

Human Rights and the Rule of Law in a Federal Nepal: Recommendations from an ICJ High-Level Mission

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EXECUTIVE SUMMARY

Accountability for human rights violations and abuses has been a prominent part of public discourse in Nepal since the 2006 Comprehensive Peace Agreement, with both sides to the decade long conflict agreeing to hold perpetrators of human rights violations accountable and provide remedies and reparation to victims. The conflict and its aftermath also brought to the forefront the longstanding discrimination suffered by ethnic minorities, low-caste communities and women. Almost fifteen years later, despite substantial improvements in Nepal's human rights law framework, victims of human rights violations continue to face many of the same obstacles to access to justice, and many of the root causes of those violations persist. In other words, the promises of accountability made by the parties to the conflict have yet to be met.

In 2017, the ICJ conducted a baseline study on accountability and the rule of law in Nepal, as part of a global initiative to assess both progress and setbacks to the legal protection of rights worldwide. That study found that despite significant strides in the development of human rights law, policy and jurisprudence, Nepal was caught in a cycle of impunity – a crisis of accountability illustrated by a stalled transitional justice process, compromised justice sector institutions, an increasingly fragmented civil society, and the persistence of systemic discrimination.

This report documents the findings of a follow-up mission to Nepal conducted in December 2019 by ICJ Commissioners and senior staff that sought to revisit the conclusions of the 2017 report. It gives particular attention to the impacts of recent changes in the political and legal context, such as the implementation of provisions of the 2015 Constitution that operationalize elements of a new federal system of governance, long-awaited amendments to the Penal Code and other laws affecting the criminal justice system, and the human rights impacts of an uncharacteristically stable (but not human rights-friendly or fully representative) government coalition coming into power.

The specific findings of the Mission can be summarized as follows:

- **Non-Implementation.** Nepal has made notable strides in the progressive development of the law and jurisprudence that incorporates significant elements of the international human rights law framework. However, these laws and judicial decisions have in many cases gone unimplemented, or even been actively undermined – at the expense of public trust in government, and access to justice for victims.
- **Independent and Impartial Institutions.** Nepal has made progress in establishing and building the capacity of justice institutions including police, prosecutors, the judiciary, transitional justice mechanisms and national human rights bodies. However, these institutions suffer from weaknesses in capacity and independence, and are vulnerable to and experience political influence and manipulation at all stages from the appointment process to operational practices and the transparency of judgements or reports.
- **Accountability and Access to Justice.** Notwithstanding improvements in the law and progress in institution-building, most Nepalis still face the same barriers to accessing the justice system. Frontline institutions, particularly the police, lack the political will and capacity to effectively interface with communities, and ordinary Nepalis (but especially those from ethnic minority communities) face sometimes overwhelming obstacles when pursuing a remedy in the courts. The persistence of these obstacles, alongside deliberate attempts by government to limit civic space to discuss and advocate for change, have done damage to public trust in government to a degree that it threatens social stability.

The report then offers some reflections on root causes of the impunity crisis in Nepal with a focus on understanding why – despite progressive human rights law and jurisprudence – access

to justice and meaningful accountability have remained so out of reach. These conclusions cluster around a set of inter-related root dynamics that underpin and help to explain why legal and institutional reform has fallen short of the post-conflict expectation that the injustices of the past and inequalities of the present could be swiftly addressed through some combination of political, legal and institutional reform. The report draws a number of conclusions:

- Nepali governance and justice institutions are caught in a recursive, and destructive, **dynamic of diminishing credibility** whereby a persistent failure to implement often good law and policy measures actually results in a loss of trust in justice institutions. This dynamic threatens to undermine public confidence that decisions will be respected and that the system can deliver impartial justice.
- The practice of treating conflict and post-conflict human rights violations as distinct and unrelated problems to be addressed through different institutions and processes has obscured the **common obstacles to access to justice** experienced by all victims of human rights violations, whether contemporary acts of discrimination or conflict-era violence. There is a need to redraw the links between the root causes of all violence (including economic, ethnic and caste-based inequality) and the institutional weaknesses that pervade democratic governance, law enforcement and judicial institutions.
- International human rights law has played an undeniably important role in Nepal. It has been incorporated into constitutional and statutory law, as well as in the jurisprudence of the Supreme Court. International institutions have played a constructive role in supporting democratic change and human rights accountability at key historical moments. Notwithstanding recent nationalist and populist trends, this history creates a strong foundation for the **continued relevance of international human rights law** and mechanisms to positively influence the further development of human rights protections.
- Despite significant concerns about the quality and pace of reform, solutions to the most pressing issues of governance and justice require engagement with and coordination among actors at the federal, provincial and local levels. The **opportunities of new federal structures and relationships to protect and promote human rights** and the rule of law are promising and substantial. Addressing the tensions that underpin social and political disagreements about the nature and pace of this reform – including the relationship between justice, governance and historical discrimination - should be a priority

Drawing on these findings and observations, the report offers a set of recommendations, which cluster around a single over-arching concern – the preservation of the ‘rule of law,’ a concept which encompasses concerns about access to justice, accountability, the right to a remedy and the responsiveness of governmental and non-governmental justice institutions.

The detailed recommendations are directed to the Office of the Prime Minister, federal and provincial legislatures, the Nepal Police, the Office of the Attorney General, the judiciary including the Supreme Court and National Judicial Academy, the National Human Rights Commission, civil society and the diplomatic community.

I - INTRODUCTION

The ICJ's December 2019 Mission to Nepal, and the Objectives of this Report

This International Commission of Jurists has worked extensively to advance human rights accountability, the fair and effective administration of justice and the rule of law in Nepal for more than 15 years. Throughout this time, it has supported and provided advice and technical assistance to lawyers, judges, civil society groups and the victim community with the aim of improving the implementation of international human rights law and better policy and practices protecting human rights. To this end, it has employed a wide-range of tools including monitoring and fact-finding; strategic litigation; commentaries on draft and enacted legislation assessing their compliance with international law and standards; workshops and capacity-building with justice sector actors; and consultations and meetings with relevant stakeholders for collaboration, strategy and advocacy purposes.

In July of 2017, the ICJ published a baseline study on accountability and the rule of law in Nepal, as part of a global initiative to assess both progress and setbacks to the legal protection of rights worldwide.¹ That study found that despite significant strides in the development of human rights law, policy and jurisprudence, Nepal was caught in a cycle of impunity – a crisis of accountability illustrated by a stalled transitional justice process, compromised justice sector institutions, an increasingly fragmented civil society, and waning donor and diplomatic interest - which threatened the sustainability of progress made since the end of the conflict in 2006. The report examined the law and jurisprudence on the protection of human rights and took a critical look at the role of key institutions such as the Supreme Court, Office of the Attorney General, Nepal Police and the National Human Rights Commission.

Since the publication of that report, there have been some significant developments in Nepali politics and governance. Most notably, consequential provisions of the 2015 Constitution of Nepal have begun to operationalize elements of a new federal system of governance, amendments have been made to the Penal Code and other laws affecting the criminal justice system, and a negotiated consolidation of political parties has led to a comparatively stable (but not human rights-friendly or fully representative) government coalition coming into power.

The spread of the COVID19 pandemic has added an additional element of uncertainty and created social and economic pressures that have exacerbated inequality and further highlighted the gaps and weaknesses in current law and policy.² Although other aspects of the human rights environment remain static, including the perpetually stalled transitional justice process, the ICJ considered that it was an appropriate time to conduct a high-level mission (the 'Mission') to examine these new developments with particular attention to their implications in a federally-structured Nepal with greater devolution of political and economic power. This report is the result of that Mission.

¹ ICJ Global Redress and Accountability Initiative, 'Achieving Justice for Gross Human Rights Violations in Nepal: Baseline Study (July 2017)', available at: <https://www.icj.org/nepal-search-for-truth-and-justice-continues-new-icj-report/>.

² See Terai Human Rights Defenders Alliance, *Five Major Concerns of Human Rights in Response to COVID 19 in Nepal* (9 June 2020), available at <http://www.thrda.org/situation-update/five-major-concerns-of-human-rights-in-response-to-covid-19-in-nepal/>

The Mission took place from 2 to 7 December 2019 with the following objectives:

- To assess the current state of human rights accountability, through engagement with civil society groups, national and provincial government, victims of human rights violations, justice sector actors and members of the judiciary;
- To identify opportunities for law and policy reform at the national and provincial levels, with particular attention to the division of power between federal and provincial governments, provincial chief attorneys' offices and law enforcement; and
- To engage with the judiciary, including the National Judicial Academy, to identify threats to the independence of the judiciary, and offer recommendations to maintain and develop Nepal's strong human rights jurisprudence.

The mission was made up of three of the ICJ's global commissioners: Justice Sanji Monageng (Botswana), Dame Silvia Cartwright (New Zealand) and Justice Kalyan Shrestha (Nepal).³ The ICJ's Legal and Policy Director Ian Seiderman, and Asia-Pacific Programme Director Frederick Rawski also participated as Mission members. The Mission was supported by Advocacy Forum-Nepal and the Terai Human Rights Defenders Alliance, as well as the University of Passau in Germany (on aspects of the assessment pertaining to police reform). The Nepal Law Society and the Accountability Watch Committee also held events for the Mission. The ICJ takes full and sole responsibility for the findings and analysis in the report.

During the week, the Mission met with a wide range of actors including prominent members of civil society, several groups of people who had been victims of violence both during and since the conflict, human rights lawyers and defenders, diplomats, the UN Resident Coordinator and other senior UN officials.⁴ Government meetings included with officials from the Office of the Prime Minister, Attorney General, Minister of Law and Justice, Supreme Court, National Judicial Academy, and the Inspector General of Police. The ICJ also met with judges of the Supreme Court. In addition to these meetings, which took place in Kathmandu, the Mission visited Janakpur – the capitol of the recently formed Province 2, where it met with government officials including the Chief Attorney, provincial Minister of Law, high court and district court judges, and representatives of civil society, including lawyers from the Janakpur Bar Association. The Mission members also participated in a regional conference on the prevention of torture, which drew experts from throughout South Asia.⁵

This three-part report presents the findings of that Mission. The first section includes an introduction to the current political context and a brief review of relevant parts of the international human rights framework to situate the subsequent analysis. The second section is a summary of the main findings of the Mission – itself divided into three sections examining the (i) relevant legal frameworks and their implementation, (ii) the operation of key justice sector and human rights institutions, and (iii) obstacles faced by victims of rights violations seeking to access a remedy and reparation for the harms caused to them. The third section of

³ Commissioner biographies are available at <https://www.icj.org/commission/>

⁴ Civil society organizations with which the Mission met included Accountability Watch Committee, Nepal Law Society, SAARCLAW Nepal, Amnesty International Nepal, the Nepal Bar Association, the Forum for Women (FWLD), Law and Development, the Human Rights Organization of Nepal (HURON), the Informal Sector Service Centre (INSEC), the People's Forum for Human Rights, Community Mediators' Society Nepal, Campaign for Human Rights and Social Transformation Nepal (CAHURAST), Himalayan Human Rights Monitors (HimRights), Access to Justice and Advocacy of Rights (AJAR), and Constitution Watch Group.

⁵ ICJ, *Human Rights Day: South Asian States must end culture of impunity for torture* (10 December 2019), at <https://www.icj.org/south-asian-states-must-end-culture-of-impunity-for-torture/>

the report offers some reflections on root causes of the impunity crisis in Nepal with a focus on understanding why – despite the adoption of human rights compliant law and jurisprudence – access to justice and meaningful accountability have remained out of reach. It then offers a set of recommendations for government, civil society and the international community.

The Current Legal and Political Context in Nepal

Accountability for human rights violations and abuses has been a prominent part of public discourse in Nepal for many years. The armed conflict between the then-monarchical State, conducted by the Royal Nepal Army, and the Communist Party of Nepal (Maoist) lasted for roughly ten years between 1996 and 2006. During and immediately after the conflict much of the focus among human rights advocates was understandably on redress and accountability for the families of thousands of people who were unlawfully killed or “disappeared”, and countless others who were subjected to gross human rights violations and abuses including torture, including sexual violence, and other ill-treatment.⁶ The Comprehensive Peace Agreement (CPA) put an end to the conflict on 21 November 2006, with both sides agreeing to hold perpetrators of human rights violations accountable and provide remedies and reparation to victims. Nearly fifteen years later, these promises have yet to be met.

The conflict and its aftermath also brought to the forefront of the human rights agenda the longstanding discrimination suffered by ethnic minorities (and in parts of southern Nepal, majorities), low-caste communities and women. The 2007 *Madeshi Andolan* and 2015 demonstrations bookended a decade of manifestations of public discontent about the failure of multiple constitutional frameworks to adequately address pervasive and systemic inequalities. Caste, ethnicity, nationality, sexual orientation and gender-based discrimination remains common despite improvements in the law.⁷ Extra-judicial killings (often euphemistically described as ‘encounter killings’ by police) also continue with little accountability, with Madheshi (people of Indian ancestry in the Terai) men being especially hard-hit.⁸ Because the lack of access to justice cuts across these contexts and time periods, linking impunity for conflict and post-conflict violations and understanding its root causes was a priority concern of the Mission.

As described in the 2017 baseline study, Nepal has seen substantial improvements in its human rights law framework and jurisprudence since the signing of the Comprehensive Peace Agreement in 2006. In the years immediately following the signing of the CPA, there was a widespread sense of hope that institutional and constitutional reform would result in a significant measure of accountability, reparation and a guarantee of non-repetition for serious conflict-era human rights violations. This period was marked by a strong civil society-led human rights movement, and incremental but important improvements in policy. The 2015 Constitution contained strong, if flawed, fundamental rights provisions that enshrined economic, social and cultural rights - including protections for caste and ethnic minority communities and LGBTI persons.

⁶ The best summary available to date of the human rights violations committed during the conflict can be found in UN Office of the High Commissioner for Human Rights, Nepal Conflict Report (October 2012), available at <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>.

⁷ For ongoing documentation, see Nepal Monitor at <https://nepalmonitor.org/dashboard/human-rights-issues>

⁸ For ongoing documentation of EJKs, see the reports and statements of the Terai Human Rights Defenders Alliance, at <http://www.thrda.org>. For a historical view, see UN Office of the High Commissioner for Human Rights, *Investigating Allegations of Extra-Judicial Killings in the Terai: Summary of Concerns* (July 2010), available at <https://nepal.ohchr.org/en/resources/publications/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf>

Importantly, it also established Nepal as a 'federal democratic republic' with three tiers of Government - local, provincial and federal. Elections have since been held to fill more than 35,000 elected positions in 753 local governments, seven provincial governments, and the federal government. The Constitution delineates their powers to a certain degree, but leaves many questions open for determination by political and judicial bodies. While the federal parliament has the responsibility to enact laws necessary to ensure coordination between all three levels, consequential aspects of governance have been devolved to state and regional governments and legislatures. The struggle to find a balance of powers and responsibilities across these different levels of government that is most protective of human rights was a recurring theme for the Mission, and for this report.

In recent years, however, the united front for promoting accountability has begun to weaken. The lack of implementation of human rights compliant law and jurisprudence has negatively affected the credibility of government institutions and poses a threat to the integrity and effectiveness of the judiciary, and public trust in the justice system. Civil society has become fractured, and governance continues to be plagued by corruption and considerations of private expedience rather than the public interest. Transitional justice efforts have stalled. There have been a vanishingly small number of prosecutions for the thousands of serious conflict era crimes and little positive impact on the lives of victims of human rights violations and abuses. And notwithstanding significant political change, responsible government authorities have failed to effectively address violations of the human rights of communities in the Terai (Nepal's southern plains bordering India), which has led to a debilitating polarization along ethnic and caste lines. The feints towards a return to armed conflict by the Maoist breakaway group led by Netra Bikram Chand (*nom de guerre* 'Biplap') was also raised by some during the Mission's visit as a harbinger of where inter- and intra-party tensions might lead if left unchecked.

