

# ARTICLES

# Gurkha's Quest for Justice: Possible Remedies for Gurkhas Under International Human Rights System

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## Abstract

*There is a 205-year long history of Gurkha's entanglement with the British. In 1816, the British East India Company defeated Nepal in the Anglo-Nepalese war. Dominant narratives of this history suggests that the British were impressed by the war-fighting capabilities and loyalty of the Gurkhas, and recruited them- not as mercenaries but part of their army- to fight in the World Wars, to maintain imperial administration in British India, Burma, Malaya, Singapore, and Hong Kong. After the 1947 Tripartite Agreement between India, Nepal, and Britain, Gurkha soldiers were recruited annually in both British and Indian armies. For decades, the Gurkhas have carried out a movement seeking equal pay and pension in comparison to their British counterpart. After a long struggle, their movement reached the European Court of Human Rights wherein the Court did not find a violation of the European Convention regarding the differential treatment of Gurkha soldiers. The paper, briefly subscribes to the available literatures about the magnitude of problems and the status of Nepali Gurkhas in the British Army, including an overview of the commitments and obligation of United Kingdom towards human rights. The paper fills the scholarly gap by taking international human rights as an analytical framework in approaching the Gurkhas' issue. In making a case for possible remedies, Gurkhas as 'rights-holders' is proposed as a suitable frame. It concludes with recommendations, grounded in international human rights law, as a possible remedial mechanism for the Gurkhas— in their quest of justice.*

*"We never got equal terms and pay, and we are not even bothered about that. What we are seeking is justice for our pensions, getting equal to what the British get, according to the service rendered." (Retired major Tikendra Dal Dewan) <sup>1</sup>*

## Introduction:

Nepali Gurkha<sup>2</sup> soldiers have served the United Kingdom (UK) since 1815. Before

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<sup>1</sup> Tikendra Dal Dewan served 31 years in the Gurkhas. He is now in British Gurkha Welfare Society (BGWS), see for detail, Ram Barker, 'Gurkha Veterans for better pensions despite Government top-up', The Telegraph, 18 March 2019, available at <https://www.telegraph.co.uk/pensions-retirement/news/gurkha-veterans-battling-better-pensions-despite-government/>, accessed on 31 October 2019.

<sup>2</sup> The term 'Gurkha' derives from the place name of Gorkha, one of the hilly Districts of Nepal. See for

1947, they were enlisted into the British Indian Army. Following an agreement between Nepal, India and Britain meant four Gurkha regiments from the Indian army were transferred to the British Army. The remainder of the Gurkha Brigade was to remain as part of the new Indian Army.<sup>3</sup> The Gurkha Pension Scheme (“GPS”) was established in 1949 and applied the former Indian Army Pensions Code to Gurkhas serving in the Brigade. Pension entitlements under the GPS were index-linked to the cost of living in Nepal as it was presumed that the Gurkhas would retire there. Pensions were immediately payable upon retirement.

“The great British Empire was not built in a day”<sup>4</sup>. The ‘legendry Gurkhas’<sup>5</sup> wholeheartedly have sacrificed their life, liberty and happiness to maintain the ‘Greatness’ of Britain. The casualties and sufferings reported by a number of literatures and empirical testaments are self-evident:

- In the wars, around 150,000 Gurkha soldiers were wounded and 45,000 were killed in action.<sup>6</sup>
- Thousands disappeared without trace, and thousands suffered casualties, disability, and/or war trauma. For obvious reasons, family members also suffered greatly from the direct and indirect impacts of the World Wars.<sup>7</sup>

In return, what have they gained other than occasional flowery appraisals of ‘braveness’ and few awards? The right to equal pay for equal work is a well-established principle of human rights that may be evoked in the discussion on Gurkhas’ pay and pensions.<sup>8</sup> Despite the provisions of non-discrimination and equality guaranteed by international human rights instruments and national laws, the race and national origin-based inequalities remain persistent. Yet, the quested justice is far from being achieved. Where would the victims of these human rights violation go after exhaustion of local remedies? Are there any remedies available under the international human rights system?

The paper, briefly subscribing the available literatures about the magnitude of problems and the status of Nepali Gurkhas in the British Army, overviews the commitments and obligation of Britain towards human rights. The paper attempts in bringing food for thoughts for discussion primarily among the ‘rights-holders Gurkhas’ and then for

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detail, Lionel Caplan, ‘Bravest of the Brave’: Representations of ‘The Gurkha’ in British Military Writings’, School of Oriental and African Studies, Cambridge University Press, 1991, p. 571.

<sup>3</sup> BBC News, “Who are Gurkhas?”, 27 July 2010, available at <https://www.bbc.com/news/uk-10782099>, accessed on 31 October 2019.

<sup>4</sup> Arun Budhathoki, Britain’s Nepali Gurkha Veterans Struggle for Justice, 10 July 2019 available at <https://thediplomat.com/2019/07/britains-nepali-gurkha-veterans-struggle-for-justice/>, accessed on 2 November 2019.

<sup>5</sup> Denis D. Gray, ‘Nepal’s legendary Gurkhas face an uncertain future’, Nikkei, Asian Review, 7 July 2016 available at <https://asia.nikkei.com/NAR/Articles/Nepal-s-legendary-Gurkhas-face-an-uncertain-future>, accessed on 31 October 2019.

<sup>6</sup> Chandra K. Laksamba, David Gellner, & Krishna Adhikari, British Gurkha Pension Policies and Ex-Gurkha Campaigns: A Review, September 2013, available at [https://www.researchgate.net/publication/309176316\\_British\\_Gurkha\\_Pension\\_Policies\\_and\\_Ex-Gurkha\\_Campaigns\\_A\\_Review](https://www.researchgate.net/publication/309176316_British_Gurkha_Pension_Policies_and_Ex-Gurkha_Campaigns_A_Review) p. 21, accessed on 22 October 2019.

<sup>7</sup> Gurkha casualty figures for the two World Wars and other conflicts are difficult to ascertain with precision. (Cawthorne 2009), cited at Ibid.

<sup>8</sup> Laksamba, Gellner, & Adhikari (n 6).

academia and other stakeholders who tend to join hands at different levels in order to seek further possible remedies under international human rights standards and mechanisms, including ways and approaches along with strategic intervention to be taken up for the cause of justice.

## 2. Tripartite Agreement (TPA)

The British Army's Gurkha employment policy was based on the Tripartite Agreement (TPA) signed by Britain, India and Nepal on 9<sup>th</sup> November 1947. It was agreed that all matters of promotion, welfare and other facilities the Gurkha troops should be treated on equal footing as other units in the parent army so that the stigma of 'mercenary troops' may for all time be wiped out.<sup>9</sup> The vigor of the Tripartite Agreement explicitly mentions about the rights of British Gurkha as the part of British Army not as the mercenaries<sup>10</sup>. Means, the Brigade of Gurkhas is a fully integrated part of the British Armed Forces, and Gurkhas perform the same duties as other units at home and abroad in defence of the United Kingdom. Ironically, the status of British Gurkha was still reported as mercenaries by Western media.<sup>11</sup>

In 2006, the TPA was reviewed and was implemented on 8<sup>th</sup> March 2007. They brought radical changes in Gurkha pay and pensions. One consequence was to divide Gurkhas into four groups, namely:

- a. Serving Gurkhas – with equal pay, pension and welfare (equal terms and conditions with British soldiers, except pensions of the service before 1 October 1993);
- b. Gurkhas who joined the army before 1 October 1993 and retired on and after 1 July 1997 (pensioners and serving) with Gurkha Pension Scheme (GPS) for the service before 1 July 1997 and Armed Forces Pension Scheme (AFPS) for services after 1 July 1997 – (mixed GPS/AFPS);
- c. Gurkhas who were enlisted before 1 October 1993 and retired from the Army before 1 July 1997 – GPS only; and,
- d. Gurkha veterans without service pension.

