Victim's Common Platform on Transitional Justice

FOLLOW-UP REPORT

ON THE IMPLEMENTATION OF THE RECOMMENDATIONS

ISSUED BY THE HUMAN RIGHTS COMMITTEE

(CCPR/C/NPL/CO/2)

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Submitted by

TRIAL (Track Impunity Always)

Terai Human Rights Defenders' Alliance (THRD Alliance)

Victim's Common Platform on Transitional Justice

The member organisations of the Victim's Common Platform on Transitional Justice are: National Network of Families of Disappeared and Missing (NEFAD), Conflict Victims' Society for Justice (CVSJ), Terror Victims' Orphan Society of Nepal (OTV-Nepal), Conflict Victim National Society (CVNS) Nepal, Maoist Victims Association, Conflict Victim Committee (CVC), Conflict Victims Farmers Welfare Association, Kailali, Conflict Victims Disable Association, Dolakha, Reena-Arpan Dalit Upliftment Forum, Committee for Social Justice (CSJ), Maina Bal Bikas Samittee, Ganesh-Ujjan Memorial foundation, and Guru Luitel Memorial Foundation

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Background

On 21 February 2012, Nepal presented its second periodic report (CCPR/C/NPL/2) to the Human Rights Committee (hereinafter, HRC).

In April 2013, TRIAL (Track Impunity Always), 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) submitted written information to the HRC to highlight **matters that in their view should be included in the list of issues** ("April 2013 Report").[1]

In February 2014, the above-mentioned organizations submitted an **alternative report** to the HRC in view of the examination of the second periodic report submitted by Nepal ("February 2014 Report"). [2]

On 28 March 2014, the HRC adopted its Concluding Observations on Nepal (CCPR/C/NPL/CO/2) containing a number of recommendations. In paragraph 21, the HRC requested Nepal to provide, within one year (i.e., on 28 March 2015), relevant information on the implementation of the recommendations made in paragraphs 5, 7 and 10.

TRIAL (Track Impunity Always), Terai Human Rights Defenders' Alliance (THRDA) and the recently created Victim's Common Platform on Transitional Justice, which includes three organisations that submitted the previous reports - Conflict Victims' Society for Justice (CVSJ), National Network of Families of Disappeared and Missing (NEFAD) and Terror Victims' Orphan Society of Nepal (OTV-Nepal) - and other victims' organisations, hereby submit information to the HRC on the implementation of the recommendations made in paragraphs 5, 7 and 10 of its Concluding Observations on Nepal ("the 2014 Concluding Observations").

[1] TRIAL (Track Impunity Always), Conflict Victims' Society for Justice (CVSJ), Forum for the Protection of People's Rights

[2] TRIAL (Track Impunity Always), 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), *Written Information for the Consideration of Nepal's Second Periodic Report by the Human Rights Committee (CCPR/C/NPL/2),* February 2014. The report can be found at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_CSS_NPL_16472_E.pdf

1. The Lack of Criminalisation of Torture, Enforced Disappearance and Other Gross Violations of International Human Rights Law

Paragraph 5 of the 2014 Concluding Observations

(a) Ensure that all gross violations of international human rights law, including torture and enforced disappearances, are explicitly prohibited as criminal offences under domestic law;

Paragraph 10 of the 2014 Concluding Observations

(…) It should take appropriate measures to eradicate torture and ill-treatment, including by adopting legislation defining and prohibiting torture with sanctions and remedies commensurate with the gravity of the crime, in accordance with international standards. (…)

1. At the time of writing, and despite the recommendations formulated in March 2014 by the HRC, **torture and enforced disappearance have yet to be codified as separate autonomous crimes under Nepalese criminal legislation. This situation perpetuates the climate of impunity for the perpetrators of gross human rights violations in Nepal**.

2. On 27 March 2014, under the framework of the drafting of the transitional justice bills, the government formed a "task force" with the mandate of issuing recommendations to the government on the legal framework. The task force, which was initially envisaged to have 11 members, was finally reduced to 10 members, after the victims objected to the inclusion of Mr. Chuda Bahadur Shrestha, a former police superintendent of the then Unified Security Command. Mr. Shrestha was reportedly involved in the murder of five men in Dhanusha in 2003.[3] The 10 members of the task force, under coordination of the Joint Secretary of Peace and Reconstruction Ministry Sadhu Ram Sapkota, included Joint Secretary of Prime Minister's Office Ramesh Dhakal, Under Secretary of Law Ministry Indira Dahal, Under Secretary of Ministry of Peace and Reconstruction Ganga Bahadur Kharel, Section Officer Nabin Kumar Joshi, advocates Dinesh Tripathi and Raju Chapagain, and **three victims' representatives**: Mr. Suman Adhikari, Ms. Manjima Dhakal, and Mr. Janak Bahadur Raut.[4] Despite the fact that victims' representatives were included to participate in the policy making process, the organisations submitting this follow-up report which took part to the dialogues consider that **their inclusion was a mere manoeuvre to legitimate the process without actually listening to their demands.**

3. **The task force was given 10 days to present its findings and recommendations**, which is a blatantly insufficient period of time to carry out such an important and complex mandate. On 2 April 2014, the task force presented its report to the government, including three draft bills. The first two draft bills referred to the establishment of transitional justice mechanisms – one for the

[3] Nepal News, *TRC submits report; denies amnesty for grave crimes,* 4 April 2014. Available at: http://www.nepalnews.com/index.php/politics-archive/32980-trc-task-force-submits-report-denies-amnesty-for-grave-crimes

[4] Mr. Suman Adhikari is Chairperson of the Terror Victims' Orphan Society of Nepal (OTV-Nepal). Mr. Janak Bahadur Raut is President of Conflict Victims' Society for Justice (CVSJ). Both organisations participated in the drafting of this follow-up report.

establishment of a Truth and Reconciliation Commission (hereinafter, "TRC"), another for the establishment of a Commission of Investigation of Enforced Disappeared Persons (hereinafter, "CIEDP").[5] The third **draft bill aimed at criminalising serious human rights violations under Nepalese legislation, including enforced disappearance and torture.** Similarly, the task force recommended the government to draft the necessary laws to make war crimes, ethnic cleansing, and crimes against humanity punishable in Nepal. Arguing that all three bills are complementary to each other, the task force recommended expediting the enactment and passing of all these bills together. Contrary to the recommendation of the task force, the government dealt with these legislative measures separately. It eventually passed into law the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014 (hereinafter, "TR Act").[6] However, it did not adopt **the draft bill proposed by the task force for the criminalisation of gross human rights violations**.

4. In relation to **torture**, **the legislation currently applicable in Nepal stands at the same point as the date of submission of February 2014 Report**.[7] Torture is prohibited under Article 26 of the 2007 Interim Constitution and Section 62 the 2006 Army Act.[8] However, the legislation **does not provide for a definition of torture or for specific penalties** for those responsible and **does not allow the ordinary criminal justice system to register complaints of alleged acts of torture**.[9] Moreover, the 1996 Torture Related to Compensation Act (hereinafter, "TRCA") is of a civil nature and therefore does not criminalize torture, but simply provides for the possibility of disciplinary actions ordered by courts against the perpetrators.[10] In practice, even if the court orders that the concerned authorities take disciplinary actions against those involved in torture, the concerned authorities rarely do so.[11]

5. On 21 November 2014, the Ministry of Home Affairs tabled in Parliament the Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill for approval. On 24 November 2014, the draft bill

[5] See *infra* Section 3.
[6] See *infra* Section 3.
[7] See February 2014 Report, paras. 23-27.
[8] Section 62 of the 2006 Army Act is related with Special provisions relating to offences of corruption, theft, torture and disappearance.
[9] Section 62(1) of the 2006 Army Act reads: "To commit any acts which are defined as an offence of corruption, theft, torture and disappearance by prevailing law shall be deemed to have been committed the offence of corruption, theft, torture and disappearance." Therefore, torture under the 2006 Army Act means torture defined by prevailing laws. Pursuant to Section 62(2) of the 2006 Army Act, there shall be a committee comprising of Deputy Attorney General as designated by the government of Nepal, Chief of legal section of the Ministry of Defence, Representative of Judge Advocate General Department not below the rank of Major *(Senani)* to conduct an investigation and inquiry into the offences relating to the offence of corruption, theft, torture and disappearance. Section 62(4) of the Act reads that the original jurisdiction to hear and dispose of the case relating to the offence of corruption, theft, torture and disappearance shall be on the Special Court Martial formed thereof.
[10] In this sense, in its recent views on the case *Jit Man Basnet and Top Bahadur Basnet* v. *Nepal* views of 29 October 2014 (No. 2051/2011), the United Nations Human Rights Committee affirmed, in relation to the author who was recognised as a victim of torture that "the 50,000 rupees granted to Jit Man Basnet by the NHRC as compensation does not constitute an adequate remedy commensurate to the serious violations inflicted" (para. 8.8.). Accordingly, the UN Human Rights Committee found a violation of Article 2, para. 3, in conjunction with Article 7 of the International Covenant on Civil and Political Rights.
[11] Terai Human Rights Defenders Alliance (THRDA) has litigated several cases relating to torture. In THRDA's experience, the concerned authorities have been reluctant to take any disciplinary action despite a court's decision to that effect.

was distributed to parliamentarians for discussion in the Legislative Committee. The draft bill was prepared without consulting the civil society.

6. In the draft bill, torture is defined as "physical or mental torture (*sic*.) amounting from serious hurt, pain or suffering intentionally inflicted, by act or omission*, on a person in custody or any other person* by or at the instigation of or with the consent of a person holding public post *or other person* for the following purposes: (1) obtaining information on any matter from the victim or other person; (2) obtaining confession of the victim or any other person in any offence; (3) punishing him for an act he or other person has committed or is suspected of having committed or is planning to commit; (4) intimidating or coercing him or other person for commission or omission of any act; (5) *doing any discriminatory act that is punishable by existing laws*"[12].

7. This definition presents three major drawbacks. Firstly, the "acquiescence" of the person holding a public post in an act of torture is not encompassed in the draft provision. In the proposed definition, aside from the actual perpetrator, only the instigation or consent of a third person is required – which are both active acts of commission that need to be proved. Acquiescence, which is part of the definition of the offence enshrined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, "CAT"),[13] should also be encompassed in the definition. This is important in order to extend liability more readily to superiors or colleagues of the perpetrator who have permitted the acts of torture, even if there was no active instigation or express consent.[14]

8. Secondly, the phrase "other person" raises the question of whether the definition encompasses acts of torture committed by persons who do not hold public posts. This ambiguity should be addressed, and replaced by the definition of the conduct contained in the CAT: "public official or other person acting in an official capacity".

9. Thirdly, the phrase "doing any discriminatory act that is punishable by existing laws" is narrower than the wording of the CAT (i.e. "any reason based on discrimination of any kind"). This narrower definition hence theoretically permits torture on grounds of discrimination that may not be punishable under existing laws, and should be avoided. Otherwise, possible retrogression in laws pertaining to discrimination may have an adverse effect on the prosecution of perpetrators for torture.

10. It is worth recalling that the only definition of torture currently existing under Nepalese legislation - that contained in Section 2 of the TRCA – is not in line with international standards, given that it is limited to torture occurring during detention.[15]

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[12] Unofficial translation of Section 2(k) of the draft bill, which defines "torture". Emphasis, here and elsewhere across the follow-up report, is added.

[13] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment New York, 10 December 1984. Nepal accessed the CAT on 14 May 1991.

[14] The definition of "consent" has been left ambiguous, provided that it is not stated whether consent needs to be express, or it can be implicit. As such, it is preferable to include "acquiescence" in order to extend the scope of liability for third persons.

[15] See April 2013 Report, *supra* note 1, para. 40.