In May 2018, the United Communist Party of Nepal (Maoist) merged with the Communist Party of Nepal (Unified Marxist-Leninist) to form the Nepal Communist Party. An agreement struck between KP Sharma Oli and Pushpa Kamal Dahal put Oli into the Prime Minister's office (for the second time) and established the seemingly most stable political alliance that Nepal has seen since the end of the conflict. This has had consequences: an increased tension between government and civil society, particularly the human rights community (manifest in attempts to introduce greater regulation of civil society organizations); attempts to push forward with a transitional justice process perceived by many victims and civil society as inadequately transparent or consultative; and political and bureaucratic impediments to the devolution of power to the provinces (including disputes over the federalism provisions of the 2015 Constitution). This environment has presented new challenges for human rights lawyers seeking to preserve the gains of the post-conflict period and translate legal and constitutional change into genuine improvements in peoples' lives.

On the positive side, incremental progress toward empowering provincial and local governments has created opportunities to address long-standing issues of human rights accountability, including the persistent use of torture and ill-treatment by police of detainees (a focus of the Mission). At least certain Chief Attorneys at the provincial level have shown interest in developing a common set of detention monitoring guidelines and procedures. The police command has expressed a commitment to reform, despite weaknesses in the implementation of existing law and policy. The Supreme Court, despite setbacks, remains a competent and influential institution – though its credibility and independence are under threat.

Nepal's International Law Obligations

Nepal, like all States, has a general legal obligation to respect, protect, and fulfill all human rights including civil, cultural, economic, political, and social rights. These obligations arise out of treaty obligations and customary international law. There are a number of human rights instruments that give shape and clarity to the obligations that are applicable to Nepal.⁹

Nepal is a party to many of the principal human rights treaties, including the:

- International Covenant on Civil and Political Rights (ICCPR)
(first) Optional Protocol to the ICCPR (allowing for international complaints)
Second Optional Protocol to the ICCPR aiming at the elimination of the death penalty
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
Optional Protocol to CEDAW (allowing for international complaints)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Rights of Persons with Disabilities (CRPD)
Optional Protocol to the CRPD (allowing for international complaints)
- Convention on the Rights of the Child (CRC)
Optional Protocol to the CRC on the involvement of children in armed conflict
Optional Protocol to the CRC on the sale of children, child prostitution and child pornography
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Nepal is not yet a party to the following:

- Optional Protocol to the ICESCR (allowing for international complaints)
- Optional Protocol to the CRC on a communication procedure (allowing for international complaints)
- Optional Protocol to the Convention against Torture (OPCAT) (providing for independent international monitoring of places of detention, and requiring the establishment of an independent national preventive mechanism)
- International Convention for the Protection of All Persons from Enforced Disappearance
- International Convention on the protection of the Rights of All Migrants Workers and members of their Families

⁹ A list of the treaties to which Nepal is a part can be found on the website of the Ministry of Law and Justice, at <http://www.moljpa.gov.np/wp-content/uploads/2019/04/List-of-Multilateral-Treaties-Signed-by-Nepal.pdf>

The indivisibility of human rights. Economic, social and cultural rights have been historically distinguished from civil and political rights in international law in large measure due to geopolitical factors that resulted in the division of human rights into two different treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). A rigid distinction between these categories of rights is inconsistent with the notion of rights as indivisible, interdependent and interrelated. The UN Office of the High Commissioner of Human Rights has called such distinctions “artificial and even self-defeating.”¹⁰ What is important about all human rights is that they are subject to the same regimes of legal accountability and the right to remedy and reparation.¹¹ It is through this framing that human rights and the rule of law cut across the artificial divisions between rights in international treaties. This report seeks to apply this rule of laws lens to analyze the systemic inequalities that prevent the enjoyment of the full range of rights.

The obligation to establish criminal liability and prosecute. While there are various forms of political and legal accountability under international human rights law and international humanitarian law, certain of the most serious violations are established as crimes under international law which require criminal liability and prosecution. These include, among other offences, genocide, war crimes, crimes against humanity, enforced disappearance, extrajudicial killings, torture and other ill-treatment.¹² Nepal has clear treaty obligations in this regard under the ICCPR (articles 2(3), 6, 7) and CAT (articles 3-13).

Describing these obligations under the ICCPR, the UN Human Rights Committee makes clear that “States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity....”¹³

This is reinforced by other standards of international law, including Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity which provides that: “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal

¹⁰ Office of the High Commissioner of Human Rights, “Frequently Asked Questions on Economic, Social and Cultural Rights,” pp. 8-10, available at <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>

¹¹ In the words of the United Nations Special Rapporteur on extreme poverty and human rights: “Whether in the home, village, school or workplace or in the political marketplace of ideas, it makes a difference if one is calling for the realization of collectively agreed and internationally recognized and defined rights to housing or education, rather than merely making a general request or demand... the legal conception of human rights presupposes and demands accountability.” Philip Alston, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/32/31, (2016), para. 8.

¹² A full treatment of these duties can be found in the ICJ’s *International Law and the Fight Against Impunity: Practitioner’s Guide No. 7* (2015), available at <https://www.icj.org/international-law-and-the-fight-against-impunity-icj-practitioners-guide-no-7-now-available-in-english/>

¹³ UN Human Rights Committee, General Comment 31 on the Nature of the General Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add 13 (26 May 2004), para. 18,

justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished”.

In the transitional justice setting, it is important to recall that while truth commissions or similar mechanisms are an aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights. There is a substantial body of international good practice that can inform police investigations into serious human rights violations such as the Minnesota Protocols for the Investigation of Unlawful Death.¹⁴

The right to an effective remedy and reparation. In addition to the question of criminal accountability, it is critical that victims of any human rights violation are able to enjoy access to justice in the form of an effective remedy and reparation. As a general principle across all legal systems and enshrined in article 8 of the Universal Declaration of Human Rights, every right must be accompanied by the availability of an effective remedy. This right is provided for expressly or in the jurisprudence of all international human rights treaties, including the ICCPR (article 2(3)) and the CAT (article 14) ¹⁵

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law was adopted with the consensus of all States by the UN General Assembly in 2005. The Basic Principle that applies to all violations, not only gross violations, is that “[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation...”¹⁶

Broadly speaking, then, the right entails the right of victims to obtain recognition of a violation(s), to cessation of any continuing violation(s) and to adequate reparation, including compensation, rehabilitation, restitution, satisfaction and guarantees of non-recurrence. The right to an effective remedy is therefore more than the State’s obligation to incorporate an

¹⁴ For more, see ICJ, *The Investigation and Prosecution of Potentially Unlawful Death: Practitioner’s Guide No. 14* (2019), available at <https://www.icj.org/the-investigation-and-prosecution-of-potentially-unlawful-death-icj-practitioners-guide-no-14/>. The ICJ has conducted workshops with Nepali prosecutors on the Protocols. Details at <https://www.icj.org/2nd-two-day-workshop-on-minnesota-protocol-for-public-prosecutors-in-nepal/>

¹⁵ The right to an effective remedy is contained in numerous international legal instruments, including most international human rights treaties and a number of declaratory instruments. In addition to the Universal Declaration on Human Rights, these include: the International Covenant on Civil and Political Rights (Article 2 (3)); the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention on the Rights of the Child (Article 39); the American Convention on Human Rights (Articles 25 and 63 (1)); the African Charter on Human and Peoples’ Rights (Article 7(1)(a)); the Arab Charter on Human Rights (Articles 12 and 23); the European Convention on Human Rights (Articles 5 (5), 13 and 41); the Charter of Fundamental Rights of the EU (Article 47); and the Vienna Declaration and Program of Action (Article 27).

¹⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, A/RES/60/147, principle 3

avenue for legal recourse in domestic legislation. Victims are entitled to the specific rights to obtain a legal decision on the merits of a case and recognition of the violation within a reasonable time; to demand that any ongoing violation is halted; and to receive full and effective reparation for the harm suffered. It is also fundamental that victims have equal and effective access to justice, particularly to the judicial organs that have jurisdiction to rule and issue legally binding decisions on remedies and reparation.¹⁷ In the context of Nepal, access to a remedy – or lack thereof – is the thread that ties together each and every rights issue, whether they be conflict-era civil and political rights violations, or contemporary concerns of discrimination or denial of economic, social and cultural rights.

Judicial independence and accountability. Under international law, every person has the right to be judged by an independent, impartial and competent court, with the observance of the basic guarantees of a fair trial. These include, among other elements, the presumption of innocence, the right to be informed of the charge, the right of defence, the right against self-incrimination, the principle of equality of arms, the right to test evidence, the prohibition against the use of information obtained under torture or other serious human rights violations, the non retroactivity of criminal liability and the right to judicial appeal.¹⁸ The independence and impartiality of the courts are principles that are universally recognized in international instruments.¹⁹ Courts must be effectively independent and free from influence or pressure from any of the other branches of government or other sectors. To achieve this, States have the obligation to adopt concrete measures that guarantee judicial independence and that protect judges from any form of political influence, whether through their appointment, remuneration, dismissal or imposition of disciplinary sanctions. The principle of independence and impartiality of the courts is not meant to grant personal benefits to judges, but to offer protection from abuse of authority and ensure the fair administration of justice. Therefore, alongside measures to protect independence, mechanisms must be put into place to ensure accountability for serious judicial misconduct, such as corruption or complicity in human rights violations.²⁰

II – SPECIFIC FINDINGS OF THE MISSION

The specific findings of the Mission are organized around three primary areas of focus – each with a corresponding thematic concern.²¹ The first is the legal recognition of human rights in law, policy and the constitutional framework. Here, Nepal has made notable strides through the reform of the law that references and, in some cases, incorporates significant elements of the international human rights law framework. This has been bolstered by the strong human rights jurisprudence of the Supreme Court. Unfortunately, human rights law has in many cases

¹⁷ See, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, A/RES/60/147, principle 8; and International Commission of Jurists, *Practitioners' Guide 2, revised edition: The Right to a Remedy and Reparation for Gross Human Rights Violations* (2018), available at <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

¹⁸ UN Human Rights Committee, General Comment 32 on the Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (23 August 2007); see also, ICJ, *Trial Observation Manual for Criminal Proceedings: Practitioner's Guide No. 5* (2009), available at <https://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/>

¹⁹ See, among others: Universal Declaration of Human Rights (article 10); International Covenant on Civil and Political Rights (article 14.1); International Convention on the Elimination of All Forms of Racial Discrimination (article 5.a); Convention on the Rights of the Child (articles 37.d and 40.2); Basic Principles on the Independence of the Judiciary; Guidelines on the Role of Prosecutors, and the Basic Principles on the Role of Lawyers.

²⁰ For a full treatment of these issues, see the ICJ's *Judicial Accountability: Practitioner's Guide No. 13* (2016), available at <https://www.icj.org/icj-launches-new-practitioners-guide-on-judicial-accountability/>

²¹ This section follows the analytical framework set out by the Special Rapporteur on extreme poverty and human rights in an April 2016 report to the Human Rights Council, UN Doc. A/HRC/32/31, (2016), paras. 20-29.

gone unimplemented, or even been actively undermined, by political leaders. This issue of a lack of **implementation** was a central theme for the Mission.

The second area of focus was the justice sector institutions created to safeguard and promote human rights and the rule of law – with particular attention to police, prosecutors, the judiciary, transitional justice mechanisms and national human rights bodies. Again, the Mission members found that while, formally, Nepal had made progress in establishing institutions with appropriate mandates, these institutions suffer from serious weaknesses in capacity and independence. Nepal’s institutions are vulnerable to political influence and manipulation at all stages of their work – from the appointment of their members to their operational practices. **Independence and impartiality** was a second theme that arose often during the Mission.

The third area of focus was obstacles to accountability for human rights violations and abuses, either pursuant to national law or Nepal’s international obligations. Frontline institutions, particularly the police, lack the leadership, political will and capacity to effectively interface with communities, especially ethnic and caste minorities. Ordinary Nepalis face overwhelming obstacles when they seek a remedy in the courts. The Mission found that the persistence of these obstacles, which have endured despite progress on the legal and institutional fronts, have done damage to public trust in government to a degree that threatens social stability. **Access to justice in the form of accountability** was the third over-arching theme of the Mission.

IIA – Ensuring the Effective Implementation of Human Rights

As described above, all States have an obligation to respect, protect and fulfil the full range of civil, cultural, economic, political and social rights, which involves taking effecting measures to implement those rights at the domestic level.²² This includes an obligation to adopt and enforce constitutional, legislative, judicial, administrative, educative, and other measures to give effect to their legal obligations, so that human rights can be enjoyed without discrimination.²³ In this regard, “[a]ll branches of government (executive, legislative and judicial), and any other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State”²⁴ in respect of its human rights obligations.

The Mission concluded that, overall, since the Comprehensive Peace Agreement was signed in 2006 and despite numerous political setbacks, Nepal has succeeded in adopting a strong, though imperfect, legal framework to protect human rights. The 2015 Constitution delineates and guarantees protection to 31 ‘fundamental rights,’ though there are some serious shortcomings, including the fact that it limits many rights protections to citizens only, in contravention of international human rights law.²⁵ The Supreme Court has produced an impressive body of human rights jurisprudence, for example in its rejection of governmental attempts to allow for impunity through amnesties and its 2007 judgement ordering the government to implement fundamental elements of international law on enforced

²² Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/74/CRP.4/Rev.6 (2004); Committee on Economic Social and Cultural Rights, General Comment No. 3 on the nature of State parties Obligations, contained in UN Doc E/1991/23 (1990).

²³ See Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/74/CRP.4/Rev.6 (2004), para 7.

²⁴ *Ibid.*, at para. 4.

²⁵ ICJ, *Nepal’s Draft Constitution: Procedural and Substantive Concerns* (July 2015), available at <https://www.icj.org/nepal-time-and-change-needed-to-fulfill-promises-for-a-new-constitution/>

disappearances.²⁶ Regrettably, its judgements often put it at odds with a government unwilling to take the necessary steps to enforce them. There have been genuine, though often poorly executed, policy efforts to address long-standing discriminatory practices and address poverty. The Mission also concluded that new federal structures offer promising opportunities for provincial governments to take forward human rights policies.

Unfortunately, as set out in this section of the findings, there is a persistent and ubiquitous problem of non-implementation. This implementation crisis cuts across all institutions and all branches of government. Constitutional provisions, national laws, administrative policies and judgements (at all levels of the judiciary) go unenforced especially when they involve politically contentious matters, implicate influential individuals, or involve substantial changes to working cultures of officials in the justice sector. The Mission members agreed that addressing and overcoming the lack of political will to enforce the law, and specific procedural and institutional obstacles that inhibit the implementation of human rights protections, is an urgent necessity.

The 2015 Constitution: Implementing Fundamental Rights Provisions

The extensive fundamental rights provisions of the 2015 Constitution were raised as a point of pride by many of those with whom the Mission members spoke. It is true that the Constitution protects a wide range of civil, cultural, economic, political and social rights (in Articles 16 to 46), including protections for LGBT persons and prohibitions on some gender discriminatory practices. It creates seven constitutionally mandated bodies to address inequalities faced by women, as well as the Madhesi, Muslim, indigenous, Tharu and Dalit communities, and a National Inclusion Commission. Its preamble presents ending discrimination and inequality as the Constitution's over-arching frame, and acknowledges the historical injustices faced by people based on their ethnicity, religion, gender, caste and other identities. However, as noted above, many of the provisions themselves are discriminatory, as they fail to extend protection to non-Nepali nationals, despite the fact that, with the exception of a few political rights, international law requires that these protections be extended to all persons under Nepal's jurisdiction.²⁷ In addition, the Mission heard consistently, especially from people from marginalized communities, that these provisions have had limited impact due to a lack of understanding and impartiality by officials, and poor enforcement at all levels of government.

The fact that Nepal denies human rights protections and government services to non-citizens makes the establishment of citizenship particularly important, especially to marginalized and disadvantaged people. One area of concern raised frequently during the Mission was the gap in both constitutional protection and enforcement relating to the intersecting issues of statelessness and gender inequality. Despite a clearly worded constitutional provision guaranteeing "equal lineage rights without gender based-discrimination," the government continues to enforce a highly discriminatory policy of denying citizenship to children born to Nepali mothers and foreign (or unidentified) fathers. Interlocutors reported that this policy was emblematic of a larger pattern of discrimination perpetrated against women from the Terai, based in part on the unjustified but sadly common demonization of foreign (Indian) born men as a threat to a patronizingly idealized view of Nepali women and culture – now frequently intertwined with populist and nationalist narratives in public discourse.

