COMMISSIONS OF INQUIRY IN NEPAL: DENYING REMEDIES, ENTRENCHING IMPUNITY

INTERNATIONAL COMMISSION OF JURISTS

(June 2012)

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EXECUTIVE SUMMARY

Nepal has a long history of establishing *ad hoc* Commissions of Inquiry (COIs) or variants of such mechanisms to investigate into matters of public concern, including allegations of serious human rights violations. At least 38 such commissions have been established since 1990 in response to public outcries to investigate into the facts and circumstances surrounding violent incidents, and to provide recommendations to the Government and/or other relevant actors for subsequent remedial action. These inquiries generally take three forms: commissions appointed pursuant to the *Commissions of Inquiry Act* 1969; Legislature-Parliament inquiry committees set up under the *Constituent Assembly (Conduct of Business of Legislature-Parliament) Rules* 2008; and high-level investigative committees supervised by the Supreme Court.

Though ostensibly formed to provide a measure of public accountability, more often than not, COIs have promoted impunity by diverting investigation of human rights violations and crime through the criminal justice process into a parallel *ad hoc* mechanism vulnerable to political interference and manipulation. Recent experiences in Nepal, the South Asia region and around the world suggest that without substantial reform to existing law and practice, continued use of COIs will not succeed in providing remedies to victims of human rights violations.

Despite the lack of effectiveness of the large majority of COIs that have been appointed in Nepal, establishment of an *ad hoc* inquiry committee has become a standard demand of aggrieved individuals and groups in the aftermath of demonstrations and violent incidents that result in deaths and/or damage to property. This persistent, and persistently ineffectual, reliance on COIs highlights a number of troubling trends and attitudes. The invariable calls for the appointment of COIs reflect a general lack of confidence in the independence and efficacy of the criminal justice system and its ability to handle incidents that involve politically-affiliated persons or that have political consequences. At the same time, the willingness of successive governments to resort to *ad hoc* investigative mechanisms as opposed to relying on the ordinary criminal justice system to hold perpetrators of serious crime and human rights abuses to account suggests that COIs themselves are highly vulnerable to political manipulation.

This Report looks at two types of inquiry commissions that have been appointed in Nepal: (i) *ad hoc* investigative committees that were established following violent incidents that would typically fall under the jurisdiction of the normal criminal justice system, e.g. murder, assault and arson; and (ii) high-level commissions appointed by the government of the day to investigate incidents of significant public interest, which in the case of Nepal includes the widespread practice of enforced disappearance during the decade-long conflict.

At a time during which the establishment of transitional justice mechanisms such as a truth and reconciliation commission is being debated, it is especially pertinent to reflect upon the long legacy of failed commissions in Nepal. There is reason to suspect that any proposed transitional justice institution will be equally vulnerable to the weaknesses and political influences that have plagued the numerous inquiry commissions dotting Nepal's social and legal-political landscape. Because COIs are necessarily complementary to the criminal process, such *ad hoc* mechanisms will only be effective to the extent that systemic weaknesses in the criminal justice system can be overcome.

With a view towards making a positive contribution to ongoing discussions about the future use of *ad hoc* commissions as an avenue for seeking remedies and redress for human rights violations and abuses, this Report locates Nepal's experience within the global context (Section I) and provides an overview of COIs that have been set up in Nepal (Section II). It outlines the right of victims to a remedy under international human rights law, focusing in particular on the duty of the State to carry out investigations with respect to human rights violations and abuses, and discusses the role of COIs in satisfying such an obligation (Section III). The Report also provides an analysis of the *Commissions of Inquiry Act* 1969 and presents a critical assessment of the effectiveness of COIs that have been set up (Section IV). Finally, the Report offers a set of preliminary recommendations that the ICJ hopes will contribute to discussions surrounding the establishment of transitional justice mechanisms as Nepal moves forward in its democratisation process (Section V). These recommendations include:

1. Repeal or amend as necessary the *Commissions of Inquiry Act* 1969 so that it conforms with international standards governing investigations and conduct of COIs, in particular the UN Impunity Principles;

2. Clarify the relationship between COIs and the normal criminal justice system – which has primary responsibility for the investigation of crimes, prosecution of the accused, punishment of the guilty and provision of reparation to victims – by instituting legislative and other reforms as necessary, such as by amending relevant provisions of the *Government Cases Act* 1992;

3. Undertake to make public the reports of all COIs that have been appointed pursuant to the *Commissions of Inquiry Act* 1969, and to respond to all relevant outstanding requests made pursuant to the *Right to Information Act* 2007;

4. Undertake to publicly respond to, and follow up with, the findings and recommendations of all COIs set up under the *Commissions of Inquiry Act* 1969; and

5. Ensure that legislation establishing the transitional justice mechanisms conform with international standards.

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I. INTRODUCTION

Certain events shock the public conscience and demand an accounting of harms, causes and responsibilities that can overwhelm or exceed the capacity of the existing justice system to provide effective responses. At these moments, it is common practice across many jurisdictions to establish temporarily an independent Commission of Inquiry (COI). Such commissions may be appointed due to the sheer magnitude of the demand; for example, to evaluate a State's flawed response to a natural disaster, or to examine evidence of widespread or systematic crimes. Even a more limited incident may, due to its notorious impact, demand an extraordinary response from the State, where the justice system or the Government itself is under suspicion, or where the public conscience is so disturbed that guarantees of a competent and independent investigation and a corresponding set of recommendations are required.

Attracting the most attention on a global scale are commissions set up following internal armed conflicts, particularly since the early 1990s. The typically non-judicial role of these inquiries, often termed "truth commissions", is to deliver a combination of truth about widespread harms and underlying causes, recommendations regarding reparations for victims, and the production of any evidence of crimes committed that merit follow-up by the criminal justice system under the norms of applicable domestic and international law.[1] In Nepal, as in other jurisdictions, a lower statutory threshold exists for constituting COIs based on an identified need to inquire "into any matter of public importance"[2], while other *ad hoc* investigative mechanisms have also been formed under parliamentary or judicial authority, each with varying purposes as well as intended and unintended consequences.

Nepal's modern political history is replete with COIs as well as established executive, judicial and legislative responses to matters of urgent public concern. Thirty-eight such commissions are identified in this Report.[3] Though contemporary COIs and the political context in which they are set up are very different to some of the earliest documented inquiries in Nepal,[4] they nevertheless share some of the same characteristics: an *ad hoc*

[1] See generally: Mark Freeman, *Truth Commissions and Procedural Fairness* (2006).

[2] *Commissions of Inquiry Act* 1969, section 3(2).

[3] Whilst this Report identifies 38 COIs appointed between 1990 and 2010, many more have been set up. One source claims that 55 commissions were formed between 2006 and 2010 alone, see: Rameshwor Bohara, "Ayo Gayo Aayoga" *Himal Khabarpatrika* (17-31 August 2010).

[4] One of the earliest known examples of an inquiry was formed in 1846 following the Basnyat conspiracy, which "contemplated … the political elimination of Jang Bahadur [Rana] and his family and the assassination of King Rajendra and Crown Prince Surendra" by (Junior) Queen Lakshmi Devi. An extraordinary meeting of the State

investigative mechanism set up primarily to serve political ends, but without successfully accounting for alleged violations of the right to life and other serious human rights violations.

Looking forward, Nepal's post-2006 peace process continues to be shaped significantly by debate over promised truth-seeking mechanisms to look into conflict-era harms as agreed to in the November 2006 Comprehensive Peace Agreement[5] and as noted in the 2007 Interim Constitution[6]. Looking back, it is possible to view Nepal's broader history of democratic struggle through the lens of a long line of commissions that punctuate this history. Unfortunately, the actual role played by Nepal's inquiry commissions demonstrates many of the weaknesses surveyed globally. As this Report elaborates in detail, these mechanisms have tended to lack the independence, competence and resources to respond adequately and effectively to public demands for accountability. Instead, their invocation has become an almost ritualised form of avoiding accountability and entrenching impunity, with incomplete and partisan investigations, narrow and arbitrary decisions limiting possible conclusions, inadequate time and resources, and the frequent shelving of reports without independent public dissemination and implementation by responsible authorities. Similarly, as with patterns in other countries,[7] there is an equally disappointing failure to learn from these flawed processes.

Importantly, the United Nations has invested significant resources in supporting, studying, recommending and implementing norms and principles in response to this global history.[8] The ICJ has drawn on these sources in the development of this Report, which looks particularly at two types of inquiry commissions: (i) *ad hoc* investigative committees that were established following violent incidents that would typically fall under the realm of the normal criminal justice system, e.g. murder, assault and arson; and (ii) high-level commissions appointed by the government of the day to investigate broader phenomenon of significant public interest, which in the case of Nepal includes the widespread practice of enforced disappearance especially during the conflict.

Council convened by Jang Bahadur Rana, who was Prime Minister, found that the Queen had attempted to murder Rana as a first step towards the subsequent murder of Crown Prince Surendra so as to install her own son on the throne. The Council also found that the Queen "had caused the death[s] of hundreds of people and brought misery and ruin upon her subjects whose misfortunes would not end so long as she was in the country." The State Council, comprising of Rana supporters, determined that the Queen was guilty of complicity in the murder plot and sentenced her to exile in Banaras, India. See: Sushila Tyagi, *Indo-Nepalese Relations (1858-1914)* (1974), p. 163; Bhuwan L. Joshi & Leo E. Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (1966), p. 32.

[5] Clause 5.2.5.

[6] Article 33(s).

[7] For ICJ's review of COIs in Sri Lanka, see: Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of law, the criminal justice system and commissions of inquiry since 1977* (2010).

[8] See, for example: *United Nations Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (UN Doc. E/CN.4/2005/102/Add.1); Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, *Report to the General Assembly*, UN Doc. A/HRC/19/61 (18 January 2012).

See also: Section III.C below, pp. 22-25.

II. COMMISSIONS OF INQUIRY IN NEPAL: AN OVERVIEW

From a legal-historical perspective, the adoption of COIs in the Nepali context reflects the influence of India on the development and growth of Nepal's legal culture, a phenomenon that is still very much prevalent today. Separately, the use of COIs map the broad social and political contours of Nepal's history, charting constitutional and regime changes from absolute monarchy to a federal republic, the ultimate form of which is at present being rigorously debated. The use of COIs against such a backdrop of political change highlights the increasing acceptability of the use of violence within the bounds of political life in Nepal, the ineffectiveness of *ad hoc* investigative mechanisms for securing accountability, and the corresponding entrenching of impunity.

A. LEGAL-HISTORICAL OVERVIEW

The Nepali legal system is predominantly a common law system heavily influenced by the Indian common law tradition, though there are discernable aspects of the civil law system, and infused with many Hindu elements from its early legal-political history.[9]

Whilst Nepal was never colonised and the British common law system that was imposed on India was resisted by the Nepali ruling regimes, the return of Indian-educated lawyers and judges to Nepal in the 1950s after the fall of the autocratic Rana regime ushered in a period during which the common law tradition was consolidated in the Kingdom.[10] For instance, Hari Prasad Pradhan, who trained in India and served for many years in the Indian judiciary, was appointed as the first Chief Justice of the Supreme Court following enactment of the *Nepal Pradhan Nyayalaya Act* 1951, which itself drew from common law/adversarial legal principles.[11] In such a context, Royal Commissions that were first set up after the turn of the 20th century to provide expert investigation and recommendations to the British Government on complex matters were exported to India,[12] and such bodies in turn formally found their way into the Nepali

[9] The first Nepali code of law, the *Manab Naya Sastra*, introduced by King Jayasthiti Malla in the late 14th century was based on the *Narada Smiriti* and was an attempt to compile and codify traditional Hindu customs, with personal rights and obligations being tied to gender and caste. In 1854, Jang Bahadur Rana promulgated the *Muluki Ain*, a comprehensive code of laws that despite being inspired by the Napoleonic Code still reflected Hindu values and practices.

See: International Commission of Jurists, *Human Rights and Administration of Justice – Obligations Unfulfilled* (2003), paras. 87-90; Yubaraj Sangroula, *Building Competency of Legal Education: Need for Innovative Approach of Teaching and Methodology*, pp. 1-2 (available at: www.ksl.edu.np/cpanel/pdf/legaled.pdf).

[10] Regime change in Nepal can also be situated within the broader changing global governance structure: decolonisation in many parts of Asia between the late 1940s and 50s. With Indian independence in 1947, the political movement in Nepal was also undoubtedly influenced by ideas of constitutional government and liberal democracy. See: Centre for Legal Research and Resource Development, *Analysis and Reform of the Criminal Justice System in Nepal* (1999) pp. 39-40 (available at: www.ksl.edu.np/cpanel/pics/AnalysisReform.pdf).

[11] For example, the *Nepal Pradhan Nayalaya Act* 1951 recognises the Supreme Court's writ jurisdiction (section 30) and power of subpoena (section 27).

[12] V. R. Krishna Iyer, "Enquiry committees and commissions" *TheHindu.com* (19 June 2001) at http://www.hindu.com/2001/06/19/stories/13190179.htm (reviewing M. Anees Chishti, *Committees and*

legal-political landscape with the enactment of the *Commissions of Inquiry Act* in 1969.[13] In the same year, a commission headed by Justice Bhagawati Prasad Singh recommended to the Government that the Anglo-American approach was the most appropriate for development of Nepal's criminal justice system, thus further aligning the Nepali legal system with the common law tradition.

