



## The State of Human Rights in Nepal in 2011

### *Executive Summary*

2011 began with the Government of Nepal committing before the international community to uphold the rule of law and defend the human rights of its people. During the United Nations Human Rights Council's Universal Periodic Review assessment of human rights in Nepal, held in late January 2011, the government claimed to have a zero-tolerance policy concerning impunity, pledged to investigate and prosecute all allegations of human rights violations, and to provide equal access to justice for all its citizens, without distinction. It also committed to eradicate social gender-based violence and caste-based discrimination from the country's society.

For several years, the Asian Human Rights Commission (AHRC) has been closely following the state of human rights in Nepal and the struggle of the Nepalese people to develop a democratic system that protects rights through an effective rule of law framework. The gains achieved in this several-decade long struggle are fragile and remain under threat. In 2011 the extreme politicization of all aspects of civilian life, political instability, high levels of insecurity, impotent institutions - including a decaying policing system and a toothless judiciary - have all contributed to the inability of the State to make significant progress concerning the protection of human rights. At the time of writing of this report, although some progress was achieved in the peace process, most pressing issues relating to the democratization of the country and to the protection of human rights remained in abeyance. The Constitution, which has been in the process of being drafted since 2008, has still not been enacted, and transitional justice remains an abstract concept. To be able to uphold the law as a shield against abuses of power protecting the rights of all the Nepalese equally, deep structural reforms of State institutions will be required. Until these issues are settled, State institutions will not be sufficiently strengthened to ensure that any gains in the protection of human rights will be achieved and be irreversible.

Of particular concern to the AHRC in 2011, have been the repeated and calculated attempts to ensure that commitments concerning accountability for past human rights violations remain unfulfilled. The end of the political blockade brought a perceptible change in the attitude of the government toward past human rights cases, switching from ineptness and inaction to actively exploiting all the channels at their disposal to prevent prosecutions. The government indicated that it was planning to withdraw human rights cases dating from the conflict en masse, sought amnesty for a lawmaker convicted of murder, and alleged perpetrators of human rights violations were nominated as Ministers within the government. In addition, the criminal justice system proved unable to pursue accountability. Orders by the Supreme Court to investigate human rights violations remained unfulfilled, while the police neglected or proved unable to conduct thorough investigations into past allegations.



The following report looks into the mechanisms underpinning the continuing impunity for past human rights violations and addresses the current human rights violations that have taken place throughout the year. The reign of impunity has continued in 2011, as the State's apparent inability and unwillingness to provide redress to victims of past human rights violations opens the door to further abuses. Perpetrators are encouraged by a situation in which those that violate fundamental rights do not face any sanctions.

Reports of torture were on the rise in 2011 and allegations of the extra-legal use of violence by the security forces have typically not been investigated. The absence of any effective checks and balances that would be used to hold accountable police officers who do not fulfil their duties, means that Nepal's citizens do not benefit equally from the protection of the law. Victims of gender-based or caste-based violence often find themselves without access to any legal remedies.

The adoption of legislation criminalizing caste-based discrimination was a great achievement in 2011 for the Dalit community, who had long been advocating for this legislation. However, this legislation runs the risk of being rendered meaningless, if no tangible rejuvenation of the justice system takes place.

## *I - Major Developments in 2011*

### **A- Political deadlock and progress**

In 2011, as in previous years, the political parties continued to favour political gains over the well-being of the citizens and the progress of their country toward democracy and development, as is the case in a number of other countries in Asia. Nevertheless, in few countries was political brinkmanship pushed to such an extent as seen in Nepal, where it resulted in significant blockage of any move forward away from the current unacceptable status quo.

Following the last minute one-year extension of the Constituent Assembly mandate on May 28, 2010, after it had failed to produce a constitution within the initially assigned two-year timeframe, then-Prime Minister Madhav Kumar Nepal stepped down on June 30, 2010, but was to remain at the head of a caretaker government until February 2011. It took seventeen rounds of elections and seven months for the Legislature-Parliament to be able to designate a new Prime Minister. The political impasse witnessed during these seven months obstructed significant areas of the government and further delayed much-needed reforms and investments. On 3 February 2011, Jhala Nath Khanal from the Communist Party of Nepal-Unified Marxist-Leninist (CPN-UML) was eventually elected following the signature of a secret seven-point agreement with Pushpa Kamal Dahal, chairman of the Maoist party, which came under fire, including by members of the CPN-UML, as being undemocratic. Disputes over the distribution of minister portfolios, in particular about who was going to acquire the Ministry of Home Affairs, hobbled the formation of a full-fledged government for another 3 months, as the UML was demanding that the Maoists turned itself into a civilian party, including by dismantling its



youth wing, and completed the necessary tasks comprising the peace process before being granted the Home Ministry. However, on May 4th, the cabinet was expanded by a dozen more ministers from the Maoist party, which was also granted the Home Ministry. A new cabinet reshuffle took place on July 24 to make it “more inclusive”, meaning that for most of 2011, most of the ministers remained in office for less than 2 months.

History repeated itself when the Constituent Assembly for the second, third and fourth times, by dint of political brinkmanship, failed to produce a Constitution by the designated deadline, and had its mandate extended for another three months, a deadline it also missed. On November 29, the Constituent Assembly adopted an amendment bill on the 2007 Interim Constitution extending its tenure by another 6 months.

After failing to produce a new constitution in the assigned timeframe, Khanal resigned from his post as the Prime Minister on August 14. Baburam Bhattarai, vice-Chairman of the Maoist party was elected as his successor on August 28, in the first round of elections, after securing the votes of deputies from the United Democratic Madhesi Front, a constituency from the Terai.

The absence of a new constitution has slowed down the adoption of important legislation and the reform of key institutions, such as the police, the judiciary and the army, and undermined the trust of the people in the ability of politicians to defend their best interests.

#### A time-line of the major developments in 2011

**June 30, 2010:** Prime Minister Madhav Kumar Nepal from the UCN-UML party resigns, but continues to serve as caretaker PM for seven months;

**January 15, 2011:** the United Nations Mission in Nepal withdraws;

**January 25:** Nepal's human rights record is scrutinized by the UN Universal Periodic Review in Geneva

**February 3:** The President of the Communist Party of Nepal Unified Marxist-Leninist (CPN-UML), Jhala Nath Khanal, is elected Prime Minister after 17 rounds of elections, following the signature a seven-point agreement with the Maoist chairman. Disagreements over the sharing of portfolios means that Nepal remains without a fully-fledged government and without Home Minister for 3 months

**May 4:** Maoist ministers enter the government. Agni Sapkota is nominated minister for Information and Communication

**May 29:** The deadline for the creation of a constitution is extended by three months;

**August 14:** Resignation of Khanal

**August 28:** Baburam Bhattarai, vice-chairman of the Maoist party, becomes Prime Minister after the signature of a controversial four-point deal between the Maoist party and the Unified Democratic Madhesi Front

**August 29:** The Constituent Assembly's (CA) tenure is extended for a third time for three months

**November 2:** The major political parties reach a seven-point agreement in which they agree to the modalities concerning the integration of Maoist combatants into the Nepal Army

**November 29:** The CA adopts the 11<sup>th</sup> Amendment on the Interim Constitution which extends the tenure of the CA by a further 6 months



## B- Nepal's peace process: Rehabilitation and reintegration of former combatants

One of the main obstacles to the peace process since 2006 concerned the future of the two formerly-belligerent armies. Following a first wave of demobilization of “disqualified” Maoist combatants in 2010, 19,000 former Maoist combatants remained in cantonments and their future was to be a bone of contention among the main political actors for the major part of the post-conflict period. This issue, entangled with discussions around the constitution and the structure of the State, has crystallized the political debate and the success of the peace process has been made contingent upon the outcomes of discussions concerning the future of the two armies.

2011 began with the departure of the United Nations Mission in Nepal (UNMIN), which had been in the country since 2007 to monitor the implementation of the Comprehensive Peace Agreement (CPA). There were concerns that this departure would leave Nepal with a dangerously unstable security void, as well as hopes that this would inject a sense of urgency, encouraging the actors to settle the issue swiftly.<sup>1</sup> At the time of writing of this report, it seems that both expectations were proven wrong. Progress has been slower than expected, but at the end of 2011 the parties' once irreconcilable positions have evolved, creating space for a possible agreement.

On January 15, the Nepal Army submitted a proposal to the Prime Minister of Nepal in which it agreed with the idea of integration of Maoist combatants in a specific Nepal Army directorate, which would be in charge of development work and disaster management. The integration of the combatants into the Army and the creation of a separate directorate were demands made by the Maoists that the army had staunchly opposed in the past. In August, the Maoists indicated that they agreed to this proposal.

In a sign of goodwill, on September 1, the Maoists handed over the keys to containers in which PLA's arms and ammunitions had been stored since 2006 to the Special Committee for Supervision, Integration and Rehabilitation of the Maoist combatants.

A major breakthrough was achieved on November 2, 2011, as the major political parties reached a “seven-point agreement” in which they agreed to the modalities of integration, which had been a source of discord for four years. The agreement contains the following provisions:

- 6,500 combatants will be integrated within a directorate of the Nepali Army (NA), with both combat and non-combat roles
- 12,500 combatants will receive a compensation package of between Rs 500,000 and Rs 700,000,

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<sup>1</sup> UN Under-Secretary-General for Political Affairs, B. Lynn Pascoe quoted in Security Council reiterates support for Nepal's peace process, 20 October 2010, UN News Service, <http://www.un.org/apps/news/story.asp?NewsID=36514&Cr=nepal&Cr1>



- A relief package will be provided to combat victims
- The renewed commitment to the TRC and to the enactment of the constitution
- The Young Communist League, the youth wing of the Maoist party, will be dismantled
- The return of “private and public properties” seized by the Maoists during the conflict
- A consensus government will be formed

There is a highly symbolic value to this agreement, as it saw the Maoist party overcome the ambiguous role that it had played since the end of the conflict. Its use of revolutionary and conflict rhetoric had raised doubts about its willingness to move forward with the peace process. The agreement therefore represents a major breakthrough in overcoming the lack of trust that has been paralyzing Nepal's political life. As such, that agreement could represent an opening in Nepal's transformation process, but it remains to be seen whether the parties will manage to translate this renewed commitment into a decisive, exhaustive and concrete plan of action, which does not leave the issues of accountability, human rights and justice behind.

The Nepal Army's initially proposed criteria for integration included a human rights vetting system, an assessment which would be based on reports produced by the NHRC, the OHCHR, the police and army human rights cells. This is an interesting point given the army's own resistance to investigation and prosecution of those accused of human rights violations within its ranks, and its refusal to see a vetting system applied to its soldiers' human rights record as part of their participation in UN peace keeping missions. The cases of Maina Sunuwar<sup>2</sup> and the Bardiyia killings<sup>3</sup> are of course cases in point. As the International Crisis Group points out, “There will have to be detailed agreements on what constitutes a credible allegation; how to establish command responsibilities, so commanders and commissars are also held accountable; how similar standards will be set for the NA; and how all this will tie into judicial processes and the mandate of a future truth and reconciliation commission.”<sup>4</sup> In the November plan of integration concerning Maoist combatants, a “clean human rights record” was also included as a criterion for integration. Nevertheless, it remains to be seen which process will be adopted to check

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<sup>2</sup> Stop denying justice to Maina Sunuwar, AHRC-PRL-005-2011, 17 February 2011, Asian Human Rights Commission <http://www.humanrights.asia/news/press-releases/AHRC-PRL-005-2011/>

<sup>3</sup> NEPAL: Recipe for impunity at work in Bardiyia National Park, AHRC-STM-081-2010, Asian Human Rights Commission, 20 May 2011, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-081-2010>

<sup>4</sup> For more information see the very documented report of the International Crisis Group, From two armies to one, Asia report N 211, 18 August 2011 available online at: <http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/211----%20Nepal%20-%20From%20Two%20Armies%20to%20One.pdf>



the human rights records of the combatants and what the army understands as being a “clean” human rights record.

This points to one of the other core issues concerning the transformation of the armed forces following the peace agreement, namely, the transformation of the Nepal Army into a democratic and inclusive force under civilian control. The clauses of the Comprehensive Peace Agreement related to the Nepal Army mandates the government’s Cabinet to “prepare and implement the detailed action plan of democratisation of the Nepali Army [...]. This includes works like determination of the right number of the Nepali Army, prepare the democratic structure reflecting the national and inclusive character, and train them on democratic principles and human rights values”. So far, the reforms have been cosmetic at best, as underlined by the ICG in its latest report. “There is a barely-there defence ministry, an ineffective national security council and state affairs and parliamentary accounts committees that do not push on difficult questions of transparency, accountability and reform.”<sup>5</sup>

From a human rights perspective, it is not hard to see how this independence from civilian supremacy challenges the notion of accountability of the army. The army continues to resist and deny the authority of the civilian institutions when its personnel are involved in human rights allegations. In the two cases mentioned above, it has refused to abide by civilian court orders, including by the Supreme Court, has attempted to influence the police to support its version of events, has opposed the arrest of its personnel by the police and turned a deaf ear to feeble injunctions by politicians to cooperate with criminal investigations.

The double process of democratization and integration of both armies is likely to remain filled with potholes, and it will be unlikely to lead to a durable and sustainable peace if accountability is sacrificed.

### **C- Politicization of the public sector and everyday life insecurity and instability**

Insecurity and extreme politicization of all aspects of life have continued to challenge the strengthening of State institutions at the local level as well as hampering the democratic process, draining vital resources and energy away from the rebuilding of the State and development.

Public life in Nepal is dominated by the major political parties. There is actually very limited “non-political” space in Nepal, local development bodies, citizens’ groups, such as school management committees or forest user groups, public institutions such as public hospitals, NGOs all face tremendous pressure from local representatives of the major political parties. As will be seen later in this report, this omnipresence of political interests prevents the police from operating independently and protecting all Nepal’s

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<sup>5</sup> International Crisis Group, From two armies to one, Asia report N 211, 18 August 2011



citizens equally. The work of NGOs on the ground is also directly hampered by constant interference by political party members. Influential positions in school management committees or in groups responsible for managing Nepal's resources are routinely determined by the applicant's political affiliation. In a number of cases, political considerations determined whether a person could be included in the list of conflict victims or martyrs resulting from the conflict, and therefore whether they would be entitled to appropriate monetary relief. Similarly, local development budgets are often found to be divided among political parties, directly hampering the efficient allocation of resources for the community.<sup>6</sup> Citizens cannot therefore equally take part in the public life of their community, as those who do not belong to any political party will have less opportunities and resources to do so than those belonging to the most influential party in the area.

In addition, this extreme politicization of public life has resulted in increased reports of clashes among party cadres at the local level, contributing to deteriorating security in the country.

Armed and criminal groups continued to fuel insecurity and instability in the southern plains of the Terai, lying along the open border with India. Several bomb blasts and attempted bomb blasts shook the Terai districts and Kathmandu in 2011, most of which were claimed by armed groups seeking the establishment of an independent Terai State. Reports of land-grabbing, extortion targeting local businessmen and civil servants, and reports of kidnapping of children for ransom were on the rise, fuelling locals' sense of insecurity and mistrust in the police's ability to curb the crime rate and ensure their security.

In March, Human Rights Watch denounced the police's ineptness in securing the release of children, the arrest of the perpetrators and in abating the trend of abductions. The press release further mentioned documented cases in which the police had abetted the abduction and kidnapping of children.<sup>7</sup>

Even in the centre of Kathmandu, insecurity remains a serious concern, as was exemplified by the murder of a Muslim leader, Faizan Ahmed, near two police stations in September, and by the shooting inside Kathmandu Central Jail, which is supposed to be the most secure jail in the country, of media owner Yunus Ansari by an Indian hit-man.

Several policemen, civil servants, and political party members - in particular members of the Maoist party - were the target of killings in the Terai.

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<sup>6</sup> For a more detailed analysis of the politicization of all the aspects of public life in Nepal, please refer to the very documented report of The Carter Center, "Political space in Nepal has improved since Constituent Assembly Elections but challenges remain, sustainability still in question", The Carter Center, August 4, 2011, available online at: [http://www.cartercenter.org/resources/pdfs/peace/democracy/Carter%20Center\\_Political%20Space%20in%20Nepal\\_Aug%204%202011\\_EN.pdf](http://www.cartercenter.org/resources/pdfs/peace/democracy/Carter%20Center_Political%20Space%20in%20Nepal_Aug%204%202011_EN.pdf)

<sup>7</sup> Nepal: Rampant Child Kidnapping, Human Rights Watch, 29 March 2011, available at: <http://www.hrw.org/news/2011/03/29/nepal-rampant-child-kidnappings>



This apparent security vacuum and the State's inability to guarantee the stability of the region continues to alienate people's trust in State institutions, while the police tend to resort to extra-legal measures in their ineffectual attempts to curb crime. As an illustration, according to the latest report by Nepalese NGO Advocacy Forum report, 43.9% of those taken into custody under allegations of kidnapping and abduction reported having been subjected to torture or ill-treatment.<sup>8</sup>

## *II-Nepal's first Universal Periodic Review- 25 January 2011*

The first assessment of Nepal's human rights record under the United Nations' Universal Periodic Review system took place on January 25, 2011. The UPR process was established by the UN General Assembly on 15 March 2006 through resolution 60/251 to "review the fulfilment by each State of its human rights obligations and commitments." The Human Rights Council's mechanism assessed Nepal's compliance with its international obligations to protect and promote human rights. Prior to the session, the Asian Legal Resource Center and Advocacy Forum submitted a joint report<sup>9</sup> as part of the process. The report detailed the institutional shortcomings of the criminal justice system which prevent provisions guaranteeing a number of fundamental rights enshrined in the Interim Constitution from being properly enforced, and which stymie the right to redress of the victims. The report highlighted specific continuing human rights concerns such as torture by the police, extrajudicial killings, gender and caste-based violence and attacks against human rights defenders and journalists, all of which have not been addressed in any meaningful manner by the authorities. Persisting impunity for conflict-related and present human rights violations was a core concern expressed in the report, which called on the government to prioritise bringing an end to impunity making this the cornerstone of its post-UPR action.

