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**ALTERNATIVE REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)
TO THE UN HUMAN RIGHTS COMMITTEE ON THE COMBINED SECOND, THIRD AND
FOURTH PERIODIC REPORTS OF NEPAL UNDER THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Submitted February 2014

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

ICJ ALTERNATIVE REPORT TO THE HUMAN RIGHTS COMMITTEE ON THE COMBINED SECOND, THIRD AND FOURTH PERIODIC REPORTS OF NEPAL

1. During its 110th session, 10th March – 28th March 2014, the Human Rights Committee (the Committee) will examine Nepal's implementation of the provisions of the International Covenant on Civil and Political Rights (the Covenant), including in light of the State Party's combined second, third and fourth periodic reports under Article 40 of the Covenant. In this context, the International Commission of Jurists (ICJ) welcomes the opportunity to submit the following observations to the Committee.

EXECUTIVE SUMMARY

2. In the present submission, the ICJ expresses concern about the failure of the authorities to meet its obligations under Article 2(3) of the Covenant to ensure effective remedies for violations of Covenant rights, including those gross violations of human rights and international humanitarian law, which occurred in the context of the conflict.

3. The ICJ is concerned about the lack of effective mechanisms available to ensure remedies for victims of human rights violations in Nepal. In particular the submission highlights concerns that:

- The National Human Rights Commission lacks guarantees of independence; it currently has no serving Commissioners and many of its decisions and recommendations have not been implemented;
- The authorities have yet to establish the effective transitional justice mechanisms. The Ordinance adopted in the absence of Parliament in 2013 failed to establish a separate commission to investigate enforced disappearances; permitted amnesties for gross human rights violations; imposed a short statute of limitations for filing of prosecutions including for enforced disappearances and other crimes under international law. Provisions of this Ordinance were struck down by the Supreme Court in January 2014 as unconstitutional, inconsistent with previous rulings of the court and in violation of international law. Defying the ruling of the court, the Government nonetheless submitted the Ordinance, un-amended before Parliament in January 2014, seeking its adoption.
- A complex web of constitutional and statutory immunities, measures taken by the government in defiance of court rulings and inaction thwart efforts to investigate serious violations of Covenant rights, prosecute and punish those responsible for the crimes that those violations entail¹ and facilitate impunity. Notwithstanding reports of thousands of alleged serious violations of international human rights law and international humanitarian law committed during the decade long conflict (up to 9,000 of which were examined in the OHCHR sponsored Nepal Conflict.²) as of February 2014 only a few cases involving serious conflict-related crime have been filed in a civilian court in Nepal.

4. Furthermore, the submission addresses other factors which thwart redress and foster impunity including:

- The lack of a vetting system facilitates impunity and risks;
- In relation to Articles 2, 6, 7, 9, 10 and 16 of the Covenant, the continued absence to criminalize in domestic law serious human rights violations, including enforced disappearance, unlawful killings, torture, rape and other forms of sexual violence in a manner consistent with internationally accepted definitions;
- The failure to provide remedies for violations of Convention rights found by the Human Rights Committee in cases submitted under the Optional Protocol to the Covenant.

5. The State party's repeated failure to implement the rulings of its own courts, to ensure

¹ Arts. 2(1), 2(3), 6, 7, 9, 10 and 26 of the ICCPR.

² Office of the High Commissioner for Human Rights, *The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf.

investigations into human rights violations, bring those responsible to justice, ensure reparation for the victims and to establish independent and credible and effective transitional justice mechanisms are inconsistent with the authorities obligations under the Covenant and undermine the rule of law.³

ICJ ALTERNATIVE REPORT

Article 2(3) and the Optional Protocol: Constitutional and legal framework implementing the Covenant

6. Under article 2(3) of the Covenant, the State Party must guarantee an effective remedy to victims of violations and ensure that any person "claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."⁴As addressed in General Comment 31, which underpins the rights set out in article 2(3), "[n]ational human rights institutions, endowed with the appropriate powers, can contribute to this end."⁵

7. The ICJ is concerned about the lack of effective mechanisms available to ensure remedies for victims of human rights violations in Nepal, including those gross violations of human rights and international humanitarian law which occurred in the context of the conflict.

National Human Rights Commission

8. Independence and autonomy are cornerstones of National Human Rights Commissions/Institutions. They are key to their ability to promote and protect human rights. As a result, they must be guaranteed and safeguarded in the law. The ICJ is concerned however that the government of Nepal has taken steps that undermine the independence of the National Human Rights Commission. These concerns are amplified by failures of the authorities described below to ensure the full implementation of the majority of the decisions of the NHRC and to ensure implementation of its recommendations for the initiation of prosecutions in a large majority of cases.

9. In paragraph 97 of the State Party's Report, the authorities of Nepal assert that the National Human Rights Commission (NHRC) is "a constitutionally independent body, has very broad powers. It may, on any petition or suo motu, investigate violations of human rights and make recommendations, including compensation to victims. It may exercise the same powers as a court has in relation to summoning, taking deposition, making search, among others."⁶

10. In contrast, the ICJ is concerned that the National Human Rights Commission Act, 2068 (2012), passed on 21 January 2012 has limited the independence as well as its powers and mandate of the NHRC in many significant ways, changing it to an administrative body, rather than a constitutional one.⁷ As noted below, some provisions of the Act have been ruled to be null and void.

11. In order to guarantee the independence of the NHRC, it should be able to recruit its own staff, including its Secretary. While Section 18(1) of the 1997 Act allowed the Commission to appoint employees as required to carry out its functions and services,⁸ the 2012 Act does not have such a provision. Instead it provides for the Government of Nepal to approve the organizational structure of the Commission and posts.⁹ This results in the

³ *Ibid.* at arts. 2(3), 9(5) and 14(6).

⁴ *Supra* fn. 1 at art. 2(3).

⁵ See Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁶ See Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Second periodic reports of States parties, Nepal State Report*, UN Doc. CCPR/C/NPL/2 21 February 2012. Nepal State Report, UN Doc. CCPR/C/NPL/2 21 February 2012.

⁷ See National Human Rights Commission Act, 2068 (2012), available: http://nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf.

⁸ See National Human Rights Commission Act, 2053 (1997), available at: http://www.nhrcnepal.org/nhrc_plan_details-7.html

⁹ See also National Human Rights Commission Act, 2068 (2012), section 27, available:

Government sending employees to the Commission, undermining its independence in appearance if not in practice. In addition, under the 2012 Act,¹⁰ the NHRC is also required to consult with the Ministry of Finance if it wishes to establish branch offices, which the 1997 Act did not require.¹¹ This requirement opens the door for interference by the Ministry of Finance.

12. Moreover, in this respect, the NHRC should be provided with adequate funding. The 1997 Act allowed for the Commission to obtain "such means and resources from different agencies by way of grants" as was required.¹² However, the 2012 Act legislation does not provide such power to NHRC. For example section 20(1) of the 2012 Act requires approval of the Ministry of Finance before any agreement can be entered into with either national or international organizations.¹³

13. Additionally, the amendments introduced by the 2012 Act have stripped the NHRC of its power under section 11 of the 1997 NHRC Act to act in the same manner as a court of law.¹⁴ The preamble to the 1997 Act had made the NHRC an independent and autonomous body.¹⁵ Furthermore, the power of the Commission under Section 11 of the 1997 Act provided it with the same powers as a court, namely:

- Requiring any person to appear before the Commission for recording his/her statement and information within his knowledge;
- Summoning witnesses and examining them;
- Ordering the production of any document;
- Requesting any document or copy thereof from any governmental or public office or the court;
- Examining evidence;
- Carrying one or causing to be done an on-the-spot inspection, ordering the production of any physical evidence.

14. Similarly, the limited definition of the term "human rights", may limit the ability of the NHRC to act as a mechanism of redress on address on the full range of Covenant rights.¹⁶ Section 2(f) of the 2012 NHRC act defines human rights as defined in the international

http://nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf.

