



**ALTERNATIVE REPORT**  
**on**  
**NEPAL**  
**in view of the adoption of the**  
**LIST OF ISSUES PRIOR TO REPORTING**  
**by the**  
**HUMAN RIGHTS COMMITTEE**

**DECEMBER 2020**

**submitted by**  
**Human Rights and Justice Center**  
**TRIAL International**

## I. Introduction

1. The Human Rights Committee (hereinafter, “the Committee”) will adopt its List of issues prior to reporting (hereinafter, “LoiPR”) concerning Nepal on the occasion of its 131<sup>st</sup> session, to be held from 1 to 26 March 2021, in view of the exam of the State party’s third periodic report, which should have been presented by 28 March 2018.<sup>1</sup>
2. This alternative report is submitted by the Human Rights and Justice Center (hereinafter, “HRJC”) and TRIAL International and aims at providing a review of the main obstacles in the implementation of Nepal’s obligations pursuant to the International Covenant on Civil and Political Rights (hereinafter, “the Covenant”), in particular, with regard to the areas of work and expertise of the two organisations. In this light, the report will focus on a limited number of issues concerning **impunity for gross human rights violations and crimes under international law during the period of conflict (1996-2006) as well as the post-conflict era and the lack of adequate protection for victims and their families, as well as the flawed legislation and policy framework.**
3. The alternative report will thus analyse Nepal’s compliance with its obligations concerning the **prohibition of arbitrary deprivation of life, arbitrary detention and torture**, as well as the **prohibition of rape and other forms of sexual violence and enforced disappearance** and the **obstacles faced by victims and their families in obtaining access to justice, truth and adequate reparation** for the harm suffered. Reference will be made in particular to Nepal’s obligations pursuant to **Arts. 2, 6, 9, 10, 16, 24 and 26 of the Covenant**. For each subject covered **concrete questions for the LoiPR are suggested**. The exclusion of other matters from this report does not imply by any means that the subscribing organisations find that Nepal fully complies with all its obligations under the Covenant or that it has implemented all the recommendations contained in the concluding observations adopted by the Committee in March 2014.

## II. General Information on the Framework in Which the Covenant Should be Implemented and Lack of Constructive Engagement with relevant United Nations Special Procedures

4. Nepal acceded to the Covenant and its First Optional Protocol on 14 May 1991, thus having been a State party for almost 30 years. However, as illustrated in the following

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<sup>1</sup> Human Rights Committee (HRC), *Concluding Observations on Nepal*, UN Doc. CCPR/C/CO/2 of 28 March 2014, para. 22.

paragraphs, Nepal does not count on a solid domestic framework to implement its obligations under the Covenant and it has not shown genuine political will to enforce the Committee's recommendations respectively included in the last concluding observations of March 2014 and in the several Views issued since 2006 on individual communications. This unfortunate situation is worsened by the State party's failure to constructively engage with other international human rights mechanisms – such as certain United Nations Special Procedures, and the persistent failure to become a party to core international treaties and to recognise the competence of other United Nations Treaty Bodies to receive and examine complaints.

## **II. a) The Lack of Cooperation in the Follow-up Procedure on the Previous Committee's Concluding Observations**

5. On 26 March 2014, the Committee adopted its concluding observations on the second periodic report presented by Nepal. The Committee requested the State party to provide, within one year, relevant information on the recommendations contained in paras. 5, 7 and 10 of its concluding observations, concerning respectively impunity for gross violations committed during the conflict, the National Human Rights Commission (hereinafter, "NHRC"), and extrajudicial killings, torture and ill-treatment.
6. Nepal's participation in the ensuing follow-up procedure has been lacklustre at the beginning and subsequently non-existent, to the point that, **on 8 August 2017, the Committee sent a discontinuation letter to the State party**. In fact, in 2015 Nepal submitted an initial follow-up report, but the Committee considered the information contained therein insufficient and the three recommendations contained in its concluding observations not fully implemented. Accordingly, **the Committee requested Nepal to provide additional information, which the State party never submitted**, despite the various reminders sent by the Committee. The State party **even failed to respond to the invitation to a meeting with the Special Rapporteur for Follow-up to Concluding Observations** (sent on 21 February 2017) to discuss the matters concerned.
7. Due to Nepal's failure to submit follow-up information, the Committee eventually assigned a **D grade for non-cooperation** and sent the discontinuation letter mentioned above, requesting the State party to provide in the context of its next periodic report information on the implementation of all its recommendations, including

the additional information on the implementation of recommendations contained in paras. 5, 7 and 10 of the concluding observations of 2014.

8. The organisations presenting this alternative report wish to highlight that, unfortunately, not only **the three recommendations** identified in 2014 for the follow-up procedure **have not been implemented in the last six years** – as the next paragraphs will illustrate – but, in general, **also the other recommendations** issued by the Committee in its concluding observations of March 2014 **remain unimplemented**.
9. The situation described in the previous paragraph is especially troublesome in view of the forthcoming process of review of Nepal's third periodic report, the ensuing constructive dialogue and the corresponding follow-up procedure. The experience with the non-implementation of the recommendations contained in the concluding observations of 2014 and the lack of cooperation from Nepal, followed by the discontinuation of the procedure, somewhat **undermined civil society's trust in the whole process**, because **it would seem that the failure to respond to the Committee and to implement its recommendations does not attract any significant consequence**.
10. The organisations subscribing this report consider it essential to avoid by all means the repetition of a similar situation which would harm the credibility of the system and, eventually, the rule of law. In this view, **Nepal should enter this new periodic review counting on a plan – which may include setting up a mechanism or appointing specific authorities to be in charge of the follow-up procedure** – so that the dialogue with the Committee could truly be constructive and the recommendations issued could be implemented in good faith and in a reasonable timeframe.

#### **Suggested Question**

- ✓ Please clarify whether Nepal is considering designing a plan and creating a national system or appointing specific authorities (and if so, which) to engage in the constructive dialogue with the Committee, including through the follow-up procedure, and to ensure the timely and full implementation of the recommendations contained in the concluding observations.

#### **II. b) The Lack of Implementation of the Views on Individual Communications rendered by the Committee**

11. Between 2008 and December 2020, the **Committee rendered its Views on 25 individual communications** against Nepal<sup>2</sup> concerning cases of gross human rights violations, including enforced disappearance, extra-judicial killings, torture, sexual violence and forced labour. In all these decisions, the Committee held Nepal internationally responsible for breaching its obligations and indicated **several measures of reparation in favour of the victims**, including searching and establishing the fate and whereabouts of disappeared persons; carrying out effective investigations that allow to identify the perpetrators of the crimes concerned, prosecute and sanction them; provide compensation and the necessary and adequate psychological rehabilitation and medical treatment for the victims; and adopting measures of satisfaction and guarantees of non-repetition. **None of the 25 Views has been fully implemented** and the authors of the communications concerned are **deeply frustrated** by the **failure of the State to reach out to them and initiate a dialogue to facilitate the implementation of the Committee's Views or to answer to their requests**, which ultimately is a token of the official indifference of the authorities in the face of their sufferings.
12. Non-implementation of international decisions on gross human rights violations not only perpetuates injustice and re-victimises people, but also undermines the international legal order and the rule of law, conveying the dangerous message that a State can breach its international undertakings without consequences. The organisations submitting this report highlight the necessity to **urgently adopt domestic measures to ensure a comprehensive strategy of implementation and to identify the domestic authorities responsible for such purposes and the steps to be undertaken with the aim to ensure a timely enforcement of the Committee's Views.**

