



Review of implementation of the recommendations made by the UN Working Group on Enforced or Involuntary Disappearances after its visit to Nepal in December 2004

BACKGROUND

This review of the implementation of recommendations made by the Working Group on Enforced or Involuntary Disappearances (WGEID) after its mission to Nepal in 2004 is submitted with a request to the WGEID to step up its efforts to ensure accountability and reparation for the thousands of victims of enforced disappearances during the armed conflict from 1996 to 2006, the fate or whereabouts of at least 1,300 of whom remains unknown. [1]

This review focuses on developments in Nepal during the five years since members of WGEID visited Nepal, with specific reference to the conclusions and summary of recommendations contained in the report on the visit and other concerns highlighted in subsequent reports to the Human Rights Council. [2] The submission first sets out general issues in relation to enforced disappearances in Nepal and then provides information on the implementation of the WGEID's specific recommendations. The submission is predominantly based on information gathered by Advocacy Forum-Nepal.

In both 2003 and 2004 Nepal took on the ignominious distinction of having the highest yearly number in the world of new cases of disappearances reported to the WGEID. The total number of outstanding cases before the Working Group is 458. [3] Throughout the conflict, in addition to thousands of cases of long-term incommunicado detention and torture, 1,619 disappearances (1,234 attributed to the security forces, 331 to the Communist Party of Nepal-Maoist (CPN-M) and 54 unidentified) were reported to the National Human Rights Commission (NHRC). [4] Many of those whose whereabouts remain unknown were arrested at the hands of the security forces are suspected to have been tortured and subsequently killed while held in secret detention in the custody of the Royal Nepal Army (RNA, renamed the Nepal Army, NA in 2006). This was documented in detail in a report by the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) on 49 disappearances reported in late 2003 from Maharajgunj army camp in the heart of Kathmandu. [5] At least 1,300 cases of disappeared persons related to the conflict remain unresolved, including the torture and disappearance of these 49 individuals from Maharajgunj army camp, and over two hundred who disappeared mostly after arrest by security forces in Bardiya District. [6]

As mentioned above, more than 300 cases of actions tantamount to enforced disappearance after abduction by the CPN-M were also documented during the conflict, some of which have been acknowledged by the CPN-M. [7] The disappearances at the hands of the CPN-M involved took place within a pattern of what the CPN-M termed "party action" against persons considered to be exploiters or informants and included public executions, abductions, torture and assaults.

In its report on the enforced disappearances in Bardiya District, OHCHR-Nepal concluded that "there appears to be evidence of acts by both the RNA and CPN-M which could amount to war crimes: in particular in the serious allegations of torture and ill-treatment, murder and sexual violence." [8] When considering the composite nature of the crime of enforced disappearances, more particularly the fact that enforced disappearance refers to "the arrest, detention or abduction of persons followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time" [9], it is clear that this practice was widespread and systematic in Nepal during the time the security operations were conducted under the unified command of the NA. Tens of thousands of civilians suspected of being members or sympathizers of the CPN-M were illegally detained in army camps, kept blindfolded for months, severely tortured, not given access to their relatives, and their detention was repeatedly denied to the NHRC as well as the courts. The UN special procedures, the NHRC and national and international human rights organizations made numerous appeals to the army and political leadership, many of which were also reported in the national media. On that basis, it can be argued that the army leadership must have been aware of these concerns but did not take any effective action to bring this practice to an end. This raises concern that there was a deliberate strategy sanctioned from the highest level of the army and continued throughout 2001 to 2005 with the apparent knowledge and consent of the commanders. On that basis, it can be argued that enforced disappearances in Nepal amounted to crimes against humanity.

Among the many cases, some are worth highlighting as they are emblematic about wider concerns about the way in which the Ne-

pal authorities are systematically breaching the state's obligation to investigate and prosecute and provide a full and effective remedy and reparations, including full rehabilitation for these grave human rights violations. Chiefly among them is the case of 15-year-old Maina Sunuwar, which has become well-known and in relation to whom the Office of the High Commissioner for Human Rights in Nepal has played a very active role. [10]

The fight for justice in Maina's case began on the day that she disappeared in 2004, and justice has been thwarted at each step since then. First, the army denied her arrest and detention. They lied to all actors including OHCHR and tried to cover up that they had disappeared, illegally detained, tortured and killed a young girl. They then falsely claimed that she was shot whilst trying to escape from army custody. It was only following intense national and international pressure that the NA initiated an internal inquiry in March 2005 and eventually recommended that three soldiers — Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun — be brought before a Court Martial. The court gave its decision on September 8, 2005, finding the three military officers guilty only of using wrong interrogation techniques and of not following proper proceedings in the disposal of the dead body. It is unclear from an unofficial (and possibly partial) copy of the report obtained by Advocacy Forum on what basis the Court of Inquiry Board decided not to recommend prosecution against a fourth soldier, then captain Niranjana Basnet, clearly identified in the board's report as being involved.

As stated, no one was convicted by the Court Martial for the disappearance, torture and killing of Maina Sunuwar. On the contrary, the army's internal investigation concluded that the death by prolonged torture as "accidental", and put down to "carelessness", and a failure to follow procedures. Maina was blamed for her "physical weakness" in not being able to withstand the simulated drowning and electrocution acknowledged by the Court Martial. Based on this false representation of the facts, the three accused were convicted of procedural offences and sentenced to six months' imprisonment, temporary suspensions of promotions and a paltry monetary fine as compensation to Maina's family. The guilty officers did not actually have to serve the prison term because the court held that they had spent that time in confinement during the proceedings of the Court Martial.

The civilian justice system too, has so far failed to deliver justice. Outraged by the military court's findings, in November 2005 Devi Sunuwar lodged a complaint with the Kavre District police against the four alleged perpetrators. In addition to the three soldiers sentenced by the military court, she also named Captain Niranjana Basnet. Under pressure from OHCHR-Nepal, and after Devi, with legal support from Advocacy Forum, had lodged a writ at the Supreme Court in January 2007, the District Police Office (DPO), Kavre proceeded with sending dozens of letters to senior police authorities, public prosecutors' offices at regional and national level and to the NA. However, feeling intimidated by the NA and unsupported by the political leadership of the country, the police did not exercise its powers to question, arrest and/or detain the suspects.

In March 2007, Maina's body, which had been illegally buried at the Panchkhal army camp, was exhumed. On May 8, 2007, responding to a petition filed by Advocacy Forum, the Supreme Court ordered that the NA Headquarters produce the original file concerning the Court Martial within a week. However, on June 11, 2007, the army headquarters merely presented a copy of the Court Martial judgment marking it as "strictly confidential". The Court of Inquiry Board report and none of the other 34 documents known to have been considered by the Court Martial were provided.

After much pressure and a ruling by the Supreme Court in September 2007 clearly stating that the case should be dealt with in a civilian court, on January 31, 2008, the Kavre Public Prosecutor finally filed murder charges in the Kavre District Court against the four army officers. The court also issued summons for the arrest of the four accused.

However, none of them were arrested. Instead, Niranjana Basnet (the only one of the four accused still serving, who had since been promoted from Captain to Major), was deployed with the United Nations (UN) Peacekeeping Mission in Chad. On September 13, 2009, the District Court ordered NA Headquarters to immediately proceed with the automatic suspension of Major Basnet and for Army Headquarters to submit all the files containing the statements of the people interviewed by the Court of Inquiry.

