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Evaluation Report

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Contents

I. SUMMARY	4
II. BACKGROUND.....	4
III. REVIEW OF TRIAL DOCUMENTATION.....	5
a. Objectives and Approach.....	5
Victim Access to Justice	6
Complementary reporting.....	7
Training	7
Domestic demand and leadership	7
TRIAL's Nepal Office.....	8
b. Theory of Change	8
Victim Access to Justice	8
Changing State Behaviour	8
c. Logical Framework	9
d. Risk Management.....	9
IV. ADDITIONAL FINDINGS BASED ON INTERVIEWS.....	10
a. Relevance and Effectiveness	10
Individual victim applicants	10
Training and accompaniment.....	12
International Advocacy.....	12
State Behaviour	13
b. Impact and Sustainability	14
Victims.....	14
Capacity-building	14
International Advocacy.....	15
V. CONCLUSIONS	15
a. Victim access to justice.....	15
Relevance	15
Effectiveness.....	16
Impact and Sustainability	16
b. Training.....	17
c. Changing State Behaviour	17
d. Risks.....	18
Legal Status of TRIAL's Nepal Office	18
Registration of TRIAL with SWC.....	18
Victim, witness and lawyer protection.....	18

VI. RECOMMENDATIONS TO TRIAL.....	19
a. Implementation challenge: linking international and domestic advocacy	19
b. Capacity challenge: TRIAL’s exit strategy	20
c. Resolving TRIAL’s legal status in Nepal	20
ANNEX ‘A’ – DOCUMENTS REVIEWED.....	21
ANNEX ‘B’ - INTERVIEWS.....	23
ANNEX ‘C’ – BACKGROUND	24
ANNEX ‘D’ – LOGFRAME SUGGESTIONS.....	30
ANNEX ‘E’ – TRIAL’S INTERNATIONAL ADVOCACY.....	33

I. Summary

The human rights activities reviewed by the Consultant were carried out through Swiss FDFA funding to TRIAL from 2010 to the present. TRIAL also received funding from MISEREOR for the same objectives. Funding from both sources will continue through 2016.

The evaluation is based on a review of official documents (Annex 'A') and interviews with TRIAL partners, beneficiaries, and personnel (Annex 'B'). Two kinds of activity were discussed: case-based and general advocacy before domestic and international bodies; and, second, training and accompaniment.

The key conclusions and recommendations are the following:

- **Linking international and domestic advocacy.** TRIAL's most important challenge is to give domestic traction to its successful record of international advocacy. TRIAL is giving first priority to this challenge. In support of this focus, the Consultant suggests consideration of a more tailored approach to domestic advocacy. This would be reflected in deeper contextual analysis in TRIAL project documentation, the development of collaborative strategies and long-term reform agendas with partners and associates, greater focus on specific human rights and impunity challenges, and a refined set of outcomes (see Section V (a-c), pp. 15-17 and Annexes 'C', 'D' and 'E').
- **Building local capacity.** The most important aspect of domestic implementation strategy and TRIAL's eventual exit is local leadership, competence, and demand for the kinds of technical skills TRIAL offers. The recent partnership with KSL is part of TRIAL's response to this challenge, and it is promising. The Consultant has several specific recommendations in support of TRIAL's current planning, including consideration of a Training of Trainers programme, the elimination of English as a prerequisite to participation, and the linkage of legal knowledge to broader, more holistic training agendas that practically seek to give local traction to international human rights norms. The disappointing impact of most donor-funded efforts to date with regard to the latter challenge (see Annex 'C') is the single most important result in Nepal from which lessons should be learned, articulated, and built upon (see Section V (b), p. 17).
- **Resolving TRIAL's legal status in Nepal.** Committed donor support and courageous participation by Nepali staff has made TRIAL's Nepal office available to victims and supported TRIAL's work. Assuming that the legal status of the office cannot be resolved in the short term, however, the Consultant recommends – as in interim measure to reduce risks – that TRIAL seek to work through private lawyers who are have registered practices based at home or in larger firms (see Section V (d), p. 18).

II. Background

TRIAL's work since 2010 has been carried out in a political environment increasingly adverse to advocacy to promote the values and principles of inclusion or accountability (see more detailed background in Annex 'C'). In 2006, most international observers assumed political will in support of constitutional, legislative and institutional reform on the basis of these core peace process values. Since then, dominant political forces have shifted steadily from UCPN-Maoist dominance in the first Constituent Assembly to the NC and UML after the national elections in 2013. The current political leadership is marked its traditional conservatism and willingness openly to challenge Supreme Court decisions that are politically unfavourable. Following the

earthquake in April 2015 and the enormous donor commitment to reconstruction under concentrated and largely unaccountable executive authority, the government and political party resistance to the kind of advocacy in which TRIAL engages is only likely to increase in strength.

The current fast-track constitutional process reflects this shift, with key political leaders retreating from CPA and Interim Constitution commitments on secularism, inclusion, equality, and accountability. Madheshi political forces, which might otherwise have been expected to protest, have experienced a radical decline in popular support since the Madheshi Movement of 2007. There are early indications that the illegitimacy of the constitutional process is again generating popular opposition in the Terai and related human security and governance challenges.

On accountability issues, the UCPN-Maoist is united with its erstwhile political opponents, the NC and UML, in steadfastly rejecting calls, including orders from the Supreme Court, to investigate and prosecute human rights and humanitarian law violations that may amount to crimes under international law. Politically appointed commissions of inquiry (the TRC and the Disappearances Commission) are cynically used by political leaders to defer and deflect calls for prosecutions in spite of Supreme Court decisions that have resisted executive attempts to displace the judiciary in relation to serious crimes under international law.

The international donor community is not unaffected by these events. While the UNDAF 2013-17 and its underlying Peace and Development Assessment (2010), both the result of intensive negotiations between the UN, donors, and government, highlight the importance of addressing the situation of conflict victims, the relevance of this issue for the international community as a whole (with notable exceptions) has diminished significantly since 2006. With the frequent turnover of international personnel, the depth of knowledge of donors regarding the legacy of the armed conflict is necessarily weakened with the passage of time. The Government has also increasingly sought to control donor-funded civil society activity through the Social Welfare Council, and no area of donor assistance is more sensitive than that targeted by TRIAL. Most donors comply with the criteria established in the SWC, with few questioning the legitimacy of this exercise of control of civil society activity. The outcome is weakened support for human rights advocacy in Nepal.

At the same time, the unity and vision of the human rights community up to 2006 has entirely disappeared. There was a natural progression from the leadership of human rights activists until April 2006 to the resurgence of political parties and leadership following the re-establishment of parliamentary democracy. Civil society leadership has weakened and divided, however, far beyond what this natural evolution could explain. In the vacuum left by this development, human rights and transitional justice advocacy has tended to be dominated by three or four INGOs and NGOs, mostly led by Kathmandu-based lawyers. This has led to resentment from leaders of the still nascent conflict victim movement. The latter has grown notably in strength since the formation of the Conflict Victim Common Platform and its support by the UN and some bilateral donors.

III. Review of TRIAL Documentation

a. Objectives and Approach

One of the comparative advantages of TRIAL's work in Nepal, from the perspective of monitoring, evaluation and learning, is its consistent focus on combating impunity through a narrowly defined set of activities. TRIAL has remained committed since 2010 to providing victims with access to international justice mechanisms, building a body of international views through UN human rights mechanisms, and strengthening the knowledge and capacity of

lawyers, human rights defenders and journalists in Nepal. There was a shift, however, from seeking to “influence the practice of the authorities, strengthen the rule of law and set the standards be followed and respected” (2010 Proposal) to “encouraging the respect for international standards in the field of human rights in Nepal” (2015-16 Proposal). TRIAL’s overall goal is to strengthen the rule of law and transitional justice; arguably, its objectives with regard to changing State behaviour could be more strongly formulated and linked to implementation strategies. This is the main focus of the Consultant’s conclusions and recommendations.

Victim Access to Justice

TRIAL’s General Allegations and Alternative reports demand accountability for perpetrators on both sides in the internal armed conflict.¹ In its selection of cases for the HR Committee, however, TRIAL has focused on cases involving State perpetrators, mainly the Nepal Army. TRIAL’s documentation does not elaborate on the reasons for this approach or its consequences for TRIAL advocacy in Nepal.

In its report on 2013-14 activities, TRIAL notes the deterioration in the external environment, suggesting that the situation could be explosive if victims continue to be ignored by the Government. TRIAL does not offer more detail about how this situation may become ‘explosive’. Arguably victims are more likely to lose hope in their day-to-day struggles with poverty and the psychosocial consequences of harms suffered before and after the conflict.²

TRIAL’s documentation does not make use of numerous studies of Nepali victim needs, concerns, and aspirations, which demonstrate that the desire for justice has multiple meanings and is embedded in what are generally situations of poverty, unemployment, illiteracy, lack healthcare, and a generalized lack of trust in the State. When asked about their immediate priorities, few victims mention prosecutorial justice, but rather emphasize social and economic hardships.³ The Nepal Conflict Victim Common Platform, led by TRIAL client, Ram Bhandari, has played a strong role in raising public awareness that the legal dimension of the transitional justice process has obscured social and economic realities and that social and legal dimensions must be linked under the leadership of victims, not lawyers.⁴ The deteriorating livelihoods of victims points to the need for coordination between various donor-funded initiatives aimed at assisting victims (recognizing and learning lessons from the failures of the Nepal Peace Trust Fund, from which most donors have withdrawn, but not because its goals were ill-advised). At the moment, economic, psychosocial and legal approaches tend to be artificially de-linked or stove-piped.⁵

In its most recent project document (2015-16 Proposal), TRIAL describes its policy with regard to the accompaniment of victims through the legal process.

As a matter of policy, TRIAL accompanies victims in their quest for justice at the minimum until a decision is taken by the relevant body but more generally conducts as

¹ See *Follow-Up Report on the Implementation of the Recommendations Issued by the Human Rights Committee* (CCPR/C/NPL/CO/2), March 2015, Submitted by TRIAL (Track Impunity Always), Terai Human Rights Defenders’ Alliance (THRD Alliance), Victim’s Common Platform on Transitional Justice.

² Consultant’s observation, based on work in Nepal since 2005.

³ See ICTJ, “To Walk Freely with a Wide Heart” - A Study of the Needs and Aspirations for Reparative Justice of Victims of Conflict- Related Abuses in Nepal, 2012.

⁴ Interviews with Ram Bhandari and Suman Adhikari, July 2015, in addition to Consultant’s own experience in Nepal since 2005.

⁵ Interview with UN Women representative and with TRIAL staff, July 2015.

much follow up work as possible (both in Geneva through regular reports to the Human Rights Committee and in the country through legal actions and advocacy work) to ensure that the decision will actually be implemented. (p. 18)

This description of ‘policy’ versus ‘more general’ practice is ambiguous, but appears to state that, from a policy perspective, TRIAL’s work on implementation is optional.

Complementary reporting

TRIAL collaborates with national partners in submitting General Allegations and Alternative Reports to Special Procedures, the UN HR Committee, and the UPR. In 2010, this work played a minor role in the overall approach: “This work is not a priority for TRIAL but may be complementary to the submission of cases”.⁶ However, this aspect of TRIAL’s work cumulatively has become more significant over the last five years. In its 2015-16 Proposal, TRIAL highlights the fact that it had contributed to ten reports to human rights mechanisms.

