, including doctors, lawyers, engineers, and teachers, who had played a key role in the People's Movement, opposed the formation of the commission. Citing these opposition as the difficulties for the commission to properly discharge its duty, the

chairperson and commissioners resigned and the commission was dissolved on 16 May 1990 (Final Report of the Mallik Commission, 1990).

On 23 May 1990, the new interim government established another commission (the Mallik commission), under the 1969 COI Act,

To investigate into the damage inflicted to life and property in the course of the *Jana Andolan* from 18 February 1990 to the mid-April 1990, and to submit a report containing [the Commission's] findings on whose error it was and opinion on what actions His Majesty's Government should take (Final Report of the Mallik Commission, 1990: preface).

The 1969 COI Act required a judge to chair the commission. Justice Janardan Lal Mallik was appointed as the chairperson and Justices Uday Raj Upadhyay and Indra Raj Pande as commissioners. The commission was invested with the same powers as a court, such as those to subpoena, search and seize, among others. On 24 September 1990, the commission's mandate was expanded to also investigate the damage inflicted to lives and properties during the various incidents in Pokhara during the period from 12 to 17 February 1990. Furthermore, the initial mandate period of two months was extended to seven. The commission submitted its final report on 31 December 1990.

The final report compiled factual information to conclude that 45 people were killed and thousands injured as a result of police excessive force. Beyond the specific incidents, the report also found that the excessive use of force by the police was based on a premeditated decision by the *Panchayat* government to suppress and neutralize the People's Movement. Hence, beyond naming those police officers responsible for specific killings, the report mentioned the Primer Minister, the cabinet ministers and other individuals on the various committees formed to suppress the People's Movement as the main perpetrators. The report also concluded that the government's suppressive policy led to public fury caused damages inflicted to governmental vehicles, buses, government buildings through incidents of vandalism and arson (Final Report of the Mallik Commission, 1990: 682-3).

While the interim government had pledged to provide economic support to the victims, the commission's final report recommended measures to compensate financially the relatives of those who had been killed. It also recommended treatment to those wounded and provision of livelihood arrangements for those disabled. It further

recommended the construction of memorials in the name of the deceased. The report also recommended perpetrators to be subjected to departmental and other necessary actions in accordance with the prevailing law, based on the severity of their faulty conduct (Final Report of the Mallik Commission, 1990: 682-3).

The Mallik commission submitted its report to the Prime Minister on 31 December 1990. The government did not officially publish the report. However, it was leaked to the media that published its excerpts along with the names of those accused. At the same time, commissioners also contributed to publicizing the content of the report through radio interviews. Dr. Mathura Prasad Shrestha, then Minister of Health, emphasizes the lack of transparency of the Prime Minister at that moment. 'The report had to be leaked to the press to be public. The report was presented, but the content of it was not made known even to the Ministers.' (interview Mathura Prasad Shrestha, 2014). In July 1991, G.P. Koirala, the Prime Minister of the first elected NC government, presented the Mallik Commission report to the parliament. The report was eventually placed at the Parliamentary Library. In 1994, INHURED International, a human rights organization, published the report.

### *The Committee on Disappearances*

The *Committee to investigate persons disappeared in the course of restoration of democracy* (hereafter Committee on Disappearances) was established on 31 July 1990 to investigate disappearances that happened between 15 December 1960 and 8 April 1990. It had the mandate

To investigate into the cases of disappeared persons as a result of various actions in the course of the restoration of democracy and to present a report to the Majesty's Government (Final Report of the Committee on Disappearances, 1991: preface).

Committee members included Chairperson Hiranyashwar Man Pradhan, Additional Justice of the Supreme Court; Surya Bahadur Shakya, vice-chancellor of Tribhuvan University; Basudev Prasad Dhungana, senior advocate; Dr. S.K. Pahari, president of the Nepal Medical Association and royal physician; Prakash Kafle, from the human rights organization FOPHUR and Ananda Mohan Bhattarai, lawyer and committee secretary.

Although it was established on 31 July 1990, the committee commenced its work only on 4 November 1990. On 9 November, the new constitution came into force. As a result of the new constitution, the committee chairperson, Hiranyashwar Man Pradhan, was no longer the additional justice of the Supreme Court and formally resigned from the committee (Final Report of the Committee on Disappearances, 1991: preface). On 22 February 1991, the government decided to appoint one of the Committee members, Surya Bahadur Shakya, as chairperson.

The Committee registered a total of 205 cases of disappearances. It investigated 61 cases. In 35 out of 65 cases, the investigation was completed. In 26 cases, the investigation was still pending at the time the report was submitted. The Committee classified 61 disappearances in to five groups: a) nine persons disappeared during the confrontation with or actions by the army and those disappeared after their arrest; b) 14 persons disappeared who were involved in political activities, but who could not be confirmed that they were arrested at the time of their disappearance; c) five persons had disappeared and found to have died; d) 26 persons that include those whose information were received too late to undertake detailed investigation and those whose case remained incompletely investigated due to inadequate support; and e) seven persons who were arrested and disappeared during the 1985 bombings.

Although the report discussed all these cases, it mainly focused on the seven disappeared in relation to the 1985 bombings. A half of the report (page 5 to 65) discusses 54 cases of disappearances with very few details, sometimes a few lines. The other half of the report (page 65 to 129) is devoted to the seven disappearances in relation to the bombings. The second volume of the report provides testimonies and documents related only to these seven disappearances.<sup>36</sup> In short, the main purpose to establish the committee seems to have been to exclusively examine this incident. The episode of the bombing itself has significance for ending the non-violent civil disobedience campaign called on 23 May 1985 by the NC and supported by other political parties to protest against government's violations of fundamental rights. Many

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<sup>36</sup> Annex 1 includes 39 documents under the heading "*Statements and responses provided by former and incumbent police officers and other officers in the context of 1985 bombings.*" Annex 2, 43 documents under the heading "*Important statements, affidavits and responses relating to individuals in the context of 1985 bombings.*" Annex 3, 22 documents under the heading "*Important documents.*"



saw the 1985 bombings as a conspiracy to stop the social movement for democracy. The number of arrests after the bombing was massive. Around 1,750 people were initially detained for questioning. Eventually, 23 were convicted and sentenced imprisonment ranging from three years and life. After the end of the *Panchayat* system, there were calls to pardon those still in prison. They were finally pardoned in June 1991 (Amnesty International, 1992: 13). However, seven people remained disappeared. They are Ishwar Chandra Lama, Padam Bahadur Moktan, Dilip Chaudhari, Saket Chandra Mishra, Dr. Lakshmi Narayan Jha, Satya Narayan Shah, and Surya Nath Rao (Yadav). The committee found that they had been arrested by state agents, moved from one detention center to another until the last location where they had been kept without any evidence of release. The committee also found evidence that they had been severely tortured while in detention.

Although officially created by the council of ministers, the Committee on Disappearances was not established under the 1969 COI Act. This meant not having the powers foreseen under section four of the COI Act, such as those to subpoena, search and seize. In this regard, Lal Shrestha describes the committee 'more like a civil society committee, non-government investigation; not empowered as the Mallik commission; formed by the government and supported by the civil society, but without a strong legal mandate' (interview Hiranya Lal Shrestha, 2015). To overcome this lack of power, some of the committee members used their previous relationship with the *Panchayat* regime. For example, senior lawyer Basudev Dhungana had been a minister during *Panchayat* regime and a vice chairperson of the *Rashtriya Panchayat* [the National Legislature] (interview Hiranya Lal Shrestha, 2015). Dr. S.K. Pahari was a royal physician. Ananda Mohan Bhattarai, the Committee Secretary, was formerly working in the *jaheri bibhag*, an appeal mechanism which allowed the King to overrule decisions by the Supreme Court. Therefore, while committee members were from civil society, most had links with key personnel from the former *Panchayat* regime. These ties became strength for the Committee in dealing with the state actors.

The mandate of the committee was to investigate cases of disappearances and to present an accurate report to the government. It was not tasked to make recommendations on any matter. Rather, it was understood that once the committee

submitted its report, the government had the responsibility to conduct further investigation or take other appropriate actions (interview Dhungana in INSEC, 1999: 15). Nevertheless, even after the report was submitted, the government ignored it without taking any further measure. As one of the committee members expressed, 'we submitted it to the Prime Minister. The Prime Minister sent it to the Home Minister, and that was it. No action was taken thereafter' (interview Dhungana in INSEC, 1999: 15).

On 21 April 1991, the four-committee member submitted its report to the interim government which did not publish it. As one interviewee expressed, in Nepal, official reports are not generally widely shared with the public and consequently their findings are not well publicized (interview Hiranya Lal Shrestha, 2015). Despite the efforts by committee members, the report of the Committee on Disappearances was not published either. As a former committee member stated that,

We put a lot of pressure [on the government] to bring this report before the general public. We even issued press statements. We provided information for the public through that press statement. But still, no other additional information other than that was made public (interview Dhungana in INSEC, 1999: 15).

Another former committee member recalled that,

We submitted [the report] to the Home Minister, and we were ready to make it public and call a press conference. All of a sudden it was postponed. We never had a press conference. It was the duty of the government to call a press conference and make it open [to the public]. [That the report] was incomplete, that was the pretension they [the government] put forward [not to release it to the public]. We had the answer, but it never came to the public (interview Pahari, 2014).

Sushil Pyakhurel recalls of making copies of the final report and distributing them. He remembers sending a press release to the media, explaining that the report had been submitted to the interim government, how many number of people the committee had found disappeared and that it had reached the point where it could not verify remaining allegations further (interview Sushil Pyakhurel, 2014). According to him,

The report was submitted and then the government sitting on it (...) They [the government] didn't release the report, but somehow the content was given to the media, and at that time, not private media [existed], no TV except Nepal TV, no paper except Gorkha Patra and Rising Nepal [government media], that was the situation. Only weekly papers carried some information (interview Sushil Pyakhurel, 2014).

Having presented an overview of the work of two commissions, in the next section, I explain a prevailing confusion in the literature concerning the Mallik Commission and the Committee on Disappearances.

#### 4.2.2 Re-writing what has been said about the two commissions

Most of what has been attributed to the 1990 Committee on Disappearances in the literature relates to the Mallik Commission. The fact that none of the reports of the two bodies has been translated into English has also limited the available information. Most of the studies that include the Committee on Disappearances have relied on the information available in Hayner's seminal work on TCs, *Unspeakable truths: Facing the Challenge of Truth Commissions* (Hayner, 2002).

According to Hayner's book, Nepal had a TC in 1990-1991, the *Commission on Inquiry to Find the Disappeared Persons during the Panchayat Period*. To start with, it was not a COI, but a committee. The difference is relevant as Nepal has the 1969 COI Act which regulates the powers and appointments of commissioners for this specific type of commissions. The less than one page devoted in Hayner's book to the Committee on Disappearances notes that the 1990 interim government established two commissions 'to inquire into allegations of torture, disappearances, and extrajudicial executions that had taken place under the *Panchayat* System from 1961 to 1990'. It further says:

The first commission was dissolved soon after it was appointed; the chair of the commission was seen as a collaborator with the prior regime and was not accepted as credible, so that the other two members, representatives of two human rights groups, soon resigned in protest (Hayner, 2002: 57).

This description has nothing to do with the Committee on Disappearances. As explained in relation to the overview of the Mallik Commission in the previous section, Hayner's description appears to apply the Anil commission, the appointment of Kapil Shrestha and Prakash Kafle as representatives of human rights organizations, their refusal to join which led to its dissolution on 16 May 1990 and the appointment of the Mallik Commission on 23 May (Final Report of the Mallik Commission, 1990: Preface). Hayner continues,

A second commission was then appointed, the Commission on Inquiry to Find the Disappeared Persons during the *Panchayat* Period, which included a founding member of a prominent human rights group in Nepal, the Informal Sector Service Center. The commission completed its two-volume report in 1991 (Hayner, 2002: 57).

The Committee on Disappearances had no relation with the Mallik Commission. The Committee was appointed on 31 July 1990. The Committee included four members from civil society, including, as Hayner mentioned, the general secretary of FOPHUR, the precedent to the Informal Sector Service Center, a human rights organization active in Nepal.

The confusion also appears to continue with the reports of the commissions. Concerning the publication of the report of what she calls as the 'Commission on Inquiry to Find the Disappeared Persons' and its implementation, Hayner argues,

Over the next few years, Amnesty International and local human rights groups repeatedly urged the government to publish the commission's report and ensure that any persons implicated in human rights violations be brought to justice. The report was finally released to the public in 1994, although few of its recommendations have been implemented (Hayner, 2002: 57).

The Committee on Disappearances report was not released to the public in 1994. In fact, it was never published. Again, it was the Mallik Commission's report that was published in 1994 by INHURED International, a human rights organization. Hayner's observation that 'few of its recommendations were implemented' appears again to refer to the Mallik Commission's report. As explained in the previous section, the report of the Committee on Disappearances did not include any recommendations.

Interestingly, the second edition of Hayner's book published in 2011 includes a new paragraph on the Mallik Commission. The second edition mentions the Commission as a separate and better-known commission to 'specifically investigate the abuses against the popular movement that took place during the two months in early 1990'. It refers to the Commission's findings of 45 people being killed and 23,000 injured and to the fact that neither of two commissions, the Mallik Commission and the Committee on Disappearances, led to trials of the alleged perpetrators (Hayner, 2011: 244-5).

I decided to clarify those points from Hayner's book because of its influence on other researchers, online collections and databases. For example, the United States Institute of Peace's Truth Commissions Digital Collection, widely used by researchers on TCs, reproduces exactly the same inaccurate information (United States Institute of Peace's Truth Commissions Digital Collection, Commission of Inquiry: Nepal 90). As for researchers, in his recently published book, Bakiner also attributes facts that are related to the Mallik Commission to the Committee on Disappearances. For example, he writes,

The commission was mandated to investigate the "loss of lives and damage to property" in early 1990 during the People's Movement against the monarchy. The government had to dissolve the first commission of inquiry because the appointment procedure referenced the abolished 1962 *Panchayat* Constitution rather than the new legal system. The controversial process caused two former commissioners, both human rights defenders, to resign. Then, a new set of commissioners was appointed (Bakiner, 2016: 166).

Again, all these points reflect the Mallik Commission, and not the Committee on Disappearances. Bakiner further argues,

The first elected government, taking office in May 1991, chose not to disseminate the final report. Civil society pressure forced the government to release the report in 1994, which remains the only area in which the truth commission produced impact. However, only a handful of copies are available in the national library and the parliamentary secretariat (Bakiner, 2016: 167).

The facts are not accurate either. The first elected government presented the Mallik Commission's report to the speaker of the House of Representatives in July 1991. Since then, the report was stored at the Parliamentary Library, located at the Parliamentary Secretariat. In 1994, it was INHUIRED International, a human rights organization, that published the report, following the due process with submission of a letter of request and making copies of the report at the Parliament Secretariat (INHUIRED International, 1995: 24).

The scarce information available has led scholars to even refer to both commissions as if they had been one and the same. Even in a recent study on TJ in Nepal, the author still refers to the Commission of Inquiry to locate people who had disappeared during the *Panchayat* system, from 1961 to 1990, as 'named the Mallik Commission after the judge who headed it' and attributing the findings of Mallik Commission to the Committee on Disappearances (Sajjad, 2013: 37). In chapter six, I

examine whether or not the new factual information presented in this study affects the consideration of the Committee on Disappearances as a TC. I also examine the implications that inaccurate information has had on other studies assessing the Committee's impact.

#### 4.2.3 Elite interviews

I interviewed 24 people involved with the commissions and the broader transition. I carried 13 of these interviews in April 2014 and 11 in March 2015. As explained in the methodology chapter, I organized the sample in three main groups: a) former members of a TC; b) representatives of the governing regime; and c) victims and broader civil society. This classification corresponds to the three groups among which vertical and horizontal accountability relations are generated.

With regards to the Mallik Commission, I met with judge Indra Raj Pandey, a former commissioner, and with the son of Chairperson Janardan Mallik, Vidyadhar Mallik, as his father had passed away<sup>37</sup>. I also interviewed Kapil Shrestha, one of two human rights activists who resigned after the government appointed them without their prior consent to the Anil commission. With regards to the Committee on Disappearances, three out of four commissioners had passed away. I did meet the only survivor, Dr. S.K. Pahari as well as the secretary of the committee, currently Appeal Court Judge Ananda Mohan Bhattarai. I also used an extensive written interview by INSEC of another commissioner, late Basudev Dhungana. Finally, I also interviewed Sushil Pyakhurel, working with the human rights organization FOPHUR when the Committee was established. Although formally not a member, Sushil Pyakhurel closely collaborated with the Committee because of his human rights work with Prakash Kafle, a committee member who was also the secretary general of FOPHUR.

As for representatives of the governing regime, key people I interviewed included three former Ministers in the 1990 interim government; Dr. Mathura Prasad Shrestha, Minister of Public Health, Devendra Raj Pandey, Minister of Finance, and Nilambar Acharya, Minister of Law and Justice. Both Dr. Shrestha and Mr. Pandey had

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<sup>37</sup> Vidyadhar Mallik was appointed minister for health and population in the government formed under chief justice Khil Raj Regmi in 2013.

been appointed as representatives of civil society. As for Mr. Acharya, he had been appointed in representation of the ULF. I also interviewed other members of the NC and the ULF who are included under this category (representatives of the governing regime) as they belonged to the two political parties in the government. For example, I interviewed Daman Nath Dhungana, spokesperson of the NC for the 1990 People's Movement who became the speaker of the parliament after the 1991 elections. From the leftist political parties, I interviewed R.K. Mainali, acting chairperson of the ULF during the People's Movement, and Hiranya Lal Shrestha, a ULF member during the *Jana Andolan* who became a Member of Parliament with the Communist Party of Nepal (United Marxist-Leninist) after the 1991 and 1994 elections. Hiranya Lal Shrestha was also a teacher and journalist and a founding member of Amnesty International Nepal chapter. Also for this group (representatives of the governing regime), I interviewed Bhek Bahadur Thapa, a senior bureaucrat knowledgeable about the state bureaucracy; and two officers from the Nepal Police - Mr. Achyut Kharel, interrogated by and named in the report of both commissions and Dr. Chuda Bahadur Shrestha, deputy superintendent of the Nepal Police at the time of the People's Movement.

The third group of interviewees includes members of civil society and victims. Civil society leaders I interviewed include Padma Ratna Thuladar, former member of the *panchayat* National Legislature since 1986 who mediated the seven communist parties to form the ULF during the People's Movement. I also interviewed members of Professional Solidarity Groups and human rights advocates, as listed in the annex. As opposed to other groups, victims were not active actors in accountability relationships. They were a source of information for the commissions to documents human rights violations. In chapter 3, I have justified limiting interviews with victims only to those with victim activists.<sup>38</sup> I interviewed two people who are currently running their own non-governmental organizations. Shrawan Sharma is the brother of a political activist disappeared whose case was investigated by the Committee on Disappearances. And J.B. Dhaulakoti, the son of a political activist killed by security forces during the 1980 referendum.

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<sup>38</sup> I have developed this position in chapter 3, section "3.3 Ethical and gender considerations".

While conducting the interviews, the TJ situation in contemporary Nepal was recurrently mentioned by various interviewees. Many mentioned the continuous failure to establish a truth and disappearances commission even almost 10 years after the 2006 Peace Agreement which provided for such mechanisms as a recurrent link between the 1990 transition to multiparty democracy and the 2006 transition from the armed conflict. The box below shows the interviewees' composition, based on three groups among which accountability relationships can be generated.

Box 2- Interviewees composition: Nepal 2014-15

Former commissioners and committee members:		5
Mallik Commission	(2)	
Disappearances Committee	(3)	
Governing regime		9
Former Ministers in the interim Government	(3)	
Political Party members in the interim Gov.	(3)	
Civil Servant	(1)	
Nepal Police officers	(2)	
Civil society, victims		10
Independent Member of Parliament	(1)	
Members of Inter-professional Solidarity Group	(4)	
Teacher	(1)	
Lawyer	(1)	
Doctor	(1)	
Media	(1)	
Student	(1)	
Human rights activists	(2)	
Victims	(2)	
<b>Total: 24 people interviewed in Nepal</b> <sup>39</sup>		

Source: Author

<sup>39</sup> Appendix 2 compiles a list of interviewees including: name, role played at the time, date of interview, and place. I also indicate when the interview was not recorded and when the interview was done with the support of interpreter.



### 4.3 Assessing the impact on accountability: the Mallik Commission

In this section, I present evidence to demonstrate the existence of vertical and horizontal accountability relationships as a result of the Mallik Commission. Specifically, I examine whether or not the evidence collected from semi-structured interviews and primary and secondary documentary sources fulfill the criteria proposed in chapter two to evaluate the commission's contribution to promoting accountability.

Following the framework in chapter two, the 14 evaluative criteria (EC) are divided in four accountability relationships. Criteria 1 and 2 refer to answerability as a result of vertical accountability relationships before the establishment of a TC. Criteria 3 to 9 correspond to the answerability as a result of horizontal accountability relationships during the period the commission undertake its work. Criteria 10 to 14 correspond to enforcement as a result of horizontal and vertical accountability relationships as a result of the recommendations put forward in the final report. I do not conduct an assessment based on criteria 7 and 11, which are not applicable to the Mallik Commission, because it did not investigate disappearances.

#### 4.3.1 Answerability as a result of vertical accountability relationships before the establishment of a TC (EC 1-2)

*If pressure from civil society leads the governing regime to establish a TC (EC-1), the state is rendered answerable.* Evidence collected suggests that the public outrage in response to violations committed by the security forces during the People's Movement led to the establishment of the Anil Commission, precedent to the Mallik Commission. On 25 February 1990, one week after the People's Movement began, human rights organizations demanded an immediate judicial investigation into the unnecessary force against demonstrators and strong actions against the persons responsible (Final Report of the Mallik Commission, 1990: Preface). On 1 March, the Nepal Medical Association issued its first press release, denouncing the killing of demonstrators and torture in detention centers and demanding 'that an independent judicial inquiry be instituted and the findings of this commission be made public' (Adams, 1998: 96-7). On 13 March, 48

writers and poets issued a joint press statement, expressing their rage at torture and killings of protesters and demanding the formation of 'an impartial investigation committee to look into these incidents' (Final Report of the Mallik Commission, 1990: Preface). As a result, on 6 April, the newly appointed *Panchayat* government established a COI to investigate into the damages inflicted by the recent incidents in the nation and to submit a report with Justice Prachanda Raj Anil as the Chairperson. As a result, the Anil Commission was established, indicating the fulfillment of EC-1.

While the setting of the Anil Commission came as a response to pressure from various sectors of civil society, people did not consider this Commission legitimate and mobilized against it. A second criterion for assessing whether or not the governing regime is rendered answerable during the pre-TC period is when *pressure from civil society leads the governing regime to make changes to the proposed mandate, powers, appointment of commissioners or any other relevant aspect of the commission* (EC-2). Civil society mobilization led to the dissolution of the Anil Commission and the appointment of a new one. The Anil Commission faced objections from the public, as they perceived it a commission created by the Prime Minister newly appointed by the King under the *Panchayat* regime. The new interim government appointed two representatives from human rights organizations to legitimate the Anil Commission, but they refused to be involved. Civil society groups also opposed the Commission, leading to the resignation of the chairperson and its members. According to Nilambar Acharya, former Minister of Law and Justice in the interim government, the Anil Commission presented two obstacles. First, the royal proclamation to establish it was issued on 6 April 1990, before the end of the People's Movement and the declaration of multiparty democracy; thus it was a commission established under the *Panchayat* regime. Second,

After the completion of the movement it was understood that the King would work according to the advise of the cabinet of ministers. But the cabinet did not decide the constitution of the commission and thus the King was behaving like absolute monarch (interview Acharya, 2015).

On 23 May, one week after the dissolution of the Anil Commission, the new interim government appointed a new commission with Judge Janardan Mallik as the chairperson. The mandate of the new commission mentioned explicitly to investigate

the killings during the movement, name the perpetrators and advise the government on further actions (Final Report of the Mallik Commission, 1990: 1). These developments suggest that the interim government was rendered answerable to civil society. Civil society opposition to the Anil Commission led to its dissolution and the appointment of the Mallik Commission mandated to investigate the killings, name perpetrators and recommend further actions.

#### 4.3.2 Answerability as a result of horizontal accountability relationships during the work of a TC (EC 3-9)

During the period between their establishment and the submission of their reports, TCs collect information and evidence from victims, witnesses, broader civil society, as well as from state agencies. Through these interactions and disclosure of evidence in support of state violations by TCs, state answerability is produced. For the state to be rendered answerable, in the first place, *victims, witnesses, and/or civil society organizations need to access and provide information to the commission* (EC-3). This requires the commission to reach out to victims, witnesses, and civil society organizations, and to ensure that the environment is conducive for them to come forward and provide information.

The Mallik Commission used the media, such as Nepal TV, Radio Nepal, and the Gorkhapatra Daily, a newspaper, to disseminate information about the commission, report its activities and keep the public informed. According to one of the commissioners, 'we used the radio to make calls to those who had been injured during the *Jana Andolan*' (interview Indra Raj Pandey Pandey, 2014). It also requested Ministries, universities and hospitals to cooperate by sending information about incidents and damage inflicted during the People's Movement. The Commission used three questionnaires to collect information about those who were killed or injured and properties damaged (Final Report of the Mallik Commission, 1990).

The environment where the Mallik Commission operated appears conducive for victims and witnesses to come forward. This was so, despite some from the previous regime were against the commission, believing that the government had every right to maintain peace and the rule of law when confronted with thousands of demonstrators

(interview Thuladar, 2015). One of the challenges for the Commission in interacting with victims was to gain their trust and encourage them to explain their stories. As the son of late Judge Mallik pointed out,

The commission went to a couple of places to interview people and it was rejected. *Why should we reopen our trauma?* My father had to convince citizens this is a different commission: *This time justice will be done [Since I am] a judge, whatever report I give to the government will be implemented* (interview Mallik, 2014).

On the other hand, there was little interaction between the Mallik Commission and human rights organizations. Instead, commissioners requested victims, political parties offices in the districts as well as from hospitals and universities to provide factual information on the incidents (Final Report of the Mallik Commission, 1990: 4). Commissioners also had direct access to primary sources of information on the excessive use of force by security forces. To conclude the assessment of this criterion, EC -3 was fulfilled.

State answerability is also produced as a result of the horizontal accountability relationship between a TC and the state agencies. For state agencies to be rendered answerable, *the commission has to have access to state/non-state actors and these actors have to be answerable to the commission* (EC-4). The Mallik Commission had access to the Nepal Police and the government to investigate the killings of protestors. The Mallik Commission interrogated police officers who had been on the ground at the time of the incidents and those who had issued the orders, up to the Inspector General of the Nepal Police. Commissioners also had access to state officials who had been making decisions at the policy level. Within the government, the commission interrogated the Primer Minister and Ministers who had some involvements in the incidents The Commission also questioned other political appointees who acted on the various committees created to suppress the People's Movement. On the administrative side, all the high-ranking bureaucrats, such as acting Secretaries of concerned Ministries, and other officials within the state apparatus were questioned. Former Commissioner Indra Raj Pandey recalls that 'everyone cooperated with the inquiry, including *Panchayat* elements' (interview Indra Raj Pandey, 2014).

The Mallik Commission did not have access to the Nepal Army or to the palace. Former Minister Devendra Raj Panday stated that,

[The Commissioners] didn't get to talk to the military, a major instrument of the state in perpetrating violence; neither with key civil servants in the palace; and of course no body from the palace who gave the orders (interview Panday, 2014).

While the role of the palace was crucial to understand the response from the government and the security forces during the *Jana Andolan*, the Nepal Police, and not the Nepal Army, had been dealing with the street protests and responsible for the killings and excessive force. However, there was one important incident where the military intervened. On 6 April 1990, the crowds marched towards the royal palace. At that time, both the police and the army shot unarmed demonstrators. As Patma Ratna Thuladar explained,

Because of the incident outside Narayanhiti Royal Palace, there was expectation that the commission could take action against the military leadership who ordered shooting at the people protesting. Inside the royal palace, all of them were military men, so army was directly involved in those killings but no one [was] named in [the] report (interview Thuladar, 2015).

The lack of access to the palace and to the army hindered the findings of its investigation. Lack of answerability from these actors entails EC-4 was only partially met.

The publication of a TC's final report transfers the state answerability resulting from the fact-finding to the public domain. Hence, one criterion for evaluating answerability is whether or not *the final report is made public* (EC-5). On 31 December 1990, the Commission submitted the final report to the interim government. The interim government did not officially publish the report, but the report was leaked to the media. During the same week, main Nepali newspapers reported that the report had been submitted to the Prime Minister. On 5 January 1991, the English daily *The Motherland* published,

Nepali language weeklies (...) have all highlighted the Mallik Commission report quoting sources close to the Cabinet Secretariat that action against those who had misused their power to suppress the movement for restoration of democracy would be initiated very soon. *Saptabik Bimarsha*, *Nepali Patra* and *Dristi* [three weekly newspapers] have all revealed quite a few confidential

contents of the Mallik Commission report with comments from the Chairman and members of the Commission (*The Motherland*, 1991).

The article quoted the weekly *Nepali Patra* that the report had named members of the government and the committees created to suppress the movement. The article further suggested if any action was to be taken on the basis of the report, those named as responsible would be given maximum punishment. It also quoted another weekly, *Saptabik Bimarsha*, which had reported that '[Former Prime Minister] Marich Man Singh, [Chairperson of the *Panchayat* Policy and Evaluation Committee] Nava Raj Subedi, [Minister of Home Affairs] Niranjana Thapa and others are soon to be arrested for action on the basis of the one thousand page Mallik Commission report' (*The Motherland*, 1991). Finally, the article also quoted the weekly *Dristi* which had published contents of the Mallik Commission report and provided a list of the people against whom actions were to be taken. This weekly also quoted Chairperson Mallik expressing his confidence that 'the government would mete out due punishment to the guilty' (*The Motherland*, 1991).

The Commissioners also contributed to publicizing the content of the report through radio interviews. Vidyadhar Mallik recalls,

Initially the report was very much secretive. My father was in trouble after doing a couple of interviews with BBC Nepali service and local media. He and his team discussed in detail on the policies and directives given (interview Mallik, 2014).

Commissioner Pandey also remembers the media interviews after the submission of the report. He expressed that he had no faith in political parties. 'At the time I stated the government was not brave, lacked courage to implement the report' (interview Indra Raj Pandey, 2014). Although the interim government did not officially publish the report, state answerability from the fact-finding done by the commission was transferred to the public domain through other means. Mainly through leaking of the report to the media that published parts of it, along with the names of those responsible. I conclude the report was made public through being leaked to the media. As a result, state answerability was transferred to the public domain, even though the report was not officially published. Consequently, I consider EC-5 was fulfilled.

Once a TC's report is made public, we can evaluate the scope of state answerability. Evaluative criterion 6 assesses the extent to which *the report discloses new facts and*

*evidence surrounding violations committed* (EC-6). The Mallik Commission report compiles factual information on the incidents leading to killing of protesters and other incidents which resulted in injuries and property loss. The Commissioners collected factual information from clippings of newspapers and radio reports. They also obtained firsthand information from victims and witnesses through field visits (interview Indra Raj Pandey, 2014). For example, concerning the killing of four protesters in Kirtipur, the Commissioners inspected the area of the incident, collected testimonies, examined records maintained at police offices, and summoned all those responsible based on the line of command. The report states,

It appears from the nature and from the incident site and the incident reports that as a result of the firing by the police from the police station against the protest, approximately 200 m far, Raj Man Mali and Rajendra Maharjan, who were on the streets of the Khasi Bazaar, and Lan Bahadur Maharjan and Hira Kaji Maharjan, who were 75 feet to the north of the police station, were shot. It appears from the hospital reports that the deceased individuals had sustained gunshot injuries in the stomach, neck, chest and forehead. Also, from the bullet impressions on the surrounding houses, it is apparent that bullets were fired all around and in a haphazard manner. Given this situation, the statement from the police that fire had been opened below the knee does not appear to be believable. Also, individuals participating in a peaceful protest were forcefully arrested and beaten, which led to that incident. Therefore, the act of opening fire at the protest does not appear to be justifiable; rather, the police appear to have acted in an atrocious manner. (...) In relation to this incident, the then Bagmati Zonal Officer, Narendra Kumar Chaudhari, the then Chief District Officer, Keshav Raj Rajbhandari, and the then Acting Deputy Inspector General, Achyut Krishna Kharel, were in the Command Post and issued an order to use force; Deputy Superintendent of Police (DSP) Rabi Kant Aryal implemented such an order; police personnel, including DSP Baburam Gurung, DSP Krishna Bahadur Lama, DSP Mohan Bahadur Khadka, the then Police Head Constable Ram Bahadur Lama, Police Constable Binod Thapa and Police Constable Khil Bahadur Thapa, were present at the incident site, and they implemented the order on the ground by opening, and causing to open, fire. Their actions go against Section 6 of the Local Administration Act, 2028 (1971), and it does not appear that they carried out the appropriate functions in their line of duty but that as a result of their ill-intentioned activities, such a damage was inflicted (Final Report of the Mallik Commission, 1990: 291-4).

The previous passage discloses evidence refuting the police's claim that people had been shot below their knees to minimize harm, as provided in the Local Administration Act. It also establishes how the events unfolded chronologically, rejecting the police's argument that the shooting was necessary and justified. The evidence collected

concerning the killing of four protesters in Kirtipur is thorough. The full account reproduces the responses given by all those summoned by the Commission based on the line of command, starting from the officer-in-charge at the site to the Minister of Home Affairs and the Prime Minister. Thus, the Mallik Commission's report did disclose new facts and evidence surrounding violations committed.

Attribution of institutional and individual responsibilities also indicates the scope of the answerability produced. Concerning institutional responsibility, if *the report acknowledges that state agencies and/or non-state actors committed violations of human rights (EC-8)*, it is producing further answerability. In this regard, the Mallik Commission report also established the *Panchayat* government's determination to use disproportionate force against the protesters. The report held the government with the Prime Minister at the top responsible for implementing a policy intended to suppress the People's Movement through the police's use of excessive force that killed civilians and injured thousands (Final Report of the Mallik Commission, 1990: 682). I conclude EC-8 was fulfilled.

