



**Written Information for the Consideration of
Nepal's Second Periodic Report
by the Human Rights Committee**

(CCPR/C/NPL/2)

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Submitted by

TRIAL (*Track Impunity Always*)

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1. Background

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).

* * *

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 **April 2013 TRIAL** and six NGOs from Nepal submitted written information to the HRC to highlight **matters that in their view should be included in the list of issues**. **Since the majority of the information provided in such occasion remains valid, it will not be reiterated here and extensive reference will be made to it as the “April 2013 report”**.¹

* * *

At its 108th session the HRC adopted the **List of issues in relation to the second periodic report of Nepal (LOIS)**².

1. The present written information is an alternative report to Nepal’s combined second, third and fourth periodic reports, submitted by the State party on 21 February 2012 pursuant to Article 40 of the International Covenant on Civil and Political Rights (“the Covenant”) and to be examined by the HRC on its 110th session.
2. This report focuses on a limited number of issues selected among those included by the HRC in the LOIS in accordance with the expertise and mandate of the subscribing organizations. As a result, it is

¹ The report submitted in April 2013 by TRIAL, Conflict Victims’ Society for Justice (CVSJ), Forum for the Protection of People’s Rights (PPR) Nepal, Himalayan Human Rights Monitors (HimRights), National Network of Families of Disappeared and Missing (NEFAD), Terai Human Rights Defenders Alliance (THRD Alliance) and Terror Victims’ Orphan Society of Nepal (OTV-Nepal) can be found at: http://www.ccprcentre.org/doc/2013/05/TRIAL_Nepal_HRC108.pdf (hereinafter “April 2013 Report”).

² Human Rights Committee (HRC), *List of issues in relation to the second periodic report of Nepal*, doc. CCPR/C/NPL/2 of 21 August 2013, (hereinafter “LOIS Nepal 2013”).

mainly concerned with matters related to impunity and to past and ongoing gross human rights violations in Nepal.

3. The present report analyses Nepal's compliance with its obligations under Articles 6 (the right to life), 7 (prohibition of torture), 9 (the right to liberty and security of person), 10 (the right of detainees to be treated with humanity and dignity), 16 (the right to recognition as a person before the law), 24 (the rights of the child), and Article 2, para. 3, (the right to an effective remedy) of the Covenant. This does not in any way imply that the organizations submitting this report consider the State party to be in full compliance with all its obligations under the Covenant.
4. As most of these matters have been thoroughly analysed in the April 2013 report and only few substantial changes have been registered since, that document shall be deemed as the main reference.

2. Gross Human Rights Violations, Lack of Accountability and Reparations

5. As pointed out in the April 2013 report, victims of gross human rights violations in Nepal face several obstacles when seeking for justice and redress. The lack of accountability for past and ongoing crimes coupled with the absence of any significant redress favours the reoccurrence of conducts contrary to the State party's international obligations. The widespread impunity for past human rights violations as well as new episodes of arbitrary detention, torture, enforced disappearance and extrajudicial killings disclose ongoing violations of Articles 2, para. 3, 6, 7, 9, 10, 14, 16, 24 of the Covenant under both their substantive and procedural limbs.
6. On 21 August 2013 the HRC included a number of questions related to these matters in the relevant session of LOIS.

2.1 The Ongoing Failure to Effectively Investigate, Judge and Sanction Those Responsible for Arbitrary Detention, Enforced Disappearance, Torture, and Rape or Other Forms of Sexual Violence

Questions related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant included in the LOIS Adopted in August 2013

3. Please report on concrete measures taken to address impunity for past and ongoing human rights violations and investigate and prosecute human rights violations committed by both State and non-State actors. Please clarify the status of the "Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)" after the Supreme Court issued an interim order on 2 April 2013 staying its implementation, and elaborate on the

steps taken to review the Ordinance to ensure that its provisions are in full compliance with the Covenant. Please comment on the application of constitutional, statutory and regulatory immunities from accountability (including criminal accountability) of public officials, military and security forces and on the use of **political interference to withdraw charges against persons accused of serious crimes amounting to human rights violations**. Please also indicate whether the State party has established a vetting system to exclude persons accused of human rights violations from law enforcement bodies, the army and other relevant State bodies.

7. The April 2013 report highlighted that the State party's **failed to undertake effective investigations into human rights abuses and to prosecute those allegedly responsible**, pointing out in particular that to date "no one has been criminally prosecuted in a civilian court for serious human rights or IHL violations"³.
8. The **situation remains unvaried**. The State party has consistently failed to adopt measures to repel and contrast the several legal as well as *de facto* obstacles to prosecution that facilitate the perpetuation of the current climate of impunity. Such impunity is not restricted to few violations of the rights enshrined in the Covenant but regards, at least, all those conducts which represent grave breaches of human rights, such as extrajudicial killings, torture, enforced disappearance, rape and other forms of sexual violence. As noted by a number of UN bodies, obstacles to prosecution that shield perpetrators from justice are common to all of these crimes⁴.
9. In particular, victims of gross human rights violations **face insurmountable hurdles in registering First Information Reports (hereinafter "FIRs"), criminal complaints that are essential to trigger investigations into any alleged crime**. Regardless to their legal duty to record FIRs and start

³ April 2013 report, quoting Office of the High Commissioner for Human Rights (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, p. 36.

⁴ In relation to extrajudicial killings see Special Rapporteur on Arbitrary Executions (SREJK), *Mission to Nepal*, UN doc. E/CN.4/2001/9/Add.2, 9 August 2001, para. 43 (hereinafter "Nepal Mission Report"); in relation to enforced disappearance see Working Group on Enforced or Involuntary Disappearances (WGEID), Annual Report for 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), para. 288; and WGEID, *Missions to Colombia and Nepal: follow-up to the recommendations made by the Working Group*, 2011, UN doc. A/HRC/19/58/Add.4, 13 February 2012, (hereinafter "Mission to Nepal Follow-up Report") para. 18; in relation to torture see Committee against Torture (hereinafter CAT), Concluding Observations, UN doc. CAT/C/NPL/CO/2 of 13 April 2007, paras. 24 and 25; and Special Rapporteur on Torture (SRT), 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 (hereinafter "Nepal Mission Follow-up Report"), para. 23.; in relation to sexual violence see Committee on the Elimination of Discrimination against Women (CEDAW), Concluding Observations on Nepal, UN doc. CEDAW/C/NPL/CO/4-5, 29 July 2011, paras. 35 and 36.

inquiries into the facts thereby reported, Nepalese **Police consistently refuse to register FIRs when they are related to State authorities' conducts**⁵.

10. The fact that, overall, not more than 100 FIRs have been registered to date in relation to conflict-related human rights violations⁶, shows that the mechanism designed by the current legislation⁷ to ensure that Police comply with their duty to record criminal complaints is grossly inadequate. According to the Nepalese law, when Police personnel refuse to register an FIR the persons who tried to lodge it can “give the information of the crime to the concerned Chief District Officer or the upper level Police Office than that Office which is prescribed to register the information”⁸. However, **the refusal to register an FIR is not sanctioned and therefore there is no deterrent effect preventing Police officers from maintaining a wrongful conduct**. Moreover, in many cases also Chief District Officers or higher ranking Police officers refuse to register complaints alleging criminal responsibility of some members of the security forces. In some instances the **Police refused to register FIRs even after mandatory orders issued by the Supreme Court to do so**⁹.
11. One major problem in this regard is represented by the lack of criminalization under Nepalese law of some crimes such as torture and enforced disappearance¹⁰. Since **FIRs can only be registered in relation to criminal offences enlisted in Schedule 1 attached to the 1992 State Cases Act, and since neither torture nor enforced disappearance figure in such document, victims of such crimes are prevented from filing criminal complaints**.
12. Besides, even in those rare cases where criminal complaints related to State authorities' wrongdoings are registered, investigations into the alleged facts are *de facto* rarely initiated. Moreover, as thoroughly detailed in the April 2013 report, **even when prosecution took place, the executive branch often interfered with the independence of the judicial proceedings by withdrawing cases from court pursuant to Article 29 of the 1992 State Cases Act**. This strategy has been heavily relied upon by successive governments at least in 2008, 2011 and 2012, with the result of provoking the dropping of charges and the release of those accused in up to 1,222 proceedings¹¹.
13. To the knowledge of the subscribing organizations no efforts have been undertaken by the State to eradicate any of these hindrances to prosecution and to seriously tackle the systematic impunity that

⁵ April 2013 report, paras. 71-76.

