



Sir Nigel Rodley
Chairperson, Human Rights Committee
Office of the High Commissioner for Human Rights
UNOG-OHCHR
CH-1211 Geneva 10
Switzerland

13 February 2014

Dear Sir Nigel,

110th SESSION OF THE HUMAN RIGHTS COMMITTEE – CONSIDERATION OF NEPAL’S SECOND PERIODIC REPORT

We are writing in relation to the examination of Nepal’s second periodic report during the upcoming 110th session of the Human Rights Committee from 10 to 28 March 2014.

In the attached submission, we are providing additional information in response to the Committee’s list of issues to be considered during the examination of Nepal’s second periodic report.¹

The co-signatories of this submission, Advocacy Forum – Nepal (Advocacy Forum), the Redress Trust (“REDRESS”) and the Association for the Prevention of Torture (“APT”) are non-governmental organisations, which work in the field of international human rights protection in Nepal, based in Kathmandu, London and Geneva, respectively.

Advocacy Forum and REDRESS have jointly assisted and are continuing to assist individual victims of human rights violations in Nepal in bringing their grievances to the attention of the Human Rights Committee by way of individual communications lodged under article 2 of the First Optional Protocol to the International Covenant on Civil and Political Rights, and in preventing torture.

This submission seeks to identify the systemic problems in legislation and practice in Nepal in response to the critical points highlighted and the questions posed by the Committee in the List of Issues and Conclusions and Recommendations on Nepal’s initial report.² Where relevant, the submission also refers to the Universal Periodic Review of Nepal of January 2011.³

¹ United Nations, ‘List of issues in relation to the second periodic report of Nepal’, (21 August 2013), UN Doc CCPR/C/NPL/Q/2.

² United Nations, ‘Report of the Human Rights Committee’, (3 October 1995), UN Doc A/50/40, paras 60-78, available at

For ease of reference, we follow essentially the same order as the list of issues.

Yours sincerely,



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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f50%2f40&Lang=en

³ United Nations, 'Report of the Working Group on the Universal Periodic Review. Nepal' (8 March 2011), UN Doc A/HRC/17/5, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>.

SUBMISSION TO THE HUMAN RIGHTS COMMITTEE AHEAD OF ITS EXAMINATION OF NEPAL'S SECOND PERIODIC REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

February 2014



ADVOCACY FORUM-NEPAL
एड्भोकेसी फोरम नेपाल
Lawyers Forum for Human Rights & Rule of Law

REDRESS

Ending Torture. Seeking Justice for Survivors



association for
the prevention
of torture

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1 INTRODUCTION

1. This briefing provides a summary of concerns ahead of the Human Rights Committee's examination of Nepal's second periodic report during the 110th session of the Human Rights Committee from 10 to 28 March 2014.
2. This examination takes place while impunity for past and current human rights violations continues to prevail, torture in police custody is systematic, the National Human Rights Commission is weakened after recent changes in its statute and the criminal justice system is in need of reform. We suggest a number of critical areas to be addressed to improve Nepal's implementation of the Covenant, and to enable the enjoyment of rights it guarantees by those within its jurisdiction.

2 CONSTITUTIONAL AND LEGAL FRAMEWORK (ARTICLE 2)

Summary

3. Though Nepal has been a party to many of the main human rights treaties since the early 1990s, and reference is made to international human rights obligations in its interim Constitution of 2007, numerous key provisions of the Covenant have not been incorporated into national law. Nepalese courts (particularly the Supreme Court) regularly take Nepal's international obligations, including those under the Covenant, into account in their judgments, and regularly order the Government to take specific steps to uphold its obligations. However, the Government has singularly failed to implement the majority of these decisions. The National Human Rights Commission (NHRC), National Women Commission and National Dalit Commission lack independence and resources and there are serious problems with the implementation of their recommendations.

2.1 Constitution drafting process

4. Following more than six months under a caretaker government, a new Constituent Assembly was elected in November 2013. It has been tasked with agreeing a new Constitution to replace the interim Constitution drawn up at the end of the conflict in 2006.
5. The first Constituent Assembly (between May 2008 and May 2012) failed to agree on a new Constitution. The leaders of the main political parties created a political mechanism called the 'high level political committee' on top of the sovereign parliament, which hijacked the process ultimately failing to deliver the Constitution.
6. We urge the Human Rights Committee to use this opportunity to provide recommendations to the State Party on ways to enshrine human rights protection, particularly those guaranteed in the Covenant, in that new Constitution, and to ensure that the process for its drafting and adoption is transparent, participatory and representative and no political mechanism is created to bypass the legitimate and sovereign parliament.

2.2 Amending the legal framework

7. This report describes how Nepal's legal framework is deficient in many ways, leading to impunity for serious human rights violations, and to the commission of human rights violations. It focuses on violations of the right to life, the right to be free from torture and other ill-treatment, the right to a fair trial and the right to liberty. As such, many of the

deficiencies can and should be addressed through a thorough reform of the criminal justice legislative framework.

8. Bills for a new Penal Code and new Criminal Procedure Code and a Sentencing bill were tabled in the Legislative-Parliament in 2011 but were not passed before the Constituent Assembly was dissolved in May 2012. The bills were a significant improvement on the current legislation, although they did still raise concerns from a human rights perspective, some of which are discussed further below.¹ At the time of writing, the new Constituent Assembly has recently convened, and is focussing on the Constitution drafting process.
9. The new government, once established, should undertake a review of the 2011 draft laws to ensure that they uphold its obligations under international human rights treaties including the Covenant and prioritise their tabling. Their enactment would strengthen the criminal justice system in Nepal and make the legal framework more compatible with the ICCPR and other treaty obligations.
10. **However, the organisations stress that a number of urgent amendments to the currently existing criminal justice framework, found predominantly in the *Muluki Ain*, or national code of 1964, should not wait for the passage of the new Penal Code, Criminal Procedure Code and Sentencing Bill, as this is likely to take a significant amount of time. These issues – including criminalisation and ensuring reparation for torture, enforced disappearance and crimes against humanity and war crimes, repeal of discriminatory limitation periods, and reform of Chief District Officers’ powers (see further on each below) – should be addressed by stand-alone legislation.**

LOI 18

2.3 The National Human Rights Commission (NHRC)

Summary

11. The NHRC’s investigative role has long been hampered by a lack of cooperation especially from the army during the armed conflict.² Once the NHRC was made a constitutional body under the Interim Constitution of 2007, there were hopes that it would be able to conduct more effective investigations independent from political and executive interference. However, a new law introduced in 2012 has instead weakened this critical institution for human rights protection.

LOI 1

The National Human Rights Commission Act

12. The **National Human Rights Commission Act**, adopted in January 2012,³ curtails the independence and jurisdiction of the NHRC, reducing it to an administrative branch of the state rather than a constitutional body that functions as the effective watchdog for upholding human rights in Nepal. It is notable that the Government of Nepal does not mention the January 2012 law and its implications on the functioning of the NHRC in its second periodic report to the Committee.
13. It is also important that the NHRC is afforded sufficient functional independence, as required by the Paris Principles. The Commission should be able to recruit its own staff, including its Secretary. The new Act, however, provides for the appointment of the

¹ For an analysis of aspects of this Bill see: Advocacy Forum and REDRESS, ‘Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence’, April 2011, available at: http://www.redress.org/downloads/publications/AFRedress_Report_on_Draft_Legislation.pdf.

² Human Rights Watch and Advocacy Forum, ‘Waiting for Justice. Unpunished Crimes from Nepal’s Armed Conflict’, p 38, available at: <http://www.advocacyforum.org/downloads/pdf/publications/waiting-for-justice-sep-10.pdf>.

³ National Human Rights Commission Act, 2068 (2012), available at: [http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/National-Human-Rights-Commission-Act-2068-\(2012\)/](http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/National-Human-Rights-Commission-Act-2068-(2012)/).

NHRC's Secretary by the government, thereby politicising the position and seriously jeopardising the Commission's independence.

14. The new law also introduced a time limit of six months for lodging of complaints (Article 10(5)). This prevents victims from lodging complaints about human rights abuses committed during the 1996-2006 armed conflict and unduly limits the time within which victims of serious violations such as torture can pursue remedies before it. This is a retrograde measure given the repeated concerns raised about unduly short statutes of limitations in Nepalese laws (see further below).
15. Section 17 (10) of the Act is also of concern. It explicitly gives the Attorney General the power not to implement certain NHRC recommendations, namely that the government initiate legal action against alleged perpetrators of human rights violations, as long as the NHRC is informed in writing about the reasons for non-implementation.
16. On 6 March 2013, the Supreme Court declared Sections 17(10) (non-implementation) and 10(5) (six month time limit) of the National Human Rights Commission Act, 2012 null and void. The judgment means the Attorney General now must follow NHRC recommendations as per Section 17(5) of the Act, if the NHRC recommends legal action against alleged human rights violators. The legislation has not yet been amended to reflect this ruling, and particularly given the government's history of non-compliance with NHRC recommendations (see further below) this should be done as a priority.

Key questions

What steps has Nepal taken or is planning to take to review the January 2012 NHRC Act and bring it in line with the Paris Principles and the March 2013 Supreme Court judgment?

Appointment of Commissioners

17. The tenure of all the commissioners of the National Human Rights Commission (NHRC) lapsed on 16 September 2013, rendering the constitutional human rights body leaderless and literally dysfunctional. In the situation at the time, with no functioning parliament (which normally would hold a hearing and public consultations for new Commissioners' appointments) and the country heading towards polls, it was technically difficult to make new appointments. Now that elections have been held and a new parliament is in place, appointments to the NHRC should be a priority.
18. To date, the appointment of new Commissioners has been the subject of political horse-trading. This has seriously damaged the legitimacy of the commission. Advocacy Forum, Redress and APT urge that the appointment of Commissioners should be done immediately, following an open and transparent procedure as per the Paris Principles. Once appointed, it is important that the Commission plays its constitutional role and receives adequate and necessary support from the government for its day-to-day operation.

Key questions

When will Nepal appoint new Commissioners and will it ensure the Human Rights Committee that the appointments will be made following an open and transparent procedure, without political deal-making, and that Commissioners will be representative of the Nepali human rights community, including women and people from minorities?

(In the event new Commissioners have been appointed prior to the 110th session of the Human Rights Committee: Can Nepal ensure the Committee that new Commissioners were appointed after a transparent process, and ensure the Committee of the Commissioners' independence?)

Can the Government of Nepal give an undertaking to ensure the Secretary to the NHRC is to be recruited by the Commission, fully independent from the government?

Failure to implement recommendations of the NHRC

19. The NHRC's recommendations to the government are rarely implemented, despite repeated calls from civil society and the NHRC itself. A July 2011 NHRC report shows that out of a total of 464 recommendations, the Government had fully implemented 18 policy recommendations, and 121 other recommendations, but was yet to implement the remaining 325 recommendations.⁴ Most of those recommendations that remain unimplemented are for legal action to be taken against alleged human rights violators associated with the security forces and those affiliated to various political parties.⁵
20. The reason for the weak and inadequate implementation of recommendations of national institutions such as the NHRC is the general culture of impunity in the country. The NHRC itself has suggested, in the context of its summary report on the status of implementation of its recommendations made during the conflict, that the culture of impunity has often been aided by politicians, as links between crime and politics have increased.⁶

Key questions

Can the government provide assurances that it will implement the recommendations of the NHRC, including for those against whom there is sufficient evidence of involvement in serious crime to be brought to justice?

Will the government also ensure that the NHRC has clear powers to refer cases for prosecution directly to the Attorney General's Office, either through an amendment to the law or a policy directive?

⁴ Human Rights eBulletin, National Human Rights Commission of Nepal, Volume 6, Issue 11, May 2011, available at: http://nhrcnepal.org/nhrc_new/doc/newsletter/E-bulletin-Vol6-11.pdf.

⁵ Interview with then NHRC commissioner Gauri Pradhan, November 2012.

⁶ NHRC Newsletter, 'Summary Recommendations Upon Complaints in a Decade (2000-2010)', November 2010, available at: http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Sum-Report-NHRC-Recommendation.pdf.

2.4 Failures to implement decisions of Courts and the Human Rights Committee on human rights issues

Failure to implement Court judgments

21. The Human Rights Committee has requested the government to provide examples of the application of the ICCPR by the Nepalese courts. The Supreme Court of Nepal and lower courts regularly apply the Covenant and other international human rights standards. For example, in its landmark judgment of June 2007, the Supreme Court directed the government to criminalise enforced disappearances, based on its obligations under the Covenant and other international human rights treaties.⁷ In December 2007 the Supreme Court issued a detailed judgment ordering the government to criminalise torture.⁸ In addition, the court has in scores of cases directed the police to investigate criminal complaints related to disappearances and extrajudicial executions during the armed conflict, and in some cases has ordered the prosecution of alleged perpetrators. With the exception of one case where the suspect (an army deserter) was acquitted in a murder trial before the Kavre district court in December 2013, none of these have yet been implemented (see further paragraph 39).
22. Lack of political will and weaknesses in and lack of independence of the main institutions of the criminal justice system – the Nepal Police and Attorney General’s Department – are among the main causes of this lack of implementation. In May 2009, the then Chief Justice Min Bahadur Rayamajhi introduced some encouraging reforms, including on the establishment of a Court Decisions Enforcement Directorate. Though the name suggests that the Enforcement Directorate would seek to enforce decisions, it has been restricted to mere monitoring of whether or not decisions are implemented.

LOI 2

Key question

What steps is the government taking to ensure prompt and full implementation of the many judgments of the Supreme Court directed to the legislature, executive, and criminal justice bodies whose implementation remains outstanding?

Failure to implement views of the Committee

23. The State Party has also consistently failed to implement the views of the Human Rights Committee in any of the individual communications concluded under the Optional Protocol, and to comply with its obligation to provide a remedy to those the Committee has recognised as victims of violations. To date the Committee has adopted Views in five complaints concerning Nepal: *Sharma v Nepal*,⁹ *Sobhraj v Nepal*,¹⁰ *Giri v Nepal*,¹¹ *Maharjan v Nepal*,¹² and *Sedhai v Nepal*.¹³ Advocacy Forum, with the support of REDRESS, represents

⁷ *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khil Raj Regmi and Hon. Justice Kalyan Shrestha issued on 18 Jestha 2063 (2007). For an unofficial translation of the judgment, [http://www.icrc.org/ihl-nat.nsf/0/5eab6202e55a6ff3c125753f003a5722/\\$FILE/Decision%20of%20the%20Supreme%20Court%20on%20Disappearance%20Case.PDF](http://www.icrc.org/ihl-nat.nsf/0/5eab6202e55a6ff3c125753f003a5722/$FILE/Decision%20of%20the%20Supreme%20Court%20on%20Disappearance%20Case.PDF)

⁸ *Rajendra Ghimire v. The Government of Nepal*, Supreme Court of Nepal, Judgment of 17 December 2007. See excerpts of the judgment at p. 79 of Coalition against Torture, ‘Criminalize Torture’, 26 June 2009, available at: <http://www.advocacyforum.org/downloads/pdf/publications/criminalize-torture-june26-report-english-final.pdf>.

⁹ No. 1469/2006, CCPR/C/94/D/1469/2006 (28 October 2008).

¹⁰ No. 1870/2009, CCPR/C/99/D/1870/2009 (27 July 2010).

¹¹ No. 1761/2008, CCPR/C/101/D/1761/2008 (27 April 2011).

¹² No. CCPR/C/105/D/1863/2009 (19 July 2012).

the victims in each of the cases except *Sobbraj*. As reported by Advocacy Forum in a letter to the Committee on 20 March 2013, in none of these cases have the Committee's views been implemented – the only action that has been taken is the provision of small monetary payments as 'interim relief', in line with the State Party's general policy towards victims of human rights violations. This demonstrates not only a continuing violation of the victims' rights, but also a failure to cooperate with the Committee and to uphold Nepal's treaty obligations in good faith. (For more details on the decisions of the Committee, and the lack of implementation of its views, **see separate report in Annex 1.**)

Key question

Will the State Party introduce legislation mandating and providing a procedure for implementation of the views of UN treaty bodies in individual communications?

3 IMPUNITY FOR SERIOUS CRIMES AMOUNTING TO HUMAN RIGHTS VIOLATIONS (SEE ALSO ARTS. 2, 3, 6, 7, 9, 10, 16, 19, 21 AND 26)

24. Nepal has a long legacy of serious human rights violations by military, police and armed groups.¹⁴ Despite stated political commitments to accountability, impunity for these violations remains the norm. Commissions of Inquiry have been established, including the Mallik Commission formed after the democratic movement of 1990 and the Rayamajhi Commission formed in 2006 after ten years of internal armed conflict, but no individuals have been prosecuted as a result of their findings. Transitional justice mechanisms have been promised, but after a long delay are being established in clear violation of international standards. Police have been slow to investigate crimes, where courts make orders for cooperation or investigation these are generally not followed, and the military and some leading political figures appear to be keen to obstruct justice rather than promote it.
25. Accountability for abuses from the conflict period has a real significance for the sustainability of peace, for human rights, and for the consolidation of democratic institutions and the rule of law in Nepal. As the OHCHR in Nepal warned:
- Persistent impunity for human rights violations has had a corrosive effect on rule of law institutions and has further damaged their credibility. Impunity has contributed directly to widespread failings in public security by sending a message that violence carries no consequences for the perpetrator. Nepal has relatively independent rule of law institutions, but they remain vulnerable to political pressure and manipulation and are in need of support.¹⁵
26. The failure to address past violations, and wilful failure to support and cooperate with judicial processes, puts the consolidation of peace on shaky foundations. Impunity for serious human rights violations is therefore the single most serious human rights problem in Nepal.

