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The Role of National Human Rights Institutions in Ending Impunity for Human Rights Abuses During Conflict: the Case of Nepal

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Abstract

Building on a case study of the National Human Rights Commission (NHRC) in Nepal, the thesis shows that the NHRC, in particular, and National Human Rights Institutions (NHRIs), in general, play a very important role in ending impunity for conflict-related human rights abuses. NHRIs have a particular role to play as they contribute to establishing accountability and securing victims' rights while supporting truth and reconciliation processes. NHRIs complete these processes through their monitoring and follow-up of key recommendations by Truth and Reconciliation Commissions (TRCs). Therefore NHRIs and TRCs complement each other: NHRIs contribute to the success of TRCs and TRCs' success contributes to NHRIs' central objective of promoting a human rights culture.

The thesis argues that ending impunity is primarily a state responsibility. According to their mandate, NHRIs have a major role to play as the national custodian of human rights. However, the examination of the role of the NHRC in Nepal shows that the effectiveness of that particular NHRI is linked to the interpretation and clarity of its mandate, its internal capacity and the response of other actors. While many NHRIs have already played a key role in transitional justice processes, this study shows that a stronger principle basis needs to be developed to support the NHRIs' role as a key to the transitional process.

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List of Abbreviations

APF	-	Asia Pacific Forum of NHRIs
CNDH	-	Conseil National des Droits de l'Homme (National Human Rights Council of Morocco)
CPA	-	Comprehensive Peace Accord
CPN-M	-	Communist Party of Nepal- Maoists
CRPD	-	Convention on the Rights of Persons with Disabilities
DIHR	-	Danish Institute for Human Rights
DIHR	-	Danish Institute of Human Rights
EU	-	European Union
HRC	-	Human Rights Commission
HRCSL	-	Human Rights Commission of Sierra Leone
ICC	-	International Coordination Committee
ICCPR	-	International Covenant on Civil and Political Rights
ICERD	-	International Convention on the Elimination of All forms of Racial Discriminations
ICJ	-	International Commission of Jurists
IDPs	-	Internally Displaced persons
NHRC	-	National Human Rights Commission
NHRIs	-	National Human Rights Institutions
NHRPS	-	National Human Rights Protection System
NIHRC	-	Northern Ireland Human Rights Commission
OHCHR	-	Office of the High Commissioner for Human Rights
OPCAT	-	Optional Protocol to the Convention Against Torture
TJ	-	Transitional Justice
TRC	-	Truth and Reconciliation Commission
UK	-	United Kingdom
UN	-	United Nations
UNDP	-	United Nations Development Programme
UPR	-	Universal Periodic Review

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Chapter 1

Introduction

1.1 Background for the Research

Dealing with human rights abuses committed during a conflict period is generally considered as the role of Transitional Justice (TJ) mechanisms. Failure to deal with these abuses leads to impunity, and a risk that abusive acts may reoccur. The concept of 'Transitional Justice' is defined in a UN Guidance Note as the processes and mechanisms working to ensure accountability, serve justice, and achieve reconciliation after a period of conflict where widespread human rights abuses have taken place.[1] A 'Set of Principles on Impunity' adopted by the UN includes Truth and Reconciliation Commissions (TRC) or inquiry commissions as mechanisms for transitional justice, which are tasked to ascertain the truth and document the cases of violations of human rights and humanitarian laws.[2] The Principles further elaborate the role of such ad-hoc Commissions in providing reparation to victims or their families, initiating reintegration/rehabilitation, and making recommendations for prosecution and institutional or structural reforms.

The lack of reference to National Human Rights Institutions (NHRIs) in this UN adopted Set of Principles naturally leads to question whether NHRIs have any important role to play when it comes to dealing with conflict-related human rights issues. NHRIs as a permanent national structure and as a key institution in the national human rights

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1 *Guidance Note on National Human Rights Institutions and Transitional Justice*, UN Office of High Commissioner for Human Rights, 27 September 2008, p.4.

2 UN General Assembly adopted the Report of the Special Rapporteur on Impunity: UN Commission on Human Rights, E/CN.4/2005/102/add.1, 8 February 2005. As a part of the transitional process, the Set of Principles requires states to undertake institutional reforms to foster a culture of respect for human rights and restore or establish public trust, for which the establishment of effective civilian oversight institutions are suggested (Principle no. 36). However, it does not refer NHRIs despite their strong existence as guided by the Paris principles' adopted by the UN General Assembly in 1993. By the time the Set of Principles were adopted, many NHRIs around the world have been playing a constructive role as the oversight institution in both the conflict and post-conflict period. See more at Adhikari, B. (ed.), *Conflict, Human Rights and Peace Challenges Before Nepal*, *Rishikesh Shah Memorial Lectures 2003*, National Human Rights Commission (NHRC), Kathmandu, 2003 that elaborates the extensive role played by the NHRC in Nepal during the conflict. '*Kampala Declaration' 2002* also reveals the presence and the role that NHRIs have played by that time.

protection system are the key player of human rights protection in all situation within their general mandate of protection and promotion of human rights.[3]

In this context, this paper will have a closer look at the role played by the National Human Rights Commission (NHRC) of Nepal. The NHRC is a good subject for a case study as it has been operational both during the armed conflict (1996 - 2006) and in the post-conflict transition (2006 onwards). Within its general mandate, which includes complaints handling role as well, NHRC has dealt with around 4000 cases of conflict related human rights abuses and has documented and established the facts of abuses.[4] This documentation may lay the basis for the work of the Truth Commissions (established in February 2015) and their recommendations. Monitoring the implementation of and follow up to the TRC recommendations is tasked to the NHRC.[5]

It seems logical to assume that NHRIs functions can contribute to making a TJ process successful as the failure or lack of implementation of their recommendations may cause to another conflict. The success of TJ processes may lead to ending impunity, ensuring respect for the rule of law and fostering and sustaining culture of respect for human rights that 'the set of Principles on Impunity' has suggested for guaranteeing non-recurrence of violations (Principle no. 35). TRCs are typically ad-hoc bodies established with a relatively short time-bound mandate. In this sense they may even be considered as institution that complement to NHRIs, which play an 'important and constructive role' in 'promotion and protection of human rights' as described in the Vienna Declaration of

[3] NHRIs are introduced as 'effective national institutions for the promotion and protection of human rights' in the Principles Relating to the Status of National Institutions – Paris principles. For the details, please refer UN Resolution on the National Institutions for the Promotion and Protection of Human Rights, A/RES/48/134, 20 December 1993.

[4] *13 years of the Commission*: *Commission Recommendations on the Complaints received and the Status of Their Execution (2000-2013)*, National Human Rights Commission, Nepal, Lalitpur, 2013. The Report (available in Nepalese version) provides the statistics of 11407 complaints received (out of which 4510 are claimed as settled) and their status. Though it is not clearly segregated, the majority of the cases are enlisted as those related to the Armed conflict launched by the Communist Party of Nepal-Maoists (CPN-M) in 1996, against the government of Nepal, which ended after signing the Peace Agreement in 2006. The figures were validated by interviewees during the field research. For more on NHRC and its role please refer Chapter 5.

[5] Section 30, *Bill on Commission on Investigation of Missing Persons, Truth and Reconciliation 2070 (2014)*

Programme of Action.[6] Despite the obvious links between NHRIs and TRCs, the important role of the NHRIs in dealing with conflict related human rights abuses in post-conflict transitions is not recognised in any of the authoritative texts. Based on this consideration, this research paper intends to identify the basic principles for and the role of NHRIs in processes that deal with conflict related human rights abuses. In the absence of sufficient research into this matter, the point of departure of the study will be the UN OHCHR Training Manual and Guidance Notes on 'NHRIs' role in Transitional Justice' which have elaborated NHRIs' role simply as the supportive role.[7]

The terms 'impunity' and 'accountability' are used often and in some places interchangeably in this thesis. Throughout the research, accountability is considered as an explicit acknowledgement of grave human rights violations occurred in the past, and the state's involvement or responsibility for them, through means that can include but are not limited to the establishing truth, criminal prosecution, reparations to victims, and efforts to guarantee non-repetition. The term 'impunity' denotes the absence or inadequacy to hold perpetrators of human rights crime accountable and the inherent denial of the victims' right to justice, truth and reparation.[8] In an extended sense, in this research the term is used as the negation of accountability. It terms of dealing with the subject of accountability, legal, ethical and political dimensions are taken into account as human rights abuses in a conflict context cannot be reduced to a legal issue.[9] Most of the literature

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6 A/CONF.157/24 (Part I), chap. III.

7 In line with the Guidance Note (supra note 1) NHRIs' role as dealing with past human rights violations is reiterated in the 2010 as: *'Accountability can be ensured and impunity combated by documenting and investigating violations, and monitoring and recording abuses both during conflict and during transitional period. These efforts can support future prosecution initiatives, truth-seeking and truth-telling bodies, reparations measures and vetting processes. National human rights institutions can assist victims by ensuring that they have equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information. They can also support the reintegration in society of demobilised forces, displaced persons and returning refugees, and support special initiatives for child soldiers and child abductees; and gender-sensitive approaches to transitional justice.'* For more details, please refer *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1) United Nations, New York and Geneva, 2010, P. 27.

8 Vriezen, V., '*Amnesty Justified? The Need for a Case by Case Approach in the Interests of Human Rights*', Intersentia, Cambridge, 2012, p. 13.

9 Mendez elaborates that accountability problem has legal, ethical and political dimension and all three components need to be tackled while establishing accountability. Please refer, Mendez, Juan E., "Accountability for Past Abuses", in *Human Rights Quarterly* 19.2, 1997, pp.255-282, p. 256.

including the UN guidance note use the term 'combating or fighting impunity'. In this research combating or fighting impunity is used to refer the process that ultimately leads to ending impunity.

Ending impunity is first and foremost a state responsibility. As a party to different international conventions, states have affirmative obligations in response to massive and systematic violations of human rights.[10] In the case of extrajudicial execution, torture, disappearance, and prolonged arbitrary arrests, states cannot derogate immunity even in emergency situations.[11] The Convention on Genocide and the Convention Against Torture oblige states to prosecute the human rights perpetrators, and non-compliance with these obligations may lead to international sanctions due to 'universal jurisdiction'.

In order to comply with international obligations, states in post-conflict situations establish TRCs to deal with conflict related human rights abuses. In principle, the TRCs are to ensure that the violations of laws do not go unpunished. However, the new regime with the fear of the possible influence by and power of the old regime may assume that impunity is a condition for reconciliation.[12] This presumption may help to facilitate the short-term peace deals, but it has longer-term consequences, as prevailing impunity could be the root cause of other conflicts in the future. In this context, NHRIs may play an important role to make the TRC role effective, its recommendations enforceable and protection of the rights of victims. While they represent the voice of vulnerable groups, NHRIs serve as a mechanism to ensure state compliance with international commitments and they provide support to states to realise their commitments in this regard.[13] Taking these factors into account, this research paper will make the following assumptions:

i) The role of NHRIs in conflict and post conflict period is to protect the rights of vulnerable groups particularly conflict victims and making TRCs successful which ultimately leads to ending impunity;

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10 Ibid, p.259
11 Ibid.
12 Vriezen, V., supra note 8, p. 16.
13 Goodman, R., and Pegram, T. (eds.), *Human Rights, State Compliance and Social Change- Assessing National Human Rights Institutions*, Cambridge University Press, New York, 2012, p. 2-3

ii) Truth and Reconciliation Commissions without NHRIs are incomplete as there seem to be good reason to believe that they complement each other.

The research will proceed with outlining the role and functions of NHRIs and common characteristic of internal conflicts and human rights violations. On this basis the research will carry out a case study of Nepal in order to identify and analyse the challenges and opportunities that the NHRC has encountered. The NHRIs in Morocco, Northern Ireland and Sierra Leone, which are known to have had a direct role to play in addressing conflict related human rights abuses, will provide very relevant comparative reference material for the contextual analysis and discussions of the NHRC mandate and its role in following up TRC recommendation in Nepal.

1.2 Research Objective

The main objective of the thesis is to analyse the role of NHRIs in dealing with human rights abuses committed during internal armed conflict in a country. The research will analyse the general principles of collaboration and complementarities between the TJ mechanisms, particularly the TRC and NHRIs. On the basis of this, the case study of Nepal provide a more detailed analysis of the situation in this particular post-conflict environment. The research will define NHRIs role in dealing with past human rights abuses as a process to establish accountability of past human rights abuses and assuring victims justice and non-reoccurrence of violence, which largely corresponds to ending impunity.

1.3 Research Questions

The research is intended to find answer to the following questions:

1. Do NHRIs have a key role to play in ending impunity for the human rights abuses committed during conflict period?
2. What are the specific roles that only NHRIs can fulfil and cannot be substituted by other institutions?
3. How do TJs, and more specifically TRCs and NHRIs best complement each other in dealing with the past human rights abuses committed during conflict?

1.4 Theoretical Framework

The Paris principles that broadly guide the establishment and functioning of NHRIs are the primary framework of this research in terms of elaboration and analysis of the mandate, role and effectiveness of NHRIs. Dealing with the conflict related human rights abuses is primarily related to establishing accountability. It will be analysed based on the 'UN Set of Principles on Impunity' as explained in section 1.1. There are no any specific principle bases already developed for the NHRIs role related to the transition periods and particularly in terms of collaborating with TJ mechanisms. With this consideration, the analysis of the NHRIs' role will be based on the UN guidance notes and manuals that explain the actual and potential role of NHRIs. International human rights principles will be the guiding norms for NHRIs as is the case for all NHRIs including those created as part of a peace process or as a measure to instigate such a process.[14]

Victims' justice is the primary concern for NHRIs' while dealing with the conflict related human rights abuses. For this purpose, the strict application of international human rights principles would require applying punitive approaches, which is based on the principles of 'retributive justice'. The central idea of retributive justice principles is that the offender has gained unfair advantages due to his behaviour and that punishment will correct this imbalance.[15] This approach considers victims seeking for punitive responses and retribution of their sufferings.[16] However, other research seem to suggest that victims of human rights abuses place attention to other values such as information, participation, material reparation, and symbolic reparation including apologies.[17] From this perspective, the alternative seems to be the application of the principles of 'restorative justice', which aim to correct imbalances and restore broken relationship through healing, harmony, and

[14] *International Roundtable on the Role of National Institutions in Conflict and Post-conflict Situation: Roundtable Proceedings Report*, Northern Ireland Human Rights Commission and the OHCHR, Belfast, 20-22 June 2006, p-6.

[15] Maiese, M., "Retributive Justice" in Burgess, G. and Burgess, H. (eds.), *Beyond Intractability*, Conflict Information Consortium, University of Colorado, Boulder, 2004, 2004.

[16] Combs, N., A., *Guilty Pleas in International Criminal Law – Constructing a Restorative Justice Approach*, Stanford University Press, California, 2007, p.137

[17] Ibid., p.137.

reconciliation.[18] With this consideration, the restorative justice principles will be applied while analysing the NHRIs role related to victims' justice.

Ending impunity is primarily the state responsibility. In order to contribute to the states to realise their obligations, NHRIs' support will be based on the Principles of 'State responsibility to protect'. This principle denotes the responsibility to prevent by addressing the causes of conflict, responsibility to react and respond to human rights needs with appropriate measures, and the responsibility to rebuild with recovery, reconstruction, and reconciliation as well.[19]

1.5 Research Outline

The research is divided into six chapters. The first chapter is to introduce the context, objectives, the main questions and the theoretical basis of the research. The second chapter deals with methodological approaches including the sampling and selection of the interviewees for field research and some challenges of the research. Chapter 3 focuses on dealing with the features of NHRIs, international norms and mechanisms for setting the norms. This chapter explains NHRIs as a part of the national human rights protection system that provides them the overall human rights responsibility. The theoretical aspects of conflict, human rights violence, the issue of impunity and the role of NHRIs in terms of ending impunity for past human rights abuses are discussed in Chapter 4. It also includes a brief comparative study of three post conflict countries where the thesis looks into those NHRIs mandate and their ability to deal with conflict-related human rights abuses. Chapter 5 focuses on a case study of the NHRC in Nepal. This crucial chapter includes an analysis of the NHRC's mandate as provided by the law and peace agreement; the role it has played during the conflict period and in the post-conflict period; their effectiveness in protecting human rights in the short term and their contribution to ending impunity in the long term. The last one, chapter 6 concludes with key findings and some recommendations.

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[18] Ibid., p. 136.

[19] *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, December, 2001, p.xi.

Chapter 2

Research Methodology

2.1 Research Motivation and Methods

This thesis builds on the analysis, observations and reflections during my stay at the Danish Institute of Human Rights (DIHR) - Denmark's NHRI - in Copenhagen and field work done in Nepal in the first half of 2015.

The idea of the research on this topic originate with my personal and professional experiences with the armed conflict and post-conflict situation in Nepal. As a Programme Manager of the EU Delegation in Nepal, I have been following the NHRC activities since 2003 and managed a number of civil society projects in the areas of democracy and human rights. In the post-conflict situation I worked with the government of Nepal in managing the EU programme on Stability and Peace Building. During these periods the NHRC has been dealing with most of the conflict related human rights abuses. However, the TRC Act enacted in 2014 does not assign any specific roles to the NHRC in the process of the TRC but only for monitoring the execution of their recommendations. The Truth Commissions established in early 2015 further encouraged me to continue with the research idea as the actual practices and the strategic approaches of these two institutions could be checked and verified, which I did during the field work.

This research is primarily a desk review in the area of law supported by a brief comparative study and a detail case study. Field research is the crucial part of the case study, which had two objectives: first, assessing the Knowledge, Attitude and Practices (KAP analysis) of the relevant actors; and second, validating the findings of the principle basis and theoretical analysis in terms of their application and practical consequences. Author's personal and professional experiences have contributed to framing the research, analysing the content and approaching the right persons for interviews during the field work. In this respect, the research analyses some of the socio-economic and political aspects as well in terms of assessing the conflict context, their impacts and effectiveness at the institutional level.

2.2 Primary and Secondary Data

The desk review includes the analysis of soft law namely the Paris Principles and their elaboration by the International Coordination Committee of NHRIs as well as the regional networks of the NHRIs, UN resolutions, declarations of different international conferences, and the peace agreements of different countries. Hard law includes primarily the legal provisions of Nepal for the case study, the legal provisions of Morocco, Northern Ireland and Sierra Leone for comparative study, and human rights and humanitarian conventions of the UN system. Official reports of the governments and NHRIs are also used as primary sources for this study. The interviews held with the actors (Annex 1) also serve as the primary sources of information or validation of other sources.

Academic works of law and political science scholars are used to explain the rationale and elaboration of the legal provisions, looking at their practical consequences and the impacts. The theoretical aspects of the research are based on literature related to conflict, human rights, conflict resolution and peace studies. Though there is a huge scholarship developed in the areas of conflict and human rights and it is emerging on NHRIs as well, there is a huge gap of scholarship on the role of NHRIs in the transitional justice processes. All the reference materials used for this research were either accessed from the DIHR library and the internet or gathered during the field work in Nepal.

2.3 Sampling and Interview with Key Actors in Nepal: The Country Case-study

For the case study, a three week-long field study in Nepal was undertaken between April and May 2015. Earlier, the mandate, role and effectiveness of the NHRC were analysed based on the available primary and secondary sources as explained earlier and questionnaires (Annex II) developed for holding a semi-structured interview.

In terms of selecting actors for the interview a long list of 58 different stakeholders was prepared, which was divided into four categories, namely as: a) actors having direct role; b) opinion makers; c) civil society and victims groups; and d) external actors. On this basis 18 actors were selected by applying the purposive random sampling method to ensure sufficient representation from each category, having the person who could come

up with the authentic institutional position and balancing the socio-political diversity including gender.

The field research was held based on a rigorous interview with most of the actors and a fairly short interactive meeting with the Constituent Assembly chairperson and the former Attorney General. At the end, two actors planned with the Supreme Court Judge and an international civil society actor and two follow up meetings scheduled with the NHRC chair and the former Attorney General couldn't be held due to the earthquake that hit Nepal on 25th April.

2.4 Research Limitations

I encountered a number of challenges in conducting this research. A substantial challenge was related to the availability of limited scholarship as mentioned in section 2.1. While the lack of sufficient scholarship has justified the significance of this research, it has posed challenges in terms of sufficiently developing and analysing a theoretical basis. As a result in some cases such as in terms of analysing the NHRIs role in transitional justice, I had to fully rely on some UN produced Manuals and guidelines.

Another major practical challenges was related to my field work in Nepal. In the middle of the three weeks of field work, a devastating earthquake hit Nepal on 25th April 2015. As it caused heavy damages and losses, it obstructed interviewing two remaining actors and two follow up meetings planned as mentioned above. As a result, I had to rely on the information received from other actors and the limited information received from the NHRC Chair and the former Attorney General.