### Suggested Questions

- ✓ Please indicate what procedures are in place to guarantee the implementation of the Committee's Views on individual communications under the Optional Protocol, and provide information on measures taken to ensure full compliance with such Views.
- ✓ Please clarify whether Nepal has programmes to initiate a dialogue on the subject of implementation with victims and their representatives and has established a

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<sup>2</sup> The organisations submitting this alternative report are aware that the HRC might have adopted other Views on individual communications concerning Nepal during its 130<sup>th</sup> session (October-November 2020). However, at the time of writing, no such decision has been made public and is therefore not accounted for in this report.

tentative timeline to ensure that all the measures indicated by the Committee are eventually implemented.

- ✓ Please clarify whether Nepal is considering creating a national system or the appointment of specific authorities (and if so, which) to ensure the implementation of the Committee's Views on individual communications.

## II. c) Nepal's Failure to Engage with United Nations Special Procedures, to Become a Party to Key International Treaties and to Recognise the Competence of other United Nations Treaty Bodies to Receive and Examine Individual Communications

13. In the past years, Nepal has received multiple requests from United Nations Special Procedures to conduct country visits to assess the prevalent human rights situation. Among others, the **Working Group on Enforced or Involuntary Disappearances issued a request to visit Nepal on 12 May 2006** and, since, it has sent several reminders. However, **the government has not responded to any of these requests**, showing a worrying ongoing lack of cooperation. Similarly, **since 2012, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence** has been requesting the government of Nepal for a country visit, but, despite multiple reminders, he has **not received a reply**. This blatant failure to cooperate is all the more troublesome, bearing in mind the loopholes and the impasse of the transitional justice process in the country.<sup>3</sup>
14. Moreover, international human rights mechanisms have repeatedly **recommended Nepal to become a State party to core international treaties**, including the **International Convention on the Protection of All Persons from Enforced Disappearance**, the **Rome Statute of the International Criminal Court** and the **Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity**. At the time of writing, **Nepal has not even initiated the domestic procedure to become a party to such international treaties**.
15. Similarly, Nepal has **not recognised the competence of various United Nations Treaty Bodies, including the Committee against Torture and the Committee on Enforced Disappearances, to receive and examine individual communications**, thus unduly hindering access to justice for victims of gross human rights violations.

### Suggested Questions

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<sup>3</sup> See, *infra*, paras. 16-24.

- ✓ Please clarify whether Nepal is willing to accept to the requests to carry out a country visit submitted by the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence respectively in 2006 and 2012 and provide a tentative timeline for such purposes.
- ✓ Please clarify whether Nepal is considering becoming a party to the International Convention on the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court and the Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity and, if so, what are the concrete steps envisaged and the tentative timeline.
- ✓ Please inform whether Nepal is considering recognising the competence of all the United Nations Treaty Bodies, and in particular the Committee against Torture and the Committee on Enforced Disappearances, to receive and examine individual communications.

### III. The Flawed Transitional Justice Process (Arts. 2, 6, 7, 9 and 16)

16. When the Committee issued its concluding observations on Nepal in 2014, the establishment of transitional justice mechanisms was in progress and the Committee recommended the State party to create, as a matter of priority and without further delay, a transitional justice mechanism and ensure its effective and independent functioning in accordance with international law and standards, including by prohibiting amnesties for gross human rights violations and serious violations of international humanitarian law.<sup>4</sup>
17. Pursuant to the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014 (hereinafter, “the TRC Act”), in February 2015, two transitional justice bodies were eventually established, namely the Truth and Reconciliation Commission (hereinafter, “TRC”) and the Commission on Investigation of Enforced Disappearance of Persons (hereinafter, “CIEDP”). Each commission was entrusted with a two-year mandate, which has subsequently been extended multiple times.
18. In **February 2015, the Supreme Court issued a decision whereby it declared several provisions of the TRC Act unconstitutional and at odds with Nepal’s international obligations.** The Supreme Court directed the government to amend and make them consistent with its international undertakings. In subsequent rulings, the Supreme Court reaffirmed the existence of serious loopholes in the legislative

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<sup>4</sup> HRC, *Concluding Observations on Nepal*, *supra* note 1, para. 5(c).

framework on transitional justice. Among others, **the provisions that would allow amnesties for persons responsible for crimes under international law and gross human rights violations were the source of special concern, together with the lack of adequate guarantees of independence and impartiality of the two commissions.**

19. Notwithstanding the Supreme Court's clear orders, **the legislative framework regulating the functioning of the two commissions has not been amended and they collected complaints based on such flawed mandate.**<sup>5</sup>
20. The TRC registered more than 60,000 complaints of gross human rights violations and the CIEDP received more than 3,000 complaints of enforced disappearances. **The registration of complaints was conducted in the absence of an adequate witness protection programme and lacking technical knowledge and expertise.** The commissions only launched some preliminary investigations, but the lack of competence and political will made it impossible to obtain any meaningful result. Their mandate expired before they could come up with findings in any single case, publish a final report on the outcome of their work, or grant redress to victims.
21. In February 2019, the mandate of the two commissions was extended a third time (i.e. until February 2020). However, throughout the entire year 2019, Nepal failed to amend the underlying legislative framework and to appoint new commissioners, *de facto* paralysing the transitional justice process.
22. After a whole year of inactivity, in the proximity of a further expiry of the mandate, in January 2020, the government announced its intention to appoint new commissioners at the end of a **rushed, secretive and politically driven process, thus causing outrage among victims' groups**, who consider the provincial consultations convened for such purpose on 13 January 2020 and lasted only 3 hours a mockery in the face of their suffering and the appointments clearly politicised, so that their trust vis-à-vis the entire process has been undermined.<sup>6</sup> In fact, albeit the government has expressed its

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<sup>5</sup> See, among others, [http://advocacyforum.org/press-statement/2017/02/EnglishVersion-VictimsandHRpositionPaper\\_Feb2\\_20171.pdf](http://advocacyforum.org/press-statement/2017/02/EnglishVersion-VictimsandHRpositionPaper_Feb2_20171.pdf).

<sup>6</sup> See, among others, <http://advocacyforum.org/downloads/pdf/publications/tj/briefing-paper-on-tj-consultation-february-2020.pdf>.



commitment to amend the TRC Act and bring it in accordance with international law,<sup>7</sup> after more than five years of empty promises victims are deeply frustrated.<sup>8</sup>

23. Notwithstanding, on 27 January 2020, the Cabinet of Ministers decided to extend the mandate of the two commissions for one more year (i.e. until February 2021). Although the mandate has formally been renewed, this is **unlikely to produce any meaningful results, until the legislative framework regulating their mandate remains at odds with international law; the process of selection and appointment of the commissioners is not transparent, consultative and impartial; and the commissions are devoid of adequate technical expertise and resources.**<sup>9</sup>
24. On 27 April 2020, the Supreme Court rejected a petition previously lodged by the government of Nepal, seeking the review of the above-mentioned 2015 ruling against amnesties for conflict-era abuses. The rejection of the government's petition is certainly a positive signal from the Nepalese judiciary, but, as already recalled, until the relevant legislation is not amended, the State party will continue breaching its international obligations and victims and their families will not have access to justice and adequate and comprehensive measures of reparation for the harm suffered.

