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Lawyers Forum for Human Rights & Rule of Law

REDRESS

Ending Torture. Seeking Justice for Survivors

HELD TO ACCOUNT

**MAKING THE LAW WORK TO
FIGHT IMPUNITY IN NEPAL**

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TABLE OF ABBREVIATIONS

APF	Armed Police Force
APT	Association for the Prevention of Torture
CAT	Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CDO	Chief District Officer
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CPA	Comprehensive Peace Agreement
CPN-M	Communist Party of Nepal (Maoist)
CPN-UML	Communist Party of Nepal (Unified Marxist–Leninist)
CRC	Convention on the Rights of the Child
FIR	First Information Report
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTJ	International Centre for Transitional Justice
INSEC	Informal Sector Service Centre
NHRC	National Human Rights Commission
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
PLA	People’s Liberation Army
RNA	Royal Nepal Army
TRC	Truth and Reconciliation Commission
UCPN-M	Unified Communist Party of Nepal (Maoist)

I. EXECUTIVE SUMMARY

Nepal is in a period of transition from conflict and abuse of state power to the rule of law and democratic governance. Five years ago a peace agreement brought to an end a decade of violent conflict which saw thousands arbitrarily detained and arrested, forcibly disappeared, extrajudicially killed, raped and tortured. Since then, efforts have been made to reform the constitution and institutions of the state to implement and guarantee basic principles of democracy and human rights, but significant human rights violations persist and the victims of past human rights violations continue to be denied justice.

This report considers how the law presents both an obstacle and an opportunity to combat impunity for serious human rights abuses – making the case for legislative review and reform.

Despite action taken by brave individuals to seek justice for crimes committed against them and their loved ones, impunity for serious human rights violations by military, police and armed groups remains the norm. Police have been slow to investigate crimes, where courts make orders for cooperation or investigation these are generally not followed, and the military and some leading political figures appear to be keen to obstruct justice rather than promote it.

There has been a lack of will by governments of all political colours to ensure accountability. Successive governments have continued to use laws which allow them to authorise the withdrawal of criminal cases pending in the courts, including for serious crimes such as murder, and a constant refrain is that justice must wait for the promised – but not yet delivered – transitional justice mechanisms. In 2011 the situation has continued to worsen with some leading political parties supporting a general amnesty for all those involved in the Maoist insurgency and other ‘political’ movements, the Council of Ministers recommending a pardon for the only person convicted of a conflict-era crime (and who has only served some of his sentence), and the appointment of two Constituent Assembly members accused of serious human rights violations to the position of government minister. Meanwhile, there is no directive from the government to military and police to proceed with or cooperate with investigations, or to comply with judgments and decisions of national courts and international bodies, and downright political interference obstructing certain cases.

Legislative reforms to bring the army under civilian and democratic control have not gone far enough, and practical implementation of control and oversight envisaged in legislation has been severely deficient. Further reforms are needed to ensure that security personnel can be held individually accountable for serious violations of human rights, and there is an urgent need to develop comprehensive human rights-compliant vetting procedures to ensure that those facing serious allegations of human rights abuses are suspended or removed from the security forces. Meanwhile, the police lack independence from the executive on operational matters, and are not subject to the oversight of a specialised independent mechanism which would help to ensure that they fulfil their duties to investigate crimes and that any potential violations by the police themselves are fully examined.

Apart from a lack of oversight, state officials operate in a legislative environment granting very wide powers with limited safeguards. By providing a framework in which human rights violations are sanctioned, these laws not only legitimize and encourage such

violations, but ensure that they cannot be punished. These include laws granting powers to use lethal force – including in relation to minor offences and powers to shoot at sight in emergency situations – and wide powers of arrest and detention – including administrative preventive detention. They also include laws which make arbitrary arrest and detention more likely, including repressive and widely drafted criminal offences and myriad provisions which allow trial for criminal offences by administrative officers accountable to the executive such as Chief District Officers.

A glaring gap in Nepal’s legislation is the failure to criminalise torture and enforced disappearances. These are serious international crimes which cannot be dealt with (as torture is currently) by the provision of compensation and occasional use of disciplinary sanctions. Some steps have been taken towards the passing of legislation to make these offences criminal and punishable by appropriate penalties, but these proposed laws must be improved and enacted as a matter of urgency.

Because of structural weaknesses in Nepal’s criminal justice system, even where the laws are in place to criminalise acts and crimes have clearly taken place, justice remains elusive no matter whether these acts are committed by state actors or non-state actors. Systemic failures in investigations, prosecutions and the provision of remedy and reparation mean that impunity prevails. Existing laws should be strengthened to ensure that complaints are registered, investigations proceed in a timelier manner, and investigators are shielded from political or other pressure. Provisions can be introduced to ensure cooperation from military officers and political parties, and to strengthen the powers of the National Human Rights Commission and ad hoc Commissions of Inquiry. Where investigations reveal that a serious crime has taken place and provide evidence as to the identity of the perpetrator, these must be followed through with prosecutions, and obstacles in law to those prosecutions such as immunities and short periods of limitation must be removed.

In terms of the provision of a remedy and reparation to victims, the current laws are a patchwork of different legislation which cover some rights and not others, and some forms of reparation but not all. A considered review of these laws is required, and comprehensive provisions allowing reparations claims in the courts for serious human rights violations must be enacted.

Oversight and control of military and police, safeguards against abuse of power, criminalisation of serious human rights violations, the system of investigations and prosecutions (including the creation of specialised units) and the provision of reparation for victims must all be addressed to counter impunity in Nepal. Change to the law cannot achieve this on its own, but it is a crucial step in the process.

Key Recommendations

- Enact legislation to prohibit those in power from authorising amnesties, pardons and other forms of immunity for crimes under international law and gross violations of human rights, and ensure that this is enshrined in the new Constitution.
- Repeal or amend provisions blocking accountability of state officials, including immunity provisions and short limitation periods to file complaints.
- Criminalise torture and enforced disappearances and punish them in line with Nepal’s treaty obligations and obligations under international law.

- Implement the decisions of the Supreme Court on reform of the military justice system and removal of criminal jurisdiction from quasi-judicial officers without delay.
- Promptly establish a Truth and Reconciliation Commission and Commission of Inquiry into Disappearances, ensuring that their mandates are fully in line with international standards and best practices, and in particular that they are complementary to the normal criminal processes.
- Undertake a comprehensive review of laws to identify and amend provisions granting powers to use lethal force and allowing for or facilitating arbitrary arrest and detention to bring them in line with international standards.
- Amend legislative provisions concerning investigations and prosecutions to improve compliance with procedures and to allow for special investigative and prosecution units staffed by senior officers to deal with any reported crime amounting to a serious human rights violation or where a conflict of interest exists.
- Introduce legislation to establish an independent police complaints body and a Police Services Commission responsible for appointments, promotions and transfers of police officers.
- Revise vetting procedures for members of the security forces proposed for promotion, overseas UN peacekeeping duties, or specialised training abroad and introduce vetting procedures for members of the Maoist People's Liberation Army proposed for integration into the regular security forces.
- Take laws concerning civilian oversight of the military seriously and provide sufficient resources to implement these in practice.
- Amend legislation to include provisions requiring military and police to cooperate with investigations of civilian authorities or implementation of court decisions and imposing sanctions for failure to do so.
- Conduct a formal review of existing mechanisms for claiming reparation, and enact comprehensive and consistent provisions allowing for reparation claims in the courts for all serious violations of human rights.

II. INTRODUCTION

A critical obstacle in the path of Nepal's transition is enduring impunity for human rights violations. This culture of impunity applies both to violations committed during the conflict – not one person has been properly brought to justice before the civilian courts for the horrific crimes committed during that period¹ – and to violations occurring since.

Addressing impunity is an obligation under international and domestic law and the cornerstone of a successful transition to a democratic Nepal. Respecting and securing respect for human rights requires that those who might commit violations know that there will be consequences if they do. A failure to hold perpetrators to account creates an environment in which those with power know that they can act as they please. And a society cannot be healed where those most harmed within it have the harm done to them left unheard and unremedied.

This imperative to address impunity has been accepted – at least superficially – by the Nepal government. Continuing impunity was a central issue in the review of Nepal's human rights record by the Human Rights Council at its Universal Periodic Review in January 2011. Numerous states expressed concern at the failure to hold those responsible for serious human rights violations to account, and the impact that this has on the consolidation of the rule of law.² The Nepal government accepted states' recommendations, among others "to tackle impunity by investigating and prosecuting human rights abuses committed by state and non state actors during and since the conflict, implementing court orders, including on the Nepal Army, and ending political interference" and to "review legislation, and amend it where necessary, to remove provisions which allow Government and military personnel to act with impunity".³ However, its actions, as examined in this report, have in many cases pulled in the opposite direction.

Tackling impunity and securing respect for human rights is complex, particularly in a country in transition. But it is vital. It requires not just changes in the laws which make it

¹ One person, UCPN-Maoist Constituent Assembly member Bal Krishna Dhungel, has been convicted of a murder committed during the conflict, and his conviction upheld by the Supreme Court. Although he served some time in prison before his conviction was initially overturned on appeal, he has not been rearrested since the Supreme Court decision to serve the remainder of his sentence and attempts have been made to grant him a pardon, while he remains an active member of the Constituent Assembly: see Anil Giri, 'Impunity watch: Cases against Maoists being fast withdrawn', Kathmandu Post, 17 May 2011, <http://www.ekantipur.com/the-kathmandu-post/2011/05/17/top-story/impunity-watch-cases-against-maoists-being-fast-withdrawn/221795.html>; Advocacy Forum, 'Evading Accountability by Hook or by Crook: The issue of amnesties in post-conflict Nepal' (June 2011) pp. 2 and 8, available at: <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf> and República, 'Victim's Kin Condemns Proposal to Pardon Maoist Lawmaker', República, 3 October 2011, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=36828; Kiran Chapagain, 'PM, AG solicit President of pardon Dhungel', República, 7 November 2011, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=37996.

² See Human Rights Council, Seventeenth session, Universal Periodic Review, 'Report of the Working Group on the Universal Periodic Review: Nepal', A/HRC/17/5, 8 March 2011, concerns expressed by Hungary (para. 32), Switzerland (para. 34), United Kingdom (para. 66), New Zealand (para. 77), Netherlands (para. 78) and Denmark (para. 80). See also the government's responses to the recommendations in para. 108 of the report in: 'Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review', A/HRC/17/5/Add.1, 1 June 2011. Note in particular the response to recommendation 108.17, where the government states that it brings any official found responsible for extrajudicial killings or enforced disappearances to 'justice'.

³ *Ibid.*, paras. 106.38, 107.3.

difficult to achieve justice, but a holistic approach addressing laws, institutions and practices which underpin and reinforce impunity both on the books and in reality.

Advocacy Forum has written extensively on the problems in laws, institutions and practices that contribute to ongoing impunity in Nepal.⁴ This report focuses in more detail on one of those aspects: the law – looking at the ways in which it presents both an obstacle and an opportunity to combat impunity for serious human rights abuses. Advocacy Forum and REDRESS, as organisations who work with survivors of serious human rights violations, are faced constantly with the issues raised in this report: it is the experience of survivors and victims' families that this report hopes to give voice to.

This report makes the case for legislative review and reform – drawing attention to significant existing problems in the legislation, and pointing to areas in which the law can be used as a positive force in shaping institutions and practices to fight impunity. It is hoped that this will be a useful launching pad for the parliament, political parties and those engaged in law reform to begin a comprehensive legislative review, and a reference and rallying cry for civil society and international donors to hold the government to its commitment to combating impunity: indeed to hold it to account.

Methodology

This report is based on an examination of 20 pieces of Nepali legislation currently in force (listed in the Appendix) against international human rights standards and Nepali constitutional law in terms of how those laws contribute to impunity for serious human rights abuses, both past and current. It focuses in particular on impunity for arbitrary arrest and detention, enforced disappearances, extrajudicial executions, rape and torture – all of which were widely committed during the conflict period, and which continue to greater or lesser extent today.

In relation to de jure impunity the review specifically looked for:

- (a) provisions which facilitate the commission of serious human rights violations by state agents and others;
- (b) provisions which provide immunities or amnesties to those who have committed human rights violations;
- (c) provisions imposing barriers to the investigation or prosecution of such violations, and the provision of reparation to victims;
- (d) the absence of legislation specifically criminalising the specific human rights violations referred to above.

In relation to de facto impunity, the review examined:

- (a) the extent to which the law provides for accountability and oversight of the military and police;

⁴ See Advocacy Forum and Human Rights Watch, 'Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict' (September 2008) available at: <http://www.hrw.org/reports/2008/09/11/waiting-justice-0> (Waiting for Justice); 'Still Waiting for Justice: No End to Impunity in Nepal' (October 2009) available at: <http://www.hrw.org/reports/2009/10/15/still-waiting-justice-0> (Still Waiting for Justice); and 'Indifference to Duty: Impunity for Crimes Committed in Nepal' (December 2010) available at <http://www.hrw.org/reports/2010/12/14/indifference-duty-0> (Indifference to Duty).

- (b) the extent to which the law provides for effective vetting of government, military and police personnel and armed groups who are the subject of credible allegations of having committed serious violations of human rights or humanitarian law;
- (c) the extent to which the law provides the necessary institutions with appropriate functions and powers, and procedures for the effective investigation, prosecution and provision of remedy for the human rights violations identified above.

A section by section breakdown of the relevant issues raised in each law, and suggested action in relation to each section identified as problematic, is provided in the Appendix. It should be emphasised that the review of the laws is limited to the particular issues of focus for this report as outlined above, and does not address all human rights concerns within each piece of legislation.

III. BACKGROUND AND CONTEXT: A CULTURE OF IMPUNITY

Impunity for serious human rights violations by military, police and armed groups has been a central and longstanding feature of life in Nepal, allowing abusive behavior to continue and spread.⁵

Following ten years of conflict, Nepal is now in the process of consolidating a democratic state under the rule of law. However, a complete failure to date to address crimes committed during the conflict period is undermining the rule of law and separation of powers. This failure makes it clear that the old rules still apply: the powerful are not to be held accountable. In such an atmosphere stated commitments to human rights principles rest on very weak foundations, and the atmosphere is conducive to the continuation of abuses.

This section examines the history of abuses during the conflict and the power dynamics at play in resisting accountability for the crimes. Unlike the rest of this report, this section is therefore not focused on the wording of legislation and the position under the law, but rather how impunity has played out in practice. Attempts to address impunity through law must consider and deal with these dynamics. The lack of accountability for these crimes is a key human rights failing in itself, and creates an atmosphere conducive to future violations.

History of violations

Human rights violations predate Nepal's armed conflict, which started in 1996, after the Communist Party of Nepal (Maoist) ("CPN-M") declared a 'people's war' against the ruling classes, targeting the monarchy (which traditionally had close connections to the army) and Nepal's political parties. Between 1996 and 2006 Nepal was gripped by conflict between government forces and Maoist insurgents and experienced widespread, and in some cases systematic, human rights violations.⁶

In the first years of the conflict the Nepal Police were predominantly responsible for fighting the CPN-M. Hundreds of police officers lost their lives and the majority of police posts across the country stopped functioning. In 2001 a state of emergency was declared and the Royal Nepal Army ("RNA", now Nepal Army) was deployed to quell the insurgency, with wide powers to arrest people involved in what were termed "terrorist activities". In 2003 the police and paramilitary Armed Police Force (APF) were put under the unified command of the army.

The declaration of a state of emergency and the enactment of new anti-terrorist legislation providing wide powers to security personnel led to a sharp increase in the number of abuses committed against civilians by all parties – police, paramilitary, army and CPN-M cadres. Reports document how extrajudicial killings, arbitrary arrest and

⁵ For further detail, see 'Waiting for Justice', *ibid.* pp. 15-21. After visits to Nepal in 2005 and 2006, the UN Special Rapporteur on Torture and UN Working Group on Enforced Disappearances both expressed deep concern at the "culture of impunity" existing in Nepal: see Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Nepal, E/CN.4/2006/6/Add.5 (9 January 2006) available at: <http://daccess-ods.un.org/TMP/4839534.html>; Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal, E/CN.4/2005/65/Add.1 (2004) available at: <http://daccess-ods.un.org/TMP/6563128.html>.

⁶ For a detailed explanation of the history of the conflict, see 'Waiting for Justice' (2008), (above n.4), pp. 9-14.

detention, torture, enforced disappearances and rape were systematically practiced.⁷ As the army was not able to maintain positions outside of their barracks, they made regular ‘sweeps’ into areas of Maoist activity, often in response to Maoist attacks. These ‘sweeps’ tended to target civilians, as in most cases the People’s Liberation Army (“PLA”, the armed wing of the CPN-M) had left the area by the time the army arrived.

In February 2005 the King assumed all executive authority. Thousands of political activists, journalists and human rights monitors were ordered to be detained and severe restrictions were imposed on civil liberties, including bans and curfew orders.

In November 2005 the parliamentary parties and CPN-M agreed to a memorandum of understanding for peace and democracy, which proposed peaceful transition through the election of a constituent assembly, and committed the CPN-M to multi-party democracy, respect for human rights and the rule of law. Following widespread street protests in April 2006, the King announced the reinstatement of the House of Representatives, and a government was formed under the Nepali Congress party leader.

After difficult negotiations between the government and the CPN-M, the conflict formally came to an end in November 2006 with the signing of a ‘Comprehensive Peace Agreement’ (“CPA”). A new interim Constitution was adopted in 2007,⁸ and a deadline of May 2010 set for the drafting of a new Constitution.

Even though the conflict had ended, human rights violations by security forces, Maoist cadres and armed groups continued in 2007, including killings of civilians by armed opposition groups, and killings through use of excessive force by police and APF during demonstrations.⁹

Elections were held in April 2008: no party gained a majority, but the CPN-M gained the largest number of seats. Since then political wrangling has kept the government in deadlock for significant periods. The May 2010 deadline for the drafting of the Constitution was missed, and extended to May 2011. That deadline was also missed, as was the next one of August 2011. A new deadline was set for 30 November 2011.

As this report went to press – with the November deadline looming and almost certain to be missed again – the major political parties reached what was hailed as a breakthrough seven-point deal on completing the peace process, writing the constitution and formation of a national consensus government. The agreement addresses, among other things, integration and rehabilitation of former Maoist combatants, the formation of the transitional justice mechanisms, a ‘relief package’ for victims of the conflict and the

⁷ See for instance: Amnesty International, generally on Nepal, <http://www.amnesty.org/en/region/nepal>; ‘Nepal: A Spiralling Human Rights Crisis’, 3 April 2002, available at: <http://www.amnesty.org/en/library/info/ASA31/016/2002/en>; ‘Nepal: A Deepening Human Rights Crisis’, 19 December 2002, available at: <http://www.amnesty.org/en/library/info/ASA31/072/2002> and Human Rights Watch, generally on Nepal, <http://www.hrw.org/asia/nepal>; ‘Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal’s Civil War’, 6 October 2004, available at: <http://www.hrw.org/en/reports/2004/10/06/between-rock-and-hard-place>.

⁸ Interim Constitution of Nepal 2063 (2007).

⁹ Human Rights Council, ‘Report of the High Commissioner for Human Rights on the human rights situation and activities of her office, including technical cooperation in Nepal’ (18 February 2008) A/HRC/7/68, available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/HC/2008_03_14_HRC_Report.pdf.

formation of a high level political mechanism to resolve outstanding issues around the drafting of the constitution.¹⁰

The deal does not directly address the question of justice for crimes committed during the conflict, stating simply that “[t]he legal cases of the conflict era would be looked into as per the letter and spirit of the Comprehensive Peace Agreement and the Interim Constitution, 2007”. Given recent government moves to evade accountability for conflict-era crimes there are concerns, however, that this leaves the way open for a further entrenchment of impunity.

Investigations & Impunity

In 2011 an official taskforce established by the government determined that the conflict had resulted in at least 17,265 deaths and 1,327 disappearances.¹¹

However, an almost complete lack of investigation and accountability for these violations was a key feature of the conflict. Following a visit to Nepal in February 2000, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged the government “to put in place strong, independent and credible mechanisms to investigate and prosecute alleged human rights abuses, including extrajudicial executions and disappearances, attributed to the police and other state agents”.¹² Concerns about the existing “culture of impunity” were again raised by the Working Group on Involuntary and Enforced Disappearances and the UN Special Rapporteur on Torture following visits in 2004 and 2005 respectively.¹³

After the conflict, some political commitments were made to investigate and address the crimes committed. The CPA committed all signatories to respect human rights, to reveal the whereabouts of those disappeared during the conflict and to set up a high-level Truth and Reconciliation Commission (“TRC”). These commitments were repeated in the Interim Constitution as responsibilities of the state.¹⁴ In addition, the CPA required the parties to clarify the fate of the disappeared within 60 days,¹⁵ and a 23 December 2007 agreement committed the then government to set up a commission within a month.¹⁶

Although bills to set up a TRC and Disappearances Commission have been pending for a number of years, these mechanisms have not yet been established.

¹⁰ See Republica, ‘The Seven Point Agreement’, 2 November 2011, available at:

http://www.myrepublica.com/portal/index.php?action=news_details&news_id=37799.

¹¹ As reported by the Ministry for Peace and Reconstruction on 29 March 2011, using figures compiled by an official taskforce responsible for ascertaining the loss of life and property during the conflict: see report by ‘Nepal Monitor’ at http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html.

¹² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (9 August 2000), E/CN.4/2001/9/Add.2, para. 20.

¹³ ‘Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal’ (28 January 2005), E/CN.4/2005/65/Add.1; Report by the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Manfred Nowak, Mission to Nepal’ (9 January 2006), E/CN.4/2006/6/Add.5.

¹⁴ Interim Constitution 2063 (2007), See Article 33 (c), (m), (q), (s).

¹⁵ Comprehensive Peace Agreement (21 November 2006), Article 5.2.3.

¹⁶ Point 6 of the 23-point agreement of 23 December 2007 between the government and the CPN-M, which committed the parties the government to establish the Disappearances Commission, Truth and Reconciliation Commission, State Reconstruction Commission, Study and Recommendation Commission for Scientific Land Reform, a High Level Peace Commission and a High Level Committee to Monitor the Effective Implementation of the Comprehensive Peace Accord and other Agreements, none of which have been established to date.

In the absence of comprehensive transitional justice mechanisms, investigations of the conflict-era crimes have taken place in various fora, but with little concrete result. To date, not one person from the military, APF, police, or CPN-M has been properly brought to justice in a civilian court for a crime committed during the conflict period.¹⁷

Investigations outside the criminal justice system

Under national and international pressure towards the end of the conflict, and following it, the government established various ad hoc inquiries and investigations into killings, disappearances and excessive use of force from the conflict period. Despite public recommendations for criminal prosecutions from some of these none resulted in any prosecution.¹⁸

The Office of the High Commissioner for Human Rights (OHCHR) in Nepal has also conducted numerous investigations into specific cases of extrajudicial executions and disappearances,¹⁹ as well as more wide-ranging investigations into patterns of violations, such as disappearances in the Bardiya District.²⁰

The National Human Rights Commission (“NHRC”), recognised under the Interim Constitution as a constitutional body,²¹ has also conducted a significant number of investigations into cases brought before it by victims and families of victims of conflict-era and post conflict crimes.²² The NHRC has powers to conduct inquiries and investigations into violations of human rights, either on its own initiative, upon receipt of a complaint, or at the direction of the government.²³ In terms of disappearances alone, 1,619 disappearances were reported to the NHRC (1,234 attributed the security forces, 331 to the CPN-M and 54 unidentified).²⁴ It has investigated and recommended disciplinary action and/or prosecution of perpetrators in many of those cases, but it has not initiated prosecutions of its own motion.

Attempted investigations using the criminal justice system

In the absence of concrete action stemming from these investigations, victims have turned to the normal criminal justice system and, in some cases where that has failed, the UN Human Rights Committee, to push for investigations and prosecutions of those responsible. However, as discussed further below, police investigations have been slow or

¹⁷ In relation to the case of Bal Krishna Dhungel, see fn. 1.

¹⁸ See ‘Waiting for Justice’ (2008), (above n.4), pp. 19-21.

¹⁹ See the various reports of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, 2006-2011, available at: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NPIndex.aspx>.

²⁰ See, for example, the 2008 report into disappearances in the Bardiya District, following investigation of 156 cases of disappearances by both state agents and the CPN-M: OHCHR, ‘Conflict Related Disappearances in Bardiya District’ (December 2008) available at: <http://www2.ohchr.org/SPdocs/Countries/OHCHRReportBardiyaDistrict.doc>.

²¹ See Interim Constitution 2063 (2007), Article 131.

²² For a breakdown of the recommendations made over the period 2000-2010, see NHRC, ‘Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)’ (November 2010) available at: <http://www.nhrcnepal.org///publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf>. This shows that up to November 2010 the NHRC had received 10,507 complaints, of which 2,872 had been ‘settled’ either by the making of recommendations by the NHRC or by dismissal, while 7,635 remained under investigation (pp. 8-9).

²³ Human Rights Commission Act 2053 (1997), Sections 9(a) and (b).

²⁴ ‘Waiting for Justice’ (2008), (above n.4), p. 10.

non-existent, court orders and arrest warrants have been ignored by the army, police and armed groups, and the government and political parties have not only failed to take positive action to support court processes but have in some cases been responsible for undermining them. Furthermore, the government has failed to implement the actions recommended by the Human Rights Committee in its Views on the cases from Nepal.

Responses of Institutional Actors

Government inaction and obstruction

Given the power of the army, the implication of CPN-M officials in crimes from the conflict period, and the relative weakness of Nepal's institutions, addressing impunity requires sustained political commitment from the government, of whatever makeup.

During the Universal Periodic Review of Nepal's human rights record before the Human Rights Council in January 2011, the government of Nepal indicated that it is "fully committed to establishing Constitutional supremacy, ensuring the rule of law, good governance and human rights, as well as providing a positive conclusion to the peace process by eliminating insecurity and addressing impunity". It added that "addressing impunity entails addressing the past and maintaining the rule of law at present. Nepal is fully committed to work on both fronts".²⁵

However, these words have not been matched by action. Instead governments of all colours have shown a complete lack of political will to address impunity, and have in some cases taken significant steps to entrench it.

First, successive governments have used executive power to authorise the withdrawal of criminal charges in cases (including murder and rape) pending before the courts. More than 600 cases were withdrawn by just two cabinet decisions – one in October 2008 by the Maoist-led government, and the other in November 2009 by the Communist Party of Nepal (Unified Marxist–Leninist) (CPN-UML) led government.²⁶ The government next constituted under Prime Minister Jhanna Khanal announced plans to follow suit in June 2011,²⁷ but did not pursue this in the face of national and international pressure. The cases withdrawn to date included a significant number of cases filed by state agencies against Maoist leaders and cadres during the conflict, as well as incidents after the signing of the CPA.²⁸

In 2011, rather than making progress, the situation has continued to worsen. In late August 2011, after the passage of yet another deadline for the drafting of a Constitution without concrete results, the UCPN-M and United Democratic Madhesi Front (UDMF) formed a new government. Their coalition was based on a four-point agreement, the second point of which provides for a general amnesty for all court cases against those involved in the Maoist insurgency, Madhes movement, Janjati movement, Tharuhat

²⁵ Draft report of the Working Group on the Universal Periodic Review (28 January 2010) A/HRC/WG.6/10/L.3 para. 51, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/Nepal-A_HRC_WG.6_10_L.3-eng.pdf.

²⁶ Advocacy Forum, 'Evading Accountability by Hook or by Crook' (2011), (above n.1), p.10.

²⁷ Republica, 'Mahara indicates withdrawal of cases against Sapkota, others', 20 May 2011, <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=31508> accessed 19 May 2011.

²⁸ Advocacy Forum, 'Evading Accountability by Hook or by Crook' (2011), (above n.1), p.10.

movement and Dalit and Pichadabarga movements. Ironically, the third point of the agreement was “to uphold universal fundamental rights, constitutional supremacy and the rule of law” among other values.²⁹ In November 2011 the government recommended a pardon for the only person convicted of a conflict-era crime, UCPN-Maoist Constituent Assembly member Bal Krishna Dhungel, and promoted another Constituent Assembly member facing an arrest warrant for abduction and murder to the position of cabinet minister.³⁰ The issue of amnesties is addressed further in Section VIII, below.

The government has also failed to take the positive steps required by the CPA and Interim Constitution to address past crimes, including the formation of a high-level Truth and Reconciliation Commission and Disappearances Commission. In the words of the Supreme Court: “It is a paradox that providing the transitional justice system is still not in the priority of the government, parliament and the political parties”.³¹ The deal reached in November 2011 between the major political parties agreed again on the prompt formation of these mechanisms, however significant further work and time will be required to pass the legislation and make these operational.

In the meantime, the government has failed to ensure that state agencies investigate conflict-era crimes and prosecute those responsible, and that the army cooperates with such processes – in defiance of international treaty bodies and orders of national courts – by arguing that these will be ‘dealt with’ by the yet to be established TRC and Disappearances Commission. For example in October 2008, the Human Rights Committee examined the case of the disappearance of Mr Surya Sharma and found Nepal had violated multiple rights under the International Covenant on Civil and Political Rights (ICCPR). It also found that the failure to investigate and provide a remedy amounted to a separate violation under the ICCPR.³² More than three years since the Committee’s recommendations, the government has failed to take any concrete action to investigate and, in its responses to the Committee, explains this on the grounds that the case will be dealt with by the future transitional justice systems.

Stalled reform of the military

It was clear at the end of the conflict that to rein in abuses by the military, political oversight needed to be strengthened and action taken to ensure that army officials operated within the law and were accountable under it. A 2006 report noted that:

Political oversight of the army has been chronically weak. The courts have been unable effectively to enforce remedies such as habeas corpus and to hold the army to account when it ignored orders of the court to release those arbitrarily detained. In the few cases that have been prosecuted – in military and not civilian courts – the charges have

²⁹ See Gani Ansari, ‘Maoists, Madhesis Ink Four Point Deal’, Republica, 28 August 2011, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=35296. See also the open letter from Advocacy Forum and other human rights organisations to the Prime Minister, Dr Baburam Bhattarai, dated 2 September 2011 expressing serious concern about the plans, available at: <http://www.advocacyforum.org/downloads/pdf/press-statement/open-letter-to-pm-september-2-2011.pdf>.

³⁰ The member, Suryaman Dong, who was appointed State Minister of Energy, faces an arrest warrant for the abduction and murder of Arjun Lama in Kavre on 29 April 2005 (see fn. 52).

³¹ Decision of the Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011.

³² Sharma v Nepal, Communication No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006 (28 October 2008) para.7.

been inappropriate and relatively minor and the penalties inadequate given the gravity of the unlawful conduct involved.³³

A stated priority of the newly restored government at the end of the conflict was to remove the King as commander in chief of the armed forces and to bring greater democratic and civilian control and accountability to the Nepal Army. One of the first pieces of legislation passed by the new government in 2006 was a new Army Act,³⁴ which goes some way to legislating to achieve these aims. The Act is examined in further detail in Section V, below.

The Interim Constitution, adopted in 2007, also enshrined provisions related to democratic control of the army. It provides that the Council of Ministers shall control, mobilise and manage the Nepal Army, on the advice of a National Defence Council made up of members of the executive. It also required the Council of Ministers to create an extensive work plan for the democratisation of the Nepal Army and implement it.³⁵

Despite the potential for greater democratic control and accountability of the military under the Interim Constitution and the 2006 Act, few steps have been taken to reform the security forces, and no cooperation has been shown with the civilian justice system.³⁶ There is no sign of the political will needed in order to “grip the generals, or to build the capacity to make civilian control of the military a reality – both essential foundations for a democratic state”.³⁷

The positive aspects of the Interim Constitution and the Army Act, which aim to increase the accountability of the army to civilian authorities (as described further below), have not been matched by political will or administrative capacity to ensure effective control and oversight (see further below, Section IV).

Furthermore, where the courts have attempted to hold officers to account and have required the army’s cooperation, that cooperation has been denied. In the two cases where sustained pressure including Supreme Court judgments have led to the issue of arrest warrants against serving army officers, the army has refused to hand over the accused to police, arguing that they have already been tried by court martial.³⁸ Both cases relate to the killings of teenage girls during the conflict period – the first, Reena Rasaili, was killed in her village after being detained and the second, Maina Sunawar, was killed while in military custody after sustained torture.³⁹ Both officers, Saroj Basnet, and

³³ International Commission of Jurists, 'Nepal: Recommendations for Amendments to the Draft Army Act' (September 2006) p. 7, available at: http://www.ici.org/IMG/ICJ_report.pdf.

³⁴ Army Act 2063 (2006).

³⁵ Interim Constitution 2063 (2007), Article 144.

³⁶ See, eg. International Crisis Group, 'Nepal's Fitful Peace Process', Crisis Group Asia Briefing No. 120 (Kathmandu/Brussels: 2011), p. 17, available at: <http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/B120-Nepals%20Fitful%20Peace%20Process.pdf>. 'Indifference to Duty' (2010) (above n.4), pp. 9-10.

³⁷ Sam Cowan, "The Lost Battles of Khara and Pili", Himal magazine, Vol 21, No. 9 (September 2008) pp. 25-30.

³⁸ Advocacy Forum, 'Separating Fact from Fiction. Maina Sunuwar', (February 2010), pp. 3-4, available at: <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>, concerning the arrest warrant issued for Maj. Niranjana Basnet [Maina Sunuwar case]; Letter from Nepal Army Human Rights Unit to Kavre District Court, February 2011, concerning the arrest warrant issued for Lt. Saroj Basnet (copy on file with author) [Reena Rasaili case].