⁶ April 2013 report, para. 72.

⁷ 1992 State Cases Act (also called 1992 Government Cases Act), entered into force on 23 December 1992, Art. 3, para. 5.

⁸ 1992 State Cases Act, Art. 3, para. 5.

⁹ April 2013 report, para. 71.

¹⁰ See *infra*, paras. 23-34.

¹¹ April 2013 report, paras. 77 and 78.

shields perpetrators of gross human rights violations and grave breaches of international humanitarian law.

14. A welcomed evolution since the April 2013 report was registered at the beginning of 2014. **On 2 January 2014, the Supreme Court of Nepal issued its judgment on two writ petitions submitted on 23 March 2013**¹² to challenge the constitutionality of the Executive Ordinance signed into law on 14 March 2013 (hereinafter “the March 2013 Executive Ordinance”) by the President of Nepal and establishing a Commission of Investigation on Disappeared Persons, Truth and Reconciliation (hereinafter, “the prospective Commission”).
15. Some of the concerns detailed in the April 2013 report were shared by the Supreme Court of Nepal which **declared the contrariety of the March 2013 Executive Ordinance to human rights as granted by the 2007 Interim Constitution and by international human rights law, and ordered the government of Nepal to amend it with the necessary support and help of an “expert team constituting conflict experts, organizations representing victims or victims’ interest, human rights law experts, and other stakeholders on these matters”**¹³.
16. In particular, the Supreme Court considered that the amnesty clause provided for under Section 23 of the March 2013 Executive Ordinance is “against the victims’ fundamental right to justice including their right to life and liberty, right to information, right against torture, and against the accepted principles of justice”¹⁴ and it ordered the government of Nepal to amend it in such a way as to bring it in compliance with international human rights law.
17. Similarly, the Supreme Court considered that Sections 25 and 29¹⁵ of the March 2013 Executive Ordinance, relating to the prosecution process, provide immunity for perpetrators of serious crimes and hinder effective, prompt and thorough investigations and prosecution into gross human rights violations, leaving victims with no prospect of justice¹⁶.

¹² 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; 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.

¹³ January 2014 Judgment, Annex No. 1, p. 39, emphasis added.

¹⁴ January 2014 Judgment, Annex No. 1, p. 38.

¹⁵ March 2013 Executive Ordinance, Section 25: “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*” (emphasis added); Section 29: “The Attorney General [...] shall decide on the matter whether a case can be prosecuted or not against any person found guilty on allegation of serious human rights violations, if the Ministry writes to it , on the basis of the recommendation provided by the Commission, to file a case”.

¹⁶ January 2014 Judgment, Annex No. 1, p. 38.

18. In order to further facilitate prosecution, the Supreme Court **ordered to remove the statutory limitation of 35 days imposed by the March 2013 Executive Ordinance on the Attorney General** for launching prosecution after the prospective Commission's issuance of its recommendations¹⁷.
19. The Supreme Court also made clear that **two different commissions shall be formed, in line with a previous judgment of the Supreme Court itself never implemented by the government**¹⁸: one commission should specifically and exclusively deal with enforced disappearance, while the other mechanism should have competence over all the remaining violations.
20. Finally, the Supreme Court went beyond the scope of the March 2013 Executive Ordinance, referring to serious flaws affecting Nepalese law that must be addressed in order to ensure adequate investigation of alleged human rights violations and prosecution of those allegedly responsible. Thus, the Supreme Court mandated the government of Nepal to “*arrange legal provisions for the criminalization of acts amounting to serious human rights violations*”¹⁹.
21. Nonetheless, the **judgment does not deal with all the problematic provisions contained in the March 2013 Executive Ordinance**. In particular, while the Supreme Court ordered the government “to *provide for reparation* to the victims and their families with enough economic, legal and institutional arrangement”²⁰, it **did not analyse the concept of victim as envisaged in the March 2013 Executive Ordinance and question its compatibility with international standards**²¹. Further, on the one hand, the Supreme Court ordered the establishment of a “*victim and witness protection programme* for them to be able to tell their [sic] truth, to be able to effectively defend it, and to protect their individual identity and related details”²². On the other, the **Supreme Court failed to define the access to security measures as a right on its own, to order that the protection programme must be totally independent from the government and to clarify the means and methods for granting the inclusion of victims and witnesses in the protection programme**. In addition, the Supreme Court's judgment **does not contain any reference to the structure, finance and independence of the new Commission**.

¹⁷ January 2014 Judgment, Annex No. 1, pp. 36 and 38.

¹⁸ Supreme Court of Nepal, *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, 1 June 2007.

¹⁹ Unofficial translation by TRIAL, emphasis added.

²⁰ January 2014 Judgment, Annex No. 1, p. 38.

²¹ Section 2 (h) of the 2013 Executive Ordinance defines a victim as “a person and/or his/her family members either killed or affected/harmed physically, mentally, sexually or economically as a result of serious violation of human rights during the course of armed conflict and the term also includes the community as well which has suffered serious adverse consequences in humanitarian, social and communal forms as a result of serious violation of human rights”. Such definition is more restrictive than the notion established by Principles 8 and 9 of the *UN Basic Principles and Guidelines on Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter “UN Basic Principles on Reparations”).

²² January 2014 Judgment, Annex No. 1, p. 38, emphasis added.

22. Finally, **the Supreme Court’s judgment requires implementation by the executive, which unluckily has a history of non-compliance with key Supreme Court decisions²³**. A final assessment of the impact of the judgment at stake will be possible only after the State party takes measures to implement it and amends its current legislation. Such radical changes of the current legislation will take time. Until the government of Nepal correctly implements the Supreme Court’s judgment, there is a concrete risk that State authorities continue refusing undertaking investigation and prosecution over cases of gross human rights violations, deferring them to non-yet-existing transitional justice mechanisms, as done until now²⁴. This would imply a further delay in delivering justice and redress to victims that have been waiting for over eight years. **To this end, it is important to underline that the Supreme Court did not establish a deadline for the government to implement the measures ordered in its judgment.**

| Recommendations |
|--|
| - Ensure that criminal complaints relating to gross human rights violations are duly registered , that the allegations therein reported are promptly, effectively, impartially, independently and thoroughly investigated and that those allegedly responsible for such violations are duly prosecuted, judged and, if found guilty, sanctioned; |
| - Amend the current legislation on FIRs to ensure that State officials who refuse to register a criminal complaint face administrative as well as criminal sanctions ; |
| - Take adequate measures to ensure that Supreme Court’s judgments are duly implemented by the authorities concerned and that failure to do so is sanctioned ; |
| - Refrain from any interference with courts’ proceedings, take all the possible steps to grant the independence of the judiciary and ensure that the executive will put an end to the policy of withdrawing pending cases ; |
| - Promptly and thoroughly implement the Supreme Court’s judgment of 2 January 2014 and amend the March 2013 Executive Ordinance with the help of a team of experts in international law and human rights law. In particular, establish two separate Disappearance Commission and a Truth and Reconciliation Commission; |

²³ To this hand see in particular the already mentioned 2007 judgment *Rajendra Dhakal and Others v. The Government of Nepal*, whereby the Supreme Court had already mandated the Government of Nepal, *inter alia*, to expeditiously create a Disappearance Commission and a Truth and Reconciliation Commission, as well as to criminalize both torture and disappearance in conformity with international human rights law, highlighting that instances of reconciliation could not bar investigations into gross human rights violation and prosecution of those responsible.

²⁴ April 2013 report, paras. 86-94.