In early December 2009 it became publically known that Major Basnet had been deployed within the UN Peace Keeping Mission in Chad, leading to his repatriation to Nepal by the UN. He was immediately taken under control of the NA upon arrival in the country. He was never handed over to police, despite initial orders from the Prime Minister to do so. Appeals from the UN Secretary-General for the NA to comply with the court order and suspend Major Basnet and from the NHRC to hand over Major Basnet were not acted on. In July 2010, the NA announced that it had concluded its internal inquiry into the return from Chad of Major Basnet, finding him "innocent" and the return by the UN "against all international norms and regulations." [12] According to Major General BA Kumar Sharma, chief of the NA Legal Department, "Even going by the definition of the Military Act itself, it is clear that the Army was acting against a common enemy then and functioning under TADA [13]," and that "therefore there is no case against Basnet." [14] As of September 2010, neither Major Basnet nor any of the other three accused have been handed over to the police despite the outstanding court order.

In another emblematic case, student Sanjiv Kumar Karna was last seen by his family on October 8, 2003. He was arrested with ten friends while picnicking in Janakpur, Dhanusha District, by a group of 25 to 30 army and police personnel. Witnesses say that they were then taken into police detention where they were interrogated. Six of the men were subsequently released, but Sanjiv and four friends – Durgesh Kumar Labh, Pramod Narayan Mandal, Shailendra Yadav and Jitendra Jha – have not been heard of since.

Sanjiv Kumar Karna's relatives registered complaints with the authorities and were repeatedly assured that investigations were underway and that they would be informed of the results. However, nearly seven years on, no one has been arrested and brought to trial.

In 2006, the army claimed that they were not involved and that all five had been killed in a "police action" on the day of their arrests. The police refute the army's claim and deny involvement. Sanjiv's father, Jai Kishore Labh, a lawyer by profession, used his expertise to seek justice at national and international level.^[15] He died of a heart attack in April 2010, leaving a wife and younger son. In September 2010, the authorities finally gave permission for a group of national and international forensic experts to exhume the site where the five students are thought to have been killed and secretly buried. Whether the exhumations will lead to the arrest and charges of the alleged perpetrators remains a big question, given the experience in the Maina Sunuwar case.

Similarly, in the case of Arjun Lama, who was seen by many witnesses being abducted by members of the CPN-M in April 2005, and subsequently paraded in several villagers in Kavre district but remains missing, the police have failed in their duty to investigate. Eventually, a writ filed in the Supreme Court led to that court issuing a directive on August 11, 2008, ordering the Kavre police to register a murder case against six Maoists, including Agni Sapkota, a Maoist Central Committee member. Under ongoing pressure from OHCHR-Nepal and local human rights groups, the police have conducted some tentative investigations, but the case remains stalled.

Exhumation underway in Dhanusha



After seven years of continuous efforts to establish the whereabouts of five students in Janakpur, the Nepal police have eventually started an exhumation with support from National Human Rights Commission (NHRC), UN Office of High Commissioner for Human Rights (OHCHR) and forensic Experts from Finland and Nepal. Four bodies have been recovered one is still to be exhumed and the exhumation work has been put on hold for the time being.

Back on October 8, 2003, security forces had arrested five students, – Sanjeev kumar Karna from Janakpur Municipality-10, Durgesh Labh from the same ward, Jitendra Jha from Janakpur Municipality-4, Pramod Narayan Mandal from Kurtha VDC-1 and Shailendra Yadav from Duhabi VDC-7. After the incident, the authorities persistently denied their arrest and made them disappear. However, their arrest, detention and summary execution were established only after

investigations by human rights organizations like Advocacy Forum, Informal Sector Service Centre (INSEC), and National Human Rights Commission and family members. The revelation of the fact led to a sustained campaign and advocacy on the case, forcing authorities to disclose the truth.

Because of the deteriorating rule of law, climate of impunity and ongoing threats to the family members in an effort to establish truth and justice, it took us several years to use the existing legal mechanisms. Advocacy Forum assisted victim to file First Information Report (FIR) on the case on 9 July 2009 there was no formal criminal investigation by the government on the case. In the FIR, we had identified the possible burial sites and demanded the protection of site, exhumation of the bodies and thorough investigation on the case. After several hours of discussions, District Police Office, Dhanusa, headed by then SP, Bigyan Raj Sharma, took the FIR, went to the site, took the detailed information of the site and surrounded the place by barbed wire. However, investigation did not proceed even after that. During a follow-up, AF was told by the police that they had written to the NHRC on January 23 ; to the Gorakh Box Battalialion of the then NA on November 12, 2006, with a copy to Nepal Army Headquarters in Kathmandu; and to Nepal Police Headquarters and its Human Rights Cell in Kathmandu on October 25, 2006, requesting all of them to provide any information related to the case. The DPO stated it had received no responses from any of the agencies concerned. Dismayed, the father of Sanjeev Kumar Karna, and Pramod Narayan Mandal knocked the doors of the Supreme Court. Advocacy Forum assisted them to file the writ of mandamus in the Supreme Court on 28 January 2007. In its final hearing on the petition on February 3, 2009, the Supreme Court noted the conflicting versions provided by the army and the police. An internal police investigation report stated that the students were handed over to the Bhiman Barracks. The army on the other hand informed the court that the police were responsible for the disappearance and killing. On January 29, 2009, the NHRC wrote a letter to the PM and Council of ministers recommending that the government provide NRs 300,000 (US \$ 3,922) compensation to the families and initiate further investigations with a view to bringing those responsible to justice.

Owing to the involvement of high-ranking security officials in the case, family members and human rights organisations like Advocacy Forum have felt that deliberate attempts have been made to muffle up the impact of the case. Therefore, AF wants NHRC to form an investigation committee comprising of representatives from the Police, NHRC, UN-OHCHR ensuring the rights of human rights organizations involved in the cases to observe the process of investigation. As the NHRC's has taken the lead role on the case, which is a commendable act in itself, there is a pressing need to develop a strategy on the case. AF also wants NHRC to further resume the exhumation to establish the whereabouts of the fifth body as the abrupt halt on exhumation process has added to the anguish of the families and has put a blight on the prospects of early investigation.

These are all signs of the daunting struggle that still awaits not just Maina Sunuwar's, Sanjiv Kumar Karna's and Arjun Lama's family and supporters, but all victims of human rights violations during the 10-year armed conflict. In the reports "Waiting for Justice" (2008) and "Still Waiting for Justice" (2009), Advocacy Forum and Human Rights Watch exposed the pervasive culture of impunity in Nepal with documenting how none of the alleged perpetrators in 62 cases of human rights violations (including 40 cases of disappearances) during the conflict had been arrested. [16] This despite years of intensive litigation and campaigning by the victims, their families and local human rights defenders.

The wider sense of prevailing impunity as demonstrated by the lack of progress in bringing to justice those responsible for grave human rights abuses – whether members of the security forces or of the CPN-M – is reinforced by the reluctance to proceed with establishing the transitional justice mechanisms provided for in the Comprehensive Peace Agreement of November 2006 and the Interim Constitution of 2007. The CPA expressly commits all signatories "to create an atmosphere where the Nepali people can enjoy their civil, political, economic, social and cultural rights and ... to ensuring that such rights are not violated under any circumstances in the future." [17] Both sides agreed to make public within 60 days of signing the agreement the whereabouts of those "disappeared" or killed during the conflict and to set up a high-level Truth and Reconciliation Commission (TRC) and to "rehabilitate people victimized and displaced by the war". Nearly four years later, these promises remain unfulfilled amid a prolonged political stalemate.