The *Commissions of Inquiry Act* 1969 is therefore unsurprisingly the primary means through which *ad hoc* investigative committees are appointed by the Government "for the purpose[s] of making … inquir[ies] into any matter of public importance"[14]. The Act itself consists of a mere dozen provisions that very generally outline the appointment process of Commissioners and powers vested in COIs that have been set up (see: Section IV.A below). As a practical matter, COIs established by the Government have typically been initiated by the Ministry of Home Affairs, particularly when deaths and/or damage to property occur as a result of crime or large scale protests.

After Nepal became a multiparty democracy and constitutional monarchy in 1990, Parliament was constitutionally empowered to set up committees as required in the conduct of its business.[15] The Legislature-Parliament that came into existence following the end of the civil war, ouster of the monarchy and passage of the Interim Constitution in 2007 is similarly empowered to form committees and sub-committees in the course of its duties and responsibilities.[16] In addition to the specific committees stipulated in its Rules, parliamentary committees and members have also looked into at least three incidents involving loss of life: a Parliamentary Committee to inquire into the Kotwada Incident of 24 February 2002;[17] the Belbari Massacre Parliamentary Probe Committee;[18] and the Parliamentary Commission of Inquiry into the death of MP Hem Narayan Yadav on 2 February 2004.[19]

Commissions in Pre-Independence India 1836-1947 (2001)). In a commentary and legal review of the Indian *Commissions of Inquiry Act*, B. M. Prasad and Manish Mohan comment that, "the experience of working in England gave its framers in India an idea to give a wider sweep to the Indian enactment than what is visible under English law." (B. M. Prasad & Manish Mohan, *The Commission of Inquiry Act, 1952* (2011).

[13] A former commission member has, however, also commented that the *Commissions of Inquiry Act* was promulgated by King Mahendra in 1969 to divert accountability for crimes into a political process that sidesteps the criminal justice system, and to "institutionalise impunity". ICJ interview, 2 May 2012.

[14] *Commissions of Inquiry Act* 1969, section 3(2).

[15] Constitution of Nepal 1990, Article 64.

[16] Interim Constitution 2007, Article 58; and *Constituent Assembly (Conduct of Business of Legislature-Parliament) Rules* 2008, Rules 108 and 116.

[17] A group of concerned MPs visited Kalikot to inquire into the incident following the killings; but the committee was not officially appointed and no report of the inquiry was tabled in Parliament. For details of the incident, see: FOHRID, *Case study of mass killings at Kalikot during internal armed conflict*, available at: http://www.fohrid.org/dwn/cat_res_1.pdf.

[18] See: "Soldiers shoot six dead in Nepal" *bbc.co.uk* (26 April 2006) at http://news.bbc.co.uk/2/hi/south_asia/4946748.stm.

[19] See: Box 1 below.

BOX 1:
Parliamentary Commission of Inquiry into the Death of UML MP Hem Narayan Yadav

A Parliamentary inquiry committee was formed on 10 May 2006 to inquire into the death of UML MP Hem Narayan Yadav on 2 February 2004. The committee, headed by MP Anand Prasad Dhungana, submitted its findings on 1 December 2006. The COI found that Col. Babu Krishna Karki had been involved in, and responsible for, the killing of Yadav and recommended that Karki be suspended from duty, arrested and charged with murder. The inquiry also found that a Jay Prakash Upadhyaya had acted as an informant leading to Yadav's murder and recommended compensation for the victim's family. The report appears neither to have been made public nor its recommendations implemented.

A third legal basis for the establishment of COIs relates to the Supreme Court's exercise of its extraordinary jurisdiction.[20] One of the most significant judicially appointed inquiries was constituted in 2006 in response to 27 writ petitions for *habeas corpus* and *mandamus* filed between 1999 and 2006 in respect of 83 individuals allegedly subject to enforced disappearance.[21] In order to ascertain the veracity of the allegations claimed in the writ petitions, the Supreme Court appointed a Detainee Investigation Taskforce to: determine the status of four (among the 83 "disappeared") individuals; determine whether or not legal action had been initiated against them; identify persons (including their official designations) who were involved in their arrests; and to uncover other relevant facts. In addition to its investigative functions, the Taskforce was also requested to submit an opinion to the Court as to the appropriate manner for dealing with other cases of a similar nature.

BOX 2:
Supreme Court supervised Detainee Investigation Taskforce (DIT)

The DIT, formed on 28 August 2006, was headed by Appellate Court Judge Lokendra Mallik and had as its members representatives from the Attorney General's Office (Saroj Prasad Gautam) and the Nepal Bar Association (Govinda Prasad Sharma).

The Taskforce submitted its report in April 2007, in which it found that Chakra Bahadur Katuwal had been taken into custody by the army and died as a result of torture suffered, and that Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai had been arrested and subject to enforced disappearance by security forces. The DIT recommended that a high-level commission be formed to investigate cases of enforced disappearance during the conflict; that legislation permitting retroactive prosecution of crimes against humanity be enacted; that appropriate judicial directives be issued for halting arbitrary arrest and detention; that those suspected of involvement in human rights violations be tried according to law; and that victims' families be given appropriate compensation.

[20] Interim Constitution 2007, Article 107(2). It is worth noting that the National Human Rights Commission (NHRC) is also constitutionally empowered to conduct inquiries and investigations into cases of human rights violations, and to recommend for prosecution alleged perpetrators (Interim Constitution 2007, Articles 132(2)(a) and 132(2)(c)). There has been some concern, however, that the new *National Human Rights Commission Act* imposes a six-month limitation by which victims or their representatives must file their complaints (section 10(5)), although the Interim Constitution does not set any limit on when the NHRC may receive or obtain information (Article 132(2)(a)). A provision such as Section 10(5) would arguably be in contravention of the Interim Constitution, which mandates that it is the duty of the NHRC to "ensure the respect for, protection and promotion of human rights and their effective implementation." (Article 132(1))

[21] *Rabindra Prasad Dhakal v. The Government of Nepal & Ors.* (Case No. 3775/2055).

BOX 2 (contd.):

When the Supreme Court delivered its judgment on 1 June 2007 with respect to the 27 writ petitions for *habeas corpus* and *mandamus*, it endorsed the findings of the Taskforce and directed the Government of Nepal to proceed in a manner in line with the recommendations of the DIT.

Following the Supreme Court's directive, the Government appointed on 21 June 2007 a three-member "High-Level Investigation Commission on Disappeared Persons", headed by former Supreme Court Justice Narendra Bahadur Neupane, to investigate into alleged cases of enforced disappearance between 13 February 1996 and 21 November 2006. The Commission never started work as its members refused to take their oaths of office due to the COI's limited mandate and to criticisms it faced from human rights organisations that it would be acting contrary to the Supreme Court judgment and international standards[22]. A draft Bill on Enforced Disappearance (Crime and Punishment) Act 2008, initially made public by the Government on 15 November 2008, was promulgated by executive ordinance on 12 February 2009 whilst the Constituent Assembly was in recess.[23] However, failure by the Government to adopt the Bill within the first 60 days of the subsequent Parliamentary session of the Constituent Assembly has meant that the legislation has since lapsed.[24]

B. TRENDS AND PATTERNS: A SOCIO-POLITICAL PERSPECTIVE

The use of COIs to inquire into incidents and to provide recommendations for remedial action and non-recurrence has increased since the Basnyat conspiracy in the mid-19th century,[25] and has particularly accelerated in the post-conflict period. Between 1990 and 2000, six commissions were appointed; between 2001 and 2005, seven were established; and between 2006 and 2010, at least 25 *ad hoc* investigative committees were set up. A list of these commissions can be found in Annex I.[26]

From a historical and narrative perspective, COIs that have been set up in Nepal trace political developments in the country. Some of the most high-profile commissions formed in recent decades were appointed by governments in power following regime

[22] See: ICJ Press Release, *Nepal: ICJ urges Government to ensure "High Level Commission of Inquiry on Disappeared Citizens" meets international standards and complies with Supreme Court order*, 16 July 2007, available at: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23304.

[23] See: International Commission of Jurists, *Briefing Paper – Disappearances in Nepal: Addressing the Past, Securing the Future* (2009) p. 4.

[24] See: ICJ Press Release, *Nepal: After Two Years, Government Still in Non-Compliance with Supreme Court Order on Enforced Disappearance*, 1 June 2009, available at: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23286.

[25] See: *supra* note 4.

[26] A word on research methodology: As a starting point, the ICJ went through archives of the Nepal Gazette between 1990 and 2010 at the Supreme Court library. This review was supplemented by Internet searches for COIs formed over the same period with primary reliance on news articles, reports by non-governmental organisations both national and international, and reports by the United Nations Office of the High Commissioner for Human Rights. The research also benefitted from private discussions with former commission members. The ICJ does not claim to have compiled a comprehensive list of all COIs formed between 1990 and 2010; rather it suggests that the commissions listed represent a minimum that have been set up over two decades.

changes that came after large scale, public demands for greater participation and representation in public life. The Mallik and Disappearances Commissions set up following the 1990 People's Movement, which brought an end to the absolute monarchy and to the beginning of multiparty democracy and constitutional monarchy, were formed not only to indict the authoritarian Panchayat government for its excesses and abuses, but in the process also served to lend a veil of legitimacy for the government that came into power. Similarly, the Rayamajhi Commission that was appointed after the 2006 Democracy Movement that led ultimately to the overthrow of the monarchy was established to investigate and recommend punishment for those who were responsible for the abuse of state power following the royal coup on 1 February 2005.

None of the recommendations of these commissions, however, has been implemented. In some cases, individuals who were named as being responsible for serious crimes and human rights violations have gone on to play significant roles in the political parties and security forces. Though formation of each of these inquiry commissions has marked momentous flash points in Nepal's political and constitutional history, they appear only to have provided weak alternatives to criminal proceedings, and have ultimately failed to bring to account those responsible for serious human rights violations amounting to crimes under domestic and international law. Indeed, some might argue that "the [Nepali S]tate is dysfunctional by demand"[27] because governments of the day have very little interest in addressing the root causes of popular uprisings in the country given the political parties' vested interest in maintaining the status quo, and that they have even less interest in redressing the wrongs of a previous regime and in taking steps to prevent recurrence of violations and injustice.[28]

BOX 3: COIS MARKING NEPAL'S POLITICAL AND CONSTITUTIONAL HISTORY

Commission to investigate abuses committed by the Panchayat government in suppressing the Jana Andolan protests (popularly known as the Mallik Commission)

In the aftermath of the 1990 People's Movement, the Krishna Prasad Bhattarai interim government appointed a three-member COI to inquire into the loss of life and property that occurred during the Jana Andolan. The Commission – headed by Janardan Lal Mallik, Chief Judge of the Eastern Regional Court, with members Uday Raj Upadhyay and Indra Raj Pandey (both judges of the Central Regional Court) – was formed on 23 May 1990 and it submitted its report on 31 December 1990.

Even before the COI submitted its report, a cabinet resolution dated 2 July 1990 was passed in which the Government expressly prioritised upcoming elections over criminal accountability, and stated that the COI's recommendations would not be acted upon.[29]

[27] International Crisis Group, *Nepal's Political Rites of Passage* (2010), p.29.
[28] See generally: *id*.
[29] The Asia Foundation, *Impunity in Nepal: An exploratory study* (1999), p. 10.

BOX 3 (contd.):

Eventually, only one copy of the Mallik Commission report was made available to Parliament. It named more than 100 officials and politicians as being directly or indirectly responsible for the deaths of 45 persons and injuries suffered by 23,000 others during 50 days of violence. Despite the findings of the COI, the Attorney General declined to prosecute, citing as reasons that the Commission had failed to provide adequate evidence; that even if there were sufficient evidence, prosecutions had to be initiated by district level officials; and that maintaining law and order was more important in the face of social unrest as prosecuting police perpetrators would demoralise the police force.[30] The Bhattarai interim government went on to withdraw criminal cases against 1,150 persons.[31]

When a writ petition was filed by 121 law students and lawyers in January 1999 at the Supreme Court seeking judicial orders directing the Government to prosecute those named in the report and to conduct further investigations, the registrar of the Court dismissed the petition on grounds that the Supreme Court did not have jurisdiction to direct the Government in an area in which the latter had exclusive power. A subsequent petition by the applicants against the registrar's decision was also rejected by the Supreme Court.[32]

Commission to investigate, recommend, advise or provide suggestions to the Government on actions or punishment for persons responsible for the suppression and killings of activists during the pro-democracy protests, and for those involved in abuse of power and misappropriation of state funds since 1 February 2005 (popularly known as the Rayamajhi Commission)

Appointed on 5 May 2006 by G.P. Koirala's government and headed by former Supreme Court Justice Krishna Jung Rayamajhi, the Commission found that King Gyanendra and 201 members of his administration were responsible for the violent response to pro-democracy protests, which resulted in 22 deaths and more than 5,000 injuries. Although the COI submitted its report to the Government in November 2006, it was only tabled in Parliament in August 2007, and the report has not been formally and fully made public to date.

