

NEPAL

Written information for the adoption of the List of Issues
by the Human Rights Committee with regard to Nepal's
Second Periodic Report (CCPR/C/NPL/2)

April 2013

Submitted by

TRIAL (Swiss Association against Impunity)

CVSJ (Conflict Victims' Society for Justice)

PPR (Forum for the Protection of People's Rights) Nepal

HimRights (Human Rights Monitors)

NEFAD (Network of Families of Disappeared and Missing)

THRD Alliance (Terai Human Rights Defenders Alliance)

OTV-Nepal (Victims' Orphan Society of Nepal)



1.	Focus of the report	4
2.	Suggested items for the adoption of the Committee’s List of Issues concerning Nepal	5
3.	Background	9
	3.1. ...The State party’s report	9
	3.2. ...Historical and political context to Nepal’s human rights situation	10
	3.2.1..Long delay in establishing transitional justice mechanisms and failure to meet international standards (Art. 2.3 of the Covenant).....	12
	3.3. ...Failure of the State party to extend the mandate of OHCHR-Nepal.....	18
	3.4International Human Rights Instruments Ratified by Nepal.....	19
	3.4.1 .Relationship between International and Domestic Law under Nepali Legislation	20
4.	Selected Issues	22
	4.1. ...The inadequacy of the criminal legislation on enforced disappearance, torture, rape and other form of sexual violence (Arts. 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)	22
	4.1.1..Failure to codify the crime of torture	22
	4.1.2..Failure to codify the crime of enforced disappearance.....	26
	4.1.3..Obstacles to the effective criminalisation of rape and other forms of sexual violence.....	28
	4.2. ...The ongoing failure to investigate, prosecute and punish those responsible for extrajudicial executions, enforced disappearance, torture, rape and other forms of sexual violence (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)	29
	4.2.1..Failure of the Nepali Army to credibly and effectively investigate, prosecute and punish conflict-era extrajudicial execution, enforced disappearance, torture and rape cases (Arts. 2.3, 6, 7, 9, and 16 of the Covenant)	31
	4.2.2..Refusal by authorities to register criminal complaints concerning serious human rights violations and procedural hurdles (Arts. 2.3, 6, 7, 9, 10, 16, and 24 of the Covenant).....	34
	4.2.3..Withdrawal of criminal cases concerning conflict-era human rights violations (Arts. 2.3, 6, 7, 9, 10, 16)	37
	4.2.4..Non-investigation based on deferral to transitional justice mechanisms and alleged role of National Human Rights Commission (Art. 2.3).....	41
	4.2.5..Cancellation of writs of habeas corpus (Arts. 2.3, 6, 7, 9, 10, and 16 of the Covenant)	44
	4.2.6..Inadequate exhumations and identification and return of mortal remains to families (Arts 2.3, 6 and 7 of the Covenant).....	46
	4.2.7..Post conflict extra-judicial killings, unlawful detention and torture by security forces in the Terai (Arts. 6, 7, 9, 10, and 16 of the Covenant)	49
4.3Gaps in the protection of victims of human rights violations and their relatives, witnesses and human rights defenders (Arts. 2.3, 6, 7, 9, 10 and 16 of the	

Covenant)	52
4.4. ...Failure to guarantee the right of reparation to victims of human rights violations and their relatives (Arts. 2.3, 6, 7, 9, 10, 16 and 14 of the Covenant)	55
4.4.1..Lack of declarations of absence by reason of enforced disappearance (Arts 2.3 and 16 of the Covenant)	58
4.5. ...The non-ratification of the International Convention on the Protection of all Persons from Enforced Disappearance and the Rome Statute (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)	58
5. Information on the associations submitting this written information	60
Annex 1 - Relevant concluding observations of the HRC to Nepal following consideration of its first periodic report (1994)	63

1. Focus of the report

1. The Human Rights Committee (hereinafter, “the HRC” or “the Committee”) will consider the combined second, third and fourth periodic reports by Nepal pursuant to Art. 40 of the International Covenant on Civil and Political Rights (hereinafter, “the Covenant”) at its 110th session, to be held from 10 to 28 March 2014 in Geneva. This report is submitted to the HRC by TRIAL and its partners with a view to assisting the Country Report Task Force in the preparation of the List of Issues that will be adopted at the 108th session taking place from 8 to 26 July 2013.
2. This report aims at providing a partial review of Nepal’s implementation of the Covenant and focuses on a limited number of issues connected to **impunity for serious human rights violations during the period of conflict in Nepal as well as the post-conflict era** and the lack of adequate protections against human rights violations under Nepal’s legal and policy framework. In particular, in view of the respective mandates and expertise of the contributing organisations, this report analyses Nepal’s compliance with its obligations concerning the prohibition of arbitrary detention, torture, rape and enforced disappearance as well as the significant obstacles faced by victims in obtaining access to justice, truth and reparation for serious human rights violations.
3. The present report therefore analyses Nepal’s compliance with the provisions of the Covenant concerning, in particular, **the right to life (Art. 6), the prohibition of torture (Art. 7), the right to liberty and security of person (Art. 9), the right of detainees to be treated with humanity and dignity (Art. 10), the right to recognition as a person before the law (Art. 16), the rights of the child (Art. 24) and the right to an effective remedy (Art. 2.3).**¹ The themes analysed in this regard correspond to issues of concern identified by the Committee in its previous concluding observations on Nepal’s initial report published on 10 November 1994 (hereinafter “1994 Concluding Observations”).² Annex 1 of this report contains excerpted “Relevant concluding observations of the HRC to Nepal following consideration of its first periodic report.” On the basis of the findings and analysis contained herein, concrete questions suggested by TRIAL and its partners for inclusion by the HRC in its forthcoming List of Issues to be submitted to the State party may be found in section 2 below.
4. [TRIAL](#) (*Swiss Association against Impunity*) is the principal author of this report with contributions from the Conflict Victims’ Society for Justice, Forum for the Protection of People’s Rights (PPR) Nepal, Himalayan Human Rights Monitors (HimRights), the National Network of Families of Disappeared and Missing (NEFAD), the Terai Human Rights Defenders Alliance and the Terror

¹ The omission of analysis of Nepal’s compliance with other articles of the Covenant by no means implies that the organisations submitting this report find that Nepal fully complies with all its obligations under the Covenant.

² HRC, *Concluding Observations on Nepal*, 10 November 1994, UN Doc. CCPR/C/79/Add.42.

Victims Orphan Society of Nepal.³ This joint submission is based on findings and in-depth analysis from non-governmental organisations monitoring and documenting the human rights situation on the ground in Nepal, as well as intergovernmental and Nepali governmental bodies. Throughout this report examples are referred to wherever possible in order to substantiate the allegations put forward. Some of the findings and analysis contained in this report are limited to the Terai region and thus does not refer to the country as a whole; where this is the case, it is noted.

2. Suggested items for the adoption of the Committee's List of Issues concerning Nepal

5. In light of the concerns highlighted in this submission, TRIAL and its partners recommend to the Human Rights Committee to take up the following issues and to deliver the following requests for information from the State party.

2.1 The State party's failure to establish transitional justice mechanisms in line with international standards (Arts 2.3, 6, 7, 9, 10 and 16 of the Covenant)

- i. List the issue of the ongoing delay in establishing transitional justice mechanisms to complement investigation and prosecution of serious violations of human rights and international humanitarian law during the 1996-2006 conflict as a matter of serious concern to be taken up during the forthcoming dialogue (sections 3.2.1, 4.2.4);
- ii. Request information concerning the adoption of an Executive Ordinance establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation on 13 March 2013 in the absence of approval of the legislature or consultation with civil society, including victim representatives (section 3.2.1);
- iii. List the issue of inclusion of provisions in the Executive Ordinance establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation concerning the power to grant amnesty for perpetrators of serious human rights violations and the power to undertake reconciliation between victims and perpetrators as matters of serious concern to be taken up during the forthcoming dialogue with the Committee (section 3.2.1); and
- iv. List the issues of inadequate definitions of human rights violations and reparations (section 4.4), inadequate witness protection and support mechanisms (sections 3.2.1, 4.3), inadequate powers to refer alleged perpetrators for investigation and prosecution (sections 3.2.1, 4.2.4), inadequate guarantees for independence of the Commission (section 3.2.1) and inadequate powers and capacity to determine the fate and whereabouts of victims of enforced disappearance (section 4.2.6) in the Executive Ordinance establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation as matters of serious concern to be taken up during the forthcoming dialogue with the Committee.

³ TRIAL gratefully acknowledges legal review and advice received from Raju Chapagai, Chairperson of JURI-Nepal, but notes that any errors or omissions are the responsibility of TRIAL and its partners jointly submitting this report.

2.2 The State party's failure to codify crimes under international law (Arts. 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)

- v. Request information concerning the precise status of the Covenant (section 3.4.1) and the prohibition of crimes under international law, including genocide, crimes against humanity, war crimes, torture, and enforced disappearance (sections 4.1, 4.5), in the Nepali legal order;
- vi. List the failure to codify genocide, crimes against humanity, war crimes, torture and enforced disappearance as crimes in Nepali law and the failure to provide jurisdiction over these crimes to the ordinary criminal justice system as matters of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1);
- vii. List the failure to include the crime of torture of a minor specified in the Children's Act of 1992 as a scheduled offence under the State Cases Act thus permitting a criminal complaint (FIR) to be filed with the police as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.1.1);
- viii. List the failure to bring the definition of torture contained in the Torture Related Compensation Act of 1996 into line with international standards as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.1); and
- ix. List the failure to provide for the exercise of universal jurisdiction over torture and grave breaches of the Geneva Conventions as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.1).

2.3. The State party's inadequate provisions concerning the crime of rape (Arts 2.3, 7, 9 of the Covenant)

- x. List the narrow definition of acts that amount to rape and the non-gender neutral definition of rape as matters of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.3);
- xi. List the failure to remove the 35-day statutory limitation for filing a criminal complaint (FIR) of rape despite Supreme Court orders requiring amendment of the limitation clause as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.3); and
- xii. List the penalties for rape, especially for marital rape, not being proportionate to the gravity of the crime as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.1.3).

2.4. The State party's failure to investigate, prosecute and sanction enforced disappearance, torture, rape and other crimes amounting to serious human rights violations (Arts 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)

- xiii. List the failure to bring a single perpetrator of crimes committed during the 1996-2006 conflict amounting to serious human rights violations successfully to justice as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2);

- xiv. List the failure to determine the fate and whereabouts of 1,300 alleged victims of enforced disappearance during the 1996-2006 conflict, including the failure of State authorities to clarify some 458 cases seized of the Working Group on Enforced or Involuntary Disappearances, as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (sections 4.1.2, 4.2);
- xv. List case withdrawals of conflict-related crimes of murder, attempted murder, abduction and rape by successive governments of Nepal from 2008 to 2012 as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee and request information concerning the precise number and nature of withdrawn cases (section 4.2.3);
- xvi. List the failure of State authorities to comply with orders and decisions of the Supreme Court of Nepal and recommendations of the National Human Rights Commission concerning the right to an effective remedy of victims of serious human rights violations as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (para. 35 and para. 98 respectively);
- xvii. List the cancellation of writs of *habeas corpus* by the Supreme Court of Nepal relying on denials by State authorities alone as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2.5);
- xviii. List obstacles faced by victims of serious human rights violations in filing FIRs with the police as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2.2);
- xix. List allegations that the Nepali Army is shielding its members under suspicion of having committed serious human rights violations from justice as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2.1);
- xx. List the apparent failure of the Nepali Army to cooperate with the criminal justice system, including by failing to hand over individuals subject to an arrest warrant for crimes amounting to serious violations of human rights as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2.1);
- xxi. Request information concerning the number and nature of disciplinary actions taken against members of the security forces, including courts martial of members of the Nepali Army, in relation to torture, enforced disappearances and other serious human rights violations committed during the conflict (section 4.2.1);
- xxii. List the promotion of members of the Nepali Army while under suspicion of having committed serious human rights violations as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (4.2.1.1);
- xxiii. List the lack of a process for exhumation and identification and return of remains of victims of enforced disappearance to families as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee and request information concerning the legal, policy and institutional framework applicable to conducting exhumations in cases of serious human rights violations, including how relatives' right to information is ensured (section 4.2.6); and
- xxiv. List the ongoing situation of extra-judicial killings, unlawful detention and torture by security forces, particularly in the Terai region, as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.2.7).

2.5. The State party's failure to address ongoing gaps in the protection of victims of human rights violations and their relatives, witnesses and human rights defenders (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)

- xxv. List the failure to provide an effective system of witness protection and support as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.3); and
- xxvi. List harassment, threats and reprisals against human rights defenders working on cases of serious human rights violations and challenging impunity as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.3).

2.6. The State party's failure to provide full reparation to victims of serious human rights violations (Arts. 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)

- xxvii. List the failure to establish a comprehensive reparation programme for victims of serious human rights violations committed during the 1996-2006 conflict as a matter of serious concern to be taken up during the forthcoming dialogue with the Committee (section 4.4);
- xxviii. List the maximum limits on compensation available to victims of conflict under the Interim Relief Programme, to victims of torture under the Torture Related Compensation Act of 1996 and Children's Act of 1992, and to victims of rape under the General Code as a matter of concern to be taken up during the forthcoming dialogue with the Committee (section 4.4); and
- xxix. Request information concerning the disparities among categories of victims entitled to access their rights to reparation under the Interim Relief Programme (section 4.4).

2.7. The State party's failure to accede to the Rome Statute of the International Criminal Court and the Convention on the Protection of All Persons from Enforced Disappearance (Arts. 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)

- xxx. Request information on steps taken by the State party to accede to the Rome Statute of the International Criminal Court in light of the resolution adopted by the House of Representatives on 25 July 2006 directing the Government to proceed with accession (section 3.4, 4.5);
- xxxi. List the non-ratification of the Convention on the Protection of All Persons from Enforced Disappearance and the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity as issues of concern to be taken up during the forthcoming dialogue with the Committee (sections 3.4, 4.5); and
- xxxii. List the urgency of taking the necessary steps to accept the competence of the Committee against Torture, the Committee on the Elimination of Racial Discrimination and other treaty bodies monitoring international human rights treaties to which Nepal is a State party to receive and consider individual communications as an issue to be taken up during the forthcoming dialogue with the Committee (sections 3.4, 4.5).

3. Background

3.1. The State party's report

6. The State party report of Nepal being considered by the HRC in March 2014 covers more than 15 years of the State party's compliance with the Covenant – from 1995 to 2010 – as the report was more than 14 years overdue at the time of its submission. Yet, the report fails to give the HRC an accurate picture of the widespread impunity for gross violations of human rights that took place during the armed conflict in Nepal (from 1996 to 2006) and the continuing perpetration of arbitrary detention, torture, rape, enforced disappearance and extrajudicial killings by security forces, albeit at a decreased level in comparison with the height of the conflict.
7. The government of Nepal's report refers throughout to the human rights and fundamental freedoms enshrined in the Interim Constitution adopted in 2007 following the conflict. Yet, its elaboration of the legal and policy framework for human rights protection is far from the reality of victims who face seemingly insurmountable hurdles in obtaining justice, truth and reparation in Nepal.

The HRC has already recognised the failures of the State party to deliver justice to victims of gross violations of human rights⁴ – including the prolonged delay by successive governments of Nepal in establishing the transitional justice mechanisms envisioned by the Comprehensive Peace Accord and Interim Constitution.⁵ Similarly, the Office of the High Commissioner for Human Rights (hereinafter, "OHCHR") 2012 Nepal Conflict Report mapped the enormous number of cases of extrajudicial killing, enforced disappearance, arbitrary detention, torture, rape and other forms of sexual violence, forced displacement and other violations perpetrated by both sides during the conflict that remain unaddressed by the State party.⁶ Moreover, numerous reports by non-governmental actors in the more recent period have documented ongoing violations of a serious nature.⁷

⁴See, e.g. the views of the Human Rights Committee on individual communications - Communication No. 1469/2006, *Yasoda Sharma v. Nepal*, views adopted on 28 October 2008, at para. 9; Communication No. 1761/2008, *Yubraj Giri v. Nepal*, views adopted 24 March 2011, para. 9.

⁵*Katwal v. Nepal*, Decision on Admissibility, para 6.5, 22 November 2012, Communication No. 2000/2010, UN Doc. CPCR/C/106/D/2000/2010.

⁶ OHCHR, *Nepal Conflict Report: An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006*, November 2012, (hereinafter "Nepal Conflict Report 2012") available at http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf, (last accessed 11 April 2013), at 36.

⁷See, e.g. OHCHR-Nepal, *Investigating Allegations of Extra-judicial Killing in the Terai*, 2010, available at <http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf> (last accessed 11 April 2013); Advocacy Forum, *Torture and Extra-Judicial Executions amongst Widespread Violence in the Terai*, 2010 available at <http://www.advocacyforum.org/downloads/pdf/publications/terai-report-english.pdf> (last accessed 11 April 2013); Amnesty International, *Nepal: The search for justice*, January 2013, AI Index: ASA31/001/2013, available at <http://amnesty.org/en/library/asset/ASA31/001/2013/en/11443e06-3609-4811-87a3-c35eb315f5d1/asa310012013en.pdf> (last accessed 8 April 2013); Human Rights Watch, *Appeasing China: Restricting the Rights of Tibetans in Nepal*, 24 July 2008 available at <http://www.hrw.org/reports/2008/07/23/appeasing-china-0> (last accessed 11 April 2013).

8. The government of Nepal consistently fails to acknowledge and address the prevailing situation of impunity for both past and present violations. Despite the fact that not a single perpetrator has been successfully brought to justice for conflict-related human rights violations, the State party's periodic report fails to acknowledge that victims of human rights violations by State agents have virtually no prospect of success in seeking investigation and prosecution of the perpetrators in the domestic justice system. Moreover, the State party provides no data to the HRC concerning the prevalence of cases of extrajudicial killing, enforced disappearance, arbitrary detention, torture and rape (especially during the post-conflict period) and its responses to such cases. It omits discussion of the successive governments' deeply concerning practice of withdrawing conflict-era cases against alleged perpetrators that are deemed to be "politically motivated". Similarly, it overlooks the wide gaps between Nepali legislation and international standards concerning the definition of crimes, appropriate remedies and both *de jure* and *de facto* obstacles in obtaining access to justice – including excessive criminal and civil statutes of limitation and human rights defenders' and victims' fear of retaliation for reporting crimes perpetrated by security forces. All of these issues are analysed in depth below in section 4 (selected issues).

3.2. Historical and political context to Nepal's human rights situation

9. *"Justice is a part of the peace process. The Government remains committed to strike a necessary balance between peace, justice and reconciliation."* – Government of Nepal response to the UPR Outcomes, 7 June 2011⁸
10. During the conflict in Nepal from 13 February 1996 to 21 November 2006, an estimated 13,236 people were killed and 1,300 suspected enforced disappearances were carried out, as well as at least 2,500 cases of torture and other forms of ill-treatment, thousands of arbitrary arrests and an untold number of rapes.⁹ OHCHR, in its Nepal Conflict Report published in 2012, found that some 2,000 incidents during the conflict may have resulted in the unlawful killing of one or more persons.¹⁰ Enforced disappearances were a hallmark of the conflict and were carried out by both parties to it, namely the State and the Maoist combatants.¹¹ In 2012, the Working Group on Enforced or Involuntary Disappearances (WGEID) remained seized of 458 cases of 672 received from Nepal during the conflict,¹² which led it to describe Nepal as the country with the highest reported rate of enforced disappearances worldwide in 2002, 2003 and 2005. Torture, arbitrary

⁸ Statement by H. E. Mr. Madhav Prasad Ghimire, Chief Secretary, Office of the Prime Minister and Council of Ministers, Government of Nepal, and the leader of the Nepali delegation to the 17th Session of the Human Rights Council at the adoption of the Universal Periodic Review (UPR) Outcome Report on Nepal on Tuesday, 7 June 2011, Geneva (copy on file with TRIAL).

⁹ OHCHR, *Nepal Conflict Report 2012*, citing figures compiled by INSEC and the ICRC, at fn. 1; Ch. 7 (torture).

¹⁰ *Ibid.*, at Ch. 5 (unlawful killings).

¹¹ *Ibid.*, at Ch. 6 (enforced disappearance).

¹² WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances 2012*, 28 January 2013, UN Doc. A/HRC/22/45, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf, (hereinafter Annual Report 2012) at 73, 83-4.

arrest, and displacement were common features of the conflict and are documented in numerous reports and the Transitional Justice Reference Archive which accompanies the Nepal Conflict Mapping Report by OHCHR.¹³ Rape and other forms of sexual violence went widely under-reported and an exact figure is not available for this category of crimes.¹⁴ Cases of serious human rights violations during the conflict have been compounded by denial of the right to an effective remedy in Nepal's criminal justice system.