In terms of reparation, the Government in May 2007 announced that "interim relief" would be paid to "conflict victims", including relatives of the disappeared. In 2008, the Guidelines on relief assistance for the families of disappeared persons were issued by the Relief and Rehabilitation Unit in the Ministry of Peace and Reconstruction. During the first phase, the Ministry identified 1,292 disappeared persons whose families would qualify for NRs. 100,000 (US \$ 1,350) relief assistance. As of April 2010, 1,027 families had reportedly been provided with such assistance. [18] The relief is distributed through Chief District Officers (CDOs, the highest representatives of the Home Ministry at the district level) who chairs various district-level committees with a responsibility to determine who is eligible for interim relief. The criteria used to make decision on allocation of interim relief are unclear and there are concerns about the impartiality of the process. As there is further delay in putting in place the Disappearances Commission and TRC provided for under the CPA, bodies which would normally be mandated to provide recommendations on equitable reparation policies, there are serious concerns about unfair and unequal distribution, including of the scholarships to children of the disappeared.

As a final general point, it is to be noted that there are very few provisions – in terms of truth-telling, prosecutions and reparation – for those people who were disappeared for weeks, months, and sometimes years, who often were seriously tortured but who were in the end released. The Interim Constitution of Nepal (promulgated in January 2007) established torture as a criminal offence, but to date no bill providing criminal penalties for torture has been passed by the Parliament. Therefore, torture functionally remains only a civil offence, and impunity for torture is systematic.

Victims of torture are largely absent from the draft TRC and Disappearances Commission bills. The pain, anguish and suffering of the family members of the victims of enforced disappearances, which has been recognized in international jurisprudence as amounting to torture, is not recognized in the bills. Similarly, the government has often ignored the specific sufferings of women victims of torture, enforced disappearances, or indeed the specific challenges faced by women whose husbands were killed or disappeared.

In terms of reparation, the definition of "conflict victims" in the 2008 "Interim Relief Guidelines for Conflict Victims" is limited to "persons disabled, mutilated or injured during the conflict". These guidelines only provide for economic assistance for disabled people, and for financial support for medical treatment to injured persons. Physical pain and extreme mental distress suffered during torture, as well as long-term psychological trauma and lost wages resulting from torture are not taken into account by these guidelines, leaving thousands of victims of torture without any kind of reparation whatsoever. Indeed, so far, only few disabled civilians have received reparations (as opposed to members of the security forces). Corruption and irregularities in the distribution of interim relief to disabled and injured persons have also been reported.

REVIEW OF RECOMMENDATIONS

Within this overall lack of progress in establishing the fate or whereabouts of the disappeared and the problems with providing full reparations to the relatives of victims of enforced disappearance, we set out below the specific concerns regarding the implementation of the WGEID's recommendations after its visit to Nepal in 2004.

Recommendation (a): *As soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance*

The CPA of November 2006 provided for the establishment of a Truth and Reconciliation Commission and for the fate of the disappeared to be established within 60 days. [19] The Interim Constitution of January 2007 further defined it as a state duty to: "Provide relief to affected families of victims on the basis of the report of Investigation Commission constituted to investigate the cases of those who went missing during the course of the conflict." [20]

In June 2007, in a landmark judgment recommending the establishment of a commission of inquiry to investigate disappearances, the Supreme Court also recommended that Nepal ratify the Convention for the Protection of All Persons From Enforced Disappearances “as soon as possible”. More than three years later, this directive has not been acted upon by the Government.

On December 23, 2007 a 23-point agreement was signed by the Seven Party Alliance (SPA) and the CPN-M including on the establishment of the following commissions within one month:

- Commission for the Investigation of Disappearances
- Truth and Reconciliation Commission
- State Restructuring Recommendations Commission
- Commission for the Study and Recommendation for Scientific Land Reform
- High Level Committee for Monitoring the Effective Implementation of the Comprehensive Peace Accord and other Agreements
- High Level Peace Commission

A first draft of the TRC Bill published in July 2007 included powers to grant amnesty to the perpetrators of gross human rights violations and violations of international humanitarian law (IHL), including extrajudicial execution, torture and disappearances. There were also concerns about lack of safeguards regarding the independence, impartiality and diversity of the Commission, both in relation to the selection of commissioners and in relation to operational and financial matters as well as about the lack of consultation with victims and their families during the drafting of the bill.

The inclusion in the first draft of the bill to establish a commission of inquiry into disappearances of a provision to make enforced disappearances a crime was a welcome step. However, the definition of enforced disappearances in the bill was not in line with international standards, and it did not recognize the gravity of the offence when committed as a crime against humanity or war crime. Furthermore, the punishment provided for in Section 6(1) of the proposed bill was not commensurate with the gravity of the offence. Section 6(1) provided that the person, who commits the offence shall be liable to punishment by imprisonment of up to seven years and a fine of up to half a million rupees (US \$ 6,680).

Amid pressure from national and international actors, the government has repeatedly amended the two bills. It has also removed the amnesty provisions in relation to grave human rights violations from the TRC Bill, though some confusion remains about the powers of the Commission to “cause” reconciliation. In April 2010, it tabled both bills in Parliament. As of September 2010, they have not been debated, and the drafts are before the Legislative Committee, which is considering proposed amendments to the texts.

In the meantime, the TRC and Disappearances Commission Bills are being invoked by the government to prevent criminal investigations into abuses committed by the security forces and the CPN-M during and after the 10-year conflict to proceed. This was confirmed in a recent response from the Prime Minister’s Office to the Supreme Court, in which it is reportedly stated that, “The perpetrators will be punished after an investigation by the to-be-formed commissions.” [21] This argument has also been used by district-level officials. For instance, in the case of Arjun Bahadur Lama [22], both the CDO and the Nepal Police have refused to register a First Information Report (FIR, complaint) and, in a written statement, police cited insufficient evidence and that the case would fall under the jurisdiction of the TRC as the grounds for refusal. In three other cases, the Appellate Court in Biratnagar has quashed petitions in relation to alleged extrajudicial killings, accepting police arguments that killings during the armed conflict will be the subject of investigations by the yet-to-be-established TRC and that, therefore, police have no duty to investigate. Advocacy Forum has filed an appeal against one of the Appellate Court decisions, which is pending before the Supreme Court.

In cooperation with the UN Development Program, the Government has drafted a criminal procedure code and a penal code though these have not been tabled in Parliament. Articles 200 and 201 of the draft Penal Code also define enforced disappearances as a crime, imposing a maximum penalty of 15 years. It is to be noted that the punishment provided for in the draft Penal Code is different from the one provided for in the draft Disappearances Commission bill.

In addition to not having criminalized disappearances to date, there is also a lack of action to criminalize torture. Torture and other ill-treatment are still routinely practiced in Nepal. [23] Torture cases remain non-prosecutable as torture has yet to be criminalised under Nepali law. The 1990 Constitution declared torture to be unconstitutional. However it failed to criminalize torture. The 2007 Interim Constitution requires the government to make torture a crime. According to article 26 “1) No person who is detained during investigation or for enquiry or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. 2) Actions pursuant to clause (1) shall be punishable by the law and any person so treated shall be compensated in accordance to the decision determined by law. In addition, the Supreme Court in December 2007 directed the government to criminalize torture. To date, the constitutional provision and Supreme Court judgment have not been implemented in law.

Article 164 of the draft Penal Code criminalizes torture, but fails to define it clearly in line with international standards. It provides for torture to be punishable by a maximum of five years and/or a fine, but fails to impose a minimum punishment. It also provides for a maximum time limit of six months within which victims have to file cases.

