



*Seeking Reparation for Torture Survivors*

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

September 2010

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

#### *General overview*

In his report of its 2005 visit to Nepal, Professor Manfred Nowak, UN Special Rapporteur on Torture, reported that torture and other cruel, inhuman and degrading treatment was “systematically practised.”<sup>1</sup> This finding mainly referred to the practice of torture by the security forces in the context of the armed conflict between the security forces and the Communist Party of Nepal (Maoist) (CPN-M). Since the end of the conflict in April 2006, the occurrence of torture by both the security forces and the CPN-M has reduced. Nevertheless, it remains habitual and widespread, especially in police custody in at least a considerable part of the country and in relation to certain categories of detainees such as juveniles and members of certain ethnic groups.

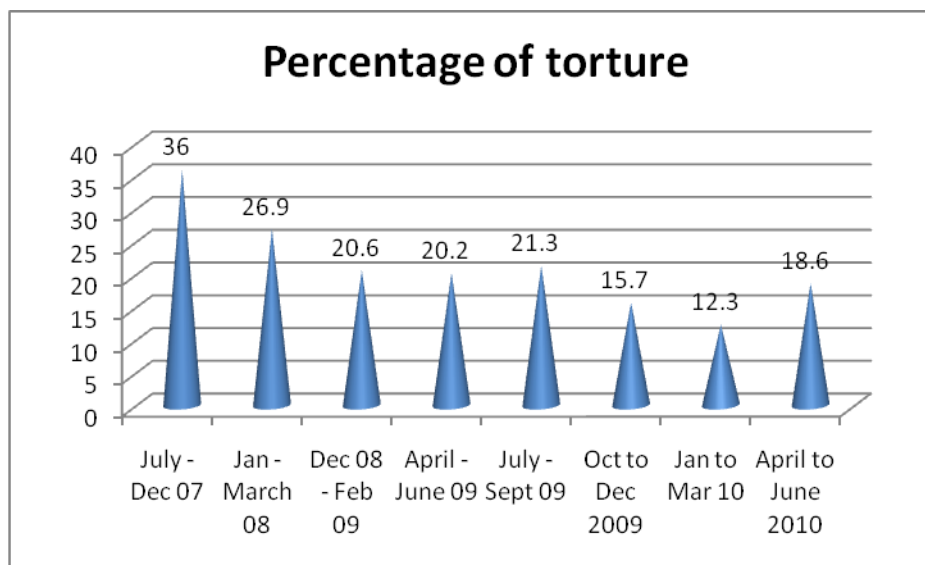
There is no nationwide mechanism to monitor places of detention in Nepal, though a number of bodies have powers to do so. Chiefly among them are the National Human Rights Commission (NHRC) and the judiciary. Additionally, the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) carries out certain monitoring functions within the scope of its mandate. The NHRC has not been able to fulfil the role of nationwide monitoring mechanism. Since the end of the conflict, the Commission does not appear to have prioritised this part of its mandate. Other bodies, such as the Nepal Police Human Rights Unit and the Attorney General’s Department, have also failed in their duties to investigate reports of torture and other ill-treatment.

In the absence of systematic monitoring, AF since 2001 has developed a program of monitoring places of detention. According to data collected by AF in the period from 2006 to date, there is a steady decline in the number of detainees claiming they were

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<sup>1</sup> Manfred Nowak, Mission to Nepal, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. No. E/CN.4/2006/6/Add.5 (9 January 2006), paras. 17, 25 and 31

tortured from around 30% in 2006 to around 15.7% in 2010, though there is a worrying increase over the period from April to June 2010.<sup>2</sup>



It is also to be noted that in some districts and in relation to some categories of detainees, the percentages are much higher. For instance, in the southern Terai<sup>3</sup> region, especially in the districts of Dhanusha and Banke<sup>4</sup>, there have been consistently higher numbers of people who claim they were tortured.<sup>5</sup> It is also found that detainees belonging to certain minority ethnic groups and lower castes face a significantly higher risk of torture than detainees from high castes.<sup>6</sup> It is further consistently found that juveniles face a higher risk of torture.<sup>7</sup>

AF has found that in the last few years there has been a significant increase in levels of torture in the Terai region.<sup>8</sup> This goes in parallel with an increase in political instability as well as the increase in activities by armed groups in the Terai, and the government's introduction of a Special Security Plan.

Given the long-term consistency with which these patterns have emerged, AF is confident that they are a fair representation of the prevailing reality relating to torture in Nepal but acknowledges that in the absence of a nationwide monitoring mechanism they cannot be determinative but just suggestive of the total figures.

<sup>2</sup> Data collected from October 2006 to June 2010. AF visits detention centres in 20 of the country's 75 districts: Baglung, Banke, Bardiya, Dhanusha, Dolakha, Jhapa, Kanchanpur, Kapilvastu, Kathmandu, Kaski, Lalitpur, Morang, Myagdi, Parbat, Ramechhap, Rupandehi, Siraha, Sunsari, Surkhet and Udayapur. In total, AF currently visits 57 places of detention on a regular basis.