The UPR interactive dialogue, which was held on 25 January 2011, reflected these concerns. Ongoing impunity was raised as the issue of major concern by other States participating in the review, with more than a dozen countries inquiring about the government's intention to act upon the issue, which was seen as contributing significantly to the decay of the rule of law in Nepal as well as jeopardizing the future of the peace process. States recommended that the government ensure investigations and prosecutions concerning human rights violations, the end of political interference in the course of justice, the implementation of court orders and respect for them by all state actors, as well as the strengthening of the National Human Rights Commission. Several States participating in the review expressed concerns about the numerous allegations of misconduct by the security forces, including the persistence of torture and the recent surge in allegations of extrajudicial killings in the Terai. They recommended that the

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<sup>8</sup> Torture Briefing-Prevention of Torture in Nepal-January to June 2010, Advocacy Forum Nepal, available online at: <http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf>

<sup>9</sup> Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review concerning human rights situation in Nepal, ALRC-UPR-10-002-2010, July 5, 2010, Available online at: <http://www.alrc.net/PDF/ALRC-UPR-10-002-2010-Nepal.pdf>



government take appropriate action to bring these widespread human rights violations to an end. The government was also questioned about the steps it had taken to address gender and caste-based violence and discrimination at all levels of society, which remain two major challenges to democratization and peace-building within Nepalese society. Obstacles to the freedom of speech, harassment, threats, attacks against journalists, as well as the precarious situation of human rights defenders, were also repeatedly raised during the review, and recommendations were made to the government of Nepal for it to grant appropriate protection to journalists and human rights defenders by investigating and prosecuting all allegations of threats and attacks against them.

During the review, the government of Nepal declared its full commitment to "establishing constitutional supremacy, ensuring the rule of law, good governance and human rights and guaranteeing the fundamental rights enshrined in the constitution of Nepal." It added that, "Addressing impunity entails two aspects: addressing the past and maintaining the rule of law at present. The government is fully committed to work on both fronts."<sup>10</sup>

As a result of the UPR process, the government of Nepal has accepted a number of essential recommendations made to it by other States from around the world, that aim to increase Nepal's compliance with international human rights law and standards. The Government of Nepal now has the primary responsibility to implement these recommendations. It accepted 96 recommendations and indicated that 28 of them were already in the process of being implemented, while rejecting 15 recommendations made to it. Disappointingly, the government rejected recommendations calling for it to become party to the Optional Protocol of the Convention against Torture, and to acknowledge the findings of an OHCHR report, which called on the government to act upon numerous credible allegations of extrajudicial killings in the Terai region.

Although the significant number of recommendations accepted by the government of Nepal and its public commitments to uphold the rule of law and adopt a "zero-tolerance policy toward impunity" led to hope that the review would encourage the development of more proactive and human rights-friendly policies, the government's reluctance to acknowledge the magnitude of persisting human rights violations in Nepal cast doubts over its willingness to address these issues in good faith. For instance, although it accepted recommendations to conform to the totality of the provisions of the Convention against Torture, the Nepal delegation stated that "Nepal does not tolerate any form of torture. There is no systematic torture in Nepal. There are sufficient constitutional and legal safeguards for the prevention of torture" and indicated that

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<sup>10</sup> Report of the Working Group on the Universal Periodic Review, Nepal, A/HRC/17/5, Human Rights Council Seventeenth session Agenda item 6, 8 March 2011, available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>

Report of the Working Group on the Universal Periodic Review Nepal Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/17/5/Add.1, 1 June 2011, Human Rights Council-Seventeenth session-Agenda item 6, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A\\_HRC\\_17\\_5\\_Add.1\\_Nepal\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A_HRC_17_5_Add.1_Nepal_E.pdf)



recommendations related to investigating and bringing to justice the perpetrators of torture were already being implemented. These denials of the reality of police torture in the country and of the inadequacy of existing legislation to prevent torture in the country, notably by bringing the perpetrators to account and ensuring the right to redress of the victims, raise serious doubts concerning the government's willingness to live up to its commitments. Similarly, the delegation asserted that "the security agencies, including the Nepal Army, are fully committed to respect and support the protection of human rights and international humanitarian law. The isolated and unintended incidents of human rights and humanitarian law violations, if any, are not policy-driven. The institution strictly observes a zero-tolerance policy against all kinds of human rights violations." This statement again purposefully misrepresents the reality of the challenges posed by the Nepal Army to attempts to ensure accountability within its ranks and the government's inertness in confronting the military concerning this. These challenges are clearly exemplified by the case of Maina Sunuwar, which is presented in detail below, on page 24 of this document.

There are obvious concerns that the promises that the government made during the UPR process are simply attempts to placate and satisfy the international community and build a satisfactory image of itself, rather than reflecting a genuine commitment to the rule of law and the protection and enjoyment of human rights.

It must be noted, however, that as of the end of 2011, some of the commitments made by the government had been fulfilled, such as the adoption of a law criminalizing caste-based discrimination and untouchability. The government must be commended for such actions. However, the number of recommendations concerning which no credible action has been seen remains a serious concern. More worrying still is the fact that the authorities continue to undermine attempts to hold the perpetrators of conflict-related human rights violations accountable, clearly contravening commitments made during the UPR.<sup>11</sup> The discrepancy between the government's commitments and representation of the reality of rights in the country, as compared with the actions it has taken following the review will be further detailed in sections of this report below.

### ***III- The rationale of impunity in Nepal: wiping clean the country's human rights record***

*"Nepal is fully committed to establishing Constitutional supremacy, ensuring the rule of law, good governance and human rights, as well as providing a positive conclusion to the peace process by eliminating insecurity and addressing impunity".* This declaration was made by the Nepal delegation to the international community during the review of Nepal under the UN's UPR process, in

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<sup>11</sup> See section below and NEPAL: Review of the UPR recommendations-3 Transitional justice and impunity, *Asian Human Rights Commission*, June 21, 2011, AHRC-STM-081-2011, available online at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-081-2011>



response to concerns raised by more than ten countries regarding the deeply entrenched problem of impunity, which continues to seriously obstruct the rule of law and the peace process in the country. Despite this statement, in 2011, the government has failed to take the steps necessary to prove its expressed commitment and translate these words into effective action to end impunity in Nepal.

When the Comprehensive Peace Agreement was signed between the government and the Maoists in 2006 both parties committed not to protect impunity. A similar commitment was included in the Interim Constitution.

Provisions in the Comprehensive Peace Agreement placed concerns for the victims' right to truth and to an effective remedy at the heart of the reconciliation process. The CPA's commitment to accountability for conflict-crimes is based upon the following pillars:

- Publication of the names of the persons killed or disappeared within 60 days. (5.2.3)<sup>12</sup>
- Formation of a national peace and rehabilitation commission to provide relief support to conflict victims (5.2.4)<sup>13</sup>
- Formation of a high level Truth and Reconciliation Commission to investigate crimes against humanity and gross human rights violations committed during the conflict to “create the situation of reconciliation in the society” (5.2.5)<sup>14</sup>
- Commitment to investigation and prosecutions of human rights violations as well as to the rights of the victims and assurance not to protect impunity<sup>15</sup>(7.1.3)

These provisions were upheld in the 2007 Interim Constitution, placing the duty on the State to fulfil these commitments. Two of the major documents that provide the guiding principles for the transformation of Nepal have therefore linked accountability and justice with the peace-building and democratization processes in the country, raising

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<sup>12</sup> “5.2.3. Prepare the details of the disappeared persons or those killed in the conflict with their real name, surname and residential address and publicise it within 60 days from the day of signing this agreement and inform the family members of concerned persons. “

<sup>13</sup> 5.2.4. Both parties agree to form a national peace and rehabilitation commission to initiate process of rehabilitation and providing relief support to the persons victimised by the conflict and normalise the difficult situation created due to the armed conflict.

<sup>14</sup> 5.2.5. Both parties agree to form a high level Truth and Reconciliation Commission on mutual understanding to conduct investigation about those who were involved in gross violation of human rights at the time of the conflict and those who committed crime against humanity and to create the situation of reconciliation in the society.

<sup>15</sup> 7.1.3 Both parties express their commitment and state that necessary investigation will be undertaken against any individual involved in violating the rights mentioned in the agreement and action will be taken against ones that are found guilty. Both parties also ascertain that they will not protect impunity and along with it, the rights of the people affected by the conflict and torture and the families of the people who have been disappeared will be safeguarded.



hopes that gross and widespread human rights violations will be brought to an end and that their perpetrators will be brought to justice.

However, Nepal has been unable to translate these commitments and principles into concrete action that produces a system capable of ensuring accountability. Five years after the end of the conflict, not a single perpetrator of human rights violations has been brought to book, and the State has failed to curb the cycle of impunity, thereby failing in its duty to create the necessary to prevent the reoccurrence of gross and widespread human rights violations.

In 2011 in particular, the government made repeated and calculated attempts to ensure that commitments concerning accountability for past human rights violations remain empty letters. The end of the political blockade brought a perceptible change in the attitude of the government toward past human rights cases, switching from ineptness and inaction to actively exploiting all the channels at their disposal to prevent prosecutions.

**A- Impunity through government protection: main accused in a case of kidnapping and murder named as government Minister.**

The government's contempt for its commitments concerning accountability are clearly manifest through the appointment of the person accused of the abduction and murder of a school teacher, Arjun Bahadur Lama in May, as Minister of Communication and Information.

On 29 April 2005, at the time of the conflict, Arjun Bahadur Lama was abducted from his school in Kavre district by three Maoist cadres. The Maoists subsequently repeatedly refused to reveal his whereabouts and fate. According to the information gathered during several years following the abduction, Arjun Bahadur Lama was taken to different places in Kavre District, and then was recruited into the Maoists' militia for armed training. He was later handed over to Agni Sapkota, a central committee member. It was later learnt that Mr. Lama had been killed, allegedly on the orders of Agni Sapkota, and his body was found buried at Charkilla in Budhakhani Village Development Committee (VDC), Kavre district. An investigation conducted by the National Human Rights Commission also concluded that the victim had been arrested by the Maoists and had been 'deliberately' killed. At the end of the conflict, the police refused several attempts by the victim's wife to file a First Information Report and it is only after the Supreme Court of Nepal issued an order instructing the police to register the widow's complaint that the FIR was eventually accepted and registered by the police. However, three years on, the police's investigation has been limited and insufficient. One of the main accused in the case, Agni Sapkota, was promoted within the Maoist party, became a member of the Constituent Assembly and has now been appointed Minister to Information and Communication. In light of the seriousness of the allegations of grave human rights violations existing against



Agni Sapkota, both the Australian and American embassies have refused to grant him visas, triggering the ire of the highest ranks of the Maoist party.<sup>16</sup>

As a protest concerning his nomination, a group of human rights defenders filed a Public Interest Litigation case at the Supreme Court of Nepal on June 14, 2011, seeking his immediate suspension for his involvement in a murder case. The Supreme Court refused to issue an interim order in the case, saying that someone could not be prevented from holding public office if there is only an FIR pending against them, and called upon Agni Sapkota to decide whether or not to resign. The Supreme Court did, however, also express its concern about the slowness of the police investigation and directed the police to report every 15 days to the court via the Attorney General's Office. It also rejected the defendant's argument that cases from the time of the conflict did not fall under the jurisdiction of the regular criminal justice system, but rather had to be dealt with by the yet-to-be established Truth and Reconciliation Commission.<sup>17</sup> Agni Sapkota was recalled from his post on 24 July, after a reshuffle of the Maoist ministers in order to produce a more inclusive government. His withdrawal was therefore not linked to his alleged involvement in the murder of Arjun Lama.<sup>18</sup> He remains free to date. Furthermore, in spite of the Supreme Court directive, no substantive progress has been seen in the investigation and the police have failed to submit its progress report every fifteen days to the AG Office.

Sapkota is not the only politician alleged to have been involved in human rights violations that has been promoted to a higher position, from which he was protected from prosecution.

The First Minister of Land Reforms and Management in Baburam Bhattarai's government, Prabhu Sah, had to resign after one month over his alleged involvement in the murder of Kashi Tiwari, a Hindu leader, in Parsa district in 2010. The district government attorney refused to prosecute the minister, citing a lack of evidence, although the police investigation report cited Sah as the main suspect. The victim's wife had previously denounced attempts to corrupt her by a secretary from the Home Ministry to encourage her to protect the minister in her testimony.

Perpetrators belonging to State security forces have also enjoyed impunity and rewards, such as promotion or nomination to lucrative overseas UN peacekeeping mission.

One such high profile case in 2011, was the case of Kuber Singh Rana, who had been charged with involvement in the disappearance and killing of five students in Janakpur

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<sup>16</sup> UPDATE (Nepal): Progress stalled in the investigation of Arjun Lama's disappearance AHRC-UAU-030-2010, August 9, 2010 <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-030-2010>

<sup>17</sup> SC Desists Issuing Interim Order in Minister Sapkota's Case, 21 June 2011, *Advocacy Forum*, available online at: <http://www.advocacyforum.org/news/2011/06/sc-desists-issuing-interim-order-minister-sapkota-case.php>

<sup>18</sup> Agni Sapkota was eventually recalled from his office on 25-07-2011 following a reshuffle of the Maoists representatives in the cabinet in an attempt to develop a more inclusive government, by including more women and members of the indigenous, Madesh and Dalit communities, hence not in relation with his alleged involvement in the murder and enforced disappearance of Arjun Lama.



on October 8, 2003. In that case, eleven students who had gone picnicking were arrested by 25 to 30 army and police personnel. While six of them were released, five of them were never seen again. The victims' families filed an FIR on July 2006, the investigation has been slow. Eventually, in September 2010, the National Human Rights Commission began the exhumation process at the supposed killing and burial site of the victims. On June 23, 2011, it was learnt that Kuber Singh Rana, one of the main accused in this case, was being promoted to the post of Additional Inspector General of Police, the second highest rank in the police hierarchy. In an interim order on July 5, 2011, in response to a writ petition seeking the removal of his nomination, the Apex Court temporarily barred him from discharging his duties as he may be in a position to tamper with evidence and hamper the ongoing investigation. On July 12, the Supreme Court reversed the order, allowing his nomination to stand, but ordered the investigation in the case to continue.<sup>19</sup> It ordered the formation of a panel under the direction of a Deputy Superintendent of Police to see if the case has not been properly investigated and to submit a report every month to the NHRC and the Supreme Court. Since this order, the investigation has not made any progress and the probe panel has not submitted its monthly reports.

In another case, Nepal Police announced on 19 October that a police officer, Kunwar, had been repatriated by the UN peacekeeping mission in Liberia. Deputy Superintendent of Police Basanta Kunwar is accused of torturing Arjun Gurung, an accused of theft, in 2009 in Balaju Police Office. The victim filed a case under the Torture Compensation Act, citing police officer Kunwar among the perpetrators. Since then, the victim's case has still not been decided, with the court postponing its verdict 17 times.<sup>20</sup> Although DSP Kunwar was accused in a case of torture, he was sent to serve in the UN Peacekeeping mission in Liberia on 22 August 2011. Nominations to serve in such missions are very lucrative and sought after by the policemen. After being informed of the accusations pending against Kunwar, the UN repatriated him.

### **B- Planned mass withdrawal of all the criminal cases filed against the government supporters would prevent investigations and prosecutions of human rights abuses**

*“Tackle impunity by investigating and prosecuting human rights violations and abuses committed by State and non-State actors during and since the conflict, implementing court orders including on the Nepal Army, and ending political interference.”* Nepal accepted this recommendation made by the United Kingdom during the country's UPR review.

As early as May 20, less than 3 weeks after his appointment, Home Minister Krishna Bahadur Mahara announced that his office was seeking to withdraw criminal cases from the time of the conflict. As many as 300 cases filed at the district level were at risk of

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<sup>19</sup> SC ORDERS TO CONTINUE INVESTIGATION ON AIG RANA'S CASE, 12 July 2011, *Advocacy Forum*, <http://www.advocacyforum.org/news/2011/07/sc-orders-to-continue-investigation-on-aig-rana-case.php>

<sup>20</sup> See the details of the case on Advocacy Forum's website “Arjun Gurung” <http://www.advocacyforum.org/torture-compensation/2011/10/arjun-gurung.php>



being withdrawn, including cases of serious human rights violations such as the disappearance and murder of Arjun Bahadur Lama or the disappearance and torture to death of Maina Sunuwar. The Home Minister argued that the cases concerned were "politically motivated" in the first place and that "the cases related to conflict time are against the spirit of the Comprehensive Peace Agreement (C.P.A.) and they should be withdrawn."

In August, the UCPN Maoist political party made public its proposal for the process of establishing peace, the constitution and integration of the two armies, which includes the commitment by the UCPN to withdraw cases.<sup>21</sup> After Prime Minister Khanal resigned in August 2011, the Maoist party came to an agreement with the Unified Democratic Madeshi Front, in which both agreed to support the Maoist candidate for the Prime Minister's post. The agreement also contained commitments to withdraw criminal cases pending against individuals affiliated with the Maoist party, the Madhesi, Janajati, Tharuhat, Dalit, and Pichadabarga movements, and declared a general amnesty for crimes from the conflict time. This triggered criticism from the national and international human rights community, in response to which the Prime Minister gave assurances that his office would only seek to withdraw political cases without touching criminal or human rights cases.