¹⁰ Section 32 of the NHRC Act requires the NHRC to seek approval from the Ministry of Finance if it wishes to make rules that has financial implication to the Government. Opening branch offices has financial implication; therefore, a prior approval is compulsory. See details at: http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf

¹¹ See also National Human Rights Commission Act, 2068 (2012), section 26, available: http://nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf. See also National Human Rights Commission Act, 2053 (1997), section 16, available at: http://www.nhrcnepal.org/nhrc_plan_details-7.html

¹² See also National Human Rights Commission Act, 2053 (1997), section 15(1), available at: http://www.nhrcnepal.org/nhrc_plan_details-7.html

¹³ See also National Human Rights Commission Act, 2068 (2012), section 20(1), available: http://nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf

¹⁴ See Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Second periodic reports of States parties, Nepal State Report*, UN Doc. CCPR/C/NPL/2 21 February 2012. Nepal State Report, UN Doc. CCPR/C/NPL/2 21 February 2012. See also National Human Rights Commission Act, 2068 (2012), available:

http://nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf.

¹⁵ The Preamble of the 1997 states that "it is expedient to establish an independent and autonomous National Human Rights Commission for the effective enforcement as well as protection and promotion of Human Rights conferred by the Constitution and other prevailing laws.."

¹⁶ See generally *supra* fn. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res.32/62, U.N. Doc. A/RES/39/46 (1984), *entry into force* 26 June 1987, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; see also The Office of the High Commissioner for Human Rights, *National Human Rights Institutions – History, Principles, Roles and Responsibilities* ("Paris Principles"), 2010, available at: http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf

treaties that Nepal is party to.¹⁷ However, the definition of the human rights is much broader than it is defined under the treaties that Nepal is party to. The narrow definition of the term human rights also limits the mandate of the NHRC as it has jurisdiction over the cases of human rights violation as defined by the NHR Act.

15. On 6 March 2013, the Supreme Court declared sections 10(5) and 17(10) of the National Human Rights Commission Act, 2012, null and void. Section 10(5) of the Act required that any complaint be lodged with the NHRC within six months from the date of the incident that formed the object of the complaint or, if the complainant was in custody, six months from his or her release.¹⁸ Section 17(10) empowered the Attorney General not to implement NHRC's recommendations concerning the initiation of legal action against officials allegedly responsible for human rights violations as long as the Attorney General informed the NHRC in writing of the reasons for the failure to proceed with the instigation of legal proceedings. The Supreme Court ordered the Government to amend the legislation by bringing a bill in the Parliament. But as of February 2014, the Government had not taken presented such amendment. The ICJ is concerned that the Government's failure to take action to implement the Supreme Court's ruling not only undermines the operation and independence of the NHRC, but also flies in the face of respect for the independence of the judiciary and the rule of law.

16. In addition, the authorities failure to take action to ensure the appointment of Commissioners before the expiry of the terms of office of all of the Commissioners on 16 September 2013 has left NHRC without Commissioners.¹⁹ In the months leading up to the expiry of their terms of office, the Commissioners had called on the government to find a solution so the country's chief human rights body would not be left without leadership. Appointments of the Commissioners are made by the President, acting on the recommendation of the Constitutional Council, following the confirmation by the Parliament hearing,, The Legislature-Parliament convened on 26 January 2014, but it remains unclear when any Commissioners will be appointed to the NHRC.

The failure to establish effective transitional justice mechanisms:

The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2069 (2013)

17. On 14 March, the President of Nepal approved the Ordinance that established the "Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2069 (2013). This Ordinance was promulgated by the Government following failure to adopt draft legislation on transitional mechanisms that had been the subject of wide consultation and debate before the dissolution of Legislative-Parliament in 2012.²⁰ However, the law requires Legislative – Parliament to adopt the Ordinance within 60 days of its resumption.

18. On 23 March 2013, victims and civil society organizations, supported by the ICJ, filed two separate writ petitions before the Supreme Court challenging the constitutionality of the Ordinance and its compliance under international law. They made submissions arguing that the Ordinance violated the victims' rights to an effective domestic remedy for human rights violations enshrined in the Interim Constitution, 2007, and in Article 2 of the Covenant.²¹ On 1

¹⁷ The Section 2(f) states that "'Human Rights" means rights related to life, liberty, equality and dignity of a person provided by the Constitution and other prevailing laws and this term also includes the rights contained in the international treaties regarding human rights to which Nepal is a party.

¹⁸ See National Human Rights Commission Act, 2068 (2012), available at http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf

¹⁹ The NHRC Chariman Kedar Nath Upadhyaya and commissioners Ram Nagina Singh, Gauri Pradhan, Leela Pathak and KB Rokaya completed their six-year tenure on 1 September 2013. Their responsibilities were delegated to the acting secretary, Bed Prasad Bhattarai. Previously when the retiring chairman and four commissioners were nominated in September 2007, the NHRC had been without leadership for 15 months.

²⁰ Article 88(1) of the Interim Constitution of Nepal, 2063 (2007), states, "If at any time, except when the Legislative-Parliament is in session, the Government of Nepal is satisfied that circumstances exist which render it necessary to take immediate action, without prejudicing the provisions set forth in this Constitution, the Government of Nepal may promulgate any Ordinance as deemed necessary."

²¹ The petitioners challenged article 2 (definition of serious human rights violations), 13 (mandate of the Commission), 22 (reconciliation without the consent of the victim), 23 (amnesty for the perpetrator of

April 2013 the Supreme Court stayed the implementation of the Ordinance.

19. On 2 January 2014, the Supreme Court (SC) declared that provisions of the Ordinance failed to conform to Nepal's Interim Constitution, 2007, international law and previous judgments of the Supreme Court.²² The Supreme Court held that the "Ordinance was an obstacle to transitional justice and violated Nepal's Interim Constitution, international human rights law, previous rulings by Nepal's SC and accepted principles of justices"²³. Furthermore, the Court also rejected the Ordinance's provisions allowing the grant of amnesties even for gross human rights violations and serious violations of international humanitarian law, including disappearances, as well as those establishing a 35-day statute of limitation for filing cases in the court following the exercise of discretion of various actors to do so. The Supreme Court held that such short period of statute of limitation "will create impunity" for international crimes. Furthermore, the SC ruled that this limitation provided the Attorney General (AG) with excessive discretion, since any case that the AG was reluctant to pursue could be quashed simply through administrative delay. The Supreme Court issued a writ of mandamus to the Government of Nepal ordering the following, among other things:²⁴

- Form two separate commissions: a "Truth and Reconciliation Commission" and a "Commission of Inquiry on Enforced Disappeared Persons;"
- Criminalize disappearances and other serious crimes, including crimes against humanity;
- Ensure that the establishment of either Commission does not result in provisions of an amnesty for serious crimes;
- Repeal the 35-days statute of limitation;
- Make all necessary legal arrangements in compliance with international standards. This includes, in particular, ensuring adequate vetting to guarantee the impartiality of the Commissions' membership. In this context, ensure that only individuals who were not involved in the hostility and who do not have any record of human rights abuses be selected for appointment;
- Amend or reform the Ordinance or draft new legislation with the assistance of an expert team, consisting of experts on conflict resolution, organizations representing victims' interests, human rights law experts and interested stakeholders (what follows is also unclear and I thought that the SC had said no to amnesties but this sounds as if in fact the SC is okay with amnesties so long as they comply with the prescribed standards and procedures) in order to prescribe standards and procedures in relation

serious human rights violations), 25 (non-criminalization of some serious crimes under Nepali law) and 29 (interference in prosecutorial power of the Attorney General under article 135 of the Interim Constitution and the 35-day statutory limitation) of the Ordinance. The writ petition requested that the Supreme Court issue a writ of certiorari to nullify the Ordinance, which granted amnesty for serious crimes, and a writ of mandamus ordering the Government of Nepal to: 1) enact legislation that criminalizes serious human rights violation; 2) establish a Commission of Inquiry (COI) on Disappearances and a Truth Commission that meets international standards; 3) remove amnesty for serious crimes under international law; 4) invalidate the 35-day statute of limitation; 5) introduce an effective witness protection system; and form an expert team to draft legislation relating to COI on Disappearances and a Truth Commission.