³⁹ See, in relation to Maina Sunuwar's case, 'Waiting for Justice' (2008), (above n.4), pp. 32-33, and 'Indifference to Duty' (2010) (above n.4), p. 9. In relation to Reena Rasaili, see 'Waiting for Justice' (2008), (above n.4), pp. 79-80 and Advocacy Forum, 'SC orders to continue custody of Kaji Karki to advance investigation', 15 August 2011, <http://www.advocacyforum.org/news/2011/08/sc-orders-to-continue-custody-of-kaji-karki-to-advance-investigation.php>.

Niranjan Basnet, remain in their posts. In both cases the court martial was seriously flawed, the accused were convicted of minor and inappropriate crimes, and only minor punishments were imposed.⁴⁰ One former soldier has been arrested (again, in relation to Reena Rasaili's case), and the army supported his petition for habeas corpus (which was denied by the Supreme Court in August 2011), arguing that he should be tried in a military court – even though on an earlier occasion when it had the chance to prosecute him, it did not do so.⁴¹

Despite provisions in the Army Act providing for the involvement of the Chairperson of the Public Services Commission in appointment of officers, the army has also continued to promote soldiers accused of involvement in serious human rights abuses to senior ranks. For example, in October 2009 Major General Toran Bahadur Singh, who is accused of involvement in cases of enforced disappearances and custodial torture in 2004 as commander of the 10th Brigade, was promoted to Brigadier General and appointed to the position of acting army chief.⁴² Similarly, Major General Victor Rana, also suspected of involvement in the 2004 violations by the 10th Brigade, was promoted to Brigadier General despite strong opposition from the OHCHR.⁴³

Police failings

The police are under the general duty to investigate crimes under the Police Act,⁴⁴ and have the specific duty to preserve evidence and, “as soon as possible”, to investigate and collect evidence in relation to any allegation where a complaint of a crime (known as an FIR or “First Information Report”) is filed.⁴⁵ Police also have the duty to investigate if they learn “through any means or medium” that a crime may have been committed.⁴⁶

The police force has exhibited serious failings in investigating crimes from the conflict period in line with these obligations. As outlined in previous reports, police have on many occasions refused to register FIRs despite the legal obligation to do so. Without a registered FIR it is impossible for a prosecution to be carried out. This refusal has often been justified on the basis that crimes committed during the conflict are a ‘political issue’, or will be dealt with by future transitional justice mechanism and so should not be dealt with by the normal criminal system.⁴⁷ When presented with prima facie evidence of the

⁴⁰ In Maina Sunuwar's case the Supreme Court, after having reviewed the court martial findings, has specifically ruled that the case is admissible in the civilian courts: See 'Indifference to Duty' (2010) (above n.4), p. 9. In both cases, Advocacy Forum has been able to obtain unofficial copies of certain documents relating to the court martials. In Reena Rasaili's case, the organisation only became aware of the court martial proceedings in 2011, when it unofficially obtained a copy of the court martial decision dated 28 August 2005 (without any documents annexed to it).

⁴¹ See the Nepal Army's submission in support of Kaji Karki's habeas corpus petition dated 15 March 2011 (copy on file with author), which shows that he was held in army custody for 46 days for desertion after the court martial.

⁴² See 'Indifference to Duty' (2010) (above n.4), p. 10.

⁴³ OHCHR-Nepal, 'OHCHR calls for comprehensive vetting as part of peace process', 28 August 2009, http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202009/August2009/2009_08_28_PR_Meeting_withCoAS_E.pdf

⁴⁴ Police Act 2012 (1955), Section 15(d).

⁴⁵ Ibid., Sections 4 and 7. The State Cases Act 2049 (1992) applies to cases where the government is the plaintiff (including crimes such as rape and homicide) or the defendant.

⁴⁶ State Cases Rules 2055 (1999), Rule 3.

⁴⁷ See 'Waiting for Justice' (2008), (above n.4), pp. 25-27. For example, in the case of Arjun Bahadur Lama, both the Chief District Officer and the Nepal Police refused to register an FIR 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.

commission of a crime and the name of the alleged perpetrators they have also on many occasions failed to gather evidence by taking statements, visiting the scene, or collecting material evidence, or have only done so after extremely long delays.⁴⁸

Police unwillingness to act in relation to conflict-era crimes may stem from various sources – including the close connection and ‘esprit de corps’ that the police share with the army given the previous joint command structure, the fact that the police are themselves implicated in some of the conflict-era crimes, fear of the army, political pressure from certain government officials, and the considerable difference in rank between junior police officers responsible for the investigations and senior army officers or politicians implicated in the crimes.⁴⁹ These are issues that must be addressed at a systemic level, and with political support, in order to combat impunity.

Like the army, the police force has been responsible for the promotion of officers alleged to have committed serious international crimes during the conflict period. For example in June 2011 an officer who is a suspect in a case concerning the disappearance and deaths of five students (known as the “Dhanusha Five”) was promoted to the position of Additional Inspector General of Police despite recommendations from the NHRC for the authorities to bring a prosecution against him. Since 2006 he has been named in an FIR in relation to the crime. In 2007, following delays, the Supreme Court ordered the police to provide a detailed report as to the investigations carried out. After further delays the students’ bodies were finally exhumed in September 2010 and February 2011 following national and international pressure. However none of the identified suspects have been charged, arrested or prosecuted.

UCPN-M obstruction

Unified Communist Party of Nepal (Maoist) (UCPN-M) cadres are implicated in a significant number of serious crimes from the conflict period.⁵⁰ However, the UCPN-M leadership continues to promote and protect members within its ranks accused of such crimes, and to refuse to cooperate with criminal investigations.⁵¹

The promotions by the UCPN-M led government of two UCPN-M members to the position of cabinet minister in May 2011 and November 2011 respectively are prime examples. The two ministers, Agni Sapkota (appointed Minister for Information and Communications in May 2011) and Suryaman Dong (appointed State Minister of Energy in November 2011), and several other UCPN-M cadres, are alleged to be responsible for the killing of Arjun

⁴⁸ See, for example, the case of the extrajudicial execution of Arjun Lama, where despite a Supreme Court order mandating the filing of an FIR, investigations went little further than trying to find the home addresses of those accused, one of whom was a prominent politician. In a decision issued on 21 June 2011, the Supreme Court said: “Therefore, in the context of all elements including the government and police having a responsibility to abide by all rules and regulations in order to establish the rule of law, the undue delay, intentional or unintentional, in crime investigation conducted in response to an FIR filed by an order of mandamus issued by the court should be taken as an indicator of the level of performance, expertise and impartiality of the police. There is no point to disagree that the investigations or inquiries carried out so far into it are disappointing”.

⁴⁹ ‘Still Waiting for Justice, (2009) (above n.4), p. 9.

⁵⁰ Note that in 2009 the CPN-M officially merged with the Communist Party of Nepal (Unity Centre-Masal), to become the Unified Communist Party of Nepal (Maoist) (“UCPN-M”).

⁵¹ See Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal’, A/HRC/13/73, 5 February 2010, para. 31, available at: http://nepal.ohchr.org/en/resources/publications/2010_HRC_Report_E.pdf. See also in relation to the case of UCPN-M Constituent Assembly member Bal Krishna Dhungel, who has been convicted of murder, above n.1.

Lama during the conflict.⁵² In 2008, after an order from the Supreme Court, an FIR was lodged in the case. However, UCPN-M officials did not cooperate with the investigation, and it stalled on the grounds of an alleged inability to locate the suspects.⁵³

In 2010 both Australian and US authorities refused Agni Sapkota a visa, explained by the US on the basis of “serious and specific human rights allegations associated with his conduct during the insurgency”.⁵⁴ These allegations did not, however, prevent the appointments of Sapkota and Dong to key government positions, causing strong criticism by human rights groups and lawyers.⁵⁵

This failure to cooperate with investigations into wrongdoing by its members has extended to crimes committed after the conflict period, including when the UCPN-M has been in power.⁵⁶

The problems of transition and reintegration

The resistance to accountability and participation in public life of those accused of serious human rights violations are problems that are experienced in many transitional justice contexts. A key problem which has not adequately been dealt with by all of the institutions discussed above is the transformation from being deeply implicated in violent conflict to being key institutions of a democratic state ruled by law, not by violence. The issue of integration and transformation – of former Maoist combatants into the army, of formerly unaccountable military officers into a democratic army, of Maoist cadres into a legitimate political party in control of the government – is a complex challenge. It is vital that some form of vetting process be established for key institutions including the army, the police, government ministries, and within political parties, to ensure that those implicated in crimes are not in positions of power to derail efforts at accountability or to repeat their crimes.⁵⁷

The role of the judiciary

Where victims have turned to the courts to push for prosecutions and reparation, the judiciary – and in particular the Supreme Court – has been relatively strong in recognising their right to do so. It has issued landmark judgments calling on the government to enact

⁵² 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.

⁵³ See the decision of the Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011.

⁵⁴ See ‘Indifference to Duty’ (2010) (above n.4), p. 10.

⁵⁵ Sapkota’s appointment was challenged in the Supreme Court, and although the Court expressed its disapproval at the unreasonable delay in investigation by the police, and stated that Sapkota had a moral and legal responsibility to cooperate with the police investigation, it did not find that he should be suspended unless and until charges were filed. The court ordered the police to continue the investigation and to report to the court every 15 days on its progress: Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011. Sapkota is no longer in the position of Minister, after a reshuffle in early August 2011.

⁵⁶ Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal’, A/HRC/16/23, 16 February 2011, Para. 14, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/67/PDF/G1110767.pdf?OpenElement>.

⁵⁷ On the considerations involved in implementing such a programme see: OHCHR, Rule of Law Tools for Post-Conflict States: Vetting: an operational framework’, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

legislation criminalising torture and enforced disappearances (see Section VII further below), and has issued orders requiring police to register FIRs and investigate conflict era crimes, and requiring cooperation from the military and politicians. Recently, it strongly criticised the government and UCPN-M line that conflict era crimes should not be tried by the normal criminal justice system, stating that:

the regular justice system gains momentum where the transitional justice system is not in place yet. The system of law and justice is never inactive in a democratic country; law is never vacant. The process of criminal investigation must be pursued as per the prevailing State Cases Act, 2049 BS and the State Cases Regulation, 2055 BS, which engage the regular justice system where an FIR has been lodged for homicide. In the future, once the transitional justice system is in place, the cases which have been investigated, which are under investigation and which have been filed according to the prevailing laws can be pursued under changed jurisdiction as prescribed if provided by the concerned law.⁵⁸

However, as demonstrated above, the issue is one of implementation. Court orders have been ignored or implemented extremely slowly, and courts have not yet held any official accountable for contempt for failure to comply. This weakens the courts' authority and undermines the rule of law.

Conclusion

Accountability for abuses from the conflict period has a real significance both for the sustainability of peace, and for the consolidation of democratic institutions and the rule of law in Nepal. As the OHCHR in Nepal has warned:

Persistent impunity for human rights violations has had had a corrosive effect on rule of law institutions and has further damaged their credibility. Impunity has contributed directly to widespread failings in public security by sending a message that violence carries no consequences for the perpetrator. Nepal has relatively independent rule of law institutions, but they remain vulnerable to political pressure and manipulation and are in need of support.⁵⁹

The failure to address past violations, and wilful failure to support and cooperate with judicial processes, puts the consolidation of peace on shaky foundations. The right laws must be in place to prevent and punish violations, but those laws must also be obeyed.

The rest of this report is written with the context described above firmly in mind. Changes must be made to the law to ensure that it is as strong as it can be to hold those responsible for violations to account, and is not open to be used as a tool to avoid justice by those in power. The law must also be used in a positive way to introduce mechanisms to ensure that those responsible for upholding the law abide by their obligations under it, but those mechanisms must be underpinned by real political will.

⁵⁸ Decision of the Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011.

⁵⁹ Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal' (2010) (above n.51), para. 27.

IV. NEPAL'S OBLIGATIONS UNDER INTERNATIONAL & DOMESTIC LAW

Obligations under international law

States have obligations under both treaty and customary international law to respect, protect and fulfil human rights. States must observe these obligations in good faith, and are legally bound to fulfil and implement them through law and domestic practice.

Nepal is a party to most of the major international human rights treaties, including the International Covenant on Civil and Political Rights (the "ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT"), the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), and the Convention on the Rights of the Child ("CRC"). Nepal is also a party to the Geneva Conventions setting out states' obligations under international humanitarian law in international and internal armed conflict.

Along with its international treaty obligations, Nepal, as any other State, is bound by obligations under customary international law. It is not in dispute that the most fundamental provisions of international human rights law have obtained customary status and now form part of general international law. Recognised customary international law prohibitions include the prohibitions of racial discrimination,⁶⁰ slavery,⁶¹ torture, cruel, inhuman or degrading treatment or punishment,⁶² enforced disappearance,⁶³ and prolonged arbitrary detention.⁶⁴ Similarly, fundamental provisions of international humanitarian law including war crimes and crimes against humanity (including systematic rape) are also recognised as forming part of customary international law binding on all states.

Incorporation of international obligations under domestic law

The provisions of treaties to which Nepal is a party, including human rights treaties, are specifically incorporated into and are enforceable as part of Nepal's domestic law under the Treaty Act.⁶⁵ The Interim Constitution, adopted in 2007, also enshrines the importance of respect for human rights in domestic law. Its preamble expresses the

⁶⁰ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, at para. 34.

⁶¹ *Ibid.*

⁶² See: International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Trial Judgment of 10 December 1998, at paras. 147 and 160 (with further authorities); ECtHR [GC], *Al-Adsani v. the United Kingdom* (no. 35769/97), Judgment of 21 November 2001, at para. 61; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Resolution 3452 (XXX) of 9 December 1975, Article 2.

⁶³ American Law Institute, *Restatement of the Law: Third Restatement of the US Foreign Relations Law* (1987), at para. 702.

⁶⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly Resolution 43/173 of 9 December 1988 (Body of Principles on Detention); American Law Institute, *Restatement of the Law: Third Restatement of the US Foreign Relations Law* (1987), at para. 702.

⁶⁵ Treaty Act 2047 (1990), Section 9.

country's full commitment to human rights, and its articles impose specific duties on the government in relation to its human rights obligations. The government is responsible for adopting a political system which fully abides by the universally accepted concept of fundamental human rights, constitutional checks and balances, the rule of law and the elimination of impunity.⁶⁶ It is responsible for effectively implementing international treaties to which Nepal is party,⁶⁷ and must have as one of its key objectives the promotion of general welfare by making provisions for the protection and promotion of human rights.⁶⁸

Specific human rights are guaranteed under the Interim Constitution, including civil and political rights such as freedom from arbitrary arrest and detention,⁶⁹ freedoms of opinion and expression, peaceful assembly, association and movement,⁷⁰ the rights to equality before the law and non-discrimination,⁷¹ freedom of religion,⁷² the right to a fair trial,⁷³ freedom from torture,⁷⁴ and the right to constitutional remedies for enforcement of such rights.⁷⁵ The Civil Rights Act also provides guarantees in relation to some of these fundamental rights.⁷⁶

Nepal's obligations to respect, protect and fulfil human rights under international human rights law

States are the duty bearers under international human rights instruments. By becoming party to human rights treaties Nepal has accepted three levels of obligation in relation to each of the rights guaranteed: the duties to respect, protect and fulfil those rights.⁷⁷

- The obligation to respect means that Nepal must refrain from interfering with the enjoyment of a right and any restrictions on those rights must be permissible under the Convention and necessary and proportionate to the pursuance of legitimate aims.⁷⁸

⁶⁶ Interim Constitution 2063 (2007), Article 33(c).

⁶⁷ Ibid., Article 33(m).

⁶⁸ Ibid., Article 34(2).

⁶⁹ Ibid., Articles 13(2), 24(1)-(3) and 25.

⁷⁰ Ibid., Article 13(3).

⁷¹ Ibid., Articles 13, 14 and 20.

⁷² Ibid., Article 23.

⁷³ Ibid., Article 24(4)-(10).

⁷⁴ Ibid., Article 26.

⁷⁵ Ibid., Article 32.

⁷⁶ Civil Rights Act 2012 (1955).

⁷⁷ See, for example, ICCPR, Article 2: "(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant... (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant ...(3) Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy..."

⁷⁸ HRCtee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004), para.6.

- The obligation to protect means that Nepal must protect individuals and groups against human rights abuses by state agents as well as private entities and individuals.⁷⁹
- The obligation to fulfil means that Nepal must take positive action to put in place institutions and procedures to enable people to enjoy their human rights.⁸⁰

Nepal must implement these obligations in its domestic law and practice. It must make any necessary changes to its legislation – ensuring, for example, that laws are not drafted in such a way as to provide excuses for those who violate human rights,⁸¹ and that violations which amount to crimes which must be punished are so criminalised.⁸² It must enact positive protections and safeguards in its legislation to protect citizens from human rights abuses by both state actors and by non-state actors.⁸³ To provide effective rights, Nepal must ensure that individuals have accessible and effective remedies to vindicate their rights where these have been violated.⁸⁴ It must also ensure that those responsible for serious human rights abuses are held to account.⁸⁵

This last aspect recognises that to respect and secure respect for human rights past violations must be addressed. Where serious violations of human rights occur states must undertake prompt, thorough, independent and impartial investigations and take appropriate measures in respect of the perpetrators, ensuring that those responsible for serious crimes are prosecuted, tried and duly punished.⁸⁶ The state must acknowledge what happened,⁸⁷ and must ensure that those who might commit violations understand that there will be consequences. This is crucial both to prevent future violations, and to provide a remedy to the victims.

A state’s positive obligations to ensure human rights will only be fully discharged if individuals are protected by the state, not just against violations of rights by its agents, but also against acts committed by private entities or individuals. It is well established that states must act with due diligence to prevent, investigate, prosecute, punish and redress crimes of violence committed by non-state actors. A failure to do so will amount to a breach of its obligations under international human rights law.⁸⁸

Where this does not happen there is a situation of impunity, which has been defined as:

the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since

⁷⁹ Ibid., para.8

⁸⁰ Ibid., para.7

⁸¹ See, for example ICCPR Article 2(2)

⁸² HRCtee, General Comment No. 31 (above n.78), para. 18.

⁸³ Ibid.

⁸⁴ ICCPR Article 2(3)

⁸⁵ HRCtee, General Comment No. 31 (above n.78), para. 16. See further, Section VIII.

⁸⁶ Ibid., General Comment No. 31, paras.16 and 18.; UN Human Rights Commission, ‘Updated set of principles for the protection and promotion of human rights through action to combat impunity’ (E/CN.4/2005/102/Add.1) (“Draft Impunity Principles”).

⁸⁷ Ibid., Draft Impunity Principles.

⁸⁸ HRCtee, General Comment No. 31 (above n.78), para. 8.

they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁸⁹

As the Human Rights Committee has stressed, "respect for human rights may be weakened by impunity for perpetrators of human rights violations"⁹⁰ as a state of impunity "encourages further violations of Covenant rights".⁹¹ International human rights mechanisms have repeatedly emphasised states' obligations to combat impunity.⁹² This report examines how Nepali law stands as both an obstacle and an opportunity to this end.

⁸⁹ Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997), at Annex II, Definitions, A (hereinafter "UN Impunity Guidelines").

⁹⁰ HRCtee, Comments on Argentina (1995), CCPR/C/79/Add.46, para. 10.

⁹¹ HRCtee, Concluding Observations: Nigeria (1996), CCPR/C/79/Add.65, para. 32.

⁹² See, for example, UN Commission on Human Rights, Resolution 2005/81: Impunity, 21 April 2005, E/CN.4/RES/2005/81, available at: <http://www.unhcr.org/refworld/docid/45377c930.html>; Commission on Human Rights resolution 2002/79: Impunity, 25 April 2002, E/CN.4/2002/200, available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/cd893dbd5bbd5ed7c1256bab0051565d?Opendocument>.

V. LAWS ON CONTROL AND ACCOUNTABILITY OF THE ARMY AND POLICE

In nearly all states the military and police have significant powers over citizens, and a near monopoly on the legitimate use of force. It is therefore crucial that these institutions act within the law and in accordance with international human rights. Ensuring that they do so requires both an internal commitment to and ethos around basic principles of human rights and accountability, internal mechanisms to ensure that those principles are lived up to, and external safeguards to ensure that where there are failures, these are addressed.

This section briefly examines the current law in Nepal governing the army and the police in light of international standards. In particular it looks at the extent to which mechanisms within the law are available to tip the balance of power away from these institutions towards the people, through its government and courts. With this power comes the ability to direct the ends to which the power held by these institutions is used, and to hold the institutions, and the individuals who make it up, to account. Other provisions of legislation relevant to the issue of impunity (for example the extent of police powers) are addressed later in the report.

a. The army

International standards on civilian control and oversight of military

It is recognised that civilian control and oversight of the military is crucial both as a principle of democracy (no area of government can be excluded from the control of elected leaders⁹³), to uphold the rule of law, and to ensure that the military abide by human rights obligations:

For democracy, civilian control -- that is, control of the military by civilian officials elected by the people -- is fundamental. Civilian control allows a nation to base its values and purposes, its institutions and practices, on the popular will rather than on the choices of military leaders, whose outlook by definition focuses on the need for internal order and external security.

The military is among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies.⁹⁴

Civilian control is established by maintaining real separation of powers, budgetary control and exercising oversight.⁹⁵ These features must be incorporated in the constitution and implemented through legislation.

⁹³ See, for example, Thomas C Bruneau, 'Civil-Military Relations in Latin America: The hedgehog and the fox revisited', *Revista Fuerzas Armadas y Sociedad*, 19 (2005), 111-31, p. 120.

⁹⁴ Military Police Complaints Commission (Canada), 'International Standards for Police Oversight', <http://www.mppc-cppm.gc.ca/300/3600/3602-eng.aspx>.

⁹⁵ Bruneau, 'Civil-Military Relations in Latin America: The hedgehog and the fox revisited' p. 124 (above n.93).

The security sector's actors must be accountable to citizens for the use of military force, both internally and abroad.⁹⁶ Central to this accountability is the role of the judiciary in punishing any abuse of powers and other misconduct by security sector actors, and the principle that security sector personnel are individually accountable to judicial courts for violations of national and international laws.⁹⁷ The jurisdiction of military courts should be limited to offences of a strictly internal, military nature, committed by military personnel, which largely means internal disciplinary measures.⁹⁸

No internationally agreed standards in the field of democratic and parliamentary oversight exist, as security and defence have traditionally been regarded as falling into the domain of national sovereignty.⁹⁹ However, regional standards and principles have been developed in relation to both the military and the police, distilling implications of the general principles of accountability and oversight. A key document is the 1994 OSCE Code of Conduct on Politico-Military Aspects of Security (1994), which adopts a broad concept of internal forces that includes the military, intelligence services, paramilitary and police. The standards reflect the duty of states to:

- maintain forces under effective democratic control by constitutionally established bodies vested with democratic legitimacy (paragraphs 20 and 21);
- require legislative approval of defence budget spending, and transparency and public access to information related to the armed forces (paragraph 22);
- ensure that armed forces personnel can be held individually accountable for violations of international humanitarian law (paragraph 31);
- ensure that armed forces are commanded, manned, trained and equipped in accordance with the provisions of international law (paragraph 34);
- ensure that recourse to force in performing internal security missions is commensurate with the needs for enforcement, and that the armed forces will take due care to avoid injury to civilians or their property (paragraph 36);
- ensure that the armed forces are not used to limit the peaceful and lawful exercise of citizens' human and civil rights (paragraph 37).¹⁰⁰

⁹⁶ Hans Born and Cecilia Lazzarini, 'Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations' (CDL-DEM(2006)003, Council of Europe, European Commission for Democracy Through Law (Venice Commission), 2006), available at: [http://www.venice.coe.int/docs/2006/CDL-DEM\(2006\)003-e.pdf](http://www.venice.coe.int/docs/2006/CDL-DEM(2006)003-e.pdf), p. 7, citing 'Understanding and Supporting Security Sector Reform', DFID Issues, 2003, UK Department for International Development, available online at: <http://www.dfid.gov.uk/pubs/files/supportingsecurity.pdf#search=%22understanding%20and%20supporting%20security%20sector%20reforms%22>.

⁹⁷ Ibid., pp. 12-13; IPU-DCAF, Handbook on Parliamentary Oversight of the Security Sector, ed. by Hans Born (Geneva: IPU-DCAF, 2003), p. 23-24.

⁹⁸ Draft Principles Governing the Administration of Justice through Military Tribunals, adopted by the United Nations Sub-Commission on Human Rights and forwarded to the Human Rights Council, E/CN.4/2006/58, Principle No. 7. See also *Akwanga v Cameroon*, Communication No. , 1813/2008, 22 March 2011, individual opinion of Mr Fabián Omar Salvioli, para. 8.

⁹⁹ IPU-DCAF, Handbook on Parliamentary Oversight of the Security Sector,(2003), p. 149 (above n.97).

¹⁰⁰ Organization for Security and Co-operation in Europe, (1994) Code of Conduct on Politico-Military Aspects of Security, available at: <http://www.osce.org/fsc/41355>.

Laws regulating the army

The army is governed by provisions of the Interim Constitution, and the Army Act, introduced in 2006.¹⁰¹ As briefly outlined above, the Interim Constitution sets out the basic ground for democratic control of the army. More specific regulation is provided by the Army Act 2063, which was introduced to replace the previous Army Act 1959 under which the army was accountable solely to the King. The new Army Act was designed to transfer control of the army to the government, to remove some of the systemic causes of impunity, and to result in fewer human rights violations. It was introduced swiftly after the transfer of power, and complaints were made by civil society at the time that it was rushed through parliament without broad and democratic consultations.¹⁰² Criticisms of the initial draft resulted in some amendments, but the Act still has significant flaws.

Democratic Control and Accountability

The Interim Constitution provides that the Council of Ministers shall control, mobilise and manage the Nepal Army, on the advice of a National Defence Council made up of members of the executive.¹⁰³ It also recognises that comprehensive institutional reform is required to achieve this democratic oversight, requiring the Council of Ministers to create an extensive work plan for the democratisation of the Nepal Army and to implement it.¹⁰⁴ The Army Act specifies further powers and functions of the National Defence Council, including making policies, plans and programmes relating to mobilization, operation and use of the Nepal Army and advising the government on management of the army.¹⁰⁵

Other provisions of the Army Act provide in theory for democratic accountability of the army. Under section 9 of the Act, the Chief of the Army Staff is now accountable to the government of Nepal and all officers must take an oath of office recognizing that the sovereignty and state power of Nepal is inherent only in the Nepali people. The Chief of Army Staff must submit an annual report to the government of Nepal, which is presented to Parliament,¹⁰⁶ and may be removed by the President on the recommendation of the Council of Ministers.¹⁰⁷

Democratic control and accountability in practice

However, real control and oversight under these mechanisms has been lacking, hampered by a lack of political will and weakness of the democratic institutions responsible for oversight.

The level of control provided by the National Defence Council has been weak and the extent to which it has attempted to exert influence over army generals limited. For

¹⁰¹ Laws in Nepal are dated using the Bikram Sambat Calendar, which is 56.7 years ahead of the Gregorian (Western) Calendar.

¹⁰² See International Commission of Jurists, 'Nepal: Recommendations for Amendments to the Draft Army Act' (September 2006) p. 3, available at: http://www.icj.org/dwn/database/ICJ_report.pdf.

¹⁰³ Interim Constitution 2063 (2007), Article 144 and 145.

¹⁰⁴ *Ibid.*, Article 144.

¹⁰⁵ Army Act 2063 (2006), Section 6.

¹⁰⁶ *Ibid.*, Section 10.

¹⁰⁷ *Ibid.*, Section 11.

example, the ‘Comprehensive Work Plan for Democratisation of the Nepal Army’ developed by the National Defence Council, has been criticised because it:

makes no reference to the various allegations of impunity and arguments for enhanced civilian oversight which underpin the “democratisation” commitment.... It allows parliamentary oversight to be enhanced on logistics and training, but says that details of military strategy and operations should be kept secret, which contradicts international standards for information sharing and accountability for decision-making in democratically controlled armed forces. There is no mention of reforming the military court or of the need to determine the relationship with civilian investigating bodies and the judiciary. It glosses over the range of areas requiring greater transparency in a single clause.¹⁰⁸

Similarly, the security policy developed by the National Defence Council has been criticised by the same commentator as “another uninspiring document” which “spells out in detail that the NA can be mobilised in practically any situation including, for example, ‘[to prevent] destructive activities’”.¹⁰⁹ Financial transparency is limited, and “[p]rocurement and accounting for peacekeeping earnings and spending are not subject to rigorous oversight from outside the NA, not least because the defence ministry is very weak”.¹¹⁰

While the overall legislative structure is therefore in place for democratic control and oversight, for this to be effective in practice the policies and regulations developed under the legislation must be significantly improved and the capacity of the civilian Defence Ministry must be strengthened.¹¹¹

Appointments and vetting

Appointments to officer level ranks are made by a committee presided over by the Chairperson of the Public Service Commission,¹¹² and those convicted of offences of violating human rights are ineligible for appointment to such positions.¹¹³ Under the Act, the government retains ultimate authority to remove or dismiss any person serving in the army.¹¹⁴

However, given that no army personnel have yet been prosecuted for offences of violating human rights during the conflict period – despite the enormous evidence of such violations – such provisions are of no use to ensure that those facing serious allegations of human rights violations are not promoted to positions of power. There is therefore an urgent need to develop, whether through law or policy, comprehensive human rights-compliant vetting procedures which ensure that those who do face serious allegations of

¹⁰⁸ International Crisis Group, ‘Nepal’s Fitful Peace Process’ (above n.36), p. 17, referring to the Nepali Senako Lokantrikaranka Lagi Bistrit Karyayojana, 2 August 2010.

¹⁰⁹ *Ibid.*, p. 18.

¹¹⁰ *Ibid.*, p. 17.

¹¹¹ Such strengthening should be carried out and achieved by civilian actors, not by military actors.

¹¹² Army Act 2063 (2006), Section 12.

¹¹³ *Ibid.*, Section 13.

¹¹⁴ *Ibid.*, Section 18.

human rights violations are suspended pending the outcome of the proceedings against them.¹¹⁵

Individual accountability for crimes

The Army Act takes a small step forward in terms of accountability in civilian courts for serious human rights abuses by providing that military personnel accused of homicide and rape should be tried in civilian courts.¹¹⁶ It also provides that where there is a dispute over whether a case should be filed under the court martial or other (civilian) courts, it shall be filed with the civilian courts, and the accused suspended from service and handed over to that court.¹¹⁷

However, many offences which are not of a “strictly internal, military nature” including arbitrary arrest, torture and enforced disappearance are still to be tried outside the civilian court system. The Act provides that crimes of torture and enforced disappearances will be heard by a specially formed committee made up of the Deputy Attorney General (as designated by the government of Nepal), the chief of the legal section of the Ministry of Defence, and a Representative of military’s Judge Advocate General Department.¹¹⁸ Other crimes, including arbitrary arrest and detention are to be tried by a normal court martial.¹¹⁹

The Act also erects significant barriers to prosecutions – under either the civilian or military system - including the provision of an immunity for certain offences resulting in death when acting in good faith,¹²⁰ and a double-jeopardy provision which prevents a person who has been tried by court martial or subject to departmental action from being tried again for the same offence.¹²¹ Such provisions have been misused in the past where officers have been tried and punished for minor and inappropriate crimes on the same facts.¹²² These barriers are examined further in Section VIII of this report.

In June 2011, the Supreme Court recognised that the entire military justice system is flawed – finding that it is not in line with an independent judiciary or with international practice in military justice – and ordered the government to form a task force on reform and to implement its recommendations.¹²³

¹¹⁵ On the considerations involved in implementing such a programme see: OHCHR, ‘Rule of Law Tools for Post-Conflict States: Vetting: an operational framework’ (2006), available at: <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

¹¹⁶ Army Act 2063 (2006), Section 66.

¹¹⁷ Ibid., Section 69.

¹¹⁸ Ibid., Section 62.

¹¹⁹ Ibid., See Section 68 in conjunction with Section 61.

¹²⁰ Ibid., Section 22 (Although it excludes this immunity for homicide, rape, torture and enforced disappearance).

¹²¹ Ibid., Section 70.

¹²² See, in relation to the case of Maina Sunuwar, Advocacy Forum, ‘Separating Fact from Fiction. Maina Sunuwar’ (above n.38) p.23; in relation to the case of Reena Rasaili see Letter from Nepal Army Human Rights Unit to Kavre District Court, February 2011, concerning the arrest warrant issued for Lt. Saroj Basnet (copy on file with author).

¹²³ Judgment of Chief Justice Khil Raj Regmi, Justices Kalyan Shrestha and Krishna Prasad Upadhaya in case brought by Bhuwan Niraula, Prem Chandra Rai and Bhakti Shah, 30 June 2011, reported in República, ‘Reform Entire Military Justice System: SC to Govt’, 1 July 2011, available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=32972.

b. The police

International standards on independent oversight of police

Police have special responsibilities to protect society requiring the exercise of special powers and authority over other citizens. It is recognised that “[i]n any place which cares to preserve or to establish the rule of law ...those with special powers - and especially those impinging directly on individual liberty - will require special accountability for the use of those powers”.¹²⁴

Specific standards have been developed in relation to police oversight bodies, which stress the need for independent and effective mechanisms of external control and supervision, in addition to systems of internal discipline.¹²⁵ For example, the European Code of Police Ethics states that: “The police shall be accountable to the state, the citizens and their representatives. They shall be subject to efficient external control”.¹²⁶ The commentary to the article specifies that there should be an external public body by which the police are effectively accountable to the public, in addition to a police force's necessary accountability to the state itself.