Their argument for the withdrawal is based on the frequently invoked 5.2.7 clause of the C.P.A, which reads: "Both parties guarantee to withdraw accusations, claims, complaints and under-consideration cases levelled against various individuals due to political reasons."<sup>22</sup> Nevertheless, the flaw of the argument is that the C.P.A only provided for "politically motivated" cases to be withdrawn, while most of the cases at risk of being withdrawn are criminal cases and therefore not subjected to this provision. According to a report issued by the OHCHR, "*The CPA does not define what motivations would constitute "political reasons" per se, though this category of cases would presumably include those relating to political offences, such as subversion and treason, and any cases brought forward on solely political motives. Such a definition would not include prosecutions of individuals for serious crimes including, inter alia, murder, rape or torture.*"

The inclusion of Arjun Bahadur Lama's case in the list of cases to be withdrawn is in itself proof of the fact that the argument that only "politically motivated" cases are being considered for withdrawal by the government is not true. As mentioned previously, the victim's widow faced great difficulties to even have her complaint registered at the police station and was turned down both by the District Police Office and District Administration Office. Even after the Supreme Court order to have this case properly registered, it took five months for the police to register the case and they have not since undertaken any proper investigation.

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<sup>21</sup> Maoists unveil peace plan, 25 August 2011, My Republica

[http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=35190](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=35190)

<sup>22</sup> Unofficial translation of the Comprehensive Peace Agreement held between the Government of Nepal and the Communist Party of Nepal (Maoist), 2006, available online at : <http://reliefweb.int/node/219161>



Moreover, the Comprehensive Peace Agreement placed accountability and the rights of the victims at the heart of the peace process, as seen in clause 7.1.3 in which both parties specifically agreed to "express their commitment and state that necessary investigation will be undertaken against any individual involved in violating the rights mentioned in the agreement and action will be taken against ones that are found guilty. Both parties also ascertain that they will not protect impunity and along with it, the rights of the people affected by the conflict and torture and the families of the people who have been disappeared will be safeguarded." (Article 7.1.3).

Since the end of the conflict, however, case withdrawal has been a convenient tool used by the government to hamper accountability. In October 2008, 349 criminal cases were withdrawn by the then-Maoist-led government, also under the pretext that they had been filed for political reasons. The majority of these cases dealt with murder or attempted murder, while others were related to rape or mutilation.<sup>23</sup> This mass withdrawal had a disastrous effect: by so blatantly contravening their stated commitment to human rights and justice, the government eroded public confidence; by hampering the due course of justice, it seriously undermined the rule of law and opened the way for more withdrawals of cases and denials of justice to victims. This first mass withdrawal of cases was subsequently followed by similar moves by successive governments, even including non-conflict related cases, following pressure from the army, armed groups and political parties - including Terai-based parties and ethnic groups and influential individuals. Even the police have been involved in asking for the withdrawal of cases involving its personnel.

District courts have the authority to authorize or refuse the withdrawal of cases under their jurisdiction, as was recalled by the Supreme Court in a 2008 ruling. Nevertheless, in practice, the courts have made little use of this authority and there has been little judicial control over the different waves of case withdrawal.

### **C- Seeking presidential pardon for murder convict**

Confronted with mounting opposition to its attempts to withdraw the criminal cases, alternative ways were sought to grant amnesty to government supporters. In a particular case, the government recommended a lawmaker, Balkrishna Dhungel, convicted of murder for presidential pardon. He had been sentenced by the Okhlandunga District Court to life imprisonment and confiscation of property, after having been convicted concerning the 1998 murder of Ujjan Kumar Shrestha. The sentence was upheld by the Supreme Court of Nepal in 2010. In June 2011, the Supreme Court further found that there was no legally-based obstacle to implement its earlier verdict.<sup>24</sup> Nevertheless, the

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<sup>23</sup> Remedies and rights revoked: case withdrawals for serious crimes in Nepal, OHCHR-Nepal, June 2011, available online at:

[http://nepal.ohchr.org/en/resources/publications/2011/2011\\_06\\_23\\_Case-Withdrawals-for-Serious-Crimes-in-Nepal\\_E.pdf](http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case-Withdrawals-for-Serious-Crimes-in-Nepal_E.pdf)

<sup>24</sup> NO LEGAL OBSTACLE TO PUT MAOIST CA MEMBER BEHIND THE BAR: SC, Advocacy Forum, 26 June 2011 <http://www.advocacyforum.org/news/2011/07/no-legal-obstacle-to-put-maoist-ca-member-behind-the-bar.php>



perpetrator has been allowed to remain active in the country's Constituent Assembly since then. His case was among those that the Maoist government headed by Baburam Bhattarai, which came to power in August 2011, was trying to withdraw. In November 2011, a Cabinet meeting decided to send a recommendation letter to President Dr. Ram Baran Yadav to ask for amnesty for Dhungel, stating that it had found the case to be "political,"<sup>25</sup> leading to criticism from civil society. The victim's sister filed a writ petition in the Supreme Court to protest that move, and on 13 November the Supreme Court issued a landmark stay order barring the government from implementing its decision to recommend pardon for Dhungel.

Most of the victims from the conflict have not even seen the perpetrators appear before a court, let alone be convicted. The amnesty of Balkrishna Dhungel would send a clear signal them that even a success in the highest court -- a prospect still distant for most cases -- does not guarantee that justice will be done, that they do not have any avenue to claim their rights. In addition, as the decision to seek pardon for Dhungel was taken following mounting opposition to the government attempts to withdraw past cases, including this one, the human rights community was concerned that if successful, this case would be setting a precedent for dozens more human rights cases to be pardoned through the same channel.

**D- Will long-awaited transitional justice mechanisms be able to complete their tasks?**

*"Take necessary steps to set up the Truth and Reconciliation Commission (TRC) and the Commission on the Inquiry on Disappearances since the failure to act on human rights abuses undermines the respect for the rule of law".* The government of Nepal accepted this recommendation made by the Czech Republic during the country's UPR.

The Comprehensive Peace Agreement (CPA), which brought Nepal's decade-long civil war to an end, provided for the establishment of "a high level Truth and Reconciliation Commission on mutual understanding to conduct investigation about those who were involved in gross violation of human rights at the time of the conflict and those who committed crime against humanity and to create the situation of reconciliation in the society."<sup>26</sup>

This provision was upheld in the 2007 Interim Constitution, which also envisioned an "Investigation Commission constituted to investigate the cases of disappearances made

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<sup>25</sup> Govt set to pardon Maoist lawmaker Dhungel, Ekantipur Report, 2 October 2011

<http://www.ekantipur.com/2011/10/02/top-story/govt-set-to-pardon-maoist-lawmaker-dhungel/341729.html>  
VICTIM'S FAMILY DEMANDS NO AMNESTY TO ASSEMBLY MEMBER DHUNGEL, Advocacy Forum, 3 October 2011 <http://www.advocacyforum.org/news/2011/10/victim-family-demands-no-amnesty-to-assembly-member-dhungel.php>

<sup>26</sup> Comprehensive Peace Agreement 2006

<http://www.satp.org/satporgetp/countries/nepal/document/papers/peaceagreement.htm>



during the course of the conflict.”<sup>27</sup> The State was vested with the duty to fulfil those commitments.

Since our 2008 annual report, the AHRC has annually expressed its concern with regard to the delays in the adoption of this much-needed transitional justice legislation, which has left conflict victims in a legislative and judicial limbo. At the time of writing of this report, both Bills remained pending before Parliament, some five years after the former parties to the conflict had agreed to enact such legislation. Upon his arrival to power, Baburam Bhattarai committed to enact them within a month, but two months after that pledge, the bills are still pending.

In April, the Supreme Court issued a show cause notice to the government seeking explanations as to why they had not yet formed the TRC.

The Truth and Reconciliation Commission Bill was subsequently presented before the Parliament to start clause by clause discussions and endorsement. Political parties proposed several amendments targeting the core principles of the Bills. The process has exposed the divergence of opinion among the political parties concerning the purpose and rationale of the TRC, with some putting justice and accountability at the centre of the TRC while others argue that the TRC should put emphasis on “reconciliation”.

Arguments centred on the Preamble of the Bill, as a Maoist lawmaker proposed an amendment to scrap the sentence stating that “bringing those involved in the crime against humanity to book to ensure there is no impunity.” The Maoists argued that the emphasis on accountability was made to the detriment of the reconciliation process. This is a central theme in their position, which consists of presenting justice and reconciliation as a zero-sum game, in which all progress in favour of one means regression in the other, instead of viewing them as mutually beneficial. At the time of writing of this report, the lawmakers have apparently agreed to split the difference and to rewrite the preamble to include reference to both reconciliation and prosecution.

In April, the Bill included much-needed provisions prohibiting amnesties for grave human rights violations and making provisions for the prosecution of the perpetrators. These articles were also the target of efforts to scrap them, for the same peace vs. justice argument. At the time of writing, the parties had temporarily agreed to a “mixed model” in which amnesty has been prohibited for the following human rights violations: murder committed after taking a person under control or killing of an unarmed person, rape and enforced disappearances. Nevertheless, they are yet to agree on whether torture and abduction should also be included under the list of human rights violations that cannot be pardoned. The prohibition of torture is non-derogable and absolute: no exceptional circumstances can be evoked to justify, condone or pardon the use of torture. Granting amnesty to the perpetrators of torture would be a serious breach of Nepal’s international

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<sup>27</sup> Interim Constitution of Nepal- 2063 [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

obligations under the Convention against Torture and would trample on the rights of victims to legal redress enshrined in the International Covenant on Civil and Political Rights (ICCPR). The final version of the Bill remains uncertain.

Another bone of contention is the criteria for qualification required to become a member of the Truth and Reconciliation Commission. As of April, the Bill contained provisions prohibiting anyone who had taken part in the armed conflict from becoming commissioners. This provision was denounced by the Maoists as aiming at keeping them out of the commission. At the time of writing, concerns also remained regarding the lack of guarantees ensuring that the appointment process will be transparent and free from political manipulation.

Furthermore, the bill has also stumbled due to the fact that the land seized by the Maoists during the conflict would be under the TRC's jurisdiction, which hardliners in the party oppose.

One of the major concerns resulting from the delays in adopting the transitional justice legislation lies with the fact that promises about future transitional justice commissions have served as excuses to postpone concrete action to combat impunity. Victims of human rights violations that occurred at the time of the conflict have repeatedly been told by the police that they could not register and investigate their cases as it fell under the jurisdiction of the “yet-to-be-formed” Truth and Reconciliation Commission. The argument according to which human rights violations cases fall outside the scope of the authority of regular criminal justice system has been a permanent feature in the rhetoric of those with personal, institutional or political connections with persons accused of such crimes. This excuse has been bolstered by the government's repeated stance that cases cannot be investigated by other entities, including the regular justice system and the National Human Rights Commission (NHRC), until the TRC has been created.

The Supreme Court has repeatedly ruled in a number of decisions<sup>28</sup> that this position has no legal basis and that commitments to establish transitional justice mechanisms could not replace or undermine the State's obligations to investigate and prosecute human rights violations through the criminal justice system. The latest such ruling

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<sup>28</sup> Advocacy Forum lists eight of such decision in its June 2011 report “Evading accountability by hook or by crook” : Government of Nepal v. Debendra Mandal, Supreme Court decision, Criminal Appeal No. 0197 of 2063, 3 September 2007; Madhav Kumar Basnet, Advocate v Honorable Prime Minister, Puspa Kamal Dahal and Others, Writ No 03557/ 2065, Supreme Court, 1 January 2009.; Government of Nepal vs Gagan Raya Yadav et al, Supreme Court, 13 February 2008; Karna Bdr. Rasaili Vs. DAO, Kavre, 14 December 2009; Kedar Prasad Chaulagain Vs. DAO, Kavre, 14 December 2009; Devi Sunuwar Vs. DAO, Kavre, 20 September 2007; Purnimaya Lama Vs. DAO Kavre et al, Supreme Court, 10 March 2008 and Jai Kishor Lav Vs Dhanusha DAO et al, 3 February 2009. The full report is available online at: <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>



resulted from the Public Interest Litigation (PIL) filed against the appointment of Agni Sapkota as Minister of Information and Communication<sup>29</sup>.

A legal opinion paper released by the OHCHR on the Relationship between Transitional Justice mechanisms and the Criminal Justice system has clarified the terms of this debate.<sup>30</sup> Based on analysis of the international and national obligations of Nepal, the report concluded that "Bearing in mind that the rights of victims to an effective remedy applies at all times, bypassing this duty to investigate and prosecute for the mere reason that the Government has taken initiatives to set up transitional justice mechanisms constitutes a separate violation of the ICCPR's "effective remedy" provisions."

In light of Nepal's national legislation, the report in particular recalled that:

- Nothing in the clause 5.2.5 of the CPA establishing the TRC grants the commission exclusive purview to deal with conflict-related human rights violations or places them outside the purview of regular justice mechanisms.
- Article 33(S) of the Interim Constitution which specifies the State's responsibility to establish the TRC appears to limit the power of the TRC to "investigate the Truth" and "create an atmosphere of reconciliation" and does not provide for any diversion from the criminal justice system to the TRC.
- The draft legislation establishing the transitional justice commissions stipulates neither that they have prosecutorial powers nor that do the commissions supersede the regular justice system.

In view of this, repeated delays in the adoption of the transitional justice bills, where it is said that investigation into past crimes can exclusively be performed by the transitional justice institutions, have resulted in a total absence of avenues for victims to claim their rights and reparation.

From the draft TRC Bill it is clear that the commission will not have prosecutorial powers, but will rely on the criminal justice system to undertake prosecutions. The successful realization of the TRC's mandate will therefore depend on the ability of the criminal justice system to undertake prosecutions against individuals who have committed human rights violations, independently of their belonging to a political party or to the security forces. The question is therefore whether the regular criminal justice system is able to function properly, effectively and independently, and is able to treat all Nepalese citizens equally. Healing the scars of the past should therefore go hand in hand

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<sup>29</sup> SC Desists Issuing Interim Order in Minister Sapkota's Case, 21 June 2011, *Advocacy Forum*, available online at: <http://www.advocacyforum.org/news/2011/06/sc-desists-issuing-interim-order-minister-sapkota-case.php>

<sup>30</sup> The relationship between Transitional Justice mechanisms and the Criminal Justice system Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?, March 2011, Office of the High Commissioner for Human Rights in Nepal, available online at: [http://nepal.ohchr.org/en/resources/publications/2011\\_03\\_29\\_Legal\\_Opinion\\_E.pdf](http://nepal.ohchr.org/en/resources/publications/2011_03_29_Legal_Opinion_E.pdf)



with the strengthening of the criminal justice system (see further concerning the problems besetting the criminal justice system in section F below).

### E- Attempts to weaken the National Human Rights Commission

**“Take all necessary measures for the capacity building of the NHRC, the respect of its independence and autonomy as well as the implementation of its recommendations”** Nepal accepted this UPR recommendation made by France and stated that it considers that it is already either fully implemented or in the process of being implementation.

In addition to the criminal justice system, the constitution includes provisions establishing independent bodies with a separate sphere of competences that complement the responsibilities of the normal machinery of the administration of justice, and also have a major role to play in bringing impunity to an end. The National Human Rights Commission (NHRC) has been vested with the prime responsibility to promote and monitor human rights of the Nepalese people. On paper, its large investigative power and its independence are the biggest assets for its mandate. Nevertheless, the NHRC’s margin of action in practice has been dramatically reduced by the government’s unwillingness to let the NHRC scrutinize its human rights record. This is best shown by the alarmingly low rate of implementation of the NHRC recommendations.<sup>31</sup>

The government has also tried to prevent the NHRC from playing the role it was vested with by the Interim Constitution: to bear the primary responsibility to promote and monitor the human rights of the Nepalese people and to be at the frontline of the fight against impunity.

Newspapers reported in July that the government had asked the NHRC in writing to halt investigations it had undertaken into allegations of gross human rights violations dating back to the time of the conflict, under the false pretext that the cases in question should be investigated by the Truth and Reconciliation Commission according to the CPA.<sup>32</sup>

The Interim Constitution of Nepal mandates the NHRC to: “conduct inquiries into, investigations of, and recommendation for action against the perpetrator, on the matters of violation or abetment of human rights of a person or a group of persons, upon petition or complaint presented to the Commission by the victim himself or herself or any person on his/her behalf or upon information received from any source, or on its own initiative.”<sup>33</sup> The Constitution therefore does not restrict the NHRC’s competence

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<sup>31</sup> According to the NHRC own data, only 8.8% of its recommendations were fully implemented between 2000 and 2010

<sup>32</sup> Government promoting culture of impunity, Ananta Raj Luitel, *The Himalayan Times*, 5 July 2011, available online at: <http://www.thehimalayantimes.com/fullNews.php?headline=Govt+promoting+culture+of+impunity&NewsID=294308>

<sup>33</sup> Clause 132.2.a Interim Constitution of Nepal, 2007, available online at: [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)



concerning issues related to the conflict time, nor does it allow the government to halt the NHRC's investigations.

In light of the attempts to reduce the scope of the NHRC's action and powers, the yet to be adopted NHRC Bill should provide an opportunity to bolster the body, by defining and therefore protecting the scope of the NHRC's duties and by strengthening the Commission's independence and mandate. The Bill has been pending before the Parliament since 2009, and concerns remain that its content may not be in full compliance with the Paris Principles that set the standards for national human rights institutions. In particular, the Bill shows grave shortcomings in failing to guarantee the commission's independence and autonomy, as provisions contained in the 2007 draft of the Bill have been removed, and are therefore missing in the version currently before Parliament. Issues of concern include: the afore-mentioned removal of a reference to the commission's independence and autonomy; the lack of guarantees concerning the independence and transparency of the appointment process, which currently falls under the control of the executive; and guarantees that the NRHC will benefit from independent staff and financial autonomy. Furthermore, the introduction of a six-month time limitation to report a violation of human rights to the NHRC is of serious concern for anyone who is aware of the difficulties faced by victims of human rights violations in accessing justice in the current impunity set-up in Nepal. This limitation, coupled with the lack of a functioning witness and victim protection mechanism, would make the NHRC inaccessible to victims who remain vulnerable to threats and attacks by perpetrators of abuse, such as victims of torture who remain in the perpetrators' custody.