The Mallik Commission report also *attributed individual responsibility through naming perpetrators (EC-9)*. The report named over 100 perpetrators from the government, the local administration and the police force. Consequently, EC-9 was fulfilled. Vidyadhar Mallik, son of the commission's chairperson, recalls,

High-level people were all booked: police chiefs, both Prime Ministers, chief secretaries in the Ministry of Home Affairs. [In] none of the cases, especially concerning the law enforcing officers at the lower level, he [Chairperson Mallik] booked any individual who simply did his duty (interview Mallik, 2014).

The fact that the Mallik Commission report named government leaders, top bureaucrats and the highest-ranking police officials might have worked against its implementation. As Nilamber Acharya, the then Minister of Law and Justice, expressed,

My thinking was not to punish everyone, but to punish some heinous cases to give the message that this type of behavior will not be accepted. But what happened, Janardan Mallik worked sincerely (interview Acharya, 2015).

"Working sincerely" was meant that Chairperson Mallik did not limit individual responsibilities to those at the low-middle level of the security forces, but also those



responsible at the highest level, including Prime Ministers, Ministers, senior bureaucrats and police chiefs. While doing so, the judge does not appear to have considered the political consequences of such an action. By naming everyone, the Mallik Commission was also placing a too large burden on the government to initiate prosecutions and take other legal actions against those responsible. These legal actions recommended by the Commission and its other recommendations are assessed next.

#### 4.3.3 Enforcement as a result of horizontal and vertical accountability relationships after the recommendations (EC 10-14)

In their final reports, TCs make recommendations that can generate two more accountability relationships. The first is a horizontal relationship between the governing regime and the state agencies which received the recommendations. The second is a vertical one as civil society pushes the governing regime to implement the recommendations in the commission's final report.

##### *Enforcement as a result of horizontal accountability relationships*

The Mallik Commission report's recommendations focused on reparations to victims and actions against perpetrators. There was no recommendation to remove perpetrators from their public office or to reform institutions or legislation to prevent future violations. Nonetheless, I examine these criteria because the dismissal of perpetrators or institutional and legislative reforms could happen as a result of prosecutions. Alternatively, even if the government does not prosecute perpetrators, it could discharge them or adopt institutional reforms.

A criterion to assess fulfillment of the enforcement dimension of accountability is whether or not *reparation programs have been implemented* (EC-10). The interim government had pledged to provide a financial support of 25,000 Nepali rupees (NPR) to the families of the killed as an immediate relief and another payment of 100,000 NPR (Final Report of the Mallik Commission, 1990). According to those interviewed, relatives of 45 people killed received compensation after the submission of the Mallik

Commission's report (interview Mainali, 2015). Other measures, such as provision of permanent livelihood for the deceased's dependents and parents and scholarships for their children, were not implemented. The mechanism created to provide compensation for the injured favored those politically connected. Those injured with political affiliation received cash up to 50,000 NPR through the mediation of political parties. The Ministry of Home Affairs also created a special assistance fund from 1991 to 1996 as well as a regular support fund which provided the victims from 5,000 to 25,000 NPR. However, victims who approached the Home Ministry to receive such cash assistance totaled no more than 100 people (interview Subodh Pyakhurel, 2014). The report also recommended providing compensation for the damages inflicted through arson and vandalism to vehicles, buildings and other properties belonging to the government and to private individuals (Final Report of the Mallik Commission, 1990: 683). According to some sources, the interim government was rather successful in this endeavor (interview Thapa, 2015). While the relatives of those killed received compensation, the government did not provide other measures such as permanent livelihood for the deceased's dependents. Such combination leads me to conclude EC-10 was partially fulfilled.

With regards to individual responsibility, there is enforcement if *prosecutions have taken place* (EC-12). The Mallik Commission's report referred to two groups of perpetrators. The first group included officers of the Nepal Police and district and regional administrative bodies, most of who had been named in the various incidents compiled in the report. The second group consisted of members of the committees responsible for formulating and implementing policies and guidelines to suppress the People's Movement. This second group included two Prime Ministers and their cabinet members, high-level bureaucrats, such as the Chief Secretary and Ministry Secretaries, Chief of the Nepal Army Staff, Chief of the Nepal Army General Staff and the Inspector General of the Nepal Police. The report acknowledged that the second group was now blaming those in the first group (police and administrative officers) and trying to holding them responsible. Nevertheless, the report stressed that those formulating and implementing the policies and guidelines were the main perpetrators for the killing of civilians to 'be subjected to departmental action, as well as other necessary action in

accordance with the prevailing law, based on the severity of their faulty conduct' (Final Report of the Mallik Commission, 1990: 681-2).

On 31 December 1990, the Mallik Commission submitted the final report to the interim government. The then Prime Minister decided not to prosecute anyone because the interim government had less than four months left of its one-year term (which had started on 19 April 1990). Furthermore, the interim government had the mandate to hold elections and handover its work to the next democratically elected government. Given the 30 years of the *Panchayat* regime without democratic elections, the importance of holding successful elections was paramount and the priority of Prime Minister Bhattarai. Devendra Raj Panday, then Minister of Finance as representative of civil society, recalls,

[Prime Minister] K.P. Bhattarai wanted the next elected government to decide on the report. That's where Mathura, Nilambar and myself come in: we didn't let him do that. No, it's our commission! We have people outside, how do I show my face to the human rights community? The Prime Minister's response was to ask to do a sub-committee [to decide on the next steps] with the Home Minister, Nilambar and myself. But we never got to do the formal business because the Home Minister was part of the team [the Home Minister was one of the two Ministers nominated by the King] (interview Panday, 2014).

Finally, it was decided to send the Mallik Commission's report to the Attorney General for the implementation. According to Mr. Panday, '[e]ven though PM wanted to wait he couldn't do that because he had so much pressure from within [the interim government]' (interview Panday, 2014). The *Decision and Opinion of the Interim Government in relation to the Mallik Commission Report*, adopted by the Council of Ministers on 1 February 1991, contained three main decisions (Council of Ministers, 1991).<sup>40</sup> The first was to acknowledge the submission of the Mallik Commission's report

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<sup>40</sup> The date that appears in *the Decision and Opinion of the Interim Government in relation to the Mallik Commission Report*, as reproduced in the publication by INHURED International, is 2 July 1990 (2047/3/18), which cannot be correct, as the Decision itself refers to the Mallik report submitted on 31 December 1990. The correct date is 1 February 1991 (2047/10/18), as pointed out in the AG response letter. In this letter the AG refers to the 'Government's decision of 2047/10/18 (1 February 1991) regarding taking no action against the police. However, the wrong date, 2 July 1990, has been taken as the basis in various studies and reports leading to wrong conclusions. A report from the International Commission of Jurists, *Commissions of Inquiry in Nepal*, June 2012, refers to the cabinet resolution dated 2 July 1990 to justify that 'Even before the [Mallik] COI submitted its report, a cabinet resolution was passed in which the Government expressly prioritized upcoming elections over criminal accountability', (International Commission of

and to send it to the Attorney General for further actions. The second decision was to seize passports and impose a ban to leave the country on all members of the two governments and senior bureaucrats responsible for formulating and implementing policies to suppress the People's Movement. Personnel affected included Achyut Raj Regmi, one of the Ministers in the 1990 interim government. This measure was effectively implemented; however, those affected went to court later. Specifically, Members of Parliament Lokendra Bahadur Chand and Chanda Shah filed a writ petition at the Supreme Court that eventually decided that 'no deliberation was necessary on the writ petition, as the Interim Government's decision of 2047/10/18 [1 February 1991], regarding passport confiscation, had been negated by the cabinet's decision of 2048/9/25 [9 January 1992]' (INHURED International, 1995). As a result, their seized passports were returned and the ban to leave the country was lifted.

The third decision by the interim government concerning the Mallik Commission's report was to take no action against the Nepal Police on the basis that the police was involved in atrocities due to the faulty system and that the government needed them to hold impartial and peaceful elections.<sup>41</sup> Thus, instead of punishing perpetrators in the police force, the interim government offered an amnesty in exchange for their support to conduct the elections. In Dr. Shrestha's words, 'the interim cabinet itself, on the proposal of Home Minister, decided to exonerate the police on the grounds that elections could not be conducted, using police whose morality is down' (interview Mathura Prasad Shrestha, 2014). He recalls protesting at that meeting and expressing that only some police officers were responsible while the vast majority had not committed abuses; nonetheless, the decision not to take any action was made.

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Jurists, 2012: 7). This analysis shows a complete misunderstanding of the context and the implications of the Council of Ministers decision. Through this decision, the interim government was formally sending the Mallik report to the Attorney General for him to take legal action.

<sup>41</sup> Specifically, the *Decision and Opinion of the Interim Government in relation to the Mallik Commission Report* stated, 'Upon a study of the report submitted by the three-member Commission formed to investigate and report on the various incidents that occurred throughout the nation in the course of the Jana Andolan, it becomes apparent that the police was involved in some atrocity due to the faulty system. However, no action is to be taken against the police, on the basis of the Commission's report, taking into account the need, in the present context, to maintain the morale of the police, the stability of the police administration and police performance, as the police has to assume all the responsibility for internal security, and bearing in mind the fact that the police will have a special role to make the general election, to be conducted in the near future, impartial and peaceful' (INHURED International, 1995).

As for the first decision, by asking the Attorney General to take actions, the interim government was compelling him to prosecute members of the *Panchayat* government, senior officials of the central government and heads of the district administrative bodies. The former Minister of Law and Justice recalls, 'the [Attorney General] did not take action, (...) [he] procrastinated and only after elections and once the new government came, did the [Attorney General] submitted its report to the elected new government' (interview Acharya, 2015). In his opinion on the Mallik Commission's report, Attorney General Moti Kaji Sthapit alleged that it had failed to specify the legal basis to punish those responsible and had failed to provide enough evidence. He argued that to conduct prosecutions, the police and the public prosecutor should undertake a new investigation. Nevertheless, he considered the political decision by the interim government to provide amnesty to the police as hindering any further action (Office of the Attorney General, 1991). In Devendra Raj Panday's opinion, the Attorney General did not comply with the decision of the interim government. He expressed,

The wording of the decision of the cabinet that sent the report of the Mallik Commission did not give the [Attorney General] that flexibility; he was not there to decide whether to implement it or not. He was asked to implement it; it means to go through it and prosecute, isn't it? But [he] took it on himself to decide that there was no evidence of any kind to prosecute anybody on that basis' (interview Panday, 2014).

The Minister of Law and Justice shared the same opinion: 'Instead [Attorney General] should have filed cases, but [he] wrote that evidence was not enough to file the case' (interview Acharya, 2015). This was the official justification why the report's recommendation to prosecute was not implemented. As Achyut Kharel, then Deputy Inspector General of the Nepal Police who was named in the Mallik Commission's report reflected, '[t]he attorney general, who is the legal adviser to the government said with this report we can't prosecute' (interview Kharel, 2014). Consequently, the interim government with appointed representatives from civil society was unable to prosecute those responsible for the killing of civilians during a popular movement that had led to its establishment. Lack of prosecutions entails non-fulfillment of EC-12, and therefore no accountability in its enforcement dimension. Moving forward the process rested on the

pressure civil society was capable to exert. I assess the role of civil society in the following section on enforcement, as a result of vertical accountability relationships.

Another measure concerning individual responsibility that demonstrates enforcement is whether or not *perpetrators have been removed from public office* (EC-13). Those named in the Mallik Commission's report were not removed from their office. Instead, some members of security forces were promoted years later. Among the Nepal Police, the most well-known perpetrator was Achyut Kharel who was the Deputy Inspector General in Kathmandu at the time of the *Jana Andolan*. According to the report, he issued the order that led to the killing of demonstrators in Kirtipur (Final Report of the Mallik Commission, 1990: 292). As he himself expressed, 'minimum power was used; I was upgraded to Assistant Inspector General of Police and to Inspector General of Police' (interview Kharel, 2014). Inspector General Kharel was at the post when the then government launched 'Operation Kilo Sierra II' to respond to the Maoist insurgency in the districts most affected by the conflict from May 1998 to May 1999. Operation Kilo Sierra II 'reportedly resulted in approximately 500 deaths at the hands of the police and the serious human rights violations allegedly committed by the police during the operation further served to increase popular support for the [Community Party of Nepal] (Maoist) movement' (OHCHR, 2012: 40). In fact, Inspector General Kharel is not the only case where a person named as a perpetrator later received promotions. Sahabir Thapa, then Superintendent of Police, was later promoted to Inspector General of Police in the Armed Police Force, a paramilitary force created to deal with the Maoist rebels. Madhav Bahadur Thapa, Inspector in Lalitpur at the time of the People's Movement, was also promoted to Special Superintendent of Police in the Armed Police Force. Rajendra Bahadur Singh, then Deputy Superintendent of Police in Rupandehi (western region), was promoted to Assistant Inspector General of Police. And Surendra Pal, also Deputy Superintendent of Police in Sunsari (central region), was promoted to head the Kathmandu Valley Traffic Police Office (Shiwakoti 'Chintan', 2006). Some of Chief District Officers and Zonal Officers named in the Mallik Commission's report were also promoted.

As for members of the cabinet responsible for formulating and implementing policies to suppress the People's Movement, many of them joined a new political party, the Rashtriya Prajatantra Party (RPP). While they won a very few seats in the 1991 May elections (4 seats out of 205), they obtained 20 seats in the December 1994 elections and became the third political force.<sup>42</sup> Some of the core cabinet members during the suppression of the People's Movement became Ministers after the royal coup on 1 February 2005. Nirajan Thapa, Minister of Home Affairs during the 1990 People's Movement, became the Minister for Justice, Law and Parliamentary Affairs; Ramesh Nath Pandey, former Minister for Communication and Industry, became the Minister of Foreign Affairs; Kamal Thapa, former Minister of State, Forest and Land conservation became the Minister of Home Affairs; and Badri Prasad Mandal, former Minister for Law and Justice became Minister for Forest in the cabinet created after the February 2005 coup (Shiwakoti 'Chintan', 2006). In addition to the naming by the Mallik Commission report, the four of them were later also found responsible by the Rayamajhi Commission appointed to investigate the violent response towards protesters during the 2006 People's Movement, second *Jana Andolan*, which resulted in 22 deaths and more than 5,000 injured (International Commission of Jurists, 2012: 8, United We Blog, 2006). Consequently, as perpetrators were not removed from public office EC-13 was not fulfilled.

While evaluative criteria 12 and 13 assess individual responsibility, criterion 14 assesses enforcement considering whether or not *institutional or legal reforms to prevent future violations have been adopted* (EC-14). The Mallik Commission did not recommend a reform of legislation or institutions to avoid reoccurrence. In fact, the bureaucracy and the security forces remained the same before and after the People's Movement, hindering the implementation of the Mallik Commission's report. The same bureaucrats and administrators the report demanded to be punished were in charge of its implementation. A former senior bureaucrat expressed,

The same Secretaries of Home Affairs and of Defense were in charge of charting out a map for the future, and also [had] the obligation to look into the past deeds;

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<sup>42</sup> While in the 1991 elections, RPP contested as two different parties, RPP-Thapa and RPP-Chand, in 1994 they both contested as RPP.

so, the implementing mechanism hovered around the bureaucracy which was a hangover of the past (interview Thapa, 2015).

In 1992, one year after his appointment as the Prime Minister of a NC government, G.P. Koirala amended the Civil Service Act to retire public employees after completing 30 years of service. Earlier, the retirement age was 60. According to the amendment, anyone who had been employed for a period of 30 years had to retire on the day when the King sealed the law. Thousands of civil servants retired on the day. Some of the civil servants filed a lawsuit and were later reinstated. The Civil Service Act was again amended several years later to abolish the 30 year retirement rule (interview Mallik, 2014). While some consider this amendment in 1992 as a way to remove civil servants supporting the old regime, others argue that it failed to bring any substantive change in the state bureaucracy. As Bhekh Bahadur Thapa, former senior bureaucrat, recalls,

[Prime Minister] G.P. Koirala retired some of the very senior people, but the people who took over were also of the same orientation. They came from the same schooling, same background. People who had joined the government 20 years ago. So, in overall, the orientation remained unchanged, the style of work, the regulations governing the responsibility of the civil service, accountability and all that (interview Thapa, 2015).

As for the police and security forces, they still kept their old loyalties. As Mr. Thapa recalls,

The political parties never felt empowered enough because the orientation of the security mechanism was still the same. Before the [1991] elections, the generals marched to the [Prime Minister's] office and wanted certain concessions, certain guarantees. So in a sense, the transition didn't allow anyone to prevail (interview Thapa, 2015).

In the next section I examine whether civil society pressure and mobilization led to implementation of the recommendations in the Mallik Commission's report.

#### *Enforcement as a result of vertical accountability relationships*

In the previous section, I have analyzed enforcement as a result of horizontal accountability relationships between the governing regime and the state agencies following the Mallik Commission recommendations. In this section, I examine enforcement as a result of vertical accountability relationships between civil society and



the governing regime. I explore whether or not civil society mobilized to implement the recommendations and whether or not this mobilization led to the implementation of the Mallik Commission recommendations.

The vertical accountability relationships between civil society and the governing regime revolved around two main objectives; the official publication of the Mallik Commission's report (EC-5) and the prosecution of those responsible (EC-12). Although the publication of the report was not a recommendation in the final report, I examine this in this section, as pressure to officially publish the report was a demand from civil society to the governing regime. Here, I assess the short medium and long-term position of civil society.

#### Short-term (one year)

As we have seen, the interim government did not officially publish the Mallik Commission's report. It was leaked to the media and the newspapers published the main findings. The Attorney General did not pursue prosecution of those responsible either, even after the governing regime directed him to do so. Patma Ratna Thuladar, civil society activist, recalls strong voices from civil society asking for the report to be made public and perpetrators to be punished (interview Thuladar, 2015). Nevertheless, the situation had changed and the pressure from civil society was not so strong anymore, partly because they were directing the pressure towards their government. Mr. Thuladar reflects on this: 'The problem was very serious for civil society and human rights groups because the government was run by their own leaders' (interview Thuladar, 2015). R.K Mainali points specifically at those leaders who were in the interim government representing the civil society: 'some civil society activists protested, they demanded the publication of the Mallik report, but they did not organize mass protest against it. [Dr. Mathura Shrestha] and [Devendra Raj Panday] were in the Cabinet.' (interview Mainali, 2015). Not only these two civil society representatives, the political leaders from the NC and the ULF were also the people's leaders. According to Devendra Raj Panday, this weakened the civil society as 'it became difficult [in 1990] for lawyers,

professors, university teachers, school teachers to put pressure on the government, which was NC and ULF, because it is their leaders' (interview Panday, 2014).

The first democratic elections since 1959, held on 12 May 1991, further softened civil society's stand on the Mallik Commission's report. First, the elections weakened civil society, polarized by competing political parties. Nilamber Acharya, former Minister of Law and Justice, recounts that after the 1991 elections, civil society remained divided according to party lines (interview Acharya, 2015). Second, representatives from civil society and human rights organizations formally became political party members. A doctor, activist during the People's Movement, reflects on the reasons why civil society pressure vanished: 'the human rights movement became orphan; after multiparty democracy, people could engage with political parties, so civil society people were recruited as members' (interview Boghendra Sharma, 2015).

On 8 July 1991, G.P. Koirala, the Prime Minister of the first elected NC government, presented the Mallik Commission's report to the Speaker of the House of Representatives along with the decision of the interim government and the advice of the Attorney General 'pointing out that the report was of public importance' (*The Independent*, 1991). By the act of presenting it to the Parliament, the report was placed at the Parliamentary Library (INHURED International, 1995: 22). Thus, the report was formally released to the public, although it was placed at the library of the parliament with restricted access.<sup>43</sup> Moreover, beyond a debilitated civil society, the focus of the government had changed completely. Minister Acharya stresses the need of the first elected government to implement the new constitution and to deal with other priorities. In this new relationship, between the elected-government and a palace without official power, the former was not ready to implement the Mallik Commission's report (interview Acharya, 2015). As Mr. Thapa also reflects on the situation of the elected new government,

When elections took place and a new government came in, the degree of mutual suspicion lessened somewhat and nobody was powerful enough to look at the law

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<sup>43</sup> The library at the parliament is only accessible to the members of parliament, secretariat officials, officials from ministries and researchers that look for references in different fields of studies ere any outsider needs permission to access (RANA, J. 1997. Parliamentary Library and Information Services of Nepal. In: BRIAN, R. (ed.) *62nd IFLA Conference*. Beijing, China: International Federation of Library Associations.

of the land and the commitment [to implement the Mallik Commission's report] made during the period very seriously; and I think attentions moved more towards re-structuring governance through elections and other things (interview Thapa, 2015).

#### Medium term (five years)

In August 1992, one and a half years after the submission of the Mallik Commission's report, the issue of prosecuting those named surfaced again. On 21 August 1992, with mounting pressure from the opposition, Prime Minister G.P. Koirala asserted in the Parliament that it was impossible to initiate actions against anyone implicated in the Mallik report without concrete evidence. The opinion of then Attorney General Moti Kaji Sthapit was again used as the rationale for this argument. The statement caused the Commission's Chairperson Janardan Mallik to publicly challenge the Prime Minister and the Attorney General. Chairperson Mallik was quoted as saying, '[t]he [Prime Minister] himself has not perhaps read the report' (*The Independent*, 1992) and '[t]he [A]ttorney [G]eneral is not the only person who knows about laws, there are people who know even better' (*The Commoner*, 1992). Chairperson Mallik was also quoted by the media stating, '[t]he report does not lack evidence but the government is not implementing it to protect its own position' (*The Independent*, 1992). Vidyadhar Mallik, son of the Chairperson, recalls his father being publicly criticized by the Prime Minister, who argued, 'The job of a judge is to do things and keep quiet, shouldn't give interviews' (interview Mallik, 2014).

Devendra Raj Pandey and Nilambar Acharya, former Ministers of the interim government, also criticized the Prime Minister's statement against prosecution, alleging that 'by refusing to take action against the *Panchayat* chiefs who suppressed the historic Jana Andolan through terror and killings, [the Prime Minister's statement] reflects a lack of intent to consolidate democracy' (*The Independent*, 1992). They further criticized the government for 'promoting and rewarding several individuals associated with the previous regime, including those who have been implicated in the Mallik Commission report' and charged against the leadership of the opposition, the Communist Party of Nepal (United Marxist-Leninist) party, for 'not being firm in its commitment to see that the Mallik Commission report is fully implemented' (*The Independent*, 1992).

The pressure from the public was enough to force the government to respond. As reported at the time, 'due to escalating public pressure to implement the report the Prime Minister decided to constitute a "study group" to take up the matter' (*The Independent*, 1992). Radheshyam Adhikari, lawyer and then Member of Parliament for the NC, recalls a meeting where then Prime Minister G.P. Koirala asked what could be done. Mr. Adhikari recalls advising the Prime Minister that,

The interim government had already decided to conduct elections and that as a result, nobody from security forces would be prosecuted. Now all these wounds should not be opened; otherwise it will be difficult to move forward (interview Adhikari, 2015).

Mr. Adhikari recalls the Prime Minister saying at the end of that meeting, '[the Mallik Commission report] is a document of that time. It will be preserved for the history, but now nobody will be prosecuted' (interview Adhikari, 2015). The decision was strongly protested. Patma Ratna Thuladar, then Member of Parliament, recalls, 'I myself was in the parliament and some of us shouted very loudly that the commission report should be accepted by the government formally and then [the government] should take strong action against all those, one by one' (interview Thuladar, 2015).

On 12 July 1994, King Birendra dissolved the popularly elected House of Representatives on the recommendation of Prime Minister G.P. Koirala. During its time in office between June 1991 and July 1994, the NC government did not publish or implemented the recommendations in the Mallik Commission's report. Nonetheless, the report was still a pending issue in the agenda of human rights organizations. Sushil Pyakhurel, human rights activist, recalls, 'because we had access to UML [the Communist Party of Nepal (United Marxist Leninist)] we lobbied them to put in their manifesto that if you will be in power, you will do two things: set up a human rights commission and publish Mallik report; and they agreed' (interview Sushil Pyakhurel, 2014). Thus, the 1994 Communist Party of Nepal (United Marxist Leninist) election manifesto stated on page 30,

The violators of human rights shall be prosecuted according to the law; the reports of the Mallik Commission and Committee to Investigate the Disappeared Persons after 2017 BS (1960) shall be made public and they shall be implemented (INHURED International, 1995: 26).

The Communist Party of Nepal (United Marxist Leninist) won the elections in November 1994, securing 88 of the 205 seats, and formed a minority government. However, the new government did not implement the Mallik Commission report. It did not publish it either. It was INHURED International, human rights organization, that photocopied and published the report, making it accessible to the general public in 1994 (INHURED International, 1995: 24).<sup>44</sup> Interviewees who represent civil society and the human rights movement see the fact that the Mallik Commission report was neither published nor implemented as their failure. They agree that the way civil society was organized around political parties weakened their demand for publication and implementation of the report.

#### Long term (10 years)

On 1 January 1999, a group of law students filed a petition to the Supreme Court asking for the publication of the Mallik Commission report and the implementation of its recommendations. Gopal Shiwakoti 'Chintan', who had long advocated for the publication and implementation of the report since its submission, was their professor. 'He provoked us: *It is time for you, why don't you do something remarkable that the community feels?* We met with human rights defenders, discussed and got similar response: the problem is lack of implementation of human rights' (interview Mainali, 2014). On 21 May 1999, the Supreme Court decided that it could not issue a directive order to publish the report and to implement its recommendations on the ground that the power to make policy decisions belongs to the government (Shiwakoti 'Chintan', 2006).<sup>45</sup>

Various interviewees linked the failure to implement the Mallik Commission report to the increasing support for the Maoist movement. Vidyadhar Mallik notes that 'one of the causes the Maoist raised was the impunity itself' (interview Mallik, 2014). On

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<sup>44</sup> Since July 1991, after the government presented the Mallik report to the speaker of the House of Representatives, it had been stored at the Parliamentary Secretariat, where the Parliamentary Library is located. According to its own publication INHURED International made copies of the report by following the due process through a letter of request. The date of the INHURED International publication of the Mallik Report is Nepali year 2051, which corresponds to 1994.

<sup>45</sup> Order by single bench of SC Justice Keshav Prasad Upadhyaya.

4 February 1996, Baburam Bhattarai, submitted a list of 40 demands to the Prime Minister. Demand number 17 referred to the need to declare as martyrs those who died during the *Jana Andolan*, provide proper compensation to those who were wounded and disabled, and take actions against the killers (Mahendra Lawoti and Pahari, 2010: Annex A). On 13 February, the CPN (Maoist) launched the 'People's War'. Mr. Thapa also stresses that,

[The Maoist] picked up the thread from where the democrats left it. If the Mallik Commission report was implemented in full, my reading is that the Maoist movement would not have taken off as speedily as it did (interview Thapa, 2015).

Charan Prasai, human rights defender, also linked the failure to prosecute as recommended in the Mallik Commission report to the widespread human rights violations during the Maoist armed conflict:

If something had been done at the time [of the Mallik Commission], even one or two people who were really responsible would have been prosecuted, at least if some of the politicians would have been prosecuted, those who were on top, things would have changed. The armed conflict would have been different, all those civilians would not have been disappeared, killed, or even the security forces [would not have] disappeared so many people. That is the main reason. The cause that was not addressed at the right time has had a negative impact and, if it still continues, things would be worst because in the name of politics everything is justified (interview Prasai, 2015).

Civil society limited pressure was not enough for the government to publish the Mallik report (EC-5) or to prosecute alleged perpetrators named in the report (EC-12). The lack of enforcement entails there was no vertical accountability relationship between civil society and the governing regime as a result of the recommendations compiled in the Mallik Commission report.

#### 4.3.4 Explaining lack of enforcement as a result of the recommendations

The previous evaluation shows the Mallik Commission produced answerability as a result of horizontal accountability relationships with the police and the *Panchayat* government. However, the recommendations compiled in the final report only led to very limited enforcement. The previous section also shows a governing regime being

answerable to the demands from civil society, as a result of vertical accountability relationships before the commission was established. Nevertheless, only limited pressure was applied to the governing regime even when it failed to implement the Commission's recommendations. In this section, I attempt to explain why horizontal and vertical accountability relationships after the submission of the Mallik Commission's report did not lead to enforcement. In other words, I try to understand why the recommendations were not implemented.

To explain the lack of enforcement as a result of horizontal accountability relationships, I will examine the responses from the governing regime and state agencies to the Mallik Commissions' recommendation to prosecute perpetrators. The overall reason that prevented enforcement was the compromise between political parties and the King. The interactions between different actors after the report's submission were all subordinated to this compromise. What challenged this premise was the pressure from the 'civil society' Ministers on the interim government to implement the report. Through the 1 February 1991 decision, the interim government directed the Attorney General to take actions. At this time, the interim government had less than four months left in office. The Attorney General replied only five months later to the newly formed NC government after the May 1991 elections. This course of action followed what interim Prime Minister Bhattarai had already decided that it was for the next elected government, and not for his interim government, to decide on the fate of the report (interview Panday, 2014). Through his 7 July 1991 opinion on the Mallik Commission report, the Attorney General announced that he would not initiate any action against those named as responsible. However, he had to justify why he was resisting implementing the decision by the Council of Ministers to prosecute. Specifically, the Attorney General argued that the report had failed to specify the legal basis to punish those responsible and emphasized the need for a joint investigation by the Public Prosecutor and the police. He also treated the political decision by the interim government to grant amnesty to the police as hindering any further action (Office of the Attorney General, 1991). However, the interim government had decided to take actions against members of the government, top bureaucrats and state administrators. The Attorney General did not justify why he was *de facto* extending the amnesty granted to

the police to these other state officials. As former Minister Panday observed, it was not for the Attorney General to decide whether or not to implement the Mallik Commission's recommendation to prosecute; he was asked to prosecute as per the recommendation, but instead decided that there was no evidence to prosecute (interview Panday, 2014).

The Attorney General was only a part of a system to implement the compromise reached between political parties and the King. As Vidyadhar Mallik notes, 'the 1990 movement ended in a compromise and the compromise included the King and his people' (interview Mallik, 2014). Prosecuting members of the *Panchayat* government and top officials, as directed by the interim government's Council of Ministers decision, meant also holding the King responsible. As Daman Nath Dhungana, spokesperson of the NC during the People's Movement, expressed,

Even [Attorney General] could not go too far; implementing the report was bringing the agencies of the state of the time and institutions and heads of institutions responsible for atrocities. That indirectly was holding the King also. There was an expressed concern then, to whom to call, to whom to [issue] warrant, [the] King was the ultimately responsible (interview Dhungana, 2015).

The second factor that prevented enforcement was the fact that the implementing mechanism, state apparatus, the bureaucracy and the security forces, remained the same throughout the transition to the new regime. In other words, the same officials and administrators whom the Mallik Commission report urged to punish were also in charge of its implementation. As former Minister of Law and Justice expressed,

With the passing of the time there were certain changes in the attitude of the government in the broader sense: bureaucracy was involved and it was not very much cooperative with the [Mallik] Commission (interview Acharya, 2015).

As for the lack of enforcement as a result of vertical accountability relationships after the recommendations, the main reason was the limited pressure from civil society on the government to implement the recommendations. Civil society pressure, which was very strong before the Mallik Commission was established, became diluted with the governing regime. The main reason for such dilution was the close relation between civil society and political parties in Nepal. Civil society activists who had been protesting on the streets and calling to punish those who had killed demonstrators also had their political affiliation. Some of them were political party members. After the ban



on political parties was lifted, these activists became officially political party members who had to follow the party discipline. Such party discipline was dependent on the compromise which political leaders had reached with the King, excluding any prospect of prosecuting figures from the previous regime. As former Minister Panday explained, talking hypothetically,

I [am] a human rights person until April 18, 1990; I [am] associated with Nepali Congress, but I [would] not say that openly. After 1990, I [could] say it openly: I am a party member. Under the party, I have to be under the discipline. When the party people are running human rights movement, they can't put as much pressure [on the government]. This constrain is very important (interview Panday, 2014).

A second reason for the softening of civil society mobilization against the government is that it is now their government. The 1990 interim government was the result of civil society and ordinary people's mobilization through the People's Movement. People would not organize mass protests against it. Further, this government had included not only the political party leaders, but also Mathura and Devendra, civic leaders who strongly criticized the political parties for their 8 April 1990 agreement with the King to end the People's Movement in exchange for lifting the ban on political parties without abolishing the *Panchayat* institutions and forming a new government. Subsequently, the following 1991 NC, and 1994 Communist Party of Nepal (United Marxist Leninist) governments were the result of the citizens' choice. It was the people who had voted for these parties to lead the government. This led to a limited mobilization against the government.

#### **4.4 Assessing the impact on accountability: the Committee on Disappearances**

In this section, I present evidence in support of the contribution of the Committee on Disappearances to promoting accountability. As with the assessment of the Mallik Commission, I examine whether or not the evidence collected through interviews and documentary sources fulfills the evaluative criteria. As compared to the Mallik Commission, the overall contribution of the Committee on Disappearances to promote accountability was much more limited. This limited impact was because the Committee on Disappearances' final report was never made public. Consequently, the

answerability produced as a result of the fact-finding was never transferred to the public domain.

#### 4.4.1 Answerability as a result of vertical accountability relationships before the establishment of a TC (EC 1-2)

*If pressure from civil society leads the governing regime to establish a TC (EC-1), the state is being made answerable to civil society demands. Evidence collected suggests that the pressure from civil society led the then government to create the Committee on Disappearances. As opposed to the Mallik Commission, the Committee on Disappearances did not have that broad social support. According to a written interview by INSEC of Basudev Dhungana, former Committee member, 'the committee was not formed so easily. It was formed after pressure was put by the various human rights organizations and other sectors' (interview Dhungana in INSEC, 1999: 11). Specifically, national human rights organizations HURON and FOPHUR, with their strong links to mainstream political parties, were crucial to establish this committee. Sushil Pyakhurel, with FOPHUR, recalls at the time,*

We talked to Krishna Prasadh Bhattarai [then Prime Minister from the NC], Radha Krishna Mainali, Nilambar Acharya and Sahana Pradhan [all three from the ULF]. We got support from Kapil Shrestha [from HURON] and others. We lobbied to the government and it formed the commission (interview Sushil Pyakhurel, 2014).

