JUSTICE DENIED: THE 2014 COMMISSION ON INVESTIGATION OF DISAPPEARED PERSONS, TRUTH AND RECONCILIATION ACT

May 2014

NEPAL: COMMISSION ON INVESTIGATION OF DISAPPEARED PERSONS, TRUTH AND RECONCILIATION ACT 2014 DOES NOT ADHERE TO INTERNATIONAL LAW AND STANDARDS ON TRANSITIONAL JUSTICE

EXECUTIVE SUMMARY

The *Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014* (TRC Act) is the most recent transitional justice mechanism to be introduced in Nepal. It was promulgated into law on 11 May 2014.

The new TRC Act is only a slightly modified version of the 2013 Ordinance on the Truth and Reconciliation Commission (2013 TRC Ordinance); it replicates almost all of the 2013 TRC Ordinance provisions, including many of its problematic aspects, such as the 'amnesty' provision (section 26 under the Act), which enables the possibility of granting amnesties for gross human rights violations and crimes under international law. If implemented in its current form, parts of the TRC Act will breach Nepal's international legal obligations and violate Supreme Court rulings, thereby posing a serious threat to the credibility of the transitional justice process in Nepal.

The Supreme Court of Nepal struck down the 2013 TRC Ordinance in a landmark judgment on 2 January 2014, holding that the Ordinance was unconstitutional and contravened international law and standards on transitional justice. The Court also found that the 2013 TRC Ordinance had disregarded previous Supreme Court judgments on justice and accountability. In its judgment, the Supreme Court directed the Government to elaborate a new law, which would: exclude any possibility of granting amnesties for gross human rights violations; comply with Nepal's international legal obligations; implement previous Supreme Court decisions; and be in conformity with the 2007 Interim Constitution and 2006 Comprehensive Peace Agreement.

The Supreme Court of Nepal further called on the Government to enact laws that criminalize gross human rights violations, as currently there is no distinct crime of enforced disappearance, torture, crimes against humanity or war crimes under Nepali domestic law. Even if political will to prosecute these offences exists, in the absence of a distinct criminal law, these human rights abuses will not be fully justiciable.

The TRC Act further fails to address the issues of potential interference and politicization of the envisaged Commission. Indeed, under the Act, the allocation of resources and financing of the Commission will be under the discretion of the Ministry and oversight of the Auditor General, while its commissioners will be selected by a Recommendation Committee established by Government. Moreover, the Government is empowered to remove the Chairman as well as any member of the Commission on the basis of 'bad conduct' or 'inefficiency.' In its present form, the TRC Act does not provide for the establishment of a Commission that will be able to adhere to international standards of independence and impartiality.

To bring the TRC Act into accordance with international law and the Supreme Court directive of 2 January 2014, the International Commission of Jurists makes the following recommendations to the Government of Nepal:

(1) Amend section 22 to provide that any mediation between victims and alleged perpetrators must take place only with the informed consent of the victim;

(2) Amend section 25.2(a) to enable the Commission to recommend investigation and prosecution, where required in accordance with Nepal's obligations under international law, even in those cases that have been mediated;
(3) Repeal section 26 to exclude any possibility of amnesty for crimes under international law;
(4) Implement fully the Supreme Court judgments in *Rajendra Dakal v. the Government of Nepal*, *Liladhar Bhandari v. the Government of Nepal* and *Madhav Kumar Basnet v. the Government of Nepal*;
(5) Amend section 3 so as to ensure that the process for the selection of Commissioners accords with international standards, in particular, a fair vetting process aimed to ensure the impartiality of Commission members;
(6) Amend Section 3 and 13 so that the power, function and mandate of the two separate transitional justice mechanisms - 'Truth and Reconciliation Commission' and 'Commission of Inquiry on Enforced Disappeared Persons' - are defined in a clear manner that is consonant with international law and standards;
(7) Amend Section 10 to ensure that an independent Commission is empowered to appoint its Secretary and other staff members without interference or undue influence by the Government;
(8) Amend section 12 to ensure the Commission is independent of the Government in the allocation of its financing and resources and is able to seek funding from outside sources;
(9) Enact legislation to ensure torture, enforced disappearance, crimes against humanity and war crimes are distinct criminal offences, defining them in a manner consistent with their definition under international law;
(10) Amend Chapter 14, Section 11 of the *Muluki Ain* (General Code) *2020* to remove the 35 days statute of limitation for filing a complaint of rape;
(11) Fully implement the relevant recommendations issued on 15 April 2014 by the UN Human Rights Committee pursuant to its review of Nepal's compliance with its obligations under the International Covenant on Civil and Political Rights; and
(12) Implement the international commitments made by Nepal on 11 June 2011 under the UN Human Rights Council Universal Periodic Review Process.