Advocacy Forum requests the WGEID to renew its recommendation for enforced disappearances and torture to be made a crime; with their definitions fully in line with international law and a punishment commensurate with the gravity of these offences; and for the Commission of Inquiry into Disappearances and Truth and Reconciliation Commission to be set up promptly, with full guarantees of independence and impartiality. Advocacy Forum also requests WGEID to recommend for the government of Nepal to ratify the Convention against Disappearances at the earliest opportunity.

Recommendation (b): *The Army Act be amended to provide that security forces personnel accused of enforced or involuntary disappearance in relation to a civilian be tried only in civilian courts; that this amendment also cover the crimes of murder and rape when committed by security forces personnel against a civilian; and furthermore, that no exception be made for crimes alleged to have been committed by security force personnel against civilians during a military operation*

A New Army Act was passed in May 2006. This Act shows some improvement to the earlier 1959 Act though it continues to provide for immunity from prosecution for any army personnel who “commits any act in good faith, in the course of discharging his duties, resulting in the death of or loss suffered by any person.” The Act however excludes acts of torture, disappearance, corruption as well as homicide and rape from these immunity provisions as well as from the jurisdiction of Court Martials. [24] It introduces “special provisions” for the investigation and trial of these crimes [25]. However the Act neither set out the definitions nor the penalties for these crimes. It merely refers to “acts which are defined an offence of corruption, theft, torture and disappearance by existing law” but as disappearance and torture are yet to be criminalised in Nepali law, there is no legal definition or penalty for these crimes in existing law.

In terms of the investigative procedures applicable to these offences, the Act provides for a process for investigation involving a committee composed of a Deputy Attorney General, the Chief of the Legal Section of the Ministry of Defence, and a representative of the Judge Advocate’s Office (*Prad Bivag*) of the Nepal Army not under the rank of Lieutenant. It is not known how many cases have been investigated by this committee.

The Army Act also provides for the adjudication of these cases by a “special court martial” consisting of a judge of the Appellate Court, the Secretary to the Ministry of Defence and the Chief of the Judge Advocate’s Office of the Nepal Army. [26] It is not known whether any such “special court martials” have been constituted to date, and, if so, whether they have heard any cases relating to enforced disappearances. In any event, AF would argue that such cases need to be tried before civilian courts. (See also below)

The army continues to fail to cooperate with civilian investigations into crimes committed by its members against civilians. The Maina Sunuwar case, as described above, is a prime example of this with the army continuing to refuse to hand over Major Niranjana Basnet and other accused soldiers to the Kavre District Court and police under an arrest warrant issued by the Court on January 31, 2008. The army has also used the argument of double jeopardy to avoid personnel facing prosecution before civilian courts. In the case of Maina Sunuwar, the then Brigadier General (now Major General), BA Kumar Sharma in a letter of May 22, 2006 to the DPO Kavre, stating that since the Court Martial had rendered a verdict “it is not lawful to initiate actions” against the four officers. However the argument of double-jeopardy is without foundation. The Supreme Court of Nepal reviewed the Court Martial findings in September 2007 and decided to refer the matter the Kavre District Court thereby issuing a ruling on the admissibility of the case. On the one hand, the NA is not formally challenging this Supreme Court decision; on the other, it is not cooperating with the civilian courts, thereby undermining the rule of law.

In any event, the Court Martial verdict ordered the punishment of the perpetrators in accordance with section 54 and 60 of the 1959 Army Act merely for using wrong and irresponsible procedures while interrogating her and for, burial without due legal process, not adhering to human rights and protection of humanitarian law, but not for torturing and killing Maina. On the basis of the limited Court Martial documents available, it is not clear what the exact charges were against the three accused. In any event, Principle 29 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts, or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.” [27] The Supreme Court of Nepal also upheld this principle in its judgement in the case of Imam Singh Gurung where it held that a civilian should never be tried by a military court, that “offences considered as military offences should have the direct involvement of the institution of the Nepal Army, its operations or official conduct” and that an offence should not be considered a military offence merely because an army official is involved. [28]

The NA has also used the argument that crimes committed during military operations should be adjudicated by Court Martial as was provided for in Section 60 of the 1959 Army Act. There is no legitimate argument that premeditated actions such as enforced disappearances and torture can be argued to be part of military operations. In any case, the proper forum for this argument to be settled is a civilian court, not the NA’s own Court Martial proceedings. All of the above proves that the NA remains firmly outside of civilian control and that there is no accountability of its members before civilian courts. [29]

Advocacy Forum requests the WGEID to renew its recommendation for all investigations and trials relating to enforced disappearances of civilians to be entrusted to civilian authorities; and for the NA to be compelled to fully cooperate, including through the handing over of suspects.

Recommendation (c): *The army release full and complete details, including any written judgements, of all court-martial proceedings undertaken in*

the last two years, and in the future; and, furthermore, that the Judge Advocate General undertake more aggressive prosecution of army personnel accused under the existing law of kidnapping and torturing civilians

The Maina Sunuwar case is the only Court Martial where some of the documents relating to a case heard during the armed conflict have been made public, but only after protracted legal battle by Maina's mother, Devi Sunuwar, as described above. The NA is not making public its court martial judgements though it does from time to time announce decisions through a press release.

On May 8, 2007, the Supreme Court ordered that the NA Headquarters produce the original file concerning the military court proceedings in the case relating to Maina Sunuwar within a week. Army Headquarters sent only a copy of the Court Martial report to the Supreme Court marking it "very confidential". In late June 2007, the registrar of the Supreme Court refused Devi Sunuwar's lawyers access to the documents arguing they were confidential. Advocacy Forum challenged this under the Freedom of Information Act 2007. On September 18, 2007, the Supreme Court ordered that copies of the judgement be provided to the family. Despite the initial order of the Supreme Court to the army to provide the full file, to date the NA has failed to comply. The army has provided a copy of the judgement, and copies of statements given by four accused to the court-martial to the Kavre District Court. However, none of the other 34 documents listed in the Court Martial judgement have been provided. [30]

On March 10, 2010 the NA was allegedly involved in the killing of two women and a child in Banspani, Bardiya National Park. However the versions of events given by the survivors and that by the army differ drastically. The NA claims that the three victims were killed during an encounter with armed poachers. Two survivors claim that they were collecting *kaulo* (medicinal tree bark) and were not armed. They said they found themselves surrounded by about 17 army personnel at 9pm on March 10, who then shot at them. The men ran away, but the women were arrested. An investigation carried out by Advocacy Forum and another human rights organisation, the Informal Service Sector (INSEC) revealed that there were no blood stains at the location where the encounter allegedly took place, but they did find discarded women's clothes at the sight, which the families have identified as belonging to the victims. This led to fears that the women and girl were raped, though the medical examination found no evidence. Two eye-witnesses reported seeing army personnel carrying the victims' bodies more than 24 hours after the time of the alleged encounter, and reported that the blood was fresh. With the help of Advocacy Forum a FIR against 17 army personnel was filed on March 25. However no investigation has taken place. The government has provided NRs25000 (US \$ 340) per victim to the families. It was also reported that the families and witnesses were threatened by the army personnel involved and coerced into signing an agreement to withdraw the FIR. There are also concerns that the evidence gathered was tampered with. The photos of the crime scene provided to the NHRC show guns and knives at the location of the alleged crime. However eye-witnesses who arrived at the same location shortly after the incident reported that there were no guns. Furthermore, not all the weapons present in the photos were collected as evidence by the police. The knives are missing. There are also questions raised about the location of the guns in the photographs, as they are all placed together in a way that does not reflect the alleged events. [31]

The NHRC has carried out an investigation and recommended to the government that those involved be identified, and criminal cases against them be filed in civilian courts. It also recommended taking action against those who tampered with the evidence. To date no steps have been taken to enforce these recommendations. On August 16, the parliamentary committee for women and children ordered the government to search and punish the army personnel involved. An army spokesperson responded that the army was not involved in the incident so there is no need to punish army personnel over this incident. [32]

Advocacy Forum requests the WGEID to repeat its recommendation for the NA and the government to provide full transparency regarding court martial and special court martial proceedings, including the publication of all relevant documents.