Best practice recognises not only the need for independent police oversight bodies to have sufficient powers to investigate complaints and, in so doing, to have access to all relevant information in the possession of police,¹²⁷ but also for such bodies to have the authority to effectively monitor the internal police response to complaints and to investigate related systemic issues which may go beyond the specific concerns raised by complainants.¹²⁸

Although accountable to the government and directed by it as to general priorities, the police should nevertheless retain operational independence from other state bodies in carrying out its given tasks.¹²⁹

Police personnel, at all levels, should be personally responsible and accountable for their own actions or omissions or for orders to subordinates.¹³⁰

The Police Act

The Police Act¹³¹ provides mechanisms by which the police force and individual officers are accountable to the government and responsible for failure to fulfil their duties. It provides

¹²⁴ Military Police Complaints Commission (Canada), 'International Standards for Police Oversight', <http://www.mpcc-cppm.gc.ca/300/3600/3602-eng.aspx>.

¹²⁵ UN Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, endorsed by the UN General Assembly in Resolution 44/162 of December 15, 1989.

¹²⁶ European Code of Police Ethics, Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, Article 59, available at: <http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=95671>.

¹²⁷ See for example, European Code of Police Ethics, Commentary to Article 59, p.42.

¹²⁸ Military Police Complaints Commission (Canada), 'International Standards for Police Oversight', available at: <http://www.mpcc-cppm.gc.ca/300/3600/3602-eng.aspx>. See also REDRESS, 'Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities' (September 2004) pp. 41-47, available at: <http://www.redress.org/downloads/publications/PoliceComplaints.pdf>.

¹²⁹ See for example, Article 15 and the commentary to Article 60 of the European Code of Police Ethics (above n.126).

¹³⁰ See for example, Article 16 of the European Code of Police Ethics (above n.126).

that the police force is under the control of the government of Nepal, and that the government has power to issue directives to the police.¹³² Administration of the Police is the responsibility of the Inspector-General of Police, and subordinates.¹³³ The government may dismiss higher ranking police officers, including the Inspector-General.¹³⁴

However, there are no provisions guaranteeing the operational control of the police in carrying out their given police tasks. District level police employees are under the control and direction of the Chief District Officer (who is essentially a civil servant), and are duty bound to follow his or her orders.¹³⁵ The misuse of the police force for vested political interests has been a major problem for the professional independence of the force in Nepal, and a barrier to addressing impunity.¹³⁶

Furthermore, there is no separate and independent mechanism which has specific oversight of the police, and to which the public can complain. The Local Administration Act provides that complaints about police employees are to be investigated by the Chief District Officer, who is not independent as they are in charge of the police force in a district and responsible for giving them orders.¹³⁷ When police commit abuses or fail to pursue investigations the victims involved must instead turn to the NHRC or the courts.¹³⁸ The NHRC has investigated a significant number of complaints about police behaviour and has recommended disciplinary action or criminal prosecution in a number of these, but its recommendations are (as discussed below) not uniformly acted on. The courts have, on the whole, been relatively active in ordering the police to register FIRs, and to pursue investigations where prima facie evidence exists.¹³⁹ However taking such measures can be extremely time consuming, and even when orders mandating investigations are made, police have in many cases been very slow to respond, if they respond at all.¹⁴⁰ And the

¹³¹ Police Act 2021 (1955).

¹³² *Ibid.*, Section 4.

¹³³ *Ibid.*, Sections 5 and 6.

¹³⁴ *Ibid.*, Section 9(3).

¹³⁵ *Ibid.*, Section 8.

¹³⁶ See Advocacy Forum, 'Torture and Extrajudicial Executions amid Widespread Violence in the Terai' (January 2010) p. 3, available at: <http://www.advocacyforum.org/downloads/pdf/terai-report-english.pdf>.

¹³⁷ Local Administration Act 2028 (1971), Section 7.

¹³⁸ Note also the existence of the 'Commission for the Investigation of the Abuse of Authority', also established under the Interim Constitution 2063 (2007) (Article 120). Its functions include investigating improper conduct or corruption by a person holding any public office (but excluding any official to be prosecuted under the Army Act). If its investigations reveal corruption it may initiate prosecution and/or sue the perpetrator in the courts. Where there is a finding that a person has misused his or her authority or by improper conduct it may recommend action by the relevant authorities. Most civil society organizations believed the CIAA is not an effective commission. The Commission itself claimed a 75 percent success rate concerning corruption cases it filed, but some cases involving politicians were not filed or were defeated in court. See <http://www.state.gov/documents/organization/160061.pdf>.

¹³⁹ 'Indifference to Duty' (2010) (above n.4), pp. 28 – 33.

¹⁴⁰ See, for example, the case of Arjun Lama, referred to above at n.52; the case of Subhadra Chaulagain (described in 'Waiting for Justice' (2008), (above n.4), pp. 80-81): on 14 December 2009 the Supreme Court ordered the police and Attorney General's office to conduct a prompt investigation (Writ no. 064-WO-0339) but in the nearly two years following the only action taken has been recording depositions of three witnesses and a visit to the site (which was more than a year after the issuance of the order); and the case of Reena Rasaili: Advocacy Forum, 'AF raises concern to AG about lacklustre investigation into Reena murder case', <http://www.advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lackluster-investigation-in-reena-murder-case.php> (see also the letter to the Attorney General of 5 July 2011 on Reena's case: <http://www.advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>).

courts cannot respond, as an independent oversight mechanism would be able to, to the systemic issues going beyond the specific concerns of the individual complainants.

The Police Act provides mechanisms by which disciplinary proceedings may be taken for failure to discharge duties or for improper behaviour, but to date no police officer has been held accountable for not registering a complaint or failing to proceed with an investigation. As explored further below, disciplinary proceedings are, however, the mechanism of choice for addressing allegations of torture by police.

VI. LAWS FACILITATING HUMAN RIGHTS VIOLATIONS BY STATE AGENTS

This section examines laws which give state agents wide powers which, when used, may result in the violation of human rights. By providing a framework in which human rights violations are sanctioned, these laws not only legitimise and encourage such violations, but ensure that they cannot be punished.

The review shows that serious problems exist in legislation in relation to two main areas relevant to the scope of this report: the use of lethal force and arbitrary arrest and detention.

a. Powers to use lethal force

The issue of extrajudicial killings remains a serious problem in Nepal. The Office of the High Commissioner for Human Rights in Nepal indicated that between January 2008 and June 2010, it had "received reports of thirty-nine incidents, resulting in fifty-seven deaths, which involved credible allegations of the unlawful use of lethal force".¹⁴¹

Reminiscent of practices during the conflict period, some if not all of these appear to have been staged as 'encounters' between the security forces and alleged members of armed groups in which the victims were killed in crossfire.¹⁴² In such cases, there is often evidence that force has been used contrary to international standards (as further described below) but a lack of specific provisions requiring prompt, impartial and independent investigation means that such killings are committed with impunity.¹⁴³

The case of Sahid Ullah Dewan, alias Abdul, shot in broad daylight by three policemen in Rupandehi District on 26 October 2009 provides an illustration. The police claim that the victim was killed in an encounter and that they shot him in self-defence. However, several eye-witnesses assert that the victim was unarmed and shot in cold blood in a staged manner. Witnesses further asserted that they saw police officers placing pistols around the dead body. The District Police Office initially refused to register an FIR, and only did so after an order by the appellate court to register the FIR and initiate an investigation. Since this order of 5 January 2010, however, no investigation has yet been conducted.¹⁴⁴ The District Attorney, reportedly referring to "the inadequacy of the documents" (presumably the FIR and the police preliminary investigation report), refused to prosecute the case. When this was communicated to the Attorney General's Office at the Appellate Court it directed the District Attorney to file court proceedings and move the case forward. In

¹⁴¹ OHCHR-Nepal, 'Investigating Allegations of Extra-Judicial Killings in the Terai. OHCHR-Nepal Summary of Concerns' (July 2010) available at:

<http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf>.

¹⁴² See Advocacy Forum, 'Torture and Extrajudicial Executions amid widespread violence in the Terai', (above n.136), pp. 23-27.

¹⁴³ Advocacy Forum and Asian Human Rights Commission, 'Review of the UPR Recommendations-2 Extrajudicial Killings' (2 June 2011) available at: <http://www.advocacyforum.org/news/2011/06/review-of-the-upr-recommendations-2-extrajudicial-killings.php>.

¹⁴⁴ Ibid.

direct defiance of the order, the District Attorney directly corresponded to the Attorney General's Office seeking approval not to initiate proceedings. In the meantime, the father of the victim was allegedly threatened by the police officers suspected of being involved in the killing. He submitted a complaint to the Prime Minister and eleven other organizations on 26 December 2010. The Sub-Inspector of Police was subsequently transferred out of Rupandehi and a process for departmental action was reportedly begun. Finally, on 18 October 2011, the District Attorney confirmed that he had been directed to proceed with investigations, and had requested the Rupandehi District Police Office to proceed accordingly.

Other killings result from wide powers to use lethal force granted under legislation which is incompatible with human rights standards and, in particular, Article 6 of the ICCPR. The powers were widely misused during the conflict period and to curb mass protests in April 2006,¹⁴⁵ but have continued to be exercised in apparent contravention of international standards in the years since, particularly in the Terai region which has seen considerable unrest and protest by minority groups.

For example, on 17 July 2009, APF personnel shot dead Akhilendra Yadav and injured three other people when opening fire on a demonstration at Itahari VDC-4, Bishnupur, Saptari District. The APF claimed they opened fire after the demonstrators had tried to snatch their weapons. This is disputed by the demonstrators and eye-witnesses.¹⁴⁶

In 2008, the Office of the High Commissioner for Human Rights investigated the deaths of six civilians, all male, who died during protests in Terai.¹⁴⁷ OHCHR's findings indicated that five died as a result of police fire and one as a result of injuries sustained when he was hit by lathis. In the cases of death by police fire, OHCHR reached an initial conclusion that in most cases the use of lethal force had not been justified. At least thirty civilians were treated in hospitals for bullet wounds sustained as a result of police fire; most bullet injuries were sustained above the knee.¹⁴⁸

International standards

Article 6 of the ICCPR guarantees the right to life, which provides that "no one shall be arbitrarily deprived of his life".¹⁴⁹ The Human Rights Committee has stated the following in relation to obligations flowing from Article 6:

...states parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.

¹⁴⁵ OHCHR-NEPAL, 'The April Protests. Democratic Rights and the Excessive Use of Force. Findings of OHCHR Nepal's Monitoring and Investigations' (September 2006), available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_09_21_OHCHR-Nepal.Report%20on%20The%20April%20Protests.pdf.

¹⁴⁶ OHCHR-Nepal, 'Summary of the Human Rights Concerns Arising from the Terai Protests of 13-29 February 2008' (27 March 2008), available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2008_03_27_Terai_Protest_E.pdf

¹⁴⁷ Ibid.: In Nepalgunj on 17 February, Siraha district on 19 February, Saptari district on 25 February (two persons), Nawalparasi district on 26 February and Sunsari district on 27 February.

¹⁴⁸ Advocacy Forum and Asian Human Rights Commission, 'Review of the UPR Recommendations-2 Extrajudicial Killings' (2011) (above n.143).

¹⁴⁹ ICCPR, Article 6(1).

Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.¹⁵⁰

It is internationally recognised that use of firearms by law-enforcement personnel may be authorised only if other means of restraint remain ineffective or without any promise of achieving the intended result.¹⁵¹ When nevertheless using firearms, law-enforcement officials must exercise restraint and proportionality in such use, minimise damage and injury, ensure medical assistance and prompt notification to the relatives or friends of the injured person if applicable.¹⁵² In particular, in case of confrontation with officers of law-enforcement agencies, those involved should be given proper warning and the opportunity to surrender or to provide explanations.¹⁵³ Exceptional circumstances, such as internal political instability, or any other public emergency, may not be used as a pretext to justify any departure from the above-stated rules and practices.¹⁵⁴

Any incident of use of firearms should be independently reviewed, and in cases of death and serious injury or other grave consequences a detailed report should be promptly sent to the competent authorities responsible for administrative review and judicial control.¹⁵⁵ All suspected cases of unlawful killings, including complaints made by relatives and reliable reports, must be investigated in a “thorough, prompt and impartial” manner.¹⁵⁶ The investigation should seek to establish the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about the death.¹⁵⁷ Furthermore, it should include an adequate autopsy, the collection and analysis of all physical and documentary evidence, and statements from witnesses.¹⁵⁸ Those affected and/or their legal counsel should have access to related administrative and judicial proceedings.¹⁵⁹

States must also ensure that the arbitrary or abusive use of force and firearms by law enforcement officials constitutes a criminal offence under domestic legislation.¹⁶⁰

¹⁵⁰ HRCtee, General Comment No. 6, Article 6, U.N. Doc. HRI/GEN/1/Rev.6 (2003). See also HRCtee, *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45, U.N. Doc. Supp. No. 40 (A/37/40) at 137 (1982), para. 13.1.

¹⁵¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders (1990), (Basic Principles on Use of Force and Firearms) at para. 4.

¹⁵² *Ibid.*, Principle 5. See also Article 3 and the Commentary to Article 3 of the UN Code of Conduct for Law Enforcement Officials. Adopted by General Assembly resolution 34/169 of 17 December 1979. Available at: <http://www2.ohchr.org/english/law/codeofconduct.htm> Like Principle 5, Article 3 and the commentary emphasises that the use of force by law enforcement personnel should be reasonably necessary under the circumstances and must be proportionate. On proportionality, see also Communication No. 960/2000, ICCPR, A/58/40 vol. II (31 July 2003) 261 (CCPR/C/78/D/960/2000). Para. 9.4. Available at: http://www.bayefsky.com/html/germany_t5_iccpr_960_2000.php.

¹⁵³ HRCtee, *De Guerrero v. Colombia* (above n.150), para. 13.2.

¹⁵⁴ Basic Principles on Use of Force and Firearms (above n.151), para. 8; UN Code of Conduct for Law Enforcement Officials, Articles 3, 5; ICCPR, Article 4; HRCtee, General Comment No. 29, States of Emergency, U.N. doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001).

¹⁵⁵ *Ibid.*, at para. 22.

¹⁵⁶ *Ibid.*, para. 9

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* See also the ‘Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions’ adopted by the Economic and Social Council in its resolution 1989/65 of 24 May 1989, (known as the ‘Minnesota Protocol’) available at: <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html>.

¹⁵⁹ *Ibid.*, para. 23.

¹⁶⁰ *Ibid.*, para. 7.

Problems in the legislation

A number of provisions in Nepali law give police and other officials very wide powers to use force, including lethal force. These provisions raise numerous problems under the international standards outlined above. The relevant legislation is set out in greater detail in the Appendix.

i. Powers to shoot at sight in emergency situations

Under the Local Administration Act,¹⁶¹ police have very wide powers to shoot people at sight in certain emergency situations, contrary to international law by which such “exceptional circumstances” do not provide any excuse from deviating from the general safeguards regarding the use of firearms. Where a curfew has been imposed, the Chief District Officer (who controls the district’s police force) may issue an order to shoot at sight “any person or group who violates curfew with violent tendencies”.¹⁶² Likewise, where the Chief District Officer orders an area to be designated a “riot affected area”, he or she may order to shoot at sight any person “who loots or burns houses and shops or destroys public property or causes any other types of violent or destructive acts”.¹⁶³ These provisions can be contrasted, for example, with other provisions in the Act which require warnings to be given and non-lethal force to be used before firing, and (where force is resorted to after such warnings) that shots be fired below the knee.

The powers can result in violations of the right to life. For example, a curfew order issued by the Chief District Officer of Banke district on 17 February 2008 stated that “...the security forces deployed for security reason may even open fire if anyone is found moving...”. The same day, a 25 year old construction worker, Guljar Khan, was fatally shot in the forehead during the curfew, in the Gahasmandi area of Nepalgunj.¹⁶⁴

ii. Powers to use lethal force in relation to minor offences by administrative officers

Powers to use lethal force are not limited to preventing violent or destructive acts, nor are they restricted to police officers. The Forest Act allows District Forest Officers and other employees of the Forestry Department to use “necessary force” to prevent offences under the Forestry Act (which deals with the conservation and management of forests, and criminalises acts such as collecting firewood),¹⁶⁵ including the power to shoot a person who is accused of a crime under the Act below the knee when they obstruct arrest or attempt to escape, or if the officer considers their own life to be in danger.¹⁶⁶ Similarly under the National Parks and Wildlife Act, a National Parks and Wildlife Officer may shoot

¹⁶¹ Local Administration Act 2028 (1971).

¹⁶² *Ibid.*, Section 6A(4) (Curfew may be imposed).

¹⁶³ *Ibid.*, Section 6B(1)(b)(To declare a riot affected area).

¹⁶⁴ OHCHR-Nepal, ‘Summary of human rights concerns arising from the Terai protests of 13 – 29 February 2008’, (2008) p.5 (above n.146).

¹⁶⁵ Forest Act 2049 (1993), Section 55 (Necessary Action to be Taken to Prevent Offences). See also Section 15 (Force May be Used).

¹⁶⁶ *Ibid.*, Section 56 (Special Powers).

a person who is attempting to obstruct or escape arrest, and “if the offender dies as a result of such firing, it shall not be deemed to be an offense”.¹⁶⁷

Use of firearms to prevent escape from arrest for offences under these Acts – where those offences include non-violent acts such as collecting firewood in prohibited places – is very likely to be a disproportionate use of force. The granting of such powers to state officials who are not part of the police training and oversight structure is also problematic; and combined with the fact that forest offices are often situated in very remote locations there is a real risk of abuse of these powers. The reality of these concerns was borne out by an incident in March 2010, where three people – two women and a 12 year old girl – were shot by forestry and army officials in the Bardiya National Park while out as part of a group collecting tree bark for medicinal purposes. Although the army alleged that the group was armed and involved in poaching, the National Human Rights Commission (NHRC) investigation concluded that the three women were shot in the back from a distance.¹⁶⁸ The NHRC recommended legal action against those involved in the incident, including 15 army personnel. No charges have been brought against the army and forestry officers involved, and other people in the group have been charged with offences under the National Parks and Wildlife Act.

iii. Immunities when use of force results in death

Some of the legislation provides specific immunities for officers who have killed a person while exercising powers under the relevant provision, for example, under the National Parks and Wildlife Act (as referred to above),¹⁶⁹ and the Essential Goods Protection Act.¹⁷⁰ These are discussed further below, in Section VIII.

iv. Lack of positive safeguards

Even where some safeguards are provided in the legislation (such as warnings and use of non-lethal force in the Local Administration Act¹⁷¹), the legislation does not set out which measures should be taken by the state agents involved to satisfy themselves that those warnings are received and understood by all parties involved.

The relevant provisions are not accompanied by any provision on automatic notification about every case of use of lethal force, depriving next-of-kin the chance to render assistance and to inquire into the circumstances of the incident.

The provisions do not explicitly require that a prompt, independent, genuine, and effective investigation into all cases of use of lethal force is conducted. Moreover, the immunity provisions make any such investigation – even if one is conducted – totally meaningless.

¹⁶⁷ National Parks and Wildlife Conservation Act 2029 (1973), section 24(2).

¹⁶⁸ United States Bureau of Democracy, Human Rights and Labor, ‘2010 Human Rights Report: Nepal’, 8 April 2011, available at: <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154484.htm>.

¹⁶⁹ National Parks and Wildlife Conservation Act 2029 (1973), Section 24(2).

¹⁷⁰ Essential Goods Protection Act 2012 (1955), Section 6.

¹⁷¹ Local Administration Act 2028 (1971), For example, section 6(1).

b. Wide powers of arrest and detention

Arbitrary arrest and detention continue to occur extensively in Nepal, and legal safeguards to prevent this are regularly not followed. As described further below, Advocacy Forum has documented numerous cases of people arrested without being notified of the reasons for their arrest, who are held without being brought before a judge within 24 hours, and who are kept in pre-charge detention for extensive periods of time without sufficient basis. It has documented cases of individuals being arrested for public order offences and administrative preventive detention orders to stop them from exercising legitimate political rights. It is also aware of a growing number of cases of individuals being held incommunicado, including in informal places of detention.

Many Acts give state agents very wide powers of arrest and detention, without safeguards as required by international human rights standards, basically allowing arrest of individuals contrary to Article 9 of the ICCPR.

International standards

Freedom from arbitrary arrest and detention is provided in Article 9 of the ICCPR. Although the right to liberty and security is qualified, Article 9 guarantees that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁷²

The prohibition of arbitrariness under Article 9(1) of the ICCPR is wider than simply requiring that detention be carried out in line with the law. The Human Rights Committee has stressed that it is to be interpreted broadly to include elements of appropriateness, “predictability and due process of law”.¹⁷³ In other words, for arrest and remand in custody not to be arbitrary it must be not only lawful but reasonable and necessary in the circumstances.¹⁷⁴

The Working Group on Arbitrary Detention has defined three categories of arbitrary detention: 1) where there is no legal basis justifying the deprivation of liberty; 2) when the deprivation results from the exercise of freedoms and rights guaranteed under the Universal Declaration of Human Rights and the ICCPR; or 3) when the deprivation of liberty has resulted from a total or partial non-observance of international standards on the right to a fair trial.¹⁷⁵

Problems in the legislation

i. Arrest without a warrant

Various Nepali laws give broad powers for arrest without a warrant.¹⁷⁶ For example, the Police Act, without any further qualification, allows police to arrest “a person who moves

¹⁷² ICCPR, Article 9(1).

¹⁷³ HRCtee, *Mukong v. Cameroon*, no. 458/1991, CCPR/C/51/D/458/1991 (21 July 1994), para. 9.8.

¹⁷⁴ HRCtee, *Marinich v. Belarus*, no. 1502/2006, CCPR/C/99/D/1502/2006 (16 July 2010), para. 10.4.

¹⁷⁵ See Working Group on Arbitrary Detention, Fact Sheet No.26, available at: <http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx>.

¹⁷⁶ See for example, Arms and Ammunition Act 2019 (1962), Section 5(2); Forest Act 2049 (1993), Section 59.

in a suspicious manner at a time when a curfew is in force”.¹⁷⁷ While it may be legitimate in some circumstances for an officer to arrest a person without a warrant, international human rights law requires adherence to certain safeguards to prevent the abuse of this power: for example, to ensure that the arrest is reasonable and necessary, there must be a “reasonable” suspicion that the person has committed, or is about to commit, a crime.

The European Court has held that the “‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. To show a ‘reasonable suspicion’ there must be facts or information which would satisfy an objective observer that the person concerned may have committed the offence”. However, what “may be regarded as ‘reasonable’ will ... depend upon all the circumstances”.¹⁷⁸ Nepali laws allowing for arrest without a warrant, including the Arms and Ammunition Act,¹⁷⁹ Local Administration Act,¹⁸⁰ Forest Act,¹⁸¹ National Parks and Wildlife Act¹⁸² and the Police Act¹⁸³ do not include the requirement that any arrest without a warrant must be based on “reasonable” suspicion. Neither do they impose the requirement that the arrest is “necessary” in the circumstances (for example, when there are reasonable grounds to think that the person suspected of the crime will abscond, or to prevent the commission of a crime).¹⁸⁴

Article 9 of the ICCPR also provides a list of procedural safeguards which should accompany any deprivation of liberty in order for it to be ICCPR-compliant. A detainee should be promptly informed of the reasons for his or her arrest, any charges against him or her, and be brought before a judge.¹⁸⁵

ii. Lack of presumption in favour of bail

Nepali legislation does not provide a general presumption in favour of bail, but instead specifies certain crimes for which the presumption is in favour of detention.¹⁸⁶ The inability of the Nepali authorities to grant police bail to suspects (assuming that the courts are satisfied with the investigation) means that anyone accused of a crime inevitably spends time in custody. The statutorily mandated detention during trial seems contradictory to a decision of the Nepali Supreme Court in *Kamlesh Dwibedi v. Ministry of*

¹⁷⁷ Police Act 2012 (1955), Section 17(c) (Power of Police to Arrest without a Warrant).

¹⁷⁸ ECtHR, *Case of Fox, Campbell and Hartley v. the United Kingdom*, (1991) 13 EHRR 157, [1990] ECHR 18, 13 EHRR 157, para. 32.

¹⁷⁹ Arms and Ammunition Act 2019 (1962), Sections 5(2) and 6(1).

¹⁸⁰ Local Administration Act 2028 (1971), Section 6B(1)(a).

¹⁸¹ Forest Act 2049 (1993), Section 59.

¹⁸² National Parks and Wildlife Conservation Act 2029 (1973), Section 24.

¹⁸³ Police Act 2012 (1955), Section 17 (Powers to Arrest without a warrant).

¹⁸⁴ See for example, the first requirement as set out in the Forest Act (section 59) and National Parks and Wildlife Act (section 17).

¹⁸⁵ Failure to do so within the period of seven days prompted the Human Rights Committee to establish violation of the detainee’s rights under article 9 (2) and (3) of the ICCPR: *HRCtee, Kurbanova v. Tajikistan*, no. 1096/2002, CCPR/C/79/D/1096/2002 (6 November 2003), at para. 7.2.

¹⁸⁶ *Muluki Ain 2020*, Part 1, Section 118. This is the pattern followed in the Criminal Procedure Code Bill (section 67) lodged with the Parliamentary Secretariat in January 2011, but not yet passed: see the Advocacy Forum/REDRESS submission on the draft, available at: http://www.redress.org/AFRedress_Report_on_Draft_Legislation.pdf. See also the State Cases Act 2049 (1992), Section 16(4).

Law and Parliamentary Affairs.¹⁸⁷ In this case the Court ruled that a provision within the Human Trafficking Act removing the possibility of bail for suspected violators of that act was unconstitutional.¹⁸⁸ By analogy, the statutory removal of the right to bail in other provisions of Nepali law would be similarly unconstitutional and contrary to the prohibition of arbitrary detention.

Article 9(3) of the ICCPR provides that "...It shall not be the general rule that persons awaiting trial shall be detained in custody".¹⁸⁹ The Human Rights Committee has stated that "[p]re-trial detention should be an exception and as short as possible",¹⁹⁰ and has concluded that the only pre-trial detention consistent with Article 9 is that required "to prevent flight, interference with evidence or the recurrence of crime".¹⁹¹ Where a state does resort to pre-trial detention the stated reason must be based on objectively verifiable facts and not on mere suspicion or conjecture.¹⁹²

The provisions of Nepali law providing for a presumption in favour of detention in laws including in the Muluki Ain, the draft Criminal Procedure Code currently before the Parliamentary Secretariat,¹⁹³ the Arms and Ammunition Act¹⁹⁴ and Forest Act,¹⁹⁵ as examined further in the Appendix, should be amended to ensure a presumption in favour of bail.

¹⁸⁷ Supreme Court of Nepal (25 June 2009) Presiding justices: CJ Min Bahadur Rayamajhi and Justices Anup Raj Sharma and Sushila Karki.

¹⁸⁸ Human Trafficking and Transportation Control Act 2064 (2007), Section 8.

¹⁸⁹ For the presumption of bail in domestic practice see, for instance, United Kingdom, Section 38(1) of the Police and Criminal Evidence Act (1984): once charged, a custody officer should release an individual on bail unless the custody officer reasonably believes that: there is doubt about the name and address given by the accused; the defendant will fail to appear in court to answer to bail; (in the case of an imprisonable offence) detention is necessary to prevent the accused from committing an offence; (in the case of a non-imprisonable offence), detention is necessary to prevent him from causing physical injury to any other person or damage/loss to property; the accused may interfere with the administration of justice or with the investigation; detention is necessary for protecting the accused. Canada: see Section 497 of the Criminal Procedure Code, which requires that an individual be released unless the peace officer reasonably believes "(a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to (i) establish the identity of the person, (ii) secure or preserve evidence of or relating to the offence, (iii) prevent the continuation or repetition of the offence or the commission of another offence, or (iv) ensure the safety and security of any victim of or witness to the offence; or (b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law." United States of America, section 3142(e)(1) of the United States Code states that it is only where a judicial officer finds that no condition/combination of conditions can reasonably assure the appearance of the person and the safety of another person/community, that detention may be ordered.

¹⁹⁰ HRCtee, General Comment No. 8, Right to liberty and security of persons Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 130 (2003).

¹⁹¹ HRCtee, *Hugo van Alphen v. The Netherlands*, no. 305/1988, CCPR/C/39/D/305/1988 (1990).

¹⁹² HRCtee, *Michael and Brian Hill v. Spain*, no. 526/1993, CCPR/C/59/D/526/1993 (2 April 1997). In this case, Spain argued that the accused, who was a foreigner, would flee the jurisdiction, and thus bail was not granted. The Committee found a violation of Article 9(3): "it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant." Para. 12.3.

¹⁹³ Draft Criminal Procedure Code, Section 67.

¹⁹⁴ Arms and Ammunition Act 2019 (1962), Section 24(a).

¹⁹⁵ Forest Act 2049 (1993), Section 64.

iii. Preventive detention

Scope for significant abuse exists in very vaguely defined and widely drawn provisions under which it is possible to arrest and detain a person in “preventive detention”.

Such provisions are included in the Public Security Act.¹⁹⁶ Under Section 3.1:

if there is reasonable and adequate ground to immediately prevent a person from acting in any manner prejudicial to the sovereignty, integrity or public peace and order of Nepal, the Local Authority may issue an order to keep such person under preventive detention for a specified period and at a specified place.¹⁹⁷

The Act does not define what amounts to “acting in any manner prejudicial to the sovereignty, integrity or public peace and order of Nepal”.

The Act allows the use of preventive detention for 90 days by order of the Chief District Officer, without the filing of charges. This can be extended for six months on the approval of the Home Ministry “to maintain sovereignty, integrity or public tranquility and order”, and it is possible to extend further to 12 months.¹⁹⁸ No question may be raised in any court concerning an order under the Act (except where there is evidence of bad faith).¹⁹⁹

This provision has been used, for example, to prevent Tibetans from demonstrating and attending Tibetan celebrations.²⁰⁰ Very few of those detained have gone on to be charged with any crime.²⁰¹

Provisions allowing for preventive detention, even when ordered by a court, raise serious human rights concerns because of the severe impact on the right of personal liberty. Such detention should be exceptional and subject to strict safeguards.²⁰² Where it is not ordered by a court, but rather by administrative mechanisms, even greater concerns arise. The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has stressed specifically that “administrative detention” of a person broadly in the name of prevention with no periodic and independent review of the lawfulness and appropriateness of such detention is incompatible with international human rights law as it now stands.²⁰³

¹⁹⁶ Public Security Act 2046 (1989).

¹⁹⁷ Note also that Article 15 of the Interim Constitution 2063 (2007) provides that “No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal”.

¹⁹⁸ Public Security Act 2046 (1989), Section 5.

¹⁹⁹ *Ibid.*, Sections 11 and 12a.

²⁰⁰ See, eg. Amnesty International (2011) ‘Nepal: Respect Basic Freedoms during Tibetan Holiday Season’ (9 March 2011), available at: <http://www.amnesty.org/en/library/asset/ASA31/002/2011/ne/66eebe71-49c5-46ae-a201-00fe0a274c34/asa310022011en.html>; Human Rights Watch, ‘Appeasing China Restricting the Rights of Tibetans in Nepal’ (2008), available at: http://www.hrw.org/en/node/62105/section/7#_ftn73.

²⁰¹ *Ibid.*, Human Rights Watch ‘Appeasing China Restricting the Rights of Tibetans in Nepal’, Part IV.

²⁰² See, HRCtee, General Comment No. 8 (above n.190).

²⁰³ Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism to the Tenth Session of the UN Human Rights Council, A/HRC/10/3 (2008), at para. 38, available at: <http://daccess-ods.un.org/TMP/6930503.html>.

As explained above, an arrest or detention which is lawful under national law may nonetheless be arbitrary under international standards. This will be the case where the law under which the person is detained is vague, over-broad, or is used in violation of other fundamental rights (such as the right to freedom of expression). Section 3 of the Public Security Act falls into all of these categories.

Although the Act provides that no court shall review preventive detention orders, some protection is provided by Article 25 of the Interim Constitution. This Article sets out that: “No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty, integrity or law and order situation of the State of Nepal”. This allows for Supreme Court oversight of such orders by way of habeas corpus petitions, through which it has on more than one occasion found that their use fails to fulfil the Constitutional requirements.²⁰⁴

iv. Detention without charge

Other provisions of Nepali law provide for very long periods of detention pending investigation without the formal bringing of charges. Those accused of crimes under the State Cases Act²⁰⁵ (which includes homicide, rape, espionage, trafficking, drug offences and forgery) may be held for investigation for 25 days, with the approval of the court.²⁰⁶ Various other enactments vary this provision in certain circumstances. For instance, the Narcotic Drugs (Control) Act allows an extended period of detention of 3 months.²⁰⁷ The Public Offences Act, which covers crimes such as disturbing the peace, vandalism, rioting and fighting, has been interpreted so that a person may be held for investigation for up to 35 days (with approval of the Chief District Officer).²⁰⁸ In contrast, in other countries, comparative practice demonstrates that detention without charge for non-terrorism related offences is normally restricted to three days or less.²⁰⁹

Under the Interim Constitution a person must be informed of the reasons for their arrest immediately and must be brought before the case hearing authority within 24 hours of

²⁰⁴ Sambhu Thapa on behalf of Rajendra Rai, v Tulsi Giri, the Vice Chairman of the Council of Ministers et. al, Habeas Corpus, 2062/2/6/6, Supreme Court Bulletin, Year 14, No. 3, Page 7, Nepal Law Magazine, 2062, No. 4, Decision No. 7521, page 425, and Raju Thapa on behalf of Gagan Kumar Thapa, v. Ministry of Home Affairs, 2062/2/10/3 et. al., Supreme Court Bulletin, Year 14, No. 3, Page 12.