<sup>3</sup> Nepal is geographically divided into three belts: the plains of the Terai in the south; the central hills (called 'pahad' in Nepali), ranging between 700 and 4,000 meters altitude; and the mountain region of the Himalaya in the north. The Terai, sometimes spelt Tarai, is constituted by the mostly plain land that stretches the length of the southern border with India. It forms about a quarter of the total surface of the country, includes twenty districts and is estimated to be home to half of the total population of Nepal. See ICG, *Nepal's Troubled Tarai Region*, Asia Report N°136, 9 July 2007, page 2 and following.

<sup>5</sup> See Table 4 in Annex

<sup>6</sup> See Table 5 in Annex

<sup>7</sup> See Table 8 in Annex

<sup>8</sup> See Table 4 in Annex

## *Perpetrators*

Since the end of the armed conflict, torture and other ill-treatment are most commonly reported to be carried out by the police, Armed Police Force (APF) (especially active in the Terai region), customs officers, officials of the Forestry Department (who have powers to arrest and investigate in national parks). In addition, 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 have committed acts amounting to torture. A number of armed groups operating in the Terai region such as, among others, the Janatantrik Terai Mukti Morcha (Jwala) (JTMM-J), Janatantrik Terai Mukti Morcha (Goit) (JTMM-G), Akhil Terai Mukti Morcha, Nepal Defence Army, Terai Cobra, Madhesi Mukti Tigers, Terai Tigers, Terai Liberation Tigers, and Madhesi Viral Killers are also reported to abduct, torture and ill-treat people.<sup>9 10</sup>

A significant number of people who report torture are held under the Arms and Ammunition Act<sup>11</sup>. These cases have to be situated in the context of a rise in crime in the country. AF has serious concerns that people held under this Act can be tried before Chief District Officers (CDOs)<sup>12</sup>, without representation by a lawyer or time to prepare their defence. These serious fair trial concerns are compounded by the fact that the evidence against these people is often extracted under torture.

## *At risk groups*

### *Children*

Juvenile detainees are treated like adult detainees and they are tortured during interrogation and forced to confess guilt. Despite some improvement after the introduction in 2006 of the Juvenile Justice Regulations, juvenile detainees are still more frequently tortured than adults in Nepal. Particularly worrying is that the percentage of torture of juveniles reported in the southern Terai region is rapidly increasing. Eight of the nine districts with torture percentages above the national average are situated either in the Terai region or in bordering districts (Bardiya, Dhanusha, Jhapa, Kapilvastu,

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<sup>9</sup> The status of the YCL under international law is under discussion. Throughout the time the CPN-M was not in government, it could be argued that it should have abided by international humanitarian law as a proxy to a former armed opposition group which has still not formally been disarmed. However, between August 2008 and May 2009, when the CPN-M formed the government, it arguably could be said to be a vigilante group. The status of many of the armed groups in the Terai is even more problematic. Many of them formally have a political agenda, but on a day to day basis the activities of many of them have much more of a hallmark of criminal gangs engaged in extortion, smuggling, etc. Although aware of severe acts committed by these groups this submission focuses on the acts committed by the official security forces in Nepal.

<sup>10</sup> Review of the Implementation of recommendations made by the special Rapporteur on torture, Manfred Nowak, after his Mission to Nepal in 2005, Human rights Watch, Advocacy Forum, Redress, 5 November 2008.

<sup>11</sup> See Table 6 Annex

<sup>12</sup> This official is appointed by the Home Ministry and represents the ministry at a district level. The administration of the local police force falls within CDOs' responsibilities. The Home Ministry defines the role as: 'The CDO has been empowered with the necessary authority to maintain law and order in the respective districts and he has also been made *responsible to act as the representative of the central Government*.'<sup>12</sup> They also play a part in elections with the Election Commission confirming that 'the practice has been to appoint Chief District Officers as Returning Officers'.<sup>(</sup> Statement by The Nepal Ministry of Home Affairs <<http://www.moha.gov.np/abtministry.php>> accessed 17 November 2009 emphasis added.) We are therefore concerned that CDO's occupy a position which defies the principle of separation of powers. This means they do not qualify as a truly independent or impartial tribunal.

Morang, Rupandehi, Surkhet and Udayapur). This trend seems to parallel the political tensions and high levels of crime in those areas of Nepal. The district of Dhanusha has been consistently above the average level since at least April 2006. In the period from September to December 2009, the highest level of torture of juveniles was reported reaching a shocking 90% in this district.

The Supreme Court has ruled that detention of minors in prison is illegal and has directed the relevant authorities to provide for their stay in child rehabilitation homes. These directions have not been implemented so far. Implementation has failed partly due to a lack of physical infrastructure and resources such as finance. AF continues to urge the government to implement the Supreme Court order of 26 February 2009 for juvenile detainees to be sent to separate juvenile correction homes rather than keep them in police custody with adults. With regard to the construction of Child Rehabilitation Homes there was a report in Kantipur of 31 May 2010 announcing that the government has decided to establish three new rehabilitation homes in view of the increasing number of juvenile detainees. The government decided to expand the one existing home at Sanothimi (Bhaktapur district); and is planning to open another in Morang district and a third one in Kaski district.<sup>13</sup>

The Juvenile Justice Procedures state that at the time of arrest of juvenile detainees, the police should be in plain clothes, at the time of interrogation they should interrogate children for a maximum of one hour at a time and the interrogation should be in the presence of his/her guardian. But in practice, these safeguards are not implemented.