Larger research based on socio-economic impact studies would have been better as the issue of ending impunity and promoting human rights culture is largely related to socio-political and historical situation of a particular country. It would have helped to provide a real picture for validating the approaches suggested and their effectiveness in both short-term and long-term. However, it was not possible to do this kind of comprehensive research within the limited time, resources and academic requirements. Future studies with the detail comparison of more post-conflict countries may complement this study and add up further validation to the conclusions of this thesis.

Chapter 3

National Human Rights Institutions: International Framework

3.1 Introduction

This chapter deals with the international principles for setting up National Human Rights Institutions (NHRIs), based on the framework of the Principles relating to the status of national institutions (hereafter referred as 'Paris Principles')[20]. The Paris Principles do not define NHRIs, they rather provide a functional description of the protection and promotion of human rights. The protection role includes receiving, investigating and resolving complaints; mediating conflicts and monitoring the rights protection. The promotional role includes education, outreach, the media, publications, training and capacity-building, as well as advising and assisting governments.[21] Article 2 of the Paris principles requires either the Constitution or legislation of a country to define the NHRI role and having 'as broad a mandate as possible'.

In practice, the institutional set up and NHRI roles vary between countries depending on their socio-political and historical context. Institutional set up and mandate are significant in terms of assessing effectiveness of NHRIs' in protecting and promoting human rights in both the conflict and post-conflict or normal/peaceful situation. The mandate together with its independence and the methods of operations are the criteria for international accreditation of NHRIs.[22] Taking all these factors into account, this chapter will discuss the principles of 'broad mandate'[23] and different factors affecting the breadth of mandate. The Accreditation subcommittee further elaborates 'broad mandate' as the NHRI competence to deal with all rights including civil, political, economic, social and cultural rights; having protection, promotion and investigative mandates; independence and

[20] For more details on the Paris Principles, please refer section 3.3.1.

[21] *General Observations*, General Observations of the Sub-Committee on Accreditation, International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), (updated) May 2013, para. 1.2.

[22] Accreditation is the official recognition of the NHRIs. More elaboration available in section 3.3.2. Also see, UN Manual, supra note. 7.

[23] *General Observation*, supra note.21.

autonomy guaranteed by national law; having the functions including monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling; and extended outreach and necessary access to investigate into the alleged human rights violations. This study will be based on the international principles and their interpretations, guidelines and toolkits developed by the UN, International Coordination Committee of the NHRIs (ICC) and regional networks of the NHRIs in Africa, America, Asia and Europe.

Variation in the institutional set-up of NHRIs can be analysed from different perspectives. Composition, role and methods of operations of NHRIs largely depends on the category to which they belong to.[24] The focus of this study will be on multimember Commissions, which is what we find in Nepal - the country of the case study presented in Chapter 5. The analysis of the structure, mandates, functions and the role of different mechanisms and the review of international principles carried out in this chapter will serve as the principle basis for the case study. This chapter covers the composition, general mandate and methods of operations of the NHRIs. Therefore, the study is primarily based on the authoritative texts available in the UN documents and their interpretations; text, materials and descriptions of the ICC, NHRI regional networks and the regional institution particularly, the EU.

3.2 NHRIs: Establishment, Types and Mandate

Though the Paris principles have set minimum standards, State practices vary in terms of establishing and mandating NHRIs. Variations are primarily due to the particular context, needs and commitments of States. However, there is also increasing pressure to establish and comply with the Paris principles particularly with the operationalisation of the Universal Periodic Review (UPR) in 2008 at the human rights council.[25] In addition, push factors include the regional context, vocal third party actors including inter-governmental

[24] As explained in Section 3.2.2, different structural model exist globally. For more, see UN Manual, supra note 7, p. 6.

[25] Roberts, Kirsten, 'The Role and Functioning of the International Coordination Committee of National Human Rights Institutions in International Human Rights Bodies', in Jan Wouters and Katrien Meuwissen (eds.), *National Human Rights Institutions in Europe- Comparative European and International Perspectives'* Intersentia, Cambridge, 2013, pp.223-246., p. 224.

organisations and domestic constituencies seeking to raise the cost of non-compliance, civil society pressure, and international funding agencies.[26] While encouraging states to establish and strengthen NHRIs, the preamble of the Paris principles has recognised the rights of the States to choose the framework 'that is best suited to its particular needs at the national level'. This section will focus on general practices and strategies of States for establishing and mandating NHRIs without going into a country specific context.

3.2.1 Establishing NHRIs: Needs and Obligations

NHRIs are non-judicial state bodies created in view of contributing to addressing state obligations to respect, protect and fulfil the rights of the citizens.[27] NHRIs are characterised as occupying a 'fourth space' in the international human rights framework due to their different features from state, Non-governmental organisation, and international organisations.[28] As independent national bodies, they delegitimise, though sometimes legitimise, government's poor record of human rights.[29] They also work as the missing link between the government and civil society, and the international and domestic level.[30] NHRIs are an important link between the aspirational claims of the international human rights ideals and their domestic application amidst the political reality on the ground. They are also significant in terms of setting/shaping international human rights norms as they participate and negotiate in different international mechanisms including the UN Human Rights Council.[31] Therefore, NHRIs are characterised as 'a conduit for transmissions of international norms and information, a locus of making human rights

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[26] Pegram, T., and Linos, K., *Interrogating Forms and Functions: Designing Effective National Human Rights Institutions*, Matters of Concern Human Rights Research Paper, Danish Institute for Human Rights, Copenhagen, 2015, p.10.

[27] Nowak, M., "National Human Rights Institutions in Europe: Comparative, European and International Perspectives", in Wouters, J. and Meuwissen, K. (eds.), *National Human Rights Institutions in Europe- Comparative European and International Perspectives'* Intersentia, Cambridge, 2013, pp. 13-26, p.13.

[28] Wouters, J. and Meuwissen, K. (eds.), *National Human Rights Institutions in Europe- Comparative European and International Perspectives'* Intersentia, Cambridge, 2013, p. 9.

[29] Goodman, R., and Pegram, T., supra note 13, p. III.

[30] Nowak, M. supra note. 27, p. 14.

[31] Goodman, R., and Pegram, T., supra note 13, pp. 2-3.

claims' where people can make complaints and redress grievances. 'As an actor NHRIs can function as a watchdog, an editor, a promotor, and an administrative overseer'.[32]

In general, NHRIs are entrusted with the task of promoting human rights, advising the executive and legislative branch and monitoring compliance with international standards. Their functions include carrying out awareness raising and human rights education activities and publishing status and annual report on the situation of human rights, and initiating preventive measures including preventive visit to places of detention.[33] Some NHRIs are also entrusted with examining and recommending actions on individual human rights complaints (complaint handling). Effective NHRIs not only directly promote human rights, but also provide crucial oversight and contribute to the accountability of state organs. Establishing a NHRI could place constraints on government and impose a significant cost as well. However, states may establish them either as 'false positives' – commitments made without any intention to comply, or 'designed to fail', rather than as an independent and effective human rights watchdog.[34] It has been observed that many states, especially those subject to human rights pressure or poor human rights records, have created NHRIs largely to appease powerful critics.[35] It has also been suggested that where coercion and pressure are the primary motive a state in all likelihood creates a relatively powerless NHRI.[36] More recently, states have recognised the significance of NHRIs as they have been significant players in the countries emerged from civil wars and regional conflicts, in terms of implementation and monitoring of peace agreements and post-conflict transitional arrangements.[37]

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[32] Meyer, David S., "National Human Rights Institutions, Opportunities and Activism", in Goodman, Ryan, and Pegram, Thomas (eds.), *Human Rights, State Compliance and Social Change- Assessing National Human Rights Institutions*, Cambridge University Press, New York, 2012, pp. 324-334, p. 334.

[33] Nowak, M., supra note 27, p. 14.

[34] Pegram, T. et. al, supra note 26., p. 9.

[35] Cardenas, S., "National Human Rights Institutions and State Compliance", in Goodman, R., and Pegram, T. (eds.), *Human Rights, State Compliance and Social Change- Assessing National Human Rights Institutions*, Cambridge University Press, New York, 2012, pp. 29-51, p. 34.

[36] Ibid.

[37] Durbach, A., "Human Rights Commissions in Times of Trouble and Transition: the Case of the National Human Rights Commission of Nepal", *'Human Rights in the Asia Pacific'* Conference, University of Sydney, Sydney, Australia, December, 2009, p.3. available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609452

Though the International Convention on the Elimination of All forms of Racial Discriminations, (ICERD) 1965 and the International Covenant on Civil and Political Rights, (ICCPR) 1966 have mentioned NHRIs in some articles, States didn't have any specific obligations as such in the past for establishing NHRIs except political pressure from UN.[38] Article 14 (2) of the ICERD required to establish or indicate a body to receive and consider petitions from the victims of violations of the rights violations granted by the convention or in case the available local remedies are exhausted. Article 2 (3) of the ICCPR required the state parties to ensure treatment of human rights violations by a judicial, administrative or legislative authority, or any other competent authority.

The Paris Principles are not directly legally binding on States. However, they are recognised within the UN system through different UN resolutions and referred to by different conventions. Furthermore, NHRIs are already part of different UN Conventions and mechanisms. UN Resolutions In 2002, the Optional Protocol to the Convention Against Torture, (OPCAT) Article 3, and Article 17 to 23 and in 2006 the UN Convention on the Rights of Persons with Disabilities, (CRPD) Article 33(2) specifically provided state obligations to designate or establish independent bodies compliant to Paris principles as a part of the implementation of the conventions. OPCAT required to 'set up, designate or maintain' National Preventive Mechanisms and the CRPD required to 'maintain, strengthen, designate or establish' one or more independent Monitoring Mechanism. Different UN Resolutions like the Resolution of the Third Committee of the UN GA, 20 November 2008 have also called upon states to set up NHRIs as the crucial step towards improving human rights.[39]

Though not obligatory, the Paris Principles are the minimum international standards for the establishment of NHRIs that provide a broad normative framework for the status, structure, mandate, composition, power and methods of operation.[40] However, the Paris principles are also claimed as inadequate as they demand too much by laying down a maximum programme that is hardly met by any national institutions and too little as it

[38] Nowak, M. supra note 27, p. 22.
[39] *UN Resolution*, supra note 3.
[40] *General Observations*, supra note 21.

does not oblige States to provide for NHRIs to deal with individual complaints that is regarded as an essential character.[41] While the post-Paris principles debate is ongoing in the context that the proliferation of NHRIs and their varied success in different context cannot be regulated by UN bodies led by States, this study is still based within the framework of the Paris principles.

3.2.2 Different Types of NHRIs

As States have the right to choose the NHRI framework that is best suited to their particular needs,[42] there are differences in state practices. Globally, NHRIs are organised in highly diverse ways. Some are highly pluralistic as multi-member Commissions, others are unitary, composed of a single Ombudsperson/institution. This is the reason why they are categorised in different forms. A UN Manual has categorised them as Human Rights Commissions, Human Rights Ombudsman institution, Hybrid Commissions, Consultative and Advisory Bodies, Institutions and centres, and Multiple institutions within a country.[43] The same are categorised into National Human Rights Commissions, Ombudsperson, and Specialised Institutions in an EU Manual.[44] Nowak in his study on NHRIs, categorises into four types: Commissions (British Model), Advisory Committee (French model), Ombuds-person/institutions (Swedish/Spanish Model), and Institutions (Danish Model).[45] Yet another study suggests two categories of NHRIs: multimember commissions and Ombudsmen, while acknowledging a blurred line between such categories.[46] In any case, the categorisation includes Human Rights Commissions, Ombudsperson, Human Rights Institutions, and Specialised Institutions having a mandate on specific issues for example Anti-discrimination Institutions, or covering specific types of population for example, Women, Children, Indigenous People etc.

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41 Goodman, R., and Pegram, T., supra note 13.p. 6.

42 *Vienna Declaration and Programme of Action*, A/CONF.157/24 (Part I), 1993, chap. III. Also the Preamble of the Paris Principles.

43 *UN Manual*, supra note 7, pp.15-19.

44 *Strengthening the National Human Rights Protection System - Manual for Embassies of EU Member States*, Human Rights Division, Ministry of Foreign Affairs, The Netherlands, The Hague, 2009, P. 42.

45 Nowak, M., supra note 27,p. 15.

46 Goodman, R., and Pegram, T., supra note 13, p. 6.

Multi-member Commissions that represent diverse social groups are usually entrusted with examining individual human rights complaints as well.[47] Advisory committees lack such authority as they are restricted to mere advisory role.[48] The Ombuds-person/institutions are single-member bodies with an oversight function of the administration. Institutions are those that focus on evidence based advice.

This study focuses on multi-member commissions, the category in which the NHRI of Nepal - the case of this study in Chapter five belongs to. Furthermore, multi-member NHRIs comply better with the minimum standards of the Paris principles than any other types of institutions. The multi-member composition depending on the clarity in National laws, helps to easily realise the plural representation, and having professional members ensures independence and neutrality. In contrast Ombudspersons, who are high level personalities elected by the parliament, often lack political neutrality.[49] The practice of entrusting broad mandate together with complain handling role in many cases of the multi-member Commissions is another advantage of establishing the Commissions of this type. This may be one of the reasons why Nowak in his study suggested the EU to ask all its member states to create fully independent, professional and pluralistic National Human Rights Commissions with an overarching mandate, including the examination of individual complaints.[50] In order to look at the comparative advantages and ensure consistent comparison of the provisions with regards to dealing with past human rights abuses, all the three NHRIs selected for the study in Chapter four includes multi-member Commissions.

3.2.3 Mandate

The Paris principles advocate 'broad mandate' for NHRIs allowing them to deal with all rights without any differentiation and encompassing a role to promote, protect, and even handle individual complaints and having access and investigative powers into alleged human rights violations. The Principles further provide the independence and autonomy

47 *UN Manual*, supra note. 7, p.16.
48 Ibid.
49 Nowak, M., supra note 27, p. 26.
50 Ibid.

to be guaranteed by national law. In fact, all NHRIs have a similar overall purpose namely the protection and promotion of human rights in their respective countries. In general, NHRIs assist government with the formulation of policies, reviewing legislation to check their compliance with international standards, and assisting victims seeking legal redress.[51]

NHRI mandates are primarily measured based on the provisions of the Paris principles. Article 1 of the Paris Principles requires any national institution to be mandated for promoting and protecting human rights. Article 2 requires such mandate to be 'as broad as possible' and clearly authorised in a constitutional or legislative text, which should specify the composition and scope of the mandate. Article 3 prescribes the main functions including advising on any existing or draft administrative and legislative provisions, and making recommendations for their compliances with the international standards.

In addition, the Paris principles mandate NHRIs to monitor any kinds of human rights violation, prepare reports and draw attention of the government for necessary action and carryout various promotional activities. Though the Paris Principles referred to a 'broader mandate' of NHRIs, the function of examining individual human rights complaints is optional for states. It provides that NHRIs may be authorised with a quasi-jurisdictional mandate for dealing with individual complaints, carrying out investigation and making recommendations to the competent authorities.[52]

Within the scope of the broad mandate that the Paris principles has provided with regards to the human rights tasks – including research, addressing accountability, institutional reform or possible reparation – NHRIs can play an important role in post-conflict situations and in the processes of transitional justice.[53] As the national mechanisms for protection and promotion of human rights with formal link to international mechanism NHRIs can play critical role in preventing conflict and mitigating its effects. Their

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51 Parlevliet, M., '*National Human Rights Institutions and Peace Agreements: Establishing National Institutions in Divided Societies*', International Council on Human Rights Policy, 2006, p. 3.

52 *Paris Principles*, supra note 3.

53 *EU Manuel*, supra note 44, p. 42.

neutrality from either side of the conflictt, as guided by the Paris principles, also enables them play this role.[54]

In order to carry out the mandate effectively the Paris Principle requires NHRIs to be independent from their government and not be subject to financial control that might put their independence in question. In addition, the legislation has to define clearly the composition by ensuring pluralistic representation, well-defined working methods, access to government information and a broad mandate to cover all kinds of human rights issues and having consultation, dialogue and networking relations with non-governmental organisations as well. Apart from their work on civil and political rights, an increasing number of NHRIs are involved in addressing the linkage between civil and political and economic, social and cultural rights and are (indirectly) contributing to national development strategies.

In addition to the above-mentioned institutional and normative criteria, there are other factors as well, which are important for NHRIs to make a real contribution towards the protection of human rights. They include the NHRI's image and status within society and among the media, its relationship with formal or informal power holders, its credibility and the extent to which it collaborates with other actors of the national level human rights protection system. Furthermore, the people should be aware of, and have access to, an effective NHRI, which implies that these institutions have a broad reach in society throughout the country.[55]

3.3 The Mechanisms Related to NHRIs

The establishment and functions of NHRIs are now guided by the minimum standards set by the Paris principles. These principles are interpreted, developed and operationalised by different mechanisms and processes of the UN system, the global frameworks developed by the NHRIs with the support and participation of the OHCHR – known as

[54] *The Role of National Human Rights Institutions in Conflict Management, Resolution and Peace Building, A Baseline Survey of the East African Situation*, The Network of African National Human Rights Institutions, Nairobi, 2014. p.ii.

[55] *EU Manuel,* supra note 44, p. 44.

International Coordination Committee (ICC) and its accreditation procedures, and the regional networks of NHRIs. This section will assess all these mechanisms and their processes that contribute to make the NHRI role effective and ultimately contributes to the protection and promotion of human rights.

3.3.1 Paris Principles

The Paris principles were first defined in a workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris from 7-9 October 1991. In 1992 the Commission on Human rights was the first UN body to adopt the Paris principles. Until then NHRIs were not independent participants to the UN Human Rights Commission. During the Vienna World Conference on Human Rights held in June 1993, states reaffirmed the importance of the NHRIs and encouraged explicitly the establishment and strengthening of NHRIs in accordance with the Paris Principles. The Principles were formally adopted by the General Assembly in 1993.[56]

The Paris principles are a non-binding UN resolution with no enforcement mechanism though having powerful impact on state behaviour in relation to NHRIs. Despite their non-binding effects, the Principles became formal when they were picked up by the UN human rights Institutions as elaborated earlier in Section 3.2.1.

3.3.2 ICC and NHRI Accreditation

The ICC is a collective initiative of NHRIs for developing their own role as well as promoting their independence. It's a self-governing body functioning since 1993 and established formally in 2008 under the Swiss law and composed of NHRIs from around the world. NHRIs did not want to assign any government or UN bodies with state members the task of assessing the compliance of NHRIs with the Paris principles, which is a highly sensitive task. Consequently, they opted for self-accreditation procedures through peer review and established the Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights

[56] *Paris Principles*, supra note 3.

with the purpose defined as: "…promotes and strengthens NHRIs to be in accordance with the Paris Principles and provides leadership in the promotion and protection of human rights."[57]

As a core function, ICC promotes the establishment and strengthening of National Institutions in conformity with the Paris Principles and uses the Principles as criteria to determine ICC membership.[58] In fact, the Paris principles adopted by the UN were first elaborated with the inputs of NHRIs. The ICC has driven this unique type of engagement within the international human rights system. It acts as a forum through which NHRIs can coordinate their international engagement.[59]

For the purpose of determining membership, ICC has established a sub-committee on Accreditation and defined its procedures. The ICC Sub-Committee on Accreditation has been delegated the task of assessing institutional compliance with the Paris Principles.[60] Through the sub-committee on accreditation and issuance of general observations, it has produced interpretations and elaborations of the principles.[61] The ICC derives its legitimacy from its working methods and the participation of leading national institutions from different parts of the world.[62] The Accreditation sub-committee consists of four members representing each regional group. The Sub-committee during its meeting held twice a year reviews the applications received for accreditation and makes recommendations to the ICC on which basis the ICC makes the accreditation decision.

NHRIs are accredited either for Status A- fully compliant to Paris principles having the authority to voting in ICC; full participation rights in UN human rights council and other international bodies; Status B – partially compliant to the Paris principles and having observer's position without voting rights; or Status c- Not compliant with the Paris

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57 *Statute (Amended),* Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 21 October 2008, Article 5. available at: http://www.nhri.net

58 *General observations*, supra note 21, para 3.

59 Roberts, K., supra note 25, p. 231.

60 General Observations, supra note 21, p. 6.

61 Goodman, R., and Pegram, T., supra note 13, p.7.

62 Ibid, p.8.

principles, but may participate in the ICC meeting as an observer. Those NHRIs that comply fully with the Paris Principles are members of the ICC and enjoy the rights to vote, participate in the Human rights council and being elected as member of the ICC.