Also, in light of the low level of implementation of NHRC recommendations, it is of the utmost importance that the Bill clearly specifies the legally binding nature of these recommendations and stipulates a clear obligation for the government to implement them within an appropriate timeframe. The 1997 NHRC Act stated a three-month period of time within which the government should implement the recommendations. However, such a limitation is absent from the 2009 draft bill, which also does not include the obligation for public officials to cooperate with the NHRC's investigations.

An OHCHR and NHRC joint report about the NHRC Bill further expressed concerns that the Bill failed to specify the NHRC's jurisdiction over the Army concerning human rights violations allegations are made concerning members of the military.<sup>34</sup>

The significant shortcomings have resulted in serious concern among the human rights community that the NHRC would not be able to retain its A-status accreditation with the International Coordinating Committee of the National Human Rights Institutions. This question was raised during Nepal's UPR review, to which the government delegation replied that "*The existing law is fully compliant with the Paris Principles. The delegation considers*

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<sup>34</sup> National Human Rights Commission-Nepal and OHCHR-Nepal Observations on the National Human Rights Commission Bill – 2009 - January 2011 [http://nepal.ohchr.org/en/resources/publications/ODS-2\\_E\\_.pdf](http://nepal.ohchr.org/en/resources/publications/ODS-2_E_.pdf)



*that it is premature to question the efficacy of the institution on the basis of a draft law that is still under consideration.”<sup>35</sup>*

In addition, the draft Bill would reduce the NHRC’s monitoring mandate by limiting it from all places of detention to “prisons” only. However, torture mostly takes place in police detention to force victims to confess a crime or to pay a bribe. This limitation would be a serious blow to efforts to combat torture and to the human rights NGOs that have been advocating for a nation-wide monitoring mechanism for years (see further information concerning this on the section of this report concerning torture).

During the UPR review process, the government accepted recommendations to “ensure that the NHRC functions in line with the Paris Principles”, to “take all necessary measures for the capacity building of the NHRC, the respect of its independence and autonomy as well as the implementation of its recommendations” and to “provide the NHRC with adequate funding and autonomy to ensure that the Commission can properly fulfil its mandate,” and even claimed that these measures were already implemented or in the process of being implemented. However, recent developments do not indicate that the NHRC is being strengthened, but rather that its ability to play the role of an effective watchdog is being undermined. The current state of implementation of the NHRC’s recommendations is deeply unsatisfactory and verging on being alarming.

The AHRC is of the opinion that a strong and independent NHRC is required, and could be a major actor in the eradication of the deeply entrenched system of impunity, and in the shaping of strong safeguards for the protection and promotion of human rights in Nepal. The Universal Periodic Review of Nepal in January underlined the consensus within the international community that the NHRC must be strengthened in order to be part of a vibrant human rights discourse in Nepal. The government’s recent moves to delay attempts to probe human rights violations from the conflict underscore the pressing need for a strong watchdog that is able to independently scrutinize the government’s compliance with its international obligations.<sup>36</sup>

#### **F- A paralyzed criminal justice system that is impotent in the protection of human rights**

Nepal’s criminal justice system has been fundamentally damaged by the country’s recent conflict and years of autocratic rule. It has not yet been able to act with the autonomy, capacity of action or physical infrastructure that is required in order to ensure the rule of law and supremacy of human rights. During the post-conflict transition phase, efforts must concentrate on strengthening the criminal justice system to ensure its authority and capacity to effectively prosecute human rights violations. These efforts have been limited

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<sup>35</sup> Report of the Working Group on the Universal Periodic Review on Nepal, 8 March 2011, A/HRC/17/5 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>

<sup>36</sup> NEPAL: Nepal must respect its commitment to a strong and independent National Human Rights Commission, July 7, 2011, AHRC-STM-093-2011, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-093-2011>



and insufficient to date, and the justice system currently remains unable to address human rights abuses adequately. It suffers from deep shortcomings at different levels:

### *1- Progressive but toothless courts*

During the UPR, the government attempted to hide the grave problems concerning its human rights record behind the screen of its independent judiciary. “The delegation noted that its independent judiciary stands as a core element of the institutional arrangement on human rights. The Supreme Court and entire branches of the judiciary have stood exemplary in promoting and protecting human rights through various judgments.”

It is true that the judiciary of Nepal, in particular its Supreme Court, has repeatedly taken positions in favour of accountability, justice and progress on the front of human rights. It ordered the enactment of key legislation such as the criminalization of enforced disappearances, torture or untouchability. Importantly, on September 22, 2011, the Supreme Court of Nepal, in response to a Public Litigation Interest case filed by Advocacy Forum Nepal, challenging the semi-judicial powers granted to Chief District Officers (CDO), the highest government-appointed administrative officers at the District level. This judgement could lead to a leap forward in terms of administration and independence of justice in Nepal. In its judgment, the Supreme Court found that allowing semi-judicial authorities to look into criminal cases and hand down sentences of up to 20 years can lead to situations in which the law is being abused. The court issued a directive to the government to conduct a study to recommend necessary changes in the powers allocated to administrative officers within 6 months. Granting judicial powers to government officials, such a district heads of police, poses a serious challenge to the very notion of independence of the judicial system. Human rights NGOs have deplored that cases which could carry sentences of up to 20 years imprisonment were being heard in the offices of a civil servant, in conditions which clearly failed to meet the minimum standards of fair trial.

In addition, in a number of individual human rights violations cases, the Supreme Court ordered the immediate investigation of the cases and the prosecution of the offenders. It also repeatedly found that commitments to transitional justice mechanisms did not supersede the role of the regular justice system.

However, such progressive judgments must be put into perspective, as the court has also often refused to ensure a consistency of approach, which has hampered the effectiveness of its rulings. For instance, in the cases quoted above concerning the nomination of Agni Sapkota as Minister for Information and the promotion of Kuber Singh Rana as Assistant Inspector General of Police, the court merely ordered the investigations to continue into the cases, without ordering the alleged perpetrators to resign from office. In Agni Sapkota’s case, the court left it to the accused’s conscience to decide whether or



not to resign, while in AIG Rana's case it merely barred him from discharging his duties for a few days.

In addition to the weak nature of these rulings, a number of factors prevent the judiciary from effectively combating deeply entrenched impunity in the country. During the UPR, the government lauded the judiciary's fierce independence, but failed to mention that its orders and findings are being ignored and do not result in change or any significant impact concerning the system of impunity. Finding a solution to the fact that the judiciary and its judgements are being ignored remains one of the greatest requirements in order to establish the rule of law and protection of rights in Nepal.

When the courts' orders run contrary to the interests of major institutional actors, such as the government, the police, the army or political parties, they are simply not implemented. Members of the military, police forces and the Maoists accused of human rights violations during the conflict have remained beyond the reach of the law, ensuring persisting injustices and violating the rights of victims to legal remedies. Nepal accepted a recommendation made by France during the UPR to "ensure that all decisions from the judiciary, regarding those presumed responsible for serious human rights violations during and after the conflict, are fully respected by all concerned institutional actors, particularly by the army and the police forces."

Examples of cases in which the authorities' ineptness in implementing court orders resulted in rendering them meaningless include the cases of Maina Sunuwar or Arjun Bahadur Lama that are presented in detail elsewhere in this report.

## ***2 - Nepal's impaired policing system***

The inadequacies of Nepal's policing system, which is crippled by high levels of corruption and inefficiency, lie at the heart of the criminal justice's inability to hold human rights violators to account. In the AHRC's 2010 annual report, the appalling situation of the policing system was denounced concerning this country in which politicization of even the pettiest issues is prevalent and where the a minimum level of accountability for the security forces remains elusive, and where the principle of equality before the law remains a mirage.

*"A lack of check and balance mechanisms which would allow police officers to be held accountable for abuses of power and authority, have prevented the police system from performing its role in establishing the rule of law and the protection of rights. The police argue that they are placed under significant pressure by influential individuals and local political leaders who do not hesitate to interfere in the investigation process in to order to protect their interests and persons allied with them – even if these are criminals. A strong feeling of impotence often discourages them from taking any action in cases involving the Nepal Army, the Young Communist League or the political parties. It is therefore frequent for the police to refuse to file a case or to improperly investigate it when the victim belongs to a marginalized and isolated community or when the perpetrators are influential, for instance if they possess strong political connections or belong to powerful organized groups which have resisted attempts to be held accountable, such as the*



*Nepal Army or the YCL. In numerous cases the police have pressured victims into negotiating settlements with the perpetrators. The police's lack of accountability and the abuses they themselves commit combine to seriously undermine their credibility and their ability to act as a strong law-enforcement agency'*

In spite of repeated commitments to ensure accountability, efficiency and human rights, the state of the policing system of Nepal has not been seen to be improving in 2011. In terms of corruption, the image of the police was severely tarnished when what came to be known as the “Sudan Scam” was brought before the Commission for Investigation of Abuses of Authorities (CIAA). In June, the CIAA filed a case in the Supreme Court against 34 senior police officers, including three former Inspector General of Police, accused of having embezzled around Rs 290 million (USD 4 million) while purchasing equipment for Nepali peacekeepers working for the United Nations in Sudan. This high-profile case involving considerable sums of money is just the tip of the iceberg.

Corruption is prevalent throughout the police hierarchy and gives rise to human rights violations, as seen in the case of a couple of shop owners, who were subjected to torture for refusing to pay a bribe (see further in the section on torture). Corruption leads to a lack of confidence in the police, discouraging citizens from seeking protection or justice from them.

On April 6, 2011, the United States Institute of Peace (USIP) released a survey<sup>37</sup> on security and peace in Nepal, which pointed out that Nepalese police personnel have complained about being subjected to corruption by their peers, hinting at the state of corruption within the institution itself. “*Nepotism, favoritism, and corruption especially in the transfer and promotions process have been witnessed by three-fifths of NP personnel surveyed.*”<sup>38</sup>

Reports of human rights abuses committed by the police remained widespread: in 2011, reports of torture have been on the rise, and although reports of extrajudicial killings have diminished, it is hardly attributable to a greater adherence to human rights norms and values. Reports of human rights violations by the police are rarely investigated, let alone prosecuted, and when they are, they carry little, if any, consequences for the perpetrators. This aspect will be developed later in this report.

If an institution is rotten on the inside, where one's ability to get promoted depends upon bribes or connections, how can accountability be promoted? In 2011, police officers against whom well-documented allegations of human rights abuses were pending, have been promoted to the highest positions (see the case of AIG Rana or DSP Kunwar above) or sent to serve in very lucrative peace-keeping missions overseas. It is

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<sup>37</sup> Calling for security and Justice in Nepal, citizen's perspective on the rule of law and the role of the Nepal Police, United States Institute of Peace, 2011 available online at:

[http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2.pdf)

<sup>38</sup> Calling for security and Justice in Nepal, citizen's perspective on the rule of law and the role of the Nepal Police, United States Institute of Peace, 2011 available online at:

[http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2.pdf)



worth noting that during the UPR both Australia and Denmark recommended that Nepal establish an independent Police Service Commission responsible for the promotion and appointment of police officers. In response, the government signalled that it was considering the adoption of such a commission.<sup>39</sup> Should such a service commission be established, it would represent a positive towards greater accountability within the ranks of the police, provided this body was truly independent and granted sufficient authority to be able to fulfil its mandate.

The USIP survey also found that one third of respondents had been victims or witnesses of a crime that they did not report to the police, because they either did not think the police would be able to conduct a thorough investigation or protect them against the perpetrators, or did not feel comfortable interacting with the police, or because no police post was available in their area. The report points out that not only those who do not report cases to the police, but also those who do, had resorted to “alternative ways” to address the crime. The respondents listed those as “asking civil society or political leaders to put pressure on the police, padlocking government or NP offices, imposing bandhs and chakkajams either against the NP or against the alleged perpetrator, taking personal acts of revenge, or paying a gang or political party wing to act against the alleged perpetrator.”

It is interesting to note that the rationale behind “alternative ways” involves gathering or showing enough support, strength, or influence to increase one’s leverage sufficiently to convince the police to conduct a thorough investigation. This raises serious concerns about the access to justice available to those who do not have financial resources or connections to influence the police and investigation process. In a functioning rule of law framework, State institutions should provide protection and support to all parties equally under the law, without bias or prejudice and without favouritism ensuring that no party finds itself in a position to impose a settlement on the other by threat or violence. However, heavy political interference within the policing system, combined with the systemic weaknesses, make the police in Nepal unable to play that role in most circumstances. Large-scale withdrawals of cases, slow judicial process and the possibility of politically-connected individuals avoiding prosecutions, have all contributed to the police being discredited and demoralised.

In sensitive cases, where the perpetrators belong to the army or a political party, purposefully ineffective police investigations contribute to impunity. As stated above, in the cases in which Agni Sapkota or AIG Kuber Singh Rana were accused, the Supreme Court ordered the police to conduct investigations and submit a report to the court every month. These reports have not been submitted, raising questions about the investigations themselves. If even in cases where the highest judicial authority of the country

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<sup>39</sup> Report of the Working Group on the Universal Periodic Review Nepal Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/17/5/Add.1, 1 June 2011, Human Rights Council-Seventeenth session-Agenda item 6, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A\\_HRC\\_17\\_5\\_Add.1\\_Nepal\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/A_HRC_17_5_Add.1_Nepal_E.pdf)



specifically ask the police to carry out a specific investigation and sets up guidelines to ensure that the investigation will be prompt and effective by ordering a monthly report, the police investigation remains perfunctory, it raises concerns about the quality of investigations in cases which do not reach the Supreme Court.

The police routinely refuse to register FIRs in cases dating back to the conflict and when these are filed, lack diligence in conducting investigations. They have been hiding behind the excuse that they don't have authority to deal with cases from the conflict, as those allegedly fell under the jurisdiction of the TRC, in spite of repeated Supreme Court findings which state otherwise.

Suspensions that the police are unable to assist all citizens equally are backed by a strong feeling of discomfort among people with fewer resources, notably the poor, women and those belonging to the Dalit community, when approaching the police, as well as scepticism concerning the police's willingness to provide them with security.<sup>40</sup>

In cases involving persons from those communities, the police often act as a mediator between victims and perpetrators rather than as a law enforcement agency, but tend to further the interests of the powerful and rich. No mechanisms exist at present to take action against police officers who fail in their duties, and who expose vulnerable persons to threats and pressure to abandon their cases.

The police's ineptness in enforcing the rule of law hampers its ability to curb the insecurity that the country is facing. It has far-reaching adverse consequences concerning the protection of human rights and democratic freedoms in the country. A 2011 report by the Carter Center<sup>41</sup> found that the weak capacity to enforce the rule of law damages the strengthening of free political space, which is an essential element of a democracy. In reference to cases of threats, intimidation and attacks to prevent the expression of political views, the Center found that *"although charges are sometimes filed, police and administration more often serve as mediators rather than as law enforcers in these cases, and the charges themselves are often treated as bargaining chips"*. In addition, reports of attacks against journalists and human rights defenders were numerous in 2011 and weak law enforcement also enabled a climate in which such threats and attacks are possible, jeopardizing a number of fundamental freedoms, including the freedom of expression.

Only if Nepal manages to develop a system of checks and balances to prevent abuses of power, that will foster a strong, independent and accountable police institution, will it be

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<sup>40</sup> Calling for security and Justice in Nepal, citizen's perspective on the rule of law and the role of the Nepal Police, United States Institute of Peace, 2011 available online at:

[http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2.pdf)

<sup>41</sup> "Political space in Nepal has improved since Constituent Assembly Elections but challenges remain, sustainability still in question", The Carter Center, August 4, 2011, available online at:

[http://www.cartercenter.org/resources/pdfs/peace/democracy/Carter%20Center\\_Political%20Space%20in%20Nepal\\_Aug%204%202011\\_EN.pdf](http://www.cartercenter.org/resources/pdfs/peace/democracy/Carter%20Center_Political%20Space%20in%20Nepal_Aug%204%202011_EN.pdf)



able to establish a strong rule of law framework in the country and address two of the most urgent challenges the country is facing: impunity and insecurity.

### *3- The Public Prosecutor's Office and Attorney General's Office are neglecting their duties*

The Attorney General's Office (AGO) and the Public Prosecutor's Office have the ultimate responsibility to initiate prosecutions, and their role is therefore at the frontline of the eradication of impunity in Nepal. However, the AGO has also contributed to the persistence of impunity in the country, both passively by being lethargic in filing charge-sheets against alleged perpetrators of human rights violations, and actively by approving repeated mass-withdrawals of criminal cases by the government. Such neglect runs through the different levels of the prosecutorial authority, and is particularly perceptible at the level of District Public Prosecutor's Offices where Public Prosecutors have often been seen to be colluding with the police to prevent progress in cases.

