

**Advocacy Forum-Nepal**  
**Asian Human Rights Commission**  
**The Redress Trust**  
**World Organization against Torture**

**Submission to the United Nations**  
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## I. INTRODUCTION

1. Advocacy Forum-Nepal (**AF**), the Asian Human Rights Commission (**AHRC**), the Redress Trust (**REDRESS**) and the World Organization against Torture (**OMCT**) make this submission as part of the Universal Periodic Review (**UPR**) of Nepal, to be held in November 2015. This report covers key concerns about human rights in Nepal from the country's first UPR in January 2011 to the present, and is based on extensive documentation by AF, REDRESS, OMCT, AHRC and partner non-governmental organizations (**NGOs**).

## II. ISSUES OF CONCERN

2. The principal issues addressed in this submission are:

- A. the continuation of impunity for serious human rights violations committed during the conflict in Nepal and since;
- B. serious flaws in the transitional justice law and transitional justice processes;
- C. Nepal's failure to effectively respond to sexual violence;
- D. the continued practice of torture; and
- E. the lack of effectiveness of the National Human Rights Commission (**NHRC**).

### A. CONTINUED IMPUNITY FOR SERIOUS HUMAN RIGHTS VIOLATIONS

#### Background

3. From 1996 to 2006 Nepal was the site of an internal armed conflict between security forces and the Communist Party of Nepal—Maoist (**CPN-Maoist**).<sup>1</sup> Both sides to the conflict were responsible for serious human rights violations; it is estimated that the conflict claimed around 17,265 lives, and resulted in 4305 disabled, 78,675 dispossessed and displaced, thousands of civilians tortured and hundreds of women and girls victims of rape and other forms of sexual violence. The whereabouts of 1,302 individuals is still not known.<sup>2</sup>
4. Under the Comprehensive Peace Agreement (CPA) of November 2006, all political parties agreed to investigate and prosecute human rights violations.<sup>3</sup> But no meaningful action has been taken.
5. Impunity for these crimes, and other crimes which have been committed since, is not a new issue. It was the subject of extensive discussion during the review of Nepal's human rights record during the UPR in January 2011. Various states

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<sup>1</sup> The party was renamed Unified Communist Party of Nepal (Maoist) (**UCPN (Maoist)**) in 2009. In a later split, a new party using the Communist Party of Nepal (**CPN-M**) name was created.

<sup>2</sup> Advocacy Forum (AF), *Transitional Justice at the Crossroads*, (January 2014), 3.

<sup>3</sup> See Comprehensive Peace Agreement, section 7.1.3.

expressed concern over Nepal's failure to hold accountable individuals who committed serious human rights violations.<sup>4</sup> Nepal's government accepted numerous recommendations to combat impunity through the investigation and prosecution of human rights abuses committed during and since the conflict.<sup>5</sup> Indeed, the government claimed it "brings any official found responsible for such activities to justice".<sup>6</sup> Specifically, it proclaimed that it is:

Fully committed to establishing Constitutional supremacy, ensuring the rule of law, good governance and human rights, as well as providing a positive conclusion to the peace process by eliminating insecurity and addressing impunity . . . **addressing impunity entails addressing the past and maintaining the rule of law at present [and] Nepal is fully committed to work on both fronts.**<sup>7</sup>

6. Despite such assurances, **no effective action has been taken and impunity remains deeply entrenched for serious human rights violations committed by both the security forces and the CPN (Maoist) during the decade-long conflict, as well as for extrajudicial executions and torture committed more recently.**<sup>8</sup>
7. No members of the military, police or Armed Police Force have been brought to justice in a civilian court of law for crimes committed during the conflict.<sup>9</sup> In a small number of cases, including the emblematic case of Maina Sunuwar, members of the army have been charged with murder and arrest warrants have been issued on the orders of the court. Only one ex-soldier who had deserted was arrested. He was acquitted on grounds of insufficient evidence in December 2013; a decision later upheld by the Appellate Court.<sup>10</sup> Other serving army personnel subject to arrest

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<sup>4</sup> UN Human Rights Council, 17<sup>th</sup> Session, *Report of the Working Group on the Universal Periodic Review: Nepal*, (8 March 2011), A/HRC/17/5, concerns expressed by Hungary (para. 32), Switzerland (para. 34), United Kingdom (para. 66), New Zealand (para. 77), Netherlands (para. 78) and Denmark (para. 80).

<sup>5</sup> *ibid.*, para. 106.38 (recommendations by UK and France). See also recommendations from Argentina, Malaysia, Sweden, Japan, Hungary, and the USA (each accepted), and recommendations from Italy, Republic of Korea, New Zealand, Norway, Spain, the Netherlands and Czech Republic (each noted).

<sup>6</sup> UN Human Rights Council, 17<sup>th</sup> Session, Agenda item 6, *Report of the Working Group on the Universal Periodic Review Nepal Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (1 June 2011), A/HRC/17/5/Add.1,

<[http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A\\_HRC\\_17\\_5\\_Add.1\\_Nepal\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A_HRC_17_5_Add.1_Nepal_E.pdf)>.

<sup>7</sup> (Emphasis added). UN Human Rights Council, 10<sup>th</sup> Session, *Draft report of the Working Group on the Universal Periodic Review: Nepal*, (28 January 2010), A/HRC/WG.6/10/L.3 para. 51,

<[http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/Nepal-A\\_HRC\\_WG.6\\_10\\_L.3-eng.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/Nepal-A_HRC_WG.6_10_L.3-eng.pdf)>.

<sup>8</sup> UNOHCHR, *Nepal Conflict Report 2012*, (October 2012),

<<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>>; AF, *Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?*, (Kathmandu: AF, June 2013); AF, *Promising Developments – Persistent Problems: Trends and Patterns in Torture in Nepal during 2013*, (Kathmandu: AF, June 2014); Terai Human Rights Defenders Alliance, *Torture in the Terai*, (Kathmandu: THRA, February 2015).

