



Seeking Reparation for Torture Survivors



## **REVIEW OF THE IMPLEMENTATION OF RECOMMENDATIONS MADE BY THE SPECIAL RAPPORTEUR ON TORTURE, MANFRED NOWAK, AFTER HIS MISSION TO NEPAL IN 2005**

This review is submitted to contribute to the UN Special Rapporteur on Torture's survey of the implementation of recommendations made after his mission to Nepal in 2005.<sup>1</sup> This review focuses on progress made in Nepal during the last year, with specific reference to concerns highlighted in the Special Rapporteur's report to the 10th Session of the Human Rights Council in March 2009.<sup>2</sup> The submission first provides a general overview of issues relating to torture and other cruel, inhuman or degrading treatment or punishment ("other ill-treatment") in Nepal and then provides information on the implementation of the Special Rapporteur's specific recommendations. It also refers to an earlier submission made to the Special Rapporteur in November 2008 by Advocacy Forum (AF), The Redress Trust (REDRESS) and Human Rights Watch. The submission is predominantly based on information gathered by AF lawyers during regular visits to places of detention in 18 districts around the country. AF, REDRESS and the Association for the Prevention of Torture (APT) also provide political and legal analysis.

### **A. GENERAL SITUATION OF ONGOING TORTURE AND OTHER ILL-TREATMENT IN NEPAL**

#### *Statistics on Torture and Other Ill-Treatment*

Since AF last provided data for the review of the recommendations made by the Special Rapporteur on Torture after his visit to Nepal, it has expanded its program of regular visits to places of detention from 15 districts to 18 districts. In addition to monitoring in Baglung, Banke, Bardiya, Dhanusha, Dolakha, Kanchanpur, Kapilvastu, Kathmandu, Kaski, Lalitpur, Morang, Ramechap, Rupandehi, Surkhet and Udayapur, AF has started visiting detainees in Jhapa, Siraha and Sunsari.

In comparison with the period from January to September 2008, the overall percentage of detainees interviewed who claimed they were tortured has declined. During the first nine

<sup>1</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Civil and Political Rights, Including: The Questions of Torture and Detention, Mission to Nepal, U.N. Doc. E/CN.4/2006/6/Add.5 (9 January 2006).

<sup>2</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Follow-up to the recommendations made by the Special Rapporteur, U.N. Doc. A/HRC/10/44/Add.5.

months of 2008, out of 3095 detainees interviewed, 760 (24.6%) claimed that they had been tortured or ill-treated while 1,279 (41.3%) claimed that they were illegally detained. Whereas, during the period from October 2008 to June 2009, AF visited 4000 detainees, among them 753 (18.8%) claimed that they were tortured or ill-treated while 1416 (35.4 %) claimed they were illegally detained (See Tables 1 and 2).

Thus, the overall rate of torture appears to have decreased over the last year by 5.8 %. This is in line with a longer-term pattern observed over several years. For instance, in the period between July 2007 and December 2007, the percentage of detainees claiming that they had been tortured was 36%; whereas, during the first half of 2008 it was 27.8%. The data analysis, therefore, shows a slow but steady decline in the prevalence of torture.

While the overall rate of detainees claiming they were tortured has reduced across the country taken as a whole, in some districts the percentage of detainees claiming to have been tortured is significantly higher than the average as highlighted in Table 3. Those districts include:

- Dhanusha: 29.7%
- Lalitpur: 29.0%
- Surkhet: 27.5%
- Parbat: 24.2%
- Kathmandu: 23.9%

Some of the high percentages of torture can be explained by attempts by police to deal with continuing armed activities of numerous small armed groups especially active in the southern Terai region and in the eastern hills, and a more general rise in crime across the country. According to the Government, there are 109 armed groups operating in the country as of July 2009.<sup>3</sup>

While torture in Nepal is no longer as widespread and systematic as it was during the conflict 1996-2006, it is unacceptable that almost one in five detainees endure severe pain and suffering at the hands of state agents in violation of the absolute prohibition of torture.

#### *Perpetrators of Torture and Other Ill-Treatment*

At present, the main perpetrators of torture and other ill-treatment are the Nepal Police. There is also concern that the police are using private houses to hold detainees in the initial period after arrest, in an attempt to avoid formally registering them as detainees. For example, AF has interviewed three such detainees, who each claimed they were held in unofficial places of detention for four days after they were arrested in early May 2009. All of the concerned people were arrested in Surkhet district and brought to Kathmandu on

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<sup>3</sup> Kantipur, "Indian leaders aiding Tarai armed Outfits: Nepal Govt. Report," 1 August 2009.

suspicion of involvement in an attack on the life of an advisor to then Prime Minister Pushpa Kamal Dahal.

In addition, the Armed Police Force (APF) is becoming more commonly implicated in cases of torture. For example, during the period October 2008 to June 2009, some very serious cases of torture by APF personnel in Jhapa and Dhanusha district were reported. In the cases from Jhapa district, the victims are four Bhutanese refugees (including two women) suspected of involvement in a murder. All of them were subjected to beatings on the soles of their feet and other beatings at both the APF camp in Beldangi-2 refugee camp and at the Pathibara Gan APF camp in Padajungi, Jhapa district. One of the victims was also burnt by cigarettes on his chest and left hand. All of them were kept in illegal detention for four days by the APF. Six cases of torture by the APF in Dhanusha district were also documented during this reporting period, more specifically from the APF camps at Hathlewa and Mujeliya.

Among other state actors involved in torture and other ill-treatment are officials from the Forestry Department and customs officers.

During this period, AF also documented a total of 71 cases of torture and ill-treatment by non-state actors. Among these cases, 32 cases were attributed to the Unified Communist Party of Nepal (Maoist) (UCPN-M)<sup>4</sup> and its youth wing, the Young Communist Democratic League (YCDL)<sup>5</sup>; 26 cases of torture and beatings were attributed to Madhesi armed groups, including the Janatantrik Terai Mukti Morcha (JTMM); six cases to the Tharu Mukti Morcha operating in Banke and Bardiya districts; and a further seven cases of torture were attributed to unidentified armed groups in the Terai.

### *Methods of Torture*

The common methods of torture currently being practised are as follows:

#### *At the time of arrest:*

1. Random beating, kicking, punching.
2. Beatings with sticks, pipes, rifle butts or electric wires on various parts of the body.
3. Slapping.
4. Verbal abuse (particularly of juveniles).

#### *During transfer to the police station:*

1. Random beatings (inside the police van or while getting into it).

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<sup>4</sup> In January 2009, the CPN-M merged with the Communist Party of Nepal-Unity Centre (Masal) and was renamed the UCPN-M.

<sup>5</sup> The Young Communist League, the youth wing of the CPN-M, changed its name to the Young Communist Democratic League (YCDL) after the January 2009 merger.

2. Blindfolding (sometimes taping the eyes with black tape and putting black goggles over the eyes).

*During interrogation:*

1. Beatings on various parts of the body with sticks (cane/bamboo), plastic pipes and rifle butts, including on thighs, hips, shoulder, back and head.
2. Kicking and punching on various body parts, including on back, chest, abdomen and face.
3. Slapping.
4. Threats: death threats (for instance, by aiming a revolver at the temple of a detainee, by pretending to order to shoot or saying "Shoot him!" and someone cocking a pistol); threats of rape; threats of bringing false charges; threats of severe torture (for instance, one detainee was threatened he would be skinned alive).
5. Handcuffing and blindfolding (or putting a sack-like cloth over the head) before beating.
6. Gagging the detainees before torture to minimise noise/screaming.
7. Jumping on and kicking detainees' bodies; or sitting on the suspect, by holding him flat on the ground, and then hitting the soles of the feet with sticks (cane/bamboo) and plastic pipes.
8. Handcuffing or tying a detainee to a post or stumps fixed on a wall, forcing the detainee to stand throughout the night.
9. Tying the legs and arms, and suspending detainees upside down by inserting a stick between the legs and arms.
10. Pouring water into the nose by holding the suspect down on the ground (similar to so-called 'water-boarding').
11. Making the detainee run or jump after being hit on the soles of the feet.
12. Trampling on a detainee's palms till they bleed.
13. Forcing detainees to assume a half-sitting position for 15 to 20 minutes (slight movement would draw baton stick strikes).
14. Stubbing out cigarettes on the body, chest and hands.
15. Plucking hairs (including that of chest), and pinching various body parts.
16. Forced labour (such as cleaning, cooking, collecting and cutting firewood).