According to a review conducted by the Centre for Nepal Studies UK (CNSUK),<sup>12</sup> "there are in addition 7,076 ex-Gurkha veterans without an Army pension; the majority of these were made redundant after the Borneo Confrontation in the late 1960s. Four to nine years of their service does not qualify them for the GPS.

<sup>9</sup> TPA 1947, Annexure III, Section G, art. 1.

<sup>10</sup> Protocol 1 of 1977 Additional to the 1949 Geneva Conventions' (not yet ratified by the United Kingdom) contains the only internationally agreed definition of a 'mercenary'. This definition excludes anyone who "is a member of the Armed Forces of a party to the conflict". See for detail, <https://www.gurkhabde.com/gurkhas-and-the-term-mercenary/>, accessed on 31 October 2019.

<sup>11</sup> See for detail, the New York Times, "Ayo Gorkhali"; 'The Gurkhas are upon you! Is the battle cry of one of the world's famous hands of fighting men: Nepal's 'happy warriors.'" 18 October 1964, available at <https://www.nytimes.com/1964/10/18/archives/ayo-gorkhali-the-gurkhas-are-upon-you-is-the-battle-cry-of-one-of.html>, accessed on 31 October 2019.

<sup>12</sup> Laksamba, Gellner, & Adhikari (n 6).

Unlike their British counterparts in similar situations, they do not qualify for the Preserved Pension, nor did they receive handsome terminal grants at the time of redundancy. They were given a few hundred pounds as redundancy pay when leaving the Army. A total of 3,438 people of this group have been identified as living in poverty and receive £40 a month charity benefit provided by the Gurkha Welfare Trust (GWT)<sup>13</sup>. This shows the grim reality of ex-Gurkhas and justifies the ‘genuineness’ of the rights-based movements.

### 3. Comparison of Pensions and Benefits of Gurkhas with other British Soldiers<sup>14</sup>:

Rank	British Pension Per Annum	Gurkha Pension Per Annum	Difference
Warrant Officer 1 (WO1)	£5,269	£498	958%
Captain	£6,348	1£606	948%

Besides the cost factor, there are other important considerations:

- a) The UK Government’s obligations to the fundamental human right of ‘equal pay for equal jobs or jobs of equal value’.
- b) Countries, such as France, which have employed foreign soldiers in their army, have started giving equal pensions to their foreign veterans.<sup>15</sup>
- c) Gurkhas retire after a maximum of 17 years of service with a pension of £91 a month. British privates serve 22 years for a pension of £623 a month.<sup>16</sup>

## 4. Remedies sought at different Courts at National and Regional Level:

### 4.1. Petition filed at the Supreme Court of Nepal<sup>17</sup>

A writ petition was filed by Gyan Rai at the Supreme Court of Nepal on 19 July 2000 requesting to issue an order to Government of Nepal (GoN) to review the Tripartite Agreement by the United Kingdom of Great Britain that was discriminatory against Gurkhas pay and pensions, ignoring the GoN’s observations and suggestions that had been incorporated into the TPA.

At prima facie, the Supreme Court issued show cause order to all respondent Ministries, Parliament including Parliamentary Subcommittee of Nepal. The respondent submitted

<sup>13</sup> Ibid, Executive Summary, para.4.

<sup>14</sup> Written evidence submitted by: The United Struggle Committee- Lead Organisation (Gurkha Satyagraha-2013), p.3.

<sup>15</sup> Laksamba, Gellner, & Adhikari (n 6).

<sup>16</sup> The Guardian, Ex-Gurkhas fail in claim on army pay discrimination, 10 Oct 2003, available at <https://www.theguardian.com/uk/2003/oct/10/military.claretyer>, accessed on 10 October 2019.

<sup>17</sup> Laksamba, Gellner, & Adhikari (n 6).

that the GoN had been raising the issue with the UK Government through diplomatic channels and the UK Government was positive to consider the pension issues of the Gurkha soldiers.

At the end, the Supreme Court dismissed the writ petition on the ground of jurisdictional issue that the nature of the case was beyond the boundary of the country's constitutional and legal provisions.

## **4.2. Cases initiated at the Courts of UK:**

### **4.2.1. Pay and pension discrimination:**

At the very outset, a former Gurkha soldier, Hari Bahadur Thapa, born in the UK and had joined the forces as a British Gurkha and later became the citizen of UK, filed a case in 1998 at UK Tribunal<sup>18</sup>. The petitioner challenged the said pay and pension being discriminatory based on grounds of racial discrimination. The tribunal rejected the claim of petitioner that he was not qualified for receiving the pension as equal to his British counterparts. The reason was given that 80% of his service had been in Hong Kong and the jungles of Brunei and Belize.

The Gurkhas did not accept the verdict as they had served in Hong Kong and in the jungles of Brunei and Belize on behalf of UK. Hence, it was justifiable that they should receive equal treatment on a par with their British counterparts as they had received the same training, performed the same duties, and sacrificed for the same missions.<sup>19</sup>

### **4.2.2. Compensation:**

The World War II veterans challenged the Ministry of Defence (MoD) in November over a ruling, which prevented them from claiming compensation for the brutality they suffered at the hands of the Japanese. They were excluded because at the time of their service the regiment formed part of the Indian Army. In November 2002, the UK High Court ruled that the Gurkhas, who were the Japanese Prisoners of War (POW) in the Second World War, should be eligible for compensation despite the MoD preventing them from getting it. Justice McCombe said, "The decision to exclude Gurkha from the compensation scheme had been both "irrational and racist".<sup>20</sup> They could receive £10,000 compensation and the decision has implications for 343 other surviving ex-Gurkhas.<sup>21</sup>

### **4.2.3. Retired Gurkhas rights to settle in the UK:**

Then after, in 2008, another issue was challenged by Gurkha veterans "who were

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid, p. 49.

<sup>20</sup> Written evidence submitted by: The United Struggle Committee- Lead Organisation (Gurkha Satyagraha-2013), p.4.

