

# **Achieving Justice for Gross Human Rights Violations in Nepal** Baseline Study, October 2017

ICJ Global Redress and Accountability Initiative

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® Achieving Justice for Gross Human Rights Violations in Nepal - A Baseline Study  
ICJ Global Redress and Accountability Initiative

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## BASELINE ASSESSMENT

Nepal's civil society and human rights organizations have done well to keep accountability for human rights violations on the agenda for more than a decade after the conflict. Human rights defenders from across the region, if not globally, draw inspiration from the dedication, persistence and imagination of the human rights movement in the country, which was able to put the human rights situation in Nepal firmly on the international agenda during the conflict, and has sustained the interest of Nepali people as well as the global community in transitional justice for more than a decade after the end of the conflict.

However, more than ten years after the Comprehensive Peace Agreement was signed in 2006, there has been near absolute impunity for those responsible for serious crimes under international law during Nepal's conflict, and few victims have had access to an effective remedy and reparation for the abuses they have suffered. Established transitional justice mechanisms such as the Truth and Reconciliation Commission and Commission on Investigation of Disappeared Persons have fallen short of international standards, both in constitution and operation. In addition to their deeply flawed mandates, the non-consultative and opaque approach of the Commissions has created distrust with all major stakeholders including conflict victims and members of civil society, who are suspicious of the transitional justice process and the Government's will to hold perpetrators criminally accountable. Impunity for past human rights violations has also further emboldened law enforcement agencies, the military, as well as political parties to continue acting outside the purview of the law, especially when faced with opposition, protest and dissent.

As a result, there are now visible signs of cynicism and hopelessness, as well as questions about the direction of the human rights movement in the country.

A part of the human rights movement considers the focus on accountability on past violations too narrow, and instead wants to work towards addressing the broader violations of social and economic rights that lay at the root of the many conflicts in Nepal. Others argue that a disproportionate focus of human rights organizations on prosecutions has neglected the significance of other transitional justice measures such as reparations, which could more directly benefit victims and their families than protracted trials focused on a small number of perpetrators that are unlikely to succeed.

There is also regret over the fragmentation of the human rights movement in the country. While some blame this on the dependence of human rights organizations on donors, others point toward the politicization of human rights and victims' organizations as having made them and their work partisan.

With dwindling donor interest in transitional justice and accountability for human rights violations, human rights organizations and victims' groups are also concerned about the sustainability of working on addressing impunity. They, however, consider it imperative for human rights organizations and victims' groups to continue to work together and once again reanimate the human rights movement in the country.

### **1 General human rights situation in the country**

Nepal's new Constitution, adopted in September 2015, recognizes 'the martyrs, the disappeared citizens and the victims' of Nepal's decade-long conflict. It promises a new polity driven by values of equality, inclusiveness, social justice

and the rule of law, where 'civil liberties, fundamental rights and human rights' would be recognized.<sup>1</sup>

Ironically, just as the Constitution was being debated in Parliament, Madhesi and Tharu protestors were agitating for greater inclusion and protection against State discrimination experienced by the people living in the Terai, a region in the South of Nepal bordering India. The State responded to their protests with brute force: according to some estimates, dozens of protestors lost their lives because of the excessive use of force by the Nepali Police and the Armed Police Force; scores of protestors were and continue to be unlawfully detained; and many others were subjected to torture and other ill-treatment.<sup>2</sup> Human rights organizations have been demanding independent investigations into these allegations but the Government has thus far resisted these calls.

In the backdrop of the State's clampdown on the Madhesh movement in the Terai is the persistent failure of the Government to provide justice for the victims and families of the thousands of Nepalis who were subject to extrajudicial execution, enforced disappearance, torture, rape and other gross violations of human rights during the course of Nepal's conflict.

Nepal faced a long and brutal civil war from 1996 to 2006. Human rights groups estimate that at least 13,000 people were killed; 1,300 people were 'disappeared'; and countless others were subjected to gross human rights violation and abuses including sexual violence and torture and other ill-treatment by both parties of the conflict during this period.<sup>3</sup> A Comprehensive Peace Agreement (CPA) put an end to the conflict on 21 November 2006, with both sides agreeing to hold perpetrators of human rights violations accountable and provide remedies and reparation to victims. More than ten years later, however, these promises still have not been met.

In post-conflict Nepal, like in the years preceding the civil war, political expediency has trumped calls for justice and accountability. Mechanisms adopted for transitional justice such as the Truth and Reconciliation Commission (TRC) and Commission on Investigation of Disappeared Persons (CoID) to investigate cases of enforced disappearance fall short of international standards, despite the reinforcement of such standards by directions of the Supreme Court. In contrast, the Government continues to use State machinery to shield perpetrators rather than serve the interests of justice. Police investigations into human rights violations and prosecutions by the Attorney General's Office continue to be selective, politically motivated and lacking the independence and impartiality required under international standards.

The continuing failure to address egregious violations has emboldened perpetrators of human rights violations, who know that they can, and nearly always will, escape accountability for serious crime. Impunity, therefore, lies at the heart of the rule of law crisis in Nepal. It links the horrific violations during the conflict to the simmering tensions in the Terai today, and is one of the major obstacles to the creation of a stable and legitimate democratic government in Nepal. The lingering instability once again affirms experiences from around the world that a climate of impunity undermines efforts establish democratic governance driven by respect for human rights and the rule of law.

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<sup>1</sup> The Constitution of Nepal 2015.

<sup>2</sup> See, for example, Asian Human Rights Commission (AHRC) and the Terai Human Rights Defenders Alliance, 'Protest and Repression: State responsibility for 37 killings during protests in Terai', May 2016.

<sup>3</sup> UN Office of the High Commissioner for Human Rights, Nepal Conflict Report, October 2012, Executive Summary.

## 2 Accountability of perpetrators of gross human rights violations

### 2.1 International law and standards on accountability

With respect to all human rights, whether those applicable to a State under customary international law, or those taken up through party status to international and/or regional human rights instruments, States have both negative and positive obligations: negative duties *not* to interfere with the legitimate enjoyment of rights (e.g. to respect the non-derogable right of all persons not to be arbitrarily deprived of life); and positive duties to protect rights from interference by others (e.g. to take legislative, administrative, judicial, educative and other necessary measures to guarantee the enjoyment of the right to life by all persons within the State's jurisdiction). The latter positive duty to protect includes the requirement to criminalize acts that constitute gross human rights violations (such as torture and ill-treatment, extrajudicial killings, enforced disappearance and sexual violence) in order to ensure that perpetrators are held to account.

A specific feature of the duty to protect is the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity in this regard provides that: "States shall undertake *prompt, thorough, independent and impartial investigations* of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are *prosecuted, tried and duly punished*" (emphasis added).<sup>4</sup> In the transitional justice setting it is important to recall that, while truth commissions or similar mechanisms are an important aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights.<sup>5</sup>

The duty to investigate and hold perpetrators to account requires that investigations be undertaken by independent and impartial investigating authorities: independent of those suspected of being involved, including of any institutions impugned; and impartial, acting without preconceptions, bias or discrimination.<sup>6</sup> For example, investigations into allegations made against security and military forces should be undertaken by an independent commission of inquiry, comprised of members that are independent of any institution, agency or person that may be the subject of investigation.<sup>7</sup> Furthermore, such investigations must be thorough and effective. This requires adequate capacity and resources to be provided to investigating authorities. In the context of extrajudicial killings, and applicable also to other investigations into gross violations of human rights, the revised Minnesota Protocol sets out various recommendations on the practical implications of the need for thorough and

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<sup>4</sup> Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/add.1 (2005).

<sup>5</sup> See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

<sup>6</sup> In the context of the investigation of extrajudicial killings, for example, see ICJ, *Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction* (2015), pp. 134-138. See also ICJ, *Practitioners Guide No 7: International Law and the Fight Against Impunity* (2015), especially Chapter V.

<sup>7</sup> For example, see: Human Rights Committee, *Concluding Observations: Sri Lanka*, UN Doc CCPR/C/79/Add.56 (1995), para 15; and *Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (United Nations, 2016) – Minnesota Protocol, Principle 11.

effective investigations.<sup>8</sup> The Updated Principles also recall that investigations must be prompt, reflecting the requirement that the duty to investigate is triggered as soon as authorities become aware of allegations of gross human rights violations, regardless of whether a formal complaint has been made.<sup>9</sup>

Where prompt, thorough, independent and impartial investigations conclude that there is a prima facie case that an offence(s) constituting gross human rights violations has been committed, several consequences follow. Alleged perpetrators must be made subject to prosecution, involving all persons allegedly responsible, including superiors, by proceedings that adhere with international fair trial standards.<sup>10</sup> In the context of unlawful killings, the Human Rights Committee has clarified that this means that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".<sup>11</sup> Where a prosecution leads to conviction, the punishment imposed must be commensurate with the seriousness of the crime.<sup>12</sup>

Ensuring the accountability of perpetrators of gross human rights violations also forms key elements of the right of victims to effective remedies and reparation. In the case of extrajudicial killings, for example, the Human Rights Committee has explained that the duty to investigate, prosecute and punish arises from the obligation of States parties to the ICCPR to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.<sup>13</sup> Reparation includes the right to satisfaction and guarantees of non-repetition. In the context of accountability, satisfaction incorporates two key elements: 'justice' through prompt, thorough, independent and impartial investigations that lead to judicial and administrative sanctions against perpetrators; and truth, involving the verification and full and public disclosure of facts.<sup>14</sup> Guarantees of non-repetition are likewise geared towards the combatting of impunity and adopting measures to prevent the commission of further acts amounting to gross violations of human rights.<sup>15</sup> Further elements of the right of victims to effective remedies and reparation are considered in part 3.3 of this report.