²² For example the Supreme Court in *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government & Ors.* (Case No. 3775/2055) directed the Government to form a Disappearances Commission in line with international standards. See also *Rajendra Ghimire v. Office of the Prime Minister, et. al.* (Case No. 3219/2062), which directed the Government to criminalize torture, in line with its obligations as State party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and *Raja Ram Dhakal v. Office of the Prime Minister, et. al.* (Case No. 2942/2059), which directed the Government to formulate national legislation for the implementation of the four Geneva Conventions; *Liladhar Bhandari & Ors. v. Government of Nepal & Ors.* (Case No. 0863/2064) which required the Government to establish a vetting standard; *Dhakal v. Government of Nepal*, Writ No. 3575, Supreme Court Decision, 1 June 2007, which recognized vetting as one of the measures of transitional justice.

²³ The article 100 of the Interim Constitution of Nepal empowers the court to decide case before it on the basis of recognized principles of justice.

²⁴ *Basnet and Pokharel v. Government of Nepal & Ors.*, 2 January 2013 (069-WS-0057)

to amnesties;

- Arrange necessary legal and institutional measures for effective victim and witness protection mechanisms; and
- Make any other necessary legal, administrative, institutional or other required arrangements for a reparation program.

20. On 26 January 2014, the first session of the newly formed Legislature-Parliament was held. Despite the Supreme Court's 2 January 2014 ruling provisions of the Ordinance null and void and its Mandamus order²⁵, on 27 January 2014, the Government reintroduced the Ordinance with no amendments in the meeting of the Legislative-Parliament – in direct contravention of the Supreme Court's orders.²⁶

21. The Interim Constitution says clearly that the Supreme Court's rulings are binding on the Government of Nepal. Article 116 of the Interim Constitution states that any order issued by the Supreme Court in the course of the hearing of a case shall be binding on the Government of Nepal and all its offices and courts. The Supreme Court has previously held that any mechanism for transitional justice must conform with international standards, lead to accountability for serious human rights violations, and ensure victims their right to remedy and reparations, which includes the right to truth, justice, and guarantees of non-recurrence. The mandate of the Commission under the Ordinance confers authority to recommend the granting of amnesties for all violations within its scope, including torture, enforced disappearances and crimes against humanity.²⁷ Amnesties violate the State's duty under international law to provide effective legal remedy to victims and victims' families.²⁸ They perpetuate impunity, by enabling perpetrators of crimes or human rights violations to evade accountability.²⁹

Failure to ensure effective remedies to implement the Committee's Views in Communications Nos. 1469/2006, *Sharma v. Nepal*; 1761/2008, *Giri et al. v. Nepal*; 1863/2009, *Maharjan v. Nepal*; and 1870/2009, *Sobhraj v. Nepal*

22. As highlighted throughout this submission, the ICJ is concerned about the failure of the authorities to ensure effective remedies to victims whose rights under the Covenant and international humanitarian law have been violated. This failure extends to cases considered by the Committee itself under the Optional Protocol, in which the Committee has found violations of the Covenant.

23. The Human Rights Committee adopted Views in four individual complaints concerning the State Party: *Sharma v. Nepal*³⁰, *Sobhraj v. Nepal*,³¹ *Giri v. Nepal*,³² and *Maharjan v. Nepal*,³³ in regard to the State's Party's obligation to provide an effective remedy to those the Committee has recognized as victims of violations.

24. To date, however, the only action that the government has taken in three of the cases is to make small monetary payments as "interim relief," in line with the State Party's general

²⁵ The Ordinance on Disappearances, Truth and Reconciliation Commission, signed by the President on 14 March, 2013, was declared unconstitutional and in violation of international human rights law by the Nepali Supreme Court on 2 January, 2014. In a directive, the Supreme Court ordered the Ordinance be repealed or amended significantly to bring it in line with Nepal's obligations under national and international law.

²⁶ For details see "Nepal: Respect Supreme Court ruling on Human Rights, available at <http://www.icj.org/nepal-respect-supreme-court-ruling-on-human-rights-law/>

²⁷ Sections 23 and 2(j).

²⁸ Article 24, UN Impunity Principles, *op. ed* cite 11. The UN Human Rights Committee has also stated in its *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment* that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."

²⁹ Definitions, 'A', UN Impunity Principles, *op. cit.* note 11.

³⁰ *Sharma v. Nepal*, No. 1469/2006, CCPR/C/94/D/1469/2006 (28 October 2008).

³¹ *Sobhraj v. Nepal*, No. 1870/2009, CCPR/C/99/D/1870/2009 (27 July 2010).

³² *Giri v. Nepal*, No. 1761/2008, CCPR/C/101/D/1761/2008 (27 April 2011).

³³ *Maharjan v. Nepal*, No. CCPR/C/105/D/1863/2009 (19 July 2012).

policy towards victims.³⁴ The government has made no such payment in the case of *Sobhraj v. Nepal*.

25. The ICJ considers that the State Party's failure to fully and effectively implement the Views of the Committee finding violations of the Covenant in these individual communications is inconsistent with its obligation under article 2(3) of the Covenant to provide a remedy to those the Committee has found to be victims of violations, as well as its obligations as a Party to the Optional Protocol.

Articles 2, 6, 7, 9, 10, 16, 19 and 21: Impunity for human rights violations

26. The ICJ published a report in May 2013 entitled "Authority without Accountability",³⁵ which, among other things, expressed concern about the fact that those in power in Nepal have used public office to enjoy the fruits of authority without accountability. The impunity once enjoyed by the royal family, high government officials and security personnel now also benefits the army and security forces as well as all the major political parties –that is, the Nepali Congress (NC), the Communist Party of Nepal (Unified Marxist Leninist) (CPN-UML), the Unified Communist Party of Nepal-Maoist (UCPN-M), and more recently the Terai-based Madhesi parties.

27. The application of legal provisions providing immunity to various government officials in Nepal serves as a predictable and avoidable demonstration as to why international law and standards insist on no immunity for gross violations of human rights. Despite some attempts to curtail the range of official immunity after the 2006 People's Movement, Nepal's legal landscape remains rife with constitutional, statutory and regulatory provisions granting political office holders and members of security forces immunity from prosecution for criminal acts, including crimes under international law. This catalogue of constitutional, statutory and regulatory immunities has contributed to the crisis of impunity plaguing the country, and continues to do so in significant ways. Nepal's immunities are overbroad, poorly defined, interpreted and applied on the basis of political considerations and, critically, their application is not subject to judicial review. They offer immunity not just from serious crimes, but also gross violations of human rights.

28. While under the Constitution the process and procedures of the Government's business cannot be challenged before a court of law, arguably immunity does not extend to substantive areas, although this has so far not been tested in a court of law. But in practice, ministers and other senior government officials continue to evade accountability despite police complaints, First Information Reports (FIRs), filed against them alleging involvement in serious crimes.

29. Legal immunity has historically extended far beyond senior government officials to cover security personnel. The ICJ, along with Nepali and other international organizations, have repeatedly criticized the misapplication of immunities as provided for in the following legislation: the *Public Security Act 2046 (1989)*, the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001*, as well as Section 37 of the *Police Act, 2012 (1955)*, Section 26 of the *Armed Police Force Act, 2058 (2001)*, Section 6, 6A and 6B of the *Local Administration Act, 2028 (1971)*, Section 22 of the *Army Act, 2063 (2006)*, Section 24(2) of the *National Parks and Wildlife Conservation Act, 2029 (1973)*, Section 6 of the *Essential Commodities Protection Act, 2012 (1955)*, and Section 2 and Section 5 of the *Muluki Ain (General Code) 2020 (1963)*.