11. The current political situation in Nepal hampers efforts to address concerns about human rights and the rule of law. On 28 May 2012, Nepal's legislature, the Constituent Assembly, was dissolved after failing to draft a new federal constitution by that date – the deadline set by the Supreme Court for doing so. In the time preceding the dissolution, victims' calls for measures of justice, truth and reparation were largely ignored amidst heated political debate and negotiation focused on which federal model would be incorporated into the new constitution.¹⁵ At the time of this report, persistent deadlock between the political parties delayed conclusion of an agreement to hold elections for a new Constituent Assembly until 13 March 2013. On 14 March 2013, the Chief Justice of the Supreme Court was appointed to preside over a caretaker government as Chairperson of the Interim Council of Ministers, with a mandate to accomplish free and fair elections – despite serious concerns raised in terms of independence of judiciary by this move.¹⁶ As of 24 April 2013, no date for elections has yet been announced.
12. The repercussions of the delay in holding elections and forming a new Constituent Assembly are many. In the absence of a legislature, it is impossible to drive forward necessary legislative reforms to criminalise torture and enforced disappearance (see more below, section 4.1) and establishment of a transitional justice mechanism was achieved through an Executive Ordinance signed by the President rather than through legislative approval (see below section 3.2.1). Until constitutional changes (again achieved through executive ordinance) on 14 March 2013, justices could not be appointed to the Supreme Court in the absence of legislative approval.¹⁷ The expiry of the mandate of a number of justices in 2012 and 2013 has resulted in a large backlog of cases,

¹³ See <http://nepalconflictreport.ohchr.org/> to access the Transitional Justice Reference Archive.

¹⁴ OHCHR, *Nepal Conflict Report 2012*, *supra* note 6, at Ch. 9 (sexual violence).

¹⁵ See more below in section 3.2.1 concerning the transitional justice mechanisms.

¹⁶ Kathmandu Post, *After 13-hr marathon, parties okay cj govt: Interim govt asked to hold polls by June 21; Deal on TRC, ranks for ex-PLA fighters* (14 March 2013), available at <http://www.ekantipur.com/2013/03/14/top-story/after-13-hr-marathon-parties-okay-cj-govt/368393.html> (last accessed 8 April 2013). Following a legal challenge, the Prime Minister (Chief Justice Regmi) was forced to temporarily remove himself from the post of Chief Justice in light of concerns about undermining the independence of the judiciary. See Image Channels, *Supreme Court slashes cabinet chairman Khil Raj Regmi's status of chief justice; Rules against holding of double-identity*, 18 March 2013, available at <http://imagechannels.com/news/details/25458/Supreme-Court-slashes-cabinet-chairman-Khil-Raj-Regmis-status-of-chief-justice-Rules-against-holding-of-double-identity> (last accessed 9 April 2013).

¹⁷The Himalayan Times, *Appointment of Judges postponed*, 7 April 2013, available at: <http://www.thehimalayantimes.com/fullNews.php?headline=Appointment+of+judges+postponed++&NewsID=372002&a=3> (last accessed on 9 April 2013).

including those concerning fundamental human rights issues.¹⁸

3.2.1. Long delay in establishing transitional justice mechanisms and failure to meet international standards (Art. 2.3 of the Covenant)

13. The 2006 Comprehensive Peace Accord (hereinafter “CPA”) and the 2007 Interim Constitution envisaged the establishment of non-judicial transitional justice mechanisms to address human rights violations carried out by both sides during the conflict, namely; a Truth and Reconciliation Commission (hereinafter, “TRC”)¹⁹ and a Commission of Inquiry into Disappearances (hereinafter, “Disappearances Commission”).²⁰ Notwithstanding this, both the CPA and the Interim Constitution contained a commitment to holding perpetrators of gross human rights abuses accountable and tackling impunity.²¹
14. In June 2007, the government formed a “High Level Probe Commission on Disappeared Persons” headed by former Supreme Court Justice Narendra Bahadur Neupane, which generated significant criticism by NGOs as it failed to comply with domestic and international human rights commitments Nepal had signed up to.²²
15. Thereafter, draft bills for the establishment of a TRC and Disappearances Commission were made public by the Ministry of Peace and Reconstruction in July 2007 and November 2008 respectively but were widely condemned for failing to meet international human rights standards.
16. Despite concerns raised by civil society over the definitions of human rights violations contained

¹⁸ Kathmandu Post, *Absence of Supreme Court Justices has case log going up*, 7 February 2013, available at: <http://www.ekantipur.com/2013/02/07/editors-pick/absence-of-sc-justices-has-case-backlog-going-up/366713.html> (last accessed on 9 April 2013).

¹⁹ The November 2006 CPA concluded between the Government of Nepal and the Communist Party of Nepal-Maoist of 21 November 2006, explicitly provided for the establishment of a high-level TRC “[...] in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliation[s] in the society” – clause 5.2.5, CPA. The January 2007 Interim Constitution reaffirmed that the State has a legal responsibility to constitute a high-level TRC – see Interim Constitution of Nepal (15 January 2007), Section IV, Art. 33 (q).

²⁰ The CPA also stipulated that both parties to the conflict agreed to make public the names and addresses of all those who were subjected to enforced disappearance and killed during the course of the conflict. *Ibid.*, clause 5.2.3. The January 2007 Interim Constitution reaffirmed that the State has a legal responsibility to provide relief to the families of victims of enforced disappearance, Interim Constitution of Nepal (15 January 2007), Section IV, para. 33 (s).

²¹ Clause 7.1.1 of the CPA states: “Both sides express the commitment that impartial investigation and action as per the law would be carried out against the people responsible in creating obstructions to the exercising of the rights envisaged in the letter of agreement and guarantee not to encourage impunity.”

²² Asian Forum for Human Rights and Development, *Formation of Commission on Disappeared Persons Likely to Institutionalise Impunity*, 4 July 2007, available at http://archive.forum-asia.org/index2.php?option=com_content&do_pdf=1&id=458 (document last accessed on 25 September 2012). The Commission could not make much headway due to strong criticism from national and international bodies and was finally aborted.

in the bills and the weakness of victim and witness protection mechanisms,²³ both pieces of legislation were tabled in the Legislature-Parliament in 2010 but subsequently spent over a year under review by the Legislative Committee, which was unable to resolve the contentious issues.²⁴

17. In November 2011, an agreement was reached between the political parties aimed at ending the political deadlock in the country, which included establishing the TRC and Disappearances Commission within one month. A task force set up to accomplish the latter (comprising three high-level politicians from each of the main parties; United Communist Party of Nepal (Maoist), Nepali Congress and United Marxist-Leninist) reported in January 2012. In a move widely condemned by victims and local and international human rights organisations, they recommended prioritising reconciliation over truth-seeking by incorporating a provision in the TRC bill granting amnesty to alleged perpetrators of human rights violations, including crimes under international law such as torture and enforced disappearance.²⁵
18. In May 2012, just prior to the dissolution of the Constituent Assembly, the government of Nepal decided to withdraw the two pending bills for establishing the TRC and the Disappearances Commission respectively. Then, on 28 August 2012, the cabinet (Council of Ministers) forwarded a draft executive ordinance to the President seeking approval for the establishment of a single *Commission of Investigation into Disappeared Persons, Truth and Reconciliation*. Whereas the previous bills establishing the transitional justice mechanism were far from being in line with international law and standards, the 2012 draft ordinance was a clear violation of Nepal's international human rights commitments as it contained an amnesty provision. Moreover, the ordinance aimed to establish a single commission that would also carry out functions related to resolving enforced disappearance cases in contravention of a Supreme Court decision requiring the establishment of a stand-alone Disappearance Commission. The 2012 draft ordinance also did not provide for a power to issue recommendations for prosecution, which violated the Supreme Court directive to the State party in a landmark 2007 case ordering the establishment of

²³ See, e.g., TRIAL et al. *Briefing Note to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence on the recent political developments in Nepal leading to a lack of access to justice for victims of gross human rights violations and international humanitarian law*, August 2012, available at http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Nepal/Briefing_Note_to_the_SR_on_TJ_23.08.2012_-_copie_1_.pdf (last accessed 8 April 2013), at 9; International Commission of Jurists, *Witness Protection in Nepal: Recommendations from International Best Practices*, August 2011, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-witness-protection-analysis-brief-2011.pdf> (last accessed 9 April 2013), at 12.

²⁴ A five-member sub-committee established in April 2011 to resolve problematic clauses and finalise the Disappearances Commission bill was therefore expanded in May 2011 to include two additional members with the aim of finalising both bills within a ten-day period. In spite of several extensions, the sub-committee was unable to fulfil its mandate and finalise the bills.

²⁵ *Suggestions made by the Task Force regarding the Truth and Reconciliation Bill and Commission on the Disappeared Bill*, January 2012 (copy on file with TRIAL). Although the Task Force highlighted that “amnesty should be ruled out in some incidents of serious nature” and also that “general amnesty cannot meet the expectations of victims”, it also confusingly proposed “to adopt the ways of seeking truth by the TRC and Disappearances Commission and granting amnesty.” At para. 4.2.

the Disappearances Commission.²⁶

19. International and national human rights organisations condemned the 2012 ordinance and called for it to be revised.²⁷ Throughout 2012 and early 2013, pressure from victims, national and international human rights organisations and the international community to abandon it remained high.²⁸ Despite this, the four main political parties proceeded to conclude an 11-point agreement on 13 March 2013 which included, as one of the points, the establishment of a transitional justice mechanism on the basis of a slightly revised ordinance.²⁹ The text of the executive ordinance was signed into law by the President of Nepal on 14 March 2013, without it having been seen by victims or other stakeholders including the United Nations and the international community. It entered into force immediately.
20. The executive ordinance establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation is seriously flawed, falling far short of international standards. Several of these gaps are briefly addressed here, while the State party's argument that cases of serious human rights violations should be dealt with by this Commission instead of the criminal justice system is dealt with below in section 4.2.4.
21. The purpose of the Commission is, *inter alia*, to "bring the actual facts to the public by investigating the truth concerning serious violation of human rights, incidents regarding crimes against humanity and the persons involved in such incidents during the course of armed conflict including for the investigation of the person disappeared."³⁰ While the Commission has the mandate "to end impunity" and bring perpetrators "within the ambit of the law", perpetrators may request amnesty and the Commission can recommend amnesty *ex officio*. Such a provision is

²⁶ In June 2007, the Supreme Court of Nepal ordered the Government of Nepal to "enact an Act for the protection of the disappeared persons, making provision for an Inquiry Commission [...] to carry out an in-depth and comprehensive inquiry of the said persons and [...] accomplish a criminal investigation on the basis of the report and [...] prosecute concerned persons", Decision of the Supreme Court of Nepal, *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others* (Case No. 3775/2055), 1 June 2007, at 41.

²⁷ TRIAL et al. *Briefing Note to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, *supra* note 23. Although the text of the 2012 draft ordinance was never made public or shared for consultation, copies seen by human rights lawyers revealed the extent of its incompatibility with victims' demands and international law and standards.

²⁸ My Republica, *Western countries unlikely to support TRC*, 2 September 2012, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=40915 (last accessed 8 April 2013).

²⁹ Kathmandu Post, *After 13-hr marathon, parties okay cj govt: Interim govt asked to hold polls by June 21; Deal on TRC, ranks for ex-PLA fighters*, 4 March 2013, available at <http://www.ekantipur.com/2013/03/14/top-story/after-13-hr-marathon-parties-okay-cj-govt/368393.html> (last accessed 8 April 2013).

³⁰ Preamble, Executive Ordinance establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation, 13 March 2013, (hereinafter "Executive Ordinance") (unofficial translation on file with TRIAL). The other purposes of the Commission are to:

To create an environment of peace and reconciliation in the society by enhancing mutual good wishes, and tolerance between the victims and perpetrators;

To recommend reparation for the persons victimized by the incidents; and

To end state of impunity by bringing perpetrators involved in incidents relating to serious violations under the ambit of law.

clearly contrary to international law.³¹

22. Moreover, the amnesty provision entrusts the Commission with discretion to recommend amnesty for serious crimes – explicitly including rape – if the Commission is satisfied that there are sufficient reasons and grounds for doing so. Sec. 23(2) states:

Notwithstanding anything contained in Sub Section (1), the Commission shall not recommend amnesty to the perpetrator involved in serious crimes, including rape, that the Commission's inquiry doesn't confirm sufficient reasons and grounds for granting amnesty.

23. Although the wording of Sec. 23(2) is somewhat awkwardly drafted in the original text, the provision appears to simply confirm the obligation stated in Sec. 23(1) for the Commissioners to

³¹ Amnesties for crimes under international law are incompatible with the duty of States to investigate, prosecute and punish perpetrators of these crimes. See, e.g., *Article 4, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) - <http://www2.ohchr.org/english/law/remedy.htm>: “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.” *Principle 1, Nuremberg Principles on International Law* (1946) – see: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf: “Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.” On the duty to investigate crimes against humanity and war crimes: *Article 1, Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (1973) - <http://www2.ohchr.org/english/law/guilty.htm>: “War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.” On the duty to investigate torture committed on the territory of a state: *Article 12, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) - <http://www2.ohchr.org/english/law/cat.htm>: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” *Article 13, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) - <http://www2.ohchr.org/english/law/cat.htm>: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” On the duty to investigate enforced disappearance: *Article 13, UN Declaration on the Protection of all Persons from Enforced Disappearance* (1992) - [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.47.133.En](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.47.133.En): “Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.” On the duty to investigate extrajudicial executions: *Article 9, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (1989) - <http://www2.ohchr.org/english/law/executions.htm>: “There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries.” See also: *Preamble, Rome Statute of the International Criminal Court* (1998) - <http://untreaty.un.org/cod/icc/statute/romefra.htm>: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

give written reasons for recommending amnesty. Thus, it appears that no category of crimes is excluded from the scope of the Commission's power to grant amnesty, including serious human rights violations. Moreover, as crimes against humanity, war crimes, torture and enforced disappearance are not codified as crimes in Nepali law, there appears to be no basis in domestic law for the Commission to exclude these crimes under international law from the scope of the amnesty (see para. 94 below). It is also notable that perpetrators of rape during the conflict already enjoy *de facto* impunity due to the 35-day state of limitation on reporting this crime (see section 4.1.3 below).

24. The amnesty provision is a grave disappointment to victims and has been repeatedly denounced as unlawful in international law, including by the High Commissioner for Human Rights who stated "Such amnesties would not only violate core principles under international law but would also weaken the foundation for a genuine and lasting peace in Nepal."³² On 24 March 2013, not one but two writs were filed with the Supreme Court of Nepal arguing that the ordinance violates constitutional rights and the Covenant and requesting a number of its flawed provisions be voided and an order of mandamus issued to compel the Government to enact law criminalising serious human rights violations and to establish a Commission that meets international standards.³³ The petitioners in both actions also requested interim relief in the form of non-implementation of the challenged provisions until the court rules (including Sec. 23).³⁴ On 31 March, a single bench judge of the Supreme Court issued a stay on the implementation of the challenged provisions of the ordinance pending the outcome of the consideration of the constitutional challenge.³⁵ The establishment of the Commission is therefore on hold for the time being.
25. A significant difference between the powers of the Commission proposed in 2012 and as enacted in March 2013 is a mechanism by which Commissioners may refer alleged perpetrators for prosecution. Secs. 25 and 29 allow the Commission to refer alleged perpetrators to prosecution in two ways; in its final report and by corresponding with the Attorney General prior to issuing its

³² OHCHR, *Pillay says Nepal commission must not grant amnesties for serious violations*, 20 March 2013, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13163&LangID=E> (last accessed 8 April 2013).

³³ Kathmandu Post, *TRC Ordinance challenged in court*, 25 March 2013, available at <http://www.ekantipur.com/2013/03/25/top-story/trc-ordinance-challenged-in-court/368973.html> (last accessed 8 April 2013).

³⁴ *Ram Kumar Bhandari et al v. Chairperson, Interim Election Government, Office of the Prime Minister and Council of Ministers et al*, Writ petition no. 069-WS-0058 (23 March 2013) (copy on file with TRIAL); *Madhav Kumar Basnet et al for Justice and Rights Institute (JURI-Nepal) v. Chairperson of the Interim Council of Ministers*, Writ petition no. 069-WS-0057 (23 March 2013) (copy on file with TRIAL).

³⁵ Order of mandamus of the Supreme Court of Nepal, *Ram Kumar Bhandari et al v. Chairperson, Interim Election Government, Office of the Prime Minister and Council of Ministers et al*, (31 March 2013) (copy on file with TRIAL).

report.³⁶ The Ministry of Peace and Reconstruction can also submit such a request on the basis of the final report. However, these provisions do nothing to remove other obstacles to investigation and prosecution of conflict-era crimes. There is no provision for crimes under international law not currently defined in Nepali law to be included in the scope of prosecutions arising from the Commission's recommendations, namely torture, enforced disappearance, war crimes, and crimes against humanity. Moreover, victims and national human rights organisations have expressed concern that the Attorney General lacks independence from the government of Nepal and Nepali Army and that, as a result, prosecutions of security forces will not ensue from such a process, if any remain un-amnestied by the Commission.³⁷

26. Given the State party's policies of entrenching impunity through withdrawal of criminal cases and shielding perpetrators within the security forces from criminal justice (see below sections 4.2.3 and 4.2.1), it is doubtful that the ambiguities and inadequacies in the amnesty and referral to prosecution provisions are accidental. The executive ordinance also contains numerous other deficiencies. For example, the Commission is empowered to "undertake reconciliation" between victims and perpetrators.³⁸ To achieve this, the Commission may request the perpetrator to apologise and pay compensation. While not explicitly linked to receiving amnesty, it seems clear that perpetrators could come under pressure to do both of these to avoid prosecution. Similarly, victims may come under pressure from perpetrators and a number of other sources of pressure to give their consent to this reconciliation process - which is required - and to accept its outcome.

³⁶ Sec. 25, Executive Ordinance, *supra* note 30 states:

1) While carrying out investigation pursuant to this Ordinance, the Commission may recommend for action, as per the existing laws, to perpetrators not designated for amnesty pursuant to Section 23.

2) While recommending for action pursuant to Sub-section (1), the Commission shall do so through the report to be submitted pursuant to Section 27.

3) Notwithstanding anything contained in Sub-section (2), the Commission may correspond to the Office of the Attorney General to prosecute perpetrators not designated for amnesty prior to submission of the report pursuant to Section 27(1).

Sec. 29, Executive Ordinance states:

(1) The Attorney General or a Public Prosecutor designated by him shall decide on the matter whether a case can be prosecuted or not against any person, if the Commission itself or the Ministry writes to it based on the report of the Commission to initiate a case against any persons who were found guilty on allegation of serious human rights violations.

(2) The Attorney General or a Public Prosecutor, while deciding on the matter whether a case can be prosecuted or not pursuant to Sub-clause (1), should state the ground and reason thereof.

(3) The Public Prosecutor shall have to initiate a case against such person in such court wherein the Government of Nepal, upon publishing a notice on Nepal Gazette, notifies it; if a decision, after the necessary investigation pursuant to Sub-Clause (1), is reached to initiate a case against such person.

(4) If the Attorney General or a Public Prosecutor designated by him decides to prosecute pursuant to Sub-section (1), Case can be filed within 35 days of such decision notwithstanding anything contained in any other existing law.

³⁷ Anuj Mishra, *Prosecutorial independence Separation of Attorney*, The Himalayan Times, 7 February 2012, available at <http://www.thehimalayantimes.com/fullNews.php?headline=Prosecutorial+independence+Separation+of+Attorney+%&NewsID=319578> (last accessed 23 April 2013); USAID, *Nepal Rule of Law Assessment: Final Report*, 2009, available at: http://www.ncf.org.np/upload/files/318_en_usaid_nepal%20rule%20of%20law%20assessment-sep-2009.pdf (last accessed 23 April 2013).

³⁸ Sec. 22, Executive Ordinance, *supra* note 30.

27. Overall, Nepal's prospective Commission of Investigation into Disappeared Persons, Truth and Reconciliation appears to be designed to further entrench impunity rather than to seriously investigate human rights violations, and their causes and consequences. Aside from the concerns mentioned above, the provisions concerning the brokering of reconciliation between victims and perpetrators and amnesty place the focus on direct perpetrators while shifting focus away from indirect perpetrators and those bearing command or superior responsibility for crimes. Further concerns about the Commission's powers to order reparation measures to victims, its powers to determine the fate and whereabouts of forcibly disappeared persons, and serious deficiencies in witness protection and support are dealt with below in sections 4.4, 4.2.6, and 4.3 respectively.