Despite the Koirala government's promise to fully implement the Commission's report, it set up yet another body, the Oli Commission, to "study the report and recommend appropriate action". The Oli Commission refused to follow through with the findings of the Rayamajhi Commission, claiming that the latter did not provide adequate recommendations. The Commission's report has since been sent to the Commission for the Investigation of Abuse of Authority for action against those named as being responsible for the violence,[33] but no one had been held criminally accountable for the deaths and injuries to date. In November 2011, Durj Kumar Rai was appointed to the position of Additional Inspector General of the Armed Police Force despite his being implicated by the Rayamajhi Commission.

The relationship between public mobilisation in the form of protests, *bandhs* (strikes) and *chakka jams* (bans on vehicle traffic) as a means of advancing socio-political change, and the subsequent appointments of COIs to inquire into violence resulting in deaths and/or damage to property has continued to play out following the end of the People's War and into the post-conflict period when there has been much contestation related to the form of a federal state. This is particularly apparent in relation to the series of *ad hoc* inquiry

[30] See: *id.*, pp. 9-11; International Crisis Group, *Nepal: Electing Chaos* (2006) pp. 5-6; Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict* (2008), pp. 17-18.

[31] International Crisis Group, *Nepal: Peace and Justice* (2010), footnote 29.

[32] *Satish Mainali v. Registrar of the Supreme Court* (Case No. 3478/2055). See also: The Asia Foundation, *supra* note 29.

[33] *Chandra Kanta Gyawali v. Prime Minister Girija Prasad Koirala & Ors.* (Case No. 0680/2063).

committees set up in response to deaths and damage to property in the southern Terai plains between late 2006 and mid-2007.

In late December 2006, a regional *bandh* – called to make demands for changes to the proposed Interim Constitution so that it would address Madhesi aspirations for meaningful federalism – and resultant protests in Nepalgunj turned bloody, leading to one death and 20 injuries over two days of violence. Promulgation of the Interim Constitution in January 2007 led to further protests and demands for a federal system of government, regional autonomy, proportional representation in the Constituent Assembly and inclusive democracy, all of which were epitomised by the burning of the Interim Constitution and the subsequent calling of strikes. After the killing of a Madhesi youth in Lahan in mid-January, further violence ensued over the following weeks across the central and eastern Terai plains, culminating in the Gaur incident of March 2007 that left 27 persons dead.

The Government's response to the protracted episode of unrest in the Terai was to form a COI at each juncture when the violence appeared to worsen. In response to the initial protest and violence in Nepalgunj in December 2006, a three-member investigative committee was formed "to inquire into the damage caused during the riots, its reasons and effects, and to recommend action against those involved in fuelling communal tensions". When 16-year old Ramesh Mahato was killed in Lahan in mid-January 2007, the Government established another high-level probe commission "to inquire into the sabotage and destruction that occurred following the death". Following the killings in Gaur in March 2007, yet another inquiry was set up to investigate the violence and deaths of the 28 victims. In May 2007, the Government eventually submitted itself to repeated demands by Madhesi parliamentarians and appointed a fourth COI, headed by Supreme Court Justice Khil Raj Regmi, to investigate into the violence in the Terai.

BOX 4:
COIS FORMED TO INVESTIGATE VIOLENCE IN THE TERAI BETWEEN LATE 2006 AND MID-2007

Commission to inquire into the damage caused during the riots, its reasons and effects and recommend action against those involved in fuelling communal tensions in Nepalgunj, Banke district between 25 and 27 December 2006

The Nepalgunj Riot Committee (headed by Butwal Appellate Court Judge Purushottam Parajuli with members Drond Raj Regmi and Sukha Chandra Jha) was set up on 27 December 2006, following two days of violence – triggered by initially peaceful calls to make amendments to the proposed Interim Constitution – that resulted in one death and 20 injuries. The report appears neither to have been made public nor its recommendations implemented.

BOX 4 (contd.):

Commission established to inquire into the sabotage and destruction that occurred following the death of Ramesh Kumar Mahato on 19 January 2007 in Lahan, Siraha

Upon recommendation of an all-party meeting, the Government on 22 January 2007 appointed a three-member COI – chaired by Patan Appellate Court Judge Janardan Bahadur Khadka, with Raj Narayan Pathak (Joint Attorney General) and Rabindra Pratap Shah (Deputy Inspector General of Police) as members – to investigate incidents of arson and vandalism following the death of 16-year old Ramesh Mahato, a Madhesi Janadhikar Forum (MJF) youth activist who was shot when Maoist cadres attempted to violate an MJF *bandh*.

A case that was filed at the Siraha District Court against a Maoist cadre on the charge of murder in relation to Mahato's death was subsequently withdrawn from the criminal process, along with 348 other cases, by the Government in October 2008. The victim's family received 10 lakh in compensation, but the ICJ has not been able to determine whether this was done in accordance with the recommendations of the COI. The report appears neither to have been made public nor had its recommendations fully implemented.

Gaur Incident Inquiry Committee to investigate the violence and deaths on 21 March 2007[34]

Although the Government initially proposed a four-member judicial commission[35] to investigate violence in Gaur, Rautahat during which 27 people were killed, objections by the Maoist party that it had not been consulted eventually led to the formation of a five-member commission headed by Patan Appellate Court Judge Hari Prasad Ghimire (the other members were: Ram Sarobar Dubey (Officer of the National Vigilance Centre); Tika Bahadur Hamal (Deputy Attorney General); Ananta Raj Dumre (Jumla District Court Judge); and Ramesh Chand Thakuri (Deputy Inspector General of Police)). The report appears neither to have been made public nor had its recommendations implemented.

In an act that highlights blatant distrust of the Government-appointed COI and the political vulnerability of such mechanisms, the MJF constituted a separate three-member inquiry committee headed by former Supreme Court Justice Baliram Kumar Singh (with members Surendra Mishra and Lal Babu Yadav) to investigate into the incident, which reportedly found that the Maoist-aligned Madhesi Rastriya Mukti Morcha had attacked the MJF, and that other armed Madhesi groups were responsible for the violence.

Commission established to inquire into the conflagration and looting of public and private properties during the unrest instigated by the Madheshi Janadhikar Forum in Morang, Sunsari, Siraha, Saptari, Dhanusa, Mahottari, Sarlahi, Rautahat, Bara, Parsa, Nawalparasi, Rupendehi, Kapilvastu and Banke, to provide information about the deceased, and to give recommendations for non-repetition in the future

After MPs from the Terai cut across party lines and obstructed parliamentary proceedings, the Government acceded to their demands for the formation of a COI to investigate violence in the Terai since the beginning of 2007.

[34] See also: United Nations Office of the High Commissioner for Human Rights, Nepal, *Findings of OHCHR-Nepal's Investigations into the 21 March Killings in Gaur and Surrounding Villages* (2007).

[35] Chair: Patan Appellate Court Judge Hari Prasad Ghimire; and members: Ram Sarobar Dubey (Officer of the National Vigilance Centre), Tika Bahadur Hamal (Joint Attorney General), and Niraj Pun (Deputy Inspector General of Police).

BOX 4 (contd.):

Despite concerns that there was no Madhesi representation on the committee, and that its members included the Deputy Inspector General of Police and an official from the National Investigation Department when the response of the Home Ministry to the unrest was under severe criticism, the Government on 25 May 2007 appointed a five-member COI headed by Supreme Court Justice Khil Raj Regmi with members Janardan Bahadur Khadka (Patan Appellate Court Judge), Sukha Chandra Jha (Officer of the National Investigation Department), Raj Narayan Pathak (Joint Attorney General), and Rabindra Pratap Shah (Deputy Inspector General of Police).

The Commission reportedly submitted its report to the Prime Minister on 7 November 2007, finding that the weaknesses and ineffectiveness of police administration in certain instances between January and February 2007 led to 21 deaths, 1,951 injuries and destruction of property worth NRS. 136.3m; and recommending that a mechanism be set up under the Home Ministry to prevent recurrence of such violence in the future and that victims be provided immediate relief. The report appears neither to have been made public nor have its recommendations been implemented.

Inquiry commissions set up by the Government to investigate the violence in the Terai between late 2006 and mid-2007 appear to have been incomplete and half-hearted responses to broader and deeper issues of exclusion and marginalisation experienced by large sections of Nepali society. Such fundamental issues and challenges and their violent manifestations have frequently been viewed by authorities solely through a law and order lens, and corresponding State responses have been ineffective, including in respect of law enforcement agencies' attempts to quell the unrest and the non-implementation of COI recommendations. A vicious cycle has thereby developed where unaddressed grievances find expression in violence, where law enforcement agencies are unable to deal effectively with situations of unrest when they arise, where demands for establishment of *ad hoc* investigative committees are made, where the root causes of such discontent remain unaddressed and recommendations of such commissions unimplemented, resulting in greater and deeper dissatisfaction.

The increasing resort by the Government to *ad hoc* COIs in response to violent incidents involving loss of life and/or property, instead of relying on ordinary criminal justice processes, is also illustrative of the erosion of the rule of law. For example, four commissions were set up to investigate enforced disappearances during the war: the Malego Committee; the Neupane Committee; the Detainee Investigation Taskforce; and the High-Level Investigation on Disappeared Persons. Nonetheless, the question of enforced disappearance, a crime under international law, has still not been properly and adequately addressed in accordance with international law and standards and this further exemplifies the general entrenched impunity that has obtained for other serious human rights violations.

Although it released numerous reports making public the status of 382 persons, the Malego Committee was criticised for merely listing the names of persons who had

already been released from custody so as to make the COI appear that it had made significant findings.[36] Human Rights Watch (HRW) has also stated that the work of the committee only accounts for a small fraction of the cases of enforced disappearances that HRW itself has documented.[37] Out of the 776 reported cases of enforced disappearance, the Neupane Committee that was appointed in June 2006 was only able to determine the whereabouts of 174 persons. The Committee indicated that it had not been able to carry out its mandate satisfactorily as it was not able to compel the army to cooperate with its investigations.[38] In a related but separate development, when the Supreme Court directed the Government to form a high-level investigation commission in accordance with internationally agreed criteria compiled by OHCHR-Nepal to inquire into all allegations of enforced disappearance over the 10-year conflict,[39] the panel did not actually start work due to criticisms it faced for its appointment by the Government in contravention with the Supreme Court's direction and international standards.[40]

BOX 5: COIS FORMED TO INVESTIGATE ENFORCED DISAPPEARANCES DURING THE CONFLICT

Investigative Committee on Disappearances (also known as the Malego Committee)

Under increasing pressure both domestically – the families of the "disappeared" went on a hunger strike demanding that the status of their loved ones be made public – and internationally, the Dueba Government appointed a COI under the chairmanship of the Home Ministry Joint Secretary (Narayan Gopal Malego) on 1 July 2004. Other members of the commission included the Defence Ministry Joint Secretary, the Deputy Inspector General of the Police, the Deputy Inspector General of the Armed Police Force, and the Deputy Chief Officer of the National Investigation Department. While it released numerous reports making public the status of 382 persons, the Malego Committee was criticised for merely listing the names of persons who had already been released from custody so as to make the Committee appear that it had made significant findings.

Commission to determine the whereabouts and status of persons disappeared by security forces over the 10-year insurgency (also known as the Neupane Committee)

In the lead up to the Summit Talks of October 2006, and responding to a key demand of the Maoists, the seven-party Government appointed a single-member commission led by Home Ministry Joint Secretary Baman Prasad Neupane on 1 June 2006 to disclose the whereabouts of suspected Maoist cadres who had been disappeared by state forces following arrest.

[36] Human Rights Watch, *Clear Culpability: "Disappearances" by Security Forces in Nepal* (2005), p. 72. See also: INSEC, *Impaired Accountability: State of Disappearance in Nepal – Brief Assessment of Implementation of UN WGEID Recommendations* (2008), p. 22.

[37] *Ibid*.

[38] *Waiting for Justice*, *op. cit.* note 30, p. 21.

[39] *Rabindra Prasad Dhakal v. The Government of Nepal & Ors*., *op. cit.* note 21, where the Supreme Court directed the Government to establish an inquiry commission in accordance with a set of guidelines – compiled by OHCHR-Nepal setting out internationally agreed criteria relating to the establishment, terms of reference, composition, procedures, powers and resources of a COI on enforced disappearances – that was annexed to United Nations Office of the High Commissioner for Human Rights, Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu in 2003-2004* (2006).

[40] See: Box 2 above.

BOX 5 (contd.):

The Committee submitted its report in July 2006, in which it reportedly disclosed the status of 174 persons (52 killed; one charged and detained in prison; two charged and released on bail; the remainder released) among the 776 declared missing. It also reportedly recommended that the Government set up a special mechanism legally empowered to determine the status of disappeared persons and to provide the Government with recommendations; and that the Government set up a network comprising local administration, political parties, victims and human rights groups and civil society to carry out an in-depth study on alleged cases of enforced disappearance. The Committee indicated that it was unable to carry out its mandate satisfactorily as it was not able to compel the army to cooperate with its investigations.

Supreme Court supervised Detainee Investigation Taskforce

See Box 2 above.