### Suggested Questions

- ✓ Please clarify the plans of the government of Nepal with regard to the implementation of the verdict rendered by the Supreme Court in February 2015 to bring transitional justice legislation in line with international standards, in particular to ensure that those accused of gross human rights violations and serious violations of international humanitarian law do not benefit from any amnesty law or similar measure.
- ✓ Bearing in mind that the mandate of the TRC and the CIEDP will expire in February 2021, please clarify what are the plans with regard to the future of these mechanisms and the work carried out so far. In particular, if a further extension of their mandate is foreseen, please clarify which measures will be undertaken to guarantee that the mandate of the two bodies is brought in line with international standards, and the commissions count on adequate resources and technical expertise and the members are appointed pursuant to a transparent, impartial and participative process.
- ✓ Please clarify whether any comprehensive reparation programme for victims of serious human rights violations committed during the 1996–2006 conflict has been

<sup>7</sup> The Kathmandu Post, *Minister Gyawali yet again says amendment to transitional justice law soon*, Published on 16 December 2020, available at: <https://kathmandupost.com/national/2020/12/16/minister-gyawali-yet-again-says-amendment-to-transitional-justice-law-soon>.

<sup>8</sup> *Ibid.*

<sup>9</sup> See, among others, <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/victims-public-appeal-to-the-government-idd-30-august-2020.pdf>; and <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/joint-press-statement-30-august-idd-2020-english-version.pdf>.

established, and report on the disparities among categories of victims under the Interim Relief Programme.

#### IV. Loopholes in Domestic Legislation on Gross Human Rights Violations (Arts. 2, 3, 6, 7, 9 and 16)

25. Since the adoption of the Committee's concluding observations in 2014, Nepal has implemented some relevant amendments to its legislation, especially through the adoption of the Penal (Code) Act (*Muluki Foujdaari Samhita, 2074 BS* - The National Penal (Code) Act, 2017, entered into force on 17 August 2018); the *Muluki Foujdaari Samhita Ain, 2074 (The National Criminal Procedure Code, 2017)*, which also entered into force on 17 August 2018; and the Crime Victim Protection Act, 2075 (2018), entered into force on 18 September 2018. However, the following paragraphs will illustrate how **the domestic legal framework concerning gross human rights violations remains at odds with international law** on many counts.

##### IV. a) Legislation on Rape and other Forms of Sexual Violence

26. Sect. 219 of the National Penal (Code) Act defines **rape** as "*a man has sexual intercourse with a woman without her consent or with a girl child below the age of eighteen years with her consent*". On 6 December 2020, the government issued an ordinance to amend the applicable legislation on sexual violence (hereinafter, "the ordinance" or "the December 2020 ordinance"). Although during the drafting stage of the ordinance it was proposed to replace 'woman or girls' with 'persons' as the potential victims of the offence, the text of the ordinance eventually adopted did not retain such changes.<sup>10</sup> Thus, the **definition of the offence remains flawed**, because it does not provide for other victims of rape, such as a man, a male child, or a transgender person. It also eliminates the possibility of a woman being the perpetrator of the crime of rape. Furthermore, the provision excludes the insertion of any object or parts of the body other than the penis into the anus as well as other scenarios not encompassed by this limited definition.

27. The National Penal (Code) Act considers penetration an essential element of the crime of rape and **non-physical forms of sexual violence are regarded as sexual harassment**. Under Sect. 224(2), which regulates the prohibition of sexual

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<sup>10</sup> The Kathmandu Post, *Ordinance amends law on rape but fails to recognise rape of boy child and sexual minorities*, 11 December 2020, available at: <https://kathmandupost.com/national/2020/12/11/ordinance-amends-law-on-rape-but-fails-to-recognise-rape-of-boy-child-and-sexual-minorities>.

harassment, the National Penal (Code) Act defines the latter in the following terms: *“if the person holds or touches or attempts to touch any sensitive organ of, or opens or attempts to open undergarments of, or obstructs or hinders in any way the wearing or removing of undergarments of, or takes to any lonely place in an unusual manner, or gets his or her sexual organ to be touched or held by, or uses vulgar or similar other words, spoken or written or by gesture or by way of electronic medium, or shows any pornography to, or teases or annoys with sexual motive, or behaves in an unusual, undesirable or indecent manner with, a person who is not his wife or her husband, without her or his consent, with the motive of having sexual intercourse with her or him”*. However, the Supreme Court has repeatedly held that penetration cannot be the precondition of rape.<sup>11</sup>

28. For the purposes of Sect. 224 (2) of the National Penal (Code) Act, if someone attempts to touch any sensitive organ or attempts to open the undergarments of a person who is their wife or husband without their consent, with the motive to have sexual intercourse, they will be considered to have committed sexual harassment and not rape.
29. In general, the National Penal (Code) Act **does not recognise sexual violence** committed by State agents, or with their tolerance, acquiescence or support, **as a form of torture**. Moreover, pursuant to international criminal law, under certain circumstances, **rape and other forms of sexual violence may amount to genocide or crimes against humanity or war crimes**. However, **Nepal does not codify** these crimes under its domestic legislation, thus leaving a significant loophole.
30. The December 2020 ordinance increased the fines to be imposed on the offenders, which would be paid to the victims as ‘compensation’.<sup>12</sup> However, there is no increment in the term of imprisonment foreseen. The ordinance also amended Sect. 228 of the National Penal (Code) Act, under which victims of rape or other forms of sexual

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<sup>11</sup> Supreme Court of Nepal, *Government of Nepal v. Tasi B.K. et.al*, Nepal Kanoon Patrika 2073 (BS), Issue 1, decision No. 9159, Decision date 10 January 2014. Similarly, in the case *Government of Nepal v. Mubarak Mir Musalman* (Nepal Kanoon Patrika 2067 (BS), Issue 9, decision No. 8466), the Supreme Court affirmed that, although there was no penetration, the physical, mental, and psychological along with social consequences, were sufficient to demonstrate the occurrence of rape.

