



**Nepal in Crisis: Justice Caught
in the Cross-fire**

September 2002

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IBA REPORT ON NEPAL

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EXECUTIVE SUMMARY

This is the executive summary of a report following a fact-finding mission to Nepal of an International Bar Association (IBA) delegation of distinguished jurists. During the visit the delegation met the leadership and members of the Nepal Bar Association and the Nepal Law Society and a delegation of lawyers from Biratnagar. The delegation also met the Prime Minister, Chief Justice, Attorney-General, Law Secretary, Home Minister, Chair of the National Human Rights Commission, Inspector General of Police and representatives of the Royal Nepalese Army.

The delegation's conclusions and recommendations can be found at the end of Chapters 3 and 4.

The fact-finding mission was organised by the Human Rights Institute (HRI) of the IBA in the light of reports over recent months concerning lawyers who had been arrested, detained and in some cases allegedly subjected to ill-treatment in connection with the carrying out of their professional duties (see Appendix 2 for the list of arrested lawyers). Although these cases had been raised with the Nepalese Government prior to the mission, there had been no response. In Nepal the delegation was advised of the arrest of some 11 lawyers and, since their return, a further two have reportedly been arrested. The pattern of arrest in many of these cases appears to be that subsequent to acceptance by the lawyers of instructions in the case of a suspected terrorist, they themselves have been arrested. Some have been accused of being suspected terrorists under the *Terrorist and Disruptive Activities Ordinance 2001* (TADO) and its enactment, the *Terrorist and Disruptive Activities (Control and Punishment) Act 2002* (TADA).

The terms of reference of the mission were:

- (1) To examine whether the legal profession in Nepal is free to carry out its professional duties without outside interference.
- (2) To ascertain whether the recently arrested lawyers in Nepal have been arrested for representing suspected terrorists or whether there is some substance in the reasons for their arrest.

- (3) To determine whether lawyers have been arrested and detained in accordance with Nepal's obligations under international law.
- (4) To consider what, if any, protections or remedies are available for unconstitutional acts on the part of the State.

The arrest of lawyers has taken place against the background of an order issued under the TADO on 26 November 2001 which declared the group called the Communist Party of Nepal (Maoist) to be a terrorist organisation.¹ Any person, organisation or group who is directly or indirectly involved in, or renders assistance to, the activities of the Maoists is similarly declared a terrorist.

Since the Maoists took up arms and declared a 'people's war', the Kingdom of Nepal has not known peace. Peace talks aimed at ending the 'people's war' and an accompanying ceasefire broke down on 23 November 2001 when the Maoists withdrew from the talks and attacked police and army posts in 42 districts. The authorities responded on 26 November by declaring a nationwide emergency and deploying the army. The King also announced the TADO, making legal provisions to control terrorist and disruptive activities and provide security to the general public. The promulgation of a state of emergency suspended many fundamental rights. The police have been granted wide powers to arrest anybody involved in terrorist activities. The state of emergency was lifted on 28 August 2002.

In 23 of the 75 districts of Nepal, Maoists have more or less usurped government control. The delegation was disturbed to learn that in recent months Maoists have set up their own 'People's Courts', presided over by the local Maoist militia Commander. These courts are informal, do not employ legal professionals and do not adhere to international fair trial standards.

The findings, conclusions and recommendations of the delegation are summarised as follows.

¹ Hereinafter referred to as Maoist.

Intimidation of Lawyers

In areas largely under Maoist control, the delegation concluded that it is virtually impossible for lawyers to carry out their duties without harassment and intimidation. The delegation also concluded that there are credible reports of the Maoists threatening lawyers, committing murders, and of assassination attempts on lawyers and judges. The delegation was left in no doubt that in areas under government control, and particularly in remote areas, there have been examples of interference by the Nepalese authorities with lawyers carrying out their professional duties. Incidents of harassment by the security forces, and the arrest of some lawyers under TADA, have created anxiety and have discouraged some lawyers from representing Maoist clients.

No direct and conclusive evidence was given to the delegation that lawyers had been arrested *expressly* for representing suspected terrorists; rather the arrests seem to be the result of leftwing political activity by these lawyers before the emergency, in some instances activity for or with the Communist Party of Nepal, and suspicion by the authorities that the arrested lawyer supports the Maoist terrorists or is in some way linked to the Maoists. Where lawyers had well connected family or political affiliations, such assumptions appeared not to be made. The evidence used to secure a detention order under TADA, including in cases involving lawyers, appears to be of a very low standard and is not subject to public or, in some instances, judicial scrutiny. This is more frequently the case for persons held by the Royal Nepalese Army as a potential source of intelligence. The delegation was also concerned to learn of allegations of human rights abuses in custody. While recognising that Nepal faces a dangerous and destabilising terrorist threat, the delegation concluded that the international standards applicable to detainees must nevertheless be respected.

Threats, intimidation and interference with the legal profession by any side in the conflict pose a great threat to the independence of lawyers. The delegation concluded that it was extremely damaging to the respect for the rule of law for Nepal to have a divided legal system and the 'People's Courts' do not adhere to international fair trial standards. Only with the reinstatement of properly constituted courts, applying the law in a fair and just manner, with regard to the due process guarantees set out in

international law, can the proper administration of justice be restored. There is also reported corruption endemic within Nepal's District Courts which undermines the international standards required of an impartial and independent tribunal.

Nepal's Human Rights Obligations, the Constitution and Anti-Terrorism Legislation

Nepal is a party to all the major international human rights treaties. Under section 9 of the *Treaty Act 1990*, if any provisions of domestic law conflict with a treaty obligation the latter shall prevail and is applicable as if domestic law. The particular concerns of the delegation are *prima facie* a breach of Nepal's international human rights obligations, namely: arrest without warrant; arrest without charge; detention incommunicado where relatives or legal representatives could not ascertain the place of detention; lengthy detention periods before formal charges were laid; treatment in detention relating to alleged physical abuse, hooding/blindfolding, and lack of adequate health care; lengthy periods before *habeas corpus* applications are heard and determined; and interference with professional files/records. Even in those circumstances where derogations to these obligations are possible in times of public emergency (and Nepal has not made the proper international declaration in this regard), Nepal is breaching its international obligations to properly implement and apply *effective* remedies for redress of arbitrary actions, especially with respect to *habeas corpus*. Under section 9 of the TADA the security forces can impose preventive detention of up to 90 days where there is a "reasonable ground" to detain a person who might commit terrorist or disruptive acts. This is allowed as an exception to *habeas corpus* under the Constitution (section 14(7)) provided there is sufficient ground of the existence of an immediate threat to the law and order of Nepal (section 15). However, it was reported to the delegation that a common tactic adopted by the security forces is to detain a person, often incommunicado, and then to formally indicate on the papers that they have been released (even if they are in fact in custody during this time), and then to issue a fresh detention order under the authority of the law which, under preventive detention, is not subject to *habeas corpus* under the Constitution. Section 17(5) of the TADA allows for investigative detention of up to 60 days to be imposed by a judge. This would be *prima facie* subject to the *habeas corpus* requirements of section 14(6) of the Constitution, depending on the judicial

nature of this detention and who imposes it. The use of *habeas corpus*, and whether it is properly implemented and truly effective, is therefore a crucial issue. The setting up of a special court with exclusive jurisdiction to hear cases under the TADA does not ameliorate this dilemma. The Follow-Up Committee established under the TADA² to consider grievances is moribund and unable to fulfil its role in protecting individuals against abuse by the security forces.

There would also appear to be unreasonable restrictions on the freedom of expression and media in contravention of Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

It is imperative in order to give Nepalese citizens confidence in the legal system, that where their fundamental human rights are breached the perpetrators will be brought to justice. Currently, it would appear that human rights abusers on all sides are acting with impunity. Such remedies that exist in Nepal against abuses of fundamental human rights are manifestly underused. There is a reluctance among some lawyers to bring *habeas corpus* applications for fear of being labelled pro-Maoist leading to possible arrest. *Habeas corpus* applications are also ineffective in part because of inordinate delay in the procedure. The delegation concluded that whatever the reasons for the delay this must be addressed by the Chief Justice as a matter of urgency and, if necessary, in collaboration with representatives of the legal profession.

There is a lack of knowledge among Nepalese security forces of their human rights obligations and also among Nepalese citizens as to the availability of remedies for the breach of fundamental rights. Even among those who are familiar with their legal rights there is, sadly, fear of repercussions and a lack of confidence that the available remedies function as intended.

² Anybody aggrieved by the conduct of the security forces in an investigation under the TADA can apply to a 'Follow-Up' Committee comprising a retired judge of the Supreme Court, the Secretary of the Defence Ministry, the Secretary of the Home Ministry, the Secretary of the Law Justice and Parliamentary Affairs Ministry, and the Deputy Attorney-General (section 13). This Committee determines its own procedure and if anyone is found to have been victimised, suggestions are made to the Government to remedy the problem.

Recommendations

1. In the interests of justice for all citizens and in accordance with Nepal's international human rights obligations, there is an urgent requirement to restore the District Courts to the whole of Nepal and for the judges, lawyers, prosecutors and court officials to be able to conduct their professional duties without interference.
2. Judges, lawyers, prosecutors and court officials should at all times carry out their responsibilities with independence, integrity and impartiality. All allegations of corruption should be investigated and those responsible brought to justice.
3. Any harassment of the legal profession by the police and Royal Nepalese Army in the course of their carrying out professional duties, must cease. In addition, rights to liberty, freedom from inhumane treatment and protection of human dignity must be respected. The Nepalese Government must ensure that where those institutions under its authority commit human rights abuses, including the harassment, detention and ill-treatment of members of the legal profession, the matter is investigated and those responsible are brought to trial and punished.
4. Maoists must desist from actions that prevent the District Courts from functioning, and from the murder and intimidation of lawyers and judges.
5. When lawyers become fearful of exercising their professional duties, the Bar leadership and competent, independent lawyers should consider taking relevant cases.
6. The Government must ensure that the police and the Royal Nepalese Army undergo training to ensure that they are able to comply with the relevant requirements of Nepal's international human rights obligations.
7. The President of the Nepal Bar Association should consider establishing a 'hotline' with the Inspector General of Police and the Chief of the Army Staff so that the arrest of a lawyer may be notified to him or her promptly, together with the reasons for the arrest and the place of custody.
8. Representatives of the legal profession, senior officers of the Royal Nepalese Army and senior police officers, both nationally and locally, should initiate

regular meetings to discuss matters of mutual interest and concern with the objective of developing greater scrutiny, cooperation and understanding.

9. The Government of Nepal should seriously review its obligations under the Torture Convention and the ICCPR. This could be effected by Nepal fulfilling its state reporting obligations under these treaties, as submissions under both are now several years overdue.
10. All levels of the Government and the legal profession, particularly the Nepal Law Society and the Nepal Bar Association, should review the impact of section 9 of the Nepal *Treaty Act*.
11. A Chair of the Follow-Up Committee established under section 13 of the TADA should be appointed as a matter of urgency.
12. All relevant authorities should review the powers of the special court and the Follow-Up Committee to ensure that remedies under the TADA are effective, as required by international human rights obligations.
13. All relevant authorities should review the mechanisms by which preventive detention under section 9 of the TADA is effected, so that it is in accordance with both Nepalese domestic law and Nepal's international human rights obligations.
14. All relevant authorities should consider the mechanisms by which detention under section 17(5) of the TADA is effected to determine their lawfulness.
15. All relevant authorities should examine the effectiveness of *habeas corpus* applications, particularly with respect to availability of legal counsel and delays in court. As a matter of urgency, the Chief Justice should explore the reasons for the delay in *habeas corpus* proceedings. Consideration should be given to discussions between the Bar, the Chief Justice and other senior judges, which should identify what needs to be done. Their joint recommendations should be implemented without delay. Consideration should be given to the filing and deciding of *habeas corpus* cases in Appellate Courts with arrangements for lawyers to travel to remote areas for this purpose.
16. The Bar should reassure citizens that the Bar leadership will be alert for any victimisation resulting from a *habeas corpus* case and will pursue redress through every legal means. Where lawyers are afraid to take cases, provision should be made for representations from lawyers without the same level of risk or anxiety.