- Exclude the applicability of any amnesty to those accused of gross human rights violations such as torture, rape and other forms of sexual violence, enforced disappearance or extrajudicial killings;
- Ensure that transitional justice mechanisms do not hinder criminal prosecution against those responsible for gross human rights violations;
- Create a comprehensive reparations programme for victims of gross human rights violations of the conflict era;
- Ensure that the new Commission fully recognizes the right to reparation and **grant victims of gross human rights violations, their families and members of the civil society full participation in every stage of the reparations process, i.e. design, implementation, evaluation and decision-making;**
- Ensure that the new Commission establishes the concrete forms in which reparation is to be delivered, encompassing both the individual and collective dimensions;
- Adapt the definition of reparations to international standards so as to include **restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition**. In particular, in cases of enforced disappearance, reparations shall encompass the right to be informed on the fate and whereabouts of the disappeared persons and, in the case of decease, the exhumation, identification and restitution of mortal remains to the family;
- Establish a **victims' and witness protection programme** granting security and privacy protection to all victims or witnesses, clearly spelling out the process by which witnesses can apply for and be granted anonymity;
- Grant the **full independence of the protection programme** from the executive and from any kind of political pressure;
- Create **special, independent units for witness and victims' protection and support** to assist the new Commission in the execution of its investigative tasks;
- Establish **mechanisms of psycho-social support for victims and witnesses prior, during and after their appearance before the new Commission**, with clear provisions as to their structure and functioning;
- Grant **measures of special protection to children, women and indigenous peoples**, taking into consideration their status, beliefs and customs;
- Ensure that the new Commission guarantees a **fair distribution by gender of the seats** allocated for the commissioners, who shall represent the country's different stakeholders, including at least a member of the victim's community;
- Ensure that the commissioners' selection process is both transparent and consultative;
- Ensure that the new Commission's staff requirements are carefully planned, managed and budgeted for in advance;
- Establish the source of the budget for the new Commission and guarantee its full financial and operational independence;
- Ensure that, while undertaking all the legislative reforms necessary to bring Nepalese legislation

in line with the Supreme Court's judgment, **investigations and prosecutions of gross human rights violations are not delayed any further.**

2.2 The Lack of Criminalization of Torture, Enforced Disappearance, War Crimes and Crimes against Humanity and the Failure to Investigate and Prosecute Those Responsible

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

4. *Please elaborate on measures taken to **ensure that war crimes, crimes against humanity and genocide are crimes under domestic law** and that the criminal justice system has jurisdiction over these crimes [...].*
10. *Please report on measures taken to **define and criminalize the offence of torture and enforced disappearance in accordance with international standards** and ensure that allegations of enforced disappearances, torture and cruel, inhuman or degrading treatment or punishment are effectively and impartially investigated, perpetrators are prosecuted and punished in a manner commensurate with the gravity of such acts, and victims have access to adequate remedies, including compensation. Please also respond to reports that torture has been and continues to be systematically practised in Nepal, mainly in police custody, and to allegations of torture and ill-treatment committed by non-State actors, and outline the measures taken to address these issues.*

23. At the time of writing, **torture and enforced disappearance are not codified as separate crimes under Nepalese criminal legislation.**
24. As already underlined in the April 2013 report²⁵, while torture is prohibited by Article 26 of the 2007 Interim Constitution, as of February 2014 it is not codified as a crime. This lack of criminalization prevents torture victims from filing criminal complaints and hinders any investigation and prosecution against those allegedly responsible for the offence. As mentioned above²⁶, **FIRs can only be filed for crimes listed in Schedule 1 attached to the 1992 State Cases Act. Since torture is not a crime under Nepalese law it cannot figure in that list and this implies an a priori rejection of torture-related criminal complaints.** In fact, while both torture and enforced disappearance are prohibited by the 2006 Army Act, this legislation **does not define them, does not provide specific penalties** for those responsible for their perpetration **and does not bring them within the purview of the ordinary criminal justice system**, with the consequence that no FIR can be filed in relation to these offences²⁷.

²⁵ April 2013 report, paras. 37–42.

²⁶ See *supra*, para. 11.

²⁷ April 2013 report, para. 65.

25. Currently, only the *1996 Torture Related to Compensation Act* (hereinafter TRCA) contains a definition of torture. However, this piece of legislation does not criminalize torture since it is civil in nature and it only establishes as a sanction a disciplinary action that “may” be ordered by courts²⁸.
26. In any event, it is worth recalling that **the definition of torture contained in Section 2 of the TRCA is not in line with international standards either**. The wording of such provision is tautological and includes as elements of the crime parameters additional to those required by international law, thus restricting the scope of application of the prohibition and imposing on victims a disproportionate burden of proof²⁹.
27. On a positive note, the successfully held elections of the new Constituent Assembly in November 2013 marked the end of the political stalemate which was hampering the adoption of new legislation in the country since the dissolution of the previous Constituent Assembly in May 2012. However, to date, the organizations submitting this report are not aware of any measure undertaken by the State party to amend³⁰ and enact the Draft-Anti Torture Bill that was pending in Parliament before May 2012³¹.
28. With regard to **enforced disappearance, as anticipated, it is not criminalized under Nepalese legislation**. Moreover, there was no bill for the criminalization of disappearance pending before the Parliament before the dissolution of the previous Constituent Assembly and this only procrastinates the legal vacuum³².
29. The organizations submitting this report are not aware of any action undertaken by the State party aimed at codifying enforced disappearance as a crime since the election of the new Constituent Assembly.
30. In addition **neither war crimes, crimes against humanity or genocide are crimes under Nepalese legislation**³³. While some specific conducts falling within these categories such as arbitrary detention,

²⁸ TRCA, Section 7.

²⁹ It has already been highlighted that the definition contained in Section 2 of the TRCA is limited to torture occurring during detention, requirement that, on the one hand, limits its range of application and, on the other, requires victims to prove that they were under detention when they faced their torturous treatment. To this end, see April 2013 report, para. 40.

³⁰ It is worth recalling here that the Draft-Anti Torture Bill is affected, *inter alia*, by the provision of a 35-days statutory limitation on filing complaints of torture, by the absence of provisions related to the principle of universal jurisdiction and to the *aut dedere aut judicare* principle, by the prescription of overly lenient sanctions for perpetrators of torture and by the establishment of limited amount of compensation for victims of torture. See, in detail, April 2013 report, para. 39.

³¹ See April 2013 report, paras. 37, 38 and 39.

³² The 2008 draft of the Forced Disappearance of People (Crime and Punishment) Act was dropped because of its inconsistency with international human rights standards. For similar reasons the 2011 Draft Criminal Code, containing *inter alia* a section criminalizing torture and enforced disappearance, was never passed into law.

³³ April 2013 report, paras. 23, 25, 53, 74 and 132.

torture, enforced disappearance³⁴, bodily injuries, homicide and rape³⁵, though not defined, are formally proscribed both in peace and wartime by the 2006 Army Act, war crimes, crimes against humanity and genocide are not autonomously defined and criminalized.

31. Moreover, the 2006 Army Act provides for the **exclusive jurisdiction of the Court Martial³⁶ (or Special Court Martial³⁷) over members of the Nepal Army even in relation to some offences which amount to crimes under international law such as torture, enforced disappearance and arbitrary detention**. To the contrary, in relation to homicide and rape, the 2006 Army Act makes direct reference to the relevant provisions of the *Muluki Ain* (Criminal Code) and explicitly provides for the competence of ordinary courts. However, the functional immunity established by the 2006 Army Act itself³⁸ for members of the Nepal Army can entail the competence of the Court Martial also for cases of murder that have nothing to do with the military functions of the perpetrators. In these instances the immunity clause designed by the 2006 Army Act can be arbitrarily applied also to murders that amount to war crimes and crimes against humanity³⁹.
32. Due to the lack of criminalization of torture, enforced disappearance, war crimes, crimes against humanity and genocide, as well as to numerous other impediments such as Police's refusal to register criminal complaints, procrastination of due investigations, political interferences with judicial proceedings and alleged deferral of cases to transitional justice mechanisms⁴⁰, perpetrators of gross human rights violations are currently shielded by total impunity. To date, **no one has been brought to account due to his or her responsibility in the commission of acts of torture or enforced disappearance during the conflict⁴¹**.