## 2.2 Overview

The Government of Nepal and the then Communist Party of Nepal (Maoist),

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<sup>8</sup> Minnesota Protocol, *ibid*, Principles 12-17. See also: ICJ Practitioners Guides No 7 and 9, above note 6; and the UN Manual on the Effective Investigation and Documentation of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (United Nations, 2004).

<sup>9</sup> See, for example, ICJ Practitioners Guide No 7, above note 6, p. 135.

<sup>10</sup> See, for example: ICJ Practitioners Guide No 7, above note 6, especially Chapter VI; UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29; Minnesota Protocol, above note 78, para 1.

<sup>11</sup> Draft General Comment 36, *ibid*, para 29.

<sup>12</sup> See, for example, ICJ Practitioners Guide No 7, above note 6, pp. 217-222.

<sup>13</sup> Draft General Comment 36, above note 10, para 29. See also ICJ, *Practitioners Guide No 2: The right to a remedy and to reparation for gross human rights violations* (2007), chapters IV and VIII.

<sup>14</sup> See, for example: 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, adopted by the General Assembly in its resolution 60/147 (2006), paras 3(b), 4 and 22(b) and (f); and ICJ Practitioners Guide No 2, above note 13, chapters V and VII(IV).

<sup>15</sup> See, for example: Draft General Comment 36, above note 10, para 29; Basic Principles and Guidelines on the Right to a Remedy and Reparation, *ibid*, para 23; and ICJ Practitioners Guide No 2, above note 13, chapter VI.



signed the Comprehensive Peace Agreement (CPA) on 21 November 2006, which ended a decade-long armed conflict. In the CPA, both sides to the conflict expressed their commitment to seeking truth, obtaining justice and ensuring remedy and reparation for the victims of human rights violations during the conflict. The preamble of the CPA stressed full commitment towards human rights and the rule of law. Similarly, Articles 7.1.3 and 5.2.5 expressed their commitment to carry out 'impartial investigation' of human rights violations, guaranteed 'not to encourage impunity', and agreed on the establishment of a high-level truth and reconciliation commission to investigate gross human rights violation and crimes against humanity committed during the course of armed conflict.<sup>16</sup>

More than ten years later, however, prosecutions for human rights violations remain one of the greatest challenges in Nepal. Cases against alleged perpetrators have been initiated in only a handful of cases, and accused persons have been convicted in only three cases for violations during the conflict. A detailed analysis of these cases, set out next, aims to help in understanding the institutional and structural impediments to accountability for human rights violations in the country.

a) *Maina Sunuwar's enforced disappearance, torture and killing*

Maina Sunuwar was subjected to enforced disappearance, torture and unlawful killing in the course of and after a covert military operation on 17 February 2004. She was 15 years old at the time.

Following national and international pressure, the military conducted an internal inquiry to investigate the circumstances of her death. Based on the inquiry, a court martial in September 2005 concluded that Maina Sunuwar died and was buried in a clandestine grave following prolonged torture by simulated drowning and electrocution on the day of her enforced disappearance at the Nepal Army's Peacekeeping Training Barracks at Panchkhal. While the court martial in 2005 convicted three officers for failing to follow prescribed military procedures in Maina Sunuwar's detention. It described her death by prolonged torture as 'accidental' and attributed it to the officers' 'carelessness'. The accused were sentenced to six months' imprisonment, temporary suspension of promotions and a small monetary fine as 'compensation' to Maina Sunuwar's family. In fact, they served no period of imprisonment as they were considered to have served their sentences by being consigned to barracks during the investigation. The report of the Military Court of Inquiry Board implicated a fourth person, then-Captain Niranjana Basnet, but decided not to refer him for prosecution.

In a landmark ruling, the Supreme Court in September 2007 decided that the case should be dealt with in a civilian court. However, for many years the Nepali Army declined to cooperate with the police investigations and court proceedings that were initiated before the Kavre District Court.

After a number of procedural and political hurdles stretching over years, the Kavre District Court on 16 April 2017 convicted the three retired army officers *in absentia* for Maina Sunuwar's murder, a crime that carries a sentence of life imprisonment in Nepal.<sup>17</sup> The court,

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<sup>16</sup> Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), para 7.1.

<sup>17</sup> ICJ, 'Nepal: need effective steps to enforce court verdicts', 20 April 2017, at URL <https://www.icj.org/nepal-need-effective-steps-to-enforce-court-verdicts/>.

however, recommended that the sentence be reduced to five years' imprisonment because of the political context at the time and the possibility that the convicts did not intend to commit murder. This recommendation will be considered in accordance with Nepali law only when a High Court decides on the question of penalty, which has not yet happened.

Despite Major Niranjan Basnet's acknowledged role in Maina Sunuwar's enforced disappearance, the court acquitted him for lack of evidence.<sup>18</sup> In May 2017, the public prosecutor decided not to appeal this acquittal, reportedly after pressure from the Attorney General. Maina Sunuwar's mother, Devi Sunuwar, submitted requests to the district prosecutor and the Attorney General's office to appeal in light of the evidence implicating Niranjan Basnet in Maina Sunuwar's enforced disappearance. At the time of writing, the decision on appeal is pending with the Attorney General's Office.<sup>19</sup>

b) *Dekendra Thapa's torture and killing*

Dekendra Thapa, a journalist, was abducted by a group of Maoist cadres on 26 June 2004 and later killed on 11 August 2004. In June 2008, his body was exhumed with the technical assistance provided by the National Human Rights Commission (NHRC). In September 2008, his wife Laxmi Thapa filed a First Information Report (FIR) at the District Police Office, Dailekh District, in which she implicated a number of Maoist cadres in the murder and abduction of her husband based on a press release issued by the Maoists acknowledging Dekendra Thapa's assassination. However, the police did not start any investigation, arguing that action in the case would be taken only after transitional justice mechanisms were put in place.

After court orders directing the police to conduct a prompt investigation, the police arrested five alleged perpetrators while four others implicated in the case absconded. In January 2013, Nepal's Attorney General, Mukti Pradhan, sent instructions to the local police and the prosecutor not to move forward with the investigation. However, the Supreme Court ordered the then Prime Minister, Baburam Bhattarai, and the Attorney General not to interfere with the then ongoing investigation.

As a result, on 28 January 2013, the district attorney of Dailekh filed murder charges against nine suspects – five of them were in police custody but the remaining were still absconding. On 7 December 2014, the Dailekh District Court found the five accused guilty of a number of offences including witnessing Dekendra Thapa's killing, burying his body, and failing to inform the police about his abduction and killing. The five convicts were sentenced between one to two years imprisonment. The court did not find them responsible for Dekendra Thapa's murder as, according to the witness testimonies, the four Maoists cadres who were absconding had killed him by beating and kicking him.<sup>20</sup>

<sup>18</sup> *Government of Nepal v. Col. Bobby Khatari and others*, CR No. 203 of the Year 2072 BS Decision No. 202, Kabhrepalanchok District Court, 16 April 2017.

<sup>19</sup> ICJ and Amnesty International, 'Nepal: the ICJ and Amnesty sent letter to Attorney General on Maina Sunuwar's murder case', 19 May, at URL <https://www.icj.org/nepal-the-icj-and-amnesty-sent-letter-to-attorney-general-on-maina-sunuwar-murder-case/>.

<sup>20</sup> *Government of Nepal v. Lakshi Ram Gharti and others*, Case No: 77-069-00356, Judgment No: 49, Computer Registration No: 069-CR-0020, Dailekh District Court, 7 December 2014.

c) *Ujjan Kumar Shrestha's murder*

Ujjan Kumar Shrestha, a resident of Okhaldhunga District, was killed by Maoist cadets on 24 June 1998 and his body was thrown in a river. Maoists took responsibility for his killing, claiming it was carried out in accordance with the decision of the party.

Ganesh Kumar Shrestha, Ujjan Kumar's brother, lodged an FIR naming as perpetrators then Maoist local leaders, including Balkrishna Dhungel, who was later elected as member of Constituent Assembly from Okhaldhunga District.

On 10 May 2004, the Okhaldhunga District Court sentenced him to life imprisonment and ordered his property to be confiscated. Balkrishna Dhungel filed an appeal before the Appellate Court in Rajbiraj, which overturned the decision of the District Court and acquitted Dhungel of the charges. The decision of the Appellate Court was challenged before the Supreme Court by the office of the Attorney General. On 3 January 2010, the Supreme Court upheld the conviction and sentencing of the Okhaldhunga District Court.<sup>21</sup>

Despite the judgment of the Supreme Court, the police have not apprehended Dhungel. To the contrary, on 8 November 2011, the Baburam Bhattarai-led Government decided to grant a Presidential pardon in Dhungel's case, referring it as a 'conflict-era case'. Ujjan Kumar's sister, Sabitri Shrestha, challenged the decision of the Council of Ministers recommending the pardon. On 7 January 2016, the Supreme Court declared the Council of Minister's decision unconstitutional and incompatible with international law and issued a mandamus order directing the Government to implement the earlier decision of the Supreme Court.<sup>22</sup>

At the time of this report, Dhungel has still not been apprehended. Instead, he has been giving public speeches condemning the decision of the Supreme Court and threatening judges, lawyers, human rights defenders and victims who were involved in the case.

These cases give a number of insights into Nepal's transitional justice process. In all these cases, the police and Attorney General's office created (and continue to create) hurdles in the independent, impartial and proper functioning of the criminal justice system, and the Supreme Court had to intervene to ensure that the police registered FIRs, that prosecutions were not blocked by the Attorney General's office, or the convicts were not pardoned. Despite the Supreme Court's interventions, however, the main perpetrators in all three cases are still absconding and the court's directions to arrest them are yet to be implemented.