17. The IBA should give consideration to the sending of Observers to the hearing of the *habeas corpus* cases now before the Supreme Court of Nepal.
18. All relevant authorities, and in particular the Nepal Bar Association, should ensure that the legal profession and all authorities dealing with the TADA are educated in the proper role of lawyers, particularly with respect to access to legal services, the performance of professional functions, security in carrying out professional functions, and the non-identification of lawyers with their clients or their clients' causes, along the lines of the *Basic Principles on the Role of Lawyers 1990*.
19. The security forces should be trained in the human rights obligations they owe to detainees, particularly as found in the Torture Convention, the ICCPR, the *Standard Minimum Rules for the Treatment of Prisoners* and the *Code of Conduct for Law Enforcement Officials 1979*.
20. The legal profession should ensure that all citizens of Nepal, including members of the legal profession itself, avail themselves of their rights, including the opportunity provided by the *Torture Compensation Act*. The Bar leadership should be alert to victimisation of persons seeking compensation and should be forthright in letting the security forces know that the Bar will lead the legal fight for redress in cases of victimisation.
21. All relevant authorities should investigate and rectify the factors, including systemic issues, leading to unreasonable restrictions on the media, contrary to section 12 of the TADA, the Constitution of Nepal, and Nepal's human rights obligations.
22. The Nepal Law Society and the Nepal Bar Association should arrange Bar meetings at which international speakers address topics such as *habeas corpus*, the separation of powers between the Executive/army/police, the legislature and the courts within the Constitution of Nepal. Senior politicians, judges, senior army and police officers and diplomats should be invited, illustrating to all the universal importance and applicability of these matters and the national obligation to uphold basic rights.

CHAPTER 1: INTRODUCTION

- 1.1 This is the report of a mission to Kathmandu, Nepal from 11 to 15 June 2002 following increasing concerns at reports from Nepal that lawyers are being arrested, held incommunicado, subjected to illegal treatment in custody and denied basic rights. There have been reports also of lawyers who represent suspected terrorists being harassed by the security forces leading to a climate of fear within the legal profession about the repercussions of taking terrorist and related cases. These circumstances occur in the context of a new and more vigorous phase of the armed insurrection by the Communist Party of Nepal (Maoist) (hereafter referred to as “Maoists”).
- 1.2 The mission was organised by the Human Rights Institute (HRI) of the International Bar Association (IBA). The IBA is the world’s largest lawyers’ organisation with members, collective and individual, in 183 countries around the world. The IBA’s HRI works across the association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide. The HRI was formed in 1995 under the honorary presidency of former South African President, Nelson Mandela. It is directed by Officers and a Council of members coming from 21 different countries. Appendix 1 contains information about the IBA.
- 1.3 The terms of reference for the mission were:
- (1) To examine whether the legal profession in Nepal is free to carry out its professional duties without outside interference.
 - (2) To ascertain whether the recently arrested lawyers in Nepal were arrested for representing suspected terrorists or whether there was some substance in the reasons for their arrest.
 - (3) To determine whether lawyers have been arrested and detained in accordance with Nepal’s obligations under international law.
 - (4) To consider what, if any, protections or remedies are available for unconstitutional acts on the part of the State.

1.4 The IBA mission consisted of:

- Desmond Fernando PC, former IBA President and former President of the Sri Lanka Bar Association;
- Dr Phillip Tahmindjis, Associate Professor, Faculty of Law, Queensland University of Technology and Council member of the IBA's Human Rights Institute;
- Paul Hoddinott, former IBA Executive Director.

1.5 During the course of the mission, the delegation met the leadership and members of the Nepal Bar Association and the Nepal Law Society and a delegation of lawyers from Biratnagar. The delegation also met the Prime Minister, Chief Justice, Attorney-General, Law Secretary, Home Minister, Chair of the National Human Rights Commission, Inspector General of Police and representatives of the Royal Nepalese Army.

1.6 The HRI and the delegation members wish to express their gratitude and appreciation to those who assisted them, in so many ways, during their visit to Nepal. In particular, the delegation is grateful for the opportunity of meeting many senior government figures, especially the Prime Minister and the Chief Justice, and representatives of the legal profession and the security forces. The delegation would particularly like to thank Sudheer Shrestha for his invaluable assistance.

1.7 The mission took place against a background of the Maoist insurrection and abuses to basic human rights, perpetrated by the security forces and Maoists, that have been reported by a number of human rights organisations. The prevailing situation was fully appreciated by all members of the delegation.

1.8 This report sets out the findings of the delegation, together with some recommendations that, if implemented, will strengthen the legal framework within which it is hoped to provide greater protections for human rights and, in

particular, improve the ability of the courts and legal profession to play their part in that process.

CHAPTER 2: BACKGROUND

Geography and Demography

- 2.1 The Kingdom of Nepal, lying along the southern slopes of the Himalayan mountain ranges, is a landlocked country located between India to the east, south, and west and the Tibetan Autonomous Region of China to the north.
- 2.2 Nepal gained independence in 1768. Nepal's capital city is Kathmandu. The population of 23 million³ is predominantly Hindu (86.5 per cent). However, Buddhists account for about 8 per cent of the population, 3.5 per cent are Muslims and other religions make up 2.2 per cent of the population.
- 2.3 The official language is Nepali. It is spoken by 90 per cent of the population. There are, however, dozens of different languages and about 30 major dialects spoken throughout the country. The literacy rate stands at 40 per cent (male) and 14 per cent (female).⁴

Political Background

- 2.4 Modern Nepal was created in the latter half of the 18th century from when the ruler of the small principality of Gorkha formed a unified country from a number of independent hill states. Until the 1950s, Nepal was a tightly centralised autocracy that was largely isolated from external influence. In early 1959, King Mahendra issued a new constitution and the first democratic election for a national assembly was held. The Nepali Congress Party (NCP), a moderate socialist party, gained a substantial victory in the election.
- 2.5 King Mahendra dismissed the government 18 months after it was formed, declaring parliamentary democracy a failure. He then promulgated a new constitution establishing a 'party-less' system of *Panchayat* (councils). As a pyramidal structure progressing from the village assembly to a national parliament, the *Panchayat* system enshrined the absolute power of the

³<http://devdata.worldbank.org/external/CPPProfile.asp?SelectedCountry=NPL&CCODE=NPL&CNAME=Nepal&P TYPE=CP>.

⁴ <http://www.cia.gov/cia/publications/factbook/geos/np.html>.

monarchy and kept the king as the head of state with sole authority over government institutions, including the cabinet and the parliament.

- 2.6 In 1990, political parties (mainly the leftist parties and the NCP) pressed the King and the Government for change that resulted in more than 50 deaths and hundreds of arrests. Thereafter, the *Panchayat* system was dissolved and the ban lifted on political parties. An interim government was sworn in, headed by Krishna P Bhattarai as Prime Minister who presided over a cabinet made up of the NCP, the communist parties of Nepal, royal appointees and independents.
- 2.7 In November 1990, a new Constitution⁵ was promulgated which enshrined fundamental human rights and established Nepal as a parliamentary democracy under a constitutional monarch. Aspects of the Constitution relating to the IBA mission are discussed in detail in Chapter 4. Elections followed in May 1991 with the NCP winning 110 seats out of 205 to form the Government. The United Marxist-Leninist Communist Party (UML), the largest opposition party, won 69 seats. The political parties agreed that the monarchy would remain to enhance political stability and provide an important symbol of national identity.
- 2.8 In the elections of 1994, the NCP was defeated by the UML. Nepal became the world's first communist monarchy, with Man Mohan Adhikary as Prime Minister, but in mid-1994, parliament was dissolved and the subsequent general elections gave no party a majority. This led to several years of unstable coalition in Nepal, with five governments over a five-year period.
- 2.9 In the meantime, a Maoist party called the United Peoples Front (UPF) had been established. It contested the general election in 1991, winning 9 seats in the House of Representatives and, having secured more than the requisite 3 percent of the total votes cast in the election, became recognised as a mainstream party. However, a rift occurred in the UPF leading to the establishment of the United Peoples Front (Bhattarai) under the leadership of

⁵ Adopted by Act No 2047, issued in 1990.

Dr Baburam Bhattarai. Also, the Communist Party of Nepal (Maoist) (hereafter called “the Maoists”) was founded by Mr Prachand (Puspa kamal Dahal). It has never been formally registered as its objective is to establish a “New People’s Democracy” by removing the current multi-party system and the Constitution. In February 1996, insurgent activity started under the leadership of Dr Bhattarai and Mr Prachand. The Maoists declared a ‘people’s war’ with aims to establish the ‘new democracy’. The immediate reason given by the Maoists for declaring the ‘people’s war’ was the failure of the Government to respond to a memorandum presented by its representatives to Prime Minister Sheer Abrader Daub listing 40 demands, including the abolition of royal privileges, the promulgation of a new constitution and the abrogation of the Mahakali treaty with India dealing with the distribution of water and electricity and the delineation of the border between the two countries. Since February 1996, the Maoists have engaged in violent insurgencies waged through killings, torture, bombings, kidnappings, extortion and intimidation against civilians, police and public officials in more than 50 of the country’s 75 districts.

- 2.10 There was hope for political stability in Nepal when the NCP regained parliamentary majority in the May 1999 elections. Unfortunately, the pattern of short-lived governments persisted, with three different NCP Prime Ministers⁶ holding office since mid-1999. The final distribution of seats in parliament, after the 1999 elections, gave the NCP 113; the UML 69; the National Democratic Party 11; the National People’s Front 5; the Nepal Goodwill Party 5; the Workers and Peasants Party 1; and the United People’s Front 1.

The Government

- 2.11 The Kingdom of Nepal is governed under a parliamentary system of government, a constitutional monarchy and the system of multi-party democracy.⁷

⁶ K P Bhattarai (31 May 1999-17 March 2000); G P Koirala (20 March 2000-19 July 2001); and Sher Bahadur Deuda (23 July 2001-present).

⁷ Paragraph 2 of Preamble (November 1990 Constitution).

The Monarchy

2.12 The monarchy is headed by His Majesty the King of Nepal, defined by the Constitution as being the descendant of the Great King Prithvi Narayan Shah and an adherent of Aryan Culture and the Hindu religion. He is considered to be the symbol of national unity. The present King of Nepal is His Majesty Gyanendra Bir Bickram Shahdev who was crowned king after the death of King Dipendra, son of the massacred King Birendra (see ‘The Royal Massacre’ below).

The Constitution

2.13 Nepal’s Constitution, adopted in 1990, is supreme and all laws inconsistent with it are void (Article 1(1)). It is also the duty of every person to uphold the Constitution (Article 1(2)). The Constitution provides for an array of fundamental rights including the following:

- All citizens are equal before the law and no person shall be denied the equal protection of the laws, nor shall anyone be discriminated against on the basis of ideological conviction (Article 11). These rights are not derogable, even in times of emergency (Article 115).
- No one shall be deprived of his personal liberty save in accordance with law (Article 12(1)). This right is not derogable in times of emergency (Article 115).
- All citizens have the right to freedom of opinion, expression, peaceful assembly, movement and the practice of any profession (Article 12(2)(a), (b), (d), (e)). However, these rights are derogable in times of emergency (Article 115(8)), and reasonable restrictions are allowed through laws designed to prevent the undermining of the sovereignty or integrity of, or law and order in, Nepal (Article 12(2)).
- The right to freedom of association is guaranteed (Article 12(2)(c)). This right is not derogable in times of emergency (Article 115), but may be restricted by laws imposing reasonable restrictions on acts

undermining the sovereignty and integrity of Nepal or acts which may instigate violence (Article 12(2)).