LOI 3

¹³ No. CCPR/C/108/D/1865/2009 (28 October 2013).

¹⁴ For the Committee's concerns in this regard during the last periodic review see Human Rights Committee, 'Concluding Observations on Nepal', 10 November 1994, CCPR/C/79/Add.42, para. 10.

¹⁵ Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal', 5 February 2010, UN Doc. A/HRC/13/73, para. 27, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/13/73&Lang=E>.

3.1 Flawed transitional justice process and mechanisms

27. Both sides to Nepal's decade-long internal armed conflict (1996-2006) were involved in serious human rights violations. It is estimated that the conflict claimed around 17,265 lives, and resulted in 4305 disabled, 78,675 dispossessed and displaced, thousands of civilians tortured and hundreds of women and girls victims of rape and other forms of sexual violence. The whereabouts of 1302 individuals is still not known.¹⁶
28. The Comprehensive Peace Agreement signed by the parties to the conflict in 2006 made a large number of references to human rights, promised to address impunity and establish accountability for human rights violations and included provisions on the formation of transitional justice mechanisms.
29. However, rather than a mechanism to achieve peace and justice, civil society has significant concerns that transitional justice mechanisms are being used as a vehicle to amnesty for gross violations of human rights. This concern is informed by the recent history of the failure of earlier commissions of inquiries, including the Mallik Commission and Rayamajhi Commission, to prosecute those responsible for human rights violations and other abuses.¹⁷
30. In March 2013, six years after the end of the conflict, the President promulgated an Ordinance to establish a Commission on Investigation on Disappeared Persons, Truth and Reconciliation. Its text was adopted after negotiations between major political parties behind closed doors, without the involvement of victims, and falls far short of international standards.¹⁸
31. One of the most worrying features of the 2013 Ordinance was the power granted to the TRC to provide amnesty to suspected perpetrators, including in relation to serious human rights violations under international law.¹⁹
32. The constitutionality of the ordinance was challenged before the Supreme Court, and on 2 January 2014, the court held that there must be two separate commissions (a Truth and Reconciliation Commission and a Commission focused on disappearances), that the new laws should not include blanket amnesty provisions, and that any procedure for amnesty to be granted should include a process of consultation with the victims or their families and require their consent.²⁰
33. The court further said that the provision in Clauses 25 and 29 of the ordinance to keep prosecution of those involved in serious cases of human rights violations of the conflict era under the discretionary jurisdiction of the executive could deny dispensation of justice, and ordered the government to amend the provisions in line with the constitution and other laws. It also directed that any new laws should be drafted with the assistance of an expert team comprising conflict experts, representatives of the organisations of conflict victims, human rights organisations, legal experts and others concerned.²¹

¹⁶ See Advocacy Forum, 'Nepal: Transitional Justice at the Crossroads', January 2014, p. 3.

¹⁷ See further *ibid.*

¹⁸ OHCHR, 'Pillay says Nepal commission must not grant amnesty for serious human rights violations', 20 March 2013, available at:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13163&LangID=E> and Asian Centre for Human Rights, Human Rights Watch, International Commission of Jurists and TRIAL, 'Nepal: Truth & reconciliation law betrays victims', 22 March 2013, available at: <http://www.hrw.org/node/114432>.

¹⁹ Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission – 2069 (2013), Clause 23, available at: <http://www.simonrobins.com/missing/wp-content/uploads/2013/02/Nepal-TRC-Ordinance.pdf>.

²⁰ Republica, 'SC rejects TRC ordinance over blanket amnesty', 3 January 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287.

²¹ See Kantipuronline, 'Form separate commissions on transitional justice: SC', 2 January 2014, available at: <http://www.kantipuronline.com/2014/01/02/top-story/form-separate-commissions-on-transitional->

34. The Supreme Court judgment sets out the framework for the new government to implement, particularly by introducing legislation for the establishment of the TRC and Disappearances Commission fully in line with international standards.
35. In direct defiance of the Supreme Court's order, the government introduced the Ordinance unchanged, as a bill, into parliament on 29 January 2014. This undermines the rule of law in the country, and – if passed – would contravene Nepal's obligations under the Covenant.
36. **The organisations strongly recommend that Nepal:**
- allow the Ordinance on the Truth and Reconciliation Commission to lapse.
 - immediately set up a High-level transitional justice task force, comprised of relevant government officials, NHRC, political parties, human rights activists and victims' representatives. The task force should devise and publish a detailed operational calendar for the transitional justice process. This is especially important because a clear relationship between the TRC and the Disappearances Commission is crucial towards achieving any of the goals for both the commissions. Lack of clarity regarding this relationship would endanger the functioning of both the commissions due to the risks of overlaps and duplication. It is also important to keep the process less influenced by political developments and to avoid prolongation of the process in the name of Constitution drafting.
 - prepare a plan of action to implement all the relevant Supreme Court decisions related to transitional justice and draft legislation for two commissions in line with them, and prepare grounds for the eventual setting up of the Truth and Reconciliation Commission and Disappearances Commission.
 - start expert consultations to develop legal and policy frameworks for vetting and amnesty.
 - start expert consultations and enact laws and policies to start investigation and prosecution in the cases of gross human rights violations and to ensure victims access to justice,
 - establish a team to investigate and implement reforms of the currently dysfunctional system for dealing with complaints by victims suffering gross human rights violations.
37. Given the failure to implement and direct defiance of court orders and the recommendations of the previous commissions of enquiries, victims and civil society organisations have lost confidence and have well-founded doubts whether any future Truth and Reconciliation Commission's and Disappearances Commission's recommendations will be implemented.
38. **To further victims' confidence in the process, the government should:**
- initiate prosecutions on emblematic cases where the court has issued arrest warrants or mandamus orders.

[justice-sc/383311.html](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287) and Republica, 'Supreme Court rejects TRC Ordinance over blanket amnesty', 2 January 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287.

Key questions

Will the State Party withdraw the bill on a Truth and Reconciliation Commission which is currently before the Legislative Parliament?

Will the State Party set up a task force to devise a detailed operational calendar for the transitional justice process and to prepare a plan of action to implement the relevant Supreme Court decisions?

Will the State Party introduce new legislation for the establishment of a TRC and Disappearances Commission in line with the 2 January 2014 Supreme Court judgment and ensure it meets its treaty obligations to uphold the rights of victims to truth, justice and reparation?

Will the State Party guarantee that no amnesties will be granted in respect of serious human rights violations, through the TRC or otherwise?

Will the State Party start expert consultations to develop a framework for dealing with complaints brought by victims of serious crimes amounting to human rights violations?

Will the State Party initiate investigations and prosecutions into past cases where the Court has issued arrest warrants or mandamus orders and where the Committee has found violations of the Covenant?

3.2 Transitional justice mechanisms used by criminal justice authorities to refuse to investigate and prosecute

39. The concerted attempts to divert cases to transitional justice mechanisms have also had a negative impact on the operation of the regular criminal justice system. Since the end of the conflict, Advocacy Forum has assisted 124 victims with filing complaints with the police in relation to serious human rights violations (including extrajudicial executions, torture and enforced disappearances).²² However, even in those cases where the Appellate Courts or Supreme Court have given orders for investigations to proceed, and even for perpetrators to be arrested, the police have not acted on them.
40. Because of structural weaknesses in Nepal's criminal justice system, even where the laws are in place to criminalise acts and evidence is available to show that crimes have clearly taken place, justice remains elusive regardless of whether state actors or non-state actors are alleged to be involved. Systemic failures in investigations, prosecutions and the provision of remedy and reparation mean that impunity prevails. Existing laws should therefore be strengthened to ensure that complaints are registered, investigations proceed in a timely manner, investigators are shielded from political or other pressure, and victims are provided with protection. Oversight and control of military and police, safeguards

²² The lack of progress in 62 of these cases has been documented in Advocacy Forum and Human Rights Watch, 'Waiting for Justice' of 2008; 'Still waiting for Justice' of 2009, 'Indifference to Duty' of 2010, and 'Adding Insult to Injury' of 2011; available at <http://www.advocacyforum.org/publications/impunity-reports.php>.

against abuse of power, criminalisation of serious human rights violations, strengthening of the system of investigations and prosecutions (including the creation of specialised units) and the provision of reparation for victims must all be addressed to counter impunity. Legislative reform cannot achieve this on its own, but it is a crucial step in the process.²³

41. The police have regularly invoked the yet-to-be established TRC and Disappearances Commission as reasons not to accept complaints relating to serious human rights violations during the conflict, even though the Commissions have not been formally established nor will they have prosecutorial competence once established, according to earlier drafts and the March 2013 Ordinance. The Supreme Court of Nepal has rejected this rationale for refusal to investigate on several occasions.²⁴ Similarly, the Human Rights Committee has pointed to the need for investigations and prosecutions, regardless of any transitional justice mechanism.²⁵

Key question

Will the State Party provide an undertaking to the Committee that it will take all necessary measures to ensure that cases relating to serious human rights violations will be proceeded with in line with its positive obligations under the Covenant as a matter of urgency regardless of the work of any transitional justice mechanisms?

3.3 Immunities

42. Nepal's legal system includes numerous provisions which provide immunities to public officials for acts amounting to human rights violations, often applied on the basis of political considerations and, critically, not subject to judicial review.²⁶ In a report published in December 2011, Advocacy Forum and REDRESS set out concerns about several of these laws, including the Army Act, the Police Act, the Armed Police Force Act, the Public Security Act, the National Parks and Wildlife Conservation Act and the Essential Goods Protection Act. A report published in October 2013 by the International Commission of Jurists further analyses these laws, finding that "Nepal's legal landscape remains rife with constitutional, statutory and regulatory provisions granting political office holders and members of security forces immunity from prosecution for what would otherwise typically be considered criminal acts, including crimes under international law".²⁷
43. Immunities are granted on the basis that the individual has acted in "good faith" in the exercise of his or her powers. However the issue of "good faith" is rarely, if ever, examined by a Court – instead, it is assumed and investigations and prosecutions are not taken forward at all. This has led to near blanket immunity for gross violations of human

²³ Advocacy Forum and REDRESS, 'Held to account. Making the law work to fight impunity in Nepal', December 2011, p. 2, available at:

<http://www.advocacyforum.org/downloads/pdf/publications/impunity/held-to-account-nov-30-2011-english-version.pdf>.

²⁴ Human Rights Watch and Advocacy Forum, 'Indifference to Duty. Impunity for Crimes Committed in Nepal', December 2010, p.2, available at: http://www.advocacyforum.org/_downloads/indifference-to-duty-english-version.pdf.

²⁵ United Nations, 'List of issues in relation to the second periodic report of Nepal above note 1, para.3.

²⁶ Advocacy Forum and REDRESS, 'Held to account', above note 23, p. 76.

²⁷ See International Commission of Jurists, 'Authority without Accountability: The struggle for justice in Nepal', October 2013, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-final-1.pdf>.

rights, including crimes under international law, and has contributed to the debilitating crisis of impunity that threatens respect for the rule of law and democracy in Nepal.²⁸

Key question

Will the government amend all laws providing for immunities in violation of international law to bring them in line with the Covenant?

3.4 Withdrawal of cases

44. In addition to immunities, Nepali law provides the opportunity for political actors to interfere with criminal prosecutions by withdrawing charges. This political interference undermines the independence of the judiciary, which is at the same time strongly asserted by the Nepalese government.²⁹ The powers to withdraw charges have been repeatedly (mis)used in hundreds of cases against persons accused of serious crimes amounting to violations of international humanitarian and/or human rights law committed during the conflict and since.³⁰
45. Section 29 of the State Cases Act provides that a government attorney may either make a deed of reconciliation between the parties involved, or make an order with the agreement of the court, to withdraw criminal cases in which the state is the plaintiff (i.e. is prosecuting). The only qualification on the power is that it cannot be used where the property of a civilian is affected.³¹ Such an order results in the dropping of the case and release of the accused and can constitute a bar to prosecution in the future. The power is regulated by procedures, which allow the Home Ministry to request withdrawal, which is reviewed by the Ministry of Law, Justice and Parliamentary Affairs and approved by the Cabinet (known as the Council of Ministers).
46. Article 151 of the Interim Constitution also grants the President the power, on the recommendation of the Cabinet, to “grant pardons and suspend, commute or remit any sentence passed by any court, special court, and military court or by any other judicial quasi-judicial or administrative authority or body”. This power is granted without consideration to the nature of the crime concerned, including serious human rights violations, and has in some cases even been carried out in violation of Supreme Court orders to the contrary.³²

²⁸ Advocacy Forum and REDRESS, ‘Held to account’, above note 23, p. 76 and ICJ, ‘Authority without Accountability’, *ibid.*, p 14.

²⁹ United Nations, ‘Consideration of reports submitted by States parties under Article 40 of the Covenant: Second Periodic Reports of States Parties: Nepal’ (21 February 2012), UN Doc CCPR/C/NPL/2, para. 63 and 65.

³⁰ Advocacy Forum, ‘Evading accountability by hook or by crook. The issue of amnesties in post-conflict Nepal’, Occasional Briefing, Year 2, Vol. 1, June 2011, available at <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

³¹ State Cases Act, 2049 (1992) s. 29(2).

³² For example, on 8 September 2010, the Supreme Court upheld a murder conviction against UCPN-Maoist Constituent Assembly member Balkrishna Dhungel for the murder of Ujjan Kumar Shrestha in Okhaldhunga on 24 June 1998. The killing was committed during the conflict period, but related to personal disputes between the families of the victim and Balkrishna Dhungel. The Okhaldhunga District Court initially convicted Dhungel and sentenced him to life imprisonment. The Appellate Court of Rajbiraj overturned the verdict, stating that this was a case that was appropriate for transitional justice mechanisms rather than the courts. The public prosecutor then appealed to the Supreme Court, which, on 8 September 2010, upheld the original murder conviction. The UCPN-M coalition government on 8 November 2011,

Key questions

Can the State Party provide detailed statistics of all criminal cases withdrawn by cabinet decision since April 2006, including information on the nature of the crime, names of suspects, court before which the case was pending and the basis for withdrawal?

Will the State Party provide an undertaking to no longer withdraw criminal charges in crimes amounting to serious human rights violations (in particular under Articles 6 and 7), to amend section 29 of the State Cases Act to ensure such cases cannot be withdrawn and to ensure that no analogous provision is included in the new Constitution?

3.5 Lack of witness protection

47. There is at present no established witness protection program or specialised law enforcement agency for witness protection in Nepal. The state of Nepal, in its second periodic report, claims that administrative mechanisms are in place for witness protection. However, no details are given to explain which mechanisms are referred to or how they provide protection for witnesses.³³ Provisions for the protection of victims and witnesses in the March 2013 Ordinance were deficient, in that they provided that the Commission should make “appropriate arrangements” for security of victims and witnesses if it thought fit but did not put in place a mechanism to ensure such protection was provided or any penalties for intimidation of victims and witnesses.³⁴ As part of its judgment of 2 January 2014, the Supreme Court asked the government to make necessary arrangements to keep confidential the personal details of victims and witnesses and make an arrangement where victims and witnesses can share information with the commissions through video links.
48. To date, formal witness protection measures are only possible for cases under the Human Trafficking and Transportation (Control) Act, 2007. Otherwise, they are available ‘in a piecemeal manner and on a case-by-case basis’.³⁵ Several victims who have approached the courts to seek redress have been threatened or have been put under pressure to accept out of court settlements.³⁶

submitted a request to the president to pardon Dhungel under the clemency clause (article 151) of the Interim Constitution. This was stalled by an interim order of the Supreme Court on 13 November 2011. Nevertheless, the cabinet forwarded a request for Dhungel’s pardon to the President of Nepal, who at the time of writing had not yet acted on it. For more details, see Advocacy Forum and Human Rights Watch, ‘Adding insult to injury’, November 2011, available at: <http://www.advocacyforum.org/downloads/pdf/publications/impunity/adding-insult-to-injury-nov-30-2011-english-version.pdf>.

³³ United Nations, ‘Consideration of reports: Nepal’ above note 29, para. 158.

³⁴ See Ordinance number 8 of 2012/2013 on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 14 March 2013, section 17.

³⁵ International Commission of Jurists, ‘Witness Protection in Nepal: Recommendations from International Best Practices’, August 2011, p. 9, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-witness-protection-analysis-brief-2011.pdf>.

³⁶ See, for instance, Advocacy Forum, First Information Report (FIR) of ‘Ujjan Kumar Shrestha’, available at: <http://www.advocacyforum.org/fir/2011/10/ujjan-kumar-shrestha.php> and Advocacy Forum and Human Rights Watch, ‘Waiting for Justice’, above n.2, pp. 27-8.

Key question

Will the State Party ensure the laws establishing the TRC and Disappearances Commission include robust provisions for victim and witness protection as directed by the Supreme Court; and will it introduce a general statutory witness protection scheme?