³⁴ See *supra*, para 24.

³⁵ See for instance 2006 Army Act, Arts. 61, 62 and 63, prohibiting, respectively, arbitrary detention, torture, enforced disappearance and bodily injuries, and Art. 66, prohibiting homicide and rape. It is to be underlined that, while the 2006 Army Act make direct reference to the *Muluki Ain* (Criminal Code) for the definition of rape and homicide and the sanctions attached to these offences, torture and enforced disappearance are not defined.

³⁶ 2006 Army Act, joint reading of Arts. 3, 61, 63 and 67.

³⁷ 2006 Army Act, joint reading of Arts. 3 and 62.

³⁸ 2006 Army Act, Arts. 22 and 23.

³⁹ On a positive note, however, it shall be stressed that Art. 69 establishes the precedence of ordinary courts over courts martial in cases of jurisdictional conflicts.

⁴⁰ See above, paras. 7-34.

⁴¹ See above, paras. 7. It is worth recalling that Nepal's tradition of gross human rights violations and lack of accountability finds its roots well before of the conflict. Already in 1994 the HRC expressed its concerns "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

33. Moreover, while victims of torture can potentially file a complaint under the *TRCA* in order to obtain compensation for the crimes suffered, under Nepalese legislation **victims of enforced disappearance are not granted any right to compensation**, let alone integral reparation.
34. Also in this case, the organizations submitting the present report are not aware of any measure adopted by the State party to tackle the described legal shortcomings. The climate of impunity and the absence of any serious intention of the State party to address the obstacles hampering the victims' enjoyment of their most fundamental rights, in turn, facilitate the recurrence of the same violations.

| Recommendations |
|---|
| - Amend the Draft-Anti Torture Bill so as to bring the definition of torture therein provided in line with the definition enshrined in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and promptly enact the Bill and attach to the crime of torture a sanction (or a range of sanctions) commensurate to the nature and gravity of the crime; |
| - Codify enforced disappearance as a separate crime under Nepalese legislation , defining it in accordance to Article 2 of the United Nations Convention for the Protection of All Persons from Enforced Disappearance and attach to the crime of enforced disappearance a sanction (or a range of sanctions) commensurate to the nature and gravity of the crime; |
| - Ensure that war crimes, crimes against humanity and genocide are criminalized under national legislation in accordance with internationally recognized standards , taking into account, in particular, the 1998 Rome Statute of the International Criminal Court, the four 1949 Geneva Conventions and their Optional Protocols, the 1907 Conventions on the Laws and Customs of War and the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide; |
| - Ensure that criminal proceedings concerning torture, enforced disappearance, war crimes, crimes against humanity, and genocide are not subjected to any statute of limitations ; |
| - Amend the <i>1992 State Cases Act</i> so as to permit the registration of FIRs for complaints of torture and enforced disappearance ; |
| - Ensure that Police act on allegations of torture and enforced disappearance also in the absence of formal criminal complaints and, in general, take all the necessary measures to remove any possible legislative or <i>de facto</i> obstacle to investigation and prosecution those allegedly responsible for the crimes; |
| - Ensure that national legislation does not allow the trial of persons alleged to be responsible for crimes under international law and gross human rights violations by military courts , or by other specialized courts that do not meet the requirements of a competent, independent and impartial tribunal under international circumstances. |

preventing the occurrence of similar acts". [...] "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". See HRC, Concluding Observations on Nepal, 10 November 1994, UN Doc. CCPR/C/79/Add.42, paras. 10 and 16.

2.3 Lack of Reparations for Conflict Victims

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

4. [...] Please clarify whether any **comprehensive reparation programme for victims of serious human rights violations committed during the 1996–2006 conflict has been established**, and also report on the disparities among categories of victims entitled to access their rights to reparation under the Interim Relief Programme.

35. In Nepal **victims of serious human rights violations committed during the 1996–2006 conflict and their relatives do not benefit from any form of reparation**. They may only receive an *interim relief*, which however is provided in rare cases and consists of seriously limited amounts of money⁴². Not only no comprehensive reparations programme has ever been adopted, but the victims' legitimate claims for justice and redress have been continuously turned down since the end of the conflict. In these years the State constantly proved to be unable to provide any form of restitution, rehabilitation, guarantees of non-repetition or satisfaction even to victims of the most egregious violations of human rights⁴³.
36. Whereas victims of human rights violations are formally entitled to compensation, the amounts granted by the current legislation are not proportionate to the gravity of the crimes at stake.⁴⁴ Pursuant to the TRCA victims of torture can yearn for a maximum compensation of 100,000 Nepali Rupees (approximately 1,000 €)⁴⁵.
37. It shall be underlined that victims' access to compensation under the TRCA is highly hindered by two main factors. First of all, pursuant to Section 2, **the TRCA only covers torture inflicted on detainees**. This requirement imposes a further burden of proof on torture victims, who need to

⁴² April 2013 report, para. 103.

⁴³ In relation to international standards on reparation see, in particular, *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>; *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. E/CN.4/2005/102/Add.1*, 8 February 2005, Principle 32; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 Dec. 1984, Art. 14; CAT, *General Comment No. 3 on Art. 14 of the Convention against Torture*, UN doc. CAT/C/GC/3 of 13 December 2012; *Declaration on the Protection of All Persons from Enforced Disappearances*, UN doc. A/RES/47/133, of 18 December 1992, Art. 19; Report of the WGEID 2012, *supra* note 4, paras 46-58; *International Convention for the Protection of All Persons from Enforced Disappearance*, of 20 December 2006, Art. 24, para. 5.

⁴⁴ Already in 1994 the HRC observed 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". See HRC, *Concluding Observations on Nepal*, *supra* note 41, para. 6.

⁴⁵ *1996 Compensation Relating to Torture Act*, entered into force on 18 December 1996.

demonstrate that they were in detention when the offence took place. In addition, those persons who are subjected to torture outside official centres of detention have no right to claim compensation. Finally, the TRCA provides for a **statutory limitation of 35 days for filing a complaint of torture that *de facto* bars many victims from seeking compensation.**

38. The 1992 *Children's Act* provides for a "reasonable compensation" for minors that have been subjected to torture⁴⁶. However, Nepalese courts have proved to consider as "reasonable" amounts of compensations that are objectively negligible, the highest known order being for 20,000 Nepali Rupees (approximately 200 €)⁴⁷.
39. Victims of torture, moreover, were not entitled to claim any interim relief through the Interim Relief Programme established between 2008 and 2009 by the Ministry of Peace and Reconstruction to provide forms of monetary assistance to relatives of deceased people, disappeared persons and those who were injured, wounded or disabled due to the conflict⁴⁸.
40. According to Sections 9(A) and 10 of the *Muluki Ain*, in cases of rape criminal courts may order compensation. This provision is not mandatory: **it is delegated to courts to assess whether any amount of compensation shall be granted to victims and how much shall it be**, in consideration of "the gravity of offence and pain suffered by the dependent minors, [...] the age and grievance suffered by the minor"⁴⁹. Moreover, the scope of this provision is **limited to female and child victims**. Forms of sexual violence other than rape are not considered by Nepalese legislation⁵⁰ and **therefore victims of such offences cannot claim any amount of compensation**.
41. Similarly, since enforced disappearance is not codified under Nepalese criminal legislation, **victims of enforced disappearance and their relatives are not entitled to any amount of compensation, unless they can demonstrate that the victim has been subjected to additional torture or that he or she is dead, which they evidently cannot do, as they ignore the fate and whereabouts of their loved ones**.
42. While the 2 January 2014 Supreme Court's judgment⁵¹ expressly mandated the government of Nepal to "provide for reparation to victims and their families with enough economic, legal and institutional arrangement"⁵², to date the State party has not given any step forward in this direction.

⁴⁶ 1992 *Children's Act*, entered into force on 20 May 1992, amended on 21 June 2000, Art. 20, para 2.

⁴⁷ April 2013 report, para. 124.

⁴⁸ April 2013 report, para. 126.

⁴⁹ *Muluki Ain*, Sections 9 A) and 10.