The quality of TRIAL’s reports is excellent and reflects a staff in Geneva and in Nepal that is fully competent and committed. In 2013-15, TRIAL submitted 3 reports to the Human Rights Committee (April 2013, Feb 2014, Mar 2015); alternative reports to CEDAW Committee (Aug 2013) and to CRC Committee (June 2014 and May 2015); and 4 reports to UN Special Procedures (Aug and Sep 2012, Feb and June 2014). All of this occurred while, in 2013-14, TRIAL submitted 5 new cases to the UN Human Rights Committee. Relative to the contribution of other INGOs and NGOs in Nepal, this level of productivity is remarkable and fully justifies TRIAL’s reputation in Nepal for expertise, integrity, efficiency, dedication, and openness to collaboration.⁷

Training

TRIAL’s approach to training began with a ‘participation’ phase and then moved to formal training of the civil society participants, focusing on lawyers. According to TRIAL senior staff, this is the typical progression of TRIAL’s work globally.⁸ TRIAL’s reports on 2011 and 2012 activities suggest success in building local capacity. For its 2013-14 work, however, TRIAL changed its approach due to a “lack of time or motivation [by lawyers] to undertake such a time-consuming activity in light of their professional commitments and the lack of an economic incentive for doing so”.⁹

TRIAL shifted to a coaching and accompaniment approach, while continuing separate training for human rights defenders and journalists. A second iteration of TRIAL’s coaching approach was initiated in 2015 with the Kathmandu School of Law, beginning with participation by about 25 lawyers and law students in a one-day training programme. From this group, and by application only, four male lawyers were selected for the coaching programme. The programme had concluded its second training session at the end of July 2015.

Domestic demand and leadership

National partners and Nepali leadership are critical for TRIAL’s ongoing work and its eventual exit from Nepal. One of the challenges in Nepal, however, is to find reliable and consistent

⁶ TRIAL 2010 FDFA proposal, p. 9.

⁷ This is the consistent view of partners and others interviewed by the Consultant in July 2015.

⁸ Interview with senior TRIAL advisor, July 2015.

⁹ TRIAL Report on 2013-14 activities, p. 12.

partners with the right kind of motivation and capacity to carry out this kind of work, which is characterized by uncertainty and protracted periods of waiting for decisions, responses, and further replies. For example, notwithstanding the optimism expressed above with regard to LAFHUR, this partnership ended when one of the lawyers left Nepal due to threats. The NGO, itself, was unable to sustain the relationship.

TRIAL's strategic planning documents could be strengthened by explicitly assessing the importance of a national constituency that consistently demands TRIAL's support and provides local leadership. The project proposals and reports do not elaborate on how civil society and other organizations are addressing human rights in Nepal, the challenges and opportunities that they face in common, lessons learned, or how diverse approaches have shifted since 2006.

TRIAL's Nepal Office

TRIAL considers it important to have a Nepal office in order to present a credible image to victims and partners, host meetings, and provide an office environment that supports the effectiveness of its two Nepali staff. In its 2013-14 proposal, TRIAL explains its justification for this approach.¹⁰ This assessment misses the risk posed to national staff; namely, the uncertain probability that the Social Welfare Council, together with the CIAA, would "take action" against TRIAL, as it has promised against organizations operating without registration. It is difficult to judge this risk, but partners and TRIAL staff are unanimous in expressing discomfort with the current arrangement. Some observers suggest that SWC action is unlikely unless instigated by individuals who consider TRIAL's work contrary to their interests and who think they would benefit from a public smear campaign. It is not difficult to imagine the later scenario in Nepal, particularly as the Kuma Lama case proceeds in the UK.

b. Theory of Change

Victim Access to Justice

TRIAL aims to ensure that "[...] victims and their relatives increase their chances of seeing the violations committed against them being recognised, and, as a consequence, to obtain redress, learn the truth and have the satisfaction that justice has prevailed in their case. [...] These cases will directly affect the victims' family members as well, and thus have consequences for a wider circle of persons and communities".¹¹

TRIAL's documentation provides some indication of the nature and extent of reparative satisfaction that has resulted from the submission of 15 cases and views issued by the HR Committee in four cases. There is scope in TRIAL's reports for more elaboration on results related to 'satisfaction' and 'reconciliation' in Nepal. There are longstanding efforts by groups like HimRights, a TRIAL partner, to promote these values. These efforts have generated important lessons about the challenges of transitional justice and how they vary across different categories of victims groups as well as between victims. TRIAL's documentation of results could be further illuminated by the incorporation of these findings.

Changing State Behaviour

TRIAL's theory of change regarding state behaviour has shifted along with TRIAL's objectives in this regard. In 2010, TRIAL had confidence that it would observe "changes in legislation, the

¹⁰ TRIAL Proposal, 2013-14, p. 6.

¹¹ TRIAL Proposal 2010, pp. 9-10.

integration of the UN Human Rights Committees' legal reasoning into national jurisprudence, the prosecution of perpetrators of international crimes and also changes in practice, such as the improvement of conditions of detention or the information that is provided to families of disappeared persons with regard to the course of investigations."¹² In its mid-2011 Report, TRIAL noted Government resistance and "a need for further cases and strong advocacy campaigns to intensify the pressure on the state authorities to change their laws and practices".¹³ Reporting on 2012, TRIAL again optimistically assumed that, with "a barrage of grilling" generated by TRIAL's work the State would "have no alternatives left" than to comply.¹⁴ By the time of its report on 2013-14 results, TRIAL had submitted 14 individual complaints to the HR Committee and more than 10 reports to other UN mechanisms. The Government's compliance record had not changed, however, and TRIAL again calls for implementation strategies "to ensure that these are correctly translated into concrete actions of justice and redress for victims".¹⁵ TRIAL's 2015-16 Proposal restates the earlier theory of change:

TRIAL believes that when adequately understood, explained and raised at the international level through General Allegations and Alternative Reports, the pressure created through the recommendations issued by international human rights organs can help reduce the degree of incidence of these violations and bring about change in the domestic legislative framework and policies.¹⁶

Further elaboration on this assumption (expressed as a 'belief') was warranted in light of the Government's track record from 2010 to 2015. TRIAL's current strategy is to "scale up" support for domestic litigation that incorporates international norms "so as to try to breach the wall of impunity erected so far at the domestic level".¹⁷ No further analysis is provided on the nature and scope of impunity, its dynamics, lessons learned, and strategic options looking forward that take into account the relationship between the judiciary, executive, legislature, parties, and civil society.

c. Logical Framework

TRIAL's overall set of objectives, as noted above, is clearly set out year by year. There is some ambiguity, however, in the relationship between specific outputs, outcomes, and the broader impact or goal (see Annex 'D' for detailed suggestions). Some of the outcomes described in TRIAL 2013-15 and 2015-16 documents appear to be more in the nature of outputs, while in other cases there is scope for adding additional outcomes. Substantively, this relates mainly to reporting of results related to training and to victim satisfaction.

d. Risk Management

From 2010, TRIAL's project documents acknowledge the risks to victims and witnesses that flow from its casework. TRIAL has collaborated with PBI and with Kathmandu-based embassies to establish security protocols in case of threats against victims. These protocols have been put to use and proved effective. At the same time, the Consultant detected a gap in the protocols established with Nepali TRIAL staff in case of threats to themselves or others. Responses to the question as to how to respond tended to be sound yet *ad hoc*. As with electronic

¹² TRIAL 2010 Proposal, p. 15.

¹³ TRIAL Mid-Term Report on 2011 activities, p. [...]

¹⁴ TRIAL Report on 2012, p. 15.

¹⁵ TRIAL Report on 2013-14 results, p. 20.

¹⁶ TRIAL 2015-16 Proposal, p. 20.

¹⁷ TRIAL 2015-16 Proposal, p. 13.

communication, it is important to establish a fixed set of steps to be taken by TRIAL staff in case of threats, as well as regular threat assessments.

The other area of risk relates to TRIAL's status in Nepal, already noted in detail above. Here, too, Nepali TRIAL staff are unprepared with an agreed response to any action that might be taken by the SWC or other Government entity should it decide to make inquiries. It is unlikely that any such inquiry would be merely legal or technical given the political, institutional and personal interests adverse to accountability in Nepal and increasingly powerful.

IV. Additional Findings based on Interviews

a. Relevance and Effectiveness

The Consultant asked interviewees about TRIAL's relevance in Nepal, whether its work added value to the work of combating impunity, and how TRIAL had adjusted to changes in the external environment in order to ensure continuing relevance and effectiveness.

Individual victim applicants

TRIAL's submission of 15 cases to the HR Committee, with views adopted in four of those cases, is a significant result that reflects a high level TRIAL expertise regarding international human rights; access to local knowledge and the competence and dedication of Nepali TRIAL staff; the contribution of TRIAL partner organizations; and the courageous participation of victims, witnesses, and family members. The Consultant explored the relevance and effectiveness of this work from the perspective of victims, Nepali partner organizations, and TRIAL staff. This section focuses on the perspective of victims.

TRIAL has consistently reported on the "enthusiastic" participation of victims and their 'appreciation' at having recourse to international mechanisms.¹⁸ The three victim applicants interviewed by the Consultant echoed this evaluation, expressing satisfaction at decisions reached by the HR Committee in their cases. One applicant appreciated that, of 'so many cases', her father's disappearance had become the focus of international attention, forcing the Government 'to look at the case'. Another applicant obtained great satisfaction from three aspects of TRIAL's support: the documentation of his case, its formal submission to the HR Committee, and then the decision, itself, which he saw as a benefit to the victim movement as a whole. A third victim applicant and lawyer who has been in regular contact with many victims described a general reaction of 'happiness' by conflict victims when they learned of positive decisions from the HR Committee.

By May 2014, TRIAL staff in Nepal realized that they had to address a gap in communication with victim applicants that was undermining the effectiveness of their HR Committee advocacy. For example, one Nepali TRIAL staff member recounted how the office had lost touch with one victim applicant to the extent that no contact information was available when it came time to formulate a response required by the HR Committee. In another case, one victim applicant interviewed by the Consultant stated that TRIAL had not been in regular contact with her after her application information was taken in 2010, but had recently resumed regular contact.

According to current and former Nepali TRIAL staff, upon realizing the extent of this problem, a meeting with all victim applicants was convened in August 2014 and a new TRIAL policy was

¹⁸ TRIAL Report on 211 activities, p. 21.

formulated requiring contact with victim applicants at least once every two months, regardless of whether there is new information. One current and one former Nepali TRIAL staff member described that positive reaction of victims to this reinvigorated communication from TRIAL.

The problematic turnover rate of TRIAL staff in Nepal was noted frequently by TRIAL partners, victim applicants, and by senior TRIAL staff. External actors commented that, while TRIAL's work is otherwise respected, the frequent turnover of staff undermines the organization's credibility and also imposes a hardship on victims who must time and time again build trust in new TRIAL staff members. Senior TRIAL staff members recognized this problem and were taking steps to address it, including ensuring the continuous presence of an international staff member during six month intervals.