²⁰⁵ State Cases Act 2049 (1992).

²⁰⁶ Ibid., section 15(4), although the accused must be brought before the court within 24 hours of arrest, at which time the charge must be stated: section 15(2).

²⁰⁷ Narcotic Drugs (Control) Act 2033 (1976),, Section 22C.

²⁰⁸ Public Offences (and Punishment) Act 2027 (1970), Section 4. Although the Courts have clarified that a Chief District Officer may not detain a person for more than seven days before filing the charge-sheet without “reasonable grounds”: See Government of Nepal v Shanmbu Yadav, referred to in International Legal Foundation – Nepal, ‘Case Notes – Fall 2010’, p. 1, available at: <http://theilf.org/wp-content/uploads/2011/07/ILF-Nepal-Case-Notes-Fall-2010.pdf>.

²⁰⁹ See, eg. United Kingdom: Police and Criminal Evidence Act 1984, sections 41-43 (normal period 24 hours, 36 hours for indictable offences, with an extension of a further 36 hours possible upon the order of a magistrate). See the comparative review of pre-trial detention periods conducted by Liberty which shows the following limitations for non-terrorism related offences: United States of America (48 hours); New Zealand (longer than 48 hours would not be considered ‘prompt’); Germany (48 hours); France (24 hours, extension of further 24 hours possible with written authorisation of District Prosecutor); Italy (4 days); Spain (3 days); Denmark (3 days); Norway (3 days); Russia (5 days): Liberty, ‘Terrorism Pre-Charge Detention Comparative Law Study’, July 2010, available at: <http://www.liberty-human-rights.org.uk/policy/reports/comparative-law-study-2010-pre-charge-detention.pdf>.

arrest (excluding travel time).²¹⁰ However, such safeguards are routinely not followed,²¹¹ and the prompt filing of formal charges is necessary to ensure in practice both that sufficient grounds for arrest exist and that a person detained has adequate knowledge of the reasons for their detention to challenge it. Extended detention in police custody increases the risk of torture in order to obtain sufficient evidence to bring formal charges.

The provisions allowing for excessively long pre-charge detention are contrary to the requirement under Article 9(2) of the ICCPR that “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him” (emphasis added). The Human Rights Committee has emphasised that “one of the most important reasons for the requirement of ‘prompt’ information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority”.²¹²

Police also frequently arrest citizens under the Public Offences Act and detain them for short periods without bringing charges.²¹³ Again these provisions have the potential to be used to restrict legitimate exercises of the rights to freedom of expression and freedom of peaceful assembly. For example in April 2008, during protests by exiled Tibetans, hundreds of Tibetans were detained at different locations, many of them held overnight. Some were charged with public nuisance offences while others were released without charge.²¹⁴

v. Repressive and widely drafted criminal offences

It is a hallmark of criminal law that the elements of criminal offences should be as clear and precise as possible. This is indispensable as a matter of justice, so that anyone knows what he or she should be doing in order to conform to the law. The principle also acts as protection against arbitrary arrest and detention, as over-broad definition of crimes in legislation can allow state agents to use the alleged commission of such crimes as pretext to detain people arbitrarily in violation of the right to liberty.

An example of an overly-broad crime can be found, for example, in the Crimes Against the State and Punishment Act.²¹⁵ Section 3(1) provides for life imprisonment for a person who “causes or attempts to cause to create any [public] disorder with an intention to jeopardize the sovereignty, integrity or national unity of Nepal”.

²¹⁰ Interim Constitution 2063 (2007), Article 24. As mentioned above, this is also required by some acts for crimes charged under them including the State Cases Act 2049 (1992), section 15, by which a person must be brought before the Court within 24 hours (at which the charge must be stated) in order to remain in detention pending investigation.

²¹¹ Advocacy Forum and REDRESS, ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his visit to Nepal in 2005’ (September 2010), available at:

<http://www.advocacyforum.org/downloads/pdf/publications/Submission-to-UN-Special-Rapporteur-on-Torture-2010.pdf>.

For an in-depth examination of these problems see also Advocacy Forum’s forthcoming report on the right to a fair trial in Nepal. See also, eg. Government of Nepal v Sita Ram Yadav, referred to International Legal Foundation-Nepal, ‘Case Notes – Spring 2011’, p.3 available at: http://theilf.org/wp-content/uploads/2011/09/ILF-N_Case_Notes_Spring2011.pdf.

²¹² HRCtee, Barrington Campbell v. Jamaica, no. 618/1995, CCPR/C/64/D/618/1995 (1998), para. 6.3.

²¹³ United States Bureau of Democracy, Human Rights and Labor, ‘2010 Human Rights Report: Nepal’, 8 April 2011, available at: <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154484.htm>.

²¹⁴ Human Rights Watch, ‘Nepal: Stop Illegally Detaining Tibetans’, 20 April 2008, available at: <http://www.hrw.org/news/2008/04/19/nepal-stop-illegally-detaining-tibetans>.

²¹⁵ Crime Against the State and Punishment Act 2046 (1989).

Criminal offences to protect the state are part of many criminal laws. However, their broad scope in Nepali law makes these offences susceptible to abuse. The scope of section 3(1) is extremely broad as it potentially covers peaceful acts, such as calls for minority rights, or greater state autonomy, which are protected by the freedom of expression. Phrases such as “jeopardiz[ing] the sovereignty, integrity or national unity of Nepal” do not indicate with sufficient precision which acts are covered. In conjunction with the fact that such acts may carry life imprisonment, the provision is prone to deter peaceful political activities.

The Supreme Court of Nepal has recognised that there need to be strict limits on accusations under this provision, observing that the Constitution does not give the state free rein to detain a person without sufficient reasonable grounds.²¹⁶

If a person is prosecuted and found guilty of such a crime, this may give rise to a separate violation of the principle that no person should be punished for an act that was not proscribed as a crime. This principle of *nullum crimen sine lege; nulla poena sine lege* is enshrined in Article 15 of the ICCPR (and is also enshrined in Nepali legislation by Section 15 of the Civil Rights Act and Article 24(4) of the Interim Constitution). In interpreting a similar obligation from the American Convention of Human Rights,²¹⁷ the Inter-American Court of Human Rights has stated that “crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense”.²¹⁸ Clarity is necessary for two reasons: first, to allow citizens to regulate their conduct;²¹⁹ and second, to minimise the potential for states to misuse the law, which could negatively impact on the realisation of human rights. Article 15 is non-derogable, even in times of public emergency.²²⁰

Charges of offences against the state were relied upon frequently to detain members of Maoist front organizations (such as women, students and intellectuals) prior to 2006. Arrest and detention by security forces were often made without any charges being brought under the Terrorism and Disruptive Activities (Control and Punishment) Act (which is no longer in force).²²¹ Where prosecutions were brought under the Crimes Against the State and Punishment Act, they were brought in relation to a wide range of acts, many of which fell squarely within the legitimate exercise of the right to freedom of expression and political association.²²² Such provisions, open to abuse and inconsistent with international human rights law, should be repealed in democratic Nepal.

²¹⁶ Krishna Dhvaj Khadka vs. Law and Justice Ministry, Nepal Law Reporter 2055, p. 195, Verdict no. 6530; Rohini Prasad Devkota versus Home Ministry, Nepal Law Reporter 2057, p. 580, Verdict no. 6925.

²¹⁷ American Convention on Human Rights, Article 9 - Freedom from Ex Post Facto Laws: No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom. American Convention on Human Rights available at: <http://www.cidh.oas.org/Basicos/English/Basic3.AmericanConvention.htm>.

²¹⁸ IACtHR, Castillo Petruzzi v Peru (Judgment of May 30th 1999), para. 121.

²¹⁹ European Commission of Human Rights, G v Federal Republic of Germany, 6 March 1989 (1989) 60 DR 256, 262 from UK Law Commission report entitled Legislating the Criminal Code: Corruption (LC248), published 03/03/1998. Available at: http://www.lawcom.gov.uk/lc_reports.htm.

²²⁰ ICCPR, Article 4(2).

²²¹ Terrorism and Disruptive Activities (Control and Punishment) Act 2058 (2002).

²²² See Amnesty International, ‘Nepal: A spiralling human rights crisis’, (2002), pp. 35-36 (above n.7).

vi. Incomplete custodial safeguards

Nepali laws do provide for safeguards which are meant to prevent arbitrary arrest and detention, such as the requirement that a person immediately be informed of the reasons for their arrest,²²³ that they be brought before the adjudicating authority (be it Chief District Officer or Judge) within 24 hours,²²⁴ and that records be kept of those held in detention.²²⁵ However, as Advocacy Forum has described in previous reports, those safeguards are regularly ignored.²²⁶

Non-compliance with procedural law encourages a perceived “bending” of the law, increases the vulnerability of an accused person to torture and supports a culture of impunity in law enforcement.²²⁷ Although a comprehensive review of these procedural safeguards is beyond the scope of this report, the operation in practice of the safeguards included in legislation should be reviewed, and strengthened where necessary.

One positive development is the inclusion in the draft Criminal Procedure Code of a provision criminalising the detention of any person in any manner except as provided by law.²²⁸ This should in theory enable the prosecution of those officials who fail to abide by the requirements of the law in this regard.

c. Failure to separate judicial and executive branches

Another issue of concern in numerous pieces of legislation is the fact that administrative officials under the direction of the government are given the power to review detention and to try criminal matters. This has implications both for the right to freedom from arbitrary arrest and detention and the right to a fair trial – implications recognised by the Supreme Court, which has recently ruled such provisions unconstitutional.²²⁹

The position examined below is that of Chief District Officers, however similar issues arise in relation to the dual functions given to District Forest Officers under the Forests Act,²³⁰ and officers prescribed to hear cases under the National Parks and Wildlife Conservation Act.²³¹

²²³ Interim Constitution 2063 (2007), Article 24(1).

²²⁴ *Ibid.*, Article 24(3); See also eg. Forest Act 2049 (1993), Section 59; State Cases Act 2042 (1992), Section 15(2).

²²⁵ Police Act 2021 (1955), Section 23.

²²⁶ Advocacy Forum and REDRESS, ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his visit to Nepal in 2005’ (2010) (above n.211). See also UNHRC ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’ (18 February 2008) A/HRC/7/3/Add.2 para. 458: “in practice many detainees do not have immediate access to lawyers, and the 24-hour period for presentation before a judge is often not respected”.

²²⁷ See, *inter alia*, ‘Indifference to Duty’ (2010) (above n.4); Advocacy Forum and REDRESS, ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his visit to Nepal in 2005’ (2010) (above n.211).

²²⁸ Draft Criminal Code, Section 195.

²²⁹ Advocacy Forum v Ministry of Home Affairs, Secretariat of the Prime Minister and Ministry of Law and Justice, Judgment of Supreme Court Justices Kalyan Shrestha, Girish Chandra Lal and Sushila Karki, 22 September 2011.

²³⁰ Forest Act 2049 (1993), Sections 59 and 65.

²³¹ National Parks and Wildlife Conservation Act Act 2029 (1973), Sections 31 (the “court or Authority”, prescribed by the government in regulations where the offence has been committed entirely within the National Park and Conservation Area is the forest warden, an administrative official. Where the offence was committed outside the area and is subject to a fine

Chief District Officers (CDOs) are administrative officials appointed by the Home Ministry, and play the leading role in administering each district. They must “act in accordance with orders or instruments issued from time to time by the Government of Nepal”.²³² Among their many functions, CDOs are responsible for maintaining peace, order and security in the district,²³³ and have significant responsibilities in relation to the criminal justice system. In particular they are effectively in control of the district police force²³⁴ and jail.²³⁵

Despite their position as executive officers, responsible to and directed by the state, many enactments also give judicial functions to CDOs. The CDO has oversight of arrest and detention in many situations: for example when a person is arrested without a warrant, various Acts provide that the detained person must be brought before the CDO within a prescribed period of time. The CDO also has jurisdiction to try criminal cases under various Acts including the Arms and Ammunition Act,²³⁶ and the Public Offences (and Punishment) Act.²³⁷ The punishments the CDO can impose range from fines to seven years imprisonment.²³⁸

In April 2010, Advocacy Forum brought public interest litigation before the Supreme Court challenging the provisions in Nepali law granting CDOs judicial powers. On 22 September 2011, the Supreme Court handed down its judgment, ruling that the provisions are unconstitutional, breaching Articles 24, 100 and 101 of the Interim Constitution.²³⁹ It expressed serious concerns about untrained quasi-judicial officers hearing criminal cases, and held that granting any criminal jurisdiction to a CDO is unconstitutional because, as members of the executive, such officers are unable to be impartial. The court ordered the government to redefine which cases should be given to executive officers and which cases should be heard by courts or specialised tribunals. To do so, it requires the government to form a committee to review comparative practice on the extent of judicial powers exercised by executive officers, and to recommend necessary changes within six months of its formation. As an interim measure while reforms are carried out, the court ordered that, within the next year, all CDOs must be shown to have a law degree or be given three months of legal training.

of less than Rs 10,000 and imprisonment it is heard by the District Forest Officer, also an administrative official. For an example of the problems of delay and violation of fair trial rights in a case heard by a forest warden see *The Warden of Chitwan National Park v Sukram Kumal*, referred to in International Legal Foundation - Nepal, ‘Case Notes – Summer 2010), available at: <http://theilf.org/wp-content/uploads/2011/07/ILF-Nepal-Case-Notes-Summer-2010.pdf>.

²³² Local Administration Act 2028 (1971), Section 5.

²³³ *Ibid.*, Section 5(5)(a).

²³⁴ Police Act 2021 (1955), Section 8.

²³⁵ CDOs have the duty to administer the jail in their jurisdiction; Section 16 of Prisons Act 2019 (1963). Each CDO is therefore the head of their district’s jail.

²³⁶ Arms and Ammunition Act 2019 (1962), Section 24 provides that the CDO shall hear the cases under this Act. As per this amended Act, a prison term up to 7 years may be imposed.

²³⁷ Public Offences (and Punishment) Act 2027 (1970), Section 6 of this Act provides that CDOs may sentence those convicted to a fine of up to Rs 10,000/- and prison term of up to 2 years. Other Acts providing jurisdiction to hear criminal matters include: Section 9 of The Essential Goods Protection Act 2012 (1955); Section 15 of The Black Marketing and Other Social Offences and Punishment Act 2032 (1975); Section 19 of The Social Practices (Reform) Act 2033 (1976); Section 11 of Aquatic Animals Protection Act 2017 (1960); Section 17 of Nepal Standards (Certification) Act 2037 (1980); Section 22 of Animal Health and Livestock Services Act 2055 (1999).

²³⁸ See for example, the Arms and Ammunitions Act 2019 (1962), Sections 20 and 24.

²³⁹ *Advocacy Forum v Ministry of Home Affairs, Secretariat of the Prime Minister and Ministry of Law and Justice* (above, n.229).

In redefining the functions of CDOs, the government must take into account international standards on the right to a fair trial. As set out below (and as recognised by the Supreme Court), those standards require that independent, competent and impartial courts have the jurisdiction to hear criminal cases and to review arrest and detention, rather than executive officials such as CDOs. Provisions allowing for such jurisdiction must be repealed.

International standards

The right to a fair trial is enshrined in Article 14 of the ICCPR. Under paragraph (1) a state must provide every person accused of a crime with a “fair and public hearing by a competent, independent and impartial tribunal established by law”.

In terms of review of detention, the ICCPR provides that any person arrested “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. The Human Rights Committee has stated that it “considers that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”.²⁴⁰

Independence

The Interim Constitution reflects the doctrine of the separation of powers and independence of the judiciary, which are critical components of the rule of law.²⁴¹

According to the UN Human Rights Committee, “[t]he notion of a ‘tribunal’ in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.²⁴²

The requirement for independence includes the need for “actual independence of the judiciary from political interference by the executive branch and legislature.”²⁴³ Empowering non-judicial persons, such as representatives of the executive, to exercise judicial functions is a clear breach of the requirement for independence.

According to the Committee, a “situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal”.²⁴⁴

²⁴⁰ HRCtee, *Vladimir Kulomin v. Hungary*, no. 521/1992, CCPR/C/50/D/521/1992 (1996), para. 11.3. In that particular case, the Committee was “not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an ‘officer authorized by law to exercise judicial power’ within the meaning of” article 9(3) of the Covenant.

²⁴¹ Interim Constitution 2063 (2007), Articles 33 and 100.

²⁴² HRCtee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), Para. 18.

²⁴³ *Ibid.*, para. 19. Independence, as defined by the Human Rights Committee, also refers to “the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions...”.

²⁴⁴ *Ibid.*

While in some systems some non-judicial bodies may exercise quasi-judicial powers, these are strictly circumscribed, safeguards of impartiality are required, and criminal jurisdiction is generally not provided (or if it is, it is limited to crimes involving imprisonment of six months or less).²⁴⁵

Competence

Judges must be sufficiently qualified²⁴⁶ and deliver judgment in all cases before them in accordance with the applicable law, and after a careful hearing and evaluation of the arguments presented. The Human Rights Committee has emphasised the need to select judges based on their legal qualifications and merits. In its Observations on the United States of America's compliance with the ICCPR, the Human Rights Committee expressed deep concern that "in many rural areas justice is administered by unqualified and untrained persons".²⁴⁷

Impartiality

According to the Human Rights Committee, the requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.²⁴⁸ Whether in practice such persons are able to adequately dispense justice is beside the point for "[j]ustice should not only be done, but should...be seen to be done."²⁴⁹

Problems under the legislation

CDOs have none of the attributes required to exercise judicial power, and in particular criminal jurisdiction, in accordance with international human rights law and the Interim Constitution.

They are clearly not independent from the executive, as they are organisationally part of the executive apparatus, and required to follow its instructions and directions. Neither are they impartial in criminal matters – particularly given that their role is to maintain peace, order and security in the district, and they are in charge of both the district jail, and the police. Any criminal case (and any review of detention) is likely to involve a substantial amount of police evidence, and this puts the CDO in an impossible situation.

There is no guarantee either that CDOs will be competent. As Advocacy Forum noted in an unpublished report:

CDOs are appointed by the Home Ministry from a pool of civil servants who have reached the standard of 'gazetted officer' within the public service commission. There is

²⁴⁵ See for example, United Kingdom: Magistrates Court Act 1980, section 31; United States: Constitution, Article III, Section 2, and Sixth Amendment.

²⁴⁶ The African Commission for Human and Peoples' Rights has stated that "competent" (in relation to Article 7(1) of the Banjul Charter) includes the legal expertise of the judges: *Amnesty International and Others v Sudan*, Comm.48/90, 50/91, 89/93, para. 62. Available at: http://www.achpr.org/english/info/List_Decision_Communications.html.

²⁴⁷ HRCtee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50 (7 April 1995), paras. 23 and 36.

²⁴⁸ General Comment No. 32, (above n.242), para. 21.

²⁴⁹ *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256 per Hewart CJ (United Kingdom).

no requirement for such officers to have received legal training. When asked about the judicial power of the CDO, a judge interviewed by AF commented, 'They have no legal knowledge, no background in the law, and one does not need to be a lawyer.'²⁵⁰ Whilst it is entirely possible that some CDOs may be trained lawyers there is no guarantee that they will receive any formal legal training.²⁵¹

Provision of judicial functions to CDOs of itself violates both the right to freedom from arbitrary detention and the right to a fair trial. It may also contribute to impunity for abuses carried out by police or other state officials who arbitrarily arrest or mistreat detainees. Safeguards in the law to prevent and monitor such abuses – including the requirement to bring a detained person promptly before a judge – are of less value when the CDO is the person exercising oversight. There may be little incentive for CDOs to properly deal with such matters when they are responsible for directing police and maintaining security in the district.

The ruling of the Supreme Court requiring review and reform of the jurisdiction of CDOs and other administrative officials is a welcome development which has the potential to greatly improve respect for the rights of those detained on criminal charges in Nepal. The government must act swiftly on this ruling to review and reform legislation granting quasi-judicial powers to administrative officials (such as that outlined in Annex I) and put in place the necessary practical arrangements to ensure that this vital change is not any further delayed.

²⁵⁰ Advocacy Forum interview with a district judge (21 July 2009), Kathmandu.

²⁵¹ Advocacy Forum, 'The Right to Fair Trial', forthcoming publication.

VII. FAILURE TO CRIMINALISE TORTURE AND ENFORCED DISAPPEARANCE

The crimes of torture and enforced disappearance – both of which have historically been common in Nepal – are simply not adequately addressed in legislation. This leads to impunity by a different route: with no appropriate offences under national law, it is impossible to hold perpetrators to account.

A failure to criminalise such acts has further practical and symbolic consequences for impunity. On the practical side, the lack of criminal provision means that it is difficult for a victim or relative to file an FIR for these acts (both in relation to torture and disappearances), meaning that an investigation will not take place under the normal provisions of the State Cases Act and the conduct remains unscrutinised. It also means that victims must rely on patchy or non-existent provisions for obtaining reparation, and that ‘compensation’ (whether in the form of ‘interim relief’ in relation to conflict-era crimes, or compensation under the Compensation Relating to Torture Act²⁵² as a civil remedy) is used as a substitute for holding individual perpetrators accountable. These issues are further discussed in Section VIII.

On the symbolic side, the failure to criminalise these acts sends a message that despite Nepal’s clear obligations under international law to repress and punish these crimes, this is not a priority for the government. It provides tacit permission for the conduct to continue.

International standards

Under Article 2 of the International Covenant on Civil and Political Rights (ICCPR), States Parties undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”²⁵³ As explained above, states are required to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.²⁵⁴

The ICCPR therefore requires states to ensure that violations of Covenant rights are also criminalised in domestic law. These obligations arise notably in respect of those violations recognised as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).²⁵⁵

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also call on states to “ensure that their domestic law is consistent with their international legal obligations by incorporating norms of international human rights

²⁵² Compensation Relating to Torture Act 2053 (1996).

²⁵³ ICCPR, Article 2(1)

²⁵⁴ HRCtee, General Comment No. 31 (above n.78), para.7 .

²⁵⁵ *Ibid.*, para.18

law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system”, and “adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.”²⁵⁶

a. Torture

The use of torture remains systemic in Nepal. Advocacy Forum carries out a programme of monitoring places of detention in 20 of the country’s 75 districts, in the absence of systematic monitoring by government and other agencies. Since the end of the armed conflict in 2006, there has been a gradual decline in the levels of torture in the 57 places of detention in 20 districts where Advocacy Forum conducts regular visits (from around 50% in 2001–2002 to around 20% in 2009–2010). However, the last six months of 2010 and the first six months of 2011 seemed to indicate a reversal in this trend, with the percentage of torture in detention increasing from 15.8% in the first six months of 2010 to 22.5% in the second six months and 25% in the first six months of 2011.²⁵⁷ There is no independent mechanism in place to monitor detention conditions throughout the country; hence the data collected by Advocacy Forum can only be suggestive of wider patterns across the country.

The two groups of detainees associated with the highest levels of torture are those charged under the Arms and Ammunition Act and with kidnapping. Of particular vulnerability are juveniles, detainees in the Terai region, and members of specific ethnic groups, refugees and women.²⁵⁸

Torture and other ill-treatment are most commonly reported to be carried out by the police, APF, customs officers, officials of the forestry department and politically affiliated youth groups.²⁵⁹ Armed groups operating in the Terai have reportedly continued to abduct, and commit acts amounting to torture and other ill-treatment.²⁶⁰

Egregious cases of abuse of power are encountered with alarming regularity in Advocacy Forum’s work. For example, Sushan Limbu (23) was detained at the Urlabari Area Police Post in Morang District on 12 July 2009 for failing to pay his bill at a local hotel. His friend Bhakta Rai, aged 24, went to the police station the next day to inquire about him. Police officers took both men into a cell and beat them. Around 9am on 13 July, they took them out into the street, stripped them to their underwear and continued to beat them in public. According to people who were present, they were beaten with iron rods, kicked and punched and forced to crawl on their knees and elbows over stony ground for one hour.

²⁵⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on Remedy and Reparation), Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Article 2.

²⁵⁷ Advocacy Forum, ‘Recent trends and patterns of torture in Nepal: July to December 2010’ available at: <http://www.advocacyforum.org/downloads/pdf/publications/Briefing-July-to-Dec-2010-final.pdf>.

²⁵⁸ Advocacy Forum, ‘Torture Briefing: Prevention of Torture in Nepal: January to June 2011’ available at: <http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf>. p. 7.

²⁵⁹ Advocacy Forum and REDRESS Trust, ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005’, September 2010, available at: <http://www.advocacyforum.org/downloads/pdf/publications/Submission-to-UN-Special-Rapporteur-on-Torture-2010.pdf>.

²⁶⁰ Advocacy Forum, ‘Torture Briefing: Prevention of Torture in Nepal: January to June 2011’, pp. 4-6, (above n.258).

One of the members of the public took a 15-minute-long video clip of this torture. The police took both men to the hospital that evening. However, they were not examined by a doctor. Instead, the police forced the doctor to sign a medical report that stated the victims had “no external injuries.” Roshan Limbu was not allowed to see his family until 15 July 2009. Both men were brought before the Chief District Officer on 28 July. Bhakti Rai was charged under the Public Offences Act and released on bail. Sushan Limbu was remanded into prison custody awaiting trial under the Arms and Ammunition Act.

Women continue to be tortured, ill-treated and sexually harassed by the police. For example, during investigations, women report being sexually harassed with abusive language, stripped naked, beaten and threatened with rape. In many cases, male police officers were found to have tortured female detainees.

International standards

Whether in peacetime or war, there is a clear and absolute prohibition on torture in international law.²⁶¹ This prohibition is a peremptory norm of international law – also known as *jus cogens* – which means that derogation both in treaties and custom is precluded.²⁶² Further, Nepal, as a party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”), has specifically committed itself to take effective legislative, administrative, judicial or other measures to prevent acts of torture in its jurisdiction.²⁶³

The CAT requires states “to ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”²⁶⁴ In addition, states are required to “make these offences punishable by appropriate penalties which take into account their grave nature.”²⁶⁵ Any definition of torture in Nepali legislation should at least be as broad as the definition in the CAT.²⁶⁶ The offence should cover individuals who mandate torture and those who are complicit in the act, and the defence of superior orders should not apply.²⁶⁷

The link to prevention

The CAT imposes both positive and negative duties on state parties. In addition to refraining from the infliction of and criminalising the acts, Nepal must take actions to

²⁶¹ Article 1(2) CAT; Article 7 ICCPR. Article 1(1) of CAT defines torture as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

²⁶² Article 2(2) CAT, Article 4 ICCPR and ICTY, *Prosecutor v Furundzija*, (Judgment of the Trial Court) IT-95-17/1-T (1998), 121 ILR 213, paras. 153-4.

²⁶³ CAT, Article 2(1).

²⁶⁴ CAT, Article 4(1)

²⁶⁵ *Ibid.*, Article 4(2)

²⁶⁶ As stipulated in Article 1(2), the definition is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.

²⁶⁷ CAT, Article 2(3).

prevent, investigate and punish the acts; it must also provide reparation to victims and/or their family members. The last three of these aspects are discussed in further detail in Section VIII. Many of them are contingent on the criminalisation of the act itself.

Legislation criminalising torture may also address the measures required to prevent them. For example, Article 10(1) of the CAT obliges Nepal to educate and train any person involved in the custody, interrogation or treatment of individuals subject to arrest, detention or imprisonment on the prohibition on torture. Interrogation rules must be kept under review to ensure their compliance with the CAT. The CAT also provides that a confession extracted through torture cannot be admitted as evidence in any proceedings.²⁶⁸ Other preventative measures should include the following:²⁶⁹ safeguards to protect those arrested, detained or in custody from torture and cruel, inhuman or degrading treatment;²⁷⁰ measures to prevent the commission of cruel, inhuman or degrading treatment with the involvement/acquiescence of state officials;²⁷¹ and the establishment of independent and effective bodies to inspect places of detention. The latter has been identified by the UN Special Rapporteur on Torture (2002) as the most effective preventative measure against torture.²⁷²

The CAT is further supplemented with the Optional Protocol,²⁷³ which is the ‘monitoring arm’ of the convention. The Protocol establishes the Subcommittee on Prevention of Torture²⁷⁴ which, amongst other duties, must undertake regular visits to places of detention under the jurisdiction and control of state parties. The Protocol obliges state parties to establish national preventive mechanisms, in order to prevent torture at the domestic level.²⁷⁵ The Subcommittee must carry out the rest of its functions alongside national mechanisms, which include assisting them in strengthening the latter’s capacity and mandate for the prevention of torture and cruel, inhuman or degrading treatment.²⁷⁶

There is a clear link between the implementation of such measures and combating impunity: where a culture of prevention and monitoring is institutionalised, instances of abuse will be highlighted and a culture of tolerating such behaviour and allowing it to go unpunished must be undermined. This report will not address these preventative measures and how they are or are not reflected in Nepali legislation in further detail, suffice it to say that the enactment of legislation providing for such measures and the

²⁶⁸ Ibid., Article 15.

²⁶⁹ These measures have been identified by REDRESS in ‘Bringing The International Prohibition of Torture Home’ (January 2006), pp. 45-55, available at: <http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf>. For a more detailed discussion of these measures please refer to the aforementioned pages.

²⁷⁰ As recognised by the Committee Against Torture and other human rights bodies.

²⁷¹ See CAT, Article 16 – obligation on state parties to prevent the commission of cruel, inhuman or degrading treatment.

²⁷² Commission on Human Rights, ‘Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted pursuant to Commission resolution 2002/38’ (27 February 2003) . E/CN.4/2003/68, available at: <http://unispal.un.org/UNISPAL.NSF/0/7B874EAB39CFF5D85256E6F004B90D3>.

²⁷³ Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Entered into force on 22 June 2006. Nepal has so far not ratified it despite pressure from civil society to do so.

²⁷⁴ Full Name: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²⁷⁵ Protocol to CAT, Article 17.

²⁷⁶ See Article 11(b) for a full list of the Subcommittee’s duties in relation to the national preventive mechanisms.

ratification of the Option Protocol are two other crucial steps in upholding Nepal's obligations under international law.

Problems in the legislation

Articles 26 and 33 (m) of the Interim Constitution require the enactment of a law to criminalise torture. In addition, in a verdict of 17 December 2007, the Supreme Court of Nepal ordered "the Government of Nepal to criminalize torture and make provisions to punish the perpetrators of torture as demanded by the petitioners".²⁷⁷

Despite this, acts of torture and ill-treatment are still not criminalised in legislation. Currently, the only legislation to address torture is the Compensation Relation to Torture Act,²⁷⁸ which deals only with compensation and departmental action and does not allow for criminal prosecution nor penalties proportionate to the gravity of torture.²⁷⁹ This not only leaves victims without appropriate remedies (as to which, see further Section VIII), but also sends entirely the wrong message about the gravity of torture. In a recent case in which Advocacy Forum was involved, an appeal court upheld an order requiring compensation to be paid to a man who had been tortured by APF officers, but quashed an order requiring departmental action against the perpetrators, on the grounds that to do so would hamper the work of police.²⁸⁰

Some progress has recently been made towards criminalisation. A draft Penal Code - which includes a provision criminalising torture - Criminal Procedure Code and Sentencing Bill were submitted to the parliamentary secretariat in late January 2011. This is the first step towards adopting them. However they have yet to be circulated among the members of parliament.

The initial draft suffered from deficiencies such as the lack of a definition of torture and a very short limitation period. After a national consultation organised jointly by the National Judicial Academy, Advocacy Forum, the Association for the Prevention of Torture (APT) and REDRESS in January 2011, some of the recommended changes to the section on torture have been included in the bill.

Specifically, a definition of torture has now been included and changes have been introduced to the provisions regarding command responsibility. The definition of torture as set out in the new draft²⁸¹ is by and large in line with Article 1 of the CAT in most respects.²⁸²

²⁷⁷ Rajendra Ghimire v. Council of Ministers et al., Supreme Court of Nepal, 17 December 2007.

²⁷⁸ Compensation Relating to Torture Act 2053 (1996)

²⁷⁹ This is discussed further below in Section VIII.

²⁸⁰ Judgment of the Appellate Court, Biratnagar, 2 June 2011, on appeal from the order of the District Court, Morang, 29 March 2010.

²⁸¹ Draft Penal Code, Section 169 (2) Any person arrested, kept in control, put in custody, in prison or in house arrest or in security of an officer, or due to him another person, is knowingly provided physical or psychological pain or suffering or given cruel, inhuman or degrading treatment or punishment to fulfil the following objectives, this is deemed to be torture or cruel, inhuman and degrading treatment to that person: (a) To get information about any issue, (b) To ask the person to confess to an offense, (c) To punish the person for any act, (d) To show intimidation or threat, or (e) Any other act contrary to the law. (unofficial translation)

²⁸² Although it does not refer to discrimination as a prohibited purpose of torture, as required under Article 1 of CAT, and is restricted to situations of custody or control at the direction of a state official, which has the effect of excluding some types of non-state actor torture that would fall within the CAT definition.

Paragraph 169 (4) on command responsibility sets out the same punishment for the person who ordered the acts or was accomplice to the acts as for the main perpetrator. The new draft code also specifies in paragraph 169 (5) that superior orders are not an acceptable defence, and that there is no immunity for this offence.

However the proposed sentence of a maximum of five years' imprisonment or a fine of up to NRs 50,000 (US \$700) has remained unchanged and is not in line with the requirement under the CAT that torture be punishable by an appropriate penalty taking into account the grave nature of the crime.²⁸³ The draft bill should be further amended to bring the prescribed punishment for torture and other cruel, inhuman or degrading treatment in line with the requirement under the CAT. This will increase the law's power as a deterrent against these acts as well as provide the victims with appropriate redress.

b. Enforced Disappearance

Though incommunicado detention is less common now than during the conflict, illegal (unacknowledged) detention and failure to observe court orders regarding releases continue to occur. Often, after detaining an individual incommunicado for several days, the police subsequently record the arrest date as the day on which this person was finally presented in court.

