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

25 April 2013

Dear Sir Nigel

### **108TH SESSION OF THE HUMAN RIGHTS COMMITTEE – PRE-SESSIONAL MEETING ON NEPAL**

We are writing in relation to the pre-sessional meeting of the country taskforce on Nepal during the forthcoming 108th session of the Human Rights Committee from 8 to 26 July 2013.

Please find below a brief update of recent developments pertaining to Advocacy Forum-Nepal (AF), REDRESS and the Association for the Prevention of Torture (APT)'s main concerns in relation to the state party's implementation of the International Covenant on Civil and Political Rights (ICCPR). Further detailed information on each of these issues can be found in the publications referenced.

#### **Impunity for past human rights violations (Article 2(1) and 2(3) in conjunction with numerous Articles including in particular Articles 6, 7, 9, 10, 24 and 26)**

The problem of impunity for widespread past and ongoing human rights violations continues to be a major concern as it undermines justice and effective human rights protection in Nepal.<sup>1</sup> More than six years since the end of the armed conflict, both *de jure* and *de facto* impunity prevail, with not one person having been brought to justice in relation to the thousands of serious, well-documented human rights violations committed during that period.<sup>2</sup>

This impunity has been reinforced by the delay in establishing credible mechanisms to deal with past violations in the post-conflict transitional period. It has been further entrenched by the adoption by the State Party of an **Ordinance to establish an Investigation on Disappeared Persons, Truth and Reconciliation Commission** which incorporates sweeping amnesty provisions. This Ordinance was adopted after negotiations between major political parties behind closed doors, and without the involvement of victims.<sup>3</sup> In response to a writ filed by the leaders of seven different conflict victims

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<sup>1</sup> OHCHR, 'Nepal Conflict Report', October 2012, <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>.

<sup>2</sup> Advocacy Forum and Human Rights Watch, 'Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict', September 2008, available at: <http://www.hrw.org/reports/2008/09/11/waiting-justice-0>; Advocacy Forum and Human Rights Watch 'Still Waiting for Justice: No End to Impunity in Nepal', October 2009, available at: <http://www.hrw.org/reports/2009/10/15/still-waiting-justice-0>; Advocacy Forum and Human Rights Watch, 'Indifference to Duty: Impunity for Crimes Committed in Nepal', December 2010, available at: <http://www.hrw.org/reports/2010/12/14/indifference-duty-0> and Advocacy Forum and Human Rights Watch, 'Adding Insult to Injury: Continued Impunity for Wartime Abuses', December 2011, available at: <http://www.advocacyforum.org/downloads/pdf/publications/impunity/adding-insult-to-injury-nov-30-2011-english-version.pdf>.

<sup>3</sup> 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

groups challenging the process and content of the Ordinance, on 2 April 2013 the Supreme Court issued an interim order staying its implementation. This provides an opportunity for Nepal to undertake meaningful consultation with victims' groups and civil society and ensure its legislation is in line with international standards.<sup>4</sup>

Nepal's political office holders, military and security forces and other public officials enjoy a wide range of constitutional, statutory and regulatory **immunities** from accountability, including criminal accountability.<sup>5</sup> These are often overbroad, poorly defined, interpreted and applied on the basis of political considerations and, *critically, not subject to judicial review*.<sup>6</sup> Immunities are granted on the basis that the individual has acted in "good faith" in the exercise of their powers, however the issue of "good faith" is rarely, if ever, examined by a Court – rather 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 rights, including crimes under international law, and has contributed to the debilitating crisis of impunity that threatens the rule of law and democracy in Nepal.

In addition to immunities, Nepali law provides the opportunity for political actors to interfere with criminal prosecutions by **withdrawing charges**. These powers have been repeatedly misused to withdraw 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.<sup>7</sup> 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). 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.<sup>8</sup> Article 151 of the Interim Constitution also grants the President the power, on the recommendation of the Council of Ministers, to "*grant pardons and suspend, commute or remit any sentence passed by any court, special court, and military court or by any other judicial quasi-judicial or administrative authority or body*". 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.

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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>.