<sup>21</sup> See BBC News, 'MoD withdraws ex-Gurkha appeal', 14 March 2003 available at [http://news.bbc.co.uk/2/hi/uk\\_news/2849737.stm](http://news.bbc.co.uk/2/hi/uk_news/2849737.stm), accessed on 31 October 2019.

refused the right to settle in the United Kingdom because they retired from the regiment before 1997". In a ruling highly critical of the Ministry of Defence, Justice Blake said its advice to the Home Office on whether to grant settlement to the Gurkhas was confusing, resulting in "irrational and unlawful" restrictions being applied. Justice Blake ruled that the decision to refuse visas to five Gurkha veterans should be quashed and that the Home Office pays 80% of their costs.<sup>22</sup>

### 4.3. Case at European Court of Human Rights (ECtHR):<sup>23</sup>

In 2011, the British Gurkha Welfare Society (BGWS) brought a case at ECtHR contending that the pension of Gurkha Soldiers was three times less than that of Non-Gurkha soldiers. The Court was satisfied that Gurkha soldiers had been treated differently from other soldiers in the British Army as concerned their entitlement to a pension and that the difference in treatment could be regarded as less favourable. Upon being satisfied with the 'different treatment', the ECtHR held, unanimously, that there had been "no violation of Article 14 (prohibition of discrimination) read together with Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights (ECHR)" showing following reasons:

- Historically, the Gurkhas had been governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions.
- However, following changes to their situation, including the relocation of their home base to the UK on 1 July 1997, the UK decided to bring their pensions into line with those of other soldiers in the British Army.
- In 2007 they offered to transfer the pensions of Gurkha soldiers who retired on or after 1 July 1997 from the Gurkha pension scheme to the regular Armed Forces Pension Scheme. The terms of transfer allowed only the transfer of pension rights accrued after 1 July 1997 on a year-for-year basis.
- The Court accepted that by 2007 – the date of the offer to transfer – Gurkha soldiers had been in a similar situation to other soldiers in the British Army. However, the Court considered that "any difference in treatment on grounds of nationality had been objectively and reasonably justified". As it represented the transfer of the Gurkhas' home base to the UK and therefore the point in time from which the Gurkhas had started forming ties with the country.
- Court considered that any difference in treatment based on age had also been objectively and reasonably justified."

## 5. Comment on European Court of Human Rights' judgment:

<sup>22</sup> The Guardian, 'Forward Gurkhas: veterans win high court legal battle for right to settle in UK', 1 October 2008 available at <https://www.theguardian.com/uk/2008/oct/01/law.military1>, accessed on 1 November 2019.

<sup>23</sup> British Gurkha Welfare Society and Others v. the United Kingdom (application no. 44818/11), available at <https://hudoc.echr.coe.int/app/conversion/pdf/filename=Judgment>, accessed on 2 November 2019.

- **Despite being satisfied with the fact of ‘historical discrimination’ against Gurkhas, the ECtHR failed to deliver justice:** After admitting the ‘historical discrimination’, the Court drew the reason that “historically, the Gurkhas had been governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions.” The judgment merely acknowledged the ‘difference’ in the pension scheme, but failed to realize the fact that there was no difference at all in the work between Gurkhas and other soldiers in the British Army. A report published by the CNSUK, while assessing the UK’s human rights obligation towards equal pay and pension, has come up with some State practices “such as France, which have employed foreign soldiers in their army have started giving equal pensions to their foreign veterans.”<sup>24</sup> The European Court did not give a glance to these kinds of practices. Once the ‘discrimination is traced’ that provides sufficient ground to invoke the human rights violation. The case does not suffice the ‘Rule of law test’ that is not limited to ‘rule by law’. If had tested by rule of law, the Court could see whether ‘substantively comparable benefit’<sup>25</sup> was equally respected by UK to its all soldiers serving similar services. Human Rights complaint handling mechanisms have all power to check the States’ overall intent and action including process and outcomes. Here, in this case, the applicants had requested the court to adjudge the discrimination in employment irrespective of their national identity. But the Court sustained the demarcation between soldiers of British Nationality and Gurkhas with Nepali nationality.
  
- **The Court failed to protect the universally guaranteed grounds of non-discrimination:** Judgment was not delivered on the substance as the Court heavily relied on the discriminatory ceiling of recruitment phase 2007, but did not see the equal status of soldiers and the similar nature of work of Gurkhas who had wholeheartedly discharged the assigned tasks without any kinds of obvious fear of consequence of war. The Court saying, “any difference in treatment on grounds of nationality had been objectively and reasonably justified” is a blatant rejection of the universal concept and principles of equality and non-discrimination guaranteed by UDHR and subsequent human rights instruments. In human rights, there is no room for ‘difference in treatment on grounds of nationality’ other than ‘rights of political participation’<sup>26</sup>, where the concept of citizenship may be validated.<sup>27</sup> The Committee on ICCPR interprets “the term ‘discrimination’<sup>28</sup> should be understood to imply any ‘distinction, exclusion, restriction or preference’, which is based on any ground such as race, sex, language, religion, political or other opinion, national or social origin. Non-discrimination in article 26 of the Covenant is a ‘principle above the law’

<sup>24</sup> Laksamba, Gellner, & Adhikari (n 6).

<sup>25</sup> United States v. State of Virginia and others (SC, USA, 1996)

<sup>26</sup> International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966, art. 25.

<sup>27</sup> Sarah Joseph and Melissa Caston, ‘the International Covenant on Civil and Political Rights, Cases, Material and Commentary’, Oxford University Press, 3<sup>rd</sup> edition, 2013, p. 727.

<sup>28</sup> The ICCPR, Article 2 guarantees right to non discrimination following Article 26 that provides principle of equal protection of the law without discrimination in the line of article 7 of the UDHR. Ibid, p. 767.

“that prohibits discrimination in law or in fact”<sup>29</sup>The Court could go for ‘strict judicial scrutiny’ of classifications based on race and national origin. “Strict Scrutiny is the appropriate standard of review for all states actions based on race, not just those that disproportionately benefit Whites but also affirmative action programs that benefit minority groups.”<sup>30</sup> Contrary to this practice, the European Court even considered that “any difference in treatment based on age had also been objectively and reasonably justified.” The Court, however, failed to give justification.

- **The European Court’s conclusive ratio as “no violation of Article 14 (prohibition of discrimination) read together with Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights (ECHR)” is based on unreasonable subjective grounds:** Although, article 14 of the European Convention on Human Rights does not provide the same text as enshrined in article 26 of the ICCPR, “judges and legal administrators must not apply legislation in an arbitrary or discriminatory manner. Article 26 reflects similar rights of equality before the courts”<sup>31</sup> Article 2 of ICCPR guarantees right to non-discrimination following Article 26 that provides principle of equal protection of the law without discrimination in the line of article 7 of the UDHR which is the foundational principle of human rights law that are reaffirmed at national and international level. For instance, the Inter-American Court has held that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”<sup>32</sup>The European court’s conclusion has clearly undermined this peremptory norm holding universal jurisdiction.
- **Article 14 of the European Convention on Human Rights (ECHR) has not been interpreted but used narrowly:** Even though, the nature of article 14 of the ECHR is narrow and complex, eventually, the European Court itself has started rendering judgments through teleological interpretation. In 2016, the Grand Chamber of the European Court of Human Rights has clearly accepted the nexus between article 14 of the ECHR and the elements of discrimination guaranteed by ICERD that “the terms ‘national or ethnic origin’ are based on Article 1 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination and part of Article 14 of the ECHR”<sup>33</sup> and has

<sup>29</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 12, available at: <https://www.refworld.org/docid/453883fa8.html>, accessed on 17 November 2019.

<sup>30</sup> See, *Adarand Constructors Inc v. Peña* (1995) 515 US.

<sup>31</sup> M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 2<sup>nd</sup> edition, NP Engel (2005), pp. 605-606.

<sup>32</sup> Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, para. 101, available at <https://www.icj.org/sogicasebook-introduction/chapter-two-universality-equality-and-non-discrimination/>, accessed on 16 November 2019.

<sup>33</sup> See, *Biao v. Denmark*, no 38590/10, ECtHR [GC], 24 May 2016, para. 43. The grand Chamber’s judgment is available at <https://www.nyidanmark.dk/NR/rdonlyres/3238ECC8-2622-4C7F-9983>

concluded that “[a] difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim.”<sup>34</sup> Lately though, this precedent has opened up the judicial mind of the Court. Therefore, the UK Government should re-consider its decision and review the previous agreements and policies in the line of justiciable demands of Gurkhas.