3.3.3 Regional Provisions

Regional Networks of NHRIs have a particular strength. They actively engage their members and undertake substantive initiatives at the regional level and they form a part of the ICC structure as well. In connection with the International Coordinating Committee for NHRIs, four primary regional networks covering NHRIs located in Africa, Americas, Asia and Europe as well as separate cross-regional NHRI forums such as Commonwealth Forum of National Human Rights Institution are in existence. They are formed in line with the Paris Principles that require NHRIs to cooperate with international and regional human rights institutions for the purpose of protecting and promoting human rights.[63]

NHRIs have helped themselves to develop through the global and regional networks. Accreditation procedures of the ICC plays this crucial role globally. Similarly, regional networks of the NHRIs are equally crucial in the formation and development of NHRIs. There are even some regional structural features of NHRIs that reflect regional specificity such as the practices of establishing Ombudsman in Latin America, and Multi member Commission in the Asia-Pacific.[64]

Burdekin[65] claimed that the Asia Pacific Forum of NHRIs (APF) had been the most effective regional network of NHRIs. That may have been the case when writing in 2007 as it had played crucial role since its establishment in 1996 and was particularly active on drafting the CRPD convention as well as in securing the NHRI participation in the Human Rights Council.[66] The claim is less realistic at present given that other regional networks have subsequently also played crucial roles globally and within their respective regions.

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63 *Paris Principles*, supra note, 3, Article 3.e.
64 Goodman, R., and Pegram, T., supra note, 13, p. 11.
65 Burdekin, B., *National Human Rights Institutions in the Asia-pacific Region*, Martinus Nijhoff Publishers, Dordrecht, 2006, p.99.
66 Roberts, K. supra note, 25, p. 233.

In any case, the APF requirement to be compliant to the Paris Principle in order to be a member and the provisions of expulsion in case of failing to comply substantiate the claim that APF has been a particularly effective regional body and may justify the claim as one of the reasons of effectiveness.[67]

The African Network was established to encourage the establishment of NHRIs in conformity with the Paris Principles in Africa.[68] It has carried out numerous initiatives. A Conference of the African NHRIs held in 2002 came up with number of resolutions and recommendations including the need to adopt human rights-based approach to development, managing conflicts in Africa for sustainable development, the need to engage civil society in promoting good governance; and Protecting and Promoting the Rights of Persons with Disabilities.[69]

The Network together with other participants adopted the Cairo Declaration on the Role of NHRIs in Conflict and Post Conflict Situation'.[70] It outlined the role of NHRIs in both conflict and post-conflict situations. Another study launched in 2014 identified the role of NHRIs in conflict management, resolution and peace building.

These regional networks together with the international structure act as an important forum for NHRIs to have a collective voice at the regional and international level and are a key source of initiatives and substantive engagement of NHRIs at both the regional and international level.[71]

3.3.4 UN Human Rights Mechanisms

As explained in Section 3.2.1, until 1992 NHRIs were not independent participants to the UN Human Rights Commission. In 1996 NHRIs, their regional and international bodies

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67 Burdekin, B., supra note, 65, p. 98.

68 *The Role of National Human Rights Institutions in Conflict Management, Resolution and Peace Building, A Baseline Survey of the East African Situation*, The Network of African National Human Rights Institutions, Nairobi, 2014, p.II.

69 *'Kampala Declaration'*, 4th Conference of African National Human Rights Institutions held in Kampala, Uganda, 14 -16 August, 2002,

70 *Cairo Declaration on the Role of NHRIs in Conflict and Post Conflict Situations'*, Cairo, 4 December 2011.

71 Roberts, k. supra note 25, p. 233.

were allowed to participate as independent participants, though it was limited to issue specific matter: related to effective functioning of human rights mechanisms.[72] Following the establishment of the human rights council in 2005 the NHRIs compliant to Paris principles, together with their regional and international bodies, got the authority to participate in the Human Rights Council and in the Universal Periodic Review (UPR) of Human rights.[73] The Human Rights Council has authorised the NHRIs to submit documents, make written statements, and oral interventions in each agenda item of the council and organise parallel events on any issues of their interest. As a part of the UPR process of each country that the Human Rights Council carries out every five years, NHRIs and their regional and international bodies are provided with speaking time. The treaty bodies have also incorporated the interaction and participation of NHRIs in their process. In such cases their role lies providing information for the assessments by the treaty bodies, and then following up the treaty body recommendations at the domestic level.[74]

The UN provides assistance in making NHRIs independent and effective, which is primarily done through the UNDP and OHCHR. Engaging with NHRIs is a priority area for both organisations.[75] The OHCHR's engagement strategy for NHRIs includes supporting the establishment and strengthening NHRIs in accordance with the Paris Principles; strengthening NHRI capacity to work effectively and independently; Supporting an effective interaction between NHRIs and Treaty Bodies, and mechanisms such as Special Procedures and the Universal Periodic Review; and mainstreaming of the work of NHRIs throughout the whole UN system. [76] In this way, the UN has been instrumental in successful establishment of NHRIs globally.[77] While the NHRIs have contributed to shaping international human rights policies and procedures, NHRIs'

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[72] Meuwissen, K., "NHRI Participation to United Nations Human Rights Procedure: International Promotion Versus Institutional Consolidation?", in Wouters, J. and Meuwissen, Katrien (eds.), *National Human Rights Institutions in Europe- Comparative European and International Perspectives'* Intersentia, Cambridge, 2013, pp. 263-286, p. 268.

[73] Human Rights Council, UN Doc. A/HRC/RES/5/1, 18 June 2007, Rule 7 b.

[74] Meuwissen, K., supra note 72, p. 276.

[75] *UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions*, UNDP New York and OHCHR Geneva, 2010.

[76] Ibid.

[77] Goodman, R., and Pegram, T., supra note 13, p. 10.

participation within the UN human rights system has contributed to bridging between international procedures and domestic realities.[78]

3.4 NHRIs within the National Human Rights Protection System (NHRPS)

An EU Manual defines NHRPS as the human rights infrastructures of a country that includes laws, policies and institutions for the protection of human rights. It comprises the means, tools and checks and balances required for ensuring accountability of the state institutions to fulfil their duty to respect, protect and upholding all human rights.[79] An NHRPS requires first the incorporation of international standards into national laws and policies followed by existence of mechanisms with the required means and capacity and/or backing to implement and/or oversee the laws and policies. In a broader term NHRPS includes 3 elements: normative basis provided by laws, policies and procedures for protecting and promoting human rights and ensuring accountability; institutions that contribute to the promotion and protection of human rights, guarantee oversight and ensure accountability; and existence of a civil society and human rights defenders.[80]

A NHRPS provides an opportunity for greater collaboration among the institutions involved in the human rights field - governments, national human rights institutions, local non-governmental organisations, and the UN agencies in the country.[81] Effectiveness of the NHRPS depends on various contextual factors including political support and functional participation of all in the process. A National Human Rights Action plan helps to make the NHRPS effective.[82]

NHRIs have a central role to play in strengthening the NHRPS while they are also an integral part of it. The crucial role of the NHRIs includes strengthening all other elements of the NHRPS and providing crucial oversight of state organs.[83] Within the framework of

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78 Meuwissen, K., supra note 72, p. 271.
79 *EU Manuel*, supra note *44*, p. 21.
80 Ibid, p. 22.
81 *Focus*, Newsletter of the Asia-Pacific Human Rights Information Centre, Volume 31, March, 2003.
82 *Handbook on National Human Rights Plans of Action: Professional Training Series No.10*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 29 August 2002, p. 2.
83 *EU Manuel*, supra note 44, p. 41.

the NHRPS, NHRIs can facilitate state accountability on human rights. A UN Toolkit included NHRIs as 'cornerstones of national human rights protection systems indicating that they can address gaps in NHRPS and support peace building strategies in post-conflict situation.[84] In order to bridge the gap between paper and practice, the NHRIs within their mandate needs to assess the entirity of NHRPS.

NHRPS is the means of guaranteeing accountability and sustainable protection of human rights for all. Ultimately, strengthening all the components of the NHRPS is crucial to make the NHRIs' role effective as the results of NHRI actions depend on the response and realisation of other actors.

3.5 Conclusion

NHRIs as an independent state body carry out a number of different functions to protect and promote human rights that contribute to state obligations of ensuring people's rights. The Paris principles guide states to define the law establishing and defining the composition, role and functions of NHRIs. They also provide guidance to entrust NHRIs with 'as broad mandate as possible' together with independence and functional autonomy for protecting and promoting human rights. The international mechanisms, specifically the provisions in the Op-CAT and CRPD, specifically require to establish NHRIs [or other independent bodies performing functions and established as per the Paris principles] in line with the framework of the Paris Principles, to comply with the commitments of the conventions. However, state practices vary based on their context, needs and priority. In any case, the ICC Accreditation procedures, participation required in the Human Rights Council, and the participation in the process of the Universal Periodic Review (UPR) have put pressure on states to enable NHRIs compliance with the provisions of the Paris principles.

The Paris Principles themselves are debated as 'too much' for complying with by all states and 'too little' for not having a mandatory complaint handling role. While few argue that the Paris Principles cannot accommodate the rapid pace of the NHRIs, there are newer

[84] *UNDP-OHCHR Toolkit*, supra note 75, p.9.

needs being addressed by NHRIs that call for a widening of scope of the Paris principles'. They include the NHRIs' role related to peace building and dealing with impunity, which are initiated and widely promoted by the African regional network of NHRIs. International mechanisms like the ICC, the UN, and regional networks of the NHRIs needs to take such needs into account while elaborating, developing and operationalising the Paris principles. This specific role is particularly important in the countries where NHRIs have to deal with human rights issues in a conflict or post-conflict context. Chapter four in this study will look into all these theoretical aspects to identify potential areas of the NHRIs' role. This chapter will provide references for the chapter five that looks into the specific context of the NHRI in Nepal, which has dealt with human right issues during the conflict and in post-conflict situation.

Chapter 4

Internal Conflict and Post-conflict Societies: the Role of NHRIs in Ending Impunity

4.1 Introduction

This chapter will briefly look into the theoretical aspects of human rights abuses committed during conflict and how NHRIs' deal with them. The study will draw upon some general features of human rights violations as both the 'causes of conflict' and the 'consequences of conflict'. Human rights violation as the causes of conflict provide references to NHRIs for developing and prioritising their role and strategies to prevent, protect and promote human rights during conflict. Violations, as the consequences of conflict, provide NHRIs the basis for adopting measures to protect and promote human rights at the time of conflict and serve as the basis for adopting strategies to combating impunity in the post-conflict period. While the focus of this research is on human rights violations committed as the consequence of conflict, the features of violations as the causes of conflict will be used to analyse the role and effectiveness of NHRIs in chapter 5.

The term 'internal conflict' in this chapter is referred to sustained political violence taking place between armed groups representing the state, and one or more non-state groups.[85] In this chapter the actual and possible role for NHRIs during and in the post-conflict period will be analysed primarily based on the authoritative text, interpretation and analysis of the UN, ICC and NHRI regional networks. Section 4.2 and 4.3 will make some general references followed by a more specific analysis in section 4.4. The point of departure for analysing the NHRIs' role in the transition period and particularly in ending impunity will be the UN Guidance note that explains NHRIs engagement in transitional justice as "…the support process that ensures accountability and combat impunity,

[85] Sriram, C. L., et.al, *War, Conflict and Human Rights: Theory and Practices*, Routledge publication, Abingdon, OXon, 2010, p.14

provide remedies to victims, promote respect for the rule of law and strengthen democracy and sustainable peace".[86]

This chapter includes a comparative study of three NHRIs and intends to look into some practices of mandating NHRIs the specific role to deal with human rights abuses during conflict period. It will help to apply these findings when analysing the mandate and role of the NHRI in Nepal during the case study in Chapter 5. The selection of the three examples is also based on three countries being in post-conflict situations and having similar composition of their NHRIs i.e. multimember commission. The comparative study will be based on the constitutional and legal provisions and peace agreements of those countries. Other official reports, academic research and analysis are used for deriving the principle basis and doing further analysis of those principles.

4.2 Armed Conflict as the Causes and Consequences of Human Rights Abuses

Internal armed conflict or civil conflict, which is different from inter-state conflicts, generally indicates a government army or militia fighting with one or more rebel organisations (also used the term 'non-state armed group').[87] From the human rights perspective, conflict results in devastating violations of human rights on civilians. In fact, the major harm caused by a conflict is perpetrated on civilians either incidentally or more frequently, deliberately in the pursuit of resources and control.[88] It may even happen that leaders wishing to attaining or retaining their power or wealth, may manipulate the longstanding human rights grievances as the means of pushing the general public to join them the intended war launched to serve their purpose.[89] During the conflict many war laws – the international humanitarian laws are violated by imposing systematic abuse of

[86] *Guidance Note*, supra note 1, p. 3.
[87] Sriram, et.al, supra note 85, p. 13.
[88] Ibid, p. 5.
[89] Lutz, E. L., "Understanding Human Rights Violations in Armed Conflict", in Mertus, J. and Helsing, J. W. (eds.) *Human Rights and Conflict: Exploring the Links Between Rights, Law, and Peacebuilding*, United States Institute of Peace Press, Washington DC, 2006, pp. 23-38 at p. 26.

human rights such as rape, ethnic cleansing, and starvation. In many cases targeted violence are committed against women as the means of warfare.[90]

Sustained denial of human rights over a period of times gives rise to violent conflict as a result of the long term frustration of the fundamental human needs related to freedom, identity, security, and welfare.[91] In general, conflict emerges due to the violence of human rights and violent and destructive conflict leads to more human rights abuses.[92] Many of the human rights violations that NHRIs deal with may be either related to the causes or consequence of violent conflict. As it's not possible to make a clear segregation as the causes or consequences (some of them could be both), the sub-sections below will discuss some general features, which will facilitate for further analysis in the next chapter.

4.2.1 Human Rights Violations as the Causes of Conflict

The causes of conflict could be ideological issues including moral and religious differences; political issues; identity issues such as the ethnicity; distributional issues such as control and access to natural resources; and unmet human needs and human rights violations.[93] It is further underlined that violent conflict may also emerge where there are more violent human rights abuses such as illegal detention, extrajudicial killing, disappearances, torture, widespread killing or even attempts at genocide.[94]

Social conflict may be generated due to grievances over the real or perceived denial of rights. Armed conflict could be instigated as an oppose to the systemic social discriminations in-access, denial of political participation, freedom of expression etc, which largely happen in the states that are weak, corrupt, abusive or collapsing due to various factors.[95] In the cases where some human beings deliberately carry out human rights abuses on them or their beloved ones and if they cannot stop the abuses, this

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90 Frerks, G., "Human Rights Violations and Contemporary Violent Conflict- An Inquiry into Causes and Remedies", in Boerefign, I., et. al. (eds.) *Human Rights and Conflict - Essays in Honour of Bas de Gaay Fortman*, Intersentia, Cambridge, 2012 pp.67-85, p. 69.
91 Michelle P., supra note 21, p. 25
92 Ibid., p. 24
93 Sriram, C. L, supra note 85, p. 14.
94 Ibid., p.5.
95 Ibid, p.4

situation of powerlessness may cause victims to feel aggrieved and may desire revenge, which also causes people/groups launching or joining warring groups.[96]

Various factors may cause a conflict in different ways. Undermined identity, political exclusion, economic marginalisation, inequality etc may cause as the underlying causes on which some incidents such as killing a person could trigger the conflict. Political forces may mobilise the underlying causes and the triggers on which the easy access to weapons and other factors like that may further aggravate the situation.[97] In some cases, human rights may be simply invoked even for the sake of justifying war even if there is little connection or no connection at all with the real reason of the war launched.[98] Overall, the causes of conflict result when the state responsibility to respect and protect human rights are unfulfilled.

4.2.2 Human Rights Violations as the Consequence of Conflict

As George Frerks observed conflict results in massive human rights violations and violent conflict often provokes serious violations of human rights and international humanitarian laws in which civilian population is directly targeted.[99] A violent conflict may result in disappearances, torture, illegal detention, and execution mostly committed by government and widespread killing, displacement of civilians, and gross human rights abuses caused by both the parties in conflict.[100] Violations may include war crimes, crimes against humanity and even genocide.

Inability of the ongoing resolution process to address the consequences of the conflict like the grave human rights violations can set the stage for future conflict as the unaddressed past grievances are easy to manipulate.[101] It exhibits the significance of the transitional justice processes addressing all the human rights issues that either cause

[96] Lutz, E.L., supra note 89, p. 29
[97] Frerks, G. supra note 90, pp. 70-71.
[98] Lutz, E.L., supra note 89, p.27
[99] Frerks G. supra note 90, P.68.
[100] Sririam, C.L., supra note 85, p.5
[101] Lutz E.L., supra note 89, p.28

conflict or occur as the consequence of conflict in absence of which results in impunity. This also justifies the significance of the NHRIs' role in ending impunity.

4.3 Peace Process, Transitional Justice and the Issue of Impunity

Following the emergence of a conflict, different actors take initiatives to find its peaceful solution. The initiatives may include addressing the underlying causes, mitigating or minimising the effects and impacts of conflict and facilitating dialogues for a peaceful ending of the conflict. If the conflicting parties reach a conclusion as a result of the dialogue, they can reach a deal with not only as to the causes of conflict but also their consequences. States in general assign the transitional justice mechanisms primarily ad-hoc fact finding and reconciliation bodies the tasks to deal with human rights abuses committed during the conflict. In all these processes, NHRIs have also the key role to play which are the key focus of this study and are explained into detail in section 4.4. In any cases, NHRIs need to ensure that the international human rights norms are not compromised and the victims concerns are safeguarded. It requires looking at the delicacy of finding a peaceful solution of conflict, which then helps NHRIs identify the role in all those processes.

4.3.1 Peace Process

A peace process is the process initiated in order to find a peaceful settlement of an armed conflict. Countries under conflict sustain enormous pressure both internally from civil society and national institutions and from the international community including donors. The aim of such pressure is to bring the conflicting parties into dialogue and finding a peaceful solution of the problems. It includes establishing accountability mechanisms for the human rights violation caused, and ensuring justice to the victims. As acknowledged in the UN Resolution on impunity, it is the state obligation to respect and secure the respect for human rights including effective measures at least to combating impunity.[102]

[102] UN Commission on human rights, sixty-first session E/CN.4/2005/102/Add.1, Preamble.

It explains the state obligations to initiate peace processes, which is the way of securing respect of human rights.

Internal conflicts in many cases end up with peace agreements signed by the parties in conflict, which guides the post-conflict processes of dealing with human rights violations including the role of different mechanisms. Establishing accountability of the human rights abuses committed during the conflict and ensuring justice to the victims remains the main agenda of peace negotiations and the peace agreements.

Protecting rights of the civilians are largely the pressing factors for initiating dialogue. Parties in the conflict may use peace dialogues as their tactic for warfare. In any case, often the need to deal with human rights and humanitarian law obligations compels the conflicting parties to make efforts for ending war.[103] Parties negotiating the end of armed conflict usually demand for assuring human rights protection and establishing accountability for past violations. As the demand for accountability is a major concern for some of the parties in the negotiation process, together with the civil society and international community, human rights emerges as a central concern in negotiation.[104] The peace agreement that is signed as the result of successful dialogue can include the provisions of transitional Justice processes and mechanisms to deal with the violence and abuses of human rights committed during the conflict.

The dialogues/negotiations, the provisions of the peace agreements and their execution will have impact in combating and ending impunity through the assurance of non-reoccurrence. In this respect, the NHRIs plays a vital role in monitoring the process but also in engaging actively throughout. Its role is important for ensuring that human rights issues are well taken on board and sufficiently addressed throughout the peace processes.

4.3.2 Transitional Justice and the Issue of Impunity

As discussed in the earlier chapter, protecting human rights and establishing accountability for the past violations are major issues in the aftermath of a conflict. They

[103] Sriram, C.L, supra note 85, p. 4.
[104] Ibid, p. 6

are generally part of a peace agreement signed by the conflicting parties. Establishing accountability is extremely important as it is difficult to foster respect for the rule of law while serious human rights violators and abusers remain unpunished.[105] Since the parties to the conflict either do not believe or do not want to go through the existing traditional justice system, the transitional, ad-hoc and non-judicial mechanisms are entrusted to assure people that the perpetrators would be hold accountable and victims would get justice.

Here, the term 'Transitional justice' is defined as "a range of processes and mechanisms associated with society's attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation." The UN guidelines used the term 'Truth Commissions' as "official, temporary, non-judicial fact finding bodies that investigate a pattern of abuse of human rights or humanitarian law, usually committed over a number of years". Primarily, Truth Commissions are the mechanisms that are entrusted to establish accountability in a transition from conflict to the peace. Truth Commissions are described as the means of assuring justice on the past abuses and looking towards a peaceful shared future.[106] As this study is not on Transitional Justice process, the mechanisms like Truth Commissions, inquiry Commissions and other ad-hoc and non-judicial bodies will be simply referred in this chapter as the TJ mechanisms while analysing the role of NHRIs in terms of ending impunity of the conflict period's human rights abuses.