The case of Sahid Ullah Dewan (Abdul)<sup>42</sup> is illustrative. Abdul was shot in broad daylight, in sight of his fellow villagers, on October 26, 2009 in Rupandehi District. The police claim that the victim was killed in an encounter and that they shot him in self-defense. However, several eye-witnesses assert that the victim was unarmed and shot in cold blood in a staged manner and that they saw police officers placing pistols around the dead body before taking pictures. Both the District Police Office and the District Administration Office in Butwal, refused to register an FIR. Despite an order from the Appellate Court in Butwal to promptly register the FIR and initiate an effective investigation, no investigation has been conducted so far. The victim's family later came to know that the case had been withdrawn by the Public Prosecutor's Office, Rupandehi, following a meeting of the Security Committee of the District. The investigation (and subsequent prosecutions) into the incident were suspended. The case was sent to the Attorney General's Office in order to confirm the decision. The Attorney General Office was waiting for documents from the Public Prosecutor's Office, Rupandehi, in order to decide upon the case. On August 6, 2010, a writ petition was submitted at the Butwal Appellate Public Prosecutor Office, seeking to obtain an order against the Butwal DPO to initiate a prompt investigation and subsequent prosecutions of the perpetrators. The Appellate Public Prosecutor Office issued its order to the District Public Prosecutor Office to immediately investigate the case. However, for the second time and in spite of the previous order of the court, the District Public Prosecutor's Office decided to withdraw the case, and sent its decision to the Attorney General's Office in Kathmandu for confirmation. The AGO returned the case to the District Public Prosecutor ordering that it be reopened and reinvestigated. The case was forwarded to the District Police Office for further investigation. The attempts by the Public Prosecutor's Office and the

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<sup>42</sup> NEPAL: Killing of a young man in an alleged encounter by police must be investigated, May 23, 2011, AHRC-UAC-104-2011, <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-104-2011/>



police have resulted in repeated delays to the investigation and have considerably reduced the probability that the family will be informed of the circumstances of their son's death. Two years after the case, the family is still waiting for justice.

Most of the reasons underpinning the persistence of impunity for Nepal past human rights violations also account for the impunity that accompanies current human rights violations. The absence of predictable and systematically applied punishments for those who committed past human rights violations makes it impossible to deter current human rights violations.

### **Justice denied: seven years on, Maina's family is still waiting for justice.**

On February 17, 2004, fifteen-year old school girl Maina Sunuwar was illegally arrested, tortured and killed by Royal Nepalese Army soldiers. She was arrested to force her mother to present herself at the army barracks, after she had witnessed the killing of her niece by security personnel earlier the same month. After Maina's arrest, she was beaten, held face down in water and subjected to repeated electric shocks to force her to confess that she was a Maoist. Before the clandestine burial of Maina's body, she was shot to make it appear as if she had been killed while trying to escape. The police were complicit with the army in concocting the cover-up story. Seven years have passed since her killing, and even though the perpetrators have been named and the district court of Kavre has issued arrest warrants against them, the army continues to defy the court order by not handing over the soldiers to the court.

A September 2007 decision by the Supreme Court ordered the civilian authorities to carry out investigations into this case and to prosecute the perpetrators, thereby ruling that the case was to be tried by a civilian court. The District Court of Kavre subsequently issued an arrest warrant against four military officers, Major Niranjan Basnet, Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun, on January 31, 2008, on charges of illegal detention, torture and murder. To date, these warrants have yet to be executed.

Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun have not presented themselves before the court and have been declared as absconded, but no action has been taken to locate or arrest them.

One of the accused, Major Niranjan Basnet, was found to be serving in a United Nations Peace-Keeping Mission in Chad. Participation in peace-keeping missions is coveted as a lucrative reward by soldiers. Major Basnet was repatriated in December 2009 in light of the serious nature of the allegations pending against him. After his repatriation, the Nepal Army took the alleged murderer into custody and refused to transfer him to police custody, challenging the court orders and calls from the Prime Minister, the NHRC, the OHCHR and the UN Secretary General to abide by these orders. On the contrary, the Army announced on July 14, 2010, that an internal investigation had found him innocent of the charges against him. On that occasion, the Army Court of Inquiry declared that the army had been acting against a common enemy and functioning under a section of the Terrorism and Disruptive Activities Act, which stated that the Army has a right to take a civilian into custody for interrogation and referred to a section of the 1959 Army Act. According to this particular act, offences involving army personnel functioning under the TADA cannot be treated in a civilian court. Therefore the chief of the Nepal Army legal department stated that "There is no case against Basnet". It is a well-known fact that all internationally-accepted norms and standards mandate that cases of gross human rights violations against civilians (*a fortiori of minors*) by army personnel fall under the jurisdiction of civilian courts.



In addition to the lack of credibility that result from the repeated and illegal attempts of those at the army headquarters to hamper the prosecutions of their personnel, the legal reasons the army and the defence ministry put forward to justify the absolution are groundless. They hide behind the principle of double jeopardy, arguing that Major Basnet had been given a clean record in 2005 by the Court Martial. This ignored the fact that not only was the earlier judgement the result of non-transparent and non-independent investigations but also that military courts do not have jurisdiction in cases involving murders and disappearances of civilians, both under domestic and international norms. The September 18, 2007, Supreme Court decision to order that the case should be handled by the Kavre District Court has already dealt with the issue of double jeopardy and the jurisdiction of civilian courts.

Internationally accepted norms and standards also mandate that cases of disappearance fall under the jurisdiction of civilian courts. This was reasserted by the UN Working Group on Enforced Disappearances in its December 2009 report. In the section regarding Nepal, it reminded the government that the UN Declaration on the Protection of all Persons from Enforced Disappearances specifically states that persons alleged to have committed acts of enforced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts" (art. 16.2).

In May 2011, the (Maoist) Home Minister quoted the case against Basnet as one of the cases likely to be withdrawn by the government, as they fall under the jurisdiction of the TRC. So far, no further move seems to have been taken to withdraw the case, but no action has also been taken to bring the accused before a civilian court.

Undue delays in providing justice to the family in themselves constitute a further violation of their rights and only result in additional suffering. Similarly, not a single perpetrator of the tens of thousands of other human rights violations which took place during the conflict has so far been prosecuted.

The Interim Constitution of Nepal states that court orders have to be binding upon all, but the army's refusal to abide by them shows that it considers itself to be above the law and constitution.

During the Universal Periodic Review of Nepal, the government's delegation claimed that there was a "zero tolerance to impunity" policy concerning "isolated" human rights violations committed by the security agencies and supported recommendations made by France and the United Kingdom to ensure that all decisions made by the judiciary are fully respected by all concerned institutional actors, particularly by the army.

#### ***IV- Torture continues to be perpetrated widely and with impunity***

During the UPR process a number of States raised concerns about the high rates of the use of torture in Nepal. The government delegation to the UPR process rejected these allegations outright, stating that "*Nepal does not tolerate any form of torture. There is no systematic torture in Nepal*". Unfortunately, 2011 showed that this remains nothing more than wishful thinking. The widespread use of serious forms of torture continued to be reported throughout 2011, with the perpetrators continuing to enjoy impunity.

In a situation of increasing insecurity that is highlighting the police and justice system's lack of capacity in curbing crime, torture is increasingly being resorted to as a way of identifying and punishing the criminals. The police are continuously resorting to torture to extract forced confessions and conclude investigations. Investigations do not follow any accepted standards of professionalism, and confessions remain the basis for such investigations. This trend is further fuelled by the absence of sanctions attached to the



use of extra-legal measures to obtain confessions. Furthermore, a lack of faith in the judicial system, fuelled by undue delays in the judicial process and political intervention in the course of justice, has incited the police to take the law into their hands and resort to torture as a way to punish. In the end, an overwhelming majority of torture victims are not charged with any crime. Data shows that the continuing instability in the Terai and the high incidence of cross-border crimes coincide with alarmingly high and rising rates of torture in this region.

In addition, widespread corruption has led the police to use torture as a tool to extract bribes. Shop owners in the Kathmandu Valley have been harassed for that purpose, for example.

Leading Nepalese NGO Advocacy Forum reports that from January to June 2010 the percentage of interviewed detainees reporting police torture or ill-treatment reached 25%, an increase from 22.5 in the previous six months and 15.8% from the same period in 2010.<sup>43</sup>

*“Our data shows that the percentage of detainees who report that they had been tortured or ill-treated in police custody was around 33% in 2006 and around 19-20% in 2010. Although statistics are decreasing, the individual cases show that the severity of torture practice is still the same. For instance, every year, even after 2006, there were cases of custodial death. In 2009 it was reported that private houses were rented in Kathmandu itself by the police and used to torture individuals secretly. This showed that torture was still widely practiced even in Kathmandu. The data also shows that the practice of torture has actually recently been increasing in some of the Terai districts. Interviews with torture victims reveal that methods of torture used during the conflict are still being practiced today by the police. This includes beating on the soles of the feet with sticks or pipes, beating on the victims' thighs, shoulder, back, joints, punching and kicking randomly on various parts of the victim's body. From the data it seems that torture is constantly declining but when we look at the severity of the cases, it shows that torture is still widely practiced in Nepal”<sup>44</sup> Kamal Pathak, Advocacy Forum's Deputy Director*

Among the twenty districts in which the organization monitors places of detention, in five districts over 37% of detainees reported having been tortured, while in six other districts between 50% and 75% of juvenile detainees reported having been tortured. All of these districts are located in the Terai region.<sup>45</sup> Worryingly, the report shows that juveniles in detention have a 7% higher chance to be subjected to torture than adults: 32.8% of juveniles interviewed reported having been subjected to torture or ill-treatment.<sup>46</sup>

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<sup>43</sup> Torture Briefing-Prevention of Torture in Nepal-January to June 2010, Advocacy Forum Nepal, available online at: <http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf>

<sup>44</sup> "For victims of torture, there are actually very few possibilities to get justice in Nepal.", AHRC-ECT-030-2011, available online at: <http://www.humanrights.asia/opinions/interviews/AHRC-ECT-030-2011>

<sup>45</sup> Torture Briefing-Prevention of Torture in Nepal-January to June 2010, Advocacy Forum Nepal, available online at: <http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf>

<sup>46</sup> Torture Briefing-Prevention of Torture in Nepal-January to June 2010, Advocacy Forum Nepal, available online at: <http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf>



The organization also estimates that one in ten women detained by the police had been subjected to torture or ill-treatment. Out of 345 women interviewed in 20 districts, 10.4% reported having been tortured. In Kathmandu district, this percentage rises to 20.8% of women, with gender-specific methods of torture being used.<sup>47</sup> *“When we interviewed female detainees we found that they had been forced to undress, that in some occasion police*

### Police torture an eleven year old child

According to the information received from the Center for Victims of Torture Nepal (CVICT), on November 15, 2010, police officers from Pachuwarghat police station summoned Mr. Maila Tamang to bring his eleven-year old son, Lakpa Tamang, to the police station for interrogation in relation to an alleged case of a lost or stolen gold ring. In the morning of 16 November, Mr. Maila Tamang reported to the police station along with his daughter and his son, Lakpa.

There, Lakpa was reportedly separated from the rest of his family and Sub Inspector Purushottam Shrestha took him into custody and interrogated him about the lost ring. The Sub Inspector asked the child three times whether he had stolen the ring and the three times Lakpa replied that he had not. The child was then taken to the interrogation room and was reportedly tortured for one hour. The boy's back and soles were beaten with a plastic pipe and the victim received electric shocks behind his right ear.

As the police officers threatened that they would kill him if he did not admit to having stolen the gold ring, the boy was forced to confess that he had done so and to sign a letter of confession. The police officers further threatened the boy with death should he say anything about the torture.

The Sub Inspector subsequently asked Lakpa to confess in front of his father that he had stolen the gold and wrote a paper stating that Maila Tamang would pay Rs. 19,000.00 to the complainant. After Maila signed the paper, Lakpa was released.

After coming back home in the evening, Maila noticed that his son's back had numerous bruises and that walking was painful for Lakpa. He realized that his son had been tortured to force him to confess. He then brought him to a local photographic studio to take pictures of his injuries.

On January 6, 2010, a case was filed against the two alleged perpetrators in Dhulikhel District Court under the Child Right Act, 1992. After the case was filed, Dhulikhel District Police Office (DPO) issued a notice that departmental action had been taken against the two perpetrators as per the article 85 of the police civil service rules 2059.

Later, unidentified police officers belonging to Pachuwarghat police station, the same police station as the alleged perpetrators, threatened the family and the boy to drop the case or to face the consequences. When contacted by the AHRC to ask for the protection of the victim against threats and intimidations, the Deputy Superintendent of Police of Dhulikhel DPO denied these threats and insisted that now that the case was pending in court, it was not the duty of the police to protect the victim anymore. While departmental action was taken against the perpetrators, it remains insufficient in relation to the gravity of the crime committed and the AHRC continues to deplore the lack of effective prosecutions concerning this case.

<sup>47</sup> Torture of women in detention-Nepal's failure to prevent and protect , *Advocacy Forum*, 26 June 2010 <http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf>



*put objects in them or that some have been beaten on sensitive parts of their bodies. We also found instances in which women had been raped in detention.”<sup>48</sup>*

### Child tortured while being hung upside down in police custody

Fahad Khan Usmani, 10, was regularly subjected to extortion in school by a neighbour's son, who will be referred to as 'M'. As a result Usmani used to steal money from his house to give it to M. On April 2, 2011, Fahad's father, Farrukh Ahemad Musalman came to know that his son stole 8,000 Rs./ from his home and had allegedly given it to M. Farrukh then visited M.'s home and asked his father to return the money leading to an argument.

Then Farrukh went to Area Police Office in Maghgawa and filed a complaint of theft, asking for the police's assistance to get his money back. Instead of investigating the complaint, the police called both parties to the police station. During the discussion, at around 1.45 pm, Sub Inspector Bikram Sahani and Constable Mahendra Yadav took Fahad to a room inside the police station for inquiry. SI Sahani then reportedly slapped him to force him to confess that he had spent all the stolen money and had not given it to M. Fahad denied the allegation which angered the policemen. Constable Yadav then allegedly tied his legs together with a rope, hung him upside down from a ceiling hook and beat him 15 to 20 times on the soles of his feet with a bamboo stick. The torture only stopped following the intervention of another policeman.

As Fahad was brought outside the police station, crying, he informed his father about the torture. The victim's father then requested an explanation from the policemen, but the policemen denied the allegation and only released the victim after having his father had signed a statement stating that Fahad had spent the money himself.

Although there were no visible external torture marks, Fahad complained of pain to the soles of his feet and cheeks. His right shin (below the knee) was swollen.

Subjecting a child to interrogation inside a police station without the presence of his parents, as was the case in the two cases mentioned above, is in contradiction of rule four of the Juveniles Justice Regulations, 1996. The lack of implementation of these regulations is a source of serious concern, as it creates situations in which the child is vulnerable to ill-treatment and abuse during the process of interrogation.

During the UPR, Nepal accepted a recommendation by Malaysia to “*Enact a Juvenile Justice Law compliant with international standards, to consolidate the legal framework surrounding the protection of the rights of children and to ensure the proper functioning of a juvenile justice system in the country*”. The Central Child Welfare Board (CCWB) has drafted a "Proposed Bill to Amend and Codify Law Relating to Children," aiming at strengthening the safeguards contained in the Children Act. The bill is under consideration of the Ministry of Law and Justice and has not yet been presented to the Parliament. No large-scale discussions have been organized concerning the draft bill and no timeframe has been given regarding its

<sup>48</sup> "For victims of torture, there are actually very few possibilities to get justice in Nepal.", AHRC-ECT-030-2011, available online at: <http://www.humanrights.asia/opinions/interviews/AHRC-ETC-030-2011>



adoption. The implementation of the existing legal provisions protecting children during their interaction with the judicial system continues to be sporadic.

*“Under the interrogation police officers treat children as they treat adults. There is not any separate system in the police offices to deal with children. Juveniles are kept in detention with adults and hard core criminals”.*

*“Most judges remain unaware about the extent of torture. The children are brought handcuffed, chained to each other or chained to adults in court by the police officers and the judge feels that she/he cannot take action against the police. According to Juvenile Justice Procedure regulation, every Juvenile should be treated in a child friendly environment; some courts have a separate room for the juveniles, but again those are hardly used and those dispositions are scarcely implemented. Judges show indifference to the issue. Further, I've seen in a lot of cases that when there are allegations of torture, the judge does not show interest to know whether the child has really been tortured or not. Some of them think those allegations are fabricated by the children and do not want to interrogate them further about it. The judges can ask to see the body marks of torture, he/she can have a look at medical reports, he/she can order a medical check-up in a forensic lab but a lot still don't because of a lack of sensitization to the issue. There exists a bias among judges toward cases of torture. Other government employees are even more biased, even the court staff handling the case, hearing the case must be aware on how to handle the torture case, on how to deal with juveniles, on how to treat them with dignity. For the moment, the justice system does not recognize the dignity of the people.”* Tika Ram Pokharel, Center for Victims of Torture-Nepal

As the government of Nepal continues to fail to acknowledge the extent of the use of torture in the country, and its devastating impact on the child's development, children that are victims of torture are left without proper treatment and assistance to help address the psychological and physical consequences of torture and to support their reintegration into society.

*“The children who have been subjected to torture are unable to speak about it. When I conducted a research in Juvenile Reform Homes, the children didn't talk about torture. It is when they were asked to draw a picture about their past life -- with no instruction to talk about torture -- that a lot of them drew pictures representing situations in which they had been tortured.”*

*“When the juveniles fall into delinquency, they are arrested by the policemen, brought to custody and are often tortured severely through various methods. Most of the juvenile are from very poor families; they did not get any kind of opportunity. Because of torture, the victims will suffer from severe physical and psychosocial problems. Although doctors frequently visit the juvenile reform homes they are not aware about the impact of torture. The children do not have access to psychiatrists and other experts. Further, another major problem is that after having been arrested, the juveniles are often rejected by their family and society. A lot of the juveniles who have been subjected to torture see gloomy prospects for their future.”* Tika Ram Pokharel

As is the case concerning juvenile-specific regulations, safeguards guaranteeing the rights of persons deprived of their liberty are routinely ignored. These include, for instance, the constitutional requirements for a 24-hour limit to detention of a person without them being brought before a judge; the requirement to provide a person with a detention letter and an arrest warrant; and to keep the detainee's name in police records. These requirements aim at protecting individuals' rights against abuses by the State and at ensuring that no one is kept in incommunicado and arbitrary detention, leaving the door



open to torture and abuses. As a result of the lack of punishments attached to any violations of these safeguards, they are at best loosely implemented and therefore in reality provide inadequate protection to the detainees and arrestees who are left exposed to abuses.