11. Furthermore, the draft bill proposes **punishments of five-year imprisonment and/or monetary fines up to Nepalese Rupees (NRs) 50,000 (approx. USD 500)** for those found guilty of inflicting torture or ordering a third person to inflict torture.[16] It further proposes the punishment of four years of imprisonment and/or monetary fines up to NRs. 40,000 (approx. 400 USD) for those found guilty of intentionally hiding, helping to abscond and providing shelter to those accused of inflicting torture in order to protect them from arrest, investigation, interrogation or punishment.[17] Finally, it proposes the punishment of three years of prison and/or monetary fines up to NRs. 30,000 (approx. 300 USD) for those found guilty of encouraging torture, attempting to inflict torture and participating or helping to inflict torture, directly or indirectly.[18] In addition, the court may order the concerned authorities to take departmental action against the officer in charge.[19] Article 4 of the CAT requires States parties not only to criminalise torture, but also to "make these offences punishable by appropriate penalties which take into account their grave nature". Despite the fact that the Committee against Torture has not clearly specified a minimum penalty that would appropriately reflect the gravity of the crime of torture, it has been sustained that a sentence of at least six years is required for the penalty to account for the gravity of the crime of torture.[20] In this line, the organisations submitting this follow-up report consider that a maximum penalty of five years of imprisonment cannot be qualified as an "appropriate penalty" that takes into consideration the gravity of the offence. Therefore, even in the event that the draft bill is enacted, **if the current draft providing for a maximum penalty of five years of imprisonment of those found guilty of having committed acts of torture is not amended, the legislation will not comply with international standards**.

12. The proposed legislation envisages a statutory limitation period of 90 days for registering complaints after the person has been released from custody or after facing inhuman treatment.[21] The Committee against Torture has repeatedly stated that no statute of limitations should apply to the crime of torture.[22] Again, **if the draft bill is enacted and the proposed 90-days statute of limitations for the filing of complaints of torture enters into force, this would be at odds with international standards.**

13. **Enforced disappearance continues not being criminalised under Nepalese law**. The organisations submitting this follow-up report are not aware of **any initiative of the Nepalese Parliament to initiate a drafting process for the inclusion of acts of enforced disappearance as a separate criminal offence in the domestic legislation.** The recommendations of the above-

[16] Section 20(1)(a) of the draft bill.
[17] Section 20(1)(c) of the draft bill.
[18] Section 20(1)(b) of the draft bill.
[19] Pursuant to Section 6 of the draft bill, the personnel of the office in charge has the duty to stop torture being inflicted if he or she learns about such act or there is a reasonable ground to believe that torture acts are occurring. If the personnel of the office in charge do not fulfill such duty, he or she may be subjected to the departmental action. Pursuant to Section 21, the court may order the concerned authorities to take departmental action against the officer in charge.
[20] Chris Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, 2001, p. 342.
[21] Section 11(1) of the draft bill establishes that the victim may file the complaint relating to torture inflicted on him/her or cruel, inhuman or degrading treatment he/she faced within 90 days from the perpetration of the act or, in case of custody, 90 days after being released from custody.
[22] See, for example, CAT, *Concluding Observations on Turkey*, UN Doc. CAT/C/CR/30/5, 2003, para. 7(c); and CAT, *Concluding Observations on Chile*, UN Doc. CAT/C/CR/32/5, 2004, para. 7(f).

mentioned task force, as well as of several international human rights mechanisms, to criminalise enforced disappearance have been overlooked.

14. While it is possible to find a **definition of the "act of disappearing a person" in the TR Act**, it has the only purpose of defining the scope of the mandate of the two commissions thereby established (the TRC and the CIEDP) and thus it **does not replace a criminalisation of enforced disappearance**, which would require criminal sanctions attached to the offence. Moreover, the definition contained in the TR Act is not in line with that contained in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance.[23]

15. Similarly, there is **no information of any intention of the government of Nepal to ratify the Convention for the Protection of All Persons from Enforced Disappearance** and to recognise the competence of the Committee on Enforced Disappearances pursuant to Articles 31 and 32 of the Convention.

16. Finally, **war crimes, crimes against humanity and genocide continue not being autonomously defined and criminalised under Nepalese legislation**.[24]

2. The Failure to Effectively Investigate, Judge and Sanction Those Responsible for Gross Human Rights Violations Committed during the Armed Conflict

Paragraph 5 of the 2014 Concluding Observations

(b) End all forms of political interference in the criminal justice system and undertake independent and thorough investigations into alleged conflict-related cases of human rights violations, and hold the perpetrators accountable without any further delay. The Committee stresses that transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious human rights violations;

17. Besides an anecdotic and insufficient condemn by the criminal justice system of five perpetrators of human rights violations committed during the conflict[25] **the lack of politically-independent investigations into alleged conflict-related human rights violations cases remains the general trend.** Courts continue to be politically-influenced and contribute to perpetuate the climate of impunity,[26] either by not inflicting proper penalties to those found guilty of human rights

[23] Advocacy Forum Nepal, TRIAL and REDDRESS, *Paying Lip Service to Justice: the newly adopted TRC Act breaches international law and Flouts the decision of the Supreme Court of Nepal*, June 2014. Available at: http://tbinternet.ohchr.org/Treaties/CRC-OP-AC/Shared%20Documents/NPL/INT_CRC-OP-AC_NGO_NPL_17969_E.pdf para. 35.
[24] See February 2014 Report, paras. 30-31.
[25] See below para. 18.
[26] For more details, see February 2014 Report, paras. 7-22.

violations, or merely by not showing any serious intention to investigate the facts and to prosecute the perpetrators.[27]

18. With an illusory intention to break the climate of impunity, on 7 December 2014 the Dailekh District Court issued its verdict on the execution of Mr. Dekendra Raj Thapa, who was allegedly abducted, severely tortured and buried alive on 26 June 2004 by Maoist insurgents.[28] The trial of the accused, opened in 2008, was weakened by the progressive retraction of all the testimonies of the witnesses, who reportedly received pressures and threats to do so.[29] The Court found the five accused[30] **involved**[31] **in the murder and sentenced them to between one and two years of imprisonment.** The organisations submitting this follow-up report welcome the decision of the Dailekh District Court to punish the perpetrators, but express their concern for the fact that **the sentences imposed to the culprits do not reflect the serious nature of the crimes concerned**. In this sense, it is stressed that this decision, on the one hand, fails to adequately comprehend the seriousness of a gross human rights violation such as the torture and arbitrary killing by burial of an alive person; and, on the other hand, **represents an isolated decision that cannot be interpreted as a change in the tendency of impunity and lack of investigation** of thousands of human rights violations committed during the armed conflict.

19. The two following examples evidence that there is no serious intention of the Nepalese authorities to investigate the violations committed during the conflict and to prosecute those responsible. On 13 April 2014, the Chitwan District Attorney Office brought a charge-sheet seeking life imprisonment with confiscation of entire property against 13 individuals said to be former Maoist rebels[32] accused of being involved in the abduction and killing of the 19-year-old Mr. Krishna Prasad Adhikari by Maoist cadres in June 2004.[33] Seven out of the 13 accused were arrested on different dates[34] but all were eventually released on bails of between NRs 20,000 (approx. USD

[27] See examples below in paras. 19 and 20.
[28] The case was filed on 28 January 2013, despite the reported attempts of the Maoist government to obstruct the process. See One World South Asia, *Journo murder: Nepal govt accused of obstructing justice,* 15 January 2013, Available at: http://southasia.oneworld.net/news/journo-murder-nepal-govt-accused-of-obstructing-justice.
[29] Nepali Times, *Justice under threat,* 22-28 august 2014. Available at: http://nepalitimes.com/article/nation/justice-for-dekendra-thapa,1619.
[30]The five accused are Mr. Nirak Ghartimagar, Mr. Harilal Pun, Mr. Jaya Bahadur Shahi, Mr. Lakshiram Ghartimagar and Mr. Bir Bahadur KC. It should be highlighted that Mr. Laxiram Gharti confessed that he and the other four accused had buried Mr. Dekendra alive after severely torturing him, following instruction of the party.
[31] Though these five accused were charged with murder, the court found them guilty for collaborating in the crime, but not as authors, pursuant Section 17(3) of Chapter on Homicide of *Muluki Ain* (Criminal Code): "A person who is involved in discussion/preparation (Sallaha) through any other means and appears in the scene of crime and watches the incident without doing anything else or a person who is indulged in the commission of offence except as provided hereinabove, the person shall be punished with imprisonment for a term ranging from six months to three years".
[32] The 13 accused are Mr. Chabi Lal Poudel, Mr. Bhishma Raj Poudel, Mr. Ram Prasad Adhikari, Mr. Parshuram Poudel, Mr. Kali Prasad Adhikari, Mr. Him Lal Adhikari, Ms. Sita Adhikari, Mr. Ram Prasad Adhikari, Mr. Megh Nath Adhikari, Ms. Januka Poudel, Ms.Subhadra Tiwari, Bishnu Tiwari, and Mr. Rudra Acharya.
[33] Ekantipur, *Adhikari murder case: Charge-sheet seeks life imprisonment against 13*, 13 April 2014. Available at: http://www.ekantipur.com/2014/04/13/top-story/adhikari-murder-case-charge-sheet-seeks-life-imprisonment-against-13/388216.html.
[34] Mr. Chabi Lal Poudel and Mr. Bhishma Raj Poudel were arrested on 15 April 2014 and released on 17 April 2014 on bails of Rs 20,000 (200 USD) and Rs 27,000 (270 USD). See Ekantipur, *Chitwan court orders release of Fujel incident accused*, 17 April 2014. Available at: http://www.ekantipur.com/2014/04/17/top-story/chitwan-court-orders-release-of-fujel-incident-accused/388416.html. Him Lal Adhikari, Kali Prasad, Megh Nath,Sita Adhikari and Bishnu Prasad Tiwari were arrested

200) and 27,000 (approx. USD 270), due to lack of sufficient evidence. Against this background, it is noteworthy that the United Communist Party of Nepal (UCPN-Maoist) had repeatedly protested and organized strikes against the investigation of this case.[35] On 5 April 2009, the National Human Rights Commission (hereinafter, "NHRC") had already recommended the government to ensure that criminal investigation on the case was carried out, and again urged it to implement its recommendation on 12 August 2013.[36] However, the organisations submitting this follow-up report believe that **the real reason that led the authorities to initiate the investigation of this case was the hunger strike initiated in August 2013 by the parents of the victim**, Mr. Nanda Prasad Adhikari and Ms. Ganga Maya Adhikari. After breaking their fast lasted for around one month, following the government's assurance to investigate the murder of their son, the couple resumed their fast-unto-death on 24 October 2013 in order to bring attention to the serious flaws and shortcomings in the investigation carried out by Nepalese authorities. As a consequence of this prolonged hunger strike, **Mr. Nanda Prasad Adhikari died on 22 September 2014 without seeing justice delivered against the perpetrators of the killing of his son**.[37] On 18 October 2014, Ms. Ganga Maya Adhikari broke her fast-unto-death on the 359th day, following a five-point agreement with the government. The five-point agreement included the government's commitment to search for Mr. Rudra Prasad Acharya - the main accused in her son's murder — and produce him before the court; resettlement of her family; free health treatment throughout her life; security for her and her elder son Mr. Noor Prasad; and the government's pledge to perform the final rites of Mr. Nanda Prasad, her husband.[38] At the date of submission of this follow-up report, the case remains *sub judice* before the Chitwan District Court. The organisations submitting this follow-up report are not aware of any other development in the investigation of the case and of any serious attempt to identify and prosecute the perpetrators. Furthermore, the main accused, Mr. Rudra Prasad Acharya, is reportedly living in Northern Ireland. Despite civil society demands that the District Court issues a warrant for his arrest in order to initiate actions through the INTERPOL, no such warrant has been issued to date. There is a high chance that this case will follow the fate of the more than a thousand proceedings in which the charges were eventually dropped and the accused released, following interferences from the executive branch with the independence of the judicial system.[39]

20. Similarly, the lack of intention of the authorities to investigate conflict-related gross human rights violations and to punish those responsible was manifest in the event of the so-called "Dhanusha-five" case. On 23 July 2014 the remains of five youths allegedly killed by security forces in the district of Dhanusha in 2003 were handed over to their family members, in a ceremony organized

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between the 31 July and 1 August 2014. See Ekantipur, *Adhikari murder: Three accused freed on bail*, 31 July 2014. Available at: http://www.ekantipur.com/2014/07/31/top-story/adhikari-murder-three-accused-freed-on-bail/392985.html.