<sup>12</sup> An Ordinance to Amend Some Provisions on Sexual Violence, 2077 (2020), authenticated on 6 December 2020 (hereinafter, “December 2020 Ordinance”), Sect. 3 (1) that stipulates fines up to Nepalese Rupees. 6,000,000 (71,000 US \$ approximately) for crimes committed against victims aged between 10 to 14 or less years old; Nepalese Rupees 4,000,000 (47,000 US \$ approximately) for crimes committed against victims aged between 14 to 18 or less years old and Nepalese Rupees 2,000,000 (23,000 US \$ approximately) for crimes committed against victims aged above 18 years old.

violence are entitled to “reasonable compensation”. The ordinance amended the provision, replacing “reasonable compensation” with “reasonable compensation to be determined by assessing the fine paid by the offender”. The wording remains vague, because there is no reference to a calculation method or specific criteria, relying solely on the fines paid by the offender (thus disregarding that the latter may not pay the fine for a number of reasons and this should not create prejudice to the victims’ right to compensation). Sect. 31 of the 2018 Crime Victim Protection Act sets out the grounds to be considered when determining the amount of compensation. Nevertheless, the relevant provisions **leave it to the discretion of the court rather than making it compulsory** to take into due consideration certain elements when calculating the compensation to be provided to the victim.

31. Furthermore, the 2018 Crime Victim Protection Act establishes that victims may have access to **interim relief and the amount concerned should be provided through the Victims’ Trust Fund**.<sup>13</sup> In case the accused is convicted of the offence upon judgment by a court, the latter shall order him or her to pay the amount of compensation or relief that had been provided from the Fund within 35 days from the date on which the judgment was adopted.<sup>14</sup> If such amount cannot be paid by the offender, it will be recovered from any assets belonging to the offender, within 60 days from the date on which the judgment was issued.<sup>15</sup> The provision **does not adequately reflect the difference between interim relief (meant to provide support vis-à-vis the victim’s immediate needs) and compensation (meant to redress the harm suffered by the victim)**.<sup>16</sup>
32. Another general problem contributing to impunity besides the flawed criminal legislation, is that of the ongoing **practice of the Police to deny the registration of a formal complaint (after rejecting the registration of a First Information Report)**, that is the only way to trigger an investigation pursuant to Nepalese criminal legislation.<sup>17</sup> In cases involving rape and other forms of sexual violence, after having

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<sup>13</sup> The Crime Victim Protection Act, 2075 (2018), Section 29 (2). The Victims’ Trust Fund has been established under the competence of the Supreme Court of Nepal and the government of Nepal has allocated budget to ensure its functioning. However, in practice, although the application of the relevant provisions has already been invoked in court, this is very recent and the pertinent decisions rendered by District Courts are yet to reach the implementation phase.

<sup>14</sup> The Crime Victim Protection Act, 2075 (2018), Section 29 (3).

<sup>15</sup> *Ibid.*, Sect. 29 (4).

<sup>16</sup> Problems concerning access to reparation for victims of conflict-related sexual violence were highlighted by the Committee already in 2014. HRC, *Concluding Observations on Nepal*, *supra* note 1, para. 5(d).

<sup>17</sup> The Committee detected the systemic failure to register FIRs as a problem already in 2014. See HRC, *Concluding Observations on Nepal*, *supra* note 1, paras. 5(a) and 13.

rejected the registration of the First Information Report (hereinafter, “FIR”), the **Police arranges a forced reconciliation between victims of sexual violence and alleged perpetrators**,<sup>18</sup> often with the mediation and under the supervision of the so-called Panchayats (i.e. local leaders) and political leaders, including the elected government representatives. After the outbreak of COVID-19, there has been a surge in these instances.<sup>19</sup> The December 2020 ordinance incorporated provisions to punish the mediator.<sup>20</sup> The person committing such acts would be liable for the punishment up to three years of imprisonment and a fine up to 30,000 Nepalese rupees (approximately 3500 US \$) for the mediator.<sup>21</sup> Similarly, if a government official acts as a mediator, he/she would be liable to additional six months of imprisonment.<sup>22</sup> Although the criminalisation of the practice of forced mediation is a positive step, it remains to be seen whether it will be duly implemented.

33. Sect. 229 (2) of the National Penal (Code) Act provides that no complaint shall lie after the expiry of **one year** from the date of commission of any of the offences under Sect. 219 (prohibition of committing rape), 221 (prohibition of sexual intercourse with a detainee), 222 (prohibition of sexual intercourse with person in one's own protection or security), 223 (prohibition of sexual intercourse with person in office or receiving professional service), 224 (prohibition of sexual harassment), 225 (prohibition of child sexual abuse) and sub-section (3) of Sect. 226 (prohibition of unnatural sexual intercourse against a child).
34. Sect. 229 (2) of the National Penal (Code) Act states that **where the offence is committed against a person held in detention, taken into control, kidnapped or taken hostage, no complaint shall lie after the expiry of three months from the date of release from such detention, control, kidnapping or hostage-taking**. This means that the limitation period does not begin from the date of commission of the offence or date of knowledge of commission, but rather the date of release. This is a relevant advancement as the victim who is taken into control, kidnapped or taken

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<sup>18</sup> The Committee expressed concern at the practice of settlement through informal justice mechanisms in cases of rape already in 2014. See HRC, *Concluding Observations on Nepal*, *supra* note 1, para. 13.

<sup>19</sup> See, among others, <http://inseconline.org/en/news/victim-accuses-police-of-not-registering-complaint-against-rape-case/>; and <https://myrepublica.nagariknetwork.com/news/rape-victim-in-saptari-commits-suicide-after-villagers-stop-her-from-filing-a-case-with-police/>.

<sup>20</sup> December 2020 ordinance, Sect. 3(2)(1) establishes that no person should create a situation of fear, threaten or coerce the victim or the victim's family; with or without any transaction, not to complain or not to lodge an FIR or not be present in court with regard to the crimes of rape. No person should mediate or pressurize or influence to mediate between the perpetrator and the victim or the victim's family in cases of rape.

<sup>21</sup> *Ibid.*, Sect. 3 (2) (2).

<sup>22</sup> *Ibid.*, Sect. 3 (2) (3).

hostage would in most cases be prevented from filing a complaint. However, a three-month limitation period is a short time from the date of release of the victim and should be revised according to international law standards.

35. The increase of the statute of limitation period to one year for someone to register a complaint on rape or other forms of sexual violence is certainly noteworthy, but it is still insufficient as most rape victims suffer fear, trauma, stigma, and encounter other obstacles, which prevent them from coming forward within a short period of time.
36. In this sense, several international human rights mechanisms, including the Committee, already pointed out that the **one-year statutory limitation for rape or other forms of sexual violence is not in line with international law** and recommended a further amendment of the applicable legislation.<sup>23</sup> At the time of writing, these recommendations remain unimplemented.
37. It is noteworthy that the **situation of women victims of rape or other forms of sexual violence during the internal armed conflict is especially critical**, provided that the National Penal (Code) Act does not apply retroactively and therefore their complaints are considered **time-barred**. This makes access to justice impossible for thousands of women who were subjected to rape or other forms of sexual violence during the conflict, while **perpetrators enjoy impunity**.<sup>24</sup>

#### Suggested Questions

- ✓ Please clarify whether Nepal has undertaken any measure to amend the definitions of rape and other forms of sexual violence and bring them fully in line with international standards.
- ✓ Please provide information on what does Nepal envisage to do to ensure the right to reparation of victims of rape or other forms of sexual violence, including victims of conflict-related crimes, and to adequately distinguish the notions of interim relief and compensation.
- ✓ Please provide information on the measures taken to guarantee that the widespread practice of the Police of refusing the registration of FIRs is overcome.
- ✓ Please provide information on the measures envisaged to ensure that the practice of subjecting victims of rape or other acts of sexual violence to forced reconciliation with perpetrators is effectively eradicated.