Recommendation (d): *The Government of Nepal and the security forces of Nepal ensure that accessible, complete, accurate and fully up-to-date lists of detainees are kept, and shared with families of the detainees and with civilian authorities, including the National Human Rights Commission. These lists should include detainees held in formal detention centres (i.e. Sundarjial) and in informal places of detention such as army barracks. The lists should be held locally, with a national registry created to bring together the names and locations of all detainees*

In December 2005, after the visit to Nepal by the WGEID, the Home Ministry undertook to establish "at the earliest" a Human Rights Central Registry Unit of all detainees within the Office of the Prime Minister and Council of Ministers. However, in February 2006, OHCHR-Nepal reported that the Ministry of Home Affairs was unable to inform OHCHR-Nepal of the numbers of people held under TADO or their places of detention. [33]

After the People's Movement of April 2006, those held under TADO were gradually released. In its report to the Human Rights Council of February 2007, OHCHR commented that the "continued absence of a fully-functioning national central detention register, despite its announcement by the Government in December 2005 (see E/CN/2006/107, para. 27), as well as the lack of accurate record-keeping at many prisons and police stations around the country make it difficult to monitor the legal status and release of detainees and remain issues which need to be addressed." [34]

The problems with record-keeping observed during the conflict continue to manifest themselves at the local level in relation to common criminal suspects detained by the Nepal Police. The detention records held at the local level are incomplete and often inaccurate, if not deliberately falsified. This allows in many cases for detainees to be held for several days without being produced before judges, despite the law requiring that they be presented within 24 hours of initial arrest.

Incommunicado detention has not been made illegal in Nepal and many detainees continue to be detained without access to their relatives or a lawyer during the first few days after arrest.

Moreover, in relation to a substantial number of detainees, the police do not keep accurate records of their detention or falsify police registers, apparently to hide detainees or cover-up the fact that their detention is illegal. The police normally use two registers: one which lists the names of detainees before remand and the other with those on remand. The lawyers and the public do not have access to these registers. Most commonly, the date of arrest is falsified in the first register in an attempt to circumvent the constitutional requirement to bring detainees before a court within 24 hours. The police often record the arrest date as the day on which the person in question is finally produced before the court. Access to relatives and a lawyer is then normally only given after a person has been produced in court. In the event that a person is released within a number of hours or in the first few days after arrest, their names are often not entered in any police records.

Such illegal detention increases the risk of torture or other ill-treatment. It also makes it difficult to prove the fact and date of detention, and that the physical injuries or mental suffering sustained by a person resulted from their being tortured or ill-treated in police custody, reducing the chances of a victim of torture obtaining redress. Making incommunicado detention illegal would, therefore, be a significant step towards the prevention of torture in Nepal.

In addition, other forces, such as the Armed Police Force and the Forestry Department detain people, and are also known to have tortured detainees. The army is also involved in patrolling national parks (see above, Bardiya National Park case), and this still leads to illegal arrests and detention. It is alleged that Krishna Bahadur Sunar (father and husband of one of the women and the girl who was killed in Bardiya National Park) was detained for several hours in the national park by army personnel on March 10 before being detained for several days in the local Forestry Office ward. He was released without charge on March 25.

In 2009 Advocacy Forum was informed of two cases where individuals were detained in private houses in Kathmandu. In the first case, in January 2009, Ram Bahadur BC arrested in Surkhet district was transferred by aeroplane to Kathmandu and taken to a private house near the airport. He was kept for five days in a second floor room next to the bathroom before being transferred to the Metropolitan Police Range. During these five days he was severely tortured and coerced into making a confession. He also reported that a man called Kamal was being held on the ground floor. The second case relates to the arrest in June 2009 of Niranjana Khanal, from Dang district. He was detained in a private house in Maharajgunj before he was taken to the Metropolitan Police Range. During his detention at the private house he was tortured and threatened. It is thought that the detention of prisoners in private houses is a regular police practice in Kathmandu.

Advocacy Forum requests the WGEID to repeat its recommendation for an effective and publicly accessible system of record-keeping relating to detainees at the local and national level, and for lists to be shared with the NHRC and for the Nepal Police to make not maintaining accurate registers a disciplinary offence. Records should be public unless there is a serious risk to the life of the person if it is disclosed s/he is in detention.

Recommendation (e): *The Supreme Court consider a more active application of its inherent contempt power to hold accountable and punish officials who are not truthful before the Court*

Regardless of its more robust performance since the end of the conflict, the Supreme Court bears considerable responsibility for not setting strict limits on state behaviour during the period of the armed conflict. It could have played a more active role in relation to cases of illegal detention and “disappearances” by ordering the relevant security agencies to produce prisoners in court in cases of habeas corpus. However, the army’s lack of cooperation with the court was and continues to be a major concern not sanctioned by the court. Weak sanctions for perjury and contempt of court exacerbate the problem. Despite obvious and repeated lies and misinformation from soldiers and army officials in court, none has ever been prosecuted or otherwise disciplined by the courts for perjury. This contributes to the sense among security forces that they are above the law.

On June 1, 2007, Nepal’s Supreme Court ruled on 83 habeas corpus writs, and ordered the government to immediately set up a commission of inquiry to investigate all allegations of enforced disappearances and to provide interim relief to the relatives of the victims. The court ordered that the commission of inquiry must comply with international human rights standards. However, to date, this order to set up a commission of inquiry has not been implemented.

The police and other authorities are also not complying with court orders to proceed with investigations. For instance, in the cases of Reena Rasaili and Subadhra Chaulagain, who were shot and killed by a group of army personnel in February 2004, the police did very little after a FIR was submitted requesting an investigation into their deaths in May 2006. On October 8, 2007, a mandamus petition was filed in the Supreme Court requesting the court to direct the police and other relevant authorities to investigate the killings. On December 14, 2009, the Supreme Court, after finding that no investigation had been carried out in this case except for correspondence between the DPO and the army, clearly stated that such correspondence does not constitute an investigative procedure in cases of homicide, and concluded that the District Attorney’s Office had failed to provide necessary instructions to the police to carry out the investigation. The court issued a mandamus against these offices to conduct prompt investigation as per the FIR. Similarly, a judicial stricture was issued against Police Headquarters, Mid-regional Police Office and the relevant Zonal Police Office to “become serious and proactive and alert to take necessary and appropriate steps as they have continuously shown indif-

ference to fulfilling the duty of investigation. Likewise, the judicial stricture has also been issued against the Attorney General's Office of Nepal to direct the district attorney of the related district attorney's office to become serious and take prompt, appropriate and material steps to investigate the case. The district attorney also should be asked to play a directive and coordinating role with the police personnel. It was found that the district attorney was passive in fulfilling his legal duties by failing to give necessary directions to the relating police personnel." [35] However, as of September 2010, the police investigations into these two killings have not progressed.