I. BACKGROUND

Throughout the decade-long conflict in Nepal, lasting from 1996 to 2006, war crimes and gross human rights violations and abuses amounting to crimes under international law were committed by all parties to the conflict, including the Nepali army and Government security forces, and the Communist Party of Nepal (Maoist). These gross human rights violations and abuses included unlawful killings, enforced disappearance, torture and ill-treatment, including sexual violence. It has been estimated that approximately 13,000 people were killed during the conflict, many unlawfully. There are at least 1,300 people, including many victims of enforced disappearance, whose whereabouts remain unknown.[1]

Following this conflict, the Comprehensive Peace Agreement (CPA), which came into effect on 21 November 2006, instituted a roadmap for transitional justice in Nepal. Signatories to the CPA committed themselves to the seeking of truth, obtaining of justice and ensuring of remedy and reparations for the victims of

[1] United Nations Office of the High Commissioner for Human Rights, Nepal Conflict Report, October 2012, Executive Summary, accessed at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf

human rights abuse during the conflict. The CPA's Preamble stressed a full commitment toward human rights and rule of law. Article 7.3.1. called on both sides to engage in an impartial investigation to end impunity, while Article 5.2.5. required that they establish a Truth and Reconciliation Commission to investigate serious human rights violations and crimes against humanity committed during the conflict. The 2007 Interim Constitution also stressed the importance of transitional justice in Article 33.

However, the Constituent Assembly subsequently failed in its attempt to enact two separate bills to establish both a Truth and Reconciliation Commission and a Commission on the Investigation of Disappearances in 2012, and was dissolved shortly thereafter.

To break the political impasse that resulted following the Constituent Assembly's dissolution, Supreme Court Chief Justice Khil Raj Regmi was appointed Chairperson of the Council of Ministers and tasked with organizing the holding of elections in March 2013. On the day he assumed power, the Ordinance on the Formation of a Commission for Truth and Reconciliation (2013 TRC Ordinance) was promulgated as part of the political deal.

The 2013 TRC Ordinance represented a political bargain among the political parties, at the expense of the rule of law. The proposed Commission was designed, at least in part, to ensure that those alleged to have been responsible for gross human rights violations and crimes under international law, committed over the course of Nepal's decade-long internal armed conflict, would effectively avoid accountability.

Immediately following the promulgation of the 2013 TRC Ordinance, a coalition of victims' groups, assisted by the International Commission of Jurists (ICJ), lodged two separate petitions before the Supreme Court of Nepal, challenging the Ordinance's constitutionality. In response, the Supreme Court of Nepal, on 1 April 2013, issued an interim order blocking the implementation of the Ordinance until the matter could be fully considered by the Court.

On 2 January 2014, the Supreme Court issued its final judgment in the case of *Madhav Kumar Basnet v. the Government of Nepal,* finding that the 2013 TRC Ordinance contravened both international human rights laws and previous Supreme Court decisions. The Supreme Court also held that the Ordinance violated the spirit of the 2007 Interim Constitution of Nepal.

Specifically, the Supreme Court held that a provision for amnesty goes "against the victims' fundamental right to justice, including their right to life and liberty, right to information, right against torture, and the accepted principles of justice." The Supreme Court also took issue with section 29 of the Ordinance, which limited the Commission's ability to direct the investigation and prosecution of cases. Although section 25 empowered the Commission to recommend cases for prosecution, section 29 granted the Attorney General the right to decide whether a case would be investigated and prosecuted.