<sup>23</sup> Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, *Report on Country Visit to Nepal*, UN Doc. A/HRC/41/42/Add.2 of 19 June 2019, para. 59; Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *Concluding Observations on Nepal*, UN Doc. CEDAW/C/NPL/CO/6 of 16 March 2018, paras. 22-23; and HRC, Case *Fulmati Nyaya v. Nepal*, Views of 18 March 2019, para. 7.9.

<sup>24</sup> *Infra*, paras. 63-67.

✓ Please elaborate on the measures taken to repeal the 1-year statutory limitation for filing a criminal complaint (FIR) of rape or other forms of sexual violence.

#### IV. b) Legislation on Torture

38. Sect. 167 of the National Penal (Code) Act enshrines the prohibition of torture. This is a progress compared to the legal framework existing when the Committee examined Nepal in 2014, which lacked any autonomous criminalisation of torture.<sup>25</sup> However, **the definition of torture adopted is not in line with international standards**. First, the notion of “victim” is unduly restricted to persons held in detention or otherwise in custody. Second, while pursuant to international law, torture can be perpetrated by State agents or persons or groups of persons acting with the tolerance, acquiescence or support of the State, Sect. 167(1) of the National Penal (Code) Act solely refers to agents who are “competent to investigate or implement the law, take anyone in control or hold anyone in custody or detention”.
39. Furthermore, Sect. 167(2) prescribes a **sentence of up to 5 years in jail** or a fine of 50,000 Nepalese Rupees (approximately 500 US\$) which is so **evidently disproportionate with the gravity of the crime** that sounds as a mockery in the face of the acute suffering of the victims.
40. Sect. 170 of the National Penal (Code) Act sets forth the **applicable statute of limitations** for criminal proceedings concerning torture and is **at odds with international law by referring to “6 months** from the date of the commission of the offence or from the date of release of the concerned person from arrest, control, custody, detention, imprisonment”. The envisaged statute of limitations is not proportionate to the gravity of the crime and does not take into account the peculiarities of the offence and the exceptional challenges faced by victims, as well as the fact that **the investigation for this crime shall be launched ex officio and not made conditional upon the submission of a complaint**.
41. Sect. 169 **unduly restricts the notion of reparation for victims of torture to compensation paid by the perpetrator, disregarding all other measures of reparation** (including rehabilitation, satisfaction and guarantee of non-recurrence) required under international law. Furthermore, the formula used in the provision is

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<sup>25</sup> HRC, *Concluding Observations on Nepal*, *supra* note 1, para. 5(a).

overly vague by referring to “reasonable compensation”, without determining what this actually means or setting criteria to calculate the amount to be awarded to the victim.

42. Finally, under international law, **torture may amount to genocide, a crime against humanity or a war crime, but Nepal fails to codify these conducts**, thus leaving a significant loophole, which eventually favours impunity.

#### Suggested Questions

- ✓ Please report on measures taken to bring the definition of torture and the sanctions envisaged fully in accordance with international standards.
- ✓ Please elaborate on the measures taken to respond to torture and to repeal the 6-month statutory limitation for filing a criminal complaint (FIR) of torture and a civil claim for compensation.
- ✓ Please clarify whether pursuant to Nepalese legislation, authorities are bound to open investigations on torture *ex officio*, even in the absence of a formal complaint.
- ✓ Please report on measures envisaged to amend the existing legislation on measures of reparation for victims of torture to ensure that they are entitled to adequate redress, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

#### IV. c) Legislation on Enforced Disappearance

43. Since when the Committee examined Nepal in 2014, enforced disappearance has eventually been codified as a separate crime pursuant to Chapter 16 of the National Penal (Code) Act. However, the rules contained therein **are not fully consistent with international standards** and the **new provisions** will not be applied retrospectively and therefore **will not encompass the enforced disappearances committed during the conflict**. This interpretation **disregards the continuing nature of the offence of enforced disappearance** and is at odds with Nepal’s international obligations and the existing domestic and international jurisprudence.
44. Sect. 206 of the National Penal (Code) Act contains a **definition of enforced disappearance that does not reflect international law**. In particular, the expression used in Nepali (i.e. *bepatta*) generally refers to persons reported “missing” and not necessarily subjected to “enforced disappearance”, hence somewhat diluting the criminal scope of the provision. Second, while pursuant to international law the crime of enforced disappearance has three constitutive elements and one inherent consequence, the definition used in the National Penal (Code) Act departs from this scheme.



45. Pursuant to international law, the first constitutive element of an enforced disappearance is the deprivation of liberty of the victim against his or her will, in any form it takes place (e.g. abduction, arrest, kidnapping). An enforced disappearance is perpetrated by State agents or persons or groups of persons acting with the tolerance, acquiescence or support of the State. The initial deprivation of liberty of the victim is followed by the refusal to acknowledge that such deprivation of liberty took place or the concealment of the fate and whereabouts of the disappeared person. These three constitutive elements are cumulative. As a consequence, the victim is placed outside the protection of the law.
46. Sect. 206(2)(a) of the National Penal (Code) Act unduly restricts the potential perpetrators to “persons of security personnel having authority by law to make arrest, investigation or enforcement of law”, thus leaving out several State agents that may formally have different attributions, as well as persons or groups of persons acting with the tolerance, support or acquiescence of State agents. This flaw is not addressed by Sect. 206(2)(b) either, which contemplates the possibility for “any person, organisation or group, whether organised or not” to perpetrate an enforced disappearance. This wording departs from international law and uses an extremely vague formula that dilutes the State’s responsibility.
47. Moreover, the constitutive element of denial that the deprivation of liberty took place or concealment of the fate and whereabouts of the disappeared is ambiguously phrased as being alternative instead of cumulative (“*or* a refusal to let the person deprived of liberty to meet a judicial authority”).
48. Sect. 207(5) of the National Penal (Code) Act regulates **superior command responsibility** in cases of enforced disappearance. However, the provision is **not consistent with international standards**, because it does not encompass the following: (a) instances where a superior “knew, or consciously disregarded” information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit an enforced disappearance (in the Nepalese provision “disregard” is foreseen as cumulative and not alternative); (b) instances where the superior exercised effective responsibility for and control over, activities which were concerned with an enforced disappearance; and (c) instances where “a superior failed to take all necessary and reasonable measures within his or

her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution”.