Similarly, juveniles complained of being tortured and ill-treated at the time of arrest, while being taken to the police station and during interrogation at detention centres. Most of the juveniles interviewed in detention centres complained that they were kicked, punched, slapped, hit with rifle butts and abused by police personnel, including by being woken up in the middle of the night or being treated sarcastically (e.g. by making a child choose the stick used to beat him with). Most of the juveniles were tortured during investigation with the methods below:

1. Striking on various parts of the body with sticks (cane/bamboo), plastic pipes and rifle butts, including on thighs, hips, shoulder, back and head.

2. Kicking and punching on various parts of the body, including on back, chest, abdomen and face.
3. Slapping, sometimes with both hands at the same time.
4. Squeezing or crushing fingernails with a pair of pliers.
5. Death threats (threats to kill by burial by pointing at a pit).
6. Threats to chop off limbs.
7. Tying hands and legs, and hanging upside down by inserting a stick between the hands and legs.
8. Beating the soles of the feet.
9. Making the detainee run or jump after being hit on the soles of the feet.
10. Forced labour: slicing vegetables or sieving rice, washing clothes, weeding out grass, sweeping out the premises of the police office, cleaning sewage passage, doing the dishes and carrying firewood.

### *Vulnerable groups*

Juveniles and people from certain castes or ethnic backgrounds (e.g. Dalits, indigenous people and other traditionally discriminated groups) are among the groups of detainees most likely to be subjected to torture or other ill-treatment.

#### *(i) Juveniles*

During this period from October 2008 to June 2009, AF lawyers visited 1021 juveniles (57 female and 964 male). Of these, 260 (25.5%) claimed that they had been subjected to torture or other ill-treatment. This represents a reduction of 3.3% as compared to the period from January to September 2008. During the first 9 months of 2008, 28.8 % out of 806 juveniles reported being tortured by the police. (For more details, please see Tables 4, 5 and 6).

An analysis of the backgrounds of the juveniles arrested shows that 33.3 % belonged to indigenous groups, 32.7% to Brahmin and Chettri group, 12.9% to the Dalit community and 10.6% to Terai ethnic community (for more details, please see Table 8). For the period between October 2008 and June 2009, of the total number of juveniles claiming to have been tortured, 160 (61.54%) were under the age of 16. The youngest age where torture was reported during this period was 8 years old. AF found two juveniles of this age claiming to have been tortured in detention centres, one in Kathmandu district and one in Kapilvastu district. The remaining 100 juveniles were 16 or 17 years old. A comparison of the statistics from the previous year shows that the arrest and detention of juveniles under 16 years of age is increasing at an alarming rate. Moreover, about 99 % of juveniles were found detained with adult detainees – a practice contrary to both national and international law.

Despite repeated concerns expressed by local and international organisations, the Government of Nepal has not taken any meaningful steps to prevent the torture of juveniles. The continuing detention of juveniles in police custody is against the law. Sections 42 (a) and (b) of the Children's Act, 1992 provide that juveniles detained or imprisoned will be held in

juvenile reform homes. This has clearly not been fully implemented. Similarly, the provisions of the Juvenile Justice (Procedural) Regulations, 2006 remain to be fully implemented.

The standards for juvenile detention set out in the Act and Regulations were recently affirmed by the Supreme Court.<sup>6</sup> In 2008, a case was brought challenging the transfer of several juveniles from a correction home. The minors were placed, or at risk of being placed, in detention with adults. In its verdict, the Supreme Court ordered government agencies to improve the infrastructure and capacity of existing juvenile correction homes, mandated the creation of new homes in regions lacking them, and prohibited juveniles from being returned to police custody. These measures were affirmed in a subsequent Supreme Court decision in March 2009, which again directed the Government to create more correction homes. Presently, however, there is only one functional government-run juvenile reform home in the whole of Nepal.

*(ii) Caste and ethnic background*

AF has been trying to improve its analysis of patterns of torture on the basis of caste and ethnic groupings. An analysis for this period (see Table 7) shows that people belonging to the Brahmin and Chhetri caste were least likely to be tortured; whereas people belonging to the various Dalit groups and ethnic groups in the Terai region were more likely to be tortured in the 18 districts where AF has a program of visits to places of detention.

A similar analysis for the whole of 2008 shows a similar pattern: members of the Brahmin and Chhetri castes are least likely to be tortured. Only in one district (Bardiya) were detainees from these castes more frequently tortured than people from other backgrounds. This is in comparison to ten districts (Kathmandu, Dhanusha, Baglung, Bardiya, Jhapa, Banke, Kanchanpur, Udayapur, Surkhet and Lalitpur) where members of indigenous communities were more likely to be tortured; and six districts where members of the Dalit community and Terai community were more likely to be tortured. Members of the Dalit community were more likely to be tortured in Baglung, Bardiya, Banke, Kaski, Udayapur and Surkhet districts; members of the Terai community were more likely to be tortured in Kathmandu, Rupandehi, Jhapa, Kaski, Kanchanpur and Morang districts.

*(iii) Women*

While the overall percentage of women who claim they were tortured in detention in recent periods (during October 2008 to June 2009) is 10.7%, which is fairly low (see Table 4. A ), there are concerns for the hundreds of women who were subjected to rape and other forms of torture and ill-treatment during the armed conflict. Very scant documentation exists regarding this. An ongoing study of gender-based violence during the conflict suggests many women were raped during the conflict, either in their homes or in the custody of the security forces.

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<sup>6</sup> *Ghimire and Dahal v. Nepal*, Supreme Court judgment, 17 December 2007.

A 35-day statutory limitation to report cases of rape to the police represents a huge obstacle to justice for these women. The Government should amend the State Cases Act and remove this limitation with retroactive effect and ensure that the transitional justice mechanisms still to be established (see further below) will also investigate the many incidents of rape and other gender-based violence.

## **B. IMPLEMENTATION OF THE SPECIAL RAPPORTEUR ON TORTURE'S RECOMMENDATIONS**

This part of the review considers the progress made by the Government of Nepal in implementing a number of the Special Rapporteur on Torture's recommendations.

**Recommendation (a):** *The highest authorities, particularly those responsible for law enforcement activities, declare unambiguously that the culture of impunity must end and that torture and ill-treatment by public officials will not be tolerated and will be prosecuted.*

More than three years after the *Jana Andolan* (people's movement) of April 2006 and despite repeated promises of greater respect for human rights and accountability, impunity remains firmly entrenched in Nepal. While reports of torture and other ill-treatment have been slowly declining, there remain concerns that with a lack of progress in the peace process, a deteriorating public security situation and an erosion of the rule of law, this improvement may be reversed at any time.

The prevailing ongoing political instability has not helped the cause of those seeking to persuade the Government to address this issue. After the elections of April 2008, won by the Communist Party of Nepal (Maoist) (CPN-M, the former armed group which declared "people's war" in 1996), the political consensus vanished and was replaced by an increasing lack of trust between the main parties.

At a deeper level, the institutions which were always opposed to accountability – most notably the Nepal Army – have dug in their heels and steadfastly refused to cooperate with ongoing police investigations into past human rights violations.<sup>7</sup>

As a result of this political instability, the Legislative-Parliament has been largely paralysed. Key legislation to put in place transitional justice mechanisms as well as initiate reform of the criminal justice system has not progressed. For example, we would note that the 'Independent Disappearances Commission' provided for in the Comprehensive Peace Agreement (CPA) of November 2006 has yet to be established, that there is no clear timeline for the passing of the relevant legislation or for the eventual establishment of the proposed

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<sup>7</sup> Human Rights Watch and Advocacy Forum, "Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict," September 2008.

Commission, and that its powers remain ambiguous. Having delayed the creation of the commission for nearly three years now, the Government is not upholding its duty to constitute “prompt investigation and prosecution” of human rights violations as required under international human rights law. Similarly, legislation to establish a Truth and Reconciliation Commission provided for in the CPA has not been tabled and major concerns remain about an existing draft.

One of the main obstacles to progress in the peace process is an ongoing dispute over the implementation of a provision in the CPA on the integration and rehabilitation of 19,602 verified Maoist combatants, who have been held in cantonment sites around the country for nearly three years. The Nepal Army and many politicians in the Nepali Congress and other parties maintain that former Maoist combatants should be integrated into society. The UCPN-M on the other hand holds the position that the integration agreed to in the CPA refers to integration into the security forces. In mid-July 2009 there was some progress when the Government of Nepal and the UCPN-M finally launched the discharge and rehabilitation process for 4,008 Maoist army personnel, including 2,973 minors, who had been disqualified at the time of verification in 2007, though soon after, this process also seemed to stall.