The perceived need to establish a strong TRIAL presence in Nepal is contradicted directly by the lack of SWC registration (leaving aside the illegitimacy of Government efforts to control civil society activities). Two former and two current Nepali TRIAL staff members expressed their discomfort with having to conceal the existence of the TRIAL office. At the same time, the same individuals affirmed the importance of having a TRIAL office where victims can visit and, if necessary for protection or other purposes, find temporary lodging. TRIAL staff members therefore carry the burden of providing this service to victims while at the same time concealing this work from the SWC. In one case, for example, a staff member had to carefully select only friendly journalists to attend an advocacy meeting in order to avoid being questioned about the TRIAL office. In addition to weakening the effectiveness of TRIAL's advocacy in Nepal, this is clearly a disincentive for acquiring loyal and long-term Nepali team members.

In spite of this disincentive, Nepali staff members past and present are recognized in the small Nepali human rights community as competent, committed and reliable. It is relatively easy to find one or two of these qualities in applicants for such positions, but rare to find all three qualities combined. Each of these qualities is equally essential for meeting the challenges that TRIAL's work entails. Each of the former two Nepali TRIAL lawyers who left their positions did so principally for personal reasons, as opposed to questions about their performance or commitment to TRIAL, but the uncertain legal status of TRIAL's office may also have played a role. One former Nepali staff member noted with regret that, even after leaving TRIAL, he is concerned about the cloud of legal uncertainty that follows him due to the role that he played. Another former staff member echoed these concerns. TRIAL's current staff lawyer is excellent, particularly in terms of her commitment to the work and ability to develop strong relationships with victims. Her qualifications and commitment are also reason to protect her from any adverse consequences of TRIAL's unregistered status. The registration issue should be definitively addressed on an urgent basis.

Communication between TRIAL staff based in Geneva and in Italy and the Nepali Human Rights Coordinator, is reported to be very smooth and effective. Nepali staff members feel comfortable communicating by email and report that senior TRIAL staff in Geneva and Italy are responsive and supportive. There is a high level of mutual respect and admiration between national and international TRIAL staff. External actors consistently expressed high regard for TRIAL's international and national staff in terms of competence, integrity, and good will. This is a significant finding in terms of TRIAL's effectiveness, since the day-to-day work combines legal complexity, an adverse and volatile political situation, and the uncertainty of TRIAL's status in Nepal.

Training and accompaniment

From the perspective of TRIAL's senior advisors based in Geneva and elsewhere, the training and accompaniment dimension is critical for TRIAL's eventual exit strategy. One senior TRIAL lawyer described the regular 'phases' of TRIAL's work globally, which tends to move from individual case-based applications to transferring skills and knowledge to local actors who can continue the work in TRIAL's absence. This sequencing could usefully be described in more explicit terms in the logframe.

The Consultant interviewed journalists, lawyers, and human rights defenders who participated in one-off training events delivered by TRIAL since 2011 (see Annex 'A'). They described their experiences consistently in terms such as "very important", "practical", "very useful". Law schools in Nepal still do not teach TRIAL's content on international human rights regime and relevant procedures, according to one lawyer participant. Some participants especially valued the practical importance of human rights documentation methods that they learned. Training participants also all agreed that they were able to use these occasions to strengthen their networks in support of future work. They appreciated that they had the opportunity to discuss the local Nepali context and the challenges it presents for their work, which made the training more relevant.

Regarding the coaching programme, the Consultant interviewed one of the four lawyer participants. He had found the initial training session and subsequent coaching to be relevant to Nepal because victims are "waiting for justice" and may need access to international mechanisms. He is an enthusiastic participant and looked forward to the resumption of the coaching activities that were postponed due to the earthquake. The Consultant also interviewed two law faculty members from the Kathmandu School of Law who are directly involved in the design and implementation of the coaching programme. Both see great potential in the coaching programme and praised TRIAL's form of collaboration and expertise, highlighting TRIAL's willingness to consult on the content of training.

Professor Pathak Sangraula emphasized the importance of not seeing the submission of cases to the HR Committee as the goal; rather, the objective was to enhance human rights protections in Nepal by "changing mindsets and culture". She gave an example of torture in custody, emphasizing the need to build trust with the Nepal Police without compromising on human rights principles. Professor Aryal also used the same example to emphasize the importance of addressing institutional practices and the broader 'culture of torture'. He expressed appreciation for the content of TRIAL's coaching programme, highlighting the fact that domestic and international cases are "not straightforward and that TRIAL's training instilled the value of research, the skill of interacting with victim applicants, and methods for reducing risks to the lawyers, themselves.

International Advocacy

TRIAL's legal documentation work is professional and comprehensive, optimizing impact at the international and, in turn, domestic level (see Annex 'E' for details). This is the heart of TRIAL's work and it is done to a high standard, as any review of the resulting UN views will attest. The Consultant spoke directly to three victims of conflict era crimes whose cases TRIAL brought to the HR Committee, two of which are included in a trio of cases decided on 29 October 2014,¹⁹

¹⁹ United Nations Human Rights Committee, CCPR/C/112/D/2051/2011, 26 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: *Jit Man Basnet and Top Bahadur Basnet* (represented by counsel, Track Impunity

and the third, decided on 15 April 2015.²⁰ TRIAL has succeeded in these decisions in ensuring recognition by the HR Committee of the nature and scope of impunity in Nepal; the suffering endured by conflict victims; and the obligation of the State to investigate and prosecute crimes and provide reparations to victims, including, for the first time, psychosocial counselling.

Apart from its relevance to the concerned victims in HR Committee cases, TRIAL's contribution is significant beyond Nepal in further elucidating the scope of permissible amnesty following internal armed conflict, particularly for those contexts in which there is a negotiated peace and common incentives by political elites to deny remedies to victims.

Several Nepali lawyers suggested, however, that there is significant repetition in the HR Committee decisions, and that its recommendations are diluted within the larger body of UN recommendations with which the Government is inundated. As a result, he argued, to the extent that the repetitious views and recommendations were ignored in Nepal, the relevance of the HR Committee was actually diminishing. He recommended focusing on domestic implementation, as already reflected in TRIAL's 2015-16 planning.

One of the most important aspects of this part of TRIAL's General Allegations and Alternative Reports is the collaboration that involves with civil society organizations. Together they have shadowed Nepal's reporting obligations to a number of UN bodies. The Consultant interviewed several of the participants in this process, including representatives of HimRights, THRD Alliance, PPR, and the Kathmandu School of Law. Without exception, all had only positive things to say about these processes. These groups have collaboratively intervened at key dates marking Nepal's reporting obligations to UN bodies (see Annex 'E' for detail).

State Behaviour

To date, TRIAL's international and domestic advocacy and training has not resulted in the desired executive action and legislative reform. Since 2010, perhaps reflecting this challenge, TRIAL's objectives and theory of change in terms of the expected State response have become less ambitious. Notwithstanding this change in the logical framework, in its 2015-16 Project document and Interim Report, TRIAL focuses more than previously on developing implementation strategies. As the OHCHR experience showed from 2005 to 2012, the Nepali State is adept at routinely ignoring and deflecting pressure from UN bodies, meaning that TRIAL's experience in terms of the State response is not unexpected. The one positive indicator is the willingness, although not entirely consistent, of the Nepal Supreme Court to incorporate HR Committee views. TRIAL's implementation strategy will target domestic litigation but, as

Always - TRIAL); Alleged victims: the authors (HR Committee members included Sir Nigel Rodley and Walter Kalin).

United Nations Human Rights Committee, CCPR/C/112/D/2031/2011, 25 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: Ram Kumar **Bhandari** (represented by counsel, Track Impunity Always - TRIAL) (HR Committee members included Sir Nigel Rodley and Walter Kalin); Victim: the author and Tej Bahadur Bhandari (his father).

²⁰ United Nations Human Rights Committee, CCPR/C/113/D/2000/2010, 7 April 2015, Communication No. 2051/2011, Views adopted by the Committee at its 113th session (16 March – 2 April 2015); Submitted by *Yuba Kumari Katwal* (represented by counsel, Track Impunity Always - TRIAL); Alleged Victim: Chakra Bahadur Katwal (her husband) and the author herself (HR Committee members included Sir Nigel Rodley and Walter Kalin).

suggested above, TRIAL's effectiveness in eliciting a positive State response will also depend on broader collaboration and coordination with civil society and development actors. This latter observation is the basis for recommendations that follow below.

b. Impact and Sustainability

Victims

Victims of human rights violations, whether conflict era or contemporary, are not a homogeneous group. Each victim has different needs and aspirations, only part of which TRIAL's efforts can support directly. The key to sustainable impact with victims is, therefore, the coordination and collaboration with Nepali civil society organizations, particularly those with tailored and long-term relationships with victims in culturally and geographically specific areas. The 2015-16 Project document does not lay out a strategy for pursuing a holistic approach to victims that resonates with their immediate and long-term social, economic, cultural priorities, including their aspirations for justice. This is clearly part of TRIAL's strategic thinking, however, as confirmed in conversations with TRIAL's senior advisors. One senior TRIAL lawyer clearly articulated the need to 'understand the top priorities' of victims and then, 'besides trying to push the State, to enlarge the scope of partnerships and referrals to other organizations'.²¹

TRIAL's engagement with HimRights exemplifies the challenges and opportunities for identifying and addressing specific elements of impunity affecting different categories of victims. The Consultant met with a HimRights representative, a Nepali lawyer who had worked with women conflict victims and ex-combatants for over a decade, including extensive community-level reconciliation efforts. She participated in the preparation of TRIAL's CEDAW and UPR reports and facilitated TRIAL's access to potential clients for the Human Rights Committee. She praised TRIAL's role in opening 'international space' for advocacy regarding conflict related sexual violence, noting its 'empowering' effect for victims ("they are tired of hiding"). She also described the continuing resistance of development agencies and the Government to recognizing and addressing the situation of conflict era victims of sexual violence.²² The HimRights recommendation to TRIAL was to find innovative ways to address the broader dimensions of HR Committee decisions, linking 'the local' and 'the international'. These views were echoed by all other TRIAL partners consulted, including academics at KSL. At the local level, the HimRights lawyer also highlighted the importance of identifying and supporting women leaders, resisting the temptation to see them only as victims.

Capacity-building

TRIAL's capacity-building supports victims seeking justice and also can strengthen law reform efforts by lawyers and other participants. With regard to both dimensions, it is difficult to measure the impact of TRIAL's training to date: 45 lawyer and human rights defenders in 2011-12; 82 journalists and 30 human rights defenders in 2013-14. There is no reported follow-up regarding the impact of these one-off training sessions. The general sense from the few training beneficiaries interviewed by the Consultant is that an evaluation of impact would be worthwhile and likely reveal positive results and a demand for more training. The recently adopting long-term training and accompaniment ('coaching') approach is promising in terms of being able to track long-term engagement and impact.

²¹ Interview with senior TRIAL lawyer, July 2015.

²² The Consultant also met with a representative of UN Women who echoed both the necessity and the challenge of keeping this issue on the agenda in Nepal.

International Advocacy

TRIAL's most important contribution is a substantial body of human rights views from authoritative Charter and Treaty bodies that are significantly influenced by TRIAL's high quality submissions. While the impact of those views on State practice is yet to be seen, this is a sustainable body of normative legal and policy judgements that can be brought to bear as long as the State is unresponsive.