High-Level Investigation Commission on Disappearances

Following the Supreme Court's directive in the *Rabindra Dhakal Case*, the Ministry of Peace and Reconstruction on 21 June 2007 following a cabinet resolution and pursuant to the *Commissions of Inquiry Act* 1969 established a three-member COI to investigate into alleged cases of enforced disappearance between 13 February 1996 and 21 November 2006. Former Supreme Court Justice Narendra Bahadur Neupane was named as chairperson, and Raman Kumar Shrestha (General-Secretary of the Nepal Bar Association) and Sher Bahadur KC (advocate) as commission members. The Commission never started work as its members refused to take their oaths of office due to the COI's limited mandate and to criticisms it faced from human rights organisations as flawed and contrary to the Supreme Court judgment and international standards (see also: Box 2 above).

Similarly, the number of commissions that have been set up to inquire into the deaths of political figures[41] – Communist Party of Nepal (Unified Marxist Leninist) (CPN-UML) leaders Madan Kumar Bhandari and Jeevraj Ashrit in 1993; Rashtriya Prajatantra Party MP Mirza Dilshad Beg in 1998; UML MP Hem Narayan in 2006; CPN-UML Constituent Assembly candidate Rishi Prasad Sharma in 2008; Nepali Congress (NC) cadre Pradeep Khadka in 2008; Jitendra Shaha in 2009; Unified Communist Party of Nepal (Maoist) cadre Rajendra Phuyal in 2009; and Madhesh Mukti Rastriya Janatantrik leader Ram Narayan Mahato in 2009 – and the failure of a majority of the commissions to secure any form of accountability is indicative of the "politicisation of crime and the criminalisation of politics" in Nepal, and the inability of the criminal justice system to deal independently and effectively with crime. The sharp increase in the number of deaths of politically affiliated persons in the post-conflict period also strongly suggests that violence is increasingly permissible for the purposes of political mobilisation, and that brazen use of force is acceptable within the bounds of political culture and discourse.[42]

[41] See Annex I for details of these deaths.

[42] *Nepal's Political Rites of Passage*, *op. cit.* note 27, pp. 15-16, 19-26.

BOX 6:
Commission to inquire into the killing of pro-Maoist businessman Ram Hari Shrestha after this abduction and transfer to the Maoist cantonment at Shaktikhor, Chitwan

Separately and in parallel to the criminal process, the Government on 22 May 2008 formed a three-member inquiry committee headed by former Supreme Court Justice Rajendra Kumar Bhandari to investigate into the death of Ram Hari Shrestha, who was abducted on 27 April 2008 and taken to the People's Liberation Army Shaktikhor Camp where he died as a result of injuries suffered whilst in Maoist custody. The COI submitted its report in July 2008, in which it reportedly found four persons – Chitwan 3rd Division Maoist Commander Kali Bahadur Kham, Brigade Commander Govinda Bahadur Batala, Keshav Adhikarai, and Ganga Ram Thapa – to be complicit in the murder of the victim.

The Chitwan District Court, on the other hand, charged five persons – Arjun Karki, in addition to the four mentioned above – and only sentenced Brigade Commander Govinda Bahadur Batala to three years' imprisonment, as the police were said to have been unable to locate the other four accused. In the only conviction of the case, Batala was found guilty of being an accessory to murder, and subsequent proceedings initiated by the police on charges of abduction failed on grounds of double jeopardy.

III. THE RIGHT TO A REMEDY AND COMMISSIONS OF INQUIRY

The State's duty to guarantee human rights under international human rights law has a corollary in the right of those alleging any rights violation to obtain a remedy and to reparation. The obligation incumbent upon States to carry out investigations following any violation is both an essential component of States' duty to guarantee human rights and an element of victims' right to a remedy. In this regard, the role that inquiry commissions play is a crucial one: (i) to facilitate the accountability of perpetrators, including criminal accountability in the case of violations amounting to crimes; (ii) to ensure full and appropriate reparations for victims; (iii) to establish the truth about the events that occurred; and (iv) to provide effective guarantees for non-recurrence of violations in the future. In order for COIs to satisfy States' duty to guarantee human rights, such mechanisms have to meet certain criteria so as to ensure their effectiveness.

A. THE STATE'S DUTY TO GUARANTEE

Under international human rights law, States must respect, protect and fulfil human rights, which compositely form the duty to guarantee the enjoyment of human rights. This means that States must not only refrain from infringing upon human rights, but must take affirmative steps to protect the enjoyment of human rights against impairment by other actors and to ensure the necessary conditions for their full realisation.

To give effect to these obligations, States must take measures to prevent violations, to investigate them when they occur, to hold criminally responsible perpetrators in cases where violations amount to crimes, and to provide reparation for damage caused. A State falls short of its responsibilities not only when it encroaches upon the rights of an individual through the acts or omissions of its agents, but also when the State neglects to take effective measures to protect, prevent, investigate, prosecute, and provide remedies and reparations to victims.

The duty to guarantee human rights, which is sometimes referred to as the obligation to ensure or secure those rights, is enshrined in all international and regional human rights treaties,[43] including the International Covenant on Civil and Political Rights (ICCPR) to which Nepal is State Party,[44] thereby rendering its provisions enforceable domestically.[45]

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[43] For example, Article 2, International Covenant on Economic, Social and Cultural Rights; Article 2, African Charter on Human and People's Rights; Article 1, American Convention on Human Rights; and Article 1, European Convention for the Protection of Human Rights and Fundamental Freedoms.

[44] 999 U.N.T.S. 171, acceded 14 May 1991. Article 2, ICCPR provides:

> "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with

The jurisprudence of international human rights tribunals, as well as of quasi-jurisdictional human rights bodies such as the United Nations Human Rights Committee, affirm that States' duty to guarantee consists of four complementary and interdependent obligations that are not alternatives to, nor substitutes for, each other: (i) the obligation to investigate violations and abuses when they occur; (ii) the obligation to prosecute and punish those responsible, where those violations give rise to criminal liability; (iii) the obligation to provide full and appropriate reparation to victims and their families; and (iv) the obligation to establish the truth of the facts. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has described the four strands of States' duty to guarantee in relation to violations of the right to life as follow:[46]

> "Governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations … [T]he recognition of the right of victims and their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."

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the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted."

[45] Section 9 (Treaty Provisions Enforceable as good as [Nepalese] Laws) of the *Nepal Treaty Act* 1990 provides: "(1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, [are] inconsistent with the provisions of prevailing laws, the inconsistent provisions[s] of the law shall be void for the purpose[s] of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws."

[46] United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Bacre Waly Ndiaye, *Report to the Commission on Human Rights*, UN Doc. E/CN.4/1994/7 (7 December 1993), paras. 688 and 711.

Furthermore, international jurisprudence establish that States are required to exercise proper due diligence to prevent, investigate and punish certain conduct – such as torture,[47] enforced disappearance,[48] and other violations of the right to life[49] – that impair the enjoyment of human rights, even when they involve non-state actors. The Human Rights Committee has stated that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights".[50]

B. THE RIGHT TO A REMEDY

Following from the above, the State's duty to guarantee human rights gives rise to victims' right to a remedy and reparation whenever violations occur. This recognised consequence of State responsibility for human rights violations means that a victim has "the right to vindicate [his or her] right before an independent and impartial body, with a view to obtaining a recognition of the violation, cessation of the violation if it is continuing, and adequate reparation."[51] Put in another way, the multifaceted obligations incumbent on the State to guarantee human rights allow victims to assert their rights to truth, justice and reparation following any violation.[52]

The right to an effective remedy and reparation is a cardinal rule of international human rights law that is prescribed in all major international and regional human rights treaties,[53] and failure on the part of the State to make available an effective remedy for those whose rights have been infringed may itself give rise to a separate violation of those treaties.[54] The *United Nations Basic Principles and Guidelines on the Right to a Remedy*

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[47] European Court of Human Rights, *M.C. v. Bulgaria* Application No. 39272/98, Judgment 4 December 2003, para. 151; European Court of Human Rights, *Case of Opuz v. Turkey* Application No. 33401/02, Judgment 9 June 2009, para. 159; *Aksoy v. Turkey* Application No. 21987/93, [1996] ECHR 68 (18 December 1996), para. 98.

[48] *Case of Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H. R. (Ser. C) No. 4 (1988), para. 172.

[49] European Court of Human Rights, *Case of Angelova and Iliev v. Bulgaria* Application No. 55523/00, Judgment 26 July 2007, para. 93.

[50] UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 24 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

[51] International Commission of Jurists, *The right to a remedy and to reparation for gross human rights violations: A practitioner's guide* (2006), p. 43.

[52] *Id*., p. 28.

[53] For example, Article 2(3), ICCPR; Article 13, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article7(1)(a), African Charter on Human and Peoples' Rights; Articles 7(6) and 25, American Convention on Human Rights; Article 9, Arab Charter on Human Rights; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms. The right is also recognised in non-treaty instruments including: Article 8, Universal Declaration of Human Rights; Articles 9 and 13, United Nations Declaration on the Protection of All Persons from Enforced Disappearance; and Article XVIII, American Declaration of the Rights and Duties of Man.

[54] For example, the Human Rights Committee has stated that, "There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by State Parties of those rights, as a result of States' Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent,

and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation), agreed to by all UN member states and adopted by the General Assembly in resolution 60/147 in 2005, firmly establishes that "the obligation to respect, ensure respect for and implement international human rights law … includes … the duty to … provide those who claim to be victims of a … violation with equal and effective access to justice … irrespective of who may ultimately be the bearer of responsibility for the violation and provide effective remedies to the victims, including reparation".[55]

The right to an effective remedy, therefore, entails the right to reparation.[56] For the purposes of this Report, the term 'remedy' refers to the *procedural* element, and 'reparation' to the substantive component of the remedy, including the obligation to provide compensation, satisfaction, restitution, rehabilitation and guarantees of non-repetition.[57]

In the simplest sense, the notion of an effective remedy can be taken to mean access to an independent authority that is empowered to decide whether a human rights violation has taken place, or is taking place, and is empowered to offer a remedy by ordering cessation of the violation and/or reparation.[58] The requirements for an effective remedy include:[59]

- ***Promptness and effectiveness***
  The remedy should be prompt and effective. Effectiveness means that the remedy must not be theoretical or illusory, but must provide practical and real access to justice.[60] It must be capable of "establishing whether there has been a violation of human rights and [of] providing redress."[61]

- ***Independent authority***
  The remedy must not be subject to interference by the authorities against which the complaint is brought.[62]

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punish, investigate or redress the harm caused by such acts by private persons or entities." *General Comment 31*, *op. cit.* note 50, para. 8.

[55] UN Doc. A/RES/60/147 (21 March 2006), Principle 3.

[56] *General Comment 31*, *op. cit.* note 50, para. 16.

[57] See: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.* note 55; *Practitioner's guide*, *op. cit.* note 51, pp. 43-44.

[58] *Practitioner's guide*, *op. cit.* note 51, p. 46.

[59] *Id*., pp. 46-54.

[60] European Court of Human Rights, *Case of Airey v. Ireland* Application No. 6289/74, Judgment 9 October 1979, para. 24.

[61] *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of October 6, 1987, Inter-Am. Ct. H. R. (Ser. A) No. 9 (1987), para. 24.

[62] European Court of Human Rights, *Case of Keenan v. The United Kingdom* Application No. 27229/95, Judgment 3 April 2001, para. 122; European Court of Human Rights, *Kaya v. Turkey* Application No. 22729/93, Judgment 19 February 1998, para. 106.

- ***Accessibility***
  A practical and effective remedy implies a positive obligation on the State to assist those persons who are especially vulnerable and/or who do not have the means to access justice.[63] This assistance can take the form of free legal aid[64] or guaranteed legal representation.

- ***Leading to cessation and reparation***
  The Human Rights Committee has stressed that effective remedies include cessation, reparation, and the prevention of recurring violations.[65]

- ***Leading to an investigation***
  The right to an effective remedy necessarily includes the right to a prompt, thorough, independent, impartial and effective investigation (see: Section III.C below). Furthermore, reparation presupposes an independent assessment during which the facts are thoroughly and exhaustively investigated.

- ***Nature of the remedy***
  The Human Rights Committee has held that the remedy can be assured by the judiciary, and also involve administrative mechanisms, particularly in relation to the investigation of alleged violations.[66]

- ***Compliance and enforcement by the authorities***
  A remedy will not be considered effective if the judicial power lacks the means to carry out its judgments.[67]

C. THE OBLIGATION TO INVESTIGATE AND COMMISSIONS OF INQUIRY

It is clear from the foregoing that the obligation incumbent on the State to carry out investigations following any violation is of critical significance as it is both a component of the State's obligation to guarantee human rights and an element of victims' right to a remedy.

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[63] See: *General Comment 31*, *op. cit.* note 50, para. 15.

[64] UN Human Rights Committee, *Concluding observations on Poland*, 2 December 2004, UN Doc. CCPR/CO/82/POL, para. 14.

[65] *General Comment 31*, *op. cit.* note 50, paras. 15-17.

[66] *General Comment 31*, *op. cit.* note 50, para. 15.
In *F. Birindwa ci Bithashwiwa, E. Tshisekedi wa Mulumba v. Zaire*, the Human Rights Committee held in respect of violations of Articles 7, 9, 10,12 and 17 of the ICCPR that "the State party is under an obligation with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered … in particular to ensure that [the victims] can effectively challenge these violations before a court of law". Communication No. 242/1987, UN Doc. CCPR/C/37/D/242/1987 (1989), para. 14.