- The media shall not be censored, except for reasonable restrictions on acts that undermine the sovereignty and integrity of Nepal or acts which amount to sedition or the incitement to commit an offence (Article 13). This right is derogable during an emergency (Article 115(8)).
- Criminal justice rights are guaranteed and include the right not to be subjected to physical or mental torture, or cruel, inhuman or degrading treatment, and to be compensated if this has occurred (Article 14(4)). This right is not derogable in times of emergency (Article 115).
- A person under arrest has the right to be informed, as soon as may be, of the grounds for that arrest and has the right to consult a legal practitioner as well as the right to be produced before a judicial authority within 24 hours of the arrest (Article 14(5), (6)). These rights are not derogable in times of emergency (Article 115). However, they do not apply to any person arrested or detained under a law providing for preventive detention (Article 14(7)).
- 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 in Nepal, and people arrested contrary to this right shall be compensated (Article 15). This right is, however, derogable during an emergency (Article 115(8)).
- The right to proceed under Article 88 to have the Supreme Court rule that a law is unconstitutional or amounts to an unreasonable restriction on the fundamental rights set out in the Constitution is expressly preserved (Article 23). This is derogable during an emergency (Article 115(8)). However, despite this, the right to a remedy of *habeas corpus* shall not be suspended, even in an emergency (Article 115(8)).

The Executive

- 2.14 The executive branch is made up of the King and the Council of Ministers. The executive powers of the King are only exercised on the recommendation and advice of the Council of Ministers.
- 2.15 The Council of Ministers is the controlling and regulatory body in Nepal and is responsible for issuing general directives. The Prime Minister (usually the leader of the party that commands a majority in parliament) heads the Council of Ministers. The King appoints him or her to office. The present Prime Minister of Nepal is Sher Bahadur Deuba of the NCP (appointed on 23 July 2001).
- 2.16 The Council of Ministers in addition to the Prime Minister consists of the Deputy Prime Minister and other Ministers as may be required.⁸ Members of the Council are appointed from among the Members of Parliament. If the Prime Minister is relieved of his office, the Council of Ministers will continue to function until the new Council is constituted. The King may, on the death of the Prime Minister, designate either the Deputy Prime Minister or the senior-most Minister to act as Prime Minister until the new Prime Minister is appointed.

The Legislature

- 2.17 Part 8 of the November 1990 Constitution provides for the legislative branch of government. In accordance with Article 44, the legislature comprises the King and two Houses of Parliament (bicameral). The lower chamber, the House of Representatives, has 205 members, elected on the basis of ‘one person, one vote through secret ballots ...’,⁹ for a five-year term. This term may be extended by an Act for a period not exceeding one year during the operation of a proclamation of a state of emergency (Article 45(3)).
- 2.18 The upper chamber, the National Assembly, has 60 members. The King nominates ten members. The other 50 are indirectly elected into office. The

⁸ Article 36(2) of the Constitution.

⁹ Article 45(5).

members of the National Assembly hold a six-year term of office. Bills may be introduced in either Houses of Parliament but, when passed by both Houses, it is then sent to the King for assent (Article 69). With the exception of Bills dealing with finance, the Constitution allows the King to return Bills to Parliament if he feels that further deliberation is required. But when re-presented to the King for assent the King is obliged to grant assent (Article 71).

2.19 If the King is satisfied that circumstances exist which render it necessary for him to take immediate action and both Houses are not sitting, he may promulgate an Ordinance. An Ordinance has the same effect and force as an Act subject to conditions laid down in the Constitution, namely that an Ordinance:

- (a) shall be presented at the next session of both Houses of Parliament, and if not passed by both Houses, it shall *ipso facto* cease to be effective;
- (b) may be repealed at any time by the King; and
- (c) shall, unless rendered ineffective or repealed under sub-clause (a) or (b), *ipso facto* cease to have effect at the expiration of six months from its promulgation or 60 days from the commencement of a session of both Houses.

2.20 In addition, during a grave crisis the King has the authority, under Article 115 of the Constitution, to proclaim a state of emergency. The proclamation must be laid before the House of Representatives for approval, whereupon it continues for six months and may be renewed for a further six months. During this time, various fundamental rights in the Constitution may be suspended (see above) although, importantly, the right to *habeas corpus* must be preserved.

2.21 It was through a promulgation of an Ordinance after declaring a state of emergency and the later passing of an Act that the terrorist legislation was

generated under which the lawyers that are of particular concern to the delegation were detained.

The Judiciary

2.22 The courts and other judicial institutions manage the justice system in Nepal. The courts exist in the following three tiers: the Supreme Court, the Appellate Court and the District Court. Under Article 85(2) of the Constitution, special courts, including military courts, may be established.

2.23 The Supreme Court is the highest judicial body in Nepal. All other courts, except Military Courts, are subordinate to the Supreme Court. The King appoints the Chief Justice of the Supreme Court on the recommendation of the Constitutional Council. The other 14 judges are appointed on the recommendation of the Judicial Council. As guarantor of personal liberty and fundamental rights conferred by the Constitution, the Supreme Court has the authority to declare a law as void *ab initio* if it finds that the impugned law contravenes the provisions of the Constitution. The Court also has the power to issue appropriate orders and writs, including *habeas corpus*, *mandamus*, *prohibition* and *quo warranto*. However, it cannot use these powers in relation to the Military Courts other than on the ground of absence of jurisdiction or for offences committed by a non-military person where the offence does not relate to the army.

2.24 The Supreme Court has jurisdiction over matters relating to the interpretation of the Constitution or any other laws and its interpretations are binding on all, including the King.¹⁰ Although the Supreme Court is the court of last resort, the King retains the right to grant pardon and suspend, commute or remit any sentence levied by any court, on the recommendation of the government.

2.25 The Constitution also provided for the establishment of Appellate Courts and District Courts. There are 16 Appellate Courts at present. There is one District Court in each of the 75 Districts of Nepal. The King, on the recommendation

of the Judicial Council, appoints the Chief Judge and judges of the Appellate Courts and District Courts. All decisions from these lower courts, including acquittals, are subject to appeal.¹¹

- 2.26 In areas controlled by Maoists, the court structure described above has been usurped by the introduction of ‘People’s Courts’. These courts are unconstitutional and conflict with Nepal’s international human rights obligations to guarantee the right to a fair trial.

Political Parties

- 2.27 Article 122 of the Nepalese Constitution guarantees the right of persons committed to common political objectives and programmes to form political organisations and parties. Nepal is therefore a multi-party democracy. There are two main political parties in Nepal: the National Congress Party and the United Marxist-Leninist Communist Party (UML). Added to these are five other political parties holding seats in Parliament.

The Royal Massacre

- 2.28 On 1 June 2001, the Crown Prince Dipendra shot and killed nine members of the royal family. It was alleged that ‘angered by his mother’s disapproval of his choice of bride, the Crown Prince massacred all royal family members and later shot himself’.¹²
- 2.29 On 2 June 2001, the State Council called an emergency meeting and declared Crown Prince Dipendra (who was still in hospital at the time) as the new King and Gyanendra (his uncle) as the Regent. On 4 June, the Crown Prince was confirmed dead, and Gyanendra was pronounced King by the State Council. This caused agitation among the people, which led to serious civil unrest.

¹⁰ Article 96(2) of the Constitution.

¹¹ Article 122 of the Constitution.

¹² <http://ms.dk/nepal/royal/overview.htm>.

- 2.30 King Gyanendra announced the formation of a high level committee, headed by the Chief Justice with the Speaker of the Parliament and the main opposition communist party general secretary as members, to investigate the royal palace massacre. According to the Nepalese Constitution, neither the Government nor any other body can interfere in or question the acts of the palace.¹³ This move by King Gyanendra represents the first time in its long history that the monarchy has opened its doors to allow an investigation into the acts of the royal family.
- 2.31 Some opposition leaders like Madhav Kumar Nepal of the UML refused to participate, saying that the King's orders were unconstitutional. They also claimed that King Gyanendra was using the investigations to gain the trust of Nepalis who, for the first time in recent history, had greeted a new monarch with hostility.

The 'People's War'

- 2.32 Since 1996, when the Maoists took up arms and declared the 'people's war', the Kingdom of Nepal has not known peace (see 2.9 above). Peace talks aimed at ending the Maoist's 'people's war' and an accompanying ceasefire broke down on 23 November 2001 when the Maoists withdrew from the talks and attacked police and army posts in 42 districts. The authorities responded on 26 November by declaring a nationwide emergency, and deploying the army. The King also announced the *Terrorist and Disruptive Activities Ordinance 2001* (TADO), making legal provisions to control terrorist and disruptive activities and provide security to the general public. This was superseded by the *Terrorist and Disruptive Activities (Control and Punishment) Act 2002* (TADA), when it was passed by Parliament. The promulgation of a state of emergency suspended many fundamental rights, such as freedom of expression and speech, freedom of assembly without arms, freedom against arbitrary detention, right to privacy and right to constitutional remedies, although *habeas corpus* was preserved. The police were granted wide powers to arrest anybody involved in terrorist activities. The Maoists were declared a

¹³ Article 31 (Constitution of Nepal, adopted on 9 November 1990).

terrorist organisation under the TADO and anybody thought to be a Maoist sympathiser was considered a terrorist. On 28 August 2002, the state of emergency expired, however the level of violence in Nepal has increased and there have been hundreds of deaths.¹⁴

- 2.33 According to Amnesty International, more than 5,000 people have been arrested since the state of emergency was declared. Under the TADA, where there is any reasonable ground to believe that a person is involved in terrorist or destructive activities, ‘... the security forces can issue an order to detain such person in a certain place for ninety days’ (section 9). The concerned authority is given power to renew such detention period for another 90 days. This has given the Government the right to detain anybody it considers to be a terrorist. Among those arrested have been lawyers, teachers, journalists and human rights activists.
- 2.34 The Government is understood to control information and news, and to harass journalists who report on rebel activities or who work for publications seen as sympathetic to the Maoist cause. Journalists and human rights activists are generally denied access to cover activities in battle areas as well as any matters relating to the military.
- 2.35 Since declaring the ‘people’s war’, Maoists have killed scores of members of other political parties. The Maoists have made teachers one of their primary targets. According to a recent Amnesty International report, the Maoists have killed 28 teachers belonging to the Nepal Teachers’ Association.¹⁵ Deliberate and unlawful killings have become a major characteristic of the Maoist insurrection. The Maoists have abducted civilians and police officers and have engaged many children as soldiers.

¹⁴ “100 Dead as Maoists Renew Nepal Attack”, The Times, 10 September 2002.

¹⁵ Nepal: Amnesty International Condemns Horrific Killing of Teachers by Maoists, 18 January 2002, AI Index ASA 31/010/2002.