TRIAL's 2015-16 Proposal and Interim Report recognize the need to focus on implementation strategies and, relative to other efforts in Nepal, describe TRIAL's role as "crucial". In support of TRIAL's focus on implementation, a former Nepali TRIAL lawyer expressed the view that the Government was now "flooded with recommendations" from UN bodies, that this diluted the pressure and, as a result, the Government was "not taking it seriously". He emphasized, however, the willingness of the Supreme Court to take HR Committee views into account, noting a decision by the Nepal Supreme Court on transitional justice legislation.

Senior TRIAL lawyers also affirmed the importance of developing effective implementation strategies through domestic political and judicial authorities. One of the lawyers added that ultimately it would be up to Nepali actors to achieve the desired changes, highlighting the importance of capacity-building for TRIAL's ultimate success (and exit strategy). He noted that there had been a modest improvement in the Government's efforts to at least provide replies to human rights bodies. This, of course, should not be mistaken for good faith. He emphasized the legal value of HR Committee views that, while not binding, were authoritative interpretations of a binding treaty that could be used domestically to press for reforms. He saw TRIAL's role as sensitizing Nepali lawyers as to how to use these decisions in their advocacy.

V. Conclusions

a. Victim access to justice

Relevance

Victims interviewed by the Consultant, as well as TRIAL's own experience with victims, affirm the high value of TRIAL's work from the perspective of victims. They value the way the process, itself, dignifies them after years of being ignored, intimidated, and humiliated by the State and by perpetrators. Decisions in four TRIAL cases to date provide further satisfaction by recognizing harms suffered to victims and family members, and offering the hope of justice in the longer term.

Without detracting from this relevance, TRIAL's work is also seen by victim leaders and Nepali lawyers as thus far not addressing the economically and psychologically debilitating legacy of these violations for families and communities. Partly addressing this, TRIAL has adjusted its methods in response to the external environment in order to ensure its continuing relevance, expanding its coverage from enforced disappearances to a range of other conflict era and emerging patterns of human rights violations.

TRIAL's documentation provides little analytical detail, however, about the way impunity is maintained in Nepal. Arguably, the relevance of TRIAL's work depends on tailored advocacy strategies that take into account differences between categories of victims (in terms of key stakeholders and decision-makers, civil society capacities and ongoing initiatives and lessons learned, levels of victim organization and leadership, etc.).

An apparent gap in TRIAL's documentation is the reasoning behind its focus on State perpetrators in its HR Committee casework, although not in its General Allegations and Alternative Reports. The reasons for this approach can be inferred (the HR Committee's approach to the intersection of international human rights and criminal law). However, the risks of this approach could be usefully assessed in terms of resulting public perception, engagement with the Conflict Victim Common Platform, and advocacy.

Effectiveness

Through legal research, documentation, and advocacy before the Human Rights Committee, TRIAL's expertise and dedication has provided victims with a way to press their justice demands beyond the exhausted domestic remedies and structures of impunity. In four cases to date, the claims of victims have been effectively communicated to the international bodies, the arguments accepted, the Nepal government's responses rejected and lack of good faith exposed, and remedies recommended as requested by TRIAL. The decisions obtained to date from the HR Committee provide unambiguous and personally satisfying results for the individual victims represented by TRIAL. This satisfaction is a dimension of access to justice that TRIAL has sought and effectively provided.

TRIAL's effectiveness suffered from poor communication between victims and TRIAL staff until a formal policy was introduced in 2014, to which TRIAL's clients have responded very positively.

TRIAL's effectiveness in representing victims also depends on protocols for secure electronic communication between Nepal and Europe. A protocol has just been developed and will be introduced, but to date TRIAL staff members have relied unnecessarily on assumptions about the low risk of compromised communication. This has represented an unnecessary risk in light of the ease of access to free encryption.

TRIAL has collaborated with PBI and embassies in Nepal to address possible threats to victims, witnesses, and lawyers. However, Nepali TRIAL staff members, themselves, have lacked a detailed and agreed protocol for documenting and responding to any threats.

Impact and Sustainability

The impact of TRIAL's work on the broader victim community is difficult to measure. TRIAL reports that more than 30 victims and family members benefit from its casework before the HR Committee, but it would be a mistake to measure this impact quantitatively. Given the comparatively vast numbers of victims and family members who will never access the HR Committee or even hear of it, the value on an individual level is essentially the same – unquantifiable – whether one or 30. Beyond a doubt, however, in terms of documenting and validating the moral, legal and political basis of victim claims, the victim movement is significantly strengthened by both HR Committee decisions and the views of UN bodies resulting from General Allegations and Alternative Reports.

The victim movement in Nepal is only beginning to have a voice in the transitional justice process, increasing the potential for giving international norms greater traction in Nepal. This traction cannot be provided if lawyers are the only bearers of the message, which highlights the importance of TRIAL's engagement with journalists and other human rights defenders. TRIAL's work no doubt contributes to the strength of these voices with international recognition and guidance provided by UN bodies. Victim applicants and Nepal lawyers concur that the HR Committee decisions may only lead to prosecutions or other justice measures for individual

victims in the much longer term under more receptive governments, but that they are of immediate utility in advocacy.

TRIAL's current approach appears open to more engagement with specific categories of victims, working in partnership with local leaders and organizations in a long-term process of legal, social, economic and cultural empowerment. This goal could complement or, if resources are scarce, be in tension with TRIAL's existing policy of representing as broad a range of human rights violations as possible before UN mechanisms. There is a need to balance depth and breadth in representation and advocacy. An overly broad approach will not lend itself to deeper relationships with specific categories of victims, risking a pattern of one-off case 'wins' internationally that fail to gain normative traction domestically. The advantage of establishing – through partnerships – deeper relationships (in geographic areas where leadership and organization makes this feasible) is the leverage this provides in terms of sustaining domestic advocacy for changes in State behaviour. This advocacy might provide the foundation for domestic litigation that TRIAL is aiming to support. TRIAL's current plans to carry out regional 'research missions' may assist in exploring this option.

b. Training

All of those interviewed share an optimism and enthusiasm for TRIAL coaching programme. One risk, as with all training programmes, is that beneficiaries do not take up the anticipated work that the coaching supports. This risk is mitigated to some extent by the selection of lawyers at early stages in their careers and the piloting of this effort through a university rather than through the institutional limitations of a project-dependent NGO. TRIAL might consider a recommendation by a KSL faculty member to admit senior law students to the coaching programme as way to increase the chances that a relevant career path follows.²³ A limitation of TRIAL's coaching programme is that it benefits a small number of lawyers (three in 2013-14, four in 2015, four more in 2016), but presumably this can be expanded following lessons learned from the pilot.

One of the outstanding features of the coaching programme is the opportunity it affords participants to focus in geographic areas that they already know well. This opens the door not only to a careful selection of victim applicants, but also will help in the development of implementation strategies following a HR Committee decision that are sensitive to local contexts and opportunities for giving decisions local relevance.

TRIAL's additional training plans for 2015-16 (4 sessions for 60 HRDs and 60 journalists) are also promising, with more opportunity for follow-up and attention than in the past. The 2015-16 planning document does not address several questions that relate to the sustainability of the desired impact: (i) lessons learned from the previous four years of training in terms of impact and its sustainability; (ii) whether there are plans for longer-term follow-up after this training in order to track impact and sustainability; (iii) whether consideration has been given to a training of trainers (TOT) programme that could contribute to its sustainability.

c. Changing State Behaviour

TRIAL has identified implementation of recommendations from international bodies as its key challenge looking forward. This has been a frustrating aspect of human rights advocacy across related efforts in Nepal, with the exception of softer areas of reform that are less politically sensitive. TRIAL's Project documentation does not elaborate analytically on what TRIAL has

²³ Suggestion of KSL professor, July 2015.

learned to date about the ‘wall of impunity’, the reasons for anticipating and ‘explosive’ reaction from victims, and how this is factored into TRIAL’s strategic planning.

It may be useful, for example, to explore the ways in which domestic litigation can be sequenced and coordinated with broader social, economic, and legal empowerment strategies tailored to specific constituencies of victims and their communities. This is not a new idea for TRIAL, and its senior staff members have actively looked at these options while also taking care not to weaken TRIAL effectiveness by overstretching its mandate.

d. Risks

Legal Status of TRIAL’s Nepal Office

There are a series of questions about the implications of TRIAL’s unregistered office in Nepal that the Consultant was not able to clarify, but which may pose risks for Nepali staff. First, can Nepali staff pay tax on income without risking disclosure of the unregistered office? If not, then this represents an unacceptable personal liability on staff. The experience of one former Nepali TRIAL lawyer suggests that foreign income reporting requirements include detail about the source of income that would disclose TRIAL’s unregistered status. Current Nepali staff members are uncomfortable having to take steps to avoid public disclosure of the office and are unclear about potential legal consequences.

Second, if action is taken by the SWC (mostly likely through joint team linked to CIAA) against TRIAL for operating without registration, can this action have adverse consequences for Nepali staff? If yes, then this represents an unacceptable burden on staff. The view of one informed Nepali lawyer and ex-TRIAL staff member is that the answer is ‘yes’, since any unreported income would be investigated and could lead to both fines and imprisonment.

Third, what is the specific legal risk for a staff member who is receiving funding for unregistered activities in his or her personal bank account? Would it be viewed as undisclosed, taxable income, giving rise to the risk of a fine and imprisonment? The affected staff member is currently unaware of the risk and is uncomfortable with the arrangement.

Registration of TRIAL with SWC

The current legal uncertainty and limbo is not viewed as a viable option by anyone, including TRIAL international and national staff. General registration has proved feasible for organizations like Advocacy Forum that engaged in work similar to that of TRIAL, after which individual projects have a greater possibility of being approved (since the original premise of the organization’s work has been accepted). TRIAL could seek legal advice regarding the option of simply paying individual lawyers as consultants based in their registered law firms.

Victim, witness and lawyer protection

Security of electronic communication. TRIAL is developing security protocols. This will fill a significant gap, since to date no secure form of communication has been used consistently.

Local response to threats. TRIAL staff members are unaware of any specific protocol in the case of threats to victims, witnesses, lawyers, or TRIAL staff. These protocols are in development and soon will be put in place.

VI. Recommendations to TRIAL

a. Implementation challenge: linking international and domestic advocacy

- i. *Strengthen the logical framework (project planning).* Consider adding specific outcomes related to State behaviour that more directly link international advocacy with TRIAL's goal of strengthening the rule of law and transitional justice (see suggestions in Annex "). As a strategic matter, consider the feasibility of developing these outcomes in relation to targeted human rights issues (torture in custody, sexual violence, disappearances, etc). To the extent possible, link these outcomes to measurable changes in the wellbeing of victims of human rights violations and in the longer term, to a strengthening of public trust in the justice system.
- ii. *Strengthening domestic advocacy (national level).* Complementing TRIAL's plans to hold roundtables with stakeholders (through Juri Nepal), consider explicitly formulating an outcome aimed at supporting and sustaining the development among human rights defenders in Nepal of a shared analysis and understanding of the challenges and opportunities for combating impunity. Indicators of change related to this outcome would be more coherence, collaboration and coordination in HRD advocacy (increasingly weak since 2006). A sustained effort could gradually incorporate comparative lessons from other global contexts, particularly South Asia.
- iii. *Strengthening local constituencies of victims and their communities (local level).* On the basis of coordinated and collaborative action with local partners and associates (rather than direct implementation by TRIAL), consider strategies that take into account the broader social, economic as well as legal dimensions of victim reparations and empowerment.