<sup>9</sup> See International Commission of Jurists (ICJ), *Authority without Accountability: The Struggle for Justice in Nepal*, (October 2013), 82, <<http://icj.wengine.netdna-cdn.com/wp-content/uploads/2013/10/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-final-1.pdf>>. See also AF, *Evading Accountability by Hook or by Crook: The Issue of Amnesties in Post-Conflict Nepal*, (Kathmandu: AF, June 2011), <<http://advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>>; Republica, *Victim's Kin Condemns Proposal to Pardon Maoist Lawmaker*, (3 October 2011), <<http://goo.gl/oITlqQ>>; Republica, *PM, AG Solicit President of Pardon Dhungel*, Kathmandu Insider (7 November 2011) <<http://ktminsider.com/blog/2011/11/06/pm-ag-solicit-president-of-pardon-dhungel>>.

warrants have not been handed over to police by the Army despite specific requests on the basis of the arrest warrants.<sup>11</sup>

8. In addition, individuals who have been accused of grave human rights violations are still being promoted and appointed to senior government positions. Among them is Kuber Singh Rana, a senior police officer against whom the NHRC had recommended criminal prosecutions in connection with the disappearance and murder of five students in Dhanusha in October 2003. He was appointed as Inspector General of Police, the most senior police officer, while investigations into the case were proceeding. The Supreme Court in August 2012 held that in absence of any law to vet or suspend public officials for their alleged involvement in human rights violations, courts cannot suspend the promotion of Kuber Singh Rana. However, the court noted that the Government should in the future be extremely cautious about the transfer and promotion of officials implicated in human rights violations. The court ordered the Government to put in place vetting laws that would regulate the promotion and transfer of government officials, including those from the security forces.<sup>12</sup> Some members of the security forces have also been selected for UN peacekeeping duties despite serious charges pending against them.<sup>13</sup>
9. Trials have gone ahead in only two cases against members of the **UCPN (Maoist)**. These have resulted in convictions, but either no punishment, or light punishment. In one of them, Bal Krishna Dhungel, a senior UCPN (Maoist) member, was convicted for murder and sentenced to life imprisonment in 2004 (a sentence upheld by the Supreme Court), but remains at liberty due to political pressure. In November 2011, the government recommended that he should be pardoned (although this has not yet happened).<sup>14</sup> In the other case, very light sentences were imposed in December 2014 on five individuals found guilty of the murder of journalist, Dekendra Thapa. They were sentenced to only one and a half to two years' imprisonment.<sup>15</sup>

### Challenges in seeking justice

10. Victims of human rights violations face five major challenges in seeking justice: (1) authorities' refusal to register and investigate cases and no accountability for failure to investigate, (2) interference with investigations, (3) lack of independent oversight of police and army, (4) inadequate legal framework and (5) failure to implement views of the UN Human Rights Committee.

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<sup>10</sup> AF, *Reena Rasaili*, <<http://advocacyforum.org/fir/2011/01/reena-rasaili.php>>.

<sup>11</sup> ICJ, *Authority without Accountability*, *supra* note 9, 67 and 106.

<sup>12</sup> ICJ, *Authority without Accountability*, *supra* note 9, 113.

<sup>13</sup> AF and Human Rights Watch (HRW), *Adding Insult to Injury: Continued Impunity for Wartime Abuses*, (Kathmandu: AF, December 2011), 1, <<http://www.hrw.org/reports/2011/12/01/adding-insult-injury-0>>.

AF, *Vetting in Nepal: Challenges and Issues*, (Kathmandu: AF, July 2014), <<http://www.achrweb.org/reports/DPKO-Nepal.pdf>>.

<sup>14</sup> ICJ, *Authority without Accountability*, *supra* note 9, 37.

<sup>15</sup> Nepali Times, *Dekendra's Murderers Sentenced*, (8 December 2014),

<<http://www.nepalitimes.com/blogs/thebrief/2014/12/08/dekendas-murderers-sentenced>>;

Kathmandu Post, *Impunity watch: Cases Against Maoists Being Fast Withdrawn*, (18 May 2011),

<<http://www.ekantipur.com/the-kathmandu-post/2011/05/17/top-story/impunity-watch-cases-against-maoists-being-fast-withdrawn/221795.html>>.

## 1. Authorities' refusal to investigate

11. For any criminal investigation to begin in Nepal a First Information Report (FIR) must be registered. **The police failure to register FIRs and investigate complaints of serious human rights violations that occurred during the conflict and since, including torture and extrajudicial executions, is a major contributing factor to impunity.**
12. Since the end of the conflict, AF has assisted at least 128 victims to register FIRs with the police in relation to serious human rights violations committed during the conflict (including extrajudicial executions, torture and enforced disappearances). In all those cases either the Appellate Court or the Supreme Court had to order police to register the FIR. However, even in those cases, the police have often failed to act.<sup>16</sup> In mid-March 2015, for instance, the Bardiya District Police Office refused to register FIRs in six cases of political killings during the conflict despite a November 2014 order from the Appellate Court Nepalgunj to do so.
13. Police refusal to register FIRs stymies the judicial process at its inception. Without a registered FIR, the prosecution of a crime becomes impossible, as the Nepali legal system does not allow for private prosecutions.<sup>17</sup>
14. The Nepal authorities have sought to justify their refusals to proceed with criminal investigations and prosecutions on the basis that the transitional justice mechanisms are better suited to address past human rights violations than the criminal justice system. However the UN Human Rights Committee, the OHCHR and Nepal's Supreme Court have all held this position to be contrary to Nepal's international obligations (see paras. 29-34). The Supreme Court has repeatedly stated that the transitional justice mechanisms cannot replace normal criminal investigations and prosecutions.<sup>18</sup> Very recently, it stated that transitional justice mechanisms:  
  
cannot displace a judicial body, nor can it replace judicial functions or provide for an alternative to judicial functions. In fact, the Commission in itself merely provides assistance to the judicial process. The resultant cases of serious

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<sup>16</sup> HRW and AF, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict* (New York: HRW 2008); HRW and AF, *Still waiting for Justice: No End to Impunity in Nepal* (New York: HRW, 2009); HRW and AF, *Indifference to Duty: Impunity for Crimes Committed in Nepal*, (New York: HRW, 2010); HRW and AF *Adding Insult to Injury*, <<http://advocacyforum.org/publications/impunity-reports.php>>.

<sup>17</sup> The case of the extrajudicial execution of Arjun Lama, where despite a Supreme Court order mandating the filing of a FIR, investigations barely went beyond trying to find the home addresses of those accused, one of whom was a prominent politician. In its 21 June 2011 holding, the Supreme Court admonished: "Therefore, in the context of all elements including the government and police having a responsibility to abide by all rules and regulations in order to establish the rule of law, the undue delay, intentional or unintentional, in crime investigation conducted in response to an FIR filed by an order of mandamus issued by the court should be taken as an indicator of the level of performance, expertise and impartiality of the police. There is no point to disagree that the investigations or inquiries carried out so far into it are disappointing." See also AF and HRW, *Adding Insult to Injury*, *supra* note 15, 13–14.