²⁶ See, for instance, ICJ, *Nepal's Supreme Court lays down the Gauntlet* (13 January 2014), available at <https://www.icj.org/nepals-supreme-court-lays-down-the-gauntlet/>

²⁷ A list of the rights in the Constitution that are citizenship dependent, and an analysis of the ways in which the Constitution fails to extend certain human rights protections to non-Nepali nationals can be found in the ICJ's July 2015 report, *supra* note 25, pp. 25-29.

Such provisions, in general and in the specific case of Nepal, have been clearly and unequivocally condemned by the UN Committee on the Elimination of Discrimination against Women, (CEDAW Committee) when reviewing Nepal's compliance with its obligations under the Convention.²⁸ In a number of decisions, the Supreme Court has also directed the Government of Nepal to revise the Nepal Citizenship Act 2006 so as to put it in compliance with the prohibitions on gender-based discrimination in the Constitution and international law.²⁹ The problem is compounded by the fact that decisions relating to the registration of births are primarily dealt with by local administrative officials, who effectively impose a citizenship test as a prerequisite for access to basic legal recognition or government services.³⁰

It was also apparent from the Mission that obstacles to securing citizenship are not restricted to gender. Longstanding systemic and structural discrimination based on caste and ethnicity also play a role in preventing issues of effective statelessness from being properly addressed. Landless Dalits and Madhesi communities face great difficulty in documenting their claims to citizenship and experience prejudicial treatment from local officials who exercise great discretion in the issuance of birth registration certificates and other documents crucial for accessing public services. These procedural and bureaucratic obstacles are exacerbated by persistent and widespread discriminatory attitudes particularly against Madhesis (Nepalis of Indian ancestry), ethnic minorities and members of low-caste groups. The Mission reminded government interlocutors that Nepal has an international obligation to respect, protect and fulfill the human rights of all persons in its territory or otherwise within its jurisdiction, without discrimination on any grounds, including citizenship status.³¹

As for the new commissions, at the time of the visit, several of these bodies (the Madhesi Commission, Indigenous Nationalities Commission, National Dalit Commission, Tharu Commission, Muslim Commission and National Women's Commission) had not had their chairs or all of their members appointed or budgets allocated, and so were not fully functional. At the time of publication of this report, the Constitutional Council responsible for making these appointments had not met for more than a year.

Concerns were also raised about the weak investigative powers of the commissions and their lack of capacity to effectively monitor or challenge government policy. While acknowledging the symbolic importance of creating these commissions and giving them a constitutional mandate, Mission members noted the significant risk that establishing so many different bodies - all constrained by similarly limited mandates and powers - might end up undermining their

²⁸ Committee on the Elimination of Discrimination against Women, CEDAW/C/NPL/CO/6, para. 30.

²⁹ A summary of the Supreme Court decisions can be found on the website of the Forum for Women, Law and Development at <http://fwld.org/core-areas/legal-identity-and-citizenship/>. A draft amendment to the Act was before the legislature as this report went to press. The amendment, if passed, would protect some rights for the children of women who are foreign nationals married to Nepali men, but would deny them others, and does nothing to resolve the underlying discrimination described here.

³⁰ The discriminatory withholding of birth registration based on citizenship status is incompatible with international law. See, UN High Commissioner for Human Rights, *Birth registration and the right of everyone to recognition everywhere as a person before the law* (17 June 2014), A/HRC/27/22, paras. 23-24.

³¹ UN Treaty bodies have made it clear that the human rights protections set out in human rights treaties are not limited to citizens – with some very narrow exceptions (such as voting and access to serve in public service). For example, Human Rights Committee, General Comment No. 15, The Position of Aliens Under the Covenant, HRI/GEN/1/Rev.1 at 18 (1994); Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (1 September 2005); CEDAW Committee, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32 (14 November 2014).

overall effectiveness.³² Even the National Human Rights Commission, which has the most robust mandate and expansive powers, as well as a historic legacy of using those powers effectively, has struggled to assert its independence (see analysis below).

Enforcing Law and Policy: Obstacles to Ending Torture and ill-treatment, Chhaupadi and Marital Rape

Article 47 of the 2015 Constitution requires the State to adopt legislation to implement the rights protections set out in its fundamental rights provisions within three years of the Constitution coming into force.³³ By the September 2018 deadline, 16 separate bills addressing a range of issues including land, consumer, labour and environmental rights as well as legislation on racial and caste discrimination had been passed by the Parliament. However, representatives of minority communities and human rights defenders raised concerns that the administrative regulations required to operationalize these general legal provisions had yet to be adopted. At the time of the Mission, only implementing regulations on the right to social security and employment had been issued. Some had suspicions that officials were deliberately giving low priority to regulations affecting low caste and ethnic minority communities. Human rights defenders and civil society repeatedly raised concerns about the lack of consultation or public debate when these draft laws and regulations were being prepared.

One example of an apparently progressive reform of the legal framework that has failed the implementation test are certain provisions of the Penal Code, which came into force in August 2018, and criminalize torture (Article 167), degrading or inhuman treatment (Article 168) and enforced disappearance (Article 206).³⁴ The inclusion of these new provisions was cited by many interlocutors both in government and civil society as a welcome development, and represented a significant improvement in the law, despite their falling short of international standards in some respects.³⁵ Unfortunately, there is little evidence that these provisions are being used by those tasked with the administration of justice, including police, prosecutors, and the judiciary. As of June 2020, the ICJ and its partners have not been able to document a single case of the criminal offences and penalties set out in Articles 167, 168 and 206 being used to charge or

³² These commissions suffer from the same infirmities as past *ad hoc* commissions (limited and redundant mandates, lack of effective authority, vulnerability to political manipulation, and poorly-defined links to the justice system). The ICJ reviewed 38 commissions established between 1990 and 2010 and concluded that they had primarily served political ends without accounting for serious crimes and human rights violations. International Commission of Jurists, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity* (June 2012), at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf>.

³³ Article 47 states that "For the enforcement of the rights conferred in this Part, the State shall make legal provisions, *as required*, within three years of the commencement of this constitution" (emphasis added).

³⁴ *The National Penal (Code) Act, 2017: An Act Made to Amend and Consolidate Laws In Force Relating To Criminal Offences* (date of authentication: 16 October 2017), available at <http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf>

³⁵ Weaknesses include omission of a provision on superior command responsibility that complies with international standards; failure to recognize the continuous nature of the crime of enforced disappearance or its status as a crime against humanity; a six-month limitation period to file complaints; and penalties incommensurate with the gravity of the crimes. The definition of "torture" is also narrowly limited to torture inflicted while in a place of custody or detention. In practice, in Nepal, torture or other cruel, inhuman or degrading treatment commonly occurs at the point of contact with the police, even prior to arrest and transport to a detention center. For more detailed analysis of these deficiencies, see *Nepal: ICJ Submission to the UN Universal Periodic Review* (10 July 2020), available at <https://www.icj.org/nepal-icj-submission-to-the-universal-periodic-review-upr/>. For an analysis of the draft bill, see International Commission of Jurists, *Serious Crimes in Nepal's Criminal Code Bill* (March 2017), at <https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf>

prosecute perpetrators.³⁶ Despite repeated inquiries, including with the Office of the Attorney General, no official statistics on the use of these new provisions appear to be available.

Victims of torture and other ill-treatment, arbitrary detention and other serious crimes reported that they continue to struggle to overcome the same obstacles that they have always faced when seeking a remedy for the violations committed against them (discussed further below). While incidents of torture and ill-treatment in police custody have overall decreased as a consequence of the cessation of hostilities in the armed conflict in 2006, they remain stubbornly prevalent – particularly in the Terai.³⁷

Other egregious examples of how the most unlawful practices continue even when an unequivocal prohibition is written into law, the Constitution and in Supreme Court jurisprudence, are the persistence of *chhaupadi* and marital rape. The practice of *chhaupadi*, by which women are forced to live in horrid and sometimes lethal conditions outside of the home during menstruation, continues to be prevalent in the far western region of Nepal.³⁸ Women and girls continue to suffer, and even die, as a result of *chhaupadi* notwithstanding its criminalization in Section 168 of the Penal Code, prohibition by Ministry of Women, Children and Social Welfare Guidelines, and condemnation by the Supreme Court in its jurisprudence.³⁹

Similarly, marital rape was expressly outlawed in the Country Code (*Muluki Ain*) in 2006 after the Supreme Court declared the practice unconstitutional two years earlier.⁴⁰ In a subsequent decision, the Court also ruled that the lesser punishment for marital rape (versus non-marital rape) was a violation of the principle of equality, and ordered the government to correct the disparity (it has yet to do so).⁴¹ Preventing, and redressing marital rape requires a positive and dedicated effort of due diligence by state authorities, as well as the independent bar, but recent data and anecdotal reports shared with the Mission suggest that far more could be done to improve implementation of the law and to make it easier and safer for women to take their concerns to the justice system. One human rights defender in Janakpur reported that lawyers

³⁶ ICJ, AF and THRD Alliance, “Nepal: Despite new criminal laws, impunity for acts of torture prevail” (26 June 2020), available at <https://www.icj.org/nepal-despite-new-criminal-laws-impunity-for-acts-of-torture-prevails/>

³⁷ Although civil society data is incomplete, and official data nearly non-existent, there appears to be an increase in reports of torture over the past few years, after a gradual decline since 2011. Of more than 1000 police detainees interviewed by the Advocacy Forum in 2018, 22.2% reported mistreatment that may amount to torture. Advocacy Forum-Nepal, *Rise of Torture in 2018: Challenges Old & New Facing Nepal* (June 26, 2019), at advocacyforum.org/downloads/pdf/publications/torture/june-2019-report.pdf?m=1561458640. In 2017, according to data from the Terai Human Rights Defenders Alliance, detainees from ethnic minorities and lower castes reported being tortured at higher rates than others (~30%). Only 1.5% of those interviewed were informed of the reason for their arrest at the time of arrest (in violation of Article 20 of the Constitution), and 14% reported not having been brought before a judge within 24 hours of arrest (in violation of Article 14 of the Criminal Code). Terai Human Rights Defenders Alliance, *Torture in the Terai 2017: Victims awaiting justice* (January 2017), at <http://www.thrda.org/publication/torture-in-the-terai-2017-victims-awaiting-justice/>

³⁸ The National Human Rights Commission documented the deaths of 13 women and girls in one district alone over the past 13 years. It is further indicative of the scarcity of data that the ‘national inquiry program’ only collected data in two districts (Accham and Dailekh). See, National Human Rights Commission, *Report on the National Inquiry Program related to Chhaupadi* (22 March 2019), available at https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Chhaupadi_final%20report_compressed.pdf

³⁹ *Dil Bahadur Bishwakarma v. the Prime Minister and Ministers of Council and Others*, Nepal Law Journal 2004 (2062 BS), Issue 4, Decision no. 7531, available at <http://nkp.gov.np> (in Nepali)

⁴⁰ *Advocate Meera Dhungana v. His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs*, Writ no. 55 2001-2002 (2058 BS), available at <https://globalhealthrights.org/wp-content/uploads/2013/10/The-Forum-for-Women-and-Law-and-Development-Nepal-2002.pdf>

⁴¹ *Jit Kumar Pangei (Neupane) v. Nepal Government, the Prime Minister and Ministers of Council and Others*, Nepal Law Journal 2008 (2065 BS), Issue 6, Decision no. 7973.

are reluctant to take on marital rape cases, and prosecutors do not take action due to community pressure and an overall lack of sensitivity to the plight of the victims.

Interlocutors who spoke to the Mission identified a number of challenges to reducing or eliminating these practices including the persistence of cultural stereotypes, a lack of public education, cultural and social barriers making women reluctant to report, and misogynistic traditional practices. The question for the mission was what the responsible State authorities, in particular from the justice sector, are doing to overcome these challenges in the exercise of their responsibilities as public authorities. Many of those with whom the Mission spoke came back to the same concerns around the lack of capacity and political will by government officials to enforce the law, and the barriers to obtaining an effective remedy for violations. These intersecting root causes of impunity will be further addressed in Section III of this report, below.

Implementation of the Decisions of the Judiciary and Constitutional Bodies

Since the end of the conflict, the Supreme Court has played a crucial role in protecting human rights. In a relatively short period of time, the Court transformed itself from an institution with questionable relevance into a body that has produced some of the most important human rights jurisprudence in South Asia.⁴² There was a near consensus among those with whom the Mission met that the Supreme Court continues to effectively carry out its responsibilities under Nepal's constitution and international law in protecting human rights. This has helped to prevent the government from backsliding on past commitments. For the most part, the Mission was impressed with the competence and capacity of the judges with whom it met at all levels of the judiciary in Kathmandu and Janakpur.

While the Supreme Court and some lower courts have been active in securing human rights, the Mission considered that non-implementation of some of their key judicial decisions was a condemnable abdication of responsibilities on the part of the executive authorities. There was a widespread feeling – shared by judges themselves – that the problem of non-implementation had become so acute that it threatened to diminish the stature and credibility of the judiciary in the eyes of the public. According to a report commissioned by the ICJ and National Judicial Academy in 2016, more than 50 per cent of Supreme Court and Appellate Court orders on transitional justice had not been executed.⁴³ While the ICJ does not have more recent data, interlocutors from the legal community suggested that this trend was continuing. The absence of reliable data on implementation was identified as a serious issue.

Both the Supreme Court and Office of the Prime Minister have established their own mechanisms to monitor implementation and compliance. The Court's statistics, about which the Mission heard only anecdotally, were reliably reported to the mission to have asserted unrealistically high implementation rates.⁴⁴ One explanation offered for this positive spin on what most observers seems to agree is a ubiquitous problem was the practice of classifying

⁴² The contribution of the Court, and its use of international law in its judgements, has been well-documented elsewhere. ICJ, *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal* (January 2012); International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Nepal* (July 2017), p. 21, at <https://www.icj.org/nepal-search-for-truth-and-justice-continues-new-icj-report/>

⁴³ National Judicial Academy and International Commission of Jurists, *Study Report on Execution Status of Supreme Court and Appellate Court Orders/ Judgments relating to Transitional Justice* (December 2016).

⁴⁴ The Supreme Court does publish some hard to interpret general data on the execution of judgements in its annual report. Between June 2018 and July 2019, of a total of 1425 writ petitions decided by the Court, a directive, mandamus or other order was issued in 206 cases. Thirty-eight decisions were executed during this period. Supreme Court of Nepal, Annual Report 2018/2019 [Sarwaochha Adalatko Barsik Pratedhan, 2075/2076], available at <http://supremecourt.gov.np/web/assets/downloads/annual/An7576.pdf> (in Nepali)

decisions that are 'partially implemented' as 'implemented' in official statistics.⁴⁵ A representative of the Law and Judgement Execution Division in the Office of the Prime Minister made the untenable claim that they had achieved 100% compliance. Such assertions do a disservice to the judiciary, as well as to those coming to the courts to seek a remedy for human rights violations or even ordinary crimes.

The non-compliance by government officials with judicial decisions has resulted in a disconnect between success in courtrooms and the expectations of persons seeking to use the court to ensure that their rights are protected, especially victims of human rights violations. Indeed, the testimony offered by victims of both conflict-era and post-conflict human rights violations illustrated a pattern of intransigence by those responsible for implementing judgements, and a disturbing indifference to the plight of victims – some of whom have been engaged with the courts for many years. Their stories contrasted starkly with the dismissive attitude of some of the government officials with whom the Mission engaged.

In one compelling case, a victim's family had been waiting ten years to receive the meager compensation to which the family was entitled after fighting through the judicial system for a conflict-era enforced disappearance. In another instance, the wait for court-ordered compensation in a case of alleged torture had exceeded seven years since the time of judgement. And in yet another, despite two court rulings in favor of the victim, no compensation had been received after more than 18 months of waiting. These stories of waiting for years to receive court-ordered compensation are sadly common.