30. In addition, the military remains effectively outside of civilian jurisdiction. While The

³⁴ In April 2007, the Ministry of Peace and Reconstruction was established and given the mandate to provide relief and rehabilitation to "conflict-affected persons." The Interim Relief Program began providing monetary forms of assistance to several categories of conflict-affected persons between 2008 and 2009. See *Guidelines for providing relief to beneficiary of a deceased person pursuant to cabinet decision*, 5 October 2008. *Guidelines for providing relief to the beneficiary of a disappeared person pursuant to cabinet decision*, 12 January 2009.

³⁵ For details see, "Authority without Accountability - the struggle for justice in Nepal" available at, <http://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/>

Army Act, 2063 (2006) allows for soldiers accused of homicide and rape to be tried by civilian courts, at the same it time provides for immunity for these offences if committed by personnel on duty, stating that acts 'shall not be deemed to be an offence committed in the course of discharging duties in good faith.' A June 2011 Supreme Court order³⁶ for the Government to form a task force to review the new *Army Act* and to provide recommendations on reforming the military justice system to ensure its compliance with Nepal's human rights obligations has not been acted on.

31. Immunity is further compounded by political abuse of Clause 5.2.7 of the *Comprehensive Peace Agreement (CPA)*, which allows for the withdrawal of politically motivated cases; this is in contravention of Clause 7.1.3, which expresses a commitment to ensuring impartial investigations. Three successive governments between 2008 and 2012, from across the political spectrum, have withdrawn more than 1055 criminal cases filed in district courts across the country. The overbroad and vague definition of what constitutes a "politically-motivated" allegation has led to the withdrawal of a host of cases that involved crimes under international law, including, unlawful killings, sexual violence such as rape and torture³⁷. For instance, in mid-2011, withdrawal of cases was a pre-condition for cooperation between the Maoists and Madhesi political parties, which led to the formation of a government led by Prime Minister Baburam Bhattarai. Such cases, however, do not fall within the ambit of the CPA; more important, these cases deal with human rights violations and as such their investigation and, if appropriate, prosecution, are legal obligations of the Nepali government.

32. *De jure* and *de facto* impunity continue due to a number of policies adopted by the State Party. Despite repeated orders from civilian courts, including the Supreme Court of Nepal, in relation to the duty of police to register First Information Reports (FIR), these orders are still routinely ignored.³⁸ For example on 10 December 2009, Human Rights Day, family members of 30 victims of serious human rights violations simultaneously demanded the filing of FIRs in 28 police stations. The police refused all of these FIRs. The authorities justified this refusal by stating that they needed permission 'from above' to register such complaints. However, the Supreme Court's *State Cases Act of Nepal*³⁹ obliges the Nepal Police to register FIRs immediately if officials receive these petitions either orally or in writing.

33. The failure of the police to register the FIRs, in addition to undermining the independence of the judiciary and administration of justice, results in the failure of Nepal to discharge its obligations to investigate and when evidence warrants, prosecute persons alleged to be responsible for serious human rights violations.

34. But, even in cases in which FIRs are registered, the police still typically fail to carry out their duty to investigate. One of the main obstacles in combating impunity has been the lack of progress in the investigation and prosecution of FIRs filed by relatives alleged to have been subjected to gross human rights violations by security forces or Maoists during the conflict. At least 100 cases of this type are pending in various police stations. Police authorities openly admit in some cases that they do not investigate and arrest members of the Nepal Army or Maoist suspects because of threats to their own security and position.

35. One such example is the case of the killing of Argun Lama in April 2005. He was allegedly killed by six Maoist cadres, one of whom was current spokesperson of UCNP (Maoist), Angi Sapkota. The ICJ has received credible reports that Maoists have threatened the lawyers

³⁶ *Bhuwan Parsad Niraula v. The Government of Nepal*, Writ No. 917 of the year 2064 BS (2007 AD)

³⁷ Supra note 15 (For details see, "Struggle for justice in Nepal" available at, <http://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/>). In this context, under Nepali law, rape is not considered a form of torture. See *Muluki Ain 2066*, (2006).

³⁸ For example see, *Maina Sunuwar v. District Police Office Kavre*, *Arjun Lama v. District Police Office Kavre*, *Sanjeev Kumar Karna v. District Police Office Dhanusha and others*, *Yogmaya Dahal v. District Police Office Bankey and Bhumisara Thapa v. District Police Office Banke*, For further details please see Supreme Court Reporter.

³⁹ The Nepal State Cases Act governs the investigation and prosecution of most crimes. The first State Cases Act of 1961 introduced an adversarial justice system and the new State Cases Act of 1993 introduced those crimes, which were classified as State Crimes for the first time and to be prosecuted by the State. These crimes are listed in Schedule 1 of the State Cases Act 1993 as amended. Murder, rape and battery causing grievous bodily harm, but not other types of battery or inhuman detention are currently listed in the schedule. See State Cases Act 2049, 1992.

working on the case and challenged the State agencies regarding the arrest of their cadres. On 10 March 2008, the Supreme Court had issued an order to the District Police Office and District administration Office of Kavre District to register a First Information Report (FIR) and conduct a criminal investigation in relation to a murder case of Arjun Lama. Allegedly due to the harassment, no progress has been made in this case. Additionally the cabinet decided to suspend the ongoing criminal investigation against senior Maoist leader Agni Sapkota.

36. The authorities have also take active measures to shield individuals from accountability. For example the conduct of the authorities has thwarted the investigation of the enforced disappearance, torture, and unlawful killing of 15-year-old Maina Sunuwar, who was arrested by a group of RNA soldiers on 17 February 2004 and allegedly tortured to death⁴⁰. In this case the Kavre District Court issued arrest warrants against Major Basnet and three others on 31 January 2008 pursuant to a decision to charge them with the murder of Maina Sunuwar. Not only have the authorities failed to ensure the arrest Major Basnet, the Minister of Defense Bhidya Bhandari has publicly supported the Nepal Army's defiance of the arrest order, in spite of the rulings of the Supreme Court and Kavre District Court. Furthermore, as noted below, Raju Basnet was promoted to Brigadier General on 4 October 2012, notwithstanding the warrant for his arrest.

37. Moreover on 11 January 2013, Nepal's Attorney General, Mukti Pradhan, sent a written instruction to the local police and prosecutor not to move forward with the investigation and prosecution on the murder of Dekendra Raj Thapa, who was allegedly tortured and buried alive by Maoist cadres in 2004 during the country's decade-long civil war, which ended in 2006. The Prime Minister approached the Attorney General's Office and the Police Headquarters asking for immediate halt in investigations against the arrested Maoist activists. However, the criminal investigation eventually resumed, after the Supreme Court order in response to a writ petition filed on 13 January 2013.

38. As referred to above, the ICJ is also concerned about the Nepali authorities' failure to implement the NHRC's recommendation. The NHRC was established in 2000 and was charged with the duty to ensure respect, protection, promotion and effective implementation of human rights in Nepal.⁴¹ The Commission has received total 11407 complaints since its establishment in 2001. By July 2013 it had taken decisions in 4510 complaints. According the NHRC report published in 2013⁴², 14 percent of its decisions have been implemented in full; 48 percent have been implemented partially; and 38 per cent remain fully unimplemented. In particular, the complete failure to instigate criminal prosecutions for serious crimes in most cases, notwithstanding the recommendations of the NHRC, remains a profound concern.⁴³

39. A recent report by the United Nations Office for the High Commissioner for Human Rights, documenting serious violations of international law during the conflict, cited approximately 2,500 cases of alleged torture and ill-treatment, 2,000 incidents of alleged unlawful killings and over 600 cases of enforced disappearance during the conflict. So far, however, criminal charges have only been filed in three cases:

- Maina Sunuwar, a 15-year old who was subjected to torture and subsequently died in army custody in February 2004;
- Reena Rasaili, an 18-year-old was killed in February 2004; and
- Dekendra Thapa, a journalist, who was beaten almost to death and died as a result of being buried alive by a group of Maoist cadres in August 2004.