Furthermore, the information gathered by AF shows that juveniles are significantly more likely to be tortured or ill-treated in detention than adults, with adults facing a 15.7% risk of torture, and juveniles a 20.8% risk.<sup>14</sup>

### *Women*

The data collected by AF from October to December 2009 indicated an improvement in the treatment of women during investigation and interrogation, with only 2% (one woman) reporting torture. However, in the last quarter 10% of women detainees (8 out of 74) interviewed reported torture and/or ill-treatment. Over the period from October 2009 to June 2010, 5.7% of women detainees interviewed reported torture and/or ill-treatment in detention.<sup>15</sup>

### *Ethnic groups*

AF has observed a longer-term trend of detainees from the Terai ethnic groups and Dalit community being tortured more frequently than other detainees. Although Terai ethnic groups represent 16.7% of detainees, they face a 21.4% chance of torture in

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<sup>13</sup> <http://202.166.193.40/2010/05/31/editors-pick/child-reform-centres-to-open/315437/>

<sup>14</sup> See Table 2 and 8 Annex.

<sup>15</sup> See Table 3 Annex.

detention. Dalit groups, representing 11.1% of the detention population, face 18.8% chance of torture.<sup>16</sup>

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

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

As argued in previous submissions made by AF and REDRESS in 2008 and 2009, impunity in relation to torture in Nepal is widespread and systematic as torture is not defined as a crime and therefore no criminal charges can be brought against the alleged perpetrators. Furthermore, though the Police Act provides for disciplinary action against police officers involved in torture, it is found that the penalties imposed are very lenient; and that the police authorities never refer their staff implicated in incidents such as severe beatings to the normal court for charges such as assault.

Impunity in relation to torture is also exacerbated by the role played by Chief District Officers (CDOs), who have quasi-judicial powers under several laws in Nepal. While providing legal aid to the detainees, AF also represents cases before quasi-judicial bodies, such as CDOs and Forestry Department Officers. CDOs are administrative officers designated to discharge administrative function of the Government under Local Administration Act 2028. AF reviewed the law relating to CDO's powers and functions under different laws. The quasi-judicial powers of CDOs were found unreasonable, arbitrary and against principles of natural justice and the Interim Constitution 2007. AF filed a Petition of Public Interest Litigation (PIL) on 6 April 2010 (Writ No W 0043) to challenge the quasi-judicial powers of CDOs. The petition argued that provisions in no less than ten laws granting powers to CDOs are in breach of Nepal's commitments under international human rights law to which it is a party, more specifically in breach of Article 14 of the International Covenant on Civil and Political Rights, guaranteeing a right to a fair trial before an independent tribunal. The Case is *sub judice* before the Supreme Court.

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

Article 26(1) of the Interim Constitution of January 2007 requires the Government to criminalize torture. It states:

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<sup>16</sup> See Table 5 in Annex.

[n]o person who is detained during investigation, or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.

Article 26 (2) reads:

Any such action pursuant to clause 1 shall be punishable by law.

To date, this provision has not been implemented in law. Recently, a draft Criminal Procedure Code and Penal Code have been brought before the cabinet. Article 164 of the draft Penal Code criminalizes torture, but fails to define it clearly in line with international standards. It provides for torture to be punishable by a maximum of five years and/or a fine, but fails to impose a minimum punishment. It also stipulates a maximum time limit of six months within which victims have to file cases.

In the absence of specific legislation criminalizing torture and specifying specific punishments, the only domestic law addressing the question of torture is the Torture Compensation Act, 1996 (TCA). This law however fails to meet normative standards to prevent, punish and provide adequate redress in relation to torture. The main objective of the TCA is to compensate torture victims in a very limited way, not to prosecute the perpetrators. The continuing absence of effective punishment for perpetrators, the existing impunity in relation to torture in Nepal is reinforced time and again. Regularly, this results in inmates dying in custody after severe torture.<sup>17</sup>

There have been no developments in regards to the criminalization of torture since the last follow-up report submitted by this organization.

#### **Recommendation (c) (d) (e) and (f):**

*Incommunicado detention be made illegal, and persons held incommunicado released without delay.*

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

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

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<sup>17</sup> See Coalition against Torture, *Criminalize Torture*, June 2009.

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

The problems with record-keeping by all security forces (and especially the Nepal Army) observed by the Special Rapporteur on Torture during the conflict continue to manifest themselves at the local level in relation to common criminal suspects detained by the Nepal Police. The detention records held at the local level are incomplete and often inaccurate, if not deliberately falsified. This allows in many cases for detainees to be held for several days without being produced before judges, despite the law requiring that they be presented within 24 hours of initial arrest.