There were increasing levels of mistrust between the UCPN-M and the other political parties as well as between the UCPN-M and the Nepal Army, not only relating to the question of integration but on wider security sector reform, including bringing the Nepal Army under effective civilian control.

The increasing mistrust culminated in the resignation of Maoist Prime Minister Pushpa Kamal Dahal (alias Prachanda) in early May 2009 after President Dr Ram Bharan Yadav countermanded a decision by a Maoist majority in the cabinet to sack the Commander of the Army, General Katuwal accusing him of insubordination. The ensuing political as well as constitutional crisis lingers with a remaining lack of clarity about the powers of the President under the Interim Constitution.

Madhav Kumar Nepal of the Communist Party of Nepal – United Marxist Leninist (CPN-UML), the party which came third during the April 2008 elections, and who himself lost the elections in two constituencies, was appointed as the new Prime Minister on 23 May 2009 with the support of a 22-party coalition.

The lack of trust and consensus between the parties has also severely impacted on the functioning of the Legislative-Parliament (which also functions as the Constituent Assembly). Parties from across the political spectrum have boycotted sessions on numerous occasions. This has contributed to a considerable delay in drafting a new constitution as well as a lack of new laws being passed (including one to establish the Independent Disappearances Commission, as mandated by the CPA [referred to above]). There is also growing concern that the deadline of May 2010 for the promulgation of the new Constitution (as stipulated in the Interim Constitution) cannot be met.



The three governments that have held power since the CPA was signed have each made commitments to end impunity, but sadly all of them have failed to deliver.

For example, in August 2008, the “Common Minimum Programme” (CMP) was agreed when UCPN–M was leading the Government. The 50-point programme states - among other commitments - that the culture of impunity shall end through consolidating law and order. However, no progress was made. In the sixty-third session of the United Nations' General Assembly in New York on 26 September 2008, Prime Minister Pushpa Kamal Dahal stated: “[t]he government is committed to end the environment of impunity”. Instead, the climate of impunity remained firmly entrenched, evidenced by actions such as the withdrawal of criminal charges in 349 cases (see below) and the lack of progress in police investigations into past human rights violations.<sup>8</sup>

Similarly, Prime Minister Madhav Kumar Nepal when presenting his Government’s policies and programs to the Legislative-Parliament in July 2009 stated:

[t]he Government is committed to establish constitutional supremacy, to ensure the rule of law and good governance, to implement the understandings and agreements and to take the peace process to a positive conclusion by eliminating anarchy, insecurity and impunity.<sup>9</sup>

However, there has been no tangible improvement in the human rights situation. Amid continuing concern about a deteriorating law and order situation, the cabinet on 27 July 2009 approved a “Special Security Program”. According to Home Minister Bhim Rawal, the security strategy includes plans to curb organised crime, a special security plan for the Kathmandu valley, strengthening of the security situation in the Terai and the eastern and the mid-western hills, and raising public awareness to ensure effective implementation of the strategy.<sup>10</sup>

Crucially however, we would note that the Views of the UN Human Rights Committee in *Sharma v. Nepal*,<sup>11</sup> adopted in October 2008, have yet to be implemented. The Committee clearly stated that Nepal,

...is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves.

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<sup>8</sup> Human Rights Watch and Advocacy Forum, “Waiting for Justice. Unpunished Crimes from Nepal’s Armed Conflict,” September 2009.

<sup>9</sup> Unofficial translation

<sup>10</sup> Nepalnews, “Govt adopts new security strategy,” 26 July 2009.

<http://www.nepalnews.com/main/index.php/news-archive/2-political/623-govt-adopts-new-security-strategy.html> (accessed August 7, 2009).

<sup>11</sup> HRC, *Sharma v. Nepal*, UN Doc. CCPR/C/94/D/1469/2006 (28 October 2008).

While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person, the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future.<sup>12</sup>

The Committee's Views, therefore, place an unequivocal duty on the Government of Nepal to investigate and prosecute the enforced disappearance of Mr. Sharma, and to provide Mrs. Sharma with an effective remedy, which they have failed to do for more than seven years. Moreover, the Human Rights Committee does not only require investigation and prosecution to take place, but also requires these actions to be prompt. In its response to the Committee's Views, the Government of Nepal referred, *inter alia*, to the "Independent Disappearance Commission". However, as noted above, this does not constitute the "prompt investigation and prosecution" specifically recommended by the Human Rights Committee in its Views on this communication.

In its response to the Committee, the Government also indicated that the Mrs. Sharma "is being provided by the Government of Nepal a sum of NRs 200,000.00 [approx. USD 2,567.00] as immediate relief". Besides the fact that Mrs. Sharma has not yet received this amount, it is her view that NRs. 200,000 proposed as "immediate relief" does not constitute the "adequate compensation" required by the Committee. Enforced disappearance is one of the most severe human rights violations and since the damage to Mrs. Sharma has been extreme (loss of her husband, extreme pain and anguish, uncertainty of her husband's fate, loss of income, etc) she is entitled to a substantial amount of compensation.

The cycle of impunity prevailing in the country will only end when members of the security forces are made aware (both as a matter of law and practise) that such human rights violations will be investigated and those found to be responsible punished.

**Recommendation (b):** *The crime of torture is defined as a matter of priority in accordance with article 1 of the Convention against Torture, with penalties commensurate with the gravity of torture.*

The Interim Constitution of January 2007 requires a law to criminalise torture to be enacted. However, by the end of August 2009, no legislation criminalising torture has been put before parliament, let alone enacted. The only legislation to redress torture survivors is the 'Torture Compensation Act -1996' of Nepal, which deals only with the compensation of torture. It does not allow for criminal prosecution of the perpetrators involved in torture and other ill-treatment.

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<sup>12</sup> Id. At para. 9.

In the view of AF, APT and REDRESS, Nepal's Torture Compensation Act 1996 (TCA) is not a satisfactory alternative to the enactment of specific legislation criminalising torture in Nepal. For example, the TCA "does not contain a definition of torture in line with article 1 of the Convention, nor does it provide for effective remedies; it does not provide for the criminalization of torture or the imposition of punishment commensurate with the gravity of torture".<sup>13</sup> Similarly, "the TCA does not have a provision for the protection for those filing cases, and complainants and their attorneys repeatedly reported receiving threats and intimidation".<sup>14</sup>

Furthermore, Section 5 of the TCA stipulates that a victim of torture must file their complaint "within 35 days from the day the torture is inflicted on him or the day he has been released from custody". This provision is the single most significant factor contributing to the denial of compensation to thousands of victims of torture in Nepal. In effect, the 35-day limitation period means that perpetrators of torture need only ensure the silence of their victims for 35 days after the torture is inflicted or the victim is released. Unfortunately, this is most effectively done through intimidation, violence, or re-arrest.

Therefore, the inadequacy of the TCA has allowed the practice of torture to persist in Nepal as those responsible continue to be blanketed by a culture of impunity.

Similarly, Section 62 of the Army Act 2006 which criminalises torture (without providing a definition or specifying a punishment) has not been amended.

On 26 June 2009, at an event to mark UN International Day in Support of Victims of Torture, Home Minister Bhim Rawal committed to end impunity for human rights violations. He attributed the continued incidence of torture in Nepal to the fact that impunity exists for such crimes, and expressed his commitment to end impunity. He further said, "[t]he culture of impunity should be ended if the people are to free themselves from being tortured".<sup>15</sup> However, at a later meeting with human rights activists, when asked to put legislation before the Legislative-Parliament to criminalise torture, the Minister stated that as there are so many other competing issues, this has not yet been agreed as a priority for all political parties and unless there is some consensus, it is difficult to proceed.

In a verdict dated 17 December 2007 (*Rajendra Ghimire v. Council of ministers et. al.*), the Supreme Court held: "[a]s no legislation has been drafted till date in line with the Convention against Torture and Other cruel, Inhuman and Degrading Treatment or Punishment (1984), albeit a considerable amount of time has elapsed since Nepal ratified the convention, and as

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<sup>13</sup> Manfred Nowak, Mission to Nepal, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. No. E/CN.4/2006/6/Add.5 (9 January 2006), para 26.