[67] European Court of Human Rights, *Hornsby v Greece* Judgment of 19 March 1997, Reports 1997-II, No. 30, para. 40.

The Obligation to Investigate: As a starting point, investigations are a crucial first step towards gathering the facts of a violation. This then provides the basis for determining, where required, accountability of suspected perpetrators of crime, for providing proper and adequate reparation to victims, and for preventing recurrence in the future.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation provides that "[t]he obligation to respect, ensure respect for and implement international human rights law … includes, *inter alia*, the duty to … [i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law"[68]. In the same vein, the *United Nations Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (UN Impunity Principles) provides that "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[69]

For its part, the Human Rights Committee has reiterated in numerous judgments that "the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular … violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified."[70]

Most of the COIs that have been set up in Nepal have been in response to serious violations of the right to life, especially in the form of extrajudicial and other unlawful killings, as well as enforced disappearances. In this respect, it is instructive to look to the jurisprudence of the Inter-American Court of Human Rights, which clearly establish that "one of the conditions to effectively ensure the right to life is necessarily reflected in the duty to investigate [its] abridgments"[71]. "[S]ince full enjoyment of the right to life is a prior condition for the exercise of all the other rights, the obligation to investigate any violations of this right is a condition for ensuring this right effectively. Thus in cases of extrajudicial executions, forced disappearances and other grave human rights violations, the State has the obligation to initiate, *ex officio* and immediately, a genuine, impartial

[68] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.* note 55, Principle 3(b).
[69] Independent Expert to update the Set of principles to combat impunity, Diane Orentlicher, *Report to the Commission on Human Rights*, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), Principle 19.
[70] UN Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication 563/1993, UN Doc. CCPR/C/55/D/563/1993, para. 8.6; and *Case of Jose Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres (Colombia)*, Communication 612/1994, UN Doc. CCPR/C/60/D/612/1995, para. 8.8. See also: Human Rights Committee, *Marcellana and Gumanoy v. Philippines*, Communication No. 1560/2007, UN Doc. CCPR/C/94/D/1560/2007, paras. 7.2-7.4.
[71] *Case of Mipiripan Massacre v. Colombia*, Judgment September 15, 2005, Inter-Am. Ct. H. R. (Ser. C) No. 134 (2005), para. 137.

and effective investigation, which is not undertaken as a mere formality predestined to be ineffective. This investigation must be carried out by all available legal means with the aim of determining the truth and the investigation, pursuit, capture, prosecution and punishment of the masterminds and perpetrators of the facts, particularly when State agents are or may be involved."[72] Even where private persons or groups may have been responsible for the acts violating the right to life, and they "are not seriously investigated, those parties are aided in a sense by the government"[73].

The European Court of Human Rights has echoed such findings, holding that the due diligence obligation to protect the right to life requires that States carry out an effective official investigation. The Court has underlined that "[w]here death results … the investigation assumes even greater importance, having regard to the fact that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life."[74] It has also confirmed that this obligation to carry out some form of effective official investigation applies not only when injury was caused by a State agent, or with State involvement, but equally when the conduct of private actors is at fault.[75]

The duty to investigate is termed a 'procedural obligation'[76] or 'an obligation of means', which "is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."[77] This means that "[t]he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia*, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including cause of death."[78] "Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of the required effectiveness standard."[79]

Where crimes involve torture and other ill-treatment, unlawful killings and enforced disappearance, specific principles have been developed to clarify the standards for investigating such violations. The *United Nations Convention against Torture and Other*

[72] *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Inter-Am. Ct. H. R. (Ser. C) No. 140 (2006), para. 143.

[73] *Case of Velasquez Rodriguez*, *op. cit.* note 48, para. 177 (references omitted).

[74] *Angelova and Iliev v. Bulgaria, op. cit.* note 49, para. 94; European Court of Human Rights, *Case of Finucane v. the United Kingdom* Application No. 29178/95, Judgment of 1 July 2003, para. 67.

[75] *Angelova and Iliev v. Bulgaria, op. cit.* note 49, para. 98; European Court of Human Rights, *Yasa v. Turkey* Application No. 22495/93, Judgment of 2 September 1998, para. 100.

[76] European Court of Human Rights, *Case of Ergi v. Turkey* Application No. 23818/94, 28 July 1998, para. 82; *Case of the Pueblo Bello Massacre*, *op. cit.* note 72, para. 147.

[77] *Case of Velazquez Rodriguez*, *op. cit.* note 46, para. 177.

[78] European Court of Human Rights, *Jordan v. The United Kingdom* Application No. 24746/94, Judgment of 4 May 2001, para. 107; *Angelova and Iliev v. Bulgaria*, *op. cit.* note 49, para. 95.

[79] European Court of Human Rights, *Nachova et al. v. Bulgaria* Application No.s 43577/98 and 43579/98, Judgment of 26 February 2004, para. 117; see also: *Jordan v. The United Kingdom*, *ibid*..

Cruel, Inhuman or Degrading Treatment or Punishment mandates States Parties to conduct investigations whenever an act of torture is reasonably believed to have been committed,[80] and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principles on the Effective Investigation and Documentation of Torture) provide further guidance in fulfilling this obligation.[81] Similarly for enforced disappearances, the *International Convention for the Protection of All Persons from Enforced Disappearance* and the *Declaration on the Protection of all Persons from Enforced Disappearance* respectively set out and elaborate on the duty to investigate.[82] Where there have been killings, the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principles on the Effective Prevention and Investigation of EJEs) lay down criteria for thorough and effective investigations into incidents involving loss of life.[83]

COIs and Investigations: Typically, investigation of crimes, prosecution of the accused, punishment of the guilty, and provision of reparation to victims of violations are assured through the criminal justice system involving the police, public prosecutors, courts and other administrative bodies. However, "where the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice"[84], or where it might be inappropriate for it to carry out investigative procedure due to perceived or actual bias and lack of impartiality, COIs can play an important role towards a State's fulfilment of its obligation to investigate human rights violations.[85]

In contexts where the ordinary criminal justice system functions effectively, the appointment of a COI, principally mandated to inquire into the facts and details of a particular incident or a broader phenomenon of significant public interest, is an exceptional measure invoked to ensure justice when the system in place is under stress. Frequently, these inquiry procedures are also tasked with advisory functions to provide recommendations for reparation to victims and for prevention of future recurrence of similar events. Commissions of inquiry are thus extraordinary, *ad hoc* mechanisms established in parallel with the regular criminal justice system, and they are not

[80] 1465 U.N.T.S 85, Article 12. Nepal acceded to the Convention on 14 May 1991. See also: *Bulacio v. Argentina*, Judgment of September 18, 2003, Inter-Am. Ct. H. R. (Ser. C) No. 100 (2003), paras. 110-121; *Aksoy v. Turkey*, *op. cit.* note 47, paras. 95-100

[81] Recommended by UN Commission on Human Rights resolution 2000/43 (20 April 2000) and UN General Assembly resolution 55/89 (4 December 2000).

[82] Disappearances Convention, Article 2 and Disappearances Declaration, Article 13. The Convention entered into force on 23 December 2010; and the Declaration was adopted by the UN General Assembly in resolution 47/133 (18 December 1992).
See also: *Case of Caballero-Delgado and Santana v. Colombia*, Judgment of December 8, 1995, Inter-Am. Ct. H. R. (Ser. C) No. 22 (1995), paras. 58-59; *Case of Velasquez Roeriguez*, *op. cit.* note 48, paras. 164-166, 169 and 174.

[83] Adopted by UN Economic and Social Council resolution 1989/65 (24 May 1989), and in para. 1 recommended that Governments take into account and respect the Principles within the framework of their national legislation and practices. See also: UN Commission on Human Rights resolution 2005/34 (19 April 2005), para. 5; *Case of McCann and ors. v. The United Kingdom* Application No. 18984/91 (1995) 21 EHRR 97, para. 161.

[84] Alston, *supra* note 8, para. 5.

[85] See: *id*., paras. 22-23.

empowered to prosecute crimes nor do they have the power to determine the guilt or innocence of a person.[86] The role that COIs play is necessarily complementary to the criminal process,[87] and can never be a substitute for normal criminal investigations and prosecutions. In other words, while inquiry commissions can play an important role in fulfilling victims' right to truth, they do not serve to fulfil their right to justice.

General Principles for COIs: The standards that govern the conduct of any investigation within the regular criminal justice system as such also generally guide the functioning of COIs.[88] The UN Impunity Principles,[89] as well as the Principles on the Effective Investigation and Documentation of Torture,[90] supplemented by the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),[91] and the Principles on the Effective Prevention and Investigation of EJEs,[92] supplemented by the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol),[93] all make special provision for the establishment of COIs where existing inquiry procedures are unable and/or unwilling to carry out an effective investigation.[94] The general standards that govern how a COI should function include:

- ***Scope of the inquiry***
  The COI's terms of reference should: be neutrally framed so that they do not suggest a predetermined outcome; state precisely which events and issues are to be investigated and addressed in the commission's final report; provide sufficient flexibility in the scope of inquiry to ensure that investigation by the commission is not hampered by overly restrictive or overly broad terms of reference.

[86] See also: UN Impunity Principles, *op. cit.* note 69, Principle 8.

[87] Alston, *supra* note 8, para. 55; Mendez, *supra* note 8, para. 70.

[88] In order for States to properly discharge their obligation to investigate serious crimes and human rights violations, investigations have to be (i) *ex officio*; (ii) prompt, impartial, thorough and independent; (iii) capable of leading to the identification, and if appropriate, punishment of perpetrators; (iv) adequately resourced and empowered; (v) involve the participation of victims' next-of-kin; and (vi) provide for the protection of victims' next-of-kin and witnesses against threats and intimidation. Persons alleged to have committed serious human rights violations must at least be removed from positions of power or control, whether direct or indirect, over victims' next-of-kin, witnesses and their families, as well as those conducting investigations. Those implicated in serious human rights violations should be suspended from official duties over the course of the investigations. See: *Practitioner's guide*, *op. cit.* note 49, pp. 65-78.

[89] UN Impunity Principles, *op. cit.* note 69, Principles 6-13. An extract of the Principles can be found in Annex II.

[90] Principle 5.

[91] Office of the United Nations High Commissioner for Human Rights, Geneva, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. HR/P/PT/8/Rev.1 (2004), paras. 107-119.

[92] Principle 11.

[93] UN Doc. E/ST/CSDHA/.12 (1991), Principles 6-13.

[94] See also: Alston, *supra* note 8, para. 16.

- ***Guarantees of independence***
  The COI should be structurally and hierarchically independent of the authorities against which the complaint is brought.

  Irremovability of commissioners should be ensured, except on grounds of incapacity or behaviour rendering them unfit to discharge their duties, and pursuant to procedures ensuring fair, impartial and independent determinations. Commission members should also enjoy whatever privileges and immunities necessary for their protection, including in the period following their mandate, especially in respect of any defamation proceedings or other civil or criminal action brought on the basis of facts and/or opinions contained in the COI's report.

- ***Membership selection and criteria***
  Commissioners should be selected based for their recognised impartiality (the individual should have a reputation for fairness, and not have preconceived ideas or prejudice about the incident), competence (the individual should have expertise in law, medicine, forensic science, or any other relevant specialised field, and must be capable of evaluating and weighing the evidence and be able to exercise sound judgment), and independence (the individual should not be closely associated with parties potentially implicated in the violation, or too intimately connected with victims' groups, which may affect the COI's credibility). There should also be reasonable gender balance, as well as representation from groups whose members have been especially vulnerable to human rights violations.

  The objectivity of the investigation and the commission's findings may, among other things, depend on whether the COI has three or more members, rather than one or two.

- ***Powers and resources of the commission***
  The commission should be empowered with the authority to: compel testimony under legal sanction; order the production of documents; conduct on-site visits; prevent the burial or disposal of bodies until adequate post-mortem examinations have been concluded; receive evidence from abroad; issue a public report. The COI should also be provided with sufficient transparent funding (so that its independence is not in doubt) and adequate material and human resources (to ensure its competence and credibility).

- ***Notice of inquiry***
  There should be wide and public notice of the appointment of a COI and the subject of its inquiry. The notice should include an invitation to submit relevant information and written statements to the commission and instructions to persons willing to testify.

- ***Commission proceedings***
  Following from general principles of criminal procedure, hearings by the COI should be conducted in public, unless in-camera proceedings are necessary to protect the safety of a witness.

- ***Victim and witness protection***
  Effective measures must be taken to ensure that complainants, witnesses and their families are protected from violence, threats of violence or any other form of intimidation or harassment.

- ***Publicising of commission's report***
  The COI's final report should be made public in full within a reasonable period and disseminated as widely as possible, except where for security reasons, relevant portions of the inquiry are to be kept confidential. Following publicising of the report, the government should undertake to furnish a public reply and/or indicate the actions it will take in response to the findings and recommendations of the COI.

In the final analysis, "[t]he basic question that must guide an assessment of a commission is whether it can, in fact, address impunity."[95] In his global assessment of COIs, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions found that "many commissions have achieved very little … [and] that many of them have in fact done little other than deflect criticism."[96] The Special Rapporteur's conclusion is that "[t]he commission's mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether [a] commission meets the relevant international standards. Experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective."[97]

[95] Alston, *supra* note 8, paras. 50-51.
[96] *Id*., para. 27.
[97] *Id*., para. 53.