Consequently, as opposed to the Mallik Commission, pressure to establish this Committee came from specific human rights organizations with links to political parties, rather than from a broad popular support. Nonetheless, beyond pressure from human rights organizations, there was also some public pressure to find whereabouts of seven people who had disappeared in relation to the 1985 bombings. Regarding these seven individuals, Dr. S.K. Pahari, another former Committee member, explained,

Personally I feel, there were few individual for whom there was a great demand from the people side to know what had happened to them. Government had not declared if they were dead or alive (...). Only few persons, seven, eight people, Dr. Jha, Shaket Mishra, they were main figures and government had to answer what has happened to them (interview Pahari, 2014).

Among the seven disappeared, the information about the present condition and immediate release of Dr. Laxmi Narayan Jha was among the demands of the Nepal Medical Association to the *Panchayat* government (Adams, 1998: 118-9). Not only the domestic public pressure, but also international human rights organizations were following closely the fate of these seven disappeared. Amnesty International published the report “Nepal: A pattern of Human Rights Violations” in 1987 with detailed information of its investigation on their disappearances (Amnesty International, 1992: 13).

A second criterion for assessing the governing regime answerability is whether or not the *pressure from civil society leads the governing regime to make changes to the mandate, powers, and appointment of commissioners or any other relevant aspect of the commission* (EC-2). There was no pressure from civil society to make any changes which means EC-2 is not fulfilled. The evidence collected suggests that human rights organizations were satisfied with the formation of the committee from the beginning. It would appear changes did not seem necessary as the government set up the committee in response to their demands.

#### 4.4.2 Answerability as a result of horizontal accountability relationships during the work of a TC (EC 3-9)

State answerability is produced when TCs disclose evidence to establish violations by the state. To this end, *victims, witnesses, and/or civil society organizations need to access and provide information to the commission* (EC-3). The evidence collected suggests that the Committee on Disappearances reached out to victims and the environment was conducive for victims and witnesses to access and share information with it.

The Committee on Disappearances made public announcements through radio and newspapers to reach out to the people who might be interested in providing information about the disappeared persons. The first deadline to share such information was 6 December 1990, barely a month after the commission had started its work. It was extended until 21 December 1990. Committee members also travelled to various districts

where new cases of disappearances were uncovered. In some places, local residents apparently had not received any information regarding the investigation by the Committee. For this reason, on 20 February 1991, the Committee announced 14 March 1991 as a new deadline through radio (Final Report of the Committee on Disappearances, 1991: 2-3). Hiranya Lal Shrestha remembers that Committee members ‘traveled to various parts outside the valley. They contacted various persons, families of disappeared people. They contacted different party activists’ (interview Hiranya Lal Shrestha, 2015). One of the Committee members referred to visits to the districts to collect data and conduct fact-finding (interview Pahari, 2014). In the case of the disappearances in relation to the 1985 bombings, Committee members were able to interview individuals who had been detained with those who disappeared. The environment at the time appears conducive for victims and witnesses to come forward. There is no evidence of obstacles from the government or intimidation by the local authorities.

For state agencies to be rendered answerable through the interactions with a TC, *the commission has to have access to state/non-state actors and these actors have to be answerable to the commission* (EC-4). This criterion was partially met as the Committee managed to collect information from key state officials, although it did not have access to the palace or the army.

The Committee on Disappearances was not established under the 1969 COI Act. Consequently, it did not have the power to summon and enforce the attendance of anyone from the state apparatus. Instead, the Ministry of Home Affairs sent a circular to the concerned authorities, asking them to cooperate with the Committee. Nevertheless, even if anybody refused to provide all relevant information, the Committee did not have the power to put additional pressure on or take any action against the individual (interview Dhungana in INSEC, 1999: 12). Still, regarding the seven disappearances in relation to the 1985 bombings, the Committee collected statements and written responses from police officers and received documentation relating to detention facilities and records of the detainees and other relevant documents. The committee also had access to police officers who had been in charge of detention centers where people

had disappeared. Therefore, despite lacking subpoena and search and seizure powers, the Committee managed to question key officers in the police and the bureaucracy and collected extensive documentation.

Hiranya Lal Shrestha notes the role of Basudev Dhungana, one of committee members who had been a Minister during the *Panchayat* regime, as one factor for state officials being ready to attend the requirements by the Committee. He stated,

Dhungana was former Minister and he had very good rapport and because of his legal background practicing law, he was able to contact both sides. Even [Chief District Officers], Police Chiefs could communicate with him easily. He [could] extract more information from [the] administration [than those] that [have] pure opposition personalities. That's the benefit [of having a former Minister] (interview Hiranya Lal Shrestha, 2015).

Dr. Pahari, former Committee member, provides another example of access to a former Inspector General of Police who had been his patient, when he was the Palace doctor during *Panchayat* regime. He recalls,

When we gave reasons, why we wanted to meet (...), they might hesitate to come out with 100 per cent truth. This was the reason why D.B. Lama [former Inspector General of Police in 1985 who at the time of the Committee on Disappearances' inquiry was imprisoned] called me [for the] second time. He thought he had not vomited out sincerely in front of the group, so he sent a message he will come out with more truth if he could see me one-to one (interview Pahari, 2014).

Nevertheless, as in the case of the Mallik Commission, the Committee on Disappearance had access neither to the palace nor the Nepal Army which was one of the main actors implicated in the disappearances. Sushil Pyakhurel who supported the Committee's work, remembers, 'everybody would say: *yes it happened but we got [an] order from above* What is above? Above means the King, but we didn't have access [to him]' (interview Sushil Pyakhurel, 2014).

In a sense, EC-4 was partially met as the Committee produced answerability to an extent as a result of their interactions with the Nepal Police, Chief District Office and prison officers in the districts where disappearances occurred. Nevertheless, the lack of access to the palace and the Nepal Army hindered its investigation and limited the answerability.

*If the final report is made public* (EC-5), state answerability is transferred to the public domain. The Committee on Disappearances did not hold public hearings nor it published interim reports. Neither the government published the final report. Those interviewed in relation to the Committee appear to agree that the media was not interested in the report of the Committee on Disappearances as much as the Mallik Commission's report, submitted four months earlier. One of the reasons for this lack of interest was the fact that Nepal was already in election mood at the time of the submission of the report on 21 April 1991. Political parties had already started campaigning for the 12 May elections, the first democratic elections since 1959. As opposed to the submission of the report by the Mallik Commission, the report of the Committee on Disappearances barely appeared in the media too pre-occupied with the elections. There is no information on the release of the Committee's report in any of the English weeklies, such as *The Independent*, *The Telegraph* or the *Spotlight Fortnightly*, at the time. After the elections, G.P. Koirala of the NC formed a new government on 30 May 1991. This government paid no attention to the report of the Committee of Disappearances. Even relatives of those disappeared did not know about the publication of the final report, indicating the complete lack of publicity of its findings and communication with the victims' families (interview Shrawan Sharma, 2015).<sup>46</sup>

While there is agreement that the disappearances report was never published, there is some confusion whether or not it became available to the public at all. Hiranya Lal Shrestha, who had closely followed the work of the Committee, recalls, 'the disappearances report was available in the Parliamentary Library. It was available to the concerned circle and to those interested. It was not a restricted copy' (interview Hiranya Lal Shrestha, 2015). On the other hand, Radha Krishna Mainali, acting chairperson of the ULF during the *Jana Andolan*, stated that the Disappearances Committee report became controversial and was not available in the Parliamentary Library. According to Mainali, 'the government hid the report and put it aside' (interview Mainali, 2015). As a result, few people in Nepal have had access to this report. In its 1992 report, Amnesty International notes that 'the government has made no public statement about how the

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<sup>46</sup> Shrawan Sharma, brother of Maheshwar Chaulagai, was not aware about the existence of the final report even though he had reported the disappearance of his brother to the committee, his name appears in the final report and the committee looked into the case of his brother.

report will be acted on; nor has the report been officially published' (Amnesty International, 1992: 25). In fact, the report of the Committee on Disappearances was not a restricted copy, as I was able to find it. As in the case of Mallik Commission's report, the government did not officially publish the disappearances report. It might have been placed at the Parliamentary Library, like the Mallik report. However, the fact that it was not leaked might have limited its media coverage. Unlike the Mallik Commission's report, no organization ever published the report. As a result, the state answerability was never transferred to the public domain, and thus EC-5 was clearly not met.

Evaluative criteria 6 assess the extent to which *the report discloses new facts and evidence surrounding violations committed* (EC-6). In the report, the Committee on Disappearances disclosed new facts and evidence surrounding the enforced disappearances of seven detainees following the 1985 bombing. The lack of publicity of the report means this state answerability was never transferred to the public domain. Nonetheless, I refer here to some of the facts and evidence disclosed to assess the work of the committee.

The report of the Committee on Disappearances presents evidence obtained from fellow detainees that the seven disappeared had been severely tortured in detention. The report collected documentary evidence of the arrest of the seven. It also traced and documented how they were moved from one detention center to another until the last place where they were kept without evidence of release. Further, the Committee found that the police had forged the signature of one of the detainees on a document showing his release as well as the signature of a police officer who allegedly acted as a witness to the release. According to the Secretary of the Committee secretary, in the five cases, there was enough evidence to prosecute those responsible (interview Bhattarai, 2014). S.K. Pahari, former Committee member, recalls,

When we came back [after conducting investigation in the districts], we interviewed responsible persons from the police. (...) We were trying to find out [was] real facts. It was very difficult to take the truth out because maximum what you can do is trace. [The seven] were taken from and brought and from there no one knows what happened. We could trace them, but not to get the final answer (interview Pahari, 2014).

The report did speculate with their fate by concluding 'that a decision regarding these persons must have been made at a high-profile policymaking and implementation level

and that these persons must have experienced the same results' (Final Report of the Committee on Disappearances, 1991: 129). Nevertheless, the report failed to provide evidence to prove those disappeared had been killed. Neither did the report *identify the place where they had been buried* (EC-7).

With regards to institutional responsibility, if *the report acknowledges that state agencies and/or non-state actors committed violations of human rights* (EC-8), it is producing more answerability. The report of the Committee of the Disappearances acknowledged that the state agencies had committed violations. The report acknowledged the general practice of security forces to forcefully disappear citizens who were politically active. The report states,

During the *Panchayat* era, there was a custom for the government's agents to secretly kill people who were involved in politics that was opposed to the state power; to arrest and disappeared them; and to destroy proof and evidence (Final Report of the Committee on Disappearances, 1991: preface).

The report also disclosed that the seven disappeared in relation to the 1985 bombings had been severely tortured while in police custody. Reflecting on the content of the report, Mr. Thapa, then senior official, noted that the report limited the responsibility only to the police officers and administrators. He expressed,

After all if the police does something, there must be the Home Ministry behind it, right? Or if the army does it, there must be, the Defense Ministry behind it. That perusal never got verified. One was trying to protect himself and accuse the other (interview Thapa, 2015).

With regards to the seven disappearances in relation to the 1985 bombings, the report of the Committee on Disappearances *attributed individual responsibility through naming perpetrators* (EC-9). The report named police officers under whose command those who had been detained disappeared as well as administrators at the zonal and district levels. But as opposed to Mallik, the Committee on Disappearances did not name political figures in the government. Due to lack of publicity of the report, the fact that perpetrators were named does not entail answerability was produced.



#### 4.4.3 Enforcement as a result of horizontal and vertical accountability relationships after the recommendations (EC 10-14)

The fact that the report of the Committee of Disappearances did not contain any recommendation and that it was never publicized meant there could be no enforcement as a result of horizontal accountability relationships. Neither *reparation programs were implemented* (EC-10), nor *prosecutions* were carried out (EC-12), based on the Committee's report. As a former Committee member recalls, the government did not send the report to the Attorney General for further actions (interview Dhungana in INSEC, 1999: 15). Neither *perpetrators were removed from public office* (EC-13) nor *institutional or legal reforms to prevent future violations were adopted* (EC-14).

Neither there was any vertical accountability relationship that produced enforcement. There was no pressure by civil society to compel the governing regime to publish the report or to take action against those named in the report. Sushil Pyakhurel, who supported the Committee, gives two reasons for not putting pressure after the report was submitted: '[first] the priority was to cultivate a weak democracy; and, second, civil society was weak at the time' (interview Sushil Pyakhurel, 2014).

## 4.5 Conclusions

The data collected suggests the prospect of establishing the Mallik Commission generated vertical accountability relationships between civil society and the governing regime. These relationships produced state answerability as demonstrates the fact that pressure from civil society was decisive for the governing regime to establish the Anil Commission which was the precedent to the Mallik Commission (EC-1). Specifically the demand calling for an impartial investigation of the killing of protesters came from human rights organizations, the Nepal Medical Association and from writers and intellectuals before the King issued a royal proclamation creating such a mechanism. The pressure from civil society led to the dissolution of the Anil Commission, and the creation of a new commission, the Mallik Commission, with the mandates, powers and commissioners more acceptable by civil society (EC-2).

The Mallik Commission also generated horizontal accountability relationships as a result of their interactions with the police, government and state officials involved in suppressing the People's Movement. It did not have access to the military and the palace, which hindered the investigation and limited its findings. Nonetheless, the data collected suggests that the Committee generated state answerability to an extent (EC-4). This answerability became public mainly through the publicity that the content of the final report received. Although the interim government did not officially publish the report, the content was eventually reported by the media. Newspapers widely published about the Commission's findings and the names of those accused. This publicity of the findings generated public debate and dialogue. In this way, the answerability the Mallik report produced through its interactions with state agencies was transferred to the society, despite the report was never officially published (EC-5). The report established that the Nepal Police had used excessive force, resulting in the killing of protesters (EC-6). The Mallik Commission also acknowledged that state agencies had committed violations of human rights. The *Panchayat* government's responsibility for directing and implementing policies leading to the security forces' use of disproportionate force against unarmed civilians was also demonstrated (EC-8). The Mallik report named over 100 perpetrators from the government, local administrative offices, and the police force (EC-9).

While the Mallik Commission was successful in generating answerability during its first two stages, its impact appears to be more limited in the period after the submission of the report. I have examined two more accountability relationships as a result of recommendations compiled in the final report. First, a relationship of horizontal accountability between the governing regime and the state agencies towards which the recommendations are directed; and second, a relationship of vertical accountability between civil society and the governing regime.

With regards to the horizontal accountability relationships, of all the recommendations intended to repair victims, only monetary compensation was implemented and produced enforcement (EC-10). Recommendations to prosecute those responsible did not produce enforcement, as the Attorney General refused to initiate any prosecution. This was due to the compromise political parties had reached with the

King. Even after the interim government ordered the Attorney General to take action against the perpetrators, the Attorney General alleged the report lacked evidence and legal basis to prosecute those responsible. In fact, prosecuting members of the *Panchayat* government and top bureaucrats, as directed by the interim government's Council of Ministers decision, meant holding the King, along with other seniors officials, responsible. Moreover, the state agencies in charge of implementing the Mallik report were the same bureaucracy and administrators the Mallik report pretended to punish. Still, the report produced at least limited answerability as the Attorney General had to justify his refusal to follow the decision from the Council of Ministers to implement the recommendation to prosecute (EC-12). Nevertheless, there was no removal of those named in the Mallik report from office (EC-13). Contrarily, some members of security forces were in fact promoted years later. Neither was any further legal or institutional measure adopted to prevent future violations (EC-14).

While most of the recommendations were not implemented, civil society pressure remained limited, hence no enforcement created as the result of vertical accountability (EC-10 to 14). Hence, the level of the pressure which rendered the governing regime being answerable to the demands from civil society before the commission was established did not appear to have existed during the third stage, when the commission's recommendations were to be implemented. Key to understand this lack of pressure is the close relation between civil society and political parties, which subordinated the former to the latter's interests. With the legalization of the political parties civil society activists became formally political party members. As political party members, they had to follow the party discipline. Such discipline was dependent on the compromise political leaders had reached with the King, which excluded any prospect of prosecuting figures from the previous regime.

The first democratic elections celebrated in 1991, after more than 30 years, further softened civil society's stand on the Mallik Commission's report. The elections further weakened civil society that became polarized along political party lines. Civil society became part of the political system and, eventually, part of the new governing regime under multiparty democracy. Interviewees representing civil society and the human rights movement see the lack of publication and implementation of the report as

a failure of civil society. They agree that because civil society was organized around political parties, the government was able to avoid the implementation of the Mallik report.

Much more limited was the contribution of the Committee on Disappearances in promoting accountability relationships. The data collected suggests that the prospect of creating this Committee generated vertical accountability relationships between civil society and the interim government. This relationship generated state answerability as indicates the fact that pressure from civil society led the governing regime to create the Committee (EC-1). However, as opposed to the Mallik Commission, pressure to establish this Committee came from specific human rights organizations with links to political parties, rather than from a broad social support.

The Committee on Disappearances had access to victims and witnesses as demonstrated by the fact that Committee members could question key witnesses who had been detained along with the disappeared, among others (EC-3). The Committee produced answerability through interactions with state agencies, specifically the Nepal Police, district administration offices, and prison officers (EC-4). Nonetheless, as was the case of the Mallik Commission, the Committee lacked any access to the palace and the Nepal Army, two of the main actors allegedly behind the violations. This limited the reach of its investigation and findings. Most importantly, the report was never published and there was no significant public debate about it at the time of its submission. Consequently, the answerability produced as a result of the fact-finding conducted by the Committee was never properly transferred to the public domain (EC-5). The findings of the report, mainly in relation to the disappearance of seven detainees following the 1985 bombing (EC-6), the human rights violations state agencies committed (EC-8), or the attribution of individual responsibility through naming perpetrators (EC-9) had very limited implication as the content of the report never reached to the public domain to generate debate and dialogue.

The mandate of the Committee on Disappearances was to investigate cases of disappearances and to present an accurate report to the government. The Committee was not to make recommendations. Rather, the government was supposed to move the

investigation further forward and take appropriate measures. Nevertheless, the government never took any follow-up actions (EC-10 to 14). Had the findings been publicized, even without formal recommendations in the report itself, further actions could have been taken. Complete lack of publicity meant not even those police officers named in the report under whose custody the detainees disappeared were further questioned by other state agencies. It also meant no further pressure from civil society to publish the report or to follow up on its findings, and therefore, lack of vertical accountability relationship (EC-10 to 14). The complete absence of the pressure on the government was such that, the relatives of the seven disappeared in relation to the 1985 bombings have not been provided with an answer until today, more than 30 years later. The seven remain disappeared.

In short, the Committee on Disappearances hardly contributed to promoting accountability. And, although the Mallik Commission had a much a bigger impact in promoting accountability, it is the Committee on Disappearances that the literature treats as a TC.

## Chapter 5

### Truth commissions in Sri Lanka: the impact of the three Zonal Commissions of Inquiry

*'We had these changes since colonial rule: the Portuguese, the Dutch, and the British, each time fairly big changes. There had been rebellions in the country. People felt the changes. But those things are said in terms of the ruling kings or the royal families. It's not said in terms of the people. I think our commission tells you a story within the terms of the people. I think that is the difference'. Manouri Muttetuwegama, Chairperson, Commission of Inquiry into the involuntary removal or disappearance of persons in the Western, Southern and Sabaragamuwa Provinces (personal interview).*

#### Introduction

In this chapter, I present the second case study, the three *Zonal Commissions of inquiry into the involuntary removal or disappearance of persons* established by presidential warrants issued on 30 November 1994. These three Zonal Commissions represent the other example of TCs established in South Asia, almost five years after the Malik Commission and the Committee on Disappearances in Nepal.

The chapter starts exploring the political developments between the independence in 1948 and the People's Alliance's electoral victory in 1994 which led to the establishment of the three Zonal Commissions. Section two examines the three Commissions, including the context in which they were established, their mandate, findings, and recommendations made in their interim and final reports. The section also

presents an overview of the people interviewed. Finally, section three evaluates the contribution of the Zonal Commissions to promoting accountability based on the 14 criteria discussed in chapter two.

## **5.1 Context: Party politics and armed insurgencies in Sri Lanka**

This section discusses the political developments between the independence in 1948 and the People's Alliance (PA)'s electoral victory in 1994, after 17 years of the United National Party (UNP) government. The section examines how the Tamil 'issue', initially exploited by political parties to get electoral votes, became a protracted and unmanageable armed conflict after 1983. It also explores the two insurgencies launched by the Janatha Vimukthi Peramuna (JVP) or People's Liberation Front in 1971 and 1987 and the brutal response by the state security forces. The section further examines how the campaign against disappearances initiated by victims, human rights organizations, and political party leaders in the opposition became a campaign to defeat electorally the UNP government which was responsible for massive violations.

### **5.1.1 An evolving scenario: Political developments after the independence**

Sri Lanka's independence from the British rule was relatively smooth compared to the violence unleashed in British India which eventually led to the partition of India and the creation of the Dominion of Pakistan and the Union of India on 15 August 1947. Pre-independence Burma also suffered from violent conflicts which continued even after its independence on 4 January 1948. In Sri Lanka, the UNP won the pre-independence general elections in 1947. Don Sebastian (D.S.) Senanayake of the UNP became the first Prime Minister after the independence on 4 February 1948.

Senanayake knew that the Tamils feared the possibility of the independence leading to discrimination and oppression by the Sinhalese after their privileged status under the colonial rule (Richardson, 2005: 131). He appointed Ganapathipillai Gangasera (G.G.) Ponnambalam, from the All Ceylon Tamil Congress, as a member of his cabinet. In joining his government, 'Ponnambalam was acknowledging that the Prime Minister's

sensitivity to minority interests was genuine' (de Silva, 2005: 601). However, the government under Senanayake also enacted various laws which deprived the majority of Indian Tamils residents of their citizenship and right to vote. Through this move, Senanayake was avoiding the possibility that Indian plantation workers mostly in the central highlands could become a source of support for the indigenous Tamils in the North and East while averting a vote that was anti-UNP in nature. In the 1947 elections, Indian workers had voted primarily for the Ceylon Indian Congress. In the areas where Ceylon Indian Congress was not contesting, they had voted for the left-wing parties and left independents (de Silva, 2005: 605).

Senanayake's cabinet formulated in 1948 included four members who would become later on Prime Ministers. His son Dudley Senanayake, his nephew Sir John Kotelawala, Junius Richard (J.R.) Jayewardene (a distant relative who became Prime Minister in 1977) and Solomon West Ridgeway Dias (S.W.R.D.) Bandaranaike, who resigned from the government in July 1951 and established the Sri Lanka Freedom Party (SLFP). Senanayake died unexpectedly on 22 March 1952 and was succeeded by his son Dudley who won the elections in May 1952. However, Dudley resigned in October 1952 due to a government financial crisis that led to street protests and deaths as a result of police overreaction. Sir John Kotelawala was named as his successor (Richardson, 2005: 133).

S.W.R.D. Bandaranaike's new political party, the SLFP, was a Sinhala nationalistic party that envisioned a nation dominated by Sinhalese culture and language and Buddhism. It was also a leftist party, but leaning more towards the center of the political spectrum than other Marxist parties, such as the Lanka Sama Samaja Party (Lanka Equal Society Party) or the Communist Party of Sri Lanka. The SLFP brought an alternative to the centrist, conservative, pro-business and secular UNP. In 1956, the SLFP won the general elections with promises to re-distribute economic and political benefits to the Sinhala majority at the cost of the most populous minority community, the Sri Lankan Tamils (Richardson, 2005: 158). Bandaranaike's government took office in April 1956. His policy of Sinhala as the only official language provoked Tamil demonstrations and counter-demonstrations, leading to outbreaks of communal violence and growing radicalization of some sections of the Tamil community.



In September 1959, Venerable Talduwe Sonarama, a Buddhist priest and ayurvedic physician killed Prime Minister S.W.R.D. Bandaranaike (Richardson, 2005: 169). The parliamentary elections were held in March 1960. The results did not provide a clear winner. The UNP minority government formed under Dudley Senanayake soon collapsed and new elections were held in July 1960. The SLFP emerged as the clear winner under the leadership of S.W.R.D. Bandaranaike's wife, Sirimavo Dias Bandaranaike. Prime Minister Bandaranaike moved decisively to implement her late husband's Official Language Act, requiring that Sinhala become the only language of the administration throughout the island from 1 January 1961 (Richardson, 2005: 171). The Federal Party, a Tamil party formed in 1949 as a breakaway faction of the All Ceylon Tamil Congress, declared a civil disobedience campaign in the Tamil majority areas from March to April 1961. Prime Minister Bandaranaike responded by declaring a state of emergency in the Northern and Eastern Provinces (de Silva, 2005: 645). Emergency regulations were in place more than half of Prime Minister Bandaranaike's term in office (Richardson, 2005: 202). The Sri Lankan police force at that time was reasonably effective in controlling the public order in the normal condition; however, but controlling massive disobedience proved beyond their capabilities. Moreover, the traditional respect for the authority, especially the respect for the police in Sri Lankan society, diminished during the SLFP rule, as SLFP politicians criticized the police during demonstrations and ordered them not to intervene even when the mobs were destroying properties (Richardson, 2005: 203).

Senior police and army officers were against the 'Sinhalaization' and politicization of the security forces. S.W.R.D. Bandaranaike's appointment of an Inspector General with little police experience, but close political ties and a Sinhalese-nationalist agenda created resentment among senior police officers. His policies, as well as those implemented by his wife after his death, were seen as creating problems that needed police intervention. This perception was especially strong in the Tamil majority areas in the north and east where unpopular policies had led to civil disturbances. The increasing presence of Sinhalese police officers also eventually led to the police being perceived as 'agents of a hostile occupying power' (Richardson, 2005: 204). Similarly, preserving the professional and non-political character of the army was one of the stated

goals of the unsuccessful 1962 coup. However, the coup had an opposite effect. Sirimavo Bandaranaike moved quickly to transform the army into a force politically dominated by reliable Sinhalese Buddhist officers. To that end, she appointed her relative Colonel Richard A. Udagama as the Chief of Staff and those officers deemed unreliable were forced to retire (Richardson, 2005: 204-5).

In the general elections of 1965, votes of the minorities to the UNP, despite a substantial shift of the Sinhalese votes to the SLFP, brought Dudley Senanayake of the UNP back to power (de Silva, 2005: 649). By this time, all main political parties, besides the SLFP, were appealing to Sinhalese-Buddhist nationalism during election campaign, diminishing its influence as a decisive factor in the election results (Richardson, 2005: 190). Despite this appeal, the 1965 UNP government was in coalition with the Tamil Federal Party. As Prime Minister Dudley Senanayake made ethnic and religious reconciliation one of its main policies, he was confronted by a campaign of Sinhala-Buddhist nationalism under the leadership of the SLFP, joined by the Communist Party and the Lanka Sama Samaja Party (de Silva, 2005: 649). In fact, while in opposition, the Lanka Sama Samaja Party and the Communist Party formed the United Front (UF) with the SLFP under Sirimavo Dias Bandaranaike as a joint platform to contest the 1970 elections. While the three political parties had contested the elections as separate political parties, the UF manifesto declared that they would form a 'people's government' following a general election victory (Richardson, 2005: 247). To this end, the UF socialist platform agreed a common program to tackle increasing problems of inflation and unemployment. On the other hand, the UNP had become widely perceived as a party out of touch with the concerns of ordinary citizens. In the general elections held in 1970, the UF won an overwhelming majority with 49 per cent of the votes, winning 116 out of the 151 seats in the Parliament.

#### *The 1970 United Front government and the 1971 JVP insurgency*

The UF was made possible partly because the leaders of the SLFP and the Marxist parties all came from the nation's English educated elite (Richardson, 2005: 248). When the changes and reforms of the new UF government failed to satisfy their young

supporters, a significant number of articulated, educated but unemployed young people became alienated from political parties. Two factors contributed to facilitating this alienation. First, the number of those aged 25 and less almost doubled in 20 years, from 3.8 million in 1946 to 7.2 million in mid-1968, with a seriously high unemployment rate, especially among the youth (de Silva, 2005: 658-9). Second, because of free-education in primary, secondary and tertiary levels, Sri Lanka became an example of the global phenomenon of educated unemployed (de Silva, 2005: 658). Unemployment was especially severe in the populous rural south. In April 1971, the radical leftist Janatha Vimukthi Peramuna (JVP) or People's Liberation Front, launched the first armed insurgency with the aimed to establish a radical Marxist regime.

On 5 April 1971, simultaneous attacks by the armed insurgents led to the attacks on 92 police stations across the country, resulting in at least 5 stations overrun by the insurgents and 43 abandoned by the police. 57 police stations were damaged (Hettiarachchi and Sadanandan, 2001). Sirimavo Bandaranaike's government counterattacked firmly and mercilessly. By June, organized resistance by the insurgents was over and around 14,000 youths had surrendered in exchange for amnesty. Government forces dealt severely with rebels and suspected rebels. JVP members or sympathizers as well as their relatives were tortured to extract confessions and additional names (Richardson, 2005: 277). It is not clear how many people were killed or disappeared during this period. According to the figures by the government, 53 security forces personnel died, 323 were injured and 1,200 members of JVP were killed. However, others estimate the number of JVP members killed to be somewhere between 8,000 and 10,000 (Hettiarachchi and Sadanandan, 2001). One of the consequences of the 1971 JVP insurgency was that the government became increasingly authoritarian. The emergency regulations imposed after the initial JVP attacks remained in place until Prime Minister Sirimavo Bandaranaike dissolved parliament in 1977.

These emergency regulations provided the context that made the use of enforced disappearance by the security forces possible. Emergency regulations rendered some critical provisions in the Criminal Procedure Code inapplicable, including those that require the police to produce any person arrested before a magistrate within 24 hours and to report to a magistrate any person arrested without a warrant (Nadesan, 1971: 25).

In effect, under emergency regulations, the police did not have the duty to even inform the magistrate about any arrest. Moreover, these regulations also entitled any officer, authorized by an Assistant Superintendent of Police or officer in charge, to bury or cremate any dead body without complying with any other law in respect of an inquest, burial or cremation (Nadesan, 1971: 25).

In 1972, the adoption of a new constitution led to new protests in the Tamil dominated Northern and Eastern Provinces. The Tamils claimed that the new constitution confirmed their second class-citizenship as it accorded Buddhism the foremost place as the state religion and recognized Sinhala as the state language (de Silva, 2005: 674). The Tamil political parties (the Federal Party, Tamil Congress and Ceylon Workers Congress) allied under the Tamil United Front staged a one-day general strike in the Northern and Eastern provinces followed by a six-week civil disobedience campaign to protest the new constitution (Richardson, 2005: 278). Tamil-Sinhalese relations worsened during the UF government. In the span of seven years, from 1970 to 1977, the Federal Party went from demanding language rights and devolution of power to calling for political independence under the Tamil United Liberation Front coalition (Richardson, 2005: 294). Many see the divisive policies, indifference and miscalculations by Sirimavo Bandaranaike's government as the main causes for the Tamil alienation (Richardson, 2005: 295).

#### 5.1.2 The 1977-1994 UNP government and armed conflicts

The UNP won the parliamentary elections held on 21 July 1977 by the largest landslide in Sri Lankan history, obtaining 140 seats out of 168. The Tamil United Liberation Front won the second largest number of seats, 18. The SLFP became the third with 8 seats, losing 83 in relation to the 1970 elections. Communal violence followed the elections. In August 1977, six days of communal rioting, primarily against Tamil individuals living in Sinhalese dominated areas, led to the killing of several hundreds men, women and children. Restoration of order led a relatively peaceful period until the spring of 1981 (Richardson, 2005: 384). Communal violence re-started in May 1981 as a result of the UNP political campaign for District Developments Council seats representing the Jaffna

peninsula. The trigger was the killing of two police constables assigned to election duty in Jaffna. The violence led an organized mob of Sinhalese origin to burn the Jaffna Public Library on the night of 1 June 1981 (Richardson, 2005: 387).

The UNP government adopted the second Republican Constitution that entered into effect on 31 August 1978. It established an Executive Presidency where the President was free from cabinet and legislative oversight and could declare a state of emergency and enact emergency regulations at his or her sole discretion. However, a majority in the Parliament had to ratify both the state of emergency and emergency regulations within 30 days or they would lapse automatically (Richardson, 2005: 397). In 1979, the government passed the Prevention of Terrorism Act, giving security forces the authority to arrest detain and interrogate 'suspected terrorists' without judicial oversight. Although section 29 limited the effectiveness of the Act to a period of three years, this provision was repealed in 1982, transforming it into a permanent law. The law was used primarily to arrest and detain alleged Tamil separatists (Kishali Pinto-Jayawardena, 2010: 18). By this time, Tamils militancy had become more violent and factionalized with competing groups, such as the Liberation Tigers of Tamil Eelam (LTTE), the Eelam People's Revolutionary Liberation Front, Tamil Eelam Liberation Organization, the People's Liberation Organization of Tamil Eelam, and the Eelam Revolutionary Organization of Students.

In 1980, Sirimavo Sirimavo Bandaranaike was expelled from the Parliament for alleged corruptions and abuse of power and deprived of her civic rights for seven years without being able to contest the Presidential elections (Richardson, 2005: 399-400). Junius Richard (J.R.) Jayewardene, from the UNP, won overwhelmingly the 1982 presidential elections. General elections had to be held, but the UNP politicians were aware that they were going to lose their ample majority in the Parliament. To avoid landslide majorities, such as those by the SLFP in the 1970 elections and the UNP in the 1977 elections, the 1978 UNP constitution had replaced the 'first-past-the-post' principle with a proportional system of representation. This meant the UNP would lose the overwhelming majority of 140 out of 168 seats, which provided the two-thirds quota needed to amend the constitution when deemed necessary. Consequently, instead of holding new general elections, J.R. Jayewardene decided to extend the term of the

parliament six more years through an amendment of the constitution, which needed to be ratified by the people in a referendum on 22 December 1982. The supporters of the constitutional amendment won with a 54 per cent of the vote, amid claims of systematic intimidation of voters by pro-UNP supporters. The parliament period was extended for 6 years while the opposition accused Jayewardene of turning Sri Lanka into a one party state, the model operating in many Southeast Asian nations that he admired (Richardson, 2005: 425). The referendum not only eroded Jayewardene's reputation, but the faith of Sri Lankans in their political institutions and the rule of law (Richard, 2005: 422). As the Civil Rights Movement, a Sri Lankan human rights organization, concluded in a later publication, disrespect for the law engendered by the referendum contributed to the widespread anti-Tamil rioting in July 1983 (Richard, 2005: 422).