[35] Ekantipur, *UPCN (Maoist) enforces transport strike in Chitwan*, 15 April 2014. Available at: http://www.ekantipur.com/2014/04/15/top-story/upcn-maoist-enforces-transport-strike-in-chitwan/388313.html.

[36] Advocacy Forum, Emblematic cases: Krishna Adhikari. Available at: http://advocacyforum.org/emblematic-cases/2013/09/krishna-adhikari.php.

[37] Human Rights Watch, *Nepal: Adhikari Death Highlights Injustice,* 26 September 2014. Available at: http://www.hrw.org/news/2014/09/26/nepal-adhikari-death-highlights-injustice.

[38] The Himalayan Times, *Ganga Maya breaks fast-unto-death*, 19 October 2014. Available at: http://www.thehimalayantimes.com/fullTodays.php?headline=Ganga+Maya+breaks+fast-unto-death+&NewsID=430983.

[39] See February 2014 Report, para. 12.

by the NHRC.[40] Representatives of the local administration and police attended the ceremony, but they did so in their personal capacity, rather than their official capacity. Regrettably, during the ceremony **there was no acknowledgement of the State's responsibility** for the deaths of the five youths, **nor any assurance that the truth would be sought and that the perpetrators would be brought to justice. Neither the government nor the concerned authorities have formally apologised with the victims so far.**

21. As the above-mentioned examples show, the only cases where it is possible to open investigations are those where victims actually died and mortal remains were recovered. In cases of torture and enforced disappearance, mainly due to the flawed domestic legislation[41], investigations are not even opened.

3. Failure to Create an Effective and Independent Transitional Justice Mechanism

Paragraph 5 of the 2014 Concluding Observations

(c) Create, as a matter of priority and without further delay, a transitional justice mechanism in accordance with the Supreme Court writ of mandamus of 2 January 2014 and ensure its effective and independent functioning in accordance with international law and standards, including by prohibiting amnesties for gross violations of international human rights law and serious violations of international humanitarian law.

22. The Supreme Court's decision of 2 January 2014 ordered the government to amend some aspects of the Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2069 (14 March 2013) in order to create a transitional justice mechanism in line with international standards.[42]

23. On 27 March 2014, the government formed the above-mentioned task force [43] to make recommendations to the government on the legal framework within 10 days. As already recalled, **on 2 April 2014 the task force submitted its recommendations in the form of three draft bills to the government**: one for the establishment of a TRC, one for the establishment of a CIEDP, and one aimed at criminalizing serious human rights violations.[44]

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[40] Ekantipur, *Victims' remains handed over to kin*, 24 July 2014. Available at: http://www.ekantipur.com/2014/07/24/top-story/victims-remains-handed-over-to-kin/392613.html.
[41] See *supra* section 1.
[42] The ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2069 (2013) was challenged in the Supreme Court due to controversial provisions including amnesty and reconciliation. See My Republica, SC rejects TRC ordinance over blanket amnesty, 3 January 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287.
[43] See *supra* para. 2.
[44] My Republica, *Panel submits draft TRC, Disapperance Commission bills*, 13 April 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=72139.

24. The government acted as if these draft bills had never been drafted, and on 5 April 2014 it appointed a "high-level committee" chaired by Mr. Raju Man Singh Malla, Secretary of the Office of the Prime Minister, to draft the bills establishing the two commissions, which was eventually replaced by a 6-member Committee representing the three main political parties. This Committee was entrusted with the mandate of finalising the bills and elaborated its own recommendations, which differed from those issued by the task force.

25. The Committee's recommendations were approved by the main political parties and on 18 April 2014 the government tabled the TR Act, which provided for the establishment of two commissions, a TRC and a CIEDP. **The TR Act was adopted by the Parliament on 25 April 2014,**[45] after members of the Parliament who had tabled 18 amendments on 119 points of the act allegedly received pressures from their respective party leaders to withdraw the proposed amendments.[46]

26. The 2014 TR Act has essentially the same contents than the 2013 Ordinance and is therefore contrary to the 2 January 2014 Supreme Court's decision. There are several issues of concern in relation to the 2014 TR Act, which can be summarised as follows: a) flawed understanding of the notion of reconciliation and related excessive power of the commissions; b) powers to recommend amnesty for crimes under international law and gross human rights violations; c) lack of criminalisation of offences that amount to crimes under international law and inadequate prosecution system; d) non-recognition of victims' right to reparation; and e) lack of independence of the commissions.[47]

27. Despite strong mobilization of civil society pointing out the mentioned concerns about the provisions of the TR Act[48] and, in particular, calling for the removal of the amnesty provision,[49] and the declarations of the then **UN High Commissioner for Human Rights who criticised the TR Act for its failure to abide by the Supreme Court's decision of 2 January 2014 and minimum international standards,**[50] the President signed the TR Act on 11 May 2014. The TR Act came into force immediately, and was published in the Official Gazette on 21 May 2014.

28. On 3 June 2014, 234 victims filed a writ petition before the Supreme Court seeking nullification of Sections 13(2), 13(4) and 26(2); amendment of Sections 22(1), 24, 25(3), 26(5) and 29(1))[51] of the

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[45] Ekantipur, *Parliament passes TRC bill*, 26 April 2014. Available at: http://www.ekantipur.com/2014/04/26/top-story/parliament-passes-trc-bill/388765.html.

[46] Nepal News, *House passes bill on TRC and enforced disappearance commission,* 26 April 2014, available at: http://www.nepalnews.com/index.php/politics-archive/33770-house-passes-bill-on-trc-and-enforced-disappearance-commission.

[47] For a further analysis of the questions at stake, see TRIAL, Advocacy Forum and REDRESS "Paying Lip Service to Justice: the Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal", See *supra* note 23.

[48] The Himalayan Times, *Call to amend TRC Bill for justice*, 27 April 2014. Available at: http://thehimalayantimes.com/fullTodays.php?headline=Call+to+amend+TRC+Bill+for+justice&NewsID=413104.

[49] Nepal News, *Intl human rights bodies say amnesty provision in Nepal TRC bill violate international law,* 17 April 2014, available at: http://www.nepalnews.com/index.php/news/33450-Intl-human-rights-bodies-say-amnesty-provision-in-Nepal-TRC-bill-violate-international-la.

[50] Kathmandu Post, *Pillay urges gov't to uphold int'l law on TRC, disappearance bills,* 16 April 2014, available at: http://www.ekantipur.com/2014/04/16/top-story/pillay-urges-govt-to-uphold-intl-law-on-trc-disappearnce-bills/388333.html.

[51] Section 13 (2), (3) and (4) (jurisdiction of the Commission: potential to transfer cases *sub-judice* in the courts); section 22(1) (reconciliation); section 24 (1) (return of seized/confiscated property); section 25 (5) (recommendation for departmental

TR Act[52] and necessary orders to be issued in the name of the government of Nepal to formulate the laws in compliance with previous decisions of the Supreme Court.[53] The petitioners also requested from the Supreme Court a *mandamus* order so that the necessary amendments could be made to all provisions of the TR Act not line with national and international legal standards. On 5 June 2014, the Supreme Court, after listening to the applicants and respondents, decided not to issue the *interim* order to suspend the provisions of the TR Act as requested by the applicants, but it issued a show-cause order.[54] On 9 July 2014, the government replied arguing that the TR Act was consistent with Nepal's obligations under international law.[55]

29. On 16 June 2014, pursuant Section 3(3) of the TR Act, the Cabinet Meeting decided to form a 5-member Recommendation Committee,[56] in charge of recommending candidates to be appointed as Commissioners of the TRC and CIEDP.[57] The process was criticised from the outset due to the lack of transparency. Former Chief Justice Om Bhakta Shrestha was appointed as Chairperson and three other members were also appointed. The process was, however, delayed for different reasons. In the first place, one of the appointed members of the Recommendation Committee refused her nomination arguing that the government should wait until the Supreme Court pronounced a verdict and that the TR Act "was not victim-friendly"[58]. The government took time to replace her till 22 August 2014.[59] Secondly, the fourth member, who had to be the member recommended by the NHRC pursuant Section 3(3) of the TR Act, could not be appointed until the NHRC was given full shape in October 2014, given the posts of Commissioners at the NHRC were vacant since September 2013.[60] Only on 27 October 2014, the Commissioner of the NHRC was sent as a representative to the Recommendation Committee [61] and the Recommendation Committee was given a full shape.

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action); section 26 (1), (2), (5) (recommendation for amnesty); section 29 (1) (executive control over the Office of the Attorney General).

[52] My Republica, Conflict victims move SC seeking amendment to TRC act, 4 June 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=76279.

[53] Supreme Court of Nepal, Case *Suman Adhikari et. al.* v. *Government of Nepal et.al.*. Writ Petition Number 070-WS-0050, decision of 26 February 2015.

[54] My Republica, SC summons parties in TRC petition, 5 June 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=76415.

[55] My Republica, TRC Act consistent with int'l law: Government, 9 July 2014. Available at: http://www.nepalupclose.com/News.aspx?ID=625337.

[56] The government recommended former Chief justice Om Bhakta Shrestha as a chair of the Committee, and Sapan Malla Pradhan, Pradip Pokhrel, Ghanashyam Lal Das and a member to be nominated by Chairman of the NHRC as the four members of the Committee.

[57] My Republica, Govt forms 4-member TRC recommendation committee, 16 June 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=77193; and INSEC Online, *Recommendation Committee Formed to Expedite TRC Process,* 17 June 2014. Available at: http://www.inseconline.org/index.php?type=news&id=14166&lang=en.

[58] Ekantipur,TRC naming panel seeks fourth member urgently, 14 July 2014. Available at: http://www.ekantipur.com/2014/07/14/top-story/trc-naming-panel-seeks-fourth-member-urgently/392126.html.

[59] The Himalayan Times, *Lawyer Khanal replaces Malla in committee to pick TRC commissioners*, 25 August 2014. Available at:
http://thehimalayantimes.com/rssReference.php?headline=Lawyer+Khanal++replaces+Malla+in+committee+to+pick+TRC++commissioners&NewsID=425354.

[60] See *infra* Section 6.

[61] The representative sent was Mr. Sudip Pathak. The government had appointed former Chief Justice Anup Raj Sharma as a chairperson of the NHRC and Mr. Prakash Osti, Mr. Sudip Pathak, Mr. Mohna Ansari and Mr. Govinda Sharma Paudyal as members of the NHRC on 20 October 2014, after 13 months in which the positions were vacant. See Ekantipur, *Pathak in*

30. On 14 July 2014, another writ petition was brought by Forum for Women, Law and Development (hereinafter, "FWLD") challenging some provisions of the TR Act **considered discriminatory against women.**[62] The petition challenged Section 3 of the TR Act, which provides that one out of the five members of each Commission ought to be a woman. The applicants claimed that this provision does not guarantee a proportional representation of women as Commissioners and as personnel of the two Commissions. The second claim related the definition of "victim" included on Section 2(h) of the TR Act, which does not include married daughters, being therefore discriminatory. The petitioners further claimed that statute of limitations should not apply to conflict-era cases. Other claims reiterate the claims of the writ petitions submitted on 3 June 2014, namely those related to the possibility of granting amnesties and the powers of the executive branch to recommend prosecution.