As seen above, the Army has failed to cooperate with orders by the Supreme Court to produce documents from the Court Martial in the Maina Sunuwar case, and to comply with arrest orders. However there have been no measures taken against those who have failed to comply with these orders. Furthermore there is no effective victim and witness protection legislation in Nepal. On August 24, 2010 the Asian Legal Resource Centre urged the Nepali government to adopt an effective system to protect witnesses of crime, as a big step towards ending the culture of impunity in Nepal. The necessity of such a system was highlighted again with the case of the Bardiya National Park killings in March 2010. It has been reported that the families and witnesses were threatened by the army personnel involved and coerced into signing an agreement to withdraw the case filed against the 17 army personnel.

As extensively documented, including by the WGEID, the remedy of *habeas corpus* was not effective during the conflict, and members of the security forces repeatedly lied to the court, and were never held in contempt for doing so. There remain concerns about the effective functioning of the *habeas corpus* remedy, in the absence of robust legislation on perjury and contempt of court. For example, in one recent case in which police arrested two members of an organisation for victims of Maoist abuses in Kathmandu on March 3, 2009 and kept them at various places of detention, including Hanuman Dhoka police station, Gausala police station and the police headquarters. However, when their friends and relatives made inquiries at these places, they were told that the two people were not held there. In response to a *habeas corpus* petition filed on 6 March 6, 2009, both the police authorities and the Home Ministry denied the two were in custody. Later, on March 15, 2009, an additional petition was filed in the Supreme Court after information was obtained that the detainees had been transferred to the District Police Office, Pyuthan. Hearing the petition on the same day, the Supreme Court issued an order requiring the Registrar of the District Court of Pyuthan to search for the detainees at the District Police Office, Pyuthan. The Registrar found that they were illegally detained in the District Police Office, Pyuthan. The detainees told the Registrar that they had indeed been arrested in Kathmandu and had been taken to Pyuthan. They also claimed they had been held blindfolded and in handcuffs throughout the period of their detention.

Thus, on March 16, 2009, the Supreme Court held that they had been illegally detained and issued a writ of *habeas corpus* to the Secretary of Ministry of Home Affairs and the Inspector General of Police requiring them to produce the detainees, without delay, to the Supreme Court by transporting them by the fastest means and to release them in the presence of the Registrar of the Supreme Court. The detainees were subsequently released from the Supreme Court on March 18, 2009. The Supreme Court further held that the written reply submitted to the Court by the authorities showed that they had attempted to hide the reality by forwarding false information to the court, and it directed the authorities to "show cause" as to why they should not be held in contempt of court. In response, the Secretary of the Ministry and the Inspector General of Police claimed that they had not been aware of the fact that the two detainees were in police custody and issued apologies to the court. As a result, no further action was taken. It is not known whether disciplinary action was taken against the individual police officers involved in these cases of illegal detention.

Advocacy Forum requests the WGEID to repeat its recommendation for the Supreme Court and other courts to practise a more robust application of contempt and perjury legislation and to recommend to the government to amend the relevant legislation on contempt and perjury and to put in place effective victim and witness protection legislation to ensure the relatives and other witnesses to enforced disappearances prepared to give evidence are able to do so without fear.

Recommendation (f): *The Terrorist and Disruptive Activities (Control and Punishment) Ordinance be rescinded immediately by the Government of Nepal*

Following the end of the conflict and the restoration of Parliament, the Terrorism and Disruptive Activities (Control and Punishment) Ordinance (which, in the absence of Parliament, had replaced the Act by the same name from October 2004) was allowed to lapse in September 2006 and is no longer in force. However, there is other security legislation that remains in force, more specifically the Public Security Act (PSA), which gives Chief District Officers (CDOs) powers to make detention or internment orders of up to an initial period of 90 days (which can be extended by further administrative decisions at a higher level up to 6 months, and one year). The discretion to make such an order exists as long as "adequate and appropriate grounds to prevent any person from doing anything which may immediately undermine the sovereignty, integrity or public tranquillity and order of Nepal" exist. [36] The International Commission of Jurists has commented that this Act contains provisions which are "overbroad and vague". There is certainly compelling evidence that this Act was seriously misused during the armed conflict to keep people in administrative detention for long periods of time. [37] It continues to be used from time to time, for instance, to detain members of the Tibetan community in Nepal demonstrating against Chinese Government repression in the Tibet Autonomous Region of China.

The role of CDOs is wide and varied. Section 5(5) of the Local Administration Act 2028 provides that the functions, duties, and powers of CDOs are: to maintain peace and order in a district; to provide assistance in developmental work by the Government of Nepal, District Development Committees, and Village Development Committees; to protect, care for and repair governmental

property in a district, and to act in accordance with orders or instructions issued from time to time by the Government of Nepal. Various other statutes assign further executive responsibilities to CDOs. Some of these statutes are: CDOs are the body required to implement verdicts of the District Court regarding compensation as per the Torture Compensation Act 2054; CDOs chair the District Security Committee; CDOs have the duty to administer the jail in their district under Section 16 of Prison Act 2019. Each CDO is therefore the head of their district's jail; CDOs have the authority to receive and investigate complaints filed regarding irregularities committed at a district level in accordance with the Investigation of Abuse of Authority Act and CDOs are the local officers responsible for issuing detention orders as provided by the Public Security Act 2046. In summary, a CDO has a large range of executive powers and functions. They play the leading role in administering each district. That role incorporates significant responsibilities in relation to the criminal justice system. In particular they are effectively in control of the district police force and jail.

The CDO also has significant quasi-judicial functions. For instance, in cases under the Miscellaneous Public Offences and Punishment Act 2027 (POA), a CDO is the officer of first instance responsible for taking legal action and delivering verdicts. Section 6 of this Act provides that CDOs may sentence those convicted to a fine of up to NRs 10,000 (US \$ 135) and prison term of up to 2 years. Section 9 of the Essential Goods Protection Act 1955 provides CDOs with the jurisdiction to hear cases. Section 15 of the Black Marketing and Other Social Offences and Punishment Act 2032 provides CDOs with first instance jurisdiction. Section 24 of Arms and Ammunition Act, 2019 has the provision that CDO shall hear cases under this Act. As per this amended Act, prison term up to 7 years may be imposed.

The preamble of the Interim Constitution asserts the importance of an independent judiciary. This principle is reinforced by Articles 33 and 100 which require the Nepali judiciary to be independent, and the government to adopt a political system respecting that independence. This principle is closely associated with the doctrine of “separation of powers”. That doctrine is central to the rule of law and requires that the different branches of government are independent of each other. Giving judicial powers to CDOs is in breach of that doctrine and the associated constitutional principle. CDOs cannot be considered independent as they are general representatives of the executive, specifically responsible for the police in any given district. Criminal cases are brought in the name of the Government of Nepal. To have a representative of that government as a judge in such case is clearly problematic. Secondly, it is likely that each case over which a CDO presides will incorporate a substantial quantity of police evidence. To have the local head of the police evaluating such evidence places him or her in an impossible situation. It also makes the CDO concerned partial; as s/he has an interest in upholding the reputation of the force.

It is also to be noted that around half of all detainees are not produced before a court, but are rather produced before a CDO. In a recent case a CDO, in response to a *habeas corpus* petition, informed the Appellate Court that a detainee had been produced before him whereas the detainee denied this was the case. [38]

In early 2010, Advocacy Forum filed a public interest litigation petition seeking a court order for the government to review all laws that grant powers to CDOs to hear criminal cases. The case is pending before the Supreme Court. Furthermore, Section 22 of the PSA (similar to the same section in the Army Act) provides immunity for any acts committed by state officials in good faith during the course of duty—including egregious human rights violations—that can be said to have been carried out in “good faith” while they were discharging their duties. These laws may be misused to shield soldiers, police officers and their superiors, who can merely assert “good faith” to escape legal liability.