## 6. UK’s action violated inherent religious rights:

Apart from discrimination in pay and pension, there are many other issues of human rights violation that can be brought before the international attention and seek remedies. British Government’s attack on the ‘right to practice and profess of inherent right to religion’<sup>35</sup> can be taken as an instance. “Discrimination between human being on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights<sup>36</sup>. Throughout their service”, Gurkhas had been even punished for speaking English and were compelled to practice Hinduism, despite the fact that most of them were Buddhist. Hinduism was the only religion formally authorized in the brigade.<sup>37</sup> As far as religion and spiritual care was concerned, the Gurkhas were made to register as Hindus during recruitment without considering their religious background.<sup>38</sup> The action of the UK has violated the internationally guaranteed human rights.<sup>39</sup> The right to have a religion of belief is an absolute right. “It encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”<sup>40</sup> The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency.<sup>41</sup>

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EFA2B71E9D92/0/Biao\_dommen\_af\_24\_maj\_2016.pdf, accessed on 13 November 2019.

<sup>34</sup> Ibid. Although the case is concerning citizenship, the issue of ‘difference in treatment’ and the foreseeable vulnerability identified in the case may be relevant to compare with the issues and concerns of Gurkhas.

<sup>35</sup> ICCPR (n 26), art. 18.

<sup>36</sup> See article 1(3) and 55 of the UN Charter and Article 18 of UDHR

<sup>37</sup> Taeko UESUGI, Two Aspects of Hinduism Associated with Military Labour Migration: Hinduism in the British Army’s Brigade of Gurkhas before the Abolition of the Nepalese Monarchy, *Journal of Contemporary India Studies: Space and Society*, Hiroshima University, available at [https://home.hiroshima-u.ac.jp/hindas/PDF/2014/Uesugi2014\\_HINDAS\\_Journal.pdf](https://home.hiroshima-u.ac.jp/hindas/PDF/2014/Uesugi2014_HINDAS_Journal.pdf), accessed on 25 October 2019.

<sup>38</sup> Written evidence submitted by: The United Struggle Committee- Lead Organisation (Gurkha Satyagraha-2013), p. 7.

<sup>39</sup> See article 18 of the ICCPR to which UK is party.

<sup>40</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): .30/07/93. CCPR/C/21/Rev.1/Add.4.

<sup>41</sup> Article 4 of the ICCPR has listed out the right to religion and belief as non-derogable rights. See also, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93. CCPR/C/21/Rev.1/Add.4.

## 7. Stakeholders' Efforts and Initiatives in Nepal:

### a. Government Level:

According to many peeved Gurkha organisations, the Government of Nepal is failing in its duty to pressurize the UK Government to live up to its treaty obligations, as embodied in the TPA of 1947. The hesitation on the part of the Government of Nepal may be due to the unequal political clout and political instability that these two countries have in global forums.<sup>42</sup> For this reason, the Gurkha organisations are also pressing for what they see as the long overdue renegotiation of the TPA. Renegotiation is thought to be essential in light of the significant changes in recruitment conditions and the recent changes in immigration policy in the UK. Eventually, the Prime Minister K.P Sharma Oli has shown concern on the issue including review of the Tripartite Agreement in between Nepal, Britain and India. This is for the first time that the British Gurkha issue was raised at the prime ministerial level.<sup>43</sup>

### b. Parliament Level: Parliamentary Committees of Nepal have Taken Two Initiatives:

1. In early 1998, the Parliamentary Sub-committee for Foreign Affairs and Human Rights of Government of Nepal, under the coordination of a parliamentarian Mr. Jaya Prakash Gupta, conducted an investigation into Gurkhas' pension issues.<sup>44</sup> The Sub-committee submitted the report to the Government of Nepal for further action. The Ministry of Foreign Affairs on 16 September 1998 forwarded the questions posed by the Sub-committee to receive the UK Government's response.<sup>45</sup> The UK's reply was submitted to the GoN through the British Embassy, Kathmandu, on 18 December 1998.<sup>46</sup> The Sub-committee traced the discrimination on the contended issue.<sup>47</sup>
2. The Parliamentary Committee on International Relations and Human Rights, Nepal took the second initiative. It unanimously endorsed a recommendation on 26 December 2011 seeking to stop the recruitment of Nepali citizens into foreign armies. The report<sup>48</sup> presented in the Parliament argued, "although the Gurkha recruitment gave the Nepali youths limited employment opportunity, serving with foreign military had not allowed the

<sup>42</sup> Laksamba, Gellner, & Adhikari (n 6).

<sup>43</sup> By A Staff Reporter, PM Oli raises British Gurkha issues with May, The Rising Nepal available at <http://therisingnepal.org.np/news/32049>, accessed on 25 October 2019.

<sup>44</sup> The Parliamentary Sub-Committee for Foreign Affairs and Human Rights consisted of Rt. Hon. Jaya Prakash Gupta, MP - Coordinator, Rt. Hon. Dev Shankar Paudel, MP - Member, Rt. Hon. Nawa Raj Subedi, MP - Member and Rt. Hon. Himmat Bahadur Shai, MP - Member.

<sup>45</sup> It was send under the Ministry's covering letter Reference; WE/138-BG/1705 on 16 September 1998. A total of 12 questions were posed by the Parliamentary Sub- Committee on retired British Gurkhas to the UK Government's response.

<sup>46</sup> Laksamba, Gellner, & Adhikari (n 6).

<sup>47</sup> Ibid

<sup>48</sup> Rewati Sapkota , 'Bar Nepal's from joining foreign armies: Left alliance', The Himalayan Times, May 6 2018, available at <https://thehimalayantimes.com/nepal/bar-nepalis-from-foreign-armies-left-alliance/>, accessed on 18 November 2019.

country to hold its head high<sup>49</sup>. It further pointed out that Nepal was suffering from the impact of reverse remittances after Britain decided to offer citizenship to Gurkha soldiers, and that therefore the time had come to evaluate Nepal's foreign policy on Gurkha recruitment.

### **c. Initiatives of Ex-Gurkha Organisations and Individuals:**

The 1990s movement for democracy in Nepal has been instrumental in encouraging Ex-British Gurkhas to form organisations and launch a campaign for equal pay and pensions. The retired Gurkhas themselves have converted into an institutional force and exerted all strategies available at the civil society level. The Gurkhas movements eventually succeeded in winning the 'hearts and minds' of the equality friendly British people.

The Gurkha campaigns moved on collecting signatures, sitting in and demonstrating in front of Parliament and lobbying the parliamentarians, addressing political conferences and so on. Now, they are planning direct action, such as hunger strike (fasting to death) and national movement.

The campaigners have been pressing the British government to fulfill a four-point demand as mentioned below<sup>50</sup>:

1. Pension for soldiers made redundant after the two world wars and the communist insurgency in Malaysia in the 1960s,
2. Provision of residential visas in Britain and British-ruled territories for ex-Gurkhas,
3. Equality in education facilities, and
4. Establishment of employment welfare for their children.

Gurkha movements' have given some tremors to the Government of the UK, as a result, it has recently announced to increase the pension scheme for the Brigade of Gurkhas who joined the service before 2007 by up to 34 percent, but hours within the decision was announced, Gurkha veterans rejected the offer calling it a 'piecemeal approach'.<sup>51</sup> This is indeed a non-compromising wise decision helpful for strengthening the movement.