IV. DENYING REMEDIES, ENTRENCHING IMPUNITY

All inquiry commissions must, at a minimum, conform to the international standards elucidated in the preceding Section so as to satisfy the State's obligation to investigate human rights violations, including those amounting to criminal conduct. Although there are three different legal bases for the appointment of COIs in Nepal (see: Section II.A above), Legislature-Parliament probe committees and judicially appointed inquiries do not fall within the ambit of the *Commissions of Inquiry Act* 1969, which is the primary means through which *ad hoc* investigative committees have been constituted. The Act itself, however, falls far short of international standards, and given the weak legal framework within which it operates, COIs have more often been used as a tool for perpetuating impunity rather than for securing accountability.

A. THE COMMISSIONS OF INQUIRY ACT 1969

The *Commissions of Inquiry Act* 1969, which consists of a mere dozen provisions, is the primary means by which the Government of Nepal appoints *ad hoc* investigative committees "for the purpose[s] of making … inquir[ies] into any matter of public importance"[98]. The *Commissions of Inquiry (Terms and Conditions of Service of Commission Members) Regulations* 1994, promulgated under section 12 of the Act, further outlines the code of conduct expected of commission members.

Membership: The Act provides that the Government may, in consultation with the Judicial Council, form COIs consisting only of judges from the Supreme Court, Appellate Court or District Court, or also including other persons.[99] Commissions falling into the latter category will have the appointed judge sitting as chairperson.[100] Beyond stipulating that inquiries formed pursuant to the Act include judges as members, both the Act and the Regulations are silent on the criteria for, and the selection process of, commission members; although the Regulations provide some guidance on the appropriate conduct expected of commission members once selected.[101] There are no explicit requirements under the Act and the Regulations that members of COIs be chosen for their independence, competence and/or impartiality.

Powers and Resources of the Commission: Once constituted, the inquiry commission is in principle given the powers of a court of law, including the authority to summon and

[98] Section 3(2).
[99] Section 3(1).
[100] *Ibid*.
[101] Rules 4-12. In general, the Regulations state that commission members must act fearlessly (Rule 7) and in the national interest (Rule 5), that they must carry out their responsibilities free from external influences (Rule 8), and that their conduct must not affect the integrity and prestige of the commission (Rule 6). Commission members are also prohibited from exploiting their positions on the commission (Rule 11), from misappropriating commission funds (Rule 10), and from instructing third parties to carry out prohibited acts (Rule 12).

subpoena witnesses,[102] the authority to compel the production of documents,[103] the power to authorise search and seizure of documents,[104] the authority to examine evidence,[105] as well as general contempt powers.[106] The investigative committees, however, are not empowered to frame their own rules of procedure. That power appears to lie with the appointing Government agency,[107] and commissions are specifically only allowed to "manage" the rules governing its business and procedures.[108] With respect to budgetary and technical resources available to COIs for their investigations, both the Act and the Regulations are silent as to the source and nature of support available.[109]

Notice of Inquiry: The Act requires that notice of COIs appointed pursuant to section 3 be published in the Nepal Gazette.[110]

Commission Proceedings: Contrary to general principles of criminal procedure, the Act specifically prescribes that all activities of commissions be kept secret.[111] This emphasis on secrecy for commission proceedings is highlighted in the Regulations,[112] particularly as part of an oath that all commission members are required to take prior to assumption of formal responsibilities.[113]

Guarantees for Victims and Witnesses: The Act is silent on measures, and on powers available to COIs, to ensure that victims, witnesses and their families are protected from violence, threats of violence or any other form of intimidation or harassment. However, it provides that statements made by a witness before an inquiry commission cannot subject the witness to any legal action nor be admissible in evidence against the witness in another case.[114] The provision is subject to two provisions relating to perjury and to the making of irrelevant statements by witnesses. *Prima facie*, such a provision granting immunity to an individual accused of perpetrating serious human rights violations amounting to serious crimes under international law and who appears as a witness before a COI would be in contravention of international law.

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[102] *Commissions of Inquiry Act* 1969, section 4(3)(a).
[103] *Id*., sections 4(3)(b) and 4(3)(d).
[104] *Id*., section 4(5).
[105] *Id*., section 4(3)(c).
[106] *Id*., section 6.
[107] *Id*., section 12(2)(b).
[108] *Id*., section 8.
[109] Rule 13 of the Regulations provides that "remuneration and facilities for commission members are to be decided at the time of appointment of the commission." In the context of Nepal, and given the provision's incorporation within a set of regulations that have been promulgated to address specifically the terms and conditions governing service of commission members, the "facilities" provided to commission members are likely to be of a personal nature, such as use of vehicles by commissioners, rather than technical resources including specialist advice from forensic experts for the purposes of the COI's investigations.
[110] Section 3(3).
[111] Section 8A.
[112] Rule 9.
[113] Rule 3.
[114] Section 5.

Publicising of Commission's Final Report: Although the Act provides that final reports of commissions appointed be "published for public information", the general provision is subject to broad and vaguely worded exceptions including "adverse impact" on sovereignty, territorial integrity, national security, public peace and order, and harmonious relations between different ethnic groups or communities and relations with neighbouring countries,[115] all of which are open to different interpretations, thus providing easy excuses for the Government to keep significant portions of COI reports confidential.

It is clear from a cursory review of the *Commissions of Inquiry Act* 1969 and the *Commissions of Inquiry (Terms and Conditions of Service of Commission Members) Regulations* 1994 that legislative provisions for the appointment and functioning of COIs do not meet international standards for an effective investigation, and thus do not satisfy the duty incumbent on Nepal to guarantee the human rights of those within its jurisdiction. The Supreme Court itself recognised such deficiencies when it stated in the *Rabindra Prasad Dhakal Case* that the Act does not set out procedures for the formation of COIs, that it does not ensure the competence and impartiality of Commissioners, and that it does not provide guarantees for the safety and security of victims and witnesses.[116]

The overarching concern with the *Commissions of Inquiry Act* 1969 relates to the lack of provision for the independence of COIs set up pursuant to the legislation. To the extent that some selection criteria and an appointments process for commission members can be discerned from both the Act and the Regulations, it is clear that the personal independence of commission members and the structural independence of inquiries established are not considered to be of any significance, falling far short of the standards elucidated in the UN Impunity Principles that inquiry commissions "must be established through procedures that ensure their independence, impartiality and competence"[117] and that they be provided with transparent funding and resources to ensure that their independence and credibility are never in doubt.[118]

As a practical matter, most of the COIs constituted under the Act have been done so at the initiative of the Ministry of Home Affairs, though this is not legislatively prescribed. In reality, this has meant that inquiry commissions convened and set up under the auspices of the Home Ministry are structurally subordinate to it, and that one of the Secretaries of the Ministry – and at times the Deputy Inspector General of Police – has frequently been appointed as a member of the commissions. This lack of independence, both structurally and with respect to its members, of COIs is especially apparent when establishment of such *ad hoc* investigative mechanisms have been in response to public

[115] Section 8A.
[116] *Rabindra Prasad Dhakal v. The Government of Nepal & Ors.*, *op. cit.* note 21.
[117] UN Impunity Principles, *op. cit.* note 69, Principle 7.
[118] *Id.*, Principle 11.

outcries following loss of life, at times as a consequence of excessive use of force by the law enforcement agencies that operate under the oversight authority of the Ministry of Home Affairs.

Even in instances where COIs are composed entirely of judges, or where the committees do not include as members representatives from the Home Ministry and law enforcement agencies, the commissions are not free to execute their responsibilities in a manner that they deem necessary and appropriate to the issues under inquiry, and are instead subject to rules of procedure framed by the Government. Investigative committees' lack of institutional independence from the executive branch of government is further reinforced by non-provision of independent and transparent budgetary and technical resources for commissions to carry out their investigations and inquiries.

B. LEGAL FRAMEWORK

The lack of independence of COIs in all aspects described above has profound implications on the impartiality, competence and overall effectiveness of inquiry commissions appointed under the Act, and exposes such *ad hoc* mechanisms to a high degree of political manipulation. Governments, when pressured by the momentum of the events, typically concede to the formation of COIs to calm heightened public sentiments. However, such measures also paradoxically undermine the integrity of an already weak criminal justice system and contribute to the erosion of the rule of law when instances of criminality involving human rights violations and abuses are regularly subjected to what should be the exceptional invocation of a COI. The result is a diversion into a political inquiry process where investigations do not lead to accountability, nor do they result in proper and adequate reparation for victims, and where recommendations when provided are not seriously considered (see generally: Section II.B above).

Within a legal framework that leaves the registration of potential crimes at the whim of police officers and that subjects formal criminal investigations to the political discretion of the Office of the Attorney General,[119] the findings and recommendations made by a COI – whether appointed under the *Commissions of Inquiry Act* 1969, or established pursuant to the *Constituent Assembly Rules* 2008, or constituted and supervised by the

[119] *Government Cases Act* 1992, sections 3 and 6. Although section 3 of the Act stipulates that a police officer must make a written record of information about a crime (also known as a First Information Report) transmitted to him/her, the Act does not provide for the consequences of a police officer failing to do so, beyond placing the onus on the informant to then report the crime to the Chief District Officer or a higher ranking police official. Section 6 of the Act provides that formal investigations into any alleged crime can only commence after the Office of the Attorney General has considered the First Information Report from the police, and after the Office gives the necessary directions to the police to begin criminal investigations.
For a description of other barriers to legal accountability in the Nepali criminal justice system, see: United Nations Office of the High Commissioner for Human Rights, Nepal, *Investigating Allegations of Extra-Judicial Killings in the Terai: OHCHR-Nepal Summary of Concerns* (2010), pp. 7-9.

Supreme Court – in respect of any incident involving loss of life and/property feed uneasily into a criminal process that is weak, politicised, and generally inadequate for satisfying victims' right to a remedy. Not only is there a lack of clarity in the law as to how COIs' findings and recommendations are to lead to further criminal investigations and prosecutions of perpetrators of crimes, but politicisation of COI appointments also translate into greater reluctance on the part of other actors in the criminal justice system to act according to the rule of law. It has been suggested that amendments to the *Government Cases Act* 1992 to make explicit the role of the Office of the Attorney General in considering findings of COIs when directing police investigations,[120] and/or to legislatively mandate the police to file First Information Reports on the basis of inquiry commission findings, would go some way towards improving the effectiveness of COIs.

Where the existing criminal justice system suffers from systemic weaknesses, overlaying it with extraordinary measures such as COIs will therefore serve only to further attenuate the deficiencies of the system. Given inquiry commissions' complementary role to the regular criminal process (see: Section III.C above), "a commission of inquiry will not be able to overcome [on its own] the systemic impunity embedded institutionally in the criminal justice system",[121] which in turn compromises the effectiveness of commissions established. The history of inquiry commissions set up in Nepal lead to the inexorable conclusion that not only have COIs not contributed to Nepal satisfying its duty to guarantee the human rights of those within its jurisdiction, but the misuse and abuse of such *ad hoc* commissions as "silencing and diverting"[122] mechanisms has in fact led to further entrenchment of impunity for human rights violations.

C. COMMISSIONS OF INQUIRY SCORECARD

Operating within the legal framework described above, COIs have failed in Nepal for a number of reasons, the overriding one being that there is an ***acute lack of public and official information about the formation, conduct, findings and/or follow up in relation to a COI and its work***. This general lack of information means that it is very difficult for victims and the general public to monitor the performance of investigative mechanisms where they have been set up, as was the experience in researching this Report, and that such mechanisms become much more vulnerable to political manipulation.

Where there is information about COIs and their work, they have nevertheless failed to provide victims with adequate remedies for reasons including:

[120] Former commission member, ICJ interview, 30 March 2012.
[121] Pinto-Jayawardene, *supra* note 7, p. 161.
[122] Former commission member, ICJ interview, 30 March 2012.

- ***Failure of the inquiry to take place***
  Such was the fate suffered by the High-Level Investigation Commission on Disappearances constituted by the Ministry for Peace and Reconstruction following a cabinet decision in June 2007, after the Supreme Court handed down its landmark decision in the *Rabindra Prasad Dhakal Case*. The COI never started work as its members refused to take their oaths of office due to the commission's limited mandate, and to criticisms it faced from human rights organisations as being flawed and contrary to the Supreme Court's judgment and international standards (see: Box 5 above).

- ***Limited mandate***
  This was most evident from the string of COIs appointed by the Government in response to the violence in the southern Terai plains between late 2006 and mid-2007. All four investigative committees that were set up – the Nepalgunj Riot Committee; the commission established following Ramesh Mahato's death; the Gaur Incident Inquiry Committee; and the commission appointed in May 2007 and chaired by Supreme Court Justice Khil Raj Regmi (see: Box 4 above) – were given narrow mandates that focused primarily on the violence, deaths and destruction that occurred, which although necessary, were insufficient to address the deeper and more complex issues of marginalisation and historical exclusion experienced by large sections of Nepali society. Viewing such issues and their violent manifestations through an exclusively law and order lens necessarily leaves the root causes of discontent unaddressed.