<sup>4</sup> Kantipuronline, 'Supreme Court stays TRC Ordinance move', 2 April 2013, available at <http://www.ekantipur.com/2013/04/02/editors-pick/supreme-court-stays-trc-ordinance-move/369348.html> and Advocacy Forum, 'Stay TRC Ordinance: SC', 2 April 2013, available at <http://www.advocacyforum.org/news/2013/04/stay-trc-ordinance-sc.php>

<sup>5</sup> Including the Army Act (2006), Section 22, which provides an immunity for certain offences resulting in death when acting in good faith (although it excludes this immunity for homicide, rape, torture and enforced disappearance); Police Act 2012 (1955), Section 37; Armed Police Force Act 2058 (2001), Section 26; Public Security Act 2046 (1989), Section 22; National Parks and Wildlife Conservation Act 2029 (1973), Section 24(2); Essential Goods Protection Act 2012 (1955), Section 6.

<sup>6</sup> Advocacy Forum and Redress, 'Held to account. Making the law work to fight impunity in Nepal', December 2011, available at: <http://www.redress.org/downloads/publications/Nepal%20Impunity%20Report%20-%20English.pdf> and forthcoming publication by the International Commission of Jurists with an analysis of immunity provisions in Nepali law.

<sup>7</sup> For further details see *ibid.*, pp. 76-77 and Advocacy Forum, 'Evading Accountability by Hook or by Crook: The issue of amnesties in post-conflict Nepal', June 2011, available at:

<http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

<sup>8</sup> Procedures and Norms to be Adopted While Withdrawing Government Cases 1998, 17 August 1998; see 'Evading Accountability by Hook or by Crook', above, pp. 2-3.

In addition, the Government of Nepal has even rewarded those responsible for serious human rights violations, including with deployment on peacekeeping missions, whereas those officials who try to uphold the law are bypassed for promotion.<sup>9</sup> Many UN bodies have recommended that there should be a system of **vetting of security forces personnel** to be deployed on peacekeeping missions. For instance, in its report after its visit to Nepal in 2004, the WGEID recommended that the “United Nations Department of Peacekeeping Operations evaluate the future participation of Nepalese security forces in United Nations peacekeeping missions, assessing the suitability of such participation against progress made in the reduction of disappearances and other human rights violations attributed to the Nepalese security forces, and seek the cooperation of the Office of the High Commissioner for Human Rights to review progress”.<sup>10</sup> Instead of acting on this recommendation to review the selection and vetting system, the Nepal Army and Nepal Police have repeatedly promoted and sent on peacekeeping missions officers against whom there was prima facie evidence of involvement in serious human rights violations (see below).

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.<sup>11</sup> Despite this, neither the Government of Nepal nor the Nepal Army have shown any intention to introduce more transparency and accountability into the vetting process for peacekeepers. This was demonstrated clearly in early January 2013 when Colonel Kumar Lama was arrested by the United Kingdom (UK) police on suspicion of the torture of two detainees at Goringhela army barracks in Kapilvastu District, Nepal in 2005. Colonel Lama was on leave from peacekeeping duties in South Sudan, visiting his family living in the UK. It transpired that there had been a court order for disciplinary action against Colonel Lama from the Kapilvastu District Court in a case relating to Compensation for Torture in November 2007. Despite this, Colonel Lama was selected for peacekeeping duties in February 2012. Moreover, in late January 2013, the Government decided to hire a leading UK law firm to defend Colonel Lama.<sup>12</sup> The high costs of the defence are being paid for from the government’s budget.<sup>13</sup> This is in sharp contrast with the limited amount of ‘interim relief’ so far offered to victims of the conflict (see below). Furthermore, where police officers have taken positive steps to investigate human rights violations they have been punished. For example, the police officer in charge of the investigation into the murder of journalist Dekendra Thapa in 2004, which progressed further than most such investigations, is reported to have been bypassed for promotion on the orders of the Inspector General of Police.<sup>14</sup>

The Inspector General of Police himself has been promoted to this highest post in the force despite a criminal case pending against him for his alleged involvement in the enforced disappearance and

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<sup>9</sup> See, for example, the cases of Colonel Lama and the Thapa case referred to below.

<sup>10</sup> Commission on Human Rights, ‘Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Nepal’, UN Doc. E/CN.4/2005/65/Add.1, 25 January 2005, para 58, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/105/23/PDF/G0510523.pdf?OpenElement>.