Furthermore, in Dekendra Thapa's case, the sentences imposed on the five convicts do not reflect the serious nature of the crimes concerned, and in Maina Sunuwar's case, the Kavre district court has recommended five years imprisonment in light of the political context of the time.

Nepali civil society is divided on the question of whether these convictions are isolated incidents made possible because of a peculiar set of circumstances or whether they are to be interpreted as some change in the tendency of impunity for human rights violations committed during the armed conflict. While some derive hope from the limited success of these prosecutions, others take a more cynical view, arguing that these cases show that penalties commensurate with

<sup>21</sup> *The Government of Nepal v. Bal Krishna Dhungel*, case no 2063-CR-0392, Okhaldhunga District Court, judgment of 3 January 2010.

<sup>22</sup> *Sabitri Shrestha v. Office of the Prime Minister and Council of Ministers and others*, Case No. 2068-Ws-0029, Supreme Court of Nepal, judgment of 7 January 2016.

the gravity of the offences may not be possible for human rights violations during the conflict and that perhaps the only way forward is to compromise on criminal responsibility and instead prioritize victims' right to remedies and reparation.

### 2.3 Commissions of inquiry

The Government responded to widespread calls for accountability for human rights violations during Nepal's conflict by enacting the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act in 2014. Pursuant to the Act, two Commissions of Inquiry (COIs) were established in February 2015: the Truth and Reconciliation Commission (TRC), which has a mandate over extrajudicial killings, sexual violence, torture and a range of other serious crimes committed during the conflict; and the Commission of Inquiry on Disappeared Persons (CoID), which has a mandate specific to enforced disappearances. The COIs were established initially for a two-year period but, in February 2017, their mandates were extended for one more year.

Despite repeated Supreme Court rulings that any mechanism for transitional justice must conform to international standards and lead to accountability for gross human rights violations,<sup>23</sup> these commissions continue to have a legally flawed mandate which, among other problems, allows the commissions to recommend amnesties for gross human rights violations. In addition, the legislation establishing the commissions does not provide sufficient guarantees for the independent and impartial operation of the commissions and the Commissioners, keeping open the possibility of political pressures interfering in their work.<sup>24</sup> Because of these reasons, the UN Office of the High Commissioner for Human Rights (OHCHR) has also refused to provide technical support to the COIs.<sup>25</sup>

An analysis of the operation of the COIs since February 2015 shows that problems go beyond a legally flawed mandate. Meager resources and capacity, coupled with lack of political will to hold perpetrators to account, have been major hurdles in the ability of the commissions to discharge their functions. For example, under their respective laws, the COIs are empowered to go door to door to victims to collect allegations of human rights violations and carry out investigations. In many cases, however, they have failed to do so even now that they are in their third year of operation. This has resulted in putting the burden on victims, who have had to travel long distances without any provision for reimbursement of travel costs, to register cases with the commissions. While provisions exist for registering complaints through post or email, many victims are unaware of this option. Furthermore, ICJ's interviews with victims' groups revealed that victims are also deterred from registering their allegations with the COIs because of threats, intimidation and pressures exerted by the political parties affiliated with alleged perpetrators.

Victims' groups have also raised concern about the secrecy and opacity with which the COIs operate. According to information given to the ICJ, and media reports, the TRC has thus far received more than 58,052 complaints and the

<sup>23</sup> See, for example, ICJ, 'Nepal: Government must implement landmark Supreme Court decision against impunity', 27 February 2015, at URL <https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>.

<sup>24</sup> For a detailed analysis of the legal mandate of the commissions, see ICJ, 'Justice Denied: The 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation act', May 2014, at URL <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf>,

<sup>25</sup> OHCHR Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014), at URL [http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical\\_Note\\_Nepal\\_CIDP\\_TRC\\_Act2014.pdf](http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf).

CIED has received 2,874 complaints. There is, however, no procedure in place to track the progress of these cases.

Furthermore, ICJ's monitoring mission in Bardiya district, home to reportedly one of the largest numbers of enforced disappearances during the conflict, showed a lack of coordination between district level local peace committees, which have the mandate to collect complaints of human rights violations and submit them to the COIs; the police, which is required to investigate the complaints; and the Attorney General's office, which has the legal duty to initiate prosecutions based on investigations that reveal a case to answer. The secretary of the peace committee in Bardiya district, for example, said to the ICJ that he had no information on the progress on the hundreds of cases submitted to the COIs from the district. The police too claimed that the COIs had thus far referred no case of human rights violations for investigation to the police.<sup>26</sup>

That the COIs are not working comes as no surprise to those in Nepal. Nepal has a long history of establishing Commissions of Inquiry to investigate matters of public importance, including allegations of gross human rights violations. Though ostensibly formed to provide a measure of public accountability, more often than not COIs have promoted impunity by diverting investigation of human rights violations and crime from the criminal justice process into a parallel *ad hoc* mechanism vulnerable to political interference and manipulation. In a number of cases, the Attorney General's office has refused to prosecute conflict-related crimes on the basis that only the COIs have the mandate to recommend cases for action.<sup>27</sup> This is despite Supreme Court rulings that transitional justice systems may complement the regular criminal justice system, but cannot replace it.<sup>28</sup>

Despite the embedded institutional problems with investigation and prosecution in the regular criminal justice system, civil society groups continue to see COIs as their only hope. In response to protest-related violence in the Terai, in which reportedly at least 34 protestors and bystanders were killed because of excessive use of force by the Nepali police and armed police force, human rights organizations including the Terai Human Rights Defenders (THRD) Alliance demanded a commission to investigate the allegations.<sup>29</sup> In July 2016, the Government announced its intention to form a COI but, as of June 2017, the terms of reference and the commission's composition and mandate have not been made public.

#### 2.4 Special court

Linked to the CIED, a provision for the establishment of a special court for the trial of conflict-era human rights violations can be found under the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014. Section 29(4) of the Act states that any cases recommended for prosecution will be tried in a 'special court'. The law describes the 'special court' as a court 'constituted by the Government of Nepal pursuant to the law to try and settle the case which has been decided by the Attorney General or the Government Attorney designated by the Attorney General to prosecute against the perpetrator pursuant to sub-section (2) on the basis of the recommendation of the Commission'.

<sup>26</sup> ICJ interview, 16 May 2017.

<sup>27</sup> See, for example, ICJ, 'Commissions of inquiry in Nepal: Denying remedies, entrenching impunity', June 2012, at URL <https://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>.

<sup>28</sup> *Madhav Kumar Basnet v. Government of Nepal*, Nepal Kanoon Patrika 2070 (BS) Issue 9, Decision No. 9051.

<sup>29</sup> See Asian Human Rights Commission (AHRC) and the Terai Human Rights Defenders Alliance, 'Protest and Repression: State responsibility for 37 killings during protests in Terai', May 2016.

According to media reports, the Government of Nepal has started the process to establish a special judicial mechanism to try allegations of conflict-era crimes and human rights violations and is currently considering a Bill to constitute the court. The procedure to appoint judges of the special court, if such a court is established, remains a key concern for human rights groups and civil society, who fear that the law could possibly authorize the Government to nominate judges for the special court, compromising the court's independence and impartiality. At the time of writing, the process of establishing the special court remains opaque and lacks consultation with stakeholders.

## 2.5 External accountability mechanisms

Nepali civil society has also tried to use external fora to bring perpetrators of human rights violations to account. Nepal is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which establishes an individual complaints mechanism under the treaty. Under this mechanism, the UN Human Rights Committee has already issued views in at least ten cases. Nepal's human rights organizations have also worked with the United Kingdom to prosecute Colonel Kumar Lama, a Nepali army officer, using universal jurisdiction as the basis of bringing him to account for his alleged participation in torture during Nepal's conflict.

### a) *UN Human Rights Committee*

As of June 2017, the UN Human Rights Committee has issued views in at least ten cases under the individual communications (complaint) mechanism under the first Optional Protocol to the ICCPR.<sup>30</sup> In all these cases, the Human Rights Committee decided in favour of the victims and found that Nepal has failed to ensure an effective remedy for people whose rights under the ICCPR have been violated. The Human Rights Committee called on Nepal to conduct thorough and effective investigations into the allegations of human rights violations and to prosecute, try and punish those responsible for the violations committed. The Government, however, is yet to implement the views of the Human Rights Committee in any of these cases.

### b) *UK exercise of universal jurisdiction: Colonel Kumar Lama*

Colonel Kumar Lama was arrested on 3 January 2013 from East Sussex in the United Kingdom based on allegations that, in 2005, he participated in the torture of two detainees at an army barracks under his command. He was subsequently charged with two counts under Section 134(1) of the Criminal Justice Act 1988.

The United Kingdom indicted Colonel Kumar Lama, exercising its authority pursuant to the legal principle of universal jurisdiction, which allows, and in some cases requires, States to investigate and prosecute, or extradite for prosecution, any person suspected of committing certain acts criminalized under international law – including torture.

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<sup>30</sup> See the views of the Human Rights Committee in: *Sharma v. Nepal*, Communication 1469/2006, UN Doc CCPR/C/94/D/1469/2006 (2008); *Sobhraj v. Nepal*, Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010); *Giri v. Nepal*, Communication 1761/2008, UN Doc CCPR/C/101/D/1761/2008 (2011); *Maharjan v. Nepal*, Communication 1863/2009, UN Doc CCPR/C/105/D/1863/2009 (2012); *Sedhai v. Nepal*, Communication 865/2009, UN Doc CCPR/C/108/D/1865/2009 (2013); *Purna Maya v. Nepal*, Communication 2245/2013, UN Doc CCPR/C/119/D/2245/2013 (2017); *Dhakal v. Nepal*, Communication 2185/2012, UN Doc CCPR/C/119/D/2185/2012 (2017); *A.S. v. Nepal*, Communication 2077/2011, UN Doc CCPR/C/115/D/2077/2011 (2015); *Tharu v. Nepal*, Communication 2038/2011, UN Doc CCPR/C/114/D/2038/2011 (2015); and *Katwal v. Nepal*, Communication 2000/2010, UN Doc CCPR/C/113/D/2000/2010 (2015).