These systematic failures of the justice system are not limited to conflict-era violations. Victims of more contemporary extra-judicial killings, arbitrary and other unlawful detention and torture and ill-treatment described a similar pattern of obstruction and non-implementation. Cases brought to the attention of the Mission include instances of severe beatings in police custody, extra-judicial killings (explained away as 'encounter killings' by police), and deaths resulting from the unlawful use of force by police during demonstrations in the Terai in 2015.⁴⁶ Victims and their lawyers reported that the justice system had failed so utterly to take these killings seriously that a petition had been filed with the Supreme Court seeking the creation of an independent investigative agency to pursue the allegations.⁴⁷ Many spoke of the cascading effects that having a close family member subjected to torture, unlawful killing or enforced disappearance can have, including mental and emotional breakdown, instability in the household and community, devastating impacts on livelihoods and loss of trust in government.

⁴⁵ The last publicly available date on the implementation of judgements published by the Office of the Prime Minister and Council of Ministers in 2016 appears to classify most of the partially implemented decisions as fully implemented in official statistics. Nepal Government, Office of Prime Minister and Council of Ministers, Report on Implementation of Supreme Court Order related to the Public Interest conflict, 2015/2016 (7 August 2016), available at <https://www.opmcm.gov.np/>

⁴⁶ The ICJ examines two of these last cases in depth in a forthcoming publication, *Investigating Unlawful Killings in the Terai: The cases of Rohan Chaudari and Nitu Yadav* (June 2020).

⁴⁷ On January 6, 2020, the Supreme Court granted a writ of mandamus ordering the formation of the commission – though a written decision had yet to be issued, and no action had been taken at the time of publication. Unfortunately, as discussed above, Nepal's record on effective investigations by *ad hoc* commissions of inquiry is poor. One pertinent example is the inquiry commission led by former Supreme Court justice Girish Chandra Lal, mandated to investigate abuses by the security forces during protests in the Terai (which resulted in the deaths of at least forty-five people, including security personnel and one child). Controversially, the government has not made the report (submitted to the Prime Minister in December 2017) public despite an October 2019 Supreme Court directive to do so. THRD Alliance, *Supreme Court directs information commission to respond to writ regarding Lal Commission report* (18 October 2019), available at <http://www.thrda.org/forwarded/supreme-court-directs-information-commission-to-respond-to-writ-regarding-lal-commission-report/>

Seasoned human rights lawyers expressed great frustration to the Mission about their inability to effectively use the large and growing number of positive judicial decisions to affect meaningful changes in policy and practice. One lawyer reported to the Mission that human rights defenders were having second thoughts about bringing cases to force implementation of lower court decisions to the Supreme Court due to their lack of efficacy. They cited recent Supreme Court precedent ordering the government to abide by the binding recommendations of the National Human Rights Commission. That judgement has not only gone unimplemented but was answered by an attempt to introduce amendments to the law that would undermine the NHRC's independence (more on this, below). These attacks on precedent culminated in the revival of an attempt by the government to have the Supreme Court reverse its most important precedent on impunity and transitional justice. Fortunately, the Court rejected the petition and refused to revisit the ruling.⁴⁸

IIB – Securing Independent and Impartial Rule of Law Institutions

Independent, competent and impartial institutions charged with the administration of justice are fundamental to the preservation of the rule of law and the protection of human rights. Without such functioning institutions, the rights set out in treaties and under customary international law will not be given full practical effect. Governmental authorities of the executive and legislative and, in certain respects, private actors have responsibilities under international law, but their authority must be complimented and checked by justice sector actors.

The independence, impartiality and accountability of judges, and, at least in a functional sense, prosecutors and other justice actors, are the instrumentality by which rights can be effectively vindicated. They are often the only meaningful safeguard against incursions from the misconduct, including human rights violations and abuses, of governments or other powerful actors. As described above, there is a well-developed body of international standards that describe the scope and application of these principles.⁴⁹

The UN Basic Principles on the Independence of the judiciary affirm that Judges “shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”. Similarly the UN Guidelines on the Role of Prosecutors establish that “States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability .”

In addition to overt improper influences, including through political manipulation, intimidation and interference by governments or other influential actors, justice sector and human rights institutions often suffer from a lack of human and material resources, or capacity to effectively integrate international law and standards into their work. Issues of internal accountability, such as a lack of independence within the internal institutional hierarchy, compromised appointment processes and inadequate internal monitoring and disciplinary mechanisms can also diminish the effectiveness of these institutions to preserve the rule of law.⁵⁰

⁴⁸ ICJ, *Nepal: Supreme Court's decision reaffirms the need to amend transitional justice law* (1 May 2020), at <https://www.icj.org/nepal-supreme-courts-decision-reaffirms-the-need-to-amend-transitional-justice-law/>

⁴⁹ Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 (1985) and 40/146 (1985); Basic Principles on the Role of lawyers and Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

⁵⁰ See International Commission of Jurists, *Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007); and *Practitioners Guide No. 13: Judicial Accountability* (2016), at <https://www.icj.org/category/publications/practitioners-guides-series/>

As discussed above, Nepal has relatively robust legal and constitutional protections that suffer from a lack of effective implementation. Similarly, the Mission concluded that while Nepal appears to have a reasonably strong institutional framework to protect human rights, in practice, these institutions are hobbled by political interference, lack of capacity and persistent and well-grounded questions about their credibility and trustworthiness. Interlocutors expressed a common frustration that the justice and security sector institutions, which have as a central purpose the protection of their rights, were too often serving the needs and interests of a small political, caste and ethnic elite.⁵¹

The following section will assess these challenges in the context of three institutions: the judiciary, law enforcement and national human rights institutions. Here it should be underscored that the authorities comprising the justice sector, including the judiciary, police, prosecutors and national human rights institutions, are distinctly different institutions, each with their own mandates and functions. The performance of each in terms of the fair administration of justice and human rights compliance will of course vary, not only among institutions, but also among geographical jurisdictions. Nonetheless, it is fair and appropriate to describe some characteristics at the most general level. All suffer in varying degrees from similar deficiencies in respect to a lack of independence, human and material resources and political will from their leadership to investigate and, where substantiated to pursue effective redress and accountability, prosecute allegations of human rights violations and abuses.

The Judiciary: Protecting Independence and Ensuring Accountability

The Nepal judiciary, and the Supreme Court in particular, has played an important role in promoting and protecting human rights. It has repeatedly (if sometimes inconsistently) pushed back against government over-reach, and delivered important human rights decisions on issues including torture,⁵² transitional justice,⁵³ *habeas corpus*,⁵⁴ gender equality,⁵⁵ LGBTI rights,⁵⁶ reproductive health,⁵⁷ and caste-based discrimination.⁵⁸

⁵¹ For an analysis of the how patronage networks that underly this apparent state dysfunction provide stability to an otherwise chaotic political system. See, International Crisis Group, *Nepal's Political Rites of Passage* (29 September 2010), at <https://www.crisisgroup.org/asia/south-asia/nepal/nepal-s-political-rites-passage>

⁵² *Rajendra Ghimire and Others v. Office of the Prime Minister and Others* (17 December 2007)

⁵³ *Liladhar Bhandari v. the Government of Nepal* (7 January 2009), *Sunil Ranjan Singh v. the Government of Nepal* (13 August 2010), *Madhav Basnet for JuRI-Nepal v. Government of Nepal and Ram Kumar Bhandari and Others v. Government of Nepal* (2 January 2014); *Suman Adhikari and others v. Government of Nepal* (26 February 2015)

⁵⁴ *Rajendra Dhakal v. the Government of Nepal* (1 June 2007)

⁵⁵ *Meera Dhungana vs. Ministry of Law, Justice and Parliamentary Affairs, et al.* Writ No. 55 of the Year 2058, Order (2 May 2002) [marital rape]; *Pun Devi Maharjan v Government of Nepal, Office of Prime Minister and Council of Ministers and Others*, Writ No. 3581 (2005), *Sapana Malla Pradhan v Prime Minister and Council of Ministers*, Writ No. 064- WS-0011 (2007) [marriage equality]

⁵⁶ *Sunil Babu Pant and Others v. Government of Nepal and Others* (21 December 2007); *Rajani Shah v. National Women Commission et. Al* (11 April 2013); *Suman Panta v. Ministry of Home Affairs et al.* (23 October 2017)

⁵⁷ *Lakshmi Dhikta v Government of Nepal* (20 May 2009); *Prakash Mani Sharma and Others v Office of Prime Minister and Council of Ministers and Others* (4 June 2008); *Sapana Pradhan and Others v Prime Minister and Council of Ministers and Others*, Special Writ No. 98 of the Year 2062 (2005)

⁵⁸ *Mana Bahadur Bishwokarma vs. His Majesty's Government of Nepal*, Writ no. 2505 of 1992; *Dil Bahadur Bishwokarma vs. His Majesties' Government of Nepal*, Writ no.3138 (2004); *Ratna Bagchand vs. Government of Nepal*, Writ no.3138 of 2005 AD, *Suk Lal Nepali vs. His Majesty's Government of Nepal*, writ no.2873 (2005)

When faced with an unresponsive government administrative apparatus, victims alleging human rights violations reported to the Mission that seeking a judicial remedy was their main recourse. For their part, judges at all levels reported concern about their lack of capacity to deliver on such high expectations, as well as a constant struggle to reconcile the interests of justice with political and other forms of undue influence upon their work.

The Mission had the opportunity to engage with diverse stakeholders, including lawyers, human rights defenders, victims, and prosecutors about the role of the judiciary. Several themes stood out relating to threats to formal and functional independence, including undue pressures on judges; concerns about the integrity of the appointment process; the exercise of quasi-judicial powers by newly constituted judicial committees; and the lack of ethnic, gender and caste diversity at all levels of the judiciary - including both judges and court staff.

All of the judges with whom the Mission spoke, both in Kathmandu and Janakpur, reported that they felt some level of pressure when cases came before them that involved sensitive subject matter or politically well-connected persons. At the highest and most public level, Nepal has seen overt attacks on the Supreme Court, illustrated by the Parliament's effort to remove (now retired) Chief Justice Sushila Karki after she intervened in an apparently illegal appointment of a new police chief by the Cabinet.⁵⁹ At the level of the Supreme Court, numerous people including judges expressed concern about the lack of transparency and the potential for undue influence in the allocation of cases to judicial panels.⁶⁰

At the regional and district-levels, judges experience even more persistent and insidious forms of pressure from local government officials or influential persons. Judges often face pressures to issue satisfactory decisions for influential litigants or defendants.⁶¹ Lower court judges reported feeling under significant pressure to issue arrest warrants without an adequate evidentiary basis, despite provisions in Section 9 the Criminal Procedure Code that require a sound evidentiary and legal basis be provided for their issuance.

A second area of concern that emerged in the Mission's meetings was the appointment of judges. Under international standards, bodies responsible for judicial appointments should be constituted at least by a majority of judges that adequately represent the non-government community, and the process must be open and transparent.⁶² Despite long-standing concerns about its independence, Article 153 of the 2015 Constitution retained the Judicial Council - comprising the Chief Justice, a senior Supreme Court judge, the Minister of Law and Justice, a legal expert nominated by the President, and a senior advocate appointed by the President on the recommendation of the Nepal Bar Association. Some lawyers complained that the Council is practically and effectively under the control of the executive branch and questioned the ability of its members to act independently.

⁵⁹ ICJ, *Nepal: Parliament should reject motion to impeach Chief Justice* (2 May 2017), at <https://www.icj.org/nepal-parliament-should-reject-motion-to-impeach-chief-justice/>

⁶⁰ See Istanbul Declaration on Transparency in the Judicial Process, Principle 5: The judiciary should ensure transparency in the assignment of cases, available at <http://www.summitofhighcourts2018.com/en/home.html>

⁶¹ Principle 4 of the UN Basic Principles on the Independence of the Judiciary speaks clearly about interference of this kind: "[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision".

⁶² For instance, the International Bar Association's Minimum Standards of Judicial Independence (1982), available alongside other relevant international standards at <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/>

The Judicial Service Commission, which appoints the civil servants who operate the administrative infrastructure of the court (including court clerks, who act as gatekeepers) is even more weighted toward the executive branch. Article 154 of the Constitution sets the membership of the Commission as the Chief Justice, Minister of Law and Justice, Chairperson of the Public Service Commission, Attorney General and a senior Supreme Court judge. A constitutional amendment will be needed to correct the formal deficiencies in the appointment procedures. But in view of the significant questions about the independence of these bodies, consideration should be given to increasing the level of transparency and public engagement around the appointment process, absent an immediate opportunity to adjust their membership.

The Constitution preserves a unitary national judiciary, such that subsidiary courts continue to fall under the supervision of the Supreme Court. However, Article 217 does allow for the establishment of local bodies empowered to adjudicate some cases, and send others to alternative dispute settlement.⁶³ The implementing legislation enumerates certain areas over which the committees' jurisdiction may extend, including over disputes brought to them by community members that include certain criminal offences.⁶⁴ The lists, however, lack precision, and it is not clear how they were developed, or according to what criteria. That the precise subject matter jurisdiction of these bodies remains vague and undefined is problematic from a rule of law perspective.

To the extent that the committees act as alternatives to, and not a displacement of, the ordinary courts and their subject matter is appropriately circumscribed, they could have potential to improve access to justice through a type of mediation. They are led by deputy mayors or vice chairpersons, over 90 percent of whom are women by virtue of a constitutional provision that requires gender-balanced electoral tickets at the municipal level. Stakeholders raised concerns about fairness and due process given the lack of training of many committee members, as well as the lack of any formal means of holding them accountable if they act in a way that lacks impartiality and independence.⁶⁵ A number of people expressed confusion as to whether these bodies should be referred to as courts, 'quasi-judicial' bodies or alternative dispute mechanisms, and whether the members should appropriately be described as judges.

While Articles 128 and 136 of the Constitution give the Supreme Court and the Chief Justice an oversight role, there is dispute as to what that role entails, and no indication at present that the Court will exercise it. Section 21 of the Judicial Administration Act also states that "an appeal-hearing court shall, at least once a year, inspect its subordinate courts and the offices of judicial or quasi-judicial bodies and authorities". However, the Mission was not made aware of any instances in which the courts had intervened or exercised a supervisory role vis-à-vis

⁶³ Article 127(2) of the Constitution allows for, but does not compel, the formation of 'judicial bodies... at the local level to try cases under law or other bodies as required.... to pursue alternative dispute settlement methods.' It is the Local Government Operation Act that required the formation of judicial committees in every urban and rural municipality, and set out their jurisdiction. Sections 46 and 47, Local Government Operation Act, 2017

⁶⁴ There are two lists under section 47(1) and 47(2) of the Local Government Operation Act. If mediation fails, the committees can issue a binding, non-appealable decision in 'less serious' cases listed under section 47(1) (including property damage, failure to pay wages, neglect of senior citizens, and other offenses). In more 'serious' cases under section 47(2) (including battery that does not cause disfigurement, defamation, looting, trespass, divorce matters and other issues), the committees cannot adjudicate - but can refer the matters to mediation, and parties can file cases with the courts if mediation fails pursuant to section 47(3) and 49(4).

⁶⁵ Of a total of 753 people elected in 2015 to the posts of Deputy Mayor/ Vice-Chairpersons, which chairs the judicial committee in each jurisdiction, 700 were women. The intersection of due process concerns and women's political participation in the context of judicial committees is explored in more detail in the ICJ's briefing paper Supporting Women Human Rights Defenders in Pursuing a Human Rights Agenda as Political Actors (February 2018), available at <https://www.icj.org/nepal-new-briefing-paper-on-women-human-rights-defenders-as-political-actors/>

the committees. It also noted that there was disagreement among judges, human rights lawyers and committee members themselves about the appropriate role and mandate of these committees, including some discomfort with their characterization as 'judicial' bodies.

A review and clarification of the existing applicable law is needed to ensure that these bodies are not addressing matters that are appropriate for courts; that courts can exercise concomitant jurisdiction where desired by a party or where demanded by the interests of justice; that fundamental elements of the right to a fair hearing under international law standards are guaranteed; and that these bodies are independent and impartial. Nepal has had a problematic legacy of giving political Chief District Officers a role that should be reserved to judicial authorities in criminal cases.⁶⁶ This is linked to a troubling history of local administrative bodies abusing quasi-judicial powers, particularly during the conflict period, to arrest and detain people without the protections of the criminal justice system. This misapplication of judicial function should not be replicated here.