3.6 Vetting of law enforcement personnel, the army and other state bodies

49. As stated above, to add insult to injury, in some cases of alleged human rights violations during the armed conflict, the alleged perpetrators are being promoted, appointed into senior government positions, or allowed to go on peacekeeping duties without ever facing a genuine and independent investigation.³⁷

Peacekeeping

50. In December 2012 the United Nations (UN) Secretary-General issued a new policy for the human rights screening of peacekeeping personnel.³⁸ It outlines processes by which (i) Member States who nominate or provide personnel to serve with the UN are requested to screen their personnel and to certify that they have not committed, or are alleged to have committed criminal offences and/or violations of international human rights law and international humanitarian law; and (ii) individuals who seek to serve with the UN are requested to attest that they have not committed, or are alleged to have committed, criminal offences and/or violations of international human rights law and international humanitarian law and, where necessary, to provide relevant information.
51. In light of the fact that the Nepal Army and Nepal Police have repeatedly sent on peacekeeping missions officers against whom there was prima facie evidence of involvement in serious human rights violations, there is a need for a thorough revision of existing vetting policies and practices in Nepal. However, in its second periodic report the Government of Nepal claims that personnel who are found to be involved in torture cases have not been allowed to participate in United Nations peacekeeping missions. It further states that since 2002 the Nepal Army has punished 176 military staff for the crime of torture, as well as violations of human rights and humanitarian law, without providing specific details of the cases involved.³⁹ On page 11, the Government also claims that “[b]oth Nepal Police and Armed Police Force have central human rights units and human rights cells at their regional and local level offices. These institutions have mechanisms to examine petitions against police employees for human rights violations and publish the results of such examination.” However, these have not been effective, and sometimes these units’ investigations have even resulted in further violations of people’s rights.⁴⁰

³⁷ Advocacy Forum and Human Rights Watch, ‘Adding Insult to Injury’, 2011, above n. 22 p. 1.

³⁸ See Opening Statement by Ms. Navi Pillay United Nations High Commissioner for Human Rights at the Human Rights Council 24th Session, 9 September 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13687>.

³⁹ United Nations, ‘Consideration of reports: Nepal’ above note 29, para. 122.

⁴⁰ *Ibid.*, para. 28.

Key question

Will the State Party review its existing policies and practices for the selection of UN peacekeepers to ensure that Nepal is adhering to the December 2012 UN policy?

Appointments, promotions and transfers

52. The appointment, transfer and promotion of police officers has been shown to be influenced by political patronage and directly impacts on the effectiveness of the institution.⁴¹ There is therefore a need for an independent, external oversight body for the Nepal Police, preferably as a constitutional body.
53. In August 2012, the Supreme Court directed the Government to put in place guidelines for vetting to prevent those implicated in human rights violations from holding public office and being promoted. To date, this ruling has not been implemented.

Key question

Will the State Party review its existing policies and practices for the appointment, transfers and promotions in line with the August 2012 Supreme Court judgment?

Will the State Party use the opportunity of a new Constitution being drafted to set up an independent Police Commission with the authority to oversee the police and with the powers and resources to investigate complaints of a serious nature against the police and regulate the recruitment, promotion and transfers of individual officers?

3.7 National jurisdiction for war crimes, crimes against humanity and genocide

54. Current Nepali legislation does not criminalise war crimes, crimes against humanity and genocide. In January 2011, the Government put a draft Penal Code before the Legislative Committee of Parliament, which had some positive features, including the criminalisation of torture. However, the draft did not include war crimes, crimes against humanity and genocide and all progress towards enacting the Penal Code was halted with the dissolution of the Constituent Assembly and Legislative Parliament on 27 May 2012.

LOI 4

Key question

Will the State Party amend the draft Penal Code to ensure war crimes, crimes against humanity and genocide are defined in line with international law and made punishable by appropriate penalties before re-tabling the draft Code before the new Parliament?

⁴¹See further Human Rights Watch and Advocacy Forum, 'Waiting for Justice', above note 2.

3.8 Right to an effective remedy, including reparation

55. The absence of a transitional justice mechanism and the state's wider failure to deal with past violations has resulted in ongoing violations of the right to an effective remedy, including reparation for victims. The State Party has instead relied on the provision of small monetary payments to victims of some serious human rights violations including enforced disappearance and extrajudicial execution, termed 'interim relief'. This process is entirely inadequate to redress the harms suffered by victims, and has further been marred by discrimination in design and implementation.⁴² In particular, torture and rape have not been included as crimes for which 'interim relief' has been paid within the scheme.

Key questions

Will the State Party ensure the granting of 'interim relief' to all victims of serious human rights violations during the conflict, including victims of torture and rape?

What is the legal and policy framework envisaged to ensure full reparation to all victims of human rights violations during the conflict? How will victims be involved in the design of these measures?

56. Psycho-social support for victims and witnesses of serious crimes through state programs has at best been provided in a piecemeal way. Instead, it falls largely to civil society to provide and/or fund counselling and other support.

Key question

Does the State Party have plans to set up an effective victim and witness protection scheme, including psycho-social support, and if so can it provide details of the plans?

⁴² See further Advocacy Forum, 'Discrimination and Irregularities. The Painful Tale of Interim Relief in Nepal', 2010, available at: http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf.

4 RIGHT TO LIFE AND PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTS. 2, 6, 7, 9, 10, 16, 19 AND 21)

4.1 Ongoing torture and ill-treatment and extrajudicial executions

57. In October 2012 the Committee Against Torture concluded that torture is systematically practised in Nepal.⁴³ Nepal's Government has failed to legislate against torture or tackle impunity, to the point that it is guilty of acquiescing in the policies that shield perpetrators and allow the widespread use of torture to continue.
58. In late 2012 to early 2013, Nepal's Office of the Attorney General (OAG) conducted a study into the treatment of detainees with the aim to "study the status of implementation of human rights provided by national and international instruments" and "monitor the implementation of the decision of the Supreme Court of Nepal pertaining to the rights of prisoners and detainees". Across all detention centres studied, the OAG reported that almost 15% of detainees "described receiving treatment that amounts to torture". Such treatment included "beating by hands and fists, by sticks on the soles of the feet and kicking while wearing police boots".⁴⁴
59. Advocacy Forum has visited places of detention and interviewed detainees on torture since 2001. Compared to the findings of the OAG, Advocacy Forum finds a significantly higher percentage of reported torture. For instance, in 2012, 22.3% of the 3,773 detainees reported torture, compared to 24.6% in 2011. Advocacy Forum has also recorded other methods of torture than those identified in the OAG report. For example, in 2012 Advocacy Forum recorded cases where a rod was inserted between knees and elbows of the victims, leaving them hanging in the air for long periods of time while often blindfolding them, hanging victims upside down and making them do shoulder stands for a long time. These cases also included making death threats and in some cases using the barrel of a gun and placing it in the victim's mouth or against their head in order to frighten them.⁴⁵

LOI 11-12

Key question

What measures is the State Party putting in place to make the prevention of torture more effective, following up on the findings of the Committee against Torture and the OAG that torture is systematically practised in Nepal?

60. In addition to torture and ill-treatment, there are concerns about regular reports of extrajudicial executions by the Nepal Police, especially in the Terai region which has seen a

⁴³ Committee Against Torture, 'Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party', May 2011, para. 108. In order to make such a finding the Committee must be convinced that torture is "habitual, widespread and deliberate in at least a considerable part of the territory of the country" (see para. 97).

⁴⁴ Annual Report of the Office of Attorney General, Fiscal Year 2068.069, Vol. 10, Year 2, no. 4, Ganapati Upset Press, Kathmandu, available at: http://attorneygeneral.gov.np/Bulletin/Bulletin_10.pdf.

⁴⁵ Advocacy Forum, 'Torture Briefing. Prevention of Torture in Nepal', January-June 2011, July-December 2011, January-June 2012 and July-June 2012, available at: <http://www.advocacyforum.org/publications/torture.php>

proliferation of armed groups since the end of the conflict. Between January 2008 and June 2010, OHCHR received reports of thirty-nine incidents, resulting in fifty-seven deaths, which involved credible allegations of the unlawful use of lethal force.⁴⁶ All but two of these incidents are alleged to have taken place in the Terai districts of the Eastern and Central Regions. Non-governmental human rights organisations have reported even higher numbers of alleged extra-judicial killings.⁴⁷ In a forthcoming report, the Terai Human Rights Defenders' Alliance (THRD) documented twelve cases of alleged extrajudicial executions between January 2011 and August 2013 and found that the pattern of failure to carry out credible investigations as earlier identified by OHCHR continued.⁴⁸ Complaints to police in the form of First Information Reports (FIRs) initiated by relatives of those killed have been registered in very few cases. In several cases, the police claim to have initiated their own investigations. However, none of those investigations have resulted in serious disciplinary or criminal action against the alleged perpetrators. Notwithstanding, the Government of Nepal in its second periodic report states it is committed to investigate perpetrators and fight against impunity.⁴⁹

Key questions

Can the State Party provide a statistical analysis (including names, dates, places) of the number of incidents of alleged extrajudicial executions by the police reported since 2006, and inform the Committee of the action taken in response, including any criminal or disciplinary sanctions initiated against the alleged perpetrators?

Can the State Party explain why so far not one single member of the security forces has been held accountable for scores of alleged extrajudicial executions committed since 2006?

4.2 Torture and discrimination (arts. 2, 3, 26 and 27)⁵⁰

Discriminatory violence by police

61. From more than a decade of its experience in the field of custody monitoring, Advocacy Forum has established that torture and other prohibited ill-treatment (“other ill-treatment”) are more common among detainees from underprivileged and ethnic minority groups. The graph in Annex 2 shows the percentage of detainees reporting torture and ill-treatment during 2012 according to their caste or ethnic origin, compared to their percentage among the total population of detainees claiming torture. It is clear that those from disadvantaged communities (indigenous communities, communities from the Terai

LOI 6, 7

⁴⁶ OHCHR-Nepal, ‘Investigating Allegations of Extra-Judicial Killings in the Terai. Summary of Concerns’, July 2010, available at:

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

⁴⁷For instance, the Informal Sector Service Center has reported that during the first six months of 2009, security forces killed 20 individuals. See www.insec.org.np/pics/1247468044.pdf. Advocacy Forum has also received reports of 12 incidents of possible extra-judicial killings between February and December 2009. See <http://www.advocacyforum.org/downloads/pdf/publications/terai-report-english.pdf>. The Democratic Freedom and Human Rights Institute (DFHRI), in a June 2010 report, documented allegations of 73 killings by security forces between March 2008 and June 2010, see <http://dfhri.org>.

⁴⁸ Terai Human Rights Defenders Alliance, ‘Continuing Extrajudicial Executions in the Terai’, February 2014, available at: <http://taraihumanrights.org>.

⁴⁹ United Nations, ‘Consideration of reports: Nepal’, above note 29, para. 73.

⁵⁰ See also Section 5 – Violence Against Women.

region, lower castes and Muslims) are systematically reporting torture more regularly than detainees from dominant groups such as Brahmins, Chhetris and Newars. This trend has manifested itself consistently over several years, ever since Advocacy Forum started to gather data.⁵¹

Key question

Can the State Party inform the Committee of specific measures it is taking to combat the apparent discriminatory treatment of disadvantaged communities by the Nepal Police?

4.3 Duty to investigate and prosecute

62. The Office of the Attorney General, the Nepal Police Human Rights Unit and occasional ad-hoc investigation committees set up into individual serious incidents which cause public outrage are all yet to demonstrate that they are capable of conducting the kind of thorough, independent and public investigations required under Nepal's treaty obligations.⁵² The Government of Nepal states in its second periodic report that personnel from the Nepal Police involved in torture acts have been found "guilty" in 21 cases since 1996, that it has "taken action" against 504 personnel and that officers involved in serious human rights violations have been dismissed.⁵³ However, the report does not provide more details of the precise nature of these proclaimed actions.
63. Numerous barriers also remain within the criminal justice system, which make it disproportionately hard to prosecute perpetrators and stand in the way between victims and justice.⁵⁴ There is a need for more independence of the investigative and prosecutorial bodies, by means of the creation of a special unit of senior level investigators within the Attorney General's Office, to investigate cases against the security forces, in addition to the creation of an independent oversight body.

LOI 12-13

4.4 Criminalisation of torture

64. In contravention of its international obligations, including under Article 7 of the Covenant and the UN Convention against Torture (UNCAT), torture and ill-treatment are not defined as crimes under Nepali law. The Government of Nepal states in its second periodic report that physical and mental torture or cruel, inhuman or degrading treatment or punishment is punishable by law, with reference to the provisions of Article 26 of the Interim Constitution.⁵⁵ However, while this constitutional provision indeed states that torture is illegal and needs to be criminalised and the Supreme Court has confirmed that torture is prohibited in Nepal under the Constitution and the Convention against Torture, there is as yet no statutory provision criminalising torture and specifying the corresponding punishment.⁵⁶ It is, therefore, impossible to prosecute any individual for

⁵¹ See Advocacy Forum's six-monthly reports, 'Torture briefing. Prevention of Torture in Nepal', available at: <http://www.advocacyforum.org/publications/torture.php>

⁵² See further Advocacy Forum and REDRESS, 'Held to account' above note 23, pp. 62-4.

⁵³ United Nations, 'Consideration of reports: Nepal' above note 29, para. 122.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, para. 118.

⁵⁶ Article 26 of the Interim Constitution "Right against Torture" states: "(1) No person who is detained during investigation, or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. (2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by

torture or ill-treatment, with disciplinary sanctions and the provision of compensation being the only remedies available (see further below).⁵⁷

65. The Committee has recently recommended in its Views on an individual communication that Nepal amend its legislation to bring it into line with the Covenant, including by “the enactment of legislation defining and criminalizing torture; and the repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance”.⁵⁸
66. Although the Government introduced a draft Penal Code before Parliament in January 2011 that would criminalise torture as well an Anti-Torture Bill in April 2012, these laws were not subsequently adopted.

Key question

Will the State Party urgently criminalise torture in a law fully consistent with its obligations under the Covenant and further elaborated in the UNCAT?

4.5 Torture Compensation Act

67. The only law relating to torture in Nepal is the Torture Compensation Act 1996 (“TCA”). As demonstrated below, the Act is an ineffective instrument to prevent, punish and provide reparation, including rehabilitation, for torture and ill-treatment.⁵⁹
68. The TCA provides only the opportunity to claim small amounts of compensation and for disciplinary action to be taken against those proven to have committed torture. As the TCA does not criminalise torture, a judge cannot order a criminal prosecution and the only measure that can be taken is an institutional action against the perpetrator.⁶⁰
69. Several provisions of the TCA make it difficult for victims to access even compensation under the TCA. First, the Act contains a 35-day limitation period to file a complaint, calculated from the day on which torture is inflicted or from the day of release from custody. Because no programmes exist for witness protection, victims are often too frightened to bring a complaint within this short period. Furthermore, the time needed for physical and mental recovery in order to find the strength to submit a complaint, geographical obstacles to reach district courts and unawareness of the TCA may lead to inability to comply with the time limitation. In addition, victims need to supply different pieces of information in order to file a complaint (amount of compensation claimed, reason and duration of the detention, torture methods used, harm caused, and any other additional information). This information is often difficult and time consuming to obtain.

law.” Article 33 (m) of the IC states that Nepal must “effectively implement the international treaties and agreements of which the State is a party”.

⁵⁷ In 2011 and 2012, a Draft Penal Code and a new Anti-Torture Bill were tabled in the Legislative Parliament providing for the criminalisation of torture, though the penalties provided were not commensurate with the gravity of the offence. Neither bill was passed into law before the Constituent Assembly and Legislative-Parliament were dissolved in May 2012.

⁵⁸ *Maharjan v Nepal*, Comm. No. 1863/2009, CCPR/C/105/D/1863/2009, 19 July 2012, para. 9.

⁵⁹ Advocacy Forum, ‘Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?’, 26 June 2013, pp.49-50, available at:

<http://advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>.

⁶⁰ Advocacy Forum, ‘Hope and Frustration. Assessing the Impact of Nepal’s Torture Compensation Act-1996’, 26 June 2008, p. 24, available at:

<http://www.advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf>.

Re-arrests of the victims also cause constraints to respect the time limitation and are not taken into consideration by the TCA and the 35-day limitation.⁶¹

70. Another difficulty is that the TCA puts the burden of proof on the victims. This burden is difficult to meet in the absence of impartial and effective investigations (see above). It is then for victims to provide a medical record stating that torture has occurred. Section 3 of the TCA allows police officers to do medical check-ups and keep track of the medical condition of the detained person if no medical practitioner is available.⁶² This is open to abuse by police officers who have committed torture or other ill-treatment, and it is clear that this proceeding represents a serious obstacle for victims to obtain a truthful medical report.
71. The TCA also limits the maximum compensation to NRs 100,000 (approximately USD 1,000), an amount that is far too low for victims to pay for treatment to recover fully from their physical and psychological problems. Furthermore, if any compensation is paid, this is only done years later. This has serious consequences on the full capacity for rehabilitation of the victims and their financial capacity to continue with the case.⁶³

Key question

Will the State Party ensure that its law criminalising torture and ill-treatment also sets up an effective mechanism for providing reparation, including rehabilitation, to victims?