3.3. Failure of the State party to extend the mandate of OHCHR-Nepal

28. In 2011, the State party unilaterally ceased its agreement with OHCHR-Nepal and requested it to cease all substantive activities by 8 December 2011. Yet, despite the fact that the State party submitted its periodic report some two-and-a-half months later in February 2012, it told the Human Rights Committee that Nepal "[...] continues to remain constructively engaged with the Office of the United Nations High Commissioner for Human Rights (OHCHR), which maintains a country office in Nepal since 2005. The Agreement between the GON [Government of Nepal] and the OHCHR was revised in June last to reflect democratic changes and respect constitutional provisions".³⁹
29. The unilateral cessation of the agreement between the government of Nepal and OHCHR constitutes a breach of Clause 9(1) of the CPA, which gave the task for monitoring provisions concerning human rights referred to in peace agreement to "the Nepal based United Nations Office of the High Commissioner for Human Rights." The forced withdrawal of OHCHR-Nepal has been followed by a swift deterioration in respect for human rights in the transitional justice process, as can be seen from the emergence of a proposal to include a broad amnesty provision in the TRC bill and the move to establish the mechanism by executive ordinance in the period immediate following the end of the mandate (see sec. 3.2.1 above).
30. Moreover, the departure of OHCHR-Nepal has left an obvious gap in the field of documenting and reporting human rights violations throughout the country, which has not been adequately filled by the National Human Rights Commission or any other body. Human rights defenders throughout Nepal who previously relied on the OHCHR field presence for support in the conduct of their work and monitoring in cases of harassment, threats and reprisals against them note that its departure has been accompanied by deterioration in conditions affecting human rights work and a rise in the number of attacks against defenders. For example, on 28 February 2013, Yadab Bastola, executive director of the NGO Human Rights Alliance was attacked and injured by an unknown

³⁹ Nepal, *Combined Second to Fourth Periodic Report to the UN Human Rights Committee*, 21 February 2012, UN Doc. CCPR/C/NPL/2, (hereinafter "second periodic report"), at para.35.

group in his hometown in Surkhet. Bastola believed that he was attacked by Communist Party of Nepal (Maoist) cadres in retaliation for the legal aid that he provided to the victims of conflict in Surkhet.⁴⁰

3.4 International Human Rights Instruments Ratified by Nepal

31. Nepal has ratified the following international human rights instruments:

- ▶ The Covenant and its First and Second Optional Protocols;
- ▶ Convention against Torture (CAT);
- ▶ Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol;
- ▶ Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- ▶ Convention on the Rights of the Child (CRC) and its Optional Protocol on Armed Conflict and Optional Protocol on the Sale of Children;
- ▶ Covenant on Economic, Social and Cultural Rights (CESCR);
- ▶ Convention on the Protection of the Rights of Persons with Disabilities (CRPD) and its Optional Protocol;
- ▶ Geneva Conventions, I-IV;
- ▶ Genocide Convention.

32. While Nepal has ratified the First Optional Protocol to the Covenant and the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and CRPD, it has not recognised the competence of any other treaty body to receive and consider individual or inter-state communications concerning alleged breaches of its human rights obligations. Namely, the State party has not yet done the following:

- ▶ Made a declaration under Art. 22 of the CAT;
- ▶ Make a declaration under Art. 14 of the CERD;
- ▶ Acceded to the Optional Protocol to the CRC on a communications procedure (not yet in force);
- ▶ Acceded to the Optional Protocol to the CESCR (entering into force in May 2013).

33. Nepal has not yet ratified the following important international human rights instruments:

- ▶ Convention on the Protection of All Persons from Enforced Disappearances (CED);
- ▶ Optional Protocol to CAT;
- ▶ Additional Protocols I and II to the Geneva Conventions;

⁴⁰ Republica, *Unknown group attacks HR activists with rod*, My Republica, 1 March 2013, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=50806 (last accessed 11 April 2013).

- ▶ Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity;
- ▶ Rome Statute of the International Criminal Court.

3.4.1 Relationship between International and Domestic Law under Nepali Legislation

34. According to the Treaty Act of 1990, international treaty obligations are directly enforceable in the domestic legal order,⁴¹ although in practice a legal challenge is required to overturn any domestic laws that are incompatible with international law. Despite this fact, as noted by the Committee in its 1994 concluding observations, the status of the Covenant is unclear in Nepali law.⁴² While the State party's periodic report notes that the Human Rights Commission Act of 1997 defines human rights as those "rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the treaties joined by Nepal", in reality many provisions in Nepali law are inconsistent with the definitions contained in the Covenant and other accepted international standards.⁴³ Since its first periodic report, the State party has done little to address this and, indeed, continued to adopt legislation that is incompatible with the Covenant. For example, while the State party claims in paragraph 13 of its second periodic report that specific laws have been enacted to protect certain rights, many of the pieces of legislation cited (in particular; the Children's Act of 1992, the State Cases Act of 1992, and the Torture Related Compensation Act of 1996) are inconsistent with international human rights norms. Sections 4.1 and 4.2 below describe these inconsistencies, such as the State party's failure to criminalise torture and to adequately define it for the purpose of civil remedies, in more detail.
35. In reality, most of the rights that Nepalis should enjoy by virtue of Nepal's ratification of the Covenant are not executable unless public interest litigation is taken up in the Nepali courts. The periodic report correctly notes that: "On several occasions, the SC [Supreme Court] has issued writs and directive orders, also referring to various human rights treaties including the ICCPR, and declared domestic laws inconsistent with human rights treaties to which Nepal is a party" but fails to mention that these rulings are seldom implemented.⁴⁴ For example, numerous orders of the Supreme Court directing the State to carry out criminal investigations into allegations of serious human rights violations or to establish official inquiries have been flouted. In 2009, the Supreme Court issued an order of mandamus against the Nepal Police to register an FIR and

⁴¹As stated in the State party's periodic report, the Treaty Act (1990) renders void any domestic legal provisions that is inconsistent with a treaty ratified or acceded to by Nepal. See second periodic report, *supra* note 39 at para. 36; Art. 33, Interim Constitution; and Sec. 9(1), Nepal Treaty Act, 1990, which states: "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, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws."

⁴² See HRC, *Concluding Observations on Nepal*, *supra* note 2, at para. 6. See also Annex 1 below.

⁴³ Sec. 2, Human Rights Commission Act, 1997.

⁴⁴ Second periodic report, *supra* note 39, at para. 36.

investigate the 2003 disappearance of five students from Dhanusha district.⁴⁵ While the National Human Rights Commission conducted an exhumation in 2010, no credible and effective criminal investigation has yet been undertaken in the *Dhanusha Five* case. In 2007, the Supreme Court issued an order of mandamus directing the government to establish a Commission of Inquiry into Disappearances in response to a complaint concerning the failure to investigate 28 joined cases of conflict-era disappearances. Only in March 2013 did the President sign into a law an executive ordinance establishing a Commission of Investigation of Disappeared Persons, Truth and Reconciliation but as noted above in sec. 3.2.1 the body does not meet international standards for the investigation of disappearances and none of the 28 cases (some of which concern multiple victims) has resulted in a credible criminal investigation. Therefore, while public interest litigation is a widely utilised form of human rights advocacy in Nepal, the non-implementation of important rulings obtained from the Supreme Court of Nepal is another form of the State party's weak compliance with its obligations under the Covenant and efforts to undermine the rule of law and the effectiveness of the judiciary.

36. As the Human Rights Committee is aware, the State party derogated from certain provisions of the Covenant during the period of armed conflict in Nepal and lodged repeated declarations pursuant to Art. 4(3) to this effect in 2002 and 2005.⁴⁶ While the text of the notifications of derogation purported to keep rights related to Arts. 6, 7, 8 (1), 11, 15, 16 and 18 of the Covenant intact, the UN Commission of Human Rights, in its resolution 2005/78 expressed concerns about “the serious setback to multiparty democracy and the weakening of the rule of law” through the declaration of the state of emergency of 1 February 2005. Hundreds of arrests and detention of journalists, human rights monitors and political activists were ordered.⁴⁷ Under international pressure and condemnation, the state of emergency was revoked on 5 May 2005,⁴⁸ but the King's direct rule continued and, according to the OHCHR, “some restrictions on civil liberties remained in effect or were reintroduced under other legislation”.⁴⁹ As mentioned above, both the state and Maoist combatants perpetrated a large number of crimes amounting to serious human rights violations, including extrajudicial killing, enforced disappearance, arbitrary detention, torture, rape and other forms of sexual violence.

⁴⁵ Order of the Supreme Court of Nepal, *Jaykishor Lav v. District Police Office Dhanusha, Janakpur*, Writ No. 063-Wo-0681 of 2007, 2 February, 2009.

⁴⁶ Nepal derogated on 8 March 2002, 31 May 2002, 21 November 2002 (notifying that the state of emergency had been lifted), 16 February 2005, 29 March 2005, and on 5 May 2005 (notifying that the state of emergency has been lifted). See *Nepal – Reservations, Declaration, Objections and Derogations*, available at http://www.bayefsky.com/pdf/nepal_t2_ccpr.pdf (last accessed 14 March 2013).

⁴⁷ UN Commission on Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on human rights assistance to Nepal*, 31 January 2005, UN doc. E/CN.4/2005/114, at para. 9.

⁴⁸ *ICCPR, Declarations and Reservations*, available at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=IV-4&chapter=4&lang=en> (last accessed on 25 August 2012), at 51.

⁴⁹ UN Commission on Human Rights, *Report of the OHCHR-Nepal*, 16 February 2006, UN doc. E/CN.4/2006/107, at para. 5.

4. Selected Issues

4.1. The inadequacy of the criminal legislation on enforced disappearance, torture, rape and other form of sexual violence (Arts. 2.3, 6, 7, 9, 10, 16 and 24 of the Covenant)

4.1.1. Failure to codify the crime of torture

37. Despite acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the same day it acceded to the Covenant (14 May 1991), Nepal has failed to codify torture as a criminal offence.⁵⁰ In para. 118 of its second periodic report, Nepal cites the prohibition on torture and inhuman treatment in Art. 26 of the Interim Constitution and notes “It has strictly prohibited and made legally punishable any form of physical or mental torture or cruel, inhuman or degrading treatment or punishment.” However, it remains the case in April 2013 that the State party has not legislated to criminalise torture, despite an order issued by the Supreme Court of Nepal on 17 December 2007 to do so.⁵¹ The lack of such a provision results in the rejection of criminal complaints lodged by victims of torture with the police (see further below section 4.2.2). Moreover, while the State party states in para. 119 of its periodic report that a bill to criminalise torture has been prepared, the dissolution of the Constituent Assembly in May 2012 and the subsequent failure to hold elections means that this is indefinitely delayed. The definition of torture contained in the draft bill is as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person who is detained for investigation or is in pre-trial detention or in detention due to any other reason or is under the imprisonment sentence or on any other person by or at the instigation of or with the consent or acquiescence of a law implementing official or other person acting in an official capacity for the following purposes, and the term shall also denote cruel, inhuman or degrading treatment on such person:

- i. Obtaining information*
- ii. Obtaining confession*
- iii. Punishing for an act*
- iv. Intimidating or coercing, or*
- v. Committing any act against the existing law (emphasis added)*

38. The requirement that the victim be detained is at odds with the prohibition of torture in customary international law, which has no such requirement. Adding this element to the act of torture will bar

⁵⁰ The failure to codify torture as a criminal offence has previously been noted as a source of concern by the CAT in its Concluding Observations, UN Doc. CAT/C/NPL/CO/2 of 13 April 2007, at para. 12. Similarly, the Special Rapporteur on Torture noted this failure; see *Report on the Visit to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 of 9 January 2006, at paras. 13-14, and 33(b).

⁵¹ Supreme Court of Nepal, *Rajendra Ghimire et al. v. Ministry of Council and Office of the Ministry of Council*, 17 December 2007(NKP vol. 3 2066 BS Page 452).

complaints from torture victims not held in custody and could also be used in practice to ignore torture complaints from individuals whose detention was not formally acknowledged by state authorities.

39. While the bill contains some positive aspects, including a prohibition on torture, absence of immunity for officials who engage in torture and the right for victims of State-sponsored torture to obtain compensation, it suffers from several other serious defects. It places a 35-day statutory limitation on filing complaints of torture, including in cases where the victim has died.⁵² It provides neither for extradition or prosecution of alleged perpetrators of torture present in Nepal nor for the exercise of universal jurisdiction over torture.⁵³ The maximum penalty a person convicted of torture may face is 5 years imprisonment and/or a fine of 50,000 Nepali Rupees (approximately 500 Euro) “taking into account the gravity of the offence.”⁵⁴ Moreover, the amount of compensation a victim can obtain is limited to 500,000 Nepali Rupees (approximately 5,000 Euro).
40. The Torture Related Compensation Act of Nepal of 1996 (hereinafter, “TRCA”), while providing a civil remedy to some victims of torture, fails overall to meet international standards concerning torture victims’ rights to an effective remedy.⁵⁵ For example, the definition of torture and other forms of ill-treatment contained in Sec. 2 of the act is limited to instances that occur during detention, which results in applicants having to satisfy an additional element of the crime and effectively bars those who cannot prove they were detained from filing a torture complaint.⁵⁶ It also contains no mention of any threshold for what acts constitutes “physical or mental torture” (such as, for example, severe pain or suffering).
41. A statutory limitation of 35 days for filing a complaint under the act operates in practice to bar many individuals from being recognised as a victim of torture and exercising their rights to compensation – including many who were tortured by State authorities during the conflict.⁵⁷ Moreover, compensation under the act is limited to a maximum of 100,000 Nepali Rupees

⁵² Sec. 8, *Draft Anti-Torture Bill of Nepal* (unofficial translation on file with TRIAL).

⁵³ Sec. 4, *Draft Anti-Torture Bill of Nepal*, unofficial translation on file with TRIAL), which states: “Act of torture to be considered an offence within the jurisdiction of Nepal: Notwithstanding anything contained in the current laws, offence under the given condition shall be considered an offence committed within the jurisdiction of Nepal:

(a) Torture inflicted inside aircraft or watercraft registered in Nepal.

(b) Torture inflicted inside foreign embassies or diplomatic missions.”

⁵⁴ Sec. 10, *Draft Anti-Torture Bill of Nepal* (unofficial translation on file with TRIAL).

⁵⁵ See Committee against Torture, *General Comment No. 3 on Art. 14 of the Convention against Torture*, UN Doc. CAT/C/GC/3 of 13 December 2012; See also: *Report of the Special Rapporteur on Torture*, supra note 50, at paras. 26 and 33.k; CAT, *Concluding Observations on Nepal*, supra note 50, at paras. 21.d and 28.a.

⁵⁶ The Torture Related Compensation Act of 1996 defines torture in the following way: “Torture means physical or mental torture of any person who is in detention in the course of inquiry, investigation or hearing, or for any other reason. The term includes cruel, inhuman, or insulting treatment of such person.”

⁵⁷ See *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)*, supra note 31, Principles 6 and 7 (statutes of limitation); See also *Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Addendum to the Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, UN Doc. /CN.4/2005/102/Add.1, 8 February 2005, Principle 23 (restrictions on prescription).

(approximately 1,000 Euro) – an amount an applicant normally exceeds in legal and medical costs before they even file a complaint.

42. There is no possibility of compelling the initiation of a criminal investigation even if a case of torture is proved under the TRCA. Where a case of State-sponsored torture is proved, the court hearing the civil complaint may order “departmental” (i.e. disciplinary) action be taken against the alleged perpetrator. However, in practice there are a number of examples of high-profile individuals in the security forces who have been promoted following a case in which the court established the perpetrator had committed torture.

43. Prashanta Pandey, a 22-year old medical assistant from the Terai (plains) region of Nepal was arrested without a warrant or reasons being given on 7 April 2011 in Rupandehi. He was held in unlawful detention and subjected to torture for five days to extract a confession concerning his alleged involvement in a bomb blast. During this time, police inflicted severe beatings and other forms of torture on Prashanta Pandey, at one point blindfolding him and forcing him to urinate on an electric heater. According to medical report, he was left in need of long-term medical treatment for periodic losses of consciousness and other injuries. The family of Prashanta Pandey was not aware of his whereabouts during the first six days of his arrest and filed a missing persons report with the police, who in turn did not release any information about his detention. On 13 June 2012, Prashanta Pandey was released following his trial before Rupandehi District Court during which the prosecution relied on the false confession obtained through torture. Despite putting the court on notice of his torture during detention, Prashanta Pandey was convicted of a form of aiding and abetting murder but sentenced to one year of imprisonment.⁵⁸ The judge did not order any investigation of the torture allegations. Lawyers from the Terai Human Rights Defender’s Alliance filed complaints of torture with the Human Rights Cell of the Nepal Police, the National Human Rights Commission, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Special Rapporteur on Arbitrary Detention.⁵⁹ On 12 December 2012, his lawyers also attempted to register a case under the TRCA but the court registrar rejected it due to the expiry of the 35-day statute of limitation. On 24 January 2013, Prashanta Pandey mounted a legal challenge to the statutory limitation on filing torture compensation claims under the TRCA at the Supreme Court of Nepal, arguing that he was unable to file his complaint during the statutory period due to his condition as a result of torture and that such a period is unconstitutional and in violation of international standards.⁶⁰

⁵⁸ See Sec. 17(3), Chapter on Homicide, Muluki Ain (General Code), of 2020 (1854), amended several times and completely revised by New General Act 2064 (Muluki Ain 2064), most recently amended in 2066 (2010) (hereinafter “Muluki Ain (General Code)”).

⁵⁹ Himalayan Times, *Torture victim knocks door of SC*, 25 January 2013, available at <http://www.thehimalayantimes.com/fullNews.php?headline=Torture+victim+knocks+SC+door&NewsID=363394&a=3> (last accessed 7 April 2013).

⁶⁰ In February 2013, the Supreme Court of Nepal issued a Show Cause notice to the respondents in the case, namely Registrar Anil Kumar Sharma of Rupandehi District Court, Prime Minister and the Office of the Council of Ministers, Ministry of Law and Justice and Parliament Secretariat. Scheduling of a hearing in the case is pending.

4.1.1.1 Failure to adequately sanction torture of children

44. The Children's Act of 1992 contains a general prohibition on torture and cruel treatment of children.⁶¹ In 2005, the Supreme Court struck down a provision of this law that permitted some forms of corporal punishment of children,⁶² declaring it incompatible with the Constitution and Nepal's international obligations pursuant to Art. 7 of the Covenant, Arts. 19, 28(2) and 37 of the CRC and Art. 1 and 4 of the CAT.⁶³ Similarly, in response to another legal challenge in 2008, the Supreme Court invalidated Sec. 6(3) of the Chapter on Homicide of the General Code that protected the perpetrators of violence against children from criminal responsibility by imposing a fine of only 50 Rupees (50 cent) for deaths ensuing from acts of corporal punishment.⁶⁴ Notwithstanding these positive developments, problems remain in law and in practice to effectively combating torture and ill-treatment of children in Nepal.
45. Child victims of torture and cruel treatment may file complaints under the Children's Act of 1992, which endows children with a right to "reasonable compensation" from perpetrators proven to have committed such an act against them.⁶⁵ The Children's Act also provides that torture or cruel treatment of a minor is an offence. However, in practice this provision cannot be used to initiate a criminal investigation as it does not appear in the scheduled list of offences attached to the State Cases Act of 1992, which in turn allows an FIR to be filed with the police in order to trigger an investigation. Moreover, the penalty attached to the crime of torture of a minor is not proportionate to the gravity of the offence as it consists of a fine of up to 5,000 Nepali Rupees (50 Euro) or imprisonment for up to one year or both.
46. The case of LT⁶⁶ illustrates the inadequacy of the legal framework for preventing and punishing torture of children. LT is an 11-year old boy. On 15 November 2010 police officers from a police station in Kavre district summoned LT's father to bring his son to the police station for interrogation in relation to gold ring LT was accused of stealing. The following day, they duly reported to the police station. LT was taken into custody and interrogated by the Sub-Inspector of

⁶¹ Sec. 7, Children's Act of 1992.

⁶² Sec. 7 of the Children's Act 1992 states: "... the act of scolding and minor beating to Child by father, mother, member of the family, guardian or teacher for the interests of the Child himself/herself shall not be deemed to be violation of this Section."

⁶³ *Debendra Ale et al. v. Office of the Prime Minister and Council of Ministers, Ministry for Education and Sport, and Ministry of Law and Justice*, 6 January 2005, Writ no. 57 of 2005. See also the recommendations of the Committee on the Rights of the Child on corporal punishment: 21 September 2005, CRC/C/15/Add.261, *Concluding observations on second and third combined report*, at paras. 47, 48 and 76.

⁶⁴ Decision of the Supreme Court of Nepal, *Raju Prasad Chapagai et al v. Office of the Prime Minister and Council of Ministers et al*, NKP 34 (2008). Sec. 6(3) of the Chapter on Homicide of the General Code read, "In cases where a person engaged in taking care of or educating another person beats that other person or does any other act for the benefit of the deceased and an accidental homicide occurs as a result of such act, the person shall be liable to a fine of up to Fifty Rupees."

⁶⁵ "Reasonable compensation" is not further defined in the Children's Act.