⁵⁰ See *infra*, paras. 43-51.

⁵¹ See *above*, para. 14.

Recommendations

- Adopt adequate measures to acknowledge the suffering of victims of gross human rights violations and grant them **integral reparation in line with international human rights standards**. To this end, adopt necessary measures to ensure that victims of gross human rights violations enjoy, beyond compensation, the appropriate forms of restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, ensure that, whenever possible, victims are restored to their original situation before the violation occurred; grant to victims as well as to their relatives legal, social, medical and psychological assistance; take all necessary measures to stop ongoing violations, to inquire into the facts and publicly disclose the truth; disclose the fate and whereabouts of persons who remain disappeared to date; consider issuing public apologies, acknowledgment of the facts and acceptance of responsibility in relation to gross human rights violations; adopt the appropriate criminal, civil, and administrative sanctions against the perpetrators; undertake all the legal reforms necessary to avoid the repetition of the violations;
- Amend the *1996 TRCA* so as to **grant torture victims the right to obtain a compensation proportionate to the gravity of the offence in consideration of the physical and mental harm, the loss of opportunities, material and moral damages, costs required by medical, psychological, social and legal services, including the abrogation of the current 35-day statutory limitation;**
- Amend the *1992 Children's Act* so as to **grant to minors subjected to torture the right to obtain a compensation proportionate** to the gravity of the crime in consideration of their special status as children, as well as of the physical and mental harm, the loss of opportunities, material and moral damages, costs required by medical, psychological, social and legal services;
- Amend Sections 9 (A) and 10 of the *Muluki Ain* so as to **grant compensation also to male victims of rape and to victims of sexual violence other than rape; take the necessary steps to ensure that any victim of sexual violence**, including victims of rape, are granted compensation proportionate to the gravity of the offence in consideration of the physical and mental harm, the loss of opportunities, material and moral damages, costs required by medical, psychological, social and legal services;
- Ensure that victims of **enforced disappearance and their relatives are entitled to full reparation**, including compensation proportionate to the gravity of the crime in consideration of the physical and mental harm, the loss of opportunities, material and moral damages, costs required by medical, psychological, social and legal services.

2.4 The Lack of Measures to Prevent and Combat Rape and Other Forms of Sexual Violence

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

10. *Please respond to concerns that impunity for sexual and domestic violence remains widespread, police often refusing to register such complaints, and report on measures taken to prevent and combat all forms of violence against women, including domestic violence, rape and other forms of sexual abuse, ensure that such acts are effectively investigated, perpetrators are prosecuted and sanctioned and victims have access to adequate remedies, including compensation. Please also elaborate on the measures taken to respond to rape committed by both State and non-State actors and to repeal the 35-day statutory limitation for filing a criminal complaint (FIR) of rape.*

Please provide statistics on the number of complaints lodged by women victims of violence, including domestic and sexual violence, of persons prosecuted and convicted, the remedies provided to victims and the number of safe shelters and any other resources allocated to assist victims of domestic violence.

43. **No progress has been registered since the submission of the April 2013 report in relation to the criminalization of forms of sexual violence other than rape⁵³.** Similarly, while rape is a criminal offence under Nepalese legislation⁵⁴, **sexual violence when committed as a war crime, crime against humanity or genocide is not proscribed in law.** To date, the State party has undertaken no effort to either codify these conducts as criminal offences or comply in any other way with the recommendations issued by the Committee on the Elimination of Discrimination Against Women (hereinafter “CEDAW”) in 2011⁵⁵ and aimed at an effective prevention and contrast of violence against women.
44. In particular, **crimes of sexual violence perpetrated during the conflict remain widely unpunished, no investigation or prosecution having been launched into these incidents.** Besides the flaws of the current legal framework and the social stigma affecting the victims of these crimes, Nepal has also failed to take steps to facilitate their access to justice.
45. In fact, the **problems previously reported in relation to the registration of a criminal complaint with the Police⁵⁶** also hamper victims of sexual violence in their quest for justice⁵⁷. The **lack of measures designed to protect victims and witnesses during proceedings** exposes the latter to risks of mockeries, threats and reprisals⁵⁸. This is all the more troubling for victims of sexual violence due to the particular nature of the offence, which sums up to a general climate of gender discrimination and to the social stigma attached to the violation. In turn, this implies that victims of sexual violence do not only face hindrances common to other categories of victims: due to the form of social violence they are subjected, the lack of measures of protection represents a further impediment to file criminal complaints also when the alleged perpetrators are private actors.
46. In addition, as already pointed out in the April 2013 report⁵⁹, under Nepalese law a criminal complaint concerning **rape must be lodged with the competent authorities within 35 days from the**

⁵³ April 2013 report, para. 53.

⁵⁴ *Muluki Ain* (Criminal Code), Section 14.

⁵⁵ CEDAW, Concluding Observations on Nepal, *supra* note 4, para. 20 (c).

⁵⁶ See *supra*, paras. 7-22.

⁵⁷ See April 2013 report, paras. 62 and 65.

⁵⁸ See April 2013 report, para. 114.

⁵⁹ *Ibidem*, para. 54.

occurrence of the offence⁶⁰. Such a short statutory limitation, bars many victims who may fail to register an FIR within 35 days due to several reasons related to the very nature of the crime - such as fear, stigma, trauma, health repercussions - as well as to specific circumstances in which the offence takes place - such as an ongoing detention. The HRC has already noticed the inappropriateness of this short statutory limitation and has recommended Nepal to amend it⁶¹. To date, however, the State party has failed to do so.

47. With regard to cases of sexual violence that occurred during the conflict, such a **short period of statutory limitation prevents victims from filing criminal complaints and grants total impunity to perpetrators**. To date, no measure has been taken by the State party to amend its legislation.
48. The State party has never adopted measures to either prevent or contrast the recurrence of episodes of sexual violence. To the knowledge of the organizations submitting the present report there are **no legislative projects aimed at changing the current legal framework**.
49. As far as the victims' right to reparation is concerned, as detailed in the April 2013 report and previously recalled⁶², victims of rape are entitled only to an "adequate compensation" to be determined by criminal courts⁶³. This means that victims of other forms of sexual violence are not entitled to any form of reparation whatsoever; that victims of rape are excluded from any other form of reparation, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition⁶⁴; and that **in the absence of a criminal conviction they are not entitled even to compensation**.
50. In particular, considering that nobody can be held accountable for offences of sexual violence perpetrated during the conflict due to the 35-day statutory limitation for filing an FIR over incidents of rape, **those who suffered sexual violence during the conflict do not have any prospect of obtaining compensation**.
51. It is also worth recalling that victims of sexual violence have not been included in the Interim Relief Programme⁶⁵ and therefore do not even enjoy the temporary form of monetary assistance thereby granted to other categories of victims.

⁶⁰ *Muluki Ain*, Section 14.

⁶¹ HRC, Case *Maharajan v. Nepal*, views of 2 August 2012, para. 9.

⁶² See April 2013 report, para. 125 and *supra*, paras. 40-42.

⁶³ *Muluki Ain*, Sections 9, a) and 10.

⁶⁴ In general, on the lack of reparations other than compensation under Nepalese legislation, see *supra*, paras. 35-42.