#### *Black July and the escalation of the ethnic conflict*

The July 1983 riots came as a response to the killing of 13 Sinhalese soldiers by the LTTE close to Jaffna University, in the Northern province, on 23 July 1983. The immediate response by the army was to randomly kill 39 Tamil civilians and to injure many more (Richardson, 2005: 524). On 24 July, at night, anti-Tamil riots started in Colombo and spread to other parts of the country. During the subsequent seven days, Sinhalese mobs attacked and killed ordinary Tamils and burned their homes and businesses. While it is not clear how many people were killed, some of the estimated numbers range between 400 and 3,000 (BBC News, 2003). There are still other accounts which refer to thousands of Tamils killed (Kishali Pinto-Jayawardena, 2010: 19). Just in Welikade prison in Colombo, Sri Lanka's largest prison, 53 Tamil prisoners were killed in two successive attacks on 25 and 27 July. Over 100,000 Tamils became refugees, including a substantial number that fled to India (Richardson, 2005: 525). The role played by the government remains unclear, although some argue that Ministers of the Jayewardene cabinet were involved in the riots (Kishali Pinto-Jayawardena, 2010: 19). More importantly, most Tamils believed that there were complicities by senior UNP officials in organizing the attacks against the Tamils (Richardson, 2005: 527). In any case, when President Jayewardene addressed the nation on 27 July, his core message was not to condemn the

violence, but rather to announce the sixth amendment to the Constitution to ban any political party to advocate separatism. His message seemed to justify the violence resulting from the Tamil separatism (Richardson, 2005: 526). The sixth amendment resulted in all 16 legislators from the Tamil United Liberation Front to forfeit their seats in the Parliament as they refused to renounce support for a separate state (Kishali Pinto-Jayawardena, 2010: 19).

The anti-Tamil riots changed the parameters of the ethnic conflict from relatively low-intensity to increasingly violent. In May 1985, the LTTE killed 146 Sinhalese civilians in Anuradhapura, the capital city of the North Central province. They first shot civilians in the main bus station and later nuns, monks and civilians worshipping inside Sri Maha Bodhi shrine, Sri Lanka's holiest Buddhist pilgrimage site. While the anti-Tamil riots provided the recruits needed to transform the Tamil militant groups, India provided the resources. By 1986, militant forces included approximately 15,000 men who had received training in India (Richardson, 2005: 528). By January 1987, infighting among the various militant groups led the LTTE as the victorious armed faction and the *de facto* ruler of Jaffna, the northernmost city and the capital of the Northern province.

The advance of the Sri Lankan Army to the north during 'Operation Liberation', in May and June 1987, led to the siege of Jaffna. As civilian casualties grew, India intervened. On 29 July 1987, the Indo-Lanka accord brought the Indian Peace Keeping Force to the north of Sri Lanka. The accord led the Sri Lankan Parliament to pass the 13<sup>th</sup> amendment to the 1978 Constitution, establishing Provincial Councils to devolve power to the Provinces and elevating Tamil to the second official language in Sri Lanka. The LTTE, who had signed the accord reluctantly, later refused to disarm and launched a military offensive against the Indian troops. India increased its forces from 5,000 to more than 50,000 troops. The LTTE was driven from Jaffna in an assault that caused nearly 2,000 civilian deaths (Richardson, 2005: 534). By the time the Indian Peace Keeping Force withdrew from Sri Lanka in March 1990, 1,200 Indian officers had died in the operation while the LTTE remained a military force (Richardson, 2005: 533). Ironically, the government of Sri Lanka had been providing weapons to the LTTE in its fight against the Indian Peace Keeping Force. At the time the Indian forces left Sri Lanka, the

government and the LTTE had agreed to a ceasefire and were holding peace talks. The ceasefire broke on 11 June 1990. The LTTE massacred over 600 police officers of the police stations in the Eastern Province who had been instructed to surrender to the LTTE by Sri Lankan President Ranasinghe Premadasa. The police massacre started the Eelam War II, which lasted until January 1995 when a new ceasefire was declared after Chandrika Kumaratunga became the new President.

### *The JVP second insurgency*

The UNP government response to the 1983 anti-Tamil riots also included proscribing leftist parties, the JVP, the Communist Party and the Nava Sam Samaja Party (NSSP), after accusing them of being involved in perpetrating violence against the Tamils during the riots. Having gone to underground, the JVP was able to draw militants from its supporters as well as from unemployed youth. As a result, between the 1983 riots and the 1987 Indo-Lanka accord, 'the JVP was able to recruit and train a solid cadre of core supporters' (Richardson, 2005: 536). Similarly to the 1971 first insurgency, the JVP rhetoric was based on a Sinhalese-Buddhist nationalist agenda and aimed to capture state power and establish a radical Marxist regime. The Indian intervention in the armed conflict and the resulting Indo-Lanka accord was argued as the reason to launch the second insurrection. The JVP killed over 6,000 people between 1987 and 1989 (Asian Mirror, 2014) targeting politicians from all other political parties, security forces, public servants, and anyone in civil society opposing to its ideology.

The response from the state security forces to the JVP second insurgency was again brutal. Estimates from non-governmental organizations put the number of people killed and disappeared as around 60,000. As was the case during the first JVP insurgency in 1971, security forces used emergency regulations and the Prevention of Terrorism Act to arbitrarily arrest and detain people for preventive or investigative purposes without informing a magistrate. They also enjoyed the capacity to bury or cremate dead bodies without complying with any other legal procedure. The peak of killings and disappearances coincided with the presidential and parliamentary elections celebrated in December 1988 and February 1989 respectively. These coincidences



indicate the political dimension of enforced disappearances and extrajudicial killings directed against the political opponents of the government and the UNP. As the Chairperson of the Southern Zonal Commission expressed,

What might have started as a militaristic response to this widespread-armed insurrection on all sides, very soon turned into an instrument for the retention of power. It turned against anybody and any forces in society that were a threat to the regime continuing in power (interview Muttetuwegama, 2014).

The UNP won both elections in 1988 and 1989 with Ranasinghe Premadasa, assuming the President's position after Jayewardene. Violence continued until the end of 1989 when the JVP's second insurgency was completely crushed.

In the next section, I examine how the relation between victims, human rights groups and political parties in the opposition came into existence in a context of widespread violations in Sri Lanka. The victims, human rights movement against disappearances and opposition political parties became a political movement against the UNP government.

### 5.1.3 Victims, human rights groups and political parties in the opposition

This section examines the close relationships between victims, civil society and the political parties in the opposition whose leaders would join the new government in 1994. This contextual information describes how the campaign organized against disappearances became a campaign to defeat the UNP government that perpetrated massive human rights violations (Kumarage, 2005: 118). As one interviewee pointed out, 'in 1994, one of the main factors to defeat the UNP was the issue of disappearances' (interview Brito Fernando, 2014). The interactions between victims, human rights practitioners and political parties in the opposition also shaped their relationships after those party leaders became part of the new government. The analysis shows a transition revolving around the power of political parties with civil society and victim groups submissive to the dictates of party politics. Understanding of this process as primarily a political one helps to better comprehend the vertical accountability relationships between civil society, victims and the governing regime during the first stage before establishing the Commissions and the third stage after the submission of their reports.

These vertical accountability relationships will be examined in section 5.3 which assess the impacts of the Zonal Commissions in promoting accountability.

*The relation between political parties and victim groups*

The link between victims and political parties originated in the despair of the families to find those who had disappeared. This desperation led Wijayadasa Pathirana, whose son Sudath had disappeared, to contact Vasudeva Nanayakkara, a Member of Parliament for the N SSP after having exhausted all other options. After soldiers took Sudath away in the midnight of 10 December 1989, Mr. Pathirana and his wife visited every detention camp where they suspected his son could be detained. Nevertheless, the police refused to even to register a complaint (Pathirana, 2005). Mr. Pathirana had also informed the Member of Parliament of the UNP in his area, but did not receive any response. He then contacted Mr. Nanayakkara, MP for the N SSP, the leftist party then in the opposition. According to Shanta, Sudath's twin brother,

At that time, either you go to the politician or you go to the black magic. This was the only solution [during] that period. No one can help. State power is very much misused (interview Pathirana, 2015).

According to Shanta, Vasudeva Nanayakkara and Vickramabahu Karunarathna, the N SSP leaders, had formed an underground organization collecting the information concerning the disappeared. Karunarathna recalls that he started working on this cause because,

Parents would come to our places and tell us, assuming we had some contact with people taken into custody, and we intervened. That is how we got into the process as politicians. By 1989, insurgency was over, but large numbers were getting arrested, so we continued (interview Karunarathna, 2015).

In April 1990, Wijayadasa Pathirana established with the support of the N SSP leaders, Nanayakkara and Karunarathna, the Organization of the Parents and Family Members of the Disappeared (OPFMD). The organization had four major demands to the government; (1) appointing independent commissions to establish the truth, (2) punishing the perpetrators, (3) compensating the family members, and (5) releasing the political prisoners (interview Pathirana, 2015). According to a civil society activist, the

initial work by Nanayakkara and Karunaratna of the N SSP to increase the opposition against disappearances gave the strength to the SLFP, at the time in the opposition.

Mahinda Rajapaksa was then a friend of Vasudeva [Nanayakkara]. I suppose he [Rajapaksa] was politically smart enough to position himself there, knowing that people were disappearing from his area, to link up and begin to give [the] N SSP the support to raise these issues (interview Nimalka Fernando, 2015).

On 15 July 1990, the first branch of the Southern Mothers' Front was inaugurated in the southern district of Matara under the auspices of Mahinda Rajapaksa and Mangala Samaraweera, both SLFP's Members of Parliament. Around 1,500 women from the Matara district attended the meeting to elect office bearers to coordinate the work of the group. Within six months, branches had been established in 10 other districts under the patronage of Members of Parliament of the SLFP from the respective area (Alwis, 2008: 154).

On 19 February 1991, the Southern Mothers' Front held its first convention at the Town Hall in Colombo. The 10 resolutions passed unanimously at this meeting, called, among others,

2. That the government appoint a fully powered independent Commission, free from state interference and including Supreme Court Judges, to verify the facts around arbitrary arrests and detention...
3. That the government pay compensation to the dependents of the disappeared as well as for damage of house and property...
5. That the government issue death certificates to the dependents of the disappeared and alleviate their trauma (de Mel, 2001: 245).

After the meeting, the first national rally was held with over 15,000 people attending (Alwis, 2008: 169). Addressing the mothers at the rally, Dr. Manorani Saravanamuttu, the mother of assassinated journalist Richard de Soyza, emphasized that the Southern Mothers Front would act as a peaceful watchdog on whatever government was in power. Nevertheless, she did indicate the organization's linkage with the SLFP as a measure of protection, given the insecurity at the time. The narrow focus of the Southern Mothers' Front on disappearances in the context of the political violence in the South between 1987 and 1990, in addition to its close links to the SLFP, led to the appropriation of the organization and its demands by the party. The SLFP eventually used the Southern Mothers' Front to overthrow the UNP government and secure political power (Samuel, 2006: 21). The mothers of the disappeared had managed to

create a space for protest at a time when dissenting voices were suppressed under the organizational umbrella of the Southern Mother's Front. Nevertheless, this space was then captured by the SLFP for oppositional politics. Chandrika Bandaranaike Kumaratunga, the Prime Ministerial candidate for the People's Alliance, a front of political parties formed to defeat the UNP, captured the mothers' grief for political purposes during the campaigns for the August 1994 general elections. As Alwis writes,

Herself a grieving widow and mother, she cleverly articulated the mothers' suffering as both a personal and national experience; she too "sorrowed and wept" with them but also made it clear that she was capable of translating her grief into action, of building a new land where "other mothers will not suffer what we suffer" (Alwis, 2008: 170).

There is a shared understanding among human rights practitioners that political party leaders in the opposition at the time 'had "used" or "hijacked" the movement against disappearances, especially the organizations of mothers and families of the disappeared, to consolidate their own political bases' (Wijewardene and Nagaraj, 2014: 97). The Southern Mothers' Front disintegrated with the electoral victory of the People's Alliance (Samuel, 2006: 22). The November 1994 elections resulted in Kumaratunga becoming the 5<sup>th</sup> President of Sri Lanka. The two SLFP leaders who also belonged to the Southern Mother's Front, Mahinda Rajapaksa and Mangala Samaraweera, became the Minister of Labor and Minister of Post and Telecommunications, respectively. Being dependent on the SLFP for its leadership, the Southern Mothers' Front could not convert itself to a politically independent watchdog body envisaged by Dr. Manorani Saravanamuttu (Samuel, 2006: 23).

#### *The relation between political parties and human rights groups*

As in the case of victims, civil society also engaged with political party leaders as they offered protection. According to a human rights activist, the engagement of the civil society with the political movements began at the period of terror between 1988 and 1989. Political parties could offer protective cover when civil society activists were threatened. Such protections by political parties were offered in two ways. First, Members of Parliament were in general guarded by the police. The then President J.R.

Jayawardena also had provided arms to those who supported the July 1987 Indo-Sri Lanka Peace Accord, including Vasudeva Nanayakara and Vickramabahu Karunaratna of the NSSP (interview Nimalka Fernando, 2015). Because of these security protection offered to Members of Parliament, civil society had them to engage in activities that could run certain risks. For example, in September 1990, NSSP Vasudeva Nanayakara of the NSSP and Mahinda Rajapaksa of the SLFP attended the 31 session of the Working Group on Enforced or Involuntary Disappearance in Geneva and explained about the atrocities that were taking place in Sri Lanka to the world. At the airport in Colombo, the police confiscated the 533 documents Rajapaksa was carrying that contained information about missing persons and 19 pages of photographs. Nonetheless, he was allowed to travel to Geneva, attend the working group session, and share the detailed accounts of the atrocities perpetrated by the UNP government (Bastians, 2014).

Civil society support to Chandrika Bandaranaike Kumaratunga's election campaign in 1994 was crucial to understand the relation between civil society and the political parties in the opposition. A recent study that examines the evolving relationship between political parties and human rights activists in Sri Lanka refers to 'significant sections of the community of human rights practitioners being closely involved in supporting the election of Chandrika Bandaranaike Kumaratunga as president' (Wijewardene and Nagaraj, 2014: 95). Similarly, many of the people I interviewed referred to civil society involvement in Kumaratunga's campaign. One of the interviewees explained,

So you got a situation in which a civil society in this country, which by and large in terms of those working on human rights, democracy and all of that, has a kind of left orientation, had absolutely no hesitation in being sympathetic supporter and in fact, [became] part of the campaign of Chandrika [Kumaratunga] (interview Saravanamuttu, 2014).

Another interviewee expressed,

It's not that you have independent civil society just waiting somewhere, like in a cold storage, until the change happens and when the change happens they are being called. No, they were part of the campaign (interview Gunawardena, 2014).

Human rights activists' involvement went beyond the electoral campaign; they also became engaged in the Kumaratunga administration, formally or informally (Wijewardene and Nagaraj, 2014: 95). This involvement of activists with the administration blurred the distinction between civil society and the government. Consequently, the rules of engagement between human rights practitioners and the state changed during the time of Kumaratunga in ways that human rights practice 'was seen as more muted and domesticated' (Wijewardene and Nagaraj, 2014: 96) As one of the interviewees noted, 'civil society was not as critical with the government as ought to have been' (interview Saravanamuttu, 2014).

The result was a government that had achieved power with the support from victims and human rights activists and that was now in a position to silence the same people. As a women's rights campaigner explained, 'women of the Mothers' Front were compromised by compensation and jobs given by the new [People's Alliance] government when it came to power' (Dulsie de Silva, interview quoted in Thomson-Senanayake, 2014: 225). Not only the Southern Mothers' Front, but also human rights practitioners were compromised. As Thomson notes,

Concerns were also raised that many within the human rights community had compromised their independence by publicly lending their support to the [People's Alliance] and even securing government positions. They found themselves in a weakened position at the very moment the [People's Alliance] should have been called to account to realize its election promises (Thomson-Senanayake, 2014: 226).

Next section examines the three Zonal Commissions established by the 1994 government to deal with previous violations by the UNP and the state security forces.

## **5.2 The corpus for exam: the three Zonal Commissions**

This section presents an analysis of the three Zonal Commissions. It examines the context in which they were established, their mandates, findings and recommendations in their interim and final reports. Finally, the section presents an overview of the people I interviewed.

### 5.2.1 Three Zonal Commissions to deal with two different armed conflicts

Through presidential warrants issued on 30 November 1994, new President Chandrika Bandaranaike Kumaratunga established three Zonal Commissions of inquiry (COIs) into disappearances to deal with violations committed since 1 January 1988. The COIs were organized around three geographical areas; one COI to cover the Northern and Eastern Provinces (North East Commission), another for the North Western, North Central, Central and Uva Provinces (Central Commission), and the last one for the Western, Sabaragamuwa and Southern Provinces (Southern Commission).

Map of Sri Lanka provinces



Source: Maps of Sri Lanka in Sri Lanka Business and Investment<sup>47</sup>

<sup>47</sup> Available at: <http://www.srilankabusinessandinvestment.com/information/maps-of-sri-lanka/> [last access: 27 January 2017].

The three COIs created in November 1994 were not the first commissions established in Sri Lanka to probe disappearances. In 1991, the then President Ranasinghe Premadasa of the UNP established the Presidential COI into involuntary removals of persons. Nevertheless, instead of investigating involuntary removals committed during the previous years of terror (1988 and 1989), the Commission was mandated to investigate involuntary removals happening in the following twelve months; involuntary removals that had not yet occurred. Rather than extending the term of the 1991 COI, limited to 12 months, a new Commission was appointed in 1992 and 1993 with the same mandate (Law & Society Trust, 2010: 20). After President Premadasa was assassinated on 1 May 1993 by an LTTE suicide bomber, new President Dingiri Banda Wijetunga revoked the warrants of the previous three Commissions. In August 1993, he appointed another Commission to investigate involuntary removals of persons during the period between 1991 and 1993. The changes in its mandate along with more cooperation from the security forces led this Commission to conclude investigations of approximately 140 cases, as compared to 11 cases between 1991 and 1992 and 29 cases in 1993 (Amnesty International, 1995: 15). Still, none of the reports of these four Commissions were made public (Law & Society Trust, 2010: 24). Against this background, President Kumaratunga established the three Zonal Commissions in 1994.

What distinguished the three Zonal Commissions from previous attempts was the fact that the creator of the three was not the UNP government that had allegedly committed the violations, but the government under a different party. Still, some criticized COIs in general as partisan mechanisms created to punish political opponents (Pinto-Jayawardena, 2010: 9). Such a criticism was also directed at the three Zonal Commissions as mainly aimed at 'investigating violations by the UNP regime, the political enemy of the [SLFP] government for seventeen long years' (Bulankulame, 2004: 20). Some of the people interviewed also expressed their views of a politically motivated exercise to punish the UNP government. Still, other interviewees stressed that the new government, especially President Kumaratunga herself, was also genuinely supporting victims to find out what happened to their disappeared relatives.

In any case, through establishing three Commissions organized around geographical areas, President Kumaratunga was also assigning them to separate armed



conflicts. While the Southern and Central Commissions dealt with extrajudicial killings and disappearances resulting from the JVP insurgency, the North East Commission primarily dealt with such violations as a result of the armed conflict between the government of Sri Lanka and the LTTE.<sup>48</sup> The distinction is fundamental to understand what the Commissions meant for each conflict. The Southern and Central Commissions dealt with an armed conflict that had ended in 1989 with the state security forces crushing the insurgency and committing widespread violations and disappearances. These two Zonal Commissions were the result of social demands and the response from the new government to deal with those violations.

The scenario was completely different for the North East Commission that dealt primarily with killings and disappearances as a result of the armed conflict between the government and the LTTE. Cases of killings and disappearances in relation to the JVP insurgency did not represent more than 10 percent of all the cases. Second, the North East Commission was only able to deal with a limited number of the overall violations, compared to the other two Commissions. 90 per cent of the complaints the North East Commission investigated were related to the Eastern province. Only 10 percent of the cases investigated were in the Northern province, where the war resumed in April 1995 severely limiting the work by the Commission.<sup>49</sup> Even within the Eastern province, most of the inquiries the Commission undertook concerned violations committed between June and December 1990, coinciding with the state security forces brutal response to the LTTE massacre of 600 police officers.

Beyond the lack of access to the Northern province there was also the temporal limitation, as the mandate (which was the same for the three COIs) explicitly restricted to violations after 1 January 1988. This excluded disappearances and extrajudicial killings committed after 1983, when the conflict between the government and the LTTE escalated. Amnesty International had documented 680 disappearances in the custody of the Sri Lankan security forces in the Northeast between 1984 and mid-1987 (Amnesty International, 1995: 9). No investigation concerning the whereabouts of these people had

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<sup>48</sup> Although the Commissions had the mandate to inquire into involuntary removals and disappearances, it also looked into extrajudicial killings, as I will explain in next section 5.2.2.

<sup>49</sup> The war resumed in the Northern province when LTTE broke the January 1995 cease-fire on April 19, sinking two patrol boats and shooting down two troop transport planes, killing all ninety-seven persons on board

been undertaken at the time the Commissions were established. Not dealing with the period prior to 1988 also meant not to investigate the violations resulting from 'Operation Liberation' by the Sri Lankan military to recapture the Jaffna peninsula from the LTTE in May and June 1987 and from 'Operation Pawan' by the Indian Peace Keeping Force to gain control of Jaffna from the LTTE in October and November 1987. In fact, the three Commissions did not have the mandate to probe direct civilian casualties of the armed conflicts. Consequently, the North East Commission could not to include 40 people killed in a mill where they had sought refuge by the Sri Lankan army, among those extrajudicially killed (Final Report of the North East COI, 1998: 91).

Considering the lack of access to the Northern province, the temporal limitation and the violations excluded from the mandate of the three Commissions, the work of the North East Commission was very limited in relation to the overall conflict between the LTTE and the government.

### 5.2.2 Single mandate, different interpretations

Under the presidential warrants, the three zonal COI had the same mandate. They were tasked to inquire into and report on:

- (a) Whether any persons have been involuntarily removed or have disappeared from their places of residence at any time after January 1, 1988;*
  - (b) The evidence available to establish such alleged removals or disappearances;*
  - (c) The present whereabouts of the persons alleged to have been so removed, or to have disappeared;*
  - (d) Whether there is any credible material indicative of the person or persons responsible for the alleged removals or disappearances;*
  - (e) The legal proceedings that can be taken against the persons held to be so responsible;*
  - (f) The measures necessary to prevent the occurrence of such alleged activities in the future;*
  - (g) The relief, if any, that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have disappeared (sic);*
- And to make such recommendations with reference to any of the matters that have been inquired into under the terms of this Warrant (President Chandrika Bandaranaike Kumaratunga, 1995a, President Chandrika Bandaranaike Kumaratunga, 1995b, President Chandrika Bandaranaike Kumaratunga, 1995c).*

The Commissions had an initial period of four months until 31 March 1995 to discharge the mandate. After this initial term, the mandate was extended eight times until 3 September 1997.

### *Crimes under the jurisdiction of the Commissions*

The mandate of the Commissions referred to *involuntary removals or disappearances*. The term *involuntary removal* was initially used to name the COIs established by President Premadasa in 1991, 1992, 1993 and by President Wijetunga in 1993. These Commissions referred to *involuntary removals* in relation to 'persons who [were] involuntarily removed from their places of residence by persons unknown' (Law & Society Trust, 2010: 23). Amnesty International understands the term *removal* as abduction by non-state actors (Amnesty International, 1995: 6), possibly because of the reference to a crime perpetrated by unknown persons, as opposed to a crime perpetrated by the state. Nevertheless, the three Zonal Commissions did not follow this interpretation and used the term *involuntary removal* as a synonym for abduction (Law & Society Trust, 2010: 24).

A second clarification the three Zonal Commissions had to consider was whether or not extrajudicial killings, understood as abduction followed by subsequent killing, fell under their mandate. The Central Zonal Commission investigated extrajudicial killings while acknowledging that 'they do not strictly fall into the category of involuntary removal and/or disappearances as specified in the warrant' (Final Report of the Central COI, 1998: 2). The Southern Zonal Commission also considered that extrajudicial killings should fall under its mandate for two reasons. First, the Commission understood that the right of a person to live in his or her place of residence is equally violated in both cases when the person is involuntarily removed and remains disappeared and when his or her corpus is found. Second, given the aims of the mandate to report on the measures to prevent re-occurrence and on the relief to the relatives of those disappeared, it would have been hard to distinguish between those who were involuntarily removed or disappeared and those who were killed after being involuntarily removed. Contrary to the other two, the North East Commission did not

discuss in its report the issue of whether or not to include extrajudicial killings; however, the Commission investigated extrajudicial killings in a few cases.

The three Commissions did not have consensus on whether or not to include involuntary removals or disappearances committed by state actors exclusively or also those committed by non-state actors. Although the state security forces committed most of the violations, there existed activities by insurgent groups in all three zonal areas. At the end, the Southern Zonal Commission looked into 779 killings by the JVP (Final Report of the Southern COI, 1998: Chapter 4), and the North East Commission also investigated into abductions by the LTTE, the Tamil Eelam Liberation Organization, and the Eelam People's Revolutionary Liberation Front. Conversely, the Central Commission did not investigate violations by non-state actors. Nevertheless, even with Southern and North Eastern Commissions, it might have not been clear to victims and their relatives that the zonal Commissions were also investigating crimes committed by non-state actors. In a study about the three Zonal Commissions, the author finds that interviewees invariably associate the COIs with those killed by the armed forces. Thus, they saw the Commissions as 'not for those killed by the JVP' (Bulankulame, 2004: 19-20). This misunderstanding was not limited to victims and their relatives. The OPFMD legal advisor at the time of the Commissions explained that Commissions could only investigate disappearances committed by the state, as enforced disappearances require the perpetrator being a state and not a third party. 'Any other by third party would be an offense and they would be charged with murder' (interview Kumarage, 2015). This misunderstanding might have translated into less complains of cases of violence by these groups being reported to the Commissions.

#### *Lack of consistency in the Commissions' working procedures*

The three Zonal Commissions were created in November 1994. In mid-January 1995, they called for complains of disappearances by publishing notices in newspapers, radios, and televisions. An initial period of one month for the submission of complaints was officially extended by another month. Government departments, such as the ministry of justice and defense and the presidential secretariat also referred information

and addresses of petitioners who had communicated with them to the Commissions. The previous Presidential Commissions from 1991 to 1993 as well as the Human Rights Task Force (an agency established to prevent illegal arrest and detention prior to the setting up of the Human Rights Commission of Sri Lanka) also provided information to the Commissions. Nevertheless, as the Commissions started conducting their work, their methodologies started to differ.

The first area of disagreement was the timeframe to accept complaints. While the North East Commission stopped accepting complains after the official two-month period (Final Report of the North East COI, 1998: Introduction), the Central Commission continued doing so until 30 September 1996 (Final Report of the Central COI, 1998: 1) and the Southern Commission until 3 September 1997, the last day of its mandate (Final Report of the Southern COI, 1998: Chapter 1). Their mandate had directed the Commissions to probe disappearances any time after 1 January 1988 without any ending date. Consequently, Central and Southern Commissions that continued accepting applications during their work also received complaints of ongoing violations.

The methodologies to collect information also varied from one Commission to another. Upon receiving the complaints, the North East and the Southern Commissions sent a questionnaire to be completed by the complainants whereas the Central Commission registered complains as they came in. Both the Central and North East Commissions held public hearings with the possibility of hearings *in camera* when requested by the complainant, in accordance with the provisions under the 1948 COI Act. Instead, the Southern Commission held hearings only *in camera*. The Southern Commission argued that given that the evidence provided was entirely *ex-parte* (based on one side only), allowing the names of persons suspected as the perpetrators of the acts in question to be made public would contravene its duty to act fairly. The Southern Commission further argued that to hold the hearings *in camera* was necessary to protect victims and witnesses from possible threats. In fact, because most police and army personnel accused were still holding their official positions, there were several cases of threats and intimidation nationwide.

Another issue of the disagreement among three Commissions was whether or not to name suspected perpetrators. Both the North East and the Central Commissions

included names of some of the alleged perpetrators in their reports. Moreover, the Central Commission sent a list of perpetrators in relation to over 1,000 cases to the President under a separate confidential cover. The Southern Commission did not name perpetrators in its report, but confidentially submitted a list of over 600 perpetrators to the President. Finally, while the Central and Southern Commissions compiled a list of applicants/victims in a separate volume, the North East Commission did not do so.

### 5.2.3 An overview of the Commissions and their findings

This section examines the composition of the Commissions and their findings. An analysis of the work of the three Zonal Commissions shows the Southern Commission undertook much more in-depth fact-finding, than the other two. The section starts with the Central and Southern Commissions, which dealt with the JVP insurgency. The North East Commission and its investigation of the disappearances resulting from the armed conflict between the government and the LTTE is reviewed at the end.

#### *The Central Commission*

The President appointed Thirunavukkarasu Suntheralingam as the Chairperson, and two retired High Court Judges, Marnickam Dutton Jesuratnam and Hitihamy Mudiyansele Senaratna Banda Madawala as Commissioners. While Judge Jesuratnam declined the appointment due to ill health, Judge Madawala requested to be relieved effective on 1 April 1995. M.C.M Iqbal assisted the Commission as the Secretary. The Central COI submitted nine interim reports, ranging from two to six pages each. Four of the interim reports dealt with each of the provinces under the jurisdiction of the Central Commission, while the others dealt with findings of the Commission, evidence found, and a list of recommendations. Some of the recommendations in the interim reports were intended for the implementation during the period of the Commission's operations, but the government did not act upon them. The five pages of the final report specifically examined the two issues left unaddressed in the interim reports; the legal proceedings to be taken against those found responsible and the measures to prevent re-

occurrence. The final report also contains the annexures with the total number of complains received and inquired, percentages of the complaints for each province, 35 districts where the Commission held hearings and the period of each hearing. Hearings started in March 1995 and ended in April 1997. The second part of the final report includes a list of the 6,443 complains investigated, the 8,602 pending complains, a list of vehicles used to abduct people along and their owners. The Commission sent a list of names of identified perpetrators for 1,397 cases of disappearances to the President under a separate confidential cover.

The Central Commission received 15,045 complains in total. It was able to investigate 6,443 of them. The remaining 8,602 were handed over to the All Island Commission, a commission established in 1998 to inquire into the disappearances left unexamined by the three Zonal Commissions. The Central Commission received by far the most complains among the three. Consequently, the Commission also left a larger number of complaints received unattended. The Commission found evidence of people having been removed and disappeared, but it could not locate their whereabouts except for those cases where bodies were found subsequently. The Central Commission also referred to the political dimension of disappearances, as most of the victims were organizers of the SLFP, the opposition party during the UNP government. The Commission found that such persons appear to have been branded as subversives, members of JVP and that their names were given to the police and the army for 'elimination' (Final Report of the Central COI, 1998: 5).

### *The Southern Commission*

The President appointed Manouri Muttetuwegama, then practicing criminal lawyer as Chairperson of the Southern Commission. Professor Amal Jayawardena and Lawyer Jayantha De Almeida Guneratne were appointed as Commissioners. The three provinces covered by the Southern Commission included the capital Colombo and contained a half of the population of Sri Lanka. The Southern Commission also covered the area where the 1987-1989 JVP insurgency had originated. It was also the region that had more strongly supported the SLFP, the opposition during the UNP government.

The Southern Commission had support from the Attorney General's Department. The Commission also had more human resources than other two. Moreover, it received support from non-governmental entities, such as Universities, civil society organizations, and the Bar Association. The assistance provided by a team of 12 lawyers from the Movement for the Defense of Democratic Rights, a human rights NGO that had been working closely with the relatives of people disappeared nationwide, proved especially important. Much more resources available to the Southern Commission are reflected in the length and depth of its reports.

The Southern Commission prepared four interim reports in March 1995, July 1995, March 1996 and November 1996, examining a broad array of issues. The first interim report issued in March 1995 describes the efforts by the Commission to reach out to state agencies to collect information on detentions and disappearances (Interim Reports of the Southern COI, 1997: 4). The Commission communicated with the Commissioner of Prisons who provided the names of all persons in his custody as of 1 January 1995, their addresses and places of detention. The Inspector General of Police provided the details of persons detained by the police since 1 January 1988 and the records of the disposal of dead bodies under emergency regulations since 01 January 1988. The Inspector General of Police also provided a list of police stations and the names of officers-in-charge since 1988, as well as the Police Headquarters circulars relating to arrest, detention and release issued between 1989 and 1994. The first interim report also indicates that the Southern Commission had requested the President to direct all officers-in-charge of police stations to preserve and retain all police information books in their charge. The Inspector General of Police issued the order on 24 February 1995. The access to the police information books was critical for all three Commissions to establish the facts and collect the evidence on the role of the police in disappearing people. The Southern Commission also asked the Army Headquarters to provide information on detention camps, officers-in-charge and names of detainees. The Army Headquarters replied that it did not have any list of detainees because it was the police and the joint operation headquarters the authorities that managed the detention camps. The Commission also requested the Attorney General's Office a list of *habeas corpus* applications filed, as Sri Lankan law requires the Attorney General to be made a



respondent in all *habeas corpus* application where detention by the state is alleged. The Southern Commission also requested the Courts copies of the records of judicial proceedings regarding the habeas corpus applications.