In light of its determinations, the Supreme Court issued a *mandamus order* to the Government to enact new legislation for the creation of two separate Commissions of Inquiry: (1) a Commission to inquire into allegations of enforced disappearance; and (2) a Commission relating to truth and reconciliation for human rights abuses and violations committed during the decade-long conflict. The Court also directed the Government to ensure that any new laws unequivocally exclude the possibility

of granting amnesty for serious human rights violations, including the deprivation of life, liberty and security. The Court further directed that legal provisions be enacted to criminalize as separate offenses serious human rights violations, including enforced disappearance, torture, war crimes and crimes against humanity. Finally the Court directed the Government to form a team of experts, including human rights lawyers, to provide advice in the drafting of the new laws.

On 25 March, the Nepali government announced its intention to present to Parliament draft bills within 15 days that would establish both a Commission of Inquiry into Disappearances, as well as a Truth and Reconciliation Commission. Two days later, the Government announced the formation of an 'Expert Task Force' (ETF) to advise the Government on the drafting of the two commissions. It was chaired by the Assistant Secretary of the Ministry for Peace and Reconstruction and was comprised of Government officials, human rights lawyers, victims and conflict experts. The ETF submitted its report to the Government eight days later, at which time a three-member committee was formed by the Office of the Prime Minister and Council of Ministers to draft the bill. The draft was then finalised by a six-member political working group, which presented it at a high-level political party meeting chaired by the Prime Minister. Although the ETF had earlier provided draft bills to the Government, these had been disregarded by the Government's drafting committee, political working group and the high-level political party meeting, and were thus not incorporated into the final version presented to Parliament.

The ICJ and other international human rights organizations voiced their concerns over the troubling language of the final Bill appealing to members of Parliament to amend the Bill to bring it in line with the Supreme Court's directives and Nepal's obligations under national and international law.[2]

Notwithstanding these concerns, Parliament passed a new TRC Act on 25 April 2014, largely replicating the 2013 TRC Ordinance and retaining many of its impugned provisions, including: section 26 (provision regarding amnesty); section 25 (recommendations for action); and section 29 (provision for filing cases). Further contravening the Supreme Court's earlier directive, there also continues to be no domestic law criminalizing enforced disappearance, torture, war crimes and crimes against humanity as distinct offences.

II. FORCED RECONCILIATION

The new TRC Act (TRC Act) confers broad powers of reconciliation to the Commission on Truth and Reconciliation. Firstly, section 22 of the Act enables the Commission to mediate cases when an application for mediation is made by either the victim or perpetrator. In its previous commentary on the TRC Ordinance, the United Nations Office of the High Commission for Human Rights (OHCHR) in Nepal had warned that "[e]ntrusting the Commission with such a broad authority is highly problematic and inappropriate. Reconciliation…should not be forced upon people by the Commission."[3] Nevertheless, like its predecessor (section 22 of the TRC Ordinance), the wording of section 22 of the TRC Act does not require the

[2] International Commission of Jurists, Human Rights Watch and Amnesty International, 'Nepal: Reject Draft Truth and Reconciliation Bill: Proposed Measure Contravenes International Law,' 17 April 2014, accessed at: http://www.hrw.org/news/2014/04/17/nepal-reject-draft-truth-and-reconciliation-bill

[3] United Nations Office of the High Commissioner for Human Rights, 'OHCHR Comments on the Nepal 'Commission of Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013),' 3 April 2013, p 7, accessed at: http://www.ohchr.org/Documents/Countries/NP/OHCHRComments_TRC_Ordinance.docx

Commission to obtain the victim's consent prior to initiating mediation, thereby disregarding the OHCHR's warning.