⁶⁶ Initials are used to protect the individual's right to privacy and for security reasons. Upon the request of the Committee, TRIAL will make available the identity of the individual concerned in good faith.

the police station about the alleged theft, which LT denied. LT was then taken into an interrogation room and tortured for approximately an hour. The Sub-Inspector, together with another police officer, flogged him with a plastic pipe on his back five or six times, subjected the soles of his feet to *falanga* around 20 to 25 times, and gave electric shocks behind his young victim's right ear. The police also threatened to kill LT if he did not confess to stealing the ring or told anyone about the torture. Under duress, he confessed immediately. After being forced to repeat his confession in front of his father, who then promised to pay 19,000 Nepali Rupees (approximately 190 Euro) to the complainant, he was released. Later that day LT's family discovered his injuries. Subsequent photographs and medical reports tend to confirm the torture that LT was subjected to. LT continues to suffer insomnia, pain and trauma as a result.

47. On 6 January 2011, a civil case under the Children's Act was filed against the two alleged perpetrators in District Court. LT requested the maximum penalty under the statute of one year imprisonment, a 5,000 Nepali Rupee fine and compensation. Following this, the District Police Office (DPO) announced that "departmental" (disciplinary) action had been taken against the two perpetrators according to Art. 85 of the Police Civil Service Rules (2001), but this was discontinued by the time the case was heard by the District Court. On 27 February 2012, the District Court issued a 2,000 Nepali Rupee fine and ordered the payment of 20,000 Nepali Rupee's compensation to the victim by the government. It is the first time a Nepali court has ordered a fine for torture under the Children's Act. An appeal against the leniency of these penalties is now running.

4.1.2. Failure to codify the crime of enforced disappearance

48. Similarly, Nepal has failed to codify enforced disappearance as a separate and autonomous offence and as a crime against humanity. This failure has been among the main obstacles faced by victims of enforced disappearance and their relatives who wish to file criminal complaints alleging this crime was committed by State security forces or Maoist rebels during the conflict.
49. A draft of the Forced Disappearance of People (Crime and Punishment) Act was proposed in the parliament in 2008. The bill would have criminalised enforced disappearances but the proposed definition of the crime was not in line with international standards;⁶⁷ the bill was eventually dropped. In June 2011 a draft Criminal Code was introduced in the parliament; the text criminalised some serious human rights violations such as torture and enforced disappearance. However, those provisions again fell short of international human rights standards.⁶⁸ The dissolution of parliament before the draft Criminal Code was completed has further prolonged the

⁶⁷ HRW and others, *Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill*, 30 August 2009, available at <http://www.hrw.org/news/2009/08/31/nepal-joint-memorandum-disappearances-persons-crime-and-punishment-bill>, (last accessed 11 April 2013).

⁶⁸ WGEID, *Missions to Colombia and Nepal: follow-up to the recommendations made by the Working Group*, 2011, A/HRC/19/58/Add.4, (hereinafter "Mission to Nepal Follow-up Report") at para. 15 and the final table at 86.

delay in criminalising enforced disappearance. Therefore, as of April 2013 there remains no means of opening a domestic criminal investigation into alleged perpetrators concerning any of the some 1,300 cases of enforced disappearance documented in Nepal during the conflict.

50. The March 2013 Ordinance to establish a Commission of Investigation into Disappeared Persons, Truth and Reconciliation contains a definition of the “act of disappearing persons” for the purpose of defining the scope of the Commission’s mandate of “investigating the truth” about such cases. However, the definition contained in Sec. 2(k) is not in line with the definition contained in the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance. The Ordinance states:

- ▶ If any person arrested, detained, or taken control of by any other means by any person given the authority by law to arrest, investigate or implement a law or by security personnel is not allowed to meet concerned persons or concerned persons are not given information as to where how and in which state he/she is kept in after the time period as provided for in the law that such a person needed to be presented before the authority that hears the case has elapsed.
- ▶ If any person is arrested or abducted, taken control of or deprived of from his/her personal liberty in any other ways by any organization or organized or unorganized group.⁶⁹

51. While the definition encompasses acts of enforced disappearance when carried out by both the State and non-State actors, it fails to adequately articulate important elements of the violation. For example, the definition does not include mention that the effect of *refusing to acknowledge the deprivation of the disappeared person’s liberty or concealing the fate and whereabouts of the individual* has the effect of placing him or her outside the protection of the law. In this sense, the definition fails to distinguish enforced disappearance adequately from arbitrary detention or abduction.⁷⁰ Moreover, the definition contained in the Ordinance appears to consider that an enforced disappearance can begin only *after* the prescribed time period for bringing a detainee before a judicial authority has elapsed. There is no such requirement in international law, which allows that an enforced disappearance begins from the moment that authorities conceal the individual’s fate and whereabouts and/or refuse to acknowledge the deprivation of liberty. The definition contained in the Ordinance, therefore, may negatively impact the Commission’s future findings concerning cases of enforced disappearance.

52. It is important to note that the definition of the “act of disappearing persons” contained in the Ordinance does not constitute codification of a criminal offence in Nepali law as it does not provide for any sanction. Further, enforced disappearance as a crime against humanity is not

⁶⁹ Sec. 2(k), Executive Ordinance, *supra* note 36.

⁷⁰ See WGEID, *Study of the WGEID on Best Practices on enforced disappearance in domestic criminal legislation*, UN Doc. A/HRC/16/48/Add.3 of 28 December 2010.

mentioned in the Ordinance. Therefore, despite the adoption of the Ordinance containing a definition of the “act of disappearing persons”, Nepal still has not codified enforced disappearance as a both an autonomous crime and a crime against humanity and provided sanctions appropriate to its extreme seriousness.

4.1.3. Obstacles to the effective criminalisation of rape and other forms of sexual violence

53. Rape and other forms of sexual violence recognised as crimes under international law have not been incorporated into Nepali law. While rape and incest have been codified as ordinary offences,⁷¹ sexual violence when committed as a war crime, crime against humanity or genocide is not proscribed in law.⁷² Other specific forms of sexual violence such as the crimes of sexual slavery, enforced pregnancy, forced prostitution, forced sterilisation (including penile amputation), forced nudity, mutilation of genitals and breasts, forced circumcision and other sexual assaults not involving penetration have not been criminalised in Nepali law. Moreover, the crime of rape can only be perpetrated against a woman or minor girl and the definition of sexual intercourse is unduly narrow as it appears to be limited to penile penetration of a vagina.
54. The law prescribes a 35-day statutory limitation on filing complaints of rape.⁷³ In practice, this serves to bar many victims of rape who – due to detention, fear, trauma, stigma or severe health consequences – are unable to file a complaint within such a short period. OHCHR has documented how, in some instances, “the police refuse to file a case because there is no medical report, while the doctor refuses to do a forensic examination in the absence of a First Information Report [criminal complaint].”⁷⁴ Moreover, victims of sexual violence face numerous additional obstacles to reporting complaints due to entrenched social stigma against survivors of sexual violence, fear of retaliation, lack of legal literacy and the belief that the police will not effectively investigate alleged perpetrators who possess wealth, influence and powerful patronage in Nepali society.⁷⁵
55. The criminal penalties attaching to rape, particularly marital rape, are not proportionate to the gravity of the offence and are therefore not in line with international standards. For example, the maximum penalty for marital rape is 6 months while the penalties for non-marital rape range from 5 to 15 years’ imprisonment (depending on the victim’s age). The penalty range for a person

⁷¹ See Chapter 14 on Rape, Muluki Ain (General Code), *supra* note 58. On a positive note, the definition of rape does allow for consent to be vitiated by circumstances of fear, use of force or coercion.

⁷² In general, war crimes, crimes against humanity and genocide are not defined in Nepali law. Nepal is, however, a State party to the Geneva Conventions.

⁷³ Sec. 11, Chapter 14 on Rape, Muluki Ain (General Code), *supra* note 58, states: “If a suit on the matter of rape is not filed within Thirty Five days from the date of the cause of action, the suit shall not be entertained.”

⁷⁴ OHCHR, *Nepal Conflict Report 2012*, at 169.

⁷⁵ For more, see Advocacy Forum and the International Center for Transitional Justice, *Across the Lines: The Impact of Nepal’s Conflict on Women* (2011), available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AdvocacyForum_NepalCEDAW49.pdf (last accessed 5 April 2013).

convicted of raping a woman aged 20 or above is just 5 to 7 years' imprisonment.⁷⁶

56. Following its review of Nepal, the CEDAW recommended that the State party should: "Take immediate measures to abolish the statute of limitations on the registration of sexual violence cases, to ensure women's effective access to courts for the crime of rape and other sexual offences."⁷⁷ However, the State party has failed to take these steps to date.

4.2. The ongoing failure to investigate, prosecute and punish those responsible for extrajudicial executions, enforced disappearance, torture, rape and other forms of sexual violence (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)

57. According to OHCHR in its Conflict Mapping report:

Despite the multiple layers of accountability mechanisms in place, no one has actually been held accountable and given a punishment proportionate to the offence: several years after the formal end of the hostilities, no one has been criminally prosecuted in a civilian court for serious human rights or IHL violations.⁷⁸ (footnote omitted)

58. In 2001, the Special Rapporteur on Arbitrary Executions noted that cases documented during a country visit in the midst of the conflict "illustrate the pervasive climate of impunity for human rights violations, including extrajudicial executions, which prevails in Nepal."⁷⁹ Over a decade later, in its annual report for 2012, the WGEID noted that the government of Nepal has failed to respond to request for information in some 458 outstanding cases of disappearance reported it to it.⁸⁰ Moreover, in February 2012 the WGEID reiterated "with concern that there have been no prosecutions of army officials for committing enforced disappearances, and that the army has refused to cooperate with the police and civilian courts on enforced disappearances."⁸¹
59. Similarly, in 2005 the Committee against Torture noted that it was "concerned about the prevailing climate of impunity for acts of torture and ill-treatment and the continued allegations of arrests without warrants, extrajudicial killings, deaths in custody and disappearances."⁸² It further noted that notwithstanding the establishment of human rights cells in the security forces, "the lack of an independent body able to conduct investigations into acts of torture and ill-treatment committed by law enforcement personnel" was also of concern.⁸³ In a 2009 follow-up report of the Special

⁷⁶ See Sec. 3, Chapter 14 on Rape, Muluki Ain (General Code) *supra* note 58.

⁷⁷ *Concluding Observations on Nepal*, CEDAW, at para.20(c), UN Doc. CEDAW/C/NPL/CO/4-5 (2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/450/52/PDF/N1145052.pdf?OpenElement> (last accessed 7 April 2013).

⁷⁸ OHCHR, *Nepal Conflict Report 2012*, *supra* note 6, at 192.

⁷⁹ Special Rapporteur on Arbitrary Executions, *Addendum to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir: Mission to Nepal*, UN Doc. E/CN.4/2001/9/Add.2 (9 August 2001), at para. 43 (hereinafter "Nepal Mission Report"). See also paras. 44-50 (impunity and legal concerns).

⁸⁰ WGEID, *Annual Report 2012*, *supra* note 12, at para. 288.

⁸¹ WGEID, *Mission to Nepal Follow-up Report*, *supra* note 68, at para. 18.

⁸² CAT, *Concluding Observations on Nepal*, *supra* note 50, at para. 24.

⁸³ *Ibid.*, at para. 25.

Rapporteur on Torture concerning a country visit to Nepal, he noted that “torture allegations continue to frequently not be properly investigated and perpetrators are not prosecuted or punished.”⁸⁴

60. Concerning women victims of rape, in its 2011 concluding observations on Nepal, the CEDAW said that it was:

*deeply concerned that cases of sexual violence, including rape allegedly committed by both security forces and Maoist combatants during the armed conflict, are not being investigated and perpetrators have not been brought to justice. The Committee is also concerned that a large number of women affected by the conflict face difficulties in accessing justice and that the statute of limitations on filing complaints relating to rape and other sexual offences could obstruct access to justice by women victims of rape and other sexual offences during the conflict. The Committee is further concerned that many survivors of sexual violence during the conflict are suffering from acute post-traumatic stress disorder and other mental and physical health problems.*⁸⁵

61. The CEDAW issued detailed recommendations to the State party concerning these problems, including to fully investigate all crimes of sexual violence during the conflict perpetrated by the security forces and Maoist combatants and to ensure access to legal aid and protection measures for women seeking justice.⁸⁶ Nearly two years later, the State party has not taken any steps towards implementing these recommendations. Owing to the continuing deficiencies in the legal framework in relation to sexual violence, set out above in sec. 4.1.3, and the extreme stigma attached to suffering from such crimes, the legacy of conflict-era rape remains a largely invisible issue in Nepal.

62. The case of NT, a 22 year old woman, is illustrative of the serious obstacles faced by women survivors of sexual violence in accessing justice and reparation.⁸⁷ In 2001, aged 15 years old, she was taken by security forces from her home, who were seeking her sister – a Maoist cadre. NT was accused of being a Maoist cadre, although she was not in fact affiliated with the rebels. She was unlawfully detained for 9 months, during which time she was repeatedly raped and subjected to other forms of torture and ill-treatment. Following her release through the efforts of her father, she was so afraid that what had happened to her would be discovered that she dared not even to

⁸⁴ Special Rapporteur on Torture, *Addendum to the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Follow-up to the recommendation by the Special Rapporteur Visits to China, Georgia, Jordan, Nepal, Nigeria and Togo*, 17 February 2009, UN Doc. A/HRC/10/44/Add.5, at para. 23 (hereinafter “Nepal Mission Follow-up Report”).

⁸⁵ CEDAW, *Concluding Observations on Nepal*, *supra* note 77, at para. 35.

⁸⁶ *Ibid.*, at 36.

⁸⁷ Initials are used to protect the individual’s right to privacy and for security reasons. Upon the request of the Committee, TRIAL will make available the identity of the individual concerned in good faith. The case of NT was first reported using a pseudonym in Himalayan Human Rights Monitors, *Shadow report on Nepal: Sexual Violence against Women during the Conflict*, June 2011, available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/HimRights_forthesession.pdf (last accessed 7 April 2013) (alternative information submitted to the CEDAW).

visit a doctor. Fearing threats or violent reprisals from the soldiers who were still in her area, she could not report the case to the authorities. NT slowly rebuilt her life, becoming economically independent and continuing her education and supporting that of her siblings. She eventually married, but several days after her arrival in her in-laws' home, they learned of what had happened to her during the conflict. She was thrown out of her home following abuse by her husband's family. NT suffers grave physical and psychological problems to this day as a result of the sexual torture she endured, and although she eventually reconciled with her husband she lives in constant fear of further humiliation or retaliation. In the absence of witness protection and support programmes, NT has no recourse available to her in Nepal to report crimes against her and seek her rights to justice and reparation.

4.2.1. Failure of the Nepali Army to credibly and effectively investigate, prosecute and punish conflict-era extrajudicial execution, enforced disappearance, torture and rape cases (Arts. 2.3, 6, 7, 9, and 16 of the Covenant)

63. The military justice system is largely used to shield perpetrators of crimes under international law from facing justice. According to OHCHR, despite repeated claims by the State party that it has “conducted military proceedings against its members for IHL [International Humanitarian Law] or IHRL [International Human Rights Law] violations, [...] the Nepali Army has never substantiated these claims despite repeated requests by OHCHR to do so.”⁸⁸ Tellingly, the State party report notes that military and police personnel have been disciplined or discharged – the only form of sanction to sometimes result from complaints of torture and other violations inflicted by security forces. Para. 122 of the periodic report discloses that: “From the year 2002 onwards, Nepali Army, through Military Court decisions, has penalised 176 *military personnel for torture, violation of human rights and humanitarian law. Sixteen military officers were found to be involved in grave violation of human rights.*” (emphasis added)
64. By comparison to the number of violations alleged to have taken place during and since the conflict (some 2,000 incidents involving unlawful killing, 1,300 alleged enforced disappearances, thousands of cases of arbitrary detention and torture and an unknown number of rapes during the conflict alone) these figures are comparatively low, especially in the case of commanders. By the State party's own admission the sanctions applied in these cases have merely involved disciplinary action such as suspension or disqualification from UN peacekeeping operations rather than the penalties of imprisonment, which are theoretically available in court martial cases concerning serious violations of human rights.⁸⁹ Notwithstanding the requirement in international law that perpetrators of crimes under international law should be tried in the ordinary criminal

⁸⁸ OHCHR, *Nepal Conflict Report 2012*, *supra* note 6, at footnote 813.

⁸⁹ See para. 122, second periodic report, *supra* note 39; Sec. 101 (penalties), Army Act of 2006.

justice system,⁹⁰ such sanctions via the military justice system fail to satisfy the obligation to provide an effective judicial remedy for serious human rights violations.

65. In para. 77 of its periodic report, the State party claims that it has criminalised torture and enforced disappearance committed by military personnel under Sec. 62 of the Army Act of 2006⁹¹ - yet this legislation does not contain any definition of the crimes of torture or enforced disappearance. Notably, this provision does not bring torture or enforced disappearances within the purview of the ordinary criminal justice system as these offences are not scheduled to the State Cases Act of 1992, which allows the filing of FIRs with the police in order to trigger an investigation. An investigative committee and a special court – both lacking in independence due to their formulation – are established to investigate and prosecute suspected perpetrators in a court martial proceeding.⁹² No specific penalties for these offences are prescribed. Other serious crimes under international law, including rape and other forms of sexual violence, are not mentioned in the Army Act.

66. For example, intense pressure from the human rights and international community in the case of **Maina Sunuwar**, a 15 year old girl disappeared in February 2004, led to the Nepali Army holding an inquiry into her case and subsequent court martial of three officers in September 2005. A report from the inquiry, seen by OHCHR-Nepal, affirmed: “It was indeed as a result of torture inflicted during the course of interrogation that the death of Maina Sunuwar occurred.”⁹³ Despite the clear evidence of enforced disappearance, torture and extrajudicial killing of the minor victim, the officers were charged only with using improper interrogation techniques and illegally disposing of human remains. The sanctions against the three convicted officers consisted of paying compensation of being 25,000 and 50,000 Nepali Rupees (approximately 250 to 500 Euro), temporary ineligibility for promotion and six months imprisonment, which they did not serve as their time confined to barracks during the proceedings was considered time served. Following the court martial, obstruction by the Nepali Army and Nepal Police delayed the exhumation of her Maina Sunuwar’s body from near the Birenda Peace Operations Training Centre in Panchkhal, Kavrepalanchowk District where she had been detained until March 2007. Despite numerous petitions lodged at the Supreme Court by the relatives of the victim and the issuance of orders

⁹⁰ For example, Art. 16 of the *UN Declaration on the Protection of All Persons from Enforced Disappearance* (1992) states: “Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, [enforced disappearance] shall be... tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.” See also Principle 29, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, *supra* note 57.

⁹¹ Note; referred to as the Military Act of 2007 in the State party’s periodic report, at para. 77.

⁹² For example, Sec. 62(2) of the Army Act of 2006 prescribes that the investigative committee shall be constituted by the Deputy Attorney General, the Chief of legal section of the Ministry of Defence, and a Representative of Judge Advocate General Department not below the rank of Major (*Senani*).

⁹³ OHCHR-Nepal, *The torture and death in custody of Maina Sunuwar: Summary of concerns*, December 2006, available at http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_12_01_HCR%20_Maina%20Sunuwar_E.pdf (last accessed 5 April 2013), at 4.

compelling an investigation, the suspected perpetrators – including a fourth who was not part of the original court martial – have not been arrested and brought to trial to date. The case of Maina Sunuwar continues to be emblematic of the entrenched culture of impunity in Nepal.

4.2.1.1 Promotion of army members allegedly responsible for the commission of serious human rights violations

67. Moves by successive governments of Nepal to promote members of the security forces who are subject to allegations of committing serious human rights violations are a further symptom of the flagrant disregard of the State party for its obligation to combat impunity. For example, the State party promoted Constituent Assembly member Suryaman Dong to the post of Minister of State for Energy and Maoist leader Agni Sapkota to the post of Minister for Information and Communications in November and May 2011 respectively despite both men being named as suspects in the case concerning the abduction and murder of Arjun Lama in 2005.⁹⁴ In July 2011, Brigadier General Victor Rana was promoted to Major General within the Nepali Army, despite his alleged command responsibility in relation to multiple cases of arbitrary detentions, torture and disappearances at the Maharajgunj Barracks in Kathmandu 2003 and 2004.⁹⁵
68. OHCHR-Nepal, human rights groups and victims have strongly condemned attempts to promote suspected human rights abusers within the Nepali Army on each occasion and have mounted legal challenges through the courts.⁹⁶
69. For example, in the case of Nepali Army Colonel Raju Basnet, international human rights organisations and Nepali human rights defenders vociferously objected to his promotion to the post of Brigadier General when news of it first emerged in July 2012. Colonel Basnet allegedly presided over a system of secret detention and torture of detainees at Maharajgunj Barracks in Kathmandu in 2003 as the commander of the Bharaibnath Battalion. No investigation into his responsibility has ever been conducted by the State authorities – despite an order of the Supreme Court of Nepal in 2007 to open one, including into allegations of torture personally carried out by the commander.⁹⁷ Amnesty International, Human Rights Watch, and the International Commission of Jurists strongly condemned the appointment and called on Nepal to carry out independent and transparent investigations into alleged perpetrators of human rights

⁹⁴ See Kathmandu Post, *Murder slur on Minister: OHCHR concerned about Sapkota appointment*, 5 May 2011, available at: http://www.ekantipur.com/tkp/news/news-detail.php?news_id=221350 (last accessed 5 April 2013).