The Southern Commission concluded that the state investigative agencies failed to investigate involuntary removals and disappearances even when such incidents were brought to their attention. The Commission wrote that 'in these circumstances, the evidence of members of the general public having personal knowledge of these matters becomes all the more important' (Interim Reports of the Southern COI, 1997: 6). The lack of follow-up by the state investigative agencies of involuntary removals and disappearances led the Commission to establish an independent investigative unit. After collecting information from various state agencies, the Commission turned to the public for the information. The Commission announced that all evidence that it received, including the information from the petitioners, would be completely confidential. Consequently, the Southern Commission decided to conduct all the hearings *in camera*.

The Southern Commission's final report comprises of a 178 pages volume divided in 14 chapters and 27 pages of annexures. The report also includes a list of the names of persons disappeared and another list of the affected families for whom the Commission recommended measures of special relief. The second volume of the final report (227 pages) presents the findings in emblematic cases of disappearances and killings, such as the disappearances of 53 schoolboys in Embilipitiya area. A list of over 600 perpetrators identified by the Southern Commission was sent to the President under separate file, which was not published. Perpetrators named included police and army officials, as well as civilians. The list was divided into perpetrators responsible for one disappearance, two and three or more disappearances.

The Southern Commission received 8,739 complaints of disappearances and investigated 7,761 of them. In 436 cases, the complainants did not appear before the Commission. 542 complaints remained pending and were handed over to the All Island Commission. Of the 7,761 complaints investigated, the Commission established 7,239 involuntary removal or disappearance. To undertake the investigation, the Commission called 9,744 witnesses and summoned 54 special witnesses, including political party

representatives, security forces officers, civil society representatives and other organizations.

Out of the 7,239 cases established as involuntary removal or disappearance, the Southern Commission found that the victims' bodies were discovered and identified in 1,513 cases. 628 out of 1,513 cases were attributed to subversive killings. In 1,026 out of 7,239 cases, there was evidence that the victims were seen in detention locations after their abduction, but subsequently disappeared. However, in the majority of the disappearances cases, the Commission obtained evidence regarding their abductions, but none to ascertain where they were taken afterwards. Some other cases even lacked evidence regarding abductions. The Southern Commission also received 191 complaints from those who were abducted, but later released. The Commission considered these persons to constitute a powerful body of evidence of the practices at that time.

The Southern Commission also examined the materials available to determine responsibility. Out of 7,239 cases of disappearances, petitioners identified the perpetrators as agents of the state or paramilitary groups in collaboration with the state in 4,858 cases (67.10 per cent), as subversive groups in 779 cases (10.8 per cent), as personal enemies acting in collaboration with agents of the state/paramilitary in 59 cases (0.8 per cent), and unknown in 1,543 cases (21. per cent). To determine the perpetrators, the Commission considered other factors, such as the pattern of the incidents, whether or not the previous UNP government had provided compensation to the relatives, or whether or not the police had recorded a complaint. The payments of compensation or police records of complaints were considered to indicate that perpetrators were subversive groups.

Similarly to the Central Commission, the Southern Commission also referred to the political dimension of disappearances. The Southern Commission established the role played by the UNP politicians in the counter-insurgency. When the police was dependent on informers, local politicians often supplied lists of names to the Members of Parliament who were politically guiding the fight against the insurgency. These Members of Parliament would pass the list of names given by informers to the security forces. In this way, the security forces came to be used in the interest of particular politicians to remove their opponents.

The Southern Commission was the only Commission to report about the existence of mass graves. Specifically, the Commission examined 12 mass graves about which it had received the information. Local villagers knew their locations as sophisticated logistics were generally needed to create these graves, such as modern fire-arms and heavy vehicles. Without explicitly mentioning the police and the army as responsible, the Commission noted that mass graves were a sign of the clandestine nature of the counter-insurgency operation (Final Report of the Southern COI, 1998: Chapter 10 part III). The Southern Commission's final report does mention the police's refusal to record the existence of mass graves (Final Report of the Southern COI, 1998: Chapter 10, part II). The police's refusal to acknowledge mass graves meant not to initiate any legal proceeding to investigate or identify the corpses buried.

#### *The North East Commission*

The President appointed retired Judge Krishnapillai Palakidner as the Chairperson. Justice Luwisdura Walter Romulus Widyaratne and Professor Wedaarachchi Nawalage Wilson were appointed as Commissioners. The North East Commission submitted a 19-page interim report on their fact-finding in Trincomalee district. Their final report is 144 pages long and organized in two volumes; volume I on contents and volume II with 29 annexures. Volume I is organized around the eight districts under the jurisdiction of the Commission. The information regarding three districts of Eastern province (Trincomalee, Baticaloa and Ampara) comprises the bulk of the report. The chapters covering these districts provide numbers of disappeared persons by ethnicity, age groups, civil status and numbers of arrests by year. Contrarily, the information on the four districts from the Northern province is very limited.

As opposed to the other two Commissions, the North East Commission's final report does not provide a total numbers of complains received and how many of those were effectively investigated. Some chapters provide the numbers of complains inquired in the respective district, while other chapters do not provide such figures even concerning the districts where investigations were undertaken. Volume II of annexures include the names of persons arrested and subsequently disappeared from refugee

camps, during mass arrests at villages and other locations, and from army checkpoints and police stations. Annexures also include cases of abductions by the LTTE. Nevertheless, there is no figure for some of the districts either. Moreover, contrary to the report of the Southern and Central Commissions, the North East Commission's report does not provide an overall list of complainants along with the names of the missing persons based on its investigations.

The total number of complains inquired by the North East Commission appears to amount to 2,815 when it is calculated based on the number of complains investigated, when this number appears in the corresponding district chapter, and the list of complains inquired which appears in the annexures for some other districts. Over 90 per cent of these (2,610) correspond to the three districts in the Eastern region: Trincomalee (614), Batticaloa (1,219) and Ampara district (777). The Commission's report also includes very short chapters for other districts, such as Kilinochchi and Mannar, with no information about the number of investigated complaints. The Commission similarly referred 551 cases to the All Island Commission. Out of the 551 cases referred, 447 alone came from Jaffna, given that the Commission could not visit the district as 'a good portion of it was under LTTE control and the ground situation was not conducive for a visit' (Final Report of the North East COI, 1998: Chapter 9).

The North East Commission found large-scale involuntary removals of people from their places of residence. The Commission found substantial corroborative evidence as most of the arrests were made in full public view with many witnesses (Final Report of the North East COI, 1998: 61). Nevertheless, the Commission could not determine whereabouts of the persons disappeared. Despite the existence of incriminatory evidence, the security forces denied any involvement in arrests and detention in unknown locations. The Commission's final report states,

The fact is that Army arrested people in large numbers. The Army only can answer what happened to the corpus of those arrested. It was no use denying that they have nothing to do with these arrests (Final Report of the North East COI, 1998: 62).

As for those responsible for the disappearances, the North East Commission found 90 per cent of cases attributable to the security forces comprised of the army, navy, air force and the police. Specifically, the Commission's final report names 10 army and police

officers 'against whom there is enough evidence in our files for initiating prosecution' (Final Report of the North East COI, 1998: 62). Furthermore, the report names officers against whom there is evidence available in 48 cases of disappearances. In some cases, instead of naming the alleged perpetrator, the report refers to the officer-in-charge of a police station or army camp responsible for the violation. The LTTE was also found responsible for killings, removals, and disappearances specifically targeting Muslim population.

Having analyzed the main findings of the three Zonal Commissions, next section reviews their recommendations.

#### 5.2.4 The Zonal Commissions' recommendations

This section presents an overview of the recommendations by the three Zonal Commissions. The classification follows the logic of evaluative criteria (EC) 10 to 14 to assess how TCs contribute to promoting accountability. First, the section reviews recommendations to redress victims, which includes reparations (EC-10) and exhumations of mass graves (EC-11). Second, the section discusses measures of individual responsibility, including recommendations to prosecute (EC-12) and other disciplinary measures, such as removal from public office (EC-13). Finally, measures intended to prevent reoccurrence (EC-14) are reviewed.

##### *Measures intended to redress victims: Reparations and Exhumations*

I review here recommendations that the Commissions made in relation to reparations in all forms, including compensation, employment, trainings, scholarships and emotional rehabilitation, among others. I then examine other measures dealing with exhumation of mass graves.

The three Commissions made various recommendations dealing with reparations for the relatives of those killed or disappeared (EC-10). With compensation, the Commissions had to consider the previous UNP government had already provided

some. However, compensations at the time had only been provided to those killed and injured by the insurgents. In September 1988, the Ministry of Rehabilitation and Reconstruction inaugurated a scheme known as the 'Payment of Compensation to Most Affected Persons'. According to the Ministry's circular from 26 September 1988 compensation would be paid in respect of 'deaths that may have occurred and injuries sustained as a result of ethnic violence, terrorist activity, related security operations and consequent civil unrest, since 24 July 1983'<sup>50</sup> (Interim Reports of the Southern COI, 1997: 37). Following this scheme the surviving spouse, children of the deceased would receive 50,000 Sri Lankan Rupees (\$800)<sup>51</sup>. For the death of an unmarried adult above 21 years old, the next of kin would receive 25,000 Sri Lankan Rupees (\$400), and for the death of a minor below 21, 15,000 Sri Lankan Rupees (\$240). If the person was a Minister, Governor, a Member of Parliament or a Chief Minister the amount increased to 600,000 Sri Lankan Rupees (\$9,600) for death and the same amount for injuries. If the target were the spouse or children of these political figures, the amount would be 500,000 for death and the same amount for injuries (\$8,000) (Interim Reports of the Southern COI, 1997: 38). However, a decision made by the Cabinet on 22 November 1989 effectively denied the benefits of these schemes to the families of those alleged to be 'terrorists'. To determine who was a terrorist, government officials relied on the police to ascertain whether the missing person was engaged in terrorist or subversive activities. Hence, if the state security forces were responsible for the killing, it was assumed that the person had terrorist links. Beyond denying the compensation, this practice led to social ostracism of the families of the person killed or disappeared. As the interim report of the Southern Commission notes, the majority of those who suffered in the era of terror between 1988 and 1989 did not receive any compensation (Interim Reports of the Southern COI, 1997: 38). This changed after the Presidential election in November 1994. The new government instructed officials in the various provinces to process all applications for compensation. As a result, the three Zonal Commissions received large number of applications for compensation from relatives of those disappeared.

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<sup>50</sup> The date coincides with the starting of the anti-Tamil riots.

<sup>51</sup> Average exchange rate years 1996-1999, 1 USD = ± 62.5 Sri Lankan Rupee.

In their interim and final reports, the three Commissions recommended the payment of compensation to the relatives of the disappeared. In some cases, the Commissions suggested a bigger amount than that established under the 'Payment of Compensation to Most Affected Persons' scheme. The Central Commission proposed to equate payments to the general public with the amount of 150,000 Sri Lankan Rupees paid to public officers and local government employees killed due to terrorist violence<sup>52</sup> (Interim Reports of the Central COI, 1997: 6-7). On the basis of the Samurdhi payment, a social welfare program, the North East Commission suggested to increase the payment to 60,000 Sri Lankan Rupees for the loss of the breadwinner in families with up to four dependents, and 75,000 in case of more than four dependents. In case the disappeared person was not the breadwinner, the North East Commission proposed a payment of 50,000 Sri Lankan Rupees (Interim Reports of the Northeast COI, 1997: 7). The Southern Commission recommended the payment of fair and adequate compensation within a time frame in all the districts. The Commission also called on introducing a new tax to generate funds for the payment of compensations (Interim Reports of the Southern COI, 1997: 39). Furthermore, it recommended enacting legislation to exempt the compensation paid from being made the subject matter of a civil claim and seizure.

Another measure the Commissions dealt with since their early reports was the issuance of death certificates. The lack of death certificates was creating various problems for the relatives of the disappeared, including those related to employment emoluments (unclaimed salaries or employee's provident funds), property rights, bank loans, the release of money in bank accounts, insurance benefits. The lack of the death certificates had also prevented the families of the victims from claiming the compensation. On 5 January 1995, the government enacted a new law amending the general procedure for registering a death. The act facilitated the registration of deaths of persons when the applicant had not seen the person alive or heard from the person for a period of over one year (Registration of Deaths (Temporary Provisions) Act, 1995: section 1). Under the previously applicable law, the period required was seven years.

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<sup>52</sup> In accordance with the Public Administration Circular issued by the Ministry of Public Administration No. 21/88 of 13 July 1988.

Since their initial reports, the three Commissions raised concerns about the process leading to the issuance of death certificates. In its first interim report issued in March 1995, the Southern Commission recommended the use of the media to bring the new procedure to register a death and obtain a death certificate to the public's attention (Interim Reports of the Southern COI, 1997: 9). Similarly, in its final report, the North East Commission recommended that changes in legislation to register a dead person to be brought to the notice of the family members of the disappeared through the district level administration (Final Report of the North East COI, 1998: 64). The North East Commission had found that the relatives of disappeared remained unaware of the legislative changes and continued to face problems in relation to their civil status, inheritance, and widows and orphans pensions. In its final report, the Southern Commission recommended to issue a public administration circular to the district registrars of marriages and deaths regarding their power to issue death certificates and to establish an advisory service bureau to assist affected families on legal and other issues (Final Report of the Southern COI, 1998: chapter 14).

The North East Commission also considered other measures to support families where the breadwinner had been disappeared. The Commission recommended providing employment either in the state or private sector to one person in these families with minimum qualifications. In case no family members possess minimum qualifications, the Commission recommended providing vocational training at the state expenses to ensure that at least one person in the family is employable. Similarly, the Southern Commission recommended recruiting the youth from affected families in the public sector on a priority basis. The Southern Commission also recommended vocational trainings to be provided to members of affected families and they be accommodated within the existing training schemes provided by the government. The Southern Commission also encouraged some measures specifically targeting women, such as training on home-based self-employment and counseling on savings. Concerning female heads of families, the Commission called on the National Commission on Women or a special committee created to address special needs of vocational training, employment and financial assistance.



The three Commissions recommended scholarship programs for the education of children of the families of the disappeared. The Southern Commission suggested integrating these children into the many scholarship programs administered by the Ministry of Education. Moreover, having identified malnutrition among the children of the disappeared, the North East Commission recommended extending to these families the existing program to fight against malnutrition.

The Commissions encountered several incidents of suicide of members of affected families. For example, the Southern Commission wrote in its report that 'we saw how emotionally shattered people were when they came before the Commission. These people urgently need emotional help' (Final Report of the Southern COI, 1998: chapter 9). The Commission recommended equipping the community personnel attached to the educational, health, rural, development services to assist in emotional rehabilitation of the families of the victims. With regards to women, the Southern Commission recommended counseling services to be made available to the victims of sexual abuse while they are in custody and after they are released.

The three Zonal Commissions' mandate did not cover 'returned detainees,' who were removed, tortured, but were not killed either because they were released or because they ran away. Nevertheless, acknowledging their mental and physical sufferings, the Central Commission recommended providing them with adequate relief, rehabilitation and referral to psychiatric clinics, when necessary (Final Report of the Southern COI, 1998: chapter 14). The Southern Commission also recommended the National Human Rights Commission should be requested to advise the government in formulating legislations or administrative procedures to protect the fundamental rights of returned detainees (Final Report of the Southern COI, 1998: chapter 14).

Both the Central and Southern Commissions recommended monetary assistance to affected families who had suffered loss and damage to property. The Central Commission recommended a team from the Valuation Department of the government to decide the amount of the compensation regarding damage of property (Final Report of the Central COI, 1998: 14). The Southern Commission also recommended settling homeless families on state-owned land, preferably in the area of their residence prior to the displacement (Final Report of the Southern COI, 1998: chapter 14). With regards to

those who had been dispossessed of their land, the Southern Commission recommended that they should be restored in their possession or be given alternate lands after an inquiry is done (Final Report of the Southern COI, 1998: chapter 14).

The Southern Commission recommended measures to effectively implement the relief measures proposed. It recommended adopting laws to deal with relief issues if they could not be dealt through administrative actions and appointing a committee to monitor the implementation of relief recommendations (Final Report of the Southern COI, 1998: chapter 14).

As for the existence of mass graves, the Southern Commission recommended developing trainings on skills needed to disinter mass graves with the assistance of international agencies, such as the United Nations Working Group on Enforced Disappearances (Final Report of the Southern COI, 1998: chapter 14). The Southern Commission also recommended establishing a Human Identification Center to provide training and technical assistances in aspects of identification of those buried in the graves (Final Report of the Southern COI, 1998: chapter 14). In the meantime, the Commission recommended collecting information regarding the existence of mass graves, their locations and the identity of persons alleged to be buried. The Commission identified appropriate state agencies to undertake such tasks and called them initiate the tasks (Final Report of the Southern COI, 1998: chapter 14).

*Measures of individual responsibility: Prosecutions and other disciplinary measures*

Since their interim reports, the three Zonal Commissions focused on the need to prosecute alleged perpetrators. In its second report issued in October 1995, the Central Commission already referred some cases where there was credible evidence against persons responsible to the Inspector General of Police. No action was taken. In its interim sixth report issued in June 1996, the Central Commission called for a special investigations team to conduct investigations promptly, thoroughly and impartially (Interim Reports of the Central COI, 1997: 16). In its interim report, the Southern Commission acknowledged that the main concern of relatives of those disappeared was not compensation, but that 'they wanted the Commission either to find their loved ones

or to punish the wrongdoers (Interim Reports of the Southern COI, 1997: 38). Both the Central and Southern Commissions considered the punishment of wrongdoers necessary to promote national reconciliation (Final Report of the Central COI, 1998: 3, Interim Reports of the Southern COI, 1997: 34).

In their final reports, the three Commissions continued to call for prosecutions. Acknowledging the fact that causing the disappearances of a person is not an offense under Sri Lankan law, the Central Commission recommended prosecutions on account of acts that constitute the ingredients of a disappearance, such as arbitrary arrests, unlawful detention and failure to produce before a court of law. Recognizing difficulties in establishing liability in all cases of disappearances, the Commission further recommended indictment and conviction in particularly heinous cases to enhance the credibility of the administration of justice, restore trust in the rule of law, bring an end to the climate of impunity and promote national reconciliation. The Commission also called for perpetrators to be tried by civilian courts, and not by military tribunals. Due to the large volume of cases, the Central Commission recommended the establishment of special courts. It also recommended appointing a team of investigators comprised of officers from the Police's Investigation Department and a team of state counsels to assist these investigators in their work (Final Report of the Central COI, 1998: 2-3). The Southern Commission also recommended undertaking investigations through a special unit of the police under the direct supervision of an officer not below the rank of Deputy Inspector General. The Commission also recommended the establishment of an office of an independent human rights prosecutor and the relevant police records, such as information books from police stations, to be handed over to this prosecutor. The Southern Commission was the only Commission to propose creating a committee to recommend amnesty to witnesses, including perpetrators, who confess to their own participation in human rights violations and give full evidence of the accompanying circumstances. Nevertheless, particularly concerning 70 applications of *habeas corpus* where the courts had found persons to be responsible for the disappearances, the Commission recommended a vigorous prosecution. The Commission's final report contained a list of such people who had been found responsible by the courts (Final Report of the Southern COI, 1998: chapter 7).

Beyond criminal prosecutions, both the Central and Southern Commissions also recommended other measures to address individual responsibilities, such as severe disciplinary punishment to government officials who failed to take adequate measures to prevent disappearances. The Southern Commission also recommended human rights to be a factor in consideration of promotions. Suspension of officers from active duty until disciplinary inquiries were completed was also recommended. The Southern Commission's recommendations also included other measures such as assistance to families in litigation (Final Report of the Southern COI, 1998: chapter 14).

The North East Commission was the only one to publish the list of police and army officers found responsible for specific cases of disappearances based on the evidence that it had obtained. However, in an apparent contradiction, the Commission also acknowledged it could not decide on the guilt of the accused on the ground that evidence had been collected only from the complainants' side. Consequently, the Commission called for proper investigations to be undertaken and to test the evidence given by complainants under the scrutiny of cross-examination (Final Report of the North East COI, 1998: 62).

#### *Measures to prevent repetition*

As measures to prevent a repetition of killings and disappearances, all three Commissions recommended a general review of emergency regulations relating to arrest and detention of persons. They called for stricter requirements to security officers in relation to the arrest records, detention, transfer and release of detainees. The Commissions also called for provisions to increase the transparency of the process, including informing relatives of the detainee the name and rank of the arresting officer, the time and date of arrest and the place of detention, as well as informing the arrestee of the reasons for the arrest. The Commissions also recommended other measures aimed at having people detained only in places legally authorized for such a purpose, providing the detainees with access to legal counsel and providing access to detention places to members of human rights organizations. The Southern Commission also recommended the magistrate to visit all place of detentions within its jurisdiction once a

month (Final Report of the Southern COI, 1998: chapter 14). The Commissions also recommended the recognition and implementation of the right of the detainee to communicate with relatives. The Southern Commission also made some recommendations specifically addressing the concerns of female detainees, such as recognizing rape and sexual assault in custody as torture and training judicial medical officers to detect sexual abuse (Final Report of the Southern COI, 1998: chapter 14). Some other measures recommended were intended to create accountability among state agencies dealing with arrests and detentions. The Southern Commission recommended the arresting authority to inform the magistrate about each arrest within 24 hours and any change in the detention location, including transfer out of the magistrate's jurisdiction or release from custody. It also recommended the arresting authority to submit a weekly list to the District Secretary with the information on the detainees (Final Report of the Southern COI, 1998: chapter 14). The North East Commission stressed the importance of effectively enforcing the legislation adopted to protect and promote human rights of those detained (Final Report of the North East COI, 1998: 62-3).

Beyond issues related to arrests and detentions, the three Zonal Commissions also examined how to generally prevent violations by the state security forces. The Central Commission recommended providing education on human rights and international humanitarian law to members of the police and armed forces, which should be considered during the deliberation of promotions. It also recommended that the report and the findings of the Commission to be given wide publicity to spread the message that police and security forces would not be allowed to abuse their power with impunity (Final Report of the Central COI, 1998: 4-5). The Southern Commission recommended elimination of alternative structures of command within the police force with the recruitment and promotions to be decided on the basis of qualification and record of past performance (Final Report of the Southern COI, 1998: chapter 8).

Having analyzed the recommendations of the three Commissions, I now assess the Commissions' impact in promoting accountability. Before that, I briefly explain the source of the evidence I present to undertake the assessment.

### 5.2.5 Elite interviews

Elite agent interviews provided evidence supporting the existence of vertical and horizontal accountability relationships and the fulfillment of evaluative criteria in this study.

In Sri Lanka, I interviewed 23 people involved with the Commissions and the broader transition. I conducted 8 of these interviews in October 2014 and 14 in July 2015, all of them in Sri Lanka. I also carried one interview in a European country in July 2014. As opposed to Nepal, where I had a wide network of contacts because of my past work there, I had never been in Sri Lanka prior to the fieldwork for this research. I conducted my first exploratory field trip in September 2013. I met with representatives of human rights organizations, directors of think tanks, a staff of the United Nations, and a retired officer of the Sri Lankan army. The trip was useful to collect various contacts and to assess challenges to conduct interviews. One of such challenges was the fact that many of the human rights organizations were still under surveillance under the Rajapaksa regime. Some of the people I met with, including well-known representatives from human rights organizations, warned me of potential problems I could face for meeting with them. In fact, by meeting with representatives from well-known human rights organizations, I was exposing myself. On the other hand, my meeting with less known people in or outside Colombo could to expose themselves. Consequently, I decided not to travel outside of Colombo and only meet human rights defenders and people with high profile. In February 2014, I went back to Colombo to participate in a program on TJ, which gave me the opportunity to expand my pool of contacts. In October 2014, I carried out a first round of interviews in Colombo. I conducted my last field trip in July 2015. By this time, new President Maithripala Sirisena was in the office. Given that the environment was more relaxed with a new political climate, I decided to travel to Trincomalee and Batticaloa districts to interview people.

As in the case of Nepal, I have organized the sample in three main groups: a) former members of a TC; b) representatives of the governing regime; c) and victims and broader civil society. These classifications correspond to the three groups among which vertical and horizontal accountability relations are generated. Members of TCs included

Manouri Muttetuwegama, former Chairperson, and Amal Jayawardena, former Commissioner, of the Southern Commission. I also met two attorneys from the Movement for the Defense of Democratic Rights, a human rights organization, who had supported the Commission. For the Central Commission, I met with the Secretary, M.C.M. Iqbal, but could not meet with the only Commissioner, former Judge Suntheralingam, as he had passed away in October 2013. For the North East Commission, I interviewed W.N. Wilson, former Commissioner.

As for representatives of the governing regime, I met with Yasantha Kodagoda, state counsel of the Missing Persons Unit, Attorney General's Office. I also met Gerry de Silva, former Sri Lankan Army Commander.

The third group of interviewees, people from civil society, included J.C. Weliamuna, lawyer who had litigated criminal cases against the security forces, and Ruki Fernando, high profile human rights activist. I also met with representatives of human rights organizations, such as the Center for Policy Alternatives, the Civil Rights Movement, Lawyers for Democracy, the National Peace Council, and the Movement for the Defense of Democratic Rights. Others organizations whose representatives I met included the International Center for Ethnic Studies, an international research organization, and Law and Society Trust, a legal research and advocacy organization. As for victim organizations, I interviewed Shanta Pathirana, Secretary General of the OPFMD whose brother disappeared during the JVP insurgency. The OPFMD became a nationwide organization of victims that linked survivors of the conflict and the COIs. Given the importance this organization had at the time when the three Zonal Commissions were established, I also interviewed Dr. Vickramabahu Karunarathna, leader of the NSSP and patron of the OPFMD and Chandrapala Kumarage, lawyer with the Lawyers for Human Rights and Development who also became a legal advisor of the OPFMD. Other interviewee working with victims included Brito Fernando, President of the Families of the Disappeared, a victim's organization that provided a platform to relatives of the disappeared at the time of the violations and during the work of the zonal COIs. From the North East part of the country, I interviewed Father Yoges Shwaran, a Jesuit priest and attorney, working with victims in Batticaloa, Eastern province, on human rights and social issues at the time of Eelam War II, between 1990

and 1995. I also met with Amara Hapuarachchi, a human rights activist at the Peace Committee in Batticaloa who provided support to many survivors of the armed conflict between the government and the LTTE and who knew about the experiences of victims with the Commissions.

Box 3- Interviewees composition: Sri Lanka 2014-15

Former Commissioners and staff:		6
Southern Commission	(4)	
Central Commission	(1)	
North East Commission	(1)	
Governing regime		2
Attorney General Office	(1)	
Sri Lankan Army	(1)	
Civil society, victims		15
Lawyers	(1)	
Human rights activists	(8)	
Political party member in the opposition	(1)	
Victims	(1)	
People working with victims	(4)	
<b>Total: 23 people interviewed in Sri Lanka</b> <sup>53</sup>		

Source: Author

The box shows the interviewees' composition based on the three main groups among which accountability relationships can be generated.

### 5.3 Assessing the impact on accountability: the three Zonal Commissions

In this section, I evaluate the impact of the three Zonal Commissions in promoting accountability. I will compare the evidence collected through semi-structured interviews and documentary sources against the criteria proposed to evaluate production of answerability and enforcement.

<sup>53</sup> Annexed, list of interviewees including: name, role played at the time, date of interview, and place. I also indicate when the interview was not recorded.



Following the framework in chapter two, the 14 evaluative criteria (EC) are divided in four accountability relationships. Criteria 1 and 2 refer to answerability as a result of vertical accountability relationships before the establishment of a TC. Criteria 3 to 9 correspond to the answerability as a result of horizontal accountability relationships during the work of the Commissions. Criteria 10 to 14 correspond to enforcement as a result of horizontal and vertical accountability relationships after recommendation made in the final report of the Commissions.

### 5.3.1 Answerability as a result of vertical accountability relationships before the establishment of a TC (EC 1-2)

If the *pressure from civil society leads the governing regime to establish a TC (EC-1)*, the state is being made answerable to civil society demands. In Sri Lanka, the prospect of establishing the COIs to investigate disappearances generated vertical accountability. Immediately before the establishment of the Commissions, Sri Lankan citizens held the UNP government accountable through elections. In both the parliamentary elections in August 1994 and the presidential elections in November 1994, the majority of citizens voted for the People's Alliance, a platform of leftist and minority parties in the opposition, that was promising investigation into cases of disappearances. Specifically, the then opposition leader Chandrika Bandaranaike Kumaratunga promised speedy actions on past human rights abuses (Final Report of the Southern COI, 1998: Introduction) and payment of compensation to the relatives of those who had disappeared, been tortured or lost property without any political discrimination (Interim Reports of the Southern COI, 1997: 37-9).

After the victory of the People's Alliance at the parliamentary elections in August 1994, the new government began the task of appointing three Zonal Commissions to investigate involuntary removals or disappearances alleged to have taken place since 1988 (Final Report of the Southern COI, 1998: Introduction). However, the government was not successful to establish the COIs because of the disagreement by the then President, still from the UNP, who argued against such bodies (Final Report of the Southern COI, 1998: Introduction). During the three months interval between the

parliamentarian and presidential elections, the Prime Minister's Office under Kumaratunga's direction, had responded to letters sent by relatives of the disappeared. The Office promised that, in case of winning the Presidential elections, the new President would appoint a COI into disappearances and that measures would be taken to pay compensation to the affected families (Interim Reports of the Southern COI, 1997: 37-9). The establishment of the COI, not possible under a UNP President, and the payment of compensation to all those victimized became the central issue in the November 1994 Presidential elections.

After winning the elections, new President Chandrika Bandaranaike Kumaratunga immediately established the Commissions. In doing so, the new governing regime became answerable to the citizens as a result of electoral accountability (EC-1).

A second criterion for assessing whether the governing regime is rendered answerable is if *pressure from civil society leads the governing regime to make changes to the mandate, powers, appointment of commissioners or any other relevant aspect of the commission* (EC-2). The evidence collected show that the governing regime did not initiate any process to consult with civil society or victim groups about the type of commissions to be established. In this regard, there was no discussion leading to changes in the substance of the Commissions. There are reasons why the new regime did not initiate any process of consultation. First, Sri Lanka had legislation providing for the establishment of COI and the tradition to do so. The 1948 Commission of Inquiry Act had already been used to establish commissions prior to 1994. With this tradition, it is not surprising that President Kumaratunga, who had won the elections on 12 November 1994 with a promise for thorough investigations on disappearances, issued the Presidential decree establishing the three COI on 30 November 1994, only 18 days later. Given the short period between the elections and the Presidential decree, there was no time to make demands changes in the mandate, powers, and appointment of commissioners. Nonetheless, there were a few voices at the time, calling for the investigations to be extended to cover the period from 1984, instead of 1988, as some disappearances had

taken place during those years (Civil Rights Movement, 1994). The government did not respond to these calls.

Interestingly, very few of the interviewees recall any complaint at the time about the lack of an inclusive process leading to the establishment of the Commissions. Rather, the interviewees did refer to the fact that civil society trusted completely the new government and that commissioners elected were the right choice. One of the interviewees stated in relation to the Southern COI,

Commissioners chosen had already been identified as people who were leading lights in civil society on human rights or in the legal profession (...) No one would question their credentials (interview Saravanamuttu, 2014).

Another interviewee, a lawyer, reflected, 'commissioners were activists in the civil rights movement of a high integrity and people believed what they said; that helped the Commissions' (interview Weliamuna, 2014). Consequently, no new answerability was generated as EC-2 was not fulfilled.

### 5.3.2 Answerability as a result of horizontal accountability relationships during the work of a TC (EC 3-9)

During the period between their establishment and the submission of the report, TCs collect information and evidence from victims, witnesses, and broader civil society. They also document violations and gather evidence through seizing documentation from state security agencies as well as interrogating state officials.

In interaction with victims, witnesses, and broader civil society, state answerability is produced when TCs disclose evidence in support of state violations. For the state to be rendered answerable, in the first place, *victims, witnesses, and/or civil society organizations need to access and provide information to the commission* (EC-3). This requires the commission to reach out to victims, witnesses, and civil society organizations, and to ensure that the environment is conducive for them to come forward and provide information. Through interaction with victims and civil society organizations, the three Zonal Commissions received around 30,000 complaints, out of which they were able to inquire into over 17,000.

The environment where each Commission operated was different. For the Central and Southern Commissions, the environment was generally conducive for victims and families of the disappeared to come forward, beyond some cases of intimidation and threats by security forces to witnesses. Such intimidates were particularly noted with the Central Commission that was holding public hearings, and eventually the Commission decided to exclude the press and the public from the hearings (Final Report of the Central COI, 1998: 2). The need to protect witnesses led the Presidential Secretariat to issue a directive in February 1996 and send those officers interfering in the proceedings of the Commissions on compulsory leave. The Southern Commission looked into 7,761 and the Central Commission into 6,443 complaints. This was not the case for the North East Commission as the ceasefire between the government and the LTTE declared in January 1995 was broken in April 1995 and intense fighting resumed. As a result, the North East Commission could not investigate disappearances in part of the provinces it was mandated to cover. According to one of the Commissioners, the North East Commission was able to contact half of the 6,000 complainants (interview Wilson, 2015).

The three Commissions had contact with NGOs, including international organizations such as the International Committee of the Red Cross and Amnesty International, as well as national organizations and victim groups. The OPFMD, the main nationwide organization of victims, held discussions with Commissioners and Commission staff and encouraged relatives of the disappeared to provide evidence which could be the basis to receive compensation (interview Kumarage, 2015). As the OPFMD had also been documenting cases of disappearances, it provided the Commissions with details of people disappeared (interview Karunarathna, 2015).

While all three Zonal Commissions developed relations with civil society organizations, the Southern Commission had a highest number of interactions with civil society due to various factors. First, the Southern Commission covered the capital Colombo, where most of the civil society organization and NGOs headquarters were based. It also covered the Southern part, which was the most affected by the JVP insurgency and where most of the political leaders from the opposition and victim groups came from. In its reports, the Southern Commission specifically mentioned

collecting information from victim groups, such as the Mothers and Daughters of Lanka Front and the Parents and Children of the Disappeared, and non-governmental organizations, including Inform Human Rights Documentation Center and the Movement for the Development of Democratic Rights.