Another issue of concern that the Mission was not in a position to investigate in depth was a lack of ethnic and caste diversity in the judiciary. Notwithstanding the Constitution's repeated invocation of the principle of "proportional inclusion," and the establishment of a National Inclusion Commission, recent statistics show that only 28 female judges and 62 judges from all of Nepal's minority and indigenous communities (of a total 401 judges) have been appointed to all levels of the judiciary (Supreme Court, High Court and District Court).⁶⁷ This suggests that Section 5 of the Judicial Council Act, which requires appointment to be made in accordance with the principle of proportional inclusion, and the Judicial Council Rules, which set out quotas for women and minorities, are not being effectively implemented.⁶⁸ International standards are clear that judges, appointment bodies and judicial officers should be broadly inclusive and include adequate representation from women and marginalized groups.⁶⁹

This discrepancy was of great concern in Janakpur, where the mission heard discontent expressed by both government and non-government actors about the lack of Madhesi representation in all government institutions, including the judiciary. It was noted that the provincial-level Judicial Service Commissions envisioned under Article 156 of the Constitution had not yet been created because the required federal implementing legislation had never been introduced. These bodies, once established, would have responsibility for the appointment, transfer and promotion of judicial officers, as well as some responsibility for taking disciplinary action. It was clear that ambiguities about the role and mandate of these bodies need to be clarified in a way that takes into account both provincial concerns about local control and representation, as well as safeguards for the independence of judges and judicial officers.

⁶⁶ In 2015, human rights lawyers challenged the constitutionality of certain quasi-judicial powers of Chief District Officers in the Supreme Court. The Court order that the government revise the laws that gave CDOs power to make criminal determinations and in some cases, issue prison sentences. *Bishnu Lama v. Chief District Officer Kathmandu* Writ No. 072-WH-0018 (November 3, 2015) (Rt. Hon Kalyan Shrestha and Hon Sushila Karki)

⁶⁷ Data is from the Judicial Council's website at <https://jcs.gov.np/judges>

⁶⁸ Judicial Council Act, 2016 (2063 BS), available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/judicial-council-act-2073-2016.pdf>; Judicial Council Rules 2017, available at http://jcs.gov.np/regulations/1547182068Nyaya_Parisad_Niyamawali_2074_educed.pdf (in Nepali)

⁶⁹ See, ICJ, Practitioners Guide No. 13, pp. 38-40; see also, UN Special Rapporteur on Minority Issues, Report on minorities in the administration of justice, UN Doc A/70/212 (2015), paras 79-93, 109-110.

The Police and Prosecutors: Addressing Impunity through Institutional Reform

The police are more often than not the first stop for individuals who have been victims of serious crimes or human rights violations. In addition to being charged with a primary protective function, they necessarily act as gatekeepers to the prosecutors and other engaged components of the government administration, and ultimately to the local courts. Therefore, the quality of the relationship between the police and communities will have a dispositive impact on the credibility of the justice system as a whole, objectively and in the eyes of the public. For their part, prosecutors often exercise immense discretion as to whether or how to pursue criminal charges. The Attorney General, appointed by the President, is an influential position with broad discretion to initiate or forgo prosecution even in the most serious cases. Without independent and professional prosecutorial services, it is impossible to secure access to justice for most victims.

When police are implicated in human rights violations, they must be subject to prompt, thorough independent and impartial investigations. In addition, prosecutors who decline to pursue charges for reasons which are unstated or appear to be biased must be subject to oversight and accountability. Investigations into police and prosecutorial misbehavior that might constitute or facilitate a human rights violation - such as torture or cruel, inhuman or degrading treatment- must be conducted by a civilian body, or a civilian entity within the police force but independent from its chain of command.⁷⁰

The Mission gave notable attention to the issue of police accountability for torture and ill-treatment in detention. As set out above, torture and ill-treatment has long been prevalent in Nepal and is exacerbated by a lack of police capacity, indiscipline, a lack of training and poor investigative practices. It remains common practice for the "confession" of information provided by detainees as result of torture, ill-treatment or coercion, to serve as the primary (and sometimes sole) piece of "evidence" in an investigation. Even on the rare occasion when torture or ill-treatment during interrogation is acknowledged, allegations are usually resolved through an informal resolution process and the offer of nominal *ex gratia* payment in lieu of real reparation. Medical examinations, which are required by law after an arrest, are cursory, and often happen in the presence of the arresting officers.

The Mission raised these concerns with the Nepal Police at several levels, including with the Inspector General of Police (IGP), Sarbendra Khanal. The IGP welcomed the Mission and spoke openly of the historical pattern of abuse by police during the conflict period. He informed the Mission that more than 15,000 police officers had participated in human rights trainings, and that community policing initiatives had brought the police and communities closer together. While the IGP acknowledged that historically torture was common in police custody, he took a patently non-credible position that there had not been a single case of torture under his watch.

Although there is a Nepal Police Human Rights Section, which has a broad mandate including to investigate human rights violations by police personnel and to make recommendations for 'appropriate action,' it has not published meaningful case-specific information as to its operations, particularly in respect of data on disciplinary measures taken against police officers

⁷⁰ See, Principle 11 of the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Principle 2 of the Principles on the Effective Investigation and Documentation of Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.

since 2011.⁷¹ Indeed, the overall absence of publicly available data on actions taken against police for alleged abuses was remarkable.

While better training and an enhanced Nepal Police Human Rights Section are welcome developments, they fall short of the kind of accountability mechanisms required by international standards. A lack of independence by investigators tasked with collecting evidence in cases involving human rights violations by State authorities, and the vulnerability of those investigations to political interference, remains a major issue at all levels of the police hierarchy. This requires structural reform within the police, including the establishment of robust internal institutions that can investigate allegations of wrongdoing, and protect decisions about appointment, transfer, promotion and disciplinary measures from inappropriate interference. There is a wealth of global experience that can inform such an endeavor, if carefully tailored to the Nepal context.⁷²

The IGP's acknowledgement that internal oversight is important was reassuring, though it appeared to rely heavily on oversight by the relatively powerless Nepal Police Human Rights Section. It is notable that in the government's response to a recommendation by States through the UN Human Rights Council Universal Periodic Review process to establish an independent mechanism to investigate complaints against the security forces, it simply asserted that there are already adequate mechanisms in place.⁷³ It also made reference to the monitoring role of the National Human Rights Commission, an unconvincing justification given the government's efforts to undermine its authority (more, below).

The prosecutorial services have great discretion as to whether or when to bring a criminal action, but they are also often subject to pressure in sensitive cases from government officials, political party leaders and other influential persons. It is not uncommon for human rights lawyers to advocate for the Office of the Attorney General or lower-level prosecutors to bring charges when they show reluctance to do so. There is a substantial body of Supreme Court litigation involving cases of refusal to prosecute. One egregious example of this dynamic is the conflict-era murder of 15-year-old Maina Sunuwar, in which prosecutors found themselves arguing before the Supreme Court on the side of the Nepal Army seeking to overturn the conviction of three Nepal Army perpetrators brought by district-level prosecutors.⁷⁴ The Office of the Attorney General also played an unhelpful role in ensuring an appropriate sanction of Maoist leader Bal Krishna Dhungel, convicted of murdering a civilian in Okhaldhunga in 1998.⁷⁵

⁷¹ The only publicly available data appears to date from 2011. According to Nepal Police Human Rights Section website, between 2003 and 2011, departmental action of some kind had been taken against 586 police personnel for (undefined) human rights violations including 86 senior officers. See, Nepal Police, Human Rights Section at <https://www.nepalpolice.gov.np/index.php/admin-depart/49-human-rights-unit/194-human-rights-section>

⁷² Mission members participated in a South Asia regional torture conference convened by the ICJ in Kathmandu in December, at which a number of very promising models for internal police monitoring and investigative bodies were presented from jurisdictions including British Columbia, Jamaica and Ireland. At a minimum, these models could serve as the basis for engagement, or an exchange of experience with the Nepal Police. See, *Human Rights Day: South Asian States must end culture of impunity for torture* (10 December 2019), at <https://www.icj.org/south-asian-states-must-end-culture-of-impunity-for-torture/>

⁷³ See, Human Rights Council, *Report of the Working Group on the UPR*, A/HRC/31/9 (23 December 2015), recommendation at para. 124.15, response at para. 131.

⁷⁴ The Nepal Army argued that military court martial jurisdiction superseded the civilian courts, which Supreme Court jurisprudence has now firmly established is not the case. For more on this case, see the ICJ's *Legal Briefing on the Nepal Army's Petition to Overturn Convictions for Maina Sunuwar Killing* (November 2018), available at www.icj.org/nepal-army-efforts-to-frustrate-justice-in-case-of-maina-sunuwar-killing-lack-legal-foundation/

⁷⁵ For more on the Dhungel case, see the ICJ Baseline Study, pp. 10-11.

Several recent investigations and prosecutions were brought to the attention of the Mission as examples of a growing political will to prosecute cases against powerful actors. Some people with whom the Mission met viewed the recent arrest and prosecution of the Speaker of the House Krishna Bahadur Mahara for attempted rape as a positive sign. However, in February 2020, he was released from detention after the Kathmandu District Court dismissed the case for lack of evidence.⁷⁶ The creation of a high-level investigative committee within the police to investigate its negligence in investigating the gang rape of Nirmala Pant was also raised as a positive sign, although the recommendations of that committee to suspend and fire police personnel for mishandling the investigation are now being revisited by a second committee.⁷⁷

More skeptical interlocutors pointed to these not as examples of political will, but of the way in which the system promotes impunity even when superficially it appears to take action. They also noted that in these cases action only came after a public outcry, and thus illustrated the power of the public and civil society more than the institutional commitment of police and prosecutors. In regard to this skepticism, the Mission can only reassert its observation that vanishingly few State authorities have ever been held criminally accountable for any of voluminous serious human rights violations and abuses that have occurred in Nepal.

In a meeting with the Mission, the Attorney General expressed his support and commitment to the prosecution of human rights violations, and repeatedly asserted that prosecutors were free from political pressure. His insistence that both Supreme Court judgements and NHRC recommendations had by and large been fully implemented did not comport with the information that the Mission received from all other sources and is manifest from the public record. Although the AG insisted that prosecutions were underway in conflict-related cases, he was not able to provide an example of a successful investigation or prosecution. Both the AG and a representative of the Office of the Prime Minister asserted that these cases should be dealt with by transitional justice commissions, and not the criminal justice system – a position which is at odds with current Supreme Court jurisprudence.

Issues surrounding the control and mandate of police and prosecutors at the provincial level were of special interest to the Mission given the context of federal devolution. During its visit to Janakpur, the Mission met with Chief Attorney Dipendra Jha, who discussed the passage of provincial legislation that created the legal framework to recruit and administer a provincial police force. The legislation initially drew criticism from police and government officials in Kathmandu. However, with the passage of the national Police Integration Act and Nepal Police & Province Police (Operation, Supervision & Coordination) Act, discussions were said to be underway to address issues of contention, particularly those relating to the appointment and supervision of police chiefs, and the promotion, transfer and deployment of police officials. Notably, the national legislation prohibits provincial police from launching criminal investigations, keeping crime records or protecting crime scenes. Chief Attorneys, the highest-level law officials at the provincial level, are entirely prohibited from initiating prosecutions.

Neither the Constitution nor existing national legislation, however, appears to prevent Chief Attorneys or provincial authorities from putting into place policy measures that could help prevent torture and ill-treatment, extrajudicial killings, enforced disappearance or other

⁷⁶ Questions have been raised about the integrity of that decision after the Court refused to consider certain evidence, including the victim's testimony by video. Republica, "Former speaker Mahara released from jail" (17 February 2020), available at <https://myrepublica.nagariknetwork.com/news/hours-after-being-acquitted-of-attempt-to-rape-charge-former-speaker-mahara-released-from-jail/>

⁷⁷ Shuvam Dhungana, "Kanchanpur police to launch fresh probe into Nirmala Pant rape and murder after a new committee scrapped earlier report by Dhiru Basnyat" The Kathmandu Post (14 February 2020), available at <https://kathmandupost.com/national/2020/02/14/negligent-officials-in-nirmala-pant-case-could-be-exonerated>

violations. In Province 2, the Chief Attorney indicated that his office would exercise its mandate to monitor places of detention and establish an investigative committee to address allegations of police misconduct, including allegations of extra-judicial killings. Mission members were convinced that such an initiative had potential to address continuing allegations and serve as a model for other provinces - or perhaps for a nation-wide regulation. Both the Attorney General and a representative of the Office of the Prime Minister expressed support for this initiative as well as international cooperation and assistance to help make it effective.

National Human Rights Institutions: Struggling for Relevance

The UN General Assembly and the UN Human Rights Council have repeatedly affirmed the "importance of the development of effective, independent and pluralistic national institutions for the promotion and protection of human rights, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)."⁷⁸

National human rights institutions can and should play an important role in ensuring the legal enforcement of human rights, and accountability for violations. Unfortunately, if certain pre-requisites are not in place, including a modicum of political will to support their effective functioning, they may end up promoting impunity by diverting investigation of human rights violations from the criminal justice process to weaker, parallel mechanisms even more vulnerable to political interference and manipulation.⁷⁹ The Paris Principles set out the minimum functions and responsibilities of national human rights bodies, including the necessary measures to ensure that they are independent.⁸⁰

Although concerns were raised about the independence and effectiveness of the National Human Rights Commission (NHRC) of Nepal, there was also a broad consensus that it played an important role and should be strengthened. The NHRC has a mixed record. At crucial times, it has played an important role investigating alleged rights violations – for instance, its courageous and groundbreaking report on the massacre at Doramba in 2003.⁸¹ There was also agreement among those with whom the Mission met that NHRC field offices and staff have played a positive role in monitoring places of detention, though concerns were expressed about attempts by the government to shut down or de-fund NHRC field offices.

Unfortunately, the NHRC has fallen short of being an effective body to ensure accountability for serious human rights violations due to many factors, including a lack of training and resources in investigation, and vulnerabilities that affect the independence and autonomy of its commissioners. Similar concerns about political interference in the appointment process were

⁷⁸ UN General Assembly, A/Res/74/156, para 2. See also list of sources provided by the UN OHCHR: <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>

⁷⁹ In a previous report, the ICJ assessed these pre-requisites in relation to the common practice in Nepal of establishing ad hoc commissions of inquiry to address human rights violations that would be better dealt with in the criminal justice system. The report reviewed 38 commissions established between 1990 and 2010 and concluded that they had primarily served political ends without improving justice outcomes. ICJ, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity* (June 2012), available at <https://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>

⁸⁰ Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993), available at <https://daccess-ods.un.org/TMP/39804.2052984238.html>

⁸¹ National Human Rights Commission, Doramba Incident, Ramechhap: Report of the Investigation Committee (2003), available at www.nhrcnepal.org/nhrc_new/doc/newsletter/Reprot_Doramba_R.pdf

raised in relation to the appointment of NHRC commissioners as were raised in the context of judicial appointments.⁸²

In 2018, a proposed amendment to the law was introduced that would subordinate the recommendations of the NHRC to the discretion of the Attorney General and allow the Attorney General to make the determination as to whether NHRC recommendations to initiate criminal investigations or prosecutions were actionable. The Chairperson of the NHRC objected to the proposal on the grounds that it infringed upon the constitutional authority of the body, as well as violated a Supreme Court judgment that made the implementation of NHRC recommendations mandatory. Other provisions of the bill also threatened the financial independence of the NHRC by requiring the Finance Ministry's approval to receive funds.⁸³

In a meeting between the Mission and several NHRC Commissioners, including Chairperson Anup Raj Sharma, non-implementation was once again the main issue. The NHRC Chair raised concerns about the unwillingness of the government to execute its orders, described political pressures that affect the appointment process for commissioners, the allocation of financial resources and its day-to-day investigative work. Nonetheless, he did report an overall improvement in government transparency in relation to the number and identities of individuals in police custody. The NHRC claimed to have resolved 800 of the more than 2300 cases of enforced disappearance from the conflict period. Of these, 150 cases were recommended for prosecution. The NHRC reported being unaware of the government having initiated prosecutions into any of these cases.