4.6 Independent monitoring of places of detention and ratification of OPCAT

72. There is no independent national detention monitoring mechanism in place in Nepal. The NHRC rarely visits places of detention in cases where it has received specific complaints and does not have a program of regular visits. Members of the judiciary have a legal duty to visit prisons but in reality very rarely do so. Other bodies set up to investigate violations of human rights such as the Nepal Police Human Rights Unit lack independence and impartiality and are largely ineffective.
73. During its participation in the Universal Periodic Review in January 2011, Nepal did not accept recommendations from several states to ratify OPCAT and to put in place a national preventive mechanism to safeguard the rights of detainees. Given that the Committee against Torture has found torture to be systematically practised in Nepal, it is imperative that an effective preventive mechanism is put in place.

LOI 17

Key question

In light of the inadequate current monitoring systems in place, will the State Party consider ratifying the Optional Protocol to the Convention against Torture and ensure the establishment of a national monitoring mechanism at the earliest opportunity?

⁶¹*Ibid.*, pp. 28-29.

⁶²*Ibid.*, pp. 31-32.

⁶³Advocacy Forum, 'Hope and Frustration', above note 60, p. 34.

4.7 Forensic expertise

74. Whether in respect of investigations of rape, torture or criminal investigations more generally, there is a lack of forensic expertise in Nepal, particularly in the more remote areas. Police investigations only rarely include medical or other forensic documentation; and instead rely heavily on confessions, often extracted under torture. There is likely to be a need for specialised forensic teams to assist the Disappearances Commission, once it is set up, to exhume bodies from illegal and secret graves and conduct tests to establish the identity of the victim as well as to assess the injuries of torture victims, among others.

Key question

Will the State Party inform the Committee of the current forensic expertise available in the country, and how it is planning to ensure that the necessary legal and policy framework and expert resources are in place to ensure investigations are speedy and effective?

Will the State Party include training on the Istanbul Protocol into the curriculum for police and health professionals?

5 VIOLENCE AGAINST WOMEN (ARTS. 2, 3, 6, 7 AND 26)

5.1 Impunity for sexual violence

75. Advocacy Forum, REDRESS and APT also draw the Committee's attention to significant failures in responding to sexual violence committed by both State and non-State actors.

LOI 10

Definition of rape

76. The current definition of rape in Nepali law is narrow in its scope and does not reflect international standards.⁶⁴ It is limited to penile-vaginal penetration and disregards the insertion of other bodily parts and objects. This definition must be changed and expanded so that rape is understood to be a violation of bodily integrity.
77. Additionally, the *Muluki Ain* refers to forced sexual intercourse (jabarjasti) instead of rape (balatkar).⁶⁵ The use of this type of language creates an understanding that there must be evidence of force and signs of a struggle to prove non-consent. As a result, rapes that have occurred as a result of someone abusing the vulnerable, regardless of physical strength, through abuse of power or threats are increasingly more difficult to prove.

Discriminatory limitation period for rape

78. A discriminatory 35-day limitation period for filing complaints of rape has made prosecution of rapes committed during the conflict period impossible.⁶⁶ It also severely hinders access to justice for victims of rape committed since.
79. This limitation is contrary to international human rights standards, and in 2008, the Supreme Court of Nepal directed the government to amend this provision.⁶⁷ However, the law has not been changed, and as Advocacy Forum and REDRESS have shown in a

⁶⁴ *Muluki Ain*, Chapter 14.

⁶⁵ *Ibid.*

⁶⁶ See Advocacy Forum, 'Torture of Women: Nepal's duplicity continues', June 2012, pp. 31-39, available at: <http://www.advocacyforum.org/downloads/torture-of-women-report-june-26-2012-english.pdf>.

⁶⁷ *Sapana Pradhan Malla v. Government of Nepal*, Nepal Law reporter 2065, volume 11, p. 1358-1366.

recent communication under the Optional Protocol concerning Nepal,⁶⁸ the police still refuse to admit complaints of rape filed after 35 days.

80. The draft Penal Code and Criminal Procedure Code put before the Legislative-Parliament in early 2011 proposed to increase the limitation period for a majority of sexual offences to one year, which is some improvement on the current 35 day limitation but still prevents a significant barrier to justice for victims. Factors of intimidation, shame and fear may still have an impact on the victim's ability to make a complaint within that time.⁶⁹ As such, a general provision permitting for a complaint to be heard at the discretion of the court is necessary taking into account the above factors.

Key questions

Will the State Party amend existing legislation to (i) amend the definition of rape and (ii) extend the limitation period and ensure the courts are granted discretion to permit complaints of rape and sexual assault that are filed after any such date? Will the State Party ensure that any future criminal procedure code reflects these changes?

81. The draft Criminal Procedure Code provided that a complaint in relation to the sexual abuse of children must be made within three months of the offence occurring. A child is especially vulnerable to coercion and intimidation, is unlikely to be aware of her/his rights at law and therefore may be unable to seek help within three months. We recommend, in line with international law, that the beginning of a limitation period for a child to complain begin once they attain majority, i.e. 18 years, and that such period can be extended at the Court's discretion.

Key question

Will the State Party ensure that the statute of limitation for complaints involving sexual abuse of children is extended and that it is set to begin only once the child concerned reaches the age of majority?

Failure to investigate rape cases

82. Even in more recent cases where complaints have been filed within this short time limit, there is a widespread failure of police to register complaints (known as First Information Reports), investigate and prosecute rape cases, and a trend of such cases being diverted to "settlement" through informal justice mechanisms.⁷⁰ These issues led to long-running

⁶⁸ Communication No. 2245/2013.

⁶⁹ Advocacy Forum and International Center for Transitional Justice, 'Across the Lines - The Impact of Nepal's Conflict on Women'. December 2010, available at: <http://www.advocacyforum.org/downloads/across-the-lines-the-impact-of-nepal-conflict-on-women.pdf>.

⁷⁰ General Assembly, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal', A/HRC/16/23 (16 February 2011), para. 46; Human Rights Watch, 'Nepal: No Justice for gang-rape Victim 5 months on threats and attacks displace a Woman in Siraha', 15 March 2011, available at:

protests during 2012-13 (known as the “Occupy Baluwatar” movement).⁷¹ A key demand of protestors was that police officers who failed to register complaints contrary to law be held accountable.

Lack of confidentiality

83. In Nepal, lack of confidentiality, poor police practices and weak legislation compound the issue of sexual violence against women. For example in September 2009 police publically interrogated a 14-year-old rape victim outside the Sunsari Police Station in Dharan in front of a large crowd. One of the alleged rapists was a police officer who offered the family 30,000 rupees to withdraw the case against him. According to the district police, the case was dismissed.⁷²
84. Legislation that protects the confidentiality of sexual assault victims is necessary due to the social stigmas and difficulties that victims face once their assault is revealed.⁷³ This includes taking further measures in trials to protect victims. Although laws in place⁷⁴ and a the Supreme Court has issued a comprehensive order⁷⁵ including a procedural guidelines the for ensuring *in camera* proceeding in rape cases, these rules are generally not followed and proceedings are usually held in open court. Although there are certainly public policy reasons in favour this, such as ensuring a fair trial for the accused, this type of hearing does not protect the confidentiality of victims.⁷⁶ Allowing victims of SGBV to testify confidentially *in camera* would provide a level of protection to Nepali victims that is not presently available. Moreover, permitting a victim of sexual violence would minimize the chance of further trauma to the victim from direct confrontation with the accused.⁷⁷

Key question

Will the State Party make a clear policy announcement and issue a circular to all police stations confirming that police are not permitted to promote informal settlements in cases of rape, and instead have a statutory duty to proceed with investigations and prosecutions and failing to do so would automatically trigger departmental action against such officer?

Will the State Party take special measures to ensure that criminal complaints filed by women are treated in a non-discriminatory way, including by recruiting more female police officers, improve the quality of medical examinations and ensure confidentiality of the

<http://www.hrw.org/en/news/2011/03/15/nepal-no-justice-gang-rape-victim>; Advocacy Forum and ICTJ, ‘Across the Lines’, above note 69, p. 82.

⁷¹ See Kathmandu Post, ‘Regmi lauds ‘Occupy Baluwatar’ on its anniv’, 27 December 2013, <http://www.ekantipur.com/2013/12/27/capital/regmi-lauds-occupy-baluwatar-on-its-anniv/382984.html>.

⁷² See US Department of State, ‘2010 Human Rights Report: Nepal’, 8 April 2011.

⁷³ Amnesty International, ‘Annual Report 2011 – Nepal’, 13 May 2011, available at: <http://www.unhcr.org/refworld/docid/4dce1550c.html>.

⁷⁴ Rule 46(b) of the *District Court Rules, 2052* (1997), Rule 60(a) of the *Appellate Court Rules, 2048* (1991) and Rule 67(a) of the *Supreme Court Rules, 2049* (1992) provide for *in camera* hearings of cases relating to minors, rape, trafficking in person, divorce and any other case that a court deems necessary.

⁷⁵ *Sapana Malla Pradhan v Government of Nepal*, Writ No. 3561, Supreme Court Judgment of 25 December 2007.

⁷⁶ *Ibid.* (Procedural Guidelines for Protecting the Privacy of Parties in the Proceedings of Special Types of Cases (2007).

⁷⁷ Yuba Raj Subedi and Soorya Prasad Pokharel, *The Criminal Justice System of Nepal*, Attorney General of Nepal 12 (2010).

6 RIGHT TO LIBERTY AND SECURITY OF PERSON, TREATMENT OF PERSON DEPRIVED OF THEIR LIBERTY, FAIR TRIAL AND INDEPENDENCE OF THE JUDICIARY (ARTS. 2, 7, 9, 10, 14 AND 24)

Summary

85. There are numerous concerns about the right to a fair trial in Nepal. While Article 24 of the Interim Constitution guarantees the right to be informed of the grounds of arrest, the right to consult a lawyer, the right to be produced before a court within 24 hours of arrest, the right to be presumed innocent until proven guilty and the right to a fair trial by a competent court, there are major problems with the implementation of each of these.⁷⁸ The custodial safeguards that exist in law are routinely flouted.

6.1 Arbitrary and unlawful detention

86. Many detainees complain that they are not informed of the grounds for their arrest, and that they are not produced before a court within 24 hours as required under the Interim Constitution.⁷⁹ The police commonly circumvent the provisions of the law by maintaining false or inadequate custody records.⁸⁰ The practice of keeping detainees in unofficial places of detention still occurs.⁸¹ Advocacy Forum, REDRESS and the APT recommend that, as an additional safeguard against torture, the law should require the publication of all official places of detention on a regular basis and explicitly forbid and criminalise the use of unofficial places for detention in line with the Human Rights Committee's General Comment No. 20.

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Key questions

Will the State Party publish a list of official places of detention and forbid and criminalise the use of unofficial places?

What measures are in place to ensure the rights as guaranteed under Article 24 of the Interim Constitution and Article 9 of the ICCPR are upheld in law and in practice?

⁷⁸ For a detailed analysis of key concerns about the right to fair trial, see Advocacy Forum, 'The right to fair trial in Nepal. A critical study', January 2012, available at: <http://www.advocacyforum.org/downloads/fair-trial.pdf>

⁷⁹*Ibid.*, pp. 5-7.

⁸⁰*Ibid.*

⁸¹ Advocacy Forum and REDRESS, 'Held to account', above note 23, p. 53.

6.2 Pre-trial detention and bail issues

Production before a judicial body

87. Article 12(2) of the Interim Constitution guarantees that, ‘No person shall be deprived of his/her personal liberty unless in accordance with law’.⁸² Article 24 provides that a person must be informed of the reasons for their arrest immediately and must be brought before the case hearing authority within 24 hours of arrest (excluding travel time).⁸³ The State Cases Act 1992 also requires the police to bring every suspect before a judicial body within 24 hours of his or her arrest.⁸⁴
88. However, Advocacy Forum has found that in practice detainees are often held for far longer than 24 hours before being produced before a Court or other competent authority. AF data shows that during 2012, 1,450 (43.7%) of detainees claimed that they were not taken to the court within 24 hours of their arrest.⁸⁵

Detention without charge

89. Even once arrested individuals are brought before a judicial officer, they may then be held for a significant period before charges are brought. The time allowed for detention without charge is up to thirty-five days (for crimes under the Public Offences Act such as disturbing the peace, vandalism, rioting and fighting⁸⁶ and crimes under the State Cases Act such as homicide, rape, espionage, trafficking, drug offences and forgery) or even three months (for crimes under the Narcotic Drugs (Control) Act⁸⁷).
90. The prompt filing of formal charges is necessary to ensure in practice both that sufficient grounds for arrest exist and that a person detained has adequate knowledge of the reasons for their detention to challenge it. Extended detention in police custody increases the risk of torture in order to obtain sufficient evidence to bring formal charges.

Lack of provision for bail

91. As it stands, the State Cases Act does not envisage granting bail during the pre-trial period. In fact, it currently provides that as long as the court is satisfied with the investigation it should remand the defendant in custody.⁸⁸
92. The first opportunity that a defendant realistically has to be freed is when, after the initial period of detention, a charge sheet is produced and the judicial process begins (which, as described above) may be after a long period of detention without charge). Even at this stage the *Muluki Ain* (the National Legal Code) mandates detention without the opportunity for bail in certain circumstances. These include cases in which a prima facie case has been made out and the minimum sentence for the alleged crime is more than three years (or six months for non-permanent Nepali residents).⁸⁹ The law does not place

⁸² Interim Constitution, Article 12(2).

⁸³ Interim Constitution 2063 (2007), Article 24. As mentioned above, this is also required by some acts for crimes charged under them including the State Cases Act 2049 (1992), section 15, by which a person must be brought before the Court within 24 hours (at which the charge must be stated) in order to remain in detention pending investigation.

⁸⁴ State Cases Act, 1992, Section 15(2).

⁸⁵ Advocacy Forum, ‘Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?’, June 2013, pp. 64 and 122, available at

<http://www.advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>.

⁸⁶ Public Offences (and Punishment) Act 2027 (1970), Section 4. Although the Courts have clarified that a Chief District Officer may not detain a person for more than seven days before filing the charge-sheet without “reasonable grounds”: See *Government of Nepal v Shambu Yadav*, referred to in International Legal Foundation – Nepal, ‘Case Notes – Fall 2010’, p. 1, available at: <http://theilf.org/wp-content/uploads/2011/07/ILF-Nepal-Case-Notes-Fall-2010.pdf>.

⁸⁷ Narcotic Drugs (Control) Act 2033 (1976), Section 22C.

⁸⁸ The State Cases Act, Section 15(4).

⁸⁹ Muluki Ain 1963, No. 118(3).

any duty on the judge to consider whether or not pre-trial custody is required for the purposes of preventing flight, preventing interference with evidence or preventing the recurrence of crime.⁹⁰ The authorities refer to the open border between Nepal and India as a reason for the lack of bail used.

Key question

Will the State Party amend its legislation to prohibit detention without charge for more than 24 hours?

Will the State Party amend its legislation to provide for bail pre-trial in line with requirements under the ICCPR?

6.3 Legal aid and access to lawyers

93. Even though the Legal Aid Act only came into force in 1997, the concept of legal aid has long been incorporated in the Nepalese Legal system in the form of stipendiary lawyers (VaitanikOkil) at the Supreme Court. Later, the provision of such lawyers extended to the Appellate and the District Courts as well. The role of the stipendiary lawyer is to represent those who are unable to afford the services of a lawyer. In 2007 the right to legal aid was acknowledged as a fundamental right and its provision enshrined in Article 24(10) of the Interim Constitution of Nepal, which guarantees indigent persons the right to free legal service in accordance with the law.
94. Rule 6 of the Legal Aid Committee Rules 1998 provides that any person who earns in excess of NRs 40,000 (approximately US\$ 400) per year is not entitled to legal aid. The income limit has remained unchanged since the enactment of the Rules, thereby failing to respond to rising wages and living expenses. Rule 6 also suffers from a lack of flexibility. The income threshold makes no allowance for circumstances reducing a person's capacity to afford legal fees, for instance by varying the amount of legal aid depending on the number of dependents, the likely cost of the proceedings, the type of proceedings and whether the person would suffer hardship if legal aid was refused.
95. In addition, applicants for legal aid face several procedural hurdles. Section 3(1) of the Legal Aid Rules 1998 provides that a Nepalese citizen in need of legal aid must submit an application to the District Legal Aid Committee indicating that his or her annual income is less than NRs 40,000, and a supporting letter from the Village Development Committee (VDC) verifying the person's income. Compliance with the requirement is difficult for a person in custody, particularly if detained in a district other than his or her own. Another problem is that the means test assumes that all applicants have regular employment whereas many people work irregular jobs and engage in subsistence agriculture. Currently, there is no mechanism to calculate annual income in those circumstances. Furthermore, once the District Legal Aid Committee receives an application for legal aid it has 45 days in which to make a decision.⁹¹ This is too long and it denies defendants in pre-trial detention access to urgent legal assistance.
96. The District Committees are also hamstrung by their lack of independence, being headed by the District and Appellate prosecutors. One of the responsibilities of the District Committees is to draw up lists of suitable legal aid providers. An obvious conflict of

⁹⁰ *Van Alphen v The Netherlands*, No 458/1991 (1994) UN Doc CCPR/C/51/D/458/1991, para. 5.8. See also Human Rights Committee, Draft General Comment No. 35, Article 9: Liberty and security of person, 28 January 2013, para. 39.