The case of Nijamuddin Sekh<sup>49</sup> is an unfortunate illustration of how the disrespect for fundamental rights enshrined in the Nepalese Interim Constitution has created a situation where the very notion of law as a shield against abuses of power is denied. On July 21, 2011, the 21-year old carpenter was arrested in Nepalgunj by police officers from the Banke District Police Office concerning allegations relating to a case of abduction. In the DPO, he was tortured for about one hour during the night, and then blindfolded, handcuffed and pushed from what seemed to be a high place. As a result of the torture, the victim suffered extensive injuries, including a fractured lumbar vertebra, which may take months to heal and may prevent him from going back to work. The authorities had reportedly registered him under a false name in the hospital, therefore preventing his identification. The victim's father was therefore unaware of his son's arrest and whereabouts for several days. During the arrest, the police had switched off the victim's phone and repeatedly denied his requests to contact his family to inform them about his situation. The DPO also repeatedly refused to accede to the victim's family's queries about his whereabouts and only learnt about his presence in the hospital by chance. On 16 August, the victim's bail hearing was held, and the court ordered the DPO to provide him with free medical treatment as he had been injured during the course of investigation. On 6 September, he filed a case under the Torture Compensation Act seeking compensation and punishment for the perpetrators.

A similar ordeal was endured by Atiram Rana<sup>50</sup>. He was arrested on April 12, 2011, and kept in illegal and incommunicado detention for six days. It was only after a habeas corpus hearing that he was given a detention letter and an arrest warrant. At the habeas corpus hearing, the judge ordered the policemen to stop inflicting torture on the victim but did not take any further action against the perpetrators. Although it was apparent that the victim had been subjected to torture, the judge did not even order his transfer to another place of detention and he remained in the custody of his torturers for one more month.

The weak nature of the government's commitment to eradicate torture can be measured by the indifference shown to civil society's repeated requests for the government to establish a system of regular monitoring of places of detention. Although several legislative measures enable different bodies, including the National Human Rights Commission and the Attorney General Office, to conduct regular monitoring, such system is yet to be implemented effectively, and the burden of monitoring is mostly

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<sup>49</sup> NEPAL: A young man's spine is broken following police torture, **August 2, 2011**, AHRC-UAC-129-2011, <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-129-2011>

<sup>50</sup> NEPAL: Police keep incommunicado and torture a young man by water pouring and using chili powder in Banke, May 19, 2011 AHRC-UAC-099-2011 <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-099-2011>



handled by NGOs. During the UPR, Nepal refused recommendations urging it to accede to the Optional Protocol to the Convention against Torture, which allows for a torture prevention mechanism based on regular visits by independent bodies to places of detention. Nepal also rejected a recommendation made by the Maldives to "designate a national preventive mechanism, to safeguard the rights of detainees and to prevent any acts of torture" and indicated that "a preventive mechanism already existed." In light of the above, it is evident that whatever mechanism the government is referring to is clearly not working. The government stated position of committing to eradicate torture is obviously called into question by its refusal to allow independent scrutiny. The extensive work of NGOs in Nepal have demonstrated that in places of detention in which visits were regularly conducted, the incidence of torture tended to decline, thus illustrating the necessity to have such a mechanism implemented nation-wide.

Cases documented in 2011 show that persisting impunity protects perpetrators of torture from any consequences arising from their abuses and is the major cause of the continuing use of torture in Nepal. Cases in which children and adults having been subjected to serious form of abuse at the hands of the police illustrate how the system of impunity operates concerning this grave human rights violation. The lack of sanctions taken against police officers who are violating fundamental rights under the Nepalese Constitution allows criminal State agents to retain a position of authority from which they can abuse power for their own advantage.

The fight against impunity should therefore be made the cornerstone of a serious approach to the eradication of torture, and start with enactment of a law criminalizing torture and the establishment of clear punishments for those found guilty of torture that are in line with international standards. Currently in Nepal, in spite of repeated commitments expressed by the government, such legislation remains absent and the only law relating to torture is the Torture Compensation Act, 1996, which limits itself to granting compensation to victims of torture. Under the act, if torture is found to have been inflicted on a victim, "the district court shall order the appropriate agency to take departmental action according to the current law against the government employee who has inflicted torture"<sup>51</sup> In reality, such action is rarely ordered by the courts, who limit themselves to granting limited amounts of compensation to the victims. In the case of Mahima Kusule<sup>52</sup> discussed below, the court acknowledged that torture had been committed, as defined in the Torture Compensation Act, but disregarded the provisions of the law which allow for punishment of the perpetrators, thereby granting them with impunity. Furthermore, when compensation is provided as per the Torture Compensation Act, the State pays the monetary compensation, not the perpetrators. Therefore, even the smallest degree of individual liability is absent from the current legislation on torture.

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<sup>51</sup> Torture Compensation Act, 2053

<sup>52</sup> Court acknowledges torture but no sanction is taken against the perpetrators, AHRC-UAU-027-2011, 30 May 2011 <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-027-2011>



### Court acknowledges torture but fails to punish the perpetrators

On May 22, 2011, the Dolakha District Court ordered that compensation amounting to Rs.15,000 should be provided to Mahima Kusule, a 26 year-old woman, who on July 14, 2010, had been brutally tortured in the custody of the Dolakha district police, because she had refused to falsely identify herself as the accused in a theft case. She was detained on suspicion of theft without being provided any detention letter, arrest warrant or a health check-up as is mandatory under the law.

She was told that would she have the truth tortured out of her. Two policemen in plain clothes and two policewomen tied her hands with a strip of denim, inserted a bamboo stick between her knees and hands and propped her legs up. The soles of her feet were then beaten with plastic pipes for about 20 minutes and she was also beaten on her hands, thighs and chin. She was slapped and threatened with being subjected to electric shocks. She was released without charge the following day.

In the aftermath of the torture, the victim has been suffering from pain in her swollen cheeks; hands; left shin, which was deeply bruised; the soles of her feet, which were clotted with blood, as was her lower abdomen and her chest. The victim also reported suffering from severe headaches, nausea and dizziness, along with sleeplessness, a loss of appetite and occasional anxiety attacks. A psychiatrist diagnosed the victim with post-traumatic stress disorder, depression and an adjustment disorder.

With the assistance of Advocacy Forum, she lodged a case under the Torture Compensation Act at the District Court, Dolakha. On May 22, 2011, the District Court acknowledged that the victim had been subjected to torture and issued an order to provide the victim with Rs. 15,000/- as compensation. The court limited itself to instruct the perpetrators not to torture detainees again but no departmental action was ordered against them. The victim and her family said that her fight was not to get compensation but justice. They therefore filed the case at the Appellate Court seeking an order to bring the perpetrators to justice.

The UN Special Rapporteur on Torture intervened concerning this case in a communication transmitted to the Nepalese government on September 8, 2010. The government's response however was unsatisfactory, as it limited itself to denouncing the allegations as "completely baseless, fabricated and hypothetical" without providing any evidence to support this claim. The government's position runs contrary to the findings of the court, which has acknowledged the veracity of those torture allegations, and is therefore illustrative of the government's lack of credibility concerning the eradication of torture.

During the UPR process, Nepal accepted the following recommendation made by Switzerland: "In the framework of the reform of the penal code and the penal procedure code, conform to the totality of the provisions of the Convention against Torture". Nepal is currently in the process of reviewing both its Criminal Procedure Code and its Criminal Code. In the process, it has committed to include provisions that criminalize torture and to provide for clear punishments for those found to have committed the crime. For the moment, the draft versions of both codes have been published and various stakeholders and NGOs have provided feedback. Some of their comments have been incorporated to ensure that the proposed text shows greater adherence to international standards. Nevertheless, concerns remain as to whether this revision will provide an instrument that is capable of bringing torture and impunity to an end. Human



rights organizations welcome the efforts to introduce specific punishments for torture as a first step to put an end to the current, absurd situation, in which no sanctions can be taken against those who violate one of the most fundamental constitutional rights. At the moment, enacting specific legislation to deal with the issue of torture is not under consideration.

At the moment, the draft code criminalizes secret detention, detention without provisions of minimum humane facilities and enforced disappearance, all of which enable torture. Such a measure would assist in safeguarding against ill-treatment and torture of detainees. Furthermore, other measures would increase the protection from torture, including the notification of the detainees' families of their arrest, the systematic access of detainees to legal counsel and the keeping of written records of detainees in detention and their interrogation.

Section 164 of the proposed Criminal Code criminalizes torture and makes it an offence punishable by a fine or a maximum penalty of five years imprisonment. Of serious concern is the fact that the penal code may not set a mandatory prison sentence for perpetrators of torture, which is required under the Convention against Torture, which states that torture should be "punishable by appropriate penalties which take into account their grave nature." The possibility for those convicted of torture to get away with only paying a fine, is clearly not proportional to the gravity of the crime and is therefore unlikely to act as a deterrent to other would-be perpetrators.

Furthermore, the draft criminal code includes provisions under which the government needs to issue an order in writing before a State agent who was in the course of discharging her/his official duties can be prosecuted. If this provision was to be included in the adopted legislation, the result would provide a de facto veto right to the government regarding prosecutions for torture. Under international law, the prohibition of torture is absolute and non-derogable, which means that exceptional circumstances cannot be invoked to justify the lack of prosecutions against perpetrators. Given this, the decision to undertake prosecutions against government employees allegedly involved in torture cannot be subjected to a political decision by the executive branch of the government. In other Asian countries, such as India and Bangladesh, similar provisions are also in force and are widely misused to prevent the prosecution of human rights violations and to protect human rights violators. In addition, the crime of torture is excluded from the list of "non-pardonable" offences, concerning which the withdrawal of cases cannot be allowed, in the Draft Criminal Procedure Code, keeping open another avenue down which impunity for perpetrators of torture may still be pursued.

Furthermore, the act includes a limitation period of six months for the filing of cases of torture, which also falls short of internationally accepted international norms and standards, as there can be many obstacles, including medical, psychological or security reasons, which may prevent a victim of torture from filing a complaint within 6 months. In 2005, the Committee against Torture recommended that government of Nepal to "amend its current and planned legislation so that there is no statute of limitation for



registering complaints against acts of torture”<sup>53</sup>. Nepal should implement this recommendation and remove any statute of limitation concerning the filing of torture complaints.

In light of the cases documented by the AHRC and its partners in recent years, it is apparent that the absence of an investigation body mandated to investigate complaints of torture is a serious loophole that contributes to the lack of any impartial and efficient investigations into such complaints. Under current legislation, the head of police retains control of the investigation process, even when it concerns his or her staff. As long as no independent body is created to probe cases which, if investigated by the police, would result in an open conflict of interest, the effective prosecution of cases of torture will remain impossible. During the UPR of Nepal, Australia recommended the adoption of an independent complaint mechanism on the conduct of the security forces. However, the government did not accept the recommendation and claimed that the existing complaint mechanism is already independent, which is clearly erroneous. It also responded to recommendations calling for the government to ensure prompt and impartial investigations and prosecutions of allegations of torture by stating that it considered that they were already implemented or in the process of being implemented. This represents a complete denial of the reality of the obstacles that torture victims face in seeking legal redress. The absence of any independent authority to probe cases of abuse by the police accounts for the criminal justice system’s inability to investigate and prosecute such cases.

The case of Ang Dorje and Jambu Sherpa speaks to the difficulties faced by torture victims seeking to have their cases registered, let alone investigated. The afore-mentioned victims first tried to file a case in the police station to which the perpetrators of torture belonged, to no avail, as the Deputy Superintendent of Police, who has the highest authority in that police station, openly admitted that he wanted to protect his subordinates and therefore could not file the case. Similarly, when they tried to file the case in the highest-ranking police office in Kathmandu District, the Superintendent of Police there also refused to receive the FIR. Instead, he put the blame on the victims themselves and accused them of having fabricated the incident to tarnish the police officers’ reputation. He also insisted on interrogating the lawyer who had helped the victims draft the FIR, a requirement which has no legal basis whatsoever. Because they insisted on having their case investigated the police reportedly threatened them and put pressure on their landlord to evict them from their home. When Jambu went to the Home Ministry to file a petition, instead of taking her statement and making sure an independent investigation would be launched, the government official that she was reporting to contacted the police station where she had been tortured, recorded their version of events and thereafter refused to discuss the matter with her. It is reported that

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<sup>53</sup>CAT/C/NPL/CO/2 15 December 2005 CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION Conclusions and recommendations of the Committee against Torture NEPAL <http://www.unhcr.org/refworld/pdfid/441182d90.pdf>



the then-Home Minister also refused to take any interest in the case, stating that it was common for shop owners to get into trouble with the police. This case illustrates the collusion between the different levels of the police hierarchy and the complacency of the Home Ministry, which has the highest responsibility to ensure that the police forces maintain the highest standards of professional ethics and integrity and abide by the law.

The case of Dharmendra Barai is yet another illustration of the inadequacies of the current investigation system concerning allegations of police violence. This 14-year-old boy died while in police custody in July 2010. Allegations that his death was due to torture were supported by substantial evidence and witness statements. In its 2010 annual report, the AHRC described how investigation teams set up to probe into this case failed to show due diligence and worked to prevent the prosecutions of the alleged perpetrators rather than at shedding light on the exact circumstances of the boy's death: "The investigation team set up to probe the circumstances of his death was composed exclusively of policemen under the leadership of a government official, without including any representative of the deceased's family or civil society, casting doubts over its ability to impartially investigate a case involving police officers.[...] The investigation report concluded that it could not establish that torture was the cause of death, and it ignored information concerning the victim's injuries in the post-mortem report. The report limited itself to denouncing minor procedural flaws in the police's behaviour and to recommending departmental actions without specifying the nature of the sanctions or giving the names of those who should be sanctioned, and without denouncing the fact that a minor was kept in the same detention conditions as adults. [...] The District Police Office and the District Administration Office (whose head also lead the investigation team) both refused to file an FIR in the case under fallacious pretexts."<sup>54</sup>

A separate investigation team formed by the Ministry of Home Affairs is yet to publish its report, more than one year on. The police officers have also refused to visit the sub regional office of the National Human Rights Commission in spite of being summoned to do so on numerous occasions. Following an application for a writ of mandamus filed by the victim's father on September 9, 2010, the Butwal Appellate Court issued a writ of mandamus against the Butwal DPO, on January 26, 2011, ordering it to initiate a "fully independent, impartial, effective and prompt investigation into the case as per law." At the time of writing this report, almost ten months on, no such investigation has yet taken place. As per a decision taken by the Council of Ministers of Government of Nepal, the Ministry of Home Affairs on February 2, 2011, sent NRs. 150,000 (around US\$ 1,860) to the DAO to provide monetary support to the victim's family members. At first, the victim's father was told that he needed to withdraw the criminal case to receive the monetary compensation, and therefore initially refused to take the money. After NGOs ensured him that he could receive that money unconditionally, he eventually accepted the monetary support on September 13, 2011. This is one more illustration of the government's attempt to elude the need for criminal investigations and prosecutions by

<sup>54</sup> [http://www.humanrights.asia/resources/hrreport/2010/6%20Nepal\\_2010.pdf](http://www.humanrights.asia/resources/hrreport/2010/6%20Nepal_2010.pdf)



offering compensation to the victim's family, a move which falls short of realizing the family's fundamental right to a legal remedy, as enshrined in the International Covenant on Civil and Political Rights, to which Nepal is party.

These cases clearly show that police officers must not be entrusted with the task of registering and investigating cases of alleged misconduct by other members of the police, as torture has repeatedly been condoned by the police hierarchy or administration. Making sure that victims of torture have access to independent authorities to register their complaints is therefore essential as part of the criminalization of torture, an effective system that can provide remedies is going to be established. And yet, in spite of clear evidence to the contrary that is exemplified by these two cases and dozens of other similar cases that the AHRC has documented since the end of the conflict, the government still claims that it "believes that the existing complaints mechanism on the conduct of security forces is independent" and does not accept recommendations to establish a separate complaint and investigation mechanism.

The absence of an independent investigation process combined with the absence of a witness and victim protection mechanism makes victims seeking redress vulnerable to threats, intimidation and further abuses if they pursue their cases. As a result, only a handful of victims of torture are willing to press charges against the perpetrators. According to Advocacy Forum's data, in 2010, out of the thirty-six the organization documented, only five cases of torture against women were transmitted to the relevant governmental office for investigation, as the victims were afraid to make a complaint due to the fear of further victimization.<sup>55</sup>

In 2005, the Committee against Torture recommended that Nepal "Consider adopting legislative and administrative measures for witness protection, ensuring that all persons who report acts of torture or ill-treatment are adequately protected."<sup>56</sup> Such legislation is yet to be adopted, although the proposed criminal procedure code has included some elements of witness protection such as the possibility to give evidence via audio-visual recording as well as prohibiting the publication of names of vulnerable witnesses.

As described by Advocacy Forum's Kamal Pathak: "*Victims of torture may not be willing to file the case because of the impunity for the perpetrators; they do not feel encouraged to do so. Also, they know that if they file a case, it may bring them more problems than if they do not. As I mentioned, after filing the case, victims have been receiving threats, including death threats, to force them to withdraw the case and some of them are even bribed by the police. So because of that they are not very willing to file the case. But if we had a good legislation and if they knew that they could get justice and see the perpetrators punished, a lot more torture victims would probably be willing to come forward and file cases*".