31. On 5 August 2014, seven conflict victims filed **another writ petition before the Supreme Court seeking a stay order against the establishment of the Recommendation Committee**.[63] The petitioners claimed that the composition of the Recommendation Committee and, in particular, the appointment of former Chief Justice Om Bhakta Shrestha as a Chairperson was unconstitutional, given that Article 106 of the Interim Constitution bars former Chief Justices from holding any government posts other than the Chairperson of the NHRC.[64]

32. On 20 August 2014, a single bench of Chief Justice Damodar Prasad Sharma issued the show cause notice to the government asking to furnish a written statement within 15 days over the formation of Recommendation Committee under the leadership of the former Chief Justice. However, the Supreme Court did not issue a stay order on the formation of the Recommendation Committee. Later, **this writ petition was joined to the writ petition filed by 234 victims on 3 June 2014**.[65]

33. In the meantime, on 4 July 2014 **five United Nations Office of the High Commission for Human Rights (hereinafter "OHCHR") Special Rapporteurs** – Mr. Pablo de Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence; Mr. Ariel Dulitzky, Chair-Rapporteur, Working Group on Enforced or Involuntary Disappearances; Mr. Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Ms. Rashida Manjoo, Special Rapporteur on Violence against Women, its Causes and Consequences; and Mr. Juan E. Méndez, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading

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TRC recommendation panel, 27 October 2014. Available at: http://www.ekantipur.com/2014/10/27/top-story/pathak-in-trc-recommendation-panel/396867.html.

[62] Supreme Court of Nepal, Case *FWLD et al.* v. *government of Nepal et al.,* Writ No. 070-WS-0052 registered on 14 July 2015.

[63] Supreme Court of Nepal, Case *Gyanendra Raj Aran et al.* v. *government of Nepal et al.*, Writ Petition No. 071-WS-0002, registered on 5 August 2014.

[64] My Republica, *Petition seeks dissolution of recommendation committee*, 5 August 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=80399; and Ekantipur, *TRC Formation: Victims say panel is not legitimate*, 26 September 2014. Available at: http://www.ekantipur.com/2014/09/26/national/trc-formation-victims-say-panel-is-not-legitimate/395632.html.

[65] My Republica, *SC issues show-cause notice to govt*, 20 August 2014. Available at: http://www.myrepublica.com/portal/index.php/thweek/www.myrepublica.com/sradda.thapa@gmail.com?action=news_details&news_id=81395.

Treatment or Punishment- **urged the government to amend the TR Act by removing the possibility of granting amnesties in cases of serious human rights violations** and expressed their concerns for many other provisions contained in the TR Act.[66]

34. Despite the pending writs before the Supreme Court and the calls from the international community and Nepalese civil society, the Recommendation Committee started to work and adopted its working methods on 11 September 2014. **On 19 September 2014, the Committee decided to call for applications from eligible candidates to Chairpersons and members of the two commissions until 27 September 2014.**[67] The application form was made available in the Peace Trust Fund Secretariat and was also uploaded on the website of Ministry of Peace and Reconstruction.[68] On 22 September 2014, various conflict victims' groups condemned the procedure for electing members for the Commissions, claiming that it was against the TR Act itself and the Supreme Court's verdict of 2 January 2014**. The victims expressed their concern that the procedure had been adopted without consulting stakeholders and that it would lead to political appointments of commissioners.** They further demanded the possibility of filing complaints against the nominations.[69] However, on 28 September 2014, a member of the Recommendation Committee said in local media that the Committee had received 65 applications and that a list of shortlisted candidates would be made public for the citizens to present their comments. He also advanced that the list would include candidates picked by the Committee itself, invoking "a provision" that allows the Committee to headhunt persons deemed indispensable for the composition of the Commissions, should they not apply on their own initiative.[70]

35. Considering the activities of the Recommendation Committee, **the victims brought another writ petition in the Supreme Court seeking an *interim* order to instruct the Recommendation Committee for nominating Chairperson and members of the TRC and CIEDP to halt its work**.[71] On 14 October 2014, the Supreme Court issued a show cause notice to the Recommendation Committee, Prime Minister Office, Ministry of Peace and Reconstruction, Ministry of Law, CA Secretariat and Attorney General Office but did not issue the *interim* order as requested by the petitioners.[72] This petition was also joined with the writ petitions filed on 3 June 2014 and 5 August 2014.

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[66] OHCHR News, *Nepal: Truth-seeking legislation risks further entrenching impunity, alert UN rights experts*, 4 July 2014. Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14824&LangID=E and My Republica, *OHCHR opposes reconciliation without victims" consent,* 8 July 2014. Available at: http://myrepublica.com/portal/index.php/media/twb/v?action=news_details&news_id=78559.

[67] Ekantipur, *Panel set to start TRC formation*, 11 September 2014. Available at: http://www.ekantipur.com/the-kathmandu-post/2014/09/11/top-story/panel-set-to-start-trc-formation/267336.html.

[68] www.peace.gov.np.

[69] My Republica, *Victims unhappy with work procedure of TRC panel*, 27 September 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=83929; and Ekantipur, *Victims seek amendment in TRC formation*, 15 September 2015. Available at: http://www.ekantipur.com/2014/09/15/capital/victims-seek-amendment-in-trc-formation/395065.html.

[70] My Republica, *TRC panel to out own roaster, applicants list post-Dashain*, 30 September 2014. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=84106.

[71] Writ Petition No. 071-WO-0239.

[72] Ekantipur, *SC show cause over TRC picks, 15 October 2014*. Available at: http://www.ekantipur.com/2014/10/15/capital/sc-show-cause-over-trc-picks/396367.html.

36. On 18 December 2014, victims' organisations and human rights organisations objected once again to the procedure, by submitting a joint letter to the Prime Minister regarding the formation of the two Commissions.[73] Their concerns and demands were again overlooked.

37. On 12 January 2015, the Recommendation Committee finally made public a roster of candidates for the TRC and CIEDP, containing 68 names. A period of five days for citizens to register complaints before the Peace Committees and the District Administration Offices against the candidates was opened.[74] However, the Recommendation Committee never disclosed whether it received any objection against one or more of candidates listed in the roster.

38. On 10 February 2015, the Recommendation Committee recommended the names of the Commissioners for the TRC and the CIEDP. Former General Secretary of Parliament Secretariat Surya Kiran Gurung and former Chief Justice of the Appellate Court Lokendra Mallik were recommended to head the TRC and CIEDP respectively. Ten other commissioners were recommended for a two-year mandate.[75] The very same day, the names were approved by the Cabinet[76] and on 11 February 2015 both Chairpersons and all Commissioners took the oath of office.[77] Victims' groups and human rights organisations continue to express their concerns in relation to the process and the contents of the TR Act itself.[78]

39. On 12 February and 26 February 2015 respectively, the first and second hearing on the writ petitions before the Supreme Court took place. On 26 February 2015 a special bench of Justices Kalyan Shrestha, Baidyanath Upadhyaya and Cholendra SJB Rana decided the petitions against the TR Act. The Supreme Court issued the writ petition filed on 3 June 2014 but quashed the other two petitions related to the Recommendation Committee. **The Supreme Court annulled some wording of Sections 26(2) and 29(1) of the TR Act that gave discretionary powers to the transitional justice mechanisms to recommend amnesty, and that allowed the Ministry of Peace and Reconstruction to decide whether or not to prosecute perpetrators of crimes of serious nature**. Likewise, the Supreme Court held that the victims' consent should be made

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[73] Human Rights Watch, *Nepal: Joint Letter Regarding Formation of the Truth and Reconciliation Commission and the Commission on Enforced Disappearances*, 18 December 2014. Available at: http://www.hrw.org/news/2014/12/18/nepal-joint-letter-regarding-formation-truth-and-reconciliation-commission-and-commi.

[74] The list of the members was released at the website of the Ministry of Peace and Reconstruction: http://www.peace.gov.np/uploads/files/List%20of%20candidate.pdf. See also The Himalayan Times, Shortlist for TRC members released, 12 January 2015. Available at: http://www.nepalupclose.com/News.aspx?ID=676131; and Ekantipur, *Recommendation committee announces candidates' roster*, 13 January 2014. Available at: http://www.ekantipur.com/2015/01/13/capital/recommendation-committee-announces-candidates-roster/400277.html.

[75] Lila Udasi, Shree Krishna Subedi, Dr Madhavi Bhatta and Manchala Jha are the members of TRC. Similarly, the members of CED are Bujul Bishwakarma, Dr. Bishnu Pathak, Nar Kumari Gurung and Ai Bahadur Gurung.

[76] My Republica, *Cabinet forms long-awaited TRC, CED finally,* 10 February. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=91925.

[77] Ekantipur, *TRC, CED office bearers sworn in,* 11 February 2015. Available at: http://www.ekantipur.com/the-kathmandu-post/2015/02/11/nation/trc-ced-office-bearers-sworn-in/273105.html.

[78] Victims questioned the commitment and credibility of the TRC and CIEDP through a press release issued on 11 February 2015. The Victims' Common Platform on Transitional Justice issued the press release stating their concerns and objections on the current TRC and CIEDP. See Ekantipur, *Victims question TRC, CED credibility,* 11 February 2015. Available at: http://www.ekantipur.com/2015/02/11/top-story/victims-question-trc-ced-credibility/401541.html.

mandatory for reconciliation and that cases that are *sub judice* at various courts cannot be transferred to the Commissions.[79]

40. The Supreme Court's verdict was well received by the conflict victims and local human rights community. However, the conflict victims expressed their doubts regarding the independence and effectiveness of the Commissions. Meantime, the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein welcomed the Supreme Court's decision for upholding international standards relating to accountability for gross violations of international human rights law and serious violations of international humanitarian law.[80]

41. On the other hand, on 10 March 2015, UCPN (Maoist) and CPN-Maoist issued a joint press statement expressing their concern over the recent Supreme Court's decision regarding the jurisdiction of the TRC and CIEDP.[81] They claimed that the Supreme Court's ruling was directed towards reviving the decade-long conflict rather than taking it to a logical conclusion.[82] Likewise, lawyers affiliated to UCPN (Maoist) and CPN-Maoist accused the Supreme Court, the NHRC and the Nepal Bar Association of not being neutral while dealing with conflict-era cases.[83] Many political parties have not made their stance clear regarding recent development so far.

42. Currently, **the Commissions have not officially started working on their truth-seeking mandate.** So far, the Commissions have been working on drafting their working procedures and arranging other logistical aspects, such as finding an office.[84] As the media reported, the Commissions are planning to first raise awareness about their functioning and only start taking up complaints after few months.[85] Mr. Lokendra Mallik, head of CIEDP declared that **"the commission could ask people to register their complaints only after at least four months".**[86] Furthermore, **the government has yet to provide the budget to the Commissions** and it is currently unknown whether the resources allocated to the Commissions will be sufficient for their mandate.