49. The sanction envisaged for enforced disappearance pursuant to Sect. 206(7) is deprivation of liberty for a maximum of 15 years and a fine up to 500,000 Nepalese Rupees (approximately 4500 US\$). If the victim of the enforced disappearance is a child or a woman, the sentence could be increased to 17 years in jail. Besides failing to clearly establish a minimum sentence for perpetrators, **these penalties are hardly proportionate to the gravity of the crime** and do not meet international standards on the matter.
50. Sect. 208 of the National Penal (Code) Act **unduly restricts the notion of reparation for victims of enforced disappearance**, by providing that the disappeared person is entitled **solely to pecuniary compensation from the perpetrator**, and **only if he or she surfaces alive. “Heirs” of the disappeared are entitled to pecuniary compensation if the disappeared person “is already dead”**. This requirement implies that the fate and whereabouts of the disappeared are actually known, whilst enforced disappearance is characterised precisely by the lack of such knowledge. This provision departs from international law also because it disregards the fact that, pursuant to international law and jurisprudence, **“victims of enforced disappearance” are not only the disappeared persons but also any other individual who suffers direct harm as a consequence of the disappearance.**<sup>26</sup> The failure to recognise relatives of the disappeared person as victims in their own right, may lead to their arbitrary exclusion from programmes of reparation or psycho-social support.
51. Furthermore, Sect. 208 of the National Penal (Code) Act **does not clarify which criteria would be applied to calculate the compensation to be awarded**, being the expression “reasonable compensation” extremely vague and indeterminate. This is problematic as it undermines legal certainty. Moreover, Nepal has a history of awarding very low amounts as compensation to victims of gross human rights violations that are not commensurate with the gravity of the crimes at stake.

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<sup>26</sup> For the purposes of the present report, pursuant to international jurisprudence and law, “victim” means the disappeared person, as well as any individual who has suffered harm as the direct result of an enforced disappearance. See, among others, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 24, para. 1.

52. Moreover, **reparation for gross human rights violations cannot be limited to pecuniary compensation** (even less if made conditional upon the fact that the perpetrator is identified, sentenced, and able to pay such compensation), but must encompass restitution, rehabilitation, satisfaction and guarantees of non-repetition. For the reasons pointed out above, access to reparation cannot be made conditional upon the fact that the victim is actually dead.
53. Even more troubling is Sect. 210 of the National Penal (Code) Act, concerning the **statute of limitations** for criminal proceedings on enforced disappearance, which establishes that “**no complaint shall be entertained after the expiry of 6 months from the date of having knowledge of commission of the offence** or from the date of the disappeared person getting or being made public”. This provision is at odds with international law and conducive to impunity. The crime of enforced disappearance is of a continuous nature and it shall not be subjected to any statute of limitations. Pursuant to international law, if a statute of limitations is to be applied, it shall nevertheless be of long duration and proportionate to the extreme seriousness of the offence and commence from the moment when the offence ceases. Hence, the 6 months provided for by Sect. 210 of the National Penal (Code) Act are not enough and they should not be counted from the moment when the commission of the offence is known, but only after the fate and whereabouts of the disappeared persons are established with certainty. Finally, it must be recalled that the **investigation for this crime shall be launched ex officio and not made conditional upon the submission of a complaint.**
54. Pursuant to international law, enforced disappearances committed in the context of a widespread or systematic attack against any civilian population, with the knowledge of such attack, constitute crimes against humanity and shall attract the consequences provided for under applicable international law. The National Penal (Code) Act **fails to codify enforced disappearance as a crime against humanity**, thus leaving a considerable loophole and favouring impunity.
55. An additional obstacle that relatives of disappeared persons during the conflict – and in particular women<sup>27</sup> – have to face relates to the **use of declaration of death in**

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<sup>27</sup> International Committee of the Red Cross (ICRC), *Families of missing persons in Nepal: A study of their needs*, April 2009, p. 2. “90% of the disappeared are males...”.

**cases of enforced disappearance**,<sup>28</sup> which exposes them to a number of legal and social consequences that only add to the severe anguish suffered as a result of the impossibility to learn the truth on the fate and whereabouts of their loved ones. As the majority of victims of enforced disappearance in Nepal are men, their female relatives – and more specifically their wives – are usually those who suffer the most from such consequences.

56. Officially determining the status of their loved ones is a step that most relatives must undertake in order to resolve a wide range of administrative issues arising from the enforced disappearance. Those may include regulating the status of marriage for the remaining spouse; implementing rights to inheritance; and dealing with management of property.
57. In the absence of a legal framework providing for situations of absence due to enforced disappearance, the sole provisions available are to be found in laws regulating the presumption and the recording of death, in particular, the Evidence Act of 2031 (1974) and the Birth, Death and Other Personal Event Registration Act of 2033 (1976). Pursuant these pieces of legislation, after 12 years during which a person has been not been heard of, the burden of proving that the person is alive shifts to whoever claims so.<sup>29</sup> In practice, Section 32 of the Evidence Act has been interpreted as establishing the presumption of death after 12 years of absence.
58. Relatives are however unable to prove whether those who have been disappeared are alive and are calling on authorities precisely to establish this: unveiling the truth on the circumstances of the enforced disappearance and the fate of their loved ones, whether dead or alive.<sup>30</sup>
59. **“Absence due to enforced disappearance” is not included among the personal events that can be object of an official registration by relatives** under the Birth, Death and Other Personal Event Registration Act. As a consequence, **families of the disappeared have no choice but to request the provision of a death certificate**

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<sup>28</sup> TRIAL International and the HRJC, submitted a report entitled *The Use of Declaration of Death in Cases of Enforced Disappearance: Regulating the Status of Disappeared Persons in Nepal*, to the CIEDP in March 2018. They never received any formal answer to their submission.

<sup>29</sup> Section 32 of the Evidence Act, 2031 (1974), on the ‘Burden of proving that a person is alive’ after he or she goes missing, states that: “Provided that, when the question is whether a person is alive or dead, it is proved that such person has not been heard of for a period of twelve years by those who would naturally have heard of him/her if he/she had been alive, the burden of proving that he/she is alive is shifted to the person who claims it”.

<sup>30</sup> The concealment of the fate and whereabouts of the disappeared is indeed one of the constitutive elements of this crime. See International Convention for the Protection of All Persons from Enforced Disappearance, Art. 2.

**upon the delivery of false information to the registrar concerning the supposed death of the disappeared.**

60. The right to inheritance and the management of property are two of the numerous issues that push families to request a death certificate of their disappeared relatives. However, many families have expressed the desire to be granted certificates of absence due to enforced disappearance, instead of certificates of death, which would ensure the official recognition of the enforced disappearance of a relative, and would clarify the relationship between the disappeared individual and the certificate holder.<sup>31</sup>
61. In particular, in the absence of such document, many wives of forcibly disappeared men have faced problems in establishing the relationship with their husband. As the conflict allowed for a context in which marriages with members of the Maoists would occur without the knowledge of the spouses' relatives, the wives of those who were disappeared encountered economic hardship and social exclusion after the peace accord.<sup>32</sup> Faced with the impossibility to ascertain their relationship with the disappeared and register the marriage, many women have been denied access to the social benefits they should have been entitled to, in particular within the framework of the Interim Relief Programme.