⁹¹ Legal Aid Rules 1998, r 5(2).

interest arises in circumstances where those who prosecute the defendants also select the legal aid providers to represent defendants.⁹²

97. A further significant challenge is the police's prevailing antipathy towards the involvement of lawyers at the pre-trial stage. Advocacy Forum's research indicates that detainees are rarely allowed to meet with lawyers within the first 24 hours of their detention and that visits take place mostly in supervised conditions. The latter compromises the confidential quality of such meetings and, in particular, it also dissuades detainees from disclosing the fact of torture or other ill-treatment to their lawyers. There are no facilities for lawyers to visit detention centres at pre-trial stage and many lawyers do not go to detention to provide legal counselling to detainees complaining of police behaviour, lack of private space and lack of respect for lawyers. Similarly, even at the trial stage, consultation with legal counsel is often not confidential.⁹³

Key question

Will the State Party review the legal aid system and make it functional to ensure every detainee has access to it?

What steps will the State Party take to ensure that detainees are given access to a lawyer in accordance with the Covenant?

6.4 Quasi-judicial powers of Chief District Officers

98. Nepalese law currently vests significant criminal justice judicial functions in the hands of Chief District Officers (CDOs), who are senior government officials accountable to the Home Ministry. The CDO has oversight of arrest and detention in many situations: for example when a person is arrested without a warrant, various Acts provide that the detained person must be brought before the CDO within a prescribed period of time. The CDO also has jurisdiction to try criminal cases under various Acts including the Arms and Ammunition Act,⁹⁴ and the Public Offences Act.⁹⁵ The punishments the CDO can impose range from fines to seven years imprisonment.⁹⁶
99. This practice is fraught with difficulty. Having functions as a member of the executive and judiciary places CDOs in an untenable position. Furthermore, such officials are not legally trained. This leads to conflicts of interest, a lack of impartiality, a failure to respect procedural safeguards, excessive fines and ill-defined sentences, all in clear violation of Article 14.⁹⁷

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⁹² Legal Aid Act 1997 s 10(b).

⁹³ Advocacy Forum, 'The right to fair trial in Nepal. A critical study', 2012, p. 29, available at <http://www.advocacyforum.org/downloads/fair-trial.pdf>.

⁹⁴ Arms and Ammunition Act 2019 (1962), Section 24 provides that the CDO shall hear the cases under this Act. As per this amended Act, a prison term of up to 7 years may be imposed. The full act is available at: <http://www.lawcommission.gov.np/en/documents/func-startdown/461/>.

⁹⁵ Public Offences (and Punishment) Act 2027 (1970), Section 6 of this Act provides that CDOs may sentence those convicted to a fine of up to Rs 10,000/- and prison term of up to 2 years. Other Acts providing jurisdiction to hear criminal matters include: Section 9 of The Essential Goods Protection Act 2012 (1955); Section 15 of The Black Marketing and Other Social Offences and Punishment Act 2032 (1975); Section 19 of The Social Practices (Reform) Act 2033 (1976); Section 11 of Aquatic Animals Protection Act 2017 (1960); Section 17 of Nepal Standards (Certification) Act 2037 (1980); Section 22 of Animal Health and Livestock Services Act 2055 (1999).

⁹⁶ See for example, the Arms and Ammunitions Act 2019 (1962), Sections 20 and 24.

⁹⁷ Advocacy Forum and REDRESS, 'Held to account', above note 23, pp. 43-7.

100. The Supreme Court recognised this systemic problem in a judgment handed down in September 2011.⁹⁸ The Court ordered the Government to redefine which cases should be given to executive officers and which cases should be heard by courts or specialised tribunals. To do so, it required the Government to form a committee to review the extent of judicial powers exercised by Executive Officers, and to recommend necessary changes within six months of its formation. As an interim measure while reforms are carried out, the Court ordered that, within the next year, all CDOs must be shown to have a law degree or be given three months of legal training.
101. Since then, the Government has started providing 3 months of training to CDOs. On 22 March 2012 the Council of Ministers decided to form a 10-member “Committee on the Study of Judicial Power of Administrative Officers” under the coordination of the Secretary (Law) of the Office of Prime Minister and Council of Ministers. In December 2012/January 2013, the Committee submitted a 73-page report to the Office of the Prime Minister and the Minister of Council. It found that 117 laws and 16 bylaws provided broad discretionary power of a judicial nature to CDOs without clear grounds and standards, which were open to abuse. The report concluded however, that the quasi-judicial power provided to CDOs is a necessary evil which should be controlled and regulated by introducing reforms in laws, policies and institutions, and made 18 recommendations for legal, policy and institutional reforms.⁹⁹

Key question

Can the State Party update the Committee regarding the implementation of the recommendations of the Committee on the Study of Judicial Power of Administrative Officers and amend laws to disallow any quasi-judicial bodies to try cases that result deprivation of liberty?

6.5 Juvenile justice system (arts. 16, 24 and 26)

102. Nepal has reasonably well-developed legislation on juvenile justice, which includes a prohibition of “torture or cruel treatment” of children.¹⁰⁰ The punishment for torture or cruel treatment set out in the Children’s Act of one year’s imprisonment and/or a fine of up to NRs. 5,000¹⁰¹ is, however, not commensurate with the gravity of the violation. The perpetrator may also be “made liable to pay a reasonable amount of compensation to the child” but the Act does not specify the minimum or maximum amount.¹⁰² The Children’s Act, although theoretically applicable to torture and other ill-treatment by agents of the state, does not refer to such context and is rather intended primarily to deal with situations of child abuse carried out by parents or teachers. In the meantime, reports of torture of juveniles remain high with 34.7 per cent among 930 juvenile detainees interviewed during 2012 reporting torture or other ill-treatment.¹⁰³

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⁹⁸ Advocacy Forum, ‘The right to fair trial in Nepal, above note 78, pp. 48-9.

⁹⁹ The Nepali language version of the report is available at:

http://www.opmcm.gov.np/uploads/resources/file/123_Quasi_20130222115342.pdf.

¹⁰⁰ Children’s Act 1992, Article 7, full text of the Act available at:

[http://www.ccwb.gov.np/uploads/userfiles/resources/English/Acts/Children's%20Act,2048\(1992\).pdf](http://www.ccwb.gov.np/uploads/userfiles/resources/English/Acts/Children's%20Act,2048(1992).pdf).

¹⁰¹ *Ibid.*, Article 53 (3).

¹⁰² *Ibid.*

¹⁰³ Advocacy Forum, ‘Nepal: Is the government unable or unwilling to prevent and investigate torture?’, June 2013, available at <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>.

103. There is serious concern that juveniles continue to be detained together with adults. The Supreme Court of Nepal has on more than one occasion directed state authorities to build child rehabilitation homes, and also ordered that children should not be kept in police custody. The Juvenile Justice Regulations of 2006 have contributed considerably to increase the responsiveness of the judiciary and other actors of the criminal justice system to bring about the gradual reduction of detention as well as torture of juveniles. However, implementation gaps remain. Much of the necessary infrastructure, whether within the police, the courts or in terms of rehabilitation homes still has to properly be put in place across the country.¹⁰⁴ For instance, during the second quarter of 2012, only 33% of the district courts in the 20 districts where Advocacy Forum operates had a juvenile bench.¹⁰⁵ This contradicts information provided by the government in the second periodic report, where it says that juvenile benches have been set up in every district court.¹⁰⁶
104. One of the reasons why juvenile detainees spend a long time in detention (with adults) is the challenge of proving their age. On many occasions, the juvenile's lawyer and the police are in dispute about the exact age of a detainee and a judge has to order age verification through a medical examination or other means such as obtaining copies of birth certificates, school records and other official documents to prove a juvenile's age.¹⁰⁷ The system of birth registration remains haphazard in Nepal.¹⁰⁸

Key questions

What steps are underway to improve the juvenile justice system to bring it in line with Nepal's treaty obligations and the orders of the Supreme Court?

How many juvenile benches are functioning right now and what are the State Party's plans to have them established in all districts? What are the measures taken to strengthen them?

How many rehabilitation homes are functioning in the country and what are the plans to increase their number?

¹⁰⁴For instance, to date there is still only one child correction home.

¹⁰⁵Advocacy Forum, 'Torture Briefing. Prevention of Torture in Nepal', July to December 2012, available at: <http://advocacyforum.org/downloads/pdf/publications/torture/torture-briefing-july-december-2012.pdf>.

¹⁰⁶United Nations, 'Consideration of reports: Nepal' above note 29, para. 157.

¹⁰⁷Under Nepali law, a child is anyone under the age of 16 years, whereas AF applies the definition of the Convention on the Rights of a Child (18 years). Determining a young detainee's exact age is a critical element in ensuring children's rights are upheld. See Advocacy Forum, 'Torture of Juveniles in Nepal. A serious challenge to Justice System', June 2010, available at: http://advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf.

¹⁰⁸

7 FREEDOM OF EXPRESSION, RIGHT TO PEACEFUL ASSEMBLY, FREEDOM OF ASSOCIATION AND FREEDOM OF CONSCIOUS AND RELIGIOUS BELIEF (ARTS. 2, 18, 19, 21, 22 AND 26)

7.1 Threats to human rights defenders

105. Although an active civil society was initially able to operate after the end of the conflict, human rights defenders now work in an increasingly hostile environment. The OHCHR has been asked to leave the country, the NHRC's powers have been significantly curtailed under the new NHRC Act 2012 and UN Special Procedures have been refused cooperation.¹⁰⁹ In addition, there has been a campaign to besmirch the reputation of leading human rights organisations in Nepal and deliberate attempts of character assassination of some prominent human rights defenders.¹¹⁰ Nepal Army soldiers and cadres of the Communist Party of Nepal (Maoist) are the primary perpetrators of threats against HRDs.¹¹¹ In the case of women HRDs, threats also come from the leaders in the community and from private actors.
106. Current national law requires every NGO to be affiliated with the Social Welfare Council (SWC, a government body) and to be registered with the relevant District Administrative Office. The registration needs to be renewed yearly. The Government also has a policy that the SWC requires NGOs to have prior permission before receiving foreign funding. This is essential for the renewal of the yearly registration. In addition, individual projects have to be submitted to the SWC for approval. This is problematic especially for organisations working against impunity.

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Key questions

Will the State Party give an undertaking to cooperate with the Special Procedures of the Human Rights Council and issue a standing invitation for all mechanisms to visit the country if they see a need? In particular, will Nepal soon invite the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture, who have long requested to visit the country?

What measures is the State Party taking to respect, protect and fulfil human rights, which includes exercising due diligence to prevent, investigate and punish any violations against HRDs by state and non-state actors?

How will the State Party ensure the independence of organisations working in the field of human rights and ensure no hurdles are put in their way to prevent their effective operation?

¹⁰⁹ Advocacy Forum, News Archive 2012, 'New NHRC Act Curtails Commission's Powers', 17 July 2012, available at: <http://www.advocacyforum.org/news/2012/07/new-nhrc-act-curtaills-commission-powers.php>.

¹¹⁰ Accountability Watch Committee, Letter to the Special Rapporteur on the situation of human rights defenders, 2013, available at: http://www.frontlinedefenders.org/files/letter_to_sr_on_hrds.pdf.

¹¹¹ *Ibid.*

107. The government's action plan for the implementation of the recommendations of the UPR provides for a special programme for the security of human rights defenders, including journalists.

Key question

Can the State Party inform the Committee of the implementation status of the special programme for the security of human rights defenders?

Annex 1: Report on implementation of Human Rights Committee Views



ADVOCACY FORUM-NEPAL
एड्भोकेसी फोरम नेपाल
Lawyers Forum for Human Rights & Rule of Law

REDRESS

Ending Torture. Seeking Justice for Survivors

UN HUMAN RIGHTS COMMITTEE 110TH SESSION

NEPAL'S FAILURE TO IMPLEMENT VIEWS IN INDIVIDUAL COMMUNICATIONS

February 2014

A. SUMMARY

In the list of issues to be taken up in connection with the consideration of the second periodic report of Nepal, the Human Rights Committee has asked Nepal to indicate:

what procedures are in place for the implementation of the Committee's views under the Optional Protocol, and provide information on measures taken to ensure full compliance with the Committee's views in communications Nos. 1469/2006, *Sharma v. Nepal*; 1761/2008, *Giri et al. v. Nepal*; 1863/2009, *Maharjan v. Nepal*; and 1870/2009, *Sobhraj v. Nepal*.¹

This submission addresses the Committee's request for information, and shows that there is no effective procedure in place for the implementation of the Committee's views. In fact, not one of the five views issued by the Committee in relation to Nepal has been implemented, apart from providing (in some cases) a small amount of money as "interim relief".

Nepal, as signatory to the Covenant and the Optional Protocol, has the obligation to use whatever means lie within its power in order to give effect to the views issued by the Committee.² Nepal should make a commitment to implement the views of the Committee without reference to any future transitional justice mechanisms and must provide effective remedies, including reparation, in relation to the cases the Committee has already considered.

Nepal's failure to provide a remedy to those who the Committee has recognised as victims of violations of the Covenant is a systemic issue. In addition to providing remedies in individual cases, this should be addressed at a policy level by the introduction of a legal framework designating clear responsibilities and transparent mechanisms for the implementation of views adopted by UN bodies.

B. SURVEY OF IMPLEMENTATION OF VIEWS

This report collates information on the extent to which views adopted by the Committee have been implemented in each of the five individual communications brought against Nepal which have been concluded. Advocacy Forum Nepal, assisted by REDRESS, represents the victims in four of these communications (Sharma, Giri, Maharjan and Sedhai). The authors of this report have also been in contact with the legal representatives of the victim in the fifth case to provide an update in relation to his case (Sobhraj).

¹ CCPR/C/NPL/Q/2.

² CCPR/C/GC/33 (2008), para. 20.

Detailed information about each case, and follow-up information, is provided at the end of this document. A table summarising our findings is below, and demonstrates that:

- The only remedy provided to any of the victims is the provision of small payments of what it termed ‘interim relief’ or ‘interim compensation’ in three cases. These payments are generally in line with the State party’s policy towards conflict victims in any event.³ In only two cases has the amount provided been greater than that provided to other victims in a similar situation: Sharma (provided with NRS. 400,000 (USD 4000) in circumstances where other victims have received NRs. 300,000 (USD 3000) and Giri (provided with NRs. 150,000 (USD 1,500) in circumstances where other victims have not been provided with payment).
- No effective investigations have been carried out in any of the cases, and no further remedies – including guarantees of non-repetition such as legislative reforms – have been provided.

Table: Summary of implementation

Author (Date of views)	Violation	Remedy ordered - effective remedy, including:	Remedy provided
Sharma (2008)	2(3), 6, 7, 9, 10	<ul style="list-style-type: none"> • thorough and effective investigation • immediate release if he is still alive • adequate information resulting from its investigation • adequate compensation • prosecute, try and punish those held responsible • take measures to prevent similar violations in the future 	<p>Provision of NRs. 400,000 (USD 4,000) in ‘interim relief’ (Note all disappearance victims have been provided with NRs 300,000 interim relief and the Author was asked to return NRs. 100,000 by the District Administrative Office as they were not aware of the views of the Committee).</p> <p>No investigation carried out and no further remedy provided.</p>
Sobhraj (2010)	7, 10(1), 14(2, 3a-f, 5, 7), 15(1)	<ul style="list-style-type: none"> • speedy conclusion of the proceedings • compensation • prevent similar violations in the future 	None.
Giri (2011)	2(3), 7, 9, 10	<ul style="list-style-type: none"> • thorough and diligent investigation • prosecution and punishment of those responsible • adequate compensation • ensure that the author and his family are protected from acts of reprisals or intimidation • prevent similar violations in the future 	<p>NRs. 150,000 (USD 1,500) provided as ‘interim relief.</p> <p>Police made one visit to interview witnesses but the investigation did not proceed further and the reason for this visit was not</p>

³ The State Party has adopted a policy of providing ‘interim relief’ payments to victims of the conflict instead of pursuing investigations, accountability and adequate reparation: see further Advocacy Forum Nepal (2010), ‘Discrimination and Irregularities: the painful tale of interim relief in Nepal’, http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf.