43. **The petition filed by FWLD challenging sections of the TRC Act deemed discriminatory against women is still *sub judice* in the Supreme Court.**[87] Though the petition was brought

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[79] Supreme Court of Nepal, Case *Suman Adhikari et al.* v. *government of Nepal et al.*, see supra note 53.
[80] My Republica, *OHCHR hails SC rejection of amnesties for serious HR violations*, 7 March 2015. Available at: http://new.myrepublica.com/politics/item/16734-ohchr-hails-sc-rejection-of-amnesties-for-serious-hr-violations.html#sthash.plvTbGsV.dpuf.
[81] My Republica, *UCPN (M), CPN-M condemn SC verdict on TRC jurisdiction*, 10 March 2015. Available at: http://new.myrepublica.com/politics/item/16913-ucpn-m-cpn-m-condemn-sc-verdict-trc-jurisdiction.html#sthash.eXXaH3Wi.dpuf.
[82] *Ibid.*
[83] My Republica, *Maoist lawyers decry SC verdict on TRC jurisdiction*, 10 March 2015. Available at: http://new.myrepublica.com/politics/item/16878-maoist-lawyers-decry-sc-verdict-on-trc-jurisdiction.html#sthash.R5LzL8Dg.dpuf .
[84] My Republica, *TRC, CIEDP yet to get office space, logistics*, 11 March 2015. Available at: http://new.myrepublica.com/politics/item/17014-trc-ciedp-yet-to-get-office-space-logistics.html .
[85] *Ibid.*
[86] *Ibid.*
[87] The scheduled hearing date is 16 April 2015.

against the TR Act in June 2014, it did not receive big attention in comparison to those writ petitions filed by direct victims.

44. While welcoming the establishment of the two Commissions to deal with the transitional justice process in the country, the organisations submitting this follow-up report **are deeply concerned with the Commissions' effectiveness and independence**.

45. In the first place, as described above, the process that lead to the formation of these Commissions has not offered the victims' groups a sufficient and genuine space for participation. Despite repeated attempts of the victims' groups to have their demands heard, their concerns were not reflected in the final text of the TR Act nor during the process of selection of the Commissioners.

46. Secondly, **the independence of the Commissioners is not guaranteed,** given that the process of selection of the candidates described above did not provide enough time for civil society to analyse the background of the candidates, that many candidates were included in the list by direct appointment by the political parties and that there is no public information as to whether some formal complaints were submitted and which was the outcome of such complaints. Most importantly, the question of the independence of the Recommendation Committee was brought to the Supreme Court. **The government, disregarding the pending case before the Supreme Court** and despite civil society's efforts to urge the amendment the process of selection of commissioners**,** [88] **established the Recommendation Committee which appointed the Commissioners, forcing the Supreme Court to eventually quash the *sub-judice* case before it.**

47. Serious concerns have been expressed in relation to the background of some Commissioners as well as to the actual expertise on human rights and transitional justice issues of the appointed Commissioners. In particular, the two cases broadly covered by the media regard the commissioner Shree Krishna Subedi, who had been the defendant lawyer of Agni Sapkota, allegedly responsible for several extra-judicial killings during the conflict; [89] and Mr. Surya Kiran Gurung, chairperson of the TRC and former Nepalese Ambassador to Russia.[90]

48. Furthermore, **the provisions of the TR Act do not guarantee the autonomous and independent functioning of the Commissions.** Section 10 provides that the government shall appoint a civil servant as the Secretary of the Commissions, which is one of the most powerful

[88] Accountability Watch Committee (AWC) – Sushil Pyakurel – Chairperson, Amnesty International (AI) – Richard Bennett – Asia-Pacific Director, Center for Legal Studies (CLS) – Birendra Thapaliya – Chairperson, Conflict Victims' Committee (CVC) – Bhagiram Chaudhari – Chairperson, Conflict Victims Orphan Society (CVOS) – Suman Adhikari – Chairperson, Conflict Victims' Society for Justice (CVSJ) – Janak Rawat – Chairperson, Human Rights Watch (HRW) – Brad Adams – Asia Director, International Commission of Jurists (ICJ) – Sam Zarifi – Asia-Pacific Director *Letter to Prime Minister Sushil Koirala : Nepal: Joint Letter Regarding Formation of the Truth and Reconciliation Commission and the Commission on Enforced Disappearances,* 18 December 2014. Available at: http://www.hrw.org/news/2014/12/18/nepal-joint-letter-regarding-formation-truth-and-reconciliation-commission-and-commi.

[89] Ekantipur, *Victims question TRC, CED credibility,* 10 February 2015. Available at: http://www.ekantipur.com/the-kathmandu-post/2015/02/10/top-stories/victims-question-trc-ced-credibility/273067.html.

[90] Ekantipur, *Recommendation committee announces candidates' roster,* 13 January 2015. Available at: http://www.ekantipur.com/2015/01/13/capital/recommendation-committee-announces-candidates-roster/400277.html.

positions in the structure of the Secretariat. **This provision leaves some room for influences by the government on the work of the Commissions, through the appointment of a government-aligned Secretary.**

49. Sections 11 (1) and (2) allow the Commissions to appoint personnel on a contract basis only if the government does not have the particular expertise sought by the Commissions or is unable to provide the required number of personnel demanded by the Commissions. Despite the fact that the government must consult with the Commission for such provision of personnel, in practice that means that **the Commissions do not have full control over the selection of their personnel.** The Commissions may decide to appoint experts to complement their work, but these appointments can be denied or invalidated if the government states that it has available staff and expertise. There is no specific provision in the TR Act providing for a mechanism to ensure that once an employee is appointed by the government, he or she will be preserved from all possible governmental interferences. [91]

50. Regarding the financial, administrative and operational autonomy, Section 12 of the TR Act regulates the resources of the Commissions, but it does not provide for an obligation of the government to provide "adequate" resources. Furthermore, **the Commissions are dependent on the government for all the resources they need for their functioning. This raises serious concerns about the independence and autonomy of the Commissions.**

51. Other concerns regarding the effectiveness of the Commissions regard the different interpretation that domestic courts have given to the status of the Commissions and their relation with the ordinary criminal justice system. The Human Rights Committee recently reminded Nepal that "in cases of serious violations, a judicial remedy is required. In that respect, the Committee observes that the transitional justice bodies to be established are not judicial organs."[92] However, Nepalese case law is not uniform in this regard and some District Courts have decided that they lack jurisdiction to deal with conflict-era cases as those that are to be examined by the transitional justice Commissions.[93] **The Supreme Court, nevertheless, issued some remarkable decisions whereby it stated that ordinary courts retain their jurisdiction over the crimes committed during the conflict.** For example, the Supreme Court has stated that "civilian courts have jurisdiction over the killing of civilians by the army during the conflict";[94] that "the refusal to register an First Information Report (hereinafter, "FIR") in cases of conflict-era violations is unconstitutional; the government has an obligation to investigate and prosecute notwithstanding the possibility that transitional justice commissions may be created"; [95] that "impunity for conflict-era rights violations

[91] Although section 36(5) provides that government employees will return to their previous offices, in practice there are no guarantees to ensure that they would receive the same benefits and promotions that they would have received, should they have not been appointed as personnel for the Commissions.

[92] HRC, Case *Jit Man Basnet and Top Bahadur Basnet* v. *Nepal.* See *supra* note 10; and Case *Sharmila Tripathi* v. *Nepal,* views of 29 October 2014 (No. 2111/2011), para. 6.3.

[93] Chitwan District Court, decision of 17 April 2014 on Mr. Krishna Adhikari's murder case.

[94] Supreme Court of Nepal, case Devi Sunuwar v. District Police Office, Kavrepalanchok and Others, Writ No. 0641, Order of 18 Septermber 2007.

[95] Supreme Court of Nepal, case Purnimaya Lama v. District Police Office, Kavrepalanchok and Others, Writ No. 1231, Order of 10 March 2008; and Supreme Court of Nepal, case Jayakishor Lav. District Police Office Dhanusha, Janakpur, Writ No. 063-Wo-0681, Order of 2 February 2009.

cannot be tolerated; the government has a responsibility to ensure a remedy for rights violations including the unlawful seizure of property by non-state actors during the conflict".[96] Notably, in the recent Supreme Court's decision on the writ petition against the TR Act,[97] the Court held that the cases *sub judice* in court cannot be dealt by the TRC as they fall under the purview of the court. However, **the fate of the cases which are not currently *sub judice* in the Supreme Court, but that could be initiated in the future, remains uncertain.**

52. Finally, despite the welcomed decision of the Supreme Court annulling the provisions concerning amnesties and the powers of the executive branch to recommend prosecution, restating that ordinary courts retain the jurisdiction of the cases *sub judice* and that the consent of the victims should be sough when recommending reconciliation, **many flaws of the transitional justice mechanisms remain**. In particular, the flawed domestic legislation,[98] which fails a criminalising torture and enforced disappearances and imposes limited statute of limitations to report other serious crimes, such as rape, poses **questions related to the legal framework that the Commissions will use to recommend prosecution**.

53. Furthermore, the regulation of the measures of reparation pursuant Sections 2(e) and 23 of the TR Act, is not in line with international standards and, in particular, with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the General Assembly in 2005. Namely, the TR Act envisages the possibility for the Commissions to make recommendations for reparations but **it does not recognise a clear "right to reparation" to the victims**. Secondly, the **TR Act does not provide for guarantees of non-recurrence and measures of satisfaction as possible forms of reparation**.[99] Furthermore, there are serious **concerns about the protection of the security of victims and witnesses**. Section 17 of the TR Act sets out some provisions on witness protection but to date it remains unclear how this protection will work and which organ will ensure such protection, given that there is no provision of the establishment of an independent until for witnesses' and victims' protection.[100] Finally, **the TR Act does not entrust the Commissions with the power of recommending vetting for public office of those involved in serious human rights violations**.[101]

[96] Supreme Court of Nepal, case Liladhar Bhandari and Others v. the Government of Nepal and Others, Writ No. 0863, Order of 7 January 2009.
[97] See *supra* note 53.
[98] See *supra* Section 1.
[99] Advocacy Forum Nepal, TRIAL and REDDRESS, *Lip Service to Justice: the newly adopted TRC Act breaches international law and Flouts the decision of the Supreme Court of Nepal*, see *supra* note 23, paras. 49-53.
[100] *Ibid,* paras. 68-69.
[101] *Ibid*. paras. 72-73.

4. Failure to Provide All Victims of Gross Human Rights Violations during the Conflict with an Effective Remedy

Paragraph 5 of the 2014 Concluding Observations

(d) Ensure that all victims are provided with an effective remedy, including appropriate compensation, restitution and rehabilitation, taking into account the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147); and

54. Most victims of gross human rights violations, and especially those perpetrated during the armed conflict, continue to lack access to effective remedy and reparation.

55. Firstly, the TRCA theoretically provides for the possibility of granting compensation to victims of "cruel, inhuman and degrading treatment". However**, the TRCA excludes *de facto* most victims of torture and sexual violence from the enjoyment of such compensation by imposing a 35-day limit from the date of the torture or release to file a complaint and seek compensation.**

56. Moreover, the notion of "reparation" contained in the TRCA is restrictive and not in line with international standards,[102] given than it is limited to pecuniary compensation and does not include other forms of reparation such as rehabilitation, restitution, satisfaction and guarantees of non-repetition.[103]

57. Furthermore, **where the right to obtain pecuniary compensation has been granted to the victims, the amounts offered are often too low.** In particular, the TRCA limits the claims for compensation to a maximum of NRs 100,000 (approx. USD 1,000),[104] which is an amount that can only be qualified as symbolic and in any case acknowledges the needs of the victims. No steps have been taken by the authorities in order to modify this provision and ensure an effective implementation of a compensation programme for victims of torture.