40. The ICJ believes that the accused in these cases remain at large. In other cases,

⁴⁰ OHCHR-Nepal, 'The Torture and Death in Custody of Maina Sunuwar', December 2006, p 24.

⁴¹ The enabling legislation was created in 1997. See Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Second periodic reports of States parties, Nepal State Report*, UN Doc. CCPR/C/NPL/2 21 February 2012. Nepal State Report, UN Doc. CCPR/C/NPL/2 21 February 2012, para 21, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/434/36/PDF/G1243436.pdf?OpenElement>

⁴² See NHRC report on the status of the implementation of the NHRC recommendation, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/13_years_report.pdf

⁴³ See: 13 years of NHRC, the status of the implementation of the NHRC recommendation, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/13_years_report.pdf

however, there has been little or no progress despite repeated court orders directing the police and the Attorney General's Office to proceed with investigations.

Article 2
Failure to ensure appropriate vetting

41. In light of the obligations to ensure accountability for human rights violations and to prevent human rights violations, human rights bodies and some standards have underscored the importance of establishing fair procedures to ensure that those responsible for human rights are not hired to carry out or permitted to remain in positions as public officials, law enforcement officials or members of the security services. Furthermore those suspected of serious human rights violations should be suspended from active duty during the period of investigation and any subsequent trial. For example the UN Human Rights Committee recommended the Government of Argentina to take measures "to ensure that persons involved in gross human rights violations are removed from military or public service."⁴⁴

42. In keeping with such standards, the Supreme Court directed the Government to put in place guidelines for vetting to prevent those implicated in human rights violations from holding public office.⁴⁵ On 12 August 2012, the Supreme Court (SC) of Nepal issued a directive order to the Government of Nepal to frame an appropriate law and standards on vetting to regulate the promotion and transfer of public officials, including those from the security apparatuses implicated in serious human rights violations. The court held that:

"It would be appropriate to identify eligible candidates while selecting individuals for positions of authority involving public accountability and appoint them accordingly in order to create an environment conducive to sustainable peace and justice.

"As a deterrent measure to ensure non-repetition of human rights violations in future, it is pertinent to test the eligibility of the candidates before deciding on their appointment, transfer and promotion.

"Assigning someone with a special authority involving exercise of state power, without determining whether he/she is involved in human rights violations and he/she has faith in human rights and rule of law, might further jeopardize the state and general public . . . therefore a directive order is hereby issued in the name of respondents Government of Nepal and the Office of the Council of Ministers to make arrangements for framing necessary laws and standards vis-à-vis vetting process and duly implement them."⁴⁶

43. This and a January 2009 ruling of the Supreme Court both emphasize the need for immediate, appropriate and comprehensive legislative reforms to establish a regular vetting process of public officials and the setting up of ad hoc vetting measures as a part of transitional justice efforts in Nepal.

44. Similarly and in keeping with its jurisprudence in its 2 January 2014 ruling concerning the "Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)," the SC ordered the authorities to ensure the independence and impartiality of the Truth and Reconciliation Commission that no one appointed to work on the Commission was a party to or otherwise involved in the conflict or has a record of human rights violations.⁴⁷

45. Notwithstanding the rulings of the Court and the duty of the authorities to ensure accountability for serious violations of Covenant rights and take measures to prevent such violations in the future, to date, neither the Nepali Army nor the Nepali Police have introduced

⁴⁴ Human Rights Committee, concluding observations: Argentina, CCPR/CO/70/ARG, para. 9 (2000).

⁴⁵ The Supreme Court recognized vetting as one of the measures of transitional justice and required the Government to establish a vetting standard. See *Liladhar Bhandari & Ors. v. Government of Nepal & Ors.* (Case No. 0863/2064), *Sunil Ranjan Singh & Dipendra Jha v Office of the PM and Others* (Case No. 067-WO-1198) and *Dhakal v. Government of Nepal*, Writ No. 3575, Supreme Court Decision, 1 June 2007.

⁴⁶ An unofficial translation of the Supreme Court judgment.

⁴⁷ *Basnet and Pokharel v. Government of Nepal & Ors*, 2 January 2013 (069-WS-0057)

a system of vetting consistent with international principles.

46. Furthermore it is still routine practice for the authorities in Nepal to promote those suspected of responsibility for serious human rights violations.

47. For example, on 13 September 2012, the Government promoted Kuber Singh Rana from Assistant Inspector General to the rank of Inspector General of Police, notwithstanding the fact that he is implicated in the ongoing criminal investigation ordered by the Supreme Court in February 2009 of the enforced disappearance and extrajudicial killing of five students in Dhanusha in October 2003.

48. On 4 October 2012, the Government promoted Col. Raju Basnet to Brigadier General. Raju Basnet was commander of the Bairabnath Battalion in 2003, when systematic enforced disappearance and torture were alleged to have been committed by forces under his command at the battalion's Maharajgunj Barracks, according to investigations carried out by UN OHCHR and the NHRC.

49. Furthermore, individuals who were alleged to be responsible for serious human rights violations have also been promoted to the post of cabinet minister on at least two occasions.⁴⁸ These promotions marked indicate the government's failure as of yet to respect and ensure their obligations to ensure accountability and justice for and to prevent Covenant violations prevention of violations.

Articles 2 and 6 Extrajudicial killings

50. The ICJ is concerned about unlawful killings, including extrajudicial executions committed during and since the conflict. Furthermore, the failure of the authorities to ensure the effective investigation of alleged violations of the right to life and to bring those responsible for such violations to justice in the course of fair proceedings. The lack of a law criminalizing unlawful killing in accordance with international human rights and international humanitarian law may facilitate impunity.

51. According to Government figures, between the launch of the "People's War" in February 1996 and the formal end of the armed conflict on 21 November 2006, a total of 12,686 individuals - including both combatants and civilians - were killed in the armed conflict⁴⁹. According to the OHCHR 2013 report⁵⁰, data shows that unlawful killings occurred throughout the conflict in multiple contexts: for example, during Maoist attacks on Security Force posts and bases, Government buildings, national banks and public service installations; in "chance encounters" and during ambushes, such as in the *Madi* bus bombing.⁵¹ Other examples of unlawful killings have been recorded as having occurred during search operations conducted by the Security Forces in response to earlier Maoist attacks and following abductions, abuse and torture of suspected spies and informants at the hands of the local PLA and political cadres. Unlawful killings were also perpetrated against individuals suspected of being Maoist insurgents and civilians who were in detention or otherwise under the control of the adversary, for example, in execution-style killings. One of the most compelling cases is that known as *Doramba*, where 17 Maoists and two civilians were taken by the Royal Nepal Army (RNA), marched to a hillside, lined up and summarily executed."

52. The Maoists also killed captives; for example, three teachers, Muktinath Adhikari, Kedar Ghimire and Arjun Ghimire, were each allegedly executed after abduction in separate incidents in Lamjung District in 2002.

⁴⁸ Human Rights Watch, 'Nepal: Promotion of War Crime Suspect Affront to Justice', 5 October 2012, available at <http://www.hrw.org/news/2012/10/05/nepal-promotion-war-crimes-suspect-affront-justice>.

⁴⁹ Ministry of Peace and Reconstruction website, Emergency Peace Support Operation (available from www.epsp.gov.np/eng/index.php?page=deceased_main).