⁶⁵ See *supra*, para. 35 and April 2013 report, para. 126.

| Recommendations |
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| - Criminalize forms of sexual violence other than rape, such as sexual slavery, enforced pregnancy, forced prostitution, forced sterilization, forced nudity, genital and breast mutilation, forced circumcision; |
| - Codify rape and other forms of sexual violence as war crimes, crimes against humanity and genocide; |
| - Adopt all the necessary measures to facilitate the denunciation of sexual violence and to ensure to victims access to justice; in particular, consider instituting within the Nepal Police a special counselling service for victims of sexual violence and establishing gender sensitive units for the registration of criminal complaints and the conduction of investigations; |
| - Amend the 35-day statutory limitation for filing complaints of sexual violence; |
| - Ensure that any reported episode of sexual violence is promptly, independently, impartially, thoroughly and effectively investigated , even in the absence of a formal criminal complaint; also ensure that alleged perpetrators are duly prosecuted, judged and, if guilty, adequately sanctioned; |
| - Establish educational programmes with the aim to sensitize the population on the issue of sexual violence so as to eradicate the stigma attached to the crime and mitigate its social consequences; |
| - Adopt all necessary measures to ensure that victims of sexual violence have access to health care and psychological assistance free of charge , regardless to the registration of a criminal complaint or to the success of any judicial proceedings that the authorities, victims themselves or their relatives may have started; |
| - Ensure that victims of sexual violence obtain integral reparation , including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Ensure that victims are guaranteed full participation in every stage of the reparation process , i.e. design, implementation, evaluation, and decision-making. |

2.5 Recent Human Rights Violations and Ongoing Failure to Bring to Account Perpetrators of Extrajudicial Killings and Enforced Disappearance in Terai

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

11. *Please respond to reports that **unlawful use of force and well-documented violations of the right to life by State agents, including extrajudicial killings and enforced disappearances, remain unpunished**. Please provide information on the measures taken to prevent such cases, promptly and impartially investigate them, bring the perpetrators to justice and provide adequate remedies to victims or their relatives, including in the case of **alleged extrajudicial killings by state security forces, as well as serious injuries inflicted during protests, in the Terai region**. Has the State party set up a special investigative unit with sufficient independence to inquire into allegations of extrajudicial killings? Please also indicate whether human rights law, including the principles on the use of force and firearms, is a standard component of curriculums for law enforcement officials.*

52. Even though after the end of the conflict the number of reported violations of fundamental rights decreased, in several instances State agents, and in particular the **Nepal Police, still make recourse**

to arbitrary detention, torture, extrajudicial killings and even enforced disappearance⁶⁶. Nothing seems to be changed in this regard since the submission of the April 2013 report⁶⁷. Also after the election of the new Constituent Assembly held on 19 November 2013 episodes of gross human rights violations continue being registered across the country⁶⁸.

53. This holds particularly true in remote regions and, in general, outside the Kathmandu Valley. In particular, a number of cases of **extrajudicial killings**⁶⁹, **torture**⁷⁰, **arbitrary detention, and enforced disappearance**⁷¹ **have been registered since 2008 in the region of Terai, the plain region of Nepal bordering India**. To the knowledge of the subscribing organizations, these cases have **not been subjected to thorough and effective investigation and those responsible enjoy impunity**.
54. In December 2013 the Police have intensified its operations to stop armed groups active in the region, closing up on some of their alleged leaders⁷². Most of the arrests and subsequent detentions and interrogations, however, did not comply with international human rights standards. In particular, many siblings of persons arrested under suspicion of affiliation with armed groups claim that their relatives have been **arbitrarily deprived of their liberty and then tortured by the Police that tried to force them to confess their responsibility** for previously committed crimes. In some instances, the Police have allegedly **refused to grant to the arrested persons their right to contact their families and legal representatives**, concealing the fate and whereabouts of the persons deprived of their liberty for some days⁷³.

⁶⁶ April 2013 report, paras. 107–113.

⁶⁷ For instance, on 12 August 2013 Mr. Dudhraj Tamang and Mr. Rabi Shrestha were arbitrarily arrested, blindfolded, tortured and thereafter arbitrarily detained for almost one month by the Police in Kathmandu. See in detail, Asian Human Rights Commission, *Nepal, Police Arbitrarily Arrest and Torture Two Men in Kathmandu*, 16 September 2013, available at <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-120-2013>; On 13 August 2013 the mortal remains of Ram Sewak Dhobi were found in a paddy field in Marchbar, Rupandehi District. Regardless to the clear signs beatings on his body and to the mysterious circumstances surrounding Ram Sewak Dhobi's death, Police officers who were found by the villagers standing in the field next to the victim's body did not start any investigation into the incident, refused to bring his body for a post mortem examination and forced the victim's parents to cremate his body immediately. See in detail, Asian Human Rights Commission, *A man is found dead in suspicious circumstances and as the police refuse to investigate a cover-up is suspected*, 4 September 2013, available at <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-116-2013>.

⁶⁸ On 20 December 2013 13 years-old Sunita Soren and her mother Ms. Tallu Soren were arbitrarily arrested by in Jhapa district and subsequently detained for five days during which they have been severely tortured by Police officers who tried to extort their confession about an alleged theft perpetrated in a nearby house a few days before. See in detail, Asian Human Rights Commission, *Mother and a daughter severely tortured by police officers*, 21 January 2014, available at <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-009-2014>.

⁶⁹ April 2013 report, paras. 109 and 110.

⁷⁰ *Ibidem*, para. 111.

⁷¹ April 2013 report, para. 112.

⁷² See in detail THRD-A, *Bulletin, December 2013, Issue No. 5*, available at <http://www.taraihumanrights.org/contentSingle-bWZW>.

⁷³ *Ibidem*.

55. Most of the legislative flaws and *de facto* hindrances previously reported in relation to impunity for past human rights violations⁷⁴ also hamper accountability in the most recent cases.
56. While post-conflict human rights violations do not fall within the envisaged mandate of the Commission to be established pursuant to the judgment of 2 January 2014 of the Supreme Court, all the other above-mentioned obstacles to prosecution persist. In particular, victims of gross human rights violations and their relatives endure grave difficulties when it comes to trigger an investigation, the Police remaining inactive on criminal complaints concerning the involvement of State agents in the reported offences.
57. In addition to these factors hampering the victims' access to justice, the complex reality of remote regions of Nepal pose further practical hindrances. As already detailed in the April 2013 report, in the region of Terai the community generally accepts that individuals arrested, tortured or killed by Police were indeed criminals⁷⁵. In some instances also the victims' relatives are influenced by the community's view and, even when this does not happen, the social stigma attached to the consideration of their sibling as a criminal prevents them from seeking justice. This sums up to fear of retaliation from State agents for reporting the crimes, often ingenerated by more or less explicit threats advanced by public authorities⁷⁶. Against such background, many violations of human rights remain uninvestigated, victims have no access to reparations and perpetrators remain at large. The lack of prompt, *ex officio*, independent, thorough, impartial investigations, coupled with the impossibility to obtain full reparation for the harm suffered⁷⁷ therefore prevents victims of gross human rights violations from enjoying any form of justice.
58. The State party has not adopted any effective measure to **put an end to this state of affairs**. In particular, **no external oversight mechanism or special investigative unit mandated to conduct independent and impartial investigations in the region** has been established, regardless to a recommendation to do so issued by the OHCHR in 2010⁷⁸. The Nepal Police Human Rights Unit cannot be considered as such⁷⁹. Its mandate is not specific for the region of the Terai and its inquiries can only lead to "recommendation for appropriate action against police personnel found guilty of human rights violations"⁸⁰, but are *per se* insufficient to trigger criminal prosecution. The Human Rights Unit of the Nepal Police organizes, in cooperation with international organizations such as the

⁷⁴ See *supra*, paras. 7-34.

⁷⁵ April 2013 report, para. 113.

⁷⁶ *Ibid.*

⁷⁷ See *supra*, paras. 35-42.

⁷⁸ OHCHR-Nepal, *Investigating Allegations of Extra-Judicial Killings in the Terai*, July 2010, p. 10.

⁷⁹ Special Unit of the Nepal Police established on 16 December 2003 "to ensure better protection and promotion of Human Rights".

⁸⁰ Nepal Police website, *Human Rights Unit*, available at <http://www.nepalpolice.gov.np/human-rights.html>.