58. Victims of crimes others than torture are not formally granted a "right to compensation" but can opt for applying to the Interim Relief Programme (hereinafter, "IRP"), which was established by the Ministry of Peace and Reconstruction in 2008. **The beneficiaries of the IRP are those "harmed by the conflict". Therefore, the definition of "victim" in this framework** includes individuals and family members affected by killing, abduction, enforced disappearance, displacement or destruction of property.[105] **Victims of torture, rape, and other forms of sexual violence are in practice excluded from the IRP,** which envisages the reimbursement of medical costs related to

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[102] See CAT, *General Comment No. 3 on Art. 14 of the Convention against Torture,* UN Doc. CAT/C/GC/3 of 13 December 2012. Available at: http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.
[103] See April 2013 Report, *supra* note 1, paras. 126-127.
[104] *Ibid*., paras. 128-129.
[105] IPR Policy Document, *Measures for Financial Support and Relief for Conflict Victims Pursuant to Cabinet Decisions*, 25 April 2008.

physical injuries that can be demonstrated. However, "in reality, the poorly designed policy *de facto* excludes most, if not all, torture survivors because it is unavailable to those who have not received medical treatment, who have accessed medical treatment outside Nepal (…), or who lack receipts or other documentary evidence to support their claims".[106]

59. Furthermore, as the ICTJ recently pointed out in its report on needs and aspirations for reparative justice in Nepal,[107] the IRP "was a first response. It is not, and was never intended to be, a comprehensive reparations program".[108] To the contrary **"it took the form of humanitarian relief, with broadly uniform, mainly financial benefits distributed to some, although not all, categories of victims of the armed conflict"**.[109] The programme fails at identifying the specific harms suffered by the victims and at addressing "the different ways in which harms might be experienced by victims due to their identity or economic status, and the different needs arising from these variations".[110] While thousands of beneficiaries have received lump sums, financial assistance, scholarships and skill trainings as consequence of the programme,[111] "**the IRP neither treats beneficiaries as victims of human rights violations nor acknowledges the state's responsibility for those violations** (by commission or omission); yet, reparations are founded on the recognition that rights have been violated and that the State is obligated to repair the consequences".[112]

60. The IRP also fails at understanding the reparative needs and expectations of victims and the way they are determined by gender, caste, ethnicity and socioeconomic status, among other variables; at providing comprehensive reparation to victims; and at addressing long-term and non-physical impacts. The ICTJ report, result of more than 400 interviews to survivors of human rights abuses, pointed out the multiplicity of harms suffered by the victims, which are translated into physical, mental, social and economic needs. Most of the victims interviewed for the research identified as immediate needs those of a socioeconomic nature: "financial support, employment, free education, free medical care, and subsistence needs ('food, shelter, and clothing') were consistently raised".[113] However, the research showed an "integrated relationship between material and nonmaterial needs and a holistic notion of the meaning of justice. Given the opportunity, broader aspirations for reparations that address moral as well as material harms were articulated, including 'punishment of perpetrators'; truth-seeking; searching for the disappeared; long-term security and protection, including from human rights abuses; and measures that would strengthen good governance".[114] Finally, the report identified two other sets of "future hopes and aspirations": those related to "measures that would acknowledge and affirm them as victims of human rights abuses

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[106] International Centre for Transitional Justice (ICTJ), *To Walk freely with a Wide Heart: A study of the needs and aspirations for reparative justice of victims of conflict-related abuses in Nepal*, September 2014. Available at: https://www.ictj.org/sites/default/files/ICTJ-Report-Nepal-Reparations-2014.pdf, p. 11.
[107] *Ibid.*
[108] *Ibid.*, p. 1.
[109] *Ibid.,* p. 5.
[110] *Ibid.*
[111] For more details about the numbers of beneficiaries and the specific groups of beneficiaries of the programme as per February 2014, see *Ibid.*, p. 10.
[112] *Ibid.*
[113] *Ibid.,* p. 1.
[114] *Ibid.,* p. 2.

(or, as many described them, 'martyrs'), restore their place as equal citizens, and ensure protection against future harms", and those "pointing to the desire for permanent solutions and secure futures, not only for the participants but also for their children".[115] The report concludes: "the IRP, while providing some immediate assistance to those who were eligible, has not begun to address the full harms suffered by conflict victims of significantly contributed to repairing them. Rather, the government has effectively subordinated any meaningful consideration of victim's right to reparation to protracted negotiations over legislation on the establishment of a TRC".[116]

61. Finally, "the IRP procedures have been widely criticized for their complexity, lack of transparency, and inaccessibility to those living in poor and remote communities or those who face additional barriers due to their gender, caste, ethnicity, or economic status."[117]

62. It is noteworthy to recall that in its most recent views against Nepal, the Human Rights Committee held that the *interim* relief provided pursuant to the IRP "does not constitute an adequate remedy commensurate with the serious violations inflicted."[118]

63. In relation to the power of the two transitional justice Commissions to recommend reparations, Section 23 of the TR Act empowers the two Commissions to recommend compensation, restitution, rehabilitation and other reparative measures, including free education and health care; skills training and employment; support for housing; and financial assistance on the form of loans. However, it should be noted that, despite the fact that the TRC and the CIEDP have already been formed, several months will pass before they can issue recommendations on specific cases and **victims have urgent needs that must be addressed without further delay**. If recommendations for reparations are to be the responsibility of the TRC and the CIEDP, a prior process of consultation with the victims must be undertaken in order to assess their needs. Furthermore, "reparation" must be understood by the two Commissions in line with the 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, namely compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.[119]

5. Failure to Adopt Guidelines for Vetting

Paragraph 5 of the 2014 Concluding Observations

(e) Adopt guidelines for vetting to prevent those accused of violations of the Covenant from holding public office and being promoted.

[115] *Ibid.*
[116] *Ibid.,* p. 3.
[117] *Ibid*., p. 11.
[118] HRC, Case *Ram Bhandari* v. *Nepal*, views of 29 October 2014 (No. 2031/2011), para. 8.9; and Case *Sharmila Tripathi v. Nepal*, see *supra* note 92 para. 7.8.
[119] See supra para. 53.

64. The organisations submitting this follow-up report are not aware of **any initiative of the government to adopt guidelines for vetting** to prevent those accused of human rights violations from holding public office and being promoted.

65. While the Public Hearing Committee created by the Constituent Assembly/Legislature Parliament verifies the background of the persons to be appointed in high-level positions of the governmental service, there is no similar vetting process for regular promotion in bureaucratic positions, in the police or in the military.

66. The implementation of the 2012 Supreme Court's order[120] requiring the government to adopt some legislative measures to screen the recruitment, promotion, and transfer of officials, including those from the security forces, remains pending. On 23 January 2013, the government announced a new Army Service Regulations (ASRs), which sets forth basic criteria for the selection of peacekeepers and commits the Ministry of Defence to formulate and implement a detailed policy for selection of peacekeepers.[121] The selection procedure is yet to be drafted by the Ministry. Moreover, the Nepal Army's internal Directives for Selection of Peacekeepers (2008) remain unavailable to the general public. According to the report *Vetting in Nepal: challenges and issues* published by the NGO Advocacy Forum, [122] which analyses vetting within the Nepal Army, the Nepal Police and the Armed Police Force "in contrast to the Nepal Army, the Nepal Police (NP) and the Armed Police Force (APF) are more transparent in their decision making processes for the selection of peacekeepers; however human rights and gender issues need to be incorporated more clearly into these policies".[123]

67. Conversely, **there have been several instances where alleged perpetrators of gross human rights violations have been recently promoted**. The police officers Ram Kumar Khanal and Keshari Raj Ghimire,[124] who are enlisted as human rights violators during the people's movement (2006) in a report of the Asian Centre for Human Rights,[125] were promoted from the post of Senior Superintendent of Police (SSP) to Deputy Inspector General (DIG). Likewise Rajendra Singh Bhandari,[126] who was promoted from the post of DIG to the Additional Inspector General (AIG) on 15 August 2014, also had his name as one of the suppressors during the people's movement (2006).[127] **These recent developments consolidate a general trend of absence of proper vetting procedures** which was already manifested by the participation in UN peace-keeping missions of Major Niranjan Basnet, who was sent to Chad in 2009 while a case before the Kavre District Court was pending against him as responsible for the killing of the 15 year-old girl Maina

[120]Supreme Court of Nepal, case Sunil Ranjan Singh and Dipendra Jha v. Office of the Prime Minister and Council of Ministers et al., Writ No. 067-WO-1198, Order of 12 August 2012.
[121] Ekantipur, *Ministry to select UN peacekeepers*, 16 February 2013. Available at: http://www.ekantipur.com/2013/02/16/top-story/ministry-to-select-un-peacekeepers/367159.html.
[122] Advocacy Forum, "Vetting in Nepal: challenges and issues", July 2014, available at http://www.achrweb.org/reports/DPKO-Nepal.pdf.
[123] *Ibid*., p. 13.
[124]The officers were Superintendent of Police (SP) at the time when the violations took place.
[125] Asian Centre for Human Rights, *Briefing Papers on Nepal. Nepal: Time To Prosecute The Perpetrators*, 23 December 2013. Available at: http://www.achrweb.org/briefingpapers/BPNEPAL-03-2013.pdf.
[126] Bhandari was a Senior Superintendent of Police (SSP) at the time of the crime.
[127] Asian Centre for Human Rights. *Briefing Papers on Nepal. Nepal: Time To Prosecute The Perpetrators*, *supra* note 125.

Sunuwar in an army barrack; DSP Kunwar, who was sent to Liberia in August 2011, being a case against him under the TRCA pending at the Kathmandu District Court; and Colonel Kumar Lama, who was serving as an expert on a UN mission in South Sudan when he was arrested during a visit to the United Kingdom, and whose trial began on 25 February 2015.[128]

68. It must be highlighted that the absence of vetting procedures does not only concern those perpetrators of crimes during the armed conflict. Particularly in the region of Terai, **perpetrators of recent acts of torture do not suffer any kind of punishment, even in terms of disciplinary action and suspension from duty or disqualification.** THRDA pointed out that "with regard to disciplinary action against the perpetrators, the only action taken was in one case where DSP Dipak Neupane[129] was transferred to another police station (which, arguably, is not a form of punishment at all). Even in the cases where the victims suffered the most direct consequences in that they died, such as Mangare Murau or Ramsewak Dhobi, disciplinary action has yet to be carried out".[130]

69. There is, furthermore, a lack of visibility on the implementation of disciplinary actions ordered against the police. "The Nepal Police Human Rights Unit claims that since its establishment, departmental action has been taken against 585 police personnel regarding human rights violations. However, it does not state what violations the police personnel had committed (such as torture) and what disciplinary action was taken (which needs to reflect the severity of the offence)".[131]

70. Regrettably, the TR Act does not entrust the Commissions with powers to consider the vetting from public office of those found to have been involved in serious human rights violations. Nevertheless, the organisations submitting this follow-up report hope that the Commissions include vetting among their recommendations. Recommendations for vetting must be issued against individual perpetrators of serious human rights violations, but must also take into consideration command responsibility.

[128] Advocacy Forum, *Vetting in Nepal: challenges and issues*, see *supra* note 122, p. 12.
[129] See The Himalayan Times, *Court issues mandamus on FIR against two cops*, 17 December 2013. Available at: http://thehimalayantimes.com/rssReference.php?headline=Court+issues+nandamus+on+FIR+against+two+cops+&NewsID=399996; and World Organisation Against Torture (OMCT), *Nepal: Alleged torture and killing in police custody of Mr. Ram Sewak Dhobi, a 30-year-old permanent resident of Asuraina VDC-06*, 4 September 2013. Available at: http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2013/09/d22376/.
[130] THRD Alliance, *infra* note 156, p. 2.
[131] *Ibid.,* p. 65.