⁹⁵ OHCHR-Nepal, Press release: *UN concerned over recent Govt. decisions to appoint, pardon and promote alleged perpetrators of human rights violations*, 10 November 2011 available at: http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/November/2011_11_10_PR_Dhungel_pardon_E.pdf (last accessed 5 April 2013).

⁹⁶ *Ibid.*

⁹⁷ See The Himalayan Times, *Govt cracks down on protest against Basnet's promotion*, 7 October 2012, available at <http://www.thehimalayantimes.com/fullNews.php?headline=Govt+cracks+down+on+protest+against+Basnet's+promotion&NewsID=350156> (last accessed 11 April 2013).

violations with the Nepali Army before recommending such individuals for promotion.⁹⁸ Notwithstanding such calls, Nepal's cabinet proceeded to confirm the promotion of Colonel Raju Basnet on 4 October 2012.⁹⁹ A few days later, victims appealed to the Supreme Court of Nepal through public interest litigation to quash the promotion and an interim order of 16 October 2012 staying the appointment was issued, which remains in force at the time of this report.¹⁰⁰ The National Human Rights Commission also sought a written explanation from the government concerning the appointment, but it was not furnished.¹⁰¹

70. The State party's promotion of alleged perpetrators of serious crimes under international law is contrary to international standards. Art. 16 of the *United Nations Declaration on the Protection of All Persons from Enforced Disappearance* and principles 3(b) and 15 respectively of the *United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* provide a basis for Nepal to suspend such individuals from official duties until the completion of investigations into alleged wrongdoing, which should include withholding promotions.

4.2.2. Refusal by authorities to register criminal complaints concerning serious human rights violations and procedural hurdles (Arts. 2.3, 6, 7, 9, 10, 16, and 24 of the Covenant)

71. The practice of authorities refusing to register First Information Report (FIRs – criminal complaints) and procedural hurdles faced by victims or their representatives in filing them is a symptom of the systematic denial of the right to an effective remedy for serious human rights violations in Nepal. An FIR is required to initiate a criminal investigation by the police¹⁰² and once filed the Nepali Police and Public Prosecutor are under mandatory obligations to investigate.¹⁰³ Since there is no penalty for refusal to register an FIR, a situation whereby the police treat registration of FIRs as a matter under their discretion has evolved. In practice, the authorities

⁹⁸ Amnesty International, Human Rights Watch, and the International Commission of Jurists, *Nepal: Prosecute, Don't Promote, Notorious Army Officer*, 22 July 2012, AI Index: PRE 01/361/2012, available at <http://www.amnesty.org/en/for-media/press-releases/nepal-prosecute-don-t-promote-notorious-army-officer-2012-07-24> (last accessed 5 April 2013).

⁹⁹ See Amnesty International, Human Rights Watch, and the International Commission of Jurists, *Nepal: Promotion of War Crimes Suspect Affront to Justice*, 6 October 2012, AI Index: PRE01/474/2012 available at: <http://www.amnesty.org/en/for-media/press-releases/nepal-promotion-war-crimes-suspect-affront-justice-2012-10-06> (last accessed 5 April 2013).

¹⁰⁰ *Order of Single Bench of the Supreme Court of Nepal*, 15 October 2012, (copying on file with TRIAL) staying the Office of the Prime Minister and Ministry of Council decision of 4 October 2012 to promote Raju Basnet. See also Kathmandu Post, *SC issues stay order on Col. Basnet's promotion*, 15 October 2012, available at: <http://www.ekantipur.com/2012/10/15/top-story/sc-issues-stay-order-on-col.-basnets-promotion/361630.html> (last accessed 11 April 2013).

¹⁰¹ Kathmandu Post, *Basnet Promotion: NHRC still awaits govt response*, 17 October 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/10/17/top-story/basnet-promotion/240897.html> (last accessed 5 April 2013).

¹⁰² Sec. 3(1), State Cases Act, 1992. For a useful description of the procedures related to opening a criminal investigation, see OHCHR, *Nepal Conflict Mapping Report*, *supra* note 6, at pp. 184, 187-188, 197-198.

¹⁰³ The Supreme Court of Nepal ruled that this mandatory obligation exists in the case of *Purnimaya Lama v. District Police Office, Kavrepalanchowk and Others*, Writ No. 1231, March 10, 2008, at para. 9.

often refuse to register FIRs against security forces or fail to follow them up with investigative action. On many occasions, police have refused to register FIRs prior to consulting “higher authorities”¹⁰⁴ and have even failed to do so following mandatory orders issued by the Supreme Court and other courts.¹⁰⁵

72. In at least two instances, the courts have even refused to issue an order to register an FIR or to compel the police to investigate on the basis of an FIR, accepting the argument put forward by the authorities that cases of conflict-era human rights abuses are to be dealt with by the CPA-mandated transitional justice mechanisms (see also below para. 91 concerning the case of Keshav Rai).¹⁰⁶ OHCHR, in its 2012 *Nepal Conflict Mapping Report*, noted that fewer than 100 FIRs relating to conflict-era serious human rights violations have been filed in Nepal and summarised the factors preventing victims from filing FIRs:

- ▶ Most individuals and their families who believed a crime had been committed did not attempt to file a First Information Report. This may reflect a lack of public confidence in the police because, in many instances, police refused to file the Reports when an attempt was made: multiple accounts identified during the [Transitional Justice] Reference Archive Exercise indicate that the police were uncooperative in this respect.
- ▶ Court orders to the police to file a First Information Report or to conduct an investigation were ignored. Police justifications for refusing to register First Information Reports included “insufficient evidence”, “no authority”, the belief that such cases would be dealt with by the TRC, and the fact that the implicated army personnel were still in the district.
- ▶ Victims or their families were coerced or harassed by security forces or the CPN (Maoist) not to file a First Information Report or to withdraw the complaint if they had already filed it. At times, this appeared to occur in combination with an offer of compensation.
- ▶ Police also resorted to mediation in order to avoid having to register a First Information Report or to undertake an investigation. During the conflict, mediation cases were also brought before the Chief District Officer. Whereas mediation can be an effective means of achieving justice in a timely, consensual manner, it should not be imposed and not used in relation to serious violations and abuses. Mediation may place victims, especially women, at a disadvantage relative to local power structures. It is particularly inappropriate as a substitute to accountability for serious crimes.
- ▶ In some cases, when First Information Reports were filed, they were recorded at the police station in a register other than “Diary 10” and no action was taken by the police. Suspicious deaths caused by security forces were reported in First Information Reports as

¹⁰⁴ See Advocacy Forum and Human Rights Watch, *Indifference to Duty: Impunity for Crimes Committed in Nepal*, 14 December 2010, available at: <http://www.hrw.org/reports/2010/12/14/indifference-duty>, (last accessed 5 April 2013) at 2.

¹⁰⁵ *Ibid.*, at 3.

¹⁰⁶ International Commission of Jurists and Nepal Bar Association, *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal*, January 2012, at vi.

“accidental”. (footnotes omitted)

73. In addition, an FIR must allege a crime that is listed in Schedule 1 of the State Cases Act of 1992.¹⁰⁷ As enforced disappearance, torture, war crimes, and crimes against humanity have not been codified as crimes in Nepali law to date, they do not appear in the schedule and therefore the police systematically refuse to register such complaints. Also, an individual must register an FIR in the nearest police station to where the crime was committed, which often presents concerns about possible intimidation, threats or reprisals against victims if the crime involved security forces in the vicinity.

74. Ang Dorje Sherpa is a 47 year old man, who at the time of his unlawful arrest and torture, worked as a mountain porter, the traditional occupation of his ethnic group (the Sherpas).¹⁰⁸ On the evening of 18 July 2007, Ang Dorje Sherpa was arrested by seven or eight plain clothes police who drunkenly accosted him on the road and then hassled him for a bribe, beat him when he refused, robbed his mobile phone and cash, and then placed him under “arrest” without producing a warrant or stating the reason. Following this, he endured a 20-hour long ordeal of unlawful detention, torture and ill-treatment, and denial of medical care despite being assessed by a physician who produced a report detailing Mr. Sherpa’s injuries. Following his release on 19 July 2007, Mr. Sherpa was admitted to the hospital for emergency treatment. He was unable to resume his work as a porter as a result of the severe injuries inflicted on him and continues to suffer debilitating physical and mental consequences.

75. Ang Dorje Sherpa’s ordeal continued when he attempted to seek a remedy for what had happened to him. Upon his release, he was warned by his abusers that if he sought to make a complaint he would receive “only suffering, not justice” and was offered 5,000 Nepali Rupees (approximately 50 Euro) to forget the incident. Officers also threaten to punish or kill Mr. Sherpa if tried to make a criminal complaint (FIR) concerning the crimes perpetrated against him. Despite this intimidation and threats of reprisal, Mr. Sherpa filed a civil claim under the TRCA. Subsequently, the police unleashed a campaign of harassment against Mr. Sherpa and his family in 2011 – including death threats, attacks on Mr. Sherpa and his wife, a looting incident and apparently forcing the family’s landlord to evict them from their home and tea shop. When a lawyer attempted to file an FIR concerning the looting incident, the police refused to register it without stating any reasons. The Assistant Sub-Inspector involved in the initial torture and unlawful detention was, after a brief departmental (disciplinary) action, promoted to a higher rank within the Nepali Police.

¹⁰⁷ Sec. 3(1), State Cases Act, 1992: “The person, who knows that a crime listed in Schedule 1 has been committed or is being committed, shall, as soon as possible, supply such information to the nearest Police Office by lodging a written complaint or verbal information mentioning relevant evidences to the extent available or seen or known by him/her.”

¹⁰⁸ The communication *Ang Dorje Sherpa v. Nepal* is pending before the Committee since 20 July 2011, Communication No. 2077/2011.

76. Notwithstanding the right and duty of individuals to register an FIR to report crimes to the police, the authorities themselves are under an obligation to investigate where they learn through “any means or medium” that a crime may have been committed.¹⁰⁹ The hurdles faced by victims of serious human rights violations in registering FIRs are inconsistent with the right to an effective remedy under Art. 2.3 of the Covenant, particularly for violations of Arts. 6 and 7 as previously recognised by the Committee.

4.2.3. Withdrawal of criminal cases concerning conflict-era human rights violations (Arts. 2.3, 6, 7, 9, 10, 16)

77. Impunity for conflict-era human rights violations has been further compounded by the practice of the State party withdrawing criminal cases according to a provision in the CPA that states: “Both parties guarantee to withdraw accusations, claims, complaints and under-consideration cases levelled against various individuals due to political reasons and immediately publicise the status of those imprisoned and immediately release them”.¹¹⁰ While this provision was most likely intended as a temporary amnesty in the immediate aftermath of the conflict to free prisoners who were being held on charges of politically motivated crimes, in practice it has most often been used to withdraw cases of murder, attempted murder, rape and mutilation. The power to withdraw cases has been exercised by successive governments, notably in 2008, 2011 and 2012.¹¹¹

78. The State party has never publicly provided comprehensive data and information concerning case withdrawals. According to media articles and research by OHCHR-Nepal and non-governmental organisations, up to 1,222 cases involving an unknown number of alleged perpetrators have been withdrawn to date. On 27 October 2008, the Maoist-led government of Prime Minister Pushpa Kamal Dahal withdrew 349 criminal cases against numerous political party cadres, including two senior members of the Cabinet. They include numerous incidents reported

¹⁰⁹ See OHCHR, *Nepal Conflict Report 2012*, *supra* note 6, at 184 noting that under Sec. 3(1) of the State Cases Act, “It is understood that “a person” includes police officials, and thus police themselves must file a First Information Report when they learn of a crime, in particular a serious crime.”

¹¹⁰ Clause 5.2.7, CPA, *supra* note 19.

¹¹¹ The procedure to withdraw cases is set out in Sec. 29 of the State Cases Act, 1992, which provides that cases can be withdrawn on the basis of a deed of reconciliation between the parties involved (not a formal withdrawal of charges), or if a court agrees to the Government’s proposal. On 17 August 1998, the government approved the “Procedures and Norms to be Adopted While Withdrawing Government Cases-1998” (“1998 Standards”) clarifying the nature of the criminal cases qualifying for withdrawal and the process to be followed. The effect of this process is the dropping of the case, the release of the accused and the inability to prosecute the case in the future.

Sec. 29 of the State Cases Act, 1992, states:

(1) If the Government of Nepal issues an order, in a case or dispute prosecuted by the Government or submitted on behalf of the Government or submitted against the Government, the Government Attorney may undertake *Milapatra* (compromise) if agreed by the other party to the case or withdraw a criminal case from prosecution by the Government subject to the permission of the Court; in case of aforesaid activities, it shall be carried out as follows: a) No fee for arbitration shall be imposed, b) The criminal charge or Governmental claim ceases to exist with the withdrawal of the case. (2) Notwithstanding anything provided by sub-Section (1) if the case affects the property matters of a person who is not a Government employee, such case shall not be withdrawn from the court in accordance with this Section.

well after the signing of the CPA in 2006.¹¹²

79. Case Type	Number of cases
▶ Murder (intentional homicide)	93
▶ Arms and Ammunitions	44
▶ Robbery	43
▶ Robbery and Theft	38
▶ Attempted Murder	31
▶ Arson	32
▶ Public Offence	23
▶ Robbery and Murder, Attempted Murder, Arson	30
▶ Crime against state	6
▶ Physical Assault (mutilation)	2
▶ Abetting prison escape	2
▶ Cow Slaughtering	1
▶ Rape	1
▶ Narcotics	1
▶ Foreign exchange	1
▶ Crime against state and murder	1
Total (2008)	349

80. The then government claimed that this was a necessary step to promote the peace process and fully implement the CPA. Yet this stands in contrast to the guarantees in the CPA itself, which – in the words of the State party’s periodic report – “committed to carry out impartial investigation of perpetrators and to end impunity, and to ensure the right of victims and families of the disappeared persons to relief.”¹¹³ In January 2009, the Supreme Court of Nepal issued an interim order preventing the implementation of the government’s decision to withdraw these cases.¹¹⁴ However, in February 2011 the interim order was quashed on appeal with the court stating that

¹¹²Kathmandu Post, *Op-ed: Serious Crimes*, 23 June 2011, available at <http://www.ekantipur.com/the-kathmandu-post/2011/06/23/oped/serious-crimes/223221.html> (last accessed 8 April 2013).

¹¹³ See para. 73, second periodic report, *supra* note 39.

¹¹⁴ *Madhav Basnet et al v. Prime Minister Puspa Kamal Dahal et al*, 1 January 2009.

the government's decision was lawful as per the case withdrawal procedure set out in law and regulations.¹¹⁵

81. On 17 November 2009, the government led by Prime Minister Madhav Kumar Nepal decided to withdraw a further 282 cases.¹¹⁶

82. Case Type	Number of cases
▶ Murder (intentional homicide)	200
▶ Arson	82
Total (2009)	282

83. Nepal's most recent government led by Prime Minister Baburam Bhattarai moved to withdraw cases on at least three occasions. On 28 August 2011, the Prime Minister's party signed a 4-point agreement, which included provision to withdraw cases against party cadres of the Unified Communist Party of Nepal (Maoist) and the United Democratic Madhesi Front.¹¹⁷ Following this, the Ministry of Home Affairs reportedly forwarded 35 cases to the Ministry of Law and Justice seeking approval for withdrawal.¹¹⁸ It is unknown if these cases have been formally withdrawn yet. After being publicly called to clarify this issue, Prime Minister Baburam Bhattarai stated that he would withdraw only "politically motivated" cases, but failed to clarify the basis for determining a politically motivated case.¹¹⁹

84. Case Type	Number of cases
▶ Unknown	35
Total (2011)	35

85. Moreover, the 4-point deal of August 2011 also declared a general amnesty which included

¹¹⁵ See NHRC and OHCHR- Nepal, *Legal Opinion: Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal*, June 2011, available at http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case-Withdrawals-for-Serious-Crimes-in-Nepal_E.pdf (last accessed 22 April 2013).

¹¹⁶ Advocacy Forum, *Occasional Brief: Evading Accountability by hook or crook*, June 2011, available at: <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

¹¹⁷ The second point of the deal reads as follows: "All the court cases against those involved in the Maoist insurgency, Madhes movement, Janjati movement, Tharuhat movement and Dalit and Pichadabarga movements will be dropped and they will be given general amnesty". G. Ansari, *Maoists, Madhesis ink four-point deal*, Republica, 29 August 2011, http://archives.myrepublica.com/2012/portal/?action=news_details&news_id=35296&show_comments=true (last accessed on 25 August 2012).

¹¹⁸ *Govt effort to withdraw Maoist cases dubious*, The Himalayan Times, accessed on 26 Feb 2013; available at: <http://www.thehimalayantimes.com/fullNews.php?headline=Govt+effort+to+withdraw+Maoist+cases+dubious&NewsID=302861>.

¹¹⁹ Kathmandu Post, *Op-ed: Nepal's elusive justice*, 16 September 2011, available at <http://www.ekantipur.com/the-kathmandu-post/2011/09/15/oped/nepals-elusive-justice/226358.html> (last accessed 6 June 2012).

serious crimes and human rights abuses.¹²⁰ The consequence would be that hundreds of perpetrators of serious human rights violations such as rape, enforced disappearance, torture or extrajudicial killings might avoid being subjected to any inquiry that may lead to their being tried and sentenced to appropriate penalties and to making reparation to their victims.

86. On 3 March 2012, the media reported that the then government of Prime Minister Baburam Bhattarai withdrew a further batch of cases against 349 individuals, which included allegations of abduction and murder.¹²¹ These cases were alleged to be “under consideration [*sub judice*] at different courts” but their withdrawal before the completion of the criminal process was justified as preventing the “innocent” from “languishing in jail”.¹²² It was also claimed that senior members of the ruling party could “hardly have been involved in abductions”¹²³ – despite documented case of enforced disappearance, arbitrary detention and abductions by Maoists during the conflict.
87. On 4 December 2012, the government reportedly decided to withdraw another batch of criminal cases against 207 individuals affiliated to the Maoist and Madhesi parties.¹²⁴ It is not clear what the nature of the charges in these cases were.

88. Case Type	Number of suspects
▶ Abduction and/or murder (March)	349
▶ Unknown (December)	207
Total (2012)	556

89. Thus, successive governments of the State party have withdrawn, in total, up to 1,222¹²⁵ criminal cases between 2008 and the present involving an unknown number of alleged perpetrators. Only a small number of these have been shown not to be serious human rights violations, while it appears that many relate to serious human rights violations such as extrajudicial killings and enforced disappearance. This practice is contrary to victims’ right to an effective remedy under Art. 2.3 of the Covenant and a violation of Nepal’s obligations under customary and treaty law to investigate, and where sufficient admissible evidence is found to exist, prosecute alleged perpetrators of serious crimes under international law including extrajudicial killing, enforced

¹²⁰K.R. Sigdel, *Transitional Justice: Parties go for blanket amnesty*, Kathmandu Post, 17 December 2011, available at <http://www.ekantipur.com/2011/12/17/top-story/transitional-justice-parties-go-for-blanket-amnesty/345662.html> (document last accessed on 25 August 2012); see also K.R. Sigdel, *UN warns Nepal against blanket amnesty*, Kathmandu Post, 20 December 2011, <http://lookandgaze.blogspot.com/2011/12/un-warns-nepal-against-blanket-amnesty.html> (document last accessed on 25 August 2012).

¹²¹Republica, *Government drops criminal cases against 349*, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=32441 (last accessed on 26 February 2013).

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴Republica, *Government withdraws cases against 207 Maoists*, accessed on 26 February 2013, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=45964 (last accessed 22 April 2013).