Advocacy Forum requests the WGEID to recommend the review of the PSA, POA, AAA and other acts in clear violation of Nepal's obligations under international standards to guarantee the right not to be arbitrarily arrested or detained, to right to fair trial and the right to be tried by an independent tribunal. In respect of the latter, Advocacy Forum also requests the WGEID to recommend a review of all laws that grant judicial powers to CDOs in criminal cases.

Recommendation (g): *The Government and the security forces ensure that human rights defenders are protected from persecution for their work, as required under international law*

Human rights defenders continue to be frequently targeted in Nepal. Journalists and teachers, lawyers and women's human rights defenders have been most vulnerable. [39] Human rights defenders, who work in challenging impunity by taking up individual cases, raise concerns about torture in detention, investigate cases of disappearance and extra-judicial executions and violence against women face significant threats and intimidation from both the police and members of the community. The Government has not been very effective in providing protection to these defenders and preventing any threats or attacks against them. When incidents have occurred, they have not been properly investigated, and perpetrators have not been brought to justice despite EU Guidelines on Human Rights Defenders and Supreme Court Directives on women human rights defenders.

Advocacy Forum requests the WGEID to repeat its recommendation for the government to ensure that all assaults, attacks, threats and incidents of intimidation against human rights defenders are prevented and if such incidents nevertheless happen, ensure that these are properly investigated, and perpetrators are brought to justice in accordance with EU Guidelines and Supreme Court Directives on Women Human Rights Defenders. The government should also be encouraged to introduce legislation to ensure protection of human rights defenders.

Recommendation (h): *The Government continue to make every effort to strengthen the role of the National Human Rights Commission and to facilitate its work; and that, in addition, the Government ensure the continuity of the Commission even in the absence of the regular parliamentary appointments process*

The National Human Rights Commission (NHRC) was established in 2000. Despite or maybe as a result of civil society's initial cynicism, the NHRC demonstrated a real commitment to fulfilling the mandate of the organisation. However when the King took over power in February 2005, he appointed his own Commissioners. This destroyed the commission's credibility at a time when an independent monitoring body was arguably most needed. Sometime after the King stepped down, new Commissioners were appointed in 2007. The Interim Constitution establishes the Commission as a constitutional body and for Commissioners to be appointed by the Prime Minister after recommendation by the Constitutional Council. However, then Prime Minister Koirala made it clear that the Commissioners would be appointed on a party political basis. Many of those chosen by the political parties are under qualified and have demonstrated little or no understanding of international human rights law. [40] No implementing legislation has been passed to ensure that the NHRC recommendations are complied with. According to the NHRC's own figures, in total only 86 per cent of its recommendations have not been implemented and only 2 per cent of the 47 recommendations relating to disappearances have been implemented. [41]

Both the NHRC and OHCHR-Nepal have been criticised by civil society. There are serious concerns about both institutions' capacity and ability to offer protection for victims of torture and demand accountability for perpetrators through both public and private interventions. Similarly, there is a dearth of up-to-date analytical reports on any aspect of the observance of human rights in the country (the last report produced by OHCHR-Nepal was in 2008 and the NHRC annual reports are very scant on detail), questioning the effectiveness of these offices.

Advocacy Forum requests the WGEID to renew its recommendation for the NHRC to be strengthened and made a truly independent body, and for the government to ensure its recommendations are implemented within a reasonable time

Recommendation (i): *The National Human Rights Commission be given unhindered access to all places of detention, including all army barracks, without prior notification or permission*

As set out above (Recommendation h), the NHRC is not able to live up to its mandate and the expectations of the public. The NHRC still has not been able to set up systematic visits to places of detention. The mandate of OHCHR-Nepal was significantly weakened in June 2010, and now no longer provides for the monitoring of places of detention without prior permission.

From July 16, 2008 to July 14, 2009, the NHRC [42] received 677 applications of human rights violations. This included 70 cases of torture by security forces and 6 complaints for beating/assault by security forces. Out of these 70 torture cases received, the NHRC investigated 3. In 2 cases the NHRC recommended the punishment of the perpetrators, and in all 3 it recommended compensation. There is no public information available on the remaining 67 cases. The NHRC conducted investigations into half of the assault cases, and recommended action in two cases and compensation in two cases. According to the NHRC none of its recommendations in these cases have been implemented. [43] The general overview of past two reporting years is even more telling. From 17 July 2007 to 14 July 2008, the NHRC received 1173 complaints of human rights violations, including 104 of torture by security forces. It conducted a total of 175 investigations, and made recommendations in 62 cases. None of its recommendations were implemented. Of the 677 cases received in the following year, 521 were investigated, 4 were put on hold and 21 dismissed. Compensation was recommended in 63 cases, and the punishment of perpetrators in 41. However, implementation of the recommendations remains nil. [44]

The NHRC has faced a lack of cooperation by the government. It does not have the capacity to systematically visit detention centres in Nepal; it has also been slow to conduct and conclude investigations and for those cases where it has made recommendations, the government has time and again failed to implement them. According to the NHRC's own figures, only 2 per cent of the 47 recommendations relating to disappearances have been implemented. [45]

Advocacy Forum requests the WGEID to recommend the ratification of the Optional Protocol to the Convention against Torture and the establishment of a national monitoring mechanism at the earliest opportunity.

Recommendation (j): *The United Nations Department of Peacekeeping Operations evaluate the future participation of Nepalese security forces in United Nations peacekeeping missions, assessing the suitability of such participation against progress made in the reduction of disappearances and other human rights violations attributed to the Nepalese security forces, and seek the cooperation of the Office of the High Commissioner for Human Rights to review progress*

As described above, Major Basnet, suspect in a murder case, was sent on peacekeeping duties and served in the UN Peace Keeping Mission in the Republic of Chad, until he was repatriated on December 12, 2009 after the UN was informed of the fact that murder charges were pending against him in the Nepal courts relating to his involvement in the death in army custody of Maina Sunuwar.

It is necessary for there to be increased cooperation between the OHCHR and the UN Department of Peacekeeping Operations to exchange information on alleged perpetrators of human rights violators. There is an urgent need for the Nepal Government to re-assess every member of the NA currently participating in UN missions to ensure that they are not implicated in serious human rights violations and for the process of selection itself to be reviewed to ensure that no soldiers against whom there is prima facie evidence of involvement in human rights violations are sent on peacekeeping duties or training abroad.

Advocacy Forum requests the WGEID to recommend that no senior members of the NA be permitted to serve on peacekeeping missions unless and until the Nepal government has reviewed the current system of selection and put in place effective vetting procedures and the NA has demonstrated a commitment to cooperate with civilian authorities' investigations into complaints of grave human rights violations.

CONCLUSION

Advocacy Forum urged the WGEID to take the above information into consideration when reviewing the implementation of recommendations made after the mission to Nepal in 2004 and to consider its requests for additional recommendations. It also hopes that the WGEID will be able to visit Nepal again, and discuss with the Government and civil society ways to ensure prompt implementation of all outstanding recommendations.