<sup>11</sup> See Amnesty International, ‘Nepal: The Search for Justice’, January 2013, p. 10, available at <http://www.amnestynepal.org/downloads/Nepal-Impunity-Briefing.pdf> and Advocacy Forum, ‘SC directs govt to vet officials’, available at <http://www.advocacyforum.org/news/2012/08/sc-directs-government-to-vet-officials.php>

<sup>12</sup> Kantipuronline, “Pinochet lawyers take up Lama case”, 23 January 2013, <http://ekantipur.com/2013/01/23/top-story/pinochet-lawyers-take-up-col-lama-case/365976.html>

<sup>13</sup> Kantipuronline, “Col Lama’s lawyers demand Rs 57.2m”, 7 February 2013, <http://www.ekantipur.com/2013/02/07/top-story/col-lamas-lawyers-demand-rs-57.2m/366700.html>

<sup>14</sup> Kantipuronline, “Dailekh Inspector Sharma Denied Deserved Promotion”, 26 February 2013, <http://www.ekantipur.com/2013/02/26/fullnews/dailekh-inspector-sharma-denied-deserved-promotion/367616.html>

extrajudicial execution of five students in 2004.<sup>15</sup> Similarly, several officials of the Nepal Army have been promoted into senior positions despite cases pending against them.<sup>16</sup> Individuals alleged to be responsible for serious human rights violations have also been promoted to the post of cabinet minister on at least two occasions.<sup>17</sup>

The State Party has also repeatedly **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.<sup>18</sup> To date the Committee has adopted Views in four complaints concerning Nepal: *Sharma v Nepal*,<sup>19</sup> *Sobhraj v Nepal*,<sup>20</sup> *Giri v Nepal*,<sup>21</sup> and *Maharjan v Nepal*.<sup>22</sup> AF represents the victims in each of the cases except *Sobhraj*, with the support of REDRESS. As reported by AF in a letter to the Committee on 20 March 2013, in none of those 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. This demonstrates not only a continuing violation of the victims' rights, but also a failure to cooperate with the Committee and to uphold its treaty obligations in good faith.<sup>23</sup> The State Party should introduce legislation mandating and providing a procedure for implementation of the views of UN treaty bodies in individual communications.

Finally, the failure to deal with past violations has resulted in ongoing violations of the **right to reparation** for victims.<sup>24</sup> The State Party has instead relied on the provision of small monetary payments to victims termed '**interim relief**'; a process that is entirely inadequate to redress the

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<sup>15</sup> Human Rights Watch, 'Suspend promotion of new police chief', 18 September 2012, <http://www.hrw.org/news/2012/09/18/nepal-suspend-promotion-new-police-chief>.

<sup>16</sup> Human Rights Watch, 'Nepal: Promotion of War Crime Suspect Affront to Justice', 5 October 2012, available at <http://www.hrw.org/news/2012/10/05/nepal-promotion-war-crimes-suspect-affront-justice>.

<sup>17</sup> These include the promotions by the UCPN-M led government of Agni Sapkota (appointed Minister for Information and Communications in May 2011) and Suryaman Dong (appointed State Minister of Energy in November 2011). The two individuals, and several other UCPN-M cadres, are alleged to be responsible for the killing of Arjun Lama during the conflict. Sapkota's appointment was challenged in the Supreme Court, and although the Court expressed its disapproval at the unreasonable delay in investigation by the police, and stated that Sapkota had a moral and legal responsibility to cooperate with the police investigation, it did not find that he should be suspended unless and until charges were filed. The court ordered the police to continue the investigation and to report to the court every 15 days on its progress: Nepal Supreme Court in Writ No. 1094/2068 concerning stay order, 21 June 2011. Sapkota is no longer in the position of Minister, after a reshuffle in early August 2011. Until July 2012, the Attorney-General had only submitted three updates to the Supreme Court. The witness statements contained in the three updates confirmed that Arjun Lama was taken away by Maoist cadres Yadav Poudel, Karnakhar Gautam and Bhola Aryal, among others, in line with the information that the victim's wife had already submitted in her complaint. In July 2012, the Government decided to put the case on hold. The victim's wife challenged this decision before the Supreme Court and on 26 November 2012, the court issued a stay order. As of April 2013, a final Supreme Court decision is pending.