<sup>18</sup> ICJ, *Authority without Accountability*, *supra* note 9, 106–7.

violations of human rights, filed on the basis of the truth and evidence unearthed by the Commission will ultimately be settled by the Courts.<sup>19</sup>

15. The police continue to refuse to file FIRs and properly investigate serious current human rights violations, such as alleged extrajudicial killings regularly reported in the Terai region.<sup>20</sup> Although the Police Act provides mechanisms by which disciplinary proceedings may be taken against police for failure to discharge duties, to date no police officer has been subjected to a disciplinary proceeding and held accountable for the failure to register a complaint or the failure to proceed with an investigation.

#### **Recommendations:**

Existing laws must be strengthened to ensure that complaints are registered, investigations proceed in a timely manner, investigators are shielded from political or other pressures, victims are afforded requisite protection and where there is sufficient evidence prosecutions in civilian courts of those responsible for serious human rights violations can take place. This should include the establishment of a special investigation unit for serious crimes.

The Police Act should be amended to include a specific provision concerning disciplinary action to be taken against individual police officers who improperly fail to register complaints and to conduct investigations of alleged human rights violations.

## **2. Interference with investigations**

16. **Other actors including the Attorney General (AG),<sup>21</sup> politicians, the Nepal Army and the UCPN (Maoist) have also interfered with police investigations.<sup>22</sup>**
17. A recent example of interference by the AG is seen in the case of Dekendra Thapa (see para 9). In January 2013, the AG ordered the police and prosecutors not to move forward with the case on the grounds that it would be dealt with by the TRC.<sup>23</sup> This instruction was challenged and the Supreme Court ordered the AG and the

<sup>19</sup> Supreme Court Ruling in Writ (No. 070-WS-0050) Certiorari & Mandamus, *Suman Adhikari v. Nepal Government & Others*, delivered by the Supreme Court, Special Bench, comprising of Kalyan Shrestha, Baidyanath Upadhyay and Cholendra Shamsheer Rana JJ, on Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2015 (Date of Decision: 26 February 2015) (unofficial translation); UNOHCHR, *Technical Note—The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)*, (21 May 2014), 5, <[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)>.

<sup>20</sup> Terai Human Rights Defenders Alliance, *Continuing Extrajudicial Executions in the Terai*, (March 2014), <[http://www.taraihumanrights.org/uploads/wordfile/12\\_Research%20Rerpot%20on%20Continuing%20Extrajudicial%20Executions%20In%20The%20Terai.pdf](http://www.taraihumanrights.org/uploads/wordfile/12_Research%20Rerpot%20on%20Continuing%20Extrajudicial%20Executions%20In%20The%20Terai.pdf)>.

<sup>21</sup> AF and HRW, *Waiting for Justice*, *supra* note 16, 34–35.

<sup>22</sup> AF and HRW, *Indifference to Duty*, *supra* note 16, 10; AF, *AF Raises Concern to AG About Lackluster Investigation into Reena Murder Case*, (5 July 2011), <<http://advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lackluster-investigation-in-reena-murder-case.php>>; AF Letter to the Attorney General on Reena Rasaili's case, 5 July 2011, <<http://advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>>.

<sup>23</sup> International Commission of Jurists press release, (30 January 2013), *Nepal: ICJ Calls for End to Political Interference in Case of Dekendra Thapa Killing*, <<http://www.icj.org/nepal-icj-calls-for-end-to-political-interference-in-case-of-dekendra-thapa-killing>>.

Prime Minister not to interfere with the investigation again. Some of the prosecution's key eyewitnesses recanted their earlier testimony, amid strong suspicion that they were threatened, or at least induced, by the UCPN-M.<sup>24</sup> This resulted in less evidence being put before the court resulting in grossly light sentences for the perpetrators.<sup>25</sup>

18. Powers to withdraw charges have been repeatedly (mis)used in hundreds of cases against persons accused of serious crimes amounting to violations of international humanitarian and/or human rights law committed during the conflict and since.<sup>26</sup> In late 2013 – early 2014, two UCPN-M members were released after their party demanded that the case for the murder of 16-year-old Krishna Prasad Adhikari be withdrawn, maintaining that the prosecution of conflict-era crimes threatens the peace process and must be left to the transitional justice mechanisms.<sup>27</sup> As a result, the parents of the victim went on hunger strike for many months, resulting in the death of the father in September 2014. This shows the desperation of the demand for justice felt by the victims.<sup>28</sup>

**Recommendation:** The government should take effective measures to prevent interference with police investigations by political, army or other actors, including by removing legislation allowing withdrawal of cases on political grounds, introducing severe penalties for interference and setting up a special investigation unit.

### 3. Lack of independent oversight of police and army

19. In Nepal's last review, Australia recommend that it "[i]ntroduce an independent complaints mechanism on the conduct of security forces and establish a Nepal Police Service Commission", recommendations echoed by Denmark,<sup>29</sup> and the United Kingdom.<sup>30</sup> The government did not accept the recommendation on the security

<sup>24</sup> Nepali Times, *Justice Under Threat*, (August 2014), <<http://nepalitimes.com/article/nation /justice-for-dekendra-thapa,1619>>.

<sup>25</sup> Five individuals were sentenced to only one and a half to two years for the murder. See Nepali Times, *Dekendra's Murderers Sentenced*, *supra* note 15.

<sup>26</sup> AF, *Evading Accountability by Hook or by Crook: The Issue of Amnesties in Post-Conflict Nepal*, *supra* note 9; AF and HRW, *Adding Insult to Injury: Continued Impunity for Wartime Abuses*, *supra* note 13, 2–3; see Manish Gautam, *Govt Tightens Screws on Criminal Case Withdrawal*, Kathmandu Post (2 January 2015), <<http://www.ekantipur.com/the-kathmandu-post/2015/01/01/top-story/govt-tightens-screws-on-criminal-case-withdrawal/271493.html>>.

<sup>27</sup> Accountability Watch Committee, *Responsibility of Government, Political Parties, Civil Society and International Community on the Case of Krishna Prasad Adhikari*, (2 January 2014), <<http://www.awcnepal.org/images/AWC's%20concern%20on%20Krishna%20Pd.%20Adhikari's%20Case%20ENG.pdf>> AF, *Krishna Adhikari*, <<http://advocacyforum.org/emblematic-cases/2013/09/krishna-adhikari.php>>.

<sup>28</sup> See UN OHCHR press release, *OHCHR saddened by death of Nanda Prasad Adhikari*, (23 September 2014), <<http://un.org.np/headlines/ohchr-saddened-death-nanda-prasad-adhikari>>.