6. Lack of Measures to Ensure an Independent and Effective Functioning of the National Human Rights Commission

Paragraph 7 of the 2014 Concluding Observations

The State party should amend the National Human Rights Act 2068 (2012) to bring it in line with the Paris Principles (General Assembly resolution 48/134, annex) and the Supreme Court decision of 6 March 2013 so as to ensure its independent and effective functioning. It should also amend procedures governing the appointment of Commissioners to ensure a fair, inclusive and transparent selection process, and ensure that the recommendations issued by the NHRC are effectively implemented.

71. On 20 October 2014 the Chairperson and the Commissioners of the NHRC were appointed by the Constitutional Council, after a 13-month vacuum during which the positions were vacant (since 16 September 2013).[132]

72. On 27-31 October 2014, the Sub-Committee on Accreditation (hereinafter, "SCA") of the International Coordinating Committee on National Institutions for the Promotion and Protection of Human Rights (hereinafter, "ICC") recommended that the NHRC retain 'A' status (in full compliance with Paris Principles) and welcomed the recent appointments.[133] However, the ICC expressed concerns regarding **the selection and appointment of commissioners, which "do not ensure a sufficiently transparent and participatory process"**.[134] In particular, the SCA noted "the absence of constitutional or legislative provisions requiring the advertising of vacancies for members; and the assessment of all applicants by the selection committee (Constitutional Council) and Parliament, against pre-determined, objective and publicly available criteria that promote merit-based selection".[135]

73. The organizations submitting this follow-up report are not aware of any intention to amend the National Human Rights Act 2068 (2012)[136] in order to bring it in line with the Supreme Court's decision of 6 March 2013. **No amendment bill to the National Human Rights Act is currently registered in the Parliament.**[137] Therefore, there is no plan for a reform of Section 10(5) of the National Human Rights Act 2068 (2012) that calls for reporting of conflict-era cases within six

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[132] Ekantipur, *NHRC gets chairman, four commissioners,* 18 September 2014. Available at: http://www.ekantipur.com/the-kathmandu-post/2014/09/18/top-story/nhrc-gets-chairman-four-commissioners/267619.html.

[133] International Coordinating Committee Of National Institutions For The Promotion And Protection Of Human Rights (ICC), *Chart Of The Status Of National Institutions,* 23 May 2014. Available at: http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20(23%20May%202014).pdf, p. 14.

[134] *Ibid*.

[135] *Ibid*.

[136] National Human Rights Act 2068 (2012) reads "Complaints regarding the incidents of human rights violation or its abetment shall have to be lodged at the Commission within six months from the date on which the incident took place or within six months from the date on which a person, under control of someone else, got released and became public." This clause prohibits the NHRC to investigate any conflict-era related case, given that such cases are less likely to meet the six months limitation. The legality of this clause was challenged in the Supreme Court and the Supreme Court ordered to amend this provision (Supreme Court Decision No. 9029 dated 6 March 2013).

[137] The bills which are registered in the Parliament can be checked at: http://www.can.gov.np/np/bills/registered-bills.html; http://www.can.gov.np/np/bills/work-in-progress-bills.html; and http://www.lawcommission.gov.np/index.php?lang=en.

months from the date of the incident and which gives authority to the attorney general to decide on initiating new cases. In the NHRC brief note *100 Days of the Commission after the newly appointed Officials assumed the Office (October 20, 2014 – January 27, 2015)*[138] issued on 28 January 2015, no reference has been made to any process of consultation held and not even to any intention to address this question.

74. Conversely, the Amendment the National Human Rights Commissions Chairperson and Member Facilities Act, 2014 has been tabled in the Parliament.[139] This Bill exclusively deals with the facilities and remuneration of the Chairperson and members of the NHRC.

75. In relation to the implementation of the recommendations of the NHRC, the brief note states: "The Commission is serious about the implementation status of the recommendations made in the past. In this concern, the implementation status of the past has also been studied accordingly. In this regard, the Commission has organized discussion with the former NHRC members, representatives of Civil Society and Human Rights Workers in this regard. At the discussion, the invitee speakers stressed on the implementation of the NHRC recommendations by the government and also asked the Commission to ceaselessly mount pressure on the government in this concern. The Commission has decided to hold a serious discussion with the concerned officials of the government agencies soon. Recently, the decision has been dispensed on 130 complaints and the remaining complaints have also been classified accordingly."[140] These recent declarations by the NHRC evidence that the **general trend continues to be the lack of implementation by the government of the recommendations issued by the NHRC.**

76. On 28 January 2015, the NHRC issued a press note containing its latest recommendations to the government of Nepal after it became operational anew on 20 October 2014.[141] No actions aimed at the implementation of these recommendations have been taken so far.

77. The organisations submitting this follow-up report believe that the NHRC has in several occasions applied double standards and not acted guided by the principles of rule of law and justice. Moreover, it has been excessively supportive of governmental actions. On the one hand, the NHRC has time and again requested the government to take action against the perpetrators of human rights violations.[142] On the other hand, it sent its member Sudip Pathak as a representative for the Recommendation Committee for the formation of TRC and CIEDP on 27 October 2014

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[138] NHRC, *100 Days of the Commission after the newly appointed Officials assumed the Office (October 20, 2014 – January 27, 2015),* 28 January 2015. Available at: http://www.nhrcnepal.org/nhrc_new/doc/newsletter/2066265070PR-100%20days%20of%20Commissioners-Eng-28%20Jan%202015.pdf.

[139] See *supra* note 133.

[140] NHRC, *100 Days of the Commission after the newly appointed Officials assumed the Office (October 20, 2014 – January 27, 2015), supra* note 138.

[141] The NHRC had recommended providing NRs 300,000 (approx. USD 300) as compensation to the families of several deceased people who were killed in different incidents during the conflict. For more information see Ekantipur, NHRC clears 148 backlog cases, 28 January 2014. Available at: http://www.ekantipur.com/2015/01/28/capital/nhrc-clears-148-backlog-cases/400944.html and My Republica, NHRC recommends reparation for victims of Beni attack, 4 January 2015. Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=89786).

[142] Ekantipur, NHRC asks govt to take action against rights violators, 31 August, 2014. Available at: http://www.ekantipur.com/2014/08/31/top-story/nhrc-asks-govt-to-take-action-against-rights-violaters/394402.html.

although the writ petitions against TR Act and the Recommendation Committee were *sub judice* at the time, thus participating and legitimatising the process.[143]

7. Lack of Measures to Prevent the Excessive Use of Force by Law Enforcement Officials and Eradicate Torture and Ill-treatment

Paragraph 10 of the 2014 Concluding Observations

The State party should take practical steps to prevent the excessive use of force by law enforcement officials by ensuring that they comply with the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). (…)

(…) It should also ensure that law enforcement personnel receive training on the prevention and investigation of torture and ill-treatment by integrating the Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

78. Despite the fact that some efforts have been made, **the measures taken to prevent the excessive use of force and to train law enforcement officials on the prevention and investigation of torture and ill-treatment remain insufficient.**

79. In this regard, there is a worrying trend of excessive use of force being used to police political protests, and to persecute political opponents. One of the cases of alleged extra-judicial killing by security forces took place against the backdrop of several protests organised across the country in the past months. Following the failure of the Constituent Assembly to adopt a Constitution on 22 January 2015, a 30-Party Alliance of opposition parties announced a general strike on different dates across the country, to oppose the process through which the ruling parties were planning to bring the new constitution to vote. The opposition parties took the stance that this was in breach of several previous peace agreements that mandated a constitution by consensus, rather than a majoritarian vote. In the context of these protests, several episodes of excessive use of force by the police took place. In the protests organized on 11 January 2015 in Kalaiya, Bara District, a dozen of protestors were injured when police hit them with batons.[144] During these protests in the Terai region, local political leaders were targeted resulting in several of them being injured.[145] **On 12 January 2015,** a general strike was convoked across the country. In Janakpur, Dhanusa district, **Mr. Rajaram Jha (a district level leader of the political party Terai Madhes Democratic Party) died during the protests. While witnesses state that he died as a consequence of the beatings he received from police officials, Nepal police maintains that he suffered a heart attack during the march.** The *post mortem* forensic report has yet to be disclosed.[146]

[143] See supra para. 21.
[144] THRDA, *Human Rights Bulletin*, 20 January 2015.
[145] THRDA, *Situation update: unrest in the Terai region,* 18 February 2015.
[146] *Ibid*.

80. THRDA reported **several other episodes of excessive use of force from the Nepal police occurred on that day in different locations in Terai**: a political leader[147] had his hand fractured when the police were hitting the protestors with batons in Bhairahwa,[148] while another had his leg fractured in Siraha district[149]. THRDA concluded that "the police used excessive use of force to suppress the largely peaceful protests and has unduly interfered with the people's right to peaceful assembly".[150]

81. Other incidents have been registered in the framework of protests organised in Kalaiya, Bara district aimed at raising developmental concerns.[151] The police response to the protestors' burning of a newspaper's van on 13 February 2015 and the lobbing of stones at police officials on 14 February 2015, was to hit the protestors with batons and to fire a dozen and 50 tear gas shells respectively,[152] which resulted in **dozens of injured protestors**, with some witnesses alleging that the number is closer to hundred. While there were several names of the injured obtained from the Bara District Hospital,[153] this is not reflective of the actual numbers of those injured as many who visited the hospital for their injuries had not been admitted and had since returned home. For example, both Mr. Naresh Patel (a 22 years old from Kalaiya) and Mr. Pradeep Kumar Sah (a 23 years old from Pipalpati, VDC) were seriously injured on their backs and are on bed-rest at home because they are unable to move.[154] Action has yet to be taken against their perpetrators.

82. Similarly, on 20 January 2015, the NHRC was alerted that about a dozen plainclothes policemen had fired 67 rounds of bullets at Tharu villagers in Parsa district at midnight. The police, who justified the operation as an investigation on trafficking of illegal materials (such as elephant ivory and skins of rhinos and tigers) did not report the finding of such materials. Several women were wounded by the bullets. As reported by THRDA "the Chief District Officer had not given any orders to open fire. However, the alleged aggressive behaviour of the Central Investigation Bureau ("CIB") in searching the homes of the villages and beating up the women and children resulted in a backlash that necessitated members of the accompanying Nepal Police (providing cover to the CIB) opening fire on the villagers".[155]

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[147] Mr. Rajesh Ranjan Verma, the District Coordinator of Terai Madhes Democratic Party (TMDP).
[148] THRDA, *Human Rights Bulletin*, 20 January 2015.
[149] Rajlal Yadav, who is an ex-minister without portfolio and the Central Committee member of the political party Madhesi Janadhikar Forum-Nepal (MJF-N).
[150] THRDA, *Situation update: unrest in the Terai Region*, *supra* note 145.
[151] These protests took place due to the Nepal government's decision to shift the land revenue, land survey and land reform offices from Kalaiya to Simara, and were launched by the Bara Chamber of Commerce and Industry that was against this decision. Locals (including members from political parties and business persons) appeared on the streets from 9 February onwards in order to pressure the government to retract their decision. THRDA, *Situation update: unrest in the Terai Region*, *supra* note 145.
[152] *Ibid*.
[153] The names obtained are that of Shree Ram Shah, Manoj Shah, Binod Sarraf, Mohan Shah, Aakash, Dhiraj Sahani, Pappu Yadav, Prabhu Shah, Baliram Shah and Rauhful Mansuri, who have since been discharged from the hospital.
[154] A video of these beatings, documenting of excessive use of force by the police, has been widely circulated on social media: https://www.facebook.com/video.php?v=979739925387550&set=vb.100000546557348&type=2&theater. The video shows the police chasing the fleeing boys and beating them with batons and sticks when they were on the ground. From the video, there is little evidence of any real threat posed by these unarmed boys.
[155] THRDA, *Situation update: unrest in the Terai Region*, *supra* note 145.