<sup>14</sup> Advocacy Forum, "Hope and Frustration, Assessing the impact of Nepal's Torture Compensation Act – 1996," 26 June 2008, page 9 ([http://www.advocacyforum.org/downloads/June26\\_Report\\_English\\_2008.pdf](http://www.advocacyforum.org/downloads/June26_Report_English_2008.pdf))

<sup>15</sup> <http://www.kantipuronline.com/kolnews.php?nid=201150>

Nepal has treaty obligations to implement and adhere literally to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984), and as it is the constitutional duty of Nepal to draw up legislation that ensures punishment of the perpetrators of torture to deliver the provisions expressed in article 26 and 33 (m) of the Interim Constitution, a directive order hereby has been issued in the name of the respondent the Government of Nepal to criminalize torture and make provisions to punish the Perpetrators of torture as demanded by the petitioners”.<sup>16</sup> However, as noted above, no legislation criminalising torture has yet been put before parliament, let alone enacted.

Amid this lack of progress in criminalising torture and an apparent lack of commitment from the Government to do so, a number of civil society organisations created a ‘Coalition against Torture’ and put together a draft bill to criminalise torture in order to assist the Legislative-Parliament to follow through on this obligation (contained in Article 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Nepal acceded to on 14 May 1991).<sup>17</sup> However, amid the ongoing political uncertainty, it is unlikely that such a law will come into force any time soon.

**Recommendation (c):** *Incommunicado detention be made illegal, and persons held incommunicado released without delay.*

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

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

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

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<sup>16</sup> <http://www.advocacyforum.org/downloads/publications/criminalize-torture-june26-report-english-final.pdf>. (Page 79).

<sup>17</sup> The text of the bill can be found in: Coalition against Torture, “Criminalize Torture,” 26 June 2009 (<http://www.advocacyforum.org/downloads/publications/criminalize-torture-june26-report-english-final.pdf>.)

In the absence of an independent police oversight body, violations of the law on presenting detainees in court within 24 hours go unpunished. There are no known cases of disciplinary action (whether through suspension, demotion, and/or imprisonment) against police or other officers responsible for keeping detainees incommunicado.

As the APF is more and more active, especially in the Terai region, there are increasing reports of people being arrested and kept in APF custody, and being subjected to torture or other ill-treatment during that time. Under Section 24(2) of the Armed Police Force Act, the APF can arrest people but should hand any such persons over to police “as soon as possible”. However, there are reports of detainees being held in APF custody for up to four days. Again, the lack and/or falsification of detention records make bringing a case against the APF more difficult. As noted above, the Nepal Police maintains separate pre-remand and post-remand registers. Often the AF detention monitors do not have access to the pre-remand registers.

It is also to be noted that around half of all detainees are not produced before a court, but are rather produced before a Chief District Officer (CDO), who has judicial powers under several laws, including the Arms and Ammunition Act and the Public Offences Act. However, in a recent case a CDO, in response to a *habeas corpus* petition, informed the Appellate Court that a detainee had been produced before him whereas the detainee denied this was the case.<sup>18</sup> Given that the CDO is the administrative head at the district level and that the police are accountable to him (or her), the impartiality of this authority is questionable. There is, therefore, an urgent need to review the laws granting judicial powers to CDOs in criminal cases.

All this goes to show that there is great need for legislation or judicial guidance on custodial standards. For example, in the Indian case of *D.K. Basu v. State of West Bengal*, the Supreme Court of India laid down specific requirements to be followed by the police for arrest, detention and interrogation of any person.<sup>19</sup>

**Recommendation (d):** *Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention, which should not exceed 48 hours. After this period they should be transferred to a pre-trial facility under a different authority, where no further unsupervised contact with the interrogators or investigators should be permitted.*

This recommendation remains unimplemented. In addition to the fact that many detainees are not produced before a court within the required 24 hours (see *Recommendation c*), an analysis of data shows that when a detainee is produced in court for the first time, the court

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<sup>18</sup> OMCT, “Serious concerns for the safety of Mr. Sushan Limbu and Mr. Bhakta Rai at risk of further torture and other ill-treatment, Ref: NPL 230709,” 23 July 2009.

<http://omct.org/index.php?id=APP&lang=eng&actualPageNumber=1&articleSet=Appeal&articleId=8696>

<sup>19</sup> *Shri D. K. Basu v. State of West Bengal* (1996) at para. 36.

usually issues a remand order for him or her to be further detained in police custody. Generally nearly all detainees are remanded into police custody for 25 days regardless of the offences of which they are suspected. (Courts normally grant 90 days' remand for drug offences and some other very serious crimes.) The prosecution is required to file charges against the suspect within this period. The initial remand of each and every accused happens as a matter of routine without the court verifying whether the prosecution has stated valid reasons why they should be detained as required under the State Cases Act, Section 15 (2). The remand application generally states why the prosecution needs more time for investigation but does not mention reasons why the accused needs to be detained. The prosecution regards detention of suspects as a pre-condition for investigation which is in fact not envisioned by the Act.

Once a charge sheet is filed, the adjudicating officer (most likely a District Judge, a Chief District Officer or District Forest Officer) must either order further remand pending the trial or order release of the detainees with or without bail. The court can grant release (on bail) in cases where the alleged offence carries less than 3 years' imprisonment even if there is *prima facie* evidence against the detainee. If the charge carries a penalty of more than 3 years' imprisonment, release on bail can be granted only if *prima facie* evidence does not show reasonable ground to believe that the suspect is guilty.

After such a detention order is made pending trial, the detainees are taken to a prison, not to police custody.

Where a person is in prison awaiting trial, the police rarely seek access to detainees. Theoretically, any police access would be under the supervision of the Prison Department, which functions separately from the Police Department.

A related concern involves the torture and other ill-treatment of juveniles in police custody and the fact they are kept together with adults. According to records maintained by AF, 25.5% of juveniles held in police custody in the period from October 2008 to June 2009 claimed they were tortured or ill-treated – which is higher than for the adult population (see tables 1 and 5). As discussed in Part A above, the continuing detention of juveniles in police custody is against the law and in violation of two orders of the Supreme Court.

Moreover, the continued detention of juveniles in facilities meant for adults presents grave human rights concerns. Children housed with adult offenders are vulnerable to rape and other abuse. Further, they are not provided with the special opportunities and resources necessary to give them a chance to become reintegrated into society. The UN Convention on the Rights of the Child (CRC), which Nepal ratified on 14 September 1990, requires that,

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so

and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances [underline added].<sup>20</sup>

Moreover, the UN Committee on the Rights of the Child, has recognised that “[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders”.<sup>21</sup>

The aforementioned verdicts of the Supreme Court are an important affirmation of this duty. However, alleged child offenders are not currently afforded the legal rights guaranteed to them by the CRC and the Children’s Act.

**Recommendation (e):** *The maintenance of custody registers be scrupulously ensured, including recording of the time and place of arrest, the identity of the personnel, the actual place of detention, the state of health upon arrival of the person at the detention centre, the time family and a lawyer were contacted and visited the detainee, and information on compulsory medical examinations upon being brought to a detention centre and upon transfer.*

In the absence of an independent police oversight body, the lack of a nationwide system of regular inspection of places of detention, and a lack of transparency by the police in giving lawyers or human rights organisations access to detention records, it is difficult to make an overall assessment of the implementation of this specific recommendation.

However, during regular visits to places of detention in 18 districts, AF lawyers have observed that while there is a vast increase in the number of detainees taken for a medical check-up soon after they are admitted into custody (see Tables 9 and 10), there nevertheless remain serious concerns about the way in which medical examinations are conducted. For example, in many cases, the police insist on being present, thereby preventing the detainee from speaking openly to the doctor for fear of reprisals; also, doctors often do not fully document the wounds they observe on the body out of fear of repercussions from the police, misplaced loyalties or because of a lack of knowledge and skills in medico-legal documentation. In addition, there are concerns that detainees are not provided adequate medication.

Access to family and lawyers is also problematic as already described above (see *Recommendation c*). Even in those cases where access is granted, it is often very limited. For instance, lawyers are not allowed to meet with detainees in private and are only given limited time to hold discussions with their clients. Families face similar problems.

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<sup>20</sup> UN Convention on the Rights of the Child, Article 37(c).

<sup>21</sup> UN Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice (Forty-fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007) at para. 10.