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<sup>55</sup> Torture of women in detention-Nepal's failure to prevent and protect , Advocacy Forum, 26 June 2010 <http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf>

<sup>56</sup> CAT/C/NPL/CO/2 15 December 2005 CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION Conclusions and recommendations of the Committee against Torture NEPAL <http://www.unhcr.org/refworld/pdfid/441182d90.pdf>



Tika Ram Pokharel from CVICT has also added that: *“There are a lot of torture cases but not a lot of people bring this kind of cases to court, because of a lack of knowledge of the dispositions of the law and fear of re-victimization. In my experience, out of one hundred torture victims, hardly five would be ready to file a case against the perpetrators”*

Several cases illustrate the high price that is paid by torture victims seeking redress due to the absence of witness protection: a couple of shop owners who are torture victims were expelled from their home and subsequently subjected to further human rights violations.<sup>57</sup> Furthermore, policemen who had tortured an 11-year old boy repeatedly harassed his father after he filed a case and, when contacted, the DSP, who is the highest police authority in the District, refused to intervene to bring the threats to an end.<sup>58</sup> Separately, the doctor of a fourteen-year old child who had been beaten by a soldier and left unconscious was threatened by the army into halting the victim’s medical treatment.<sup>59</sup>

Perhaps the most emblematic case illustrating the hardships facing torture victims is to be found in obstacle course that Inspector of Police Hom Bahadur Bagale has been forced to navigate while trying to seek justice since 2002. Despite being a member of the police, he was tortured and detained incommunicado for two weeks in 2002, for having refused to follow an order which was not part of his regular duties. This case illustrates at length the aberrations present in the current justice process, which remains incapable of ensuring the right of remedy to victims, while creating situations in which the victims themselves may risk further punishment if they seek justice. Since 2002, no investigation has been launched into the allegations of torture in the case in question here. The victim filed a Torture Compensation case, which was rejected both by the District Court and the Appellate Court. The case was then filed in the Supreme Court on August 21, 2008, but this hearing has still not taken place as of the end of 2011. This nine-year long situation of injustice for the victim and impunity for the perpetrators has exposed the victim to repeated threats of death or dismissal, retaliations and further victimisation by the perpetrators, in order to try to force him to drop the legal proceedings he has launched. The superior ranks in the police administration have colluded with the perpetrators in their attempt to force the victim to resign if he did not stop the proceedings. In 2006, because he had refused to cede to this pressure, the victim was arrested, held in custody by the Hanumandhoka District Police Office and again tortured. Although the court acknowledged that torture was inflicted on the victim in this second case and granted him compensation on September 18, 2008, the compensation amount has never actually been received by the victim, and no punishments have been handed down against the perpetrators. Since then, some of the perpetrators have instead

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<sup>57</sup> NEPAL: Torture victims face eviction and harassment 17 March 2011 AHRC-UAU-018-2011 <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-018-2011/>

<sup>58</sup> NEPAL: The torturers of an 11-year-old child must be brought to justice AHRC-UAC-010-2011 24 January 2011 <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-010-2011>

<sup>59</sup> NEPAL: Soldier beat four villagers and a child leaving them unconscious, AHRC-UAC-095-2011, Asian Human Rights Commission, 13 May 2011, available at: <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-095-2011/>



been rewarded with promotions, while the victim has been fired from his job and stripped of his pension.<sup>60</sup>

Although attempts to criminalize torture and some changes in key stakeholders such as judges' attitudes towards torture are positive trends, the widespread nature and severity of the kinds of torture used in Nepal remains worrying. In light of the dysfunctional state of the criminal justice system, notably concerning its ability to address torture, criminalizing torture will not be sufficient of itself in order to banish torture from Nepal. In addition to the criminalization of torture, it is essential that Nepal develops mechanisms to guarantee the fairness and effectiveness of inquiries. Such mechanisms should include in particular an effective witness and victim protection system, an independent investigative body, a separate mechanism to register complaints of torture and mandatory punishments for public officers found to have obstructed victim's access to justice.

Effectively eradicating torture from Nepal will be a benchmark through which the state of the Nepalese democracy will have to be measured.

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<sup>60</sup> NEPAL: Prolonged unabated harassment of a policeman torture victim for nine years require legal redress, March 10, 2011, AHRC-UAU-014-2011, <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-014-2011>

**An illustration of the corruption-torture nexus and how the police hierarchy looks after its own**

According to information received from the Centre for Victims of Torture-Nepal, 7 to 8 policemen from the Metropolitan Police Circle, Maharajgunj, Kathmandu, came to the house of Mrs. Jangbu Sherpa and Mr. Ang Dorje Sherpa on February 9, 2011. The policemen reportedly asked them for money for no legal reason. When the victims refused they were beaten and tortured by the policemen. The policemen also reportedly looted an important amount of money from their house. The two victims were taken to the Metropolitan Police Circle, Maharajgunj, Kathmandu, and were severely beaten during the journey. At no point during their arrest were they shown an arrest warrant or informed about the charges pending against them.

They were kept in detention by the police until 11.30 pm. During their detention, the two victims were insulted with foul language, threatened with death and the police also threatened to file wrongful accusations against them, ensuring that they would be imprisoned for a long period of time.

The next day, the couple went back to the police station to claim back the money that the policemen had looted. There, the Inspector who had tortured the couple admitted the use of torture to the Deputy Superintendent of Police, the highest-ranking police officer in the police station. Instead of condemning and reporting this grave violation of the fundamental rights he is supposed to protect, the DSP mockingly told the victims "You filed case against the police in another torture incident in 2007, but you could not do anything and no police lost their jobs," in reference to a previous case of torture in which Ang Dorje Sherpa had also been a victim. The use of torture was therefore openly admitted in front of a senior officer, who instead of condemning this act and providing assistance to the victims, encouraged this breach of law, seriously failing to fulfil his duties to protect the rights of ordinary citizens.

On February 22, 2011, the victims went back to the police station to register a First Information Report (FIR) concerning this case. The DSP then reportedly refused to register the FIR, saying that he could not do so as it would make the perpetrators lose their jobs. This is an open admission from a higher-ranking police officer that he is protecting lower-ranking policemen who have committed a grave abuse of power, therefore indirectly approving, accepting, and supporting the use of torture by police officers to collect bribes. The following day, the victims went to the Hanuman Dhoka Metropolitan Police Range, which is the highest-ranking police office in Kathmandu District, to lodge the FIR, but the Superintendent of Police there also refused to receive the FIR, before interrogating the lawyer who had written it and accusing the victims of having fabricated the incident to shame the involved police officers.

On February 28, 2011, the two victims went back to the Maharajgunj Metropolitan Police Circle, to ask for the Rs. 25,070 which had been looted from their home by the team of policemen belonging to that police station. There a police officer rejected their request and reportedly threatened to harass them until they dropped the case, as they were trying to damage the reputation of police officers. He also allegedly threatened to force them out of their house in retaliation.

Following this run-in with the police, the owner of the couple's house told the victims to move out of their house and shop. There are strong reasons to believe that the police pressured the house owner to evict the couple as a reprisal. The police reportedly called the victims to the police station and ordered them to leave their house or they would be forced out and their belongings would be thrown on the road. When the victims told the police that the law contains provisions according to which the landlord should give his tenants 35 days' notice to ask them to leave his premises, the police reportedly replied that they could only give them a 20-day notice period. The victims were evicted and had to relocate to another area. The victims have since filed a petition with the Home Ministry and the Attorney General's Office but so far no concrete steps have been taken to provide them with redress or hold the perpetrators accountable.



### *V- Extrajudicial killings in the Terai*

The number of extrajudicial killings that have been reported in 2011 has significantly reduced in comparison to the previous years. Nevertheless, such cases continue to be reported and impunity for police officers alleged to be involved in such killings remains deeply entrenched. Against a background of continuing insecurity and police ineptness in re-establishing stability in the Terai, the police are resorting to extra-legal methods to re-establish “law and order,” as illustrated by the worryingly high rates of torture by the police in the Terai’s districts. None of the dozens of documented allegations of extrajudicial killings that have taken place since the end of the conflict, which the police arbitrarily and erroneously claim are “encounter killings,” have been independently investigated to date. The resultant lack of prosecutions leaves victims’ families in limbo regarding the circumstances surrounding the killing of their kin. The failure by the government to acknowledge the serious nature of this issue has been accompanied by its incapacity to develop a framework of accountability through effective investigations and prosecutions of allegations of extrajudicial killings.

The OHCHR's office in Nepal released a significant report in July 2010, entitled "Investigating Allegations of Extra-Judicial Killings in the Terai - OHCHR-Nepal Summary of Concerns (July 2010)"<sup>61</sup> in which it detailed a worrying incidence of extrajudicial killings attributable to the State in the Terai. The OHCHR's report notes that although the government's Special Security Plan, launched in 2009, appears to be reducing criminal activity, "*credible allegations of unlawful killings have continued to surface, most of which, according to information received by OHCHR, have gone uninvestigated.*" This is the case even though the Special Security Plan incorporates a commitment to protect human rights. However, the government has refused to implement the report's core recommendations and rejected the entirety of the report's findings. By disregarding the reality of the extrajudicial killings trend in the Terai, the government is justifying its inaction and condoning impunity.

Similarly, when the issue of extrajudicial killings was raised during the UPR as an issue of concern by a number of States taking part in the review, the government once again denied the very existence of the problem and indicated that it was already taking "*necessary measures for the prevention*" of extrajudicial killings, "*ensuring swift and fair investigations on alleged misconduct by law enforcement authorities*" and "*ensuring the delivery of justice regarding these serious human rights violations*". On the contrary, the cases documented indicate that the police almost always refuse to file First Information Reports following requests by family-member or to launch investigations into the circumstances of the killings. Court orders and National Human Rights Commission recommendations to investigate the circumstances of the killings are also being disregarded. When investigations are launched, they lack independence, as they often even involve police officers from the same police station as those under investigation, thereby creating a direct conflict of

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<sup>61</sup> <http://nepal.ohchr.org/en/resources/publications/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf>



interest. Witnesses and victims' families are regularly subjected to intimidation, threats and pressures from the alleged perpetrators to prevent them from pursuing their cases. The government's rejection of the OHCHR's recommendations to launch investigation into all cases of extra-judicial killings, to establish an independent complaints and investigation mechanism, and to adopt measures to support and protect witnesses, victims and their family members, which together would enable fair and impartial investigation procedures - clearly shows that the government's claim to be carrying out "swift and fair investigations" lacks credibility.

The case of Sahid Abdul Dewan, presented above, illustrates how abhorrent it is to assert that "swift and fair investigations" are being conducted, following which "justice is delivered" concerning cases of extrajudicial killings in Nepal. On October 26, 2009, members of his village witnessed the unarmed Sahid Abdul Dewan being shot by three policemen, and a few moments later saw police officers placing a pistol and ammunition around his dead body. The police prepared a report stating that while they were patrolling, they were shot at and had to return fire, killing the attacker instantly. The police further claimed that they recovered one home-made pistol, one bullet and one cartridge from the dead body. Despite a tireless fight by his father to shed light upon the circumstances of the killing, and an injunction by the District Court for the police to conduct an investigation into the case, no action has been taken so far. Instead, the public prosecutor office, in collusion with the District Police Office has spent a lot of energy trying to get the case withdrawn by the Attorney General's Office. The victim's father has faced repeated threats by the police for him to drop the case. One person who has been providing assistance to the father has been arrested on fabricated charges and detained for nine months without a trial. The police have used this person's detention to threaten the father, reportedly stating that "either you drop the case, or he will remain in our custody." Two years after the case, no "swift and fair" investigation has been conducted into the case.

### *VI-Attacks on human rights defenders and journalists continue with impunity*

During the UPR, the Czech Republic recommended that Nepal "Take concrete steps to ensure the security of human rights defenders, including journalists." The government of Nepal accepted this recommendation, thereby pledging to the international community that it would implement it. However, as will be seen below, this implementation has not taken place.

#### **A - Attacks on human rights defenders and lawyers fighting against impunity contribute to the suppression of the right to adequate remedies for victims**

In the context of a system of deeply-entrenched impunity, of the politicization of human rights issues and of a weak rule of law framework, the space for human rights defenders (HRDs) and lawyers, especially those working on impunity issues, has been shrinking in



2011. Since the end of the conflict and the Jana Andolan II movement, civil society had managed to carve a space for itself in Nepal and to impose itself as a necessary actor in Nepal's democratization process. Human rights defenders are recognized as having been the driving force behind the democratisation and peace process in the country, however, in 2011, the government's attempts to close the avenues through which conflict victims could have their voices heard and fight for justice has been accompanied by a reduction in the space enjoyed by civil society, and has placed human rights defenders in an increasingly precarious situation. In addition to State actors, non-state actors, political parties and armed groups, have also contributed to the significant shrinking of space available to human rights defenders. The government of Nepal has so far failed to establish an environment conducive to and protective of the work of HRDs, by failing to hold State and non-State actors accountable for attacks and threats against HRDs.

The failure to reverse this trend will bode ill for the future of Nepal's democracy, as civil society has become the last resort concerning the defence of human rights and justice in the absence of a functioning rule of law framework. A system which leaves no room for the work of human rights defenders and journalists is a system which place little value in the notion of right to justice and the freedom of expression. Ensuring a working environment that is conducive for human rights defenders is therefore essential if the government is to have a serious and credible approach to human rights.

There is no official recognition of human rights defenders as such by the State, and no effective legal mechanism has been designed to ensure their protection and their ability to work unhindered. As a result, human rights defenders continue to be vulnerable to threats and intimidation by State and non-State actors. The government has largely failed to comply with its international obligations to promptly investigate such acts and bring the perpetrators to justice. When attacks or threats of attacks are reported at police stations, the police very rarely provide protection to the defender at threat, or launch a thorough inquiry into the allegations, or initiate prosecutions against the perpetrators. As a result, this encourages further attacks and threats against the defenders as the perpetrators are ensured that no action would be taken against them if they do so.

At the local level, political parties have also been involved in threatening lawyers and HRDs working on cases which do not, at first sight, appear to be politically sensitive. Lawyers defending victims of violations in cases in which the perpetrators had a link, however slight, with political parties, have been at risk of receiving threats not to pursue the case. In a number of cases the lawyers were even physically manhandled. Threats against such HRDs may result in the perversion of the course of justice. This has been seen in cases of rape, caste-based violence and child abuse.

Given the system of impunity that protects those who threaten HRDs, those working on the rights of marginalized or excluded communities and groups that face discrimination, are in a particularly precarious position. As they are challenging the established social order, they often do not receive support from society and the police. In the Terai region, in the Western part of Nepal in particular, where social hierarchies are the most rigid and



where armed groups have been increasingly active, the vulnerability of such HRDs is at its greatest.

Attacks against human rights defenders and lawyers aim at preventing an effective dialogue on human rights and at discouraging them from taking action to hold human rights abusers accountable. If no action is taken to prevent these attacks, impunity for human rights violations is strengthened. By targeting those working with them to assert their rights, such attacks contribute to the denial of the right to effective remedy of victims.

As a result, the issue of protection of human rights defenders was rightly raised as an issue of serious concern during Nepal's UPR session, with several States recommending that the government guarantee the security of human rights defenders. However, the government has not taken this opportunity to take concrete and measurable commitments to the protection of HRDs. It explicitly accepted only one recommendation to "*take concrete steps to ensure the security of human rights defenders, including journalists.*" It did not however, accept more specific recommendations concerning the need to promptly and effectively investigate complaints of harassments and abuses against HRDs and journalists, and to hold the perpetrators accountable. In its response to these recommendations, the government indicated that the "*Security agencies are active in ensuring security of all citizens, including the rights defenders, journalist and women activists. The rights violators are prosecuted as per law*".

Cases documented in Nepal in 2011, however, contradict this statement, and show that the State is failing to respond to, investigate or prosecute threats or physical attacks against human rights defenders. In addition, State actors, including the security forces and the police, have been involved in coercing human rights defenders into stopping their work in favour of victims. Threats by State and non-State actors against HRDs have become a tool allowing them to enjoy impunity for serious human rights violations, such as torture or extra-judicial killings.

Nepal's government further indicated that it was considering adopting a special programme to protect human rights defenders, but has not been more specific regarding the contents of such a programme, or concerning the timeframe for its adoption. It is unclear whether the plan will lead to the development of a more conducive environment for the work of human rights defenders, by including for instance: recognition by the State of the work of human rights defenders and of the role they play in the society; addressing the issue at the policing level by giving clear and imperative instructions to the police to properly investigate all cases of threats against human rights defenders; and plans to provide them with adequate protection where necessary, with special attention to the specific needs of defenders working with vulnerable groups, including women. In addition, human rights defenders and lawyers who are victims of such acts must be provided with an effective remedy, which involves prompt investigations into all allegations of attacks or threats against human rights defenders and the prosecution of all alleged perpetrators.



## **B - Impunity puts freedom of expression in peril**

Although there is no official governmental censorship system in Nepal, freedom of expression remains in a precarious position as journalists repeatedly come under attack or face threats of attacks for reporting on “sensitive” cases. As a result, human rights is given limited coverage as journalists know that reporting such cases may lead to problems. Intervention by political parties in all aspects of social life, poor law enforcement and a general climate of impunity, combine to create a situation in which the freedom of expression for journalists is not guaranteed.