Colonel Lama's trial began in February 2015 at the Central Criminal Court of England and Wales. Some witnesses appeared before the court and made their statements. After a few weeks, however, the trial was adjourned because of the quality of the interpretation in court. The trial began afresh in June 2016 with witnesses recording their statements. He was later acquitted because of insufficient evidence.<sup>31</sup>

While this case brought international attention to impunity for human rights violations in Nepal and signaled to the Nepali Government that foreign courts could prosecute alleged perpetrators if Nepal's own institutions fail to do so, it also reiterated the weakness in police investigations into human rights violations in Nepal. Human rights groups fear that without effective, independent and impartial investigations, chances of successfully prosecuting perpetrators remain slim. While human rights defenders, international mechanisms and foreign courts can advocate for, or direct the Government to carry out, competent investigations, they remain powerless in the face of repeated disregard of their orders or without adequate evidence to successfully prosecute cases.

## 2.6 Lack of criminalization

In 2007, the Nepal Supreme Court in *Rajendra Prasad Dhakal v. Government of Nepal* (2007) directed the Government to: criminalize enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance; take action against officials found guilty of perpetrating enforced disappearances; and ensure that amnesties and pardons were not available to those suspected or found guilty of the crime. The judgment was reiterated in *Madhav Kumar Basnet v. Government of Nepal* (2014). Various UN mechanisms such as the UN Human Rights Committee and the UN Committee against Torture have also made calls on Nepal to criminalize acts involving gross human rights violations, including enforced disappearances and torture and other forms of ill-treatment.

At the time of writing, however, enforced disappearance and torture are still not autonomous crimes in the country, and the proposed legislation to criminalize these violations also falls short of international standards.

### a) *Enforced disappearance*

Enforced disappearance is not recognized as a distinct, autonomous crime in Nepal. In the absence of penal law on enforced disappearance, it remains uncertain what legal provisions alleged perpetrators would be tried under even if the CoID makes recommendations for prosecution.

On 2 November 2014, Nepal's Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs tabled five Bills before parliament, including a Bill to amend the Criminal Code. The Bill on the Criminal Code sets out numerous reforms to the laws contained in the National Code 1963 (known as '*Muluki Ain 2020*'). Amongst the key reforms, the Bill proposes to criminalize enforced disappearance. However, the proposed definition falls far short of Nepal's international obligations and the Convention on the Protection of All Persons from Enforced Disappearance (CED). The definition also inadequately addresses superior command responsibility for enforced disappearances; it does not expressly make the prohibition against enforced disappearance absolute; and the provisions on penalty for enforced disappearance are inconsistent with

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<sup>31</sup> See, for example, ICJ, 'Torture Trial in the UK: ICJ paper explains case against Nepalese Colonel Lama', 22 June 2016, at URL <https://www.icj.org/torture-trial-in-the-uk-icj-paper-explains-case-against-nepalese-colonel-lama/>.



international standards.<sup>32</sup>

b) *Torture and other ill-treatment*

Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 14 May 1991, committing to ensure that all acts of torture be made criminal offences under its laws and be punishable by appropriate penalties that take into account their grave nature. However, more than 25 years since, torture is not specifically criminalized in the country.

On 21 November 2014, Nepal's Ministry of Home Affairs introduced a Bill entitled the Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014 in the Bill Section of the Legislative-Parliament and distributed it to the members of the Parliament on 24 November 2014. The Bill is pending. ICJ's analysis of the compatibility of the draft legislation with international standards shows a number of shortcomings: the definition and scope of torture and other ill-treatment in the Bill falls short of requirements under CAT and international standards; the Bill sets in place a limitation period for filing complaints; it provides disproportionately low penalties for perpetrators; and it fails to provide access to effective remedies and reparation for victims.<sup>33</sup>

## 2.7 Culture of impunity

A common thread running across Nepal's rule of law crisis, including failure to ensure accountability for gross human rights violations, is a culture of impunity predating the conflict and a political consensus against accountability for human rights violations and other serious crime. The overall weak rule of law indicators in the country are partly responsible for impunity for human rights violations, and the continuing culture of impunity for human rights violations further erodes the rule of law. It is a viscous cycle that Nepal has been unable to escape from despite a number of movements claiming to bring justice to the heart of governance in the country.

The two sides of the conflict – the Nepali Army and the Maoists – have both resisted accountability for conflict-era human rights violations and have refused to cooperate with investigations of any of their personnel. They have repeatedly refused to abide by court judgments, including those of the Supreme Court, posing serious threats to the integrity of the judiciary and public trust in the criminal justice system.<sup>34</sup> Perversely, high-level suspected perpetrators have even been promoted, rewarded with lucrative postings within the United Nations, and allowed to hold high office, including in Nepal's Legislature and Cabinet.

One of the most striking examples of this phenomenon is the abduction and unlawful killing of Arjun Bahadur Lama, in which Maoist Central Committee member Agni Sapkota is credibly alleged to be involved. Despite a March 2008 Supreme Court order directing the police to register a murder case against Agni Sapkota and to carry out investigations, no proper investigation of the allegations against Agni Sapkota have taken place. Instead, he was appointed Minister for Information and Communication in May 2011. This appointment was challenged

<sup>32</sup> ICJ, 'Serious Crimes in Nepal's Criminal Code Bill, 2014', March 2017, at URL <https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>33</sup> For details see ICJ, 'The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014: a briefing paper', June 2016, at URL <https://www.icj.org/wp-content/uploads/2016/06/Nepal-Torture-Bill-Advocacy-Analysis-Brief-2016-ENG.pdf>.

<sup>34</sup> For a detailed analysis, see Frederick Rawski and Mandira Sharma, 'A comprehensive peace? International human rights monitoring in Nepal', in Sebastian von Einsiedel (ed), *Nepal in Transition: From People's War to Fragile Peace* (2012).



at the Supreme Court, which questioned the propriety of Agni Sapkota serving in government, but did not result in his suspension from public office. Agni Sapkota eventually lost his ministerial position in a cabinet reshuffle in August 2011, but remained an active member of the Constituent Assembly/Legislature-Parliament until it dissolved in May 2012. In 2015, Agni Sapkota was once again given a Cabinet position, this time as Minister for Forest and Soil Conservation, which he subsequently lost in 2016. He continues to be Spokesperson for the Maoist Party and has never been questioned, let alone charged, despite serious allegations of his involvement in the abduction, enforced disappearance and murder of Arjun Bahadur Lama.

Nepal's crisis of impunity can be understood and explained from a number of perspectives. First, Nepal continues to be a polity that is not based on the rule of law and institutional independence, but one that is plagued by political influence over institutions, corruption and nepotism. The Maoist movement in the 1990s and the post-conflict Madheshi movement were in part a response to these systemic issues, but failed to bring their ideals to bear once elected into power.

Second, perpetrators of human rights violations, particularly during the conflict, enjoy varying degrees of political power today. Since the CPA was signed, Nepal has had ten governments over 11 years. In Nepal's governance crisis, the promise to shield perpetrators for human rights violations has become one of the bargaining chips used to garner political support and build alliances. Fragile coalitions also mean that political parties depend on the military for support, which prevents them from taking action against current or even former military officials for human rights violations. Nearly every agreement struck between post-CPA governments has included the withdrawal of criminal charges and release of party cadres from police custody. For example, a nine-point deal signed by the four main political parties in 2016 includes a provision for withdrawing, or granting amnesty to those implicated in, conflict-era cases before the courts. Similarly, the four-point agreement struck between the Unified Communist Party of Nepal (Maoist) and the United Democratic Madhesi Front in August 2011 included a provision to withdraw criminal cases against Maoist cadres as well as individuals affiliated with the Madhesi, Dalit and other movements.<sup>35</sup>

Third, impunity for past human rights violations has emboldened law enforcement agencies, the military, as well as political parties to continue acting outside the purview of the law, especially when faced with opposition, protest and dissent. Without effective checks and balances and accountability for excesses, abuse of power has become the *modus operandi* of those in power.

Thus, the pattern of impunity in Nepal does not just arise from political inertia. Rather, more seriously, in Nepal there is a tacit consensus across the political spectrum not to hold perpetrators of human rights violations accountable. This view has seriously undermined the rule of law in an already weak criminal justice system.

### **3 Access to effective remedies and reparation for victims of gross human rights violations**

#### **3.1 International law and standards on remedies and reparation**

Every person who is a victim of a human rights violation, whether amounting to a 'gross' human rights violation or otherwise, has the right to effective remedies and reparation. Broadly speaking, this entails the right of victims to defend their rights, to obtain recognition of a violation(s), to cessation of any continuing

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<sup>35</sup> Ibid.

violation(s) and to adequate reparation. It requires that rights-holders have equal and effective access to justice mechanisms, including through access to judicial bodies that have the competence to adjudicate and provide binding decisions as to the remedies and reparation to be granted to victims.<sup>36</sup> It should be recalled that, where appropriate, such as in cases of the unlawful killing of a person, a 'victim' includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".<sup>37</sup>

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing gross human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered.<sup>38</sup> Full and effective reparation entails:<sup>39</sup>

- Restitution, aimed at re-establishing, to the extent possible, a victim's situation as it was before the violation was committed;
- Compensation, calling for fair and adequate monetary compensation (including for medical and rehabilitative expenses, pecuniary and non-pecuniary damage resulting from physical and mental harm caused, loss of earnings and earning potential and for lost opportunities such as employment and education);
- Rehabilitation, aimed at enabling the maximum possible self-sufficiency and functioning of the victim, involving restoring previous functions affected by the violation and the acquisition of new skills that may be required as a result of the changed circumstances of the victim resulting from the violation;
- Satisfaction, including through the cessation of any continuing violation(s), justice in the form of the holding to account of the perpetrator(s) of the violation, and truth in the form, amongst other things, of the verification and full and public disclosure of facts, the search, recovery and identification of direct victims and public apology and commemorations; and
- Guarantees of non-repetition, geared towards the combatting of impunity and adoption of measures to prevent the commission of further acts amounting to gross violations of human rights, including through monitoring of State institutions (including civilian oversight of military and security forces), training of law enforcement and other officials, the adoption and dissemination of codes of conduct for public officials, law, policy and institutional reform, the protection of lawyers and human rights defenders representing the interests and rights of victims, and the strengthening of the independence and effectiveness of judicial mechanisms.