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

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

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

As stated, other forces, such as the Armed Police Force and the Forestry Department detain people, and are also known to have tortured detainees. The army is also involved in patrolling national parks<sup>18</sup> and this still leads to illegal arrests and detention. It is alleged that Krishna Bahadur Sunar (whose wife and child were killed in disputed circumstances) was detained for several hours in the national park by army personnel on 10 March 2010 before being detained for several days in the local Forestry Office ward. He was released without charge on 25 March.

In 2009 AF was informed of two cases where individuals were detained in private houses in Kathmandu. In the first case, in January 2009, Ram Bahadur BC arrested in Surkhet district was transferred by aeroplane to Kathmandu and taken to a private

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<sup>18</sup> On March 10, 2010 the NA was allegedly involved in the killing of two women and a child in Banspani, Bardiya National Park. It is alleged that Krishna Bahadur Sunar (father and husband of one of the women and the girl who was killed in Bardiya National Park) was detained for several hours in the national park by army personnel on 10 March 2010 before being detained for several days in the local Forestry Office ward. He was released without charge on 25 March.

house near the airport. He was kept for five days in a second floor room next to the bathroom before being transferred to the Metropolitan Police Range. During these five days he was severely tortured and coerced into making a confession. He also reported that a man called Kamal was being held on the ground floor. The second case relates to the arrest in June 2009 of Niranjana Khanal, from Dang district. He was detained in a private house in Maharajgunj before he was taken to the Metropolitan Police Range. During his detention at the private house he was tortured and threatened. It is thought that the detention of prisoners in private houses is a regular police practice in Kathmandu.

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

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

There have been no changes to these provisions nor to the use of confessions obtained under coercion since the last review by the Special Rapporteur. It is noted that people held under certain laws that grant quasi-judicial powers to CDOs are also more likely to be tortured. This is particularly alarming given the extremely high conviction rates of people brought before CDOs. In the fiscal year of 2006-2007 the District Courts decided 4,524 criminal cases and CDOs decided 2,516 criminal cases. The District Courts convicted the defendant in 72.67% of the 4,524 criminal cases. The CDOs convicted in no less than 98.27% of cases.<sup>19</sup> This indicates that the use of confessions obtained during torture remains prevalent in these cases.

Laws, such as the Arms and Ammunition Act 1963, provide powers to CDOs to sentence detainees to up to 7 years in prison during quasi-judicial hearings which fall far short of international standards of fair trial. For cases under the Public Offences (and Punishment) Act 1970, the CDO is the officer of first instance responsible for taking legal action and delivering verdicts. 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.

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<sup>19</sup> The Attorney General of Nepal ‘Annual Report’ (Fiscal Year 2063-64, Kathmandu) p 55



The Public Security Act 1989 provides that the CDO has jurisdiction to make detention or internment orders of up to an initial period of 90 days. The discretion to make such an order exists as long as “adequate and appropriate grounds to prevent any person from doing anything which may immediately undermine the sovereignty, integrity or public tranquillity and order of the Kingdom of Nepal” exist.<sup>20</sup> During the armed conflict, it was found that detainees held under the PSA are much more likely to be tortured. Among the detainees interviewed by AF between October 2009 and June 2010, 13.9% of those charged under the Public Offences Act and 34.5% who were charged under the Arms and Ammunition Act reported torture.<sup>21</sup>

Furthermore, though there are legal safeguards set out in the Interim Constitution and various laws (such as for detainees to be given a notice of arrest; to be produced before a court within 24 hours; for detainees to be given a medical check-up), these are often not adhered to and this non-adherence is not sanctioned.

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

It is not strictly required under Nepali law for judges to inquire whether a detainee has been tortured while in custody, although under influence of sustained awareness raising by AF some judges have made it a practice of asking detainees to remove their shirt and state whether they have been subjected to torture by the police. During the last year, 9.2% of the detainees interviewed by AF were asked whether they were subjected to torture during interrogation by judges at the time they appeared before them to consider remand. This percentage represents an increase of almost 5% compared to the previous year.<sup>22</sup>

Major problems remain with regard to the critical issue of health check-ups which according to the TCA have to be done at the time detainees are taken into custody and before they are released from custody. The percentage of detainees taken for check-up has increased considerably over the last few years. During this quarter, 985 detainees (93.1%) stated that they were provided with health check-ups in the early part of their detention whereas in the previous quarter from January to March 2010, 828 (86.5%) said they were provided with a health check-up.<sup>23</sup> However, no health check up is carried out while releasing the detainees. Furthermore, according to the detainees' statements, health check-ups are just a formality as police routinely take detainees in groups to see a doctor; and doctors simply ask the detainees whether they have any injuries or internal wounds, but fail to physically examine them.

When victims claimed before the court that they were tortured and when courts give orders to the police to take the victims for a physical and mental check-up, it is noted

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<sup>20</sup> The Public Security Act, Section 3(1)

<sup>21</sup> See Table 6 in Annex.