More problematic is section 25.2(a) of the TRC Act, under which any case that is mediated is barred from being recommended for prosecution.[4] In effect, victims are forced to give up their right to justice as part of the "reconciliation" process. Under international law and standards, neither the victim's right to an effective remedy and reparations, nor a State's obligation to hold perpetrators accountable for their crimes, can be extinguished by informal processes such as reconciliation. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence warned that "reconciliation should not be conceived as either an alternative to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice, reparations and guarantees of non-recurrence)."[5]

III. AMNESTIES

Section 26 of the new TRC Act invites the possibility of the Commission to grant amnesties for serious human rights violations, including torture, enforced disappearances and crimes against humanity.[6] Section 26 is identical to section 23 of the previous Ordinance, which the Supreme Court had declared unconstitutional and in violation of Nepal's international legal obligations. By allowing the granting of amnesties, Nepal is thus contravening both its domestic laws and its international legal obligation to provide effective legal remedy to victims and their families.[7]

Amnesties perpetuate impunity. They enable perpetrators to evade accountability for gross human rights violations and serious crimes.[8] In allowing the granting of amnesties, Nepal is contravening its obligation under international law to provide effective legal remedy to victims and victims' families. It has long been recognized that amnesties for international crimes are not permitted under international law. Further, there is a substantial body of well-settled international law and jurisprudence rejecting amnesty laws and other measures that interfere with the investigation and prosecution of serious violations of human rights.

The UN Secretary General concluded in his *Report on the rule of law and transitional justice in conflict and post-conflict societies* that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights."[9] Further the UN *Updated set of principles for the protection and promotion of human rights through action to combat impunity* provide that perpetrators of serious crimes under international law may not benefit from any form of amnesty, at least not before they have been suggested for criminal prosecution.[10]

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[4] Section 22(5).

[5] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, *Report to the Human Rights Council*, UN Doc. A/HRC/21/46 (9 August 2012), para 37.

[6] Sections 26 and 2(j).

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

[8] Definitions, 'A', UN Impunity Principles.

[9] International Commission of Jurists, *The Right to a Remedy and Reparations for Gross Human Rights Violations: ICJ Practitioners' Guide No 2,* Geneva, Switzerland, 2012, p 155.

[10] Article 19 and Article 24, UN Impunity Principles.

As a State party to the core international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR)*,* the *United Nations Convention against Torture and other cruel, inhumane or degrading punishment*, and the *Convention on the Elimination against all forms of Discrimination against Women*, Nepal has an obligation under international law to ensure victims are given prompt access to an effective legal remedy and reparations for human rights violations. To meet this obligation, the State must conduct impartial investigations and hold criminally accountable those persons responsible for such violations. The Human Rights Committee, the treaty monitoring mechanism for the ICCPR, has underscored that amnesties are incompatible with the Covenant and the duty of States to investigate allegations of gross human rights violations such as torture.[11]

The Committee against Torture has also urged that States "ensure that amnesty laws exclude torture from their reach." In its General Comment 2, the Committee stressed that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."[12]

Where the conduct amounts to an international crime, such as enforced disappearance, violation of the right to life, torture or other cruel, inhuman or degrading treatment, including sexual violence, there is a specific obligation on the State to ensure that those responsible are held accountable. The Human Rights Committee stresses that failure to bring to justice perpetrators of crimes under either domestic or international law could in and of itself give rise to a separate breach of the Covenant.[13] Likewise, the Committee against Torture has stated in its General Comment 3 that "failure to criminally prosecute…acts of torture in a prompt manner…constitute[s] a violation of the State's obligation under article 14."[14]

In the context of a non-international armed conflict, the State must hold criminally responsible those persons involved in serious violations of international humanitarian law amounting to war crimes.[15] In addition to the obligation to prosecute suspects,, there is also a specific obligation on the State to investigate all allegations of war crimes committed by nationals or armed forces on their territory or extra-territorially, where the State exercises jurisdiction.[16] Customary international humanitarian law is explicit in its prohibition of amnesties for persons suspected of or accused of war crimes.[17]