In addition, after arrest, detainees are often initially detained in local police posts, which do not have proper holding cells or detention registers. Police have, on occasion, maintained that there is no obligation to register detainees until they are taken to an “official” place of detention – usually a District Police Office. However, there are no express legal provisions designating police stations as “official” places of detention nor is there is law that prohibits Nepal Police Offices from detaining people provided that detainees are produced for remand hearings within 24 hours. However, the time taken to transfer detainees to an “official” place of detention varies and may exceed the 24 hour period. Again, the names of some detainees, particularly those who are released without being transferred, are never registered.

Finally, as noted above, the APF has become increasingly involved in arrests related to armed groups operating in the Terai region, and has held people for up to four days. It does not operate or maintain official detention facilities or detention registers.

**Recommendation (f):** *All detained persons be effectively guaranteed the ability to challenge the lawfulness of their detention, e.g. through habeas corpus. Such procedures should function effectively and expeditiously.*

The denial of detainees’ rights to file *habeas corpus* applications to challenge their detention is not as serious a problem now as it was during the conflict. Nevertheless, as noted above, concerns remain about considerable delays in bringing detainees before a court within 24 hours as provided for by the Constitution.<sup>22</sup>

Misrepresentations by police and other state officials, apparently to hide detainees or cover-up the fact that their detention is illegal, continue to present an obstacle to the effective functioning of the *habeas corpus* remedy.

For example, in one case, two members of an organisation for victims of Maoist abuses were arrested by police in Kathmandu on 3 March 2009 and were kept at various places of detention, including Hanuman Dhoka police station, Gausala police station and the police headquarters. However, when their friends and relatives made inquiries at these places, they were told that the two people were not held there. In response to a *habeas corpus* petition filed on 6 March 2009, both the police authorities and the Home Ministry denied the two were in custody. Later, on 15 March 2009, an additional petition was filed in the Supreme Court after information was obtained that the detainees had been transferred to the District Police Office, Pyuthan. Hearing the petition on the same day, the Supreme Court issued an order requiring the Registrar of the District Court of Pyuthan to search for the detainees at the District Police Office, Pyuthan. The Registrar found that they were illegally detained in the District Police Office, Pyuthan. The detainees told the Registrar that they had indeed been arrested in Kathmandu and had been taken to Puythan. They also claimed they had been held blindfolded and in handcuffs throughout the period of their detention. Thus, on 16 March

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<sup>22</sup> Article 24 (3) of the Interim Constitution of January 2007 provides that an “arrested person should be brought before judicial authority within 24 hours of the arrest excluding the time required to travel”.



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

In another recent case documented by AF, it was alleged that false information provided by the CDO to cover-up a case of illegal detention led to the court’s rejection of a *habeas corpus* writ petition. The petition was filed with the Morang Appellate Court on 19 July 2009, on behalf of Sushan Limbu and Bhakta Rai who were arrested around a week earlier by police, detained initially incommunicado and tortured. On 21 July 2009, in response to a court order, the police submitted to the court a detention order apparently issued by the CDO. The CDO apparently falsely informed the court that the detainees were brought before him within the legally required period of 24 hours and that he had extended the period of detention. The court therefore rejected the *habeas corpus* petition and at the time of writing the detainees remain in custody, with serious concerns for their safety.

Weak sanctions for perjury and contempt of court are contributing factors in relation to the way in which the authorities respond to *habeas corpus* petitions. Despite obvious and repeated lies and misinformation from officials in court (including by the Nepal Army during the time of the conflict), none has ever been prosecuted or otherwise disciplined by the courts for perjury.<sup>23</sup> This has contributed to the sense among security forces that they are “above the law”. The courts bear considerable responsibility for not setting stricter limits on state behaviour.

For this situation to be improved, there should be improved access for family members and lawyers, and a better functioning legal aid system. In contrast, at the moment, unless and until AF makes an intervention, hardly any detainees can challenge the legality of their detention.

**Recommendation (g):** *Confessions made by persons in custody without the presence of a lawyer and that are not confirmed before a judge not be admissible as evidence against the persons who made the confession. Serious consideration should be given to video and audio taping of all persons present during proceedings in interrogation rooms.*

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<sup>23</sup> Amnesty International, “A Deepening Human Rights Crisis,” December 2002, AI Index: ASA 31/072/2002.

Section 24 of the Interim Constitution affirms a number of important “Rights Regarding to Justice” within the Fundamental Rights chapter. Subsection 7 provides that “[n]o person accused of any offence shall be compelled to be a witness against oneself” (Section 24(7), Interim Constitution). Unfortunately, coerced confessions remain commonly used in criminal proceedings throughout Nepal.

For example, recent data reveals that torture and other ill-treatment are still frequently inflicted on detainees in efforts to “gather evidence”. As neither public prosecutors nor defense lawyers are ever present during interrogations, there is little to prevent the police from using physical and mental coercion to compel the confessions they seek.

Although, under the TCA and Evidence Act, forced self-incriminatory statements are ostensibly inadmissible in court proceedings, police continue to torture and humiliate detainees in efforts to coerce confessions and the “evidence” they get from this process is frequently used to establish suspects’ guilt during trials. Thousands of interviews with detainees each year reveal that, at the initial remand stage, judges very rarely ask detainees whether their statements were freely given. Further, although the prosecution carries the burden of ultimately proving a defendant’s guilt, each defendant has to “persuade” the court of the “specific fact” that a statement was not freely given (Section 28, State Cases Act). In practice, this means that forced confessions are routinely accepted unless the defendant is able to produce some compelling evidence demonstrating that coercion or torture took place. In other words, Nepali law reverses the burden of proof and expects detainees to prove that they were in fact tortured. Furthermore, the law is not clear as to the exact procedure to be used by courts in order to establish whether or not a confession was extracted under torture.

In this regard, Article 15 of the UN Convention against Torture provides that: “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. Most of the case-law on this issue indicates that the burden of proof cannot rest with either the individual or the state alone. For example, in their commentary on the UNCAT, Nowak and McArthur conclude that, “[a]ny interpretation which takes into account both the wording and the purpose of Article 15 must, therefore, aim at striking a *fair balance between the legitimate interests of the State and of the individual against whom the evidence is invoked*” [emphasis in original].<sup>24</sup> As noted above, at present in Nepal, the burden is placed squarely on the victim.

In addition, it is very common in Nepal for detainees to be forced to sign statements (whether “confessions” or other documents) without being able to read them beforehand. This is sometimes due to illiteracy but mainly because the police refuse to give detainees an opportunity to read their statement. Police officials openly admit that they rely heavily on

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<sup>24</sup> M. Nowak & E. McArthur, “The United Nations Convention against Torture: A Commentary,” Oxford University Press, 2008, Ch. 15 para. 81.

confessions during criminal investigations, and that they constitute the main and sometimes almost exclusive part of an investigation. Some members of the police have even implied that if they did not use force they would not be able to obtain a confession (see also Recommendation (d)). Police are often under considerable public and political pressure, which forces them to complete investigation promptly and by implication they rely heavily on confessions.

Finally, under Section 9 of the State Cases Act, statements are taken by police officers in front of public prosecutors. It is, however, very common for detainees to be interviewed by the public prosecutor without a lawyer present, as part of the investigation process. The public prosecutor normally takes a statement from the detainee in his or her own office, sometimes in the presence of police personnel. The detainee is required to sign the statement, which may be used in court. The majority of public prosecutors prohibit the presence of lawyers during this interview. (Such presence is not clearly guaranteed under Nepali law.)

As far as AF is aware, the video and/or audio taping of proceedings in interrogation rooms is not being considered.

OHCHR-Nepal, NHRC, AF and others have initiated discussions with the Nepal Police regarding human rights training, including on legitimate interrogation methods. After extensive consultations in January and March 2009, a meeting has been proposed with the Training Directorate of the Nepal Police to discuss the review of in-service training (as opposed to one-off human rights training) to ensure full integration of human rights. However, as of late August 2009, the police have not responded and it appears they do not give priority to human rights training. Similarly, the judges and public prosecutors have not given high priority to incorporating human rights into their in-service training although generally they are found to be more aware of human rights than the police.