### 3.2 Overview

Access to effective remedies and reparation for victims of human rights violations, particularly during the conflict, have been high on the agenda of

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<sup>36</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 14, paras 3 and 11; and ICJ Practitioners Guide No 2, above note 13, especially chapter III.

<sup>37</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 14, para 8.

<sup>38</sup> Ibid, para 15.

<sup>39</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 14, paras 15-23; and ICJ Practitioners Guide No 2, above note 13, especially chapters V, VI and VII.

victims' groups and human rights defenders in Nepal. The Government too has acknowledged its obligations to provide remedies and reparation to victims. The 2006 Comprehensive Peace Agreement signed by the parties to the conflict, for example, provides that the parties would ensure victims' rights to truth, justice, relief and rehabilitation. A decade later, political parties once again reiterated their commitment in the nine-point deal 'to provide reparations, as per the decisions taken by previous governments, to the family members of martyrs and those who were made to disappear'.<sup>40</sup>

The Supreme Court of Nepal has also issued a number of judgments recognizing victims' right to remedies and reparation and has directed the Government 'to provide for reparation to the victims and their families with enough economic, legal and institutional arrangement' in line with Nepal's international human rights obligations.<sup>41</sup>

International human rights mechanisms, including the UN Human Rights Committee, have also repeatedly called on the Government to ensure effective remedies and reparation to victims including by providing adequate compensation and taking measures to prevent similar violations in the future.

Yet, in practice, reparations have been largely restricted to monetary compensation and other relief programmes and, contrary to Nepal's international legal obligations, have excluded truth, justice and guarantees of non-repetition.

### 3.3 Interim relief

#### a) *Interim Relief and Rehabilitation Programme*

In 2008, the Government of Nepal introduced the Interim Relief and Rehabilitation Programme (IRRP) with the aim to provide conflict victims with interim financial support and other forms of relief. Under the Programme, the Government tasked the Ministry of Peace and Reconstruction, the Relief and Rehabilitation Unit, a Special Task Force to collect data on people affected by the conflict, Nepal Peace Trust Fund, and Local Peace Committees to facilitate the implementation of the Interim Relief and Rehabilitation Programme.<sup>42</sup>

A number of categories of conflict victims have received assistance under this programme, such as: families (including widows) of people who were killed during the conflict; people who were subjected to enforced disappearance and their families; orphan children whose parents were killed or 'disappeared' during the conflict; people with disabilities due to the conflict; and people whose private property was destroyed or damaged during the conflict. Benefits range from cash payments of 100,000 Nepali Rupees (\$1,000 USD) up to 10,00000 (\$10,000 USD) to families of those who were killed or 'disappeared'; scholarships for children of the deceased, 'disappeared' and disabled individuals as well as children disabled during the conflict; medical treatment and re-imbursments for treatment followed by individuals injured during the conflict according to the doctor's prescription and bills from government or community hospitals in Nepal; and compensation to persons whose private property was damaged or destroyed

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<sup>40</sup> Nine Point Agreement between the CPN-UML and UCPN (Maoist), May 2016, at URL [http://www.satp.org/satporgtp/countries/nepal/document/papers/Nine\\_Point\\_Agreement\\_between\\_CPN-UML\\_and\\_UCPN-M.pdf](http://www.satp.org/satporgtp/countries/nepal/document/papers/Nine_Point_Agreement_between_CPN-UML_and_UCPN-M.pdf).

<sup>42</sup> International Organization for Migration and the UN Office of the High Commissioner for Human Rights, Report on Mapping Exercise and Preliminary Gap Analysis of the Interim Relief and Rehabilitation Programme, Interim Relief and Rehabilitation to the Victims of Nepal's Armed Conflict, December 2010, at URL <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Mapping-Excercise-of-Interim-Relief-and-Rehabilitation-to-the-Victims-of-Nepals-Armed-Conflict.pdf>.

during the conflict.<sup>43</sup>

It is important to note that while many victims welcomed the relief measures provided under the programme, the IRRP does not fulfil victims' right to remedies and reparation for a number of reasons.

First, the programme does not acknowledge the State's role in human rights violations and its responsibility to bring perpetrators to account. Beneficiaries under the programme are recognized as 'conflict victims', not victims of human rights violations, and the IRRP makes no distinction between people killed as a consequence of human rights violations and those who were killed because of legitimate use of force while acting as combatants. Under international standards, reparations include 'satisfaction' in the form of truth and justice (see section 3.1 above), not only a means to relieve victims of the financial difficulties that arise from an armed conflict.

Furthermore, the programme applied only to a specific set of conflict victims. Victims of torture, rape and other forms of sexual violence were excluded from availing themselves of redress under the programme.

#### b) *Interim relief under the Serious Crimes Bill*

Section 47 of the draft Bill to amend the Criminal Code envisages authorizing courts to order alleged perpetrators of serious crimes under the Code including enforced disappearances to provide 'interim relief to the victim or their dependents for any medical treatment or monetary compensation'. Such amounts should be provided immediately to the victim or to dependents of the victims. Section 47(2) of the Bill also provides that if a defendant is acquitted, the victim or the victim's dependents must return the amount of the interim relief to the accused within 35 days of being acquitted and if the amount is not returned within 35 days, the court must order payment of that amount through any property of the victim within 60 days.

While the principle of immediate interim relief to victims of crimes such as enforced disappearance is welcome, the Bill would require the payment of interim relief by persons who have not been finally convicted and is thus incompatible with the presumption of innocence. Furthermore, under international standards, the principal obligation to provide remedies and reparation, including compensation, to victims of human rights violations must be borne by the State, not the perpetrators alone. In addition, the provision of return of the amount of interim relief by victims, if the individual is acquitted, can serve to re-victimize the victim.<sup>44</sup>

### 3.4 Commissions of inquiry

The Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Disappeared Persons (CoID) have the mandate to 'make recommendation on reparation and/or compensation to be provided to the victims and their families'.<sup>45</sup> The TRC Act defines reparation to mean 'compensation, facilities or concession'.<sup>46</sup> The powers of the COIs to recommend reparations is one of the key reasons why victims' groups engage with the commissions, despite their deeply flawed mandates.

<sup>43</sup> International Center for Transitional Justice, 'Relief, Reparations, and the Root Causes of Conflict in Nepal, October 2012', at URL <https://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf>.

<sup>44</sup> ICJ, 'Serious Crimes in Nepal's Criminal Code Bill, 2014', March 2017, at URL <https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>45</sup> Truth and Reconciliation Commission Act 2014, section 3.

<sup>46</sup> Ibid, section 23.

Upon completion of an investigation, the COIs have the power to make recommendations to the Government of Nepal for reparations under the Act to 'provide compensation to the victim, to make restitution or to rehabilitate or to make other appropriate arrangement'. Reparations specified include: free education and medical treatment; skill-oriented training; loan facilities without interest or with concessionary interest; arrangements for settlement; facilities of employment; or any other facility or concession as the Commission considers appropriate.

The commissions are also empowered to recommendation to the Government to provide an amount up to three hundred thousand rupees (\$3,000 USD) as compensation 'upon taking into account the gravity of damage and loss the victim suffered'.<sup>47</sup>

These provisions do not fulfil the right of victims to effective reparation, as reparation, including compensation, must be determined on a case-by-case basis in accordance with the nature of the harm and the specific needs and circumstances of the victim.<sup>48</sup>

At the time of writing, it was not clear how in how many cases the COIs has recommended reparations for victims; the nature and scope of the reparations recommended; and the number of cases where recommended reparations had been implemented by the Government.

### 3.5 Supreme Court

Over the years, the Supreme Court of Nepal has developed a robust body of jurisprudence on victims' right to remedies and reparation. While the Supreme Court's judgments on victims' right to remedies and reparation have not always been respected or implemented by the Government, they have helped keep these demands on the political agenda in the country.

In *Madhav Kumar Basnet v. the Government of Nepal* (2014), the Supreme Court struck down the Truth and Reconciliation Commission Ordinance 2013.<sup>49</sup> The Court clarified Nepal's obligations under international standards to ensure victims' rights to truth, justice and reparation and ruled that the rights of victims and their families cannot be bargained away or be the subject of amnesties. The Supreme Court reiterated these principles in *Suman Adhikari v. the Office of the Prime Minister and Council of Ministers* (2015), where it invalidated provisions of the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014 for allowing amnesties and compromising victims' right to remedies and reparation.<sup>50</sup>

In a number of other judgments, the Supreme Court has directed the Government to enact legislation to specifically criminalize serious crimes including enforced disappearance and torture and other ill-treatment (see section 2.6), treating the criminalization of human rights violations as a part of the guarantee of non-repetition.<sup>51</sup>

<sup>47</sup> Truth and Reconciliation Commission Regulations, rule 32(1); and Commission on Investigation of Disappeared Persons Regulations, rule 28.