¹²⁵The actual number of cases may be lower if the allegations against some individuals were joined in complaints or cases against multiple accused.

disappearance and torture. As the National Human Rights Commission (hereinafter, “NHRC”) and OHCHR-Nepal noted in a 2011 legal opinion condemning the practice of case withdrawals as a breach of the ICCPR and other international human rights treaties, “Case withdrawals have effectually served to protect politically connected individuals from criminal accountability, promoting a policy of *de facto* impunity for the perpetrators of hundreds of serious crimes.”¹²⁶

4.2.4. Non-investigation based on deferral to transitional justice mechanisms and alleged role of National Human Rights Commission (Art. 2.3)

90. The frequent refrain of the State party in response to victims’ demands for realisation of their rights to an effective remedy is that cases of conflict-era human rights violations will be dealt with by the CPA and constitutionally-mandated transitional justice mechanisms. Prior to the State party’s March 2013 decree bringing into force an ordinance to establish a Commission of Investigation of Disappeared Persons, Truth and Reconciliation, the Committee had already stated that such a mechanism will not constitute an effective judicial remedy in the context of the requirement to exhaust all available and effective judicial remedies before bringing an individual communication before the Committee:

*With regard to such potential future transitional justice mechanisms, as the Truth and Reconciliation Commission and the Enforced Disappearance Commission, the Committee recalls that it is not necessary to exhaust avenues before non-judicial bodies to fulfil the requirements of Art. 5, paragraph 2 (b) of the Optional Protocol.*¹²⁷

91. One at least two occasions, Nepali courts have accepted the argument that “special provisions” in the CPA and Interim Constitution concerning transitional justice govern conflict-era human rights violations and prohibit prosecutions of alleged perpetrators of such crimes.¹²⁸ In 2010, Keshav Rai, then a member of the Constituent Assembly, petitioned the Supreme Court of Nepal to dismiss the criminal charges against him for serious human rights abuses, including murder, that he was accused of carrying out as a Maoist combatant during the conflict. He argued that the special provisions concerning transitional justice in the CPA and Interim Constitution required the dismissal of the charges against him. In a two-page decision, the Supreme Court accepted this argument and used it as the basis to quash an order of Okhaldhunga District Court to arrest the suspect.¹²⁹

¹²⁶ NHRC and OHCHR-Nepal, *Legal Opinion: Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal*, *supra* note 115, at 2 (footnote omitted). On the incompatibility of Sec. 29 of the State Cases Act 1992 with the ICCPR and other international human rights treaties, see 23.

¹²⁷ HRC, *Katwal v. Nepal*, Decision on Admissibility, *supra* note 5, at para 6.5.

¹²⁸ See International Commission of Jurists and Nepal Bar Association, *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal*, January 2012, at vi.

¹²⁹ Decision of the Supreme Court of Nepal, *Constituent Assembly Member Keshav Rai v. Government of Nepal, Office of the Prime Minister and Ministry of Council, Singhadurbar et.al*, Written Order No.0532 of 13 December 2010 (copy on file with TRIAL)

92. Nepal's transitional justice mechanism will not displace its obligation to conduct independent, impartial, credible and effective investigations into alleged perpetrators of serious human rights violations amounting to crimes under international and domestic law. First, the mechanism (now unsatisfactorily combining a truth commission with a commission of inquiry into disappearances) remains unavailable some six years after the beginning of the peace process and therefore cannot constitute an effective remedy. The Executive Ordinance purporting to establish a Commission of Inquiry into Disappeared Persons, Truth and Reconciliation signed into law by the President of Nepal on 14 March 2013 immediately came into force, but in reality the mechanism will not be established for some time. At this writing, a Supreme Court ruling has placed a stay on the implementation of the ordinance pending a constitutional challenge, placing its future in doubt. Meanwhile, victims cannot be expected to wait indefinitely for a remedy.
93. Second, if and when the Commission is established in its current form it will fall far short of international standards concerning the right to an effective remedy and access to justice, truth and reparation given that it promotes amnesty for serious crimes. International human rights experts have expressed the view that the amnesty is in contravention of international law.¹³⁰ On 20 March 2013, the UN High Commissioner for Human Rights strongly criticised the amnesty provisions contained in the Nepali ordinance:

Such amnesties would not only violate core principles under international law but would also weaken the foundation for a genuine and lasting peace in Nepal... An amnesty for those who committed serious human rights violations will deny the right of thousands of Nepalese to truth and justice.¹³¹ (emphasis added)

94. Third, the ordinance contains weak powers for the Commission to refer cases for prosecution.¹³² It is not clear if these powers will be used at all considering that it may also grant amnesty following either the request of the perpetrator or *ex officio*. Should the Commission refer any cases for prosecution, the final decision will rest in the hands of the Attorney General. The previous Attorney General of Nepal interfered in the course of criminal investigations that were embarrassing for the government,¹³³ giving rise to understandable concern from human rights

¹³⁰ Asian Centre for Human Rights, Human Rights Watch, International Commission of Jurists, and TRIAL, *Nepal: Truth & Reconciliation Law Betrays Victims*, (22 March 2013) available at http://www.trial-ch.org/en/about-trial/trial-acts/details/article/nepal-truth-reconciliation-law-betrays-victims8232.html?tx_ttnews%5BbackPid%5D=1188&cHash=8ec03cf3c812639a87daa49cfd719729 (last accessed 8 April 2013).

¹³¹ OHCHR Press Release, *Pillay says Nepal commission must not grant amnesties for serious violations*, 20 March 2013 available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13163&LangID=E> (last accessed 21 April 2013).

¹³² Sec. 25, Executive Ordinance, *supra* note 30. The Ministry of Peace and Reconstruction may also make such a recommendation.

¹³³ International Commission of Jurists, *Nepal: ICJ calls for end to political interference in case of Dekendra Thapa killing*, 30 January 2013, available at <http://www.icj.org/nepal-icj-calls-for-end-to-political-interference-in-case-of-dekendra-thapa-killing/> (last accessed 25 April 2013) noting how "On 11 January, Nepal's Attorney General, Mukti Pradhan, sent a written instruction to the local police and prosecutor not to move forward with the investigation and prosecution."

groups that this does not represent a sufficiently independent and impartial mechanism for the initiation of investigations into crimes under international law. Further, given that enforced disappearance and torture are not crimes under Nepali law and a 35-day statutory limitation for rape is in force it is not clear how cases of this nature could result in the opening of an investigation.

95. Non-judicial transitional justice mechanisms can never replace criminal investigations and trials for past crimes. Neither the CPA¹³⁴ nor the Interim Constitution¹³⁵ indicated that the investigation and prosecution of conflict-related human rights violations should be deferred by the existing criminal justice system to a truth commission or commission of inquiry or that any diversion from established criminal justice procedures is permitted. On the contrary, as mentioned above both texts made a commitment to ending impunity and bringing perpetrators to justice. In a March 2011 legal opinion, OHCHR-Nepal expressed the view that:

[A] truth commission should be viewed as complementary to judicial action and not as a basis to supplant or suppress the regular judicial system. Accordingly, the regular judicial system cannot be held in abeyance because a commitment to establish transitional justice mechanisms has been made or even once these mechanisms are actually established and functioning. It cannot erode the obligation upon all States to take clear steps to provide justice for past violations.¹³⁶

96. In the already mentioned landmark decision of June 2007 on enforced disappearances, the Supreme Court reiterated the prominent role of the obligation to promptly and effectively investigate and prosecute gross human rights violations:

*The State may take a stand that the formation of a Commission with respect to matters pertaining to directive principles and policies are to be done at its' own convenience in accordance with its own priorities. The State may also contend that the implementation of directive principles of the State is a matter at its own discretion. **However, the legal investigation, prosecution and provision of a remedy, to be carried out with respect to a remedial mechanism as a part of fundamental right, cannot be a matter of secondary priority [...]**¹³⁷ (emphasis added)*

97. Despite the weight of international and domestic legal authority and victims' demands for criminal accountability, the State party continues to insist that the prospective transitional justice mechanism could deal with cases of serious human rights violations from the conflict. At the same time as making such promises, the State party has continued to obstruct the criminal justice process by withdrawing criminal cases, refusing to register FIRs, and shielding members of the

¹³⁴ Clause 5.2.5 and 7.1.3, CPA, *supra* note 19.

¹³⁵ Art. 33(S), 100 and 135.2, Interim Constitution, 2007.

¹³⁶ OHCHR-Nepal, *The relationship between Transitional Justice mechanisms and the Criminal Justice system*, Legal Opinion, March 2011, at 3.

¹³⁷ Supreme Court of Nepal, *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others* (Case No. 3775/2055), *supra* note 26.

security forces from justice (see sections 4.2.1 – 4.2.3 above).

98. Another argument put forth by the State party to dismiss its responsibility to investigate, prosecute and sanction crimes under international law is that the NHRC is the competent body to deal with such claims. The NHRC indeed enjoys broad investigative powers to investigate human rights violations, including torture, after receiving a complaint or *suo muto* as mentioned in the State party's second periodic report.¹³⁸ Notwithstanding this, the NHRC is not an independent judicial authority with the mandate and competence to sanction and punish violators of human rights. Moreover, the State party regularly flouts the orders of the NHRC and ignores its recommendations.¹³⁹ The NHRC has claimed that out of 386 recommendations issued over a decade from 2000 to 2010, more than 55% of those recommendations remain completely unimplemented.¹⁴⁰ In this regard, the Committee against Torture noted has previously noted its concern "about the frequent failure by the State party to implement the Commission's recommendations."¹⁴¹

4.2.5 Cancellation of writs of *habeas corpus* (Arts. 2.3, 6, 7, 9, 10, and 16 of the Covenant)

99. Art. 107(2) of the Interim Constitution of Nepal provides that: "[T]he Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*." The right to *habeas corpus* may not be suspended even during time of emergency.¹⁴² Applications for the writ of *habeas corpus* were one of the principal means used by lawyers and human rights defenders to prompt judicial intervention in enforced disappearances and arbitrary detentions during the conflict.¹⁴³ This judicial recourse doubtlessly saved the lives of many individuals. Yet despite the ability of relatives and representatives to apply for the remedy, it often resulted in blanket denials from State agencies that the person was in their custody. More

¹³⁸ See paras. 97 and 120, second periodic report, *supra* note 39, citing the Human Rights Commission Act, 1997 and the NHRC Regulation (Complaints, Action and Compensation), 2000.

¹³⁹ For example, the Nepali Army ignored orders from the prime minister and the NHRC to hand over Major Nirajan Basnet, as well as appeals from the UN secretary-general, to face criminal charges concerning conflict-era abuses. See Advocacy Forum and Human Rights Watch, *Indifference to Duty: Impunity for Crimes Committed in Nepal*, 14 December 2010, available at: <http://www.hrw.org/reports/2010/12/14/indifference-duty>, (last accessed 5 April 2013) at 9. See also Kathmandu Post, *Annual Report: NHRC recommendations largely unimplemented*, 7 December 2011 available at: <http://www.ekantipur.com/the-kathmandu-post/2011/12/07/nation/annual-report-nhrc-recommendations-largely-unimplemented/229074.html> (last accessed 11 April 2013).

¹⁴⁰ See National Human Rights Commission, *Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)*, November 20120, available at: http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Sum-Report-NHRC-Recommendation.pdf (last accessed 11 April 2013).

¹⁴¹ CAT, *Concluding Observations on Nepal*, *supra* note 50, at para. 15. See also, WGEID, *Annex: Report Submitted by the Working Group on Enforced or Involuntary Disappearances on the Mission to Nepal, 6-14 December 2004*, UN Doc. E/CN.4/2005/65/Add.1 of 28 January 2005, at paras. 52-53 (hereinafter "Nepal Mission Report").

¹⁴² Art. 143(7) Interim Constitution, 2007.

¹⁴³ Rawski and Sharma, *A Comprehensive Peace? Lessons from Human Rights Monitoring in Nepal* in Von Einsiedel, Malone and Pradham eds, *From People's War to Fragile Peace* (Cambridge University Press, 2012) 175-200, at 179.

disturbing still, on occasion the Supreme Court itself cancelled previously issued writs of *habeas corpus* in the face of these denials. In a report of the Asian Human Rights Commission in 2004, some 160 instances in which the writ was quashed in alleged cases of enforced disappearance and arbitrary attention were documented.¹⁴⁴

100. In another case, that of Amrit Kandel, a 20-year old first-year university student was allegedly forcibly disappeared with his brother in October 2003 by the RNA Bharaibnath Battalion and held at Maharajgunj Barracks in Kathmandu. His brother was released a short time later but the fate and whereabouts of Amrit Kandel remain unknown to date. His father petitioned the Supreme Court of Nepal for the writ of *habeas corpus* in 2004, but the Court later quashed the writ on a technicality in 2005 when the lawyer acting on his behalf failed to appear at a hearing.¹⁴⁵ Government respondents had completely denied they were responsible for the enforced disappearance and detention of Amrit Kandel throughout the proceedings. By this time, it was well known that alleged Maoist rebels and sympathisers were being forcibly disappeared and held at Maharajgunj. A 2006 report published by OHCHR-Nepal that documented the use of the barracks as a secret detention centre includes Amrit Kandel's name in a list of those known to be detained at Maharajgunj.¹⁴⁶ A second writ of *habeas corpus* was issued on his behalf and 33 other individuals in 2007.¹⁴⁷
101. In the case of Sarita Sharma, a 24-year old housewife and mother of two young children, allegedly unlawfully detained, forcibly disappeared and tortured over the course of 20 months from 20 October 2003 to 29 June 2005 at the hands of the Royal Nepali Army (hereinafter, "RNA") Bharaibnath Battalion at Maharajgunj Barracks in Kathmandu. Her husband applied to the Supreme Court of Nepal for the writ of *habeas corpus* on 30 October 2003, immediately following his discovery of her disappearance. The writ application mentioned eight respondents possibly responsible for the unlawful detention of Sarita Sharma, including the RNA Bhairabnath Barrack, Maharajgunj. However, on 25 June 2004 the Supreme Court quashed the writ petition on the ground of lack of evidence proving that Mrs. Sharma was being held in unlawful detention. In its order, the Court explicitly mentioned that each of the respondents had completely denied the

¹⁴⁴ Asian Human Rights Commission, *Special report: The mathematics [sic] of barbarity and zero rule of law in Nepal*, Vol. 03 - No. 06 December 2004 at *Appendix I, part A: Taking: Forced disappearances and quashed habeas corpus bids – available at* <http://www.humanrights.asia/resources/journals-magazines/article2/0306/appendix-i-taking-and-killing-recent-forced-disappearances-and-extrajudicial-killings-committed-by-the-nepalese-security-forces> (last accessed 5 April 2013).

¹⁴⁵ Order of the Supreme Court of Nepal, *Tika Nath Kandel in favour of Amrit Kandel v. Ministry of Home Affairs and others* (habeas corpus), Writ no. 180 (13 July 2005) (copy on file with TRIAL).

¹⁴⁶ OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004*, (May 2006) available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/Pages%20from%202006_05_26_OHCHR-Nepal.Report%20on%20Disappearances%20linked%20to%20Maharajgunj%20Barracks_Eng.pdf (last accessed: 5 April 2013), at 69.

¹⁴⁷ The Supreme Court of Nepal issued a landmark decision on the writ concerning Amrit Kandel and 33 other individuals together with 27 other such writs on the same day, ordering the authorities to establish a Commission of Inquiry into Disappearances, *inter alia*. See Decision of the Supreme Court of Nepal, *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others*, *supra* note 26.

claims made in the petition as one of the grounds for the decision to quash the writ. Sarita Sharma was released from Maharajgunj one year later on 30 June 2005, one day following a second writ of *habeas corpus*, which was obtained on the basis of eye-witness testimony from NHRC officials placing her within the custody of the Bharainbath Battalion.

102. The practice of cancelling the writ of *habeas corpus* in cases alleging the forcible disappearance or arbitrary detention of the person outside the protection of the law, gives rise to serious concerns that denial by State officials, occasionally coupled with procedural missteps, could be grounds for quashing the order. The WGEID pointed out following its visit to Nepal during the height of the conflict in 2004 that:

*In a number of notorious cases the army has flatly denied before the Supreme Court that a particular person is in detention, only to reverse that position later when forced to do so by revelations in the media, in political debate, and even in official documents issued by other branches of the public authority” and noted that the absence of effective penalties for perjury by government officials in such cases contributed to this practice.*¹⁴⁸

103. The Special Rapporteur on Arbitrary Executions drew attention to a number of alleged enforced disappearances that took place in 1998 and 1999 for which the writ of *habeas corpus* appeared to be largely ineffective.¹⁴⁹ The Special Rapporteur on Torture similarly noted that the remedy of *habeas corpus* and other safeguards appeared to be “illusory” in practice during his 2005 visit to Nepal.¹⁵⁰

4.2.6. Inadequate exhumations and identification and return of mortal remains to families (Arts 2.3, 6 and 7 of the Covenant)

104. More than six years after the end of the conflict, Nepal still lacks the technical capacity and institutional and legal framework to conduct exhumations of grave sites and identification and return of mortal remains to relatives of victims.¹⁵¹ This situation is part of the State party’s overall failure to determine the fate and whereabouts of individuals who went missing or were forcibly disappeared during the decade long conflict. It constitutes a denial of the right of relatives of victims of extrajudicial executions and enforced disappearances to know the truth and to recover the mortal remains of their loved ones. As noted by the WGEID:

The right to know the truth about the fate and the whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of

¹⁴⁸ WGEID, *Nepal Mission Report*, *supra* note 141, at para. 42.

¹⁴⁹ *Special Rapporteur on Arbitrary Execution, Nepal Mission Report*, *supra* note 79, at para. 40.

¹⁵⁰ Special Rapporteur on Torture, *Nepal Mission Report*, *supra* note 84, at para. 22. See also CAT, *Concluding Observations on Nepal* (2005), *supra* note 50, at para 21(f).

¹⁵¹ See ICRC, *Families of missing persons in Nepal: a study of their needs*, (April, 2009) available at <http://www.icrc.org/eng/assets/files/2011/families-of-missing-persons-nepal-report.pdf> (last accessed 7 April 2013), recommending “The State body must have access to professional resources for investigation and for exhumation and identification of the remains of people who have been reported missing.” At 36.

*their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture. The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation.*¹⁵²

105. Nepal's lack of a single authority with the legal competence and technical capacity to conduct independent exhumations and identification processes severely impedes its ability to determine the fate and whereabouts of the disappeared. The NHRC has initiated exhumation processes with the cooperation of the police in a handful of cases, including that of the Dhanusha Five (see above para. 35).¹⁵³ Similarly, before its departure, OHCHR-Nepal provided technical assistance to an exhumation in a high profile case – that of Maina Sunuwar (see above para. 66). Notwithstanding the fact that such efforts are welcome, it is highly problematic in the context of Nepal and the possibly high number of mass graves and individual grave sites that no comprehensive mapping of possible sites has been carried out and that exhumations can only be undertaken on an *ad hoc* basis, requiring the marshalling of experts, equipment and other resources on each separate occasion.
106. The lack of clarity over which State institutions should lead and direct exhumations is also of major concern. Under the current legal framework, the police may conduct exhumations in suspected cases of suspicious deaths.¹⁵⁴ However, the reluctance of the criminal justice authorities to investigate conflict-related human rights violations and in particular those that may have involved security forces as the perpetrators, has meant that the courts or NHRC have taken the initiative to prompt exhumations even if the Nepali Police subsequently provided a legal basis for it. The NHRC has interpreted its broad powers of inquiry in cases of human rights violations to encompass the competence to engage forensic pathologists in conducting exhumations and

¹⁵² WGEID, *General Comment No. 10 on the Right to Truth in relation to Enforced Disappearances*, UN Doc.A/HRC/16/48, at para. 6. See also, Advisory Committee of the Human Rights Council, *Report on Best Practices in the Matter of Missing Persons*, UN Doc. A/HRC/AC/6/2 of 22 December 2010; Human Rights Council, *Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons*, UN Doc. A/HRC/14/42 of 22 March 2010; Art. 24(3), International Convention on the Protection of All Persons from Enforced Disappearance (2010) which states: "Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."

¹⁵³ See, for example, National Human Rights Commission, *Preliminary Summary Report on Exhumation Godar VDC, Janakpur, Dhanusha District*, 19 September 2010, available at http://www.swisspeace.ch/fileadmin/user_upload/Media/Countries/Nepal/NHRC_-_Pre-Report_Janakpur-Exhumation_100919.pdf (last accessed 7 April 2013). See also Advocacy Forum Nepal, *Exhumations of bodies of the disappeared – in need of a policy framework* (2011) available at <http://advocacyforum.org/downloads/pdf/publications/impunity/exhumation-of-bodies-of-the-disappeared-english.pdf> (last accessed 7 April 2013), noting that the NHRC had conducted six other exhumations at the time of writing, at 17.

¹⁵⁴ Sec. 11, State Cases Act 1992.

identification of remains.¹⁵⁵ Civil society actors have raised concerns that NHRC-led investigations have been purely humanitarian in purpose and did not pay sufficient attention to evidence preservation.