A number of international courts and quasi-judicial bodies have also been consistent in their position that amnesties are unlawful for serious crimes, including torture. The UN International Criminal Tribunal for the Former Yugoslavia affirmed the absolute nature of this prohibition, holding in *Furundzija* that:

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[11] *General Comment No 20 on Article 7*, 10 March 1992, HRI/GEN/1/Rev.7, para 15.
[12] *General Comment No 2 on the Implementation of Article 2 by States Parties,* 24 January 2008, CAT/C/GC/2, para 5.
[13] UNHRC, General Comment 31, para 18.
[14] Committee against Torture, 'General Comment No. 3, Implementation of article 14 by State parties,' UN Doc. CAT/C/GC/3 (2012), para 18.
[15] Rule 156, J. M. Henckaerts, *Internatonal Committee of the Red Cross Study on customary international humanitarian law*, accessed at: http://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf.
[16] Rule 158, *Ibid*.
[17] Rule 159, *Ibid.*

> ***[I]t would be senseless to argue, on the one hand that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators though an amnesty***.[18]

The Inter-American Court of Human Rights has likewise stressed that amnesties are incompatible with international law and particularly with the right of victims to an effective remedy and to reparation.[19] In *Barrios Altos*, the Court held:

> ***All amnesty provisions…are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.***[20]

The Inter-American Court has upheld and affirmed its position in *Barrios Altos* in numerous judgments, including: *Myrna Mack Chang v. Guatemala*,[21] *El Caracazo v. Venezuela*,[22] *Trujillo-Oroza v. Bolivia*, *Almonacid-Arellano et al v. Chile* and *Gomes-Lund et al. (Guerrilha do Araguaria) v. Brazil*.[23] As a result, the prohibition against amnesties has become well-established jurisprudence within the Inter-American Court.

The African Commission on Human and Peoples' Rights has also found that "an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries […] cannot shield [a] country from fulfilling its international obligations…."[24] It has further held that "[t]he granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy."[25]

In the past, the Supreme Court of Nepal has also expressed the view that amnesties for certain serious crimes amounting to human rights violations are impermissible. For example, in the *Rabindra Prasad Dhakal* case, the Supreme Court held that persons suspected or accused of enforced disappearance must not be granted amnesty. And, on 1 June 2007, the Supreme Court of Nepal issued a directive to the Government to take into account the international standards and

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[18] *Ibid.*
[19] *Ibid.*
[20] I/A Court H.R., Barrios Altos v. Peru. Merits. Judgment of March 14, 2001. Series C No. 219, para. 41.UN Secretary General, *Report on the rule of law and transitional justice in conflict and post-conflict societies*, 20 July 2004, UN Doc. S/2004/616, para 10, reprinted in *ICJ Remedies and Reparations Guide,* p 154.
[21] *Myrna Marck Chang v. Guatemala*, Merits, Reparations and Costs, 25 November 2003, Series C. No. 101, para 276.
[22] *Caracazo v Venezuela*, Reparations and Costs, 29 August 2002, Inter-Am. Ct. H.R., Series C. No. 95, para 119.
[23] *Gomes-Lund et al (Guerrilha do Araguaia) v. Brazil*, Merits, Reparations and Costs, 24 November 2010, Inter-Am. Ct. H.R., Series C. 219.
[24] *Malawi African Association et al v Mauritania,* Communications 54/91 et al (27th Ordinary Session, May 2000), para 83, reprinted in *ICJ Remedy and Reparations Guide*, *supra* p 157.
[25] *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C(d), reprinted in *ICJ Remedy and Reparations Guide*, p 158.

impunity principles embodied in OHCHR rule of law tools for post conflict Truth Commissions in forming such a commission. The Court held that:

> ***It is also equally important to enact a provision that uphold[s] the international standard that pardon cannot be granted to persons who should be prosecuted for their alleged involvement in the act of disappearance, as well as to persons who are convicted for their direct responsibility or complicity in the act of disappearance. For this purpose, it is expedient to adopt the International Convention for the Protection of All Persons from Enforced Disappearance as a guideline***.[26]