<sup>29</sup> Denmark recommended that it "[e]stablish a Police Service Commission responsible for appointments, promotions and transfers" and "...introduce an independent complaint mechanism on the conduct of the security forces", UN Human Rights Council, 17<sup>th</sup> Session, *Report of the Working Group on the Universal Periodic Review*, *supra* note 4.

<sup>30</sup> The UK recommended that it "Strengthen the rule of law by establishing an independent complaints commission capable of investigating and prosecuting complaints against the security forces and a police service commission responsible for police recruitment, transfers and promotion", *ibid*.



forces, but said that it was “examining the possibility of establishing a Nepal Police Service Commission”.<sup>31</sup>

20. **Apart from relevant Parliamentary Committees, there are currently no independent mechanisms in place overseeing the police and army and which can investigate human rights violations allegedly committed by them.** This means that when police or military commit abuses or fail to pursue investigations, the victims’ only recourse is to turn to the National Human Rights Commission (**NHRC**) or – where there is a failure to register an FIR – to the courts to obtain an order that an investigation proceed (see previous section).<sup>32</sup>
21. The police and military have human rights units that perform internal investigations. However, these units lack independence, are at risk of improper influence and have repeatedly put the lives and physical integrity of complainants at risk by not protecting their identity.<sup>33</sup> Victims view these mechanisms as window dressing and feel hesitant to complain to such units as their impartiality is suspect and they fear reprisal.
22. In the very few instances in which any sanctions have been imposed, for example by military courts, individuals have been held responsible for minor disciplinary offences rather than the true crime committed, and sentenced to minor punishments such as very short periods of imprisonment or no promotion for a specified period when in reality crimes including torture and extrajudicial execution have been committed.<sup>34</sup> These punishments are then later used to shield accused facing criminal investigations arguing that they have already faced a court martial.<sup>35</sup>
23. In some cases, the government has formed special commissions to investigate alleged human rights violations by the police and army. However similar issues around independence and impartiality have plagued these and they have not resulted in meaningful investigations and convictions.<sup>36</sup> At best, they have been ineffective. At worst, these commissions have further entrenched the culture of impunity rather than promoted accountability.<sup>37</sup>

**Recommendation:** Introduce an independent complaints mechanism on the conduct of security forces, establish a Nepal Police Service Commission and undertake a wider reform of the police and army.

<sup>31</sup> See the government’s response to recommendation 108.15–108.16 of the report in: *Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/17/5/Add.1, (1 June 2011).

<sup>32</sup> Note there is also a *Commission for the Investigation of the Abuse of Authority* (CIAA), established under the Interim Constitution 2063 (2007) (Article 120), which mainly handles cases of corruption.

<sup>33</sup> AF, *Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?*, (June 2013), 89–90, <<http://advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>>.

<sup>34</sup> For example, in the case of the torture and murder of Maina Sunuwar, three soldiers were only charged with minor offences and sentenced to six months’ imprisonment, temporary suspensions of promotions and a paltry monetary fine. See AF, *Separating Fact from Fiction. Maina Sunuwar*, (February 2010), 16–17, <<http://advocacyforum.org/downloads/pdf/publications/maina-english.pdf>> and ICJ, *Authority without Accountability*, *supra* note 9, 79–86.

<sup>35</sup> See AF, *Separating Fact from Fiction*, *supra* note 34.

<sup>36</sup> ICJ, *Authority without Accountability*, *supra* note 9, 14.

<sup>37</sup> *Ibid.*

#### 4. Inadequate legal framework

24. Even if investigations did proceed, **current Nepali legislation does not allow for prosecutions of many of the serious crimes committed during the conflict and since, including torture, enforced disappearance, war crimes, and crimes against humanity, as these are not criminalised in domestic law.**
25. Previous governments have introduced Bills to criminalise torture and enforced disappearance, however these have never been adopted into law. Although the introduction of the Bills was a positive step, the Bills themselves were in a number of respects not in line with international law and international standards.<sup>38</sup>
26. Very recently the government has tabled a new Bill criminalising torture in Parliament, however the Bill continues to suffer from issues in the previous bills, including a restrictive definition of torture and low period of maximum punishment.<sup>39</sup>
27. In addition, Nepal's legal system includes several laws under which public officials enjoy immunity for acts that otherwise amount to human rights violations.<sup>40</sup> The government denied the existence of such laws during the 2011 UPR and refused to accept recommendations to amend laws.

#### **Recommendations:**

Promptly criminalise international crimes including torture, enforced disappearance, war crimes, crimes against humanity and genocide, following a transparent consultation process. Ensure that the criminalisation of these crimes has retroactive effect to the moment when Nepal ratified the relevant conventions and/or the crimes became applicable in Nepal by virtue of international custom, and that prosecution is not subject to a limitation period.

Ratify the Rome Statute of the International Criminal Court and the Convention on Enforced Disappearances.

Amend all laws providing immunity in respect of grave human rights violations.

<sup>38</sup> See, eg. AF and REDRESS, *Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence*, (April 2011), <[http://www.redress.org/downloads/publications/AFRedress\\_Report\\_on\\_Draft\\_Legislation.pdf](http://www.redress.org/downloads/publications/AFRedress_Report_on_Draft_Legislation.pdf)>; AF and REDRESS, *Letter to the Prime Minister on Proposed Torture Bill*, (17 April 2012), <<http://www.redress.org/downloads/publications/Letter%20to%20Prime%20Minister.pdf>>.

<sup>39</sup> Ram Kumar Kamat, *Bill needs to broaden definition of torture, say rights activists*, Himalayan Times, 14 March 2015, <<http://thehimalayantimes.com/fullNews.php?headline=Bill+needs+to+broaden+definition+of+torture%26sbquo%3B+say+rights+activists&NewsID=447813>>.

<sup>40</sup> See Advocacy Forum and REDRESS, 'Held to Account: Making the Law Work to Fight Impunity in Nepal', (December 2011), 76, <<http://www.advocacyforum.org/downloads/pdf/publications/impunity/held-to-account-nov-30-2011-english-version.pdf>>; see also International Commission of Jurists, 'Authority without Accountability: The struggle for justice in Nepal', (October 2013), 14, <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-final-1.pdf>>.