⁵⁰ For details see: OHCHR, Nepal Conflict report, available at http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

⁵¹ The Madi bus bombing occurred on 6 June 2005 in the Chitwan district of Nepal. Thirty-eight persons were killed, with 72 injured when a passenger bus ran over a Maoist roadside bomb in southern Nepal. See BBC, 'Dozens die' in Nepal bus blast, 7 June 2005, available at: http://news.bbc.co.uk/2/hi/south_asia/4612633.stm.

53. Since the 2006 Comprehensive Peace Accord was signed, political violence has continued, and in some areas has increased, particularly in the Terai Districts.⁵² Some credible reports have shown that party youth wings and armed groups continue to resort to extortion and intimidation and have been responsible for scores of killings. In mid-2009 the government launched a "Special Security Strategy"(SSS), aimed at maintaining law and order by deploying additional security forces in half of Nepal's districts. Half of these units are situated in the troubled Terai region, constituting Nepal's southern plains bordering India. In October 2009, the OHCHR-Nepal and a number of human rights organizations, expressed concern about the high number of individuals reported killed in "encounters" with security forces and about credible allegations of extrajudicial killings involving police personnel.

54. As discussed above, in its ruling on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013), on 2 January 2014 the Supreme Court held that it is the State's obligation to criminalize serious violations of human rights.⁵³ The ICJ considers that compliance with this judgment, among other things requires the government to ensure that the laws of Nepal criminalize violations of the laws of war and serious violations of human rights, including extrajudicial executions and to ensure that these crimes are punishable by penalties that are commensurate with the gravity of the offences.

Articles 2, 6, 7, 9 and 16
Enforced disappearances

55. Enforced disappearance⁵⁴ were among the most serious human rights violations committed during the armed conflict in Nepal. Conflict-related disappearances were reported as early as 1997⁵⁵ and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.⁵⁶ In its 2009 report⁵⁷ to the United Nations General Assembly, the United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) stated that during the ten-year conflict in Nepal, the highest number of cases of enforced disappearances it received was in 2002, when it was notified of 277 cases.⁵⁸ The WGEID has transmitted 672 cases to the Government of Nepal and, as of 2 March 2012, it had received no further information on 458 of these cases.⁵⁹

56. The ICJ remains concerned that the authorities have failed to date to take effective measures to ensure the independent, impartial and effective investigation of enforced disappearances and to bring those responsible to justice.

⁵² "Nowhere are the results of this justice vacuum more apparent than in the Terai region of southern Nepal where the legacy of conflict-era violations and prolonged impunity has allowed a culture of violent lawlessness to take root." See Amnesty International, *Nepal: the search for justice*, January 2013, AI Index: ASA31/001/2013, at 5, available at <http://www.amnesty.org/en/library/asset/ASA31/001/2013/en/11443e06-3609-4811-87a3-c35eb315f5d1/asa310012013en.pdf>.

⁵³ *Basnet and Pokharel v. Government of Nepal & Ors.*, 2 January 2013 (069-WS-0057).

⁵⁴ See Office of the High Commissioner for Human Rights, *The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

⁵⁵ Informal Sector Service Centre, *Human Rights Yearbook 1997 (1997) as cited by Office of the High Commissioner for Human Rights, The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf.

⁵⁶ Amnesty International, *Nepal: Escalating 'disappearances' amid a culture of impunity*. Available from www.amnesty.org/en/library/asset/ASA31/155/2004/en/202bdd2f-d59d-11dd-bb24-1fb85fea05/asa311552004en.html as cited by Office of the High Commissioner for Human Rights, *The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

⁵⁷ *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council (A/HRC/13/31) as cited by Office of the High Commissioner for Human Rights, The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

⁵⁸ *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council (A/HRC/19/58/Rev.1) as cited by Office of the High Commissioner for Human Rights, The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

⁵⁹ Office of the High Commissioner for Human Rights, *The Nepal Conflict Report*, October 2012, available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

57. Among other things, despite the judgment of the Supreme Court in 2007⁶⁰, and long-standing recommendations of a range of bodies including the WGEID⁶¹ and commitments to do so, to date, the State Party has failed to codify enforced disappearance as an offence within its domestic criminal law and to codify it as a crime against humanity in certain circumstances in accordance with international law. This failure has been among the significant obstacles faced by the victims of enforced disappearances and their relatives who wish to file criminal complaints.

58. The most recent failure of the government to ensure that the adoption of laws to criminalize enforced disappearance and to establish the separate independent commission to investigate enforced disappearances as set out in the 2006 Comprehensive Peace Accord, have been elaborated above in the section on the 2013 Ordinance.

59. As of 10 February 2014 the government has failed to take effective measures to ensure the effective investigation of enforced disappearances, to criminalize the acts of enforced disappearances as distinct crimes and on a manner with the internationally agreed definition of this, to ensure that those responsible for enforced disappearances are brought to justice in proceedings which meet international standards of fairness and to ensure adequate reparation for victims. It has thus, as of yet failed to meet its obligations under Articles 2(3), 7, 9 and 16 of the Covenant with regard to enforced disappearances.

Articles 2 and 7: Freedom from torture and cruel, inhuman or degrading treatment

Failure to prevent, to investigate, to punish and to codify the crime of torture

60. Torture was systematically practiced in Nepal during the armed conflict and is still prevailing as a means of obtaining a confession in the context of criminal investigations.

61. During the decade long armed conflict, torture, mutilation, and other forms of cruel and inhuman and degrading treatments appear to have been perpetrated extensively by both the security forces and the Maoists. According OHCHR, Nepal Conflict report, Maoists also allegedly used torture and other ill-treatment as a punishment. Whether through the "People's Court" or simply by decisions of local commanders, Maoists regularly, and often violently, punished persons deemed to have "misbehaved" according to the Maoist code, or those targeted because of their active or symbolic opposition to the Maoist movement. The most notable group of victims were those that the Maoists suspected of being spies or 'informants'.

62. Advocacy Forum has recently published a report, which documents a hundreds of cases of torture in police detention centers. According to the report, in 2012, 22.3 % of those interviewed reported that they had been subjected to torture or ill-treatment as defined under the United Nations Convention Against Torture (CAT).⁶²

63. Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 May 1991.⁶³

64. On 17 December 2007, the Supreme Court issued an order directing the Government of Nepal to codify the crime of torture.⁶⁴ To date, Nepal has failed to codify torture as a criminal

⁶⁰ *Rajendra Dhakal v. The government of Nepal*, SC Bulletin Jun 2007

⁶¹ Report of the Working Group on Enforced or Involuntary Disappearances on its Mission to Nepal (6-14 December 2004), UN Doc. E/CN.4/2005/65/Add.1 (2005), para 58 (a).

⁶² For details see, Advocacy Forum, Nepal: Is the Government unable or Unwilling to prevent and investigate the Torture, available at: <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>

⁶³ Pursuant to the Treaty Act of 1990, international treaty obligations are directly enforceable in domestic law. Section 9(1), Nepal Treaty Act, 1990, states, "In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, is inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws." See Nepal Treaty Act, 1990.

⁶⁴ Supreme Court of Nepal, *Agenda Ghimire et al. v. Ministry of Council and Office of the Ministry of Council*, 17 December 2007(NKP vol. 3 2066 BS Page 452).

offense.⁶⁵ The failure to enact such legislation has resulted in the rejection of criminal complaints lodged by victims of torture⁶⁶ with the police and the failure to prosecute any individual for torture or ill-treatment.⁶⁷

65. In May 2012 the Committee against Torture conducted a confidential inquiry into Nepal. A portion of the Committee's findings from its inquiry were made public and concluded that despite the Government of Nepal's claims to the contrary, the authorities "appear to acquiesce in the policy that shields and further encourages torture."⁶⁸

66. As noted above, in 2 January 2014 ruling on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013), the Supreme Court emphasized the State's obligation to criminalize serious violations of human rights, such as torture.⁶⁹ In its order, the Supreme Court issued a mandamus order directing the Government of Nepal to enact domestic legislation criminalizing acts of serious human rights violations.