Victims are at the core of the transitional justice efforts. The Declaration of the Basic principles of Justice defines 'victims' as 'persons who individually or collectively have suffered harm including physical or mental injury, emotional suffering economic loss or substantial impairment of their fundamental rights through acts or omission that are in violation of criminal laws operative within member states including those laws

[105] *Negotiating Justice? Human Rights and Peace Agreements*, International Council on Human Rights Policy, Versoix, 2006, P.76

[106] Brahm, Eric, "Truth Commissions." In Burgess, Guy and Burgess, Heidi (eds.), *Beyond Intractability*, Conflict Information Consortium, University of Colorado, Boulder, June 2004.

proscribing criminal abuse of power'.[107] Amnesty law or impunity measures violate the rights of victims as they never pass title of those rights to state to decide on their behalf.[108] Thus Amnesty includes the rights of victims that cannot be compromised in any peace processes. Principle no. 24 also recognises as: "*Amnesty or other measures of clemency shall be without effect with respect to the victims' right to reparation…and shall not prejudice the right to know*".[109] As these rights of victims imply state obligations, Juan Mendez defines those obligations as state duty: i) *"to investigate, prosecute and punish the perpetrators; ii) to disclose the victims, their families and the society about the events; iii) to offer the victims adequate reparation; and iv) to separate known perpetrators from law enforcement bodies and other positions of authority"*.[110] Based on these state obligations Mendez derives a set of rights including – 'i) right to justice; ii) right to know the truth; iii) the right to reparation; and iv) the right to new, reorganised, and accountable institutions'.[111] As the violation of these rights entails impunity, these are the basis on which this research and more specifically the case study in chapter five will be carried out.

It is not only individual victim but the society as well that needs the stories of the past in order to move forward. This is required for both acknowledging the experiences of violence during the conflict and ending debate over the rights and wrongs of the conflict by providing an authoritative record of what happened.[112] While moving forward with the peace process, parties negotiating the end of conflict demand for prosecution, lustration or vetting, truth commission or reparation whereas the perpetrators press for blanket amnesty.[113] In any case, establishing accountability is the first step for moving forward from the consequences of conflict. That is also the process of ending impunity

[107] Declaration of basic principles of justice for victims of crime and Abuse of power, A/RES 40/34, 29 November 1985, principle 1.
[108] Vriezen, V., supra note 8, p. 159.
[109] Ibid.
[110] Mendez, J. E., supra note 9, p. 261.
[111] Ibid
[112] Negotiating Justice?, supra note 105.
[113] Sriram, C.L., supra note 85, p.6.

and assuring non-recurrence of human rights abuses for which countries deploy varieties of mechanisms.

Overall, the notion of ending impunity denotes to imparting justice in the cases of gross human rights violations committed during conflict period. It's the way of healing victims and/or their families and preventing reoccurrence of the violence thereby assuring freedom from fear in a society.[114] Hence is the ending impunity a key factor for protecting and promoting human rights that the NHRIs are supposed to deal with.

4.4 NHRIs' Role to Deal with Conflict Related Human Rights Abuses

NHRIs play the role in preventing, protecting and assuring non-repetition of violations as explained in section 4.2 as well as in all phases of the conflicts and post conflict period explained in section 4.3. However, the role is not specifically defined in any international instrument except some relevant references available in some international conventions like ICERD, ICCPR, OPCAT, and CRPD.[115] In any case, as a part of the national human rights protection system NHRIs have been dealing with those cases at the country level and within the scope of the general mandate of protection and promotion of human rights. In number of countries' peace agreements specify the role that NHRIs play for the post conflict period. All these tasks of the NHRIs either lead to or facilitate the ending of impunity of the human rights abuses committed during the conflict period. In fact, NHRIs are considered as the mechanism for constructive conflict management in a society. Effectiveness of NHRIs would provide individual and groups with non-violent means to express their discontent and raise issues related to violation of their rights in order to bring about the desired changes.[116]

As indicated in chapter three, efforts are made primarily by the African Network of NHRIs to institutionalise all the roles of the NHRIs in conflict and post-conflict transition. Gradually they are elaborated in the UN documents as well. However, there is still a huge gap of the scholarship between the intersections between conflict, human rights and

[114] Brahm, E., supra note 106.
[115] Nowak, M., supra note 27, P. 21-22.
[116] Michelle P., supra note 21, p. 25.

NHRIs and particularly on the role of the transitional justice mechanisms and NHRIs. This section will look at the role assigned to or practiced by NHRIs in different phases of conflict and their principle basis that contribute to ending impunity. As the principle basis are yet to be fully developed, the analysis is largely based on the UN guidance note and training manuals.

4.4.1 NHRIs Role During Conflict

During the conflict period, NHRIs have to change or refocus their priorities on their core protection role as well as on contributions to peacebuilding and resolving conflict.[117] It includes promoting dialogue between state and combatants; promoting the establishment or strengthening of mechanisms for peacebuilding; and encouraging to deal with the underlying causes of conflict as referred in Section 4.2.1; and preventing escalation of the conflict or their impacts.

Prevention as to the causes and consequences of conflict: NHRIs could prevent any potential conflict by facilitating to address all the factors either that cause or trigger the conflict. Potential conflict could be prevented by promoting human rights regime where everybody is equally protected and empowered and participated in the decision making.[118]NHRIs may initiate mitigating measures including promotional activities together with the training, education and public awareness focusing on the vulnerability of different groups of population, role of different actors etc.

Monitoring and documentation of the human rights situation in general and investigation in some specific cases of violence (e.g. use of child soldiers, sexual assault as a weapon, internal displacement etc,) is an important function of NHRIs. The monitoring includes specific ways of finding and gathering facts, maintaining records and publishing them so that the reports could serve for both the immediate follow up action as well as follow up in the post conflict period.[119] Human rights investigation has far reaching impact as it

[117] UN Manuel, supra note 7, p.139.
[118] Adhikari, B., supra note 2, Forward.
[119] UN Manuel, supra note 7, P. 139.

serves two purposes: first, it identifies whether a particular act is a human rights violation or not and then it identifies the perpetrator.[120]

Overall, detail knowledge of the underlying causes of conflict helps NHRIs to develop and prioritise the strategies for preventing occurrence of human rights violation and carrying out effectively the protection and promotional functions. A best practice document indicates NHRIs to continue working on protection and promotion of human rights and the peace process; focus on vulnerable groups; and working with other organisations to address the specific needs of refugees, internally displaced persons etc.[121]

Protection from the mass abuses: NHRIs may complement the judicial implementation of human rights. Sue-motto action, complaint handling and the investigative functions help them to fulfil this role. If the judicial system is functional, NHRIs may bring legal cases to protect the rights of individuals or to promote changes in law and practice. They may challenge the legality of government action and obtain judicial orders to remedy the situation, particularly when the government has failed implementing NHRIs recommendations and supporting victims.[122] NHRIs may even serve as an alternative agency for initiating the cases with speedy response where the judiciary is not easily accessible or people are hesitant to approach the justice institutions due to biasness, corruption, or inefficiency.[123]

Support to and facilitation of the peace process: NHRIs could promote the efforts of having dialogue between the conflicting parties; promote mechanisms for peace building efforts at the community level.[124] It may also include formulation of code of conduct, organising a national debate on the violation of human rights etc.[125] NHRIs may play the

[120] Poudyal, K., *The Role of National Human Rights Institutions in Armed Conflict Situations: With Special Reference to NHRC-Nepal*, Danish Institute for Human Rights, Copenhagen, 2006, P. 59.
[121] *National Human Rights Institutions Best Practices*, Commonwealth Secretariat, London, 2001, p. 33.
[122] Ibid.
[123] *National Human Rights Institutions, Conflict Management and Peacebuilding in Africa*: *Technical Seminar Report*, Centre for Conflict Resolution, Cape Town, 2004, p. 30.
[124] UN Manuel, supra note 7, p.140.
[125] Parlevliet, M. Supra note 21, p.19.

role as an interface in terms of establishing or strengthening the channels for dialogue. NHRIs should be able to propose solutions to the underlying problems.

Reference to the Geneva Conventions 1949 and their optional protocol that define the responsibility to respect by non-state actors as well, may provide reference to hold the combatants accountable. At least NHRIs could let the combatants know that they, also have human rights responsibilities at least in the areas where they claim their control. For this purpose NHRIs should maintain neutrality and assure that they are neither the government agent nor a sympathizer of the combatants.[126] While carrying out these action NHRIs should try to prevent any criticism of unfair pressure over the government and make both the state and combatants accountable for human rights violations.[127]

The NHRI in Nepal, established almost in the middle of the conflict period, has carried out most of the tasks defined in this subsection. This will be elaborated in chapter 5.

4.4.2 NHRIs in the Post-conflict Period

In a number of countries NHRIs exist at the time of conflict and it has also become a common feature of establishing NHRIs as a part of the peace agreements. In the post-conflict period, they are considered as the mechanism for preventing future occurrence of human rights violations or restoring respect of human rights and social harmony. This is also reflected in the UN document that elaborates NHRIs role in promoting human rights, tolerance and respect, which can help to prevent the occurrence of violence and ensure that local issues are resolved without recourse to violence.[128]

Monitoring the peace agreement and carry out promotional activities: In order to carry out regular monitoring, NHRIs role may be specified in the peace agreement. It is particularly important in the situation where there is mistrust between the conflicting parties.

[126] *UN Manuel*, supra note 7, p.140.
[127] Ibid.
[128] Ibid., p.143.

During this period NHRIs may launch different promotional activities, carry out or facilitate different survey, research on the contentious human rights issues etc. The objective of the promotional role should be to restore harmony within the community and it might therefore seek non-confrontational and non-adversarial ways to resolve the conflicts.[129] This role may also include providing formal training and support for enhancing their human rights knowledge and capacities that the state institutions may require. NHRIs can also recommend to the State to join relevant international conventions in case they are not party to these conventions.

Post conflict rehabilitation: NHRIs may support the post conflict reconciliation processes including rehabilitation of displaced people, reintegration of ex-combatants, promoting an environment for cohesiveness and togetherness etc. During all these processes NHRIs needs strong vigilance so that any confrontation does not occur between the communities. Ensuring justice may serve to deal with past abuses so as to ensure that there is no impunity for gross human rights abuse.[130] People would be in need of specific trauma counselling like child soldiers, sexually abused women, families of those whose members were killed or disappeared during the conflict etc. NHRIs needs to play a crucial role in their reconciliation and rehabilitation.

Archiving and providing documentary evidences: This particular role is built on the NHRIs functions during conflict period, which include: monitoring and reporting; investigation; complaints handling; information gathering, documentation and archiving. It is also related to cooperation with national, regional, hybrid or international judicial mechanisms that they would require the documentary evidences to proceed with.[131]

4.4.3 NHRIs Role Related to Transitional Justice Processes

Peace agreements or enabling laws may assign NHRIs a specific mandate related to transitional justice processes or a supporting role to the transitional mechanisms. The OHCHR manual illustrates that NHRIs can contribute a holistic approach of the

[129] *UN Manuel*, supra note 7, p.145.
[130] Ibid., p. 143.
[131] Ibid., p. 145.

transitional justice that include truth seeking, prosecution of perpetrators, reparation to victims, vetting and institutional reform.[132]

Supporting to establish accountability: Accountability includes establishing an accountability mechanism, developing a knowledge management system to document past abuses, or to support other truth-seeking/truth-telling mechanisms. In addition, developing a plan or programme to review and comment on enabling legislation for a truth and reconciliation commission, special court or reparation programme, creating capacity to advise on Institutional reforms (as a remedy to address causes of conflict). In addition, NHRIs could contribute to the TJ processes through information gathering, documenting, and archiving, of the human rights abuses, conducting investigations and monitoring, cooperating with the specialised mechanisms and providing assistance to victims etc.[133]

The role of NHRIs related to accountability, ensuring effective social reintegration, and reparation to conflict victims during the transition period are directly relevant to ending impunity.[134] Impunity is a crucial aspect in terms of the NHRIs' role in post-conflict period as it is considered as a new aggression that amounts to crime against humanity and is regarded as adding up to a new violation on top of the human rights crimes already committed.[135] Human rights protection for which NHRIs are mandated in general also requires victims' justice including investigation, reparation and prosecution of perpetrators. NHRI role in establishing accountability and ending impunity is based on its functions within the general mandate as explained earlier. Information gathering processes of the NHRIs are essential to work for future prosecution initiatives, truth seeking and truth telling bodies, reparation measures and vetting processes.[136] NHRI mandate related to search and seizure; witness protection and providing effective remedy against human rights violations are also important in terms of ending impunity.[137]

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[132] *Guidance note*, supra note 1, p.3.
[133] Ibid., p. 4.
[134] *UN Manuel*, supra note 7, p. 145.
[135] Vriezen, V. supra note 8, p.157.
[136] *Guidance note*, supra note 1, P. 4,
[137] *NHRI: Best practices*, supra note 121, p.20,

Accountability is a delicate issue as well, which requires parties to deal with it very cautiously. While the denial of human rights can endanger and intensify conflict, the demand may do the same. In any case, it needs to be taken into account that state's inability or unwillingness to protect basic human rights may result yet another violent conflict.[138]

Performing the tasks assigned in Peace Agreements: NHRIs, play the role in promoting and protecting human rights during the transition, no matter whether or not the peace agreement specifically tasked them any additional role.[139] The role defined in peace agreements adds up the principle basis of the NHRIs' role in the post-conflict transition. It may include continued monitoring the compliance with peace agreements as mentioned in the earlier section and until the transition period is over or simply supporting the transitional justice mechanisms. During this periods, the NHRIs role is crucial in terms of preventing retaliation of the conflict related violence and successful ending of the transition periods. It is important to take into account that while the human rights protection and accountability for past abuses remains essential to peace making and peacebuilding process, the pursuit of accountability may hamper not only peace negotiations but also peace implementation.[140]

Promoting and protecting victims' rights and execution of the TRC reports: NHRIs role is particularly important during the transitional period in terms of promoting and protecting victims' rights. It could be achieved through the awareness raising about various TJ mechanisms, facilitating to hold national consultations on TJ by ensuring participation of victims, women and other vulnerable groups. Assisting in establishing and implementing TJ initiatives and following up on the recommendation of various TJ mechanisms are also crucial aspects of the NHRIs' role in the TJ processes.[141]

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138 Mertus, Julie, and Helsing, Jeffrey, (eds.), *Human Rights and Conflict: Exploring Links between Rights, Law and Peacebuilding*, United States Institute of Peace Press, Washington DC, 2006., p. 4

139 *Guidance note*, supra note 1, p. 3.

140 Sriram, C.L., supra note 85, p.7

141 Ibid.

4.5 Country Experiences: Mandate and Role of NHRIs' in Post-conflict Countries to Deal with Conflict Related Human Rights Abuses

This section will look into the national practices of NHRIs dealing with past human rights abuses that are assigned by the national laws, policies and the peace agreements. The selected three NHRIs Morocco, Northern Ireland and Sierra Leone also represent the ones having mandate to deal with conflict period human rights violations. This study will inform and guide the analysis of the case study on Nepal in chapter 5.

4.5.1 Morocco

Context and the institutional set up of the NHRI: In 1991 a seize fire agreement has been signed and ended the 14 years of Guerrilla warfare launched by *Polisario*, declaring the establishment of the Sahrawi Arab Democratic Republic in 1976. A truth commission which was set up to investigate human rights violations during the Guerrilla warfare confirmed nearly 10,000 fatalities, ranging from death in detention to forced exile.[142] With this background, the National Human Rights Council - Conseil National des Droits de l'Homme (CNDH) of Morocco was established in 1990 as an Advisory Council for the protection and promotion of human rights.

The founding law, as amended in 2001, ensured compliance with the Paris principles and provided more powers, autonomy and broad prerogatives to protect and promote human rights. It gives a wide coverage in the country where 13 regional human rights commissions have been established.[143]

General Mandate: CNDH has a broad mandate to receive and handle complaints and investigate cases of human rights violations that the regional Commissions carry out in their respective regions. Regional commissions are also mandated to monitor the human rights situation and carry out projects and programmes within their region. It includes promoting the international humanitarian law, monitoring the implementation of

[142] Information available at: http://www.geneva-academy.ch/RULAC/state.php?id_state=140

[143] Except the ones with references, all other information related to the CNDH are extracted from its official website: http://ccdh.org.ma/an

international convention to which Morocco is a party, making recommendations to the Treaty bodies, submission and publication of annual report are some general mandate of the Commission. In addition, the CNDH is mandated to monitor, investigate, and document human rights situation and making recommendation to competent authorities; visiting detention centers; examining national laws; contributing to the government report; urging the government to comply with international law etc.

Specific mandate and their practices: Taking into account the specific contribution of the CNDH, the founding Act of the CNDH 2011 has made a specific reference as: '*the positive achievement of the Advisory council on human rights in terms of promoting rights and freedom, settling past grave human rights violations and achieving the strategic objectives targeted by the Moroccan experiences in the areas of transitional justice*'[144] This may be the reflection of number of actions that the CNDH has carried out in terms of the human rights abuses committed during the conflict period.

In 1999 the CNDH issued a report on 112 disappeared persons and recommended the establishment of transitional justice measures to provide reparation to the victims. The government responded on this recommendation only after the pressure from civil society and victims. Even after restructuring in 2003, CNDH continued to implement the transitional justice measures.[145] A report of an Equity and Reconstruction Commission (IER) that was established under the recommendation of the CNDH, was subsequently tasked to follow up on the recommendation of the Commission.[146] In 2006, CNDH set up joint working committees comprised of government officials and former members of the IER to examine the recommendations particularly on reparation, institutional and legal reform. CNDH also continued doing research in the cases of enforced disappearance.[147]

IER has addressed both short term and long term medical and psychological services to victims of human rights violations that includes immediate medical assistance and for the

[144] *Dahir No. 1.11.19 Dated 18 Rabii I 1431 H (1 March 2011), Establishing the National Human Rights Council*, Morocco. Para 5 - explanatory statement.
[145] *Guidance note*, supra note 1, p. 14.
[146] Ibid, p. 18.
[147] Ibid, pp. 29-30.

longer run IER recommended for establishing of a permanent mechanism that would administer health care to victims and their families.[148] CNDH even requested the Minister of Justice to initiate proceedings against 14 current and former government officials suspected of complicity in grave human rights violence. CNDH also sent an open letter to the parliament as well asking to form a commission of inquiry to investigate suspected responsibility for torture and disappearances.[149] CNDH also pursued the implementation of collective reparation programme for the communities and areas that suffered from systematic human rights abuses or that were located in close proximity to a detention center.[150]

4.5.2 Northern Ireland

Context and the institutional set up of the NHRI: The Belfast/Good Friday Agreement that was signed between the British and Irish governments and most of the political parties in Northern Ireland on Friday 10th April 1998, ended the 30 years armed struggle launched by Irish Republican Army and Protestant paramilitary groups. This war is claimed to have taken the lives of more than 3000 people.[151] The Agreement provided two institutions with an enforcement role for the "rights, safeguards, and equality of opportunity". The Northern Ireland Act 1998 made provisions for the Northern Ireland Human Rights Commission- NIHRC (Part VII, Article 68), which was set up in 1999. In 2014 the new law – Irish Human Rights and Equality Commission Act 2014 replaced the previous law and established a new Commission called Irish Human Rights and Equality Commission.[152] As the context of this study is the role of NHRIs dealing with past human rights violations, the study is based on the previous commission and its mandate.

General mandate: NIHRC was mandated as an Advisory body to advise the Secretary of State and the Assembly of legislative. Review the adequacy and effectiveness of laws and practices, making necessary recommendations to the government, Awareness raising,

[148] *Guidance note*, supra note 1, p.21.
[149] Ibid, p.31.
[150] Ibid, p.36.
[151] The Belfast/Good Friday Agreement available at: http://education.niassembly.gov.uk/post_16/snapshots_of_devolution/gfa
[152] *Irish Human Rights and Equality Commission Act 2014*, Number 25 of 2014, Article 12 and 13.

providing individual assistance, bringing proceedings to the legal action etc. were all part of the mandate of the NIHRC (Article 69) in line with the provisions of the aforementioned Good Friday Agreement that has decided to establish the Northern Ireland Human Rights Commission.[153]

Specific mandate and their practices: Article 69 (7) of the 1998 Act provided that the Secretary of State may request the NIHRC to provide advice on matters related to the Human Rights Section of the Belfast/good Friday agreement. This section provided different provisions related to the past human rights violation including the specific concern of victims of violence as a necessary element of reconciliation. NIHRC is entrusted to carry out investigations and publicise its reports.