			<p>clear.</p> <p>Council of Ministers agreed that Ministry of Home Affairs and the Ministry of Defence would develop a mechanism to prevent the reoccurrence of such incidents in future, however this has not been done. A draft bill to criminalise torture was tabled in the Parliament but was not passed before Parliament was dissolved.</p> <p>No effective investigation carried out and no further remedy provided.</p>
Maharjan (2012)	2(3), 7, 9, 10	<ul style="list-style-type: none"> • thorough and diligent investigation prosecution and punishment of those responsible • adequate compensation • amend legislation to bring it into conformity with the Covenant, including amendment and extension of the 35-day statutory limitation from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act; enactment of legislation defining and criminalising torture; and repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance • ensure that the author and his family are protected from acts of reprisals or intimidation • prevent similar violations in the future 	<p>NRs. 25,000 (USD 250) in interim relief as provided to all victims of ‘abduction’ from the conflict.</p> <p>Mr Maharjan has not been provided with any further money although he has been advised that papers are before the Cabinet awaiting approval of a payment to him of NRs 150,000 (USD 1,500) in interim relief.</p> <p>No investigation carried out and no further remedy provided.</p>
Sedhai (2013)	2(3), 6(1), 7, 9, 10(1)	<ul style="list-style-type: none"> • thorough and effective investigation • provide the author and her family with detailed information about the results of its investigation • immediate release if he is still being detained incommunicado • handing over Mr Sedhai’s remains to his family in the event that he is deceased • prosecute, try and punish those responsible for the violations committed • adequate compensation • take steps to prevent similar violations in the future 	<p>Mrs Sedhai has only received NRs. 300,000 (USD 3,000) in interim relief, in line with the general policy for family members of disappeared persons.</p> <p>No investigation carried out and no further remedy provided.</p>

C. BY FAILING TO IMPLEMENT THE COMMITTEE'S VIEWS NEPAL IS IN BREACH OF ITS OBLIGATIONS

Under the International Covenant on Civil and Political Rights (ICCPR) states undertake to ensure that any person whose rights or freedoms, as recognised in the Covenant, are violated shall have an effective remedy.⁴ States must also ensure that any person claiming such a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority.⁵ Accordingly, states must also ensure that the competent authorities shall enforce such remedies when granted.⁶

The duty to comply with the views of the Committee arises from the State party's acceptance of the Optional Protocol and its obligations under the Covenant. The views adopted by the Committee represent an authoritative, legal determination made by the recognised interpreter of the Covenant.⁷ By ratifying the Covenant and its Optional Protocol, states accept the authority of the Committee in this regard and agree to respect and implement its views.

A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.⁸ Compliance is not discretionary. States parties must give full effect to the views of the Committee in view of their obligation to ensure to all individuals within their territory, or subject to their jurisdiction, the rights recognised in the Covenant and to provide an effective and enforceable remedy in cases where a violation has been established.⁹ The Committee has made it clear that States parties "*must use whatever means lie within their power in order to give effect to the views issued by the Committee*".¹⁰ For a remedy to be effective, Nepal must implement the views expressed by the Committee in a timely manner and provide the requisite reparation measures.

D. NO PROCESS FOR IMPLEMENTATION OF VIEWS

Nepal does not have specific enabling legislation to receive the views of the Committee into its domestic legal order. Nor does Nepalese law or practice provide for any specific procedure to be followed where treaty bodies adopt views finding violations by the State.

This means that when views are adopted which require implementation by the State:

⁴International Covenant on Civil and Political Rights (ICCPR) art.2(3)(a)

⁵ ICCPR art.2(3)(b)

⁶ ICCPR art.2(3)(c)

⁷ General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, doc. CCPR/C/GC/33 (2008), paras. 11 and 13.

⁸ Ibid., para. 15.

⁹ Ibid., para. 14.

¹⁰ Ibid., para. 20.

- the onus rests on victims to approach state institutions to implement the views;
- it is not clear to victims which state agencies should be approached in order to ensure implementation of their views;
- responses to the views have been one-off decisions by Nepal's Council of Ministers (part of the Executive with role of Cabinet) to provide small amounts of interim relief, without any follow-through to other state institutions to undertake investigations and reform;
- there has been no publication and consideration of views by the State among state institutions or the wider society, and therefore lessons have not been learned from them.

Even where decisions have been taken by the Council of Ministers to provide interim relief (in the case of Sharma and Giri), these decisions have not been effectively communicated to government officials at the local level responsible for payment to the victims. When they have approached the relevant government office for payment, victims have been refused payment (as in the case of Yubraj Giri¹¹) or asked to return money already provided (as in the case of Yasoda Sharma¹²).

E. REFUSALS TO IMPLEMENT: REFERENCE TO TRANSITIONAL JUSTICE MECHANISMS

Four of the five cases in which the Committee has adopted views against Nepal relate to violations committed during the conflict (1996-2006). In its responses on follow-up concerning these Communications, the Government of Nepal has repeatedly maintained that it will investigate the violations found, through a yet to be established transitional justice mechanism, and has suggested that to do otherwise would not be equitable to other victims.

Such a position is in clear violation of the State Party's obligations under both the Covenant and the Optional Protocol. As the Authors have shown in their responses to the Committee (and as is explored in greater detail in these organisations' main shadow report to the Committee for this review process), the mechanisms proposed by the State party will not provide an adequate remedy in their cases. Instead, the normal criminal justice system is available and should be used immediately to investigate and prosecute the crimes committed.¹³ The Committee has also taken this position, recently finding in another communication concerning Nepal that:

potential future transitional justice mechanisms, such as the Truth and Reconciliation Commission, will not be able to provide an adequate remedy in respect of the

¹¹ See further p. 23.

¹² See further p. 13.

¹³ See, eg. Letter of 20 June 2011 from Mandira Sharma to the Committee concerning the case of *Surya Prasad Sharma v Nepal* (Communication No. 1496/2006).

violations alleged in [the communication], and recalls its jurisprudence, establishing that in cases of serious violations a judicial remedy is required....¹⁴

More than five years after the first of these views was adopted no progress has been made. Contrary to what the government of Nepal argues, it is not inequitable to other victims to pursue these cases where the Committee has found that serious violations have been committed which require redress through an effective investigation in the criminal justice system. Rather, doing so would serve as a symbol of the State Party's real commitment to addressing impunity for violations committed during the conflict period, and would assist in the development of the machinery necessary for the State to do so.

F. CONCLUSION: A FAILURE OF PROCESS AND COMMITMENT

Under the Interim Constitution of Nepal of 2007 the State has the obligation to "effectively implement the international treaties and agreements of which the State is a party".¹⁵ There is not, however, a procedure for implementing the views of the Committee in Nepalese law, and there has been an almost complete failure to do so. Instead, the State Party has effectively rejected the implementation of the Committee's views pending the outcome of the transitional justice process, notwithstanding its clear obligations, and findings by the Committee, to the contrary. In addition to violating the State Party's obligations to implement its Covenant obligations in good faith, this practice frustrates the Optional Protocol's objectives and leaves victims without any realistic prospect of obtaining redress.

G. RECOMMENDATIONS

- The State Party should establish clear, transparent and effective legal frameworks, institutional arrangements and procedures to ensure that those who have been recognised as victims of human rights violations by the Human Rights Committee promptly obtain the remedy to which they are entitled, without being required to take further action at the domestic level. Legislation should include procedures in case of non-compliance with the Committee's views.
- The State Party should establish clear procedures to ensure that views of the Committee finding violations established are translated into Nepali and made available online, are publicised in the local media and are disseminated to relevant national institutions including national police, prosecution and judicial training academies for consideration.
- The State Party should commit to and act immediately to appoint an identified state official responsible for ensuring the implementation of all currently outstanding views in individual communications, within twelve months, and as part of the remedy given provide compensation calculated to take into account the delay in the provision of such remedies in the case concerned

¹⁴ *Chaulagain v Nepal*, Communication No. 2018/2010, Decision on Admissibility, 9 March 2012, para. 6.4.

¹⁵ Interim Constitution of Nepal, Art. 33(m).

SUMMARY OF COMMUNICATIONS AND STATUS OF IMPLEMENTATION

The first three parts of each of these summaries is drawn from the Views of the Committee. Follow-up information is (where specified) taken verbatim from the Committee's Annual Reports, and further information available to the authors.

Sharma v. Nepal, 1469/2006, 28 October 2008

Summary of facts:

Surya Prasad Sharma disappeared after he was arrested by the army in January 2002. His wife followed the soldiers and saw them lead her husband into the Kalidal Gulm army barracks, just 7-10 minutes walk from her house. She was later visited by a soldier who told her that her husband was being severely tortured. In response to a habeas corpus petition filed in the Supreme Court in February 2003, all government authorities denied his arrest and detention. However, the Baglung Chief District Officer (CDO) informed the court that Mr. Sharma had tried to escape and had jumped in the river and drowned. A government committee set up to investigate disappearances provided the same information. In February 2005, the Supreme Court quashed the petition, believing the CDO's response.

Violations:

2(3), 6, 7, 9, 10

Remedy:

"In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person,¹⁶ the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations.¹⁷ The State party is also under an obligation to take measures to prevent similar violations in the future."

Follow up information as reported in Committee's Annual Reports:

A/66/40 (Vol. I), pp. 143-147

"In its response of 27 April 2009, the State party submitted that Ms. Y[a]shoda Sharma would be provided with the sum of 200,000 Nepalese rupees (approximately 1,896.67 euro) as an immediate remedy. With respect to an investigation, the case would be referred to

¹⁶ See Communication No. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para.11.6; and Communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para.8.8.

¹⁷ See Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para.11; and Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.10.

the Independent Disappearance Commission to be constituted by the Government. A bill had already been submitted to Parliament and once legislation had been enacted, the Commission would be constituted as a matter of priority.

Author's comments

On 30 June 2009, the author commented on the State party's submission. She highlighted that it had been more than seven years since Mr. Sharma disappeared and that the State party is under an obligation to conduct a prompt investigation into his disappearance and to promptly prosecute all those suspected of being involved. As to the Independent Disappearances Commission, she argued that there was no clear timeline for the passing of the relevant legislation or for the establishment of the proposed Commission. Neither was it clear whether this Commission, if established, will actually examine the Sharma case specifically. In addition, such a Commission is by definition not a judicial body and does not therefore have the powers to impose the appropriate punishment on those found responsible for Mr. Sharma's disappearance. Even if it did have the power to refer cases of disappearances for prosecution, there is no guarantee that a prosecution process would be initiated or that it would be prompt. Thus, in the author's view, the said Commission could not be considered an adequate avenue for investigation and prosecution in this case. The criminal justice system is the most appropriate avenue.

As to the prosecution, the author highlighted the State party's obligation to prosecute violations of human rights without undue delay. This obligation is clear when considering its contribution to deterring and preventing the recurrence of enforced disappearances in Nepal. In the author's view, in order to prevent such recurrences, the Government should immediately suspend from duty any suspects involved in this case. If they remain in their official capacity, there is a risk that they will be able to intimidate witnesses in any criminal investigation. The author also suggested that an investigation to identify the whereabouts of Mr. Sharma's remains should also be initiated immediately.

On the issue of compensation and the State party's submission that the Government has provided the author with "immediate relief" of 200,000 Nepalese rupees, the author stated that it would not amount to the "adequate" compensation required by the Committee. She argued that she is entitled to a substantial amount to cover all pecuniary and non-pecuniary damage suffered.

Author's supplementary comments

On 11 March 2010, the author provided the following supplementary information. She stated that she had finally received the full amount of 200,000 Nepalese rupees but that despite having been promised in a meeting with the Prime Minister's Secretary on 30 June 2009 that an investigation into her husband's death would be initiated, this had still not been undertaken. In mid-December 2009, she received information from the Prime Minister's Secretary that the army officials were objecting (no specific names provided) to a separate investigation, insisting that this case should be examined by the Independent Disappearances Commission, yet to be established.

State party's supplementary submission

On 28 July 2010, the State party provided a supplementary submission stating that although Government policy contained a provision to distribute 100,000 Nepalese rupees to the family of the deceased or disappeared during the conflict, the Government had made a

special decision in this case, in consideration of the Committee's Views, to give the author twice that amount. However, it underscores its view that this amount cannot compensate the family and is only considered to be interim relief. The State party informs the Committee that the Truth and Reconciliation Commission Bill and Disappearance of Persons (Crime and Punishment) Bill have been submitted to the Legislature Parliament. According to the State party, these Commissions shall in no way "substitute" or supersede the administration of any legal proceedings within the existing legal system as outlined in the author's submission. The Disappearance Bill has been designed to establish enforced disappearance as a crime punishable by law; to establish truth by investigating the incidents that happened during the armed conflict; to end impunity by paving the way for appropriate action to be taken against the perpetrators and to provide appropriate compensation and justice for the victims. The Truth and Reconciliation Bill stipulates that the individuals involved in acts of enforced disappearance shall not be granted amnesty under any circumstances. Due action shall be taken, in accordance with the existing law, against individuals found guilty after the investigations of the two future commissions.

The State party denies that the Prime Minister's Secretary recommended that a separate investigation team be set up to investigate the case at issue as well as the claim that the army had "objected" to such a recommendation. According to the State party, it would not be feasible or practical from a financial, technical and managerial perspective to set up a separate commission to investigate the case at issue alone.

The State party's submission of 28 July 2010 was sent to the author on 9 August 2010.

Additional information from the author

On 30 November 2010, the author responded to the State party's additional comments. She notes first, that even if the Truth and Reconciliation Commission Bill and Disappearance of Persons (Crime and Punishment) Bill have been submitted to the Legislature Parliament, there is no indication as to when the bills would be adopted, in particular in the light of the current political situation. Thus, the Committee's recommendation to establish an investigative body to carry out prompt investigations and prosecutions of human rights violations, in particular enforced disappearances and acts of torture, was not implemented by the State party. In addition, the two Commissions, as they are envisaged in the bills, are not judicial bodies, and they could not impose appropriate penalties to perpetrators of human rights violations. The process thus would not guarantee the promptness required by the Committee. In addition, Nepalese law does not contain crimes such as torture, enforced disappearance, incommunicado detention, or ill-treatment.

The author recalls that she has received a total of 200,000 Nepalese rupees, as "immediate relief". According to her, the amount in question, as pointed out by the State party itself, cannot be seen as commensurate to the pain and anguish befallen upon the family, nor can it, according to the author, compensate the pecuniary and non-pecuniary damages inflicted upon her and her children by the enforced disappearance of her husband.

Even if the State party has committed itself to provide her with an additional relief package under the transitional justice system to be established, the author contends that neither the immediate relief nor any future additional relief could absolve the State party of its obligation to provide an effective remedy and full and adequate reparation — including compensation — for the violations suffered.

On the State party's denial that the Prime Minister's Secretary recommended that a

separate investigation team be set up to investigate the case at issue as well as the claim that the army had “objected” to such a recommendation, the author reiterates her previous statements, but regrets that she has no material evidence to refute the State party’s affirmation. As to the State party’s contention that it would not be feasible or practical from a financial, technical and managerial perspective to set up a separate commission to investigate the case at issue alone, the author explains that she has not asked to have a specific commission to deal with her case, but she expects to have her case investigated within the existing criminal law framework.

Finally, the author regrets that the authorities have not contacted her to inform her on the developments in her case.

The author’s submission was sent to the State party on 2 December 2010.

Additional information from the State party

By note verbale of 9 March 2011, the State party provided additional observations concerning the counsel’s comments of 30 November 2010. The State party notes, first, that article 33 (s) of the Interim Constitution of Nepal provides for the establishment of a Truth and Reconciliation Commission to investigate facts about those involved in serious human rights violations and crimes against humanity during the conflict, and to create an atmosphere of reconciliation in the society. Article 33 (q) of the Constitution stipulates the provision of relief to families of the victims, on the basis of the conclusions made by the Investigation Commission empowered to investigate cases of enforced disappearance during the conflict. Clause 5.25 of the Comprehensive Peace Agreement concluded between the Government and the Communist Party of Nepal (Maoist) states that both sides agree to constitute a high-level truth and reconciliation commission to investigate truth about human rights abuses and create an environment for reconciliation in the society. The Government has already presented two bills in the Legislature-Parliament for the formation of the said commissions. The current Prime Minister, in his first address to Parliament, stated that the Government would take further initiative in having these bills passed promptly.

On the issue of the provision of adequate compensation in the present case, the State party recalls that the family was provided with 200,000 Nepalese rupees as an interim relief. The State party remains committed to provide an additional relief package on the basis of future recommendations of the mechanisms of transitional justice.

As to the author’s comments on reports concerning the lack of cooperation by the Nepalese Army in the context of criminal investigations, the State party explains that under the Constitution and the Army Act (2006), the Army is directed and controlled by the Government. The Army acts in accordance with the laws in force, and always cooperates.

Author’s additional comments

The author presented her comments on the State party’s observations on 20 June 2011. She notes that the State party has failed to implement the Committee’s Views in the case related to the disappearance of her husband. She recalls that the only concrete action undertaken by the State party is the payment of 200,000 Nepalese rupees (US\$ 2,790 at the time of writing), as an interim relief; the author welcomes the State party’s commitment to provide her with further compensation. No further investigation has been carried out into the disappearance of her husband. The author reiterates her comments of the irrelevance of

the transitional justice proceedings (which are not in place yet) to her husband's case and asks to have the case dealt with promptly under the ordinary criminal proceedings. With reference to a recent legal opinion issued by the OHCHR office in Nepal, the author notes that truth commissions should be viewed as complementary to judicial action, and that the regular judicial system cannot be held in abeyance because a commitment to establish transitional justice mechanisms has been made or even if such mechanisms are established and function.

The author reiterates that in this case, the army officials have not cooperated satisfactorily in connection to her husband's disappearance, in particular by failing to provide information which could help identify her husband's whereabouts. Lastly, she expresses concern at the recent calls of high-level State party's officials to have a number of criminal cases relating to the conflict period, including alleged serious human rights violations, withdrawn.