#### **Suggested Questions**

- ✓ Please report on measures taken to bring the definition of enforced disappearance and the sanctions envisaged, including with regard to superior command responsibility, fully in accordance with international standards.
- ✓ Please report on measures envisaged to amend the existing legislation on measures of reparation for victims of enforced disappearance to ensure that they are entitled to adequate redress, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.
- ✓ Please elaborate on the measures taken to respond to enforced disappearance, recognising its continuous nature, and to repeal the 6-month statutory limitation for filing a criminal complaint.
- ✓ Please clarify whether pursuant to Nepalese legislation, authorities are bound to open investigations on enforced disappearance *ex officio*, even in the absence of a formal complaint.
- ✓ Please report on measures envisaged to introduce in the legal framework the "certificate of absence due to enforced disappearance" to avoid relatives of the

<sup>31</sup> ICRC, *Civil Legal Issues related to the Families of the Missing in Nepal*, July 2015, p. 14.

<sup>32</sup> International Centre for Transitional Justice (ICTJ), *Briefing: Beyond Relief- Addressing the Rights and Needs of Nepal's Wives of the Disappeared*, August 2013, p. 12.

disappeared being forced to declare their loved ones dead in order to regulate social welfare, financial matters, family law and property rights.

#### IV. d) Lack of Criminalisation of Genocide, Crimes against Humanity and War Crimes

62. As pointed out in the previous sections, a significant loophole in the National Penal (Code) Act is that it **does not codify genocide, crimes against humanity and war crimes**, thus facilitating impunity for such crimes perpetrated in the past and failing to effectively prevent their commission in the future.

#### Suggested Question

- ✓ Please elaborate on measures envisaged to ensure that war crimes, crimes against humanity and genocide are criminalised under domestic law and that the criminal justice system has jurisdiction over these crimes.

#### V. Impunity for Gross Human Rights Violations (Arts. 2, 3, 6, 7, 9, 10, 14, 16, 24 and 26)

63. In its concluding observations of March 2014, the Committee expressed its concern “at the **prevailing culture of impunity for gross violations of international human rights law and serious violations of international humanitarian law** committed during the 10-year conflict from 1996 to 2006, including extrajudicial killings, enforced disappearances, torture, sexual violence and arbitrary detention.<sup>33</sup> Moreover, the Committee denounced “[...] **reports of unlawful killings in the Terai region**, deaths in custody, and the official confirmation of the widespread use of torture and ill-treatment in places of police custody. It is deeply concerned at the [...] lack of concrete and comprehensive information on investigations, prosecutions, convictions, sanctions imposed on those responsible, and the **impunity of law enforcement officials involved in such human rights violations**”.<sup>34</sup>
64. Unfortunately, **the situation has not changed since 2014. If anything, it has worsened.** It must be stressed that many of the gross human rights violations and crimes whose perpetrators continue enjoying impunity were committed **against children, women, members of indigenous communities or ethnic minorities, thus highlighting the existence of a deeply rooted culture of discrimination** and raising

<sup>33</sup> HRC, *Concluding Observations on Nepal*, *supra* note 1, para. 5 (a), emphasis added.

<sup>34</sup> *Ibid.*, para. 10, emphasis added.

issues also with regard to Nepal's respect of its obligations pursuant to Arts. 3, 24 and 26 of the Covenant.

65. With regard to conflict-related crimes, **less than a handful of cases of enforced disappearance, extra-judicial killings, sexual violence and torture have been successfully prosecuted through the criminal justice system.**
66. In October 2020, the NHRC published a report whereby the level of implementation of its recommendations over the past 20 years is assessed (49,12% of the recommendations remains unimplemented and 37,24% have been implemented only partially).<sup>35</sup> The report contains a list with the **names of 268 individuals implicated in the commission of gross human rights violations** during the conflict. All of these individuals are **enjoying impunity** and it is unclear if and how Nepalese authorities are planning to eventually take action in this regard through the adequate channels and not by merely referring the issue to the flawed transitional justice process.<sup>36</sup> It is essential that the NHRC's recommendations are implemented without any further delay.
67. Impunity for conflict-related crimes and gross human rights violations is favoured by the obstacles already identified by the Committee back in 2014, including the **failure to register FIRs** by the Police; the generalised application of **statutes of limitations**; the **referral of cases to transitional justice mechanisms** that, in turn, are flawed and not meant to prosecute perpetrators; the extensive practice of **political withdrawal of charges** of gross human rights violations; and the **lack of a vetting system** to exclude persons accused of serious human rights violations from holding public office and the practice of **promoting them instead**. None of these problems has been addressed by the government of Nepal since 2014 and the Committee's recommendations in this regard remain unimplemented.
68. Moreover, over the past years, several **extra-judicial killings attributed to law enforcement personnel, especially in the region of the Terai, and in particular in the context of manifestations and protests**, were recorded. However, the corresponding **allegations were neither registered by the Police nor thoroughly**

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<sup>35</sup> National Human Rights Commission, *20 years of the Commission- Recommendations of the Commission and their implementation status*, October 2020 available at [https://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Inner\\_20\\_Years\\_Book\\_2077\\_Final\\_CT](https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Inner_20_Years_Book_2077_Final_CT) (Nepali version).

<sup>36</sup> *Supra*, paras. 16-24.

**investigated, and those responsible have not been prosecuted and sanctioned,** thus nourishing the climate of impunity.

69. In 2020 alone, at **least five people have been extra-judicially killed by Nepalese security forces, mostly the Police.**<sup>37</sup> While most of the extra-judicial killings in 2019 targeted people allegedly involved in criminal groups and labelled by the government as ‘encounter killings’, in 2020 many arrestees died while in custody of the Nepal Police,<sup>38</sup> and the latter referred to these cases as ‘suicides’. The killing of Mr. Bijaya Mahara, a young Dalit, is illustrative of the cases that occurred in 2020. Mr. Mahara, suspected of murder, was arrested on 16 August 2020 by 10 Nepal Police officers. On 26 August 2020, his family was informed about his death in custody. In a videotape recorded before dying, Mr. Mahara stated that he had been tortured by the Police while in custody.<sup>39</sup> Despite the video evidence and the *post mortem* report, the Police rejected several attempts to register an FIR and conduct a thorough investigation into the events. On 9 September 2020, the case was eventually registered through the Public Prosecutor’s Office. However, the family of Mr. Mahara has not received any information about the progress (or lack thereof) of the investigation. To their knowledge, the only action taken by the authorities is the suspension of three Police officers for six months and the transfer of the Deputy Superintendent of Police and the Superintendent of Police.
70. Among various other cases, one can recall also those of Mr. Kedar Sahani, Mr. Dipendra Chaudhary and Mr. Kumar Poudel, extra-judicially killed respectively on 14 and 23 January 2019 and 20 June 2019 in the region of the Terai. The victims were charged with committing criminal acts or allegedly associated with criminal groups and the Police claimed that they opened fire first and were shot dead in retaliation.
71. With regard to the extra-judicial killing of Mr. Kumar Poudel, on 24 June 2019, the Minister of Home Affairs provided this account of the events also to the state of affairs and good governance committee within the Nepalese parliament. However, upon carrying out an investigation, the NHRC rejected this version and it found that Mr. Poudel was killed after being taken in custody. The NHRC also found that the Police

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<sup>37</sup> See Terai Human Rights Defenders Alliance (THRDA), *A memorandum seeking investigation into incidents of custodial deaths*, 2020, available at: <https://www.thrda.org/wp-content/uploads/2020/09/Memorandum-submitted-to-Justice-Committee-of-Parliament-on-Custodial-Deaths.pdf>.