<sup>48</sup> ICJ Briefing Paper, 'Analysis of TRC and CoID Regulations, 2016', April 2017.

<sup>49</sup> See *Madhav Kumar Basnet and others v. Government of Nepal*, Nepal Kanoon Patrika, 2070 (BS) Issue 9, Decision No. 9051.

<sup>50</sup> See *Suman Adhikari and others v. Government of Nepal*, Office of the Prime Minister and Council of Ministers and others, Nepal Kanoon Patrika 2070 (BS) volume 12, Decision No. 9303

<sup>51</sup> See *Rajendra Prasad Dhakal and Others v. Government of Nepal and Others*, Nepal Kanoon Patrika 2064(BS), Issue 2, Decision No 7817; *Rajendra Ghimire v. Office of the Prime Minister and others* (case No 3219/2062), 17 December 2007; *Raja Ram Dhakal v. Office of the Prime Minister and Others*, Nepal Kanoon Patrika, 2060 (BS), Issue 12,

### 3.6 Compensation Relating to Torture Act 1996

As discussed earlier (see section 2.6), torture and other ill-treatment are not specifically criminalized in Nepal. The existing legislation related to torture is the Compensation Relating to Torture Act 1996 (CRT), which establishes a civil remedy for victims of torture to claim monetary compensation.

The Government cites, before national and international fora, the Compensation Relating to Torture Act as an effective preventive and deterrent measure against the practice of torture, which is problematic for a number of reasons: first, the CRT envisages only departmental action against those found responsible for torture and does not contain any provisions for criminal responsibility; second, the definition of torture under the law is at odds with international standards; third, the conception of reparation for victims of torture is overly restrictive as it confines reparation for torture to compensation only; and fourth, it sets a limitation period of 35 days from the date of torture was allegedly perpetrated or the date of the victims' release from detention to file claims under the law.

Observations of the UN Special Rapporteur on torture, who visited Nepal in 2005, remain true more than ten years later. According to the Special Rapporteur, the sanction of 'departmental action' against perpetrators provided for in Nepali legislation (such as demotions, suspensions, fines, delayed promotions, etc) is so grossly inadequate that any preventive or deterrent effect that may have been envisaged is meaningless in practice.<sup>52</sup> The Special Rapporteur was also of the view that the CTA actually prevented and discouraged torture victims from seeking and receiving justice for torture and ill-treatment.

Furthermore, according to human rights groups, victims of torture are rarely able to access compensation. Since the enactment of the CRT, out of 160 cases filed by the Centre for Victims of Torture, Nepal, only eight have resulted in victims receiving some compensation.<sup>53</sup> Due to this lack of access to justice and redress, victims have lost confidence in the judicial system and have become increasingly reluctant to bring compensation cases to court. In cases where victims obtain some form of compensation, it is usually awarded with significant delays. The compensation amounts provided are very low, ranging from 10,000 Nepali Rupees (\$100 USD) to 100,000 Nepali Rupees (\$1,000 USD), which is not sufficient to cover the costs of their physical and psychological rehabilitation.

Lawyers also point out other problems in the implementation of the law, including: refusal by the police to initiate action; pressure on the victims to reconcile with the perpetrators; and threats and intimidation to withdraw complaints.<sup>54</sup>

### 3.7 UN Human Rights Committee

As discussed previously (see section 2.5), the UN Human Rights Committee has in a number of cases has found that Nepal has failed to provide victims of human rights with remedies and reparation required under international law, including

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Decision No. 7274; *Sapana Pradhan Malla v. Government of Nepal*, Writ No. 3561 of the year BS.

<sup>52</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc E/CN.4/2006/6/Add.5 (2006), p.3.

<sup>53</sup> UN Committee against Torture, 'Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party', UN Doc A/66/44, Part 2(b)(iv); and 'Submission to the Committee against torture under article 20', Advocacy Forum and REDRESS, 5 March 2010.

<sup>54</sup> See, for example, Dipendra Jha, 'People in Pain', *Ekantipur*, 29 June 2015, at URL <http://kathmandupost.ekantipur.com/printedition/news/2015-06-29/people-in-pain.html>.

under the ICCPR. In multiple cases, the Committee rejected the Government's claim that monetary compensation was sufficient to fulfil victims' right to remedies and reparation and called on Nepal to provide 'appropriate measures of satisfaction' to victims; ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided; and take steps to prevent the occurrence of similar violations in the future.<sup>55</sup>

#### **4 Independence and accountability of justice actors**

##### 4.1 The role of justice actors and institutions in the pursuit of redress and accountability

The equal administration of justice for all without fear or favour is essential to the ability of a State to discharge its obligations to hold perpetrators of gross human rights violations to account and to provide effective remedies and reparation to victims.<sup>56</sup> In turn, the equal administration of justice relies on several factors, including:

- The operation of independent judicial mechanisms comprised of judges whose independence is protected from interference by the executive branch or third parties (including, for example, as a result of dismissal or disciplinary action initiated on the basis of judicial decisions that are unfavourable to the executive, or other forms of interference or intimidation, or threats from police, security forces or private actors);
- The impartial adjudication by judges of cases, which may be negatively influenced, for example, by appointment processes for judges, the internal allocation of cases and/or corruption;
- The accountability of judges and prosecutors, including for corruption or lack of adherence with fair trial standards;
- The competence of judges and prosecutors, for example including as a result of adequate training and knowledge of international law and standards, particularly concerning obstacles to redress accountability and the available means to overcome such challenges;
- The knowledge and skills of lawyers and human rights defenders that act to pursue accountability or redress for victims; and
- The ability of such lawyers and other representatives to act free from external interference, undue influence or persecution.

##### 4.2 Overview

The lack of independence and accountability of justice sector actors is among the foremost reasons why perpetrators of human rights are able to escape justice in Nepal. This pattern of de facto impunity has persisted despite efforts to push for accountability by Nepal's Supreme Court, National Human Rights Commission, ad hoc Commissions of Inquiry and, in some cases, even legislation.

Difficulties for victims begin with the filing of a First Information Report (FIR), which is very often not possible without court orders in cases of gross human rights violations. Despite *mandamus* orders by the court to register FIRs, police authorities in some instances continue to refuse to register complaints in conflict-era cases. Due to lack of political will and weaknesses in the criminal justice

<sup>55</sup> See, for example, *A.S. v. Nepal*, UN Human Rights Committee Communication No. 2077/2011, UN Doc CCPR/C/115/D/2077/2011 (2015).

<sup>56</sup> See, for example: Practitioners Guide No 7, above note 6, pp. 318-325; and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 14, para 12.

system, even cases registered by the police are often not investigated. Furthermore, even if a claim is filed, it may be subject to withdrawal as a result of political intervention by district attorneys, the Attorney General or, in some cases, even the Cabinet. Compounding these difficulties are efforts by the various political parties to provide for amnesties in cases of gross human rights violations. Thus, victims are largely denied their right to remedy and reparation in conflict era human rights violation cases.

### 4.3 Independence of the judiciary

The preamble of Nepal's Constitution promises 'an independent, impartial and competent judiciary' and guarantees 'separation of powers'.

In many ways, the Supreme Court has emerged as a beacon of hope for victims of human rights violations, especially since the end of the conflict. Jurisprudence of the Nepali Supreme Court on accountability for human rights violations and the duty of the State to provide remedies and reparation to victims is among the most progressive in the region and does well to give legal effect Nepal's obligations under international human rights standards. Nepal's Supreme Court human rights jurisprudence is also used as authority in other parts of the region. For example, in its judgment in the *Muhabat Shah* case,<sup>57</sup> the Pakistani Supreme Court relied on the Nepali Supreme Court's judgment in *Rajendra Prasad Dhakal v. Government of Nepal* (2007) to hold that the practice of enforced disappearance was unlawful and that, even though Pakistan (like Nepal) had not ratified the CED, the Convention's principles should be read into the fundamental rights provisions of the Constitution.

Notwithstanding, lawyers and human rights defenders are concerned that political pressures on judges, coupled with inadequate procedures of judicial appointments and accountability, undermines the institutional integrity, independence and impartiality of the judiciary, preventing it from becoming a truly independent institution.<sup>58</sup>

#### a) *Impeachment of Chief Justice Sushila Karki*

On 30 April 2017, two of Nepal's ruling parties, the Nepali Congress and the Nepal Communist Party (Maoist Center), sponsored a motion to impeach the Chief Justice of the country, Sushila Karki. The motion was filed pursuant to Article 101 of Nepal's Constitution, which provides for the impeachment of the Chief Justice or other judges of the Supreme Court '...on the grounds of serious violation of the Constitution and law, his or her incompetence, misbehaviour or failure to discharge the duties of his or her office in good faith or his or her inability to discharge his or her duties because of physical or mental reason'.

The impeachment motion stated that Chief Justice Karki had encroached on the jurisdiction of the executive by rejecting the promotion of the Inspector General of Police (IGP) because the IGP's appointment was within the sole exclusive power of the Government. Chief Justice Karki was immediately suspended pursuant to Article 101(6) of the Constitution, which states that filing the impeachment motion would result in the suspension of the judge from their duties.

Under international standards, where a judge is at risk of being removed, she or he must be accorded: the right to be fully informed of the charges; the right to be represented at the hearing; the right to make a full defence; and the right to be judged by an independence and impartial tribunal. Removal proceedings must

<sup>57</sup> HRC No. 29388-K/13, 10 December 2013.

<sup>58</sup> See, for example, Govinda Sharma Bandi, 'Judge the Judges', *Kathmandu Post*, 2 July 2015, at URL <http://kathmandupost.ekantipur.com/printedition/news/2015-07-01/judge-the-judges.html>.



meet international standards on fair trial and due process.