67. The State Party has failed to implement court orders and NHRC recommendations, thereby undermining the effectiveness of these institutions in promoting and protecting the prohibition of torture. In its concluding observations, the Committee against Torture stated the continuation of these practices has contributed to the continuing habitual, widespread and deliberate practice of torture in Nepal and that the State Party must do

⁶⁵ In paragraph 118 of its Second Periodic Report, Nepal cites to art. 26 of the Interim Constitution guaranteeing a prohibition on torture and inhuman treatment. However as noted above there has been no actual legislation to criminalize the act of torture. Both the Special Rapporteur and the CAT in its Concluding Observations noted the failure to codify torture as a criminal offense was a source of concern. See Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Second periodic reports of States parties*, Nepal State Report, UN Doc. CCPR/C/NPL/2 21 February 2012. Nepal State Report, UN Doc. CCPR/C/NPL/2 21 February 2012. See Concluding Observation, UN Doc. CAT/C/NPL/CO/2 of 13 April 2007, at para. 12. See also Special Rapporteur on Torture Report on the Visit to Nepal, UN Doc. E/CN.4/2006/6/Add.5 of 9 January 2006, at paras. 13-14, and 33(b).

⁶⁶ According to the UN Special Rapporteur on Torture, torture was found to be "systematically practiced by the police, armed police and Royal Nepalese Army" during the armed conflict. Since the end of the armed conflict, civil society groups, such as Advocacy Forum and the Informal Sector Service Centre (INSEC), have documented cases of torture and ill-treatment reported to be carried out by the Nepal Police (NP), the Armed Police Force (APF) (especially in the Terai region), customs officers and officials of the Forestry Department (who have powers to arrest and investigate in national parks), in addition to members of the Young Communist League (YCL), the youth wing of the Communist Party of Nepal-Maoist and similar youth organizations set up by other political parties, and a number of armed groups operating in the Terai. Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (E/CN.4/2006/6/Add.5) of 9 January 2006, para. 31. See also Advocacy Forum, 'Recent trends and patterns of torture in Nepal. A briefing (January to June 2011)', available at: <http://www.advocacyforum.org/publications/torture.php>. See also INSEC, *Nepal Human Rights Yearbook 2013*, available at: <http://www.inseconline.org/pics/publication/1361179714.pdf>, and INSEC, *Nepal Human Rights Yearbook 2012*, available at: <http://www.inseconline.org/pics/publication/1329980248.pdf>.

⁶⁷ In addition to the constitutional provision there is the Torture Related Compensation Act of Nepal, 1996. The TRCA is a civil remedy, which allows for courts to award a maximum of NRs 100,000 compensation to victims and for disciplinary action against alleged perpetrators. There is a 35-day time limit contained in this act, within which a complainant must file a claim after the torture or release from detention. This limit is unduly restrictive and inconsistent with international law. As a result, the State Party has failed in its obligation to provide an effective remedy to victims of torture. See *Compensation for Torture Act, 1996* [Nepal], 18 December 1996, Section 5(1), available at: <http://www.refworld.org/docid/3ae6b4fac.html>, accessed 28 January 2014. See also Committee against Torture, *General Comment No. 3 on Art. 14 of the Convention Against Torture*, UN Doc. CAT/C/GC/3 of 13 December 2012; See also Report of the Special Rapporteur on Torture, *Report on the Visit to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 of 9 January 2006, at paras. 26 and 33.k; CAT, *Concluding Observations on Nepal*, UN Doc. CAT/C/NPL/CO/2 of 13 April 2007, at paras. 21.d and 28.a. See also Advocacy Forum and others, 'Criminalize torture' June 2009 and 'Hope and frustration: an assessment of the Torture Compensation Act', both available at <http://www.advocacyforum.org/publications/torture.php>.

⁶⁸ The inquiry also stated that under article 20 of the UNCAT "torture is being systematically practiced in the territory of Nepal, according to its longstanding definition, mainly in police custody." Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party, paras.104 and 109.

⁶⁹ *Basnet and Pokharel v. Government of Nepal & Ors*, 2 January 2014 (069-WS-0057) pgs. 7 and 21.

more to address this issue.⁷⁰

Articles 2, 3, 7, 9 and 26
The crime of rape

68. While rape and incest are included as crimes in Nepal's domestic law, it is important to note that under these provisions, the crime of rape can only be perpetrated against a woman or minor girl and is limited to sexual intercourse involving vaginal penile penetration. As a result the crime of rape does not encompass other forms of non-consensual sexual contact, including anal or oral penetration. Indeed no criminal provisions exist in Nepal subjecting these, and other, forms of sexual assault to effective, dissuasive and proportionate criminal punishment.⁷¹

69. Moreover the law applies a 35-day statute of limitations in relation to the crime of rape which is far shorter than the limitation period applicable in relation to other serious crimes.⁷² On two occasions, the Supreme Court has ordered the repeal of this statute, calling the statute of limitation of 35 days "unreasonable" and "unrealistic."⁷³ However it remains in force. Meanwhile, although subject to the criminal law, marital rape is subject only to a penalty of imprisonment for less than six months.⁷⁴

70. In addition the 2 January 2014 ruling of the Supreme Court on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013), includes a mandamus order directing the Government of Nepal to enact domestic legislation criminalizing serious human rights violations. Such laws should include the offense of rape and other forms of sexual assault and sexual violence.⁷⁵ Other specific forms of sexual violence that should be criminalized include, forms of sexual assault not involving vaginal penetration; sexual violence when committed as a war crime, crime against humanity or genocide; sexual slavery; enforced pregnancy; forced prostitution; forced sterilization; forced nudity; mutilation of genitals and breasts; forced circumcision.

RECOMMENDATIONS

71. Against the background of the information provided, as well as in the context of the thematic areas considered in this submission, the ICJ calls on the Committee to make the following recommendations to the Government of Nepal:

Article 2(3)

National Human Rights Commission

1. Amend the 2012 National Human Rights Commission Act in a manner that is consistent with the Supreme Court's judgment and international human rights standards safeguarding its independence, and enlarging its mandate so as to ensure that it can function in a manner that is consistent with the government's obligations to ensure the right to an effective remedy, in accordance with article 2(3) of the Covenant.
2. Take measures to ensure, without delay the appointment of independent and suitably

⁷⁰ *Ibid*, para. 105

⁷¹ Although the legislation, 'Amending Some Nepal Acts to Maintain Gender Equality, 2063 (2006)' (Article 11) introduced a crime called 'sexual harassment' into Nepali criminal law which would appear to be applicable to such forms of sexual assault, the relevant penalty is limited imprisonment of up to one year and a fine. Meanwhile it also does not encompass sexual violence against men and boys.

⁷² See Sec. 11, Chapter 14 on Rape, Muluki Ain (General Code), which states: "If a suit on the matter of rape is not filed within thirty five days from the date of the cause of action, the suit shall not be entertained." Many victims are delayed in reporting due to fear, trauma, stigma or severe health consequences.

⁷³ See *Sapana Pradhan Malla v. Prime Minister and Council of Minister & Ors.*, Writ. No. 3561 (2006) OHCHR reported that "the police refuse to file a case because there is no medical report, while the doctor refuses to do a forensic examination in the absence of a First Information Report [criminal complaint]. See OHCHR, *Nepal Conflict Report 2012*, at 169

⁷⁴ Article 12(2) 'Amending Some Nepal Acts to Maintain Gender Equality, 2063 (2006)'

⁷⁵ *Basnet and Pokharel v. Government of Nepal & Ors.*, 2 January 2013 (069-WS-0057) pgs. 7 and 21.

qualified Commissioners to the NHRC to fill the posts of those whose terms of office have expired in a fair, inclusive and transparent manner that safeguards the independence and appearance of independence of the Commission.