## 5. Failure to implement views of the UN Human Rights Committee in individual cases

28. Symptomatic of the impunity prevailing in the country, **Nepal has consistently failed to implement the views of the Human Rights Committee in any of the individual communications concluded against it under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and to comply with its obligation to provide a remedy to those the Committee has recognised as victims of violations.** To date the Committee has adopted Views in nine complaints concerning Nepal: *Sharma v Nepal*, *Sobhraj v Nepal*, *Giri v Nepal*, *Maharjan v Nepal*, *Sedhai v Nepal*, *Chaulagain v Nepal*, *Bhandari v Nepal*, *Basnet v Nepal* and *Tripathi v Nepal*. Advocacy Forum, with the support of REDRESS, represents the victims in four of these cases. In none of these cases have the Committee’s views been implemented – the only action that has been taken is the provision of small monetary payments to two victims of torture as well as a one-off payment additional to the ‘interim relief’ payment provided in a disappearance case, in line with the State Party’s general policy towards victims of human rights violations.<sup>41</sup> This is in breach of Nepal’s obligations under the Optional Protocol and the ICCPR, and reinforces impunity by rendering remedies at the international level ineffective.

**Recommendation:** Fully implement the views of the Human Rights Committee in individual communications concluded against Nepal under the Optional Protocol to the ICCPR without further delay.

## B. FLAWED TRANSITIONAL JUSTICE PROCESSES

29. In its last review, Nepal accepted a number of recommendations concerning the establishment of transitional justice processes, including to ensure that “there be no amnesty for grave violations of human rights” (Switzerland), that commissions have “independence from political interference” (Denmark) and that they are “fully in accordance with international standards” (Netherlands).
30. At the time of writing, two transitional justice mechanisms – a Truth and Reconciliation Commission (**TRC**) and an Enforced Disappearances Commission (**CoID**) have been appointed. However, the Supreme Court in February 2015 ruled the legislation constituting the Commissions unconstitutional, and a number of victims’ groups and non-government organisations have stated that they will not

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<sup>41</sup> See AF & REDRESS (2014), *Nepal’s Failure to Implement Views in Individual Cases*, report to the UN Human Rights Committee (Annex to Shadow report), February 2014, <<http://www.redress.org/downloads/publications/AF%20REDRESS%20APT%20Nepal%20submission%20for%20website.pdf>>.

engage in the processes until amendments ordered by the Supreme Court have been enacted.<sup>42</sup>

### 1. The Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation (“TRC Act”)

31. Nearly eight years after the commitment to do so in the CPA, **the Parliament passed the TRC Act on 25 April 2014, establishing the TRC and the CoID (hereinafter referred to collectively as the “Commissions”). The Act was passed without proper consultation with victims and non-government organisations. Political parties also did not allow any of their MPs to register amendments. Several of the TRC Act’s provisions contravene international human rights law and Supreme Court jurisprudence.**<sup>43</sup> Key issues of concern included:

- provisions giving the Commissions discretionary power to recommend amnesty for gross violations of international human rights law and serious violations of international humanitarian law.<sup>44</sup>
- excessive powers to “facilitate reconciliation” between victims and their perpetrators, including in cases of serious human rights violations.<sup>45</sup> Where victims and perpetrators have “reconciled” the TRC Act provides that investigation and prosecution shall not proceed.<sup>46</sup> UN Treaty Bodies and experts expressed serious concerns about “mediation” between victims and perpetrators in relation to serious violations of human rights; any such mediation risks undermining states’ obligation to prosecute.<sup>47</sup> Even where mediation may be appropriate for lesser crimes, it must be used with caution where there are power imbalances between the parties, and can only be carried out with the full consent of both parties.<sup>48</sup>
- the Act provides that the Commissions shall recommend action be taken against individuals found to have been involved with gross human rights

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<sup>42</sup> Accountability Watch Committee, *Protesting the Process for Establishing Transitional Justice Commissions*, (11 February 2015), < <http://www.awcnepal.org/index.php/press-release/press-release-english/80-news-and-events/108-press-release-protesting-the-process-for-establishing-transitional-justice-commissions>>.

<sup>43</sup> See OHCHR, *Technical Note—The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)*, (21 May 2014), <[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)>; AF, TRIAL, REDRESS, *Paying Lip Service to Justice—The Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal*, (June 2014), 8–26, <[http://www.redress.org/downloads/publications/1407TRC\\_Act\\_UN\\_Submission\\_AF\\_TRIAL\\_REDRESS\(June2014\).pdf?utm\\_source=smartmail&utm\\_medium=email&utm\\_campaign](http://www.redress.org/downloads/publications/1407TRC_Act_UN_Submission_AF_TRIAL_REDRESS(June2014).pdf?utm_source=smartmail&utm_medium=email&utm_campaign)>.

<sup>44</sup> Sections 26 and 25(2), TRC Act. Note that rape is excluded from the operation of the amnesty provision.

<sup>45</sup> Section 22, Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation.

<sup>46</sup> Section 25(2), Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation.

<sup>47</sup> Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of non-recurrence, Pablo de Greiff, Report to the Human Rights Council, UN doc. A/HRC/24/42, 28 August 2013, para. 48.

<sup>48</sup> See Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12, (“[t]he victim and the offender should be able to withdraw such consent at any time during the process . . . [a]greements should be arrived at voluntarily . . . [and] . . . [n]either the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes”).

violations (except where they are granted amnesty or have “reconciled” with the victim). However, this recommendation must be made to the Ministry of Peace and Reconstruction, which must approve any prosecution before it is initiated.<sup>49</sup>

- cases pending before the courts can be transferred to the Commissions.<sup>50</sup>
- the Act does not recognise victims’ right to reparation, and provisions on reparation do not provide for all the forms of reparation required in line with international standards.<sup>51</sup>
- a failure to ensure the requisite independence and transparency in the commissioner selection process. The TRC Act does not contain any provisions ensuring transparency or consultations in the selection process.<sup>52</sup>

32. The Act was challenged in the Nepal Supreme Court, and the Court ruled in the applicants’ favour on 26 February 2015.<sup>53</sup> **In its judgment, a three-judge panel struck down section 26(2) of the Act, finding that the amnesty provision was in violation of international law, established principles of justice, the Nepalese constitution and the prior jurisprudence of the Supreme Court.** The Court ruled that the Commission may not be conferred with uncontrolled powers to grant amnesty in all types of crimes, depriving victims of serious crimes of the right to obtain justice from an independent and competent authority. For less serious crimes, where it may be possible to grant amnesty, the Court ruled that the consent of the victim is mandatory for amnesty to be granted.<sup>54</sup>

33. The Court also clarified that:

- (i) reconciliation under section 22(1) can only be granted with the consent of the victim, and the Commissions would need to have this as a primary consideration in allowing for any such “reconciliation”;
- (ii) conflict-era cases pending before the Courts cannot be dealt with by the Commission, as they fall under the Court’s jurisdiction (concerning Section 13);
- (iii) the Attorney General does not require the permission of the Ministry of Peace and Reconstruction under Section 29 to begin a prosecution.