<sup>22</sup> See Table 9 in Annex.

<sup>23</sup> See Table 9 and 10 in Annex.

that at that time too in many cases the doctor fails to conduct a proper examination. The doctors also often fail to give adequate description of any wounds in the medical report to be submitted to the court, and to give adequate prescription of medicines for treatment of the wounds. In some cases, when doctors have provided good medical reports they have been threatened. For instance, in one case in Dolakha district in early 2010, a doctor was threatened by the police and CDO and pressurized to change the report but he didn't do so. Although the doctor's response is encouraging, these occurrences remain too rare. It highlights the ongoing difficulties faced by the medical profession in carrying out their work and the need for the authorities to provide stronger support and direction to doctors to ensure they provide full and accurate medical records and prompt and adequate treatment.

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

There are significant systemic problems relating to the state's response to allegations of torture. A number of bodies set up to investigate reports of human rights violations (including torture) lack independence and impartiality and are largely ineffective. These include the Nepal Police Human Rights Unit (NP HR Unit) and the Attorney General's Department. Even in those cases where these bodies make recommendations for "further action", disciplinary action or for compensation -- however inadequate -- to be granted, the authorities often do not act on these recommendations. In addition, the way in which the NHRC has dealt with torture is extremely problematic.

According to the NHRC annual report covering the period from July 16, 2008 to July 14, 2009, the NHRC received 677 complaints of human rights violations.<sup>24</sup> This included 70 cases of torture by security forces. Out of these 70 cases, the NHRC investigated only three. In two of the three cases, it recommended action against the perpetrators, and in all three cases it recommended compensation. The annual report does not provide any information on the remaining 67 cases or on the reasons why one case it investigated was dismissed. The NHRC conducted investigations into half of the assault cases (i.e. cases of crimes amounting to torture by non-state actors), and recommended action in two cases and compensation in two cases. According to the NHRC none of its recommendations in these cases have been implemented.<sup>25</sup>

In addition to the lack of capacity of the NHRC, there is a major concern that its recommendations to the government in those cases that were investigated by it are not acted on. According to its Annual Report, the NHRC received 1173 complaints of human rights violations, including 104 of torture by security forces from 17 July 2007 to 14 July 2008. It conducted a total of 175 investigations, and made recommendations in 62 cases. None of its recommendations were implemented. Of the 677 cases received in 2008-2009, 521 were investigated, 4 were put on hold and 21 dismissed. Compensation was recommended in 63 cases, and the punishment of perpetrators in

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<sup>24</sup> The NHRC works to the Nepalese fiscal year.

<sup>25</sup> NHRC Annual Report July 2008 to July 2009, only available in Nepali

41. However, the government had not implemented any of these recommendations by July 2009.<sup>26</sup>

The Attorney General's Department, entrusted with the investigation and prevention of ill-treatment in custody under Section 135 (3) (c) of the Interim Constitution has regrettably not taken this duty seriously. During a meeting with Attorney General Bharat Bahadur Karki in May 2010, AF raised concern about the lack of responses from the department to correspondence regarding torture. The Attorney General stated that there is no mandate to send responses to individual organizations and maintained that the Attorney General's Department is not an investigating body; rather it has the power to monitor investigations by police of cases reported to them. It is of serious concern that the Attorney General's Department is not recognizing its constitutional duty to carry out investigations into reports of torture and other ill-treatment.

The Human Rights Unit definition of "investigation" appears to comprise merely of sending a letter with details of the complaint provided by AF to the relevant DPO and to ask the DPO to respond to the allegations. AF knows of no cases in which the Human Rights Unit has itself visited the victim and interviewed him or her privately to ascertain the veracity of the allegation; or of any interviews with other detainees or other police officers who may have been witnesses to the torture.

In one egregious case of torture in public of Bhakta Rai and Sushan Limbu at Urlabari Area Police Post (APO), Morang district in July 2009, the Human Rights Unit summoned the officer in charge of the APO and other policemen allegedly involved in the torture and questioned them.<sup>27</sup> The interrogation concluded that the policemen were responsible for torture. Subsequently, the Human Rights Unit suggested to Police Headquarters, Legal Section to take departmental action against the policemen. Accordingly, the Police Headquarters, Legal Section gave a warning to 1 Police Inspector (in charge), 1 head constable and 2 constables as a form of departmental action. AF is seriously concerned that there was no criminal investigation instituted, and that the disciplinary "punishment" of a warning is not commensurate with the gravity of the allegations. The investigations conducted by the police do not qualify as prompt, effective, thorough, independent and impartial investigations to identify all those responsible, bring them to trial and apply adequate sanctions, as required under the Convention against Torture and other treaties to which Nepal is a party.

Furthermore, AF came to know that after few weeks some police officers were sent back APO. Thus, not qualifying as prompt and thorough investigations required under international human rights treaties, the "investigations" conducted by the Human Rights Unit have at times put victims at unnecessary risk as the police have not maintained necessary levels of confidentiality, thereby exposing victims to further torture.