Further action taken or required

On 28 October 2009, the Special Rapporteur met with Mr. Bhattarai, the Ambassador, and Mr. Paudyal, First Secretary, of the Permanent Mission. The Special Rapporteur referred to the State party's response in this case, including the information that the Disappearance Commission would be set up, and asked the representatives whether, given the limitations of such a commission, "a factual investigation" could not be conducted immediately. The representatives responded that there were still reservations that the author had not exhausted domestic remedies and that this was just one of many similar cases which, for the sake of equity, would all have to be considered in the same way, i.e. through the Disappearance Commission and the Truth and Reconciliation Commission which would be set up shortly. They stated that the legislation was before Parliament, the functioning of which was currently being obstructed, but that the enactment of legislation in this regard was assured. They could give no deadline for its enactment. The representatives noted the Special Rapporteur's concerns and would report back to their headquarters. They highlighted throughout the discussion the fact that the State party was recovering from a civil war and that the path to democracy is a very slow one.

The author's latest submission was sent to the State party in June 2011. The Committee decided to organize a further meeting with the Permanent Mission of Nepal, to take place during the 103rd session (October–November 2011).

Decision of the Committee The Committee considers the follow-up dialogue ongoing."

A/67/40 (Vol. I), pp. 118-119

"On 4 August 2011, the State party reiterated in part its previous submissions, and provided additional observations. It explains that Ms. Sharma has been provided with the sum of 200,000 Nepalese rupees, that is, double what other individuals in her situation are entitled to under the law, by decision of the Government. The State party explains that it is committed to providing further relief packages, once the mechanisms of transitional justice are in place. On 15 July 2011, the Government presented to the Parliament a budget for the provision of relief to the families of martyrs and of persons disappeared during the conflict, in the National Budget 2011/2012. The Government states also that it continues to work to promote additional relief measures for [the family of] Mr. Sharma and other victims of the conflict and their families.

As to the investigation concerning the disappearance of Mr. Sharma, the State party

reiterates that it will be dealt with under the mechanisms to be created under the transitional justice system, in line with the provisions of the Interim Constitution. The bills are before Parliament.

In this context, the State party explains that the Supreme Court of Nepal, through a directive order, has asked the Government to formulate a separate law governing investigations into the status of disappeared persons and to carry out investigations through a commission to be formed under such law.

The State party, lastly, explains that the Nepalese Army acts in conformity with the law. It has extended full cooperation to the investigating officials or agencies.

On 20 October 2011, the author's counsel noted that in its most recent submission, the State party in fact reiterated the information contained in its previous submissions. According to counsel, the State party's continued refusal to give effect to the Committee's Views amounts to a failure to fulfil, in good faith, its commitments under the Covenant and the Optional Protocol, and constitutes a separate violation of the author's rights. If the State party does not give full effect to the Committee's Views, the author will submit a separate communication to the Committee, based on article 2 of the Optional Protocol.

The State party was provided with the author's submission on 25 October 2011. The Committee will await receipt of further information in order to decide on the matter.

The case was also mentioned at a meeting between the Special Rapporteur for follow-up on Views and representatives of the State party, which took place on 25 October 2011, during the 103rd session. The State party's representatives recalled the State party's commitment to act against impunity of crimes committed during the conflict. They reiterated that it was a Constitutional requirement that such acts be dealt with under the future post-conflict mechanisms, namely, the commissions on disappearances and on reconciliation. Draft laws are before Parliament, and a draft of the new constitution was to be completed by the end of 2011. The case of Mr. Sharma will be dealt with under the new mechanisms, as will the cases of several thousand other victims.

The Committee considers the follow-up dialogue ongoing, while noting that, to date, its recommendation has not been satisfactorily implemented."

A/68/40 (Vol. I), pp. 181-182.

"On 20 July 2012, author's counsel, with reference to the meeting held with the Committee's Special Rapporteur on Follow-up to Views during the Committee's 105th session, recalls her briefing to the Rapporteur on the current political situation in the State party, and the latter's failure to establish transitional justice mechanisms, despite assurances that it would investigate the violations found by the Committee through a yet to be established transitional justice mechanism.

According to the author's counsel, such a mechanism will not provide an adequate remedy to the victims, and the ordinary criminal justice system must be used to investigate and prosecute the crimes committed.

In the light of the recent political developments in the State party, the prospect of any transitional justice mechanism being established in the immediate future became even more remote. Under the interim Constitution and successive extensions, the Government had a final deadline of 28 May 2012 to adopt a new Constitution. The Parliament failed to do so, and following this, the Constituent Assembly was dissolved, leaving Nepal without

legislative authority. Although legislative elections were scheduled for November 2012, there is little prospect that they take place, and the possibility of a transitional mechanism being established is very slim. Also, a transitional justice mechanism, which would be established through Ordinance, without any consultation with civil society, and without a process of amendments, would fail to bring justice to victims (either because of a weak commission, or because it is not endorsed by Parliament). With no transitional justice mechanism in sight, the authors' counsel is of the view that the State party must use the existing criminal justice system to investigate the violations.

The author's Counsel confirms that the author was provided with a total of Rs. 400,000 ([at the time] approximately USD 4,520) by the Government in "interim relief", made in three separate payments. She further notes that all families of victims of disappearances and extra judicial killings have now been paid up to Rs. 300,000 under the interim relief policy. Ms. Sharma has therefore received Rs. 100,000 more than other victims. However, the Chief District Officer of Baglung has in return asked her to reimburse the Government Rs. 100,000. She has challenged this demand, but this has put additional strain on her and her representatives. Aside from the provision of "interim relief", which is not sufficient as compensation, the State party has taken no steps to meaningfully implement the Committee's Views.

On 29 August 2012, the State party reiterated its previous observations regarding the transnational justice mechanisms and explains that elections are scheduled for 22 November 2012 to elect a new constituent assembly, to function as parliament, and to establish the transitional justice mechanism. The State party reiterates that the current criminal justice system does not allow it to provide full justice of victims of acts occurring during the conflict.

The State party explains that it has implemented the Committee's Views by providing the author with an interim relief; it is, in addition, effortful in establishing a transitional justice mechanism. Accordingly, the State party considers that there is no justifiable ground to take any action in this case by the Committee.

The State party's submission was sent to the author, for comments, on 15 January 2013 (one-month deadline). The Committee will await receipt of further information before finally deciding on the matter.

The Committee considers the follow-up dialogue ongoing, while noting that, to date, its recommendation has not been satisfactorily implemented."

Further information:

On 20 March 2013 the Author's counsel wrote to the Committee and advised that no further steps had been taken to implement the Views.

The State Party sent a further response on 19 September 2013, and the Author's counsel responded on 14 November 2013.

Sobhraj v. Nepal, 1870/2009, 27 July 2010

Summary of facts:

In September 2003 the author was arrested by the Nepalese police, initially accused of being in possession of false documents, then accused of having committed a murder in 1975. He was detained for 25 days without the assistance of a lawyer. During the trial, the author was not able to confront any of the witnesses testifying against him as he did not speak or understand Nepali. In August 2003 he was sentenced to life imprisonment. The verdict was appealed. However in August 2005 a new panel of appeal judges confirmed the original verdict. The author appealed to the Supreme Court. In June 2009 the Appeal Court quashed its previous judgment and sentenced the author to one year imprisonment and a fine of 2000 rupees for illegal entry into Nepalese territory in 1975, while the main part of the appeal remained in issue. At the time of the views the appeal remained undecided.

Violations:

7, 10(1), 14(2, 3a-f, 5, 7), 15(1)

Remedy:

“In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the speedy conclusion of the proceedings and compensation. The State party is also under an obligation to prevent similar violations in the future.”

Follow up information as reported in Committee’s Annual Reports:

A/66/40 (Vol. I), pp. 147-150

“The author’s counsel (based in France) informed the Committee, on 5 January 2011, that following the adoption of the Committee’s Views, the author was placed in isolation, for an undetermined period of time, in isolated and insalubrious premises, with a clay floor, slits in the brick walls and no protection from the winter cold. The author has been prohibited from communicating with visitors, he is prevented from making phone calls and cannot communicate with his lawyer. The lawyer also informs the Committee that the author’s Nepalese lawyers do not represent her client any longer, pursuant to an action undertaken by the Supreme Court, and thus, as a result of this, he faces a situation where he no longer has legal representation.

Finally, the lawyer reports that the Chief of the detention facility in question has prevented the author from signing his review petition to the Supreme Court, which he had to prepare on his own, so as to hand it to a representative of the French Embassy in Nepal. Counsel provides a copy of the unsigned review petition. The Committee’s support is sought.

The lawyer’s submission was transmitted to the State party on 7 January 2011.

State party’s submission

The State party presented its comments on 19 January 2011. Firstly, it regrets that the Committee’s Views have “undermined the independence, impartiality and competence of the Judiciary” of Nepal, and that the Committee has “failed to recognize that an administration of justice has its own procedures which need to be recognized and

respected”.

The State party recalls that it had submitted its observations, on 29 July 2010, challenging both the admissibility and the merits of the author’s allegations, but, as it subsequently transpired, the Committee’s Views had already been adopted, on 27 July 2010.

It states also that the Supreme Court of Nepal has already rendered its verdict in the case of Mr. Sobhraj, “almost concurrent in timing with the adoption of the Views by the Committee”.

On the issue of independence and competence of the judiciary, the State party notes that the Interim Constitution of Nepal (2007) enshrines the principle of the separation of power. The executive, the legislative and the judiciary have been established in the Constitution and their jurisdictions have been clearly defined so as to maintain the spirit of the separation of power, and they act independently, avoiding the interference of one organ into the function of another. The Constitution encompasses the concept of independent judiciary and the prevailing law has ensured the respect of the same in the administration of justice. It is explicit in the Constitution that the people’s right to justice is to be served, in accordance with the prevailing provisions of the Constitution and the fundamental principles of law and justice, through competent courts and other relevant judicial institutions. The Constitution has established the Supreme Court, the Appellate Court and the District Court for independent and fair administration of justice at three levels. The prerogative of the final interpretation of laws and constitutional provisions remains with the Supreme Court. The supremacy of the Supreme Court has been asserted by the constitutional provisions that all mechanisms of the Government and the public are required to respect the verdict and decisions of the court; the government machineries have to assist in the smooth functioning of the courts, and they have to respect and abide by the interpretation of law and establishment of the principles of law and justice by the courts.

The State party explains that the courts in Nepal are competent and independent in reaching a decision, on the basis of facts and evidence before them and the relevant provisions of prevailing law, on the cases brought to their attention and are immune, in doing so, from external pressure, influence, threat and interference of any kind. Every individual has been guaranteed the right to fair trial in a case against him in the competent court of law and this universal right has been fully respected in Nepal. Established judiciary procedures have been impartially observed in the rendering of justice and rights of the defendant and the plaintiff have been duly honoured. The Nepalese judiciary has been commended for its contribution to promotion and protection of justice, human rights and fundamental freedom of people even in adverse times.

As per the stipulation of Administration of Justice Act (1991) that the preliminary hearing of the cases related to murder and fake passports should begin at a district court level, the hearing of the case of Mr. Shobhraj was initiated in the District Court of Kathmandu. As required by law, reviews of verdicts are undertaken by higher courts, and the first verdict of the district court was reviewed by the Appellate Court and the review of the decision of the latter has now been concluded by the Supreme Court, reaffirming the decision of the lower courts.

The State party continues by explaining that Nepal is a democracy, and as a party to the Covenant, the Government takes the Covenant seriously and it is committed to abide by all its provisions. The Constitution and the laws have accordingly incorporated the fundamental

rights guaranteed by the Covenant. Thus, anyone accused of a crime is entitled to the rights of fair trial, a trial at an independent and impartial court, presumption of innocence until proven guilty and punishment only as decided by the competent court. According to the State party, these fundamental rights have been fully honoured in the case related to Mr. Shobhraj.

Mr. Sobhraj's conditions of detention do not undermine "the inherent dignity of human persons". Every provision of the Prison Act (1962) and the Prison Regulations (1963) applies to him without distinction and discrimination. He has been provided with healthy food, appropriate medication and has been allowed to receive visits and to communicate as per the terms of the Prison Act and Regulations. The allegation that Mr. Sobhraj has been placed in "solitary confinement" is, according to the State party, untrue.

The peremptory norm of international law vests unquestionably upon a sovereign State an authority to investigate and sanction offenders as determined by the competent court of law. This is not simply a State prerogative, but also an indispensable task expected of the State for the general well-being of the public and protection of their life and property from criminal behaviour. Mr. Sobhraj has been serving incarceration as per the verdict of two lower courts on the charges of murder and the use of a fake passport and his appeal for the review of the verdict has been repealed by the Supreme Court.

The State party explains that it rejects the author's claim that the documents submitted by the police authority to the court are "fake" and that the Appellate Court reached its decision in the absence of strong "material evidence". It is the competent and independent court, not the parties in the case, that is mandated to decide whether evidence is admissible. In the case of Mr. Sobhraj, the Appellate Court issued the verdict on the basis of the factual report prepared by the relevant experts who examined thoroughly the documents and evidence to verify their reliability and authenticity. All the processes observed during investigation of the case have been in full compliance with general principles of law and existing laws.

The State party adds that every legal case follows certain procedure and every hearing in the court is regulated by relevant rules. In Nepal, the hearing procedures in the Supreme Court, the Appellate Court and the District Court have been regulated by the Supreme Court Regulations (1992); Appellate Court Regulations (1991); and District Court Regulations (1995), respectively. The hearing of every case is conducted as guided by these instruments and this was the situation in Mr. Sobhraj's case. He has been incarcerated as he was found guilty by the two lower courts and finally by the Supreme Court on the basis of substantive evidence. The case of Mr. Sobhraj was accorded priority and all hearings were held in his presence. The State party further draws the Committee's attention to the fact that Mr. Sobhraj's lawyers have expressed gratitude to the Court for according priority to the case of their client.

The State party contends that the Supreme Court has full authority to decide on the admissibility of all evidence submitted, in accordance with law, at the time of prosecution. In the case of Mr. Sobhraj, the Supreme Court reached its decision on the basis of standard values of universally recognized evidence law, upon examination of relevant decisions of courts of other countries and as provided in the criminal law and the Evidence Act of Nepal 2031 BS. The Court admitted only evidence that did not go against the principle of fair trial and all investigations with respect to the case were carried out in accordance with the standard principles of law and relevant national law. No retroactive application of law and

no application of controversial procedures have occurred in this case. The State party also notes that the Act Related to Foreigners 2015 BS and its Regulations 2031 BS deemed the use of a fake passport as a crime punishable by law and the Immigration Act 2049 BS that annulled the 2015 Act incorporated those offences. Mr. Sobhraj used a fake passport to enter Nepal in 1975 and he was convicted for this as per the Act Related to Foreigners 2015 BS and its Regulations 2032 BS and no penalty in excess of that prescribed by the law has been applied to him.

According to the State party, the allegation that the burden of proof has been shifted to the “detriment of the author” is a complete misrepresentation of facts. The evidence law of Nepal places on the prosecution the responsibility to provide evidence to prove the claim. The principle of burden of proof assumes that while it is the responsibility of the prosecutor to substantiate his claim, the responsibility to substantiate a special plea made with a view to reduce the penalty for an acquittal from the charge falls upon the party that makes the plea. Clause 27 (1) of the Nepal Evidence Act 2031 BS states that if the defendant makes a counter claim regarding remission of the penalty or acquittal from the charge (penalty) pursuant to existing law, the burden of proof of proving such a fact shall lie with the defendant him/herself. Pursuant to clause 28 of the same Act, the burden of proof as to any particular fact falls on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other particular person. This is a universal law of evidence. In the case of Mr. Sobhraj, while the prosecutor submitted with evidence that Mr. Sobhraj was in Nepal at the time when the crime was committed, the latter submitted a plea of alibi and consequently was asked to substantiate his claim, which he could not do.

The State party explains further that under the Constitution, every individual arrested retains the right to consult a lawyer of his choice right from the time of the arrest and Mr. Sobhraj was no exception to this provision. At the time he testified in the Court, he was assisted by a lawyer (name provided), who also served as his interpreter. He was allowed to speak in English, which he did, and the questions in Nepali were translated to him by his lawyer. A French lawyer (name provided) also took part in the process as Mr. Sobhraj’s legal counsel.

The State party explains that it has taken note of the concerns expressed by the Committee over the alleged infringement of human rights that Mr. Sobhraj is entitled to under the national law and the international human rights commitments. It expresses assurances to the Committee that it is committed to ensure that even convicted prisoners enjoy the rights that are accorded to them by national and international law.

Finally, the State party reiterates its wish to remain constructively engaged with the Human Rights Committee and other United Nations international human rights mechanisms.

Additional comments from the author

On 23 February 2011, the counsel provided further comments. She refers to her previous correspondence and affirms that no change had occurred in the situation of Mr. Sobhraj. The counsel also notes that the State party has not made any proposal in its submission as to the measures it intends to take in order to comply with the Committee’s Views. On the contrary, the State party denies having breached the author’s rights under the Covenant, thus disregarding the Covenant’s and the Optional Protocol’s provisions, the Committee’s rules of procedure, and the Committee’s Views. The lawyer recalls that the author is entitled

to an effective remedy, including compensation, for the violations he had suffered and is still suffering.

As to the independence of the judiciary in Nepal, the counsel contends that the conduct of numerous enquiries about corruption and different reports from human rights organizations show that the State party's arguments are incorrect.

The counsel requests the Committee to intervene and ensure that the author receives an effective remedy.