Explanatory note:

This is not a recommendation to expand TRIAL's mandate, or to substitute for the obligations of Government, but rather to more profoundly understand and articulate the challenge of linking international advocacy to the fraught domestic contexts in which victims seek justice. The documentation of this process in project reports potentially would describe shared analyses, strategies, coordinated action, some level of collaboration, and coherent (as between related efforts of partners and associates) benchmarks tailored to the specificities of distinct but related human rights and transitional justice struggles in particular geographic areas. The empowerment of local victim leaders in this process, particularly women victims of sexual violence, would merit consideration as an outcome-level change.

- iv. *Continuity with victims following international decisions (policy level).* Clarify in future documentation TRIAL's commitment to victims after a HR Committee decision (currently an ambiguous relationship between official policy and actual practice).

b. Capacity challenge: TRIAL's exit strategy

- i. *Training of trainers (project planning).* Consider forming a core Nepali team of trainers (ToT) as an adjunct to the KSL partnership and coaching programme, in order to support TRIAL's exit strategy.
- ii. *Barriers to participation (policy level).* Consider eliminating English as a requirement for participation in any training activities (addressing the risk that the most qualified participants are left behind for irrelevant reasons).
- iii. *Supporting engagement between lawyers and victim communities.* Consider the development of training activities that combine legal (TRIAL) and other social and economic empowerment issues (through TRIAL partners and associates). In measuring the outcome of this training, TRIAL could include indicators that track

Explanatory note:

This recommendation is intended to support TRIAL's implementation strategy by linking human rights defenders engaged in related but frequently stove-piped ('projectized') dimensions of victim experience. A lawyer participant in such a programme would have an opportunity, for example, to learn technically how to work with victim leaders and other relevant stakeholders in developing implementation strategies (eg., linking legal empowerment of women victims of sexual violence with economic empowerment activities by UN agencies). This would strengthen the voice of local constituencies and their access to domestic and international remedies, thereby also supporting TRIAL's exit strategy. To the extent that victim demand for remedies and reform is not supported in this or other ways, TRIAL's impact (and exit) hinges narrowly on a legal profession that tends to limit itself to broad, Kathmandu-based demands for reform (such as those issued through the UPR) or to case-based litigation without follow-up. The assumption here is that the relatively weak impact of this work can be addressed in part by complementing it with a more sustained focus on issue-based reform agendas that engage victim leaders and other stakeholders at the local and national level.

c. Resolving TRIAL's legal status in Nepal

- TRIAL should ensure that Nepali staff members are fully comfortable with any chosen modality for operating in Nepal, and that this comfort level is based on a full understanding of their legal situation.
- In the Consultant's view, in the absence of further clarification of the legal uncertainties, the benefits of a physical office space do not convincingly outweigh the potential risks posed for Nepali staff. There is a feasible option to close the office and hire individual lawyers and other consultants who have registered professional practices (at home or in a larger firm). In the longer term, TRIAL could consider funding a registered NGO in Nepal (higher budget and larger staff) with programmatic opportunities for international experts to participate in activities.

Annex 'A' – Documents Reviewed

TRIAL Project Documents

Proposals to FDFA

2010, 2012, 2013-14, 2015-16

Reports to FDFA

2010, 2011, 2012, 2013-14

Reports to MISEREOR

Interim 2015

TRIAL General Allegations and Alternative Reports

Regarding Transitional Justice Mechanisms

Briefing Note to the SR on TJ 23 Aug 2012

Submission to UN SPs on Exec Ordinance 28 Feb 2014

Submission to UN SPs on TRC Act June 2014

Submission to OHCHR on HR Sit'n 7 Sept 2012

Treaty Bodies

CEDAW Follow-up observations to 4/5th Periodic Report 9 Aug 2013

Submission to CRC Committee OP Children Armed Conflict June 2014

Submission CRC Committee under OP May 2015

Submission to HR Committee re 2nd Periodic Report April 2013

Submission to HR Committee re 2nd Periodic Report Feb 2014

Submission to HR Committee on Implementation with THRD Alliance and CVCP March 2015

Submission UPR 2nd Periodic Report March 2015

HR Committee Decisions

United Nations Human Rights Committee, CCPR/C/112/D/2051/2011, 26 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: *Jit Man Basnet and Top Bahadur Basnet* (represented by counsel, Track Impunity Always - TRIAL); Alleged victims: the authors (HR Committee members included Sir Nigel Rodley and Walter Kalin).

United Nations Human Rights Committee, CCPR/C/112/D/2031/2011, 25 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: Ram Kumar **Bhandari** (represented by counsel, Track Impunity Always - TRIAL) (HR Committee members included Sir Nigel Rodley and Walter Kalin); Victim: the author and Tej Bahadur Bhandari (his father).

¹ United Nations Human Rights Committee, CCPR/C/113/D/2000/2010, 7 April 2015, Communication No. 2051/2011, Views adopted by the Committee at its 113th session (16 March – 2 April 2015); Submitted by *Yuba Kumari* **Katwal** (represented by counsel, Track Impunity Always - TRIAL); Alleged Victim: Chakra Bahadur Katwal (her husband) and the author herself (HR Committee members included Sir Nigel Rodley and Walter Kalin).

Annex 'B' - Interviews

SUNDAY 28 JUNE

Punam Chaudhary, Dhanusha (training participant)

Bimala Katwal and Yuba Kumari Katwal (victim)

MONDAY 29 JUNE

Suman Adhikari (victim leader)

Ram Bhandari (victim leader and applicant)

Nirajan Thapaliya (former TRIAL staff)

Shiv Bisangkhe (coaching programme participant)

Tika Ram Pokharel (PPR)

Kapil Aryal (KSL)

TUESDAY 30 JUNE

Basanta Gautam (training participant)

Dipendra Jha (THRD Alliance)

Pabitra Raut (training participant)

Prof. Geeta Pathak (KSL)

Yugichha Sangraula (training participant)

THURSDAY 2 JULY

Akit (TRIAL staff)

Rukamanee Maharjan (TRIAL staff)

Raju Chapagain (Juri Nepal)

Concluding Phone Interviews

Gabriella Citroni, TRIAL

Helena Rodriguez, TRIAL

Daniele Perissi, TRIAL

Martin Sturzinger, Swiss Government

Annex 'C' – Background

Human Rights Advocacy in Nepal

Human rights organizations affiliated with the UML and, to a much lesser extent, the NC, played a leading role from about 2002 through April 2006, in drawing international attention to enforced disappearances, abduction, killings, torture, freedom of expression and assembly, arbitrary detention, and habeas corpus rights.²⁴ A Nepal field visit and report by the Working Group on Enforced Disappearances in 2004 and, in the following year, by Walter Kalin, then UNSG Special Representative on Internally Displaced Persons (now member of the Human Rights Committee), was a result of lobbying by human rights defenders in Nepal, and led to sufficient international pressure that resulted eventually in the establishment of a large OHCHR presence in Nepal in 2005.

During this period, European and Canadian diplomats played a key role in supporting directly and indirectly the work of human rights defenders who faced regular threats and intimidation, particularly after the Royal Coup on 1 February 2005. The NHRC also benefited from this donor support and emerged strongly 2003 to 2005, able to bridge political differences between Commissioners and provide a relatively independent voice on civil and political rights issues. OHCHR's monitoring and reporting from 2005 to 2006 also played a key role in opening space for the activities of national human rights defenders; unfortunately, by the end of its mandate in 2012, the OHCHR was resented by the NHRC and had weak relationships with Nepali human rights organizations for reasons related to the analysis below.

The main Maoist party (UCPN-M) also formed a putative human rights organization and its own conflict victim organization, but these organizations were ideologically aligned with the consistent Maoist position that human rights are a bourgeois Western imposition. This led to a constant tension between the desire of some State victims to use human rights discourse, including many prominent Maoist cadres, particularly in relation to enforced disappearances, and the Maoist party line that effectively defined serious crimes under international law as political actions with historic justification as part of the armed struggle. Successive Nepali governments have withdrawn many hundreds of 'political cases' through the mechanism of the Attorney General's Office and, unfortunately, with the consent of the Supreme Court in one key moment, in spite of criticism from OHCHR that this violated the State's duty to investigate and prosecute gross and serious human rights and humanitarian law violations.

TRIAL notes the context in 2011:

There is hardly any real progress made towards countering impunity in the country, and majority of victims of conflict-related human rights violations have received no remedy whatsoever for the grievous harm they have suffered. Indeed, throughout the reporting period, direct government intervention to prevent the prosecutions of conflict-related human rights violations continues to remain unchanged. Since the signing of CPA in November 2006, more than 800 cases pending in the courts have been arbitrarily withdrawn following orders by the government without taking permission from any of the victims or their family members. Even as this report is being written, there are reports that the government decided to withdraw on 4 December 2012 an additional 207 cases against the Maoist cadres.²⁵

²⁴ The analysis in this section is based on the Consultant's experience in Nepal since 2005, rather than on interviews conducted in the course of this consultancy.

²⁵ TRIAL Report on 2011 activities, p. 8.

After April 2006, the public presence of human rights organizations declined as the restored multi-party system allowed political leadership an open and leading role, displacing the former mediating role of human rights activists. However, the need for human rights advocacy continued for mainly two reasons. First, successive post-2006 governments have routinely ignored their obligation under binding treaty agreements and customary international norms to take effective legislative and executive action against torture, sexual violence, enforced disappearance, killings, abduction and other crimes. Second, identity-based politics and a repressive state response to related political protest emerged as one of the most pressing areas of human rights concerns, particularly in the Terai.

Formerly outspoken leaders of the human rights community have played a notably diminished role, however, on issues of inclusion and federalism. Some prominent human rights defenders only weakly reported excessive use of force in the Terai by Nepal Police in response to identity-based protest, as well as a widespread pattern of extrajudicial killings purportedly in response to gang-related crime. They instead emphasized security concerns and the need for a police response. This appears to be part of a more general pattern in which human rights advocacy is subsumed by party politics and also limited by increasingly conservative funding opportunities. For example, reporting by one prominent human rights organization on the violence of political party youth organizations (UML's Youth Force, UCPN-Maoist's Youth Communist League) appeared to vary in obvious ways along lines of political affiliation.

More recently, the four political parties forced the promulgation of a draft Constitution against Supreme Court orders and drastically curtailed the time for public consultation on a series of articles that are regressive on practically every important human rights commitment since 2005 (social inclusion, gender equality, freedom of expression, apolitical role of the Nepal Army). With notable exceptions, the response of the human rights community has been muted, appearing to fall in line behind the view that any constitution at this stage is better than none. The THRD Alliance was virtually alone in the early days after promulgation in raising concerns about inclusion rights. Similarly, with the exception of THRD Alliance, human rights defenders have had virtually no voice in response to alleged patterns of direct and indirect discrimination in the distribution of earthquake relief. This role has instead fallen to international organizations or to new monitoring initiatives. The NHRC and INSEC, for example, have focused attention on alleged inferior quality of rice supplied on an emergency basis by the WFP, a thus far unsupportable accusation and diversion from the real issues of discrimination and vulnerability.