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<sup>26</sup> NHRC Annual Report July 2008 to July 2009 and NHRC Annual Report July 2007 to July 2008.

<sup>27</sup> See OMCT, "Serious concerns for the safety of Mr. Sushan Limbu and Mr. Bhakta Rai at risk of further torture and other ill-treatment, Ref: NPL 230709," 23 July 2009, <http://omct.org/index.php?id=APP&lang=eng&actualPageNumber=1&articleSet=Appeal&articleId=8696>

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

As torture is not defined as a crime, impunity for torture is systematic in Nepal. As has been indicated, there has been a failure to prosecute alleged offenders using the common crime definitions of assault or aggravated assault, notwithstanding the inadequacy of such a response, and the few disciplinary punishments that have been imposed bear no relationship to the gravity of the offences committed. This is best illustrated by the way in which the Nepal Army (NA) has handled the torture and death in custody of 15-year-old Maina Sunuwar in February 2004. Initially, the NA issued fabrications about her fate or whereabouts. Thereafter, after intense national and international pressure, the NA initiated an internal inquiry in March 2005 and eventually recommended that three soldiers — Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun — be brought before a Court Martial. The court gave its decision on 8 September 2005, finding the three military officers guilty only of using wrong interrogation techniques and of not following proper procedures in the disposal of the dead body. It is unclear from an unofficial (and possibly partial) copy of the report obtained by AF on what basis the Court of Inquiry Board decided not to recommend prosecution against a fourth soldier, then captain Niranjana Basnet, clearly identified in the board's report as being involved in the torture and killing. The army's internal investigation concluded that the death by prolonged torture was "accidental", and put it down to "carelessness", and a failure to follow procedures. Maina was blamed for her "physical weakness" in not being able to withstand the simulated drowning and electrocution acknowledged by the Court Martial. Based on this misrepresentation of the facts, the three accused were charged and eventually convicted of procedural offences and sentenced to six months' imprisonment, temporary suspensions of promotions and a paltry monetary fine as compensation to Maina's family. The guilty officers did not actually have to serve the prison term because the court held that they had spent that time in confinement during the proceedings of the Court Martial.

The civilian justice system too, has so far failed to deliver justice as the state authority themselves fail to observe the court order. Despite murder charges and arrests warrants against all four accused, Niranjana Basnet (the only one of the four accused still serving, who had since been promoted from Captain to Major), was deployed with the United Nations (UN) Peacekeeping Mission in Chad. In early December 2009 it became publically known that Major Basnet had been deployed in Chad, leading the UN to repatriate to Nepal as a result of the allegations regarding his involvement in the torture and killing. He was immediately taken under control of the NA upon arrival in the country. He was never handed over to police, despite initial orders from the Prime Minister to do so. Appeals from the UN Secretary-General for the NA to comply with the court order and suspend Major Basnet and from the NHRC to hand over Major Basnet were not acted on.<sup>28</sup> In July 2010, the NA announced that it had concluded its internal

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<sup>28</sup> Nepalnews, *NHRC urges govt to proceed cases of HR violation through civil courts*, December 24, 2009, <http://www.nepalnews.com/main/index.php/news-archive/19-general/3068-nhrc-urges-govt-to-proceedcases-of-hr-violation-through-civil-court.html>

inquiry into the return from Chad of Major Basnet, finding him “innocent” and the return by the UN “against all international norms and regulations.”<sup>29</sup> As of September 2010, none of the four accused have been questioned let alone arrested by the police.

As already indicated above, some of the disciplinary measures imposed after investigations by the Nepal Police Human Rights Unit are entirely inappropriate. Similarly, in the rare cases when the courts have recommended disciplinary action against perpetrators named in cases brought under the TCA, it is not known whether any action was taken by the concerned authorities. In any event, such disciplinary action was recommended in only a paltry 3 cases.

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

There are a number of statutory frameworks (more particularly the TCA) as well as transitional procedures issued by the Ministry of Peace and Reconstruction providing “interim relief” to “conflict victims”. In addition, there are powers given to the NHRC to recommend to the government to provide compensation to the victims of human rights violations and abuses.

The Torture Compensation Act, 1996 entitles the people against whom, allegations of torture has been proved to a compensation amount of maximum NRs. 100,000 (US \$ 1,420) from the government. Of the 16 cases in which compensation was granted, six victims received the minimum amount of compensation: just NRs 10,000 (US \$142). Only one victim received the maximum amount, NRs 100,000 (US \$1,420). Many of the victims have yet to receive the money, although the TCA provides that compensation should be handed over within 35 days of the court order being issued.<sup>30</sup>

There has been considerable delay in putting in place the Disappearances Commission and Truth and Reconciliation Commission provided for under the CPA, bodies which would normally be mandated to provide recommendations on equitable reparation policies. In the interim, the Ministry of Peace and Reconstruction has put in place “interim relief” measures, with an overall policy set out in the *Standards for Economic Assistance and Relief for Conflict Victims, 2008* (as approved by the Council of Ministers, 25 April, 2008). There are two separate guidelines that followed the Standards – one for the provision of relief to the deceased and one for the disappeared, both detailing the procedure for identifying and handing over relief to the families. Despite numerous reports of rape and other forms of sexual violence against women and instances of torture meted out to people suffering mental trauma as a result of the conflict, none of these categories of victims were addressed through the interim relief

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<sup>29</sup> South Asians for Human Rights *Army gives Basnet clean chit, claims UN violated norms* July 14, 2010 available on <http://www.southasianrights.org/?p=1233>

<sup>30</sup> TCA (1996), Section 9(1)

scheme. There are serious concerns about unfair and unequal distribution, including of the scholarships to children of the disappeared.