Failure to establish effective transitional justice mechanisms

3. Establish two separate transitional justice commissions: a "Truth and Reconciliation Commission" and a "Commission of Inquiry on Enforced Disappeared Persons".
4. Criminalise the act of enforced disappearance in accordance with the definition set out in the International Convention on the Protection of All Persons from Enforced Disappearance and ensures that it is punishable with penalties commensurate with the gravity of the crime.
5. Criminalise other serious crimes, including crimes against humanity, and other crimes under international law, in a manner that is consistent with international law.
6. Prohibit amnesties for gross human rights violations or crimes under international law.
7. Ensure that the law does not contain a limitation period on the reporting of violations and ensures there are no time limits on the prosecutions of serious crimes including enforced disappearance, other crimes under international law including, war crimes, and crimes against humanity.
8. Ensure that the composition and structure of the transitional justice Commissions and mechanisms comply with international standards. In particular, there should be a fair vetting system that aims to ensure the impartiality of the commission members and to ensure that no individuals against whom there are credible allegations they have committed human rights abuses are selected as Commissioners.
9. Take necessary legal and institutional measures to enable and ensure the establishment, adequate resourcing and maintenance of effective victim and witness protection mechanisms.
10. Take other necessary legal, administrative, institutional, or other arrangements for an effective reparation program.

Failure to implement Committee Views

11. Implement as a matter of urgency and in full the views of the Committee in the above-mentioned cases.
12. Fully cooperate with the Committee.

Articles 2, 6, 7, 9, 10, 16, 19 and 21

13. Conduct prompt and thorough investigations into alleged cases of human rights abuses which occurred during or outside of the context of the conflict and, when the evidence so warrants, bring charges against those allegedly responsible, including, when relevant those who bear command responsibility.
14. Ensure that those allegedly responsible for cases of serious human rights violations and crimes under international law, are brought to justice before a civilian court.
15. Enact legislation to ensure that any parliamentarian or State official.
16. Repeal or amend legislation so as to remove any immunity afforded to State officials for human rights violations, including Section 11 of the Public Security Act, 2046 (1989), Section 37 and Section 38 of the Police Act, 2012 (1955), Section 26 of the Armed Police Act, 2058 (2001), Sections 6, 6A and 6B of the Local Administration Act, 2028 (1971), Section 22 of the Army Act 2006, Section 24(2) of the National Parks and Wildlife Conservation Act, 2029 (1973), Section 6 of the Essential Commodities Protection Act, 2012 (1955) and parts of the Muluki Ain (General Code), notably Section 2 and Section 5.
17. Ensure the new Constitution does not grant any State official the power to issue an official pardon, withdraw a case or grant an amnesty to anyone suspected or convicted,

as relevant, of a human rights violation or crime under international law.

18. Implement the decisions of the Supreme Court including in the cases *Kedar Chaulagain v Kavre District Police Office and District Attorney's Office* (2009), *Rabindra Prasad Dhakal v. The Government of Nepal and Others* (2007), *Devi Sunuwar v. District Police Office, Kavrepalanchok and Others* (2007), *Purnimaya Lama v. District Police Office, Kavrepalanchok and Others* (2008), issuing instructions to the Attorney General and all relevant law enforcement personnel to proactively and vigorously pursue all cases alleging serious violations of international human rights law.
19. Comply with the Supreme Court Order and surrender Major Basnet and other military officials to the jurisdiction of the civilian court.
20. Withdraw the ordinance and establish a Truth and Reconciliation Commission and a Commission of Inquiry on Disappearance and amend it in accordance with international standards and the rulings of the Supreme Court.

Article 2: Failure to ensure appropriate vetting

21. Establish and implement standards and fair procedures to ensure that public officials and public employees, law enforcement, members of the armed forces and state agents against whom there is a credible evidence of responsibility for involvement in human rights violations are suspended from duty pending the completion of an independent impartial and thorough investigations and any subsequent adjudicatory proceedings.
22. Establish and implement clear and transparent standards and fair procedures for vetting of public officials, state employees and state agents; such standards must be consistent with international standards and ensure that persons who have been responsible for gross human rights violations or crimes are not hired to fill positions of public service as state agents or employees or are removed from such position.

Articles 2 and 6: Extrajudicial killings

23. Investigate promptly all allegations of extrajudicial killing by the security forces, including in Terai District, and bring those alleged to be responsible to justice in accordance with international standards of fair trial.
24. Fully implement the Supreme Court decision of 2 January 2014, which ordered the State Party to criminalize extrajudicial killings in domestic legislation in accordance with international law and standards.

Articles 2, 6, 7, 9 and 16: Enforced disappearances

25. Fully implement the Supreme Court's rulings of 1 Jun 2007 and of 2 January 2014, which ordered the State Party, among other things, to criminalize enforced disappearance, and establish a separate commission of inquiry on conflict-related enforced disappearances.
26. Ensure the effective investigation of all cases of enforced disappearances by an independent and impartial body; bring those responsible for enforced disappearance to justice in fair proceedings and ensure that they are sanctioned in a manner commensurate with the gravity of the offence; and ensure adequate reparation for the victims of disappearance, including the families of the disappeared.
27. Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance and accede to the Rome Statute of the International Criminal Court (ICC).
28. Invite the relevant thematic mandates of the Human Rights Council to visit Nepal, including the Working Group on Enforced and Involuntary Disappearances, the Special Rapporteur on Torture, and the Special Rapporteur on extrajudicial, summary or arbitrary execution.

Articles 2 and 7

Failure to prevent, to investigate, to punish and to codify the crime of torture

29. Take all necessary measures to prevent all forms of torture and other cruel, inhuman or degrading treatment.
30. Ensure the prompt adoption of a provision into law criminalizing torture that is consistent with the definition of the crime set out in Article 1 of the Convention against Torture.
31. Ensure that other forms of cruel, inhuman or degrading treatment or punishment are also criminalized in a manner consistent with international standards.
32. Take all necessary measures to ensure the effective and independent and impartial investigation of all allegations of torture and other cruel, inhuman or degrading treatment or punishment; ensure those responsible are brought to justice and subjected to punishment which is commensurate with the gravity of the offence; ensure reparation to the victims of torture or other cruel, inhuman or degrading treatment or punishment.

Articles 2, 3, 7, 9 and 26: The crime of rape

33. Reform the current domestic law, so that it criminalizes rape and other forms of sexual violence in a manner that conforms with international standards.⁷⁶
34. Without further delay, implement the recommendation made by CEDAW in 2001 to "[t]ake immediate measures to abolish the statute of limitations on the registration of sexual violence cases, to ensure women's effective access to courts for the crime of rape and other sexual offences."⁷⁷

⁷⁶ Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Jallow v. Bulgaria, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011; CEDAW, *General Recommendation 19, Violence Against Women*, U.N. Doc. CEDAW/C/1992/L.1/Add.15.

See also Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008 (hereinafter CAT *General Comment No. 2.*), Paras. 18, 22; Committee Against Torture, *General comment No. 3, Implementation of article 14 by States parties* CAT/C/GC/3, 13 December 2012 (hereinafter CAT *General Comment No. 3.*), Paras. 32, 34. See also *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, available at: <http://www.refworld.org/docid/3ae6b7560.html>; *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <http://www.refworld.org/docid/40278fbb4.html>; *The Prosecutor v. Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, available at: <http://www.refworld.org/docid/48abd5791a.html>; International Criminal Court, *Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (2000), Articles 8(2)(b)(xxii) and Article 8(2)(e)(vi), available at: <http://www1.umn.edu/humanrts/instreet/icclementssofcrimes.html>

⁷⁷ See Concluding *Observations on Nepal*, CEDAW, at para.20(c), UN Doc. CEDAW/C/NPL/CO/4-5 (2001), available at: <http://www1.umn.edu/humanrts/instreet/icclementssofcrimes.html> daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/450/52/PDF/N1145052.pdf?OpenElement