There are exceptions to this general pattern of diminished civil society and NHRC capacity for effective human rights monitoring and reporting. The Accountability Watch Committee (AWC), for example, emerged early on in the post-2006 process as an important platform for joint statements by human rights defenders, particularly in support of Supreme Court orders to investigate and prosecute war crimes and in favour of transitional justice mechanisms that comply with international norms. However, the AWC has not reported consistently on human rights concerns and is not seen as sufficiently lobbying for social inclusion or acknowledging the voices of conflict victim leaders. Another prominent exception to this trend towards dispersion is the collaborative work in preparation for the Universal Periodic Review, supported by the Swiss government, among others, through partners such as INSEC, TRIAL, HimRights, and the Kathmandu School of Law. Also worth noting in this context is Advocacy Forum, which stood out during this entire period in relative terms as among the organizations most capable of nurturing and maintaining focus, objectivity, and leadership within the broader community of human rights defenders. It can justifiably claim to have pioneered strategies in Nepal for monitoring torture in custody and led the way in bringing the first conflict era cases to the Human

Rights Committee in collaboration with INGOs such as Redress. Swiss partners such as THRD Alliance and TRIAL have benefitted from this pioneering work by Advocacy Forum.

The following factors are routinely discussed among Nepal observers to explain the generally weak and disparate response of civil society to inclusion and accountability issues in Nepal:²⁶

- Political and cultural (caste and ethnic) affiliation and loyalty of civil society actors, including human rights defenders, and the absence of non-sectarian, shared political space founded on human rights principles (although this gap was partially filled during particular periods by the AWC);
- NGO competition for scarce donor funds and the lack of programmatic incentives for collaboration (for example, between TRIAL and ICJ);
- With notable exceptions, the weak technical capacity of human rights defenders, including lawyers, which relates in turn to the undervalued status of the legal profession in Nepal relative to other career paths such as medicine, engineering, or business;
- Except within the narrow circle of donor-funded human rights advocates mostly based in Kathmandu, the weak political and cultural resonance of human rights in Nepal, which continues to be perceived as an external discourse;
- With important exceptions, the relative silence of the international community on inclusion and accountability issues due to lack of in-depth knowledge, frequent rotation of officials, and pressure to comply with a conservative shift in government priorities.

These factors need to be further contextualized within the broader Nepali political culture.²⁷ The behaviour of members of the state bureaucracy, including the security forces, as well as decisions by political actors, are systematically shaped by patronage, corruption, party and caste affiliation, and seniority. Technical competence and ethics matter, but it is uncontroversial to note that these are entirely secondary and regularly trumped by contrary incentives that determine job security and status. Opportunities for new political leadership to emerge through the existing political party processes are non-existent, with the result that most youth avoid the political arena and seek first their livelihoods abroad. This political culture is entrenched further by the absence of locally elected bodies since 2002, a problem which can not be overcome to the satisfaction of the contending political forces until new provincial boundaries and are redrawn and federal responsibilities at the local level determined.

²⁶ The main source for these observations are the Consultant's experience in Nepal since 2005, although they are supported generally by interviews from April to June 2015 as part of work with the Swiss Embassy.

²⁷ The observations in this paragraph are uncontroversial and based on the Consultant's experience in Nepal since 2005. A recent and concise summary of these issues in relation to the constitution-drafting debacle is available in an editorial by Asia Foundation staff member, Ajay Khanal: 'Power to the Few', *Kathmandu Post*, 15 July 2015: "Nepal's polity depends on political parties. The control of political parties pervades all institutions. Within the de jure political stage, there is a clear separation of powers. But behind the stage, de facto political power is centralised in a handful of political parties. Because there is a complete absence of financial transparency and internal democracy, these political parties are under the control of a handful of leaders. It implies that all Nepal's institutions are controlled by a handful of political leaders. The only check and balance to this provision is the flimsy idea of political competition." See: <http://www.ekantipur.com/the-kathmandu-post/2015/07/07/oped/power-to-the-few/278150.html>

Role of the International Community

The joint Government-UN-Donor *Peace and Development Strategy 2010-2015* (PDA) reflected the continuing importance given by the international community at that time to the impact of the internal armed conflict as well as concern that victims had yet to see adequate redress.²⁸

Addressing impunity and improving accountability will have a direct impact on Nepal's successful transition to peace, as failure to address past violations and improve the rule of law will leave grievances to fester. Conflict victims have expressed increasing frustration and betrayal.²⁹

In his Forward to the UN PDA, then Vice Chair of Nepal's National Planning Commission, Jagadish Pokharel, stated:

...our citizens expect government policies that are tailored to some of the challenges particular to our current situation—for example, a closer attention to equity and inclusion, special efforts to strengthen the rule of law, and satisfactory responses to address the expectations of the many war-affected.³⁰

Largely on the basis of this analysis, Outcome 8 of the 2013-17 UN Development Assistance Framework in Nepal framed the following result:

National institutions have addressed conflict-related violations of human rights and international humanitarian law and the post-conflict needs of victims.³¹

Importantly, the UNDAF also recognized the human rights was not an issue confined to conflict-era violations, but needed to be integrated across inclusion and accountability donor strategies. The UNDAF emphasizes the Nepal UN Country Team's 2010 consensus on an *Intersectional Framework and Programming Tool on Gender Equality, Social Inclusion and Human Rights*:

This framework recognized that, although the issues of human rights, gender equality and social inclusion are sometimes considered as separate, they are in fact interdependent and overlapping. The evolving scenario in Nepal perfectly illustrates this interdependence, underlining the need for a common conceptual framework to address interdependence and build synergies between diverse actors and initiatives for human rights, gender equality and social inclusion.

Notwithstanding this emphasis in 2010 and in 2013, the international community appears to have growing fatigue with advocates of rights-based approaches.³² Human rights issues are instead subsumed within broader governance objectives where they are vulnerable to being treated as technical rather than inherently political issues, or, alternatively, where they are often

²⁸ The analysis in this section is based on the Consultant's own experience in Nepal since 2005 rather than on interviews conducted in July 2015.

²⁹ United Nations, *Nepal Peace and Development Strategy, 2010-15*, p. 17. See: <http://un.org.np/report/pds-2010-2015>

³⁰ United Nations, *Nepal Peace and Development Strategy, 2010-15*, p. iii. See: <http://un.org.np/report/pds-2010-2015>

³¹ United Nations *Development Assistance Framework Nepal 2013-2017*, p. 38; See: <http://un.org.np/reports/undaf-2013-2017>

³² Interviews with members of donor agencies in Kathmandu, April to June 2015.

confined to the still-relevant but transitional peacebuilding paradigm rather than incorporated more directly and sustainably into the social and economic development agenda.³³

With regard to the victims of rights violations during the conflict, many former supporters of the Nepal Peace Trust Fund (NPTF) now consider it a largely disappointing attempt to fulfill the peacebuilding aspirations set out in the PDA and UNDAF. Beyond this specific effort, few development initiatives take into account the specific rights and vulnerabilities of conflict victims, and in some cases the accountability agenda is actively excluded from consideration by large development agencies due to anticipated government resistance.³⁴

Meanwhile, successive Nepali governments have taken no significant steps to address conflict violations or, more generally, to respond to recommendations by international human rights mechanisms, including treaty bodies, Special Procedures, and the Universal Periodic Review (UPR). Advances are limited to relatively softer areas regarding the rights of women and children. With regard to conflict victims, Government action has been limited to the Interim Relief Programme (IRP) that does not include recognition of responsibility for violations, including many violations that may amount to serious crimes under international law that implicate current government and political actors.³⁵

The IRP was designed for “conflict victims” and not necessarily victims of violations of human rights or international humanitarian law. This has resulted in the program blurring the distinction between those killed or injured as a consequence of the legitimate use of force while acting as combatants and those killed or injured as a consequence of human rights violations.³⁶

The trend during the last nine years is one of growing government and united political party resistance to projects that promote accountability and inclusion, each of which, at least formally, must be registered individually or under larger programmatic arrangements by the increasingly interventionist Social Welfare Council (SWC) of the Ministry of Women, Children and Social Welfare.³⁷

Adding to these difficulties, some donors appear inclined to treat the work of human rights defenders as they would any development project. There are at least two key differences. Efforts to promote state accountability for arbitrary detention, torture, enforced disappearance, and extrajudicial killings, need to be evaluated in terms of the quality of processes (of litigation and institutional reform) as much as specific outputs. These processes are key to building trust, persuading stakeholders to shift positions and behaviour, and establishing safe mechanisms for victim claims. As TRIAL’s work demonstrates, the timing of outcomes will not have a linear relation to project outputs.

The second reason to distinguish human rights projects from other donor-funded initiative is that human rights defenders, victims and witness are vulnerable to threats and intimidation, meaning that donors must take special care to protect the image of funded organizations in order to avoid inadvertently endangering those involved. Perpetrators implicated by NGO advocacy will actively seek opportunities to discredit donor-funded human rights groups. From this

³³ This is the Consultant’s view, based on related work in Nepal since 2005.

³⁴ Interviews with members of donor agencies and Nepali NGO actors in Kathmandu, April to June 2015.

³⁵ See OHCHR Nepal Conflict Report: <http://nepalconflictreport.ohchr.org/>

³⁶ Ruben Carranza, ICTJ Nepal (October 2012), *Relief, Reparations, and the Root Causes of Conflict in Nepal*, p. 4. See: <https://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf>

³⁷ Interviews with informed Nepali sources, April to June 2015.

perspective of 'doing no harm', the facts about NGO competence or even any alleged malfeasance in this context cannot justify remedial actions that put victims and witnesses at risk.

Taking these factors into account, in order to 'do no harm', human rights initiatives require additional due diligence by donors before and after project funding has begun. Before funding begins, donors must ensure that recipient will receive any necessary training and accompaniment to fulfil the often burdensome reporting requirements; and, second, that the national staff will be protected from legal liabilities or other risks that arise from Government efforts, legitimate or not, to control civil society activities. After funding, due diligence requires taking into account the risk of doing harm through otherwise legitimate remedial measures that are recommended when funding recipients appear unable or unwilling to comply with agreed terms.³⁸

In the face of such challenges, some donors, including the Swiss, have demonstrated remarkable insight and sensitivity to the situation of conflict victims, and continue to take risks to ensure that civil society organizations are able to find funding for their struggles against impunity. The post April 2015 earthquake environment, however, only gives more momentum to the trend away from support for conflict victims, particularly given the abundant resources committed by the international community to reconstruction that effectively will be controlled by a handful of political elites. As a result, it is even less likely that any donor will have sufficient leverage (assuming interest) to overcome government and political party resistance to rights-based approaches and even less to more targeted efforts to promote inclusion and accountability. The due diligence requirements become even more important in this setting.³⁹

³⁸ In one specific case unrelated to TRIAL, Nepali observers complained about the apparent insensitivity of one prominent donor which did not maintain confidentiality about suspected malfeasance in the case of one human rights organization. The donor's punitive actions appeared to ignore potential consequences for victims, witnesses, and lawyers.

³⁹ Conversation with senior member of donor community.