## **8. Scope of Remedies Available under Human Rights Provisions and Mechanisms:**

### **8.1. Key Human Rights Provisions Related to the Concerned Issues:**

<sup>49</sup> See for details 'Times of India' Nepal Government Directs Ministries to Halt Gurkha Recruitments', 18 March 2012, available at <https://timesofindia.indiatimes.com/world/south-asia/Nepal-government-directs-ministries-to-halt-Gurkha-recruitments/articleshow/12318233.cms?>, accessed on 18 November.

<sup>50</sup> Ramyata Limbu, RIGHTS-NEPAL: Gurkha Pensioners Pressure Britain For Pay Parity, IPS News Agency, 26 September 1999, available at <http://www.ipsnews.net/1999/09/rights-nepal-gurkha-pensioners-pressure-britain-for-pay-parity/>, accessed on 22 October 2019.

<sup>51</sup> Anil Giri, 'Gurkha veterans reject pension hike offer of the UK government', Kathmandu Post, 9 March, 2019, p. 1, available at <http://kathmandupost.ekantipur.com.np/printedition/news/2019-03-09/gurkha-veterans-reject-pension-hike-offer-of-the-uk-government.html>, accessed on 30 October 2019.

Although the very purpose of the Charter of the United Nations (UN Charter) was to maintain effective peace and security, it has explicitly accepted the provision of ‘universal respect for and observation of human rights and fundamental freedoms for all without distinction of race, sex, language or religion.’<sup>52</sup> Article 55 also provides that ‘UN shall promote higher standards of living including ‘full employment, and conditions of economic and social progress and development.’”

The preamble of the Universal Declaration of Human Rights (UDHR)<sup>53</sup> contains a statement that human rights apply equally and inalienably to “all members of the human family”. Article 1 reinforces the inherent character of human rights with the statement that “All human beings are born free and equal in their dignity and human rights”. The UDHR guarantees broader grounds of the right to non-discrimination.<sup>54</sup> The provision of non-discrimination and equality is cardinal to all human rights core treaties, most importantly, the International Convention on the Elimination of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (known as Twin Covenants) and other instruments.

Laying the foundational basis for ‘equal pay for equal work’, article 23 of the UDHR reads:

- a) Everyone has the right to work, to free choice of employment.
- b) Everyone, without any discrimination, has the right to equal pay for equal work.
- c) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

The right to work and rights at work, and right to social security have been guaranteed by the ICESCR.<sup>55</sup> In alignment with the related provisions under the UDHR and ILO, the Committee on ICESCR has issued the General Comment<sup>56</sup> as interpretative guidelines. The Comment reiterates ‘equal remuneration for work of equal value without distinction of any kind’ as minimum criteria<sup>57</sup> and State parties have a core obligation to ensure “guarantee through law the exercise of the right without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, **national or social origin**, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, **nationality or any other status**”<sup>58</sup> (emphasis added).”

Aftermaths of the UDHR, the twin Covenants, mainly the ICESCR and several other

<sup>52</sup> Preamble, Articles 1(3), 55 and 56 (C) of the UN Charter.

<sup>53</sup> UDHR, art. 23 available at [https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf), accessed on 12 October 2019.

<sup>54</sup> Article 2 of the UDHR guarantees, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>55</sup> See articles 6-9 of the ICESCR. The General Comments of the Committee on ICESCR provide the interpretative guidelines to the State party for the implementation of the provision at domestic level.

<sup>56</sup> See, General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights).

<sup>57</sup> Ibid, para. 9.

<sup>58</sup> Ibid, para. 65.

instruments have recognized the right to and at work. For examples, in article 5, paragraph (e) (i) of the ICERD; in article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); in article 32 of the Convention on the Rights of the Child (CRC); and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their families. Similarly, several regional instruments recognize the right to work in its general dimensions, including the European Social Charter of 1961 and the Revised European Social Charter of 1996 (Part II, art. 1).

The ICESCR Committee has issued a landmark General Comment<sup>59</sup> that “social security scheme should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations.”

<sup>60</sup> With regard to the implementation of international and regional agreements, the Committee urges State parties to take steps to ensure that these instruments do not adversely impact upon the right to social security<sup>61</sup> that includes pension as one of the most important elements.

## 8.2. Equality and Non-Discrimination in Employment under ILO:

According to ILO<sup>62</sup>, “discrimination at work includes any “distinction, exclusion or preference, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>63</sup> Discrimination occurs when a person is treated less favorably than others because of characteristics that are not related to the person’s competencies or the inherent requirements of the job. Bases of discrimination are identified and prohibited in various international labour standards includes racial discrimination among many other grounds. <sup>64</sup>

The ILO, Equal Remuneration Convention, 1951 (No.100) sets conditions for ‘equal pay for the equal job’, and ‘equal pay for the job of equal value’ which have been supported by many other Conventions. The ILO Convention No. 169<sup>65</sup> inscribes these principles. According to which, the Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

- a. Admission to employment, including skilled employment, as well as measures for promotion and advancement;
- b. Equal remuneration for work of equal value;
- c. Medical and social assistance, occupational safety and health, all social security

<sup>59</sup> See, General Comment No. 19 of the ESCR, adopted on 23 November 2007.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, para. 57.

<sup>62</sup> See the ILO database at [www.ilo.org](http://www.ilo.org).

<sup>63</sup> Discrimination (Employment and Occupation) Convention, 1958 (No. 111), art. 1(b).

<sup>64</sup> Ibid.

<sup>65</sup> C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Nepal has ratified this Convention but Britain has not ratified.

benefits and any other occupationally related benefits, and housing;

The measures taken shall include measures to ensure that workers belonging to these peoples equal opportunities and equal treatment in employment. Therefore, equal pay for equal work should not be considered from 'monetary value demand as 'mercy' or privilege but a rights-based demand to be 'recognized as a person before the law'<sup>66</sup> entitling 'everyone's right to equality before the law and equal protection of the law'<sup>67</sup> irrespective of their race, national origin, religion or/ and any other grounds.

### 8.2.1. Complaint Mechanism under ILO:<sup>68</sup>

- A complaint may be filed against a member State for not complying with a ratified Convention by another member State, which has ratified the same Convention<sup>69</sup> by a delegate to the International Labour Conference or the Governing Body of its own motion.
- Upon receipt of a complaint, the Governing Body may establish a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making recommendations on measures to be taken to address the problems raised by the complaint.
- The Commission of Inquiry is the ILO's highest-level investigative procedure and is generally set up when a member State is accused of committing persistent and serious violations and has repeatedly refused to address them.
- When a country refuses to fulfill the recommendations of the Commission of Inquiry, the Governing Body can take action under article 33 of the ILO Constitution.

The UK is the member of the ILO since 29 September 1919 and has become party to significant number of the ILO Conventions<sup>70</sup> including Equal Remuneration Convention (No.100) and Discrimination (Employment and Occupation) Convention, 1958 that are ratified on 15 June 1971 and 8th June 1999 respectively.

It is to note that reservations to the ILO Conventions are not permitted. "The ILO Standards are adopted by a two-thirds majority vote of the ILO constituents and are therefore an expression of universally acknowledged principles. However, the "ratifying countries are usually required to make a declaration to the Director-General of the ILO if they exercise any of the flexibility options, and to make use of such clauses only in consultation with the social partners."<sup>71</sup> . Therefore, the Gurkhas issues

<sup>66</sup> Article 6 of the UDHR and Article 16 of the ICCPR guarantee for the 'recognition as a person before the law'.