<sup>38</sup> See Human Rights Watch (HRW) and Advocacy Forum (AF), *No Law, No Justice, No State for Victims: The Culture of Impunity in Post Conflict Nepal*, 2020, available at [https://www.hrw.org/sites/default/files/media\\_2020/11/nepal1120\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/media_2020/11/nepal1120_web_1.pdf), pp. 54-94.

<sup>39</sup> See THRDA, *A memorandum seeking investigation into incidents of custodial deaths*, *supra* note 37.



committed mistakes while collecting information from the crime scene and examining the corpse. On 21 October 2019, the **NHRC recommended the government to suspend the three officials involved in the incident and to conduct a fresh, thorough, independent and impartial investigation.** At the time of writing, the **full report of the NHRC's investigation has not been made public and its recommendations have not been implemented, while the three officials concerned are actively serving in the Nepal Police.** The Home Ministry had initially even asked the NHRC to reconsider its recommendation and change it.<sup>40</sup> Finally, on 4 February 2020, the Ministry of Home Affairs prompted the Nepal Police to take action on the case and two days later, Mr. Poudel's mother lodged a new FIR against 10 alleged perpetrators before the District Police Office, Sarlahi. Currently, the FIR on the case of Mr. Kumar Poudel has been registered. However, in the absence of any effective investigation, in December 2020, the family of Mr. Kumar Poudel lodged a writ of mandamus before the Supreme Court seeking the order of the Court for the effective investigation and commence proceedings on the case. The case is currently pending before the Supreme Court.

72. Nepalese security forces have also used lethal weapons to **open fire on peaceful protestors, mostly belonging to the Madhesi people, which has been historically discriminated.**<sup>41</sup> Mr. Saroj Narayan Singh and Mr. Suraj Kumar Pandey were arbitrarily killed in two different incidents in 2019 when the Police opened fire on protestors in the districts of Sarlahi and Kapilvastu. In both cases, the **Police have not registered an FIR and rather tried to settle through extra-judicial agreements signed with the protestors and the families of the victims.** These agreements do not guarantee the carrying out of an effective investigation or the prosecution of those responsible.
73. The **government of Nepal also has failed to publish the report of the Commission formed under the chairmanship of former Supreme Court Justice Girish Chandra**

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<sup>40</sup> HRW and AF, *No Law, No Justice, No State for Victims: The Culture of Impunity in Post Conflict Nepal*, *supra* note 38, p. 8.

<sup>41</sup> The term '*Madhes*' is a synonym of 'Terai' indicating the Southern plains of the country. However, the word '*Madhes*' has come into social lexicon in around 2007. The word '*Madhesi*' refer to people of '*Madhes*'. The plural of '*Madhesi*' is referred as '*Madhesis*'. The term is often distorted as *Madise* and used in denigrating terms for the people belonging to Southern plains, who would allegedly not be "true Nepalis". See: International Crisis Group, *Nepal's Troubled Terai Region*, 9 July 2007, p. 2, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/B61ABDF7FF1DE4AA852573130064E8C9-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/B61ABDF7FF1DE4AA852573130064E8C9-Full_Report.pdf). *Madhesis* speak their own specific languages such as Maithili or Bhojpuri, instead of Nepali, and wear different clothing.

**Lal** on 18 September 2016 to probe the incidents that took place during the Madhes movement in 2015, where 10 policemen were killed by the protestors as well as many protestors and bystanders were killed when the Police fired indiscriminately and without justification. The Commission submitted its report to the government in December 2017.

74. The **report has not been made public**, despite the ongoing demand by civil society organisations of the victims' families. The latter turned to the Information Commission and the Supreme Court eventually. On 17 October 2019, the Supreme Court directed the Information Commission to respond to the victims' application. Despite the direction of the Supreme Court, the **report has not been made public yet**.
75. On 6 January 2020, adjudicating a writ petition filed in a case of extra-judicial killing, the Supreme Court ordered to establish an impartial and independent mechanism to investigate on the cases of extrajudicial killings in Nepal in consultation with relevant stakeholders; and requested the Central Bureau of Investigation under the Nepal Police to promptly investigate the cases until the formation of an independent mechanism; and to implement the recommendations forwarded by the NHRC, among others.<sup>42</sup> The verdict remains unimplemented.

### Suggested Questions

- ✓ Please report on concrete measures taken to address impunity for past and ongoing gross human rights violations and investigate and prosecute crimes committed by both State and non-State actors.
- ✓ Please comment on the application of constitutional, statutory and regulatory immunities from accountability (including criminal accountability) of public officials, military and security forces and on the use of political interference to withdraw charges against persons accused of serious crimes amounting to human rights violations.
- ✓ Please indicate whether the State party has established a vetting system to exclude persons accused of human rights violations from law enforcement bodies, the army and other relevant State bodies.
- ✓ Please respond to concerns that impunity for sexual and domestic violence remains widespread, police often refusing to register such complaints, and report on measures taken to prevent and combat all forms of violence against women, including domestic violence, rape and other forms of sexual abuse, ensure that such acts are effectively investigated, perpetrators are prosecuted and sanctioned and victims have access to adequate remedies, including compensation.

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<sup>42</sup> Case *Sunil Kumar Ranjan versus Nepal Government*, Supreme Court of Nepal, Decision No. 067-WO-1043, para 60.

- ✓ Please respond to reports that unlawful use of force and well-documented violations of the right to life by State agents, including extra-judicial killings and enforced disappearance, remain unpunished. Please provide information on the measures taken to prevent such cases, promptly and impartially investigate them, bring the perpetrators to justice and provide adequate remedies to victims or their relatives, including in the case of alleged extra-judicial killings by State security forces, as well as serious injuries inflicted during protests, in the Terai region. Please clarify whether Nepal has set up a special investigative unit with sufficient independence to inquire into allegations of extra-judicial killings.
- ✓ Please indicate whether human rights law, including the principles on the use of force and firearms, is a standard component of curricula for law enforcement officials.
- ✓ Please indicate which are the measures envisaged to: (a) make public the 2016 report of the Commission formed under the chairmanship of former Supreme Court Justice Girish Chandra Lal; (b) make public the 2019 NHRC report on the extra-judicial killing of Mr. Kumar Poudel and implement the recommendations contained therein; (c) act upon the report published by the NHRC in October 2020, especially with regard to the list of names of alleged perpetrators of conflict-related gross human rights violations; and (d) implement the decision of 6 January 2020 rendered by the Supreme Court (*Sunij Kumar Ranjan v. government of Nepal*).

## **Organisations submitting the alternative report**

The **Human Rights and Justice Centre (HRJC)** improves access to justice for victims of human rights violations in Nepal such as torture, enforced disappearances, extrajudicial executions and sexual violence.

The HRJC provides free legal support to victims regardless of their background, religious or political affiliation. Through a network of trusted Nepalese human rights lawyers, it litigates cases domestically and internationally to end impunity and enforce the rule of law.

**TRIAL International** is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice.

TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable sufferings. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.