During incommunicado detention, women are often sexually abused and then threatened not to disclose what happened. For example, after Advocacy Forum informed the international community about the torture of Sumitra Khawas who was stripped naked and beaten by police in Morang District, she was subsequently denied access to her lawyers and held in incommunicado detention for approximately two weeks.²⁸⁴ Ms. Khawas was also told not to disclose the incident to human rights defenders. No investigation has been carried out into this case despite national and international interest in the case. Similarly in July 2011, a woman called Harkali Pun was arrested and denied access to her lawyer and family for nine days, during which time she was tortured.²⁸⁵

There are also indications that the use of private residences as secret places of detention is continuing and potentially on the increase. According to a special report published on 19 December 2010 in Nepal, a national weekly magazine,²⁸⁶ the police have continued to use private houses to interrogate and detain suspects - a practice which started during the conflict. Advocacy Forum has received complaints regarding the use of private residents as secret places of detention in Kathmandu.²⁸⁷

²⁸³ Following a review of the Committee Against Torture's concluding observations on state party reports, Chris Ingelse concluded that a custodial sentence of between six and twenty years best corresponds with the Committee's interpretation of the requirements in relation to an appropriate penalty: Ingelse, Chris (2000) 'The Committee Against Torture: One Step Forward, One Step Back' 18 *Netherlands Quarterly of Human Rights* 307-327 at 342, cited in Nowak and McArthur (2008), *The United Nations Convention Against Torture: A Commentary*, OUP: Oxford, p. 250.

²⁸⁴ Urgent Appeal issued by Amnesty International: http://amnesty.org.uk/news_details.asp?NewsID=17883

²⁸⁵ For details of Ms Pun's case, see Asian Human Rights Commission 'Police refuse to provide medical treatment to a woman whose hand was broken due to torture' (29 July 2011), available at: <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-125-2011>.

²⁸⁶ <http://www.ekantipur.com/nepal/article/?id=1768> (In Nepali only)

²⁸⁷ Advocacy Forum, 'Recent trends and patterns of torture in Nepal: July to December 2010' (above n.257).

International standards

International law prohibits the use of enforced disappearances.²⁸⁸ This was recognised by the General Assembly in 1992²⁸⁹ and has more recently been elaborated in the International Convention for the Protection of All Persons From Enforced Disappearance (“Enforced Disappearances Convention”).²⁹⁰ No exceptional circumstances, whether a state of war, threat of war, internal political instability or any other public emergency, can justify the use of enforced disappearance.²⁹¹

Any act of enforced disappearance puts those subjected to it outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, among others, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.²⁹²

Although not a party to the Enforced Disappearances Convention, the Supreme Court of Nepal has recognised that Nepal has a duty under customary international law and its existing human rights obligations to repress and punish the crime of enforced disappearance, and that the Convention sets out the standards of international law which should be followed by Nepal.²⁹³

The Enforced Disappearance Convention requires that “each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”²⁹⁴ and make it “punishable by appropriate penalties which take into account its extreme seriousness.”²⁹⁵ The Convention requires States Parties to hold criminally responsible any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced

²⁸⁸ The UN Convention defines enforced disappearance as follows: “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law” (Article 2).

²⁸⁹ Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (Enforced Disappearance Declaration); Inter-American Convention on Forced Disappearance of Persons Article 3, June 9, 1994, 33 I.L.M. 1429.

²⁹⁰ The Convention was adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177. Entered into force on 23 December 2010, in accordance with article 39(1). Available at: <http://www2.ohchr.org/english/law/disappearance-convention.htm>. See also Enforced Disappearance Declaration (above n.289).

²⁹¹ Convention on Enforced Disappearances, Article 1(2).

²⁹² Enforced Disappearance Declaration (above n.289), para. 1.

²⁹³ Order rendered by Justice Khila Raj Regmi and Justice Kalyan Shrestha (regarding Supreme Court Writ No. 3775) issued on 18 Jestha 2063 (2006). For an unofficial translation of the judgment, see 1 National Judicial Academy Law Journal (2007), 301–339. For a full discussion of the judgment see Kishor Uprety (2008) ‘Against Enforced Disappearance: the Political Detainees’ Case before the Nepal Supreme Court’ 2 Chinese Journal of International Law 429–457, full text available at: <http://chinesejil.oxfordjournals.org/content/7/2/429.full>.

²⁹⁴ Convention on Enforced Disappearances, Article 4.

²⁹⁵ *Ibid.*, Article 7(1).

disappearance.²⁹⁶ Superior orders do not constitute a defence in relation to an act of enforced disappearance.²⁹⁷

The Enforced Disappearances Convention also requires states to take specific measures to prevent enforced disappearances: it prohibits individuals from being held in secret detention²⁹⁸ and obliges states to provide in their domestic legislation rules on the powers regarding detention. Some international standards, similar to those in the UN body of principles on detained/imprisoned persons, are provided in the article, including: the right of the detained individual to communicate with his legal representative and family,²⁹⁹ and access by competent and legally authorised authorities/institutions to places of detention.³⁰⁰ Paragraph (3) of Article 17 mandates state parties to maintain up-to-date registers and/or records of persons deprived of their liberty.³⁰¹ Again, this report does not address how these preventive measures are or are not incorporated into domestic legislation, but their crucial importance cannot be overstated.

Problems in the legislation

Again, despite a Supreme Court order in 2007 mandating the government to criminalise enforced disappearances,³⁰² this has still not been achieved.

There have been some positive developments, with a draft Disappearances Commission Bill introduced in Parliament in early 2010. Many concerns of civil society organizations about initial shortcomings in the Bill³⁰³ have been addressed in the final version tabled in the parliament by the government. However, some concerns remain as the Bill is not fully compliant with international standards.³⁰⁴ The Bill has been under review of the legislative committee of the parliament since May 2010, though with the agreement reached between the major political parties in November 2011 there should now be more impetus for this to be passed.

²⁹⁶ Ibid., Article 6(1)(a).

²⁹⁷ Ibid., Article 6(2).

²⁹⁸ The need to keep individuals deprived of their liberty in officially recognised places of detention is expressed in Human Rights Committee, General Comment No. 20, Article 23 (Thirty-ninth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003), para. 11. See also Principle 10(1) of the Enforced Disappearance Declaration (above n.289) and Principle 6 of the Principles on extra-legal, arbitrary and summary executions.

²⁹⁹ See Principle 15 of the Body of Principles on Detention (above n.64), for a similar obligation.

³⁰⁰ See Principle 29(1) of the Body of Principles on Detention (above n.64), for a similar obligation.

³⁰¹ For a similar obligation, see Enforced Disappearance Declaration, (above n.289) para. 10(3); Body of Principles on Detention (above n.64), para. 12; Principle 6 of the Minnesota Protocol (above, n.158). See also HRCtee, General Comment No. 20 (above n.298), para. 11.

³⁰² Rajendra Dhakal and Others v. The Government of Nepal, writ no.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khila Raj Regmi and Hon. Justice Kalyan Shrestha issued on 18 Jestha 2063 (2007). For an unofficial translation of the judgment, see 1 National Judicial Academy Law Journal (2007), 301–339.

³⁰³ See, eg. the joint memorandum of civil society organisations including Advocacy Forum, 'Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill', 30 August 2009, available at: <http://www.advocacyforum.org/downloads/pdf/publications/disappearance-memo-english.pdf>.

³⁰⁴ Advocacy Forum, 'Review of implementation of the recommendations made by the UN Working Group on Enforced or Involuntary Disappearances after its visit to Nepal in 2004' (September 2010), available at: <http://www.advocacyforum.org/downloads/pdf/publications/af-briefing-series-1-disappearance.pdf>.

The draft Penal Code submitted to the Parliamentary Secretariat in January 2011 also criminalises enforced disappearances, whether committed by the state or by any other group.³⁰⁵ The Bill also criminalises unlawful detention and secret detention, which will help to address situations where officials do not follow the safeguards that do already exist in law to prevent arbitrary arrest and detention (see Section VI, above). Although these are welcome steps forward, there are still problems with the draft, including the definition of enforced disappearance, the failure to recognise the crime against humanity of enforced disappearance and the existence of a limitation period. Advocacy Forum and REDRESS made recommendations to the Ministry of Law, Justice and Home Affairs on these issues in April 2011.³⁰⁶

Aside from the problems with each bill itself, there is also significant conflict between the crimes of enforced disappearance set out in each. Each bill has different, but overlapping, definitions of enforced disappearances, and there is no temporal distinction made between crimes committed under either act. The two bills also provide for different penalties – up to seven years imprisonment in the Disappearances Bill and up to 15 years imprisonment in the draft Penal Code. These issues must be resolved to ensure the clarity and certainty required in criminal law. One approach would be to ensure that the Disappearances Commission Bill applies to acts committed before the coming into force of the new Penal Code, and the draft Penal Code operates prospectively.

³⁰⁵ Draft Penal Code, Sections 200 and 201.

³⁰⁶ See Advocacy Forum and REDRESS, 'Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence' (April 2011) available at: http://www.redress.org/AFRedress_Report_on_Draft_Legislation.pdf.

VIII. LAWS CONCERNING INVESTIGATION, PROSECUTION AND THE RIGHT TO REMEDY AND REPARATION

Impunity for human rights abuses has an impact additional to the continuation of abuses. It denies the victims of such abuses the right they enjoy under international humanitarian and human rights law to an effective remedy and reparation for the abuse. The suffering of victims goes unacknowledged, unaddressed and unrecompensed.

As is demonstrated by this report, impunity for serious human rights violations is a key problem in Nepal. This section examines both the way Nepali law has established the mechanisms and procedures which are crucial to the achievement of remedy and reparation, and the difficulties encountered in practice by victims which could be addressed by changes to the law. It also examines specific barriers enacted in law which promote impunity and block victims' access to justice.

a. The right to remedy and reparation

The right to a remedy and reparation for international crimes and human rights violations has been affirmed by a range of treaties,³⁰⁷ United Nations treaty bodies,³⁰⁸ regional courts,³⁰⁹ and in a series of declarative instruments.³¹⁰ For example, Article 2(3) of the ICCPR provides that the state party is obliged:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

This report focuses on the serious international crimes and human rights violations of extrajudicial killings, arbitrary arrest and detention, torture, enforced disappearances and rape. As particularly grave violations, states are under specific and more extensive obligations to provide access to judicial remedies and substantive reparations. These obligations are set out in treaties specific to the crimes and are required by customary international law, as reflected in the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

³⁰⁷ For example, ICCPR, Articles 2(3), 9(5) and 14(6); CAT, Article 14; and Statute of the International Criminal Court (1988) Article 75.

³⁰⁸ See, for example, HRCtee, General Comment No. 31 (above n.78), paras. 15-17; UN Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, (CAT/C/GC/2/CRP.1/Rev.4 (2007)), at para. 15.

³⁰⁹ See for example, IACtHR, *Velasquez Rodríguez v Honduras*, (Judgment of 29 July 1988), para. 174. See also ECtHR, *Papamichalopoulos v Greece*, App. No. 14556/89, (1995) at para. 36.

³¹⁰ Basic Principles on Remedy and Reparation, (above n.256). See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985; and the Universal Declaration of Human Rights (1948), Article 8.

and Serious Violations of International Humanitarian Law (“Basic Principles on Right to a Remedy and Reparation”).³¹¹

The ICCPR establishes the right to a remedy determined by a “competent judicial, administrative or other authority”. However, for serious violations of international law, it is recognised that the option of a judicial remedy must always be available.³¹² As stated by the Human Rights Committee, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...] in the event of particularly serious violations of human rights [...]”.³¹³

The right to remedy and reparation has both procedural and substantive aspects, which are very closely interlinked. Access to remedy must be equal: the remedy must be appropriately adapted so as to take account of the special vulnerability of certain categories of person.³¹⁴ A necessary prerequisite to any judicial remedy, including prosecution, is mechanisms for prompt, independent and effective investigations. This is also, however, part of the substantive requirement of a victim and public’s right to know the truth of what happened. Credible institutions must be in place to bring perpetrators to account, and to provide substantive reparations to victims, and barriers to remedy must be removed. This report will examine three major aspects of the overriding obligation: the right to truth, the right to justice, and the right to reparation. Failure to achieve these amounts to impunity.

b. The right to truth and the obligation to investigate

i. International Standards

The duty to investigate credible allegations of human rights violations is central to the fulfillment of Nepal’s obligations under Article 2 of the ICCPR and other international treaties to provide a remedy for violations of human rights.³¹⁵ Without a thorough and effective investigation it is impossible to bring perpetrators to account, and for victims to prove their entitlement to remedy and reparation. Multiple human rights bodies, including the Human Rights Committee, have stressed that complaints of violations must

³¹¹ Basic Principles on Remedy and Reparation, (above n.256). The Basic Principles on Right to a Remedy and Reparation do not define the terms “gross violations of international human rights” and “serious violations of international law” however the Special Rapporteur who drafted the text noted in relation to the initial text that “gross violations of human rights and fundamental freedoms” is not fixed and exhaustive. He made it clear that they “include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender”: Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8 (2 July 1993). Rape is also recognised as a serious criminal law offence, and – where it is carried out by a state official or where it can be said that the state has facilitated, acquiesced or enabled others to commit rape – is recognised as torture. Rape is also prohibited under international humanitarian law and can amount to an international crime: see REDRESS, ‘Time for Change: Reforming Sudan’s Legislation on Rape and Sexual Violence’, November 2008, pp. 12-17, available at: <http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf>.

³¹² Basic Principles on Remedy and Reparation, (above n.256), para. 12.

³¹³ HRCtee, *Bautista de Arellana v Colombia*, no. 563/1993, CCPR/C/55/D/563/1993 (1995), para. 8.2

³¹⁴ General Comment No. 31 (above n.78), para. 15.

³¹⁵ See Basic Principles on Remedy and Reparation, (above n.256), paras. 3(b) and 4.

be investigated “promptly, thoroughly and effectively through independent and impartial bodies” to make the right to a remedy effective.³¹⁶ The Committee has also made it clear on many occasions that “[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”³¹⁷ Nepal’s obligation to protect individuals against violations by private persons or entities means that the duty to investigate human rights abuses includes acts which implicate private individuals as well as state agents.³¹⁸

Specific and stringent obligations to investigate are clearly recognised in relation to suspected violations of the right to life, including extrajudicial killing,³¹⁹ torture,³²⁰ and enforced disappearances.³²¹

This jurisprudence and these treaties spell out in greater detail what is required for an effective and human rights compliant investigation. An individual who claims to be a victim of torture has the right to complain and have his or her allegation examined promptly and impartially by competent authorities,³²² although obligations to investigate suspected serious violations arise irrespective of whether there has been a formal complaint;³²³ victims or their relatives should be involved in and informed of the progress of the investigation;³²⁴ the findings of the investigation must be made available to the relevant state authorities;³²⁵ the competent authorities should be granted the necessary powers and resources to carry out an effective investigation, including access to relevant

³¹⁶ HRCtee, General Comment No. 31 (above n.78), para. 15. In relation to complaints of torture, see HRCtee, General Comment No. 20 (above n.298), para. 14.

³¹⁷ HRCtee, General Comment No. 31 (above n.78), para. 15.

³¹⁸ HRCtee, General Comment No. 31 (above n.78), para. 8.

³¹⁹ See, eg. HRCtee, *Baboeram et al v Suriname*, nos. 146/1983 and 148-154/1983, CCPR/C/21/D/146/1983 (1984). See also ECtHR, *Finucane v United Kingdom*, no. 29178/95 (1 July 2003). In finding a violation of Article 2 (right to life), the Court said: “[t]he obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force...”; see also the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principle 9, <http://www2.ohchr.org/english/law/executions.htm>.

³²⁰ CAT, Article 12.

³²¹ HRCtee, *Herrera Rubio v Colombia*, no. 161/1983, CCPR/C/OP/2, pp. 192-195 (1987), paras.10.3 and 11; HRCtee, *Miango v Zaire* no. 194/1985, CCPR/C/OP/2, p. 219 (1990), paras.8.2, 10 and 11. In both of these cases the Committee found a violation of Article 6, in part, because there had been no investigation or no effective investigation; *Enforced Disappearance Declaration* (above n.289), Article 13; *Convention on Enforced Disappearances*, Article 12.

³²² Eg. CAT, Article 13; UN Standard Minimum Rules for the Treatment for Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) (13 May 1977), rule 36(4); HRCtee, General Comment No. 20, (above n.298), para. 14. See also IACtHR, *Maritza Urrutia v Guatemala*, (Judgment of 27 November 2003), para. 119; and ECtHR, *Mikheyev v Russia*, no. 77617/01 (26 January 2006), para. 109; ECtHR, *Ogur v Turkey*, no. 21594/93 (15 December 1997), paras. 91-92.

³²³ Eg. *Convention on Enforced Disappearances*, Article 12(2); *Committee Against Torture*, *Henri Parot v Spain*, no. 6/1990, U.N. Doc. A/50/44 at 62 (1995), para 10.4; *Committee Against Torture*, *Blanco Abad v Spain*, no. 59/1996, CAT/C/20/D/59/1996 (1998), para 8.6; *General Recommendations of the Special Rapporteur on Torture*, para.26 (k).

³²⁴ See principle 4 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (known as the ‘Istanbul Protocol’) annexed to General Assembly resolution 55/89 of 4 December 2000 and to Commission on Human Rights resolution 2000/43 of 20 April 2000, both adopted without a vote; *Committee Against Torture*, *Hajrizi Dzemajl v Yugoslavia*, no. 161/1999, CAT/C/29/D/161/2000 (2002).

³²⁵ Article 10(2).

documentation and other information;³²⁶ state parties must implement measures to prevent, as well as impose sanctions for, acts that hinder the conduct of an investigation (including by ensuring that persons subject to an investigation are not in a position to influence the progress of the investigation by means of pressure, intimidation or reprisal);³²⁷ and states must protect those involved in the investigation from intimidation, ill-treatment or sanction.³²⁸

The Human Rights Committee has stressed the useful role that independent and impartial administrative mechanisms, including national human rights institutions, can play in giving effect to states' general obligation to investigate allegations of violations promptly, thoroughly and effectively.³²⁹ However, as outlined above, in cases of serious human rights violations these must never be seen to remove the option of access to a judicial remedy.³³⁰

Effective investigations are a necessary prerequisite to the provision of remedy and reparation, and a state's duty to prevent future violations. However, they are also part of providing the autonomous and substantive right to the truth.

The right to know the truth has been developed through the jurisprudence of human rights bodies and international criminal law courts and includes the entitlement to seek and obtain information on:

the causes leading to the person's victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.³³¹

It is both an individual and collective right: the right of a victim to know the truth about violations but also a right of society, with the aim of preventing the recurrence of violations.³³²

The updated 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity' places significant weight on the right to truth,³³³ and the

³²⁶ eg. Enforced Disappearance Convention, Article 12(3)(a).

³²⁷ eg. Ibid. Article 12(4); See also Article 22.

³²⁸ eg. Ibid. Article 18(2); ECtHR, *Assenov & others v Bulgaria*, no. 24760/94 (22 September 1997), para 169; IACtHR, *Velasquez Rodriguez v Honduras*, (above n.309); para 39. The right to protection for victims and witnesses has also been increasingly recognised in statutes of international and internationalised courts: see Articles 43(6), 54(1)(b), 57(3)(c), 64(2)(6)(e), 68, 87, 93(l)(j) of the Rome Statute; and Articles 15,20 and 22 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

³²⁹ HRCtee, General Comment No. 31 (above n.78), para.15.

³³⁰ Basic Principles on Remedy and Reparation, (above n.256), para. 12.

³³¹ See the 2006 study by the OHCHR: Commission on Human Rights, 'Study on the right to the truth Report of the Office of the United Nations High Commissioner for Human Rights', E/CN.4/2006/91, 8 February 2006 (Study on the Right to the Truth), para. 38.

³³² WGEID, General Comment on the Right to the Truth in Relation to Enforced Disappearances, 22 July 2010.

³³³ Submitted to the United Nations Commission on Human Rights on 8 February 2005. Principle 2 provides "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and

importance of respecting and ensuring the right to the truth was recently affirmed by the UN Human Rights Council.³³⁴ Effective investigations are therefore not merely a means to an end, but an end in themselves.

ii. Domestic legal framework governing investigations

As described in Section II, investigations of serious human rights abuses fall under the mandate of an array of different actors and institutions in Nepal, including the Police; the National Human Rights Commission (NHRC); and ad hoc “commissions of inquiry” (under the Commissions of Inquiry Act³³⁵).³³⁶

In addition, the following bodies and officials are also involved in investigations of serious violations of human rights:

- Human Rights Units of the police and the army. These were set up during the conflict and receive complaints about human rights violations by their respective officers. However, at least in relation to complaints of torture by the police, the “investigations” conducted by the Police Human Rights Unit are generally limited to sending details of the complaint to the relevant District Police Office and asking that Office to respond to the allegations. These lead at most to disciplinary sanctions against offending officers, which are inadequate where serious human rights violations are at issue.³³⁷
- Public Prosecutors have responsibilities to oversee police investigations under the State Cases Act. Before starting any investigation the police officer responsible must send a preliminary report relating to the crime to public prosecutor, and after receiving the report the public prosecutor may “give necessary directions relating to the investigation of the crime to the Police personnel undertaking the investigation”.³³⁸ If, following the police investigation the relevant officer considers either that the crime was not committed, or a crime was committed, but there is insufficient evidence to prosecute all or some of the accused or the accused could not be identified, they must report this to the public prosecutor.³³⁹ The public prosecutor must review this report, and can direct that further evidence be obtained, or statements taken.³⁴⁰
- The Attorney General, who is appointed by the President, on the recommendation of the Prime Minister, is the head of the public prosecutors

effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”. Principle 4 states “Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”

³³⁴ UN Human Rights Council Resolution 12/12 of 12 October 2009 entitled “Right to the truth”, para. 1. See also Study on the Right to the Truth (above n.331).

³³⁵ Commissions of Inquiry Act 2026 (1969).

³³⁶ See above, Section III. There are also ad hoc committees of inquiry set up by the Home Ministry.

³³⁷ As is envisaged in the Compensation Relating to Torture Act 2053 (1996), Section 7.

³³⁸ State Cases Act 2049 (1992), Section 6.

³³⁹ *Ibid.*, Section 17.

³⁴⁰ *Ibid.*

employed throughout Nepal. The Attorney General is empowered to make the final decision to initiate legal proceedings in any type of case on behalf of the government of Nepal in any court or judicial authority,³⁴¹ and is also entrusted with the responsibility to investigate ill-treatment in custody.³⁴²

As discussed above, the government is also committed under the Comprehensive Peace Agreement to establish a Truth and Reconciliation Commission and a Disappearances Commission, which will be tasked with the investigation of crimes from the conflict period; while the bills to set up these institutions have not yet been passed, there is at least now political agreement to do so promptly.

iii. Problems in legislation and implementation

Failures to investigate serious violations of human rights cannot be blamed on a single factor. Instead a range of issues in legislation and its implementation lead to a situation where cases are simply not investigated, despite strong evidence that a crime has been committed.

Focussing on the law, three central problems can be identified. First, legislation does not provide for the necessary independence of some investigatory bodies. Second, powerful actors with information about crimes committed by their own personnel, including the army and the UCPN-M, refuse to cooperate with investigation procedures. Third, those tasked with investigations – in particular the police and prosecution authorities – are reluctant to follow the procedures required under the law to investigate serious violations of human rights.

A. Lack of independence of investigative mechanisms and susceptibility to political or other interference

A significant problem is the lack of independence of mechanisms tasked with investigating these serious violations when they involve state officials, and their susceptibility to interference where the crimes (particularly from the conflict era) affect powerful actors.

This is most blatant in the case of investigations by the human rights units of the military and police into misdeeds by their own personnel. These units, staffed by personnel from the same organisation as that implicated in the crimes, are clearly not independent of the alleged perpetrators and incentives exist for the violation to be minimised or covered-up.³⁴³ In the few instances where disciplinary sanctions have been imposed on public officials, the punishments have been grossly disproportionate to the gravity of the offences committed.³⁴⁴ In addition, the large majority of victims are too fearful to

³⁴¹ Interim Constitution 2063 (2007), Section 135(2).

³⁴² Interim Constitution 2063 (2007), Section 135(3)(c).

³⁴³ This is supported by the findings of a previous UN Special Rapporteur on extrajudicial, summary or arbitrary executions, who expressed her concern that military trials allowed the accused to evade punishment because of “an ill-conceived esprit de corps which generally results in impunity” A/51/457, 7 October 1996, at para. 125. See, for example, the cases of Reena Rasaili, Subhadra Chaulagain and Tasi Lama, where it was accepted even by the court martial that investigations involved falsification of the facts (copy of court martial decision on file with the author).

³⁴⁴ For instance, in the case of the torture and murder of Maina Sunuwar, three soldiers were only charged with minor offences and sentenced to six months’ imprisonment, temporary suspensions of promotions and a paltry monetary fine. See , Advocacy Forum, ‘Separating Fact from Fiction. Maina Sunuwar’(above n.38), pp. 16-17. <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>

complain to the Human Rights Units of the army or the police as they do not trust its independence and fear reprisals.

The police themselves are also not independent where FIRs are lodged alleging violations by their own (or by the army), and (as discussed in Section II) they and public prosecutors have been shown to be susceptible to political interference where powerful interests are involved in other cases. This has led to obstructions and delays in investigation, or even intimidation and pressure on victims and their families to withdraw complaints.³⁴⁵

Where ad hoc commissions have been appointed, concerns have often been raised about the independence and impartiality of commission members.³⁴⁶ Combined with other difficulties outlined below such as their limited powers and repeated failures to implement their recommendations, they are generally seen as a way for governments to wipe their hands of the affair in question, without taking any concrete action.

New draft legislation governing the NHRC has been in process for a number of years, and there are concerns about recent changes to the draft removing wording which would have guaranteed its independence and autonomy.³⁴⁷ Furthermore, section 10 of the current Human Rights Commission Act provides that the NHRC is not competent to deal with any matter certified by the Attorney General as having a potentially “adverse effect on the conduct of an inquiry and investigation being carried out in accordance with the law for the purpose of identifying the crime or the criminal”. Allowing the Attorney-General to certify matters as outside the competence of the NHRC provides an opportunity for political interference.

Furthermore, Section 10 of the current Human Rights Commission Act excludes from the NHRC’s competence any matters falling within the Army Act, with the caveat that “nothing will bar the Commission from carrying out the functions mentioned in this Act on a matter in respect of which the court may exercise its jurisdiction pursuant to the Constitution and the prevailing law”. As outlined above in Section V, some provisions of the Army Act give courts martial jurisdiction over offences which are not of an internal, military nature, and for which civilian courts should have jurisdiction. Such matters should also be within the competence of the NHRC.

Interventions from the executive have further weakened the role of NHRC as an independent constitutional body mandated to investigate incidents of human rights violations and abuses. The latest in the series of such attempts was a July 2011 letter by the Ministry of Defense to the NHRC asking them to halt investigations into the cases from the conflict period. Such bureaucratic intervention adds fuel to de facto impunity.

Recommendations

- Remove investigations of alleged serious human rights abuses from units within the organisations alleged to be responsible.

³⁴⁵ ‘Waiting for Justice’ (2008), (above n.4), pp. 30, 42, 105 (case of Chandra Bahadur Basnet alias “Manoj Basnet”); ‘Still Waiting for Justice’, (2009) (above n.4), pp. 1 and 35; ‘Indifference to Duty’ (2010) (above n.4), p. 15.

³⁴⁶ See ‘Waiting for Justice’ (2008), (above n.4), pp. 17-21.

³⁴⁷ National Human Rights Commission-Nepal and OHCHR-Nepal Observations on the National Human Rights Commission Bill – 2009, available at: http://nepal.ohchr.org/en/resources/publications/ODS-2_E.pdf.

- To address concerns about political interference with police investigations, amend the State Cases Act and/or the draft Criminal Procedure Code to provide for special investigative police units staffed by independent, senior officers to investigate any reported crime amounting to a serious human rights violation or where a conflict of interest exists, under close scrutiny of the NHRC and/or others representing the interest of the victims.³⁴⁸
- Amend the National Human Rights Commission Bill to provide guarantees of the independence and autonomy of the body, in line with the internationally-agreed 'Paris Principles', and repeal any provisions that restrict the NHRC's jurisdiction in relation to crimes which may amount to human rights violations against civilians.

B. Lack of cooperation by state security services and political parties and inadequate powers of investigative bodies

As outlined above in Section II, powerful players such as the Nepal Army and the UCPN-M have on many occasions failed to cooperate with the investigative processes of administrative bodies such as the NHRC,³⁴⁹ and with police investigations.³⁵⁰

The NHRC has wide powers under the prevailing Act to compel witnesses and to order the production of documents and material evidence, and, in cases of non-compliance, to send recommendations for action against the concerned authorities to ensure compliance.³⁵¹ However it does not have the power to sanction for non-compliance.

Where there has been a failure of cooperation in police investigations, the courts have on some occasions issued orders requiring that cooperation.³⁵² In such cases under the law the Supreme Court has the power to find individuals guilty of contempt of court for failure to comply and to punish those responsible with a fine of up to NRs. 10,000 and/or imprisonment of maximum period of one year.³⁵³ However, no such orders have been made in relation to failure to comply with orders to cooperate with investigations into serious violations of human rights.

³⁴⁸ The current draft Criminal Procedure Code does make provision for special investigative units, but gives the Inspector-General of Police and the Superior Authority above him the power to determine which cases should be staffed by such a unit: Draft CPC, Section 11.

³⁴⁹ See also statement by Justice Ram Nagina Singh in NHRC, 'Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)' (November 2010), pp. 4-5, available at: <http://www.nhrcnepal.org///publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf>.

³⁵⁰ See 'Indifference to Duty' (2010) (above n.4), p. 10 [Arjun Lama case]; Advocacy Forum, 'AF raises concern to AG about lacklustre investigation into Reena murder case', available at: <http://www.advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lacklustre-investigation-in-reena-murder-case.php> (see also the letter to the Attorney General of 5 July 2011 on Reena's case: <http://www.advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>) [Reena Rasaili case].

³⁵¹ Human Rights Commission Act 2053 (1997), Sections 11 and 13(5).

³⁵² For example, in the Maina Sunuwar case both the Supreme Court and the Kavre District Court ordered the Army to provide copies of the court martial file to the police, but they have still not done so: see Advocacy Forum, 'Separating Fact from Fiction. Maina Sunuwar' (above n.38), pp. 17-18. In the Sapkota case (see above, pp.13 and 56) the Court stated that Sapkota had a moral and legal responsibility to cooperate with the police investigation: Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011.

³⁵³ Supreme Court Act 2048 (1991), Section 7(1); See also Interim Constitution 2063 (2007), Article 102(3).

Recommendations

- Provide the NHRC with specific powers under legislation to sanction for non-compliance with its orders (although not in the nature of criminal law sanctions). The NHRC Bill should also set out the government and state authority's duties to cooperate with the NHRC investigations and provide for sanctions in case of failure to do so, as well as its jurisdiction to fully investigate allegations of human rights violations by army officers and staff.
- Amend the Army Act, the Police Act and the Armed Police Force Act to include specific provisions requiring individual officers to cooperate with investigations of civilian authorities and imposing disciplinary sanctions for failure to do so.
- Strengthen provisions in the Supreme Court Act 1991 concerning contempt of court to ensure greater compliance with court orders, and amend the Muluki Ain (National Code) or its replacement to ensure that state officials, including members of the army and police, can be charged for perjury and contempt of court. Where orders of the court to cooperate with investigations have been ignored those responsible should be held in contempt under the law.

C. Reluctance or refusal of authorities to follow procedures to investigate criminal complaints

A significant problem in the investigation of crimes is the failure of police to follow the provisions of the State Cases Act to register FIRs and to proceed promptly with investigations.³⁵⁴ This failure has been criticised on many occasions by the courts,³⁵⁵ and has been a significant factor leading to a finding of the violation of right to a remedy under the ICCPR by the Human Rights Committee on at least two occasions.³⁵⁶

Public prosecutors have been passive in the face of police failures to send preliminary reports as required under the Act, and in directing investigations as permitted under the Act.³⁵⁷ This inaction is compounded by the fact that under the State Cases Act, if the police identify a suspect but he or she remains at large, no report needs to be sent to the Prosecutor until 15 days before the expiry of the limitation period.³⁵⁸

These concerns apply both to crimes committed by state officials during the conflict and since, and to crimes committed by other actors including armed groups and private individuals. For example, on 30 September 2010 Gauri Yadav was subjected to a violent gang rape by a group of villagers in Siraha District. Five months later, after being subjected to violence and threats, she had to flee her home town. Despite the fact that she

³⁵⁴ These issues are discussed in detail in Advocacy Forum and Human Rights Watch reports 'Waiting for Justice' (2008), (above n.4), pp. 25-29; 'Still Waiting for Justice', (2009) (above n.4), pp. 3-6; and 'Indifference to Duty' (2010) (above n.4), pp. 6-10. The State Cases Act does provide that if police fail to register an FIR the informer may complain to the CDO, who may decide to file the FIR. In many cases this has not happened, however, and informers have had to obtain court orders mandating the filing of the FIR.

³⁵⁵ See a recent example in the case of Arjun Lama: Decision of the Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011, referred to above at n.31.