More importantly, Manouri Muttetuwegama, a respected lawyer and human rights activist, was the Chairperson of the Southern Commission, as opposed to the other two Commissions headed by Supreme Court judges. This led the Chairperson to rely on the documentation work previously done by many organizations. As Chairperson Muttetuwegama noted, 'we could not have done it without the civil society; when it came to the appointment of the Commissions, they showed the confidence to turn all the papers over to us' (interview Muttetuwegama, 2014). Such cooperation also extended to the operations of the Commission. Instead of relying on the support of the Attorney General's department to collect statements from victims as directed by the government, Chairperson Muttetuwegama sought the collaboration of the Movement for the Defense of Democratic Rights, a civil society organization that had been supporting relatives of the disappeared in filing *habeas corpus* applications. One of the lawyers from this organization justified the Chairperson's request as the lawyers from the Attorney General department 'were the same people defending the State when we [Movement for the Defense of Democratic Rights] had filed *habeas corpus*. Now the very State was asked to assist the victims' (interview Gunawardena, 2014). Lawyers from the Movement for the Defense of Democratic Rights went to the districts, listened to the complainants, recorded their statements, prepared the documentation and fed them back to the Commissioners (interview Punchihewa, 2015). By taking civil society lawyers who had been supporting the relatives of those disappeared on board, the Southern Commission increased its level of legitimacy to the victims. Through all these interactions with victims and civil society organizations, the Commissions were able to collect information and document human rights violations.

In conclusion, while victims, witnesses, and civil society organizations were able to access and provide information to the Southern and Central Commission, this was not the case for the North East Commission due to the ongoing war. Consequently, EC-3 was partially met.

State answerability is also produced as a result of the horizontal accountability relationship between a TC and the state agencies. For state agencies to be rendered answerable, *the commission has to have access to state/non-state actors and these actors have to be answerable to the commission* (EC-4).

The three Zonal Commission found four categories of alleged perpetrators; police officers, armed service personnel, politicians and subversive groups. The Commissions did not access insurgent groups. By the time the COI started their work in 1995, JVP members had been almost exterminated. In relation to the LTTE, the armed conflict was ongoing during the operations of the Commissions. The Commissions did not access UNP politicians either, although they collected incriminatory evidence in some cases. The three Commissions had access to the police force and the army, though unevenly. While Commissioners found some degree of collaboration from the police force, they met a wall of silence from the Sri Lankan army.

With regards to the police, the Commissions undertook an exhaustive fact-finding to corroborate the evidence collected from victim's relatives and witnesses. As a result of a request by the Southern Commission, President Kumaratunga directed the Inspector General of Police to order all officers-in-charge of the police stations to preserve information books, telephone registers, prisoners detention registers and other documents connected with arrests and detentions since 1 January 1988 (Inspector General of Police, 1995). Diet registers proved to be critical evidence as they had recorded meals given to detainees even if their arrests and detentions had not been recorded. Similarly, charts of police and other government vehicles were key to track trips to villages and other locations around the time when disappearances had taken place. Through such fact-finding, the Commissions produced answerability as a result of the horizontal accountability relationships with the police.

As for the army, the Commissions' attempts to collect information met with little success. For instance, when the Southern Commission inquired about 43 army camps revealed by witnesses to the Commission, the army provided information only regarding 8 army camps arguing that,

No particulars whatsoever can be found in their records regarding 13 camps. In respect of the other 22 camps, the army maintains that the units stationed in

these camps, the officers-in-charge and their period of service are not mentioned in records (Final Report of the Southern COI, 1998: annexures, 199).

Lack of records was the recurrent response by the army also in relation to food register or records regarding the release and transfer of detainees, and the names of persons to whom the detainees were released. In one instance where evidence collected from victims and witnesses against army officers was compelling, the North East Commission requested the army commander to conduct an internal inquiry. The military court found that there was inadequate evidence because the army had not maintained proper records during the relevant period. The court considered it understandable due to the intense terrorist activities which had halted the administrative machinery (Final Report of the North East COI, 1998: Chapter 2). The final report of the North East Commission expresses the frustration of the Commissioners,

The fact is that Army arrested people in large numbers. The Army only can answer what happened to the corpus of those arrested. It was no use denying that they have nothing to do with these arrests (Final Report of the North East COI, 1998: 62).

In addition to the direct interactions with the army and the police, the Southern Commission thoroughly examined the *habeas corpus* applications filed with the Supreme Court. The Supreme Court also became answerable to the Southern Commission. Chairperson Muttetuwegama recalls,

The Supreme Court said this Disappearances Commission is turning into a commission of inquiry of our conduct, as we kept applying for case records [of *habeas corpus* petitions] to be made available to us (interview Muttetuwegama, 2014).

As a result the final report compiles a list of 70 *habeas corpus* application cases with the names of perpetrators (Final Report of the Southern COI, 1998: Annexure C, 185-93).

The Commissions had access to both the police and the army and these were answerable to the Commission. However, while the Commissioners had access to documentation that allowed them to cross-examine actions undertaken by the police, this was not the case for the army. This resulted in the Commissions being much more successful in the fact-finding done in relation to the police as compared to the army. However, because Commissions did have access to the police and the army and because

these security agencies had to be answerable to the Commission, I conclude EC-4 was fulfilled.

The publication of the final report transfers the state answerability resulting from the fact-finding to the public domain. Hence, one criterion for evaluating answerability is whether or not *the final report is made public* (EC-5).

By September 1995, interim reports by three Zonal Commissions had already been forwarded to the President, but none of them was made public (Human Rights Watch, 1996). The government published the interim reports of the Southern Commission in October 1997. The three Commissions' final reports were submitted in September 1997. The government published them in February 1998 as separate volumes. In the case of the Southern Commission, a second volume was submitted later and published in April 1998.

While the government made the reports by the three Commissions public, they were not widely circulated. In a 1999 report, the United Nations Working Group on Enforced and Involuntary Disappearances refers to the fact that the reports 'were available from the Government Publications Bureau albeit only in a very limited number. The reports were not widely distributed, nor can they be found in local libraries' (Working Group on Enforced or Involuntary Disappearances, 1999: para.16). While the reports are and were available in libraries of research centers dealing with human rights and disappearances, they were not widely circulated at the time of their publication.<sup>54</sup> For instance, as various sources indicate, relatives of the victims and those who appeared before the Commissions were not informed of the findings of the Commissions (Kishali Pinto-Jayawardena, 2010: 87-8, Working Group on Enforced or Involuntary Disappearances, 1999: para.16). As a representative of the local peace committee in Baticaloa mentioned, 'nobody here, not victims, neither civil society organizations got to know about the content of the reports' (interview Hapuarachchi, 2015).

The context at the time of the publication in February 1998 explains why the government published the reports, but without my publicity. On 25 January 1998, the

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<sup>54</sup> Appendix III compiles the location where I found each of the reports of the Zonal Commissions.



LTTE exploded a bomb just outside the Temple of the Tooth in Kandy, Central province, the most sacred shrine of Sinhalese Buddhists. The bomb killed 16 people just one week before the 50<sup>th</sup> anniversary celebrations of Sri Lanka's independence, which were to be held in Kandy. The government outlawed the LTTE as a political party, 'a step it had so far refrained from taking on the grounds that it would make peace talks illegal' (Brabant, 1998). In this context, a large-scale publication of the reports by the government with accounts of atrocities committed by the security forces against the Tamils could have given some legitimacy to the violence unleashed by the LTTE.

Nevertheless, it is not clear why none of the various human rights organizations or victim groups did not publicize the reports further. They had, for example, failed to publish summaries of reports with the key findings of the Commissions. As a former commissioner expressed 'there was no upsurge of enthusiasm. Why? I don't know' (interview Jayawardena, 2014).

Once the report is made public, we can evaluate the scope of state answerability. Evaluative criterion 6 assesses the extent to which *the report discloses new facts and evidence surrounding violations committed* (EC-6). Based on the information provided by the relatives of those disappeared and those collected by examining documentation and records of the police, the three Zonal Commissions were able to disclose new facts and evidence surrounding involuntary removals, disappearances and extrajudicial killings.

As previously unacknowledged facts, the Commissions established around 16,500 cases of involuntary removals or disappearances, including abductions followed by subsequent killing where the corpora were found. The Commissions concluded that those disappeared were dead. The final report of the Southern Commission mentions that 'disappearance following an abduction is in our finding only an euphemism for a killing, a reality that the absence of recovery of the body should not be allowed to obscure' (Final Report of the Southern COI, 1998: Chapter 5). The Central Commission found security forces had run eight torture chambers where persons removed were confined. In Kandy district, the Commission found a college that had been used as a detention camp by the Police's Counter Subversive Unit. According to the evidence collected, 'about 1,000 persons were detained in this camp and systematically tortured

before being taken away and killed' (Interim Reports of the Central COI, 1997: interim report II).

Another previously unacknowledged fact was the finding of the political dimension of disappearances by the Commissions. The Central and Southern Commissions found a clear link established between the political conflicts and disappearances in areas with the JVP insurgency. The Central Commission found enough material 'to indicate that most of the victims were organizers of the Sri Lanka Freedom Party' (Final Report of the Central COI, 1998: 5), the political party in the opposition during the UNP government. According to the Commission, 'such persons were branded as subversives, [members of JVP], and their names given to the police and armed forces for elimination' (Final Report of the Central COI, 1998: 5). Similarly the Southern Commission established the role played by the politicians of the UNP party in the counter-insurgency. As discussed previously, Members of Parliament providing the political direction to fight the insurgency were passing lists of names given by local informers and politicians, to the security forces. Consequently, the security forces were used to advance the interests of certain politicians.

Concerning the evidentiary standards, the Commissions were mandated to collect evidence indicative of the person responsible, not evidence beyond reasonable doubt as a court would do. The fact-finding through the documentation made available proved to be important for the Commissions' findings. The Secretary of the Central Commission recalls examining the victims' testimonies with the entries in the information books maintained by the police. He expressed,

Victims said persons who appeared to be police officers had come home and taken their children away. In the [police] information books, no such entries were there. No entry in detention register. But diet register had entries of the person who had disappeared having been given a meal on that day. Running charts of police vehicles confirmed travels to the particular village. We immediately concluded, there is evidence indicative that the officer in charge of the police station was responsible (interview Iqbal, 2014).

Chairperson of the Southern Commission also referred to the careful work needed to seek and to corroborate evidence with documentation.

We had to do a paper chase. In the case of Richard de Soysa [emblematic case of disappearance of a journalist], I had to go through the books of 57 different

police stations, for a vehicle here, for a team there (interview Muttetuwegama, 2014).

From the evidence collected I conclude the Zonal Commissions fulfilled EC-6 as the Commission's final reports disclosed new facts and evidence surrounding violations committed.

Evaluative criteria 7 examines whether or not *the TC has identified burial sites* (EC-7). According to the Secretary of the Central Commission, 'our mandate didn't allow us to probe into that [identification of burial sites] but complainants gave us evidence where bodies were buried' (interview Iqbal, 2014). As a result, the Central Commission recorded evidence of mass graves (personal communication Secretary Central COI, Mr. Iqbal, 2017). The Southern Commission final report referred to the existence of 12 mass graves and acknowledged that there were many more known to the local people. Where testimonies based on first-hand knowledge existed, the Commission recorded the existence, locations and the identities of bodies alleged to be buried in these graves (Final Report of the Southern COI, 1998). As for the North East Commission, the report does not refer to the identification of burial sites.

I conclude EC-7 was only partially met. As the Secretary of the Central Commission expressed, the commissions did not have a clear mandate to locate burial sites. Therefore, they only identified those for which witnesses provided information.

Attribution of institutional and individual responsibilities also indicates the scope of the answerability produced. With regards to institutional responsibility, if *the report acknowledges that state agencies and/or non-state actors committed violations of human rights* (EC-8), it is producing more answerability.

The three Commissions refer to police and army officers as responsible for involuntary removals or disappearances. Moreover, the North East and the Southern Commissions also identifies subversives as perpetrators. The North East Commission found 90 per cent of cases it investigated attributable to the security forces (army, navy, air force and the police) while the LTTE was also responsible for its own share of removals (Final Report of the North East COI, 1998: 62). The Southern Commission

found that petitioners identified perpetrators in 5,696 cases out of the 7,239 cases where disappearance was proved. Among those cases where perpetrators were identified, 4,858 (85.2%) petitioners identified agents of the state or paramilitary groups in collaboration with them. The subversive groups were identified as perpetrators in 779 cases (13.7%) (Final Report of the Southern COI, 1998: Chapter 4).

In addition to the security forces and the subversive groups, the Central and the Southern Commissions also refer to the UNP political leaders as responsible for disappearances. Alleging they were insurgents, Member of Parliaments provided lists of SLFP political opponents to security forces for their elimination. As the Central Commission concluded, 'it would appear, that such persons were branded as [JVP members] and their names given to the Police and Armed Forces for elimination' (Final Report of the Central COI, 1998: 5).

Consequently I conclude EC-8 was fulfilled as the three Commissions' reports acknowledged that state agencies and non-state actors had committed violations of human rights.

With regards to whether or not *the report attributed individual responsibility through naming perpetrators* (EC-9), the three Zonal Commissions adopted a different approach. The Southern Commission did not name names on the grounds that the evidence was collected *ex-parte* process without cross-examining alleged perpetrators. The Commission's final report argues that 'confidentiality must prevail both in respect of the nature of the evidence available and in respect of the identity of persons implicated by such evidence', on the ground that the Commission did not have the evidence offer by the accused persons (Final Report of the Southern COI, 1998: Chapter 5). The Commission further argued that confidentiality should prevail until further investigations by the investigative authorities are held. On these grounds, the Commission submitted a list of over 600 perpetrators to the President under a separate file, which was not published. Perpetrators named included reportedly police and army officials as well as civilians. The list differentiated perpetrators based on the number of involuntary removals or disappearances that they were responsible for (Final Report of the Southern COI, 1998: Chapter 5).

On the contrary, the interim reports of the Central Commission already include the name of 15 alleged perpetrators against whom there was material indicative of their implication in involuntary removals or disappearances. These include officers-in-charge of police stations and police personnel in charge of torture chambers. The report also contains the names of one army officer who was in charge of a torture chamber and senior politicians with links to the UNP who supervised torture chambers or who were responsible for disappearances. These politicians include members of the Provincial Councils, the Chief Ministers in the UVA province and the North Central province and one Member of Parliament. The Central Commission also sent a confidential list under a separate cover to the President. The list included the names of persons deemed responsible in 1,396 cases of disappearances (Final Report of the Central COI, 1998: Records not published).<sup>55</sup> Nevertheless, the list was leaked to the media. Without mentioning the names, an article by the Sunday Times from 15 March 1998 states,

At least 27 UNP [Members of Parliaments], 14 Provincial Council Members, 12 *Gramas Sevras* [village officer appointed to carry out administrative duties] and a Buddhist priest — along with 20 Police superintendents, 51 Police officers-in-charge, 12 Army captains and four majors — have been implicated in 1396 cases inquired into by the Commission that probed Involuntary Removals or Disappearances of Persons in the Central, North Western, North Central, and Uva provinces. According to an annexed schedule to the Commission's final report — a copy of which was obtained by The Sunday Times — a [Member of Parliament] and a [Provincial Council Member] were each responsible for 14 disappearances in the Central province, while two police [officers in charge] — one who was posted in Central and another in the North West province — were connected to 54 disappearances between them (Imran Vittachi, 1998).

The final report of the North East Commission names 10 army and police officers against whom there was enough evidence for initiating prosecution (Final Report of the North East COI, 1998: 62). Furthermore, the report also names officers against whom there was evidence available in relation to 48 cases of disappearances. In some cases instead of a name of the alleged perpetrator, it refers to the officer-in-charge of a police station or army camp (Final Report of the North East COI, 1998: Annexure 'E', List of officers against whom evidence is available in files).

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<sup>55</sup> The total number of perpetrators named is unclear while some of them were considered responsible for more than one disappearance, some cases had up to six perpetrators named.

Again EC-9 was only partially fulfilled. While the Central and North East Commissions included some names of alleged perpetrators in their final reports, lists with hundreds of names were confidential, sent to the President under separate cover and never published.

### 5.3.3 Enforcement as a result of horizontal and vertical accountability relationships after the recommendations (EC 10-14)

In their final reports, TCs make recommendations that can generate two more accountability relationships: First, a horizontal relationship between the governing regime and the state agencies towards which the recommendations are directed; and second, a vertical one as civil society pushes the governing regime to implement the recommendations in the commission's final report.

#### *Enforcement as a result of horizontal accountability relationships*

The three Commissions made a comprehensive package of recommendations to provide relief to victims, confront past violations through prosecutions and other measures to address individual responsibility and prevent future disappearances. Nevertheless, what followed was a lack of actions by the governing regime to implement them. In this section, I evaluate the enforcement produced as a result of the horizontal accountability relationships following the recommendations of the three Zonal Commissions under evaluative criteria 10 to 14.

President Chandrika Bandaranaike Kumaratunga was the President of Sri Lanka from November 1994 to November 2005. As former Secretary of the Central Commission wrote,

That even the President who appointed the Commissions of inquiry into disappearances had not been serious about the issues involved and the recommendations made is seen from the fact that none of the four reports of the Commissions have been placed before the Parliament for a full discussion on them to enable the Parliament to take action on the recommendations contained in them and to raise public awareness of the issues (Iqbal, 2004a).

A criterion to assess fulfillment of the enforcement dimension of accountability is whether or not *reparation programs have been implemented* (EC-10). The three Commissions found family members were in a dire situation as the breadwinner was disappeared in most of the cases.

Until the establishment of the Commissions, compensation had been paid by the state only in respect of loss suffered at the hands of the subversives and not when perpetrators were the state security forces or paramilitary groups in collaboration with them. Confronted with this reality, the interim reports by all three Commissions recommended payment of compensation to the relatives of those disappeared to relieve the families for the loss of their breadwinners. According to the Southern Commission's interim report issued in March 1996, payments of compensation to relatives of 500 persons disappeared in the area under its jurisdiction had started in December 1995 (Interim Reports of the Southern COI, 1997: 55).

Relatives of disappeared persons sought the support of the Commissions to assist with problems related to employment rights, property rights, and bank loans among others. Such problems included the release of money lying to the credit of the disappeared, including unclaimed salaries or employees' provident funds. To address the particular needs of family members of the disappeared, the Southern Commission recommended the establishment of legal advisory services at a sub-district level. However, in cases where evidence was enough to prove the involuntary removal or disappearance, the Southern Commission requested state agencies, such as the Ministry of Education, public institutions and private companies to address issues faced by the immediate families of those disappeared. In doing so the Commission itself was seeking the implementation of the recommendations contained in its interim reports, by the concerned agencies, adopting the role of a governing regime.

Since their interim reports, the three Zonal Commissions had recommended to increase the public's awareness about the new procedure established to facilitate the issuance of death certificates by the government. Nevertheless, after the Registration of Deaths (Temporary Provisions) Act lapsed in 2001, it was not re-enacted. Consequently, relatives who held certificates of confirmation of disappearance from one of the three Zonal Commissions could not get death certificates in respect of such persons on a

presumption of death. The absence of an act prevented many families of disappeared persons from benefitting from relief measures available, even when they hold certificates of confirmation of disappearance issued by the Commissions (Iqbal, 2004b).

Although the three Commissions made extensive recommendations on reparations, the families of the victims only received monetary for very limited amount. The former Secretary of the Central Commission recalls that 'we were summoned to the President's office and told to follow a 1988 circular on the amounts to recommend, which provides for small amount' (interview Iqbal, 2014). According to this circular, under a program called *Payments of Compensation to Most Affected Persons*, the Ministry of Rehabilitation and Reconstruction provided 50,000 Sri Lankan Rupees (800 United States dollars) for the death of a married man;<sup>56</sup> 25,000 (400) for the death of an unmarried person; and 15,000 (240) for the death of a minor. To public officers an *ex-gratia* payment up to a maximum of 150,000 (2,400) and payment of the full salary and allowances of the deceased officer until he would have reached 55 years of age. Finally, 500,000 (8,000) for the death or disappearances of a politician (personal communication Secretary Central COI, Mr. Iqbal, 2017). Nevertheless, the Rehabilitation of Persons, Properties and Industries Authority tasked to provide the payments sometimes did not make the payment, alleging non-allocation of funds by the Ministry of Treasure (Iqbal, 2004b).

I conclude EC-10 was only partially met. Partially, as relatives of those killed or disappeared received compensation. But implementation of reparation programs ended there. As a result, very few of the whole range of recommendations intended to redress victims were effectively implemented and produced enforcement.

A specific criterion to assess the production of enforcement in commissions looking into disappearances is whether or not *exhumations have been carried out* (EC-11). Even though the Southern Commission recommended developing training in the requisite skills with the assistance of international agencies, such as the UN Working Group on Enforced and Involuntary Disappearance, this was never done. The recommendation to establish a center to train forensic pathologist and scientist and to provide modern state of the art

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<sup>56</sup> Average exchange rate years 1996-1999, 1 USD = ± 62.5 Sri Lankan Rupee.



techniques was not implemented either. Not even the recommendation to collect information on the existence of mass graves, their locations and identities of bodies alleged to be buried was implemented (Final Report of the Southern COI, 1998: Chapter 14).

In few cases, exhumations were conducted after mass graves were accidentally discovered. In 2013, workers digging a site for construction purposes at Matale, Central province, discovered a mass grave containing the remains of around 200 bodies. The assumption was the remains were of persons who were arrested as suspected members of the JVP during its second insurrection, the disappearances covered by the 1994 COI (Colombo Telegraph, 2013). Even in this case at Matale, one of the very few cases where a judicial inquiry was carried out, the entire process to exhume the remains was stopped alleging technical questions (Fernando, 2016). Consequently, EC-11 was not fulfilled.

With regards to individual responsibility, there is enforcement if *prosecutions have taken place* (EC-12). Lack of any action by the government on the Commissions' early recommendations in their interim reports to probe the involvement of specific individuals named, signaled the way it was going to deal with the prosecution of alleged perpetrators. According to the Central Commission's Secretary, 'commissioners were called to the President's Office and told to give interim reports every 3 months so that government could deal with perpetrators instead of waiting till the final report' (interview Iqbal, 2014). Nevertheless, the Minister of Defense was advocating with the President on behalf of the security forces to get assurances that no perpetrators would be punished, as he needed the military to continue the war in the North. The Secretary of the Central Commission explained,

There was a headline in the papers, that the President has ordered immediate action against 200 perpetrators identified by the COI as per interim [report] as directing the Army Commander and [Inspector General of Police] to take immediate action and report back within one month (...) A week later another headline "*Defense minister says not such order has been given by the President*" (...) Although the President seemed anxious to deal with them, the circumstances the country was going through at the time prevented from dealing with the perpetrators identified in the interim reports (interview Iqbal, 2014).

As mandated, the Commissions collected and presented in their reports evidence indicative of the persons being responsible for violations. Such evidence was not intended to probe the guilt of the alleged perpetrators in a criminal proceeding, but to facilitate and direct the work of the police investigation. To safeguard the independence of the investigators, both the Southern and Central Commissions recommended appointing a special unit of the police for such investigations. As a result, in November 1997, the government established the Disappearances Investigation Unit (DIU) under the Deputy Inspector General of Police of the Criminal Investigations Department (Final Report of the All Island Commission, 2002: 15). The DIU was to conduct criminal investigations through collecting additional evidence to that of the Commissions to send cases to court. Data concerning cases investigated, criminal proceedings started and number of convictions is available through United Nations reports. These include a 1999 report by the United Nations Working Group on Enforced or Involuntary Disappearances, as well as periodic reports submitted by the government of Sri Lanka to the Human Rights Committee in 2002 and to the Committee Against Torture in 2004 to fulfill its obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment respectively.

The first reference to prosecutions as a result of the three Zonal Commissions is in the 1999 report from the United Nations Working Group on Enforced or Involuntary Disappearances. The report states that 'with respect to criminal action against perpetrators of enforced disappearances, the three Presidential Commissions of Inquiry mentioned above (paras. 7 and 15) played a crucial role' (Working Group on Enforced or Involuntary Disappearances, 1999: Para. 34). It mentions the Commissions identified suspected perpetrators in relation to 3,861 cases of disappearances and that the DIU had started investigations against 1,560 suspected perpetrators members of the police and the armed forces (Working Group on Enforced or Involuntary Disappearances, 1999: Para. 34). The report further refers to the establishment of the Missing Persons Commissions Unit (MPU) (the unit in charge of cases of disappearances within the Attorney General's office) on 14 July 1998 and to the fact that the Unit had received dossiers relating to 890 cases of disappearances from the DIU. The task of the MPU was

to consider the initiation of criminal proceedings against perpetrators. The report further refers to the fact that, criminal proceedings had started against 486 persons in relation to 270 cases of disappearances as of 1 October 1999. As enforced disappearances was not a criminal offense under Sri Lankan criminal law, criminal proceedings relate to other offenses, such as abduction with intention to murder, wrongful confinement, torture, rape or murder. The report also highlights that the first of the accused, a police officer, was convicted for the crime of abduction and sentenced to five years of imprisonment on 14 September 1999 (Working Group on Enforced or Involuntary Disappearances, 1999: Para. 35).

The next reference to the prosecution as the result of the recommendations by the three Commissions is in the fourth periodic report submitted by the government to the Human Rights Committee. The report refers that, out of the total of 16,800 alleged disappearances, the Zonal Commissions found evidence indicative of the identities of those responsible for involuntary removals and disappearances in 1,681 cases.<sup>57</sup> Of these, as of 31 December 2000, the DIU had completed criminal investigations into 1,175 cases and sent the notes of investigation to the MPU. The report refers to criminal proceedings having started against 597 security forces' personnel in relation to 348 cases (Government of Sri Lanka, 2002: Para. 156-60). This represents an increase of criminal proceedings against 111 new security forces in relation to 78 new cases as compared to the 1999 report of the Working Group (Working Group on Enforced or Involuntary Disappearances, 1999: Para. 35).

The last official data available appears in the report submitted by the government to the Committee Against Torture. However, the report excludes data from the North East Commission without any explanation, and includes data from the All Island Commission and the Board of Investigation for Jaffna established in 1996. According to this report, the DIU conducted investigations in 3,615 cases. Of these, 2,462 cases had been completed and the relevant files of 2,095 cases had been forwarded to the Attorney General, on whose advice 1,033 cases have been closed. Investigations with

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<sup>57</sup> We don't know why in passing from 3,861 cases of disappearances where the Commissions identified suspected perpetrators, as indicated in the previous WGEID report, to 1,681 cases where the Commissions found evidence indicative of the identities of those responsible, as indicated in this report, we end up losing 2,180 cases. None of the reports explain the reasons behind this drop.

regard to 256 cases could not be continued owing to insufficient evidence. The data provided refer to 432 cases filed, with 178 concluded and 247 pending. In this report, the government does not provide the total number of personnel against whom criminal proceedings had started. The report mentions that while 12 accused had been convicted, 130 had been acquitted (Government of Sri Lanka, 2004: Para. 63-4). There is no indication of how many of these cases referred in the report overlap with those mentioned in the report to the Human Rights Committee or one by the Working Group.

The 2004 report refers to 12 accused being convicted and 130 discharged, while the 1999 report estimates investigations against 1,560 suspected perpetrators (Working Group on Enforced or Involuntary Disappearances, 1999: Para. 34). The former Secretary of the Central Commission refers to the cases filed as a government strategy to deal with international pressure at the United Nations sessions. According to him,

The government has to give an account, what happened to the Commissions' report. What action did you take? They have to say we have started so many prosecutions; cases are pending before the courts; then nobody can pressurize. That is why at every [United Nations] session they used to give figures; to give figures they must have some cases filed. So they filed a few cases (interview Iqbal, 2014).

It is not that the MPU had filed only a few cases. By 2002, at least 348 cases were filed against 597 security forces personnel in response to the recommendations of the three Zonal Commissions, with notes of investigation concerning hundreds of other cases at the MPU ready to be filed. The government used various strategies to attenuate the number of cases to be filed and that of convictions. One way to reduce the number of cases to be filed was inaction by the MPU. When the DIU within the police sent the notes of investigation to the MPU under the Office of Attorney General alleging insufficient evidence to take the investigation further, this was accepted without any objection (Kishali Pinto-Jayawardena, 2010: 101). In this way, the Attorney General turned down many of the cases on the grounds of insufficiency of evidence.

Even cases filed with courts, they were usually against junior officers. One reason for this is that the DIU would simply not return the files relating to senior officers to the MPU, claiming investigations were not completed. As one report noted, 'such delays are said to result from "considerations of brotherhood"'. Investigators are especially likely to protect senior officers at the expense of their juniors' (Asian Legal

Resource Center, 2002). Another report goes further to state that ‘those police officers who investigated their superior officers in this regard too zealously were transferred out of the DIU or penalized in some other way’ (Kishali Pinto-Jayawardena, 2010: 101). The recent report of the OHCHR investigation on Sri Lanka further highlights this when it mentions that,

Most of the cases referred to courts involved alleged perpetrators of a low rank in the police and military. Since DIU itself consisted of police officers, credible sources told [the investigators of OHCHR] that it was reluctant to pursue investigations against superior officers (OHCHR, 2015: Para. 503).

At the same time, the number of people convicted remained low. Yasantha Kodagoda, Senior State Counsel at the MPU, referred to a convictions rate as low as five per cent (interview Kodagoda, 2015). Referring to the low number of convictions, the Human Rights Committee pointed at the lack of satisfactory evidence and unavailability of witnesses and recommended the authorities to,

Diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases (Human Rights Committee, 2003: Para. 9).

Another strategy to decrease the number of convictions was through cross-examining victims. The former Secretary to the Central Commission refers to prosecutions collapsing as a result of the cross-examination of victims. According to him,

None of those cases were taken up seriously, they were going down dates and dates; but the few cases that were taken up collapsed because there was nobody present in the Court to tell that the evidence recorded by the Commissions were only up to the point when evidence indicative of the perpetrator came to light. So, when witnesses added things to what had been recorded by the Commissions the defense council said why didn't you say this then? You are saying it now you are cooking up the story! And the judge tended to believe that because we were not there to tell the Court [that] she had said much more than that, [but] we didn't recorded because it was not necessary for us. So that was another reason why most of the cases collapsed (interview Iqbal, 2014).

There was yet another measure to protect perpetrators. At the time when disappearances were taking place, the police had refused to accept complaints. Only after the Commissions were appointed in 1994, a directive had been issued to the police to accept complaints even in respect of incidents that had happened long before.

Consequently, the most of the complainants who appeared before the Commissions produced copies of complaints to the police made long after the incident concerned, which the Commissions accepted. These complaints had to be annexed to the applications for compensation provided by the state (personal communication Secretary Central COI, Mr. Iqbal, 2016). In these complaints, the victim petitioners had been asked not to refer to the identity of the perpetrator, but rather to state perpetrators were unknown persons. In this regard, the Chairperson of the Southern Commission stated, 'references to anyone by name entailed having to go through a prosecution' (interview Muttetuwegama, 2014). Similarly, the official government forms which have to be signed to receive compensation actually provided that perpetrators were *subversive* or '*unknown persons*'. Hence, by signing this form, victims would be acknowledging lack of knowledge of who the perpetrators were (Kishali Pinto-Jayawardena, 2010: 102).

When those cases were filed and victims were testifying about the identity of the perpetrators, the defense counsel used their earlier statement on the compensation form to impugn their credibility. Mr. Kodagoda referred to this technical problem when he stated,

Some of these people either due to the security situation that prevailed at that time or due to the need to get compensation, had, previous to these Commissions, also made statements to the police as well as to civil administrators, saying that their so-and-so had been abducted and had disappeared and they wouldn't know the identities of the abductors. Several years down the road, they had told the Commission or the DIU, the identities of the perpetrators. So, on the face of it, there was sufficient material to cross-examine the witnesses, so their testimonial trustworthiness was seriously in doubt (interview Kodagoda, 2015).

State agencies, the police, the Attorney General, and the judiciary did not see the outcome of the fact-finding done by the Commissions as a pointer directing the police to further investigate for the Attorney General to build a stronger case. Rather, they see the Commissions' findings as information that needed to be crosschecked and, if and when contradictions came up, use it as grounds to drop the case. Two reasons justify this approach; judicial attitudes and the war between the government and the LTTE in the North East, which re-started in April 1995 after negotiations for a peace agreement failed.

In relation to judicial attitudes, some within the judiciary felt extra-judicial elimination of insurgents was necessary to restore security and normalcy in the country. A report of the International Commission of Jurists points at institutional and motivational factors within the prosecutorial and judicial system that explain the low rate of convictions. The report refers to an interview with a former senior state counsel, who is quoted as saying,

The attitude of counsel, courts and the accused sometimes make our work difficult. The attitude seems to be that if the police/army had not resorted with such force against subversives at that time, our society will not have survived that era. Hence what is done is believed to be justified. Some believe that the police officers were only doing their job. Some judges are also biased by the personal experiences that they have had to undergo during this period (Kishali Pinto-Jayawardena, 2010: 101).

The ongoing war in the North East was another reasons interviewees expressed to justify the low rate of convictions. Former Secretary of the Central Commission referred to the fact that,

Successive Governments, which were continuing their fight with the LTTE, were not sincere in their efforts to deal with the perpetrators and antagonize the military and the police. The Attorney General's Department became politicized and they too did not want to embarrass the government by prosecuting some of the perpetrators who were then in key positions in the relevant forces (personal communication Secretary Central COI, Mr. Iqbal, 2016).

Former Commissioner from the Southern Commission stated that 'the war was not over. Some perpetrators went from the south to the north [to fight]. In a situation where the war is not over, even the government cannot really take action against the higher ups' (interview Jayawardena, 2014).