In accordance to its mandate, the NIHRC has been involved in the investigation of conflict related deaths in Northern Ireland since 199

In 2003, the NIHRC launched a Victim's right project, which came out with a report - Human rights and victims of violence. The report outlined the relevant instrument that victims might use to pursue the investigation of conflict related deaths in the UK. NIHRC also proposed a Bill of Rights for Northern Ireland to advocate that victims be treated with dignity and provided with redress, investigation, information and assistance in criminal proceedings.[154] In addition to publishing the report as referred above the NIHRC organised a conference in 2004 regarding investigations into the deaths.[155] NIHRC also worked with civil society to develop a training programme on human rights and conflict transformation that is targeted at the community level that work in conflict situation.[156]

4.5.3 Sierra Leone

Context and the institutional set up of the NHRI: In 1999 the Lomé Peace Agreement was signed between the conflicting parties for ending the 8 years civil war launched by

[153] *The Belfast/Good Friday Agreement*, supra note 151 - Human Rights, Section.
[154] *Guidance note*, supra note 1, p. 22.
[155] Ibid., p.24.
[156] Ibid., p.46.

the Rebel group – Revolutionary United Front. The civil war caused severe human rights abuses including killing of more than 10000 people, largely perpetrated by the Front, which include summary execution, systematic rape, and enslavement of women, use of civilian as human shield, abduction and use of child soldiers, destruction of property and limb amputation.[157] The conflict in Sierra Leon is largely characterised as the one launched for access to resources such as diamonds.[158] The Agreement made the provisions of a Truth and Reconciliation Commission, and a Human Rights Commission. Despite the provisions of forming the Commissions within 90 days from the date of agreement, the Human Rights Commission of Sierra Leone (HRCSL) was established by an Act of Parliament in 2004 (Act No. 9 of 2004). However, the HRCSL became truly operational only in 2007.[159]

General mandate: The 2004 Act has mandated the Commission to investigate complaints regarding alleged human rights violations and to promote respect for human rights. It is also mandated to review existing legislation and is to advise government on compliance with international treaties. Other functions include drafting legislation that may affect human rights, contributing to reporting to the treaty bodies etc. The Commission was also mandated for monitoring and documentation of violations of human rights committed in Sierra Leone and publish an annual report on the state of human rights in the country.[160] The Act further provided the functions comparable to the "powers, rights and privileges as are vested in the High Court of Justice." It assured independence of the Commission by providing independent recruitment process and ensuring multiple representation of the society.

Specific mandate and their practices: In fact, the 2004 Act has prohibited the HRCSL to investigate the past human rights abuses. Article 16 provides: "*The Commission's power of investigation under this Act shall not include the investigation of any matter …involving any human rights violations that occurred before the coming into operation*

[157] Tsekos, Mary E., "Human Rights Institutions in Africa" *Human Rights Brief 9*, American University Washington College of Law,no.2, 2002 pp. 21-24, p. 23.
[158] Sriram, C.L., supra note 85, p. 5
[159] Parlevliet, M., supra note 51, pp. 22-23
[160] Ibid., p. 23.

of this Act". The reason behind this provision seems that the HRCSL was established as recommended by the TRC (Volume II, Chapter III, Recommendation Section 98-102). Though the Lomé peace Agreement has mentioned about human rights commission as well, it has not been materialised before the TRC report recommended. In addition, the recommendation indicates that the HRCSL became the official custodian of all TRC documentation and materials (Section 532) and recommended the government to appoint to the HRCSL the role of follow up committee of the TRC recommendations (Section 550).[161] In this respect, the TRC seems to have overcome the possible conflict that the investigation power could create while being the official custodian and having the responsibility to follow up of the recommendations. It shows that the HRCSL's role with regards to the human rights abuses committed during the conflict period was largely related to the follow up action of the TRC report.

In line with the provisions of the TRC report, the HRCSL in its three years' strategic plan (2009 – 2011) has set out eight priority goals in which one of them was related to the TRC Recommendations: *to promote the implementation of the TRC Recommendations and other Transitional Justice Mechanisms*.

4.5.4. Summing up

This brief comparative study reveals that NHRIs in post-conflict period can be specifically tasked to deal with the victims' concerns related to the human rights abuses committed during the conflict period. The need of the NHRIs' role may be reflected either in the Peace Agreement, enabling law or in the TRC report. The specific role may include investigation on the cases of violence, publicise the report and advise the authorities to implement the report. The role may be monitoring the implementation of the investigated TRC report/recommendations and whenever required, follow up for its implementation.

The mandate of the NHRIs in Morocco and Sierra Leone are closely linked to the TRC report, which is different from the Northern Ireland. There was no TRC in the Northern Ireland. The Moroccan NHRI recommended to establish the TRC to investigate in the

[161] *Witness to Truth*: *Report of the Sierra Leone, Truth and Reconciliation Commission*, Truth and Reconciliation Commission, Sierra Leone, 2004. Available at: http://www.sierraleonetrc.org

cases of disappearances. Follow up action of the TRC report was again tasked to the NHRI. In Northern Ireland the Peace Agreement has tasked the NHRI to deal with the victims concerns. On this basis, the enabling law mandated the NHRI to investigate and publicise its report related to conflict victims and advice the executive and legislative for their actions.

The Moroccan and Sierra Leone examples show that the NHRIs and TRC are complementary in terms of dealing with the conflict related human rights abuses. Similarly, the examples from Morocco and Northern Ireland show that the NHRIs are the central actors for dealing with the conflict related cases. The Moroccan example further elaborates that TRCs are more appropriate to investigate and establish accountability to which the NHRIs complement both the process and follow-up of the execution of TRC recommendations.

4.6 Conclusion

While domestic conflicts largely occur in reaction to the violation of human rights, the costs of the conflict remain more devastating and far reaching from a human rights perspective as well. The underlying causes of conflict may be different depending on the socio-economic context, actors and other domestic or external factors, the consequences are largely similar in all domestic armed conflict. Violent conflicts causing disappearances, torture, illegal detention, and execution, widespread killing, displacement of civilians, and gross human rights abuses require initiating negotiations to end these crimes and establishing accountability of the violence committed. Establishing accountability becomes part of the Peace deals for which the transitional justice mechanisms are primarily entrusted with.

NHRIs however, are not widely included as the inevitable part of the transitional justice process and mechanism despite the central role that they play as explained in this section. The documentation of the human rights abuses, and working towards sustaining the peace and incorporation of human rights agenda in the Peace Agreements are some of the most crucial role with far reaching impact that NHRIs carry out during the conflict period. They are the basis for TRCs to establish accountability. In the post-conflict period the central

role of the NHRIs is related to safeguarding victims' rights that include the right to truth, justice, reparation, and even getting assurance of non-recurrence of the violence. This is how they contribute to ending impunity. The examples of the post conflict countries studied in this research reveals that the TRC process - at least the follow up actions - cannot be completed without NHRIs. They even overcome any potential conflict by restoring harmony within the community as they provide non-confrontational and non-adversarial ways to resolve conflict. All these principle bases and experiences of other countries will be taken into account while doing the case study on Nepal and analysing the mandate, role and effectiveness of the NHRI in Nepal.

Chapter 5

Case of Nepal: The Role of National Human Rights Commission in Ending Impunity for Human Rights Abuses During Conflict

5.1 Introduction

This chapter deals with specific case study of the National Human Rights Commission (NHRC) of Nepal, which was established in 2000 as a statutory body and became a constitutional body in 2007 with an extended mandate.[162] This chapter is particularly focused on the NHRC role to end impunity for human rights abuses committed during 10 years' armed conflict (1996-2006) in Nepal.[163]

As the NHRC was established in the midst of the armed conflict, it had to deal mostly with conflict related human rights abuses from the outset. Its functions included monitoring and documentation; investigation and recommendation for action on cases of human rights abuses; and advisory as well as promotional functions. The Comprehensive Peace Accord (CPA) signed in 2006 supplemented the general mandate and entrusted the NHRC with monitoring the human rights iterated in the CPA. In 2012, the parliament of Nepal enacted a new NHRC Act, which elaborated further the constitutional mandate. In 2013, the Supreme Court of Nepal annulled the controversial provisions of the NHRC Act 2012, thereby maintaining the NHRC broad mandate intact.[164] In 2014, the parliament enacted a new "Act for establishing the Truth and Reconciliation and Disappearance Commissions" [hereafter referred to as the 'TRC Act' and 'Truth Commissions' to denote the two Commissions established under the TRC Act] to deal

[162] As a statutory body, the NHRC was established under the *Human Rights Commission Act 2053* (this is a Nepalese calendar, which is 57 years ahead of the English calendar and starts in April) (1997) with a mandate for 'protection and promotion of human right'. *The Interim Constitution of Nepal 2007* incorporated the NHRC as a constitutional body and gave a mandate for 'ensuring the respect for, protection and promotion of human rights and their effective implementation'.

[163] The Communist Party of Nepal-Maoists (CPN-M) launched an armed struggle in 1996, which continued until the CPA was signed between the CPN-M and the government of Nepal on 21 November 2006.

[164] A writ petition was filed in the Supreme Court of Nepal challenging the constitutionality of some provisions of the NHRC Act 2012 including Section 17 (10) that gives the Attorney General a discretion whether or not to initiate court proceeding based on the NHRC recommendation; and Section 10 (5), gives only 6 months' time limitation to submit an application in the cases of human rights violations. For details see *Om Prakash Aryal et al v. NHRC and others* (Nepal Supreme Court, 2013) – available in Nepalese language.

with the conflict period human rights abuses. The TRC Act 2014 gave the NHRC a specific mandate to monitor the implementation of reports that the Truth Commissions would produce over a 2-3 year period. These mandate give the NHRC scope for dealing with the protection and promotion of human rights in the short term and ending impunity for the conflict period human rights abuses in the long term.

In 2006, the CPA provisions recognised the understanding between the CPN-M and other political parties for establishing Truth Commissions in Nepal within six months of signing the CPA for dealing with conflict period human rights abuses. In the event, the Commissions were established only after eight years, i.e. February 2015.[165] The TRC Act 2014, however, did not specify any specific role for the NHRC beyond its participation in the Truth Commissioners selection process and the monitoring role as mentioned earlier.

In fact, the NHRC has monitored and documented the human rights situation; investigated and recommended for actions in around 4000 human rights abuses committed during the conflict; and carried out various promotional and advisory functions for making all concerned accountable. In addition, there are still a huge number of conflict related cases pending with the NHRC, which cannot be referred to any other mechanism until there is assurance that victims would get justice (Section 22, NHRC Act 2012). It shows that the Truth Commissions cannot accomplish their tasks successfully without engagement and/or coordination with the NHRC. However, there is no clarity in the TRC Act 2014 how the Truth Commissions will deal with the cases already investigated and recommended for action by the NHRC and the ones that are still pending. While the TRC Act does not prevent the Truth Commissions reinvestigating cases investigated and recommended by the NHRC for action. While there is a possibility given flaws and the interest of some political actors, it will have a huge impact on the entire process of the Truth Commissions.

[165] *Comprehensive Peace Accord, Signed Between Nepal Government and the Communist Party of Nepal (Maoist), 22 November 2006* Section 5.2.5 and 8.4. Also See the *TRC Act, supra note 5*.

Taking into account of all these factors, this chapter will analyse the NHRC role and effectiveness related to ending impunity for human rights abuses committed during the conflict period and the NHRC role in relation to the Truth Commissions and transitional justice processes. The analysis will focus on the two critical issues: i) the needs/significance of the NHRC mandate related to ending impunity and legal ambiguity between the role of NHRC and the Truth Commissions. ii) Institutional competition between the NHRC and Truth Commissions together with the interest of political actors and their impact on ending impunity.

In this chapter, the term 'ending impunity' denotes the ultimate objectives of holding the perpetrators accountable for the human rights abuses committed in Nepal by the State and CPN-M during the armed conflict period of 1996-2006. As elaborated in Chapter four Section 4.3.2, the four aspects of victims' rights, in absence of which entails impunity, are the principle basis for assessing mandate, role, and effectiveness of the NHRC in Nepal.

Constitutional and legal document related to the NHRC role in Nepal, official reports and publications of both the government of Nepal and the NHRC, decisions of the Supreme Court of Nepal, and the researcher's interview with 16 actors (Annex I) are the primary sources of the analysis in this chapter. Secondary information includes different analytical and evaluation reports, and position papers; academic research and articles; media analysis and reporting.

5.2 The Mandate to Deal with Human Rights Abuses Committed During the Conflict Period

Laws establishing and functioning of the NHRC mandated it to deal with all kinds of human rights abuses including those committed during the conflict period. In addition, different other legal provisions have directly assigned or indirectly obliged the NHRC to deal particularly with the human rights abuses committed during the conflict period. Therefore this section elaborates the general mandate, specific mandate and indirect mandate that allow or oblige the NHRC to deal with human rights abuses committed

during the conflict period. The perceptions of different actors interviewed during the field research will help to clarify and allow for analysis of understanding about different provisions and their scope. As the issue of ending impunity is related to promoting human rights culture, this section also includes discussion on the mandate and position of the NHRC proposed in the forthcoming new constitution.[166]

5.2.1 General Mandate (applicable in all situation)

The enabling law sets the NHRC objectives as "effective enforcement as well as protection and promotion of Human Rights conferred by the Constitution and other prevailing laws".[167] Section 9 of the HRC Act 1997 stated "It shall be the primary responsibility of the Commission to protect and promote the human rights". For this purpose the NHRC function includes conduct of inquiries and investigations; order a petition or compliant to be filed; with the court's prior consent, inquire into the sub-judice cases with human rights complaints; visit, inspect and observe any authority, jail or places; and making recommendations. In addition the NHRC was charged with reviewing the law and policies, carrying out research and publishing reports; promotion of human rights education and effective functioning of the institutions and coordination with non-state actors. Section 10 provided some limitations in the NHRC inquiry or proceedings on the matters within the jurisdiction of Military Act until they could be challenged in an ordinary court, and the matters certified as having adverse impact on diplomatic relation, national security or in any criminal investigations. This mandate prevailed from the establishment of the NHRC and until the new NHRC Act repealed in 2012.

The Interim Constitution of Nepal 2007 incorporated the NHRC as a constitutional body and extended the mandate stating "it shall be the duty of the National Human Rights Commission to ensure the respect for, protection and promotion of human rights and their

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[166] The processes for making a new Constitution is ongoing in Nepal. From 2 July 2015, the Constituent Assembly of Nepal has started discussion on the Preliminary draft of the *Constitution of Nepal, 2072 (2015)* accessed at http://can.gov.np/np/ncd.html on 02.07.2015. It has proposed the NHRC with the same mandate as provided in the Interim Constitution and even removed the earlier limitations related to Army Act.

[167] *Human Rights Commission Act, 2053 (1997),* Preamble.

effective implementation".[168] In order to fulfil this mandate, Article 132 of the constitution added up on the statutory provisions and authorised the NHRC to publicise the name of the authorities failing to observe or implement the NHRC recommendations and record them as human rights violators. In order to carry out these functions the NHRC was entrusted with court power procedures including summoning individuals, entering and searching any place including the government premises (except in the cases falling within the jurisdiction of Army Act and only in so far as the actions are related to the violations of human rights or humanitarian laws) and rescue of person or collection of information/evidences. The fourth amendment of the Interim Constitution in 2008 strengthened the independence of the NHRC by authorising the President (head of the state) rather than the Prime Minister (head of the government) as the authority for appointing the Commissioners and receiving the NHRC report.

In 2012, the Parliament enacted a new NHRC Act stating that the provisions were additional to the functions, duties and powers provided in Article 132 of the Constitution.[169] It further stated "the Commission shall be independent and autonomous in fulfilling the work of ensuring respect, protection and promotion of human rights". Section 14 of the 2012 Act authorised the NHRC to initiate reconciliation when requested by the parties to a case that is under consideration of the NHRC. However, reconciliation is not permitted in the cases concerning serious violations of international human rights and humanitarian laws where no reconciliation is possible. Section 16 authorised the NHRC to allow compensation to victims identified from its inquiry and investigations. Another important aspect of the 2012 NHRC Act was Victims' justice. Section 22 provided that the NHRC may conclude its investigation by considering that better justice may be imparted by another court or authority and may therefore inform victims to file the cases with this relevant court or authority.

In 2013, the Supreme Court of Nepal annulled the controversial provisions of the NHRC Act, 2012 and maintained unrestricted limitations for filing the case of human rights

[168] *The Interim Constitution of Nepal, 2063 (2007),* Article 132.
[169] NHRC Act 2012, Section 4.

violence and curtailed the discretionary power of the Attorney General.[170] Annulation of such provisions by the court contributed further to maintain the NHRC mandate intact and to strengthen the principle of independence.

All the above-mentioned references mandated and obliged the NHRC to play a crucial role in ending impunity for the human rights violations committed during the conflict period. Furthermore, the obligations related to the past abuses were also based on the notion that the past human rights abuses were not just the issue of past, but also present as long as the victims obtained justice and truths are established.[171] In line with this perspective and as provided in Section 18 of the NHRC Act 2012, the NHRC is obliged to extend coordination and collaboration in the TRC processes as it is required: "in the course of performing its [NHRC] functions [to] consult or seek assistance from or maintain necessary coordination or collaboration with any Commission, committee or any other agency".

5.2.2 Specific Mandate to Deal with the Conflict Related Human Rights Abuses, Including Support to the Peace Process

After the 10 years' of armed conflict in Nepal, the CPA signed in 2006 and the Interim Constitution of Nepal 2007 made provisions concerning the transitional justice mechanisms to deal with the conflict period human rights abuses.[172] The Parliament of Nepal enacted the TRC Act 2014, which authorises two separate commissions (Section 3): the Commission on Investigation of Missing Persons; and the Commission on Truth and Reconciliation and they are mandated for investigation and finding truth about the violations of human rights committed at the time of conflict. In addition, these specific Commissions are supposed to create an environment for reconciliation and recommend reparation to victims and prosecution in the case of gross human rights violations.[173]

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[170] For more details please refer, section 5.1 including footnote 3.
[171] Vriezen, V., supra note 8, p. 198
[172] Article 33 of the Interim Constitution refers report of the investigation Commissions as the basis for providing relief to the victims and Section 5.2.5 and 8.4 of the CPA refers establishing a high level Truth and Reconciliation Commission
[173] TRC Act 2014, Preamble.

The TRC Act 2014 provided specific mandate to the NHRC in at least the following two occasions: i) to recommend the appointment of the Chairperson and Members of the Truth Commissions (Section 3); ii) monitoring the implementation of the recommendations made in the report of the Truth Commissions and drawing the attention of the government in case of non-implementation (Section 30). It is extremely important to note that unlike the case in Sierra Leone and Morocco, the NHRC in Nepal is not prevented to investigate the conflict related human rights abuses. It leaves the possibility open for the NHRC to take initiative to ensure victims' justice.

Finally, in addition to the statutory mandate, the CPA in clause 9.4 also provides: "the National Human Rights Commission shall also carry out tasks related to the monitoring of human rights as mentioned in this Agreement." This monitoring role is significant in terms of specific human rights provisions referred in clauses 6 and 7 of the CPA including cessation of hostilities, ending impunity of the conflict period human rights abuses and ensuring dignity and human rights of every person including observance of human rights, fundamental rights and humanitarian law.

5.2.3 Indirect Obligations of the NHRC to Deal with Conflict Related Human Rights Abuses

There are number of legal provisions that oblige the NHRC to deal with past human rights abuses. Article 132 of the Interim Constitutions 2007 that mandate the NHRC to ensure respect, protection and promotion of human rights authorises the NHRC to deal with all kinds of human rights abuses irrespective of the time that they were committed. Section 11 of the NHRC Act 2012 requires the NHRC to investigate and recommend for further actions in all complaints lodged or investigations initiated on its own, until the matters fall under the jurisdiction of another agency. As required in Section 9 of the NHRC Act 2012, ensuring victims' justice based on its recommendations is also the NHRC responsibility, which requires following up implementation of its recommendation in all human rights abuses.

Section 4 of the NHRC Act 2012 provided that the NHRC has the obligation to monitor the implementation status of the prevailing laws regarding human rights and recommend to the Government of Nepal for its effective implementation. This provision also requires the NHRC to monitor the effective implementation of existing laws including the TRC Act, Regulations, policies and ensure respect of human rights.

The provisions of section 15 of the TRC Act, which requires persons, institutions and agencies rendering support in the process of the Truth Commissions, indirectly obliged the NHRC as well to cooperate in the processes of the Truth Commissions. Referring to this provision of the TRC Act, the Chairperson of the Truth Commission stated his expectation that the NHRC would cooperate and support the TRC in its processes.[174]

As described in Chapter 3, NHRIs in general are assumed to have a supporting function to the judicial and non-judicial mechanisms of transitional justice for promoting and protecting human rights.[175] With this reference, the constitutional mandate and specific mandate under the NHRC Act 2012 requires the NHRC to play a crucial role in the process of the Truth Commissions so that there would not be any deviation in terms of ensuring respect, protection and promotion as well as effective implementation of human rights. Furthermore, as provided in section 18 (TRC Act 2014), the Truth Commissions may coordinate with NHRC as well for organizing public hearings and other events outside the capital, where the NHRC already has outreach offices.[176] It was substantiated by almost all the interviewees except two of the interviewees including the NHRC chair.