Nepal's International Treaty Obligations

2.36 The Kingdom of Nepal is signatory to a significant number of international treaties, imposing a variety of international obligations. Within the region it has a good record on signing and incorporating international human rights conventions. It is a party to the International Covenant on Civil and Political Rights (accession date 14 May 1991) together with the First and Second Protocols (accession dates 14 May 1991 and 4 March 1998 respectively); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (accession date 14 May 1991), the International Covenant on Economic, Social and Cultural Rights (accession date 14 May 1991); the Convention on the Elimination of All Forms of Racial Discrimination (accession date 30 January 1971); the Convention on the Elimination of All Forms of Discrimination Against Women (ratification date 22 April 1991) and its Optional Protocol (signed 18 December 2001); and the Convention on the Rights of the Child (ratified 14 September 1990) together with its two Optional Protocols (both signed 8 September 2000). Nepal is also a party to the 1949 Geneva Conventions on the conduct of armed conflict, having acceded to them on February 7, 1964. Common Article 3 of these Conventions provides that in an armed conflict not of an international character, persons taking no part in the hostilities are to be treated humanely. To the extent that this obligation may apply to the situation in Nepal, this provision adds nothing to the human rights treaties already mentioned and so will not be considered further in this report. In fact, it is the International Covenant on Civil and Political Rights (hereafter the "ICCPR") and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereafter "the Torture Convention") which are the most relevant to the terms of reference of the mission.

2.37 With respect to the creation of obligations under a treaty, the *Nepal Treaty Act 1990* provides that the King, the Prime Minister and the Minister of Foreign Affairs can conclude treaties for Nepal (section 3), and that ratification occurs after the acceptance by a majority of the House of Representatives of a resolution of ratification (section 4). Section 9 provides that once ratification

has occurred the provisions of any laws that conflict with the treaty are invalid to the extent of such conflict and the provisions of the treaty shall be applicable as Nepalese laws.

CHAPTER 3: THREATS TO THE LEGAL PROFESSION IN NEPAL

Overview

- 3.1 Prior to this mission to Nepal, the IBA received a number of reports over several months concerning lawyers who had been arrested, detained and in some cases allegedly subjected to ill-treatment in connection with the carrying out of their professional duties (see Appendix 2 for the list of arrested lawyers known to the IBA and fact-finding mission). Although some of these cases had been raised with the Nepalese Government, prior to the fact-finding mission there had been no response. In Nepal, the delegation was advised of the arrest of some 12 lawyers and, since its return, a further two have reportedly been arrested. The pattern of arrest in many of these cases appears to be that subsequent to the lawyers' acceptance of instructions in the case of a suspected terrorist, they themselves have been arrested. Some have been accused of being suspected terrorists under the *Terrorist and Disruptive Activities Ordinance 2001* (TADO) and its enactment, the *Terrorist and Disruptive Activities (Control and Punishment) Act 2002* (TADA). The delegation discussed these cases and the problem of the harassment of the legal profession more generally with the President and members of the Executive Committee of the Nepal Bar Association, the President and Executive Committee of the Nepal Law Society, a delegation of lawyers from Biratnagar, and a number of individual lawyers across the spectrum of political persuasions. The issue was raised also with the Home Minister, the Inspector General of Police, the Royal Nepalese Army and the National Human Rights Commission. The delegation was given the opportunity of visiting one of the arrested lawyers in detention (see below).
- 3.2 These arrests have taken place against the background of an order issued under the TADO on 26 November 2001 which declared the Communist Party of Nepal (Maoist) to be a terrorist organisation. Any person, organisation or group which is directly or indirectly involved in, or renders assistance to, the activities of the Maoists is similarly declared a terrorist.

- 3.3 The delegation ascertained from its discussions that the degree of freedom Nepalese lawyers have to carry out their duties without interference, in particular to represent alleged Maoists without the suspicion of links to the Maoists terrorists, largely depends on where in Nepal a lawyer practises and whether the lawyer has professional or family connections with the authorities.

Areas Largely under Maoist Control

- 3.4 In 23 of the 75 districts of Nepal, Maoists have more or less usurped government control. The delegation was disturbed to learn that in recent months Maoists have set up their own 'People's Courts', presided over by the local Maoist militia commander. These 'courts' are informal, do not employ legal professionals and are said to dispense 'rough justice'. Sentences of the 'People's Courts' are severe, for example, the giving of 100 or more lashes of a bamboo cane, and are said to be ruthlessly enforced. These courts do not adhere to the fair trial guarantees set out in international human rights standards.
- 3.5 Citizens are coerced by the Maoists not to use the District Courts and lawyers have been threatened not to attend court. It is widely reported that Maoists have murdered some lawyers. As a result, in Maoist areas District Courts have ceased to function and many lawyers have turned to other occupations or left the area.
- 3.6 The delegation heard from a number of sources that there was also widespread corruption in the District Courts. The delegation heard that the bribing of judges was commonplace particularly in remote areas, which was where the Maoists had seized control. The Nepal Bar Association described an admirable legal aid scheme but this is ineffective where one party to a dispute can afford to pay a bribe. As a result of the perception among the population of corruption in the District Courts, especially in more remote areas, the IBA delegation was told that there is little confidence in the justice that they dispense.

- 3.7 The delegation concluded that in areas under Maoist control, lawyers are unable to carry out their professional duties without harassment and intimidation. Moreover, the 'People's Courts' are no substitute for a properly functioning District Court and lawyers have been put under pressure to send clients to the 'People's Courts'. Sources within the legal profession say that some lawyers may even advise a client to go to a 'People's Court', where that is more likely to provide redress, than the District Court. The army points to this as an indication of the pro-Maoist leanings of some lawyers.

Areas under Government Control Outside the Kathmandu Valley

- 3.8 It was confirmed to the delegation by credible sources that the police and the army have harassed lawyers who have taken briefs on behalf of alleged Maoists. There is genuine fear in the legal profession that lawyers who represent alleged Maoists bring on themselves the risk of becoming associated with the Maoists in the minds of the police and the Royal Nepalese Army.
- 3.9 The delegation also heard reports of ways in which Maoists interfere with the legal profession. In February 2001, there was a reported assassination attempt on the Chief Justice resulting in six deaths including the Registrar of one of the Appellate Courts, although the Chief Justice himself was not injured. Although the Maoists claimed they would investigate, there is no report of any such investigation taking place or its findings being made public. The delegation also learnt of a lawyer in a remote western district who received a demand from the Maoists to hand over some case files.

Kathmandu Valley

- 3.10 The delegation heard from the Nepal Bar Association that as well as the arrests referred to above, other lawyers who have represented Maoist clients have also experienced harassment from the security forces. Lawyer Ekraj Bhandari described a midnight visit in which his house was surrounded by army personnel and he was questioned at some length by a person in plain clothes, thought to be a policeman. He was repeatedly asked why he represented so many Maoist clients.

3.11 The delegation noted, however, that other lawyers told the IBA mission that they had represented Maoists and had come under no pressure from the authorities as a result. There is nonetheless a level of anxiety in the minds of some lawyers, particularly, perhaps, those whose political views are closer to those of the Maoists. This level of anxiety has not, however, prevented Maoists from being represented by other lawyers. Indeed, as noted above, the delegation was told that lawyers with the 'right' political or family connections did not face the same potential of being suspected as Maoists or detained by the authorities.

Intimidation of Nepalese Lawyers who Represent Suspected Terrorists

3.12 The Bar Association and the Law Society reported that the pattern seems to be that those lawyers who have been arrested were active in leftwing politics, often with the Communist Party of Nepal (Maoist), before the emergency. In some cases, however, colleagues doubted that the arrested lawyers were Maoists. In Nepal, the communists form the principal opposition through the United Marxist- Leninist Communist Party (UML). There has been a history of factionalism among the communists; the Communist Party of Nepal (Maoist) is one faction that has decided to pursue its objectives by armed struggle, the 'people's war'. A number of lawyers are active in the UML but do not support the Maoist insurrection. Significantly, the mission was given no examples of a lawyer who had defended Maoists and had been arrested who was not also active in leftwing politics before the emergency.

3.13 The delegation raised concerns with the Inspector General of Police and representatives of the Royal Nepalese Army that lawyers representing suspected Maoist terrorists had been harassed by the authorities. It was acknowledged that 'mistakes had been made'. However, when challenged, they maintained that in their view those lawyers who had been arrested were suspected of involvement with the Maoist terrorists. It was claimed that police and army officers are well aware of the duties of a lawyer; they would not, they say, infer that a lawyer who represents a Maoist is necessarily associated with Maoists. Overall, the delegation could not help but conclude that many in the police and army were unaware of their human rights obligations and in all

likelihood a failure to respect the prohibition on torture and other ill-treatment had, in fact, occurred in some instances (see the case of Mr Mainali below).

- 3.14 Although the IBA delegation was not granted permission to see the evidence against the individual lawyers arrested for suspected terrorist involvement, the delegation was advised by credible sources that the evidence needed to obtain a detention order from the Chief District Officer in such cases is, at times, flimsy. There is, it was reported, reliance on hearsay, circumstantial factors or a tip-off from the public. No reasons for the detention of individual lawyers are ever given to the Bar or anyone else beyond the statement that the detention order has been made under the TADA. Further, such evidence as there may be is not examined in public and the right to *habeas corpus* is denied. Without access to the evidence, it was not possible for the IBA to ascertain the likelihood that the individual lawyers have or have not assisted the Maoists, although one lawyer seen by the delegation asserted his lack of terrorist involvement (see below).
- 3.15 The delegation was concerned to learn of the manner in which the Royal Nepalese Army holds for questioning persons, including lawyers, who they believe may be a potential source of intelligence.¹⁶ These people are held incommunicado, with no reason given to next of kin or, in the case of lawyers, the Bar President (for further discussion of this practice, see Chapter 4).
- 3.16 In these circumstances, with no statement of the reasons for arrest, no public airing of the evidence given to obtain the detention order and an acknowledgment that such evidence may be only circumstantial, hearsay or a tip-off, it is understandable that lawyers may believe that the only reason a colleague has been arrested is for representing a suspected terrorist. Certainly there is the opportunity under the TADA for a person to be arrested when there is little or no substance to the allegations made against him or her.

¹⁶ Under the TADA, a person can be arrested and kept in preventive detention if there are reasonable grounds to believe that they have been involved in activities contrary to the TADA (sections 5(A) and 9).

3.17 It might have been expected that the security forces would have liaised more closely with the Bar whenever a lawyer is arrested. However, it is clear that there is no channel of communication between the Bar and the security forces.¹⁷

The Case of Ramnath Mainali

3.18 On 14 March 2002, Ramnath Mainali, a lawyer, was arrested by the Royal Nepalese Army and ‘disappeared’ for three weeks. The IBA President wrote to the Prime Minister of Nepal on 21 March expressing her concern about Mr Mainali’s case. On 4 April, having been held incommunicado since his arrest, Mr Mainali was handed over by the Royal Nepalese Army to the police and served with a 90-day detention order under the prevention of terrorism provisions of the TADA. Mr Mainali has no right of *habeas corpus*. This pattern of events seems to be typical of individuals arrested by the Royal Nepalese Army as a potential source of intelligence on Maoist activity.

3.19 When the delegation visited Mr Mainali who was held in Dillibazar Prison in Kathmandu, he asserted to the delegation that his only ‘crime’ was to act as a legal adviser to a pro-Maoist journal, *Jamadesh Weekly*. He represented the previous editor, Krishna Sen, who was arrested in April 1999 and detained for two years under the provisions of the Public Security Act. Mr Mainali had also been involved in filing a *habeas corpus* writ on behalf of Govinda Acharya, the editor of *Jamadesh Weekly*, who was arrested at the start of the current emergency. Mr Mainali had given a statement to the Chief District Officer to the effect that he was not and never had been a Maoist and was simply acting for his client. The delegation was given a copy of Mr Mainali’s statement.