34. It now remains incumbent on the government to implement the changes mandated by the Supreme Court and on the Commissions to interpret their mandate in line with the Supreme Court’s judgment.

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<sup>49</sup> Section 29. See further AF, TRIAL, REDRESS, *supra* note 43, paras. 36–47.

<sup>50</sup> See section 13, Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation.

<sup>51</sup> See sections 2(e) and 23, Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation.

<sup>52</sup> See sections 3 thru 12, Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation.

<sup>53</sup> *Suman Adhikari v. Nepal Government & Others*, *supra* note 19.

<sup>54</sup> ICJ, *Nepal: Government must implement landmark Supreme Court decision against impunity*, (27 February 2015), <<http://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>> and OHCHR, *Nepal: Zeid hails Supreme Court rejection of amnesties for serious human rights violations*, (5 March 2015), <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15649&LangID=E>>.

35. The Commissions were appointed in February 2015, while the decision of the Supreme Court on the Act's constitutionality was pending. As a result, many potentially qualified candidates had boycotted the process.

**Recommendations:** Ensure the TRC Act is amended to bring it in line with international standards and the decisions of the Supreme Court before the Commissions begin any work.

Review the composition of the Commissions following the amendment of the TRC Act to ensure the most qualified candidates are appointed.

## 2. Absence of reparation for victims of human rights violations

36. The state's wider failure to deal with past violations has resulted in ongoing violations of the right to an effective remedy, including reparation for victims.

37. **Nepal has yet to introduce a comprehensive reparations program for victims of violations committed by both sides during the conflict, and has instead relied on the provision of small monetary payments to victims of some serious human rights violations including enforced disappearance and extrajudicial execution, termed 'interim relief'.**<sup>55</sup> The "Interim Relief Program", established in 2008, is not a reparations program: it was formulated as a humanitarian relief program that uniformly distributed financial benefits to certain categories of conflict victims, excluding others such as victims of torture and rape.<sup>56</sup> It is reported that of the 79,571 internally displaced persons (IDPs), only about 25,000 had received relief funds from the government and returned to their homes by October 2013. A total of 14,201 families who lost family members have received relief, while families of 1,528 missing people have been granted government aid amounting to 300,000 rupees (about 3,000 dollars) each.<sup>57</sup>

38. This process is inadequate to redress the harms suffered by victims, and has further been marred by discrimination in design and implementation.<sup>58</sup>

**Recommendation:** Establish a comprehensive reparations program, based on a meaningful consultation process designed to understand victims' views and the different ways in which individuals are affected, ensuring wide participation taking into account the effects of gender, caste, ethnicity, and socioeconomic status.

<sup>55</sup> See International Center for Transitional Justice, *Reparative Justice—To Walk Freely with a Wide Heart*, (September 2014), 9, <<http://www.ictj.org/sites/default/files/ICTJ-Report-Nepal-Reparations-2014.pdf>> (citing IRP Policy Document, (25 April 2008)).

<sup>56</sup> See *ibid.*, 9–10. ("'victims' was defined to cover individuals and their family members affected by killing, abduction, enforced disappearance, displacement, or destruction of property").

<sup>57</sup> See *ibid.*, 28. See also Renu Kshetry, *Can Nepal's TRC Finally Bring Closure to its War Survivors?*, Inter Press Service, (24 February 2015), <<http://www.ipsnews.net/2015/02/can-nepals-trc-finally-bring-closure-to-its-war-survivors>>.

<sup>58</sup> See further AF, *Discrimination and Irregularities. The Painful Tale of Interim Relief in Nepal*, 2010, <[http://advocacyforum.org/downloads/pdf/publications/Discriminations\\_and\\_Irregularities\\_A\\_painful\\_tale\\_of\\_Interim\\_Relief\\_in\\_Nepal.pdf](http://advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf)>.

### C. FAILURE TO EFFECTIVELY RESPOND TO SEXUAL VIOLENCE

39. In its last review, Nepal accepted a number of recommendations on responding to sexual violence, including to “[a]dopt effective measures to guarantee the protection of victims of gender violence, duly investigate allegations and ensure that those responsible be prosecuted and sanctioned” (Spain).<sup>59</sup>
40. **However, systematic failures of the police to investigate cases of sexual violence – committed during the conflict and since – have been well documented** by OHCHR-Nepal,<sup>60</sup> AF, HRW and the Women’s Rehabilitation Centre.<sup>61</sup> This results both from the general impunity affecting conflict-era crimes and other crimes committed by state actors, but also from discriminatory legal provisions including a 35-day limitation period in which to file complaints with the police, a failure to provide proper support to victims to enable them to safely report and document rape, and a lack of commitment to prosecutions, with police regularly referring complainants to “mediation”, rather than registering criminal complaints.
41. **The legislation criminalizing rape is ineffective.** The current definition of rape in Nepali law is too narrow: limited to penile-vaginal penetration only.<sup>62</sup> In addition, the law refers to forced sexual intercourse (*jabarjasti*) instead of rape (*balatkar*).<sup>63</sup> The use of this type of language creates an understanding that there must be evidence of force and signs of a struggle to prove non-consent.
42. **In addition, the law continues to impose a 35-day statute of limitation on reporting cases of rape, despite a 2008 Supreme Court ruling ordering the government to amend the law.**<sup>64</sup> Police continuously refuse to allow victims to file FIRs if more than 35 days passed since the rape occurred.<sup>65</sup> This bars every victim of rape during the conflict from filing complaints, thereby granting de facto amnesty to the perpetrators.<sup>66</sup> It also provides an enormous barrier to victims of rape committed since the conflict. It may take an extended period of time for a victim of rape to gain

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<sup>59</sup> See also recommendations from Thailand, Brazil and Japan, UN Human Rights Council, 17<sup>th</sup> Session, *Report of the Working Group on the Universal Periodic Review*, supra note 4.

<sup>60</sup> General Assembly, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of Her Office, Including Technical Cooperation, in Nepal*, (16 February 2011), A/HRC/16/23, paras. 41–46, <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.23\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.23_en.pdf)>.

<sup>61</sup> See HRW Nepal: *Conflict-Era Rapes Go Unpunished*, (23 September 2014), <<http://www.hrw.org/news/2014/09/23/nepal-conflict-era-rapes-go-unpunished>>.

<sup>62</sup> Nepalese General Code, Act Number 67 of the year 2019 [1963]: *Muluki Ain*, Chapter 14.