Most of the Actors interviewed during the field works perceived an institutional obligation of the NHRC and expected the NHRC to be willing to take initiatives to support the TRC process. However one of the respondents suggested that the NHRC should not collaborate with the Truth Commissions until they assure full compliance with the Supreme Court decisions against Amnesty. In any case, the actor urged the NHRC to provide technical support to the Truth Commissions to increase their capacity. The NHRC

[174] Interview (in Nepali) with Surya Kiran Gurung, the Chairperson, Truth and Reconciliation Commission, Kathmandu, 22 April 2015.
[175] *Guidance Note*, supra note 1, p. 3.
[176] Annual Report, 2013-2014, NHRC, Lalitpur, 2015.

chair also expected the Truth Commissions to approach the NHRC for any cooperation and support that they would require.[177]

There are some other areas in which the NHRC could play an important supportive role. Based on the Section 20 and 22 of the NHRC Act 2012, the NHRC may communicate to the Truth Commissions with regard to investigations of some of the human rights violations recorded during the conflict period or the cases filed by victims or on their behalf on which the NHRC is satisfied that the Truth Commissions may impart better justice to the victims.[178]

5.2.4 Actors' Perception on the NHRC Mandate

All the Actors interviewed during the research acknowledged that the broad mandate provided by the Interim Constitution of Nepal 2007, HRC Act 1997 and the NHRC Act 2012 allow the NHRC to deal with conflict period human rights abuses.[179] However, all the interviewees stated that the NHRC mandate in terms of ending impunity for human rights abuses committed during the conflict period are secondary ones, primarily it is the mandate of the Truth Commissions. With the exception of one interviewee that strongly believed NHRC having mandate based on the principle basis of NHRIs formation, all other interviewee referred NHRC having some important role to play but not mandated as such.[180]

All the interviewees noted that the general mandate of the NHRC to deal with human rights abuses committed during the conflict period is crucial in ending impunity. However, no specific part of the NHRC mandate was referred to as directly ending impunity. Even on the indirect obligation as referred in section 5.2.3 of the NHRC as provided in Section 15 of the TRC Act 2014 that obliges persons, institutions and agencies

[177] Interview with one of the actors listed in Annex I (name not indicated as requested.)
[178] Section 13 of the TRC Act 2014 provides that the Truth Commissions investigate into cases of serious human rights violations based on the complaints filed by victims or on their behalf or known from any other sources.
[179] Please see the list of Actors interviewed during the field work in Nepal in April/May 2015, copy of the interviews on file with author.
[180] Interview (in Nepali) with Mandira Sharma, founder chair, Advocacy Forum Nepal, telephone interview, 7 May 2015.

to render support to the Truth Commissions, representatives of the NHRC and the Truth Commissions had opposite positions. The Truth Commission Chair and other Commissioner had the opinion that NHRC should cooperate and send all the document/information that the Truth Commission would require. One of the members of the Truth Commission, who joined the interview with the Truth Commission chair, observed – "…*else any institution will be subject to be fined as an action for contempt*" that is provided in Section 16 of the TRC Act 2014.[181] However the NHRC chair had the opinion, "… *we as a constitutional body are not obliged to handover the cases and documentation maintained at the NHRC. Our collaboration depends on the willingness of the TRC*."[182]

Referring to the NHRC collaboration in the work of the Truth Commission due to not having clear mandate, some of the Actors interviewed raised the concern that it may have an impact on the NHRC ownership of the Truth Commissions' report. However, the Chairperson of the Truth Commission ruled out the question on this matter as the report will remain as a national document obliging all institutions to play a role in its execution, the issue of NHRC ownership does not matter. As with any other state entities, NHRC will have the obligation to monitor the implementation of the report.[183] The Truth Commission Chairperson noted that the TRC Regulation is under discussion with different stakeholder. This information was confirmed by the government official as well. He further added: *"The TRC Act didn't include any mandate for the NHRC during the TRC process but only in monitoring the implementation of the TRC report. It's a legal gap and needs to be clarified/amended. The law should elaborate the NHRC role during the TRC process and both the Commissions should collaborate proactively to securing victims' rights and making the TRC successful. The gaps observed in the existing Act with regards to the NHRC role will be taken into account while enacting Regulations."*[184]

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[181] Section 16 of the TRC Act 2014 authorises the Commissions to take action if found to have committed contempt, which could be fine, imprisonment or both.

[182] Interview (in Nepali) with Anup Raj Sharma, Chairperson, NHRC, Kathmandu, 21 April 2015.

[183] Interview, Surya Kiran Gurung, supra note 174.

[184] Interview (in Nepali) with Ramesh Dhakal, Joint Secretary and Head of the Legal Department and human rights focal point at the Office of the Prime Minister and Council of Ministers, Kathmandu, 19 April 2015.

Finally, the analysis of the legal provisions together with analysis of the actors' perspective suggests that the NHRC mandate is strong enough in relation to ending impunity of human rights abuses committed during the conflict period. Though the primary responsibility lies with the Truth Commission, Nepal's case is unique and the Truth Commissions cannot accomplish their tasks without coordination and collaboration with the NHRC. The broad general mandate of the NHRC, more specifically, the complaint handling mandate including monitoring, investigation, and recommendations available since the beginning, were sufficient enough for establishing accountability of the conflict period human rights abuses. In the next section I will analyse it into detail to examine the extent to which it was sufficient to ensure accountability. Specific mandate of the NHRC in monitoring the implementation of the Truth Commissions' report addresses the three other aspects of ending impunity i.e. prosecution, reparation and assurance of non-reoccurrence of the human rights abuses.

5.3 The Role of the NHRC During the Conflict and in the Post-conflict Period

The protection and promotional functions that the NHRC has carried out since its establishment in 2000 were either directly or indirectly related to conflict. The direct role included complaint handling of the conflict period human rights abuses, monitoring and documentation of the human rights situations and the abuses committed. Awareness raising activities, sensitisation and capacity building of the government authorities about the human rights and humanitarian laws; urging the state and non-state parties to comply with the international human rights and humanitarian laws etc had both direct and indirect relevance to dealing with the conflict related human rights violations. Complaints received under the complaint handling functions; investigations done and recommendations made on them were also mostly those related to conflict related human rights abuses.

In addition, the declaration of the State of Emergency in 2001 and in 2005 and the monitoring of human rights situation including visiting detention centres, announcing school as the zone of peace, facilitation for peace building process and fact finding missions launched by the NHRC in the cases of some major incidents were all activities

conducted by the NHRC that focused on the cases related to the conflict.[185] During the interviews, former NHRC Commissioner referred to Nepal as a unique case where the NHRC dealt with most of the conflict period human rights violence, documented the evidence and recommended for prosecution, reparation and compensations. If the NHRC had not launched fact finding missions, the evidences would have disappeared by the time the TRC came into operation and the TRC would not have any evidence base for finding the Truth.[186] Monitoring the implementation of the CPA agreement and dealing with the violations of the CPA provisions also contributed to dealing with the conflict period human rights violations.[187] In this section the roles are described under the conflict period, post conflict period before the formation of the Truth Commissions in February, 2015 and afterwards.

5.3.1 NHRC Role During the Conflict/Emergency Period (1996-2006)

At the beginning, while the NHRC had the preliminary tasks of setting up institutional mechanisms, the NHRC immediately, had to start dealing with various challenges related to the protection of human rights of the general public.[188] Large numbers of enforced disappearances, torture and extra-judicial killing, and search and seizure, kidnapping of civilians, murder, rape, displacement etc were some common features of the human rights abuses reported at that time.[189] Despite various challenges, the NHRC continued monitoring and investigating both the conflict related and other violations including gender and caste based discriminations. While the conflict was ongoing, NHRC had

[185] The state of Emergency was declared in 2001 based on an ordinance, which got defunct as the parliament didn't endorse it. The one in 2005 was launched by the King after he took the power in his control. Also see Poudyal, K., supra note 120, p. 28

[186] Interview (in Nepali) with Gauri Pradhan, Former Commissioner, NHRC and Human Rights Defender, Kathmandu, 17 April 2015.

[187] Ibid.

[188] Durbach, A., supra note 37, p. 8.

[189] Poudyal, Kedar, "Conflict and Human Rights Culture: Challenges Before the National Human Rights Commission", in: Adhikari, Bipin (ed.), *Conflict, Human Rights and Peace Challenges Before Nepal*, *Rishikesh Shah Memorial Lectures 2003*, National Human Rights Commission (NHRC), Kathmandu, 2003, pp.212-226, p.216.

lobbied continuously for denouncing attacks by both the parties and kept on urging to hold dialogue for the peaceful means of solution.[190]

Another challenge that the NHRC had to tackle since the beginning was to deal with the CPN-Maoists as a Non-state Actor. As the Nepalese government had regarded the CPN-Maoists as terrorists and issued Terrorist and Disruption Activities (control and Punishment) Ordinance targeting to them, the NHRC could not invoke Common Article 3 of the Geneva Convention, even if Nepal was already a party to it.[191] On the other hand, the CPN-Maoists claimed themselves to be a new regime calling the existing state apparatus the old regime. Hence they refused to abide by any national rules and also claimed not to be bound by any international commitments of the old regime. However, the NHRC pursued the Geneva Conventions and the CPN-Maoists' obligations as 'obligations to respect' amongst the three sets of human rights obligations: protect, respect and fulfil.[192]

NHRC at the time of State of Emergency:

During the Emergency proclaimed in 2001 and later in 2005, NHRC had to work in such a situation where many of the Constitutional rights were suspended or derogated by a proclamation.[193] Following the announcement of the first State of Emergency on 27 November 2001, NHRC received many complaints against the army for the arrest and illegal detention of the general public and the allegations of killing, disappearances, torture, and other human rights violence.[194] In a number of cases the NHRC investigated either referring the complaints lodged or based on the suo-motto actions initiated for the allegations of extra-judicial killings or killing in the name of encounter alleged to the Army. In some cases of large casualties (for instance a mass killing happened in Doramba), the NHRC formed independent investigation panels as well. The investigation

[190] Different NHRC bulletin, consulted at: http://www.nhrcnepal.org/news.php on 2.3.2014
[191] The Geneva conventions require that any parties in an armed conflict should be complying with the Common Article 3. If the concerned states are party to the Geneva conventions, it will be automatically applicable to the non-state parties as well. For more details please see: https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf
[192] Ibid. pp. 33-35.
[193] Poudyal, K., supra note, 120, p. 28
[194] Ibid, p. 40.

panel in Doramba identified that the Nepal Army cadres did summary killing after taking hostage 18 CPN-Maoists and 2 civilians attending a marriage ceremony. The investigation revealed that the security forces were guilty of human rights abuses. On this basis the NHRC recommended legal actions against the perpetrators and compensation to the relatives of the deceased.[195]

The NHRC launched fact-finding missions in the cases of severe human rights violation caused by the CPN-Maoists as well. One of them was the case of ambushed passenger bus in Chitwan in 2005 in which 36 people were killed and many injured. There were a number of such killings of civilians. However, the NHRC in such cases was not able to identify exact perpetrators except documenting the incidents and collecting information related to the incidents.[196]

The State of Emergency proclamations limited the NHRC mandate as they suspended individual rights and their judicial discourse guaranteed by the Constitution of the Kingdom of Nepal 1990. Another challenge was preventing the misuse of power of the security forces, as the Terrorist Act 2001 had given the security forces an opportunity to exercise excessive forces and widespread power.[197] In 2002, the NHRC in coordination with civil society undertook monitoring of highly affected 35 districts in order to evaluate the human rights situation.[198] Out of this monitoring the NHRC documented large number of human rights violations as referred earlier caused by both the state party and the CPN Maoists including killing, rape, torture, disappearance, displacement, destructions etc.[199]

Enforced Disappearance:

Enforced disappearances were other gross human rights violations massively occurred between 2002 and 2004.[200] In number of cases disappearance happened after large scale

[195] Poudyal, K., supra note 120, p. 83.
[196] Ibid., pp. 89-90
[197] *Emergency and Human Rights (Human Rights monitoring Report)*, National Human Rights Commission, Lalitpur, 2003, p.3
[198] Ibid.
[199] Ibid.
[200] Poudyal, K., supra note 120, p. 101.

military operations launched in different part of the country. Most of the cases registered with the Commission were related to the civilians arrested by the government security forces in plain clothes (without wearing Army/police dress, which was a common practice during the conflict period). Some of those arrested were even brought to undisclosed place and blindfolded. Torture and ill treatment were common in the cases where the NHRC managed to gather information from those released. In order to end the human rights violation of this kind, the NHRC formed working groups along with the government representatives and visited different detention centres. However, unhindered access to the places of military detention was always an issue. As a result, NHRC could not freely visit people detained by the Nepal Army except for a few of them who were arrested by the order of the District administration.[201]

Torture, inhuman and degrading treatment

The NHRC managed to document different types of Torture, inhuman and degrading treatment which took place within detention centres. An NHRC study carried out in 2002 revealed that 75% of the victims were tortured both physically and mentally and only 17% were tortured only physically.[202] The NHRC visited different custody centres with medical personnel and recommended the government to take actions against perpetrators and compensate the victims.

Internal displacement:

Many people were Internally Displaced persons (IDPs) due to the security threats mostly in hilly areas. It also monitored this situation and sought to ensure the protection of their rights, for which the NHRC asked the government to come up with an effective plan for addressing the concerns of the IDPs.[203]

Peace Initiatives of the NHRC:

[201] In general, any person arrested by the police for preventive detention was supposed to receive arrest warrant issued by the district administration office before giving arrest.
[202] Poudyal, K., supra note, p. 117.
[203] Ibid., p. 126.

While the conflict was ongoing, the NHRC denounced attacks from both sides and urged for dialogue as the means of solution. In order to ensure rights protection of the people during the negotiation stages the NHRC drafted and pursued a cease-fire code of conduct and human rights accords. The NHRC even developed peace-zone approaches with minimum steps aiming at the CPN – Maoists complying with common Article 3 of the Geneva Convention.[204] In 2003, the Commission even proposed a six point code of conduct for making negotiation process transparent and sustainable.[205] In 2004, the NHRC put forward a 13 point draft code of human rights and urged the CPN-Maoist to sign and abide by it.[206] The NHRC also conducted peace conferences and held interactions with the concerned authorities.

5.3.2 NHRC Role in the Post-conflict Context (since the CPA signed in 2006)

Parties signing the CPA formally agreed to end the 10 years armed conflict, and committed to protecting human rights and 'not encouraging impunity' (CPA, Section 7.1). Contrary to the commitments undertaken in the CPA, the human rights situation deteriorated within the following year.[207] As highlighted in the NHRC report 2009, human rights abuses during this period were mostly killings by the CPN-Maoists on which the NHRC did investigations and recommended for necessary actions.[208]

Following the signing of the CPA in 2006, the NHRC continued to monitor the human rights situation in general and the implementation of the human rights provisions of the CPA in particular. The NHRC also continued handing the conflict related human rights abuses and managed around 4000 of such cases out of the around 11000 complaints received.[209] In 2010, the NHRC in coordination with the UN Office of the High Commissioner for Human Rights (OHCHR) initiated exhumation of 5 students allegedly disappeared and later found buried in 2004.[210]

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[204] Durbach, A., supra note, p. 13.
[205] E-bulletin, Vol 1-18, NHRC, Lalitpur
[206] E-bulletin, Vol 2- 11, NHRC, Lalitpur.
[207] Annual Report 2007-2008, NHRC, Lalitpur, 2009.
[208] *Three Year Comprehensive Peace Accord: 2006-2009*, NHRC, 2009 p. 40
[209] Interview with Gauri Pradhan, supra note 186.
[210] *Authority without Accountability: the Struggle for Justice in Nepal*, International Commission of Jurists, Geneva, 2013, p. 112.

Withdrawal of court cases was another phenomenon in the post conflict period. NHRC made strong voices to prevent the withdrawal of criminal cases in the name of cases of "political nature", which was done with reference to the State Cases Act 1990 that permits withdrawal of state cases filed by the Government with the permission from the respective courts. The Government has withdrawn large numbers of criminal cases under court's consideration that included cases of murder, rape and other serious criminal offences. They also included the ones that the NHRC had recommended for prosecution. In 2008, the NHRC directed the Ministry of Home Affairs to clarify its recommendations explaining the grounds for withdrawal of court cases.[211]

During this period, the NHRC continued to highlight that the lack of effective implementation of the NHRC recommendations and inability in bringing the perpetrators of crime and human rights violations to justice had contributed to increase the level of impunity in the society.[212] Recently, while submitting the 2013-2014 Annual report, the NHRC drew specific attention of the President of Nepal on the increased impunity largely due to non-execution of the NHRC recommendations.[213]

5.3.3 The Role of the NHRC in Relation to the Truth Commissions

In relation to the work of the Truth Commissions, the NHRC so far has a comparatively limited role to play. Since the Truth Commissions are recently established, the NHRC role may increase once the Truth Commissions start functioning in full operations. At least during the research interview the Truth Commission chairperson and the NHRC chairperson mentioned that they already had held a courtesy meeting and that detailed operational meetings were to be held. Based on the general and specific mandate described in Section 5.2.1 and 5.2.2 and particularly for securing the rights of victims, the Six-year Strategic Plan (2015-2020) of the NHRC developed in March 2015 included some possible engagements with the Truth Commissions. The 2-3 years tenure of the Truth Commissions falls within the strategic period of the NHRC. This strategic plan

[211] Govt. Slammed for Withdrawal of Cases: Attention Drawn to NHRC Recommendations, accessed at: http://www.nhrcnepal.org/nhrc_activities_details-8.html on 26.02.2015.

[212] Upadhaya, K.N, Three Years of the Comprehensive Peace Accord, Forward, at: http://www.nhrcnepal.org/nhrc_new/doc/newsletter/3-year_CPA.pdf on 2.3.2015.

[213] Annual Report, NHRC, supra note 176, p.8.

includes a specific result: Ensuring victims Justice to the conflict period violations.[214] In order to achieve this result the NHRC has planned to collaborate and coordinate with the transitional justice mechanisms, doing research and making recommendations for imparting justice to the conflict victims etc.[215]

Earlier, the NHRC drew the attention of the government to the provisions of the TRC Act 2014 that conflict with the NHRC Act 2012.[216] Actually, contrary to the provisions of the NHRC Act, the TRC Act 2014 has opened up the possibility for blanket amnesty in the cases of incidents happened during the conflict period.[217] The Chief Commissioner of the NHRC even warned that the NHRC could call back its representative if the Transitional Justice mechanisms decided for amnesty for the perpetrators of heinous human rights violations.[218] At least for now this potential mandate debate between the two state mechanisms seems over as the Supreme Court decision in 2015 annulled the amnesty provisions of the TRC Act 2014. However, the political parties, specifically the Unified Communist Party Maoists and CPN Maoists, have openly demonstrated against this decision and urged the Supreme Court of Nepal to overturn this verdict. In any case, now the case is again under consideration as the Supreme Court of Nepal has registered an application submitted by the government of Nepal seeking judicial review of the Supreme Court verdict.[219] Before the Truth Commissions were formed, the NHRC has been lobbying and advocating for an early formation and ensuring victims' concerns and rights.

5.3.4 Actors' Perception on the NHRC Role

The actors interviewed during the field research talked about the role played by the NHRC and their challenges. During the conflict, even a single press release had a great

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[214] *Strategic Plan 2015-2020*, National Human Rights Commission, Lalitpur, 2015, P.33.
[215] Ibid.
[216] Annual Report, NHRC, supra note 176, p.8
[217] Article 26 (1) and (2) of the TRC Act 2014 provides that if the Commission deemed reasonable for granting amnesty to the perpetrator, may recommend except in the cases of rape.
[218] NHRC not to support TRC, CIDP if amnesty granted, 'The Himalayan' – a Daily Newspaper, dated: 05.11.2014 accessed at:http://www.thehimalayantimes.com/fullNews.php?headline=NHRC+not+to+support+TRC%26sbquo%3B+CIDP+if+amnesty+granted&NewsID=432562 on 26.02.2015
[219] "Order for registering the application seeking review of the verdict to correct the Act related to the Truth Commission (in Nepali language)", *Setopati, Nepal's Digital Newspaper* at, http://setopati.com/raajneeti/28585/ accessed on 02.06.2015

significance in terms of saving lives of the people whose lives were under threat. NHRC did that in many cases either by appealing for their whereabouts or urging for the release of individuals Kidnapped or detained illegally. NHRC provided individual protection to individuals who were released by court order but who would have been re-arrested at the gate of the court if the NHRC had not provided protection. In addition, the fact finding missions that the NHRC launched such as the one in Doramba case, the NHRC proved its ability to carry out complex investigation as well.[220] Detailed investigations of the NHRC were cited by the Supreme Court of Nepal while deciding in number of cases such as Rajendra Dhakal's case on disappearance, Maina Sunuwars case on Summary killing.[221]

In many cases of human rights violations committed during the conflict period, the NHRC has already established truth. This is the reason why the TRC chairperson during the interview observed: "…*TRC should work closely with the NHRC. During the conflict and in post-conflict period the NHRC has dealt with conflict period cases and maintained documentations, which will be good resources for the TRC...*"[222] The Speaker of the legislative parliament also emphasised the significant role of the NHRC actions in establishing accountability for human rights abuses committed during the conflict period for the purpose of ending impunity. Another significance of the NHRC role is in terms of establishing normative practice even for non-state actors (combatants), which is exemplary. As a result, the CPN-Maoists were also obliged to respect common Article 3 of the Geneva Convention. In this way it has helped in establishing accountability of the non-state actors as well.[223] Within its mandate and capacity the NHRC used all possible means for preserving the lives of the people.