<sup>18</sup> To date the Committee has adopted Views in five complaints concerning Nepal: *Sharma v Nepal*,; *Sobhraj v Nepal*,; *Giri v Nepal*, no. 1761/2008, CCPR/C/101/D/1761/2008 (27 April 2011); *Maharjan v Nepal*, no. CCPR/C/105/D/1863/2009 (19 July 2012). Advocacy Forum represents the victims in each of the cases except *Sobhraj*, with the support of REDRESS. As reported by Advocacy Forum in a letter to the Committee on 20 March 2013, in none of those 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'.

<sup>19</sup> No. 1469/2006, CCPR/C/94/D/1469/2006 (28 October 2008).

<sup>20</sup> No. 1870/2009, CCPR/C/99/D/1870/2009 (27 July 2010).

<sup>21</sup> No. 1761/2008, CCPR/C/101/D/1761/2008 (27 April 2011).

<sup>22</sup> No. CCPR/C/105/D/1863/2009 (19 July 2012).

<sup>23</sup> See Human Rights Committee, General Comment No. 33, para. 15.

<sup>24</sup> Human Rights Committee, General Comment No. 31, para. 16.

harms suffered by victims, and which has been further marred by discrimination in design and implementation.<sup>25</sup>

### **Right to life (Article 6)**

The unlawful use of force and authorisation to use lethal force and the corresponding immunity granted under several of Nepal's laws have led to a large number of well-documented violations of the right to life, including by means of enforced disappearances, by state agents including police, army officers and forestry officials.<sup>26</sup> There are no adequate provisions or procedures for prompt and impartial investigations in such cases (including where firearms have been used). This is illustrated by cases such as the killing of Amrita Sunar, Devisara Sunar and 12-year-old Chandrakala Sunar by Army and National Parks and Wildlife Conservation Department officials in Bardiya National Park in 2010. Despite at least three separate investigations into the incident, no one has been held responsible for their deaths.<sup>27</sup>

Similarly, no one has been held accountable for scores of violations of the right to life by the Nepal Police in the Terai region, including deaths during protests and where police are alleged to have staged "encounter" killings.<sup>28</sup> 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.<sup>29</sup>

### **Prohibition of torture and other ill-treatment (Article 7)**

In contravention of its international obligations, including under Article 7 and the UN Convention against Torture (UNCAT), **torture and ill-treatment are not defined as crimes under Nepali law**. It is, therefore, impossible to prosecute any individual for torture or ill-treatment, with disciplinary sanctions and the provision of compensation being the only remedies available in theory (see further below). We therefore recommend that Nepal criminalise torture in a domestic law which is fully consistent with obligations defined in the UNCAT.<sup>30</sup>

The UN Special Rapporteur on Torture found that **torture was "systematically practised by the police, armed police and Royal Nepalese Army" during the armed conflict**.<sup>31</sup> Since the end of the armed conflict, torture and ill-treatment has continued and is most commonly reported to be carried out by the Nepal Police (NP), the Armed Police Force (APF) (especially in the Terai region), customs officers and officials of the Forestry Department (who have powers to arrest and investigate in national parks). Members of the Young Communist League (YCL), the youth wing of the Communist Party of Nepal-Maoist and similar youth organizations set up by other political parties, and a number of armed groups operating in the Terai are also alleged to have committed acts amounting to torture

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<sup>25</sup> Advocacy Forum, 'Discrimination and Irregularities. The painful tale of interim relief in Nepal', 2010, available at <http://www.advocacyforum.org/publications/transitional-justice.php>

<sup>26</sup> For a detailed examination see Held to Account, pp 31-35.

<sup>27</sup> Held to Account, p 35.

<sup>28</sup> OHCHR-Nepal, 'Investigating Allegations of Extra-Judicial Killings in the Terai. Summary of Concerns', July 2010, available at <http://nepal.ohchr.org/en/index.html> and Advocacy Forum, 'Torture and Extrajudicial Executions Amid Widespread Violence in the Terai', January 2010, available at <http://www.advocacyforum.org/publications/special-reports.php>

<sup>29</sup> OHCHR-Nepal, *ibid*, p. 4.

<sup>30</sup> Nepal acceded to the UN Convention against Torture on 14 May 1991.