OHCHR-Nepal (in the past), with the National Human Rights Commission (NHRC) or with local non-governmental organizations, trainings on human rights law for law enforcement officials. However, attendance to these trainings is not mandatory and is not a key component of police personnel's *curricula*, as can be deduced by the data provided by the Police Unit itself⁸¹.

| Recommendations |
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| - Make sure that State authorities abide by the rule of law while carrying out their daily duties as well as while contrasting armed groups active in the region of Terai; in particular, ensure that no recourse is made to arbitrary detention, torture, extrajudicial killings and enforced disappearance . To this end, consider establishing an independent oversight mechanism mandated to control State agents' conduct, with a specific focus on Terai; |
| - Establish educational programmes with the aim to create awareness among the population over the human rights they are entitled to, and over the judicial remedies they can access in order to make the enjoyment of those rights effective; |
| - Potentiate the mandate and powers of the Nepal Police Human Rights Unit; ensure its complete independence from other chains of command within the structure of the Nepal Police and grant it protection from interferences in its investigations ; grant to victims of human rights violations the possibility to directly register their complaints with the Human Rights Unit through independent and safe channels of communication; grant to the Human Rights Unit the power to investigate <i>proprio motu</i> alleged human rights violations, regardless to the formal registration of a criminal complaint, and to directly trigger prosecution against those allegedly responsible for the violations; |
| - Ensure that lectures and seminars on human rights law are made a compulsory subject for law enforcement officials as well as for members of the Royal Nepal Army; |
| - Foster cooperation among the Nepal Police Human Rights Unit, the NHRC, local and international non-governmental organizations and victims' groups to ensure that the trainings for security forces are jointly delivered by these different actors so as to reach the highest possible educational standards and practical impact. |

2.6 Sanctions Imposed on Military Personnel

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

12. Please indicate the **sanctions imposed on military personnel found guilty of torture** (State party report, CCPR/C/NPL/2, para. 122) and the **remedies provided to victims**. Please clarify whether the State party plans to set up an independent complaint mechanism on the conduct of security forces and to amend the State Cases Act of 1992 by including the crime of torture of a child specified in the Children's Act of 1992 as a scheduled offence, so that a criminal complaint (FIR) may be lodged with the police.

⁸¹ Nepal Police website, *Human Rights Unit*, available at <http://www.nepalpolice.gov.np/human-rights.html>.

59. The organizations submitting this report maintain that, despite the claim of the State party that it has successfully conducted military proceedings against army personnel involved cases of torture⁸², neither the contents nor the outcome of the proceedings against those army members have been made public. Further, trials have not been carried out with the involvement of the concerned victims and, in any case, no sanction is provided for by the *2006 Army Act* for torture and enforced disappearance. While both these crimes are prohibited by Section 62 of the act, no provision sets forth the penalties concerning the proscribed conducts. Section 119 provides for the exclusive jurisdiction of a Special Court Martial for offences listed under Section 62. Nonetheless, Section 119 itself is simply a jurisdictional clause and does not establish any penalty for the offences deferred to the competence of the Special Court Martial.
60. In any event, the members of the army who have allegedly faced military proceedings are extremely few in comparison with the number of gross human rights violations perpetrated during the conflict⁸³.
61. Since no alternative system of reparation is provided for by the *2006 Army Act* no remedy could have possibly been provided to victims of torture and enforced disappearance.
62. The organizations submitting this report are not aware of any measure taken by the State party to set up an independent complaint mechanism on the conduct of military personnel or to amend the *1992 State Cases Act* so that FIRs may be registered in relation to torture on children.

Recommendations

- Amend the *2006 Army Act* so as to ensure that **ordinary courts have exclusive jurisdiction over cases of torture and enforced disappearance**;
- Ensure that the Nepal army grants **full cooperation to competent authorities in the course of investigations, prosecutions and proceedings** against members of the army allegedly responsible for human rights violations;
- Ensure that the members of the army accused of perpetrating human rights violations are **suspended from service for the duration of investigations and prosecutions**;
- Ensure that all the victims of gross human rights violations perpetrated by the Nepal army have access to integral reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

⁸² See April 2013 report, paras. 63-65.

⁸³ April 2013 report, para. 64.

2.7 Rights of People Deprived of Their Liberty

Questions Related to Articles 6, 7, 9, 10, 14, 16, 24 and 2, para. 3, of the Covenant Included in the LOIS Adopted in August 2013

16. Please describe the measures taken to **address arbitrary and unlawful detention, including maintenance of false or inadequate custody records by police and the practice of holding detainees in unofficial places of detention**, and to ensure that those responsible for such cases are duly sanctioned and victims are adequately remedied. What steps have been taken to guarantee, in practice, the rights of detained persons to notify their immediate families about their detention and to have access to a lawyer and doctor from the moment of arrest? Please also respond to reports that lengthy pretrial detention is common and provide information on non-custodial alternative measures to pretrial detention and their application in practice.

63. During his visit to Nepal in 2005 the SRT noted with concern that registers of detainees were kept without care or not kept at all⁸⁴. This conclusion holds true also to date as the **records kept by the Police in detention centres are not complete, up to date, accurate, and in some cases they are even voluntarily altered**⁸⁵. The improper maintenance of registers creates the pre-conditions for the systematic violation of the detainees' constitutionally guaranteed right to be brought before courts within 24 hours from their arrest. In addition, it favours periods of prolonged pre-trial detention.
64. In addition, the *1970 Some Public (Crime and Punishment) Act* (hereinafter *Public Offences Act*) vests Chief District Officers (hereinafter CDO)⁸⁶, whose function is administrative in nature, with quasi-judicial powers over crimes such as disturbing the peace, vandalism, rioting and fighting. The wide discretion afforded to CDOs includes the power to uphold the detention of persons suspected of having committed a crime without the need of charging such person or bringing him or her before a court of law for an oversight of the legality of his or her arrest and detention. In practice, these powers are widely misused and pre-trial detentions "often exceed the period to which persons subsequently were sentenced after a trial conviction"⁸⁷.
65. The *2007 Nepal Public Security Act* provides the government with the **power to issue an order to keep in preventive detention for up to 12 months persons suspected of posing threats to State**

⁸⁴ SRT, Mission to Nepal, *supra* note 4, Recommendation d).

⁸⁵ Advocacy Forum and Redress, *Review of the implementation of recommendations made by the Special Rapporteur on torture Manfred Nowak after his mission to Nepal in 2005*, September 2010, p. 7.

⁸⁶ *1970 Some Public (Crime and Punishment) Act*, Section 5.

⁸⁷ U.S Department of State, *2011 Country Reports on Human Rights Practices – Nepal*, 24 May 2012, available at <http://www.refworld.org/docid/4fc75a785a.html>, Section 1, d) and U.S Department of State, *2012 Country Reports on Human Rights Practices – Nepal*, 19 April 2013, available at <http://www.state.gov/j/drl/rls/hrrpt/2012/sca/204407.htm> Section 1, d).

security, without need to charge them with a crime and excluding courts from any legal oversight function over such deprivations of liberty⁸⁸. The State party has not taken any step to repel these laws or to limit the recourse to preventive and pre-trial detention in practice.

66. The widespread impunity shielding perpetrators of torture, enforced disappearance or extrajudicial killings is also common to those responsible for arbitrary detention. To the knowledge of the organizations submitting this report no State agent has been held accountable for his or her involvement in arbitrary detentions. No victim of arbitrary detention has obtained integral reparation for the offence suffered⁸⁹.

| Recommendations |
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| - Ensure that prison authorities keep updated, detailed and precise detention registers, that arrested persons are visited by medical personnel upon their arrival in detention facilities and that they are granted the right to contact their relatives and legal counsels; ensure that in any case no person can be deprived of his or her liberty for more than 24 hours without being brought to a court of law; |
| - Amend the <i>1970 Some Public (Crime and Punishment) Act</i> so as to reduce the discretion of the powers granted to CDOs and so that organs of the judiciary only have oversight over the legality of detentions and power to uphold them; |
| - Amend the <i>2007 Nepal Security Act</i> and ensure that in no circumstance whatsoever can persons deprived of their liberty be held for more than 24 hours without being brought before a court of law; |
| - Ensure that criminal complaints concerning arbitrary detention are promptly, thoroughly, independently, impartially and effectively investigated and that those allegedly responsible are prosecuted, judged and, if found guilty, sanctioned; |
| - Amend the current legal framework so that victims of arbitrary detention have access to integral reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. |

3. Other Matters of Concern

67. Although in the LOIS the HRC formulated questions relevant for victims of past and present gross human rights violations only on the matters analysed above, the associations submitting this report are persuaded that there are other matters that are subject of concern and would like to use this opportunity to update the HRC on the current situation.