**Recommendation (h):** *Judges and prosecutors routinely ask persons brought from police custody how they have been treated and, even in the absence of a formal complaint from the defendant, order an independent medical examination.*

As previously reported, most detainees do not make formal complaints of torture and other ill-treatment when taken before a judge or prosecutor, mostly through fear of reprisals. In the period under consideration, it has been observed that judges and court staff have been more cooperative with victims of torture and their lawyers. For example, some judges have started to give orders for physical and mental health check-ups of their own accord, without formal submissions by lawyers.<sup>25</sup> In addition, a limited number of judges ask detainees about their treatment at the hands of the police, as well as checking for physical signs of torture by asking male detainees to remove their shirts. While these practices are not yet uniform, they are an improvement to the previous practice when judges tended only to check for physical

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<sup>25</sup> Coalition Against Torture, "Criminalize Torture," 26 June 2009.

signs of torture, if at all, with the result that psychological torture or other ill-treatment might go unnoticed.

Sadly, public prosecutors generally do not ask detainees about their treatment in police custody. Prosecutors do not presume that people brought before them are innocent until proven guilty; rather they immediately see “suspects” as criminals and do not care how they were treated in police custody, with some exceptions.

After AF challenged the admissibility of suspects’ statements on the basis of possible coercion, the prosecutorial authority has changed the form of the statement and has included a question asking detainees if they were tortured or ill-treated. What is perhaps not surprising is that in almost all cases the detainees are found to have answered that they were not tortured. Given what AF knows from its regular detention visits, this suggests that some detainees do not feel free to answer this question honestly. Rather, detainees are answering that they were not tortured because in almost all cases they are being asked to sign the statement at the police office itself. Even if the detainees give their statement in the public prosecutor's office, they may not feel able to tell the prosecutor about their torture because the police are present and the police may have threatened them with falsifying serious charges against them if they would talk about their torture.

As noted above, between October 2008 and June 2009, 753 detainees claimed to have been tortured (see Table 1). It should be noted that, according to the data gathered by AF, a significant proportion of these 753 detainees were detained under legislation<sup>26</sup> which provides for adjudication by CDOs, the highest representative of the Government at the district level (between October 2008 and June 2009, of 753 people who said they were tortured, 263 - around 35% - were detained under these two pieces of legislation) (see also Table 11). As noted above, this poses significant concerns for the effectiveness of judicial guarantees in these cases, given the lack of independence of the CDO, who is also responsible for public security at the district level. Not surprisingly, CDOs are not known to ask detainees brought before them how they were treated by the police or to order independent medical examinations. Rather, normal practice is for CDOs to actually sign detention orders without the detainee being present. This is of even greater concern given that CDOs may get involved in writing orders in serious cases such as under the Arms and Ammunition Act.

The State Cases Act 1993 provides the right for detainees to ask the judicial authorities for medical examinations without any fear of reprisal.<sup>27</sup> Furthermore, the TCA requires all detainees to be subject to a medical examination at the time of arrest as well as at the time of release. However, this mandatory provision is often not complied with in practice: while detainees are increasingly taken for examination at the time of arrest, there are concerns regarding the quality of these examinations, and detainees are very rarely taken for

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<sup>26</sup> The Public Offences Act and the Arms and Ammunitions Act.

<sup>27</sup> A/HRC/4/33/Add.2, para. 438.

examination at the time of transfer to the prison or release. (See also *Recommendation e* above). A medical examination on arrest, and then on release or transfer can be crucial to proving that any physical injuries or mental suffering were sustained during the time spent in custody.

However, there is a lack of qualified forensic doctors and training in forensic examination and documentation within the medical profession. There is no encouragement for doctors to specialise in forensics and a general lack of recognition of the specialisation. Based on AF's experience of working on torture cases and using the TCA to claim compensation, a low success rate can be attributed in large part to the lack of strong medical reports and evidence from medical professionals. Furthermore, the TCA ignores the role of independent medical practitioners in the care and assessment of torture victims. Often, police take detainees to government hospitals for medical check-ups where doctors do not give priority to torture victims and do not provide strong medical reports (quite commonly doctors even under-report injuries as they are concerned for their own security). Often, junior staff are assigned the task of conducting medical check-ups of detainees brought to the hospital by police. It is also common for the police insist on staying with the detainee claiming risk of escape.

**Recommendation (i):** *All allegations of torture and ill-treatment be promptly and thoroughly investigated by an independent authority with no connection to that investigating or prosecuting the case against the alleged victim. In the opinion of the Special Rapporteur, the NHRC might be entrusted with this task.*

*(i) Ad Hoc Commissions of Inquiry*

There is an established practice for commissions to be set up by the Government to look into incidents involving allegations of serious human rights violations. However, the reports of these commissions are often not made public in a timely manner, if at all, and their recommendations are rarely implemented. In addition, there have been concerns about the independence and impartiality of commission members in some cases. As such, they are generally seen as a way for governments to wipe their hands of the affair in question, without taking any concrete action. Public confidence in the effectiveness of such commissions is also lacking.

There have been no independent investigations into the allegations of systematic torture and disappearances during the armed conflict. For instance, the Government has failed to constitute an investigation into the 49 cases of illegal detention, torture and disappearances in 2003/2004 by the Bhairabnath Battalion, which were documented in OHCHR's May 2006 report. Nor have there been independent investigations into the allegations of over 170 disappearances by security forces and the CPN-M in Bardiya District, as documented by OHCHR in its report of December 2008. That report also included findings of systematic torture in Chisapani Barracks, which featured in the Special Rapporteur's report on Nepal of 2005 and which have yet to be properly investigated by the Government.

*(ii) National Human Rights Commission of Nepal*

The National Human Rights Commission of Nepal (NHRC) is mandated to investigate alleged violations of human rights.<sup>28</sup> However, the NHRC's recommendations to the Government are rarely implemented in practice, despite repeated calls from civil society and the NHRC itself. In its annual report 2007-2008, the NHRC cited this inaction on the part of the Government as one of the major challenges in its work.<sup>29</sup> On 26 June 2009, it submitted a 10-point memorandum to the new prime minister to express concern about ongoing human rights violations. It also drew the prime minister's attention to the lack of implementation of NHRC recommendations by successive governments.<sup>30</sup> On 12 August 2009, the NHRC stated that it was encouraged to hear that the prime minister had instructed the Home, Defense and Peace and Reconstruction Ministries to provide information on the implementation of NHRC's recommendations and had asked the ministries to send information on the recommendations implemented and compensation provided.<sup>31</sup> Though this is somewhat encouraging, it remains to be seen whether this results in all compensation payments recommended by the NHRC being awarded any time soon.

In the period between October 2008 and June 2009, for example, AF registered a total of 33 complaints of torture with the NHRC. Of these, 14 cases related to torture by state and non-state actors during the conflict period and the other 19 were torture cases that have occurred since the end of the conflict in 2006. The NHRC has not informed AF of any action taken; it has merely acknowledged receipt of the communications made by AF. With its current powers, it has to be questioned whether the NHRC has the capacity and indeed the cooperation needed from the Government to be able to conduct impartial investigations into allegations of torture and provide the necessary redress to the victims.

*(iii) Nepal Police Human Rights Cell*

In addition to the complaints submitted to the NHRC, AF also regularly files complaints to the Nepal Police Human Rights Cell and to the Attorney General's Department. Between October 2008 and August 2009, AF registered 28 complaints of torture relating to 34 individuals which are currently pending before the Nepal Police Human Rights Cell. Of these 28 complaints, 9 were registered in August 2009.

However, the Human Rights Cell's definition of "investigation" appears to comprise merely of sending a letter with details of the complaint provided by AF to the relevant DPO and to ask that DPO to respond to the allegations. We know of no cases in which the Human Rights Cell has itself visited the victim and interviewed him or her privately to ascertain the veracity

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<sup>28</sup> Article 9 (a) (1), The Human Rights Commission Act (1997).

<sup>29</sup> National Human Rights Commission of Nepal, "Annual Progress Report 2007 – 2008," 10 October 2008

<sup>30</sup> <http://www.nhrcnepal.org/papers.php>.

<sup>31</sup> Nepalnews, "NHRC encouraged by govt initiation to implement its recommendations," 12 August 2009, <http://www.nepalnews.com/main/index.php/news-archive/8-news-in-brief/893-nhrc-encouraged-by-govt-initiation-to-implement-its-recommendations.html> (accessed August 14, 2009).

of the allegation or of any interviews with other detainees or police officers who may have been witnesses to the torture. Moreover, we are not aware of any police officer having been suspended pending the outcome of Human Rights Cell investigations. Therefore, the "investigations" conducted by the Human Rights Cell do not qualify as the prompt and thorough investigations recommended by the Special Rapporteur. On the contrary, they appear to act as one-sided window dressing exercises which at times have put victims at further unnecessary risk.