Annex 'D' – Logframe Suggestions

TRIAL's overall set of objectives, as noted above, is clearly set out year by year. There is some ambiguity, however, in the relationship between outputs, outcomes, and the broader impact or goal. This ambiguity in the results chain will not be helpful in the formulation of specific strategies to strengthen access to justice (victim-centred) and the rule of law (changes in State behaviour). This observation can be illustrated by looking at each of the outcomes reported by TRIAL in 2013-14.

In the first outcome, TRIAL describes an indicator of improved 'access to justice' as the 'submission of cases'. This achievement, important as it is for individual victims, does not yet point to strengthened access at the more institutional and systemic level for any potential victim. Taking this distinction into account, an additional outcome might have been framed as: "Victims supported by TRIAL are satisfied that justice is being served in their cases". This takes into account the satisfaction felt by some victims even with just the mere submission of their case to the HR Committee, but without over-reaching and suggesting systemic change. The latter more far-reaching outcome might be framed as: "Victims of human rights violations have greater access to international human rights mechanisms". This outcome might be indicated by the demonstrated capacity of lawyers to facilitate this access.

The same 2013-14 Report describes the next outcome as the increased knowledge of training recipients. It is not clear why this is a significant change rather than an output. Arguably the outcome would require some indication that the training will be, or has been put to use. TRIAL's coaching programme (with three participants in 2013-14) effectively allows performance measures beyond mere training, but this is inadequately reflected in the logframe.

The training of law students and journalists is described in the same document as the change sought (outcome). This output might be recast as an outcome (meaningful change) by making reference to the perspective of the beneficiaries, who, for example (as an indicator), "state that their increased knowledge regarding HR mechanisms will positively influence their work", etc). This could indicate, albeit weakly, an outcome-level measure of change; namely, "A significant number of journalists/law students express a stronger commitment to support the implementation of international human rights norms through their professions." It would be more significant to follow-up periodically with training recipients to assess the impact of their enhanced knowledge.

Finally, regarding the same reporting period, TRIAL significantly undervalues the enormous work it undertook in supporting the submission of a series of reports to UN bodies.⁴⁰ The mere submission of reports is described as an 'outcome'. As with victim access to justice, more is needed for this to qualify as meaningful change. A number of other outcomes are suggested by this work, whether or not they were measurable during the reporting period (but should still be noted). For example, TRIAL might have added: 'the role of civil society in advocating for human rights in Nepal is strengthened' (i.e., through collaboration and joint-training in the preparation of alternative reports to UN bodies); or, to suggest another possibility, 'civil society advocacy positively influences human rights protections in Nepal' (i.e., through its incorporation in the views of UN human rights bodies that are taken into account by State institutions).

⁴⁰ The report outputs by TRIAL and its partners during this period is impressive: 2 alternative reports (April 2014, February 2015) to the Human Rights Committee; alternative reports to CEDAW Committee (Aug 2013) and to CRC Committee (June 2014); 2 reports to UN Special Procedures (Feb and May 2014).

The 2015-16 planning documents⁴¹ also provide a good basis for further discussion about the desired results chain. The ‘overall goal’ is, in fact, constituted by at least two separate goals. The first is the strengthening the rule of law; the second, an effective transitional justice process. Within this goal, itself, there is an unexplored relationship between transitional justice, its four pillars (truth, justice, reparations, institutional reform), and the rule of law. This is important because rule of law and transitional justice goals are sometimes in tension (for example, the benefits of short-term prosecutorial TJ goals versus longer-term strategies aimed at strengthening institutions while avoiding political conflict over TJ goals).⁴²

The results framework sets out a number of ‘outcomes’ combined with ‘benchmarks’, but the combination of these logframe categories is confusing.⁴³ Under this column, within the category of ‘international and domestic litigation’, most of the items are outputs rather than outcomes (number of cases submitted internationally and domestically, steps taken to promote implementation). The specific change (outcome) sought is not articulated. From a victim perspective, for example, it may be possible to describe an outcome in terms of indicators of victim satisfaction. From the perspective of changing State behaviour, a possible outcome would be meaningful engagement by relevant State actors regarding the substantive content of HR Committee recommendations. One such outcome can be inferred from a TRIAL indicator: “the number of cases where TRIAL’s intervention had a positive impact in the proceedings at the national level”. The corresponding outcome in the adjacent column might be: “the judiciary positively incorporates HR Committee jurisprudence into its decisions”. Similar outcomes might be formulated with respect to other State actors (Prime Minister’s Office, Ministry of Law and Justice, etc.).

Under ‘local capacity building’, there is again an inadvisable combination outputs and outcomes; in this case, combining training of journalists and human rights defenders (outputs) with the ability of lawyers ‘autonomously’ to use international law in their professional work (an outcome). Again, trainings are often conceived as outcomes in Nepal rule of law projects, but this is misleading as an indicator of meaningful change. TRIAL is correct in its adjacent column of indicators to focus on the performance of training recipients (incorporating the training in meaningful ways). These indicators can be maintained but corresponding outcome statements by TRIAL would strengthen the conception of the results chain and help in the formulation of strategies.

Under ‘advocacy and lobbying’, a similar confusion arises. The submission of reports to international mechanisms is conceived as an ‘outcome/benchmark’, but it is within the corresponding ‘indicators’ that the actual ‘outcomes’ could be extracted. For example, TRIAL might add in an outcome column: ‘TRIAL recommendations meaningfully incorporated by relevant international bodies’; ‘TRIAL contributions strengthen and facilitate effective advocacy’; ‘TRIAL contributions support meaningful reform initiatives domestically’. The submission of reports, in and of itself, would be difficult to conceive as a meaningful change (outcome), but it is certainly an important output that can lead to change as suggested in TRIAL’s ‘indicator’ column.

Absent from the logical framework, as discussed above, is a results chain that leads to effective implementation of recommendations emanating from UN bodies. There is an implicit assumption that the preparation of a “critical mass” of cases, reports, and the delivery of training,

⁴¹ TRIAL 2015-16 Proposal and additional 2-page internal TRIAL document with file name: “logical framework Nepal project 2015-2016”.

⁴² An excellent analysis of these tensions can be found in Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: a contentious relationship* (Routledge, New York: 2013).

⁴³ TRIAL 2015-16 Proposal, p. 24.

will lead to effective strategies for change that leads to TRIAL's overarching (and possibly competing) goals of strengthening the rule of law and transitional justice. This assumption would need to be fully explained but it is more likely that, as TRIAL suggests elsewhere in its project documents, that this level of strategic thinking is still pending.

Together with its local partners, TRIAL will undertake research and analysis of the current patterns of human rights violations taking place in the country and the situation of accountability (or lack thereof) with respect to past crimes. (p. 20)

It would be useful to formulate this pending work in terms of outcomes and outputs (while also clarifying at a policy level the extent of post-decision victim accompaniment by TRIAL). For example, one outcome of TRIAL's discussions with national partners and other relevant stakeholders might be "a shared analysis and understanding of barriers to justice and agreed strategic priorities for addressing these barriers". This would be significant change in Nepal, where human rights advocates now tend instead to compete for scarce donor funding without a common vision of change. This outcome is arguably also a precondition for giving effect to the decisions of the HR Committee and other bodies. This outcome might require, however, that TRIAL decide on a narrower focus in terms of human rights and specific institutional and legislative reforms that are sought, since the outcome might otherwise be left at too general a level to have a meaningful impact.

Annex 'E' – TRIAL's International Advocacy

Cases submitted to the Human Rights Committee

TRIAL's legal documentation work is professional and comprehensive, optimizing impact at the international and, in turn, domestic level. This is the heart of TRIAL's work and it is done to a high standard as any review of the resulting UN views attests. Three of the HR Committee's decisions are cited at some length below. They are the main basis for an evaluation of TRIAL's effectiveness in this area of its work. Three aspects of these decisions are emphasized, each of which depends on high quality TRIAL documentation: (i) the extent to which the mechanisms of impunity in Nepal are recognized by the HR Committee; (ii) the recognition by the HR Committee of the suffering endured by victim applicants; and (iii) the nature of the remedy ordered by the Committee.

The Consultant spoke directly to three victims of conflict era crimes whose cases TRIAL brought to the HR Committee, two of which are included in a trio of cases decided on 29 October 2014,⁴⁴ and the third, decided on 15 April 2015.⁴⁵ The substantive and procedural norms reviewed by the Committee in all three cases are the same, with the exception that the *Basnet* case includes an additional procedural issue regarding the level of substantiation of claims and, unlike the other two cases involving continuing disappearances, excludes consideration of article 6 of the Covenant (right to life).⁴⁶

In *Basnet*, decided in 2014, TRIAL succeeded in helping the Committee to develop a clear view of the systematic impunity in Nepal, including the effort by the Government to defer prosecutions in anticipation of a truth commission. The Committee states:

The Committee observes that the State party has contested the requirement of exhaustion of domestic remedies in a general fashion. However, it has not explained to the Committee which concrete remedies could adequately and effectively satisfy the claims made by each of the authors. The Committee recalls its jurisprudence that, in

⁴⁴ United Nations Human Rights Committee, CCPR/C/112/D/2051/2011, 26 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: *Jit Man Basnet and Top Bahadur Basnet* (represented by counsel, Track Impunity Always - TRIAL); Alleged victims: the authors (HR Committee members included Sir Nigel Rodley and Walter Kalin).

United Nations Human Rights Committee, CCPR/C/112/D/2031/2011, 25 November 2014, Communication No. 2051/2011, Views adopted by the Committee at its 112th session (7 – 31 October 2014); Submitted by: Ram Kumar **Bhandari** (represented by counsel, Track Impunity Always - TRIAL) (HR Committee members included Sir Nigel Rodley and Walter Kalin); Victim: the author and Tej Bahadur Bhandari (his father).

⁴⁵ United Nations Human Rights Committee, CCPR/C/113/D/2000/2010, 7 April 2015, Communication No. 2051/2011, Views adopted by the Committee at its 113th session (16 March – 2 April 2015); Submitted by: *Yuba Kumari Katwal* (represented by counsel, Track Impunity Always - TRIAL); Alleged Victim: Chakra Bahadur Katwal (her husband) and the author herself (HR Committee members included Sir Nigel Rodley and Walter Kalin).