³⁵⁶ HRCtee, *Sharma v Nepal*, no. 1469/2006, CCPR/C/94/D/1469/2006 (28 October 2008); HRCtee, *Giri v Nepal*, no. 1761/2008, CCPR/C/101/D/1761/2008 (27 April 2011).

³⁵⁷ See 'Waiting for Justice' (2008), (above n.4), pp. 34-35.

³⁵⁸ State Cases Act 2049 (1992), Section 17.

produced strong evidence, including medical reports, to the police that she was beaten and gang raped no action was taken by the authorities to investigate her case or to protect her against continued threats and violence by the very men who raped her.³⁵⁹

The draft Criminal Procedure Code makes some improvements: it provides that a failure to register an FIR may be appealed to the public prosecutor or higher police authority³⁶⁰ (currently it can only be referred to the Chief District Officer), and upon registration of an FIR an officer must make an “immediate” preliminary inquiry, and send a preliminary report to the public prosecutor within three days of that inquiry.³⁶¹ However, given that penalties are imposed for making false complaints the draft should be changed to require that all FIRs are registered by police, and that responsibility for deciding whether or not to investigate rests solely with the public prosecutor.

Other measures should include providing sanctions on police and prosecutors for failure to comply with time limits and directions, and requiring investigating police to send regular reports to the public prosecutor at specified time periods as to the status of the investigation when an FIR has been filed, but no person has been arrested for the crime. The relevant Act or its regulations should also provide for the provision of regular reports to the complainant as to the status of the investigation.

As outlined in Section III, one reason often given for a failure to investigate allegations of serious crimes committed during the conflict period is that they cannot be dealt with by the regular judicial system as they will fall within the jurisdiction of future transitional justice mechanisms. For example, in its response to the UN Human Rights Committee in the follow-up process to its views on *Sharma v Nepal*, the government stated that the criminal justice system could not be used to provide a remedy (including investigation) because “this present event/incident appears to have occurred during the conflict period, which is a special kind of situation. It is a recognised practice around the world to constitute a truth and reconciliation commission in order to address the cases emanating from the special situation of the armed conflict”. The position adopted by the government and certain officials has been strongly criticised by the OHCHR and (as described above in Section III), the Supreme Court.³⁶² According to the OHCHR:

‘truth commission should be viewed as complementary to judicial action’, not as a basis to supplant or suppress the regular judicial system. Accordingly, the regular judicial system cannot be held in abeyance because a commitment to establish transitional justice mechanisms has been made or even once these mechanisms are actually established and functioning. ... The legal position that investigations and prosecutions for human rights and International Humanitarian Law violations committed during conflict would only be dealt with under transitional justice mechanisms is inconsistent

³⁵⁹ Human Rights Watch, ‘Nepal: No Justice for gang-rape Victim 5 months on threats and attacks displace a Woman in Siraha’ (15 March 2011), available at: <http://www.hrw.org/en/news/2011/03/15/nepal-no-justice-gang-rape-victim>.

³⁶⁰ Draft Criminal Procedure Code, Section 5.

³⁶¹ *Ibid.*, Section 6.

³⁶² See, eg., the decision of the Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011, referred to above at p.56.

both with Nepal's existing legal frameworks as well as with the country's obligations under international law including ICCPR and customary international law.³⁶³

In addition, the Supreme Court, in an interim ruling in the public interest litigation petition challenging the appointment of Agni Sapkota as a minister, clearly stated that normal criminal justice procedures should be followed.³⁶⁴ There is clearly no basis on which police can refuse to investigate matters on the grounds that these matters will be dealt with by a separate mechanism.

The police and public prosecutors are not the only officials failing to fulfil their duties to investigate. Under Article 135(3)(c) of the Interim Constitution, the Attorney General's Office is entrusted with the investigation of ill-treatment in custody. However, it also appears extremely reluctant to carry out this function. During a meeting with former Attorney General Bharat Bahadur Karki in May 2010, Advocacy Forum raised the issue of lack of responses to complaints of ill-treatment. The Attorney General in response stated that there is no mandate to send responses to individual organizations and maintained that the Attorney General's Office is not an investigating body; rather it has the power to monitor investigations by police of cases reported to them. He suggested that Advocacy Forum send cases to the Human Rights Unit of the Nepal Police and to the NHRC for proper investigation as those were the investigating bodies. To date, Advocacy Forum has only received one response from the Attorney General's Office, which was in relation to the case of Dhan Raj Karki which had been referred by Advocacy Forum to both the Nepal Police and the Attorney General's Office. The Nepal Police investigated and sent its report to the Attorney General's Office but not to Advocacy Forum. The Attorney General's Office then provided the report of the police investigations to Advocacy Forum.

Where public officials fail to comply with their duties to investigate under the law, a victim's only potentially effective remedy is to file a writ to request the court to order the state authorities to act according to law. However, even where a court has ordered action police and officials have continued to be very slow to respond.³⁶⁵ Again, a failure to apply sanctions for contempt of court is a contributing factors in relation to the way in which the authorities respond to such orders.³⁶⁶

Recommendations

- Amend the provisions in the State Cases Act (and potentially to be substantially re-enacted in the draft Criminal Procedure Code³⁶⁷) on the investigation of crimes to:

³⁶³ OHCHR Nepal, 'The relationship between Transitional Justice mechanisms and the Criminal Justice system: Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?' (March 2011), available at:

http://nepal.ohchr.org/en/resources/Documents/English/other/2011/2011_03_29_Legal_Opinion_E.pdf.

³⁶⁴ Writ No. 1094 in Sushil Pyakhurel v Prime Minister, 21 June 2011.

³⁶⁵ See eg. above, p.13.

³⁶⁶ Supreme Court Act 2048 (1991), Section 7(1).

³⁶⁷ The draft Criminal Procedure Code makes some improvements: it provides that a failure to register an FIR may be appealed to the public prosecutor or higher police authority (currently it can only be referred to the CDO), and upon registration of an FIR an officer must make an "immediate" preliminary inquiry, and send a preliminary report to the public prosecutor within three days of that inquiry: Draft Criminal Procedure Code, Sections 5 and 6.

- require that all FIRs are registered by police, and, if there is reason not to investigate, that the police report to the public prosecutor for a final decision;
 - require the investigating police to send regular reports to the public prosecutor at specified time periods as to the status of the investigation;
 - require regular reports to the complainant as to the status of the investigation;
 - impose disciplinary sanctions on police and prosecutors for failure to comply with the legislation's requirements.
- Set up a special unit within the Attorney General's office dedicated to investigating ill-treatment in custody; or make this constitutional requirement the responsibility of the wider special police unit investigating serious human rights violations, when set up.
 - Set up a special unit or units within the Attorney General's office dedicated to overseeing police investigations and making charging decisions in relation to alleged crimes amounting to serious human rights violations or where a conflict of interest exists.
 - While the introduction of legislation establishing the transitional justice mechanisms would be welcome, such mechanisms cannot replace the normal criminal justice system. Any bills establishing these commissions must provide that they are complementary to the normal criminal processes. In the meantime state officials must not continue to use them as a reason to delay investigations where there is credible evidence of serious violations.

D. Additional concerns

Lack of provisions mandating immediate investigation in cases of use of force by state agents resulting in death

As set out above in Section VI, international standards require that any incident of use of firearms by state agents should be independently reviewed, in cases of death and serious injury or other grave consequences a detailed report should be promptly sent to the competent authorities responsible for administrative review and judicial control.³⁶⁸ All suspected cases of unlawful killings, including complaints made by relatives and reliable reports, must be investigated in a "thorough, prompt and impartial" manner.³⁶⁹ Specific provisions should be enacted to implement these requirements.

Failure to protect witnesses lodging complaints from intimidation and reprisals

Intimidation and reprisals continue to be used to pressure victims to withdraw complaints and to halt investigations and prosecutions.³⁷⁰ In all cases – not just cases of intimidation

³⁶⁸ Basic Principles on Use of Force and Firearms (above n.151), para. 22.

³⁶⁹ Ibid. para. 9.

³⁷⁰ See, eg. the case of Umesh Lama, whose family was intimidated and harassed to withdraw a complaint of torture: Asian Human Rights Commission, 'Torture victim under pressure to withdraw the case', (29 April 2008), available at: <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-027-2008>.

by state actors – the authorities have the duty to exercise due diligence to ensure the safety of victims and to allow them to exercise their right to a remedy and reparation.³⁷¹ In order to address impunity, and to comply with its obligations under international law, Nepal must establish, through legislation and policy, a comprehensive victim and witness protection programme.

c. The obligation to prosecute

i. International standards

Where a state's investigations into allegations of serious violations of international human rights law or international humanitarian law identify a suspected perpetrator and provide sufficient evidence, the state has the duty to submit the suspect to prosecution. If that person is found guilty, the state has the duty to punish him or her.³⁷²

This duty was explained briefly in Section II: it is necessary both as part of the remedy to victims (satisfaction that the person responsible for the crime has been identified and punished)³⁷³ and as a preventive measure to ensure that the violations are not repeated.

Criminal investigation and consequential prosecution are necessary remedies for violations of the most fundamental human rights. The Human Rights Committee has repeatedly emphasised that a failure to bring to justice perpetrators of violations recognised as criminal under either domestic or international law, such as torture and similar cruel, inhuman or degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6) could in itself give rise to a violation under the ICCPR.³⁷⁴

International treaties also include specific provisions requiring investigation and prosecution of anyone who is suspected of having committed specific international crimes (including war crimes, crimes against humanity, genocide,³⁷⁵ torture³⁷⁶ and enforced disappearances) – whether committed in its jurisdiction, or committed by someone who is present in its jurisdiction.

Prosecution and the obligation to exercise due diligence to prevent violations by non-state actors

Prosecution and punishment of private entities and individuals who commit acts impairing the enjoyment of human rights is also required as part of a state's positive obligations to

³⁷¹ See REDRESS, 'A Call to Action: Ending Threats and Reprisals Against Victims of Torture and Related International Crimes' (December 2009), available at: <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

³⁷² Basic Principles on Remedy and Reparation, (above n.256), para. 4.

³⁷³ See HRCtee, General Comment No. 31 (above n.78), para. 16.

³⁷⁴ Ibid. HRCtee, General Comment No. 31, para.18. See also HRCtee, General Comment No. 6 (above n.150), para.3; HRCtee, General Comment No. 20 (above n.298), paras. 8 and 13.

³⁷⁵ As to which see the Rome Statute.; see also the Genocide Convention and the Geneva Conventions.

³⁷⁶ CAT, Articles 5-7.

ensure human rights to those within its jurisdiction. The Human Rights Committee has stressed that:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.³⁷⁷

As such, Nepal would be in breach of its obligations to exercise due diligence in relation to the gang rape of Gauri Yadav by a group of villagers (see above).

The obligation to try serious human rights violations and international crimes in civilian courts

International human rights law makes it clear that serious human rights violations and international crimes, even if committed by military officers, should be tried in civilian courts. The jurisdiction of military courts should be limited to offences of a strictly internal, military nature committed by military personnel, which largely means internal disciplinary measures.³⁷⁸ Their jurisdiction should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations including extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.³⁷⁹

Regional human rights courts have also stressed the inappropriateness of trials in military courts for serious international crimes. For example, in relation to a recent case of enforced disappearance, the Inter-American Court on Human Rights repeated that:

Taking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead, the processing of those responsible always corresponds to the ordinary justice system.³⁸⁰

The Human Rights Committee has made it clear that military trials are inherently not independent or impartial.³⁸¹ Not only is there a lack of independence of the investigator and decision maker,³⁸² and incentives for the violation to be minimised or covered-up,³⁸³

³⁷⁷ HRCtee, General Comment No. 31 (above n.78), para. 8.

³⁷⁸ Principle No. 7, Draft Principles Governing the Administration of Justice through Military Tribunals (the "Draft Military Justice Principles"), adopted by the United Nations Sub-Commission on Human Rights and forwarded to the Human Rights Council, E/CN.4/2006/58. See also, for example, HRCtee, *Sarma v. Sri Lanka*, no. 950/2000, CCPR/C/78/D/950/2000 (2003) at paras. 2.1-2.4, 10 and 11; HRCtee, *Wilson v. The Philippines*, no. 868/1999, CCPR/C/79/D/868/1999 (2003), para. 9.

³⁷⁹ Draft Military Justice Principles (above n.378), para. 9. Draft Impunity Principles, Principle 29, (above n.86).

³⁸⁰ IACtHR, *Radilla Pacheco v Mexico*, (Preliminary Objections, Merits, Reparations, and Costs) (Judgment of 23 November 2009), para. 273 (citations omitted).

³⁸¹ See also HRCtee, General Comment No. 8 (above n.190), para. 22, where the Committee noted its concerns that "the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned"; similar concerns must apply where victims' right to a remedy are at issue. On the same issue see the Individual Opinion of six members of the Committee in the case of *Akwanga v Cameroon*, no. 1813/2008, CCPR/C/101/D/1813/2008 (2011); HRCtee, *Coronel et al v Colombia*, no. 778/1997, CCPR/C/76/D/778/1997 (2002), para. 6.2; Committee's Concluding Observations on Peru, CCPR/C/79/Add.8, 25 September 1992, para. 8.

³⁸² As recently noted in the Individual Opinion of six members of the Committee in the case of *Akwanga v Cameroon*, *ibid.*

but the victim and/or his or her family members are not involved in the proceedings. As is recognised in the Draft Military Justice Principles, adopted by the UN Sub-Commission on Human Rights in 2006:

the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating 'guilty pleas' to victims' detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.³⁸⁴

Removal of impediments to establishment of legal responsibility

Ensuring the prosecution of those accused of serious violations of international human rights law also requires removing impediments to the establishment of legal responsibility.³⁸⁵ These may include:

- Immunities and Amnesties³⁸⁶

Immunities are general rules which provide exemption for prosecution or civil claims for those within a certain class or category prior to the commission of an act (for example, where a person cannot be prosecuted for acts carried out in the course of their duties). Amnesties can include measures (i) prospectively barring criminal prosecution and civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; and (ii) retroactively nullifying legal liability which has previously been established.³⁸⁷

The Human Rights Committee has criticised states that have sought to impose amnesties or allow immunities for serious violations.³⁸⁸ In its General Comment No. 31, it stressed that States have obligations to investigate and bring to justice perpetrators of violations including "torture and similar cruel, inhuman and degrading treatment..., summary and arbitrary killing... and enforced disappearance". The Committee recognised that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations", and that States "may not relieve" public officials or state

³⁸³ This is supported by the findings of a previous UN Special Rapporteur on extrajudicial, summary or arbitrary executions, who expressed his concern that military trials allowed the accused to evade punishment because of "an ill-conceived esprit de corps which generally results in impunity": A/51/457, at para. 125, 7 October 1996.

³⁸⁴ Principle No. 9, Draft Military Justice Principles (above n.378).

³⁸⁵ HRCtee, General Comment No. 31 (above n.78), para. 18.

³⁸⁶ See further, Advocacy Forum, 'Evading Accountability by Hook or by Crook' (2011), (above n.1).

³⁸⁷ OHCHR, 'Rule-of-Law Tools for Post Conflict States: Amnesties', HR/PUB/09/1 (2009), p.5, available at: http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.

³⁸⁸ For example: Comments on Uruguay, CCPR/C/79/Add.19 (1993); Concluding Observations on El Salvador, CCPR/C/79/Add.34 (1994); Nineteenth Annual report of the Human Rights Committee A/50/40 (1995); Preliminary Observations of the Human Rights Committee: Peru CCPR/C/79/Add.67 (1996); Concluding Observations on France, CCPR/C/79/Add.80 (1997); Concluding Observations on Lebanon, CCPR/C/79/Add.78 (1997) and Concluding Observations on Chile, CCPR/C/79/Add.104 (1999); Concluding observations on Argentina, CCPR/CO/70/ARG (2000); Concluding Observations on Congo, CCPR/C/79/Add.118 (2000).

agents who have committed criminal violations “from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities”.³⁸⁹

Amnesties and immunities are also contrary to specific treaty duties to punish perpetrators and provide a remedy.³⁹⁰

- No defence of superior orders

The Human Rights Committee has stressed that the defence of obedience to superior orders should be removed in relation to serious violations of human rights as “no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.”³⁹¹ The defence of superior orders is also specifically outlawed by the treaties concerning war crimes, crimes against humanity, genocide, torture, and enforced disappearances.³⁹²

- Limitation Periods

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity prohibits the application of statutory limitations to war crimes and crimes against humanity.³⁹³ However, as recognised by the UN expert responsible for updating the impunity principles, “the general trend in international jurisprudence has been towards increasing recognition of the relevance of [the rule that statutes of limitation do not apply] not only for such crimes against humanity and war crimes, but also for gross violations of human rights such as torture”.³⁹⁴

The Convention on Enforced Disappearances provides that “a State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence and (b) commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.”³⁹⁵

³⁸⁹ HRCtee, General Comment No. 31 (above n.78), para. 18.

³⁹⁰ According to the Committee Against Torture, amnesties which result in the impunity of torturers are “incompatible with the spirit and purpose of the Convention”: O.R., M.M. and M.S. v. Argentina, nos. 1/1988, 2/1988, and 3/1988, A/45/44, Annex V, p.108, at p. 112, para. 9 (1990); see also Committee against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (24 January 2008), para. 5. See also, in relation to amnesties for enforced disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/2006/56, p. 17, para.1 (2005).

³⁹¹ HRCtee, General Comment No. 31 (above n.78), para.18

³⁹² Geneva Conventions, Genocide Convention, Rome Statute, CAT, Article 2(3); Enforced Disappearances Convention, Article 6(2).

³⁹³ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968, Entry into force: 11 November 1970, Article I.

³⁹⁴ ‘Report of Diane Orentlicher to update the Set of Principles to combat impunity’, E/CN.4/2005/102, para. 47. Basic Principles on Remedy and Reparation, (above n.256), para. 6. The Human Rights Committee has also highlighted unreasonably short limitation periods for criminal prosecutions of perpetrators of serious violations of human rights as an impediment to establishing legal responsibility which should be removed: HRCtee, General Comment No. 31 (above n.78), para.18.

³⁹⁵ Convention on Enforced Disappearance, Article 8(1).

Further, domestic statutes of limitations for violations that do not constitute crimes under international law must not be unduly restrictive.³⁹⁶

The special position of child soldiers

The prevalence of the recruitment and involvement of child soldiers in the conflict (and since) in Nepal is one issue requiring special attention when considering prosecution and punishment for serious crimes.³⁹⁷ Under customary international law, conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities is a crime entailing individual criminal responsibility under international law.³⁹⁸ This position is developed in more detailed human rights standards under the Optional Protocol to the Convention on the Rights of the Child³⁹⁹ (to which Nepal is a party); in particular, it states that it is completely prohibited for armed groups distinct from the armed forces of a state to recruit or use children under the age of 18 in hostilities.⁴⁰⁰

It is generally considered that child soldiers should be considered victims first and foremost.⁴⁰¹ While there is no presumption in international law that those under the age of 18 cannot be criminally responsible,⁴⁰² prosecution should be exceptional and the emphasis should be on rehabilitation and reintegration in society.⁴⁰³

³⁹⁶ Basic Principles on Remedy and Reparation, (above n.256), para.7.

³⁹⁷ Widespread reports indicate that the Unified Communist Party of Nepal-Maoist (UCPN-M) recruited or used children for military activities during the conflict, and continued to recruit children following the 2006 ceasefire agreement. They were recruited in various ways, including kidnapping and abduction, often from schools or at mass rallies that they were forced to attend, as well as through the use of propaganda campaigns to attract children as “volunteers”. Children served as messengers, spies, porters and medical assistants, as well as being used as sentries, bodyguards and combatants: Human Rights Watch, *Children in the Ranks: The Maoists’ Use of Child Soldiers in Nepal*, February 2007, available at: <http://www.hrw.org/sites/default/files/reports/nepal0207webwcover.pdf>. In 2009, the Government of Nepal, the UCPN-M and the United Nations signed an Action Plan for the discharge of Maoist army personnel disqualified as children in the United Nations-led verification process in 2007: UNICEF Press Release, United Nations, Government of Nepal and UCPN-M sign Action Plan for discharge of minors disqualified from the Maoist army, 16 December 2009, available at: http://www.unicef.org/infobycountry/media_52169.html.

³⁹⁸ See Article 4(c) of the draft Statute of the Special Court for Sierra Leone, Annexed to the letter dated 22 December 1996 from the President of the Security Council addressed to the Secretary-General, S/2000/1234.

³⁹⁹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force 12 February 2002.

⁴⁰⁰ *Ibid.*, Article 4.

⁴⁰¹ Annual report of the Special Representative of the Secretary-General for children and armed conflict, Radhika Coomaraswamy, 18th Session of the Human Rights Council, 21 July 2011 (A/HRC/18/38). Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.38_en.pdf; Amnesty International, *Child soldiers: Criminals or victims?* 22 December 2000. Available at: <http://www.amnesty.org/en/library/asset/IOR50/002/2000/en/049a91ec-dc61-11dd-bce7-11be3666d687/ior500022000en.html>.

⁴⁰² The Statutes of the ICTY and ICTR are silent on the matter, while the Statute of the Special Court for Sierra Leone prohibits the prosecution of anyone under the age of 15 and details specific provisions regarding those aged 15-18, and the Statute of the ICC excludes prosecution of anyone younger than 18: Statute of the Special Court for Sierra Leone, Art. 7; the Rome Statute of the International Criminal Court, Art.29.

⁴⁰³ Annual report of the Special Representative of the Secretary-General for children and armed conflict, Radhika Coomaraswamy, 18th Session of the Human Rights Council, 21 July 2011 (A/HRC/18/38). Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.38_en.pdf at para. 29.

ii. Domestic legal framework governing prosecutions

Regular criminal procedure

The State Cases Act sets out the procedure by which prosecutions are instituted for crimes where the State is the plaintiff (which would include all of the crimes considered here), or the State is the defendant.⁴⁰⁴

Following a police investigation the police officer must send a report to the public prosecutor stating either that a suspect has been identified and there is sufficient evidence to prosecute, or that there is insufficient evidence for prosecution or no suspect has been identified (or no crime committed). If the suspect is in detention, the report must be submitted to the prosecutor within a specified period of time by which a charge sheet must be filed for that crime.⁴⁰⁵ If no person has been apprehended there is no requirement to send a report to the prosecutor until 15 days before the expiry of the limitation period for the crime.⁴⁰⁶

On the basis of this report the public prosecutor can either direct that the police carry out further investigations, or decide whether or not to file a case against the suspect identified.⁴⁰⁷ The decision as to whether to file charges has generally been seen as the public prosecutor's prerogative, and has not generally been challenged before the courts. However, in the recent case of Suntali Dhami, involving a gang rape, the prosecutor filed charge sheets against only three of six alleged perpetrators, citing lack of evidence. When challenged in the Supreme Court, the Court ordered charge sheets to be filed against the three remaining alleged perpetrators, although it did not explicitly state that the public prosecutor's decision was reviewable.⁴⁰⁸

Military offences

As outlined above in Section V, the Army Act provides for prosecution of army officers for many offences (including illegal arrest or detention) by court martial, and other offences (including torture and enforced disappearance) by special committee.⁴⁰⁹ The offences of homicide and rape are to be tried, however, by the normal courts.⁴¹⁰

Police Special Courts

The Police Act also provides for the establishment of Police Special Courts to try offences by police officers outlawed under that Act. Those offences are predominantly linked to

⁴⁰⁴ State Cases Act 2049 (1992), Section 3 and Schedule 1.

⁴⁰⁵ For example, under the State Cases Act (which includes homicide, rape, espionage, trafficking, drug offences and forgery) charges must be brought within 25 days.

⁴⁰⁶ *Ibid.*, Section 17.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Decision dated 1 December 2010 of Supreme Court Justices Balram KC and Bharatraj Uprety: see News in Nepal, 'SC orders govt lawyers to file cases against all accused in Suntali Dhami case' (1 December 2010), available at: http://newsinnepal.com/page_options.php?id=2614.

⁴⁰⁹ Army Act 2063 (2006), Section 68 and 62.

⁴¹⁰ *Ibid.*, Section 66 and 68.

internal police matters, although they include the offence of unjustly harassing any person through arrogance or intimidation.⁴¹¹

Chapter 3 of the Police Act also provides for punishment for disciplinary offences including improper behaviour.

iii. Problems in legislation and implementation

Again, the failure to prosecute individuals responsible for serious violations of human rights in line with Nepal's obligations under international law stems from the interplay of a number of factors. Focussing on the impact of legislation in particular, these include three central issues: gaps in the criminalisation of offences, legal barriers to prosecutions, and the failure of authorities to initiate prosecutions even in the face of substantial evidence that a person has committed a crime.

A. Gaps in the criminalisation of offences

The fact that torture and enforce disappearances are not criminalised (as discussed in Section VII) means that it is impossible to prosecute those responsible in line with Nepal's treaty obligations and obligations under customary international law. In relation to torture by police officers for example, if any action is taken by the state it would be departmental action under the Police Act, or potentially charges of assault under the State Cases Act (although no such charges are known to have been brought against police officers in these circumstances). In addition, victims have the option of filing civil claims for compensation under the Compensation Relating to Torture Act.

As described above in Section VI, torture is still routinely practiced by police. Advocacy Forum's experience is that the deterrent effect of departmental action as a penalty is not strong. Where action is taken, it is taken in closed proceedings and rulings are not published. Without clear and serious punishments set out in law, and the deterrent effect of public findings of violations, the police (and other actors) have no fear of repercussions and continue to inflict torture.⁴¹²

B. Legal barriers to prosecution in civilian courts

Limitation Periods

Many provisions in Nepali law provide extremely short periods within which a person must report a crime in order for an FIR to be registered.

For example, under the Muluki Ain the crime of rape must be charged within 35 days.⁴¹³ Where rapes are reported after this time limit, the police will refuse to register an FIR. In contrast, in many countries there is no statute of limitation for filing charges of rape, and

⁴¹¹ Police Act 2012 (1955), Section 34.

⁴¹² The 2008 addendum report of the Special Rapporteur on Torture found that "the torture and arbitrary detention of criminal suspects by police has persisted": UNHRC 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal', U.N. Doc. E/CN.4/2006/6/Add.5 (9 January 2006), para. 20 available at <<http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm>>.

⁴¹³ Muluki Ain, Chapter 14, section 11. Note that in 2008 the Supreme Court ordered the government to extend the 35 day limit: Advocate Sapana Pradhan Malla v. Government of Nepal Ministry of Law and Parliamentary Affairs et al. Writ No. 3393. 2065. In the draft Criminal Code this limit is extended to one year.

where such limitation periods do exist they are generally in the region of 10 to 15 years.⁴¹⁴ The new draft Criminal Code, currently in a Bill before the parliamentary secretariat, proposes to change the limitation period to one year, which still falls far short of international standards.

Immunities

The provision of both specific and general immunities to state officials for acts carried out within the scope of their duties present a real barrier to holding those responsible for human rights violations accountable. Such immunities are rarely examined in court – instead prosecutions are not taken forward at all.

General immunities are provided in laws such as the Army Act,⁴¹⁵ the Police Act,⁴¹⁶ the Armed Police Force Act⁴¹⁷ and the Public Security Act.⁴¹⁸ These grant members of the security forces and civil servants immunity from prosecution for all actions – including serious human rights violations – that can be said to have been carried out in “good faith” while they were discharging their duties.

Specific immunities are also provided, for example, in legislation that allows the use of “necessary force” such as the Essential Goods Protection Act⁴¹⁹ and the National Parks and Wildlife Act.⁴²⁰

Such immunities, when applied to serious violations of human rights, including extrajudicial executions, are incompatible with international human rights law and should be repealed.

Amnesties & Pardons

Another significant problem has been the misuse of amnesty provisions by political actors to withdraw cases against people accused of serious crimes during the conflict period and since. Section 29 of the State Cases Act provides that the government may either make a deed of reconciliation between the parties involved, or make an order with the agreement of the court, to withdraw criminal cases in which it is the plaintiff. This results in the dropping of the case, the release of the accused and the inability to prosecute in the future. Article 151 of the Interim Constitution also grants the President the power, on the recommendation of the Council of Ministers, to “grant pardons and suspend, commute or remit any sentence passed by any court, special court, and military court or by any other judicial quasi-judicial or administrative authority or body”.

In October 2008, the CPN-M-led government recommended the withdrawal of 349 criminal cases (investigations, charges and convictions) of a so-called “political nature”.

⁴¹⁴ OHCHR-Nepal Representative urges end to 35-day limit for filing rape charges, to mark International Women's Day (8 March), available at: <http://reliefweb.int/node/259645>.

⁴¹⁵ Army Act 2063 (2006), Section 22.

⁴¹⁶ Police Act 2012 (1955), Section 37.

⁴¹⁷ Armed Police Force Act 2058 (2001), Section 26.

⁴¹⁸ Public Security Act 2046 (1989), Section 22.

⁴¹⁹ Essential Goods Protection Act 2012 (1955), Section 6.

⁴²⁰ National Parks and Wildlife Act Section 2029 (1973), Section 24(2).

They included cases of gross human rights abuses (murder, attempted murder and rape), the majority from the conflict period. Most cases were against UCPN-M members, some of whom were senior members of the government at the time. In April 2009, the UCPN-M government further decided to withdraw cases against a number of people who were facing charges for alleged involvement in the communal violence in Kapilvastu District in September 2007 (see above), apparently under pressure from Madhesi political parties.⁴²¹ Many other cases have been withdrawn; however it is impossible to establish the exact number.⁴²²

As noted above in Section III, members of the Jananath Khanal government in May 2011 also considered withdrawing further high profile cases from the conflict period, including the case against Minister for Information and Communications Agni Sapkota but did not proceed in the face of considerable national and international condemnation, and the government formed in August 2011 proceeded on the basis of an agreement to withdraw a large number of cases against Maoists and others. In early November 2011 the Council of Ministers recommended the President to invoke Article 151 of the Interim Constitution to grant a pardon to Constituent Assembly member Bal Krishna Dhungel, the only person convicted of a crime during the conflict period (though has only served part of his sentence).⁴²³

Jurisdiction of military courts and double-jeopardy provisions

The provision of the Army Act allowing for investigation and trial of offences of torture and enforced disappearances (as and when defined by the law) by a special committee⁴²⁴ is an improvement on trial by ordinary court martial, but is still open to abuse and a serious challenge on impartiality and independence.⁴²⁵ As such it is incompatible with the obligation to prosecute these offences in the civilian courts, and should be repealed.

Other provisions in the Act have either been misused or ignored in order to evade accountability. The provision on double jeopardy in Section 70 sets out that if “after being subjected to trial, hearing and adjudication of an offence ... of this Act by the Court Martial or other court, or after being subjected to departmental action, shall not be subjected an action again for the same offence”. Read strictly, this could imply that if a person is subject to departmental action for an offence which may be tried by the civilian courts under the Act (homicide and murder), they may not be tried by the civilian courts.

As explained in Section II, the idea of double jeopardy has been relied on by the army when resisting handing over soldiers pursuant to arrest warrants issued by the courts, on the grounds that the accused has already been tried for the same offence (note while they may have been punished, albeit very lightly, in relation to the same ‘facts’, they have not been punished for the same ‘offence’).⁴²⁶ This provision should be amended to make it

⁴²¹ See Advocacy Forum, ‘Torture and Extrajudicial Executions amid widespread violence in the Terai’, (above n.136), p. 7.

⁴²² Advocacy Forum, ‘Evading Accountability by Hook or by Crook’ (2011), (above n.1), p. 10.

⁴²³ Ekantipur, ‘Govt to recommend for amnesty to Dhungel’, 8 November 2011, <http://www.ekantipur.com/2011/11/08/top-story/govt-to-recommend-for-amnesty-to-dhungel/343462/>.

⁴²⁴ Army Act 2063 (2006), Section 62.

⁴²⁵ Ibid., The Special Commission is to be made up of the Deputy Attorney General as designated by the Government of Nepal, the Chief of the legal section of the Ministry of Defence, and a Representative of the Judge Advocate General Department of the Army.

⁴²⁶ See above n.40.

clear that previous departmental or court martial action does not bar cases against military officers properly within the jurisdiction of the civilian courts. Any considerations of double jeopardy can then be dealt with by the competent court.

A further problem has been the lack of transparency of court martial proceedings when they do take place. Provisions should be introduced to ensure that the victim or relatives of any violation tried in the courts martial, and relevant civilian authorities, must be provided with the evidence presented to the inquiry, transcripts of its hearings and the decision of the court. Without such transparency it is very difficult for victims to protect their own interests, or to challenge army statements that they have taken the necessary action in relation to the crimes.

Recommendations

- Amend legislation to remove barriers to prosecutions in civilian courts, including statutes of limitation for international crimes and immunities for state agents allegedly acting in good faith.
 - Amend the provisions of the State Cases Act allowing withdrawal of cases to include a prohibition on withdrawals of criminal charges, amnesties, pardons and other forms of immunity for crimes under international law and gross violations of human rights and ensure that the new Constitution includes a similar provision.
 - Amend the Army Act to allow for prosecution of all matters which are not of a strictly internal, military nature in the civilian courts.
- C. Failure of authorities to initiate a prosecution in the face of substantial evidence that a person has committed a crime.

Linked to the failure of authorities to carry out investigations into serious human rights violations is authorities' failure to initiate prosecutions. This problem is not confined to crimes committed by state agents or during the conflict period, but is rather a wider problem of authorities picking and choosing the types of crimes which are considered susceptible to trial.