The punishments that have been imposed as a result of investigations by the Human Rights Cells or otherwise bear no relationship to the gravity of the offences committed. For instance; according to information on the website of the Human Rights Cell of the Nepal Police, they responded to 1005 cases received from different national and international human rights agencies and in relation to these cases, departmental action was taken against 93 police personnel for violating human rights during police actions and in police detentions.<sup>32</sup> The departmental action consists of suspension from work, no promotion for a certain time, demotion, and/or revocation of the monthly bonus system for a certain period of time depending on the case in hand (in Nepal, there is a system whereby a monthly bonus is added to the basic salary following completion of a year's service), etc.

It is worth noting that AF has submitted only a very limited number of complaints to the Human Rights Cell of the Nepal Police in this period, which clearly bears no relation to the thousands of complaints of torture and other ill-treatment that it has received during that period. This is because AF only approaches the Nepal Police Human Rights Cell with the consent of the victim and the large majority of victims are too fearful to complain as they do not trust the independence of the Human Rights Cell of the Police as an investigation mechanism.

This reflects a wider issue - more generally, victims who complain about torture to their lawyer often face reprisals, which also explains why so few victims agree to file complaints with the Human Rights Cell. Very recently, one victim who complained about torture was charged under the Arms and Ammunition Act (which carries a maximum sentence of seven years) after he refused to withdraw an application for compensation under the TCA. The police had suggested that he would be charged under the Public Offences Act (with a maximum penalty of two years; subject to approval of the Appellate Court) if he withdrew the TCA case.

The Nepal Police Human Rights Cell therefore needs to be thoroughly reformed and an independent Police Commission needs to be set up with wide and effective powers to investigate and to refer any cases for criminal prosecutions where the evidence clearly shows criminal responsibility. Pending that, the NHRC should step up its efforts to investigate reports of torture and other ill-treatment in police custody.

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<sup>32</sup> [http://www.nepalpolice.gov.np/index.php?option=com\\_content&task=view&id=2000&Itemid=122](http://www.nepalpolice.gov.np/index.php?option=com_content&task=view&id=2000&Itemid=122)

*(vi) The Office of the Attorney General*

In the Interim Constitution, the Office of the Attorney General is entrusted with responsibility for investigating allegations of ill-treatment in custody or complaints that relatives or lawyers are barred from meeting detained persons. Article 136(3)(c) specifies that the Attorney General has the power:

on the basis of complaints or information received by him by any means, to investigate allegations of inhumane treatment of any person in custody, or that any such person was not allowed to meet his/her relatives directly in person or through legal practitioners, and give necessary directions under this Constitution to the relevant authorities to prevent the recurrence of such a situation.

AF started reporting complaints to the Attorney General's office in June 2009 and to date has registered a total of 14 complaints. At the time of writing, AF had not received any feedback regarding these recent complaints. However, in two cases submitted in 2008, the Attorney General's Office informed the Asian Human Rights Commission in October 2008 that, upon investigation, it had been found that the allegations of torture had not been substantiated.

**Recommendation (j):** *Any public official indicted for abuse or torture, including prosecutors and judges implicated in colluding in torture or ignoring evidence, be immediately suspended from duty pending trial, and prosecuted.*

As already stated above, those suspected of torture are not prosecuted or punished. In a few cases, police have been suspended briefly pending an internal inquiry.

As regards final sanctions against perpetrators however, as the Special Rapporteur himself has previously noted, "the sanction of 'departmental action' against perpetrators provided for in Nepali legislation such as demotions, suspensions, fines, delayed promotions, etc. is so grossly inadequate that any preventive or deterrent effect that may have been envisaged is meaningless in practice".<sup>33</sup> Indeed, security forces have a habit of transferring alleged perpetrators as a form of punishment. However, such transfers can equally be perceived as rewards, especially if it involves someone being transferred from a remote rural district to the capital.

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". They included cases of gross human rights abuses (murder, attempted murder and rape), the majority from the conflict period.<sup>34</sup> Most cases were against CPN-M members, some of whom were senior members of the Government at the time, raising concerns about ongoing

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<sup>33</sup> Manfred Nowak, Mission to Nepal, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. No. E/CN.4/2006/6/Add.5 (9 January 2006), at 3.

<sup>34</sup> See OHCHR, A/HR/10/53, 3 March 2009.



impunity and the de facto provision of amnesties.<sup>35</sup> In some cases victims or their relatives have filed applications challenging the legality of the Government decision with the Supreme Court. For instance, in Banke district, the widow of Prakash Thakuri, a journalist murdered in Nepalgunj in July 2007, challenged the Government's decision to withdraw the charges against the accused. As of August 2009, the court had not reached a final ruling.

**Recommendation (k):** *Victims of torture and ill-treatment receive substantial compensation proportionate to the gravity of the physical and mental harm suffered, and adequate medical treatment and rehabilitation.*

We have already noted above the failure of the Government of Nepal to implement the recommendations of the UN Human Rights Committee's in *Sharma v. Nepal*.

Turning to the TCA. In the 12-year history of the TCA, more than 240 victims of torture or their relatives have filed compensation cases with the courts with the assistance of AF and the Centre for the Victims of Torture (CVICT). However, only 66 of these cases have been decided in favour of the victims, and in only eight cases (supported by CVICT) was the money actually paid to the victim.<sup>36</sup> Ninety-five cases were dismissed; 14 were withdrawn by the victims; and all other cases are still pending. It is suggested that this low success rate can be attributed in part to the problems of illegal detention, fear of reprisals and lack of qualified medical practitioners, as discussed above.

Of 73 cases registered by AF under the TCA, only 16 have resulted in the victims being awarded compensation. None of these "lucky" plaintiffs, however, has yet been paid, due to pending appeals against district court judgments or the failure of the CDOs to disburse the awards. Likewise, as noted above, in 50 cases adjudicated in favor of victims represented by CVICT, only eight victims have actually been able to receive the compensation amount awarded to them. Of particular significance is the fact that in eight of the 16 "successful" cases filed by victims with the assistance of AF under that Act, the compensation initially awarded by the district courts was only between NRs. 10,000-15,000 (approx. USD 128.00-192.00) despite the gravity of the harm the victims suffered. Unfortunately, the TCA does not allow for the full scope of damages suffered by victims of torture to be accounted for in its awards. For example, civil damages should compensate for both tangible harm (such as lost wages and medical bills) and intangible harm (such as physical pain and fear, anguish, or other mental distress). The TCA, however, absolutely limits reparation to NRs. 100,000 (approx. USD 1,283.00), while only vaguely defining the considerations to be taken into account in deciding on the amount of damages to be awarded.<sup>37</sup>

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<sup>35</sup> Human Rights Watch, "[Letter to Prime Minister Pushpa Kamal Dahal of Nepal](#)," 9 March 2009.

<sup>36</sup> Advocacy Forum, "Hope and Frustration. Assessing the Impact of Nepal's Torture Compensation Act- 1996," 26 June 2008, page 1.

<sup>37</sup> Sections 4, 5, 6, Torture Compensation Act, 1996. *See* <http://www.unhcr.org/refworld/type,LEGISLATION,,NPL,3ae6b4fac,0.html>.

As part of the CPA, reparations were to be paid to victims of the conflict, including torture victims. In the absence of independent bodies such as a Disappearance Commission or a Truth & Reconciliation Commission, which would normally make recommendations for compensation and other forms of reparation to the victims, some reparation initiatives are underway without the involvement of transitional justice mechanisms, and decisions to award compensation are being made without proper policies. These decisions are taken by central government (i.e. the council of ministers) but implemented by local government representatives.

For example, under the Common Minimum Program of the Maoist-led Government, a decision to compensate “victims of conflict and those who suffered during the People’s Movement, People’s War and Madheshi agitation” was included.<sup>38</sup> As a result, a process has been put in place where people can make applications solely based on a reference from their Village Development Committee. CDOs in late 2008 started to register names of certain categories of conflict-victims or their relatives,<sup>39</sup> in order to provide them with financial assistance. Torture victims were not included in these categories. Some local government representatives have informed torture victims that their names will 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.<sup>40</sup> The largest share has gone to the next-of-kin of those killed, but some has also been given as scholarships to students from victims’ families. 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 disappeared during the conflict, might have received the allotted money”.<sup>41</sup> In addition, there is a lack of clarity regarding the criteria for determining who is eligible and how the measures are being implemented and concerns have been raised about the need for a proper policy, including better public information, as well as for relief to be fairly and impartially distributed, and to respect the principle of non-discrimination.