⁴⁶ Subject matter: Enforced disappearance; Substantive issues: Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; and right to an effective remedy; Procedural issues: Exhaustion of domestic remedies; Articles of the Covenant: 6; 7; 9; 10 and 16, alone and read in conjunction with article 2, para. 3; Articles of the Optional Protocol: 5, para. 2 (b)

cases of serious violations, a judicial remedy is required. In that respect, the Committee observes that the transitional justice bodies to be established are not judicial organs and considers that the investigation in relation to Jit Man Basnet's case has been unreasonably prolonged.⁴⁷

The Committee cites its earlier jurisprudence (led by Advocacy Forum) in the Nepal case of *Giri* regarding the requirement of a judicial remedy for "serious violations".⁴⁸ After finding for the victim regarding a series of violations, TRIAL's analysis also permitted the Committee to succinctly describe the denial of a remedy in Nepal:

Despite the authors' efforts and the NHRC's recommendations for investigation of 19 January 2005, almost after 10 years of Jit Man Basnet's arrest no thorough and effective investigation has been conducted by the State party in order to elucidate the circumstances surrounding his detention and to bring the perpetrators to justice. Further, the 50,000 rupees granted to Jit Man Basnet by the NHRC as compensation does not constitute an adequate remedy commensurate to the serious violations inflicted.⁴⁹

The Committee then renders its order to investigate, prosecute and provide reparations. According to TRIAL's 2013-14 report, the Committee in this case ordered the provision of "psychological rehabilitation and medical treatment" for the first time.⁵⁰

In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by: (a) conducting a thorough and effective investigation into the facts surrounding the detention of Jit Man Basnet and the treatment suffered at the Bhairavnath barracks; and prosecuting, trying and punishing those responsible for the violations committed; (b) providing the authors with detailed information about the results of this investigation; (c) providing adequate compensation to the authors for the violations suffered; (d) ensuring that the necessary and adequate psychological rehabilitation and medical treatment is provided to the authors; and (e) providing appropriate measures of satisfaction. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should ensure that its legislation allows the criminal prosecution of the facts that constituted a violation of the Covenant.⁵¹

In *Bhandari*, as in *Basnet*, TRIAL successfully establishes the facts that describe how impunity is maintained in spite of official court proceedings relied upon by the Government to claim that domestic remedies are available. For example:

In May 2009, the Supreme Court issued a judgment, ordering the Government to criminalize torture, but it is yet to be implemented, much like its judgment of June 2007 concerning the need to criminalize enforced disappearances. Moreover, those decisions have not been followed by reforms to the lower judiciary, which continues to perform poorly when handling mandamus petitions and other aspects of cases alleging serious human rights violations, such as torture and enforced disappearance.⁵²

⁴⁷ *Basnet*, para. 7.4.

⁴⁸ Communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 6.3

⁴⁹ *Basnet*, para. 8.

⁵⁰ TRIAL Report on 2013-14 activities, p. 7.

⁵¹ *Basnet*, para. 10.

⁵² *Bhandari*, para. 6.6.

In response to these facts, the Committee makes the following finding on admissibility:

With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's argument that the Supreme Court has dealt with the writ of mandamus submitted by the author on 12 May 2008, as prescribed by its regulations, and that this proceeding is still ongoing. The Committee takes notes of the author's allegations that he reported the detention and disappearance of his father promptly and filed a complaint with the National Human Rights Commission and a writ of habeas corpus before the Supreme Court on 31 January and 4 March 2002, respectively. In 2007, he attempted to lodge a first information report, but the police refused to register it. The Committee observes that 12 years after the alleged disappearance of the author's father, the circumstances of his disappearance remain unclear and the State party has failed to provide convincing arguments to justify the delay in completing the investigation. Accordingly, the Committee considers that domestic remedies have been unreasonably prolonged and that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.⁵³

The Committee also relies on the facts provided by TRIAL to find a violation of the victim's right to integrity.

The Committee also takes note of the anguish and stress caused to the author by the disappearance of his father. In particular, the author and his family have never received an adequate explanation concerning the circumstances surrounding the alleged death of his father, nor have they received his body remains. In the absence of a satisfactory explanation from the State party, the Committee considers that the facts reveal a violation of article 7 of the Covenant, with respect to the author.⁵⁴

After finding for the victim with respect to the alleged violations, the Committee makes its order, echoing its order in *Basnet*:

In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Tej Bahadur Bhandari and providing the author with detailed information about the results of its investigation; (b) locating the remains of Mr. Bhandari and handing them over to his family; (c) prosecuting, trying and punishing those responsible for the violations committed; (d) providing adequate compensation to the author for the violations suffered; and (e) ensuring that the necessary and adequate psychological rehabilitation and medical treatment is provided to the author. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should ensure that its legislation allows for the criminal prosecution of the facts that constitute a violation of the Covenant.⁵⁵

The *Katwal* case was the first filed by TRIAL on behalf of a Nepali conflict victim. The HR Committee decision was issued in April 2015. The case is significant, in the first place, for a preliminary decision on admissibility decided in 2012. In the Committee's view, the Government's reliance on a future truth commission to deal with this case was illegitimate and a failure to fulfill its treaty obligations, echoing its 2014 decisions in *Basnet* and in *Bhandari*. It

⁵³ *Bhandari*, para. 7.3.

⁵⁴ *Bhandari*, para. 8.6.

⁵⁵ *Bhandari*, para. 10.

should be noted in this regard that this decision echoed the view of the Nepal Supreme Court in several cases, that a future truth commission could not substitute for the judicial process. In one of the latter cases in 2011, the *Pyakurel* decision, the Supreme Court also explicitly stated that it is bound by the ICCPR and the UDHR in its rulings.⁵⁶

Among the important aspects of its decision, is the Committee's reliance on TRIAL's analysis to describe the nature of impunity in Nepal:

The ruling of the Supreme Court cannot be considered an adequate remedy since the investigation ordered did not in itself live up to the standard required by article 2 of the Covenant. Even though the Supreme Court ordered proceedings to be initiated, the State party's authorities have continuously failed to implement the ruling. No criminal investigation, prosecution or punishment of those responsible for the disappearance of Mr. Katwal has taken place. Moreover, the author has not been adequately compensated.⁵⁷

TRIAL also provides important context in relation to other cases in Nepal:

Several orders from the Supreme Court have recently suspended district court decisions to issue the future transitional justice mechanisms. The author considers these trends to be very worrying for democracy and the principle of separation of powers.

[...]

"all the court cases against those involved in the Maoist insurgency, Madhes movement, Janjati movement, Tharuhat movement and Dalit and Pichadabarga movements will be dropped and they will be given general amnesty". This agreement was endorsed by Mr. Bhattarai when he was appointed as Prime Minister and was also endorsed by the Attorney General appointed following the Prime Minister's nomination.

[...]

She refers to the Committee's concluding observations on the State party's second periodic report under the Covenant, in which the Committee pointed out that not a single conflict-related case had been successfully prosecuted through the criminal justice system (see CCPR/C/NPL/CO/2, para. 5 (a)).⁵⁸

TRIAL also succeeded in establishing that the relatives of the victim had also suffered violations due to the State's response, allowing the HR Committee to reach the following decision in keeping with its earlier decision in *Sharma* (led by Advocacy Forum):

The Committee takes note of the anguish caused to the author by the disappearance of her husband, the failure of the State party to provide her with adequate reparation, the alleged threats against and ill-treatment of the author, the misleading explanations provided to her for a long period by the authorities about the whereabouts of her husband, and the continued impossibility of obtaining the remains of her husband. The

⁵⁶ *Sushil Pyakurel, et. al. v Right Hon'ble Prime Minister Jhala Nath Khanal et. al.*, Writ No. 1904 of 2068 B.S., Supreme Court decision dated 21 June 2011 (2068/03/07).

⁵⁷ *Katwal*, para. 3.8.

⁵⁸ *Katwal*, para. 5.9 – 5.10, 8.2. The Attorney General at this time was

Committee considers that the material on file reveals a violation of article 7 of the Covenant with respect to the author.⁵⁹

The Human Rights Committee's view in this regard resonates with the sense of satisfaction expressed to the Consultant by the victim's daughter, who emphasized TRIAL's role in forcing the Government to 'look at' her case. There is an important dimension of reparative satisfaction in this.

The HR Committee accepts TRIAL's arguments and responses to the Government, establishing that the victim was denied a remedy, and makes the following order:

In accordance with article 2 (3) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation, with a view to locating the remains of Mr. Katwal and returning them to his family; (b) prosecuting, trying and punishing those responsible for the deprivation of liberty, torture and enforced disappearance of Mr. Katwal and making the results of such measures public; and (c) providing effective reparation, including adequate compensation and appropriate measures of satisfaction, to the author for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In this connection, the State party should ensure that its legislation allows the criminal prosecution of the facts that constituted a violation of the Covenant.⁶⁰

General Allegations, and Alternative Reports

Four kinds of reports were reviewed by the Consultant: (i) reports to the HR Committee on the TRC ordinance in 2014; (ii) reports to the Committee on the Rights of the Child; (iii) report to CEDAW; and (iv) a UPR alternative report.⁶¹

One of the most important aspects of this part of TRIAL's work is the collaboration that involves with civil society organizations. Together they have shadowed Nepal's reporting obligations to a number of UN bodies. The Consultant interviewed several of the participants in this process, including representatives of HimRights, THRD Alliance, PPR, and the Kathmandu School of Law. Without exception, all had only positive things to say about these processes. These groups have collaboratively intervened at key dates marking Nepal's reporting obligations to UN bodies:

- **Nepal's compliance with its obligations under the ICCPR** (28 March 2014 HR Committee Concluding Observations following earlier submission of Nepal's 2nd Periodic Report in Feb 2012)

⁵⁹ *Katwal*, para. 11.7.

⁶⁰ *Katwal*, para. 13.

⁶¹ The Consultant reviewed the following eleven reports: (i) TRIAL Nepal TJ Briefing Note to the SR on TJ 23 Aug 2012; (ii) TRIAL Nepal TJ Submission to UN SPs on Exec Ordinance 28 Feb 2014; (iii) TRIAL Nepal TJ Submission to UN SPs on TRC Act June 2014; (iv) TRIAL Nepal Submission to OHCHR on HR Sit'n 7 Sept 2012; (v) TRIAL Nepal CEDAW Follow-up observations to 4/5th Periodic Report 9 Aug 2013; (vi) TRIAL Nepal Submission to CRC Committee OP Children Armed Conflict June 2014; (vii) TRIAL Nepal Submission CRC Committee under OP May 2015; (viii) TRIAL Nepal Submission to HR Committee re 2nd Periodic Report April 2013; (ix) TRIAL Nepal Submission to HR Committee re 2nd Periodic Report Feb 2014; (x) TRIAL Nepal Submission to HR Committee on Implementation with THRD Alliance and CVCP March 2015; (xi) TRIAL Nepal Submission UPR 2nd Periodic Report March 2015.

- TRIAL and partners submitted list of issues in April 2013
- TRIAL and partners submitted alternative report in Feb 2014
- TRIAL and partners followed up in March 2015 on State compliance with the HR Committee recommendations
- **Nepal's compliance with UPR recommendations** (8 March 2011 UPR Recommendations to Nepal following the 1st periodic review of Nepal on 25 Jan. by the UPR Working Group).
 - TRIAL submitted review of Government's implementation of UPR recommendations in advance of 2nd UPR in 2015.
- **Nepal's obligation to investigate and prosecute serious crimes** (Nepal TRC Act 25 April 2014; entered into force on 11 May 2014)
 - Preceded by TRIAL/Advocacy Forum General Allegation on 28 Feb 2014 to Special Procedures regarding the March 2013 Executive Ordinance
 - Preceded by Briefing Note to OHCHR Treaties Division in Sept 2012.
 - Followed by General Allegation to Special Procedures together with Advocacy Forum and REDRESS in June 2014
- **Nepal's obligation to respond to CRC Committee concerns under Optional Protocol regarding children in armed conflict.**
 - TRIAL submitted report on Nepal's implementation record in June 2014
 - TRIAL submitted an update on Nepal implementation record in May 2015, by which time Nepal had still not complied with its obligation to respond by March 2015 to CRC Committee issues presented in Oct 2014.
- **Nepal's obligations to respond to CEDAW Committee July 2011 Concluding Observations by July 2013**
 - TRIAL submitted with HimRights a report on Nepal's implementation record as of August 2013

The timeliness, collaboration, and quality that characterize these advocacy efforts are of the highest standard.