- ***Redundant mandate***
  The inquiry commission appointed by G.P. Koirala's government to investigate into the abduction, transfer and subsequent killing of businessman Ram Hari Shrestha was a wholly redundant exercise given that the criminal investigation process was already underway and that one of the perpetrators of the murder had surrendered to the police (on 12 May 2008) by the time the COI was appointed (on 22 May 2008). Furthermore, the different findings of the commission and the police – the inquiry found four persons responsible for Shrestha's death, whereas the police laid charges on five individuals – served only to undermine public trust in the effectiveness of the criminal justice system.

- ***Lack of effective authority***
  Although COIs constituted under the *Commissions of Inquiry Act* 1969 are in principle given the powers of a court of law (see: Section IV.A above), the reality is that such *ad hoc* mechanisms are heavily reliant on the cooperation of the security and law enforcement agencies. The former's investigative functions are especially challenged when the latter are accused of crimes the subject of inquiry. This was publicly highlighted by the Neupane Committee with respect to non-cooperation

by the army in relation to alleged cases of enforced disappearances during the conflict (see: Box 5 above).

- ***Active political subversion***
  This was particularly highlighted by the appointment of the Oli Commission in response to the Rayamajhi Commission's findings that King Gyanendra and 201 members of this administration for the violent response towards protesters during the Loktantra Andolan in 2006. The G.P. Koirala government had promised full implementation of the Rayamajhi report, but yet set up another body headed by Deputy Prime Minister K.P. Oli to "study" the report, and which subsequently refused to follow through with the Rayamajhi Commission's findings claiming that its report did not provide sufficient recommendations for punishment of those found responsible for the 22 dead and more than 5,000 wounded.

- ***Failure of the Government to respond and to make public findings***
  Despite appointing the Mallik Commission to investigate into the abuses of the previous Panchayat regime in the aftermath of the 1990 Jana Andolan, Krishna Prasad Bhattarai's government only made one copy of the COI's 900-plus-page report available in the Parliament Secretariat's library after it was submitted to the Government. It was only after a human rights organisation hired a photocopier and made copies of the report that it was published as a book and made public.

- ***Failure of the Government to follow up, including initiating prosecutions***
  This is well illustrated by the response of the Krishna Prasad Bhattarai government to the findings of the Mallik Commission, when it passed a cabinet resolution pardoning the police for its excessive use of force even before the COI had submitted its report, prioritising political expediency over accountability.

- ***Systemic weaknesses in the criminal justice system***
  Despite findings of the Mallik Commission that more than 100 officials and politicians were responsible for the deaths of 45 persons and injuries suffered by 23,000 others during the 1990 People's Movement, the Supreme Court dismissed a petition that sought implementation of the COI's recommendations (see: Box 3 above). The Court's decision to sustain the Attorney General's argument that prosecutions of persons named by the Mallik Commission was not possible given that the *Government Cases Act* 1960 did not empower the Attorney General to direct prosecutions on the basis of a COI report,[123] even though the petition had also requested the Court to direct the Government to enact new laws or amend existing legislation should the latter be insufficient to allow prosecutions of alleged perpetrators, underscores the point that *ad hoc* investigative mechanisms will only

[123] See also: *supra* note 119.

be effective to the extent that systemic weaknesses in the criminal justice system can be overcome.

V. CONCLUSION

This Report has shown that notwithstanding the potential role of COIs in the investigative process and despite the number of *ad hoc* mechanisms that have been constituted in Nepal, inquiry commissions have been ineffective at best, and in many cases have promoted impunity rather than provided accountability. Such a phenomenon is, unfortunately, not peculiar to Nepal. In looking back at 26 years of reporting on COIs globally, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions concluded that, "[e]xperience demonstrates that, while commissions of inquiry … have much to recommend … in principle, in practice the balance sheet is often much less positive. Far too many of the commissions … have resulted in *de facto* impunity for all those implicated. In essence, the problem is that commissions can be used very effectively by Governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability and to promote impunity."[124]

It is necessary to recognise that although COIs can aid States in satisfying their obligation to investigate and victims' right to truth, such extraordinary, *ad hoc* mechanisms are no substitute for the regular criminal process and by themselves do not fulfil the right to justice. Indeed, "a commission of inquiry bereft of justice, leaves the issue of truth and reparations to the political will of the government of the day."[125] An inquiry commission will only be effective "to the extent that the normal criminal justice system is strengthened parallel to the work of the commission."[126]

At present, at a time when debates are underway regarding the possible creation of transitional justice mechanisms such as a truth and reconciliation commission, it is essential to ensure that lessons learned from the failures of past commissions be kept in mind, and that international standards – in particular the UN Impunity Principles – that govern the functioning of COIs be adhered to when establishing the proposed transitional justice mechanisms, or any other future *ad hoc* inquiry commission. Where circumstances warrant the setting up of a COI, compliance with international standards and best practices – relating to the scope of the mandate, guarantees of independence, appointment of credible members, resources, transparency of proceedings, publication of findings and recommendations – will be indicative of the requisite political will in addressing impunity for serious crimes and gross human rights violations.[127] Where inquiry commissions cannot meet these minimum criteria, "they will fail in their primary responsibility to ensure both public accountability (truth, justice and reparation) and prevention (measures to prevent repetition)"[128] and should therefore not be appointed.

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[124] Alston, *supra* note 8, paras. 50-51.

[125] Pinto-Jayawardena, *supra* note 7, p. 113.

[126] *Id*., p. 161.

[127] See: International Commission of Jurists, *South Asia: The role of national commissions of inquiry in investigating torture and other serious human rights violations* (Written submission at the 19th session of the Human Rights Council), UN Doc. A/HRC/19/NGO/74 (22 February 2012).

[128] Pinto-Jayawardene, *supra* note 7, p. 113.

Learning from a long history of failed commissions in Nepal and reminding the Government of Nepal of its obligations under international and domestic law, the following is a set of preliminary recommendations, offered with a view towards contributing to and fuelling further discussion about future use of COIs:

1. Repeal or amend as necessary the *Commissions of Inquiry Act* 1969 so that it conforms with international standards governing investigations and conduct of COIs, in particular the UN Impunity Principles;

2. Clarify the relationship between COIs and the normal criminal justice system – which has primary responsibility for the investigation of crimes, prosecution of the accused, punishment of the guilty and provision of reparation to victims – by instituting legislative and other reforms as necessary, such as by amending relevant provisions of the *Government Cases Act* 1992;

3. Undertake to make public the reports of all COIs that have been appointed pursuant to the *Commissions of Inquiry Act* 1969, and to respond to all relevant outstanding requests made pursuant to the *Right to Information Act* 2007;

4. Undertake to publicly respond to, and follow up with, the findings and recommendations of all COIs set up under the *Commissions of Inquiry Act* 1969; and

5. Ensure that legislation establishing the transitional justice mechanisms conform with international standards.

ANNEX I

COMMISSIONS OF INQUIRY IN NEPAL (1990 – 2010)[129]

	Date	Commission	Chair / Members	Outcome
1	1990 (April / May)	Commission established to inquire into the damage that occurred due to the incident between 19-30 April 1990	Chair: Ballabh Samsher Junga Bahadur Rana (one-member commission)	Report submitted: September 1990 Findings: 140 people injured in the violence
2	1990 (May)	Commission to investigate abuses committed by the Panchayat government in suppressing the Jana Andolan protests (more commonly known as the Mallik Commission)	Chair: Janardan Lal Mallik, Chief Judge of the Eastern Regional Court Members: - Uday Raj Upadhyay, Central Regional Court judge; - Indra Raj Pandey, Central Regional Court judge	Report submitted: December 1990 Findings: 45 people killed and 23,000 injured during the People's Movement, and that more than 100 official and politicians were directly or indirectly responsible for the violations
3	1990	Commission of Inquiry to locate persons disappeared during the Panchayat period	Chair: Surya Bahadur Shakya Members: - Prakash Kafle; - Basudev Prasad Dhungana; - Dr. Sachche Kumar Pahadi	Report submitted: 1994 Findings: A total of 35 persons were disappeared at the hands of the state; out of which five were killed and the status of the remainder are unknown
4	1990	Commission to investigate into the cause of death of Krishna Prasad Shrestha	Chair: Buddha Bahadur Adhikari (one-member commission)	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
5	1993 (July)	Commission to investigate into the deaths of UML General-Secretary Madan Kumar Bhandari and UML Central Committee member Jeevraj Ashrit in a car accident in Chandi Bhanjyang, Chitwan in May 1993	Chair: Trilok Pratap Rana, Justice of the Supreme Court	Report submitted: December 1994 Findings: No proof of "planned conspiracy" by driver Amar Lama in the deaths of the two UML party leaders

[129] See: *supra* note 26.

	Date	Commission	Chair / Members	Outcome
6	1998 (June)	Commission established to investigate into the death of RPP MP Mirza Dilshad Beg on 29 June 1998	Chair: Hari Prasad Sharma Members: - Govinda Prasad Parajuli; - Krishna Ram Shrestha	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
7	2001 (December)	Commission established to investigate the conflagration, sabotage and assault in Kathmandu (26-27 December 2000), Rajbiraj (31 December 2000), Bara and Dhanusha	Chair: Govinda Krishna Shrestha, Patan Appellate Court judge Members: - Bijayraj Bhattarai, Home Affairs Ministry Secretary; - Umesh Chandra Jha	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
8	2002 (February)	Parliamentary Committee to inquire into the Kotwada Incident of 24 February 2002[130]		
9	2003 (April)	Commission to investigate into the incident in Butwal, Rupandehi district, which occurred on 8 April 2003	Chair: Lokendra Mallik, Appeal Court judge (one-member commission)	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
10	2003 (July)	Commission to investigate into the death of Amar Lama on 27 July 2003 in Kirtipur	Chair: Madhusudhan Lal Shrestha, Patan Appellate Court judge	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
11	2004 (July)	Investigative Committee on Disappearances (also known as the Malego Committee)	Chair: Narayan Gopal Malego, Home Affairs Ministry Joint Secretary Members: - Defence Ministry Joint Secretary; - Deputy Inspector General of the Nepal Police; - Deputy Inspector General of the Armed Police Force - Deputy Chief Officer of the National Investigation Department	Report submitted: Five reports released between 2004 and 2005 Findings: Status of 382 persons made public
12	2004	Commission established to	Chair: Top Bahadur	Report submitted:

[130] See: *supra* note 17.

	Date	Commission	Chair / Members	Outcome
	(September)	investigate in a comprehensive manner into the destruction and sabotage that occurred on 1 September 2004 in different parts of Kathmandu, to provide details of the destruction, to recommend action against the accused, and to recommend compensation for those affected	Singh, former Justice of the Supreme Court Members: - Narendra Prasad Pathak; - Govinda Prasad Thapa; - Shreepurush Dhakal; - Prakashman Singh Raut; - Hari Prasad Uprety; - Sushil Jung Bahadur Rana	*The report appears neither to have been made public nor its recommendations implemented.*
13	2005 (December)	Commission established to investigate into the massacre in Nagarkot (Kalika Devi Temple) on 14 December 2005	Chair: Top Bahadur Singh, former Justice of the Supreme Court Members: - Prem Bahadur Bista, Attorney General; - Ram Prasad Paoudel; - Dronda Raj Regmi, Deputy Attorney General	Report submitted: January 2006 Findings: Off-duty RNA soldier Bashu Dev Thapa shot himself and committed suicide after killing 12 civilians, given poor management of weapons at the Nagarkot army barracks. Recommendation that necessary action be taken to prevent future fights between the local civilian population and army personnel; that management, operations and discipline within army barracks be immediately reformed; and that compensation be provided for victims' families
14	2006 (May)	Commission to investigate, recommend, advise or provide suggestions to the Government on actions or punishment for persons responsible for the suppression and killings of activists during the pro-democracy protests, and for those involved in abuse of power and misappropriation of state funds since 1 February 2005 (more commonly known as	Chair: Krishna Jung Rayamajhi, former Justice of the Supreme Court Members: - Ram Prasad Shrestha, advocate; - Ram Kumar Shrestha, advocate; - Dr. Kiran Shrestha, then General Secretary of the Nepal Medical Association; - Harihar Birahi	Report submitted: 20 November 2006, but only tabled in Parliament in August 2007 and not fully made public Findings: King Gyanendra and 201 members of his administration were responsible for the violent response towards protesters of the 2006 democracy