Despite all these obstacles, in rare occasions, courts continue to convict perpetrators in cases investigated by the three Zonal Commissions. Such was the case of Roshan de Silva, Colombo Crimes Division Director and Superintendent of Police, M. Jayasena and D. Shantha, two constables, who were convicted and sentenced to eight years imprisonment for murdering a 16-year-old student in June 2015. The student had been taken into custody at Elaboda (Western province) in 1989, during JVP's second insurgency, and shot to death on 15 January 1990. The complaint had been made on 21

March 1998 to the Disappearances Investigation Unit and the Attorney General had filed a case against these officers in 2006 (The Island, 2015).

I conclude EC-12 was not fulfilled. The State agencies did not work towards implementing the Zonal Commissions recommendations to prosecute. As a result, the enforcement produced was very limited.

Another measure concerning individual responsibility that demonstrates enforcement is whether or not *perpetrators have been removed from public office* (EC-13). Two such measures were undertaken after the three Commissions' final reports were submitted. First, the Southern Commission recommended interdiction of officers following initiation of criminal proceedings (Law & Society Trust, 2010: 94). According to the lawyer of a victim's group,

Some officers were interdicted but widely the government, the [Inspector General of Police], by an order circular lifted this interdiction and they were reinstated. In a case filed by us the court of appeal held that that was illegal and they were again interdicted. But we don't know what happen then after, the government changed (interview Kumarage, 2015).

Indeed, the Deputy Inspector General on Personnel and Training of the police issued a circular directing the reinstatement of all officers interdicted following inquiries conducted by the DIU and charged in courts, but subsequently bailed out. However the circular was eventually quashed, as the Court of Appeal understood that, on the basis of the Establishment Code, officers against whom criminal proceedings had started should not be reinstated (Law & Society Trust, 2010: 94, footnote 124).

The second measure related to recommendations on the removal of officers was disciplinary actions. The Central Commission recommended prompt disciplinary actions against state employees when evidence indicates they had violated official procedures (Final Report of the Central COI, 1998: 3). Similarly, the Southern Commission recommended severe disciplinary punishment to government officials who have failed to take adequate measures to prevent disappearances (Final Report of the Southern COI, 1998: chapter 14). Nevertheless, despite the Establishment Code provides disciplinary proceedings against public servants, these proceedings were not used



against of those named responsible for disappearances by the Commissions (Law & Society Trust, 2010: 105, footnote 50). Consequently, I conclude EC-13 was not fulfilled.

Evaluative criteria 14 assess enforcement considering whether or not *institutional or legal reforms to prevent future violations have been adopted* (EC-14). Most of the recommendations made by the Zonal Commissions to prevent future violations concerned reviewing emergency legislations relating to arrest and detention. The Southern Commission again submitted the most extensive recommendations, including the need for the authority to submit a weekly list of arrested people to the District Secretary and the duty to inform the magistrate of the arrest within 24 hours along with any change in the detention location (Final Report of the Southern COI, 1998: Ch. 14 Recommendations, Preventive Measures (IV. 2)). The government did not implement most of them.

Other recommendations by the Commissions concerning arrest were already adopted by the time of the submissions of their reports. For example, the Southern Commission recommended arresting officers to inform the arrestee of the reasons for the arrest, their identity and to provide a 'receipt of arrest' to a family member or friend of the person arrested (Final Report of the Southern COI, 1998: Ch. 14 Recommendations, Preventive Measures (IV.3); Emergency Regulations (VI.2)). These measures had been first included in the July 1995 Presidential directions which required members of the security forces to report all arrests to the Human Rights Task Force (Amnesty International, 1996: 11). The President issued again similar directives after the Human Rights Commission, a national human rights institution, started operations in July 1997 (Human Rights Commission of Sri Lanka, 1998). The obligation of the arresting officer to issue a receipt to a relative of the arrestee acknowledging the fact of the arrest was incorporated as a legal right in the emergency regulations (Section 20.9 Emergency Regulations, 2005).

Due to the lack of implementation of recommendations intended to review emergency legislations relating to arrest and detention, I conclude EC-14 was not fulfilled.

*Enforcement as a result of vertical accountability relationships (EC 10-14)*

Despite most of the recommendations the Commissions made were not implemented, victim groups and civil society in Sri Lanka did not pressure the governing regime to do so. As previously seen, only in one instance, the Secretary-General of the OPFMD filed a case against the Deputy Inspector General circular directing the reinstatement of all officers who had been interdicted and charged in courts, but subsequently bailed out. In response to the write, the Court quashed the circular on the grounds that officers against whom criminal proceedings had started should not be reinstated (Law & Society Trust, 2010: 94, footnote 124). Other than that, there was no pressure from victims or civil society to the governing regime to implement the Commissions' recommendations. Even if such pressure had existed, it was not enough to render the governing regime accountable to the demands from victims and civil society. Consequently, there was no vertical accountability relationships between civil society and the governing regime as a result of the Commissions' recommendations.

#### 5.3.4 Explaining lack of enforcement after the recommendations

The previous analysis shows that while the Commission produced answerability as a result of horizontal accountability relationships with state agencies (EC-3 to 9), the recommendations compiled in the final reports did not lead to enforcement (EC-10 to 14). It also shows a governing regime being answerable to the demands from victims and civil society before the Commission was established (EC-1, 2); however, these same groups did not exert enough pressure on the governing regime to implement the Commissions' recommendations (EC-10 to 14). In this section, I attempt to explain this lack of enforcement and its implications.

The responses from the state agencies to the Commissions' recommendation to prosecute indicate the reasons for the lack of enforcement as a result of horizontal accountability relationships generated by the recommendations. In the context of Sri Lanka, the state apparatus worked as a system to protect itself against a change of political leaders at the top; a change, although temporary in nature, was willing to

punish those who had committed violations. The state apparatus self-protection mechanism entailed actions (and inactions) to reduce the number of cases to be filed and to lower the rate of convictions when prosecutions went ahead. For these ends, first, state agencies did not treat the investigation results by the Commissions as a basis for prosecutions. Rather, they treated such findings as information that needed to be crosschecked and, if and when contradictions came up, as grounds to drop those cases. Second, intimidations of witnesses amidst a climate of fear plagued the investigation and prosecution of such cases. Third, inaction of the MPU's acceptance of the allegations of insufficient evidence to take the investigation further by the DIU without any objection also contributed the low number of cases to be filed. At court, victims serving as witnesses were cross-examined based on lacunas in their statements given to the Commissions years before about incidents that had taken place, sometimes, ten years earlier. Victim's credibility was also impugned on the basis of official forms they were asked to sign to receive compensation, where they had to allege the ignorance of the identity of the perpetrators.

Various factors led the state agencies to act as a system of self-protection. The Sri Lankan Army and the Police shared the Commissions' findings that the political leaders from the previous regime were responsible for directing the security forces to disappear people on the grounds they were insurgents. However, those political leaders were not brought to justice. Those prosecuted were officers of the security forces, mainly police personnel. Faced with the prospect of prosecutions of own personnel while real culprits (political leaders) escape, the security forces, including the police, must have acted to protect their own. Second, considerations of brotherhood within the police also worked to that effect. Officers of the DIU, a branch within the Police, were investigating their colleagues. Consequently, when criminal proceedings were initiated against higher ranks of the police officers, investigations appear to have concluded that the cases reached to a dead end in terms of investigations. Only cases against junior officers were sent to the MPU to initiate the criminal proceedings. Third, some prosecutors, judges and the accused themselves tended to legitimate the response of the security forces on the grounds that if they had not responded to the armed insurgency as they did, the society would not have survived that era. Finally, many interviewees pointed at the

ongoing war in the North and East of the country against the LTTE as a reason to justify the low rate of convictions. What the previous analysis shows is the failure of the institutional response (the establishment of the DIU and the MPU) to punish those responsible. Lack of punishment entailed leaving the perpetrators within the security forces, especially in the Sri Lankan Army. As former Commission Secretary alleged,

Ironically, the subsequent government [government under Mahinda Rajapaksa] appears to have made use of these names to find who is capable of committing disappearances and they put them in key positions instead of punishing them (interview Iqbal, 2014).

The absence of pressure from civil society and victim groups to implement the recommendations of the Commissions explains the lack of vertical accountability. This absence of such pressure was partly due to the close relations between victims, civil society and the political leaders in the government. While representatives of victim groups argue that politicians forgot the promises made to them, civil society representatives acknowledge that they had not exerted much pressure to implement the recommendations.

Concerning victims, the resident of a victim's organization noted that political leaders had led the victims' movement since the beginning and those same leaders became part of the government. As he expressed,

When [political leaders who had supported victims] became Ministers, [victims'] heroes are in the government. And they are promising and the promises are being implemented, the Commissions are coming, the Commissions are listening and there were very few cases coming out. So the people just thought they would do something. (...) We thought good results will come, in fact good results came, but no one pushed those recommendations to be implemented against the government. That was the main problem (interview Brito Fernando, 2014).

Others refer to political leaders "using" or "hijacking" 'the movement against disappearances, especially the organizations of mothers and families of the disappeared, to consolidate their own political bases' (interview with human rights practitioners in Wijewardene and Nagaraj, 2014). The OPFMD legal advisor recalls meeting with President Kumaratunga. 'We submitted a memorandum asking for the recommendations to be implemented. Then after, the leaders forgot all the promises made' (interview Kumarage, 2015).

Concerning the role of civil society, there is an understanding that there was no pressure on the government to implement the recommendations. Kishali Pinto-Jayawardena, human rights lawyer, expressed,

From my perception and my recollection, there was no pressure at all. There was not pressure and, therefore, [the government] was allowed to get away with not implementing or just ignoring the recommendations and just focusing on paying some money and that was it' (interview Pinto-Jayawardena, 2014).

There is also an agreement that the lack of pressure was linked to the close relation between civil society and the government of President Kumaratunga. Particularly human rights practitioners were 'closely involved in supporting the election of Chandrika Bandaranaike Kumaratunga as president and engaged in her administration, formally or informally' (Wijewardene and Nagaraj, 2014: 95). As a member from civil society reflected,

In Chandrika's time, resistance was not possible because everyone was friend. Everybody who worked with her was friend (...) So, the civil society became weak during Chandrika's time, our autonomy could not be safeguarded. We became part and parcel of that process (interview Nimalka Fernando, 2015).

Such close relation between civil society and the government had long-term consequences. As a human rights lawyer expressed,

The coopting of people who should have criticized the government resulted in the government itself becoming offender. Years later, when the government started interfering with the judiciary all these civil society voices became silent due to their political connections (interview Pinto-Jayawardena, 2014).

#### **5.4 Conclusions**

The three Zonal Commissions were established with the aim to investigate involuntary removals and disappearances resulting from two armed conflicts, the second JVP insurgency and the armed conflict between the government and the LTTE. However, the Commissions were only able to deal with the violations resulting from the second JVP insurgency. To start with, the establishment of the Zonal Commissions was the government's response to social demands to deal with the violations committed by the state security forces with the aim to defeat the JVP insurgency under the previous UNP government. It was not a response to the armed confrontation between the government

and the LTTE. Consequently, the Southern and Central Commissions which dealt with the JVP insurgency, covered almost the entire period of the insurgency and violations related to it. Contrarily, the North East Commission which dealt with the ethnic armed conflict was only able to examine a small part of the violations related to it. The restricted temporal jurisdiction to cover violations only after January 1988 and the ongoing armed conflict in the Northern province restricted the number of violations that the North East Commission could cover. The lack of a clear mandate and their separate and independent operations also resulted in very different outcomes among three Commissions. As we have seen, the Southern Commission report was the most extensive and its recommendations the most comprehensive. This Commission had much more resources, including the collaboration of civil society, human rights, and victim organizations, compared to the other two commissions.

The three Commission's establishment generated vertical accountability relationships between the civil society and the governing regime. Citizens held accountable those in office voting for the party in the opposition that was calling for the appointment of COI to investigate disappearances. The new governing regime after the presidential elections became answerable to the citizens as a result of electoral accountability, an instance of vertical accountability (EC-1,2).

Concerning the relation with the Commissions, while victims, witnesses, and civil society organizations were able to access and provide information to the Southern and Central Commission, this was not the case for the North East Commission due to the ongoing war (EC-3). The three Zonal Commissions generated horizontal accountability relationships as a result of their interactions with the security forces (EC-4). Specifically with the police, the Commissions were able to conduct an exhaustive investigation through the various police information books available. The documentation made available to the Commissions corroborated detentions by the police of people who subsequently disappeared, as alleged by victim's relatives in their statements and complaints. The Commission's final reports disclosed new facts and evidence surrounding violations committed. Overall, the Commissions established 16,500 cases of involuntary removals or disappearances, including in this category abductions followed by subsequent killing where the corpus was found.

The three Commissions established that the army and the police were the main institutions responsible for the disappearances with the insurgent groups being also responsible for certain portion of violations (EC-8). Moreover, the Commissions also referred to the political dimension of disappearances with political figures, both local politicians and Members of Parliament, being responsible. These political figures were found to have provided lists of people to be eliminated to the security forces on the grounds they were insurgents when, in most cases, they were members of opposition political parties. Some of the final reports included the names of those most responsible for disappearances (EC-9). Names of hundreds of other perpetrators were also submitted to the President in confidence. These names were not made public. Through disclosing evidence in support of violations committed by security forces and politicians the Commissions produced state answerability.

This paper has examined two more accountability relationships as a result of recommendations in the final reports of the three Commissions. The Zonal Commissions made a list of recommendations, including measures to redress the victims, to prosecute those responsible for disappearances and to prevent further violations. Few of these recommendations resulted in enforcement (EC 10-14). For example, the recommendation to provide monetary compensation led the Rehabilitation of Persons, Properties and Industries Authority to provide monetary compensation to the relatives of the disappeared. The amounts remained very small (EC-10). However, none of the other recommendations to redress victims were implemented. Neither recommendations to collect information on the existence of mass graves, their location and identities of bodies alleged to be buried or to exhume burial sites were implemented (EC-11). Recommendations to prosecute those responsible produced extensive answerability from the various state agencies concerned, but limited enforcement. Extensive answerability as the police Disappearances Investigation Unit investigated thousands of cases on the basis of the outcome of the fact-finding done by the Commissions, which led to the Attorney general's Missing Persons Unit starting criminal proceedings against 597 security forces personnel. But limited enforcement as only 12 perpetrators out of 597 security forces personnel prosecuted were convicted as of 2004, most of them junior officers (EC-12).

The recommendation to interdict officers following initiation of criminal proceedings temporarily produced enforcement (EC-13). Nevertheless, a circular issued by the Deputy Inspector General on Personnel and Training of the Police circular overruled this recommendation. The circular reinstated all officers interdicted and charged in courts who had been bailed out. Finally, the recommendations to prevent future violations were implemented to a limited extent (EC -14). Those implemented, such as one to require the arresting officer to provide a 'receipt of arrest' to a family member or friend of the person arrested, had already been included in previous Presidential directions to the armed forces before the final reports were submitted. Nonetheless, such inclusion could have been as a result of being incorporated as a recommendation. In that regard, such recommendations did led to enforcement to a limited extent.

While most of the recommendations the three Commissions made were not implemented, victim groups and civil society did not put pressure on the governing regime to effectuate them either. Only in one instance, there was enforcement as a result of civil society action. Following judicial action by the Secretary-General of the OPFMD, the Court quashed the circular by the Deputy Inspector General of the Police circular to reinstate officers who had been indicated. In short, there was hardly any vertical accountability relationship established between the government and civil society based on the outcome of the three Commissions' work (EC-10 to 14).

The analysis of the impact of the three Commissions shows that, while the Commissions produced great answerability during its work as a result of horizontal accountability relationships with state agencies, the recommendations compiled in the final reports did not lead to enforcement. It also shows a governing regime being answerable to the demands from victims and civil society before the Commissions were established, but the pressure vanishes after the Commissions submitted their final reports, despite the governing regime did not implement their recommendations. The response of state agencies to the Commissions' recommendations to prosecute shows how state agencies, mainly investigative and prosecutorial agencies, worked towards self-protection. The chapter shows the failure of the institutional response to punish



those responsible, leaving perpetrators unpunished, especially the army personnel and the UNP politicians in government.

The analysis also show that the main factor for the lack of vertical accountability between the government and civil society was the failure of civil society and victim groups to pressurize the governing regime to implement the Commissions' recommendations. This lack of pressure from victims and civil society needs to be contextualized against their close relations with the political leaders in the government. The political leaders to whom victims needed to put pressure on were, as a matter of fact, the same leaders who had founded the victims' movements. As for civil society, especially human rights practitioners had been actively involved in supporting the election of President Kumaratunga. When the time came, those who should have been increasing the pressure on the government allowed it not to act on the Commission's recommendations.

## **PART III**

# **CONCLUSIONS**



## Chapter 6

### Conclusions and final remarks

#### Introduction

I divide part III in three main sections. The first section presents the thesis conclusions. The second section discusses the implication of the findings in this thesis. The final section proposes the use of the accountability framework and avenues for future research.

#### 6.1 Thesis conclusions

The starting point for these conclusions is the research question guiding this study, “What has been the impact of the truth commissions established in Nepal and Sri Lanka in promoting accountability?” Three main themes stem out of this research question: TCs, accountability and impact. In chapters one, two and three, I have approached each of these themes through specific analytical lenses. In chapters four and five, I have applied the accountability framework developed in chapter two to the Commissions established in Nepal and Sri Lanka. I present here the findings in a systematic manner, bringing together the partial conclusions reached in the previous chapters.

##### 6.1.1 Truth commissions as processes

In this thesis, TCs have been analyzed as processes within broader TJ and also as a peacebuilding processes. Chapter one has argued that, over the last 20 years, TJ has

evolved and expanded beyond the legal discipline. The expansion of the field, from prosecutions to truth, reparations and measures intended to avoid repetition was also an expansion to other disciplines. Peacebuilding fits well with a conceptualization of TJ that goes beyond the justice-impunity binary and encompasses the broader links between dealing with the past and building peace in the future. Central to this broader approach has been, on one hand, the consideration of civil society in processes of transition and peacebuilding, and on the other, the role of TCs.

I have argued that, in parallel to the evolution of the TJ discipline, civil society organizations engaging with TJ processes have also evolved. From being initially human rights organizations working on behalf of victims to confront state violations, to TJ organizations seeking a broader participation of victims and citizens in TJ processes and, when possible, collaboration with the state. Conditions for civil society to working more closely with victims and citizens are more favorable when TCs are established as they put victims at the center, creating a space for their participation and broader civil society engagement. As TJ mechanisms implemented in contexts of postconflict or post authoritarianism, TCs emerge as an instrument that allow for the public participation. This is not new to TCs as COIs also share this trait. The chapter has emphasized similarities between two mechanisms, TC and COIs.

An approach to TCs as processes entails a focus on the public participation. If we consider TCs as processes, we can distinguish different stages with various degrees of public participation. Before their establishment of a TC, civil society can potentially play a very important role in pushing for it or in making changes in the mandate, appointment of commissioners or any other relevant aspect. During the time of operations, a TC interacts with victims, representatives of civil society and state officials. After the submission of a TC's final report, civil society can pressurize the government to implement their recommendations.

Being a mechanism that allows for public participation, a TC becomes a platform capable of generating relationships and interactions among the various affected groups within society. These groups include representatives of the state apparatus, such as members of a governing regime, officers from state agencies, security forces, justice and civil service sector, among others. These groups also include representatives of victims

associations, civil society and human rights organizations and for commissioners, usually respected individuals within the society.

The relationships TCs generate should allow participants in these relationships to feel that they are part of a process, and not just observers. These relationships should be meaningful and empower people in their interactions with state representatives. This entails, on one hand, the need for the governing regime to be responsive to the citizens. On the other, the state agencies need to be responsive to the new governing regime. The transition from the old regime which has lost legitimacy to the new regime entails “opening up” in the sense of exposing the state apparatus to the citizens, specifically to those who suffered violations from the state. In this context, accountability provides a framework to evaluate whether or not these relationships are meaningful and empower people.

#### 6.1.2 Truth commissions’ impact: bridging the gap between process and outcome through the accountability framework

Related with the consideration of TCs as processes is the need to assess their impact as processes. I examine here this question of TCs’ impacts as processes based on the issues discussed on impact studies in chapter one, the accountability framework in chapter two, and theory based impact evaluation in chapter three to evaluate the impact of TCs.

Most of the studies reviewed in chapter one assess the impact of TCs in pre-determined outcomes without considering how their processes affect that outcome. The review of quantitative studies on TCs’ impact has revealed contradictory results, even when they use the same outcomes, such as human rights and democracy. Qualitative studies that assess impact of TCs also reach divergent results. Through the in-depth analysis of two qualitative studies that approach the assessment of impact of TCs through tracing causality from different perspectives, I have identified a disconnection between process and outcome.

If studies assessing the impact of TCs at societal and state levels are to link process and outcome, they need to explain the impact they are assessing in terms of a TC’s goal. The studies that assess the impact of TCs on democracy and human rights

assume that one of the goals of TCs is to contribute to the promotion of democracy or human rights. Nevertheless, the literature does not link the impact of a TC with its goals. Linking a TC's impact and goal requires two steps; first, explaining the process through which a TC generates an impact; and second, explaining how this impact affects our pre-determined goal or outcome of reference. In other words, to link a TC's impact and goal entails linking a TC's process and the outcome of that process.

To assess impact while linking the process and the outcome of a TC, we need to explain how a TC logically works to produce a specific result. To that end, we need to develop a theory of change that explains how TCs should work to make any change. As I have argued in chapter three, theory based impact evaluation has a conceptual and an empirical component. The conceptual component, or theory of change, attempts to explain how things should logically work to produce the desired change. In this research, this means explaining how TCs generate accountability relationships. The empirical component seeks to test this theory. To empirically test this theory of change, it is necessary to probe the existence of accountability relationships. For this purpose, I have devised 14 evaluative criteria which indicate the production of answerability and enforcement. Through the accountability framework, I tried to link process impact and outcome impact, filling the gap found in the literature.

Accountability as a concept allows us to link the impact of a TC's process and how this impact affects accountability as an outcome. Process wise, I have argued that TCs generate horizontal and vertical accountability relationships and that it is within these relationships that accountability, in its answerability and enforcement dimensions, is produced. Outcome wise, it is the previous definition and operationalization of accountability as a concept what allows us to understand whether or not a TC has contributed to promoting accountability. If a TC produces answerability or enforcement as a result of accountability relationships it has generated, we can confirm that it has contributed to promote accountability as an outcome.

In chapter two, I have developed the accountability relationships TCs generate. I have argued that before their establishment, TCs generate indirectly vertical accountability relationships between civil society and the governing regime. This vertical relationships produce answerability. During the period between establishment

and the report is submitted, TCs hold state agencies horizontally accountable. This horizontal relationships produce answerability. Moreover, because TCs are authorized by the state, the truth they disclose in their report becomes state answerability in the presence of testimonies of violations. In their final reports, TCs made recommendations susceptible of generating two more accountability relationships; first, a horizontal accountability relationship between the governing regime and the state agencies towards which the recommendations are directed, and second, a vertical accountability relationship between the civil society and the governing regime, in case the latter does not implement the recommendations and the former pressures to do so. In both cases these relationships are susceptible of producing enforcement, or, in its absence, answerability.

Building up on the previous accountability relationships, chapter two has presented a framework to evaluate the impact of TCs. Following the three stages in which I have divided a TC process, chapter two proposed 14 criteria to evaluate the production of answerability and enforcement. Through showing the existence of accountability in its answerability and enforcement dimensions, the evaluative criteria probe the existence of accountability relationships.

### 6.1.3 Assessing impact on accountability: the Mallik Commission, the Committee on Disappearances, and the three Zonal Commissions

I present here a summary of the five Commissions contribution to promote accountability, as examined in chapters four and five. In Nepal, the prospect of creating the Mallik Commission generated vertical accountability relationships between civil society and the governing regime. Data collected suggests the fulfillment of evaluative criteria 1 and 2, which demonstrates the production of answerability. Specifically, pressure from civil society led to setting up a commission to investigate the killing of protesters. Mobilization of the public led to the dissolution of a commission established under the previous *Panchayat* regime and the appointment of a new commission acceptable to civil society. The establishment of the Committee on Disappearances also produced state answerability because pressure from civil society led to its establishment



by the governing regime. Nevertheless, as opposed to the Mallik Commission, pressure to establish this committee came from specific human rights organizations with links to political parties rather than from a broad social support. I conclude the vertical accountability relationship as a result of the establishment of the Mallik Commission was stronger as the governing regime was rendered answerable in the presence of a much broader sector of the Nepali society.

As for the three Zonal Commissions in Sri Lanka, the prospect of setting them up also generated vertical accountability. Nonetheless, instead of social demands led by civil society (societal accountability) the governing regime was held to account by citizens through elections (electoral accountability), an instance of vertical accountability. Citizens held politicians in the government accountable by voting for the party in the opposition that was calling for the appointment of COI to investigate disappearances. The new governing regime became answerable to the citizens. Eighteen days after winning the elections, new President Kumaratunga established the COI. What all five Commissions in Nepal and Sri Lanka share is participation from civil society in the establishment of the Commissions. However, they also show different types of participation. While civil society participation was through social demands and street protests in Nepal, it was the result of elections in Sri Lanka.

TCs also generate horizontal accountability relationships while undertaking their functions. In Nepal, the Mallik Commission generated horizontal accountability relationships as a result of its interactions with the police, government and state officials involved in suppressing the People's Movement. Similarly, the Committee on Disappearances generated horizontal accountability relationships that produced answerability through interactions with state agencies, specifically the police, district administration offices, and prison officers. However, neither of the Commissions had access to the palace and the Nepal Army, two of the main actors allegedly involved, which limited their investigation and findings. This lack of access entails neither the palace nor the Nepal Army were held accountable and made to answer to the Commissions. These state structures remained unaccountable.

The three Zonal Commissions in Sri Lanka also generated horizontal accountability relationships in their interactions with state agencies, especially with the police force. The Commissions conducted an exhaustive fact-finding through the various records and documentations that were made available to the Commissions by the police. Data collected by the Commissions from the police records corroborated detentions by the police of people who subsequently disappeared. Unlike the two Commissions in Nepal, the Zonal Commissions in Sri Lanka had access to all the actors, but any attempt to collect information from the army met with the same answer: lack of records.

The answerability produced through horizontal accountability by the two Commissions in Nepal was transferred to the public one to a limited extent. While the Government of Nepal did not publish any of the reports, the Mallik Commission's report was leaked to the media. The full report was eventually published three years later by a human rights organization. Media reports of the contents of the report and the publication by civil society transferred the answerability the report had produced to the public domain. The Mallik Commission's report established that the Nepal Police had used excessive force and killed protesters. The report acknowledged that state agencies had committed violations of human rights. It also held responsible the *Panchayat* government for directing and implementing a policy leading to the security forces use of disproportionate force. It named over 100 perpetrators from the government, the administration, and the police force.

Contrarily, the answerability due to the work of the Committee on Disappearances was never transferred to the public. Its report was neither leaked to the media nor published by civil society. As a result, the answerability produced in relation to the disappearances following the 1985 bombing, the human rights violations state agencies committed, or the attribution of individual responsibility through naming perpetrators was never transferred to the public domain to generate debate and dialogue. Consequently, the Committee did not contribute to promoting state answerability. The complete lack of its publicity meant no further impact of the Disappearances Committee report on promoting accountability during the stage after the report's submission.

The Zonal Commissions produced state answerability through collecting evidence to establish violations by the security forces and politicians, but such answerability was transferred to the public only a very limited extent. The Commissions established that the army and the police were the main perpetrators for the disappearances. At the same time, they referred to the political dimension of disappearances with political figures responsible at various level, contributing to naming people to be eliminated by the security forces. While some of the reports included the names of those most responsible for committing disappearances, the names of hundreds of other perpetrators were submitted to the President in a separate report that was not made public. This answerability was transferred to the public domain through the publication of interim and final reports of the Commissions. However, the government did not circulate the reports widely. The reports were available at the Government Publications Bureau, but in very limited number. Consequently, the transfer of answerability to the public remained limited.

As a result of recommendations compiled in the final report TCs generate two more accountability relationships. First, a relationship of horizontal accountability between the governing regime and the state agencies towards which the recommendations are directed. The implementation of recommendations produces accountability in its enforcement dimension. In the case of Mallik Commission, recommendations to compensate financially the relatives of those who had been killed were implemented. The recommendation to prosecute those responsible did not produce enforcement, as the Attorney General did not initiate any prosecution. Instead it produced answerability as the Attorney General had to justify on what grounds he was challenging the implementation of the Council of Ministers decision to prosecute based on the Commission's recommendations. As for the Committee on Disappearances, because the report was never published it did not generate any horizontal accountability relationship after its submission.

In Sri Lanka, again, the recommendations by the three Zonal Commissions led to answerability, but very limited enforcement. While the governing regime implemented the Commissions' recommendations to provide monetary compensation, it did not

implement other recommendations to redress the needs of victims. Recommendations to prosecute those responsible produced extensive answerability from the various state agencies concerned, but limited enforcement. Extensive answerability as the DIU under the police investigated thousands of cases on the basis of the outcome of the fact-finding done by the Commissions, which led the MPU under the Attorney General to initiate criminal proceedings against 597 security forces personnel. Nevertheless, enforcement remained limited with only 12 perpetrators out of 597 were convicted as of 2004, most of them junior officers.

What the previous analysis shows is that, while the Mallik Commission in Nepal and the Zonal Commissions in Sri Lanka produced great answerability as a result of horizontal accountability relationships, the recommendations compiled in the final report did not produce enforcement. In both cases of the Mallik Commission and the three Zonal Commissions, the state agencies' response to the recommendation to prosecute suggests a state apparatus working as a system to protect itself against an external aggression. Specifically in both countries, the state security forces saw that they were being targeted after a change of political regime through the Commissions' reports which portrayed them as perpetrators.

In Nepal, the failure to implement the recommendations to prosecute the political figures in the Panchayat government was due to a compromise political parties had reached with the King. This left the police as the target of future prosecutions. In response, the police sought an amnesty from the interim government, arguing that they had followed orders from political leaders from the previous *Panchayat* regime. They further threatened to refuse to keep public order during the first general elections in 30 years. In Sri Lanka, as prosecutions were initiated, the state apparatus efforts to protect itself becomes more evident. State agencies, mainly the police and the Office of Attorney General, worked towards, first, reducing the numbers of indictments and convictions. Like in Nepal, the Sri Lankan security forces, the army and the police, shared the commissions' findings that the political leaders from the previous regime were responsible for directing them to disappear people for being insurgents. However, those political leaders were not brought to justice. Only the security forces, and mainly police

personnel, were prosecuted. As the Nepal's new regime needed the police for the success of the elections, the Sri Lankan government needed the military to fight the war against the LTTE. This dependence on the security forces inevitably led to the governments willing to only look forward, rather than to look backwards.

If the governing regime does not implement a TC's recommendations, civil society can pressurize the governing regime to do so. This vertical accountability relationship between civil society and the governing regime produces enforcement if the recommendations are implemented as a result of social mobilization. Both cases of Nepal and Sri Lanka show only limited pressure on the governing regimes when they did not implement the Commissions' recommendations.

In Nepal, limited pressure was due to the fact that civil society had been absorbed by the system and was part of the governing regime when the time to implement the recommendations came. With the legalization of political parties, civil society activists became formally political party members who had to follow the party discipline. Such party discipline was constrained by the compromise political leaders had reached with the King, which excluded any prospect of prosecuting figures from the previous regime. The public's reluctance to organize mass protests against their elected government, the one they had fought for, also contributed to low pressure.

Similarly in Sri Lanka civil society and victim groups did not pressurize the governing regime to implement the Commissions' recommendations. This was due to the close relationships between victims, civil society representatives and political leaders who became part of the new governing regime. These political leaders had founded the victims' movements. As for civil society activists, they had been actively involved in supporting the election of President Kumaratunga. When the time to put pressure arrived, many within civil society were not monitoring the new government. Instead, they had become engaged, formally or informally, in the new administration.

Lack of implementation of the Mallik and the Zonal Commissions' recommendations translated into limited empowerment of victims, civil society and, as a result, the broader citizenry against the governing regime and the state agencies.

## 6.2 Implications of the findings in this thesis

In this section, I consider whether or not the Mallik Commission in Nepal should be considered a TC, rather than the Committee on Disappearances. I further examine how the confusion between Mallik Commission and the Committee on Disappearances, along with the analysis on the three Zonal Commissions in Sri Lanka, affect other studies assessing the impact of these Commissions.

### 6.2.1 On the confusion between the Mallik Commission and the Committee on Disappearances in Nepal

In chapter four, I referred to the confusion in the literature on TCs between the Mallik Commission and the Committee on Disappearances. As opposed to what has been written, it was the report of the Mallik Commission that was published, and not the report of the Committee on Disappearances. Further, the Committee on Disappearances' final report did not include any recommendation, but the Mallik Commission' did. What I explore here is in light of these new facts, whether or not the Committee on Disappearances should remain considered as a TC and whether or not the Mallik Commission should be considered one.

*Should the Committee on Disappearances not be considered a TC?*

In chapter one, I referred to five defining criteria in three definitions of a TC by Hayner, Freeman and Dancy et al. These criteria are: (1) a TC is a mechanism established anew and for a specific task with temporary, non-permanent existence; (2) it examines only past events; (3) its power or right to exist is given by the state in whose territory the violations occurred; (4) it is established to investigate; (5) it investigates a pattern of infringement of rights over a period of time, where the state was at least one of the perpetrators.

The Committee on Disappearances complies with these core criteria. It was a temporary mechanism officially created by the state for the purpose of investigating

disappearances that occurred between 1961 and 1990. The lack of a final report, either because the commission did not write one or because it was not published, as in the case of the Committee, does not determine the nature of a TC. Both Freeman and Hayner consider mechanisms that did not publish a report, such as 1982 Bolivia or 1996 Ecuador, as TCs. The fact that the Committee on Disappearances did not make recommendations does not disqualify it as a TC either. Freeman is the only author to refer to the purpose of a TC to make recommendations to redress the causes and consequences of the violence. Still, he considers the commission established in Serbia and Montenegro in 2002 which never wrote a report as a TC. In fact, the Committee on disappearances was not mandated to make recommendations. Nevertheless, other TCs, such as the one in Argentina, had no mandate to issue recommendations and there still is broad consensus on their character as a TC. In short, closer examination of the real operation of the Committee on Disappearances does not call for a change in its categorization a TC based on the classifications recognized in the literature.