Prosecutions are not instituted, even after investigations by bodies such as the NHRC and the OHCHR which point to substantial evidence that individuals are guilty of a crime. The NHRC has on a number of occasions recommended that the authorities prosecute particular individuals,⁴²⁷ but this has not led to a single prosecution. This is tied to a wider failure to implement the decisions of the NHRC: as at November 2010, of 366 recommendations made, only 34 had been fully implemented, 138 partially implemented, and 214 had not been implemented.⁴²⁸ A member of the Commission expressed his frustration:

The implementation status of recommendations of a national institution such as NHRC is in a very dismal state. The reason behind this is that the culture of impunity often

⁴²⁷ See, for example, the decision recommending prosecution of four police personnel for the intentional killing of Ramchandra Yadav and Dayaram Pariyar, dated 2 April 2006 available at: http://www.nhrcnepal.org/decision_detail.php?id=1.

⁴²⁸ NHRC, 'Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)', (November 2010), pp. 4-5, available at: <http://www.nhrcnepal.org/publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf>.

goes safe-sheltered. Crime in politics and vice versa has been crossing its height alarmingly. If the prevalent propensity of piling up the recommendations to rot away continues, the government itself will turn out to be counter-productive in the end. As a result, serious questions are being raised now as the victims are further stigmatised with the recommendations being unimplemented. The single effort of the Commission, therefore, is not adequate enough. The concerted effort from political parties, civil society, human rights workers, media sector, and various professionals is the need of the hour in order to have the NHRC recommendations implemented.⁴²⁹

Similar issues arise in respect of Commissions of Inquiry constituted under the Commissions of Inquiry Act. In many instances the recommendations of the Commissions are not even made public, making it impossible to know the truth of what happened or to monitor whether the Commission's recommendations have been adopted.

The failure to prosecute crimes extends to certain crimes committed by private actors. For example, the systematic failure of the police to investigate and prosecute rape cases has been documented by OHCHR-Nepal,⁴³⁰ Advocacy Forum and the Women's Rehabilitation Centre.⁴³¹ Advocacy Forum has identified what appears to be a growing trend of settling rape and other cases of violence against women cases outside the formal justice mechanism – for example by using community mediation where the victim receives a very small amount of monetary compensation and the perpetrator is not otherwise punished.⁴³²

A failure to prosecute rape and other violence against women amounts to a breach of Nepal's obligations under international human rights law and may lead to state responsibility for torture. The UN Declaration on the Elimination of Violence against Women stresses that States have an obligation to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."⁴³³

The Committee against Torture has stated that the State may be considered "as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing" to acts of torture where they "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors."⁴³⁴ This stems from the recognition that the "failure of the State to exercise due diligence...enables non-State actors to commit acts impermissible

⁴²⁹ Justice Ram Nagina Singh, member of the NHRC, writing in NHRC, 'Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)', November 2010, available at: <http://www.nhrcnepal.org//publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf>.

⁴³⁰ General Assembly, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal', A/HRC/16/23 (16 February 2011).

⁴³¹ Human Rights Watch, 'Nepal: No Justice for gang-rape Victim 5 months on threats and attacks displace a Woman in Siraha' (15 March 2011), available at: <http://www.hrw.org/en/news/2011/03/15/nepal-no-justice-gang-rape-victim>.

⁴³² Advocacy Forum and ICTJ, 'Across the Lines: The Impact of Nepal's Conflict on Women', (2010), p. 82, available at: <http://www.advocacyforum.org/publications/Acrossthelines.pdf>.

⁴³³ United Nations Declaration on the Elimination of Violence against Women, A/RES/48/104, adopted at the 85th plenary meeting, 20 December 1993, Article 4(c). The General Assembly Resolution on Eliminating rape and other forms of sexual violence also urges States to investigate, prosecute and punish any person responsible for rape and other forms of sexual violence, whether or not committed by State or non-State actors: UNGA/RES 62/134, Article 1(b).

⁴³⁴ Committee Against Torture, General Comment No.2 (above n.308), para.18

under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."⁴³⁵

Recommendations

- Take steps through law and/or policy to ensure that community mediation is not used in relation to cases of violence amounting criminal offence.
- Amend the provisions in the State Cases Act (and potentially to be substantially re-enacted in the draft Criminal Procedure Code⁴³⁶) on the prosecution of crimes to:
 - impose a duty on prosecutors to prosecute international crimes and serious violations of human rights where there is sufficient evidence to do so; and
 - allow victims or their families to appeal to a court from a public prosecutor's decision not to initiate a prosecution following a police investigation or following an investigation by the NHRC leading to a recommendation of prosecution.
- Amend legislation to ensure that the public prosecutor is obliged to initiate a prosecution where the NHRC so recommends following an investigation, either through an amendment to the existing Act governing the NHRC, by incorporation into the new Act governing the body, or by inclusion in the new Criminal Procedure Code, once passed.
- Amend the Commissions of Inquiry Act to provide that the full findings of the Commission should be made public, except to the extent that such publication might endanger victims or parties connected to the proceedings, or prejudice future criminal proceedings, and to oblige the public prosecutor to initiate a prosecution where recommended by such Commission.

d. The right to justice and reparation

i. International standards

The right to a remedy and reparation does not end (or necessarily begin), however, with the prosecution of the perpetrator. In addition to, and not contingent on, any such prosecution, the victim of a serious violation of human rights must have equal and effective access to remedies, including judicial remedies, for the provision of adequate and

⁴³⁵ Ibid.

⁴³⁶ The draft Criminal Procedure Code makes some improvements: it provides that a failure to register an FIR may be appealed to the public prosecutor or higher police authority (currently it can only be referred to the CDO), and upon registration of an FIR an officer must make an "immediate" preliminary inquiry, and send a preliminary report to the public prosecutor within three days of that inquiry: Draft Criminal Procedure Code, Sections 5 and 6.

effective reparation in the form of restitution, compensation, satisfaction,⁴³⁷ guarantees of non-repetition⁴³⁸ and rehabilitation.⁴³⁹

Remedies should be contained in legislation rather than solely being developed by the courts.⁴⁴⁰ For serious human rights violations - by definition involving state responsibility – those remedies must be available against the state, and not just against the individual perpetrator (even where the state’s responsibility arises out of a failure of due diligence to prevent a violation by a third party).⁴⁴¹ Neither must state liability be limited, for example by requiring state consent to file a suit against it.

States also have a positive duty to ensure that victims’ access to remedies is equal and effective, such as by providing legal assistance, and (tied to Section (b), above) carrying out investigations. State must take care to ensure that procedures do not contribute to victim re-traumatisation and put in place mechanisms to deal with threats and reprisals.

States must award forms of reparation that are adequate, appropriate and proportionate to the gravity of the crime and the physical and mental harm suffered.⁴⁴² Simply providing compensation for serious violations of human rights is unlikely to fulfil the requirement to provide adequate reparation.

The obligation to ensure that all victims are provided with the right to seek reparation still applies during periods of transition, although the sheer number of claims and weakness of infrastructure and institutions will often mean that ensuring adequate and effective reparations are a challenge. Administrative reparations programmes have been developed in many contexts in response to some of these challenges; however such mechanisms can only ever complement rather than substitute access to the courts. Ideally, the design of administrative reparation programmes will be sufficiently inclusive, responsive to the wishes and needs of victims, transparent, easy to use, efficient and seen as just, that the advantages of using the programme will outweigh the prospect of gaining reparation before the courts or other established mechanisms.⁴⁴³

Reparation and rehabilitation programmes should be inclusive and participatory at all stages.⁴⁴⁴ States should recognise that women may face specific and additional barriers to

⁴³⁷ Satisfaction includes measures such as verification of the facts and full and public disclosure, public apologies, commemorations and tributes to the victims. Prosecution of perpetrators is one form of satisfaction: Basic Principles on Remedy and Reparation, (above n.256), para. 22.

⁴³⁸ That is, measures to prevent the violation recurring in the future, such as reviewing laws that contribute to the violation and implementing monitoring measures, and ensuring effective control of the military and security services. See Basic Principles on Remedy and Reparation, (above n.256), para.23.

⁴³⁹ See HRCtee, General Comment No. 31 (above n.78), para. 16; Basic Principles on Remedy and Reparation, (above n.256), para. 18.

⁴⁴⁰ See in relation to remedies for torture: Brazil, A/56/44, paras. 115-120; Cameroon, A/56/44, paras. 60-66; Luxembourg, CAT/C/CR/28/2, para. 6(c).

⁴⁴¹ Basic Principles on Remedy and Reparation, (above n.256), para. 15.

⁴⁴² Basic Principles on Remedy and Reparation, (above n.256), para.15.

⁴⁴³ See REDRESS, ‘Bringing the International Prohibition of Torture Home: National implementation guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (January 2006), p. 87.

⁴⁴⁴ Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’, A/HRC/7/3 (15 January 2008), par. 75; Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, adopted by women’s rights advocates and activists, as well as survivors of sexual violence in situations of conflict, from Africa, Asia, Europe, Central, North and South America (March 2007), principle 2.

justice, and may have different reparation needs: it is key that reparation aims to “subvert instead of reinforce, pre-existing structural inequalities that may be at the root cause of the violence that women experience...”⁴⁴⁵ Bringing perpetrators to justice and ensuring the non-repetition of the violence might mean that legal provisions and customary practices that sustain the persistence and tolerance of violence against women be modified.⁴⁴⁶

ii. Domestic legal framework governing reparation

Nepal’s legal framework governing the provision of remedy and reparation to victims of serious human rights violations, including those from the conflict period, is patchy and underdeveloped.

- Some constitutional provisions provide the right to compensation: notably Article 25.2 (in relation to those held in preventive detention “contrary to law or in bad faith”); Article 26.2 (in relation to torture and other cruel, inhuman or degrading treatment) and Article 143.9 (for any damage done to a person from the act of any official carried out in contravention of law or in bad faith during a state of emergency).
- The Interim Constitution also grants powers to the Supreme Court to issue “necessary and appropriate orders” for the enforcement of “any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective”. It has done so on a small number of occasions, including by ordering the government to provide “immediate relief of interim nature” to families of victims of enforced disappearance.⁴⁴⁷
- The Compensation Relating to Torture Act provides a mechanism by which victims of torture may file complaints and make claims for compensation to a maximum of NRs 100,000 within 35 days of the torture or their release from custody.
- Some other legislative provisions allow for the filing of civil claims at the district court level for compensation (including the Public Security Act, which allows reasonable compensation to be provided to anyone detained in bad faith).
- The Civil Rights Act also provides that the Appellate Court can order a person found to have violated the rights protected under the Act to pay compensation to

⁴⁴⁵ Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/14/2, (2010), para. 31.

⁴⁴⁶ Report of the Special Rapporteur on Torture, (above n.444), para. 67.

⁴⁴⁷ Rajendra Dhakal and Others v. The Government of Nepal, writ no.3575, registration date Jan 21, 1999: Order rendered by Honourable Justice Khila Raj Regmi and Honourable Justice Kalyan Shrestha issued on 18 Jestha 2063 (2007). For an unofficial translation of the judgment, see 1 National Judicial Academy Law Journal (2007), 301–339.

the victim.⁴⁴⁸ The rights covered include the rights to life and liberty,⁴⁴⁹ freedom from arbitrary arrest and detention,⁴⁵⁰ and freedom of expression.⁴⁵¹

- The Comprehensive Peace Agreement provides that reparations are to be paid to victims of the conflict. It was envisaged that the two bodies required to be set up to investigate crimes from that period: the Truth and Reconciliation Commission, and the Disappearances Commission, would also have the power to make recommendations as to the provision of reparation. In the absence of those mechanisms, some “interim measures” in the form of “interim relief” have been provided to victims of crimes from the conflict period. These have been implemented through the Standards for Economic Assistance and Relief for Conflict Victims, 2008 adopted by the Council of Ministers, and further developed through policy documents.⁴⁵² A programme is now underway involving the Office of the High Commissioner for Human Rights, the International Organisation for Migration and the Nepalese Ministry of Peace and Reconstruction to develop a comprehensive reparations policy.
- The NHRC will often recommend provision of compensation to victims following conclusion of its investigations, although as outlined above, these recommendations are often not implemented.
- The government has provided ex gratia relief on some occasions, and parliament has awarded compensation in a small number of cases following investigation of incidents through parliamentary probes.⁴⁵³

iii. Problems in legislation and implementation

Two core issues arise in relation to the legislation concerning access to remedy and reparation for serious violations of human rights in Nepal. First, is the patchy nature of the violations in relation to which reparation can be claimed and types of reparation provided. Second are procedural and practical barriers which make access even to those remedies difficult or impossible.

A. Gaps in substantive rights to reparation

The outline of the domestic legal framework above shows that there is a patchwork of different legislation which might be used to try to obtain reparation, covering some rights violations and not others (though with the saving provision of the Constitution). Most of these are ineffective because of the very short limitation periods. Some allow claims to be made directly against the State (such as under the Compensation Relating to Torture Act),

⁴⁴⁸ Civil Rights Act 2012 (1955), Section 17.

⁴⁴⁹ Ibid., Section 12.

⁴⁵⁰ Ibid., Section 15.

⁴⁵¹ Ibid., Section 6.

⁴⁵² For further details see Advocacy Forum, ‘Discrimination and Irregularities: The Painful Tale of Interim Relief in Nepal’, 2010, pp. 7-12, available at: http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf.

⁴⁵³ Ibid., p. 7.

while others only allow claims against the individual perpetrator (such as under the Civil Rights Act).

Similarly, apart from the Supreme Court's broad power to provide remedies under the Interim Constitution, the laws envisage that compensation is the only form of reparation to be provided to victims. Other vital aims of reparation, including satisfaction, guarantees of non-repetition, and reintegration and rehabilitation are not addressed.

Compensation alone is not an adequate remedy. "If they can kill my daughter and escape from justice by paying 25,000 rupees" says Devi Sunuwar, mother of a Maina Sunuwar who was killed during the conflict, "I should also be allowed to kill the perpetrators who killed my 15-year-old daughter and pay 25,000".⁴⁵⁴

This issue is raised, for example, by the Compensation Relating to Torture Act, which does not provide for reparation beyond recommendation of departmental action against the perpetrator and the provision of compensation.⁴⁵⁵ In 2005, following a visit to Nepal, the UN Special Rapporteur on Torture concluded that torture was systematically practiced in Nepal, and expressed deep concern at the "prevailing culture of impunity for torture in Nepal, especially the use of compensation for acts of torture as an alternative to criminal sanctions against the perpetrator".⁴⁵⁶ Since that time, nothing has changed. The inadequacy of the Compensation Relating to Torture Act and failure to legislate for and pursue prosecutions of perpetrators has allowed the practice of torture to persist in Nepal as those responsible continue to be blanketed by a culture of impunity.

The government's provision of so-called 'interim relief' to victims of violations during the conflict period is similarly focussed on the provision of economic assistance outside a wider justice process addressing the broader reparation aims. Moreover, the scheme itself has been beset by numerous irregularities.⁴⁵⁷ The tariff was set by central government (i.e. the council of ministers) but individual decisions to award 'interim relief' are taken by local government representatives. For example, in late 2008 Chief District Officers started to register names of certain categories of conflict-victims or their relatives, in order to provide them with financial assistance. Torture victims and victims of gender based violence including rape were not included in these categories though some local government representatives informed torture victims that their names would be registered during a "later phase". By the middle of July 2009, the government had reportedly distributed a total of 1.34 billion rupees as emergency financial 'relief' to around 26,000 conflict victims or their families. The largest share has gone to the next-of-kin of those killed. However, this has been done in an ad hoc fashion, and "according to government officials, due to procedural factors not all families, especially of those killed or

⁴⁵⁴ Quote from 2007 documentary *Sari Soldiers*, in report by Advocacy Forum and ICTJ, 'Nepali Voices Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal' (2008), p vii, available at: <http://ictj.org/publication/nepali-voices-perceptions-truth-justice-reconciliation-reparations-and-transition-nepal>.

⁴⁵⁵ Compensation Relating to Torture Act 2053 (1996) Sections 6 and 7.

⁴⁵⁶ Human Rights Council, 'Report by the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Manfred Nowak, Mission to Nepal', E/CN.4/2006/6/Add.5, (9 January 2006).

⁴⁵⁷ For further detail see Advocacy Forum, 'Discrimination and Irregularities' (above n.452), pp. 7-12.

disappeared during the conflict, might have received the allotted money”.⁴⁵⁸ Furthermore, the sums provided as ‘interim relief’ are far from sufficient, even in the short term.⁴⁵⁹

Recommendations

- Introduce comprehensive provisions on reparation for human rights violations ensuring coverage of the full range of human rights, rather than relying on courts to develop remedies, which can lead to inconsistent practice. Such legislation should provide the possibility of awarding the full range of reparation measures under international law, not just compensation.
- Implement the proposed transitional justice mechanisms and comprehensive reparations policy, in line with and specifically reflecting the international standards outlined above, through legislation as soon as possible. This legislation must, however, make it clear that such mechanisms and programmes are complementary to, and not intended to replace, provision of remedies and reparation through the courts.

B. Procedural barriers

The legislative provisions specifically allowing victims to file for compensation for specified violations all have very short limitation periods. In the case of the Compensation Relating to Torture Act and the Public Security Act, claims must be filed within 35 days.⁴⁶⁰ For the Civil Rights Act claims must be filed within eight months.⁴⁶¹

These limitation periods are the most significant factor in the denial of compensation to victims of violations. All violations committed during the conflict period clearly fall out of the limitation period. Even for violations committed after the conflict period, the limitation period may be a significant barrier as victims – who have been abused at the hands of state actors - are often frightened to bring claims within such a short period of time.

Victims of human rights violations may have very good reasons for delays in making claims for reparation, including the fact that they have been traumatised by the event, and the fear of reprisals. Limitation periods for the filing of claims for reparation should be extended significantly to take this into account, and the court should always have the discretion to extend the limitation period in appropriate circumstances.

Legislative provisions limiting the competence of different courts to hear different matters also result in practical barriers to access to justice. One obstacle is the distance that people may be required to travel, over difficult terrain, to lodge claims with courts for remedies – particularly in cases where such remedies can only be provided by higher courts.

⁴⁵⁸ Ibid.

⁴⁵⁹ See Advocacy Forum and ICTJ, ‘Across the Lines’ (above n.432), p. 92.

⁴⁶⁰ Compensation Relating to Torture Act 2053 (1996), Section 5; Public Security Act 2046 (1989), Section 12A.

⁴⁶¹ Civil Rights Act 2012 (1955), Section 20.

A positive step in relation to this type of obstacle was taken earlier this year concerning the filing of habeas corpus petitions. In April 2011, the Administration of Justice Act⁴⁶² was amended to give the powers to hear habeas corpus petitions at the district court level. Prior to this, only the Supreme Court and Appellate Courts were empowered to hear such petitions.⁴⁶³ This change in the law is very welcome, and should assist in the prevention of arbitrary arrest and detention especially in more remote areas, where it may not be easy for people to appeal to an appellate court or the Supreme Court.

C. Specific issues faced by women

Research conducted by Advocacy Forum and the International Center for Transitional Justice (“ICTJ”) on gender-based violence in Nepal identified significant barriers faced by women in achieving justice. These included a lack of information about how to access justice, stigma associated with reporting crimes of sexual violence, lack of cooperation from relevant authorities (including doctors and police) and real and immediate security concerns.⁴⁶⁴

There are also concerns that women – who faced very significant and often gender-specific harms during the conflict – are not having their experiences adequately taken into account in the creation of transitional justice mechanisms. As reported by Advocacy Forum and ICTJ in 2010:

Except for a few ad hoc attempts, such as ‘thematic consultation’ with women by the Ministry of Peace and Reconstruction, there has not been a sustained and effective strategy in place to ensure women’s active participation in the consultation process on the Truth and Reconciliation Commission.⁴⁶⁵

The draft Truth and Reconciliation Commission Bill has some positive aspects for women, including that rape and sexual violence are included in the category of “serious violations of human rights”, and rape is part of the group of crimes for which no amnesties may be granted. However, the Bill does have problematic provisions including the powers given to the TRC to “cause reconciliation” for certain crimes, including sexual violence. If this was to involve a process of mediation by the Commission between the perpetrator and victim this could re-traumatise women.⁴⁶⁶

⁴⁶² Administration of Justice Act 2048 (1991).

⁴⁶³ Republica, ‘District courts can now take up habeas corpus’ (16 April 2011), available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=30354.

⁴⁶⁴ For further detail see Advocacy Forum and ICTJ, ‘Across the Lines’ (above n.432), pp. 78-84.

⁴⁶⁵ Ibid., p. 95.

⁴⁶⁶ Ibid., p. 96.

IX. RECOMMENDATIONS

a. To government

Law reform

- Order a comprehensive review of existing legislation, provided with sufficient resources, to identify provisions which contribute to impunity for serious human rights violations, and repeal or amend them. The Appendix identifies some of these problematic provisions, with suggestions for action.
- Enact legislation to prohibit those in power from authorising amnesties, pardons and other forms of immunity for crimes under international law and gross violations of human rights, and ensure that this is enshrined in the new Constitution.
- Implement the decisions of the Supreme Court on reform of the military justice system and removal of criminal jurisdiction from quasi-judicial officers without delay.
- Amend the provisions in the State Cases Act (and potentially to be substantially re-enacted in the draft Criminal Procedure Code) on the investigation and prosecution of crimes to improve compliance with its procedures and regular reporting on the status of investigations. Include provisions on special investigative and prosecution units staffed by senior officers to deal with any reported crime amounting to a serious human rights violation or where a conflict of interest exists.
- Amend the Army Act, the Police Act and the Armed Police Force Act to include provisions requiring individual officers to cooperate with investigations of civilian authorities and decisions of the courts and imposing disciplinary sanctions for failure to do so.
- Strengthen provisions in the Supreme Court Act 1991 concerning contempt of court to ensure greater compliance with court orders, and amend the National Code to ensure that state officials, including members of the army and police, can be charged for perjury and contempt of court.
- Strengthen the powers and independence of the NHRC and Commissions of Inquiry, and require the public prosecutor to initiate prosecutions where recommended by such bodies.
- Conduct a formal review of existing mechanisms for claiming reparation, and enact comprehensive and consistent provisions allowing for reparation claims in the courts for violations of the full range of human rights. These should provide the possibility of awarding the full range of reparation measures under international law, not just compensation.

Enactment of legislation

- Promptly establish a TRC and commission of inquiry into disappearances, ensuring that their mandates are fully in line with international standards and best practices, and in particular that they are complementary to the normal criminal processes.
- Incorporate the doctrine of command responsibility into law.
- Amend pending bills discussed in this report to bring them in line with international standards and to fully criminalise the international crimes.
- Introduce legislation to establish an independent police complaints body and a Police Services Commission responsible for appointments, promotions and transfers of police officers.
- Introduce legislation to ensure that all suspected cases of unlawful killings, including complaints made by relatives and reliable reports, are investigated in a “thorough, prompt and impartial” manner.
- Establish a comprehensive victim and witness protection programme through legislation and policy, and enact appropriate penalties for anyone who intimidates witnesses and victims.
- Implement a human-rights compliant comprehensive reparations policy for conflict-era crimes through legislation as soon as possible.

Ensuring law is complied with

- Order immediate, independent and impartial investigations into the alleged extrajudicial executions, enforced disappearances, and other grave human rights abuses documented here and in previous Advocacy Forum reports. Send a clear message to the police force and public prosecutors that FIRs relating to the conflict period should be registered and promptly investigated, regardless of any future transitional justice mechanisms.
- Direct police and prosecutors to implement NHRC recommendations and recommendations of other commissions established by the government to investigate allegations of serious human rights violations which call for prosecution of identified suspects.
- Ensure full cooperation by the Nepal Army and Armed Police Force with police investigations and court orders. Where such cooperation is not forthcoming, hold superior officers who are responsible for the failure accountable, including by suspension, removal or dismissal from post.

Strengthening institutions

- Improve the resources and develop the capacity of the civilian Defence Ministry to provide effective control and oversight of the military.
- Through the National Defence Council, urgently review the Comprehensive Work Plan for Democratisation of the Nepal Army and Security Policy to promote civilian

control and oversight of the army in line with international standards, including specifically addressing the prevailing situation of impunity.

- Revise vetting procedures for members of the army, armed police force and police force proposed for integration, promotion, overseas UN peacekeeping duties, or specialised training abroad to ensure that human rights violators are identified.
- Introduce vetting procedures for members of the Maoist People's Liberation Army proposed for integration into the regular security forces. Any individual under criminal investigation for grave human rights violations should be suspended from duty and banned from travelling abroad.

Engaging with international human rights mechanisms

- Ratify the Rome Statute of the International Criminal Court, the Convention against Enforced Disappearances, and the Optional Protocol to the Convention against Torture.
- Extend standing invitations to the UN Special Procedures.
- Fully and immediately implement all decisions of the Human Rights Committee in individual petitions.

b. To political parties

Law reform and enactment of legislation

- Support measures to reform legislation which contributes to impunity for human rights violations.

Ensuring the law is complied with

- Thoroughly investigate allegations of witness intimidation by party members; where allegations are credible suspend party membership and refer the allegations to the police.
- Fully cooperate with the police in its investigations into past human rights violations, including by complying with all police requests for access to suspects and relevant documentation.

Strengthening institutions

- Introduce internal vetting procedures to ensure that candidates put forward for public office are not subject to criminal investigations for human rights violations.
- Support the development of vetting procedures for cadres putting themselves forward for integration into the army or other security forces.

c. To the judiciary

Ensuring law is complied with

- Take the initiative to hold members of the Nepal Police, Attorney General's Office, and Nepal Army in contempt of court in those cases where the court orders have not been adhered to within a reasonable time.
- Make every effort to ensure consistency in jurisprudence on holding officials accountable for abuse by considering a more effective system of sharing judgments and rulings.
- Continue to refer to and apply human rights treaty obligations and jurisprudence in judgments.

d. To the National Human Rights Commission

Enactment of legislation

- Continue to engage strongly with the government to ensure that guarantees of the NHRC's independence and sufficiently strong powers are included in the National Human Rights Commission bill.

Ensuring law is complied with

- Make public a list of perpetrators known to the commission, against whom it has recommended that the government initiate investigations and prosecutions and press the government and security forces not to promote them unless and until the allegations are cleared.

e. To the army and the armed police force

Ensuring law is complied with

- Fully cooperate with the police in its investigations into past human rights violations, including by complying with all police requests for access to suspects and relevant documentation.
- Fully comply with court orders, including in relation to the provision of documents and the handing over of suspects pursuant to arrest warrants.
- Install a senior officer, untainted by allegations of human rights violations, to be responsible for receiving and ensuring compliance with all police requests and court orders concerning human rights violations by members of the relevant service, and take disciplinary action if his or her directions are not followed.

f. To the police, public prosecutors and Attorney-General's office

Ensuring law is complied with

- Immediately register FIRs and credibly investigate and prosecute all cases of alleged extrajudicial execution, enforced disappearance, torture, rape or other grave human rights violations, including by questioning suspects who are members of the army, police, or UCPN-M.
- Take disciplinary action against police who refuse to file FIRs and against police or prosecutors who fail to follow court orders and credibly investigate cases.
- Send clear instructions to all DPOs and public prosecutors that FIRs relating to the conflict period should be registered and promptly investigated and a report sent to the court within three months, as per Supreme Court rulings.
- Report investigating police officers who fail to comply with requirements for prompt investigation and reporting to the prosecutor to their superior officers.
- Set up a special unit within the office of the Attorney General dedicated to the investigation of ill-treatment in custody, in line with the responsibilities under the Constitution.
- Instruct police to allow unhindered access of lawyers to detainees.
- Refer police accused of torture to criminal proceedings in the civilian justice system rather than treating these allegations as an internal disciplinary matter.
- Introduce procedures to ensure that reports of rape are investigated and prosecuted within the criminal justice system rather than being dealt with through informal justice mechanisms.

g. To Nepal's donors and the international community

Law reform

- Promote and support law reform to bring legislation in line with international standards and to combat impunity.

Ensuring law is complied with

- Make donor funds contingent on progress on justice, reparations and truth and reconciliation and on ensuring that no blanket amnesties for past crimes are granted.
- Fund a workable witness protection scheme.
- Ensure suspected perpetrators of crimes in Nepal found in other countries are prosecuted for international crimes under universal jurisdiction laws.

Strengthening institutions

- Promote security sector reform, including developing the capacity of the Defence Ministry, the establishment of effective oversight and accountability mechanisms for the army and police and vetting procedures.
- Deny visas to persons against whom there is credible evidence of having committed serious crimes.
- Support the development of forensic expertise in the Nepal police through programmes that increase police capacity to investigate crime scenes, collect and analyze DNA samples and conduct ballistics examinations.
- Where necessary, assist in the protection of human rights defenders and lawyers at risk of reprisals
- Ensure accountability and transitional justice remains the central part of supporting Nepal's peace process.

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APPENDIX: BREAKDOWN OF RELEVANT CONCERNS ON SELECTED LAWS

1. Armed Police Force Act 2058 (2002)
2. Arms and Ammunition Act 2019 (1962)
3. Army Act 2063 (2006)
4. Black Marketeering and Some Other Social Offences (and Punishment) Act 2032 (1975)
5. Civil Rights Act 2012 (1955)
6. Compensation Relating to Torture Act 2053 (1996)
7. Crime Against State and Punishment Act 2046 (1989)
8. Domestic Violence (Crime and Punishment) Act 2066 (2009)
9. Essential Goods Protection Act 2012 (1955)
10. Evidence Act 2031 (1974)
11. Explosives Act 2018 (1961)
12. Forest Act 2049 (1993)
13. Human Trafficking and Transportation (Control) Act 2064 (2007)
14. Local Administration Act 2028 (1971)
15. National Parks and Wildlife Conservation Act 2029 (1973)
16. Police Act 2012 (1955)
17. Prison Act 2019 (1963)
18. Public Offences (and Punishment) Act 2027 (1970)
19. Public Security Act 2046 (1989)
20. State Cases Act 2049 (1992)

Below are set out provisions of Nepali laws currently in force which violate international human rights standards and Nepali constitutional law and thus contribute to impunity for serious human rights abuses, both past and current. An analysis of shortcomings in the Muluki Ain is not included here, as many of its provisions are expected to be superseded by the draft Penal Code, Criminal Procedure Code and Sentencing Act currently pending in the Parliament.⁴⁶⁷

1. Armed Police Force Act 2058 (2002)

Section	Provision	Issue Raised	Reference	General Recommendation
26	An armed police shall not be liable of penalty for a result caused while discharging duty or exercising the power in good faith to be discharged or exercised under this Act or Rules framed hereunder	Immunity	VIII.c	Repeal

2. Arms and Ammunition Act 2019 (1962)

Section	Provision	Issue Raised	Reference	General Recommendation
5.2	(2) Assistant Sub-Inspector or the police officer above the rank of Assistant Sub Inspector or the Chief District Officer or the person assigned by him/her may arrest without warrant any person carrying arms without a licence or against this Act and seize the arms from his/her possession. The police officer or the person assigned by the Chief District Officer arresting such person or seizing the arms shall produce the arrested person and the arms so seized before the Chief District Officer within Twenty Four hours with the exclusion of the period of journey.	Arrest without a warrant	VI.b.i	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest
6.1	Arrest upon of persons suspected of bringing into or taking out the arms and ammunition : (1) In case, the Assistant Sub-Inspector or the police office above the rank of Assistant Sub-Inspector is on a suspicion that any person is, with or without a licence, with the intention of	Arrest without a warrant	VI.b.i	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement

⁴⁶⁷ For comments on the three draft pieces of legislation in relation to concerns regarding sexual violence, disappearances and fair trial, see Advocacy Forum and REDRESS, ‘Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence’, April 2011, http://www.redress.org/downloads/publications/AFRedress_Report_on_Draft_Legislation.pdf.

	committing any illegal act, taking out of Nepal to abroad or bringing into Nepal from abroad or bringing into or taking out from one district to another district of Nepal, the arms and ammunition he/she may detain and conduct search of such person's body and the vehicle, luggage, porters and the boxes suspected containing and carrying such materials and, if such materials are found, arrest him/her without an warrant and also seize such arms and ammunition.			to inform of reasons for arrest
20	<p>Penalty : (1) In case a person committing any of the following offences shall be punished with imprisonment from three years up to seven years or with fine from sixty thousand Rupees up to One Hundred Forty thousand Rupees or with both:</p> <p>(a) To manufacture or repair, or put or cause to in another place or order to put the cannon or machine gun, have in his/her possession, convert from one shape to another, sell or give or take for sale contrary to Sub-section (1) of section 3, or</p> <p>(b) To bring into or take out the cannon or machine gun of any kind contrary to Sub-section (1) of section 4.</p> <p>(2) In case, a person committing any of the following offences shall be punished with imprisonment from three years up to five years or with fine from sixty thousand Rupees up to One Hundred thousand Rupees, or with both:</p> <p>(a) To manufacture or repair, or put or cause to in another place or order to put arms, have in his/her possession, convert from one shape to another, sell or give or take for sale contrary to Sub-section (2) of Section 3, or</p> <p>(b) To bring into or take out the arms contrary to Sub-section (2) of Section 4, or</p> <p>(c) To carry arms contrary to Section 5, or</p> <p>(d) To keep in his/her possession or control the arms of any kind contrary to Section 8, or</p> <p>(e) Not to surrender the arms pursuant to Section 9.</p> <p>(3) In a case, a person committing any of the following offences shall be punished with imprisonment from one year up to three years or with fine from twenty thousand Rupees up to sixty thousand Rupees, or with both:-</p> <p>(a) To manufacture or repair ammunition, or put or cause to in another</p>	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts

	place or order to put convert from one shape to another, sell or give or take for sale contrary to Subsection (2) of Section 3, or (b) To bring into or take out ammunition contrary to Subsection (2) of Section 4, or (c) To keep in his/her possession or control ammunition contrary to Section 8, or (d) Not to surrender ammunition in accordance with Section 9.			
24.1	The Chief District Officer shall have the original jurisdiction to hear and decide the case relating to the offence punishable under this Act.	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts
24.a	Notwithstanding anything contained elsewhere in the prevailing law, the accused of the case pursuant to this Act, shall be kept in to the custody on the basis of the evidence available then.	Lack of presumption in favour of bail	VI.b.ii	Amend in line with international standards

3. Army Act 2063 (2006)

Section	Provision	Issue Raised	Reference	General Recommendation
22	No case may be filed in any court against a person under the jurisdiction of this Act 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. This notwithstanding, the offences provided by Sections 62 and 66 shall not be deemed an offence committed in good faith in the course of discharging duties. Explanation: For the purpose of this Section, the phrase "committing any act in good faith, in the course of discharging his duties," means acts performed during the performance of duties as well as any action taken for internal security or self-defence, including flag march, patrolling and sentry duty.	Immunity	VIII.c	Repeal
61 read	Offence related to irregular arrest or detention: Committing any of the following acts shall be considered an offence related to irregular arrest	Jurisdiction of military courts	V.a	Amend to ensure accountability before civilian courts for illegal

with 101	<p>or detention:</p> <p>a) In arresting any person or holding him in detention but failing to submit the case before the relevant officer for investigation or in delaying the proceeding of a case without reason;</p> <p>b) In holding any person in military custody, failing to submit an account making known the appropriate reasons for placement into custody, immediately or as soon as possible or regardless of condition within twenty four hours except in the event of reasonable grounds of those who have the right to place into military custody and the Prad Viwak.</p>	over offences of irregular arrest and detention	VIII.c	arrest and detention of civilians
62 read with 101	<p>1. Committing any acts which are defined an offence of corruption, theft, torture and disappearance by existing law, shall be deemed to have committed offences of corruption, theft, torture and disappearance.</p> <p>2. There shall be a committee comprised of the following for the purpose of conducting an investigation and inquiry into the offences provided by Subsection (1):</p> <p>a. Deputy Attorney General prescribed by the Nepal Government - Chairperson,</p> <p>b. Chief of legal section of the Ministry of Defence -- Member,</p> <p>c. Representative of Prad Viwak not below the rank of Lieutenant--Member.</p> <p>3. The representative mentioned in Clause (c) of Subsection (2) shall be a person who is not involved to the Court Martial of the related case.</p> <p>4. The jurisdiction to try and proceed with cases mentioned under Subsection (1) shall be vested with a Special Court Martial formed in accordance with Subsection (1) of Section 119.</p> <p>5. The committee formed under Subsection (2) shall have the power equivalent to the power conferred by relevant existing laws in relation to an investigating and inquiry officer in respect to those cases.</p>	Jurisdiction of military courts over crimes against civilians	V.a VIII.c	Repeal and amend Section 66 to include the crimes of torture and enforced disappearances as crimes which must be tried before other courts.
70	Any person under the jurisdiction of this Act, after being subjected to trial, hearing and adjudication of an offence mentioned in Section 38 to 65 of this Act by a Court Martial, or after being subjected to departmental action, shall not be subjected to action again for the same offence.	Double jeopardy and potential de facto immunity	VIII.c	Clarify that court martial or departmental action in relation to specified serious crimes including torture, enforced disappearances, rape and homicide shall not be a bar to criminal proceedings in another court.