<sup>31</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (E/CN.4/2006/6/Add.5) of 9 January 2006, para. 31.

and ill-treatment. For instance, between January and June 2011, AF documented five cases of criminal acts amounting to torture and ill-treatment by non-state actors: three cases were attributed to the Unified CPN-Maoist party, one attributed to the party's youth wing and student wing and one to an armed group in the Terai region.<sup>32</sup>

In May 2012, the Committee against Torture conducted a confidential inquiry under Article 20 of the UNCAT. The report, which was made public, concluded that **"torture is being systematically practised** in the territory of Nepal, according to its longstanding definition, mainly in police custody."<sup>33</sup> The Nepal Government had claimed that it does not approve of torture acts and that it is committed to end impunity. The Committee against Torture however concluded that the authorities not only fail to refute well-founded allegations but "appear to acquiesce in the policy that shields and further encourages torture."<sup>34</sup> In addition to clear and unambiguous public statements from the Nepalese Government that condemn torture, it is important that the Government follow up through concrete actions such as prioritizing criminalization of torture, and removing impediments to accountability.

The Committee against Torture's confidential inquiry found that Nepal failed to ensure the effective prosecution of those responsible in cases in which copious evidence of guilt was gathered by NGOs and the National Human Rights Commission (NHRC); and particularly in cases in which national courts established the responsibility of those involved. Nepal also failed to put an end to practices such as falsification of police and prison registers, police holding individuals incommunicado for multiple days or for periods longer than 24 hours before presentation to a judge, and police refusals to register First Information Reports (FIRs). Further, it did not abolish or reform provisions of the Arms and Ammunition Act that violate basic due process guarantees. In addition, Nepal's legislation does not adequately ensure that detainees receive medical examinations conducted by independent physicians and that judges exclude confessions obtained through torture from legal proceedings. Not only does Nepal fail to suspend officials accused of torture or extrajudicial killings, they are promoted. Nepal also failed to implement court orders and recommendations of the NHRC, thereby undermining the Commission's effectiveness in promoting and protecting the prohibition of torture. The Committee concluded that all these practices and acts of negligence contribute to the continuing habitual, widespread and deliberate practice of torture in Nepal and that the Nepal Government's statements disavowing support for torture and condemning impunity are not independently sufficient to address these shortcomings.<sup>35</sup>

Since the Committee against Torture concluded its confidential inquiry, AF has continued to monitor torture in 57 places of detention in 20 districts around Nepal, finding that around 20% of all detainees visited by AF staff report torture and that many of **the constitutional safeguards continue to be violated**.<sup>36</sup>

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<sup>32</sup> Advocacy Forum, 'Recent trends and patterns of torture in Nepal. A briefing (January to June 2011), available at <http://www.advocacyforum.org/publications/torture.php>.

<sup>33</sup> Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party, para 109.

<sup>34</sup> *Ibid.*, para 104.

<sup>35</sup> *Ibid.*, para. 105.

<sup>36</sup> Advocacy Forum, 'Recent trends and patterns of torture in Nepal. A briefing (July to December 2012), available at <http://www.advocacyforum.org/publications/torture.php>.

The **Torture Compensation Act, 1996** merely allows for courts to award a maximum of NRs 100,000 compensation and for disciplinary action against alleged perpetrators.<sup>37</sup> The time limit contained in this act – that a complainant must file a claim within 35 days after the torture or release from detention<sup>38</sup> – is unduly restrictive and inconsistent with international law. These factors undermine the claim of the Government of Nepal that it constitutes an adequate remedy for victims of torture. In addition, the Government of Nepal has also failed in its obligation to provide rehabilitation to victims of torture.

AF, Redress and the APT recommend that the Government of Nepal ratify the United Nations Optional Protocol to the Convention against Torture (OPCAT). The system of regular, independent monitoring of all places of detention in Nepal would provide one of the best practical ways to prevent torture and ill-treatment in Nepal.<sup>39</sup>

#### *Discrimination and Torture (Article 7 and Articles 2, 3 and 26)*

The Special Rapporteur on Torture has noted with concerns the reports of **discriminatory targeting of detainees from certain ethnic minorities and lower castes**, as well as the reported cases of torture in the southern part of Nepal.<sup>40</sup> AF has found this to be a clear and persistent trend throughout its monitoring, as set out in its six-monthly briefings.<sup>41</sup>

AF, REDRESS and the APT also draw the Committee's attention to significant **failures in responding to rape committed by both State and non-State actors**. In particular, a discriminatory 35 day limitation period for filing complaints of rape has made prosecution of rapes committed during the conflict period impossible.<sup>42</sup> Even in more recent cases where complaints can be filed, there is a widespread failure of police to investigate and prosecute rape cases, and a trend of such cases being diverted to "settlement" through informal justice mechanisms.<sup>43</sup>

#### **Liberty of the person (Article 9)**

A thorough, sweeping and far reaching set of reforms are required to bring the Nepali criminal justice system into line with international standards. The problems with the system are multi-fold: they are structural and cultural, social and economic and based on failures to incorporate

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<sup>37</sup> Advocacy Forum and others, 'Criminalize torture' June 2009 and 'Hope and frustration: an assessment of the Torture Compensation Act, both available at <http://www.advocacyforum.org/publications/torture.php>.