Notably, Freeman introduces a final qualification regarding the application of the TC's definition in borderline cases. Specifically, he refers to 'a body that could be said to meet the definition of a TC when there is broad domestic and international consensus that it is not a TC' (Freeman, 2006: 19). As Freeman points out, the importance here is to go beyond a technical definition and consider whether or not the body in question reasonably corresponds to a broad domestic and international consensus about its classification as a TC. While the Committee on Disappearances corresponds to the technical definition of a TC, there is no domestic consensus that it was a TC. The Committee is unknown in Nepal, and even the few who know about its existence would not call it a TC. On the contrary, people I interviewed were surprised to learn the Committee on Disappearances was catalogued as a TC at an international level.

The fact that the Committee on Disappearances is unknown inside Nepal should question its consideration as a TC at an international level. Because its description, including its name, has been generally inaccurate in the literature, it should open to debate whether or not to consider it as a TC.

*Should the Mallik Commission be considered a TC?*

The Mallik Commission also complies with the five core criteria of a TC in the literature. It was a temporary mechanism officially made by the state for the purpose of investigating excessive use of force by the security forces which killed 45 demonstrators. It examined the violence during a period of two months from mid-February to mid-April 1990.

The main question with the Mallik Commission is whether or not the temporal element of the investigation (two months) constitutes enough length to consider it a TC. TCs usually examine long periods of time coinciding with autocratic regimes or armed conflicts. Dancy et al. discuss this issue. They argue for the requirement of the investigation of human rights violations over a period of time 'to indicate that the jobs of TCs is to examine patterned, systematic abuses of human rights, not isolated events' (Dancy, Kim and Wiebelhaus-Brahm, 2010: 52). In the case of the Mallik Commission, there clearly was a patterned systematic abuses committed during the period that it examined. The excessive use of force by the security forces repeated several times during the two months of protests. Dancy et al. postulate that 'for human rights violations to have been "systematic", they must have taken place in more than one single day (Dancy, Kim and Wiebelhaus-Brahm, 2010: 52). Consequently, the Mallik Commission should also qualify as a TC.

The Mallik Commission also appears to satisfy Freeman's subjective element whether or not there is domestic and international consensus it being a TC. There is neither domestic nor international consensus. Nevertheless, as opposed to the Committee on Disappearances, the Mallik Commission is a widely known commission in Nepal, perceived as one of the most popular COIs. Internationally it is unknown within the literature on TCs. What this study has established is the much broader contribution of the Mallik Commission to promote accountability, as compared to the Committee on Disappearances. If this was the basis for judgment, the Mallik Commission and not the Committee on Disappearances should be classified as a TC.



## 6.2.2 Implications for other studies of impact on Nepal and Sri Lanka

I examine here how other studies of impact could reach different results if they considered the work of the Mallik Commission or if they had accurately portrayed the Committee on Disappearances.

Olsen et al. argue that TCs, on their own, promote either accountability, which jeopardizes stability, or impunity, which fails to deter from future human rights violations. They argue that TCs have a positive impact on human rights by promoting a balance between stability and accountability only in combination with amnesties and trials (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 469). According to these authors, TCs enhance the accountability based on trials by going beyond individual criminal responsibility. Through establishing the systematic nature of violations, TCs raise awareness of past violence in the society. On the other hand, TCs perfect partial amnesties as they hold perpetrators who have legal immunity through non-prosecutorial processes accountable (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 469-70). To support their claims, Olsen et al. present the 1990 Committee on Disappearances in Nepal, which they wrongly call commission of inquiry – the *Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period*. The Committee on Disappearances is shown as a case of a TC being ‘too weak to bring stability and accountability [which] may have succeeded in appeasing potential human rights violators through its lack of subpoena power and inability to name perpetrators’ (Olsen, Payne, Reiter and Wiebelhaus-Brahm, 2010: 471).<sup>58</sup>

The analysis could be very different if they contrasted their theoretical explanation for the justice balance argument with the coetaneous 1990 Mallik Commission. As opposed to the Committee on disappearances, the Mallik Commission had subpoena powers, recommended prosecutions, interrogated perpetrators and exposed perpetrators by naming them. Contrary to the Committee on Disappearances’ report, the final report of the Mallik Commission did establish the systematic nature of violations by the previous regime, raising awareness of the state sponsored violence

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<sup>58</sup> The Committee named perpetrators but the problem is that its report was not made public. Need to mention they presume the Committee on disappearances report was published.

against its citizens. In fact, in Olsen et al. study, the Mallik Commission could be an example of a commission that promoted a balance between stability and accountability. By naming over a 100 perpetrators in the final report, the Mallik Commission hold accountable through non-prosecutorial means perpetrators who later on were granted amnesty.

I turn now to compare the results of Bakiner on the impact of the commissions in Nepal and Sri Lanka with the results in this study. Bakiner's reasoning of participatory commissions as producing indirect political impact would not apply to the Commissions in Nepal. Bakiner presents the Committee on Disappearances as a case of a participatory commission, which had indirect political impact as civil society pressure forced the government to release the report in 1994 (Bakiner, 2016: 167). However, as seen in chapter four, the government never released the report of the Committee on Disappearances, although it did release the Mallik Commission's report to the public. The report of the Mallik Commission was placed at the Parliamentary Library although with restricted access after being presented to the Parliament. Nevertheless, this was not the result of civil society pressure. In 1994, a human rights organization published the Mallik report. The government released neither the reports of the Mallik Commission nor the Committee on Disappearances as a result of civil society mobilization, which contradicts Bakiner's conclusion of a case of a participatory commission that produced indirect political impact. Bakiner also finds the TC in Nepal as the only example of a TC to not have had any direct political impact. The Committee on Disappearances could not have any direct political impact, as the final report was not made public and it did not make any recommendation. Nevertheless, the Mallik Commission did have direct political impact as its recommendations to provide compensation for the families of those who were killed during the two months of violence were implemented.

As for Sri Lanka, Bakiner refers to the three Zonal Commissions as a case of an exclusionary commission. I disagree and sustain that three Zonal Commissions were participatory commissions. The fact that the new President Kumaratunga took only 18 days after the elections to issue the decrees establishing the three COIs, should not be perceived as determining its exclusionary character. In fact, the question of their

establishment had arisen long before the elections. Initially, it was a victims' demand, which became a political demand of the opposition parties.<sup>59</sup> This close relation between victims, human rights organizations and political leaders in the opposition does not allow the Zonal Commissions to be considered exclusionary. Not only victims and civil society, the public in general participated in the process of establishing the commissions through expressing their view by their votes. In the parliamentary elections held in August 1994, Sri Lankan citizens already voted for the opposition that was promising investigation of disappearances by establishing a COI.<sup>60</sup> When the new government began the task of appointing three COIs to investigate disappearances since 1988, the UNP President, then still in the office, blocked the move. The establishing of the Commissions which proved impossible under the UNP President became again a central issue during the November 1994 presidential elections. Through electoral accountability, a form of vertical accountability, people chose the President that was promising creating a COI. Consequently, 18 days after taking office, President Kumaratunga issued the decrees instituting the three Zonal Commissions. My interviewees see the Commissions as the logical consequence of the electoral victory. They also regarded the Commissioners as important and influential people in the human rights field both from civil society and the judiciary.

Bakiner suggests that implementation of reparations in Sri Lanka was the result of indirect political impact through civil society mobilization, as 'there is no evidence suggesting that Sri Lanka's compensatory policies followed from the truth commission' (Bakiner, 2014: 24). However, as I have argued, the three Zonal Commissions had a central role in providing compensation. The Rehabilitation of Persons Properties and Industries Authority distributed payments on the basis of complaints made to the Commissions. I argue that this was the result of direct political impact of the

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<sup>59</sup> As early as February 1991, the Mothers Front had passed unanimously a resolution calling the government 'to appoint a fully powered independent Commission, free from state interference and including Supreme Court Judges, to verify the facts around arbitrary arrests and detention' DE MEL, N. 2001. *Women & The Nation's Narrative. Gender and Nationalism in Twentieth Century Sri Lanka*, Maryland, Rowman & Littlefield .

<sup>60</sup> This promise needs to be contextualized in relation to the previous Presidential COI established in 1991, 1992, and 1993 by UNP President Premadasa. These COI were mandated to investigate involuntary removals of persons taking place within the year following their establishment, but not during the years of terror, 1988 and 1989, when allegedly over 50,000 people disappeared.

Commissions. My analysis based on the accountability framework shows that the reparations were the result of horizontal accountability relationships generated through the Commissions' recommendations. Bakiner still argues that, being an exclusionary commission, the Sri Lankan Disappearances Commissions had no significant social mobilization (Bakiner, 2016: 162). While I agree that the Zonal Commissions had no indirect political impact through civil society mobilization, I sustain they were participatory commissions.

Notably, while Bakiner argues participatory commissions lead to more indirect political impact, I sustain it is precisely the participatory character of the commissions that deterred mobilization to implement recommendations.

Both Sri Lanka and Nepal are cases of participatory commissions where relationships between civil society and political parties, which existed prior to the Commission's establishment, hindered social mobilization for the implementation of the recommendations. The accountability framework analysis shows that there was vertical accountability relationship between civil society and the governing regime in the first stage of the Commissions (prior to establishment) but not during the third stage (after the report submissions). As I have explained, both in Nepal and Sri Lanka the internal dynamics explain and frame the lack of mobilization in support of the recommendations.

### **6.3 Final Remarks**

Finally, I examine here the contribution of the accountability framework in assessing the impact of TCs and I open this study to future research.

#### **6.3.1 The contribution of the accountability framework in assessing the impact of TCs**

The analysis based on the accountability framework helps identify causal relations. Each of the accountability relationships is a causal process integrated by an action and a reaction that can be traced. The action-reaction pattern can be identified for each of the other accountability relationships at different stages of TCs.

Before establishing a TC, the vertical accountability relationships exist between civil society, including victims, human rights activists and the government. The former pressurize the latter to establish a TC or to make changes to its mandate, commissioners or other aspects. This pressure can be made through punishing the government in office, for example through voting for the political party in the opposition that advocates for the establishment of a TC. It can also be made through street protests and mobilization. These actions can lead to a governing regime becoming answerable through establishing a TC or through making changes following civil society demands.

During its operations, TCs hold state agencies horizontally accountable. Here the horizontal accountability relationship exists when a TC undertakes investigation and victim-tracing functions leading to state agencies being rendered answerable. Such activities which generates answerability includes interrogation of state officers or seizure of documentation to establish violations and institutions or individuals responsibility.

After the submission of a TC final report, its recommendations can lead to a horizontal accountability relationship between the governing regime and the state agencies towards which the recommendations are directed. Here, the governing regime is supposed to order the implementation of recommendations to the concerned state agencies. In response, state agencies are to implement the recommendations. Evidence to indicate such interchanges include explicit directives from the government and subsequent actions by the concerned Ministry or state agencies. After the TC's report was submitted, civil society's pressure on the governing regime to implement can also lead to vertical accountability relationship. Such pressure can be made through street protests or mobilization.

Among these four causal relations, this thesis proposed two causal relations that had not been considered in the literature; vertical accountability relationships before the establishment of a commission and horizontal accountability relationships during the work of a TC. Rather, previous studies of impact of TCs focused on causal mechanisms in relation to TCs' recommendations. As seen in chapter one, for Brahm, the recommendations are the causal chain that links a TC and a variation in the outcome of analysis, democracy and human rights. Bakiner also refers to causal mechanisms as a

result of TCs' recommendations which are direct and indirect political impact through civil society mobilization. Brahm and Bakiner's assessment of causal relations correspond to horizontal and vertical accountability relationships as a result of a TCs' recommendations under my accountability framework.

The assessment of impacts resulting from these two new causal relations that I propose is important. Vertical accountability relationships between civil society and the governing regime prior to the TC's establishment can strengthen a peacebuilding process by connecting the people at the grassroots with the high-level political processes of negotiation, filling what Lederach calls the vertical gap (Lederach, 2012: 9). These relationships should be meaningful and empower people in their interactions with state representatives. Citizens are empowered when a governing regime is responsive to their demands. A governing regime empowers people when it establishes a TC, when it expands a commission's mandate or when it appoints new commissioners in response to social demands.

The impact of the horizontal accountability relationships between a TC and state agencies is also critical because through this causal relation, the new governing regime holds the old system accountable. The transition from the old regime, which has lost legitimacy, to the new regime entails exposing the old system. Exposure of the old regime to the new government through a TC is also an exposure of the old regime to the citizens once the TC's report is released to the public.

Second, unpacking impacts of the TCs according to the accountability framework also helps to identify their success or failure in a certain context. The analyses of the horizontal accountability relationships between the TCs and the state agencies can clarify how successful the commissions were in their fact-finding work. TCs were successful when they produce answerability by holding state officials horizontally accountable. For example, limitations of access to the army and the palace in Nepal and the army's refusal to provide information in Sri Lanka indicate that they were not successful in holding these actors horizontally accountable. The analyses of the horizontal accountability relationships following the submission of a TC's final report can also identify factors critical for the TC's success in the long term. Both in Nepal and

Sri Lanka, governing regimes trying to prosecute those responsible based on the recommendations by the Commissions were confronted with a state apparatus that resisted such efforts. These developments indicate the long-term effectiveness of a TC might be dependent not only on the willingness of political leaders in the new regime but also on the senior officers within the state apparatus.

The analysis of vertical accountability relationships before their establishment and after the submission of their final reports also help to understand the critical roles of civil society for a TC's success. Again, cases in Nepal and Sri Lanka indicated that close relations of civil society and victims with political party leaders could have detrimental consequences for a long term-success of a TC as the former cannot effectively pressure the government to act on its recommendations.

Third, the analysis based on the accountability framework also helps to identify scope conditions needed for a TC to properly function. Studies on the impact of TCs reviewed in chapter one refer to a link between previous levels of institutionalization and democracy with a positive impact of TCs. Lie et al. conclude that TCs prolong peace when established in post-conflict democratic societies (LieMalmin Binningsbø and Gates, 2007: 16). Snyder and Vinjamuri consider the role of intervening factors, such as the strength of both democratic forces and spoilers and the level of institutional development as conditions for TJ success. They find TCs contribute to democratic consolidation 'only when a prodemocracy coalition holds power in a fairly well institutionalized state' (Snyder and Vinjamuri, 2004: 20). Paris et al. also point out at reasons to suspect 'TJ is best suited to states with relatively strong institutions and a certain minimum level of democracy' (Paris, Ron and N.T. Thoms, 2010: 353). According to this literature, levels of institutional development, strength of democratic forces and strength of spoilers matter as underlying conditions that determine the impact of TCs.

The findings in this research support that impacts of TCs depend on levels of institutional development, strength of democratic forces and strength of spoilers. In this study, institutional development corresponded to the level of development of a state apparatus and the strength of democratic forces relates to the strength of political parties and civil society. TCs appear to work best where state structures are already

established and civil society is organized. If there is no functioning state apparatus, it will be difficult for a TC to generate horizontal accountability relationships while undertaking its works or as a result of its recommendations. On the other hand, if there is no civil society, either before or at the time of the transition, there cannot exist vertical accountability relationships before setting up of a TC or after the submission of its final report.

As for the strength of spoilers, this research has identified such spoilers as members from a previous regime, security officers and state officials. Potential spoilers present a tension. As discussed above, state apparatus is necessary for TCs to generate horizontal accountability relationships. Nevertheless, reactions from this same state apparatus can work against the implementation of TCs recommendations. Officers inherited from the old regime, such as the security forces, judiciary, public prosecutors, are likely to work against the implementation of recommendations intended to punish their peers or other measures intended to take their power away. In both Nepal and Sri Lanka, this tension has been reduced when Commissions managed to produce answerability in their horizontal accountability relationships with state agencies. Nevertheless, the persistent tension resulted in little enforcement after they made recommendations. States agencies were rendered answerable with incriminating evidence exposed, but spoilers were strong enough to ensure that measures of individual or institutional responsibility remain unimplemented.

Finally, assessment of impact of TCs based on the accountability framework can also show an attempt to expand the resolution of conflict to allow the participation not only of the elites, but also other segments of the society. The overall accountability relationships TCs generate between the governing regime and state agencies and those between the governing regime and civil society represents a change to the way transitions have historically unfolded. In Nepal, the 1951 transition from Rana regime to a constitutional monarchy was decided at the elite level without any other participation. Similarly, in Sri Lanka, previous changes of power during the colonial rule and soon after had taken place at the elite level. Chairperson of the Southern Zonal Commission reflected on this when she expressed,



We had these changes since colonial rule: the Portuguese, the Dutch, and the British, each time fairly big changes. There had been rebellions in the country. People felt the changes. But those things are said in terms of the ruling kings or the royal princesses families. It's not said in terms of the people. I think our commission tells you a story within the terms of the people. I think that is the difference (interview Muttetuwegama, 2014).

All five Commissions in this study took the resolution of violent conflict to the broader actors including agencies of the state, civil society and victims. However, lack of implementation of their recommendations translated into limited empowerment of victims, civil society and, as a result, the broader citizenry against the governing regime and the state agencies.

### 6.3.2 Opening this thesis to future research

An initial area of further research would be to apply the accountability framework developed in this study to other TC processes. Because the accountability framework proposed can facilitate understanding of civil society participation as an important aspect of a TC process, it would be interesting to compare processes with and without a broader public participation.

Second, I have referred to two accountability relationships that have not been analyzed prior to this research as causal mechanisms generating an impact. These two relationships are vertical accountability relationships between victims and civil society with the governing regime before establishing a TC; and horizontal accountability relationships between a TC and state agencies during the operation period of a TC. I believe both relationships are important to foster reconciliation. Vertical accountability relationships connect the grassroots with the high-level of political decision, bridging those who make the decisions and those who have to abide by those decisions. Logically, more answerability should lead to a more legitimate governing regime and to a more reconciled society with the state organs of government. Similarly, in horizontal accountability relationships, the more answerable old state agencies are rendered to a TC, possibly more answerable they are to the new regime in government and to the citizens who have access to the truth unveiled by a TC. In this context, another area of

further research could be to assess the impact of TCs in promoting reconciliation, a theme I have not dealt with in this research.

The third area of possible further study is application of process-tracing methods and the Bayesian logic to strengthen the identification of accountability relationships. In relation to a TC's recommendations, Brahm has already noted that case study research allows to chronicle the extent to which the government has acted upon these recommendations and whether civil society makes use of them to hold a government accountable (Brahm, 2007: 29). In this research, I have gone beyond the causal processes as a result of TCs' recommendations. Each of the four accountability relationships is a causal process where an action leads to a reaction. Case study research on the Commissions in Nepal and Sri Lanka has allowed collecting evidence of observable manifestations of this action-reaction process for every accountability relationship in each of the three stages, before, during and after a TC. To further research causal mechanisms identified in case study, process tracing appears as an appropriate method. Specifically, theory-testing process tracing attempts to trace an underlying theorized causal mechanism by observing whether expected case-specific implications of its existence are present in a case (Beach and Pedersen, 2013: 15). This method would allow strengthening our conviction that the hypothesized mechanism, the accountability relationships, was present in a given interaction. Process tracing methods would allow developing empirical tests of causal mechanisms. The Bayesian logic of inference 'provides a set of logical tools for evaluating whether finding specific evidence confirms or disconfirms a hypothesis that a part of a causal mechanism exists relative to the prior expected probability of finding this evidence' (Beach and Pedersen, 2013: 83). I would be considering using process-tracing methods and the Bayesian logic to strengthen the confidence that a causal mechanism, the accountability relationship, was present in a certain interaction.



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## Appendices

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### Appendix 1 – Semi-structured interview – Line of inquiry

Issue/Topic	Possible questions
<b>BEFORE the establishment of the COMMISSION:</b>	
<b>Vertical Accountability</b>	
1. TCs and the broader transition	<ul style="list-style-type: none"> <li>- How did civil society/victim groups look like at the time of the transition?</li> <li>- What was the relation between civil society/ Victims... ... And the political parties? ... And the new government?</li> </ul>
2. Role of civil society, human rights organizations, the media	<ul style="list-style-type: none"> <li>What role CS, HRO, and media played...</li> <li>...In setting up these COI? (EC-1)</li> <li>...In making changes in in the commission, such as people appointed as commissioners, the commission's mandate ... (EC-2)</li> </ul>
3. The effectiveness of civil society	<ul style="list-style-type: none"> <li>Without their role, do you think the government ...</li> <li>...Would have set up these COI? (EC-1)</li> <li>...Would have changed commissioners, mandate? (EC-2)</li> </ul>
<b>DURING the "life" of the COMMISSION – Process</b>	
<b>Relation between victims, civil society, victims, HR organizations, media and the TC</b>	
4. Victims – TC (EC-3)	<ul style="list-style-type: none"> <li>- Were victims free to access the commission and file their complains?</li> <li>- Was the environment conducive and safe for the victims to come forward?</li> <li>- Did the commission reach out to the people and specifically to the victims?</li> <li>- Did the commission take statements from victims? How it was done?</li> </ul>
5. Civil society, human rights organizations, media and the truth commission (EC-3)	<ul style="list-style-type: none"> <li>- What was the role of the media in covering and giving publicity to the work of the commission?</li> <li>- What was the role of civil society, human rights organizations ...</li> <li>... In supporting or engaging with the COI in their fact-finding and victim-tracing functions?</li> <li>... In supporting the commissions with evidence?</li> <li>... In bridging the gap between the commission and victims?</li> <li>- Did the TC generate public debate, dialogue during its operational period?</li> </ul>
<b>Horizontal Accountability between the commission and State agencies</b>	
6. Commission vs. state actors	<ul style="list-style-type: none"> <li>- Do you think the commission had access to all the main actors implicated directly/ indirectly in violations? If not, why?</li> <li>- At the time, do you recall security forces being upset, angry, threatening at the</li> </ul>

(EC-4)	inquiry done by the commission? - Do you recall any state actor speaking against the commission?
7. On the release or non-release of the report (EC-5)	- Were the commission's reports released after being submitted? - Social context at the time of the release? - Reaction from the public in general, security forces, the previous government - Any obstacles to the report being made public?
8. Answerability as a result of fact-finding – victims tracing carried out by the commission (actual functions)	- Have you read the report? Did you read it at the time it was released? Did the report... - Disclosed new information surrounding violations or evidence of violations committed? (EC-6) - Disclosed the fate of victims? Identify burial sites? (EC-7) - Acknowledged state agencies perpetrated violations? Named state institutions involved? (EC-8) - Attributed individual responsibility through naming perpetrators? (EC-9)
<b>Accountability relations as a result of the recommendations in the final report</b>	
<b>As a result of horizontal accountability</b>	
9. Evaluative criteria showing enforcement as a result of horizontal accountability between the governing regime and state agencies (EC-10 to 14)	Did the governing regime compel state agencies to implement recommendations regarding:  - Reparation programs? (Victim redress) - Exhumations? (Victim redress)  - Prosecute those responsible? (Prosecutorial) - Separate perpetrators from state institutions? Veto perpetrators to get promotions? (Preventive)  - Reform or bring under civilian control institutions responsible for violations? Adopt legislative reform?
<b>As a result of vertical accountability</b>	
10. Evaluative criteria showing enforcement as a result of vertical accountability between CS and the governing regime (EC-10 to 14)	- Did the civil society compel the governing regime to...(same as 9)?  - Did civil society, HRO, and media play any role in pushing for the implementation of the recommendations? Why yes? Why not?  - What was the interaction between civil society and political parties?

## Appendix 2 – List of interviewees in Nepal

### **Former commissioners and committee members**

#### Mallik commission

1. **Indra Raj Pandey**, former commissioner, selected from the Eastern Regional Court. 15 April 2014, Kathmandu. Not recorded. Interview with interpreter.
2. **Vidyadhar Mallik**, Son of Janardan Mallik, chairperson of Mallik commission. Minister under 2013 government. He gave his opinion as family member. 10 April 2014, Kathmandu.

#### Committee on Disappearances

3. **Sachche Kumar Pahari**. Committee member. Royal physician and President of the Nepal Medical Association in 1990. 10 April 2014, Kathmandu.
4. **Ananda Mohan Bhattarai** Secretary. Currently Judge of the Appellate Court. 9 April 2014, Kathmandu. Not recorded.
5. **Sushil Pyakhurel**. Collaborated with Prakash Kafle, Committee member. Forum for the Protection of Human Rights (FOPHUR). 16 April 2014, Kathmandu.

### **Governing regime**

#### Former Ministers in Krishna Prasad Bhattarai's interim government from 1990

1. **Mathura Prasad Shrestha**. Minister of Public Health. Professor of public health at the Institute of Medicine. President of FOPHUR. 13 April 2014, Kathmandu.
2. **Devendra Raj Panday**. Minister of Finance. Finance secretary under *Panchayat* system but resigned in 1980. Associated with the Human Rights Organization Nepal (HURON). Coordinator of the inter-professional solidarity group during the People's Movement. 13 April 2014, Kathmandu.
3. **Nilamber Acharya**. Former Minister of Law and Justice. Responsible for finalization of the 1990 draft constitution. 23 March 2015, Kathmandu.

#### Political Party members in Government

4. **Daman Nath Dhungana**. Spokesman of Nepali Congress for the 1990 People's Movement. President of the Supreme Court Bar association in 1984. 23 March 2015, Kathmandu.



5. **Radha Krishna Mainali.** Acting chairperson of the United Left Front, during the People's Movement. One of four people who met with the King on 8 April 1990 and who appeared on national TV to declare the movement for democracy had been victorious. Previously in jail for 16 years. 25 March 2015, Kathmandu. Interview with interpreter.
6. **Hiranya Lal Shrestha.** Teacher and journalist. Active politically in the Communist party of Nepal. Member of Parliament from Mawanpur in the first Parliament 1991. Chairperson of the human rights and foreign relations committee in the second parliament, from 1994. Human rights activist, one of the founders of Amnesty International Nepal chapter. 26 March 2015, Kathmandu.

#### State Officers

7. **Bhekh Bahadur Thapa.** Senior state official. Nepal's Ambassador to the United States, from 1980-1985. United Nations Resident Coordinator in Sri Lanka from 1986 to 1990. 27 March 2015, Kathmandu.

#### Security Forces

8. **Achyut Krishna Kharel.** Acting Deputy Inspector General in Kathmandu during the People's Movement. Inspector General of Nepal Police in 1997. Interrogated by the Mallik commission in relation to the killing of four protesters. 15 April 2014, Kathmandu. Not recorded.
9. **Chuda Bahadur Shrestha.** Deputy Superintendent of Police in Kathmandu, during the People's Movement. 15 April 2014, Kathmandu.

#### **Civil society, victims**

##### Independent Member of Parliament

1. **Padma Ratna Thuladar.** Civil society, independent, engaged in several rights movement. In 1986, Member of the National Assembly from Kathmandu, under *Panchayat* regime. 24 March 2015, Kathmandu.

##### Professional solidarity group

2. **Kapil Shrestha.** Teacher Union, human rights activist with the Human Rights Organization of Nepal (HURON). In 1990, he was appointed commissioner from

civil society in Anil commission although he resigned. National Human Rights Commissioner from 2000-2005. 9 April 2014, Kathmandu.

3. **Radheshyam Adhikari.** Lawyer and civil society activist at the time of the Jana Andolan. After the Jana Andolan he became politically active with the Nepali Congress. 25 March 2015, Kathmandu.
4. **Boghendra Sharma.** Doctor and human rights activist. Founder of the Center for Victims of Torture Nepal (CVICT). 27 March 2015, Kathmandu.
5. **Vinaya Kasajoo and Ganga Kasajoo.** Both active during the Jana Andolan in Palpa district. Vinaya, journalists and founder of Satya Saptalik a weekly newspaper that operated from 1983 to 1995. Ganga active with FOPHUR. 14 April 2014, Kathmandu.

#### Student groups

6. **Satish Mainali.** Lawyer. In 1999, as a law student, he filed a writ petition to the Supreme Court asking for the implementation of Mallik report's recommendations. 11 April 2014, Kathmandu.

#### Human Rights

7. **Subodh Pyakhurel.** At that time he was coordinating joint people's movement committee of eastern region. Currently President of Informal Sector Service (INSEC). 9 April 2014, Kathmandu.
8. **Charan Prasai.** HR activist, member of civil society during the 1990 movement, in Jhapa, Eastern region. 24 March 2015, Kathmandu.

#### Victims:

9. **J.B. Dhaulakoti.** Chairperson of SHAHID Nepal, an organization advocating for the rights of victims who were killed or disappeared between 1950 and 1990. His father, a political activist was killed during the *Panchayat* regime. 22 March 2015, Kathmandu. Not recorded. Interview with interpreter.
10. **Shrawan Sharma.** Brother of Maheshwa Chaulagai, whose disappearance was investigated by the Committee on Disappearances. 25 March 2015, Kathmandu. Not recorded. Interview with interpreter.

**Appendix 3 – Location of the reports of the Zonal Commissions**

<b>Central Commission</b>	
8 interim reports	International Institute of Social History in Amsterdam, The Netherlands
Part I of the final report	Library of the Center for the Study of Human Rights (CSHR), Faculty of Law, at the Colombo University
Part II, which corresponds to the list of annexures to Part I	International Institute of Social History in Amsterdam, The Netherlands
<b>Southern Commission</b>	
Interim report	Nadesan Center for Human Rights through Law (the Nadesan Center)
Volume 1 of its final report	Asian Human Rights Commission website The Nadesan Center
The annexures to Volume 1	Library of the Center for the Study of Human Rights (CSHR), Faculty of Law, at the Colombo University
Volume II related to case studies	Asian Human Rights Commission website; The Nadesan Center
Confidential parts submitted to the President	International Institute of Social History in Amsterdam, The Netherlands
<b>North Eastern Commission</b>	
Interim report	Nadesan Center for Human Rights through Law (the Nadesan Center)
Final report	Asian Human Rights Commission website
Annexures to the final report	Library of the Center for the Study of Human Rights, Faculty of Law, at the Colombo University

\*All the final reports are dated September 1997 although they were effectively published in February 1998. I have adopted the date of publication when referring to them.

## Appendix 4 – List of interviewees in Sri Lanka

### **Former commissioners and committee members**

#### COI into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces (Southern Commission)

1. **Manouri Muttetuwegama.** Chairperson. She was also appointed as Chairperson of the All Island Commission, established in 1998 to inquire into de disappearances left unattended by the three Zonal Commissions. 24 October 2014, Colombo.
2. **Amal Jayawardena.** Commissioner. Academic, at the time of the appointment he was working at the Center for the Study of Human Rights. 24 October 2014, Colombo.
3. **Nimal Punchihewa.** Supported the commission as Attorney-at-Law with the Movement for the Defense of Democratic Rights. Currently Legal Secretary, Human Rights Commission of Sri Lanka. 30 June 2015, Colombo.
4. **Sudharshana Gunawardena.** Attorney-at-Law. Supported the commission through his work in the Movement for the Defense of Democratic Rights. 21 October 2014, Colombo.

#### COI into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva provinces (Central Commission)

5. **MCM Iqbal.** Secretary. Also appointed as Secretary of the All Island Commission. 9 July 2014, Amsterdam.

#### COI into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces (North East Commission):

6. **W.N. Wilson.** Commissioner. Academic, at the time of the appointment he was a full time lecturer at Colombo University, Department of Geography. 29 June 2015, Colombo.

## Governing regime

### Attorney General Office

1. **Yasantha Kodagoda**. Senior State Counsel, Missing Persons Unit, Attorney General's Office. 3 July 2015, Colombo.

### Security Forces

2. **Gerry de Silva**. Former Army Commander. 30 June 2015, Colombo.

## Civil society, victims

### Lawyer

1. **J.C. Weliamuna**. Attorney-at-Law and human rights activist, 24 October 2014, Colombo.

### Human Rights

2. **Mario Gomez**. Executive Director International Center for Ethnic Studies. At the time of the Commissions he was working at the Law and Society Trust. 20 October 2014, Colombo.
3. **Kishali Pinto-Jayawardena**. Legal analyst whose work encompasses advocacy, research and litigation in the protection of civil liberties, 21 October 2014, Colombo.
4. **Paikiasothy Saravanamuttu**. Executive director, Center for Policy Alternatives, 22 October 2014, Colombo.
5. **Suriya Wickremasinghe**. Civil Rights Movement. 1 July 2015, Colombo. Not recorded.
6. **Nimalka Fernando**. Lawyer and human rights activist. At the time of the commissions involved with the *Movement for Inter-Racial Justice and Equality* and with the *Women's Action Committee*. Also secretary to the development commission of the *National Christian Council*. Associated the Nava Sama Samaja Party. 1 July 2015, Colombo.
7. **Ruki Fernando**. Human rights activist. 2 July 2015, Colombo.
8. **Jehan Perea**. Executive Director of the National Peace Council. 2 July 2015, Colombo.

9. **Mahinda Hattaka**. Secretary, Movement for the Defense of Democratic Rights. 3 July 2015, Colombo.

Political Party member in the opposition

10. **Vickramabahu Karunarathna**. Political leader, Nava Sama Samaja Party and Patron of the Organization of Parents and Family Members of the Disappeared. 29 June 2015, Colombo.

Victims:

11. **Shantha Pathirana**. Secretary-General Organization of Parents and Family Members of the Disappeared. 2 July 2015, Colombo.

People working with victims

12. **Chandra Pala Kumarage**. Legal advisor of the Organization of Parents and Family Members of the Disappeared. 1 July 2015, Colombo.
13. **Brito Fernando**. President of the Families of the Disappeared. 23 October 2014, Negombo.
14. **Amara Hapuarachchi**. She supported mothers coming to file complains at the Peace Committee in Batticaloa during the war and at the time of the 1994 COI. 6 July 2015, Batticaloa.
15. **Father Yoges Shwaran**. Jesuit Priest, in Batticaloa at the time of the Commissions. 4 July 2015, Trincomalee.