107. During the exhumation itself, a number of actors are necessary, including the National Forensic Laboratory and international and national experts. The lack of clearly distinguished responsibilities among the various actors gives rise to a concern not only the legal authority for the exhumation but the chain of custody for evidence acquired from it may be later called into question, causing admissibility issues at trial. Previous exhumations have prompted concerns that the processes are inadequate for the preservation of evidence for the purpose of possible criminal trials of perpetrators. Advocacy Forum Nepal noted problems with police failing to secure grave sites¹⁵⁶ and the lack of established protocols for State agencies dealing with exhumation processes.¹⁵⁷ Moreover, the possible complicity of the same security forces that are responsible for exhumation in the violations requires additional safeguards for ensuring the integrity of the overall process and in particular the collection of evidence.
108. Concerns have also been raised about failures to keep relatives of victims informed of steps in the exhumation process and to allow their participation as appropriate.¹⁵⁸ In this context, relatives of victims have no access to psycho-social support before, during and after exhumations, which is essential to mitigating the trauma which may ensue from the recovery of a loved one's mortal remains.
109. The prospective Commission of Investigation of Disappeared Persons, Truth and Reconciliation, if established in practice (see above para. 24), will have the power to conduct exhumations and return remains to family members.¹⁵⁹ However, there is no provision for how the Commission should interact with police, prosecution authorities or in the NHRC in the exercise of this power. It is not clear how the technical capacity to conduct exhumations will be created, which is deeply concerning given victims' high expectations that the transitional justice mechanism will clarify the fate and whereabouts of the outstanding 1,300 victims of enforced disappearance during the conflict. If the Commission does undertake mapping of grave sites and conduct of exhumations, it is not clear how or to what institution it will hand over its findings and any incomplete processes when its two year temporal mandate concludes. It also unclear how mortal remains will be matched and returned to relatives in the absence of a DNA database. In addition, neither existing legislation nor the edict establishing the Commission provide for declarations of absence due to enforced disappearance to be issued to relatives in contravention of international standards (see

¹⁵⁵ Art. 132, Interim Constitution. See also Secs. 4 and 12, National Human Rights Commission Act, 2012.

¹⁵⁶ Advocacy Forum Nepal, *Exhumations of bodies of the disappeared – in need of a policy framework*, *supra* note 153, at 8-9.

¹⁵⁷ *Ibid.*, at 28.

¹⁵⁸ *Ibid.* at 32, 34.

¹⁵⁹ Sec. 14(5), Executive Ordinance, *supra* note 30.

below sec. 4.4.1).

110. Nepal urgently needs to clarify and expand its legal and policy framework concerning exhumations in cases of serious human rights violations, especially as it relates to cases from the period 1996 to 2006 which by the very nature of the passage of time raise particular challenges from the legal and forensic perspective. The State party should ensure that international best practices are followed, including in ensuring sufficient linkage of exhumations to criminal justice processes and guaranteeing transparency, such as suitably notifying relatives of victims, keeping them informed of the process, and offering them adequate psychological support before, during and after exhumations.

4.2.7. Post conflict extra-judicial killings, unlawful detention and torture by security forces in the Terai (Arts. 6, 7, 9, 10, and 16 of the Covenant)

111. While it is beyond the scope of this submission to document the State party's failures to prevent and punish serious human rights violations committed since the end of the conflict in 2006 throughout the whole territory of Nepal, the situation in the Terai (plains) region from 2008 to 2012 merits particularly close attention. The results of Nepal's failure to promote and protect human rights and entrenched impunity practices became starkly evident by 2009, when confrontations between security forces and armed groups engaged in criminal activity including killings and abductions in the Terai resulted in record high levels of violence. Extrajudicial killings, enforced disappearances, unlawful detention and torture by security forces became commonplace in the attempt to quell the climate of lawlessness.¹⁶⁰ Amnesty International has noted that: "Nowhere are the results of this justice vacuum more apparent than in the Terai region of southern Nepal where the legacy of conflict-era violations and prolonged impunity has allowed a culture of violent lawlessness to take root."¹⁶¹
112. The following cases documented by the Terai Human Rights Defenders' Alliance and verified by TRIAL exemplify a pattern of extrajudicial killings, unlawful detention and torture that has been widely documented by both international and national human rights organisations.
113. With regard to extrajudicial killings, the following recent cases are illustrative. Ramodh Kumar Singh and Sanjaya Kumar Shah were kidnapped by an armed group on 19 March 2012 but were killed by gunshots during the police's attempt to rescue them – the police attempted to claim that the pair were suspected criminals killed in an encounter. Mangare Mura died on 8 April 2012 in Kathmandu's main public hospital, following severe beating by police who attempted to extort a bribe from him in Madarhaniya village. On 12 June 2012, Dhan Bahadur Tharu Thanait died in the Kathmandu Teaching Hospital as a result of a gunshot injury sustained from police on 9 May

¹⁶⁰ See OHCHR, *Investigating Allegations of Extra-Judicial Killings in the Terai: OHCHR-Nepal Summary of Concerns*, *supra* note 7.

¹⁶¹ Amnesty International, *Nepal: The search for justice*, *supra* note 7, at 5.

2012 at Danda Bazaar, Nawalparasi, during a peaceful protest. On 21 July 2012, Hareshiv Yadav was killed by police in Dhanusha district. While the police allege he was the victim of crossfire, human rights defenders note inconsistencies in the evidence that point to his death from a close range bullet, possibly following apprehension.¹⁶² On 8 September 2012, Ijhar Pamariya, a 50 year-old farmer from Laxmipur in Sarlahi district, was beaten to death by six Armed Police Force (APF) members wielding *lathis* (batons) during an operation to break up a demonstration and conduct house to house searches for rioters. In none of these cases has a prompt, impartial, credible and effective investigation into police wrongdoing been initiated. In some of the cases, police attempted to broker mediation with the relatives of the victim, offering compensation *in lieu* of a remedy.

114. On 11 August, 2012, Jay Narayan Paswan (aka Barood Tyagi), a leader of the Democratic Terai Liberation Front in the districts of Mahottari, Dhanusha and Siraha in the Terai (plains) region of Nepal, was killed in an alleged encounter with the APF. The incident took place at the hands of the “Ghumuwa” (patrolling) police of Mahottari district while the victim was riding his bicycle towards the village of Ekdara. According to the police, Jay Narayan Paswan started firing at two policemen, Bachchu Yadav and Sanjiv Singh, who fired back and killed Paswan in self-defense. Two friends of Paswan’s, who were riding with him on other two bicycles, escaped. Paswan’s body was later found to have a full round of bullets in his chest, arm and stomach. A fact-finding mission carried out by human rights defenders at the scene found evidence that the victim was shot at close range, suggesting he had already been apprehended by the police when he was shot and killed. An NHRC investigation into the case is ongoing, but has apparently encountered obstruction as the police failed to provide the NHRC with details concerning alleged injuries to the two policemen and the treatment they received and other requested documents. No police investigation has been opened into the incident.
115. In relation to torture in police custody in the Terai, in May 2012, Laxman Tharum and Surendra Chaudhry were severely beaten up by the police in Seti Hospital while visiting some of their friends who were injured during clashes which had taken place earlier that day. The group of policemen responsible for the incident was composed of around 8 to 10 officers.¹⁶³ On 8 August 2011, Shreecharan Mukhiya was unlawfully arrested by police who failed to show an arrest warrant or give reasons. The alleged reason for his detention was that Shreecharan Mukhiya was affiliated to the United Communist Party of Nepal (Maoist) and on the same day as his unlawful arrest a police officer had been shot dead by a criminal gang affiliated to another Maoist party, United Marxist-Leninist. He was severely beaten during his detention to the extent that his whole

¹⁶² Terai Human Rights Defenders Alliance, *Monthly Report, July 2012*, § Major Cases of Human Rights Violations in Madhesh, at para A) (copy on file with TRIAL). For further clues related to the possible motive of the police in killing Hareshiv Yadav and his involvement in armed groups’ activities see the report directly.

¹⁶³ Terai Human Rights Defenders Alliance, *Weekly Report, May 10 – 18*, Executive Summary (copy on file with TRIAL). See also Terai Human Rights Defenders Alliance, *Synopsis HR Reports*, Impartiality of the police (copy on file with TRIAL).

body appeared swollen when his wife saw him several days later. A claim under the TRCA was filed 16 April 2012 (see above sec. 4.1.1). On 24 May 2012, Ugrasen Murau, 42 year-old jeweler from Rupandehi district was attacked by police after presenting him to a police station to address a complaint lodged by a family member against him. A police inspector insulted and hit him in the face, then flogged him with black plastic pipe on his legs, knees, back and left hand. Following the beating he was kept in custody for more than five hours. On 30 May 2012, Jagadish Mahato, a journalist, was severely beaten by police who charged a demonstration wielding *lathis* (batons). On 19 August 2012, Altaf Husen Musalman was arrested without warrant and severely beaten by police at Taulhiwa bus station. Altaf Husen Musalman became ill from the beatings he sustained and grave injuries to his chest and genitals were discovered in hospital. His arrest was allegedly linked to a clash with police some days earlier in which a police officer had been injured in the head, but they later admitted that they had arrested the wrong person and released him, offering compensation and an apology to the victim and his family.

116. In one case from the Terai documented in 2012, an enforced disappearance apparently took place at the hands of the Nepal Police. Ajit Kumar Lal Karna was arrested by plain clothes police without warrant or reasons being given on 6 May 2012 at his residence in Jaleswhor. He was thereafter detained completely *incommunicado*. A complaint was filed with the NHRC on 17 May 2012 by his family and the writ of *habeas corpus* was sought for him on 13 June 2012 from the Supreme Court of Nepal. Replies to the Supreme Court by police agencies contained blanket denials as to knowledge of the fate and whereabouts of Ajit Kumar Lal Karna. The NHRC subsequently recommended a full investigation be undertaken into the matter, but this has not been carried out to date. In July 2012, the victim's whereabouts become known when he contacted his family. Ajit Kumar Lal Karna had in fact escaped from his unlawful detention some 10 days after the commencement of his forcible disappearance. During that time he was severely tortured for information during interrogations for information about his brother, who was suspected of involvement in a bomb blast in Janakpur. Medical reports document his injuries as a result of torture, but he fears returning to report to Nepal to report the crimes against him in case of retaliation against his family.
117. In the majority of these and other such cases, the victims and their families fail to lodge a criminal complaint or take other steps to seek redress and police failed to open any investigation. In addition to the legal and procedural hurdles outlined above in section 4.2.2, the complexities of the situation in the Terai compound difficulties faced in accessing justice. For example, when an individual is killed by the police in the Terai, it is generally accepted by the community that the victim was indeed a "criminal". Indeed, the families of the victims often perceive the deaths of their relatives in this way and the burden of stigma attached to this discourages them from seeking investigation of possible human rights violations. Moreover, fear of threats and reprisals from security force for reporting such crimes is at a level comparable to during the conflict. Further, as noted in some of the above cases, police systematically try to discourage the family

from bringing criminal actions by brokering mediation and offering financial compensation. In the absence of any other prospect of justice, families often accept such offers of compensation and remain silent. Finally, the Terai is largely a rural region and villagers there, as in other parts of Nepal, are often not aware of their rights and are intimidated by the technicalities of the legal process.

4.3 Gaps in the protection of victims of human rights violations and their relatives, witnesses and human rights defenders (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)

118. Serious gaps in the protection of victims, witnesses and their relatives exist in Nepal. The lack of adequate physical and procedural protection of witnesses' rights to life, security of person, and privacy in the criminal justice process significantly impacts upon the willingness of individuals to report crimes and cooperate with the administration of justice.¹⁶⁴ In 2005, the Committee against Torture noted its concern about "[a]lleged reprisals against and intimidation of persons reporting acts of torture, in the forms of re-arrests and threats, and the lack of witness protection legislation and mechanisms."¹⁶⁵ The International Commission of Jurists has found that:

*In recent years, despite monitoring by civil society and international organisations, reports of threats and violence against victims and witnesses remain common, particularly in criminal cases involving conflict-related human rights abuses, such as torture and ill treatment, including conflict-related sexual violence, and extra-judicial killings and enforced disappearances.*¹⁶⁶

119. There is, at present no established witness protection programme or specialised law enforcement agency for witness protection in the country. Physical witness protection measures are not prescribed in law except for victims of trafficking in human beings,¹⁶⁷ and are therefore only available in practice "in a piecemeal manner and on a case-by-case basis."¹⁶⁸ Psycho-social support for witnesses and victims of serious crimes are also not provided through any established programme, and it falls to civil society to provide counselling and other necessary support services to fill the gap.

120. The case of Jitman Basnet¹⁶⁹ illustrates how the burden of witness protection measures often

¹⁶⁴ INSEC, *Witness Protection: A Study Report*, June 2011 (copy on file with TRIAL), at 35.

¹⁶⁵ CAT, *Concluding Observations on Nepal*, *supra* note 50, at para. 28. See also, Special Rapporteur on Arbitrary Executions, *Mission Report on Nepal*, *supra* note 79, at para. 55 and WGEID, *Mission Report on Nepal*, *supra* note 141, at para. 51 (threats to human rights defenders and civil society during the conflict).

¹⁶⁶ International Commission of Jurists, *Witness Protection in Nepal: Recommendations from International Best Practices*, August 2011, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-witness-protection-analysis-brief-2011.pdf> (last accessed 9 April 2013), at 3.

¹⁶⁷ *Ibid.*, at 10, noting sec. 26 of the Human Trafficking and Transportation (Control) Act, 2007.

¹⁶⁸ *Ibid.*, at 9.

¹⁶⁹ Note: an individual communication concerning the case of Jitman Basnet submitted by TRIAL is under consideration by the Human Rights Committee. *Jitman Basnet v. Nepal*, Communication No. 2051/2011.

falls on civil society and the international community, in the absence of any effective system being established by the State party. Jitman Basnet, leader of the NGO *Lawyers' Forum for Human Rights and Justice* (LAFHUR), received death threats in June 2011 after publishing a book about the torture he was subjected to during his enforced disappearance at the Maharajgunj Barracks of the RNA in 2004 and actively campaigning against the promotion of State agents accused of committing human rights violations.¹⁷⁰ He approached the police seeking protection and filed an FIR, but no action was taken. In the absence of any available protection measures, TRIAL assisted Jitman Basnet to appeal to UN Special Procedures.¹⁷¹ He fled the country in July 2011 and has not been able to return to date.

121. The State party states at para. 158 of its periodic report that: "There is no specific legislation on witness protection as such. However, various administrative mechanisms are in place to this end." Contrary to this statement, OHCHR noted in its *Nepal Conflict Report*, there are simply "no legal provisions for witness protection in Nepal"¹⁷² and previously called for establishment of an effective system of witness protection and support.¹⁷³
122. On a positive note, in 2007 the Supreme Court adopted guidelines for the non-disclosure of the identities of victims of gender-based violence, as well as child victims and witnesses.¹⁷⁴ The draft Criminal Procedure Code – which is delayed due to the dissolution of the Constituent Assembly (see above paras. 11-12) – would make significant improvements to in-court protection for witnesses giving testimony, allowing for example *in camera* hearings, the power to order witnesses' names not to be published and use of video-link equipment to enable witnesses to testify from a secure location.¹⁷⁵
123. In 2011, the State party also prepared a draft bill for the Protection of Witnesses in response to an order of the Supreme Court to adopt legislation for an effective system of witness protection.¹⁷⁶ The bill provides for the establishment of a witness protection programme but has not been

¹⁷⁰ Jitman Basnet, *258 Dark Days*, 2007 (copy on file with TRIAL).

¹⁷¹ See, for example, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Legato, Addendum: Summary of cases transmitted to Governments and replies received*, 25 February 2008, UN Doc. A/HRC/7/14/Add.1.

¹⁷² OHCHR, *Nepal Conflict Report 2012*, *supra* note 6, at 183.

¹⁷³ OHCHR-Nepal, *OHCHR urges the prompt establishment of a witness and victim protection mechanism in Nepal*, 18 December 2010, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202010/December/2010_12_17_PR_OHCHR_Witness_protection_E.pdf (last accessed 9 April 2013).

¹⁷⁴ Supreme Court of Nepal, *The Procedural Directives on Maintaining Secrecy of the Parties in the Cases of Special Nature*, 2007, available at: www.supremecourt.gov.np/download/Gopaniyata_Nirdesika.pdf (Nepali only, last accessed on 9 April 2013), at Preamble; Art. 4.

¹⁷⁵ See Advocacy Forum Nepal and REDRESS, *Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence*, April 2011, available at http://www.redress.org/downloads/publications/AFRedress_Report_on_Draft_Legislation.pdf (last accessed 9 April 2013).

¹⁷⁶ See Decision of the Supreme Court of Nepal, *Mira Dhungana v. Nepal Government et al.*, writ No. 0043/2065, 4 November 2009.

submitted to parliament to date. The bill aims to “provide security against the risks, threats or any other undue influence likely to come up against witnesses from a suspect, convict, offender or any other individuals linked to the suspect, convict or offender.”¹⁷⁷ Bribing, harassing, threatening or otherwise intimidating a witness or his or her relatives is made an offence under the bill, which constitutes a significant improvement to the legal framework although it is not clear if the State Cases Act will be amended to allowing the filing of an FIR in such cases (see above paras. 45, 65 and 73).¹⁷⁸ The draft bill also provides for in-court (procedural) witness protection measures, including use of masks, curtains, or other equipment to conceal the identity of the witness. Sec. 29 allows the use of pseudonym by witnesses from the investigative phase onwards, although in the current wording this appears to be required in all cases regardless of whether such a measure is needed or desired. Psycho-social and logistical witness support measures are also provided for.¹⁷⁹

124. Notwithstanding the positive impact the bill would have, it suffers from a serious flaw. A Committee comprised of the chief of police, chief district officer, and the public attorney will be established in each district and shall be responsible for implementing the witness protection programme and taking decisions to admit witnesses to it or not.¹⁸⁰ The police are designated as responsible for implementing some of the protection measures ordered by the Committee, although in some parts of the bill it is not clear what agency is responsible.¹⁸¹ This approach is contrary to international best practices, which would place the responsibility for implementing a witness protection programme to a specialised law enforcement agency independent from the regular police. Moreover, there is no provision for independent judicial oversight of the application of witness protection measures.¹⁸² Given the pattern of intimidation, threats and reprisals against victims and witnesses in cases involving security forces as alleged perpetrators, it is of deep concern that responsibility for ordering witness protection measures would rest with a Committee that includes both the chief of police and the chief district officer – who has responsibility for the district police – without any independent oversight.

125. As mentioned above, human rights groups have previously criticised the weak witness and victim protection and support measures in the bills to establish transitional justice mechanisms.¹⁸³ With respect to the executive ordinance established a Commission of Investigation into Disappeared Persons, Truth and Reconciliation of 14 March 2013, these concerns are still present. It is

¹⁷⁷ Preamble, Draft Bill on Protection of Witnesses (2011) (copy of unofficial translation on file with TRIAL).

¹⁷⁸ Sec. 49, *ibid.*

¹⁷⁹ For example, Sec. 11 of the Draft Bill on Protection of Witnesses, *ibid.*, provides that “medical, psychological, legal, and social or any other kind of counseling (*sic*) services” shall be made available to witnesses as required. Secs. 13 and 14 provide for economic assistance and daily and travel allowances respectively.

¹⁸⁰ See Sec. 17, *ibid.*

¹⁸¹ For example, Sec. 8(3) makes the police responsible for supplying bodyguards to protected individuals.

¹⁸² The district Committees on witness protection will be required only to submit an annual report to the Ministry of Home Affairs pursuant to Sec. 63 of the Draft Bill on Protection of Witnesses, *ibid.*

¹⁸³ See above para. 16.

regrettable that the ordinance does not affirm that individuals appearing before the Commission have the rights to life, security of person and privacy before, during and after giving information or cooperation of any kind to it. Moreover, while the Commission is provided with the power to apply measures of physical protection, it “may seek necessary assistance from the Government” in order to do so.¹⁸⁴ No special units for witness and victim protection and support are created for this task, which is extremely problematic as lack of an independent witness protection structure may fundamentally undermine the ability of the Commission to investigate cases of human rights violations during the conflict. Further, “[a]ny provisions related to protection of security, mental and physical wellbeing, confidentiality and dignity of the persons supporting the work of the Commission shall be as prescribed” and anonymity (“confidentiality”) may be granted to witnesses by the Commission. However, no processes concerning how such measures can be applied for by victims or other witnesses appearing before the Commission are set out.

4.4. Failure to guarantee the right of reparation to victims of human rights violations and their relatives (Arts. 2.3, 6, 7, 9, 10, 16 and 14 of the Covenant)

126. The State party lacks a comprehensive programme of compensation and reparation for victims of gross human rights violations during the conflict. Nepal is in urgent need of designing reparation programmes that have the power to transform the lives of individuals and communities affected by crimes under international law but to date such efforts have been limited and insufficient legal reform has taken place to ensure that victims are able to exercise their right to full and effective reparation. Reparation measures should include a wide number of initiatives that serve to redress the harm suffered or put the victimised individual or community back in the position they would have enjoyed if the crimes had never taken place.¹⁸⁵
127. In addition to the lack of a comprehensive reparation programme, existing provisions in the legal and policy framework for reparation to victims of serious human rights violations fall far short of international standards. In general, Nepali law tends to limit the form of reparation available to compensation. For example, the Interim Constitution provides for a right to compensation for victims of torture or those held in preventive detention without a lawful basis.¹⁸⁶ The NHRC is provided with the power to issue orders for compensation to victims of human rights violations.¹⁸⁷

¹⁸⁴ Sec. 17, Executive Ordinance, *supra* note 30.

¹⁸⁵ See e.g., *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), *supra* note 31; *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, *supra* note 57, principle 32; Art. 14, Convention against Torture; CAT, *General Comment No. 3 on Article 14*, *supra* note 55; Art. 19, Declaration on the Protection of All Persons from Enforced Disappearances; WGEID, *Annual Report 2012*, *supra* note 12, at paras.46-58. See also Art. 24(5), Convention on Enforced Disappearances.