On 27 June 2011, the author's counsel informed the Committee that State party has failed to implement the Committee's Views. The State party still denies Mr. Sobhraj the right to have his review petition examined by the Supreme Court. The letters sent by the counsel, on 23 February 2011, to the State party's President and the Prime Minister also remained unanswered.

Further action taken or required

The counsel's latest comments were transmitted to the State party in July 2011. The case should be discussed during a meeting with the State party's representatives at the Committee's 103rd session (October –November 2011).

Decision of the Committee The Committee considers the follow-up dialogue ongoing.”

A/67/40 (Vol. I), p. 121

“The case was mentioned at a meeting between the Special Rapporteur for follow-up on Views and representatives of the State party, which took place on 25 October 2011, during the 103rd session.

By note verbale of 5 December 2011, the State party reiterated its previous submissions and explained that judgments of the Supreme Court are final and not subject to appeal. The Supreme Court may, however, in exceptional circumstances, review its own judgments. Review petitions must be written in the Nepalese language, which was not done in the present case, and for this reason the Supreme Court referred them back to the author.

With reference to article 14, paragraph 3 (f), of the Covenant, the State contends that the Covenant does not provide for a right to have petitions for the reconsideration of final judgments translated. All decisions in the author's case are final at present. Under Nepalese law, the author has to initiate a petition for revision. In the hearing of review petitions, the author would not undergo oral legal proceedings, and therefore the State party does not have to provide him with an interpreter for the initiation of the review. The author's appeals to the Appellate Court and the Supreme Court were filed in Nepali.

On 1 February 2012, the author's counsel reiterated her previous submissions and noted, in particular, that the refusal to admit Mr. Sobhraj's review petition to the Supreme Court, because it was not written in Nepali, prevented him from having his case reviewed with a focus on the violations revealed by the Committee in its Views, and thus prevented him from receiving an effective remedy. Counsel believes that article 14, paragraph (f), of the Covenant should also be applicable to the right to present a review petition in languages other than Nepali.

Mr. Sobhraj is still in detention, and the prolongation of undue delays in the judicial proceedings causes additional harm to him. In addition, he has received no compensation.

The submission by counsel was transmitted to the State party, in February 2012, for observations.

The Committee will await receipt of further information before finally deciding on the matter.

The Committee considers the follow-up dialogue ongoing, while noting that, to date, its recommendation has not been satisfactorily implemented.”

A/68/40 (Vol. I), pp. 179-181

“By note verbale of 27 March 2012, the State party presented additional observations. It recalls that the Supreme Court of Nepal had adopted final decisions in the cases of murder and fraudulent passports filed against the author; the judgments are final and not subject to appeal. The Supreme Court may review its own judgments only in exceptional circumstances. Review petitions must be written in Nepalese, which was not done in the present case, and for this reason, the author’s petitions were returned.

As to counsel’s contention that the Supreme Court judges understand English, the State party notes that the Supreme Court cannot register petitions which are not submitted in the official language.

The State party further notes that under the law, everyone arrested has the right to consult a lawyer of his/her choice. Accused can have free assistance of an interpreter if they do not understand Nepalese. The author had retained private lawyers of his choice during his court proceedings, who, on his behalf, submitted appeals against the judgments of the district and appellate courts. Moreover, he received assistance of an interpreter and the counsel’s allegations that he was denied access to copies of his case-file are unfounded.

The State party explains that when a person intends to submit his/her petition to the court, it is up to he/she to prepare his/her petition and the State party does not have an obligation to provide legal assistance or interpretation therein. Moreover, the author never requested to be provided with a lawyer or an interpreter for the preparation of his review petition.

The State party maintains that by refusing to register the author’s review petition, the Supreme Court did not commit any violation. Such a refusal in itself does not establish that the person was deprived of exercising the rights protected by the Covenant or that the State party has failed to fulfil its obligations under the Covenant.

As to the alleged undue delay of the author’s court proceedings, the State party maintains that the Supreme Court, in line with the Constitution and other pertinent legal acts, examines cases promptly. The judiciary cannot decide a case without due process established by the law, in the name of a speedy justice. Consequently, there is no room for allegations in the present case that the judiciary made unreasonable delay and harassment by devoting unnecessarily long period of time to settle the case. The State party further emphasizes that taking into consideration the nature and sensitivity of the matter, the author’s cases were given priority. Moreover, counsel’s comments are contradictory, as on the one hand she highlights that the excessive length of the proceedings before the Supreme Court and the regular hearing adjournments demonstrated a lack of effective justice, but on the other hand, she claims that the Supreme Court delivered its judgment in a “somehow sudden and rapid manner”.

The State party further contends that the author’s detention was not arbitrary. No physical or mental torture or cruel, inhuman or degrading treatment was inflicted upon the author

during the pretrial investigation or the trial. It further emphasizes that Nepalese judiciary is independent and its independence and competence have been guaranteed by the Constitution and the laws.

On 27 April 2012, counsel presented her comments to the State party's observations.

Counsel stresses that according to the Committee, its Views are legally binding and not mere recommendations, and notes that the State party continues to disregard the Views in the present case, violating article 2 of the Covenant. Counsel further notes that at this point in time, the question whether Mr. Sobhraj's rights under the Covenant are violated is closed, and the case should not be reargued now. The issue concerns the kind of remedy to be provided to the victim.

Counsel reiterates that she requested the President and the Prime Minister of Nepal to address the author's case and to compensate him for the violations suffered, but her requests were ignored. Moreover, the author himself had filed two review petitions to the Supreme Court, but both were dismissed without consideration as they were in English; the author does not speak Nepalese and cannot file the petitions in this language. In this connection, counsel notes that in its observations, the State party acknowledges that no free legal aid or translation services were available for the author to prepare his review petitions. Consequently, according to counsel, the State party was still persecuting the author, as the violations he had suffered were not remedied.

Counsel further notes that the duty "to give full effect" to the Committee's findings, presupposes that the remedy shall be provided by the State party on its own initiative and not within the review petition mechanism. Therefore, the State party's arguments concerning the language used by the author in his review petitions are not pertinent.

Finally, counsel requests the Committee:

- To inform the State party that according to the Committee's jurisprudence, its Views are legally binding;
- To recommend the State party to grant the author a judicial review implementing the Views adopted in the present case, either by the Supreme Court on its own initiative, or at the initiative of the author, permitting the author to submit the review petition either in English or in Nepalese (in such a case translation services have to be provided to him); to recommend that the author is discharged;
- To recommended the State party to pay the author a compensation;
- To express its deep concern about the lack, in general, of a mechanism in the State party to implement its Views;
- To have the possibility of Nepal to nominate and to elect members of the Human Rights Committee suspended.

On 11 July 2012, counsel inquired about the status of the case and reiterated its previous submission.

On 15 October 2012, counsel provided an update on the author's situation in prison in Nepal and informs the Committee that the latter was attacked and life threatened in this locked cell room at odd hours by a co-detainee.

On 24 January 2013, the State party transmitted comments to the latest observations of the

author: on the receipt of information that the author was threatened by a co-detainee, the prison officials investigated, and learnt that a minor exchange of words had occurred between the two detainees. As the author also stated in his observations that he was feeling unsafe, the prison office has deployed plainclothes police in the prison around-the-clock, so as to prevent any future altercation. The leader staff member of the internal administration is also being periodically alternated.

The State party's submission was transmitted to the author on 12 February 2013 (one-month deadline). The Committee will await receipt of further information before finally deciding on the matter.

The Committee considers the follow-up dialogue ongoing, while noting that, to date, its recommendation has not been satisfactorily implemented."

Further information:

The organisations submitting this report confirmed with the Author's counsel in December 2013 that no further steps have been taken to implement the views.

Giri v. Nepal, 1761/2008, 24 March 2011

Summary of facts:

Mr Yubraj Giri was arbitrarily arrested and detained, held in incommunicado detention in appalling conditions, tortured repeatedly, and subjected to ill-treatment in 2004 to 2005 during the conflict between the then-government and Maoist forces in Nepal. Despite bringing this to the attention of the police and court authorities, including by attempting to file a criminal complaint, no investigation was carried out into his treatment, no person was prosecuted and no compensation was provided.

Violations:

2(3), 7, 9, 10

Remedy:

“In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author, the prosecution and punishment of those responsible, and providing the author and his family with adequate compensation for the violations suffered. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future.”

Follow up information as reported in Committee’s Annual Reports:

A/67/40 (Vol. I), p. 120-121

“The case was mentioned at a meeting between the Special Rapporteur for follow-up on Views and representatives of the State party, which took place on 25 October 2011, during the 103rd session.

By note verbale of 9 November 2011, the State party referred to its submission on the admissibility and merits of the case, and explained that the draft bill for the establishment of the Truth and Reconciliation Commission was at the final stage of consideration by the Legislative Committee of the Parliament. The Commission has temporal jurisdiction for crimes committed during the armed conflict from 13 February 1996 to 21 November 2006, including serious human rights violations and torture. The aim is to establish an independent, impartial, credible, autonomous and resourceful body to carry out thorough and credible investigations on alleged human rights violations. The State party contends that the Commission would ensure an effective remedy to the author. The bill provides also for the protection of witnesses and other persons, and for compensation for victims and their families. The State party also makes assurances that neither the author nor his family would be subject to reprisals or intimidation.

As a consequence of the Committee’s Views, the State party decided to provide the author and his family with an interim compensation for the violation of the author’s rights, to be determined by the Council of Ministers. As for the non-repetition of similar violations, the State party explains that a bill on the Criminal Code was submitted to the Parliament, criminalizing acts of both physical and mental torture, and inhuman and degrading

treatment; perpetrators of such crimes would risk prison terms and/or fines.

The State party adds that it does not intend to prolong or dilute the case, nor to shield the perpetrators. It is constitutionally (art. 33 of the Constitution) and politically (the 2006 Comprehensive Peace Agreement) obliged and determined to establish the Commission to investigate crimes during the armed conflict and secure justice for victims and their families.

On 8 December 2011, the State party informed the Committee that the Government had decided to grant an immediate relief amount of 150,000 Nepalese rupees to the author and his family. It was also decided that the Ministry of Home Affairs and the Ministry of Defence would develop a mechanism to prevent the reoccurrence of such incidents in future, and that the Ministry of Peace and Reconstruction would write to the future Truth and Reconciliation Commission, to carry out investigation into the alleged torture inflicted on the author.

The State party's submissions were sent to the author in December 2011, for comments.

The Committee will await receipt of further information before finally deciding on the matter.

The Committee considers the follow-up dialogue ongoing, while noting the current steps taken by the State party to satisfactorily implement the recommendation."

Further information:

On 20 July 2012 the author's counsel wrote to the Special Rapporteur on Follow-up to Views, with reference to the meeting held during the Committee's 105th session. She recalled her briefing to the Rapporteur on the current political situation in the State party, and the latter's failure to establish transitional justice mechanisms, despite assurances that it would investigate the violations found by the Committee through a yet to be established transitional justice mechanism (see further detail of the same letter described in relation to Sharma, above).

The author's Counsel confirmed that to date Mr Giri had not received the Rs. 150,000 that the State Party had committed to providing, despite Mr Giri attending in person at the Ministry of Peace and Reconstruction on 19 March 2012 to collect the money.

On 29 August 2012 the State Party provided a further response.

On 20 March 2013 the Author's counsel confirmed that Mr Giri had received Rs. 150,000 in interim relief, but that no further steps had been taken to implement the Committee's views.

A further response from the State Party was sent on 19 September 2013. The author responded on 14 November 2013.

Maharjan v. Nepal, 1863/2009, 19 July 2012

Summary of facts:

Mr Dev Bahadur Maharjan was dragged from his house in the middle of the night on 26 November 2003 by members of the Nepal Army. He was illegally detained incommunicado at the Chhauni military barracks from the time of his arrest until 17 September 2004, when he was transferred to a detention facility. While Mr Maharjan was detained in the military barracks, he was subject to torture and ill-treatment. Once transferred to the detention facility he was kept in overcrowded rooms infested with lice, was made to sleep on a blanket on the floor, and was allowed to wash only three times during the period of his detention there. Mr Maharjan was finally released from detention on 7 January 2005, after his sister filed a petition for a writ of habeas corpus. The state party did not carry out any investigation into Mr Maharjan's enforced disappearance and torture, nor give him any compensation for his illegal arrest and detention, or torture.

Violations:

2(3), 7, 9, 10

Remedy:

"In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by (a) ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author; (b) the prosecution and punishment of those responsible; (c) providing the author and his family with adequate compensation for all the violations suffered; and (d) amending its legislation so as to bring it into conformity with the Covenant, including the amendment and extension of the 35-day statutory limitation from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act; the enactment of legislation defining and criminalizing torture; and the repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future."

Follow-up:

On 20 March 2013 the Author's counsel wrote to the Committee to advise that the author and his family have not received any payments above NRs. 25,000 provided generally to victims of "abduction" from the conflict period. Mr Maharjan has not been provided with any other remedy or reparation, despite the adoption of the Committee's Views in July 2012 finding numerous violations of the Covenant.

On 6 February 2014 the Author made further enquiries and was told that papers have been prepared for the award of NRs. 150,000 (USD 1,500) in "interim relief" to him. According to the government official the papers are awaiting approval by the Cabinet.

Summary of facts:

Mr Mukunda Sedai was arbitrarily arrested by plain-clothes men while playing cards at a tea stall nearby his Kathmandu apartment in 2003. According to the testimony of witnesses, he was subsequently detained in the custody of the Jagadal Batallion stationed at Chhauni Army Barracks to the west of Kathmandu but there have been no reported sightings of him since mid-February 2004. His wife received a handwritten note from the victim on 16 January 2004 which stated that Mukunda was being detained at Chhauni Barracks. The state authorities repeatedly denied detaining the victim, but the National Human Rights Commission, which conducted an investigation into the disappearance of the victim, concluded that he had been arrested by Army personnel and was detained at Chhauni Barracks. Despite repeated attempts by his wife, friends and family members to locate the victim, his whereabouts still remain unknown.

Violations:

2(3), 6(1), 7, 9, 10(1)

Remedy:

“In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into Mr. Sedhai’s disappearance; (b) providing the author and her family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Mr. Sedhai is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and her children for the violations suffered and to Mr. Sedhai, if he is still alive. The State party is also under an obligation to take steps to prevent similar violations in the future.”

Follow-up:

The 180 day period within which the State Party was requested to report to the Committee on implementation of the views expired on 15 January 2014. The Author is not aware of any steps having been taken to implement the views to date. She has not received any relief after the decision of the Committee.

Annex 2: Torture of detainees interviewed by Advocacy Forum during 2012 according to caste and ethnic background

Trends and Patterns of Torture

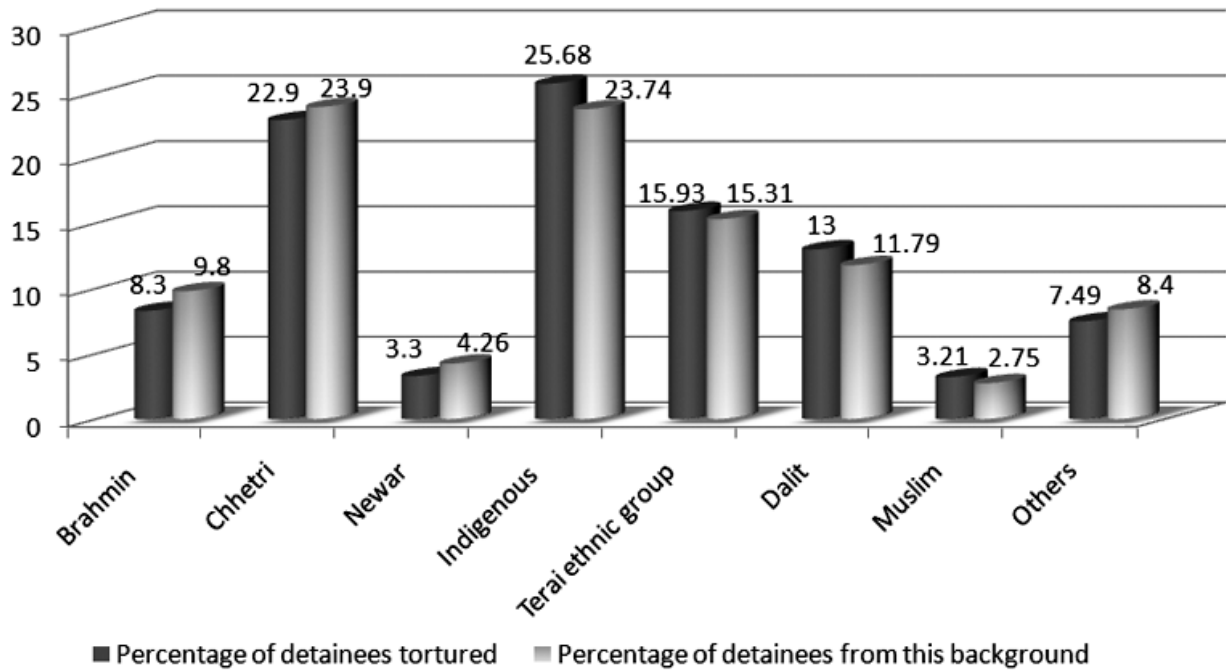


Figure: Torture of detainees by caste and ethnic group

Source: Advocacy Forum, 'Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?', 26 June 2013, p. 33, <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-June-2013-english-version.pdf>.