In addition, the NHRC made lots of efforts to promote human rights during both the conflict and post-conflict period. It trained officials, organised sensitisation events and disseminated messages and obligations of all parties in the cases of human rights

[220] Interview with Mandira Sharma, supra note 180.
[221] Interview with Anup Raj Sharma, supra note 182.
[222] Interview with Surya Kiran Gurung, supra note 174.
[223] Interview (in Nepali) with Tek Tamata, Programme Officer, UNDP, Kathmandu, 23 April 2015.

violations. All these activities had effect in protecting rights of the people. The government official interviewed observed, "*the NHRC has put lots of pressure on the government for acting upon the cases against human rights violations. During the conflict period, the NHRC has focused on civil and political rights and played a neutral role. NHRC has succeeded gaining public confidence by monitoring the executive functions that violate human rights.*"[224]

Despite underlining all the interesting roles played by the NHRC, actors provided examples of different challenges related to the NHRC's role. One of the Actors referred to deficiencies as a reason for non-execution of the NHRC recommendations. The conflict victim interviewed also added "…non-execution of the NHRC decisions is not only because of the unwillingness of authorities. In many cases the NHRC recommendations were not based on sufficient evidence and their execution was not at all possible without further investigations.[225] Furthermore, the NHRC recommendation include only few paragraphs referring to the fact and a decision asking for identification and prosecution of a perpetrator. The Attorney General's office does not receive full details of the supporting documentation. It does not make much sense to ask for effective execution without providing the details and without asking for specific action.[226] However, the available powers like blacklisting the names of the officials, persons or bodies who have failed to observe or implement any recommendations or directives of the NHRC (Article 132 h of the Interim Constitution 2007) have never been applied. The NHRC remains in consultation with different actors exploring the possibilities and impact of the blacklisting legal provision.[227] A number of Actors interviewed observed the potentially positive significance of applying this legal provision.

The Chairperson observed: "The overall design of the TRC Act is towards amnesty. TRC Act could have clarified many issues in terms of the NHRC involvement in the process. In any case, the TRC cannot go against the NHRC investigations and documentations.

[224] Interview with Ramesh Dhakal, supra note 184.
[225] Interview (in Nepali) with Ram K. Bhandari, Secretary General, Conflict Victims' Common Platform, Kathmandu, 1 May 2015.
[226] Interview (in Nepali) with Shree Ram Adhikari, Officer, NHRC, Kathmandu, 21 April 2015.
[227] Interview with Mr. Anup Raj Sharma, supra note 182.

Practically, it's not possible either as many evidences have already disappeared."[228] This does not suggest sufficient willingness for constructive engagement, despite its obligation to make the TRC successful. At least during the research interview both the Truth Commission chairperson and the NHRC chairperson expressed that they are looking forward to holding detailed operational meetings. The Truth Commission Chairperson also indicated, "… *NHRC support would be specifically required in terms of training the human resources that the TRC needs to mobilise. As the NHRC has expertise, we will coordinate to mobilise the expertise*."[229]

From the perspective of ending impunity, the role that the NHRC has played during the conflict and in post-conflict period were strong references for establishing accountability. While the interviewees acknowledged the commendable work of the NHRC on documentation, they commented on the weak role related to the prosecution and reparation role. Based on these factors, it was observed that the NHRC role in Nepal during the conflict period will help in shaping the Truth Commissions' process whereas in many countries Truth Commissions shape their own process and cause to establish NHRIs for implementing Truth Commission's report.[230] On the basis of its monitoring the NHRC made recommendations to the government, and international community, for immediate response and initiating long term measures including peace process for the protection of human rights.[231]

The NHRC role during the conflict period and in the post-conflict period has been supported by different development partner. These supports included capacity building including expanding the outreach, developing physical structures, human resources and their capacities etc. Since 2003, the OHCHR has been supporting the development of specific technical capacities including investigation and documentation of the human rights violations during both the emergency period and in the post conflict situation.

[228] Interview with Mr. Anup Raj Sharma, supra note 182.
[229] Interview with Surya Kiran Gurung, supra note 174.
[230] Interview (in Nepali) with Dr. Bipin Adhikari, NHRI expert and Dean, Kathmandu University, School of Law, Kathmandu, 23 April 2015.
[231] 13 years of the Commission, supra note 4. p. 24.

OHCHR support in the exhumation of at least 9 cases was significant contribution to enhancing the NHRC role and in ending impunity.[232]

5.4 Assessing Effectiveness and Impacts of the NHRC Roles

As presented in the earlier sections, during the conflict period, the NHRC actions have been very effective in saving lives of people whose life was under threat. Monitoring, documentation and investigation, which have helped in confidence building of the affected communities at the time of conflict will be the crucial ones for imparting victims' justice in the post-conflict situation. All these short term and long term impacts of the NHRC role during the conflict and their relation in post-conflict period are analysed in this section. As the objective of this analysis is not to assess the NHRC role in general, but only the ones having or not having impact on ending impunity, the focus is only on those aspects.

Despite having the broadest mandate for protecting and promoting human rights, various analysis and evaluations and interviews held with Actors revealed that the NHRC could not deliver as it could and should have done. They observed the NHRC role as very nominal and largely limited to documentation and proper investigation only in the cases where fact finding missions were launched. This section will also analyse the areas in which the NHRC role were not effective.

5.4.1 Immediate Effects

The work of the NHRC has had immediate effect. For example, during the conflict, the NHRC visits to different detention centres contributed to protecting some rights of the detainees. There was good progress in terms of its recommendation for compensating the victims or their families with immediate relief.[233] The immediate response from Nepal

[232] Interview with Gauri Pradhan, supra note 186. Also see, *Report on the Exhumation*, National Human Rights Commission, Lalitpur, 2014. NHRC has carried out the exhumation of at least 9 people who were the victims of enforced disappearance. This process is considered as the process for respecting victims' right to know the truth.

[233] Sharma, A., Annual Report NHRC, supra note 176, Forward.

Army due to the NHRC fact finding investigation in Doramba is another interesting example of the immediate effects of the NHRC actions. Initially, Nepal Army issued press release rejecting the NHRC report stating that the recommendation is beyond the NHRC mandate. Later on, due to the enormous pressure from different sides, Nepal Army had to launch an internal inquiry and suspend the lead officer.[234] As referred in the earlier sections, by using its general mandate NHRC saved many lives of the people, whose life was under threat.

5.4.2 Long Terms Impacts in Promoting Human Rights and Ending Impunity

Some of the NHRC actions carried out under the general mandate had long term impact in establishing accountability. Documentation of human rights abuses; recommendations made based on the fact finding and investigations have already established the truth and identified accountability. The exhumation is another example that the NHRC carried out in *Dhanusa*, *Shivapuri* etc places in the cases of people allegedly disappeared but latter on found killed and buried.

Though the recommendations made based on those reports did not have immediate effects in terms of preventing the government from promoting some of the perpetrators within the bureaucracy, documentation of the incidents and collection of the information has significance in the long run.[235] This is the reason why one of the Actors interviewed by the researcher observed that the NHRC accomplished significant tasks that fall within the scope of the Truth Commissions. Now the Truth Commissions cannot ignore the facts documented by the NHRC, it is rather obliged to move ahead on that basis.[236] However there was little progress in terms of compensating victims in the cases where the NHRC had made recommendations and perpetrators were never prosecuted based on the NHRC investigations. It did though help to justify the exhaustion of local remedies thereby allowing cases to be filed in the UN Human Rights Committee. In one of the cases Mr.

[234] Durbach, A., supra note 37, p. 8.
[235] Poudyal, K. supra note 120, pp. 89-90
[236] Interview with Bipin Adhikari, supra note 230.

Kumar Lama is now prosecuted in the UK court.[237] At least the NHRC investigations will remain the source of reference in any future prosecution as well.

5.4.3 Impacts at the Policy Level

The NHRC efforts helped to bring changes in the government strategies and policies, which significantly contributed to the protection of human rights. The findings of the NHRC monitoring done during the emergency period presented to the government in 2002 helped the government to review the situation and discontinue the emergency declaration.[238] As a result the NHRC efforts contributed to reducing negative effects and providing individual redress to the individuals in the short term and preventing any invalid imposition of emergency measures afterwards.[239] This way the NHRC contributed to address causes and consequences of conflict. The Commission has not been able to meet the expectations of the victims of Maoists atrocities as it could not address the violations caused by CPN-Maoists and pay reparation to the victims.[240] It has direct consequences in the post-conflict period as well.

NHRC monitoring helped in preventing or at least reducing the occurrence of human rights violence. Making the CPN-Maoists cadres aware of the humanitarian principles and their impact was significant. Monitoring the ceasefire and the human rights accord developed by the NHRC for signing by both the parties were also crucial initiatives with long term impact. The human rights accord was appreciated and supported by different stakeholders, though none of the parties in the conflict signed it.[241] However, NHRC continued urging to denounce the attacks from both the sides and asked for dialogue as

[237] British court has arrested one of the Nepalese Army Colonel, who was in UK for holidays and prosecuting in the court. The case is still ongoing and the alleged perpetrator is under surveillance and restricted to leave UK. He is arrested under the Command responsibility for inflicting Torture in the Army Barrack that he was leading. Detail information accessed at: http://setopati.com/samaj/24996/ on 2.03.2015

[238] Poudyal, K., supra note 120, p. 30

[239] Ibid, p.32.

[240] Poudyal, K., supra note 189, p. 216

[241] Durbach, A., supra note 37, p. 13.

the means of solution. At least the NHRC recommendations were somehow incorporated in the Code of Conduct that both the conflicting parties signed later on.

5.4.4 Areas having None Effect or Nominal Effects

During the conflict period at least until 2003 the NHRC could not provide effective remedies even on the complaints received and undertaking inquiry and investigations in all cases. Resource limitations coupled with other social and political constraints were referred as the main challenges for it.[242]

By 2004, NHRC gained strengthened capacity with the help of external support.[243] However, newer challenges appeared with the mobilization of security forces under the Army command and massive violence caused by the CPN-Maoists' as well. As a result, the NHRC could not carry out its entire functions effectively, which could have had significant impact in ending impunity in the long term. Preventive functions of the NHRC were not effective during this period. The weak protection role affected both the prevention and promotion as well.[244]

With regard to the cases of disappearances the NHRC neither had expertise to deal with them nor did it receive cooperation from the state authorities. Many cases filed in the court under the Habeas Corpus writ petition remained inactive as the cases were attributed to Army and without response. As a result NHRC made some efforts to internationalize the issue, which may have contributed to reduce the future occurrences; however, the fate of around 700 disappeared persons has remained unknown. Similarly, the NHRC had responsibility to monitor the situation of IDPs and ensure that the rights of IDPs were

[242] Annual Report, 2003, NHRC , Lalitpur, p. iii.
[243] Annual report, 2004, NHRC Chair in the Forward.
[244] Durbach, A., supra note 37, p.9

protected and respected.[245] However, the NHRC could not assure any rights to these people except asking the government to come up with an effective plan.[246]

The NHRC concluded that the State of emergency and mobilisation of the Army had created an environment of impunity. The commission encountered a great challenge due to devaluation of national and international commitments, lack of accountability, refusal of investigation or taking actions against those found guilty, refusal to take action on the complaints and evading penalty.[247] However, it was not able to take any specific action or initiate any measures for preventing the occurrence of such human rights violations. Exercising authority for blacklisting the names of officials, persons or bodies who have failed to observe or implement any recommendations or directives of the NHRC (Article 132 h) would have been an effective way of addressing impunity. However, the NHRC never applied this strong mandate provided by the Interim Constitution 2007.

The NHRC role during the post-conflict period was significant in the context that the parties signing the CPA had formally agreed to ending the 10 years armed conflict, and committed to protecting human rights and 'not encouraging impunity'.[248] However, the NHRC could not make significant contribution in achieving the CPA objectives of transforming the ceasefire into a sustainable peace. Maybe it was not possible without tackling the root causes of the conflict: discrimination, the absence of socio-economic and cultural rights, weak rule of law institutions and a culture of impunity, which were tasks beyond its capacity.[249] It could at least create enormous pressure on the actors based on its systematic monitoring, mobilisation of the civil society, and organising various events for reminding all concerned and accountable.

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[245] Pyakurel, S., "Nature of Human Rights Violations in Nepal" in: Adhikari, B. (ed.), *Conflict, Human Rights and Peace Challenges Before Nepal, Rishikesh Shah Memorial Lectures 2003*, National Human Rights Commission (NHRC), Kathmandu, 2003, pp.70-81, p. 74.
[246] Poudyal, K., supra note 120, p. 126.
[247] Annual Report, 2004, NHRC, Lalitpur, p. 79.
[248] CPA, supra note 165, Section 7.1.
[249] Durbach, A, supra note 37, p.16.

NHRC in its reports continued highlighting that the lack of effective implementation of NHRC recommendations and inability to bring the perpetrators of crime and human rights violations to justice had contributed to increase the level of impunity in the society.[250]

In the context of the NHRC role in relation to the Truth Commissions, the interviews held with the Actors revealed that the initial indications are not matching expectations. The NHRC is not yet pursuing its role in relation to the work of the Truth Commissions as analysed in section 5.2.1, 5.2.2 and 5.2.3. The strategic plan developed for 6 years, does not make any specific reference related to the monitoring of the Truth Commissions' recommendations. The Plan does not include any activities relating to the indirect obligations as well, which are analysed in section 5.2.3.

5.4.5 Analysis of the Effectiveness

The NHRC acknowledges that existing laws have entrusted it to impart justice to the victims and ensure perpetrators face legal actions.[251] However, in reality there has not been a single prosecution in civilian court for any of the serious crimes committed during the conflict on which the NHRC recommended for prosecution.[252]

Despite the shortcomings analysed in earlier section, it is a fact that the NHRC has been the only hope at the time of conflict and even in the post-conflict period as the transitional justice mechanisms did not exist until 8 years after the CPA signing in 2006. In the post conflict period, who else could address human rights violations that happened during the conflict period if the NHRC had not played the important role? Analysis of the immediate effect and long term impacts of the NHRC actions presented in earlier sections already revealed the significance of the NHRC action related to the conflict period human rights abuses. Lack of cooperation and support from both civil society and the government machinery was the reason for lack of sufficient effectiveness of the NHRC.[253] This has

[250] Upadhaya, K.N., 'Three Years of the Comprehensive Peace Accord, in the Forward.
[251] Singh, R., 'Feeling While Deciding', 13 Years of the Commission: Commission Recommendations on the Petitions and the Status of Execution, NHRC, 2014, in the Forward
[252] Durbach, A. supra note 37, p. 17.
[253] Interview with Gauri Pradhan, supra note 186.

resulted in the limited NHRC role with regards to dealing with the issues of IDPs, disappearances and effective execution of the NHRC decisions as well.

The NHRC follow up of the execution of its recommendations was also not systematic. One of the actors interviewed observed that there were many ways the NHRC could use its records even if the cases were not filed as per their recommendations. It could send human rights records of the people who are supposed to assume public position and engage with the parliamentary hearing. Had the NHRC started this approach of making the perpetrators accountable, it would have contributed to combating impunity effectively.[254]

Effectiveness depends on the context, commitment and backing of the international Community as well.[255] However, the Actors interviewed finds the existing mechanisms including the NHRC unable to deliver the expectations. As human rights is becoming like a court practice, it cannot address the urgent needs and dynamic evolution of the human rights. Furthermore, it is almost impossible for the NHRC to be an effective mechanism in dealing with impunity issues as politics is criminalised, there are very low moral/ethical standards and lack of accountability, and human rights issues are considered as a western idea.[256] Another official interviewed also had the similar observations. The interviewee referred to the reasons behind ineffectiveness of the NHRC action as largely due to a perception of human rights as an external factor and considered as a general threat for stabilisation. The interviewee stated further, "largely the human rights domain is hijacked by lawyers and the actual grass root level concerns and needs are shadowed under the procedural and normative elaborations".[257]

Nevertheless, it is perceived that the NHRC role as an oversight body on human rights issues contributed to ending impunity and promoting human rights culture. The National Human Rights Action Plan developed by the Nepal government foresaw a significant role of the NHRC. This was referred as an excellent entry point for the NHRC promoting

[254] Interview (in Nepali) with Sunil K. Pokharel, Secretary General, Nepal Bar Association, Kathmandu, 19 April 2015.
[255] Interview with one of the Actor (name not indicated as requested), Kathmandu, April, 2015.
[256] Interview (in Nepali) with KB Rokaya, former NHRC Commissioner, Kathmandu, 22 April, 2015.
[257] Interview with an Actor (name not indicated as requested), Kathmandu, April 2015.

human rights in the long run.[258] Another actor interviewed still sees the NHRC having potentiality to become an institutions for assuring non-recurrence of violations, which is one of the components of ending impunity.[259] Yet despite the NHRC claiming victims' justice remaining as the prime role, it could not enhance effectiveness in terms of taking the victims group into confidence. [260] This was observed as a missing opportunity of the NHRC for making its role effective.[261]

5.5 Issues and Challenges, Opportunities and Possible Way Forward

The effectiveness of the NHRC role related to ending impunity for the human rights abuses committed during the conflict period is dependent on various factors linked to mandate, performance and giving recommendations effect. This section will look into the issues and challenges related to the NHRC role, available opportunities and the possible way forward to address them.

5.5.1 Main Issues and Challenges

Ending impunity is a matter of highest political commitment: Ending impunity of the human rights violations committed during conflict in Nepal is a complex issue as high level government officials, security personnel and the major political parties continue to occupy positions of authority and are not held accountable. Not only the NHRC recommendations for prosecuting perpetrators were simply ignored, but those perpetrators have frequently been promoted or rewarded with lucrative postings and allowed to continue to hold high office including in Nepal's legislature and cabinet.[262] Ending impunity for human rights abuses committed during the conflict requires determined and sustained efforts at the highest political level. Regrettably, such commitment was observed neither in the legislation, policies and in action nor in the interviews held with various actors.

[258] Interview with Tek Tamata, supra note 223.
[259] Interview with Mandira Sharma, supra note 180.
[260] Interview with Ram Kumar Bhandari, supra note 225.
[261] Ibid.
[262] ICJ Report, supra note210, p. 11

NHRC role related to dealing with conflict related human rights abuses is challenged in number of cases. The government minister had asked the NHRC to stop the exhumation process that was initiated in 2010 in the case of disappearances.[263] Government's withdrawal of the court cases is another setback that included some of those recommended by the NHRC for prosecution.[264] It indicates that the broad and significant mandate provided to the NHRC by the Interim Constitution 2007, NHRC Act, 2012 and the TRC Act 2014 are overshadowed by the political and bureaucratic actors' responses. Different political and bureaucratic actors also seem interested pushing the conflict related issues to the TJ mechanisms rather than acknowledging the NHRC role. The request to review the Supreme Court verdict against the amnesty provisions of the TRC Act, shows that the political parties and the government authorities are interested towards political compromises even for the heinous crimes. The NHRC also did not exhibit its willingness and initiative to broaden its mandate towards ending impunity discussed under the broader and specific mandate and indirect obligations included in section 5.3.

NHRC role is not recognised in relation to the work of the Truth Commissions: The central role of the NHRC in the transition justice processes is neither expressed in the TRC Act 2014 nor in the perception and initiatives of the actors interviewed including the NHRC and Truth Commissions. Without participation in the process of the Truth Commissions, the NHRC role with regards to monitoring the implementation of the Truth Commissions' reports does not serve the purpose of ending impunity. In case the Truth Commission' processes are non-compliant with human rights standards, the NHRC in principle cannot support the processes neither it could advocate for implementing the TRC recommendation. The conflict victim interviewed during the field work believed that this factor had never been considered during the negotiations and discussions related to the enactment of the TRC Act.[265]

[263] ICJ Report supra note, 210, p. 112.
[264] Govt. Slammed for Withdrawal of Cases: Attention Drawn to NHRC Recommendations, accessed at: http://www.nhrcnepal.org/nhrc_activities_details-8.html on 26.02.2015.
[265] Interview with Ram Kumar Bhandari, supra note 225.