3.20 Mr Mainali reported that he was given no reasons for his three-month detention. For the first 20 days of his incarceration he was blindfolded and

¹⁷ In Sri Lanka, in similar circumstances of a state of emergency to those in Nepal today, the Bar President established a ‘hotline’ to the Chief of Police and the Chief of Staff of the Army whereby the Bar President was notified promptly of the arrest of a lawyer, the allegations against that lawyer, and the place in which the arrested lawyer was being held. Mutual confidence and understanding were further strengthened in Sri Lanka by regular meetings between Bar leaders and senior police and army officers to discuss matters of mutual interest and concern.

hooded, during which time he was interrogated by unknown persons. Mr Mainali suffers from a heart problem, diabetes and hypertension and although he was given some limited medical treatment, his diabetes may have suffered as a result of his poor prison diet.

- 3.21 The IBA delegation took up Mr Mainali's case with the Home Minister and the Prime Minister. The delegation was told that Mr Mainali was being held because he had helped, supported and encouraged terrorists; the authorities were investigating the degree and manner in which Mr Mainali had supported the terrorists and, if it were not too serious, his detention would be 'cancelled'. The delegation has since learned of Mr Mainali's release.

Conclusions

- 3.22 In areas largely under Maoist control, the delegation concluded that it is virtually impossible for lawyers to carry out their duties without harassment and intimidation. The delegation also concluded that there are credible reports of the Maoists threatening lawyers, committing murders, and assassination attempts on lawyers and judges.
- 3.23 The delegation was left in no doubt that in areas under government control, and particularly in more remote areas, there have been examples of interference with lawyers carrying out their professional duties. Incidents of harassment by the security forces, and the arrest of some lawyers under the TADA, have created anxiety and have discouraged some lawyers from representing Maoist clients.
- 3.24 Threats, intimidation and interference with the legal profession by any side in the conflict pose a great threat to the independence of lawyers. Maintaining the independence of the legal profession serves to protect democracy, fundamental human rights and ultimately helps to ensure the independence of the judiciary.
- 3.25 The delegation concluded that it was extremely damaging to the respect for the rule of law for Nepal to have a divided legal system. Only with the

reinstatement of properly constituted courts, applying the law in a fair and just manner, with regard to the due process guarantees set out in international law, can the proper administration of justice be restored. Furthermore, the ‘People’s Courts’ do not comply with international fair trial standards.

- 3.26 The corruption apparently endemic within Nepal’s District Courts undermines the international standards for impartial and independent tribunals. District Courts should dispense justice in accordance with Nepalese law and must be free from corruption or the perception of corruption, thus earning the confidence of the Nepalese people.
- 3.27 No direct and conclusive evidence was given to the IBA delegation that lawyers had been arrested expressly for representing suspected terrorists; rather the arrests seem to be the result of leftwing political activity before the emergency, in some instances activity for or with Maoists, and suspicion by the authorities that the arrested lawyer supported or was in some way linked to the Maoist terrorists. Where lawyers had well connected family or political affiliations such assumptions appeared not to be made.
- 3.28 The evidence used to secure a detention order, including in cases involving lawyers, appears to be of a very poor standard and is not subject to public or in some cases judicial scrutiny. This is even more so in the case of persons held by the Royal Nepalese Army as a potential source of intelligence. The delegation was also concerned to learn of allegations of human rights abuses and the admission by the police and Army that mistakes had been made. While recognising that Nepal faces a dangerous and destabilising terrorist threat, the delegation concluded that the international standards applicable to detainees must nevertheless be respected.

Recommendations

1. In the interests of justice for all citizens and in accordance with Nepal’s international human rights obligations, there is an urgent requirement to restore the District Courts to the whole of Nepal and for the judges, lawyers,

prosecutors and court officials to be able to conduct their professional duties without interference.

2. Judges, lawyers, prosecutors and court officials should at all times carry out their responsibilities with independence, integrity and impartiality. All allegations of corruption should be investigated and those responsible brought to justice.
3. Any harassment of the legal profession by the police and the Royal Nepalese Army, in the course of their carrying out professional duties, must cease. In addition, the rights to liberty, freedom from inhumane treatment and protection of human dignity must be respected.
4. Maoists must desist from actions that prevent the District Courts from functioning, and from the murder and intimidation of lawyers and judges.
5. When lawyers become fearful of exercising their professional duties, the Bar leadership and competent, independent lawyers should consider taking relevant cases.
6. The Government should ensure that the police and the Royal Nepalese Army undergo training to ensure that they are able to comply with the relevant requirements of Nepal's international human rights obligations.
7. The Nepalese Government must ensure that where those within the police, the Royal Nepalese Army and the security forces commit human rights abuses, including the harassment of members of the legal profession, the matter is investigated and those responsible are brought to trial and punished.
8. Security forces should ensure that all personnel are familiar with the duties of a lawyer towards his or her client, regardless of the lawyer's own views about the actions or political views of his or her client. The police and the security forces need to be aware of the role of the lawyer in obtaining the justice that must be seen to prevail and of the fact that any harassment of the legal profession strikes at the heart of the independence of the profession.
9. The President of the Nepal Bar Association should consider establishing a 'hotline' with the Inspector General of Police and the Chief of the Army Staff so that the arrest of a lawyer may be notified to him promptly, together with the reasons for arrest and the place of custody.

10. Bar Presidents, senior officers of the Royal Nepalese Army and senior police officers, both nationally and locally, should initiate regular meetings to discuss matters of mutual interest and concern with the objective of developing greater cooperation, understanding and scrutiny.

CHAPTER 4: NEPAL'S HUMAN RIGHTS OBLIGATIONS AND ANTI-TERRORISM LEGISLATION

4.1 Of particular concern to the delegation were the reports received about the detention of lawyers under the terrorist legislation. The general circumstances of this detention were discussed in Chapter 3 and a list of lawyers detained by the security forces can be found in Appendix 2. These detentions raise a number of concerns about the TADA both in respect of its application to lawyers and the population as a whole. The following allegations are significant:

- arrest without warrant;
- arrest without charge;
- detention incommunicado where relatives or legal representatives could not ascertain the place of detention;
- lengthy detention periods before formal charges were laid;
- treatment in detention relating to alleged physical abuse, hooding/blindfolding, and lack of adequate health care;
- lengthy periods before *habeas corpus* applications are heard and determined.

4.2 The delegation considered the international human rights treaties to which is Nepal is a party and which are listed in Chapter 2, as a benchmark against which Nepal must be judged. Also relevant are the provisions of the *Standard Minimum Rules for the Treatment of Prisoners*,¹⁸ the *Basic Principles for the Treatment of Prisoners*,¹⁹ the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,²⁰ the *Code of Conduct for Law Enforcement Officials*,²¹ and the *Basic Principles on the Role of Lawyers*.²² While these latter instruments are not treaties and are therefore

¹⁸ ECOSOC Resolutions 663C (XXIV), 21 July 1957, and 2076 (LXII), 13 May 1977.

¹⁹ GA Res 45/111, 14 December 1990.

²⁰ GA Res 43/173, 9 December 1988.

²¹ GA Res 34/169, 17 December 1979.

²² Adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7 September 1990.

not binding as such on Nepal, they do represent at the least an international benchmark of state conduct in the areas to which they relate.

Non-Derogable Rights

4.3 The principal non-derogable rights in the International Covenant on Civil and Political Rights (ICCPR) which are relevant to this mission report include the prohibition of torture and cruel, inhuman and degrading treatment or punishment (Article 7) and the prohibition on being held guilty of an offence which did not amount to a criminal offence at the time it was committed (Article 15). Both of these prohibitions are non-derogable, even in times of state emergency (Article 4(2)). The UN Human Rights Committee has commented that the prohibition would extend to the use of admissibility in judicial proceedings of statements obtained through torture and other forms of prohibited treatment.²³

4.4 Under the Torture Convention, Article 2(2) provides that no exceptional circumstances whatsoever, including public emergencies, may be invoked as a justification for torture. Orders of superior officers or of public authorities are not a justification for torture either (Article 2(3)). Torture is defined in Article 1 as being any act where severe physical or mental pain or suffering is intentionally inflicted by a person acting in an official capacity in order to obtain information or a confession, or to punish or intimidate a person. The Convention also provides that State Parties undertake to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture and which are committed by a person acting in an official capacity.

Derogable Rights

4.5 Other rights in the ICCPR relevant to this report but which may be derogable in times of public emergency include the right not to be subjected to arbitrary arrest or detention (Article 9). This includes the right to be informed at the time of arrest of the reasons for it and to be promptly charged. Anyone who is detained has the right to be brought promptly before a court to determine

²³ General Comment No 20, 10 March 1992, paragraph 12.

liability, and also has the right to seek a judicial determination on the lawfulness of the detention and to be released if the detention is unlawful. The Human Rights Committee has made it clear that the last right (ie *habeas corpus*) applies to all forms of detention.²⁴ It has also held that the time limit for being brought ‘promptly’ before a judge should not exceed a few days²⁵ and that pre-trial detention should be exceptional and as short as possible.²⁶ In particular, the Committee has stated: ‘... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, ie it must not be arbitrary, and must be based on grounds and procedures established by law, ... information of the reasons must be given ... and court control of the detention must be available’.²⁷

4.6 All detained persons have the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10). All persons are equal before courts and tribunals and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14). In particular, anyone charged with a criminal offence is entitled to minimum guarantees including the right to be informed promptly and in detail of the nature and cause of the charge, to have adequate time and facilities to prepare a defence and to communicate with counsel, and to be tried without undue delay (Article 14(3)). The Human Rights Committee has noted:

‘The provisions of Article 14 apply to all courts and tribunals within the scope of that Article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts that try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant

²⁴ General Comment No 8, 30 June 1982, paragraph 1.

²⁵ *Id*, paragraph 2.

²⁶ *Id*, paragraph 3.

²⁷ *Id*, paragraph 4.

does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14. ... If States Parties decide in circumstances of public emergency as contemplated by Article 4 to derogate from normal procedures required under Article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of Article 14.²⁸

4.7 The Committee has further noted that the right to communicate with legal representatives means that lawyers should be able to instruct counsel and to represent their clients in accordance with their established professional standards and judgment ‘without any restrictions, influences, pressures or undue influence from any quarter’²⁹ and that the accused and the lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.³⁰

4.8 Everyone has the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence (Article 17). The Human Rights Committee has stated that an ‘unlawful’ interference with privacy means that an interference authorised by the State can only take place on the basis of law which itself must comply with the provisions, aims and objectives of the ICCPR³¹ and that an ‘arbitrary’ interference will occur, even if allowed by law, if it is unreasonable in the circumstances.³² Everyone also has the right to freedom of opinion and expression, including the right to seek, receive and impart information of all kinds (Article 19) as well as the right to peaceful assembly (Article 21) and freedom of association with others (Article 22). These rights may, however, be subject to restrictions prescribed by law and which are necessary in the interests of national security or public order. The

²⁸ General Comment No 13, 13 April 1984, paragraph 4.

²⁹ *Id.*, paragraph 9.

³⁰ *Id.*, paragraph 11.

³¹ General Comment No 16, 8 April 1988, paragraph 3.