Finally, on 2 January 2014, the Supreme Court, striking down the TRC Ordinance, observed that:

> ***If amnesty is granted for the perpetrators involved in crimes of serious nature and grave violations of human rights having them forcibly linked with political conflicts, not only will impunity be promoted but the rule of law will also not be maintained. The Commission may not be conferred with uncontrolled powers of granting amnesty in all type of crimes depriving of the right of victims of serious crimes to get effective justice from independent and competent authority. This Court in the case of habeas corpus involving Rabindra Dhakal on behalf of Rajendra Dhakal v. Ministry of Home Affairs has clearly laid down that the state cannot ignore its obligation of finding out the actual position of the disappeared persons and making their condition public; of taking actions against those officials found to be guilty and providing for appropriate relief to the victims and that no amnesty can be granted in cases of serious cases.***[27]

The Supreme Court further identified the types of human rights violations that could not be subject to any amnesty under Nepali constitution as follows:

> ***No amnesty or pardon may be granted against any fundamental right including the right to life, right to equality, right against torture….***

In this light, it is not possible to view the new TRC Act as compliant with either international or domestic Nepali law.

IV. COMMISSION'S LACK OF INDEPENDENCE AND IMPARTIALITY

The TRC Act also fails to provide safeguards to ensure the independence and impartiality of the Commissions of Inquiry. The lack of a transparent selection process and a fair vetting mechanism for Commissioners under section 3(5) not only goes against international standards but invites the possibility of political

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[26] Madhav Kumar Basnet et al, v. the Government of Nepal, wit no 069-WS-0057, decision date 2 Jan 2014.

[27] Madhav Kumar Basnet et al, v. the Government of Nepal, wit no 069-WS-0057, decision date 2 Jan 2014.

interference. Indeed, under section 3, a Recommendations Committee to nominate Commissioners is to be established and comprised of a former Chief Justice of the Supreme Court as Chairperson and a representative of the National Human Rights Commission (NHRC) as one of its members.[28] Section 4(f) further stipulates that the Chairperson of the Commission be a former judicial officer.[29]The appointment of an officer from the judicial service as Chairperson and therefore chief executive authority of the Commission potentially threatens the Commission's independence, as he or she would be accountable to the Government under the 1993 *Civil Service Act*. One of the reasons for the failure of previous commissions of inquiry in Nepal is that all Commissions under the *Commission of Inquiry Act* were not structurally and hierarchically independent. Rather, they were composed of government officials, as is the case here. In order to avoid such institutional failings, the Commission should instead be empowered to appoint its own Secretary.

Moreover, there fails to be any safeguards to insulate the Commission's work from interference by the Government, which continues to exercise discretion over the Commission's funding and resources.[30] Given the political nature of the appointment of members to the Commission, there is a well-founded concern that sources of, or conditions attached to, its funding are likely to further compromise its independence.

The prospect of politicization is further facilitated by the tacit agreements already reached between political parties for non-prosecution of certain crimes and the granting of amnesties.[31] These arrangements and procedures seriously undermine the independence, impartiality and competence of the Commission. Indeed, this arrangement resembles the failed model of the NHRC and other national institutions which were intended to fulfil independent monitoring and oversight roles, but which instead suffer from political paralysis.

The TRC Act further ignores the 1 June 2007 Supreme Court directive to the Government of Nepal, ordering it to abide by relevant international standards when forming the Commission, particularly OHCHR rule of law tools for post-conflict Truth Commissions. The Court stated:

> ***In order to investigate cases of enforced disappearance it is also necessary to provide for a provision in the Act for a separate commission of inquiry with respect to such disappeared persons. Given that separate powers, skills and procedures are necessary to effectively probe such issues, it is necessary to adopt as guidelines the Criteria for Commissions on Enforced Disappearance, developed under the auspices of the United Nations Office of the High Commission for Human Rights.***

In 2012, the ICJ published an in-depth study entitled *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, which examined 28 commissions of inquiry established between 1990 and 2010. The ICJ study concluded that more often than not, commissions of inquiry have served political ends, resulting in impunity for serious crimes and human rights violations.