	Date	Commission	Chair / Members	Outcome
		the Rayamajhi Commission)		movement
15	2006 (May)	Belbari Massacre Parliamentary Probe Committee to investigate into two related cases involving loss of life: (i) Rape and murder of Sapana Gurung on 25 April 2006; and (ii) Killing of six unarmed demonstrators on 26 April 2006, who were protesting the murder of Sapana Gurung	Chair: MP Pari Thapa Members: - MP Narayan Prakash Saud; - MP Gokarna Raj Bista; - MP Ram Nath Adhikari; - MP Bijay Subba; - MP Tirtha Gautam; - MP Kamala Pant; - MP Dharma Shila Chapagain; - MP Shiva Kumar Mandal	Report submitted: January 2008 Findings: Army officers Prahlad Thapa Magar, Bir Bahadur Mahara and Nirmal Kumar Pant were found responsible for the abduction, rape and killing of Sapana Gurung; 27 others were found responsible for the deaths of the demonstrators. Recommendation that compensation be provided for victims' families.
16	2006 (May)	Parliamentary commission of inquiry into the death of UML MP Hem Narayan Yadav on 2 February 2004	Chair: MP Anand Prasad Dhungana Members: - MP Anand Prashad Pokhrel; - MP Lekhnath Acharya; - MP Yog Narayan Yadav; - MP Sushila Nepal; - MP Kashi Poudel; - MP Tek Narayan Chokhal	Report submitted: December 2006 Findings: Cause of death of Hem Narayan Yadav due to gunshot wound sustained. Involvement of Col. Babu Krishna Karki in the killing of Yadav, and recommendation that he be suspended from duty, arrested and charged with murder; involvement of a Jay Prakash Upadhyaya as an informant leading to the murder; and recommendation of compensation for the victim's family
17	2006 (June)	Commission to determine the whereabouts and status of persons disappeared by security forces over the 10-year insurgency (also known as the Neupane Committee)	Chair: Baman Prasad Neupane, Home Affairs Ministry Joint Secretary (one-member commission)	Report submitted: July 2006 Findings: Status of 174 people (52 killed; one absconded; one charged detained in prison; two charged and released on bail; while the remainder were released), among

	Date	Commission	Chair / Members	Outcome
				776 allegedly declared missing, was disclosed
18	2006 (August)	Detainee Investigation Taskforce to investigate the whereabouts of Rajendra Prasad Dhakal, Bipin Bhandari, Dil Bahadur Rai and Chakra Bahadur Katuwal	Chair: Lokendra Mallik, Appellate Court judge Members: - Govinda Prasad Sharma, NBA representative; - Saroj Prasad Gautam, then Joint Attorney	Report submitted: April 2007 Findings: Chakra Bahadur Katuwal was taken into custody by the army and died as a result of torture suffered; Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai were arrested and disappeared by security forces. Recommendation that a high-level commission be formed to investigate disappearances during the conflict; that legislation in relation to crimes against humanity be enacted with retroactive effect; that appropriate judicial directives be issued for halting arbitrary arrest and detention; and that those suspected of involvement in human rights violations be tried according to law
19	2006 (December)	Commission to inquire into the damage caused during the riots, its reasons and effects and recommend action against those involved in fuelling communal tensions in Nepalgunj, Banke district between 25 and 27 December 2006	Chair: Purushottam Parajuli, Chief Justice of Butwal Appellate Court Members: - Drondraj Regmi, Acting judge; - Sukha Chandra Jha, Officer of the National Investigation Department	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
20	2007 (January)	Commission established to inquire into the sabotage and destruction that occurred following the death of Ramesh Kumar Mahato on 19 January 2007 in Siraha	Chair: Janardan Bahadur Khadka, Patan Appellate Court judge Members: - Raj Narayan Pathak, Joint Attorney General; - Rabindra Pratap Shah,	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*

	Date	Commission	Chair / Members	Outcome
			Deputy Inspector General of Police	
21	2007 (March)	Gaur Incident Inquiry Committee to investigate into the violence and deaths on 21 March 2007	Chair: Hari Prasad Ghimire, Patan Appellate Court judge Members: - Ram Sarobar Dubey, Officer of the National Vigilance Centre; - Tika Bahadur Hamal, Deputy Attorney General; - Ananta Raj Dumre, Jumla District Court judge; - Ramesh Chand Thakuri, Deputy Inspector General	Report submitted: *Each victim's family reportedly received 10 lakhs in compensation for the deaths, but the ICJ has not been able to determine whether this was done in accordance with the recommendations of the COI, whether the Commission's report has been made public, or whether any (more) of its recommendations have been implemented.*
22	2007 (May)	Commission established to inquire into the conflagration and looting of public and private properties during the unrest instigated by the Madheshi Janadhikar Forum in Morang, Sunsari, Siraha, Saptari, Dhanusa, Mahottari, Sarlahi, Rautahat, Bara, Parsa, Nawalparasi, Rupandehi, Kapilvastu and Banke, to provide information about the deceased, and to give recommendations for non-repetition in the future	Chair: Khil Raj Regmi, Justice of the Supreme Court Members: - Janardan Bahadur Khadka, Patan Appellate Court judge; - Sukha Chandra Jha, Officer of the National Investigation Department; - Raj Narayan Pathak, Joint Attorney General; - Rabindra Pratap Shah, Deputy Inspector General of Police	Report submitted: November 2007
23	2007 (June)	High Level Investigation Commission on Disappeared Persons to investigate all allegations of enforced disappearances between 13 February 1996 and 21 November 2006	Chair: Narendra Bahadur Neupane, former Justice of the Supreme Court Members: - Raman Kumar Shrestha, then NBA General-Secretary; - Sher Bahadur KC, advocate	Did not start work due to limited mandate and criticisms faced
24	2007 (September)	Commission established to inquire into the conflagration and looting that occurred in Kapilvastu district on 17 October 2007	Chair: Lokendra Mallik, Rajbiraj Appellate Court judge Members: - Pusparaj Koirala,	Report submitted: January 2008 (but not made public to date)

	Date	Commission	Chair / Members	Outcome
			advocate; - Niraj Pun, Deputy Inspector General of Nepal Police	
25	2008 (May)	Commission to inquire into the death of UML candidate Rishi Prasad Sharma on 8 April 2008	Chair: Purushottam Parajuli, Butwal Appellate Court judge	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
26	2008 (May)	Commission to inquire into the incident at Chaulahi VDC Lamahi, Dang district Constituency No. 1 on 8 April 2008	Chair: Govinda Bahadur Shrestha	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
27	2008 (May)	Commission to inquire into the incidents and loss of life during the CA election in Kapilvastu and Sarlahi districts	Chair: Pushpa Raj Koirala	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
28	2008 (May)	Commission to inquire into the killing of businessman Ram Hari Shrestha after his abduction and transfer to the Maoist cantonment at Shaktikhor in Chitwan district	Chair: Rajendra Kumar Bhandari, former Justice of the Supreme Court	Report submitted: July 2008
29	2008 (September)	Commission to investigate into the killing of NC cadre Pradeep Khadka in Imadol on 10 September 2008	Chair: Rajendra Kumar Bhandari, former Justice of the Supreme Court	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
30	2008 (October)	Commission to probe into the murder of journalist Jagat Prasad Joshi and other instances of violations of press freedom	Chair: Umesh Prasad Gautam, advocate Members: - Shailkram Sapkota, advocate; - Mahendra Bista, journalist	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
31	2009 (February)	Commission to inquire into the abduction of Jitendra Shaha (President of the Madhesi Youth Forum) in Kathmandu	Chair: Govinda Prasad Parajuli	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
32	2009	Commission to investigate	Chair: Yubaraj Subedi,	Report submitted:

	Date	Commission	Chair / Members	Outcome
	(June)	into the death of Maoist cadre Rajendra Phuyal on 11 June 2009 in Kathmandu	Joint Deputy Attorney General Members: - Kuber Singh Rana, Deputy Inspector General of Nepal Police; - Birendra Babu Shrestha, Senior Superintendent	*The report appears neither to have been made public nor its recommendations implemented.*
33	2009 (July)	Commission to investigate into the killing of Akhilendra Yadav on 17 July 2009 in Bishnupur, Saptari district	Chair: Shankar Prasad Koirala, Joint Home Secretary	Report submitted: *The victim's family reportedly received 10 lakhs in compensation for the death, but the ICJ has not been able to determine whether this was done in accordance with the recommendations of the COI, whether the Commission's report has been made public, or whether any (more) of its recommendations have been implemented.*
34	2009 (July)	Commission to investigate into the death of Madhesh Mukti Rastriya Janatantrik party leader Ram Narayan Mahato (@ Manager Mahato) on 19 July 2009	Chair: Shankar Prasad Koirala, Joint Home Secretary	Report submitted: *The victim's family reportedly received 10 lakhs in compensation for the death, but the ICJ has not been able to determine whether this was done in accordance with the recommendations of the COI, whether the Commission's report has been made public, or whether any (more) of its recommendations have been implemented.*
35	2009 (September)	Commission to investigate into the gang rape of a female constable in Achham in September 2009	Chair: Krishna Prasad Bashyal	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*
36	2010	Commission to investigate	Chair: Gobinda Parajuli,	Report submitted: May

	Date	Commission	Chair / Members	Outcome
	(February)	into the death of media tycoon Jamin Shah on 7 February 2010	former Justice of the Supreme Court	2010
37	2010 (March)	Commission to investigate into the killing of two women and a child in Bardiya National Park on 10 March 2010	Chair: Saroj Prasad Gautam, Joint Attorney General Members: - Laxmi Prasad Gautam, Defence Ministry Under-Secretary; - Representative from the Department of National Parks and Wildlife	Report submitted: April 2010
38	2010 (July)	Commission to inquire into the death of Dharmendra Barai on or about 3 July 2010	Chair: Gehenath Bhandari, Home Affairs Ministry Under-Secretary Members: - Prakash Adhikari, DSP; - Krishna Prasad Baral, Chief Investigation Officer, National Investigation Department	Report submitted: *The report appears neither to have been made public nor its recommendations implemented.*

ANNEX II

E/CN.4/2005/102/Add.1

UPDATED SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

Extract

II. THE RIGHT TO KNOW

…

B. Commissions of Inquiry

PRINCIPLE 6. THE ESTABLISHMENT AND ROLE OF TRUTH COMMISSIONS

To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality. In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied.

PRINCIPLE 7. GUARANTEES OF INDEPENDENCE, IMPARTIALITY AND COMPETENCE

Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence. To this end, the terms of reference of commissions of inquiry, including commissions that are international in character, should respect the following guidelines:

(a) They shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law. They shall also be constituted in accordance with conditions ensuring their independence, in particular by the irremovability of their members during their terms of office except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations;

(b) Their members shall enjoy whatever privileges and immunities are necessary for their protection, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the

commissions' reports;

(c) In determining membership, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations.

PRINCIPLE 8. DEFINITION OF A COMMISSION'S TERMS OF REFERENCE

To avoid conflicts of jurisdiction, the commission's terms of reference must be clearly defined and must be consistent with the principle that commissions of inquiry are not intended to act as substitutes for the civil, administrative or criminal courts. In particular, criminal courts alone have jurisdiction to establish individual criminal responsibility, with a view as appropriate to passing judgement and imposing a sentence. In addition to the guidelines set forth in principles 12 and 13, the terms of reference of a commission of inquiry should incorporate or reflect the following stipulations:

(a) The commission's terms of reference may reaffirm its right: to seek the assistance of law enforcement authorities, if required, including for the purpose, subject to the terms of principle 10 (a), of calling for testimonies; to inspect any places concerned in its investigations; and/or to call for the delivery of relevant documents;

(b) If the commission has reason to believe that the life, health or safety of a person concerned by its inquiry is threatened or that there is a risk of losing an element of proof, it may seek court action under an emergency procedure or take other appropriate measures to end such threat or risk;

(c) Investigations undertaken by a commission of inquiry may relate to all persons alleged to have been responsible for violations of human rights and/or humanitarian law, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements. Commissions of inquiry may also consider the role of other actors in facilitating violations of human rights and humanitarian law;

(d) Commissions of inquiry may have jurisdiction to consider all forms of violations of human rights and humanitarian law. Their investigations should focus as a matter of priority on violations constituting serious crimes under international law, including in particular violations of the fundamental rights of women and of other vulnerable groups;

(e) Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice;

(f) The terms of reference of commissions of inquiry should highlight the importance of preserving the commission's archives. At the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.

PRINCIPLE 9. GUARANTEES FOR PERSONS IMPLICATED

Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees:

(a) The commission must try to corroborate information implicating individuals before they are named publicly;

(b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file.

PRINCIPLE 10. GUARANTEES FOR VICTIMS AND WITNESSES TESTIFYING ON THEIR BEHALF

Effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission.

(a) Victims and witnesses testifying on their behalf may be called upon to testify before the commission only on a strictly voluntary basis;

(b) Social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault;

(c) All expenses incurred by those giving testimony shall be borne by the State;

(d) Information that might identify a witness who provided testimony pursuant to a promise of confidentially must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.

PRINCIPLE 11. ADEQUATE RESOURCES FOR COMMISSIONS

The commission shall be provided with:

(a) Transparent funding to ensure that its independence is never in doubt;

(b) Sufficient material and human resources to ensure that its credibility is never in doubt.

PRINCIPLE 12. ADVISORY FUNCTIONS OF THE COMMISSIONS

The commission's terms of reference should include provisions calling for it to include in its final report recommendations concerning legislative and other action to combat impunity. The terms of reference should ensure that the commission incorporates women's experiences in its work, including its recommendations. When establishing a commission of inquiry, the Government should undertake to give due consideration to the commission's recommendations.

PRINCIPLE 13. PUBLICIZING THE COMMISSION'S REPORTS

For security reasons or to avoid pressure on witnesses and commission members, the commission's terms of reference may stipulate that relevant portions of its inquiry shall be kept confidential. The commission's final report, on the other hand, shall be made public in full and shall be disseminated as widely as possible.

…