The National Human Rights Commission (NHRC) can also recommend compensation for the victims of torture, but as already indicated above, the recommendations made by the Commissions have not been implemented by the government.

***Recommendation (r): Security forces personnel recommended for United Nations peacekeeping operations be scrupulously vetted for their suitability to serve, and that any concerns raised by OHCHR in respect of individuals or units be taken into consideration.***

As stated above, Major Basnet, suspect in the torture and murder of Maina Sunuwar, was sent on peacekeeping duties and served in the UN Peace Keeping Mission in the Republic of Chad, until he was repatriated on December 12, 2009 after the UN was informed of the fact that murder charges were pending against him in the Nepal courts relating to his involvement in the death in army custody of Maina Sunuwar.

It is necessary for there to be increased cooperation between the OHCHR and the UN Department of Peacekeeping Operations to exchange information on alleged perpetrators of human rights violators.

In addition, there is an urgent need for the Nepal Government to re-assess every member of the Nepal Army currently participating in UN missions to ensure that they are not implicated in serious human rights violations and for the process of selection itself to be reviewed to ensure that no soldiers against whom there is *prima facie* evidence of involvement in human rights violations are sent on peacekeeping duties or training abroad. Further, it is recommended that the Special Rapporteur encourage the Department of Peace Keeping Operations to carry out more stringent vetting of secondees, and to introduce policies to refuse secondees from countries where torture is systematically practiced. Furthermore, where, as is the case with Major Basnet, there has been a demonstrated failure for a particular country to adequately respond to allegations that secondees have perpetrated serious human rights violations, further secondments should be barred.

***Recommendation (s): The Special Rapporteur calls on the Maoists to end torture and other cruel, inhuman or degrading treatment or punishment and to stop the practice of involuntary recruitment, in particular of women and children.***

Although the number of abductions, assault, ill-treatment and other abuses by CPN-M dropped significantly immediately after the signing of the CPA and further reduced after April 2008, reports of such abuses by the Young Communist League (YCL, the youth wing of the CPN-M) at local level have continued.

Furthermore, according to an April 2009 report (prepared by the government lead by the Unified communist Party of Nepal (Maoist)), there are 109 armed groups in the country, 20 of which challenge the territorial integrity of the country. Twelve of these groups have been identified as political, 11 others have been categorised as “political criminal”. These groups are mainly active in the Terai region. The violence and deterioration in public security in the Terai is having a major deleterious impact on women and children. Different forms of gender-based violence have been reported: rape by members of armed groups, criminal gangs and individual perpetrators. In one case a victim was raped and killed as retaliation after her husband refused to join the Janatantrik Terai Mukti Morcha (JTMM) group.<sup>31</sup> AF has also collected numerous statements by young people and adults testifying that they were abducted by members of armed groups, and given the choice to either join the group or pay a large donation.

In some cases, members of the UCPN-M were directly implicated in rape during the armed conflict period as well as after the signing of the CPA. Survivors of sexual violence and their families repeatedly claimed during interviews that members of all main political parties had made interventions to get the alleged perpetrators released.

## **CONCLUSION**

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

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

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<sup>31</sup> Advocacy Forum, *Torture and Extrajudicial Executions amid widespread Violence in the Terai*, January 2010.

## Annex: Patterns in Incidents of Torture from October 2009 to June 2010

**Table 1: Numbers of detainees by sex**

	Frequency	Percent
Valid Female	208	7.1%
Male	2689	92.5%
Total	2906	100.0%

**Table 2: Torture Infliction**

	Frequency	Percent
Valid Yes	457	15.7%
No	2449	84.3%
Total	2906	100.0%

**Table 3: Torture infliction by gender**

		Torture infliction		Total	
		Yes	No		
Sex	Female	Count	12	196	208
		% within Sex	5.7%	94.3%	100.0%
	Male	Count	445	2253	2689
		% within	16.5%	83.8%	100.0%



Total	Sex			
	Count	457	2449	2906
	% within Sex	15.7%	84.3%	100.0%

**Table 4: Torture prevalence per district**

District			Oct to Dec 09	Jan to Mar 2010	Apr to Jun 2010
1.	Kathmandu	Number	16	27	41
		% within Detention Place	7.9%	12.9%	12.4%
2.	Rupandehi	Number	20	9	25
		% within Detention Place	21.3%	8.5%	27.5%
3.	Dhanusha	Number	11	13	10
		% within Detention Place	29.7%	46.4%	26.3
4.	Baglung	Number	0	0	2
		% within Detention Place	0%	0%	10.5
5.	Myagdi	Number	0	0	0
		% within Detention Place	0%	0%	0.0%