As noted above, in addition to the NHRC, the 2015 Constitution provides for the creation or maintenance of a number of other constitutional bodies including the National Women Commission, National Dalit Commission, National Inclusion Commission, Madhesi Commission, Tharu Commission, Indigenous Nationalities Commission and Muslim Commission. Several of these bodies have yet to be constituted or remain without commissioners. Those that have been created lack human resources and funding that have rendered them ineffective. The proper constitution of these bodies remains a demand of civil society, Madhesi and indigenous activists and others.

IIC – Addressing Impunity, and Removing Obstacles to Access Justice

The obstacles to implementation of strong human rights protections, including threats to the independence and impartiality of justice sector institutions described above, contribute to and are sustained by an enduring culture of impunity that pervades governance in Nepal. Successfully ending impunity and removing the many obstacles to obtaining effective remedies and reparations for human rights violations requires addressing this political dysfunction.⁸⁴ It also means addressing the underlying discrimination and systemic inequality that has sustained

⁸² NHRC Commissioners are appointed by the President on the recommendation of the Constitutional Council (comprised of the Prime Minister, Chief Justice, Speaker and Deputy Speaker of the House of Representatives, Chairperson of the National Assembly and one 'opposition party leader'. Article 284 of the Constitution.

⁸³ In July 2019, five UN Special Rapporteurs wrote directly to the Office of the Prime Minister raising concerns that the bill could "severely undermining the NHRC's authority, effectiveness and independence and limiting the Nepali people's ability to access justice." Full text of the letter is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24691>

⁸⁴ A fuller treatment of these issues can be found in the ICJ's *The Right to a Remedy and Reparation for Gross Human Rights Violations: Practitioner's Guide No. 2* (Revised Edition, 2018) and *International Law and the Fight Against Impunity: Practitioner's Guide No. 7* (2015), available at <https://www.icj.org/category/publications/practitioners-guides-series/>

that dysfunctional political culture at the expense of the poor, caste and ethnic minorities - a dynamic that has, in turn, fed social conflict and impeded development.

There are three categories of general rights that States must ensure in order to combat impunity: the right to know (or the right to the truth), the right to justice and the right to a remedy and reparations.⁸⁵ These groups of rights are contingent not only on better laws and institutions, but on effective access to information and a means to obtain a remedy – in other words, to *access to justice*. This section will focus on the obstacles faced by victims and civil society to gaining access to a remedy and reparation in the form of the right to truth and criminal prosecution for human rights violations committed against them, their families or their communities.

While accountability and access to justice are concerns that cut across all of the issues addressed in this briefing, the Mission chose to focus on the impediments for victims seeking justice through the filing (or attempted filing) of criminal complaints in a court of law, as well as the stalled transitional justice process, which is emblematic of the broader obstacles to justice for conflict- and post-conflict crimes. The Mission members were concerned that issues of conflict-related transitional justice appeared to be treated separately - both conceptually and in relation to the expected government response – from contemporary violations. In fact, most of the victims with whom the Mission spoke shared similar, often identical, experiences of obstruction, exclusion and marginalization.

This section will also address efforts to curtail to the exercise of the rights to freedom of association and expression that threaten to block efforts at public accountability through the media and other forms of expression. A strong civil society and public response has been an essential tool for pressing for policy reform in the face of a lack of government responsiveness – one only needs to look to the historical importance of mass peoples' movements (*jana aandolan*) that led to the end of the conflict in 2006, or the more problematic use of *bandhas* to shut down public activity as part of political protest movements. There are concerning indications that new policy measures – including those in response to the spread of COVID19 – will do irreparable harm to the vibrancy and breadth of Nepal's civic space. Such restrictions are not only a violation of the right to freedom of expression protected under Article 19 of the ICCPR, but of the right to truth enshrined in international standards, including the UN Impunity Principles and resolutions of the UN Human Rights Council.⁸⁶

Access to Justice: Obstacles to Criminal Accountability

The ICJ and its partners, Advocacy Forum and the THRD-Alliance, have been documenting these obstacles both during and especially since the end of the armed conflict. In the vast

⁸⁵ The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (the 'UN Impunity Principles') define impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." Report of the independent expert to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1 (8 February 2005), p. 6.

⁸⁶ Principle 2 of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*; UN Human Rights Council Resolutions 9/11, 12/12 and 21/7 and on the Right to Truth (The Council "[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights), See UN Doc. A/HRC/RES/21/7. See also UN High Commissioner for Human Rights Reports on the right to the truth, UN Docs E/CN.4/2006/91, A/HRC/5/7, A/HRC/15/33.

majority of cases, even accessing the justice system is difficult. Unacceptably short statutes of limitations act as a bar for prosecution, even in the most serious cases. These include a six-month statute of limitations for acts of torture under the new Penal Code, or the one-year statute of limitations in cases of rape (increased in the new Penal Code from a previous 35-days).⁸⁷ Often complainants do not even get to the stage of having the cases pass into litigation through the courts.

Victims and lawyers reported that First Information Reports (FIR), in which a victim will set out a complaint of a human rights violation to the police, are regularly rejected in sensitive cases. FIRs alleging torture are rarely registered, with victims and families subjected to intense pressure not to seek prosecution. This pressure, which may take a variety of subtle and not-so-subtle forms, typically comes from many quarters, including from police, political leaders, government officials and even local community members fearing retaliation. Many are rejected outright by police.⁸⁸ While there is a process under the law for challenging the rejection of FIRs with the office of the public prosecutor, most victims report facing similar difficulties in getting prosecutors to act in sensitive cases or to intervene to force the registration of FIRs. This leaves the courts as the main avenue when police refuse to file an FIR. Unfortunately, as described above, police regularly ignore these orders or find ways to delay the investigative process – often conducted by police personnel in the very office where the complaint was filed.⁸⁹

One family member said that “justice is only for people with political reach, for us it is nothing.” Another person, in attempting to describe the immense challenges in seeking a remedy through formal processes, simply broke down and said that victims are forced to “live with confusion.” When comparing this testimony against that of some government officials, it was clear that different actors had very different understandings of what accountability actually means, or even that the obligations of government towards victims and their families should extend beyond negotiated settlements for compensation.

Even when an FIR is registered and advanced, the investigative file is sometimes sent to the same jurisdiction in which the violation occurred. Medical examinations of detainees (required by law after an arrest) are cursory if they take place at all, and often happen in the presence of the arresting officers. In the rare case when incidents are acknowledged, they are often resolved through informal processes, with provision of a *nominal ex gratia* payment in lieu of genuine compensation or other reparation. These processes, needless to say, are especially vulnerable to external pressure when they involve influential or politically well-connected persons either as victims or defendants:

It should be underlined here that the obligation of the State to effectively investigate human rights violations that incur criminal liability and bring those responsible to justice is not in any

⁸⁷ This limitation clause has been sharply condemned by both the CEDAW Committee, and the Human rights Committee. See, Concluding Observation of the Committee on the Elimination of Discrimination Against Women on Nepal, UN Doc. CEDAW/C/NPL/CO/4-5 (2011) Para 20 (c), available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NPL-CO-4-5.pdf>; UN Human Rights Committee, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2245/2013, UN Doc. CCPR/C/119/D/2245/2013 (23 June 2017), para. 12.5.

⁸⁸ Of 15 cases of alleged torture and ill-treatment in police custody documented by the Advocacy Forum and THRD-Alliance between November 2019 and February 2020, not a single FIR had been successfully filed – suggesting that the new Penal Code provisions have not addressed the obstacles to beginning an action.

⁸⁹ The obstacles faced by victims seeking to file an FIR, or challenge the rejection of an FIR by police, in cases of torture and ill-treatment are document in a recent report by the Advocacy Forum. Advocacy Forum, *Torture in Nepal in 2019: The Need for New Policies and Legal Reform* (June 2020), available at <http://advocacyforum.org/news/2020/06/af-releases-torture-report-26-june-2020.php>

event dependent on a victim making a complaint through the registration of an FIR or other procedures. Under international law and standards, investigations of serious human rights violations must be initiated *ex officio*, irrespective of any complaint or formal report having been filed by the victim.⁹⁰ For example, article 12 of the CAT provides that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” In a context where there has been a well attested pattern of widespread and systematic human rights violations, many of which are also well-documented, the fact that police and prosecutor authorities have rarely initiated any such investigations *ex officio* constitutes a clear dereliction of duty.

The information provided to the Mission is disturbing, but not surprising, as it confirms the observation of an uninterrupted pattern of impunity going back decades to the conflict era. There appears to have been little expectation that improvements to the Penal Code alone would result in a justice system more responsive to complaints of torture and ill-treatment and other serious human rights violations. The conclusions of monitoring and legal action to date suggest that in order to improve justice outcomes for victims, the focus needs to be more squarely placed on affecting law and policy governing the actions of police and prosecutors at the local level, and the general atmosphere of impunity, as opposed to a singular focus on improvements to the national legal framework and building institutional capacities.

These findings point towards the urgent need to view legal and institutional reform efforts through the lens of access to justice and the rule of law. The Mission felt that many of the ‘law and order’ approaches promoted by the authorities failed to take into account the circumstances of victims of crimes such as torture, including sexual violence. While some officials, particularly at the provincial level, expressed support for taking a more victim-centred approach, there were many questions as to whether and how this could be done with limited resources - for instance, the tough question of establishing responsive but cost-effective victim and witness protection mechanisms.⁹¹

The ‘Theatre’ of Transitional Justice: Prioritizing the Needs and Voices of Victims

Transitional justice, as described by the UN Secretary-General in a 2004 report, is a broadly defined concept that includes “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁹² These mechanisms engage many tools including criminal prosecutions, reparations, truth-seeking processes, institutional and legal reform, vetting and various forms of non-judicial administrative action. While the term “transitional justice” has now come into widespread parlance and is therefore used here, it should be stressed that what is really signified by such appropriately applied procedures and mechanism is “justice in transition”. The quality of justice must never be diminished simply because a society is in transition.

⁹⁰ See ICJ, *International Law and the Fight against Impunity: Practitioner’s Guide No. 7* (2015), pp. 154-48, available at <https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf>

⁹¹ For a treatment of these issues in the context of Nepal, see International Commission of Jurists, *Witness Protection in Nepal: Recommendations from Best Practices* (2011), available at <https://www.icj.org/witness-protection-in-nepal-recommendations-from-international-best-practices/>

⁹² The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General, S/2004/616 of 3 August 2004, para. 8.

Transitional justice is not a special form of justice that is distinct from the broader rule of law concerns addressed elsewhere in this report. It is an approach to justice framed by a particular history of widespread and systematic human rights violations and abuses, amounting to crimes under international law, and with an objective of preventing a repetition of historical abuses. A politically driven imperative to 'close the books' on these crimes (in Nepal's case, conflict-related violations and abuses) without looking at the fallibilities of permanent justice sector institutions only serves to reinforce systemic impunity. Unfortunately, over the past decade, transitional justice in Nepal has been more or less captured by cynical, short-term attempts by the political leadership to superficially satisfy the demands of victims, while simultaneously promoting various forms of *de facto* or *de jure* amnesty for serious crimes.

The 2006 Comprehensive Peace Agreement that ended the internal armed conflict between the Government of Nepal and the Community Party of Nepal (Maoist) mandated the establishment of two transitional justice bodies. These were a truth and reconciliation commission to look into the full range of human rights violations, and a commission to investigate enforced disappearances, each addressed to the responsibility of all parties to the conflict. Fourteen years later, those obligations remain unfulfilled despite the establishment of both institutions. Interim relief programs initiated after the CPA was signed excluded certain categories of victims arbitrarily, including victims of sexual violence and other torture and ill-treatment, and took an unacceptably narrow approach that ignored international standards on remedy and reparation.

In 2015, the Truth and Reconciliation Commission (TRC) and Commission on Investigation of Disappeared Persons (CoID) were created pursuant to the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014. The TRC has received 61,615 complaints of human rights violations, and the CoID has received 3197 complaints of enforced disappearance.⁹³ The Commissions lack technical knowledge, expertise and financial resources, and are subject to political influence. During their initial two-year mandate, and two one-year extensions, the Commissions have not resolved even a single case of serious human rights violations that occurred during the decade long armed conflict.

Despite objections from civil society, victims and the international community, the Commissions were re-constituted with new members shortly after the end of the Mission in January 2020 through a non-transparent and non-consultative process.⁹⁴ This move only reinforced a perception that the commissions are, at best, incompetent and, at worst, vehicles to deliver amnesties to perpetrators. Commission investigations have lacked transparency, and measures to ensure the confidentiality and physical security of victim and witnesses are absent. The concerns raised by victims with whom the Mission spoke echoed the concerns documented during the many government and civil society-led consultations over the years.⁹⁵

The situation also illustrates how a bad-faith process can have secondary impacts on the credibility of other justice institutions – especially the judiciary. For the past five years, the government's efforts have been in violation of clear prescriptions and directives of the judgements of the Supreme Court. In 2015, the Supreme Court ruled that the 2014 legal framework was unconstitutional, and in contravention of Nepal's international legal obligations

⁹³ Truth & Reconciliation Commission TRC-Nepal, Press Release (7 February 2018), available at <http://trc.gov.np/wp-content/uploads> (in Nepali)

⁹⁴ See, ICJ, *Nepal: Recent Steps Undermine Transitional Justice* (January 2020), available at <https://www.icj.org/nepal-recent-steps-undermine-transitional-justice/>

⁹⁵ An ICJ briefing based on consultations with the victim community and civil society sets out these concerns in detail. See, ICJ, *Nepal's Transitional Justice Process: Challenges and Future Strategies* (August 2017), available at <https://www.icj.org/nepal-transitional-justice-mechanisms-have-failed-to-ensure-justice-for-victims/>

due in part to the inclusion of provisions that could be used to grant amnesty. The government has for the most part ignored the Court's directives by refusing to move forward with criminal prosecutions, and by reproducing the same weaknesses and omissions in various draft amendments to the legal framework - including a lack of reference to crimes against humanity or "enforced disappearance" and a failure to address principles of command and superior responsibility.⁹⁶

The victims and families with whom the Mission spoke were clear and passionate about their demands for justice, but they also clearly had low expectations of recent government initiatives. One issue that was raised repeatedly by victims as emblematic of the lack of political will was the government's recent proposal to amend the legal framework governing the transitional process by making serious human rights violations, including torture, punishable by minimal sentences - as little as community service and no prison time.⁹⁷ Such a proposal is in clear violation of international legal obligations, by which penalties must be commensurate with their gravity.⁹⁸ The lack of action on impunity for conflict-related sexual violence against women was also a recurring issue raised by victims.⁹⁹ Even more cynically, it was common for government officials to justify this lack of action by asserting that these issues must be addressed by the transitional justice process rather than the criminal justice process, in contravention of the Supreme Court's rulings, which they themselves had been responsible for obstructing.

That is not to say that the conversation has not changed at all over the years. All of the government officials with whom the Mission met repeated almost mantra-like that no amnesties would be given for serious human rights violations. Recent proposed amendments to the legal framework suggest that this commitment is narrowly limited to formal *de jure* amnesties for a truncated list of the most serious crimes. Still, it would be unfair to conclude that public discourse on transitional justice has remained static. It is quite clear that formal amnesties that in the recent past were proposed as a matter-of-fact part of the transition process would now result in a harsh public backlash. International human rights law has also become a prominent feature of government discourse at the national level and in international fora.

Overall, the Mission was of the strong opinion that for further progress to be made, Nepal's transitional justice approach must be better integrated into its approach to reform of the justice system overall including the issues of access and institutional independence examined earlier in this report. In other words, it needs to take a holistic 'rule of law' approach to transitional justice that takes into account the need for justice sector reform, and which goes beyond performative consultations with victims (the 'theatre' in the sub-section title) and actually responds to and integrates the demands of the victim community and the stand-alone

⁹⁶ See, joint comments on a recent iteration of draft amendments to the law by ICJ, Amnesty International and Trial International. *Preliminary Comments on the draft bill to amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2014* (July 2018), available at <https://www.icj.org/nepal-draft-bill-on-transitional-justice-falls-short-of-international-law-and-standards/>

⁹⁷ Ibid.