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[28] Section 3(3).
[29] Section 4(f).
[30] Sections 12, 12(2), 12(3), 12(4) and 12(5).
[31] The politicization of the TRC is revealed in the debate that took place when the bill was negotiated in Parliament. For details please see:
http://www.onlinekhabar.com/2014/04/192148/#sthash.lLM4w0xU.dpuf

Former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, stressed that "the mere setting up of a commission of inquiry [on its own] cannot satisfy the obligation to undertake an independent inquiry." The Special Rapporteur further warned that "such inquiries are frequently used primarily as a way of avoiding meaningful accountability."[32]

The TRC Act falls far short of the standards elucidated in the UN Impunity Principles that commissions of inquiry "must be established through procedures that ensure their independence, impartiality and competence"[33] and that they be provided with transparent funding and resources to ensure that their independence and credibility are never in doubt.[34]

V. LAW REFORMS TO BRING NEPALI CRIMINAL LAW IN LINE WITH INTERNATIONAL LAW

The Supreme Court has directed the Government of Nepal, in more than one instance, to reform domestic criminal law to recognize serious human rights violations as specific criminal offences under Nepali law and to remove prescription provisions relating to rape. However, under the TRC Act,[35] many of the serious crimes enumerated in section 2(j) continue to not be recognized as crimes under Nepali law. Examples of Supreme Court directives to reform domestic law include the following:

In *Rajendra Ghimire v. Office of the Prime Minister, et al* (Case No. 3219/2062), the Supreme Court directed the Government to criminalise torture, in line with its obligations as State party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[36]

In the *Rabindra Prasad Dhakal* case, the Supreme Court directed the Government to criminalize enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance, and to ensure that amnesties and pardons would not be available to those suspected or found guilty of the crime.[37]

In *Raja Ram Dhakal v. Office of the Prime Minister, et al* (Case No. 2942/2059), the Supreme Court focused on the need to implement the Geneva Conventions, directing the Government to formulate national legislation for the implementation of the four Geneva Conventions.

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[32] Philip Alston, 'Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,' 2 May 2008, UN Doc. A/HRC/8/3, para 14.

[33] UN Impunity Principles, Principle 7.

[34] *Ibid*., Principle 11.

[35] Section 2(j).

[36] Torture is prohibited under the CAT and under article 7 of the ICCPR. It is also recognized as an international crime; see *International Criminal Tribunal for the Former Yugoslavia (ICTY), The Prosecutor v. Anto Furundzija*, Judgment No. IT-95-17/1-T, para 154; *ICTY, The Prosecutor v. Delalic and others*, ICTY Trial Chamber, IT-96-21-T, para 454; *The Prosecutor v. Kunarac*, IT-96-23-T and IT-96-23/1-T (22 February 2001); UN General Assembly Resolution A/RES/59/183; UN Commission on Human Rights Resolution ECN.4/RES/2005/39; and the UN Special Rapporteur on Torture, 19 February 1986, UN Doc. E/CN.4/1986, para 3; see also International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration,* Geneva, 2007, p 37; see also International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, Geneva 2007, p 37.

[37] Enforced disappearance is recognized as a serious crime and prohibited under international law; see *United Nations Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992; *International Convention for the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/61/177 (2006), 20 December 2006.

In *Sapana Pardhan Malla v. the Government of Nepal* (Case No.3393/2061), the Supreme Court focused on the need to remove provisions on prescription, noting they were a barrier to effective remedy and reparations for victims. The Court directed the Government to amend section 11 of Chapter 14 of the *Muluki Ain* (General Code) *2020* to remove the 35 days statutory limitation on rape.

To date, none of the aforementioned directives of the Supreme Court have been implemented.

Even if the political will to prosecute perpetrators of such offences existed, the absence of a specific crime under Nepali law would render the offence non-justiciable.