Bringing on-board the victims is not emphasised: Conflict victims feel excluded in the formation process of the Truth Commissions. They also claim that the formation has ignored the government's earlier commitments, the Supreme Court ruling, NHRC recommendations and international norms.[266] Following the Supreme Court decision that annulled the amnesty provisions, the victims groups seemed relatively positive and ready to cooperate with the Truth Commissions.[267] The Conflict victim interviewed during the field work shared that they are opting for a 'constructive engagement' though they don't have full trust in the process and prudence of the Truth Commissions' work. In the other hand, the main opposition party and other Maoist groups, have openly challenged and demanded annulation of the Supreme Court decision.[268] The fact is that the Truth seeking process cannot succeed until all parties to the armed conflict cooperate the process. At the same time, it is tricky to bring both the victims and alleged perpetrators together. In view of the opposite positions of the victims and the political groups and due to the debate over the prosecution and amnesty, reconciling them does not look likely. [269]

Accountability is prerequisite for promoting human rights culture: Building human rights culture is not possible until impunity has ended. Ironically, the same actors interviewed who agreed in principle on the NHRC having a significant role remain unwilling to comply when their compliance is required.[270] The interview with the former Commissioners centered on the difficulty in realising the political commitment. Human right culture requires all the actors to be fully accountable and respectful to all human rights and ensuring victims' justice for any kinds of human rights violation.[271] This fact

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[266] Conflict victims say they lost trust in TRC, disappearance commission in *The Himalayan*, 18.01.2015 accessed at: http://www.thehimalayantimes.com/fullNews.php on 01.03.2015

[267] Court rescinds amnesty clause (Transitional Justice Act): *The Kathmandu Post, 27 February, 2015.*

[268] Political move cannot correct verdict: Lawyers, e-Kantipur, 07 April 2015, available at: http://www.ekantipur.com/2015/04/07/top-story/political-move-cannot-correct-verdict-lawyers/403765.html

[269] Ibid..

[270] Annual Report, NHRC, supra note 247, p. 82.

[271] '….. human rights culture is an environment where people and citizens feel secured about their lives, and their right to liberty, where they are not afraid of the police, not afraid about false cases being registered against them, and assured that they will be protected by the law from anti-social elements. This culture is not just about safeguard of civil and political rights, but go much beyond in terms of scope.' In '*Media role in promoting human rights culture important: Balakrishnan*' on 19/12/2013 accessed at: http://zeenews.india.com/news/nation/media-role-in-promoting-human-rights-culture-important-balakrishnan_897887.html on 27.02.2015

further clarifies why the political and bureaucratic actors are unlikely to be interested in broadening the role of the NHRC particularly in dealing with the past human rights abuses, as it ultimately obliges them to respect human rights and be accountable for violations caused in the past.

5.5.2 Opportunities and Way Forward

Broader mandate prevails while the specific mandate needs to be clarified:

NHRC needs to fully utilise its general, specific and indirect mandate discussed in the earlier sections. While seeking clarifications related to the specific mandate in terms of dealing with conflict related human rights abuses, NHRC needs to extend collaborations with the Truth Commissions for their success. As the Supreme Court decision has overcome the potential institutional tussle due to the amnesty provisions of the TRC Act, NHRC needs to use this opportunity to promote victims justice. At least the actors interviewed during the research acknowledged the significant role of the NHRC and already foreseen the need to clarify the role in the forthcoming Regulations. [272] It is important that all the relevant actors recognise that the NHRC engagement is needed in all the TRC processes to ensure that the outcomes are credible, practical and possible to implement by the authorities. NHRC may extend its collaboration with a view of achieving objectives of ending impunity.

The NHRC also needs to develop its own internal mechanisms, directives and communications to ensure effective participation in the transitional justice process. The NHRC strategic plan 2015-2020 needs to reflect clearly its roles and strategic processes including the preparedness for monitoring the execution of the TRC recommendations as it is not the case at present.[273] It is also important to recognise that the lack of effective TRC recommendations may immediately affects the NHRC role to fulfil its mandate, the failure of the TRC affects its overall objective. In order to achieve the NHRC objectives,

[272] Please see section 5.3.4 for the Actors sharing the prospects for collaboration.

[273] The strategic plan for the period of 2015-2020 that the NHRC has published in March 2015, does not provide any detail action programme except mentioning 'working in coordination with the TRC mechanisms, having discussion with relevant authorities for the victims relief, compensations etc', p. 34

it has the opportunity of receiving external and internal support for addressing its capacity.[274] The EU and Swiss Development Cooperation officials interviewed during the research process confirmed this possibility. Civil society also seem willing to extend cooperation which the NHRC may facilitate. Continued broad mandate for the NHRC as proposed in the new constitution is also another opportunity. It may reassure the NHRC with regard to ending impunity of the past human rights abuses and promoting human rights culture in the country.[275]

Both the former Commissioners interviewed referred that the informal mechanism of the former NHRC Commissioners, which has started working as an advisory mechanism could play a crucial role in enhancing effectiveness of the NHRC. Since ending impunity requires a high level of political commitment, the mechanisms like the former Commissioners is important for getting the commitment of political actors and supporting the NHRC to adopt and follow appropriate strategy for the realisation of ending impunity. This mechanism may guide the NHRC for promoting human rights culture and remaining as one of the institutions for assuring non-reoccurrence of human rights abuses.

Truth Commission need to realise the importance of NHRC engagement and build its process on the NHRC investigations and recommendations: The Truth Commissions need to acknowledge the complementarity of the NHRC in terms of their process and after the submission of their report as well. NHRC may help the Truth Commissions immediately to organise public hearing and other events outside the capital, where the NHRC already has the outreach offices. Ensuring victims' participation is another important area that the NHRC could help to make the Truth Commissions successful. The Truth Commissions chair has already indicated one important areas of cooperation that is to mobilise the human rights expertise already available within the NHRC.[276]

[274] The OHCHR has already offered its support during the talk with the NHRC chief in a meeting in Geneva. (Himalayan Times, 6 March).

[275] The draft Constitutional provisions as referred in section 5.2 and in the meeting with the Chairperson of the Constituent Assembly confirmed that the political actors are intending to maintain the broader Constitutional mandate and even extended in terms of the access.

[276] Interview with Mr. Surya Kiran Gurung, supra note 174.

Though there are number of practical aspects to be clarified with regards to the cases related to the past abuses of human rights dealt by the NHRC, success will depend on the Truth Commissions referring the NHRC investigation and recommendations. The matters to be clarified include the approaches for balancing the reconciliation and amnesty, the processes for relaunching investigation in case of any etc. Practically, launching reinvestigation will not be possible in number of cases as the evidence has already disappeared. Furthermore, the NHRC has already established Truth following the detail investigations in the cases where the fact finding missions or exhumations were launched.

Conclusion:

The study has revealed that the Nepal is a unique situation where the NHRC has shaped the TRC processes and dealt with the majority of the cases of human rights abuses committed during the conflict period. All the actors interviewed including the NHRC and Truth Commissions need to acknowledge the significance of the NHRC collaboration in the work of the Truth Commissions. Detailed engagement of the NHRC in the process of the Truth Commission would result in an effective recommendation, which will ultimately enable effective implementation thereby contributing to ending impunity. The study also concluded that ending impunity in the case of past human rights abuses depends on effectiveness of the NHRC role, which is subject to further clarity in mandate, initiatives of the NHRC and largely the response of all other actors.

Chapter 6

Conclusion

In this research paper, I have identified and analysed the role of NHRIs in dealing with conflict related human rights abuses. In this concluding section I will recall the most important findings, conclusions and some recommendations.

The research has shown that NHRIs have a central role to play in ending impunity for human rights abuses committed during conflict, the most crucial being the contribution to establish accountability for the abuses committed. This is based on the monitoring, investigation, documentation and advisory functions that NHRIs carry out within their general mandate of protection and promotion of human rights. As seen in the case study on Nepal, the human rights abuses that the NHRC documented during the conflict periods are the basis for the TRCs to function; and without this, important evidence would have disappeared. Effectiveness of this role depends on the broadness of their mandate together with other perquisites including the independence, pluralism and functional autonomy that the Paris Principles have identified as a key for the NHRIs to succeed.

Facilitation for ensuring participation of victims and reaching out to all the affected communities is another important contribution that NHRIs can make to TRCs. This can be directly linked to NHRIs responsibility of monitoring the execution of the TRC recommendations, as in Morocco, Sierra Leone and Nepal. In order to ensure that their role is effective, NHRIs need to participate in the TRC process. It helps to prevent any potential flaws in the TRC recommendations and promotes wider acceptance and enforceability. In fact, any flaws in the TRC report or its non-execution will result in impunity and the prolonged and unaddressed grievances of victims may cause another conflict.

There are also a number of other functions that only NHRIs carry out as a permanent national institutions that are relevant to the transitional justice process. As seen in the case study of Nepal, NHRIs can facilitate the peace building process, promote the human rights agenda in the actual peace agreements, monitor the respect and implementation of peace

agreements. NHRIs can receive complaints, investigate and recommend actions in relation to human rights abuses occurred during conflict until the TRC mechanisms are established, and lobby for establishing credible TRCs.

Overall, the success of the TRC depends on the role of NHRIs as they provide the basis for TRCs to function, support during the TRC processes, and carryout monitoring the implementation of the TRC recommendations, which is the ultimate step to ending impunity. This is the basis on which NHRIs could achieve the overall objectives of promoting a human rights culture. Hence, a key finding of this research is the importance of recognising the complementarity of these TRCs and NHRIs. However, the key role of NHRIs is not yet well recognised in the international principles of transitional justice processes. It justifies the critics on Paris Principles and the need for post-Paris principle discussions as the NHRIs' practices are ahead of the Paris principles. It demands the fact that a reflection on post-conflict situation and complementarity with TRC processes should be included in any reflection on the future of the Paris principles.

The research concludes that the Truth Commissions and the NHRC in Nepal are not fostering collaboration yet as it seems that they are yet to recognise their complementarities in the transitional justice process. It is clear from this research that the lack of recognition of common goals and the complementary roles will be counterproductive to the institutions: TRC in the short-term and the NHRC in the long-term, and of course to the victims. The NHRC needs to take into account that the success of the TRC ultimately complements its objectives. Similarly, the TRC needs to consider that its process will not succeed without close coordination with NHRC. While more clarity of the role and engagement of NHRC needs to be pursued in the forthcoming Rules and Directives, NHRC has to optimise the available opportunities within the general mandate and supportive role as required by the TRC Act 2014. Furthermore, NHRC needs to pay specific attention to developing its research basis, expanding coordination and its working relations with civil society - particularly victims groups, and adopting a 'pro-active role' approach instead of the 'reactive response' approach to ensure an effective engagement in the TRC process. This approach will enable the NHRC to gain confidence as the institution contributing to assure non-reoccurrence of human rights abuses – one of

the most essential components for ending impunity and promoting human rights culture – in Nepal as well as elsewhere.

It further concludes that ending impunity is first and foremost a state responsibility. NHRIs as permanent national bodies contribute to fulfilling state obligations. As NHRIs cannot negotiate on balancing the political and moral dimensions of the conflict-related human rights abuses, it justifies the TRC establishment and NHRIs support to TJ processes while addressing victims' concerns. The need now is to recognise the full scope of the NHRI role in post-conflict transition processes and more specifically elaborating the complementarity of the TRC and NHRIs. In order to define the role of NHRIs in terms of dealing with conflict period human rights abuses, there is a need to update the existing Paris Principles. This would provide the basis for moving forward from the current approaches of 'supportive role' that the UN Guidance note has explained, to the new approach that explains the 'central role' as is already the case practiced by some NHRIs. This is also the approach that the international forums such as the International Roundtable, Belfast 2006, Cairo Declaration 2011 etc. have urged.

The conclusions lead towards the need for further research and studies particularly in the intersection of conflict, human rights and the role of NHRIs to provide a more objective basis to look into a review of and addition to the Paris Principles. As the NHRIs are now becoming an integral part of the state mechanisms and particularly the national human rights protection system, it is very important to promote scholarship on the intersection of the three component which will contribute further to establish the principle basis for expanding the role of NHRIs to complement the TRC processes and ultimately contributing to ending impunity.

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Annex I

List of the Interviewees

Field works in Nepal

15 April 2015 – 3 May 2015

SN	Name	Title	Institution	Venue	Date
1	Mr. Gauri Pradhan	Former Commissioner of the NHRC and Freelancer/Human Rights Defender	Friends for Peace	Kathmandu, Nepal	17th April 2015
2	Prof. Dr. Yubraj Sangraula	Former Attorney General of Nepal and Trustee of the KSL	Kathmandu School of Law (KSL)	Bhaktapur, Nepal	17th April, 2015
3	Mr. Ramesh Dhakal,	Joint Secretary	Office of the Prime Minister, The Government of Nepal,	Kathmandu, Nepal	19th April, 2015
4	Mr. Sunil Kumar Pokharel	Secretary General	Nepal Bar Association	Kathmandu, Nepal	19th April 2015
5	Mr. Sudarshon Subedi	Chairperson	National Federation of the Disabled, Nepal (NFDN)	Kathmandu, Nepal	20th April, 2015
6	Ms. Pia Hanni	Programme Coordinator	Swiss Agency for Development, Embassy of the Switzerland in Nepal	Kathmandu, Nepal	20th April 2015
7	Mr. Suvash Chandra Nemwang	Speaker	Constituent Assembly and Legislative-Parliament of Nepal	Kathmandu, Nepal	21st April, 2015
8	Mr. Anup Raj Sharma	Chairperson	National Human Rights Commission of Nepal	Kathmandu, Nepal	21st April, 2015
9	Mr. Shree Ram Adhikari	Officer	National Human Rights Commission of Nepal	Kathmandu, Nepal	21st April 2015
10	Mr. Surya Kiran Gurung	Chairperson	Truth and Reconciliation Commission of Nepal	Kathmandu, Nepal	22nd April 2015
11	Dr. KB Rokaya	Former Commissioner of the NHRC	Chair, Nepal Intellectuals' Forum and Secretary General of the National Council of Churches of Nepal	Kathmandu, Nepal	22nd April 2015
12	Dr. Genoveva Hernandez	Head of Political Section	EU Delegation to Nepal	Kathmandu, Nepal	23rd April 2015
13	Mr. Tek Tamata	Programme Coordinator	UNDP, Nepal	Kathmandu Nepal	23rd April 2015
14	Dr. Bipin Adhikari	NHRC Expert and Dean	Kathmandu University, School of Law	Kathmandu, Nepal	23rd April 2015
15	Mr. Ram Kumar Bhandari	Human rights Defender and Secretary General	Conflict Victims' Common Platform – A loose Network of the conflict victims organisations	Kathmandu Nepal	1st May 2015
16	Ms. Mandira Sharma	Founder President	Advocacy Forum Nepal	UK (telephone interview)	7th May 2015

Annex II

Questionnaires for Interview

A. **Mandate**:

i. Do you think that the NHRC has a role to play in ending impunity of the human rights abuses happened during the conflict periods? Yes/no?
ii. If yes, which specific mandate you think are required to perform the role?
iii. Do you think that the existing mandate of the NHRC are is sufficient to address the requirements? If the existing mandate is not sufficient, which other mandate would you suggest to add?
iv. Existing legal provisions do not specifically spell out the NHRC having mandate to deal with ending impunity. However, some of the provisions of the Interim constitution and the NHRC Act in Nepal enacted after signing the Peace agreement, like 'respect', 'protect', and 'promote' human rights; authorizing for doing an investigation in sub-judice cases; and prohibiting to initiate reconciliation in the case of international crimes in which no amnesty is possible etc. seem having direct or indirect contribution to ending impunity even in the past human rights abuses. Do you think that these mandate were provided with the objectives of ending impunity in the cases of human rights violations happened during the conflict periods as well?
v. The new NHRC Act enacted in 2012 has limited the autonomy and independence of the NHRC (which got annulled by the Supreme Court decision). Do you think that there has been new development (changes in the situation of Nepal) that require limiting the NHRC role? If yes, which part of the existing NHRC mandate do you think should be amended?
vi. How does the new Constitution (the one that is now in the process of promulgation) propose to mandate the NHRC? Does it make any specific reference to ending impunity or promoting human rights culture? If yes, what specific mandate is proposed for achieving the objectives of ending impunity or promoting human rights culture?

B. Role

i. Do you think that the NHRC so far has played a role in ending impunity in general and particularly in the context of the human rights violence happened during the armed conflict? Yes/no?
ii. If yes, do you think that the role played by the NHRC was sufficient? If insufficient, which other roles would you think that the NHRC should play/should have played with regards to ending impunity of the conflict periods human rights abuses?
iii. If not, how would you suggest the NHRC to play a role for fulfilling its obligations within the given mandate and for bringing larger impact amongst the general public and victims?
iv. Do you think that some of the role that the NHRC played/ is playing are beyond the explicit mandate of the NHRC?

C. Effectiveness

i. (If the respondent says yes on question B1) Do you think that the role played by the NHRC were/are effective and played/playing significant impact in terms of ending impunity particularly in the context of the human rights violence happened during the conflict periods?

ii. If yes, which are the impacts that you would refer as the significant ones?
   - Social
   - Economical
   - Institutional and capacity related
   - Political or mandate related
   - Related to the cooperation of the civil society and other non-state actors
   - Related to the cooperation of the formal actors: government, political party, judicial and quasi-judicial bodies, parliamentary bodies, general public/victims?
   - All
   - Any other

iii. If not, what are the main reasons/ or challenges for not being able to deliver as expected? Could you give some examples?

iv. What are the immediate responses required for the effectiveness of the NHRC?

v. How should the NHRC be reinforced to achieve the expected impact or the required effectiveness?

vi. Would you like to make any other suggestions?

D. Additional/specific questionnaire to different Actors:

1. <u>Legislative and political Actors</u>

a. Has there been any specific discussions or follow up actions related to ending impunity within the CA/parliament based on the Annual report of the NHRC? Could you explain the role of the CA/parliament in ending impunity particularly in connection with the NHRC?

b. Do you think that the NHRC should be empowered further to make its role effective in ending impunity in the short term and promoting human rights culture in the long term?

c. What are the efforts made or to be made to make the NHRC role effective in ending impunity? If you think, the existing mandate of the NHRC has to be amended, how would you proceed with it? And when?

2. Executive

a. What is the specific role under your/institution's portfolio to make the NHRC role effective in terms of ending impunity?

b. NHRC reports have claimed that some of their recommendations have not been executed for prosecution in the court. Has there been any specific criteria established for prosecuting or not prosecuting the conflict related human rights abuses? Has there been any follow up actions asked (submission of additional references or investigations) for the NHRC to investigate in some particular cases related to the conflict periods?

c. Has the NHRC been providing sufficient recommendations and practical solutions and suggestions (including policy changes, execution, new institutional mechanisms etc) for

ending impunity? Could you share some examples? Has the NHRC annual report taken into account for specific actions of the government?

d. Is the NHRC provided with all required resources, capacities and competences including access to carry out the required performances for achieving its mandate?
e. How would you assure that the NHRC will have unhindered access and sufficient capacity and competence to carry out its performances in future?

3. Judicial and Quasi-judicial authorities and the specialized Agencies :

a. Do you think that there is some specific role and possible relationship between your institution and the NHRC role in terms of ending impunity?
b. Has there been any issue of mandate/competence of the NHRC while carrying out its role?
c. What kinds of coordination would you expect from NHRC and what would you offer to NHRC in terms of making its role effective in ending impunity?

4. UN Agencies, Donor society, Civil society, Media, Academician and the Victims Groups

a. What are/were the specific role and relationship between your institution and the NHRC in terms of addressing the conflict periods human rights violence?
b. (In case of any challenges identified under the Questions C III) In order to address the challenges identified in question C.III, how have you been collaborating or could collaborate with the NHRC? What are the specific role that the NHRC should play for making its role effective?
c. What is the specific role that you could offer to the NHRC for ending impunity with regards to the conflict periods human rights violence?

5. Experts and Former Commissioners

a. Based on the response to the question C.1, how would you assess the effectiveness/ineffectiveness? In case of ineffectiveness, why? Please provide some examples.
b. How would you think, the NHRC could play sufficient role?
c. What is the specific role that you would suggest for the NHRC to play in terms of ending impunity with regards to the conflict periods human rights violence?
d. How does the NHRC mobilise external expertise while performing its role? Do you think, the existing practice/process is sufficient? If not, what could be the ways of making it effective/sufficient?

6. Existing Commissioners

a. What has been done in the past in terms of ending impunity particularly with regards to the conflict periods human rights violence? Do you think that they were sufficient? If not, why? What should have been done?
b. What specific roles would you think that the NHRC should play particularly in the context that all actors seem focusing on Transitional justice mechanisms to deal with such cases?
c. What are the challenges that you could foresee in terms of playing an effective role?
d. What would be your suggestions for the action in case the transitional justice mechanisms could not impart justice to the victims?

e. Would you foresee any role that the NHRC could play or may have to play towards ending impunity during the process of the transitional justice mechanisms or any follow actions after the transitional justice process is over? If yes, could you give some examples? Have they been taken into account in the policies and strategies of the NHRC? Are the other actors aware about it and ready to cooperate?