Barring a judge from dispensing his or her duties without any credible and independent investigation on the allegations presents a serious risk of reinforcing political control of the judiciary solely on the basis of political representation in Parliament. For this reason, the legal community in Nepal and human rights organizations viewed the impeachment motion as politically motivated, aimed at barring Chief Justice Karki from carrying out her judicial duties.<sup>59</sup>

The Supreme Court on 5 May issued a stay order on Chief Justice Karki's suspension, finding that the impeachment was against the spirit of Nepal's Constitution.<sup>60</sup> The Chief Justice returned to office, but did not participate in any judicial proceedings until her retirement in June 2017. The legal community has expressed concern that the impeachment motion against the Chief Justice will serve as a warning sign for judges in the future, undermining their independence and impartiality in cases involving the Government.

#### b) *Threats, intimidation and external pressures*

Impeachment of the former Chief Justice is not the only case where the judiciary has been subjected to external pressures, also added to by instances of threats and intimidation of judges.

On 10 May 2004, Okhaldhunga District Court convicted Bal Krishna Dhungel, a senior member of the CPN (Maoist Centre), and seven others for the murder of Ujjain Shrestha. Bal Krishna Dhungel served a short term in jail before the Rajbiraj Appellate Court acquitted Dhungel of the murder charges in 2006. In January 2010, the Supreme Court upheld the 2004 verdict of the district court and sentenced Bal Krishna Dhungel to life imprisonment. The Supreme Court's judgment was not implemented as the Baburam Bhattarai government forwarded his name for presidential pardon. The Supreme Court in January 2015 directed the government not to provide any amnesty or presidential pardon to Dhungel in the case, since which time he has been absconding (see section 2.2).

According to media reports, in March 2017 Bal Krishna Dhungel warned of a 'physical attack' against the judge, lawyers, human rights defenders and victims who were involved in his case. At a public gathering he condemned the decision of the Supreme Court and said that he 'will not go to jail without slashing the judge's thigh'. In April 2017, the Supreme Court initiated contempt of court proceedings against Dhungel and once again directed the Inspector General of the Police to arrest him. However, till the writing of this report the decision of the court is not implemented.

Nepal's outgoing Chief Justice, Sushila Karki, in an interview with the press, also spoke about the pressures she faced to decide cases while in office, illustrating the very real dangers to judicial independence, impartiality and integrity in the country.<sup>61</sup>

#### c) *Judicial appointments*

Under Article 140 of Nepal's Constitution, judges for the Supreme Court and High Courts are appointed on the recommendation of the Judicial Council, a

<sup>59</sup> See, for example, Govinda Sharma Bandi, *Ekantipur*, 'Irreparable damage', 9 May 2017, at URL <http://kathmandupost.ekantipur.com/news/2017-05-09/irreparable-damage.html>; and ICJ, 'Nepal: Parliament should reject motion to impeach Chief Justice', 2 May 2017, at URL <https://www.icj.org/nepal-parliament-should-reject-motion-to-impeach-chief-justice/>.

<sup>60</sup> See *Advocate Sunil Ranjan Singh v. the Legislature Parliament and others*, writ no. 073-WO-1170.

<sup>61</sup> See, for example, 'Nepal SC: How it's mired in politics and factionalism', *Indian Express*, 5 June 2017, at URL <http://indianexpress.com/article/beyond-the-news/nepal-supreme-court-how-its-mired-in-politics-and-factionalism-4690263/>.

constitutional body comprising of the Chief Justice; the Federal Minister for Law and Justice; the senior-most Judge of the Supreme Court; a legal expert nominated by the President on the recommendation of the Prime Minister; and a senior advocate appointed by the President on the recommendation of the Nepal Bar Association.

The criteria on which the Judicial Council shortlists candidates are not transparent and the Council's proceedings and deliberations are not made public. In the larger context of political influence and discriminatory practices in the legal profession against minority communities and women, such secrecy has led to the perception of bias in the appointments process and allegations of politically motivated appointments.

Earlier in 2017, for example, the Judicial Council appointed 80 high courts judges despite the absence of two of the Council's members amid allegations that the nominees were chosen not because of their merit, but because of their political affiliations. The appointments were followed by protests and the boycott of courts' proceedings by more than 300 lawyers. The appointments have also been challenged before the Supreme Court, where the case is currently pending.

In this context, it is critical for the independence and integrity of the judiciary that transparent and holistic selection criteria are elaborated in relevant legislation and in rules for judicial appointments, and there is greater transparency in proceedings of the Judicial Council.

#### 4.4 The Attorney General's Office

Nepal's Constitution vests the Office of the Attorney General with significant powers. For example, the Attorney General has 'the right to make the final decision to initiate proceedings in any case on behalf of the Government of Nepal in any court or judicial authority' and the Attorney General's advice is mandatory for the withdrawal of any lawsuits filed on behalf of the Government of Nepal. The Attorney General's office has exercised these powers in a manner that has resulted in a wide perception that the Office has become an obstacle to protecting human rights and ensuring accountability, rather than fulfilling its professional responsibility to advance justice.

As documented in detail by the ICJ, prosecutors have routinely disregarded their duty to investigate credible allegations of crimes, including crimes under international law; prosecutors do not exercise their functions with the objective of protecting human rights and promoting the rule of law; and prosecutors have not been able to function independently or impartially because of political and other influences.<sup>62</sup>

In Dekendra Thapa's case, for example, Nepal's Attorney General, Mukti Narayan Pradhan, sent instructions to the local police and the prosecutor not to move forward with the investigation after a court ordered the police to launch an investigation into his wife's allegations (see section 2.2(b) above). Similarly, in Maina Sunuwar's case, the Attorney General's office continues to create hurdles in appealing the district court's decision to acquit one of the alleged perpetrators despite requests of Maina Sunuwar's mother to appeal in light of credible evidence establishing his involvement in Maina Sunuwar's enforced disappearance and killing (see section 2.2(a) above).

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<sup>62</sup> See ICJ, 'Authority Without Accountability: the struggle for justice in Nepal', October 2013, at URL <https://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/>.

a) *Withdrawal of cases*

Section 5.2.7 of the CPA states: 'Both sides guarantee to withdraw accusations, claims, complaints and under-consideration cases leveled against various individuals due to political reasons and immediately make public the state of those imprisoned and immediately release them'. In some cases, this power has the potential to serve the interests of justice.<sup>63</sup> However, the overbroad and vague definition of what constitutes a 'politically motivated' allegation has led to the withdrawal of hundreds of cases that clearly constitute crimes under international law, including unlawful killings, torture and sexual violence, and despite credible allegations against the accused.

For example, in 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. In fact, three successive governments between 2008 and 2012, from across the political spectrum, withdrew more than 1,055 criminal cases filed in district courts across the country.<sup>64</sup>

The Supreme Court of Nepal has on some occasions prevented the Government from withdrawing cases. In a number of judgments, the Supreme Court has elaborated that, even though the Government's decision to withdraw cases is an executive decision, this authority cannot be exercised without judicial scrutiny. In deciding whether it is reasonable for a case to be withdrawn, the Supreme Court has held that courts should find a balance between reasonableness to withdraw the case and the victim's right to justice. Furthermore, courts should only uphold a decision to withdraw a case if they are convinced that the decision serves the larger public interest.<sup>65</sup>

Judicial remedies, however, are not always possible where the Government withdraws criminal cases for political expediency. Despite Supreme Court judgments blocking case withdrawals in some instances, the provision continues to be used to protect politically connected individuals from criminal accountability, promoting and entrenching a de facto policy of impunity for the perpetrators of serious crimes, including human rights violations.

#### 4.5 Police

A further key contributor to impunity for human rights violations and other serious crimes in Nepal is the failure on the part of the police to carry out prompt, thorough, independent and impartial investigations.

Section 6 of the Government Cases Act states that, upon receipt of a preliminary report by the police, 'the Government Attorney shall give necessary direction to the investigating police officer'. The Act, however, is silent as to what should happen if the police do not provide their preliminary report, which is where victims face their first roadblock in their struggle for justice.

In instances where police refuse to register criminal complaints, delay investigations, or fail to provide a preliminary report to the public prosecutor recommending the initiation of criminal proceedings, the only recourse for victims and their families is to file a writ seeking court orders directing State authorities to act in accordance with the law. Maina Sunuwar's mother, for example, had to

<sup>63</sup> For an argument on why withdrawal of cases may serve the interests of justice in some cases, see Dipendra Jha, 'Questions related to withdrawal of Tikapur cases', 23 May 2017, at URL <http://archive.setopati.com/bichar/70071/>.

<sup>64</sup> For a detailed account, see ICJ, 'Authority Without Accountability: the struggle for justice in Nepal', October 2013, at URL <https://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/>.

<sup>65</sup> Ibid, pp. 53-60.

file a petition at the Supreme Court to obtain an order directing the Kavre police to investigate her case. After the order was obtained, the police finally submitted the file with its investigations to the public prosecutor in January 2008, followed by the filing of murder charges at the Kavre District Court in early February 2008. In Dekendra Thapa's case too, the police launched an investigation and arrested accused persons only after judicial orders.

The failure of the police to conduct prompt, thorough and independent investigations can be explained by political appointments of senior officers as well as the role of the police in carrying out, or being complicit in, human rights violations.

The case of the appointment of the former Inspector General of Police, Kuber Singh Rana, despite allegations of his involvement in human rights violations, illustrates some of the problems.