<sup>38</sup> *Compensation for Torture Act, 1996* [Nepal], 18 December 1996, available at: <http://www.refworld.org/docid/3ae6b4fac.html>, Section 5(1) [accessed 22 April 2013].

<sup>39</sup> At Nepal's first cycle Universal Periodic Review before the Human Rights Council, the Government of Nepal rejected the recommendation made by the Maldives that it ratify the OPCAT, stating that 'a preventive mechanism already existed' Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Nepal' (8 March 2011) UN Doc A/HRC/17/5, para.111.

<sup>40</sup> Follow-up report of the Special Rapporteur on torture, A/HRC/16/52/Add.2, p. 170.

<sup>41</sup> Advocacy Forum, 'Recent trends and patterns of torture in Nepal – a briefing (July to December 2012) and earlier briefings, available at <http://www.advocacyforum.org/publications/torture.php>.

<sup>42</sup> 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>.

<sup>43</sup> 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: <http://www.hrw.org/en/news/2011/03/15/nepal-no-justice-gang-rape-victim>; Advocacy Forum and ICTJ, 'Across the Lines: The Impact of Nepal's Conflict on Women', (2010), p. 82, available at: <http://www.advocacyforum.org/publications/AcrossstheLines.pdf>.

international standards as well as failures to observe the standards that have been incorporated.<sup>44</sup> There are serious concerns on a range of issues, including failure to respect custodial safeguards, failure to monitor places of detention, and the use of unofficial places of detention.

The widespread **failure of the Nepali authorities to produce suspects before a judge** within the 24 hour period required by Interim Constitution is especially concerning.<sup>45</sup> Police commonly circumvent the provisions of the State Cases Act by maintaining false or inadequate custody records.<sup>46</sup> AF, REDRESS and the APT recommend that a system of independent monitoring is set up (such as provided for in the OPCAT), where monitors have the right to access any place of detention, inspect all types of records relating to detainees, and have the ability to speak to all detainees in private. This oversight would enable inadequacies to be identified and brought to the attention of authorities, and the approach envisaged in the OPCAT of constructive dialogue between oversight institutions and authorities is likely to provide impetus for positive change. . In addition, the current practice of keeping detainees in **pre-trial detention** for long periods is contrary to Nepal's obligations under the Convention.<sup>47</sup> Automatic detention is arbitrary and the concept of police bail should be incorporated into the Nepali legal system.

The practice of keeping detainees in **unofficial places of detention** still occurs.<sup>48</sup> AF, REDRESS and the APT recommend that, as an additional safeguard against torture, the government of Nepal must provide for criminal sanctions against police officers who utilise private homes or other unofficial places of detention. 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.

### **Right to a fair trial (Article 14)**

Whilst the **right to remain silent** in the Nepali Interim Constitution meets the obligations of the ICCPR, this right is not respected in practice. There is confusion as to the admissibility of uncorroborated confessions as evidence, which could be remedied by an amendment to the Evidence Act. This amendment should clarify that no defendant is compelled to give evidence and that any evidence which is the result of coercion is inadmissible.<sup>49</sup> We also recommend that the burden of proof under this Act is reversed, so it is for the State to prove that statements made by the accused have been given of their free will, in line with the Human Rights Committee and Committee against Torture's jurisprudence.<sup>50</sup>

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<sup>44</sup> Advocacy Forum, 'The right to fair trial in Nepal. A critical study', January 2012, available at <http://www.advocacyforum.org/publications/impunity-reports.php>.

<sup>45</sup> *Ibid.*, pp. 5-7.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, pp. 8-10; 'Held to Account', above n. 6, pp. 37-38.

<sup>48</sup> 'Held to Account', p. 53.

<sup>49</sup> See Human Rights Committee General Comment No.32, paras. 6 and 41.