Human Rights Committee has stated that the criterion of necessity is one that States must establish to justify any restrictions.³³

4.9 All of the above rights and freedoms, however, are derogable in times of ‘public emergency which threatens the life of the nation and the existence of which is officially proclaimed’ (Article 4(1)). These derogating measures are allowed only to the extent that they are strictly required by the exigencies of the situation. The Human Rights Committee has noted that derogations under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened³⁴ and it has emphasised that not every disturbance or catastrophe qualifies as such a public emergency.³⁵ A limitation on the derogations to the extent that the exigencies of the situation require means that the duration, geographical coverage and material scope of the state of emergency and of any derogations to the ICCPR must be carefully considered, ie the principle of proportionality applies.³⁶ The requirement of an official proclamation of a state of emergency is regarded as ‘essential for the maintenance of the principles of legality and the rule of law at times when they are most needed’.³⁷ The Committee has also noted that while Article 4(2) articulates specific rights that may never be derogated from, this does not necessarily mean that everything else in the Covenant is derogable. This is especially so for general obligations applying to the treaty as a whole, such as the requirement in Article 2(3) to ensure that anyone whose human rights have been violated has an effective remedy. While remedies or procedures may be curtailed, they must still be effective.³⁸

4.10 Any State Party availing itself of the right to derogation shall immediately inform the other States Parties through the Secretary-General of the United Nations (Article 4(3)). The mission was unable to locate on the website of the UN High Commissioner for Human Rights any indication that Nepal has ever made such a communication. While this would not appear to invalidate any

³² *Id*, paragraph 4.

³³ General Comment No 10, 29 June 1983, paragraph 4.

³⁴ General Comment No 29, 24 July 2001, paragraph 2.

³⁵ *Id*, paragraph 3.

³⁶ *Id*, paragraph 4.

³⁷ *Id*, paragraph 2.

derogations made during a state of emergency, it is a breach of an obligation under the ICCPR.³⁹

Terrorist and Disruptive Activities (Control and Punishment) Act 2002

4.11 The aim of the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) is, as its name suggests, to control and punish acts of terrorism and other disruptive actions. The impetus for the TADA was the activities of Maoist groups in Nepal described earlier in this report. A terrorist and disruptive crime is defined in section 3 of the TADA as any activity against the sovereignty, integrity, peace and security of Nepal through intentional disturbance or damage to property, lives or health using weapons, bombs or explosive substances or poisons. It is also an offence to threaten to do any of these things, or to produce or distribute weapons, bombs or explosive or poisonous substances, or to train people in these activities, or to collect or loot cash, goods or property for the purpose. A person is deemed to have committed this crime if he or she attempts or conspires to do so, or encourages others to do so. All of these crimes are proceeded with and punished under the TADA rather than under other applicable law.

4.12 Under section 5, the TADA allows the Government or any security officer (ie any member of the police or the army – section 2(f)) to arrest anyone sufficiently and reasonably believed to be involved in terrorist and disruptive activities; to search any person's house, store, vehicle or any place at any time on suspicion that weapons or terrorists may be found; to search any person; to use necessary force to carry out any of these activities or if a person or group tries to harm members of a security force carrying out these activities; and to suspend the passport or bank account of any person reasonably thought to have been involved in terrorist and disruptive activities. Orders for these purposes may be made 'notwithstanding anything contained in the prevailing law'.

³⁸ *Id*, paragraph 14.

³⁹ *Id*, paragraph 17.

- 4.13 Under section 7, the Government can declare any person, organisation, association or group as a terrorist and thus they can be punished under the TADA for any crime falling under section 3.
- 4.14 The power of preventive detention is found in section 9 which provides: 'If there is reasonable ground to believe that anybody may be prevented from doing anything that causes terrorist or destructive activities, the security force can issue an order to detain such person for ninety days'. Anyone charged under the TADA shall be generally detained in judicial custody pending the hearing, depending on the seriousness of the crime (section 11). Cases under the TADA are heard in special courts following the procedure set out in the *Special Court Act 2002*, with an appeal possible to the Supreme Court. The special procedure includes the power of the judge to order an accused to be kept in remand for investigation for a period not exceeding 60 days (section 17(5)). This applies 'notwithstanding anything contained in the prevailing law' and therefore overrides the right to bring an application for *habeas corpus* because the remand is specifically authorised by the TADA and is judicially determined.
- 4.15 The punishment for murder under the TADA is life imprisonment and confiscation of all property for activities that have resulted in the crime. For crimes under the TADA not involving someone's death, the punishment is life imprisonment (section 10). Attempts to commit a crime or to encourage others to do so result in imprisonment of five to ten years and damage to property is compensated by the confiscation of the convicted person's property. People aiding and abetting a crime receive half the punishment of the principal wrongdoer, and people who intentionally interfere with a search being carried out by the security forces are liable to imprisonment for one month or a fine of 500 rupees, or both.
- 4.16 Anybody aggrieved by the conduct of the security forces in an investigation under the TADA can apply to a 'Follow-Up and Co-ordination Committee' comprising a retired judge of the Supreme Court, the Secretary of the Defence Ministry, the Secretary of the Home Ministry, the Secretary of the Law Justice

and Parliamentary Affairs Ministry, and the Deputy Attorney-General (section 13). This Committee determines its own procedure and if anyone is found to have been victimised, suggestions are made to the Government to remedy the problem. It therefore meets as and when its members consider it necessary to do so, and its determinations are not binding. However, to the best knowledge of the delegation, the Chair of this Committee has not yet been appointed. As yet, the already limited powers it has have not been exercised.

Is the TADA Contrary to the Constitution of Nepal?

4.17 As Article 1(1) of the Constitution provides that all laws inconsistent with it are void to the extent of any inconsistency, the validity of actions taken under the TADA must first be judged in the light of the provisions of the Constitution.

4.18 The delegation has focused on four principal aspects of the TADA that, it considers, potentially conflict with principles in the Nepalese Constitution:

- (1) Preventive detention for periods up to 90 days.
- (2) Investigative detention for periods up to 60 days.
- (3) The curtailment of freedoms of assembly and expression.
- (4) The setting up of a special court to try charges under the Act.

4.19 Under the TADA, a person can be arrested and kept in preventive detention if there are reasonable grounds to believe that he or she has been involved with activities contrary to the TADA (sections 5(A) and 9 respectively). Under the Constitution, the right of an accused person to be brought before a judge within 24 hours expressly does not apply to anyone held 'under any law providing for preventive detention' (Article 14(7)). However, Article 15 of the Constitution further provides that no one shall be held under preventive detention without sufficient ground of an 'immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal'. The proclamation of a state of emergency by the King on 26 November 2001, and twice extended, was made pursuant to Article 115. Together with the

stipulation in Article 31 that ‘no question shall be raised in any court about any act performed by His Majesty’, this would mean that the requirements of Article 15 have been satisfied *ipso facto* insofar as the TADA is concerned. Consequently, the exemption provided by Article 14(7) applies and the preventive detention is not unconstitutional, and will be valid within the terms of section 9 of the TADA itself, *provided* there are reasonable grounds for it. (However, see the commentary below with respect to the application of these provisions which the delegation sees as the greater problem.)

- 4.20 Section 17(5) provides that ‘notwithstanding anything contained in the prevailing law, any accused involved in a crime under this Act can be kept in police custody for investigation for a period not exceeding 60 days with the consent of the judge of the case’. This investigative detention is a period of remand and, the delegation was told, the period differs according to the applicable legislation (eg, for alleged murder, a person may be kept in police custody for up to 15 days). The detention must, however, be sanctioned by a judge. Whether this is always the case is of concern with respect to the application of this provision, even if it is technically constitutional.
- 4.21 Section 12 of the TADA provides that the right to assemble peacefully without arms, and the rights of freedom of opinion, expression and movement throughout Nepal shall not be restricted, even in areas declared to be terror-influenced under section 7. Article 12 of the Constitution also provides that all citizens have the right to assemble peacefully without arms, but proviso 2 of Article 12(2) allows the making of laws to impose reasonable restrictions on any acts undermining law and order in Nepal. The TADA is therefore constitutionally valid in this regard, but whether it breaches Nepal’s international obligations that may apply domestically is discussed below.
- 4.22 The setting up of a special court with exclusive jurisdiction to hear cases under the TADA is provided for in section 15, which expressly preserves a right of appeal to the Supreme Court. The Constitution provides for the setting up of special courts apart from the Supreme Court, Appellate Court and District Courts (Article 85(2)). It would therefore appear that section 15 of the TADA

is constitutional, but as *habeas corpus* applications appear to be used minimally, the application of this provision might be open to question. Whether there has also been a breach of any international obligation by Nepal is discussed below.

Is the TADA Contrary to Nepal's International Human Rights Obligations?

- 4.23 As discussed above, a breach of an international obligation may not only be a delict under international law, but it may also be relevant to the domestic legal system of Nepal because of the provisions of the Treaty Act.
- 4.24 The TADA allows the security forces to arrest, search, detain and use necessary force to accomplish the objectives of the Act. There is nothing in the TADA that specifically authorises torture or cruel, inhuman or degrading treatment or punishment. Indeed, Article 14(4) of the Constitution specifically forbids such treatment of detainees. The TADA in itself is therefore not a breach of the Torture Convention.
- 4.25 Under the ICCPR, on the other hand, a seminal issue is the right to derogate from some of the provisions of the Covenant in times of emergency. Article 4(2) of the ICCPR provides that no derogation is allowed from the provisions with respect to torture. As this is not *prima facie* a problem here, those provisions need not be considered. Other provisions of the Covenant, in particular those dealing with arrest and detention, privacy, peaceful assembly and association, are derogable under the Article. While the Constitution of Nepal allows the King to declare a state of emergency and provides that such a declaration cannot be challenged against the King himself, the obligation at international law under Article 4 of the ICCPR is more strict before derogations to human rights are allowed. The Human Rights Committee has made detailed observations about what is required for Article 4 to be satisfied and properly implemented.⁴⁰ In allowing for derogations, the framers of the ICCPR acknowledged the complex reality that confronts many countries in times of crisis. Equally, however, derogations must be strictly limited to the

⁴⁰ General Comment No 29, 31 August 2001, CCPR/C/21/Rev 1/Add 11).

necessity of the situation. As noted above, a declaration of this nature must be exceptional, temporary and specific in its nature, and the other parties to the ICCPR must immediately be informed. While the declaration of the state of emergency in November 2001 was publicly proclaimed in Nepal, it gave no justification but merely stated that ‘a grave emergency has arisen in regard to the sovereignty, integrity and security of the Kingdom of Nepal’ (the wording necessary for Article 115 of the Constitution to apply); while regarded as serious, the requirement under Article 4 that the situation threatens the life of the nation must be read into the declaration by inference from the fact that the Maoists had broken off negotiations and had attacked police and army posts in 42 districts.

- 4.26 As noted earlier, the delegation could find no evidence that a relevant notification to the Secretary-General of the United Nations under Article 4(3) of the ICCPR had ever been made. This in itself is a breach of Nepal’s obligations under Article 4. However, whether this means that there can be no valid derogation from other provisions in the ICCPR remains an open question. If derogations are not effective without proper notification, then any derogations by Nepal, whether sanctioned by its Constitution or not, may be a breach of international law and the impact of this on domestic Nepalese laws because of the Treaty Act must at least be considered. On the other hand, if non-compliance with the notification requirement, while being a breach of Article 4, is nevertheless merely procedural, then derogations could still be validly made. The Human Rights Committee has itself said that notification is essential for monitoring compliance with the Covenant but notes that the obligation has not always been respected.⁴¹ The Committee has not, however, on any occasion said that lack of notification by itself will render any derogations ineffective. Therefore, the TADA does not appear, *prima facie*, to breach the ICCPR. However, what the Human Rights Committee has particularly emphasised is the fact that Article 4 is not exhaustive as to the non-derogable rights of the Covenant. In particular, obligations of general application under the Covenant, such as the obligation under Article 2(3)(a) to provide an effective remedy for breaches of the Covenant, is one which is

inherent in the Covenant as a whole.⁴² Thus, even in states of emergency, and even with emergency legislation that is strictly limited to the exigencies of the situation, the legal obligation to provide remedies that are effective persists. There must always be effective judicial review of any form of detention. It is therefore necessary to consider whether the *application* of the TADA, as distinct from its specific provisions, is a breach of either the Constitution of Nepal or of its international human rights obligations.