Kuber Singh Rana served as Inspector General from September 2012 to November 2013. He was elevated to the post despite allegations of his involvement in the extra-judicial execution of five students in Dhanusa in October 2003. On 2 February 2009, the Supreme Court of Nepal directed police to duly investigate the registered FIR and proceed with the necessary investigation and inquiry in accordance with the law.<sup>66</sup> The decision of the Supreme Court remained unimplemented. Instead, the alleged perpetrator Kuber Singh Rana was promoted to the post of Chief of the Nepal Police.

#### 4.6 Witness protection

Even before the outbreak of armed conflict in 1996, efforts to prosecute corruption or to bring human rights violations to light were severely undermined by the reluctance of witnesses to provide testimony for fear of intimidation, harassment and violence. In recent years, despite monitoring by civil society and international organizations, reports of threats and violence against victims and witnesses remain common, particularly in criminal cases involving conflict-related human rights abuses, such as torture and ill-treatment, sexual violence, extra-judicial killings and enforced disappearances.

In November 2009, the Supreme Court of Nepal ordered the Government to formulate legislation for the protection and assistance of victims and witnesses.<sup>67</sup> It further ordered that until legislation is adopted, the Ministry of Home Affairs and Police Headquarters should develop and implement a plan to establish a witness protection and support section in Police Headquarters and in each district. However, at the time of writing, the Supreme Court's directions have not been implemented and Nepal still awaits a comprehensive witness protection law that meets international standards and best practices.

## **5 Post-report update**

Events taking place since the preparation of this report, and just prior to its launch, must be noted, albeit briefly, because of their potentially impact on redress and accountability in Nepal.

In early August 2017, the Commissions of Inquiry started preliminary investigations into some of the complaints they have received since February 2015. However, according to information received by the ICJ, these investigations also suffer from the flaws described above in the operation of the Commissions (see section 2.3 above): the investigation teams have inadequate human and

<sup>66</sup> See *Jayakishor Lav v. District Police Office Dhanusha and others*, writ no. 063-WO-0681 (2 February 2009).

<sup>67</sup> *Mira Dhungana v. Nepal Government et al.*, writ no. 0043/2065 (4 November 2009).

financial resources to handle the large number of cases; there are concerns about the opacity of the appointment process of the investigators; and the Commissions have taken no measures to ensure confidentiality and security of victims and witnesses who participate in the investigations. Victims have also expressed concern that the investigators in many districts have asked them about their interest in reconciliation with the alleged perpetrators, even where their complaints are of serious conflict-era crimes. This is despite the Supreme Court ruling out any possibility for reconciliation in cases of serious crime in *Madhav Kumar Basnet v the Government of Nepal*.<sup>68</sup>

On 9 August 2017, Nepal's Parliament endorsed the Criminal Code Bill 2014. The Bill will become an Act of Parliament after it receives the President's assent. Among other changes, the Criminal Code Bill makes enforced disappearance a distinct, autonomous crime in the country. However, the provisions in the Bill fall short of international standards, as described in section 2.6 above.

On 31 October 2017, the Central Investigation Bureau of the Nepal Police arrested Bal Krishna Dhungel, a leader of the Communist Party Nepal (Maoist Center). Dhungel had been absconding since the Supreme Court upheld his conviction for murder in 2010 (see section 2.2 above). The arrest comes after a contempt of court petition was filed before the Supreme Court against the Inspector General of Police for failing to implement multiple Supreme Court orders directing Dhungel's arrest.<sup>69</sup>

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<sup>68</sup> *Madhav Kumar Basnet and others v. Government of Nepal*, Nepal Kanoon Patrika, 2070 (BS) Issue 9, Decision No. 9051.

<sup>69</sup> 'Murder convict leader Bal Krishna Dhungel arrested, sent to Dillibazaar prison', *Kathmandu Post*, 31 October 2017, at URL: <http://kathmandupost.ekantipur.com/news/2017-10-31/maoist-leader-bal-krishna-dhungel-arrested.html>

## ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES

The aim of this report is to provide a baseline assessment of the situation in Nepal pertaining to the accountability of perpetrators of gross human rights violations and the access to effective remedies and reparation of victims of such violations; alongside an assessment of the independence and accountability of judges and lawyers and the ability of justice mechanisms and justice actors to provide for accountability and redress. The report is part of the ICJ's Global Redress and Accountability Initiative, currently focused on seven countries (Cambodia, Mozambique, Myanmar, Nepal, Tajikistan, Tunisia and Venezuela) with the aim to combat impunity and promote redress for gross human rights violations. It concentrates on the transformative role of the law, justice mechanisms and justice actors, seeking to achieve greater adherence of national legal and institutional frameworks with international law and standards so as to allow for effective redress and accountability; more independent justice mechanisms capable of dealing with challenges of impunity and access to redress; and judges, lawyers, human rights defenders, victims and their representatives that are better equipped to demand and deliver truth, justice and reparation.

In all regions of the world, perpetrators of gross human rights violations enjoy impunity while victims, especially the most vulnerable and marginalized, remain without effective remedies and reparation. Governments of countries in transition and/or experiencing a wider rule of law crisis often seek to provide impunity for perpetrators of gross violations of human rights, or make no effort to hold them to account, or misuse accountability mechanisms to provide arbitrary, politically partial justice. Yet international law requires perpetrators to be held accountable and victims to be provided with effective remedies and reparation, including truth and guarantees of non-recurrence. This is reinforced by the 2030 Sustainable Development Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice, are based on the rule of law and respect for human rights, and provide for accountability.

Impunity and lack of redress dehumanizes victims and acts as an impediment to the cementing of democratic values and the rule of law. Lack of accountability and claims for justice dominate national debates, frequently leading to a paralysis or reduced functioning of the institutions of the State and detracting from the pursuit of other rule of law and development initiatives. Impunity threatens a nascent democracy by rendering its constitution hollow, weakening its judiciary and damaging the political credibility of its executive. Public institutions often act in ways that bring them into disrepute and undermine the public confidence in them that is required for sustainable transition: through the legislature enacting laws providing for impunity; through law enforcement and the judiciary acting on a selective basis or without independence; and/or through the executive ignoring rule of law based judgments by higher courts. A failure to guarantee redress and accountability has too often also resulted in former structures of power, to the extent that they enjoy impunity, transforming into criminal and hostile elements that may perpetuate violence and conflict.

### Methodology

This study is based primarily on the ICJ's substantial body of work on the rule of law and impunity for gross human rights violations in Nepal. The ICJ has been working on issues related to accountability for human rights violations, remedies and reparation for victims, and justice sector reform for over a decade in the country. The ICJ's work has included public interest and strategic litigation; commentaries on draft and enacted legislation assessing their compliance with international law and standards; workshops and capacity-building with justice

sector actors; and consultations and meetings with relevant stakeholders for collaboration, strategy and advocacy purposes.

In addition, this study is based on meetings during a two-week mission in Nepal, during which meetings were held with civil society organizations, victims' groups, lawyers, journalists, donors, members of the police, the Attorney General's office and local peace committees. An ICJ regional consultation was at that time held on 'transitional justice and the way forward' in Nepalgunj, which gave an opportunity to meet and engage with a large number of stakeholders and benefit from their views on strategies for redress and accountability for human rights violations in the country. A monitoring mission was also undertaken to assess the working procedures of the Truth and Reconciliation Commission (TRC) and Commission on Investigation of Disappeared Persons (CoID) in *Bardiya* district in the *Terai* region, which informs the analysis on the shortcomings in Nepal's transitional justice processes.

The methodology also includes desk review of draft and current legislation; NGO and Government reports; court orders and judgments; and newspaper and journal articles. In addition, it relies on international law instruments, reports and jurisprudence of UN human rights mechanisms to clarify the meaning and scope of the right to remedies and reparation, and provide analysis on the extent to which the Nepali justice system complies with international standards.

The law and facts are stated as at 12 June 2017.

### **Partners and key stakeholders**

The ICJ's key partners in Nepal include: the Nepal Bar Association; the National Judicial Academy; Conflict Victims Committee Bardiya; Conflict Victim's Society for Justice; and the Center for Legal Studies.

The Nepal Bar Association (NBA), established in 1956, is the federal organization of Nepali Lawyers. The ICJ has partnered with and supported the NBA on a number of activities, including advocacy on law reform related to Nepal's transitional justice process to ensure compliance with international law and standards; the implementation of Supreme Court judgments related to transitional justice; advocacy for the incorporation of international standards in the fundamental rights chapter of the Constitution; and advocacy to the reform Criminal Code Bill draft legislation on torture in accordance with international standards.

The National Judicial Academy (NJA) was established in 2004 to serve the training and research needs of judges, government attorneys, government legal officers, judicial officers, private law practitioners, and others who are directly involved in the administration of justice in Nepal. The ICJ has partnered with the NJA on a number of activities including a national research report on the implementation of Supreme Court and Appellate Court orders/judgments relating to transitional justice and the application of international standards and Supreme Court jurisprudence on transitional justice by lower courts. The ICJ has also supported NJA in organizing sensitization seminars for judges, public prosecutors and lawyers on human rights and transitional justice issues.

The ICJ has worked with victims of the conflict to assist them on transitional justice advocacy in line with international law and standards. In particular, the ICJ has been supporting two victims' organizations, Conflict Victims Committee (CVC) Bardiya and the Conflict Victim's Society for Justice (CVSJ), through legal awareness programmes and consultation meetings for the establishment and promotion of credible transitional justice process in Nepal.

The ICJ has also supported the Center for Legal Studies (CLS), a legal education center, to monitor the work of the Truth and Justice Commission and the

Commission on in the Investigation od Disappearances to assess their compliance with international law and standards as well as established jurisprudence of the Supreme Court of Nepal.

In addition, the ICJ will collaborate with CSOs and lawyers working on the human rights situation in the Terai region to implement activities under the project to ensure greater partner diversity and include a holistic perspective on the human rights situation in Nepal.



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