<sup>50</sup> Human Rights Committee, *Singarasa v Sri Lanka*, No. 1033/2001, UN Doc. CCPR/C/81/D/1033/2001 (2004), para. 7.4; see also 'The right to fair trial in Nepal', above n.45, pp. 15-18. See also, Committee against Torture, *Ktiti v. Morocco*, UN Doc. CAT/C/46/D/419/2010 (2011), para. 8.8; and *P.E. v. France*, UN Doc. CAT/C/29/D/193/2001 (2002), para. 6.3.



AF's monitoring also indicates that detainees are unlikely to be accorded a truly **confidential meeting with their lawyers**.<sup>51</sup> Despite legal provisions guaranteeing confidential meetings with lawyers, police stations and prisons are generally not equipped with rooms in which private meetings can take place. AF, REDRESS and the APT recommend that the Government of Nepal enact legislation safeguarding this right guaranteed in the Interim Constitution, and properly equip police stations and prisons with rooms for such meetings. Furthermore, there is no system of ensuring lawyers access to detention centres where detainees request. The existing custody management standards, including the policy on visits, access to lawyers, family members and medical services need to be reviewed and systems of independent supervision and monitoring need to be established, ideally in accordance with the OPCAT.

The **legal aid system** in Nepal fails to provide a sufficient service to the very large number of litigants who rely on it. The requirement that a defendant should have an annual income lower than NPR 40,000 (USD 460) is unrealistically low. AF, REDRESS and the APT recommend that the Legal Aid Act and Regulations are amended to increase the threshold amount. Unreasonable bureaucratic hurdles placed on those seeking legal aid further restricts access to justice.<sup>52</sup> For example, the need to obtain a certificate from one's local authority makes it difficult to ensure prompt representation, and makes it almost impossible for those who are detained, and therefore most in need of legal aid, to access it. We recommend that legal assistance should be advanced to those who claim that their income falls below the limit, with the contribution to be repaid if it subsequently transpires that this estimate of income was inaccurate.

The practice of vesting significant criminal justice judicial functions in the hands of **Chief District Officers** (CDOs, senior government official accountable to the Home Ministry) is fraught with difficulty.<sup>53</sup> Excessive fines, ill-defined sentences, the official relationship between the CDO and police, and complete lack of procedural safeguards make CDO hearings in clear violation of Article 14. Having functions as a member of the executive and judiciary places them in an untenable position. Thus, in line with the Supreme Court judgement of September 2011, the government should review the law and make necessary amendments.<sup>54</sup>

### **Child rights (Article 24)**

Nepal systematically **fails to accord children a fair trial** within the framework of the ICCPR or the CRC. Instead the justice system nearly always views children and adults in the same light. Though there have been some positive measures taken recently, including the adoption of the Juvenile Justice Regulations, children still are often tried as if they were adults.<sup>55</sup> The guaranteed legal representation at trial is not sufficient to safeguard their rights due to many other shortcomings set

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<sup>51</sup> *Ibid.*, pp. 29-30. See also United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/C.3/67/L.6 (2012), Principle 7 and Guideline 3, which provides that detained persons should enjoy unhindered confidential access to their lawyer at all stages of the criminal justice process.

<sup>52</sup> See generally, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, *Ibid.*

<sup>53</sup> 'Held to Account', above n.6, p. 43-47.

<sup>54</sup> 'The right to fair trial in Nepal', above n.45, pp. 48-9.

<sup>55</sup> Advocacy Forum, 'Torture of juveniles in Nepal. A Serious challenge to justice system', June 2010, available at <http://www.advocacyforum.org/publications/child-rights-and-juvenile-justice.php>

out below. AF and REDRESS recommend that juvenile benches are established throughout the country, and procedures are strengthened.<sup>56</sup>

The failure to uphold the right to a fair trial of children is compounded by the **low age of majority and criminal responsibility** in Nepal. We note that the Committee on the Rights of the Child has called on the Nepali Government to increase both these ages.<sup>57</sup> In addition, AF and REDRESS consider current age verification procedures in the Nepali courts insufficient. We recommend that efforts are made to systematise the issuing of birth certifications, and that a particular procedure for age verification, based on internationally accepted scientific procedures, should be created.