⁹⁸ Article 4(2) of the Convention against Torture establishes: "[e]ach State party shall make these offences punishable by appropriate penalties which take into account their grave nature." See also, International Convention for the Protection of All Persons from Enforced Disappearance (Art. 7); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Art. 3.3); Inter-American Convention to Prevent and Punish Torture (Art. 6); Inter-American Convention on Forced Disappearance of Persons (Art. III); Declaration on the Protection of All Persons from Enforced Disappearances (Art. 4.1); and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 1).

⁹⁹ For more on conflict-related sexual violence and the failures to adequately address it, see the ICJ's submission to the CEDAW Committee in October 2018, available at <https://www.icj.org/nepal-icj-submits-report-to-cedaw-committee-on-the-transitional-justice-processes-failure-to-address-womens-human-rights/>

obligations of the State. It should be stressed that the ICJ and Mission consider that any transitional process must place at highest priority the combatting impunity for gross human rights violations and abuses and crimes under international law.

Protecting Civic Space and Public Accountability for Human Rights Violations

Nepal has an international legal obligation under article 19 of the ICCPR to protect the right to freedom of opinion and expression, including to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. The UN Human Rights Committee has clarified that these rights are indispensable to facilitate the evolution and exchange of opinions, which in turn make possible the transparency and accountability that underpin the entire system of justice and the rule of law. The obligation to respect and protect the rights to free expression, opinion and information apply to all branches of government - executive, legislative and judicial – as well as other administrative bodies.¹⁰⁰

Separate from, but interrelated with, the right to freedom of expression are other fundamental freedoms, including freedom of association, protected under ICCPR article 22 and freedom of assembly, protected under article 21. In relation to how these freedoms pertain specifically to human rights defenders, Nepal must respect the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders).

These fundamental freedoms are an integral part of access to justice. The Mission considered that it was critical to emphasize that the protection of public discourse and the preservation of civic space have played a particularly crucial role in opening avenues for those seeking a remedy for rights violations and abuses. Many people reported to the Mission that, alongside the judiciary, public advocacy through the media has been the primary pathway for them to seek accountability when faced with politically compromised or non-responsive state institutions. Unfortunately, since the publication of the ICJ's Baseline Study in 2017, the government has sought to implement a number of laws and policies aimed at restricting civic space and limiting freedom expression. Some of these efforts have been successfully forestalled through public advocacy and legal action.

The Government of Nepal, and particularly the current administration led by Prime Minister K.P. Sharma Oli, has followed a regional trend of effectively "weaponizing" the law to target critics, human rights defenders and the media. These initiatives take a variety of forms not limited to traditional authoritarian tools such as national security and ant-terrorism laws, but also tax laws, NGO regulations, civil and criminal defamation provisions and media laws. The introduction of new laws in Nepal also follows a pattern witnessed elsewhere and particularly in the Asia region, of governments seeking to use cybersecurity concerns as a pretext to suppress and prosecution expression online and to limit avenues to seek legal accountability for rights violations.¹⁰¹

The policy initiative that was most often raised with the Mission as emblematic of the government's hostility toward civil society was the draft National Integrity and Ethics Policy. The Policy, if enacted in law and implemented, would have imposed onerous registration and reporting requirements upon non-government organizations, including a requirement to

¹⁰⁰ UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34 (12 September 2011), paras. 2 - 8.

¹⁰¹ See, for instance, International Commission of Jurists, *Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia* (December 2019), available at <https://www.icj.org/southeast-asia-icj-launches-report-on-increasing-restrictions-on-online-speech/>

provide the names of staff to the local authorities and obtain prior consent of government ministries before the publication of reports. It would also shift supervisory responsibility for non-government organizations from the Social Welfare Council to a new body in the Office of the Prime Minister. The initiative, temporarily shelved due to push back from civil society and the diplomatic community, was even the subject of an intervention by four Special Rapporteurs of the UN Human Rights Council, who warned of the “devastating impact” that such a policy would have on human rights defenders.¹⁰²

Of particular concern are the potential impacts of the proposed Information Technology Bill, a draft law ostensibly meant to regulate the internet, but which contains provisions that would criminalize a wide range of expression across a broad scope of media (including emails, blogs, social media and news sites). The draft also proposed the establishment of extra-judicial “information technology courts” to adjudicate violations of the bill’s provisions. The introduction of the draft comes on the heels of an increase in the use of existing laws, such as the Electronic Transmissions Act, to arrest and prosecute journalists and artists.¹⁰³

The IT Bill is the third of a trio of bills – alongside the equally problematic Media Council Bill and Mass Communication Bill - introduced to the Parliament under the Oli government that pose serious threats to online expression.¹⁰⁴ Another draft bill brought to the attention of the Mission after it concluded - the Special Service Bill - would go even further by granting intelligence agencies broad surveillance power including over online communications without adequate judicial oversight.¹⁰⁵ Although all of these bills were temporarily put on hold after a public outcry, they have been reintroduced to the legislature since the Mission, and are currently under consideration.¹⁰⁶

Several interlocutors, including prominent human rights defenders, expressed the concern that key actors within the international community had stepped away from the more vigorous positions that they had taken in the past in relation to human rights and civic space. Equally troubling has been the dwindling donor support for human rights documentation and monitoring at a time when civic space is under threat. One cynically remarked that “the international community is focused on development, not accountability. It is following the money.”

III – CONCLUSIONS AND RECOMMENDATIONS

It is important not to end the analysis at the identification of problems, or with mere criticism or praise of particular law and policy initiatives. Real change must get at the root causes that underpin each of the areas of concern set out above - the law, institutions and access to a

¹⁰² Letter to Government of Nepal from UN Special Rapporteurs on freedom of opinion and expression, assembly and association, religion or belief, and the situation of human rights defenders (11 July 2018), OL NPL 1/2018.

¹⁰³ See, Amnesty International, *Nepal: A Year of Shrinking Freedom* (January 2020), available at <https://www.amnesty.org/en/latest/news/2020/01/2019-nepal-in-review/>

¹⁰⁴ These bills fall well short of the international law requirements that restrictions to expression serve a legitimate legal objective, be strictly necessary, proportionate and non-discriminatory. See, UN Human Rights Committee, *General comment No. 34, Article 19: Freedom of opinion and expression* (12 September 2011), CCPR/C/GC/34.

¹⁰⁵ See, Human Rights Watch, *Amend Intrusive Intelligence Bill* (May 20, 2020), available at <https://www.hrw.org/news/2020/05/29/nepal-amend-intrusive-intelligence-bill-0>

¹⁰⁶ At the time of publication, the Special Service Bill had been passed by the Upper House of parliament, and was expected to pass the lower house imminently. Bhinod Ghimire, ‘Upper House endorses Bill on Special Service allowing phone tapping without court order,’ Kathmandu Post (20 May 2020), at <https://kathmandupost.com/national/2020/05/20/upper-house-endorses-bill-on-special-service-allowing-phone-tapping-without-court-order>

remedy. Ultimately, the conclusions and recommendations cluster around a single over-arching concern – the preservation of the “rule of law,” a concept which encompasses all of the specific observations about access to justice, accountability, the right to a remedy and the responsiveness of governmental and non-governmental justice institutions.¹⁰⁷

This section of the report will offer some reflections on these root causes before providing a set of recommendations for safeguarding the human rights gains that Nepal has achieved since 2006, strengthening the justice institutions responsible for ensuring accountability for past and ongoing rights violations and abuses, and contributing to the development and implementation of more forward-looking, human rights-compliant law and policy. It will also set out a set of recommendations for the government, civil society and international community.

The Diminishing Credibility of Governance and Justice Institutions

Rule of law institutions are suffering from a credibility crisis and are under threat globally.¹⁰⁸ Nepal is no exception. It was a perception commonly shared by most of those with whom the Mission spoke that both democratic institutions, such as the legislature, as well as law enforcement and justice institutions, were inadequately responsive to the needs of ordinary Nepalis. All bodies of government, almost without exception, were viewed as serving the interests of elite, high-caste communities and overly vulnerable to political pressure and manipulation. It was also clear from many of the meetings that the poor implementation of laws, policies and jurisprudence had played a large part in eroding the credibility of these institutions. The examples offered in the text above (non-implementation of the torture provisions of the Penal Code, persistence of practices such as *chhaupadi* and marital rape, failure to pay court-ordered compensation to conflict victims) are only illustrative of how the implementation of progressive law and policy changes have fallen victim to a lack of political will and compromised institutions. It is a systemic problem that cuts across all aspects of governance, law and policy in Nepal.

This dynamic of diminishing credibility has been particularly damaging for the judiciary. Without actual independence, and the trust of the public that judicial decisions will be respected, judges cannot be expected to do their jobs effectively. After the CPA was signed in 2006, expectations were high that the injustices of the past and the inequalities of the present would be addressed through some combination of political, legal and institutional reform. Nearly fifteen years later, the Supreme Court stands out as one of the few institutions with a consistent record of protecting human rights. However, as years pass without meaningful progress on transitional justice and on ending systemic discrimination in defiance of judgement after judgment, the Court could well lose its vaunted status in the eyes of the public. The Mission heard from many sources – including from judges and judicial officials themselves – that non-implementation threatened to undermine the credibility of the courts and dissuade Nepalis from seeking an effective remedy through a judicial process.¹⁰⁹ For this reason, improving respect and

¹⁰⁷ For the ICJ’s global framework, analysis of current trends and general recommendations on the preservation of the rule of law, see The Tunis Declaration on Reinforcing the Rule of Law and Human Rights (March 2019), available at <https://www.icj.org/icj-congress-2019-the-tunis-declaration-video/>

¹⁰⁸ See, for instance, “The Backlash against Human Rights,” Remarks by Andrew Gilmour, UN Assistant Secretary-General for Human Rights (24 November 2017), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22514&LangID=E>

¹⁰⁹ This dynamic is illustrated in a 2013 survey on access to justice for victims of sexual violence. Women surveyed in four districts reported low levels of trust in the court (34.7%). At the same time, 81% reported that people respected the decisions of the formal justice system. Follow-up interviews with participants confirmed that overall trust was highly correlated with perceptions of accessibility and responsiveness. ICJ, CREHPA and

implementation of judicial decisions, and other measures to preserve and protect the independence of the judiciary figure prominently in the recommendations, set out below.

Linking Justice and Accountability for Conflict and Post-Conflict Rights Violations

Another issue that emerged frequently during the Mission was the underappreciated negative implications of treating conflict and post-conflict human rights violations and abuses as distinct from contemporary violations, and ones that should be segregated and addressed through different institutions and processes. This is a common and meritorious critique of a “transitional justice” approach and speaks to the consistent demands of civil society and victim groups that the process in Nepal must not be disconnected from the formal criminal justice process – at least in the case of serious crimes under international law. In fact, the concerns about a lack of accountability and functional justice institutions brought to the attention of the Mission were nearly all common concerns shared by all victims of discrimination, conflict violence or the unlawful use of force in the Terai.

The primary responsibility falls to the government and political leadership to ensure a consistent and fair application of the law in all cases of serious crimes and human rights violations. This responsibility also entails protecting and respecting the role of judicial institutions, the National Human Rights Commission and other bodies. Above all, it requires an acceptance that one of the fundamental purposes of the transitional justice process is to identify and address the root causes of violence, including economic, ethnic and caste-based discrimination and inequality, and the institutional weaknesses that prevent democratic governance, law enforcement and judicial institutions from guaranteeing access to justice in all cases. The recommendations offered below seek to promote an integrated rule of law approach to transitional justice, and the *legal accountability* approach to the full range of human rights.

Many members of civil society, particularly those engaged on issues of non-discrimination and economic, social and cultural rights, also raised concerns about the fragmentation along ethnic, caste and political lines of civil society itself. This has been particularly acute since the passage of the 2015 Constitution, and the associated blockade and protests (and excessive responses of the security forces) in the Terai.¹¹⁰ Cooperation across caste and ethnic lines, much more common in the years bracketed by the signing of the CPA and dissolution of the first Constituent Assembly, has diminished. Some human rights defenders reported that this has contributed to a sense of mistrust among civil society, with negative implications for their advocacy. Recommendations to civil society, therefore, focus on ways to rectify these disparities and recreate an inclusive platform for human rights defenders to strategize and assist each other in their work on the promotion and protection of human rights. The Mission also noted that the diplomatic community has largely taken a silo-ed approach to donor support at the expense of measures that bring together the human rights community and the broader civil society.

the Ministry of Women, Children and Social Welfare, *A Study on Advancing Justice Sector Reform to Address Discrimination and Violence against Women in Four Selected Districts of Nepal* (November 2013).

¹¹⁰ See, *supra* note 47. See also, ICJ, *Nepal: Respect for human rights crucial while resolving Terai political crisis and border blockade* (24 November 2015), available at <https://www.icj.org/nepal-respect-for-human-rights-crucial-while-resolving-terai-political-crisis-and-border-blockade/>; Human Rights Watch, “*Like we are not Nepali*”: *Protest and Police Crackdown in the Terai Region of Nepal* (October 2015), available at <https://www.hrw.org/report/2015/10/16/we-are-not-nepali/protest-and-police-crackdown-terai-region-nepal>

Bringing International Human Rights Law to Bear

Despite the obstacles that victims of human rights violations and abuses continue to face, including poor institutional responses and the persistence of discriminatory policies, the Mission was struck by an overall sense of hope expressed by many of the Nepalis with whom it spoke. Above all, there was a strong commitment to continue to seek legal remedies for human rights violations and abuses and a conviction that the fight for accountability would ultimately be won. Except for a few of the government officials with whom the Mission met, nearly everyone was also convinced that international law and standards had an important role to play in preserving and developing sound human rights law and policy. The Mission's recommendations seek wherever possible to emphasize Nepal's international law obligations and promote the use of international human rights standards to shape better law and policy outcomes.

It is undeniable that international human rights have been influential in Nepal. The UN Human Rights Council (and its predecessor body, the UN Commission on Human Rights, which it replaced in 2006) and the Office of the High Commissioner for Human Rights played an important role in setting the stage for the end of the conflict and helped moderate the behavior of both parties to the conflict.¹¹¹ Although many felt that UN institutional influence has waned in recent years, international law remains a prominent feature of public discourse and has made its mark on the law. As noted above, the Supreme Court has produced a body of human rights jurisprudence that relies heavily on Nepal's obligations under international customary and treaty law – a jurisprudence that has been cited as precedent elsewhere in South Asia.¹¹² Several people reported to the Mission that the threat of the exercise of universal jurisdiction has become a near obsession of conflict-era political and military leaders since the (ultimately unsuccessful) attempt to hold Nepal Army Colonel Kumar Lama criminally accountable in the United Kingdom for his alleged involvement in torturing detainees.¹¹³ The fundamental rights provisions of both the Interim and 2015 Constitutions, despite their weaknesses, also reflect a rights-based approach that benefited from extensive comparative and international experience.

One question is how international mechanisms and procedures can remain important to national law and policymaking in Nepal at a time when international law and institutions are themselves under attack. There are opportunities in the near-term. These include continued engagement by the Office of the High Commissioner for Human Rights, which has played a diminished but still important technical assistance role to the diplomatic community.¹¹⁴ They also include the active engagement with the UN treaty process, which has involved the periodic review of the compliance of Nepal with their human rights obligations in respect of most human rights treaties, and recommendations that have resulting in changes in law and practice.

¹¹¹ For a critical assessment of the UN's role in protecting human rights in Nepal during and immediately after the conflict, see Frederick Rawski and Mandira Sharma, *A Comprehensive Peace? Lessons from Human Rights in Nepal*, in *Nepal in Transition: From People's War to Fragile Peace*, Cambridge University Press (2012).