83. The lack of measures to prevent the excessive use of force, and the lack of investigations into these incidents, show that the State is blatantly failing to comply with the recommendations set out in paragraph 10 of the Concluding Observations.

84. In addition, in the recent report "Torture in Terai", the THRDA affirmed that "an analysis of the Court Judgements that have been delivered in cases where THRD Alliance represented torture victims shows **that the Istanbul Protocol guidelines are rarely applied**".[156]

85. Although it is known that some trainings are being delivered to police officials on issues such as human rights, women's rights, child rights, criminal justice and fair trial, the detailed content and the concrete manner in which these trainings are imparted remains unknown to civil society.[157] The THRDA rightly points out that "the Nepal Police Human Rights Unit states that it has issued a Pocket Book on Human Rights Standing Orders (in collaboration with the OHCHR) which were distributed to 'all police personnel'. Published in Nepalese, this book includes policing in a democracy, conducting investigations and the use of force and firearms – all of which are relevant in any meaningful discussion regarding torture, and is hence commendable. However**, it is unfortunate that on the ground there appears to have been no effort to ensure that the policemen who received these books actually read them, and were engaged or examined on the issues raised therein**".[158] The organisations subscribing this follow-up report welcome this initiative, but stress that technical materials become useless if they do not come accompanied by proper and regular training sessions aimed at their understanding and further implementation of public security forces.

86. Likewise, the Nepal Police Human Rights Unit announces on its website[159] the adoption of a Training Manual on Human Rights and Law Enforcement. The Unit, however, fails at indicating who has received this training material and which measures are planned for its dissemination. The contents of this training are not public and therefore it "is unclear whether such training includes any meaningful instruction on the absolute prohibition against torture, what constitutes torture and the severity and certainty of sanctions in the event that police officers are found guilty of torture".[160]

87. In relation to the number of police officials benefiting from such trainings, the Nepal Police Force[161] affirmed that 7,345 police personnel[162] had received training as of 2014. Taking into account that according to official sources there are 67,287 police officers in Nepal, it follows that, **to date, only around 10% of police officers have received some sort of human rights training.**

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156 THRDA, *Torture in Terai,* February 2015, p. 62.
157 *Ibid.*
158 *Ibid.,* p. 63.
159 http://www.nepalpolice.gov.np/human-rights.html.
160 THRD, *Torture in Terai*, see *supra* note 156, p. 63.
161 Interview with the spokesperson of the Nepal Police Force, Deputy Inspector General Madhan Joshi on 27 October 2014, quoted in THRD, *Torture in Terai*, see *supra* note 156, p. 63.
162 According to THRD, *Torture in Terai*, see *supra* note 156: 4792 constables, 686 head constables, 604 assistant sub-inspectors, 934 sub-inspectors, 224 inspectors, 72 deputy superintendents, 9 superintendents, 2 senior superintendents and 3 deputy inspector generals.

8. Lack of Investigation, Prosecution and Conviction of Those Responsible for Committing Unlawful Killings, Torture and Ill-treatment

Paragraph 10 of the 2014 Concluding Observations

The State party should ensure that allegations of unlawful killings, torture and ill-treatment are effectively investigated, and that alleged perpetrators are persecuted and, if convicted, punished with appropriate sanctions, and that the victims and their families are provided with effective remedies.

88. Several **recent incidents prove a re-emerging trend of extra-judicial killings in the Terai region, after a gap of several months from February 2014 onwards to August 2014**.

89. Since the end of the conflict, despite the fact that the number of reported violations of fundamental rights decreased, recourse by the Nepal Police to arbitrary detention, torture, extrajudicial killings and even enforced disappearance continues to be reported in the region of the Terai.[163]

90. There is a special cause of concern for the **recent increasing number of killings of citizens by state security forces in the Terai region.** The most recent case is the killing of Mr. Chhatu Sahani, from Dalit ethnicity, on 14 February 2015 in Sarlahi district. This development comes in the wake of the recent killing of Mr. Rajaram Jha in Dhanusha district on 12 January 2015; torture resulting in the extra-judicial killing of Mr. Madhu Tajpuriya[164] from Sijuwa in Morang district on 24 October 2014; and the excessive use of force resulting in the killing of Mr. Jaya Narayan Patel from Simrangaudh in Bara district on 11 October 2014.[165] Previously, on 7 August 2014, Mr. Dinesh Adhikari was shot dead by police officers.[166]

91. In relation to the case of Mr. Madhu Tajpuriya, on 9 February 2015, the Supreme Court issued a mandamus ordering investigations to be conducted into the case. The implementation of the Supreme Court order is yet to be seen. To the knowledge of the organisations submitting this follow-up report, **there are no investigations being conducted regarding the remaining three cases.**

92. Regarding the **allegations of torture and ill-treatment**, the flawed legislation as described above[167] constitutes a barrier for the cases to be investigated and the perpetrators to be persecuted. Moreover, as already pointed out, **victims of torture and ill-treatment face several challenges to obtain compensation**.[168] First of all, the current statute of limitations of 35 days for

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[163] For more details see 2014 February Report, paras. 52-58.
[164] A detailed analysis of this case can be found at THRDA *Torture in Terai*, see *supra* note 156, pp. 24-27.
[165] For detailed information about these cases see THRDA, *Human Rights Bulletin*, 20 January 2015 and THRDA, *Situation update: unrest in the Terai Region*, *supra* note 145.
[166] For more details about his case see Ekantipur, *'Chari' killed in cold blood: Oli,* 8 August 2014. Available at: http://www.ekantipur.com/2014/08/08/editors-pick/chari-killed-in-cold-blood-oli/393285.html and My Republica, UML lawmakers warn House disruption over gangster Chari murder case, 7 August 2014. Available at: http://www.myrepublica.com/portal/index.php/portal/post_cartoon_comment.php?action=news_details&news_id=80480.
[167] See *supra* Section 1.
[168] See *supra* Section 4.

the filing of a torture case under the TRCA prevents many victims from obtaining compensation. Even in cases where the application for compensation is submitted on a timely basis, the courts do not always grant compensation due to the inadequacy of medical documentation. THRDA points out that this problem finds its roots in the lack of expertise of medical personnel: "in the cases where compensation was disallowed by the Court, the possibility that the doctors were simply not trained in assessing symptoms of physical and mental torture is very real".[169] Regrettably, **"the trend is that there are fewer successful cases of compensation awarded by the courts, with many of the cases either being dismissed due to a lack of credible expert evidence** (in the form of medical documentation) **or insufficient factual evidence**".[170]

93. Furthermore, the amounts established to pay compensation are very low, usually ranging between NRs 10,000 (approx. USD 100) and 20,000 (approx. USD 200). **Even in cases where compensation is awarded, very often it is simply not paid to the victims.** An example is that of Mr. Mangare Marau, whose torture brought him to death, and out-of-court settlement was reached to grant the family NRs 1 million. As of today, the family has received NRPs 450,000 (approx. USD 450).[171]

94. Finally, victims or torture face additional difficulties to file a complaint requesting compensation for torture because of the absence of witnesses protection laws, "which result in many of the victims being reluctant to come forward o filing compensation claims because of a real fear of antagonizing the police".[172]

9. Conclusions and Recommendations

95. **Nepal must adopt without further delay domestic legislation criminalising torture**. If the Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill is to be passed, the Bill must be brought in line with international standards and, in particular, it must broaden the definition of torture, provide for appropriate penalties for those found guilty of having committed acts of torture or ill-treatment and remove the statutory limitation of 90-days to file a complaint. In the process of adoption of this Bill, wider consultation with civil society and victims' groups must take place. **Moreover, Nepal must criminalise, without further delay, the offence of enforced disappearance. Similarly, war crimes, crimes against humanity, and genocide must be autonomously criminalised.**

96. **Nepal must ensure that investigation into the crimes committed during the conflict, prosecution and appropriate punishment of those responsible takes place without further delay.** In cases of serious human rights violations a judicial remedy is provided, and hence ordinary courts must have their jurisdiction granted over such cases, without any interference from the TRC and CIEDP.

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[169] THRDA, *Torture in Terai*, see *supra* note 156, p. 62.
[170] *Ibid.,* p. 64.
[171] *Ibid.*
[172] *Ibid.,* p. 66.

97. **Nepal must ensure that the Supreme Court's verdict of 26 January 2015 is published in the Official Gazette and is fully implemented.** In particular, no amnesties must be recommended and no recommendation on prosecution of those suspected of having committed human rights violations during the conflict must come from the executive branch. Furthermore, victims must not be "forced" to reconcile with the perpetrators.

98. The TRC and CIEDP must start working without further delay in their core activities of truth-seeking and relegate to a second priority the activation of awareness raising. Moreover, the Commissions must be provided with sufficient budget and resources to discharge their mandate. The Commissions must adopt working methods to ensure the independence and autonomy of their personnel.

99. The Commissions must adopt guidelines on "reparation" which are in line with international standards and recognise a "right to reparation" of the victims. The guidelines must be approved in consultation with victims' groups and must adequately address all the needs of the victims.

100. The Commissions must adopt guidelines on "protection of witnesses and victims". Necessary resources and qualified personnel shall be provided in order to guarantee the effective implementation of these guidelines. The guidelines must be approved in consultation with victims' groups.

101. The Commissions must include among their recommendations those of vetting of those suspected of having committed serious human rights violations. Moreover, general guidelines on vetting must be approved without further delay.

102. Nepal must amend the National Human Rights Act 2068 (2012) to bring it in line with international standards and ensure its independent and effective functioning.

103. The number of trainings on human rights addressed to police officials must be increased.

104. Immediate measures shall be taken to police all protests (whether political or due to developmental concerns) in line with international human rights law standards, and avoid excessive use of force. Impartial and independent investigations against security personnel who abuse their powers shall be carried out without further delay.

105. Cases of torture, ill-treatment and extra judicial killings in the Terai must be investigated by criminal courts without further delay. The investigation must be free from all political interference and must lead to the prosecution and punishment of those responsible.

10. Organizations Submitting This Follow-up 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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THRD ALLIANCE (TERAI HUMAN RIGHTS DEFENDERS' ALLIANCE)

Founded in 2011, THRD Alliance works to promote equity and justice in Nepal by seeking redress for human rights violations (including torture, extra-judicial executions, excessive use of force by security forces during protests and accusations of witchcraft) and discrimination (such as that of gender, caste, ethnicity and low socio-economic background). This redress is sought through legal work (in the form of direct legal assistance to victims or strategic litigation at the Supreme Court) and active advocacy informed by research to champion legal and structural reform and its effective implementation. The work is focussed in the Terai region, which is home to more than half of the population, and where many of the resident communities having been historically marginalised and excluded.

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VICTIM'S COMMON PLATFORM ON TRANSITIONAL JUSTICE (CVCP)

Conflict Victims Common Platform on Transitional Justice (CVCP), is a nationwide network of conflict victims' groups actively working in the transitional justice process in Nepal, and include all kind of victimization (disappearance, killing, torture, rape, wounded, displacement) from both sides State and the Maoist of Nepal violent conflict (1996-2006), advocates for victims rights to truth, justice, reparation and sustained peace.

The member organisations of the Victim's Common Platform on Transitional Justice are: National Network of Families of Disappeared and Missing (NEFAD), Conflict Victims' Society for Justice (CVSJ),

Terror Victims' Orphan Society of Nepal (OTV-Nepal), Conflict Victim National Society (CVNS) Nepal, Maoist Victims Association, Conflict Victim Committee (CVC), Conflict Victims Farmers Welfare Association, Kailali, Conflict Victims Disable Association, Dolakha, Reena-Arpan Dalit Upliftment Forum, Committee for Social Justice (CSJ), Maina Bal Bikas Samittee, Ganesh-Ujjan Memorial foundation, and Guru Luitel Memorial Foundation.

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