**Detaining children with adults** is a serious breach of international standards and was an issue of grave concern to the Special Rapporteur on Torture when he visited Nepal in 2005.<sup>58</sup> Despite a number of decisions of the courts prohibiting the detention of children with adults, this continues to occur. We believe that it places vulnerable children at serious risk. AF and REDRESS therefore recommend that children should not be detained unless as a last resort. If they are detained, they should always be segregated from adults and held in separate facilities, such as rehabilitation homes. Officials who continue to detain children with adults should be subject to disciplinary action.

### **The National Human Rights Commission (Article 2(3))**

The NHRC was established in 2000 under the 1997 National Human Rights Commission Act. It was transformed into a constitutional body under the 2007 Interim Constitution with a mandate to ensure respect and promotion of human rights, notably by means of inquiries, investigations and recommendations to state authorities. It is not a judicial body, and hence cannot issue binding decisions.<sup>59</sup>

A **new law was passed in January 2012** to govern the functioning of the institution. The law curtails the powers 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. While Article 11 of the original 1997 NHRC Act had granted the Commission the same powers as a court of law, the new 2012 Act takes this power away altogether in direct contradiction to the *Paris Principles relating to the Status of National Institutions*, which demands a broad mandate for institutions to promote and protect human rights. This curtailment is evident from the preamble of the new Act itself where the phrases 'independent' and 'autonomous' have been removed, though they are later briefly mentioned in Section 4(2).<sup>60</sup>

The new statute also introduces a time limit of six months within which complaints must be lodged, thereby preventing victims from lodging complaints about human rights abuses during the conflict

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<sup>56</sup> *Ibid.*, pages 71-6.

<sup>57</sup> Committee on the Rights of the Child, 'Consideration of reports submitted by state parties under Article 44 of the Convention: Concluding observations: Nepal' (21 September 2005) UN Doc CRC/C/15/Add.261, para 97.

<sup>58</sup> Commission on Human Rights, 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Civil and Political Rights, Including: The Questions of Torture and Detention, Mission to Nepal', U.N. Doc. E/CN.4/2006/6/Add.5 (9 January 2006), para 28.

<sup>59</sup> For a critique of the new NHRC Act of January 2012, see Advocacy Forum, 'Necessity of amendments in National Human Rights Act 2012 for competence, autonomy and independence of the NHRC', July 2012, accessed at: <http://www.advocacyforum.org/downloads/pdf/nhrc-act-review.pdf>.

<sup>60</sup> See also, Suhas Chakma, 'Money for Justice', *Kathmandu Post*, 30 April 2012, accessed at: <http://www.ekantipur.com/the-kathmandu-post/2012/04/29/oped/money-for-justice/234330.html>

and unduly limiting the time within which victims of serious violations such as torture can pursue remedies before it.

On 6 March 2013, the Supreme Court declared Sections 17(10) and 10(5) of the National Human Rights Commission Act, 2012 null and void. Section 17(10) allowed the Attorney General the power not to implement NHRC recommendations for the government to initiate legal action against alleged perpetrators of human rights violations as long as the NHRC was informed in writing about the reasons for non-implementation. The judgment means the Attorney General now has to follow NHRC recommendations as per Section 17(5) of the Act, if the NHRC recommends legal action against human rights violator(s).<sup>61</sup> It remains to be seen how this will be implemented in practice and it is also unclear how, if at all, this decision impacts on past NHRC recommendations.

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

In addition, in the new Act, the NHRC is also not given explicit power to investigate cases of human rights violations that have been allegedly perpetrated by Army personnel. This has the potential of perpetuating the Army's impunity for egregious instances of human rights violations committed during the conflict, and even in the post-conflict period.

It should also be noted that the mandate of the current Commissioners runs out in September 2013, and that in the absence of a parliament, it will not be possible to follow normal procedures for the appointment of new commissioners. This increases the concerns already expressed above regarding the serious threats to the effective functioning of the NHRC.

We hope that this information will be useful for the Country Report Task Force in preparing the list of issues. Please do not hesitate to contact us should you require any further details.

Yours sincerely,

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Advocacy Forum-Nepal

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APT

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<sup>61</sup> 'SC rules NHRC Act provisions null and void,' *The Himalayan Times*, 6 March 2013, accessed at: <http://www.thehimalayantimes.com/fullNews.php?headline=SC+rules+AG%27s+discretionary+power+null+and+void&NewsID=368500&a=3>