¹¹² For example, in the *Muhabat Shah* case (2013), the Pakistani Supreme Court relied on the Nepal Supreme Court's judgement in *Rajendra Prasad Dhakal v. Government of Nepal*, when it ruled that although Pakistan (like Nepal) had not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention's principles should be read into the rights provisions of the Constitution.

¹¹³ For a human rights law analysis on the case, see International Commission of Jurists, *The Case of Colonel Kumar Lama: The Application of Universal Jurisdiction* (September 2013), available at <https://www.ici.org/nepal-uk-court-to-decide-whether-colonel-kumar-lama-will-be-tried-for-torture-under-universal-jurisdiction/>

¹¹⁴ The OHCHR's technical note was central to maintaining a consensus among the diplomatic community to delay support to transitional justice commissions until the law was amended. OHCHR Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014), available at https://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf

In addition, the Optional Protocol to the ICCPR has allowed for victims to access justice through filing of complaints to the Human Rights Committee, resulting in significant quasi-judicial decisions by the Committee on enforced disappearance, torture and the right to life.¹¹⁵ The Special Procedures mechanisms of the UN Human Rights Council have also addressed Nepal on numerous occasions, and have reported and provided recommendations on compliance with international human rights obligations, including in the transitional justice process.¹¹⁶ More systematic human rights vetting prior to the deployment of army and police personnel to UN peacekeeping operations have been effective in the past, but have fallen out of use or been applied inconsistently.¹¹⁷

As in many countries, the Universal Periodic Review (UPR) process has also become an important venue for international advocacy. The UPR is not an authoritative source of identifying legal compliance with human rights obligations as are the treaty bodies or, in some instances, the Special Procedures. It is, however, a platform for securing the political commitment of States to other States and the international community. Of 195 recommendations during Nepal's second UPR cycle, the government asserted that 115 had been fully implemented, or were 'in the process' of implementation.¹¹⁸

Many of the recommendations repeated the concerns raised in the previous UPR cycle and were similarly unaddressed.¹¹⁹ These purportedly implemented recommendations map directly onto many of the concerns highlighted in this report (such as torture in police custody, lack of accountability within law enforcement, non-compliance of transitional justice legislation with international standards, gender-based violence, statelessness and restrictions on freedom of expression and association).¹²⁰ The recommendations provided below are intended to inform submissions for Nepal's next review currently scheduled from January 2021.

¹¹⁵ *Chhedulal Tharu and others v. Nepal*, Communication No. 2038/2011 (21 October 2015); *Sabita Basnet v Nepal*, Communication No. 2164/2012 (12 July 2016); *Purna Maya v Nepal*, Communication No. 2245/2013 (17 March 2017); *Bimala Dhakal, Rabindra Dhakal and Manjima Dhakal v Nepal*, Communication No. 2185/2012 (17 March 2017); *Himal and Devi Sharma v. Nepal*, Communication No. 2265/2013 (6 April 2018); *Fulmati Nyaya Vs Nepal*, Communication No. 2556/2015 (18 March 2019)

¹¹⁶ For example, Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Simonovic (20 June 2019); Joint communication from Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Rapporteur on violence against women, its causes and consequences" Joint Communication of from Special Procedures (12 April 2019); Report of Special Rapporteur on the human rights of migrants, Felipe González Morales" (30 April 2018). A full list of SR visits is available at <https://spcommreports.ohchr.org/TmSearch/Results>

¹¹⁷ See, *A Comprehensive Peace*, supra at 83.

¹¹⁸ This is the same wordplay that has allowed the government to claim near total implementation of Supreme Court judgements and National Human Rights Commission decisions. See *Report of the Human Rights Council on its thirty-first session*, A/HRC/31/2 (22 July 2016).

¹¹⁹ See, UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nepal* A/HRC/31/9 (23 December 2015), *Report of the Working Group A/HRC/17/5* (8 March 2011), at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>; see also, International Commission of Jurists, *Submission to the Universal Periodic Review of Nepal* (March 2015), available at <https://www.icj.org/icj-submission-for-the-universal-periodic-review-upr-of-nepal/>

¹²⁰ Some of these issues are examined in the ICJ's mid-term UPR submission, see International Commission of Jurists, *Universal Periodic Review Mid-Term Report on Nepal's UPR Second Cycle* (May 2018), available at <https://www.icj.org/icj-submits-mid-term-upr-submission-on-nepal/>

The Opportunities and Challenges of Federalism

Public discourse on federalism has evolved substantially, and critical first steps have been made to implement it in practice – though neither discourse nor policy has generally been framed by principles of human rights and the rule of law. Concerns were certainly raised with the Mission about the quality and pace of reform, but it was also clear that solutions to many of the most pressing issues of governance and justice will require engagement with and coordination among actors at the federal, provincial and local levels. While trust in government is especially low among lower-caste communities who view the political and justice sector as a closed and inaccessible system, there was much hope that the establishment of vast new federal structures (753 local government administrations in seven provinces) may help to disrupt this dynamic.

This change was most palpably felt during the Mission's visit to Janakpur, where it was struck by the efforts being made to develop and implement new law and policy to protect human rights. Province 2 officials reported that during the 19 months since the provincial government was established, they had drafted over 80 bills, 23 of which had reportedly been passed by the provincial legislature. The officials with whom the Mission met spoke frequently of the importance of equality before the law, and non-discrimination. Their policy ideas appeared more directly informed by their local constituents, and their enthusiasms (and frustrations) contrasted noticeably with the near indifference exhibited by some Kathmandu-based officials. It was clear in these conversations that at the provincial level access to justice, accountability and ending impunity were not simply seen as applying to conflict era atrocities. They were also highly relevant to girls' access to education, Dalit empowerment, access to proof of citizenship, and the protection of community forests, among other areas.

That is not to say that these opportunities do not come with risks. The Mission's engagement on issues of federalism was not comprehensive and based largely on a visit to one province at the invitation of its officials. Indeed, global experience suggests that decentralization brings new opportunities for corruption and other forms of abuse of power.¹²¹ New local bodies present significant human rights challenges of their own – such as the due process and fair trial concerns associated with newly formed judicial committees. There is also the danger that decentralized government institutions will reproduce or even exacerbate existing ethnic and caste-divisions.¹²² At the very least, priority must be given to establishment of constitutionally-mandated bodies and legal clarification of the division of power between provincial and national-level bodies such as provincial police and judicial service commissions.

The lack of progress on establishing these bodies or their needed implementing legislation contributes to a sense at the provincial-level that the federal government may be dragging its feet in order to avoid the devolution of decision-making power to which it has publicly committed. In light of these concerns, and acknowledging the limited time that the Mission was able to spend at the sub-national level, where the following recommendations touch on issues of federalism, they seek to invoke the significant human rights opportunities that this change presents, without neglecting the rule of law and human rights framing that has been absent from so much national law and policy making.

121 Transparency International, *Corruption and Governance Indicators in Selected Asian Countries* (February 2017), at <https://knowledgehub.transparency.org/helpdesk/corruption-trends-in-selected-asian-countries>

122 See, International Alert, *A Sense of Hope: Understanding post-federal dynamics among marginalised communities in Nepal's Terai region* (March 2019), available at <https://www.international-alert.org/publications/sense-of-hope-post-federal-dynamics-marginalised-tarai-Nepal>

RECOMMENDATIONS

For the Office of the Prime Minister and other authorities of the Government of Nepal

- Ensure that existing administrative and legal provisions governing the issuance of birth registration documentation are non-discriminatory and that their enforcement is not linked to citizenship status.
- Proceed as a matter of urgency with the appointment of the full membership of the Commissions established by the 2015 Constitution, including allocation of adequate financial and human resources to allow them to function in an independent manner.
- End efforts to curtail the independence and mandate of the National Human Rights Commission, including by shelving legislation to limit its investigative powers or the enforceability of its recommendations.
- Vigorously implement the law, jurisprudence and constitutional prohibitions on the practice of *chhaupadi*, marital rape and all other forms of violence against women.
- Publish the Office of the Prime Minister's statistics on the implementation of judicial decisions, and recommendations from the National Human Rights Commission and other bodies; and develop and announce a plan to address the lack of implementation.
- Promote the ratification or accession to human rights treaties to which Nepal is not yet a party. These include the Optional Protocol to the ICESCR, the Optional Protocol to the CRC on a communication procedure, the Optional Protocol to the Convention against Torture (OPCAT), the International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the protection of the Rights of All Migrants Workers and members of their Families.
- Establish a national preventive mechanism to monitor places of detention to safeguard against torture and other ill-treatment, in line with the provisions of the OPCAT and until such time as the ratification of the OPCAT is achieved.
- Amend the existing legal framework governing the transitional justice process so that it is in line with the jurisprudence of the Supreme Court, Nepal's international legal obligations and international human rights standards. The needed amendments are well-known, and if implemented, would create a consensus that would allow the transitional justice process to finally move forward – the stated goal of the current government. Ensure that the amendment process is transparent and consultative.
- Initiate a new process for the appointment of commissioners to transitional justice bodies that is transparent and consultative.

For the Legislature-Parliament

- Pass all of the necessary implementing legislation to operationalize the fundamental rights provisions of the 2015 Constitution pursuant to a transparent and consultative process and in line with the Constitution's commitment to equality and equal protection before the law.
- Amend legislation, such as the *Bill to amend the Nepal Citizenship Act 2006*, or pursue constitutional amendment to guarantee citizenship rights without discrimination including the right to pass citizenship from mother to child.
- Ensure that that legislation implementing the fundamental rights provisions and any related legislation ensures that equal human rights protections are afforded to non-citizens, as guaranteed under Nepal's international legal obligations.
- Introduce legislative or constitutional reforms to ensure that at least a majority of members of the Judicial Council are judges, that civil society is adequately represented, and that conflict of interest safeguards are introduced and enforced to prevent political influence and manipulation.

- Take similar measures in relation to the Judicial Service Commission, and pass legislation required for the formation of provincial-level judicial service commissions that takes into account concerns about diversity and judicial independence and accountability.
- Reject legislation that would curtail the mandate, powers and independence of the National Human Rights Commission.
- Amend the Penal Code and other relevant provisions of law to eliminate statutes of limitations for serious human rights violations such as torture, including rape, enforced disappearance and unlawful killings in violation of the right to life.
- Reject legislation that infringes on the rights to freedom of expression, association and assembly, such as the Media Council Bill, Mass Communication Bill, Information Technology Bill and Special Service Bill. If legislation regulating speech online is to be passed, it should be done pursuant to a consultative and transparent policy dialogue.
- Amend the Local Government Operation Act, Mediation Act and other relevant laws to *inter alia* clarify the jurisdiction of judicial committees, unambiguously guarantee due process rights including the right to appeal to the courts in all cases, and ensure that decisions are properly documented and transparent.
- Ratify or accede to human rights treaties to which Nepal is not yet a party (including those listed above under recommendations or the Government of Nepal).

For the Nepal Police

- Follow through on commitments to establish a robust and independent internal accountability mechanism to address allegations of torture and ill-treatment and arbitrary detention in police custody, and other offenses involving the police; Welcome international assistance to learn from comparative experience in other jurisdictions.
- Commit that any allegations of torture and ill-treatment will be investigated by an independent body under judicial supervision, as per the recommendations of the Committee against Torture.
- Take all measures to end the practice of interrogating suspects at the start of an investigation in order to elicit a "confession".
- Institute trainings on proper investigative techniques in line with international law and standards such as the Minnesota Protocols, as part of a sustainable training program for police on human rights and international law, standards and best practices – including on witness protection, the preservation of evidence, gender bias and investigation of sexual and gender-based violence.
- Issue instruction, and enforce existing law, that requires police to register First Information Reports alleging that a crime has been committed.
- Ensure that investigations into allegations of police misbehavior including illegal arrest, ill-treatment or extra-judicial killings are undertaken promptly, thoroughly and effectively and conducted by an independent body outside of the normal police chain-of-command. Such investigations should never be conducted by officials within the same office as those accused of wrongdoing.
- Facilitate civil society monitoring of places of detention and make other efforts to reach out to civil society engaged on issues of police reform. Ensure that detainees have unhindered access to legal counsel.
- Develop and propose measures to protect victims and witnesses, including taking into account the specific vulnerabilities of victims of marital rape and *chhapaudi*.

For the Office of the Attorney General

- Publish and periodically update accurate and up to date statistics on the number, nature, status and disposition of cases brought under the new provisions to the Penal Code criminalizing torture and enforced disappearance.
- Implement, including by effectively supervising police investigations and bringing prosecutions where warranted, the Penal Code provisions criminalizing torture and enforced disappearance, in addition to other provisions that cover cases of other ill-treatment and arbitrary deprivation of the right to life (unlawful killings).
- Issue a circular to Chief Attorneys and all prosecutorial staff setting out guidelines for the monitoring of all places of detention, to serve as preventative measure against ill-treatment, including an endorsement of provincial level initiatives to improve monitoring and supervision of police detention.
- Vigorously and effectively investigate and prosecute, in line with international standards on the right to a fair trial, instances of the unlawful and excessive use of force by police in the Terai during 2015 demonstrations.
- Take measures to ensure court-ordered reparation, including compensation, is delivered to victims and families.
- Introduce measures to ensure the functional independence of prosecutors and insulate them from inappropriate influence by political appointees of the Office of the Attorney General or political actors – including at the Supreme Court level.

For the Judiciary

- Initiate an internal reform program to enhance the independence and impartiality of the judiciary in line with international standards, including new guidelines on the assignment of cases that will reduce the possibility of undue external influence.
- Announce a new initiative to ensure implementation of judicial policy to broaden the gender, ethnic, caste and other status diversity and representativeness of judges at all levels.
- Conduct trainings with National Judicial Academy on the arrest warrant provisions of the Criminal Procedure Code to ensure that judges are mandated to substantively scrutinize, and not simply rubber stamp, arrest warrant requests from police.
- Provide guidance on the role of district-level judges to monitor (including visiting) places of detention to protect against ill-treatment, torture and other violations, in conformity with the standards established under the UN OPCAT.
- Publish and periodically update data on the implementation of Supreme Court and other judicial decisions by the government authorities; Develop indicators as needed and ensure that a determination of “partial implementation” does not skew data in such a way as to conceal non-implementation.
- Support the National Judicial Academy in taking measures to integrate international human rights law and standards, as well as best practices, into the curriculum for judges; Welcome international cooperation and assistance in support of such initiatives.
- Exercise the mandate of the Supreme Court to supervise and give necessary direction to inferior and specialized courts and other judicial bodies under its jurisdiction, including judicial committees.

For the Diplomatic Community

- Continue to withhold support to transitional justice bodies until the law is amended so that it is compliant with international obligations and the jurisprudence of the Supreme Court.
- Support civil society-led initiatives, including memorialization and other non-government transitional justice processes in lieu of a legitimate government-led process.
- Support documentation and monitoring activities of national and international human rights organizations.
- Take efforts to program funds in such a way as to address underlying root causes of human rights violations and abuses and address the pervasive culture of impunity.
- Support human rights defenders and victims through public statements and demarches.

For the National Human Rights Commission

- Exercise its mandate vigorously, including initiating effective and thorough investigations into violations and abuses of human rights.
- Take measures to improve oversight of investigations including internal mechanisms to preserve the independence of commissioners and reduce vulnerability to outside pressure.
- Ensure that the full results of investigations are made public, with appropriate safeguards to ensure the confidentiality of witness testimony and call for measures to be taken to vet or otherwise hold accountable state officials found to have violated human rights.

For Civil Society, including the Media and Nepali Human Rights Defenders

- Develop and implement the means to translate human rights documentation and monitoring into actionable law and policy recommendations for, and engage in dialogue with, justice sector institutions and policymakers.
- Monitor and document the activities of government-led transnational justice processes to ensure that victim's rights to truth, justice and reparation are respected.

For Provincial Governments and Legislatures

- Develop and implement inclusive consultation processes to ensure that the public has an opportunity to input into the law and policy-making process, so as not to reproduce the non-transparent and non-consultative approaches so common at the national level.
- Ensure that provincial legislation and policies are human rights-compliant, including detention monitoring guidelines, and frameworks establishing and governing the operation of provincial police and other law enforcement bodies.

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March 2020 (for an updated list, please visit www.icj.org/commission)

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