4. Black Marketeering and Some Other Social Offences (and Punishment) Act 2032 (1975)

Section	Provision	Issue Raised	Reference	General Recommendation
15.1	The court or authority designated by Government of Nepal by a Notification published in the Nepal Gazette shall have the powers to initiate the proceedings and adjudicate the cases relating to the offenses punishable under this Act; and in cases where no such designation has been made, the Chief District Officer shall have such powers.	Failure to separate judicial and executive branches	VI.c	Amend in line with international standards to provide jurisdiction to courts.

5. Civil Rights Act 2012 (1955)

Section	Provision	Issue Raised	Reference	General Recommendation
20	Limitations to file a case: A person shall file a case within Eight months from the date of cause of action in a case which is mentioned in Section 17 and 18.	Short limitation period	VIII.d.iii	Amend to extend period of limitation.

6. Compensation Relating to Torture Act 2053 (1996)

General recommendation is to repeal this Act in its entirety and replace it with a new Act concerning torture in line with international standards.

Section	Provision	Issue Raised	Reference	General Recommendation
2A	Definitions: The term 'torture' shall be understood as physical or mental torture inflicted on a person who is in detention for investigation or awaiting trial or for any other reason, and this term includes cruel, inhuman or degrading treatment that person is subjected to.	Definition not in line with international standards	VII.a	Bring in line with international standards.

3.1	Torture not to be inflicted: No person in detention in the course of investigation, inquiry or trial or for any other reason shall be subjected to torture.	Punishment not defined	VII.a	Define adequate punishment.
5.1	Complaints may be filed: The victim may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of released from detention.	Excessively short limitation period	VII.a VIII.d.iii	Amend to extend period of limitation.
7.	Action against the Person Involved in the Commission of Torture: If it is held that torture has been inflicted as mentioned in this Act, the District Court may order the concerned body to take departmental action against the governmental employee who has inflicted such torture, in accordance with the prevailing law.	Obligation to prosecute	VII.a VIII.c	Impose criminal sanction with appropriate period of imprisonment for torture, and obligation on the State to provide reparation.
10.	The Government Attorney shall, if so requested by the concerned Office In-charge, appear in the Court on behalf of such employee and defend him/her on the complaint filed under Section 5.	Obligation to prosecute	VII.a VIII.c	Repeal.

7. Crime Against State and Punishment Act 2046 (1989)

Section	Provision	Issue Raised	Reference	General Recommendation
3	Subversion: 3.1 If someone causes or attempts to cause any disorder with an intention to jeopardize sovereignty, integrity or national unity of Nepal, he/she shall be liable for life imprisonment. 3.2 If someone causes or attempts to cause any disorder with an intention to overthrow the Government of Nepal by exhibiting or using criminal force, he/she shall be liable for life imprisonment or an imprisonment up to Ten years. 3.3 If someone causes or attempts to cause a conspiracy to jeopardize the sovereignty, integrity or national unity of Nepal with the help of a foreign state or organised force, he/she shall be liable for life imprisonment or an imprisonment up to Ten years. 3.4 If someone causes conspiracy of a crime as referred to in Subsections 3.1 or 3.2 or gathers people, arms and ammunitions with such intention or incites, he/she shall be liable for an imprisonment up to Ten years.	Repressive and widely drafted criminal laws	VI.b.v	Repeal or amend in line with international standards.

4	Treason: 4.2 If someone causes or attempts to cause or incites to create hatred, enmity (dwesh) or contempt to any class, caste, religion, region or other similar acts to jeopardize the independence and sovereignty and integrity of independent and indivisible Nepal, he/she shall be liable for an imprisonment up to three years or a fine up to three thousand Rupees or the both. 4.3 If someone causes or attempts to cause an act to create hatred, enmity (dwesh) or contempt of the functions and activities of the Government of Nepal in writing or orally or through shape or sign or by any other means mentioning baseless or uncertified (unauthentic) details, he/she shall be liable for an imprisonment up to two years or a fine up to two thousand Rupees or the both. Provided that, it shall not be deemed to be an offence under this Sub-section if anyone criticises the Government of Nepal.	Repressive and widely drafted criminal laws	VI.b.v	Repeal or amend in line with international standards.
5	Revolt against friendly states: If someone causes or attempts to cause or incites to revolt against any friendly state by using arms from the territory of Nepal, he/she shall be liable for an imprisonment up to seven years or a fine up to five thousand Rupees or the both.	Repressive and widely drafted criminal laws	VI.b.v	Repeal or amend in line with international standards

8. Domestic Violence (Crime and Punishment) Act 2066 (2009)

Section	Provision	Issue Raised	Reference	General Recommendation
4(8)	The police officer or local body upon recording the statements pursuant to Sub-sections (4) or (5) of Section 8 finds reason to believe that an act of domestic violence has been committed and the Victim so desires, may, within thirty days from the date of registration of the complaint, conduct reconciliation between the parties.	Obligation to prosecute	VIII.c	Amend to ensure that mediation cannot be used in relation to serious criminal offences.
14	Limitation: The complaint, for an offence committed pursuant to this Act, shall be filed within ninety days of the commission of the crime.	Short limitation period	VIII.c.iii.B VIII.d.iii.B	Amend in line with international standards

9. Essential Goods Protection Act 2012 (1955)

Section	Provision	Issue Raised	Reference	General Recommendation
6	Power to use necessary force against the offender: In case, an offender tries to flee by using or without using any force in the course of arrest from the spot (Crime Scene), he/she shall not be given any opportunity to run away. In case the situation demands to use any arm or ammunition, the Head Constable or officer senior to him/her from the Police Force or by the command or officer senior to him/her from Nepal Army or if it is from any other force, the command or officer of the same rank may, own their own or through any subordinate, issue order to use weapon or shot below the knee and arrest such person. No Government employee shall be punished for the death of any person in the course of arresting him/her, as mentioned herein. Explanation: For the purpose of this Section, other force means Militia, Pioneer, reserve, Garizon, or any other organized force.	Powers to use lethal force Immunity	VI.a VIII.c	Amend to “reasonable” force and introduce safeguards. Repeal.
9	Power to hear the case and Appeal: Chief District Officer shall hear the case pursuant to this Act and Appeal against it shall be heard by the Court of Appeal.	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.

10. Evidence Act 2031 (1974)

Section	Provision	Issue Raised	Reference	General Recommendation
44	Public Official shall not be compelled to disclose any information received in that capacity: No Public Official shall be compelled to disclose any information which he/she received in the official confidence when he/she considers that such disclosure would suffer the public interest.	Lack of cooperation by state security services	III VIII.b.iii.B	Amend to bring in line with international standards. Also enact specific provision requiring that information held by public officials related to any crimes must be shared with the relevant investigating body during the investigation.

11. Explosives Act 2018 (1961)

Section	Provision	Issue Raised	Reference	General Recommendation
7	Power to Arrest: Any police official or the possessor of the land where the production or storage of the Explosives has taken place or his/her representative or servant or any person authorized by him/her, or any official of the railway administration or airport office, as the condition requires, may arrest any person, if such person is going to commit any offense punishable under this Act and the act so committed has the possibility of causing explosion or arson in or around the place of production or storage, or any railway line or any airport or any carrier; and the person so arrested shall be handed over to the Chief District Officer within a period of twenty four hours after such arrest, excluding the time necessary for journey, from the place of such arrest.	Wide powers of arrest and detention, including by private actors Arrestee should be produced in a court of law, not before an executive authority	VI.b VI.c	Amend to bring in line with international standards. Amend to bring in line with international standards.

12. Forest Act 2049 (1993)

Section	Provision	Issue Raised	Reference	General Recommendation
15	Force May be Used: If any person opposes or causes any obstruction to the District Forest Officer while carrying out any action pursuant to this Chapter or while taking possession of any house or land, he/she may carry out action and take possession of the house or land by using necessary force.	Powers to use lethal force	VI.a	Amend to "reasonable" force. Introduce safeguards.
55	Necessary Action to be Taken to Prevent Offences: If a person is suspected of attempting to commit any offence liable to punishment under this Act or if such offence is being committed, any employee involved in the Forestry work or Police employee shall take measures to prevent such offence from being committed and for this purpose he/she may take all necessary actions including the use of necessary force.	Powers to use lethal force	VI.a	Amend to "reasonable" force. Introduce safeguards.

56	Special Powers: (1) The employee deputed to the protection of the Forest may shoot the offender under the knee in case a situation is occurred that any person obstructs within or outside the Forest Area to arrest the offender who is involved in the offences under this Act or any person assists the offender to make him/her escape even after his/her arrest and in the event without using the weapon his/her life is endangered in the course of apprehending the offender.	Powers to use lethal force in relation to minor offences by administrative officials	VI.a	Amend in line with international standards. Introduce safeguards.
59	Power to Arrest without Warrant: (1) Any Forest employee or Police employee may, if any person has committed or attempted to commit any offence to be punishable pursuant to this Act, arrest such person without warrant, if there is every likelihood on his/her escaping in case he/she is not arrested. (2) The arresting employee shall have to produce the person arrested pursuant to Sub-section (1) before the adjudicating authority within twenty-four hours exclusive of the time required for the journey. (3) In case, it is required to put into the custody to the arrested person for not completing the inquiry within twenty four hours of his/her arrest, the official involved into the inquiry shall present the detainee before the case Hearing Authority and shall only detain with his/her permission. While requesting for permission, on the charge against the detainee, ground thereof, reasons for to put him/her in the custody and details of the statement of the detainee shall be spelled out clearly. (4) The case Hearing Authority may if so requested pursuant Subsection (3), provide permission to put the detainee into the custody for a period not exceeding twenty five days as time to time if the inquiry is found satisfactory upon considering whether the inquiry is being conducted satisfactorily or not through analyzing the concerned documents .	Arrest without a warrant Detention without charge	VI.b.i VI.b.iv	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest. Reduce length of time may be held in detention without charge.
64	Provisions Relating to Proceedings: (1) In case the evidence received then and there shows that any person arrested under this Act is guilty of any offence on a charge relating to Forest to be punishable for a period of one year or more imprisonment or in case there seems to be a reasonable ground to believe from such evidence that he is guilty, such accused shall be kept in detention for the proceedings. (2) In case of offences other than mentioned in Sub-section (1), proceedings shall have to be carried after releasing him/her on bail or surety of assets equivalent to the maximum amount of fine or imprisonment that can be	Lack of presumption in favour of bail	VI.b.ii	Amend in line with international standards

	imposed on him/her is furnished and if such bail or surety is not furnished proceedings shall have to be carried keeping him in detention. Provided that, the offender who repeatedly commits the offence shall not be released on bail. (3) While carrying on proceedings by keeping the accused in the detention pursuant to Sub-section (1) or (2) , no offender shall be kept more days in detention than the limit prescribed by the punishment by counting the days in detention into imprisonment.			
65	Authority to Hear Case: (1) The District Forest Officer shall hear and decide the cases under this Act with a fine up to Rupees Ten thousands or with imprisonment up to one year or both. (2) The District Forest Officer while hearing and deciding the cases pursuant to Sub-section (1) shall follow the proceedings and exercise the powers as mentioned in the Special Court Act,1974. (3) Any party who is not satisfied with the decision made by the District Forest Officer pursuant to Sub-section (1) may appeal to the Appellate Court within thirty five days from the date of the receipt of the notice of the decision.	Failure to separate judicial and executive branches	VI.c	Amend in line with international standards to provide jurisdiction to courts

13. Human Trafficking and Transportation (Control) Act 2064 (2007)

Section	Provision	Issue Raised	Reference	General Recommendation
7	Arrest and investigation: (1) If any act considered to be an offence under this Act is being committed or may be committed or attempted in a house, land, place or a vehicle, and if there is a chance the offender will escape or evidence relating to the offence will disappear or be destroyed if immediate action is not taken; notwithstanding anything contained in the existing law, a police officer of the rank Sub-inspector or higher may prepare a report and carry out any of the activities listed below at any time: (a) To enter, search or seize such house, land, place or vehicle. (b) To break or open windows or doors in order to carry out the necessary activities in case he/she faces obstruction and opposition in performing the duties, (c) To arrest or take body search of a person engaged in such activity	Arrest without a warrant	VI.b.i	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest

	without an arrest warrant, (d) To seize and take in custody of the evidence found in such house, land, place or vehicle.			
8	Prosecution in custody: Notwithstanding anything contained in the prevailing law, and except to the offence under Clause (d) of Sub-section (1) of Section 4, the court shall keep the accused in custody while prosecuting cases on other offences that fall under Section 4	Lack of presumption in favour of bail	VI.b.ii	Amend in line with international standards

14. Local Administration Act 2028 (1971)

Section	Provision	Issue Raised	Reference	General Recommendation
6(1)	To maintain peace and security: The Chief District Officer shall perform following functions to prevent any activity if there is any doubt of violence or riot: (a) If it deems that an assembly, procession or mob (crowd) may take violent or destructive tendency and there is a possibility of disorder from such activities, he/she shall cause to control it through the police and if it goes beyond the control of the police, he/she shall attend him/herself or depute subordinate officer in the concerned place and persuade to maintain peace and if peace could not be maintained, he/she may cause to use baton (Lathi charge), teargas, Phohora, blank fire as per necessity based on the situation, to maintain peace and order, (b) If it is not possible to maintain peace pursuant to Clause (a) and it deems necessary to open fire to issue warning to the crowd with all clarity before opening the fire; if the mob is not dispersed after such warning and if it becomes necessary to open fire to give order in writing to open fire below the knee	Powers to use lethal force	VI.a	Amend to “reasonable” force. Introduce further safeguards.
6(3a)	If there happens any hooliganism or there are sufficient grounds of happening of hooliganism or disorder in any place, the Chief District Officer may issue an order to prevent to be gathered more than five persons for the purpose of hooliganism or disorder at the specific place and time. The Chief District Officer may impose a fine up to five Hundred Rupees or an imprisonment up to One month or the both to a person who violates such an order.	Restrictions on freedom of assembly Judicial powers exercised by executive	VI.b.v VI.c	Amend in line with international standards introducing “reasonable” restrictions. Amend in line with international standards to provide jurisdiction to courts.

6A(3)	(3) The person who violates curfew order shall be arrested by police and the police shall produce such person before the Chief District Officer immediately. The Chief District Officer shall impose a penalty of imprisonment up to one month or a fine up to one thousand Rupees or both to the person so arrested upon adopting an appropriate summary trial procedure and an appeal against such an order shall lie before the Court of Appeal.	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.
6A(4)	While issuing a curfew order the Chief District Officer may issue an order to the police to open fire to the person or group who violate the curfew order to control the situation. In such a situation, before firing, police shall use baton (lathi charge), teargas, phohara or blank fire and if the person or group does not disperse police shall clearly warn that if they do not dispersed police shall open fire to them. If the person or group does not disperse even after such warning the police may open fire. Provided that, it shall not deemed to bar by the provision as mentioned in this Sub-section to the Chief District Officer to issue a shoot at sight order to any person or group who violates curfew with violent tendencies.	Powers to use lethal force	VI.a	Amend to “reasonable” force. Introduce further safeguards. Repeal provision on shoot at sight.
6B(1)(a)	To arrest a suspicious person without arrest warrant from such area and put in preventive detention pursuant to Public Security Act, 2046	Arrest without a warrant Preventive detention	VI.b.i VI.b.iii	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest. Repeal.
6B(1)(b)	To shoot fire at sight who loots or put fire in houses (buildings) and shops or destroys public property or causes any other types of violent or destructive acts,	Powers to use lethal force	VI.a	Remove provision allowing for shooting at sight and replace with use of “reasonable” force. Introduce safeguards.
7(1)(d)	In a person files a complaint that a police employee has acted in contravention of the law while discharging his/her duties, the Chief District Officer shall investigate the matter as required and submit a report along with the recommendations and opinions to the Regional Administrator and Ministry of Home Affairs for necessary action.	Lack of independence of investigation into complaints	V.b VIII.b.iii.A	Amend to bring in line with international standards.

8	<p>Original and Appellate Jurisdiction:⁴⁶⁸ (1) Chief District Officer shall have the powers to proceed and adjudicate the following cases:</p> <p>(a) Minor cases of theft having claimed amount up to maximum five Hundred Rupees,</p> <p>(b) Cases relating to pick-pocketing,</p> <p>(c)</p> <p>(d) Cases relating to the use of inaccurate weights and measures for deception,</p> <p>(e) Cases relating to the slaughter of female animals at places other than temples where it is a customary practice.</p> <p>(2) A decision made by the Chief District Officer on cases pursuant to Sub-section (1) in which one is not recorded as a recidivist criminal and a fine up to five Hundred Rupees is imposed, shall be final, and no one may file an appeal against such decision. An appeal against the decision of the Chief District Officer in cases a fine exceeding five Hundred Rupees is imposed or in which a guilty person has been recorded as a recidivist may be filed before the Court of Appeal within thirty five days.</p>	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.
9(5)	<p>Other functions duties and powers of the chief district officer: If a person is found to have made undue profits through the sale of any goods or commodities, the Chief District Officer may punish the seller with a fine up to One thousand Rupees or with imprisonment up to three months or both taking into consideration the quantity and price of the goods or commodities transacted. The aggrieved person may file an appeal before to Court of Appeal within thirty five days against the decision made by the Chief District Officer.</p>	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.

⁴⁶⁸ See also Section 6(3a) (power to impose imprisonment of up to one month for violation of order to prevent hooliganism), Section 6(A(3) (power to impose imprisonment of up to one month for violation of a curfew order), Section 6B(5) (power to impose imprisonment of up to three months for certain violations of riot affected area orders), Section 6C (power to impose imprisonment of up to six months for blockading a public road or destroying a house or vehicle), Section 9(5) (power to impose imprisonment of up to three months for making undue profits through sale of goods), Section 10A(3) (power to impose imprisonment of up to three months for unauthorised reclamation of land).

15. National Parks and Wildlife Conservation Act 2029 (1973)

Section	Provision	Issue Raised	Reference	General Recommendation
24.1	In case there are reasonable grounds to believe that the offender under this Act is likely to escape, the authorized officer may arrest him\her without a warrant. The arrested person shall be produced before the adjudicating authority for legal action within 24 hours excluding the time required for journey.	Arrest without a warrant	VI.b.i	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest.
24.2	In case any offender, or any of his\her accomplices resort to violence in an attempt to free him\her or resist his\her arrest or struggles after his\her arrest by the authorized officer under the Sub-Section (1), or if a circumstance arises when the offender tries to escape or his accomplices tries to free him\her or in case the life of the person making the arrest appears to be in danger, or in case he has no alternative but to resort to the use of arms, he\she may open fire aiming, as far as possible, below the knee, and if the offender or the accompanies dies as a result of such firing, it shall not be deemed to be an offense.	Powers to use lethal force Immunity	VI.a VIII.c	Amend to “reasonable” force. Introduce safeguards. Repeal immunity provision.
31.1	The prescribed court or Authority shall have the power to hear and dispose of cases under this Act. (The Government of Nepal has prescribed that if the incident occurred within a national park conservation area the entire case will be heard by the warden of the area. If the incident occurred outside the National Park and Conservation area and it has a fine of less than 10,000 Rp. and imprisonment it shall be heard by the District Forest Officer. If the incident occurred outside of the National Park and the offence has a fine of more than 10,000 Rp. and imprisonment it will be heard by the District Court.)	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.

16. Police Act 2012 (1955)

Section	Provision	Issue Raised	Reference	General Recommendation
8	District level police employees shall remain under the control and direction of the chief district officer in regard to matters concerning law and order and the related administration.	Lack of independence from the executive	V.b	Amend to bring in line with international standards.
17	Power of police employees to arrest without warrant: (1) A police employee may arrest the following persons without warrant at any public place: (a) One who is known to have committed or attempt to commit any crime which is punishable by law with imprisonment for a term of three years or more than three years. (b) A criminal who is declared absconding and is therefore required to be arrested. (c) A person who moves in a suspicious manner at a time when a curfew is in force. (d) A person who carries arms and ammunitions at night without proper reason or tools for burglary at night. (e) A person who escapes or attempts to escape from the place where he or she is detained according to law. (f) A person who is reasonably suspected to have absconded upon deserting to Nepal army or police force. (g) A person who is reasonably suspected to have committed any of the crimes mentioned in Chapter-6 of this Act.	Arrest without a warrant	VI.b.i	Introduce requirement of "reasonable" suspicion for arrest without warrant and requirement to inform of reasons for arrest.
37	Immunity of police employee for acts committed in good faith while discharging duties: The Chief District Officer or any police employee shall not be liable to any punishment or payment of compensation for any action taken by him or her in good faith while discharging his or her duties under this Act or other laws in force or exercising powers thereunder or carrying out decrees, orders or warrants issued by a court.	Immunity	VIII.c	Repeal.
38	Limitation for institution of case: No case may be instituted against the Chief District Officer or any police employee in respect of any action taken by him or her under this Act or the rules or regulations framed hereunder or thinking that he or she was doing so in the exercise of the powers conferred by the Act, rules or regulations or in respect of any act	Limitation period	VIII.d.iii.B	Repeal or extend.

	<p>done with the intention of taking such action unless: ... (b) the case is filed within Eight months of the occurrence of the cause of action.</p>			
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17. Prison Act 2019 (1963)

Section	Provision	Issue Raised	Reference	General Recommendation
22	<p>Offense Relating to Prison: (2) Any Detainee or Prisoner who commits any of the following acts may be warned or may be deprived of any such facility for exemption from punishment as may be granted for good conduct or may be detained in a lonely place or room for a period not exceeding Fifteen days or may be imposed with fetters where he/she was not imposed with a fetter previously, with a handcuff where he/she was imposed with a fetter previously and with a manacle where he/she was imposed with a fetter and handcuff previously, for a period not exceeding One month, except in the case of a woman or sick Detainee or Prisoner. (a) Using criminal force against any person in any manner, (b) Using insulting or threatening language against any person, (c) Bearing immoral or indecent or disorderly conduct, (d) Taking off or breaking fetters or handcuffs, (e) Intentionally damaging or destroying any property of the Prison, (f) Defacing, tempering or tearing any file or document, (g) Receiving, holding or transferring any prohibited things or goods, (h) Intentionally bringing a false accusation against any employee or Detainee or Prisoner, (i) Pretending to be sick, (j) Omitting to report or refusing to report, as soon as it comes to his/her knowledge, the occurrence of any fire, any plot, any escape, attempt or preparation to escape, and any attack or preparation for attack upon any Detainee or Prisoner or any employee of the Prisoner, (k) Assisting in escaping any Prisoner or Detainee or making an attempt thereto,</p>	Punishments potentially amounting to torture or cruel, inhuman or degrading treatment	VII.a	Amend to bring in line with international standards.

	(l) Committing any other activity in contravention of the Rules framed under this Act.			
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18. Public Offences (and Punishment) Act 2027 (1970)

Section	Provision	Issue Raised	Reference	General Recommendation
3.1	The police staff may arrest the person without a warrant if he/she finds him/her on the spot committing any of the crimes mentioned in Section 2.	Arrest without a warrant	VI.b.i	Introduce requirement of “reasonable” suspicion for arrest without warrant and requirement to inform of reasons for arrest.
4	Limitation to file a case: (1) Any case under this Act shall be filed within a period of Seven days from the date of the commission on an offence. ... Provided that, the adjudicating authority may, if he/she is satisfied with reasonable ground that the case cannot be filed within a period of Seven days from the commission of the offence, extend the limitation in order to file the case up to Thirty Five days from the date of commission of the offence.	Pre-charge detention	VI.b.iv	Clarify and shorten period of allowable pre-charge detention.
5.1	The Chief District Officer shall have the power of original jurisdiction to initiate the proceeding and adjudicate case under this Act.	Judicial powers exercised by executive	VI.c	Amend in line with international standards to provide jurisdiction to courts.
6.1	In a case tried under this Act, the Chief District Officer may, upon depending on the gravity of the offence, impose a fine of up to ten thousand Rupees to the offender and order the offender to provide compensation to the victim as per the actual damage, loss, injury etc; and issue an order of detention to keep the offender in a custody for a period not exceeding thirty five days if finds reasonable ground or cause in the course of investigation upon mentioning the cause thereof in the order. Such case shall be decided within a period of three months.	Judicial powers exercised by executive Pre-charge detention	VI.c VI.b.iv	Amend in line with international standards to provide jurisdiction to courts.

19. Public Security Act 2046 (1989)

Section	Provision	Issue Raised	Reference	General Recommendation
3	<p>Power to issue an order: (1) If there is reasonable and adequate ground to immediately prevent a person from acting in any manner prejudicial to the sovereignty, integrity or public peace and order of Nepal, the Local Authority may issue an order to keep such person under preventive detention for a specified period and at a specified place.</p> <p>[Section 2.1.3: Local Authority means "Chief District Officer and this expression also include an authority who discharges the functions of chief district officer in his/her absence.]</p>	<p>Preventive detention</p> <p>Repressive and widely drafted criminal laws</p> <p>Failure to separate judicial and executive branches</p>	<p>VI.b.iii</p> <p>VI.c</p>	Repeal.
5	<p>Validity period of the order of preventive detention: 5.1 Unless abrogated earlier, an order of preventive detention issued Pursuant to Section 3 shall be effective for a term not exceeding with Ninety days from the date of issuance. 2 Notwithstanding anything contained in Sub-section 5.1, the duration of preventive detention order shall be as follows in the following circumstances,- 5.2.1 In case the Local Authority deems it necessary to extend the duration of preventive detention for more than Ninety days to hold a person under preventive detention, he/she shall forward it in writing to the Ministry of Home affairs along with the reasons and grounds thereof. If the Ministry of Home Affairs approves it, the order of preventive detention shall be remained valid for a term not exceeding with Six months from the date of issuance. 5.2.2 If it deems necessary to hold a person under preventive detention for a period longer than Six months, the Ministry of Home Affairs shall take advice with the Advisory Board constituted pursuant to Section 7. If the said Board forwards its opinion to the said Ministry stating it is reasonable to extend the duration of preventive detention, the order of preventive detention shall be extended for a period not exceeding Twelve months from the date of issuance.</p>	Preventive detention	VI.b.iii	Repeal.
8	Procedures of the Advisory Board: 8.1. If the Ministry of Home Affairs	Preventive	VI.b.iii	Repeal.

	<p>deems necessary to hold a person under preventive detention for more than Six months¹⁴ it shall submit a report to the Advisory Board along with reasons and grounds thereof, an advice given by Local Authority in this regard, If any, and the complaint lodged on behalf of detainee, if any, with</p> <p>Government of Nepal. 8.2 The Advisory Board shall, upon considering the report as well as other document received pursuant to Sub-section 8.1 and statement or clarification submitted by detainee pursuant to Sub-section 8.3 if any, forwards its opinion as to whether it is necessary to extend the</p> <p>duration of preventive detention or not. 8.3 The Advisory Board, if it deems necessary, may make an inquiry with the person held under preventive detention, or seek his/her clarification in this regard.</p>	Detention		
10	<p>Penalty: 10.1 The Local Authority may impose an imprisonment for a term not exceeding Six months or impose a fine up to One thousand Rupees on a person who violates an order issued pursuant to Subsection 3.2. 10.2 An appeal may be filed in Court of Appeal against an order of punishment made pursuant to Sub-section 10.1. 10.3 If an appeal is filed pursuant to Sub-section 10.2 the Court of Appeal shall dispose the appeal upon confining only in the matter as to whether the said order is contravened or not.</p>	Failure to separate judicial and executive branches	VI.c	Amend in line with international standards.
11	<p>No question may be raised in any court: No question may be raised in any court against an order issued under this Act.</p>	Preventive detention Immunity	VI.b.iii VIII.c	Repeal.
12A	<p>Entitlement to get compensation for mala fide preventive detention: 12A.1 Notwithstanding anything contained in Section 11, if a person held under preventive detention deems that he/she was kept under preventive detention in contravention of this Act or in bad faith, may file a case before District Court during a term of detention or within a period of thirty five days from his/her release upon claiming for a compensation from the Local Authority who issued such order. 12A.2 If the claim mentioned in complaint lodged pursuant to Sub-section 12A.1, is proved, the district court may pass a judgment for providing a reasonable compensation to the complainant from the Government of Nepal upon considering the factors such as the duration of preventive</p>	Reparation: short limitation periods Reparation: failure to ensure equality	VIII.d.iii	Amend in line with international standards.

	detention, the age and social prestige of detainee and economic loss faced by him/her due to preventive detention. 12A.3 The Local Authority may request the office of government attorney to defend him/her in relation to the complaint lodged pursuant to Sub-section 12A.1 and government attorney shall defend him/her in court of law.			
13	Departmental action: If it is proved that an order issued by Local Authority under this Act was issued in bad faith, such authority shall be subjected to departmental action and be punished.	Obligation to prosecute	VIII.c	Replace with requirement to prosecute in civilian court system.

20. State Cases Act 2049 (1992)

Section	Provision	Issue Raised	Reference	General Recommendation
14.3	In case, it requires arresting a person pursuant to Sub-Section (1) an order shall be given to him/her to voluntarily surrender explaining the cause of the need for such arrest. If such person does not surrender and tries to escape or avoid the arrest, then the Police personnel may use force to arrest such person.	Use of force	VI.a	Amend in line with international standards. Introduce safeguards.
15.4	(4) If the permission of remand is sought pursuant to Sub-Section (2) by reviewing the documents, considering whether the investigation is being conducted in a satisfactory manner, and if it is found to have been carried out in satisfactory manner, the court may grant a remand of maximum twenty five days at once or time and again.	Pre-charge detention	VI.b.iv	Shorten period of allowable pre-charge detention.
29.1	Withdrawal of the Government case or reconciliation: In the cases where the Government of Nepal has to be a plaintiff or where the Government of Nepal has filed a case or where the Government of Nepal is defendant pursuant to the prevailing laws, if there is an order of the Government of Nepal, the Government Attorney, with the consent of other parties, may make a deed of reconciliation or with the consent of the court, may withdraw the criminal case in which the Government of Nepal is plaintiff. If so happens, the following matters shall happen as following:	Amnesties	VIII.c	Amend to ensure that criminal charges of and reparation claims in relation to serious violations of human rights cannot be withdrawn by the government.

	<p>(c) if reconciliation is done, no one shall be charged any fee for the same. (d) in case of withdrawal of the case, the criminal charge or the government claim ceases and the defendant gets release from the case.</p>			
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