4.27 In any event, as the state of emergency has now officially ended, but the TADA continues in force, any provisions of the TADA not in accordance with Nepal's international human rights obligations can no longer be justified on the basis of valid derogation.

Is the Application of the TADA Contrary to the Constitution of Nepal?

4.28 Article 11 of the Constitution provides that no person shall be denied the equal protection of the law. In a state of emergency, this guarantee is not one that may be curtailed. To the extent that people, including lawyers who are representing clients who are or may be Maoists, are being detained while their connections are investigated, together with the fact that Article 12(2)(e) provides for the freedom to practise any profession as a fundamental constitutional right, the practice of detaining lawyers on suspicion of Maoist connections through clients may be a breach of Article 11, for which redress may be sought in the Supreme Court under Article 88 (Article 23).

4.29 Although some fundamental rights may be suspended in times of emergency under Article 115, Article 115(8) specifically provides that the right to the remedy of *habeas corpus* under Article 23 shall not be suspended. There may thus be a breach of the right to equal protection of the laws as well as of the common law right to *habeas corpus* with respect to absence of proper detention procedures being followed, or delays in hearing *habeas corpus* applications.

⁴¹ *Id.*, paragraph 17.

⁴² *Id.*, paragraph 14.

- 4.30 Similarly, freedom of association under Article 12(2)(c) of the Constitution, to the extent that it applies to a lawyer associating with clients and colleagues, may have been breached. This freedom is not one which can be abrogated in a state of emergency under Article 115, and the limitations on it in Article 12(2) proviso 3 only apply where the acts in question undermine the sovereignty or integrity of Nepal or instigate violence. Mere legal advice to clients with nothing more would not activate this exception.
- 4.31 Fundamental rights relating to criminal justice are covered in Article 14 of the Constitution. This provides that torture or cruel, inhuman or degrading treatment shall not be inflicted on detainees. This appears to have been breached by the practices inflicted on people in detention, including blindfolding, hooding, etc. There is no provision for derogation of this fundamental right in Article 14 itself or in Article 115.
- 4.32 Article 14 also provides that a detainee will be informed as soon as possible of the grounds for arrest and allowed to consult with a legal practitioner. This appears not to have been allowed in several cases brought to the attention of the mission. This fundamental right may only be denied to a citizen of an enemy state and may not be denied to any citizen of Nepal (Article 14(7)). It is also not subject to any derogations in a state of emergency under Article 115.
- 4.33 The same Article also provides that every person detained shall be brought before a judge within 24 hours of arrest (Article 14(6)). This right, however, may be suspended for persons in preventive detention (Article 14(7)). The delegation was told, however, that it is not uncommon for the authorities to detain a person, often incommunicado, to determine whether there might be some substance to their suspicions (ie going on a ‘fishing expedition’) and to show in official documentation that he or she has been released when in fact they have remained in prison, and then to issue a fresh detention order dated a few days later to justify an valid preventive detention which is not then subject to *habeas corpus*. This is easier than filing a formal charge and is an abuse of power as Article 115(8) of the Constitution specifically provides that even in a

declared state of emergency the right to the remedy of *habeas corpus* ‘shall not be suspended’.

- 4.34 While freedom of the press and other media is not specifically curtailed by the TADA, the mission has received accounts of the Army imposing media restrictions. The Constitution in Article 13 provides for freedom of the media, but subject to such reasonable restrictions on acts amounting to sedition or incitement to violence. These activities, if not reasonable, could violate the constitutional right to freedom of the media. However, Article 115(8) allows this provision to be suspended during a period of emergency. These activities may not therefore appear to be contrary to the Constitution. The extent to which they might breach international human rights obligations is discussed below.

Is the Application of the TADA Contrary to Nepal’s International Human Rights Obligations?

- 4.35 To the extent that the treatment of detainees under the TADA has involved allegations of beatings, blindfolding, hooding, etc, there can be no question that Nepal is in breach of its obligations under the Torture Convention. Even if the acts concerned do not actually amount to torture, they certainly amount to cruel, inhuman and degrading treatment, and have specifically been held to be such by the European Court of Human Rights when interpreting analogous provisions of the European Convention on Human Rights.⁴³ As such, allowing them to occur amounts to a breach of Article 16 of the Convention, especially considering that the armed services and the police are administering the TADA. These provisions are particularly supported and elaborated on with respect to detainees in the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 6 of which has been expressed to apply the phrase ‘cruel, inhuman or degrading treatment or punishment’ to the widest possible protection against abuses, and specifically including the holding of a detained person in conditions which deprive him or her, temporarily or permanently, of the use of any of his or her natural senses, such as sight or hearing.

4.36 With respect to the ICCPR, it must be remembered that remedies for breach must be effective and that this obligation is not derogable, even in states of emergency (see above). Article 9 provides that no one shall be subjected to arbitrary arrest and detention. In particular, preventive detention is subject to the same requirements. The TADA does amount to a valid law and so, *prima facie*, arrest and detention is not ‘arbitrary’ if conduct is undertaken within its provisions. However, the question that arises is whether despite this, and despite the apparent derogation made under Article 4 of the ICCPR, there is nevertheless no *effective* remedy in cases of potential arbitrary arrest. Under the TADA, proceedings are exclusively handled by a special court. The Supreme Court is only given an appeal jurisdiction (section 15(c)). The right to bring an application of *habeas corpus* is crucial as to whether there is in any way an effective remedy in cases of arbitrary but technically lawful conduct by the security forces. The delegation has also received reports of considerable delays in both hearing and deciding these cases. It must therefore be doubted whether the remedies, such as they are available, are truly effective and available at all times. This is potentially a breach of Nepal’s obligations under Articles 9(1) and 2(3)(a) of the ICCPR as these have been interpreted by the Human Rights Committee (see above).⁴⁴

4.37 Article 9(2) provides that a person who is arrested shall be informed, at the time of the arrest, of the reasons for the arrest and promptly informed of any charges against him. The delegation has received reports that this is frequently not the case.

4.38 Article 9(3) of the ICCPR provides that a detainee shall be brought promptly before a judge. As noted above, the Human Rights Committee has said that the period of delay should not exceed a few days and that, in any event, pre-trial detention should be exceptional and as short as possible. The information given to the delegation was that the time delay in some cases was considerable

⁴³ *Ireland v United Kingdom*, ECHR Series A, No 25, 18 January 1978.

⁴⁴ See also the Advisory Opinion on *Judicial Guarantees in States of Emergency* by the Inter-American Court of Human Rights, Advisory Opinion OC-9/87, 6 October 1987.

and that pre-trial detention was the rule rather than the exception. Although potentially derogated from under Article 4, this right is nevertheless not effectively protected when *habeas corpus* applications are lengthy, or lawyers are intimidated into not initiating them, especially where *habeas corpus* is guaranteed under the Constitution, even in states of emergency. This argument also applies with respect to Article 9(4) which provides that a detainee is entitled to take proceedings before a court to 'decide without delay the lawfulness of his detention and to order his release if the detention is not lawful'. There is thus a potential breach of all these human rights obligations by Nepal.

- 4.39 Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. In addition, Article 14(3) provides that all detainees have the right to be informed promptly of the charges against them, to communicate with and be defended by counsel of their own choosing, and to be tried without undue delay. In this regard, the mission received reports of inhumane treatment as described above, and of detainees not being adequately informed of the charges against them and not being allowed to communicate with family or legal representatives. These are, *prima facie*, a breach of the Covenant. Indeed, incommunicado detention has also been held to amount to cruel, inhuman or degrading treatment under analogous provisions of the American Convention on Human Rights because it increases a detainee's psychological suffering and makes him/her more vulnerable to aggression or other arbitrary acts.⁴⁵ If a valid derogation applies, there should nevertheless be available an effective remedy so that at least a complaint may be made about this, pursuant to Article 2(3). Moreover, the UN Human Rights Committee has stated that even though Article 10 is not mentioned specifically as a non-derogable right in Article 4, because of its close connection with Article 7 (the prohibition on torture), it 'expresses a norm of general international law not subject to derogation'.⁴⁶ The Committee has also stated that the procedural rights in

⁴⁵ *Castillo Petruzzi et al Case*, Inter-American Court of Human Rights, Series C, No 52, 30 May 1999.

⁴⁶ General Comment No 29, n 39 above, paragraph 13(a).

Article 14 apply to all courts, including special courts.⁴⁷ In addition, apart from the ICCPR, there are recognised international standards in other instruments from which there is no provision for derogation and which appear to have been breached. The *Standard Minimum Rules for the Treatment of Prisoners* provides in paragraph 37 that all prisoners shall be allowed to communicate with their families and reputable friends and paragraph 44(3) provides that every prisoner has the right to inform his family at once of his imprisonment or his transfer to another institution. The latter right particularly applies to detainees who are awaiting trial (paragraph 92). Both of these guidelines for minimum treatment appear to have been breached in Nepal. In addition, the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that anyone arrested shall be informed at that time of the reasons for the arrest and of the charges (Principle 10), the right to an effective opportunity to be heard promptly by a court and to be assisted by counsel (Principle 11), the obligation on the arresting authority to record the reasons, time and place of the arrest, as well as the law enforcement officials concerned and the place of custody, and for this record to be communicated to the detained person or his counsel (Principle 12). In addition, a record should be kept of the identity of officials conducting interrogations of a detained person, who has the right, along with their counsel, to access this information (Principle 23). Failure to notify the family or counsel of the detainee can only be based on the exceptional needs of the investigation (Principle 16) and in any event cannot extend longer than a matter of days (Principle 15). In particular, the right to communicate with legal counsel can only be suspended or restricted in exceptional circumstances when it is considered indispensable to maintain security and order (Principle 18). Legal proceedings under domestic law to challenge the lawfulness of the detention in order to obtain release must be expeditious (Principle 32). Preventive or investigative detention should only occur under a written order of the relevant authority after the detainee has been brought before that authority (Principle 37). A detained person should be kept in detention reasonably near their usual place of residence (Principle 20). These provisions

⁴⁷ General Comment No 13, 13 April 1984, paragraph 4.

are not binding as a treaty but they are recognised elaborations of the rights under the ICCPR and their effect endorsed by UN General Assembly Resolution 45/111 (14 December 1990) (Basic Principles for the Treatment of Prisoners).

- 4.40 There are also health rights that appear to have been breached. Under paragraph 87 of the *Standard Minimum Rules*, a detainee who is still awaiting trial may have their food procured at their own expense from outside the detention centre. This does not appear to have been accorded to Mr Mainali, who the delegation observed to be having problems with prison food as a result of his diabetes. In addition, an untried prisoner shall be allowed to be visited and treated by his own doctor if it is reasonable to allow this and the prisoner is prepared to pay (paragraph 91). While Mr Mainali was provided medical treatment for his condition, it did not appear that he had been allowed treatment by his own doctor.
- 4.41 Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence at the time when it was committed. This right is non-derogable, even in times of emergency (Article 4(2)). The reports of lawyers and others being detained because of former alleged sympathies or connections with Maoists at a time when this was not unlawful would be a breach of this human right.
- 4.42 Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with privacy. The Human Rights Committee has held that even if such interferences are done according to legislation (such as the TADA) that legislation must specify in detail the precise circumstances in which the interference is permitted.⁴⁸ Again, ‘fishing expeditions’ are unlawful. In this regard, the seizure of a lawyer’s files in order to search for evidence of Maoist sympathies would be a breach of the Article. This Article is derogable under

⁴⁸ General Comment No 16, 8 April 1988, paragraph 8.