<sup>67</sup> Article 26 of the ICCPR.

<sup>68</sup> See for the examples of complaints at [https://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:50011:P50011\\_ARTICLE\\_NO:26](https://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:50011:P50011_ARTICLE_NO:26), accessed on 2 November 2019.

<sup>69</sup> The complaint procedure is governed by articles 26 to 34 of the ILO Constitution.

<sup>70</sup> See the Status of ratification, available at [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0:::NO:11200:P11200\\_COUNTRY\\_ID:102651](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0:::NO:11200:P11200_COUNTRY_ID:102651), accessed on 2 November 2019.

<sup>71</sup> See for detail, International Labour Organisation, 'International Labour Standards', available at <https://>

and concerns can be raised at the ILO complaint mechanisms as the UK has become member since the inception of the ILO and has ratified the concerned conventions.

### 8.3. Obligation of UK towards Human Rights Standards:

Being a founding member of the United Nations and one of the permanent members of the UN Security Council<sup>72</sup>, the UK has additional normative obligation to respect and protect the human rights enshrined primarily in the UN documents. The obligation goes beyond and above the ratification or accession of human rights treaties. The principles of international law are embodied in the Charter of the UN, such as equal rights, sovereign equality, human rights and the development of friendly relations in order to achieve cooperation among nations. Article 26 of the Vienna Convention on the Laws of Treaty (VCLT) provides the foundational basis of interpretation of treaty in good faith (*Pacta Sunt Servanda*) that justifies the legality of the TPA.<sup>73</sup> However, the basis of the ‘good faith’ between Nepal and the UK does not seem to be respected and maintained.

#### 8.3.1. Status of Ratification/Accession of Core Human Rights Treaties:<sup>74</sup>

SN	Treaty (Name and date of adoption and came into force)	Ratification ® / Accession (a)	Reservation
1	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Adopted: 1965, (Came into force: 1969)	1969	Yes
2	International Covenant on Civil and Political Rights (ICCPR), 1966, (in to force-1976)	1976	Yes
3	Second Optional Protocol to the International Covenant on Civil and Political Right (mandated for Individual Complaint mechanism,) 1966 (came into force in 1976)	-	-
4.	Second Optional Protocol to the International Covenant on Civil and Political Rights, (Abolition of Death penalty) 1989 (came in to force 1991)	1999	-

[www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang-en/index.htm](http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang-en/index.htm), accessed on 2 November 2019.

<sup>72</sup> See, United Nations Organisation, ‘Security Council Current Members’, available at <https://www.un.org/securitycouncil/content/current-members>, accessed on 31 October 2019.

<sup>73</sup> The representative of Nepal Government, Mr Praduman Lal Rajbhandary, on 23 May 1969 and the representatives of Her Majesty’s Government of United Kingdom of Great Britain and Northern Ireland, Professor R.Y. Jennings and Sir Ian Sinclair, signed the VCLT, 1969 on 20 April 1970 (UN 1970).

<sup>74</sup> See the status of ratification at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185), accessed on 1 November, 2019.

5.	International Covenant on Economic, Social and Cultural Rights (ICESCR): (came into force 1976)	1976	Yes
6	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008 (Came into force-2013)	-	-
7	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 (Came into force in1981)	1986	Yes
8	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999 (Came into force -2000)	2004	-
9	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT),1984 (Came into force-1987)	1988	Yes
10	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Came into force -2006)	2003	-
11	Convention on the Rights of the Child (CRC), 1989 (Came into force-1990)	1991	Yes
12	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000 (Came into force-2002)	2003	Yes
13	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000 (Came into force-2002)	2003	Yes
14	Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2012 (Came into force-2014)	-	-
15	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), 1990 (Came into force-2003)	-	-
16	International Convention for the Protection of all Persons from Enforced Disappearance (CED), 2006 (Came into force- 2010)	-	-
17	Convention on the Rights of Persons with Disabilities (CRPD), 2006 (Came into force -2008)	2009	Yes
18	Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 (Came into force-2008)	2009	-

### 8.3.2. Limited Scope of Complaint Mechanisms at Treaty Bodies:

- It is noteworthy that the UK has become the State party to seven out of nine core treaties except the treaties related to the migrant workers and enforced disappearance.
- In terms of ratification, the UK's commitment seems very fragile, as it has put significant reservations in all the ratified core treaties, including the ICERD and the ICCPR.
- Tactfully, the UK has not ratified the Optional Protocols of the ICCPR, the ICESCR and the CRC that mandate for individual complaint mechanism. Means, it may take legal or other implementation or enforcement measures within the territorial jurisdiction but not ready to bring any case against at international level.
- Nonetheless, there is a scope of monitoring the incidents of torture and other cruel, inhuman or degrading treatment or punishment as it has ratified the CAT along with its Optional protocol that mandates the Sub-committee on Torture to inquire.
- It has not even declared the competence of individual complaint mechanism under the ICERD. Therefore, there is no scope to lodge the individual complaint against the UK alleging the violation of racial discrimination.

### 8.3.3. Reservation on ICERD with Interpretation:

The United Kingdom “interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4”.<sup>75</sup>

Further, it interprets “article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention. .... Her Majesty's Government has decided that the United Kingdom should sign the Convention, these objections notwithstanding, because of the importance they attach to the Convention as a whole.”<sup>76</sup> Upon ratification: “First, the reservation and interpretative statements made by the United Kingdom at the time of signature of the Convention are maintained...”<sup>77</sup>

The interpretations in all ratified treaties are clear enough to prove the intention behind putting the greater limitation by the UK both in substance and remedies. Thus, by

<sup>75</sup> See for detail, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185), accessed on 1 November 2019.

<sup>76</sup> Ibid.

<sup>77</sup> See for detail, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185), accessed on 1 November 2019.

putting reservations on those provisions mainly guaranteed under the ICESCR, the ICCPR and other treaties, the UK has undermined the core values of equality and non-discrimination, which uphold the very objects and purposes of human rights treaties. Hence, the UK's reservations to the ICERD concerning the Commonwealth Immigrants Act, 1962 (now repealed) and to the ICCPR are subject to criticism.<sup>78</sup>

#### 8.3.4. Scope of Inter-State Complaint Mechanism under the ICCPR:

Pursuant to article 41 of this Covenant, the UK “recognizes the competence of the Human Rights Committee to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication relating to the United Kingdom, made a declaration under article 41 recognizing the competence of the Committee to receive and consider communications relating to itself.”<sup>79</sup> Although seems complex, if lobbied to the State parties, there is a possibility of bringing the matter before the human rights committee against UK for the violation of the provisions of ‘equality, non-discrimination, legal recognition as person before the law and equal protection of the law’ guaranteed by the Covenant.

#### 8.3.5. The CERD Committee’s Concluding Observations on the UK’s Combined Report:<sup>80</sup>

The Committee recommends the State party to ensure the principles and the provisions of the Convention are directly and fully applicable under domestic law in England (para 8)

Regarding employment, the Committee remains concerned<sup>81</sup> at: (a) the higher rate of unemployment among persons of African and Asian descent; (b) occupational segregation, with a concentration of persons from ethnic minorities in insecure and low-paid work; and (c) discriminatory recruitment practices by employers (arts. 2 and 5).