6.	Parbat	Number	1	1	0
		% within Detention Place	16.7%	7.7%	0.0%
7.	Bardiya	Number	9	3	6
		% within Detention Place	17%	10.7%	27.3%
8.	Morang	Number	27	15	24
		% within Detention Place	50.9%	25.9%	31.2%
9.	Ramechhap	Number	2	0	4
		% within Detention Place	20%	0%	50.0%
10.	Dolakha	Number	4	0	3
		% within Detention Place	16%	0%	6.8%
11.	Jhapa	Number	7	-	6
		% within Detention Place	15.9%	9%	30.0%
12.	Banke	Number	13	5	16
		% within Detention Place	21%	7.9%	21.9%
13.	Kaski	Number	14	14	19
		% within Detention	14.4%	11%	

		Place			22.9%
14.	Kanchanpur	Number	2	0	3
		% within Detention Place	5%	0%	7.3%
15.	Udayapur	Number	1	4	3
		% within Detention Place	6.7%	10.8%	14.3%
16.	Surkhet	Number	11	23	7
		% within Detention Place	21.2%	53.5%	14.3%
17.	Kapilbastu	Number	1	4	10
		% within Detention Place	2.9%	8.2%	25.6%
18.	Lalitpur	Number	0	0	2
		% within Detention Place	0%	0%	8.3%
19	Sunsari	Number	1	0	15
		% within Detention Place	8.3%	0%	33.3%
20	Siraha	Number	0	0	3
		% within Detention Place	0%	0%	13.0%

<b>Total</b>	Number	140	118	119	377
	% within Detention Place	15.7%	12.3%	18.8%	15.7%

**Table 5: Torture in relation to caste group**

	Total No. Of detainees	Percentage of detainees from this background	Total No. of detainees inflicted torture	Percentage of detainees inflicted torture
B/C group	1015	34.9%	139	13.7%
Dalit group	324	11.1%	61	18.8%
Indigenous group	718	24.7%	103	14.3%
Newar group	125	4.3%	9	7.2%
Other group	237	8.1%	41	17.3%
Terai Ethnic group	487	16.7%	104	21.4%
<b>Total</b>	<b>2906</b>	<b>100%</b>	<b>457</b>	<b>100%</b>

**Table 6: Torture inflicted in relation to charges (Ten most common charges)**

			Torture infliction		Total
			Yes	No	
	Arms and Ammunition	Count	30	57	87
		% within Charge	34.5%	65.5%	100%
	Attempt To Murder	Count	11	90	101
		% within Charge	10.9%	89.1%	100%

	Forest Offence	Count	5	35	40
		% within Charge	12.5%	87.5%	100%
	Human Trafficking	Count	7	58	65
		% within Charge	10.8%	89.2%	100%
	Kidnapping	Count	16	44	60
		% within Charge	26.7%	73.3%	100%
	Murder	Count	41	206	247
		% within Charge	16.6%	83.4%	100%
	No Charge	Count	33	332	365
		% within Charge	9%	91%	100%
	Public Offence	Count	103	636	739
		% within Charge	13.9%	86.1%	100%
	Rape	Count	11	78	89
		% within Charge	12.4%	87.6%	100%
	Theft	Count	65	178	243
		% within Charge	26.7%	73.3	100%
Total		Count	322	1714	2036
		% within Charge	15.8%	84.2%	100%

**Table 7: Total number of juveniles interviewed in detention by sex**

		Frequency	Percent
Valid	Female	51	7.1%
	Male	664	92.9%
	Total	715	100%

**Table 8: Torture of juveniles in detention**

	Yes	Percentage per year	No	Percentage per year	Total	
<b>January 2008-September 2008</b>	232	28.8%	574	71.2%	806	100%
<b>October 2008-June 2009</b>	260	25.5%	761	74.5%	1021	100%
<b>October 2009 - June 2010</b>	149	20.8%	566	79.2%	715	100%

**Table 9: Did Judge ask about torture?**

	Yes	Percentage	No	Percentage	Total	
<b>December 2008-November 2009</b>	217	5.5%	3050	76.9%	3968	100%
<b>October 2009-June 2010</b>	241	9.2%	2385	90.8%	2626 <sup>32</sup>	100%

<sup>32</sup> Not all detainees are brought before a judge. Only those presented to court are recorded here.

**Table 10: Physical and mental check-up**

	<b>Yes</b>	<b>Percentage per quarter</b>	<b>No</b>	<b>Percentage per quarter</b>	<b>Total</b>	
<b>Oct 09-Dec 09</b>	787	88.3%	104	11.7%	891	100%
<b>Jan-March 2010</b>	828	86.5%	129	13.5%	957	100%
<b>April-June 2010</b>	985	93.1%	73	6.9%	1058	100%
<b>Total</b>	2600	89.5%	306	10.5%	2906	100%