Article 4 in times of emergency, but again there must be an effective remedy to at least raise allegations of breach and seek redress.

4.43 The right to peaceful assembly (Article 21) and to freedom of association (Article 22) are both subject in the ICCPR to restrictions prescribed by law which are necessary in a democratic society in the interests of national security or public safety. Therefore, such restrictions applied under the TADA appear to be within these allowable restrictions on the right. However, there should be the ability to challenge in an effective way whether such restrictions are necessary in the circumstances. That right is itself not derogable. To that extent, Nepal may be in breach of its international obligations.

4.44 Restrictions on media coverage of Maoist activity may be subject to Article 19 which provides that everyone has the right to hold opinions and to seek, receive and impart information unless restrictions are necessary for the protection of national security or public order. The Human Rights Committee has stressed that restrictions on this right must be linked to the ‘necessity’ criterion in the Article and must be ‘provided by law’.⁴⁹ As section 12 of the TADA specifically provides that this right is not to be abrogated, even in terrorist-influenced areas, media restrictions appear to be a breach of Nepal’s human rights obligations.

Other Remedies

Torture Compensation Act 1996

4.45 The *Torture Compensation Act* provides for compensation to be paid to the victims of torture and to the relatives of people who die in custody as a result of torture. Torture is defined as including cruel, inhuman and degrading treatment. Victims of torture, the delegation was told, are reluctant to seek compensation for fear of further victimisation. The Act gives the judge power to direct the concerned authority to take disciplinary action against the officers involved, but there is no obligation placed on the government department concerned to report back to the court or to any other authority on the action

taken. The maximum amount of compensation set by the Act is 100,000 Nepali Rupees (about £650). Where the Act has been applied, the delegation was told, the Government has paid that part of the compensation that should be paid by the torturer and his superior officer as part of their punishment. This remedy, to the extent that it is available, is not effective as required by Nepal's international human rights obligations.

Follow-Up Committee

4.46 As noted earlier, the TADA establishes a Follow-Up and Co-ordination Committee to which any person can apply who is aggrieved by the conduct of the security forces in an investigation under the TADA. Given the suspension of the rights listed above, it appeared all the more troublesome to the delegation that the Follow-Up Committee appears moribund. The delegation was told that no Chair had been appointed at the time of the mission (June 2002) and the Committee had not met. This is not an effective remedy as required by Nepal's international human rights obligations.

Habeas Corpus

4.47 To a great extent, *habeas corpus* is not being used and, where it is used, the process is slow and inefficient. As described above, some lawyers are fearful of bringing *habeas corpus* petitions lest they be marked as pro-Maoist by the security forces. Moreover, in many cases there is ignorance in the general population of the existence of *habeas corpus*. Time is of the essence in *habeas corpus* petitions but such petitions before the Supreme Court appear to make slow progress. Some lawyers suspect that the courts are deliberately slowing down these cases because that is what they know or think the authorities want. This is vigorously denied. The delegation was of the view that the judges and lawyers between them should be able to speed up the process. The Chief Justice cited a recent occasion when no less than 55 lawyers had demanded the right to be heard in the 12 *habeas corpus* cases

⁴⁹ General Comment No 10, 29 June 1983.

before the Supreme Court. Some lawyers had allegedly used the occasion to make a political speech, rather than to argue the case of the petitioner for whom they were appearing. This could be a pattern that explains in part the reason for the delay in *habeas corpus* proceedings. In any event, it is unacceptable that these petitions are still not decided for periods up to 9 months. This essential remedy is therefore not as effective as it should be and as is required by Nepal's human rights obligations.

Conclusions

- 4.48 All of the concerns of the delegation, namely: arrest without warrant; arrest without charge; detention incommunicado where relatives or legal representatives cannot ascertain the place of detention; lengthy detention periods before formal charges are laid; treatment in detention relating to alleged physical abuse, hooding/blindfolding, and lack of adequate health care; lengthy periods before *habeas corpus* applications are heard and determined; and interference with professional files/records are *prima facie* a breach of Nepal's international human rights obligations.
- 4.49 In contravention of Article 4(3) of the ICCPR, Nepal appears to have failed to have lodged the necessary notification to the Secretary-General of the United Nations of its state of emergency and intention to derogate from certain human rights provisions.
- 4.51 Even in those circumstances where derogations to international human rights obligations are possible in times of public emergency, Nepal is breaching its international obligations to implement properly and apply effective remedies for redress of arbitrary actions, especially with respect to *habeas corpus*.
- 4.52 The Follow-Up Committee is moribund and unable to fulfil its role in protecting individuals from abuse by the security forces.
- 4.53 There would appear to be unreasonable restrictions on freedoms of expression and the media in contravention of Article 19 of the ICCPR.

- 4.54 There is a lack of knowledge among Nepalese citizens as to the availability of remedies for the breach of fundamental rights. Even among those who are familiar with their legal rights there is fear of repercussions and a lack of confidence that the available remedies function as intended.
- 4.55 *Habeas corpus* applications are ineffective in part because of the inordinate delay in the procedure. The delegation concluded that whatever the reasons for the delay this must be addressed by the Chief Justice as a matter of urgency and, if necessary, in collaboration with representatives of the legal profession.

Recommendations

1. The Government of Nepal should seriously review its obligations under the Torture Convention and the ICCPR. This could be effected by Nepal fulfilling its reporting obligations under these treaties, as reports under both are now several years overdue.
2. All levels of the Government and the legal profession, in particular the Nepal Law Society and the Nepal Bar Association, should review the impact of section 9 of the Nepal *Treaty Act*.
3. A Chair of the Follow-Up Committee established under section 13 of the TADA should be appointed as a matter of urgency.
4. All relevant authorities should review the powers of the special court and the Follow-Up Committee to ensure that remedies under the TADA are effective, as required by international human rights obligations.
5. All relevant authorities should review the mechanisms by which the preventive detention under section 9 of the TADA is effected, so that it is in accordance with both Nepalese domestic law and Nepal's international human rights obligations.
6. All relevant authorities should consider the mechanisms by which detention under section 17(5) of the TADA is effected to determine their lawfulness.
7. All relevant authorities should examine the effectiveness of *habeas corpus* applications, particularly with respect to the availability of legal counsel and

delays in court. As a matter of urgency, the Chief Justice should explore the reasons for the delay in *habeas corpus* proceedings. Consideration should be given to discussions between the Bar, the Chief Justice and other senior judges, which should identify what needs to be done. Their joint recommendations should be implemented without delay. Consideration should be given to the filing and deciding of *habeas corpus* cases in Appellate Courts with arrangements for lawyers to travel to remote areas for this purpose.

8. The Bar should reassure citizens that the Bar leadership will be alert for any victimisation resulting from a *habeas corpus* case and will pursue redress through every legal means. Where lawyers are afraid to take cases, provision should be made for representations from lawyers without the same level of risk or anxiety.
9. The IBA should give consideration to sending observers to *habeas corpus* hearings now before the Supreme Court of Nepal.
10. All relevant authorities should ensure that the legal profession and all authorities dealing with the TADA (including the security forces) are educated in the proper role of lawyers, particularly with respect to access to legal services, the performance of professional functions, security in carrying out professional functions, and non-identification of lawyers with their clients or their clients' causes, along the lines of the *Basic Principles on the Role of Lawyers 1990*.
11. The security forces should be trained in the human rights obligations they owe to detainees, particularly as found in the Torture Convention, the ICCPR, the *Standard Minimum Rules for the Treatment of Prisoners* and the *Code of Conduct for Law Enforcement Officials 1979*.
12. The legal profession should ensure that all Nepali citizens, including the members of the legal profession itself, avail themselves of their rights, including the opportunity provided by the *Torture Compensation Act*. The Bar leadership should be alert to victimisation of persons seeking compensation and should be forthright in letting the security forces know that the Bar will lead the legal fight for redress in case of victimisation.
13. All relevant authorities should investigate, identify and rectify the factors, including systemic issues, leading to unreasonable restrictions on the media,

contrary to section 12 of the TADA, the Constitution of Nepal, and Nepal's human rights obligations.

14. Some regular liaison accompanied by a process of scrutiny should be encouraged between officers of the police and the Royal Nepalese Army and the Bar to help ensure that lawyers will not be victimised for bringing a *habeas corpus* petition and to inform the bar leadership when a member of the legal profession has been detained. For this purpose, the President of the Nepal Bar Association should consider establishing a 'hotline' with the Inspector General of Police and the Chief of the Army Staff so that the arrest of a lawyer may be notified to him or her promptly, together with the reasons for the arrest and the place of custody.
15. The Nepal Law Society and the Nepal Bar Association should arrange Bar meetings at which international speakers address topics such as *habeas corpus*, the separation of powers between the Executive/Army/police, the legislature and the courts within the Constitution of Nepal. Senior politicians, judges, senior Army and police officers and diplomats should be invited, illustrating to all the universal importance and applicability of these matters and the national obligation to uphold basic rights.

CONCLUSION

Since the IBA mission to Nepal in June, 2002, the state of emergency has been lifted, but hundreds of people have been killed in the hostilities. The situation remains both serious and highly volatile. In such situations, human rights and the rule of law are needed more, not less.

Nepal has an outstanding record for ratifying human rights treaties. It also has the mechanisms already in place, through its *Treaty Act*, to incorporate those treaty obligations into its domestic law. It further has a Constitution with a considerable focus on the protection of human rights and the guarantee of *habeas corpus*. The processes for the protection of human rights are therefore in place, but unfortunately they are underused.

Lawyers continue to be detained. The legal profession is truly in the cross-fire, both metaphorically and literally. The balance between the legitimate concerns of state security with human rights standards is a difficult one to achieve at the best of times. In the worst of times it is an almost impossible task, but one from which no country may shirk.

Fundamental to achieving this balance are an independent judiciary and bar which are free from harassment, effective remedies through the application of the Constitution and incorporated human rights norms, and a free media.

It is to be hoped that the balance between competing priorities struck by Nepal is one which can truly lead the nation to peace and justice through the rule of law to a strong democracy.

APPENDIX 1

About the International Bar Association

– The global voice of the legal profession

In its role as a dual membership organisation, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organisations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

Grouped into three Sections – Business Law, Legal Practice, and Energy & Natural Resources Law – more than 60 specialist Committees provide members with access to leading experts and up-to-date information as well as top-level professional development and network-building opportunities through high-quality publications and world-class Conferences. The IBA's Human Rights Institute works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

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APPENDIX 2

List of lawyers known to the IBA who have been arrested and detained

Saligram Saopkoto, arrested on 12 April 2002 without a warrant.

Tika Jung Shingh, former Vice president of the Nepal Bar Association. Arrested 29 May 2002 without warrant.

Loin Bahadur Topa, exact date of arrest unknown, believed to be around 20 December 2001. Detained under a preventative detention order.

Uddhob Kofle, exact date of arrested unknown.

Dharmo Achorya, arrested sometime before 12 April 2002. detained under a preventative detention order.

Ramnath Mainali, arrested 14 March 2002. Now released.

Padani Boidik, arrested twice by the army. On first occasion was detained for 48 hours. After a two week period he was re-arrested and detained again for two months. He has since been released.

Balkuntha Dahol, Arrested by the police immediately after the declaration of a state of emergency on 26 November 2001. Released after approximately five months in prison.

Khimlol Devkota, arrested on 11 June 2002 on his way to court. His status remains unclear.

Tirtho Khatiwada, arrested 16 February 2002. Released

Lawyers arrested since the return of the IBA mission

Krishna Prasad Pokhrel, arrested 24 July 2002.

Raman Kumar Shrestha, 23 August 2002.