⁸⁸ *2007 Nepal Public Security Act*, Section 3.

⁸⁹ The organizations submitting the present report are not aware of any victim of arbitrary detention who benefitted from any form of compensation for the offence.

3.1 Inadequate Exhumations, Identification and Return of Mortal Remains to Families (Articles 2, para. 3, 6 and 7 of the Covenant)

68. As thoroughly reported in the April 2013 report, **Nepal does not have either the necessary technical capacities or the adequate legal framework to conduct the exhumation of gravesites and identify and return the victims' mortal remains to their families**⁹⁰. Such deficiency entails an ongoing violation of the rights of victims' relatives to know the truth and to recover the mortal remains of their loved ones.
69. While in a few cases the NHRC and the Nepal Police, also with the help of the OHCHR-Nepal, carried out exhumation processes, to date no comprehensive mapping of potential gravesites containing the mortal remains of conflict-related crimes has been compiled. Moreover, the few exhumations already undertaken were performed in the absence of forensic experts, equipment and resources, which could have potentially led to loss of evidence or even identification mistakes. As a matter of fact, representatives of the civil society have repeatedly expressed their concern over the humanitarian nature of NHRC-led operations with regard to evidence collection and preservation. Matter of concern has also been the Police's failure to adequately secure gravesites. Above all, exhumations carried out by the Police are performed by those security forces that are allegedly responsible for the violations, thus hampering the independence and impartiality of the operations. Moreover, **relatives of victims do not receive any psychological assistance prior, during and after the exhumations**. To the knowledge of the subscribing organizations, the State party does not have any concrete plan to adopt a comprehensive programme to address these matters.

| Recommendations |
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| - Ensure that international standards in the field of exhumations and identification of mortal remains are followed, including sufficient linkage to criminal justice processes, guarantees of transparency, independence and impartiality, involvement of victims' relatives, establishment of psychological support before, during and after exhumations; |
| - Establish an assessment team composed of, at least, a criminal investigator, a DNA expert, a forensic pathologist, a forensic archaeologist and a forensic anthropologist and grant the assessment team total independence from political parties and from the executive; |
| - Mandate the experts team to conduct a comprehensive mapping of gravesites throughout the country; |
| - Establish a national forensic laboratory and provide adequate funding and resources; |
| - Ensure the preservation of evidence for criminal investigation . |

⁹⁰ April 2013 report, para. 100.

3.2 Lack of Protection of Victims of Human Rights Violations, Their Relatives, Witnesses and Human Rights Defenders

70. As detailed in the April 2013 report⁹¹, the lack of protection for victims of gross human rights violations, their families and witnesses strongly discourages them from reporting crimes and cooperate in the course of investigations and proceedings, thus hampering accountability⁹².
71. State authorities' resort to violence threats and re-arrests as forms of reprisals and intimidations have been repeatedly noticed and condemned by NOGs⁹³ as well as by UN bodies⁹⁴. Recently the OHCHR noted that there are "no legal provisions for witness protection in Nepal"⁹⁵. Similarly, under the current legislation no forms of psycho-social support are designed for witnesses and victims of serious human rights violations.
72. Before the dissolution of the previous Constituent Assembly the draft Code of Criminal Procedure was pending before the Parliament⁹⁶. Such Draft Bill provided, *inter alia*, for the establishment of a witness protection program which would highly improve the situation of in-court witnesses⁹⁷. Moreover, the State party prepared in 2011 a draft bill especially designed for the Protection of Witnesses that, however, has never been submitted to the Parliament⁹⁸.
73. To date, the subscribing organizations are not aware of any step undertaken by the State party to enact the draft legislation and establish a witnesses and victims' protection programme.

⁹¹ April 2013 report, paras. 114–121.

⁹² INSEC, *Witness Protection: A Study Report*, June 2011, at p. 35.

⁹³ 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>, para 3.

⁹⁴ CAT, *Concluding Observations on Nepal*, *supra* note 4, para. 28. See also, Special Rapporteur on Arbitrary Executions, *Mission Report on Nepal*, *supra* note 4, para. 55 and WGEID, *Mission Report on Nepal*, *supra* note 4, at para. 51.

⁹⁵ OHCHR, *Nepal Conflict Report 2012*, *supra* note 3, para. 183. It is worth recalling that the OHCHR itself had already recommended the establishment of a witness and victim protection program two years before. See 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.

⁹⁶ Legislative reforms related to the criminalization of torture and other international crimes as well as to compensation for victims of gross human rights violations is long overdue in Nepal. Already in 1994 the HRC recommended "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". HRC, *Concluding Observations on Nepal*, *supra* note 41, para. 18.

⁹⁷ April 2013 report, para. 118.

⁹⁸ The draft bill provided for the criminalization of a series of conducts such as bribing, harassing, threatening or otherwise intimidating a witness or his or her relatives as well as for the establishment of protection measures. Nonetheless, it also presented a serious flaw as it mandates the police to implement the program rather than a specialized and independent enforcement agency. See April 2013 report, paras. 119 and 120.

Recommendations

- Ensure that **State authorities do not harass, threat, bribe, intimidate or in any way make pressure on witnesses and victims** of gross human rights violations; ensure that **these conducts are codified as crimes** under Nepalese legislation;
- Establish a **witnesses and victims' protection programme** allowing in-camera hearings, giving witnesses the possibility to testify from secure locations and granting them that their identities remain secret;
- Ensure that **psycho-social and logistical measures of support** are granted to witnesses and victims;
- Create a **specialized, independent enforcement agency** responsible for the implementation of the witnesses and victims' protection programme.

3.3 Non-ratification of the International Convention on the Protection of All Persons from Enforced Disappearance and the Rome Statute

74. As stressed by the organizations submitting this written information in their April 2013 report, **Nepal is not a party either to the International Convention on the Protection of All Persons from Enforced Disappearance or to the Rome Statute of the International Criminal Court⁹⁹**. Nepal is neither a party to the **Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity**.

Recommendations

- **Ratify the International Convention on the Protection of All Persons from Enforced Disappearance** and make the relevant declarations pursuant to Articles 31 and 32 of the Convention recognizing the competence of the Committee on Enforced Disappearances to receive and consider individual and inter-State communications. Fully align its national legislation with all obligations stemming from the Convention
- **Ratify the Rome Statute of the International Criminal Court, the Agreement on Privileges and Immunities of the Court, and the Kampala Amendments** to the Rome Statute. Fully align national legislation with all obligations under the Rome Statute.
- **Ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity**.

⁹⁹ April 2013 report, paras. 131-133.

4. Information Concerning the Organizations Submitting the Report

TRIAL (Track Impunity Always)

Founded in 2002 TRIAL is an association under Swiss law based in Geneva. The main objective of the association is to put the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and forced disappearances). TRIAL fights against the impunity of perpetrators and instigators of the most serious crimes under international law and their accomplices. The organization defends the interests of the victims before the Swiss courts and various international human rights bodies. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law. To date TRIAL has defended more than 350 victims in the course of 132 international proceedings, submitted 40 reports to the United Nations and filed 15 criminal complaints in Switzerland.

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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 conflict that works toward bringing all the victims of conflict in a common platform for their fight for truth and justice. Currently, the society has its presence in 250 Village Development Committees in 40 districts of Nepal.

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

Himalayan Human Rights Monitor (HimRights)

Himalayan Human Rights Monitors (HimRights) was 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/>

National Network of Families of Disappeared and Missing (NEFAD)

NEFAD is an independent national level organisation working on enforced disappearance and missing persons in Nepal, consisting of families of the missing persons and led by the families of victims of enforced disappearance. It is representative of a diverse range of ethnic groups, and social backgrounds. NEFAD is politically independent. 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 working in close cooperation with various victims groups, civil society and international agencies to advance victims' rights in Nepal transitional justice process.

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

Terai Human Rights Defenders Alliance

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

www.taraihumanrights.org

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 truth and justice for the victims of conflict, calling on the State

and civil society to act towards 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>

List of the Annexes

1. Decision issued on 2 January 2014 by the Supreme Court of Nepal (unofficial translation in English).