The organizations hope that the Government of Nepal will give the highest priority to the full implementation of all outstanding recommendations and will pass a law to criminalize enforced disappearances, set up the Commission to Investigate Disappearances and the Truth and Reconciliation Commission without further delay and provide reparation to victims and their families and put in place effective measures to prevent enforced disappearances, including all those recommended by the WGEID.

AF also urges the WGEID to consider referring the situation in Nepal where there has been a clear practice of enforced disappearances which may amount to crimes against humanity and where the Government of Nepal appears unable or unwilling to investigate and prosecute those responsible to the relevant international authority, in line with its General Comment of August 2009.

References

1. All figures taken from the presentation made by the RRU of MoPR at "Reparations in Nepal" workshop of ICTJ/RRU-MoPR, 22 April 2009
2. See *Report of the Working Group on Enforced or Involuntary Disappearances: Visit to Nepal*, UN document E/CN.4/2005/65/Add.1, 28 January 2005
3. Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN document A/HRC/13/31 of 21 December 2009, page 116
4. Advocacy Forum and Human Rights Watch, *Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict*, September 2008
5. OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003-2004*, May 2006
6. OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, page 5
7. For instance, in Bardiya District, there were 14 cases reported to OHCHR, 12 of which were acknowledged by the CPN-M. See OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, page 5
8. Ibidem, page 70
9. International Criminal Court, Elements of a Crime, <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html>
10. In January 2005, Louise Arbour, the then UN High Commissioner for Human Rights met with Devi Sunawar and discussed the case during meetings with the then chief of Staff of the NA and Home Minister. OHCHR has continued to advocate for justice in this case since. See, for instance, OHCHR-Nepal, "OHCHR-Nepal insists on full investigation of Maina Sunuwar case following exhumations of remains", March 24, 2007, <http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/>

MAR2007/2007_03_24_Maina_exhumation_E.pdf

11. Nepalnews, *NHRC urges govt to proceed cases of HR violation through civil courts*, December 24, 2009, <http://www.nepalnews.com/main/index.php/news-archive/19-general/3068-nhrc-urges-govt-to-proceedcases-of-hr-violation-through-civil-court.html>
12. South Asians for Human Rights *Army gives Basnet clean chit, claims UN violated norms* July 14, 2010 available on <http://www.southasianrights.org/?p=1233>
13. The Terrorism and Disruptive Activities Act (TADA) were adopted into law by Parliament in 2002. Its provisions had earlier been promulgated as an Ordinance in the TADO. It lapsed as a law in the absence of Parliament but was re-promulgated as a royal decree from October 2004. It was not renewed after it lapsed in September 2006 and is no longer in force.
14. South Asians for Human Rights, *Army gives Basnet clean chit, claims UN violated norms*, July 14, 2010 available on <http://www.southasianrights.org/?p=1233>
15. Jai Kishore gave evidence at one of the WGEID sessions in 2007.
16. Advocacy Forum and Human Rights Watch, *Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict*, September 2008 and *Still Waiting for Justice. No End to Impunity in Nepal* of October 2009, <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0> and <http://www.hrw.org/en/reports/2009/10/15/still-waitingjustice-0>
17. *Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal*, para 7.1.2, November 21, 2006.
18. All figures taken from the presentation made by the RRU of MoPR at "Reparations in Nepal" workshop of ICTJ/RRU-MoPR, April 22, 2009
19. Comprehensive Peace Accord agreed between the Government of Nepal and the Communist Party of Nepal (Maoist), November 21, 2006 paragraphs 5.2.3 to 5.2.5
20. Interim Constitution, Article 33 (q)
21. The Himalayan Times, *Supreme Court rap brings government to its senses*, August 26, 2010, <http://www.thehimalayantimes.com/fullNews.php?headline=Supreme+Court+rap+brings+government+to+its+senses&NewsID=255358>
22. Arjun Bahadur Lama, a member of a royalist organization, Rashtriya Ekta Parishad, living in Kavre District, was abducted by members of the CPN-M in April 2005. According to witnesses, the cadre marched him through various villages in Kavre District. In late June 2005, they took him to Buddhakani Village Development Committee (VDC), where he was allegedly killed. The CPN-M claimed that he was killed on the same day he was taken during a clash with security forces but other sources which subsequently saw Lama believe he was killed after the abduction.
23. See Advocacy Forum 26 June 2010, *Torture of Juveniles in Nepal, A Serious Challenge to Justice System* and Advocacy Forum 26 June 2009, *Criminalize Torture*.
24. Army Act 2006 Article 68
25. Army Act 2006 Article 62
26. Army Act 2006 Article 62(4) read with Subsection 1 of Article 119
27. E/CN.4/2005/102/Add.1.
28. Iman Singh Gurung Case, Nepal Law Reporter 2049 at 710
29. This concern about the NA acting outside of civilian control became particularly acute in August 2010 when the Commander of the Armed Services lobbied political parties and diplomatic missions not to extend the mandate of UNMIN, claiming that its mission has been fulfilled and that it was biased in favour of the CPN-M. See Suhas Chakma, *Reality Check*, Kathmandu Post, August 30, 2010, <http://www.ekantipur.com/2010/08/30/oped/reality-check/321379/>

30. These include critical documents such as the statements given by other soldiers who were present during the time of the torture and death in custody. For a full list, see <http://justiceformainasunuwar.files.wordpress.com/2010/02/judgement-of-court-martial.pdf>
31. National Human Rights Commission, *A summary report on the 1 March 2010 incident in which a child and two women were killed in Baspani, Bardiya National Park by a patrol of Jwala Dal Battalion, Nepal Army*, April 1, 2010.
32. Kantipur Daily, August 17, 2010 <http://202.166.193.41/epaperhome.aspx?issue=1782010>
33. Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal, February 2006, UN reference E/CN.4/200/107, paragraph 27
34. Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal, January 2007, UN reference A/HRC/4/97, paragraph 27
35. Decision of the Supreme Court of Nepal in Writ no. 064-WO-0339, December 14, 2009
36. The Public Security Act, Section 3(1)
37. Lori Anderson, "Emergency and public safety laws in Nepal," Seminar, Issue No. 512, April 2002 and Amnesty International, *Nepal: A Spiraling Human Rights Crisis*, April 2002, AI Index: ASA 31/016/2002
38. OMCT, "Serious concerns for the safety of Mr. Sushan Limbu and Mr. Bhakta Rai at risk of further torture and other ill-treatment, Ref: **NPL 230709**," 23 July 2009, <http://omct.org/index.php?id=APP&lang=eng&actualPageNumber=1&articleSet=Appeal&articleId=8696>
39. Informal Sector Service Centre, *State of human rights defenders in Nepal*, 2007, http://www.humansecuritygateway.com/documents/INSEC_stateofhumanrightsdefendersinNepal.pdf
40. ACHR, *The Withdrawal of OHCHR in Nepal. Agreeing an Alibi for Violation*, Briefing Paper No. 5, March 4, 2010, <http://www.achrweb.org/briefingpapers/BPNepal-01-10.pdf>
41. The Himalayan Times, *86 percent of NHRC recommendations have been ignored*, July 6, 2010
42. The NHRC works to the Nepalese fiscal year.
43. NHRC Annual Report July 2008 to July 2009
44. NHRC Annual Report July 2008 to July 2009 and NHRC Annual Report July 2007 to July 2008.
45. The Himalayan Times, *86 percent of NHRC recommendations have been ignored*, July 6, 2010



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***Shantiniketan Marg 94/14
Gairidhara, Kathmandu, Nepal
Phone: 01-4004007/400400
Fax: 01-4426698
Email: info@advocacyforum.org.np
Web: www.advocacyforum.org***