¹⁸⁶ Arts.26 and 25 of the Interim Constitution respectively. For example, Art. 25(2) states: “Any person held under preventive detention shall, if his/her detention was contrary to the law or was in bad faith, have the right to be compensated in a manner as prescribed by law.”

¹⁸⁷ Art. 132(3)(l), Interim Constitution.

Other forms of reparation such as *rehabilitation, restitution, satisfaction and guarantees of non-repetition* are often not a feature in such provisions. These deficiencies can, in part, be traced to the absence of the concept of repairing the harm suffered by victims in the Nepali legal system.¹⁸⁸

128. Where constitutional rights to obtain compensation have been prescribed in law, the maximum amounts that can be obtained are often not proportionate to the gravity of the violation in question. For example, as mentioned above in section 4.1.1, the TRCA of 1996 limits claims for compensation to a maximum of 100,000 Nepali Rupees (approximately 1,000 Euro). The Children's Act of 1992 prescribes that "reasonable compensation" may be awarded by courts to children victims of torture and ill-treatment in civil suits. The highest known order is for 20,000 Nepali Rupees (approximately 200 Euro) in the case of LT (paras. 46-47 above). These sums of compensation demonstrably do not suffice as anything more than symbolic reparation for the violations in question.
129. In cases of rape, criminal courts may order "appropriate compensation" to female and child victims.¹⁸⁹ In cases not relating to minor victims, the provision is not gender neutral and therefore bar male victims of rape may be barred from seeking compensation.¹⁹⁰ No minimum or maximum amount of compensation is prescribed, but in cases of women the court shall consider "the gravity of offence and pain suffered by the dependent minors, if any, shall also be taken into account if such victim is already dead" and, in cases of minors, "the age and grievance suffered by the minor".¹⁹¹
130. As far as compensation measures are concerned, in April 2007 the Ministry of Peace and Reconstruction was established and given the mandate to provide relief and rehabilitation to "conflict-affected persons".¹⁹² Between 2008 and 2009, the Ministry of Peace and Reconstruction set up an "Interim Relief Program" (IRP) providing once-off monetary forms of assistance to several categories of conflict-affected persons, namely relatives of deceased people, of persons who were disappeared and those who were injured, wounded or disabled due to the conflict.¹⁹³ According to para. 127 of the periodic report of the State party, financial assistance has been provided to "the families of 14,064 out of 16,719 deceased, distributed reliefs to 28,000 out of 78,689 internally displaced persons, reliefs to the families of 1,302 disappeared persons and

¹⁸⁸ For example, widows who benefitted from the Interim Relief Programme (below at para. 111) lost their entitlement to compensation if they remarried, illustrating that the assistance was based on need rather than the harm to be addressed. See ICTJ, *From Relief to Reparations: Listening to the Voices of the Victims*, 1 September 2012, available at <http://ictj.org/publication/relief-reparations-listening-voices-victims> (last accessed 7 April 2013), at 16.

¹⁸⁹ Sec. 9A and 10, Chapter on Rape, Muluki Ain (General Code), *supra* note 58.

¹⁹⁰ It is also not possible to register a case of rape concerning a male victim under the current provision. See above para. 53.

¹⁹¹ *Ibid.*

¹⁹² See *Guidelines for providing relief to beneficiary of a deceased person pursuant to cabinet decision, October 5, 2008; Guidelines for providing relief to the beneficiary of a disappeared person pursuant to cabinet decision, January 12, 2009.*

¹⁹³ ICTJ, *From Relief to Reparations: Listening to the Voices of the Victims*, *supra* note 188, at 6-7.

subsistence allowance to 23 persons injured during the People's Movement.”¹⁹⁴ Victims and relatives of a killed or forcibly disappeared person received up to 100,000 Nepali Rupees (approximately 1,000 Euro) through the scheme, while the widows of men who had died in combat could receive up to 25,000 Nepali Rupees (approximately 250 Euro). Victims of torture and other crimes, such as sexual violence, were not entitled to claim any interim relief through the IRP, despite the constitutionally guaranteed right to compensation for torture (see above para. 127). Medical treatment, scholarships for children, and skills development training were also available forms of assistance under the IRP but the majority of victims who benefited from the scheme did not avail of this.¹⁹⁵

131. The executive ordinance of March 2013 purporting to establish a transitional justice mechanism proposed powers for the Commission of Investigation of Disappeared Persons, Truth and Reconciliation to award reparation to victims and their relatives. The reparation measures outlined in Sec. 24 of the ordinance represent a slight improvement of Nepal's existing legal and policy framework, but overall would still not be fully in line with international standards if implemented as no clear right to full and effective reparation is articulated.¹⁹⁶ Notwithstanding this, reparation measures the Commission may order include – in addition to compensation – various forms of restitution and rehabilitation, including health-care, training, loans, accommodation and employment. Sec. 26 permits property restitution where the Commission finds a victim's property (land) was seized or confiscated. OHCHR noted that:

*The definition of “reparation”, particularly in Art. 2(e), would benefit from further clarity and alignment with international standards. The definition should specify that victims have the **right** to reparation, and that full and effective reparations include not only restitution, compensation, and rehabilitation but also measures of “satisfaction” and guarantees of non-recurrence.*¹⁹⁷

132. If the ordinance survives the current challenge at the Supreme Court and the Commission is established in practice,¹⁹⁸ victims' rights to reparation may be significantly enhanced in Nepal. However, it will remain to be seen how the Commission will tackle questions about how reparation measures should be delivered, e.g. on a case-by-case basis before the Commission versus through an administrative scheme; group versus individual reparations and so forth.
133. As mentioned above in paras. 72, 113 and 117, in practice, police and the families of perpetrators often attempt to broker mediation with victims and offer “compensation” payments (or promises thereof) to ensure they will not register criminal complaints or file civil suits. This forceful

¹⁹⁴ See also para. 115 of the second periodic report, *supra* note 39.

¹⁹⁵ ICTJ, *From Relief to Reparations: Listening to the Voices of the Victims*, Research Report 2011, *supra* note 188.

¹⁹⁶ Sec. 24, Executive Ordinance, *supra* note 30. The term reparation is defined in Sec. 2 of the ordinance as encompassing only compensation, concessions and facilities to be granted to victims and their relatives.

¹⁹⁷ OHCHR, *Comments on the Nepal “Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2013*, 3 April 2013 (copy on file with TRIAL).

¹⁹⁸ See above para. 24.

mediation is also reported to often take place in relation to cases of sexual violence, violence against women, and witchcraft-related violence.¹⁹⁹

4.4.1. Lack of declarations of absence by reason of enforced disappearance (Arts 2.3 and 16 of the Covenant)

134. Nepal's failure to provide a mechanism to obtain a declaration of absence by reason of enforced disappearance also constitutes a violation of the right to an effective remedy and the right to recognition before the law of victims of enforced disappearance and their relatives.²⁰⁰ Such declarations are important forms of symbolic reparation and also serve the practical function of allowing families to conduct legal necessities in the absence of the victim in relation to social welfare, inheritance, finances, property rights and other family law matters. The failure to provide recourse to such declarations in Nepal means that relatives may be forced to seek issuance of death certificates, contrary to international standards.²⁰¹

4.5. The non-ratification of the International Convention on the Protection of all Persons from Enforced Disappearance and the Rome Statute (Arts. 2.3, 6, 7, 9, 10 and 16 of the Covenant)

135. The State party has failed to implement recommendations to accede to the International Convention on the Protection of All Persons from Enforced Disappearance,²⁰² and to take the Convention into consideration in implementing the Supreme Court's order to establish a commission of inquiry into disappearances.²⁰³ By becoming a State party to the CED, Nepal would be under positive obligations to implement the provisions in its domestic law and practice, including to criminalise enforced disappearance as both a crime against humanity and a separate and autonomous offence and to take decisive steps to end the practice of enforced disappearance, fully investigate unresolved cases, and provide victims and their families with

¹⁹⁹ Nepali Times, *Rape for ransom*, 21 December 2012, available at: <http://nepalitimes.com/news.php?id=19884#.UWUnKR9s7VI> (last accessed 10 April 2013).

²⁰⁰ WGEID, *General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances*, 2011, available at <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>, at paras. 8 and 9. See also para. 10 on the continuing obligation to investigate such cases.

²⁰¹ The WGEID has noted that "as a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family." WGEID, *General Comment No. 4 on Article 19 of the Declaration*, available at http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf, at para. 74.

²⁰² On 1 July 2009, the International Coalition Against Enforced Disappearances and Amnesty International submitted over 5,000 letters to the Prime Minister appealing for the ratification of the CED – ICAED, *International Coalition against Enforced Disappearances urges Nepal to ratify the Convention on enforced disappearances*, 1 July 2009, available at http://www.icaed.org/fileadmin/user_upload/ICAED_Press_release_July_1_2009_Call_on_Nepal_to_ratify_%E2%80%A6_02.pdf (last accessed 12 April 2013). See also, International Commission of Jurists, *ICJ urges Nepal to ratify Convention against Enforced Disappearances*, 29 January 2007, available at <http://www.icj.org/icj-urges-nepal-to-ratify-convention-against-enforced-disappearances/> (last accessed 12 April 2013).

²⁰³ Decision of the Supreme Court of Nepal, *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others* (Case No. 3775/2055), 1 June 2007, at 41.

access to justice, truth and full reparation. Moreover, Nepal should make the relevant declarations pursuant to Arts. 31 and 32 of the CED recognising the competence of the treaty body to receive and consider individual and inter-State communications alleging violations under the Convention.

136. Similarly, the State party has failed to accede to the Rome Statute of the International Criminal Court despite a commitment undertaken by the parliament in a resolution adopted on 25 July 2006 that it would do so,²⁰⁴ which was reaffirmed to civil society in response to calls from Amnesty International and others.²⁰⁵ A commitment to accede to the Rome Statute was again reaffirmed in the State party's response to its universal periodic review by the Human Rights Council in June 2011.²⁰⁶ Despite these commitments, an inter-ministerial study on the implication of Nepal's accession of ICC commissioned following the issuance of the 2006 resolution has never been released and no further concrete steps towards ratification have been taken. Nepal should urgently take steps to accede to the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court. Doing so would require Nepal to codify war crimes, crimes against humanity and genocide and the modes of responsibility in its domestic law, which is not yet the case.
137. Further, Nepal has not yet ratified the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. It should do so without further delay and implement the Convention in its domestic law in order to bring Nepal into full compliance with the imprescriptibility of enforced disappearance, torture, rape and other forms of sexual violence as war crimes and crimes against humanity.

²⁰⁴ FOHRID (Human Rights and Democratic Forum), *Need of accession to Rome Statute of the ICC by Nepal*, 23 November 2010, available at http://www.iccnw.org/documents/Report_on_Need_of_accsion_to_ICC_by_nepal_FOHRID_Nov2010.pdf (last accessed 7 April 2013), at 1.

²⁰⁵ In 2009 the then Minister for Foreign Affairs gave a commitment to Amnesty International to begin the ratification process – Amnesty International, *Nepal's Minister of Foreign Affairs commits to supporting international justice*, 28 July 2009, available at <http://www.amnesty.org/en/news-and-updates/news/nepal-minister-foreign-affairs-commits-supporting-international-justice-20090728> (last accessed 12 April 2013). See also, Coalition for the International Criminal Court, *Letter to Nepalese Officials*, 3 August 2012, available at http://www.iccnw.org/documents/HoS_Letter_Nepal_2012.pdf (last accessed 7 April 2013); FOHRID (Human Rights and Democratic Forum), *Need of accession to Rome Statute of the ICC by Nepal*, 23 November 2010, available at http://www.iccnw.org/documents/Report_on_Need_of_accsion_to_ICC_by_nepal_FOHRID_Nov2010.pdf (last accessed 7 April 2013).

²⁰⁶ *Statement by H. E. Mr. Madhav Prasad Ghimire, Chief Secretary, Office of the Prime Minister and Council of Ministers, Government of Nepal, and the leader of the Nepali delegation to the 17th Session of the Human Rights Council at the adoption of the UPR Outcome Report on Nepal on Tuesday, 7 June 2011, Geneva* (copy on file with TRIAL).

5. Information on the associations submitting this written information

CVSJ (Conflict Victims' Society for Justice)

Conflict Victims' Society for Justice-Nepal (CVSJ-Nepal) is an apolitical non-governmental organisation established in September 2008 by the victims (survivors and relatives of those killed and disappeared) of Nepal's ten year old conflict that works toward bringing all the victims of conflict in a common platform for their fight to truth and justice. Currently, the society has its presence in 250 Village Development Committees in 40 districts of Nepal.

PPR (Forum for the Protection of People's Rights) Nepal

Forum for Protection of People's Rights, Nepal (PPR Nepal) is a non-governmental, non-profit organisation established in 2003 to advocate and work in the area of human rights and access to justice. PPR Nepal is established and run by lawyers, human rights activists, health professionals, peace workers and sociologists. PPR Nepal is registered under Nepal Government/District Administration Office, Kathmandu and is affiliated with the Social Welfare Council (SWC) of Nepal. PPR Nepal works for protection and promotion of human rights, peace building, access to justice especially for the poor and marginalised section of the society through lobbying, campaigning, capacity building and research activities.

PPR Nepal envisions a society where all the members live in harmony irrespective of their class, caste, ethnicity, religion, political beliefs; where people have easy access to resources and basic government services; and all the members lead a self-determined life as per their wishes not violating the rights of others. The major objectives of the organisation are to: i) promote and protect human rights; ii) increase people's access to justice; iii) support the development of a just and peaceful society; iv) advocate for torture prevention and the rehabilitation of torture victims, and v) carry out research on the issues related to peace, human rights and justice.

<http://pprnepal.org.np/>

HimRights (Himalayan Human Rights Monitor)

Himalayan Human Rights Monitors (HimRights) officially registered in 1999 as a non-governmental, non-partisan, non-profit organisation committed to defending the rights of poor, marginalised and socially excluded communities and individuals, with a special focus on women, children and youth. HimRights works in affiliation with all major human rights institutions based in Nepal and abroad, pursuing a three-fold approach of (1) monitoring and reporting, (2) responding to human rights violations; and (3) advocating and training for policy change, influence, raising awareness, and capacity-building to cope with – and respond to – changing human rights dynamics in Nepal.

HimRights works for the advancement of human rights, gender justice, child/women empowerment, peace campaign, enhancement of participatory democracy and people-centered development.

HimRights enables to work effectively in the areas of human rights, anti-trafficking, safe migration, good governance, conflict transformation/mitigation, reconciliation and peace building.

<http://www.himrights.org/>

NEFAD (Network of Families of Disappeared and Missing)

NEFAD is an independent national level organisation working on enforced disappearances and missing persons in Nepal, consisting of families of the missing persons and led by the families of the missing. It is representative of a diverse range of ethnic groups, and social backgrounds; NEFAD is politically independent and includes as members those of various political affiliations and of none. Each of the district-based Family Associations that constitute NEFAD has an established track record that demonstrates its independence, integrity and legitimacy.

NEFAD is a non-profit humanitarian organisation formed by associations of families of the disappeared and missing in the country. NEFAD was founded in November of 2009 and its work depends on the efforts of its association members and the support of individuals and organisations in Nepal and abroad. The founding members of NEFAD are the Conflict Victims Committee - CVC Bardiya and CSJ Lamjung, comprising district and regional associations associated after post-conflict environment to advance surviving families' right to truth, justice, reparation and peaceful transformation. NEFAD is closely working with various victims groups, civil society and international agencies to advance victims' rights in Nepal transitional justice process.

<http://nefad.wordpress.com/>

THRD Alliance (Terai Human Rights Defenders Alliance)

Terai Human Rights Defenders (THRD) Alliance works to promote equity and justice in Nepal by conducting research and litigations on issues of human rights violations and discrimination with a special focus on Terai, Nepal.

www.taraihumanrights.org

THRD Alliance (Terror Victims Orphan Society) of Nepal

Terror Victims Orphan Society Nepal (OTV-Nepal) is a non-governmental organisation established in December 2001 by a group of orphan children whose parents were killed or disappeared during Nepal's decade long armed conflict. The main objective of OTV-Nepal is to lobby and advocate for the truth and justice of the victims of conflict calling in state and civil society to act toward the protection of the orphan children, helpless widows, injured people and others. OTV-Nepal has over 200 members from various districts of Nepal and is run by membership fees and private donations.

<http://otvnepal.tripod.com/id8.html>

TRIAL (Swiss Association against Impunity)

TRIAL is an association under Swiss law founded in June 2002 and headquartered in Geneva. It is apolitical and non-confessional and has consultative status before the United Nations Economic and Social Council. Its principal goals are in the fight against impunity for the perpetrators accomplices and instigators of genocide, war crimes, crimes against humanity, enforced disappearances and acts of torture. To accomplish its goals, TRIAL coordinates a network of lawyers capable of rapidly and efficiently instituting legal proceedings. These lawyers offer the victims of international crimes the necessary skills for their proper defence including filing of legal complaints at the domestic and international levels as well as liability procedures. TRIAL has also set up litigation programme born from the premise that, despite the existence of legal tools able to provide redress to victims of international crimes, these mechanisms are considerably underused. Accordingly, TRIAL aims at offering victims the requisite professional help to prepare and file their complaints before existing international mechanisms and tribunals.

Contact Person: Dr. iur. Philip Grant (Director)

E-mail: philip.grant@trial-ch.org

Address: TRIAL (*Swiss Association against Impunity*), P.O. Box 5116, 1211, Geneva 11, Switzerland

Tel./Fax No.: + 41 22 321 61 10

Website: www.trial-ch.org/

Annex 1 - Relevant concluding observations of the HRC to Nepal following consideration of its first periodic report (1994)

In March 1994 Nepal submitted its initial report (doc. CCPR/C/74/Add.2 of 10 November 1994) to the Human Rights Committee (HRC)

On 10 November 1994 the HRC issued its concluding observations (CCPR/C/79/Add.42).

Of particular relevance for the associations submitting the present written information are the following comments, suggestions and recommendations:

Paragraph 6

The Committee notes that the status of the Covenant within the legal system is unclear and that the necessary steps to adopt legislative and other measures necessary to give effect to the rights recognized in the Covenant have not yet been taken. Furthermore, a significant gap exists between provisions of the Constitution and other legal norms on the one hand, and their application in practice, on the other. Accordingly, there is a need to clearly define the place of the Covenant within the Nepalese legal system to ensure that domestic law are applied in conformity with the provisions of the Covenant and that the latter can be invoked before the courts and applied by the other authorities concerned [...].

Paragraph 10

The Committee is deeply concerned with the cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or unlawful detention committed by members of the army, security or other forces during the period under review which have been brought to its attention. It deplores that those violations were not followed by proper inquiries or investigations, that the perpetrators of such acts were neither brought to justice nor punished, and that the victims or their families were not compensated. It regrets that the draft bills against torture and ill-treatment of the person as well as on the compensation of victims of torture, have not yet been adopted. Moreover, the quasi judicial authority of the Chief District Officer and the insufficient protection of the independence of the judiciary undermines the efforts aimed at preventing the occurrence of similar acts.

Paragraph 12

The Committee recommends that the legislative reforms presently under way in Nepal be expanded and intensified in order to ensure that all relevant legislation be in conformity with the Covenant. It emphasizes the need for the provisions of the Covenant to be fully incorporated into domestic law and made enforceable by domestic courts. Necessary steps should be taken to give effect to the rights recognized in the Covenant.

Paragraph 14

[...] Prison reforms now envisaged should be accelerated.

Paragraph 16

The Committee urges the Government of Nepal to take all necessary measures to prevent extra-judicial and summary executions, enforced or involuntary disappearances, torture and degrading treatment and illegal or arbitrary detention. The Committee recommends that all such cases be systematically investigated in order to bring those suspected of having committed such acts before the courts and that the victims be compensated.

Paragraph 18

The Committee also recommends that necessary measures be taken by the Government to give effect to the separation of executive and judicial functions and to ensure the full independence and proper functioning of the judiciary. The texts of the draft bills against torture and ill-treatment of the person as well as on compensation of victims of torture should be brought into line with the provisions of the Covenant and adopted as soon as possible. Specifically targeted training courses on human rights for law enforcement officials, members of the judiciary, members of the police and security forces should be organized.

* * *

On 21 February 2012 Nepal presented its second periodic report (doc. CCPR/C/NPL/2 distributed on 8 June 2012), combining the second, third and fourth periodic reports and covering the period from 1995 to 2010.

In paras. 77-83 of the second periodic report reference is made to measures undertaken to implement recommendation N. 13 of the concluding observations by the HRC.

In paras. 84-97 of the second periodic report reference is made to measures undertaken to implement recommendation No. 14 of the concluding observations by the HRC.

In paras. 98-132 of the second periodic report reference is made to measures undertaken to implement recommendation No. 15 of the concluding observations by the HRC.