Nepal is still largely failing to hold accountable the perpetrators of such attacks, as has been illustrated by the attack on journalist Khilanath Dhakal. On June 5, 2011, Khilanath Dhakal was attacked by members of the Youth Force, a youth wing of the then-ruling party the Communist Party of Nepal Unified Marxist Leninist (CPN-UML), in retaliation for having reported an attack by Young Force members on a prisoner and the police in the premises of the Morang District Court. A complaint was filed against three members of the YF, including Parshuram Basnet, the district head of the YF, who was accused of having masterminded the attack. Although the other two perpetrators were arrested, Basnet remained at large. In response to the filing of the case, the victim and the journalists assisting him in filing his case were reportedly threatened by the alleged perpetrator with “dire consequences” if they did not withdraw the case. The national leaders of the YF reportedly publicly gave support to the perpetrator, and admitted to protecting him from the police. Furthermore, they threatened to close the newspaper of the victim, to jail his editor and issued threats to all journalists found to have reported on the case. The perpetrator also received the public support of the CPN-UML leader, who accused the police and government of being politically manipulated. In August, after the District Court issued an arrest warrant for Basnet, a bandh (strike) was enforced by the Youth Force in the district to demand the withdrawal of the case. On 18 August, Reporters without Borders reported that “several members of the Morang District Police, including a Deputy Superintendent, have been relieved from duty for helping Basnet and his accomplices to escape.” This case has revealed the extent to which collusion between political parties and law enforcement agencies can result in a situation in which freedom of the press is blatantly trampled upon with impunity.

However, there were some limited positive developments in 2011 concerning impunity for attacks on journalists in Nepal. In May, two men involved in the 2007 murder of journalist Birendra Shah, who had been critical of local Maoists, were convicted to life imprisonment by the Bara District Court. The Maoist Party publicly recognized the responsibility of three of their members in masterminding the murder, and suspended them from the party. However, the three perpetrators have not yet been apprehended. Similarly, two suspects were convicted in June 2011 of the 2009 murder of a woman journalist, Uma Singh, in reprisal for having reported on cases of land grabbing by the Maoists. The two were also convicted to life imprisonment. However, the man who reportedly ordered the attack remains free, as do the other perpetrators to date. These



two relative successes remain anecdotal, as in most of the cases documented in 2011, the perpetrators continue to enjoy complete impunity.

As a result of the lack of a response by the State to the repeated obstruction of the work of journalists, Nepal is ranked 119<sup>th</sup> out of 179 countries in the Reporters Without Borders freedom of expression ranking, while the Committee to Protect Journalists ranks Nepal as the seventh country from the top of the list in terms of impunity granted to killers of journalists.

Freedom of expression and freedom of the press are two of the fundamental pillars of a thriving democracy and as long as Nepal fails to strengthen its rule of law and law enforcement frameworks, these two pillars will not be effectively protected, handicapping the establishment of a stable and fair democracy in Nepal.

### *VII - Caste based discrimination*

Nepal is a country characterized by its diversity, with 102 ethnic groups, 92 languages and 7 religions having been recorded in the country as part of a census carried out in 2001. Of all those diverse communities, the Dalit community continues to face the harshest living conditions, due to continued discrimination by the rest of the society. 2011 saw some progress in the way caste-based discrimination was addressed by the State, with the adoption of the first law criminalizing caste-based discrimination in Nepal and the launch of a 100-day campaign by President Dr. Ram Baran Yadav, who pledged to “commit to end caste-based discrimination and untouchability.” However, many challenges lie ahead if Nepal is to bring to an end the widespread human rights abuses that accompany caste-based discrimination and which contradict the essence of democracy by denying Nepalese the right to equality and dignity.

In the Hindu religion, the Dalit community is considered as being the lowest group in the caste hierarchy. The Dalit community remains the most marginalized and disadvantaged group in Nepalese society. The feudal hierarchical caste system, based on orthodox Hindu tradition, continues to influence the structure of Nepalese society and leads to the exclusion of Dalits from every sphere of public life. Dalits continue to be prevented from sharing water taps with the rest of the community or from entering temples, for example. Dalits remain segregated from non-Dalits when they take part in socio-cultural activities, such as marriage, worshipping and other ceremonies.

Dalits, notably Dalit women, have benefited the least from the significant social and political changes that Nepal has experienced during the last two decades. They have remained under-represented at the political level and have unequal access to decision-making positions. Socially, they continue to suffer exploitation by the rest of the society. Economically, the Dalit community is among the poorest in society and has the lowest access to land.



Within the Dalit community, Dalit women suffer from three-fold exploitation, through caste, gender and class. Traditional social roles devoted to women in Nepal has meant that discrimination against Dalits disproportionately affects them: for instance, although all the community suffers when they are prevented from accessing public taps, as it is the women who are in charge of collecting the water for the household, they are those who face attacks if a controversy arises concerning the use of public taps, and have to walk further in order to collect water. Similarly, although the whole community suffers from a low access to education, within the family boys are given preference to go to school, limiting girls' right to education even further. They have a low access to justice and few opportunities to have their voice heard in the public sphere and to call for social reform.

Further, Dalit women have few resources and limited economic and social power, and have therefore been vulnerable to extreme forms of violence. Dalit women are the least able to escape from domestic violence, because of their limited financial means, low educational status and difficulties in accessing justice. Their low social and economic status also means that Dalit women are vulnerable to sexual exploitation. Violence following inter-caste marriage, untouchability, sexual exploitation, trafficking and accusations of witchcraft all affect the daily lives of Dalit women in Nepal, and which deny them their dignity and equal rights as citizens.

Dalits, and in particular women, have suffered from cultural and social exclusion for centuries and still lack of access to economic opportunities, education, and government representation, services and benefits.

The United Nations Development Programme's Nepal Human Development report 2009<sup>62</sup> draws a clear picture concerning the structural inequalities in Nepali society, and the persisting socio-economic divisions between castes. It reveals that in 2006 the Human Development Index (HDI) of persons belonging to the Brahmin/Chhetri communities reached 0.552, while it was of 0.424 among the Dalit community. The HDI takes into account three indicators concerning the development opportunities and well-being of a community: educational attainment, health measured through the life expectancy, and income. The gap among the HDI levels of different castes is therefore mirrored by a similar gap in these different indicators.

For instance, according to the 2006 population survey,<sup>63</sup> the life expectancy of a Hill Brahmin was 68.10 years, while for a Hill Dalit it was of 61.03 years. Poverty, the lack to access to medical and health services, unequal access to education, and a lack of proper sanitation in the rural areas account for this discrepancy. Similarly, with regard to health, the average life expectancy of Dalit women is 50, whereas the national life expectancy is 59 years (CERID, 1999).

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<sup>62</sup> United Nations Development Programme Nepal Human Development report 2009 [http://idsn.org/uploads/media/UNDP\\_Human\\_Development\\_Report\\_Nepal\\_2009.pdf](http://idsn.org/uploads/media/UNDP_Human_Development_Report_Nepal_2009.pdf)

<sup>63</sup> All those figures can be found in the United Nations Development Programme Nepal Human Development report 2009, [http://idsn.org/uploads/media/UNDP\\_Human\\_Development\\_Report\\_Nepal\\_2009.pdf](http://idsn.org/uploads/media/UNDP_Human_Development_Report_Nepal_2009.pdf)



In 2006, the average income of a member of the Dalit community US\$ 977, was less than half of the average income of all Brahmans/Chhetri, which was US\$ 2027. And last but not least, these figures also show that structural differences in access to education result in only 38% of all Dalit adults being literate, as opposed to 63.65% of Brahmans and Chhetris, whereas Dalit women's literacy rate is only 3.2% (SCF Source, 2001) according to Nepal's census in 2001.

Inequalities in education also affect the of access of the Dalit community to the political sphere, where they could defend their interests: to date, Dalits make up only 8% of the members in the Constituent Assembly, while official figures state that Dalits amount to 13% of the population and non-official estimates put that percentage as high as 20%.

Legally, the community has been freed from the imposed values of Hindu society structure since the Muluki Ain (civil code) was amended in 1963 to prohibit "Discriminatory Treatment against the Community." The 1990 Constitution for the first time guaranteed the right to equality for all, and prohibited caste based discrimination. In addition to the acknowledgement of those fundamental rights, Nepal was declared a secular State and free from untouchability by the reinstated House of Representatives through the people's movement in 2006.

Such provisions were further upheld in the 2007 Interim Constitution under its fundamental rights section. Articles of interest for the protection of the Dalit community have included: article (12) on the right to freedom clause (1) which clearly mentions that every person has a right to live a dignified life; article (13) on the right to equality clauses (2) and (3) state that no discrimination shall be made against any citizen. Most importantly, article (14) on the Right against Untouchability and Racial Discrimination provides that "no person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability of any form. Such a discriminating act shall be liable to punishment and the victim shall be entitled to the compensation as provided by the law and shall be punishable in accordance with law." However this provision had not been implemented since 2007, as the government of Nepal had failed to introduce legislation comprising clear punishments for acts of caste-based discrimination and untouchability, until May 2011, when a law was finally passed concerning this, as will be seen below.

Interestingly, to address the issue of the lack of access to the political sphere and to State institutions of the Dalit community, article 21 of the Interim Constitution of Nepal has ensured that Dalits have the right to take part in the structure of the State on the basis of the principle of proportional inclusion. For the proportional inclusion of every sector of society, the government has also reserved seats and set out quotas, especially for the Dalit community. Although these quotas and reserved seats have lead to the comparative increase in the representation of the Dalit community, these quotas are not been fully implemented due to the lack of an appropriate flow of information to and awareness within the concerned sectors of society.



Nepal is also party to several international conventions, such as the Universal Declaration of Human Rights; the International Convention on the Elimination of all kinds of Racial Discrimination (ICERD); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of all kinds of Discrimination against Women (CEDAW), which provides the State with the obligation to take all necessary steps to eliminate discrimination from society, including caste-based discrimination.

In spite of this positive normative progress, the State has so far failed to bring caste-based discrimination to an end and to guarantee the social, economic and political emancipation of the Dalit community. Simply granting a set of civil and political rights cannot be sufficient to ensure the socio-economic and political inclusion into the mainstream of the Dalit community. In spite of commitments, the situation of Dalits has improved considerably less than the situation of other castes or ethnic groups in the last decade, and there are concerns that Dalits may be left behind in the deep transformation process that Nepal has embarked upon since 1990.

Some further measures have been taken by the government to support the economic and social development of the Dalit community, but have been insufficient to achieve acceptable levels of impact. The State has started encouraging inter-caste marriages by awarding involved couples with NRs. 100,000. To ensure better access of Dalits to education, the government has also provided scholarship programmes, especially for Dalit students from primary to higher secondary level schooling, and also concerning university-level education since 2007. The government has also promoted nutrition programmes for children and infants below 5 years old from the Dalit community, by providing monthly assistance of NRs. 200 since 2010.

Nevertheless, corruption and discrimination often prevent these programmes from reaching their intended beneficiaries. Often, the budget allocated for Dalits is used by their Village Development Committee (VDC) or District Development Committee (DDC) authorities without providing information as to its use, or is used for public construction and social welfare programme that are not exclusively for Dalits. These authorities claim that Dalits make use of such projects, but this clearly amounts to financial misappropriation at best, and denies the Dalits from having access to funds that have been specifically earmarked for them.

In September 2011, 60 inhabitants of Sitapur VDC in Siraha District conducted a hunger strike to denounce the alleged misappropriation of social security benefits there. The VDC secretary Bibekchandra Karki, was accused of having misappropriated government-provided social allowances for the last three years. In particular, out of the 296 Dalit children in the VDC, 125 never received the 200Rs. per month nutrition allowance. Although the victims tried to raise the issues with the local authorities several times, it is only after going on hunger strike that they reached an agreement that the VDC Secretary would be relieved from duty, that a proper investigation would be launched and that the victims would receive the money they were entitled to during all those years. At the time



of writing, the alleged perpetrator had been suspended from duty and a new VDC secretary had been named in the area, but the victims were yet to receive the allowances.

Nepal's Dalit movement is trying to establish a just and equitable society where all persons can live without any fear and with dignity. Many challenges still lie ahead in this respect. A historic achievement for the movement came in 2011 with the adoption of a law criminalizing caste based discrimination. "The Caste-based Discrimination and Untouchability Crime Elimination and Punishment Act" was adopted unanimously by Nepal's interim Parliament on May 24, 2011. It includes the prohibition of the practices of 'untouchability' both in the public and private spheres, which has been a major demand of the Dalit movement. The law also criminalizes incitement to others to commit caste-based discrimination, as well as acts that prevent a person, on the ground of his or her caste, from accessing public services. It provides for increased punishments for public officials found responsible of discrimination. It contains provisions making it mandatory for perpetrators to provide compensation to victims. The law also criminalizes opposition to inter-caste marriages, expulsions of people on the basis of their caste and social boycotting. The victims have to approach the police to file a complaint, and, if the police prove unhelpful, they can also file their complaints with the National Dalit Commission.

Following the adoption of the law, one of the major challenges to its implementation will be to guarantee that the criminal justice system is equally accessible to Dalits and protects their rights.

The February 16, 2011, report of the UN High Commissioner for Human Rights on the human rights situation in Nepal rightly cites the different layers of obstacles that are faced by victims of caste-based violence, as well as of gender-based violence, to access justice, as follows:

1-police failing to treat offences targeting Dalits as criminal acts by refusing to take proactive steps when a case is reported to them and by delaying the registration of the case,

2-shortcomings in the criminal justice system which imply that the judicial process will be slow and lengthy and non-implementation of the court verdicts, insufficient margins of action and resources granted to the National Dalit Commission,

3-police encouraging the victims to "resort to measures beyond the criminal justice system" such as reaching a negotiated arrangement with the perpetrators to avoid prosecutions,

4- socio-economic and cultural barriers to justice, in other words the lack of awareness of their rights, social stigma and further victimization of Dalits that speak out and seek justice.



To address these issues, a “Dalit watch centre” in which Dalits can register cases of caste-based discrimination was established in Kathmandu. Although the establishment of the centre is a welcome development, it needs adequate funding and adequate staffing (including of women staff so that Dalit women can also feel at ease when registering their cases with the centre), and it requires extended coverage to other districts in Nepal, in order to properly tackle the issue of caste-based discrimination and untouchability across the country.

In 2011, numerous cases of violence based on caste and untouchability were reported, and illustrated the widespread nature of the problems and challenges that Dalits continue to face. In September 2011, in Nuwakot District, the members of a Dalit family were beaten for touching an 'upper caste' woman, for example. On September 23, 2011, in Nuwakot district, five members of a Dalit family were beaten up by members of a so-called higher caste family, after their young daughter had accidentally touched the foot of a local “upper” caste woman while boarding a bus. Thereafter, five members of the “upper” caste family raided the house of the Dalit family and beat up five women who were there. They also vandalized the victims’ houses, tailor shops and goods.

Violence following inter-caste marriages remains alarming and is emblematic of the continuing caste-based violence in the country. The violent reaction by sections of society to those who challenge the orthodox structure of castes has been witnessed in a number of cases in 2011, leading to the expulsion and shunning of the couple from the community or violent attacks against them, as seen in the following example:

In Dailekh district, on August 13, 2011, Santa Bahadur Damai, a Dalit man, married Raj Kumari Shahi, who belongs to a so-called higher caste family. The couple had been in love for two years and had to escape to get married, due to the reluctance of the bride’s family resulting from their different castes. After learning about the marriage, the Shahi family went to the groom’s family home and beat the groom’s father Sete Damai to ask him where their girl had been taken. The girl’s family tried to file a case in the Illaka Police Office, Dailekh on the same day, but the police refused to search for the couple after learning that both had reached the legal age of consent concerning marriage. They did, however, threaten the young man’s family with death. On August 30, the newly-weds returned to their home. Nine members of the girl’s family then attacked the groom’s family with knives and the groom’s father was killed after being stabbed in the chest. The police investigation is going on.

This case reflects the stigma and violence surrounding inter-caste marriages which result from these posing a direct challenge to the orthodox system of castes. Although the State has created a 100,000 Nrs allowance for inter-caste couples and the law on caste-based discrimination has criminalized the attempts to prevent an inter-caste marriage, social barriers often remain insurmountable for couples. Dalit women are particularly vulnerable as, traditionally, by marrying they enter their husband’s family and are therefore directly exposed to abuse and harassment by their in-laws. In a number of

cases, the in-laws have pressured the husband into abandoning his wife, who then finds herself left without financial or social support.

### *VIII - Recommendations*

In light of the findings presented in the above report, the AHRC urges the government of Nepal to:

- Uphold its commitments to accountability and justice by ensuring the investigation and prosecution of all conflict-related human rights violations. It must order the police to register and investigate promptly all such cases of human rights violations and clearly and publicly state that such cases fall under the jurisdiction of the regular criminal justice system.
- Adopt without delay the bills establishing the Truth and Reconciliation Commission and a Commission of Investigation on Disappearances, and guarantee their independence, while prohibiting amnesties for human rights violations. It must ensure the right to truth for victims and effective prosecutions of all alleged perpetrators, in order to foster lasting peace and reconciliation in society.
- Commit to refrain from any attempt to provide amnesties or withdraw cases pertaining to human rights violations
- Take all necessary steps to strengthen the criminal justice system, in particular to ensure that all court orders are binding to all, and are implemented without undue delays.
- Initiate impartial investigations into all allegations of extrajudicial killings and bring to justice the alleged perpetrators
- Adopt legislation criminalizing torture without further delay. Actively involve civil society in all stages of the discussion concerning the law, and ensure that its legal provisions are in line with internationally accepted human rights norms and standards. Enhance the current investigation mechanisms to ensure their independence and effectiveness. Establish a police service



commission, as per the recommendations formulated to Nepal during the UPR.

- Give clear instructions to the police to register and investigate all complaints of threats or harassment against human rights defenders and journalists, and develop the police's protection capacity, while speeding the process of the adoption of a special programme to protect HRDs and journalists. Involve civil society in all stages of the development of such a programme.
- Closely monitor the implementation of the law criminalizing caste-based discrimination and untouchability. Strengthen the existing Dalit Watch Centre and open other such centres in all of Nepal's districts.