<sup>63</sup> *Ibid.*

<sup>64</sup> AF, *Torture of Women. Nepal’s Duplicity Continues*, (June 2012), 32–3, <<http://advocacyforum.org/downloads/torture-of-women-report-june-26-2012-english.pdf>>. A new Penal Code has recently been tabled in Parliament providing for a six month statute of limitation. If this becomes law, it would still grant de facto amnesty to perpetrators of rape during the conflict. This renders the exclusion of rape from the amnesty provision in the TRC Act meaningless.

<sup>65</sup> See HRW Nepal: *Conflict-Era Rapes Go Unpunished*, (23 September 2014), <<http://www.hrw.org/news/2014/09/23/nepal-conflict-era-rapes-go-unpunished>>.

<sup>66</sup> See Nepali Times, *Statute of Denial*, (26 September 2014), <<http://nepalitimes.com/regular-columns/Interesting-Times/nepal-archaic-law-puts-deadlineon-reporting-sexual-crimes,368>>.



a strong enough sense of safety and trust, or agency and empowerment, to be able to talk about the experience.

43. Even in more recent cases where complaints have been filed within this short time limit, **there is a widespread failure of police to register FIRs, investigate and prosecute rape cases, and a trend of police diverting such cases to “settlement” through informal justice mechanisms.**<sup>67</sup> Lack of confidentiality and poor police interviewing practices compound the problems.

44. Notwithstanding the above, some cases of rape involving private individuals in urban areas and/or where there has been public outcry have been prosecuted.<sup>68</sup> Some measures have also been put in place to try rape cases *in camera*.

**Recommendations:** Amend the crime of rape to bring its definition in line with international standards.

Remove the 35-day limitation period for filing complaints of rape; if any new limitation period is introduced ensure that it is of long duration and can be extended at the Court’s discretion.

Improve training of police, prosecutors and judges on appropriately responding to allegations of sexual violence, improve medical reports, and ensure confidentiality for victims.

#### D. THE PRACTICE OF TORTURE IS ONGOING AND SYSTEMATIC

45. In its last review, Nepal accepted a recommendation to “undertake legal and administrative efforts to end torture and related impunity” (Germany).

46. **In late 2011, the Committee Against Torture (CAT) concluded that torture is systematically practiced in Nepal.**<sup>69</sup> **Four years later and despite repeated promises, Nepal’s government has failed to pass any meaningful legislation addressing this flagrant human rights violation.** This reinforces Nepal’s culture of impunity, leaves victims of past torture without recourse, and puts the lives and physical integrity of future victims at risk.

<sup>67</sup> General Assembly, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of Her Office, Including Technical Cooperation, in Nepal*, *supra* note 60, para. 46; HRW Nepal, *Conflict-Era Rapes Go Unpunished*, *supra* note 61; Advocacy Forum and ICTJ, *Across the Lines*, (December 2010), 82, <<https://www.ictj.org/sites/default/files/ICTJ-Nepal-Across-Lines-2010-English.pdf>>.

<sup>68</sup> See My Republica, *Court Seeks Compensation for Rape Victim*, (13 February 2015), <[http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=92137](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=92137)>.

<sup>69</sup> Committee Against Torture, *Report on Nepal adopted by the Committee against Torture under article 20 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and comments and observations by the State party*, (May 2011), paras. 97 and 108, <<http://www2.ohchr.org/english/bodies/cat/docs/Art20/NepalAnnexXIII.pdf>> (In order to make such a finding, the Committee Against Torture must be convinced that torture is “habitual, widespread and deliberate in at least a considerable part of the territory of the country”).



47. **People held in police custody are especially at risk of being tortured during interrogation.** In late 2012 to early 2013, Nepal’s AG conducted a study on the treatment of detainees to determine whether national and international human rights law were being protected and whether the Supreme Court’s holdings on the rights of prisoners and detainees were being followed. Across 20 places of detention in ten districts, the AG found that almost 15% of detainees “described receiving treatment that amounts to torture.” Such treatment included “beating by hands and fists, by sticks on the soles of the feet and kicking while wearing police boots.”<sup>70</sup>
48. Since 2001, AF has been conducting regular visits to detention centers in 20 districts of Nepal to interview detainees. AF found a significantly higher percentage of reported torture than the AG. In 2012, 22.3% of the 3,773 detainees interviewed by AF reported torture. Moreover, AF found that methods of torture not mentioned in the AG’s report were being utilized, such as rods being inserted between the bound feet and hands of victims, leaving them hanging in the air for extended periods of time. Other cases involved the use of death threats and scare tactics, such as placing the barrel of a gun inside the victim’s mouth or against the victim’s head.<sup>71</sup> During 2013, 16.7% of the 3,662 detainees interviewed by AF lawyers reported torture and other forms of ill-treatment.<sup>72</sup> There are also continuing concerns about torture among disadvantaged communities in the Terai region.<sup>73</sup>

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<sup>70</sup> Annual Report of the Office of Attorney General, Fiscal Year 2068.069, Vol. 10, Year 2, no. 4, Ganapati Upset Press, Kathmandu, <[http://attorneygeneral.gov.np/Bulletin/Bulletin\\_10.pdf](http://attorneygeneral.gov.np/Bulletin/Bulletin_10.pdf)>.

<sup>71</sup> See AF, *Torture Briefing. Prevention of Torture in Nepal*, (January-June 2011, July-December 2011, January-June 2012 and July-June 2012), <<http://advocacyforum.org/publications/torture.php>>; See also AF, *Occasional Brief*, (October 2013), sec. 8, <<http://advocacyforum.org/downloads/pdf/publications/impunity/occ-brief-impunity-2013.pdf>>.

<sup>72</sup> AF, *Promising Developments – Persistent Problems: Trends and Patterns in Torture in Nepal during 2013*, *supra* note 8.

<sup>73</sup> Terai Human Rights Defenders Alliance, *Torture in the Terai*, *supra* note 8.

49. **At particularly high risk of torture are juveniles, detainees in the Terai region, members of specific ethnic groups and refugees.**<sup>74</sup> All of these vulnerable groups require heightened surveillance and protection.

**Recommendations:**

- End impunity for torture and other forms of ill-treatment by *inter alia* holding perpetrators accountable.
- Carry out effective investigations into allegations of ill-treatment.
- Criminalise torture and other forms of ill-treatment and provides for full redress in compliance with the Convention against Torture.