VI. DOES NOT PROVIDE NECESSARY MEASURES TO PREVENT RECURRENCE

The Ordinance does not specifically mandate the Commission to make recommendations in relation to guarantees of non-recurrence, including by prohibiting those accused and/or convicted of crimes and serious human rights violations from holding public office. This omission fails to implement the Supreme Court's ruling. It also leaves a gap in the measures taken by the Government to fulfil its legal duty to provide an effective remedy, which includes the cessation and prevention of recurring violations.[38]

The UN *Updated set of principles for the protection and promotion of human rights through action to combat impunity*[39] provides that States should take all necessary measures to ensure public institutions assure the rule of law and protection of human rights. Measures specified include the removal from State institutions of public officials and employees - especially those in the military, security, police, intelligence and judicial sectors - who are alleged to have been responsible for gross violations of human rights. The same provision calls for the suspension from official duties of persons who have been formally charged with individual responsibility for serious crimes under international law, during criminal or disciplinary proceedings.

Similarly, the *Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions*[40] as well as the *Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*[41] call alleged violators to be removed from positions they may occupy and through which they may moreover be able to exert control or power, whether directly or indirectly, over complainants, witnesses or their families, as well as over those conducting the investigations. The *Declaration on the*

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[38] In *Sunil Ranjan Singh & Ors. v. Government of Nepal & Ors.* (Case No. 067/2067) the Supreme Court directed that appropriate legislation and guidelines be put in place to ensure that security officials are vetted before appointment or promotion to higher public office.

[39] Orentlicher, D. *Updated set of principles for the protection and promotion of human rights through action to combat impunity,* E/CN.4/2005/102/Add.1; 8 February 2005. Accessed at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement (accessed 25 June 2012).

[40] ECOSOC Resolution 1989/65 of 24 May 1989, Annex, ECOSOC Off. Rec. 1989, Supp. No. 1 (1990), endorsed by GA Res. 44/162 of 15 December 1989, GAOR 44th Sess., Supp. No. 49 (1990), Principle 15. Accessed at: http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/ecosocres1989-65.htm (accessed 25 May 2012).

[41] *The Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (The Istanbul Protocol),* UN Office for the High Commissioner for Human Rights, New York and Geneva, 2001. Adopted by UN GA Res. 9842, UN GAOR, 55th Sess., Annex, Agenda Item 114(c), UN Doc. A/RES/55/89 (2000), Principle 3(b). Accessed at: http://www2.ohchr.org/english/law/investigation.htm (accessed 25 May 2012).

protection of all persons from enforced disappearance[42] also calls for persons alleged to have committed any of the acts of enforced disappearance to be suspended from any official duties during investigations.[43]

The UN Secretary-General issued a report in 2004, entitled *The rule of law and transitional justice in conflict and post-conflict societies,*[44] which emphasizes the integral place of vetting in a larger transitional justice framework. The report recognizes that a vetting process needs to address the unique historical and political challenges of a society, as well as to develop a variety of approaches according to the type of institutions therein.

The Supreme Court of Nepal in *Rajendra Dhakal v. the Government of Nepal, Liladhar Bhandari v. the Government of Nepal* and *Sunil Ranjan Singh v. the Government of Nepal* recognised vetting as one of the measures of transitional justice and instructed the Government to formulate a new law on vetting. It also instructed the Government to adopt a temporary guideline for vetting public officials while making new appointments, promotions or transfers until that law is formulated.

[42] *Declaration on the protection of all persons from enforced disappearances*, GA Res. 47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49 (1992), adopted by GA Res 47/133 of 18 December 1992 (UN Doc. A/RES/47/133). Accessed at: http://www.unhcr.org/refworld/topic,4565c22532,4565c25f419,3dd911e64,0,,RESOLUTION,.html (accessed 25 May 2012).
[43] Article 16(1).
[44] The Secretary-General, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies,* IT 2–4, delivered to the Security Council, UN Doc.S/2004/616, para. 52 (23 August 2004) (hereinafter Transitional Justice). Accessed at: http://www.unhcr.org/4506bc494.html.