### **Recommendations (l), (m) and (o):**

Finally, implementation of new provisions in the Interim Constitution of January 2007 and of other legal provisions, such as those set out in the TCA, is disappointingly absent. The Special Rapporteur’s recommendations relating to ratification of the Rome Statute of the International Criminal Court (recommendation (o)), the Optional Protocol to the Convention against Torture (recommendation (m)) and additional declarations in respect of Article 22 of the Convention (recommendation (l)) have not been implemented. This remains the case despite directions from the Interim Parliament to the Government to do so, as well as orders

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<sup>38</sup> Nepalnews, “CMP lays emphasis on constitution making, state restructuring and relief,” 22 August 2008 <http://www.nepalnews.com/archive/2008/aug/aug22/news03.php> (accessed August 14, 2009).

<sup>39</sup> Killings, disappearances, abductions, as well internally displace persons, persons who were physically impaired through injury, and those whose properties were damaged.

<sup>40</sup> See *Kathmandu Post*. Vol. XVII No. 149. 16 July 2009 (01/04/2066).

<sup>41</sup> *Id.*

by the Supreme Court directing the Government to enact legislation to criminalise disappearances and torture.

## **CONCLUSION**

Advocacy Forum, REDRESS and APT urge the Special Rapporteur on Torture to take the above information into consideration when reviewing the implementation of recommendations made after his mission to Nepal in 2005.

The organisations hope that the Government of Nepal will give the highest priority to the full implementation of all outstanding recommendations and will pass a law to criminalise torture, provide fair and adequate reparation to victims, and put in place effective measures to prevent torture, including all those recommended by the Special Rapporteur.

## APPENDIX

The data below covers the period between October 2008 and June 2009. (Where possible, data for the period from January to September 2008 has also been included as a comparative.)

**Table 1: Prevalence of torture (October 08 to June 09)**

		Frequency	Percent
Valid	Yes	753	18.8
	No	3247	81.2
	<b>Total</b>	4000	100.0

**Table 2: Illegal detention (October 08 to June 09)**

		Frequency	Percent	Valid Percent
	Produced to the court within 24 hours	1735	43.4	55.1
	Not Produced to court within 24 hours	1416	35.4	44.9
	<b>Total</b>	3151	78.8	100.0
	Never produced to adjudicating authority	849	21.2	
<b>Total</b>		4000	100.0	

**Table 3: District-wise Torture data (October 08 to June 09)**

		Torture infliction		Total	
Districts		Yes	No		
1.	Kathmandu	Number	215	681	896
		% within Detention Place	23.9%	76.1%	100.0%
2.	Rupendehi	Number	91	370	461
		% within Detention Place	19.7%	80.3%	100.0%
3.	Danusha	Number	44	104	148
		% within Detention Place	29.7%	70.3%	100.0%
4.	Baglung	Number	6	78	84
		% within Detention Place	7.1%	92.9%	100.0%
5.	Myagdi	Number	3	21	24
		% within Detention Place	12.5%	87.5%	100.0%
6.	Parbat	Number	8	25	33
		% within Detention Place	24.2%	75.8%	100.0%

7.	Bardiya	Number	17	82	99
		% within Detention Place	17.2%	82.8%	100.0%
8.	Morang	Number	27	194	221
		% within Detention Place	12.2%	87.8%	100.0%
9.	Ramechhap	Number	7	25	32
		% within Detention Place	21.9%	78.1%	100.0%
10.	Dolakha	Number	6	164	170
		% within Detention Place	3.5%	96.5%	100.0%
11.	Jhapa	Number	44	195	239
		% within Detention Place	18.4%	81.6%	100.0%
12.	Banke	Number	60	245	305
		% within Detention Place	19.7%	80.3%	100.0%
13.	Kaski	Number	87	492	579
		% within Detention Place	15.0%	85.0%	100.0%
14.	Kanchanpur	Number	10	139	149
		% within Detention Place	6.7%	93.3%	100.0%
15.	Udayapur	Number	13	69	82
		% within Detention Place	15.9%	84.1%	100.0%
16.	Surkhet	Number	57	150	207
		% within Detention Place	27.5%	72.5%	100.0%
17.	Kapilbastu	Number	20	120	140
		% within Detention Place	14.3%	85.7%	100.0%
18.	Lalitpur	Number	38	93	131
		% within Detention Place	29.0%	71.0%	100.0%
<b>Total</b>		Number	753	3247	4000
		<b>% within Detention Place</b>	18.8%	81.2%	100.0%

**Table 4: Gender-wise torture data on juveniles (October 08 to June 09)**

		Torture infliction		Total	
		Yes	No		
Sex	Female	Number	7	50	57
		% within Sex	12.3%	87.7%	100.0%
	Male	Number	253	711	964
		% within Sex	26.2%	73.8%	100.0%
Total		Number	260	761	1021

	% within Sex	25.5%	74.5%	100.0%
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**Table 4. A: Gender-wise torture data on total detainees (October 08 to June 09)**

		Torture infliction		Total	
		Yes	No		
Sex	Female	Number	27	226	253
		% within Sex	10.7%	89.3%	100.0%
	Male	Number	726	3021	3747
		% within Sex	19.4%	80.6%	100.0%
Total		Number	753	3247	4000
		% within Sex	18.8%	81.2%	100.0%

**Table 5: Torture of juveniles – age specific (October 08 to June 09)**

		Torture infliction		Total	
Age		Yes	No		
	7	Number	0	2	2
		% within age	.0%	100.0%	100.0%
	8	Number	2	1	3
		% within age	66.7%	33.3%	100.0%
	9	Number	1	3	4
		% within age	25.0%	75.0%	100.0%
	10	Number	4	5	9
		% within age	44.4%	55.6%	100.0%
	11	Number	8	21	29
		% within age	27.6%	72.4%	100.0%
	12	Number	12	42	54
		% within age	22.2%	77.8%	100.0%
	13	Number	30	82	112
		% within age	26.8%	73.2%	100.0%
	14	Number	57	121	178
		% within age	32.0%	68.0%	100.0%
	15	Number	46	124	170
		% within age	27.1%	72.9%	100.0%
	16	Number	55	159	214
		% within age	25.7%	74.3%	100.0%
	17	Number	45	201	246
		% within age	18.3%	81.7%	100.0%
<b>Total</b>		Number	260	761	1021
		% within age	25.5%	74.5%	100.0%

**Table 6: Torture of juveniles (From January to September 08)**

		Torture infliction		Total	
		Yes	No		
Sex	Female	Number	3	25	28
		% within Sex	10.7%	89.3%	100.0%
	Male	Number	229	549	778
		% within Sex	29.4%	70.6%	100.0%
<b>Total</b>		Number	232	574	806
		% within Sex	28.8%	71.2%	100.0%

**Table 7: Caste wise torture data (October 08 to June 09)**

		Frequency	Percent detention	Percent torture
Valid	B/C group	1312	32.8	16.1%
	Dait group	400	10.0	22.5%
	Indigenous group	1226	30.7	18.9%
	Newar group	194	4.9	19.1%
	Other group	330	8.3	22.7%
	Terai ethnic group	538	13.5	20.1%
<b>Total</b>		4000	100.0	

**Table 8: Juvenile detainees per caste group (October 08 to June 09)**

		Frequency	Percent
Valid	B/C group	334	32.7
	Dalit group	132	12.9
	Indigenous group	340	33.3
	Newar group	51	5.0
	Other group	56	5.5
	Terai ethnic group	108	10.6
	Total	1021	100.0

**Table 9: Detainees provided with health check-up (October 08 to June 09)**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	3330	83.3	83.3	83.3
	No	670	16.8	16.8	100.0

	Total	4000	100.0	100.0	
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**Table 10: Detainees provided with health check-up (January to September 08)**

		Frequency	Percent
Valid	Yes	2422	80.1
	No	600	19.9
	Total	3022	100.0

**Table 11: Torture in relation to charges (October 08 to June 09)**

			Torture infliction		Total
			Yes	No	
Charge	Arms and Ammunition	Number	79	110	189
		% within Charge	41.8%	58.2%	100.0%
	Public Offence	Number	184	864	1048
		% within Charge	17.6%	82.4%	100.0%
<b>Total</b>		Number	263	974	1237
		% within Charge	21.3%	78.7%	100.0%