The Committee recommends that the State party collect disaggregated data on employment, unemployment and activity rates of individuals from ethnic minority groups, throughout its jurisdiction, and that it adopt and implement targeted measures to address unemployment, occupational segregation, and discriminatory practices with regard to recruitment, salaries, promotions and other conditions of employment.

<sup>78</sup> See for detail, ‘Review of the UK’ Reservations to international human rights treaty obligations”, available at <https://www.libertyhumanrights.org.uk/sites/default/files/interventions-dec-2002.pdf>, accessed on 1 November 2019.

<sup>79</sup> See for detail, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec), accessed on 12 November 2019.

<sup>80</sup> The Committee on CERD adopted the 21st-23rd combined reports of the United Kingdom of Great Britain and Northern Ireland on 3<sup>rd</sup> October 2016, available at [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD\\_C\\_GBR\\_CO\\_21-23\\_24985\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf), accessed on 2 November 2019.

<sup>81</sup> Ibid, paras. 32-33.

**8.3.6. The Equality and Human Rights Commission of the UK,**<sup>82</sup> recommends to the UK Government for a comprehensive race equality strategy to promote and enforce the laws that protect rights to fairness, dignity and respect. The Commission reports that “Across Great Britain, Black and Asian workers are also moving into more insecure forms of employment at higher rates than White workers.”<sup>83</sup> Even though, the Commission has not yet realized and pondered over the racial discrimination against Gurkhas, the evidence of prevalence of racial discrimination and inequalities in England supports the situation of Gurkhas *ipso facto*. The Chairperson of the Commission, Mr David Isaac CBE observing ‘existence of structural injustice and discrimination in England’, suggests the “UK Government to put in place a race strategy which is coordinated and comprehensive, with clear accountability and governance, and which includes stretching new targets to improve opportunities.”<sup>84</sup>

### **8.3.7. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance<sup>85</sup>:**

She visited the United Kingdom of Great Britain and Northern Ireland from 30 April to 11 May 2018. Following are some of the extracts of the report:

- Special Rapporteur highlights that important work remains to be done by UK to address structural forms of racial discrimination and inequality.
- Some of the key areas addressed in the report include the racial impact of laws and policies on austerity measures, criminal justice, counter-terrorism and immigration, as well as the impact of Brexit on racial equality in the country.
- The Special Rapporteur met with representatives of national human rights institutions and equality bodies, civil society actors, academics, representatives of racial, ethnic and religious minority communities as well.
- SR takes note about the ‘structural socioeconomic exclusion of racial and ethnic minority communities’ in the United Kingdom.
- The Special rapporteur takes reference of report of the Equality and Human Rights Commission of UK that outlined “alarming findings on how race and ethnicity shape outcomes in every area of people’s lives, including education, employment, housing, pay and living standards, health, criminal justice and participation.”<sup>86</sup>(Emphasis added)

<sup>82</sup> Healing a Divided Britain: the need for a comprehensive race equality strategy, Equality and Human Rights Commission, 18 August 2016. This report is based on the Equality and Human Rights Commission’s statutory five-yearly report on equality and human rights progress in England, Scotland and Wales.

<sup>83</sup> Ibid, See also, Trades Union Congress, Press release: Number of Black and Asian workers in low-paid jobs up by 13 per cent since 2011, 2015, available at: <https://www.tuc.org.uk/economic-issues/equality-issues/black-workers/campaigns/number-black-and-asian-workers-low-paid-jobs>, accessed on 1 November 2019.

<sup>84</sup> Ibid

<sup>85</sup> Ms. E. Tendayi Achiume (Zambia) is the Special Rapporteur on this thematic issue since 1 November 2017.

<sup>86</sup> A/HRC/41/54/Ad.

It is to be noted that not a single issue or concern of racial discrimination in employment against Gurkhas has been traced in any of the above discussed concluding observation by the CERD Committee, reports of the Equality and Human Rights Commission and the concerned Special Rapporteur. Even the shadow report submitted by the civil society group<sup>87</sup> has not written a single word about Gurkha and thier concerns of racial discrimination. Therefore, the Gurkhas movement needs to be strategic to internationalize the concerns and contention at least through Shadow report and meeting with Special rapporteur and the Equality and Human Rights Commission as independent national human rights institution in the UK.

#### 8.4. Scope of Remedy through UPR:

The Universal Periodic Review (UPR) is a 'peer review mechanism'<sup>88</sup>. This is a new human rights system introduced by the Human Rights Council (HRC), which was established on March 15, 2006 by the UN General Assembly.<sup>89</sup> The UPR has been regarded as 'institution building package'<sup>90</sup> of States' rigorous involvement. This unconventional mechanism provides scope of reviewing the obligations of States under Universal Declaration of Human Rights and other human rights instruments and international humanitarian law.

Under this peer-review mechanism, states hold each other to account on their human rights records. The review is done on the basis of a 20 pages written report submitted by the State-under-Review and oral presentation in the Human Rights Council, a compilation of UN information and also through stakeholder summary report.

Although the role of the NGO is more limited<sup>91</sup> than in other UN human rights state reporting mechanisms, they can still play instrumental role by lobbying and advocating at the ministerial level for the improved protection and promotion of human rights on the ground. However, unlike treaty mechanisms, the NGOs involved in the UPR do not have the benefit of having seen the Government report and responding to it. The NGO reports must be submitted in advance of the Government report, at least five months before the relevant session of the UPR<sup>92</sup>. Nevertheless, by March 2016, over 400 human rights defenders had raised human rights concerns on 129 countries in their UPR pre-sessions with Government representatives.<sup>93</sup> "The ability of the UPR to transcend ritualism and to function as an empowering regulatory mechanism depends

<sup>87</sup> See the detail, <https://www.ukren.org/uploads/images/CERD%20Civil%20Society%20Report%20UKfinal.pdf>, accessed on 31 October 2019.

<sup>88</sup> See Gaer, 'A Voice Not an Echo: Universal Review and the UN Treaty Body System', 7 Human Rights Law 109, 2007.

<sup>89</sup> HRC replaced the previous UN Commission on Human Rights established in 1946 through General Assembly resolution no. 60/251. See for detail, United Nations Human Rights Council available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>, accessed on 25 October 2019.

<sup>90</sup> On 18 June 2007, one year after its first meeting, members of the new Council agreed to its institution-building package. See the details at A/HRC/RES/5/1.

<sup>91</sup> NGOs were originally granted only limited consultation status under Article 71 of the UN Charter.

<sup>92</sup> UPR-Info reports are available at [www.upr-info.org](http://www.upr-info.org), accessed on 9 November 2018; UPR-Info, Database of UPR Recommendations, available at [www.upr-info.org/database/](http://www.upr-info.org/database/), accessed on 9 November 2018.

<sup>93</sup> UPR Info Pre-session', 31 March 2016, available at [www.upr-info.org](http://www.upr-info.org), accessed on 9 November 2018.

heavily on effective NGO and civil society engagement in the process”<sup>94</sup>

This opportunity may be cashed by the NGOs and civil society, including the ex-Gurkhas organization that are advocating on the issues and concerns of Gurkhas. For the active and effective engagement in the UPR process, these organizations should involve in the process with full acquaintance of the following stages of UPR:

1. Documentation,
2. Interactive dialogue in between the different countries,
3. Development of outcome by the working group,
4. Adoption of outcome document by Human Right Council,
5. Follow-up to conclusions and recommendations adopted from the review.