**1. The Torture Compensation Act 1996 (“TCA”) is inadequate**

50. **Other than Article 26 of the Interim Constitution, the only law addressing torture in Nepal is the TCA. The TCA does not criminalise torture, but instead provides victims with an opportunity to claim compensation and allows for judges to direct that the relevant department take disciplinary action against the perpetrator.**<sup>75</sup>

Such measures fail to reflect the gravity of torture and violate Nepal’s obligations under the human rights treaties to which it is a party.

51. In any event, **victims seeking compensation under the TCA encounter great difficulty.** The TCA imposes a 35-day limitation period for filing complaints, which begins to run from the day torture is inflicted or from the day of release from custody, whichever is later.<sup>76</sup> The TCA also places the burden of proof on the victims in circumstances where it is difficult, if not impossible, for victims to meet this burden in the absence of impartial and thorough investigations, and where medical evidence is compromised by police presence during medical examinations.<sup>77</sup> Even if victims are able to secure compensation under the TCA, the maximum amount to which they are entitled is NRs 100,000 (approx. USD 1,000) and payment can be delayed by years, hampering the victim’s rehabilitation progress.<sup>78</sup> In addition, there is no minimum compensation amount set.

<sup>74</sup> AF, *Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture, and Promising Developments – Persistent Problems. Trends and Patterns in Torture in Nepal during 2013*, supra note 8 and Terai Human Rights Defenders Alliance, *Torture in the Terai*, (February 2015), <[http://www.taraihumanrights.org/uploads/wordfile/32\\_Report%20on%20Torture%20in%20the%20Terai%20February%202015.pdf](http://www.taraihumanrights.org/uploads/wordfile/32_Report%20on%20Torture%20in%20the%20Terai%20February%202015.pdf)>.

<sup>75</sup> AF, *Promising Developments – Persistent Problems: Trends and Patterns in Torture in Nepal during 2013*, supra note 8.

<sup>76</sup> See *ibid.*, 28–29.

<sup>77</sup> AF, *Hope and Frustration: Assessing the Impact of Nepal’s Torture Compensation Act-1996*, (26 June 2008), 31–32, <<http://advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf>> and AF, *Promising Developments – Persistent Problems: Trends and Patterns in Torture in Nepal during 2013*, supra note 8, 28.

<sup>78</sup> Terai Human Rights Defenders Alliance, *Torture in the Terai*, supra note 8, 2.

52. Furthermore, a state prosecutor represents the alleged torture perpetrator while the victim has to use his or her own resources for legal representation. Such a system severely hampers the equality of arms.

## 2. Absence of independent detention monitoring system

53. **Intensifying the problem is Nepal’s lack of an independent detention monitoring system.** The NHRC does not have a program in place for regular visits. Even in cases where the NHRC has received specific complaints, it rarely attends detention centers. Similarly, public prosecutors and judges also visit places of detention occasionally. However, without a monitoring mechanism, it is impossible to comment with precision on nationwide patterns of torture and the findings of the AG and AF above offer only a snapshot of what is likely to be nationwide problem.

54. Regrettably, Nepal did not accept recommendations from various states during the 2011 UPR to ratify the Optional Protocol to the Convention against Torture (“OPCAT”) and establish a national mechanism to safeguard the rights of detainees and prevent torture.<sup>79</sup> In light of the findings of the CAT in 2011 (see para. 46), the AG, and AF outlined above, it is imperative that an effective national preventative mechanism is established.

### **Recommendation:**

Accede to and implement OP-CAT and establish an independent and effective National Preventive Mechanism.

## E. INEFFECTIVENESS OF THE NATIONAL HUMAN RIGHTS COMMISSION

55. In its previous review, Nepal accepted recommendations from a number of countries concerning the NHRC, including to “[r]estore the independence and mandate of the NHRC in line with the Paris Principles” (Canada), and to “promptly implement all recommendations put forward by the [NHRC] regarding prosecutions and/or departmental actions against alleged human rights violators” (Canada).<sup>80</sup>

56. However, the 2012 National Human Rights Act (“**2012 NHRC Act**”) constituted a step backwards for Nepal. **The 2012 NHRC Act curtails the powers and jurisdiction of the NHRC as initially set out in the foundational 1997 NHRC Act.**

57. Under the Paris Principles relating to the Status of National Institutions (“**Paris Principles**”), the NHRC should be able to select its own staff.<sup>81</sup> The 2012 NHRC Act, however, provides for the appointment of the NHRC’s Secretary by the

<sup>79</sup> See UN Human Rights Council, 17<sup>th</sup> Session, *Report of the Working Group on the Universal Periodic Review*, *supra* note 4, para. 109.1.

<sup>80</sup> See also recommendations from India, France, Republic of Korea and Norway, *ibid.*

<sup>81</sup> Paris Principles relating to the Status of National Institutions, (adopted 20 December 1993), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>>.

government.<sup>82</sup> This politicises the process, compromising the NHRC's independence. In its latest review of the NHRC's accreditation under the Paris Principles, the NHRC's International Coordinating Committee's Sub-Committee on Accreditation concluded that "existing provisions regarding selection and appointment do not ensure a sufficiently transparent and participatory process".<sup>83</sup>

**58. The NHRC's recommendations to the government are rarely implemented, despite repeated calls from civil society and the NHRC itself.** An August 2014 government report shows that out of a total of 776 recommendations, the Government had fully implemented 249; that 469 were partially implemented; and 58 remained to be implemented.<sup>84</sup> The NHRC itself has not updated its own assessment of implementation since 2011.<sup>85</sup> Most of those recommendations that remain unimplemented are for legal action to be taken against alleged human rights violators associated with the security forces and those affiliated to various political parties.<sup>86</sup> Section 17(10) of the 2012 NHRC Act also grants the AG the discretion to refrain from implementing the NHRC's recommendations to initiate legal action as long as the NHRC is provided with a written explanation as to why. The Supreme Court also declared this section null and void in March 2013.

**Recommendation:** Ensure the NHRC is fully independent and ensure implementation of the NHRC's recommendations.

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<sup>82</sup> Section 28(2).

<sup>83</sup> *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, 31 October 2014, 37, <<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>>.

<sup>84</sup> See Government of Nepal draft report under UPR.

<sup>85</sup> Human Rights eBulletin, *National Human Rights Commission of Nepal*, Volume 6, Issue 11, May 2011, <[http://nhrcnepal.org/nhrc\\_new/doc/newsletter/E-bulletin-Vol6-11.pdf](http://nhrcnepal.org/nhrc_new/doc/newsletter/E-bulletin-Vol6-11.pdf)>.

<sup>86</sup> Interview with then NHRC commissioner Gauri Pradhan, November 2012.