Nepal is in the third cycle of the UPR process. Yet, the issue of Gurkha has not been brought into the attention before the Human Rights Council. Now the time has come to repaint or correct the past.

## 9 Conclusion and Recommendations:

- Over two hundred years old history is evident how Nepali Gukhas have served wholeheartedly to fulfill the needs, interest and power-vested ambition of Britain to be a ‘great Britain’ that has been built on the triumph of Gurkhas and their families’ sacrifice of life, liberty and happiness. Gurkhas’ diligence and honesty have been encapsulated merely within the flowery title as ‘Bravest of the Brave, loyal and honest Gurkha’ but the Government of the UK never treated them as equal as British native citizen-soldiers. The intent of Britain is self-sufficed by a series of denials of ‘equal pay and pension’ by judicial and administrative bodies. Ironically, justice has been buried even by European Court of Human Rights, established as first human rights Court in the world, further demarcated the difference between Gurkha British armies and other soldiers. The decision has snubbed the inherent right to ‘equality among equals’ in employment and other fundamental human rights provisions, principles and practices discussed above. The decision of the European Court of Human Rights is superficial and contrary to its own precedents adopted in a number of cases regarding equality and non-discrimination enumerated in the European Convention on Human Rights.
- Although one or two piecemeal remedies have been provided through the Court orders mentioned above, the prime contention of equality in employment yet to be resolved by the Government of the UK. This impedes from exercising and enjoying the rights by Gurkhas and their family fully and equally. The piecemeal approach<sup>95</sup> relief or token shown by the UK does not

<sup>94</sup> Charlesworth and Larking (eds), ‘Human Rights and the Universal Periodic Review: Rituals and Ritualism’, 2015, p. 16.

<sup>95</sup> Anil Giri & Nabin Pokhrel, ‘Retired British Gurkhas hope Boris Johnson will work in their favour’, Kathmandu Post, 28 July 2019, p. 4.

heal the sufferings neither suffices the justiciable demands of Gurkhas who are fighting for the elimination of all forms of race-based discrimination and exploitation. The UK has not yet responded Gurkhas' concerns from human rights perspective.

- Although, aftermath of Brexit, there have been likely fear of 'far reaching consequences for the families of Gurkhas who have settled in the UK since decades',<sup>96</sup> yet, all avenues have not been closed as very recently, 'a senior Immigration Tribunal judge overturned a previous ruling which would have allowed the daughter of a former Gurkha, who served in the British Army for 15 years, to live in Britain with him.'<sup>97</sup> This has been considered as positive signal of the UK Government, in some matter of ex-Gurkhas being loyal.

### Recommendations: Possible remedies ahead

- There are some of the possible remedies still unexplored where the exhausted disputes can be revived with a hope of bringing the UK under the compliance of application of human rights provisions against discrimination in employment and other underlying matters such as discrimination in religion, inhuman and degrading treatment guaranteed mainly under the CERD, the ICCPR, the CAT and the ILO to which the UK is party, yet to be explored. The intervention can be made for bringing the complaint at the ILO complaint mechanism as mentioned above.
- Additionally, there are many other issues left out such as the rights of missing Gurkha Armies, rights of family and the children and their education and related matters. Apart from human rights violation, the movement can also be initiated from humanitarian law perspectives as the UK has not protected prisoners of war and sick and wounded Gurkha armies and sought the remedies available under the laws of war violated by the countries against whom Gurkhas fought for and scarified their life figured above. As declared in the TPA, they were not mercenaries but 'lawful combatants' entitled to be protected by the Geneva Conventions and Human Rights Treaties to which UK is party, and the customary international law. Unfortunately, the Gurkhas have been treated as mercenaries<sup>98</sup> and the possible remedies have never been sought in favour of Gurkhas.
- The strategic action should now be focused on the UPR process by lobbying States to speak out in the UK's report review session. As mentioned above, the issues and concerns should be brought in the treaty-bodies through shadow

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<sup>96</sup> Ibid.

<sup>97</sup> See for detail at The Telegraph, 'Daughter of British Army Gurkha veteran faces being separated from her father in deportation legal battle', 20 July 2019, available at <https://www.telegraph.co.uk/news/2019/07/20/court-rules-gurkha-veterans-daughter-not-allowed-join-uk/>, accessed on 4 November, 2019.

<sup>98</sup> Adityaman Shrestha, 'Gorkhali Vadaaka Sena Hoon? (Are Gurkhas Mercenaries?)' Nagarik , 26 August 2018, p. 1.

reporting from civil society of the UK and also through the UN-Charter-based thematic mechanisms like special procedures including concerned Special Rapporteur. These mechanisms are also influential in the UPR process.

- Nepal Government should take the ownership of the issue as serious national concern and initiate strongly and include in the state reports to be submitted in the treaty bodies (mainly under ICCPR and ICERD) and also to the UPR.
- The stakeholders of Gurkha movements may use all the possible channels to lobby the members and participating States present in the review session while considering the report of the UK. The UPR platform can also be used for ‘naming and shaming’<sup>99</sup> against the non-compliance of human rights obligation of the state under review. This has been considered as one of the effective ‘non-confrontational approaches’<sup>100</sup> used by international bodies to bring the States into compliance of human rights for the implementation of its obligation. The approach can also be experimented in the next cycle during the review of the report of the UK. Moreover, the Gurkha movement should also lobby the NGOs and civil society in the UK to include these concerns in the UPR report that they can submit to the Human Rights Council prior to the submission of State report. The similar strategy can also be taken for inserting the issues in the UPR report to be submitted by the NGOs in Nepal. In either way, the issues should be dragged into the UPR platform.
- Since TPA has lost its significance, it is an urgent need to formulate a new bilateral legal agreement between Nepal and the UK that may correct the past and create conducive and human rights-friendly relation.
- The Gurkha movement should not be limited to the conventional way what is being followed as of now, rather, should be shifted to a meta-analytic<sup>101</sup> strategies not leaving a single room for letting the opponent feel that Gurkhas claim as a sectorial cry for seeking mercy but a human rights-based claim supported by objective and unbeatable empirical information.
- Finally, Gurkhas and their movements should not be scattered or divided or politicized, which will weaken the ‘institutional claim’. The uniform approach and integrated voice need to be echoed in order to seek and activate all available possible remedies under international human rights enforcement mechanisms. The prime concern of the movement should be focused to bring the UK under compliance of its human rights obligation for the elimination of age old ‘historical discrimination’ in pay, pension and other related matters.

<sup>99</sup> Elvira Domínguez-Redondo, ‘The Universal Periodic Review – Is There Life Beyond Naming and Shaming in Human Rights Implementation?’, *NZ Law Review* 673, 2012.

<sup>100</sup> *Ibid*, p. 674.

<sup>101</sup> Meta-analytic suggests using statistical method the validating procedure in a specific situation. See for detail, Frank J. Landy (edited), ‘Employment Discrimination Litigation, Behavioral, Quantitative’, *Society for Industrial and Organizational Psychology (SIOP) (1988)*, p. 74 available at [https://books.google.com.np/books/about/Employment\\_Discrimination\\_Litigation.html?id=M8KwBAaHF6AC&printsec=frontcover&source=kp\\_read\\_button&redir\\_esc=y#v=onepage&q&f=false](https://books.google.com.np/books/about/Employment_Discrimination_Litigation.html?id=M8KwBAaHF6AC&printsec=frontcover&source=kp_read_button&redir_esc=y#v=onepage&q&f=false), accessed on 12 November 2019.