



ASIAN HUMAN RIGHTS COMMISSION

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December 7, 2005

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Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Nepal – without a Parliament and laws on torture and forced disappearance, the Office of the OHCHR in Nepal cannot fulfil its work for human rights

On the occasion of the December 10, 2005 International Human Rights Day, the Asian Human Rights Commission (AHRC) wishes to highlight the continuing flagrant abuses being perpetrated in Nepal and request your intervention regarding specific issues.

AHRC welcomes the establishment of the Office of the High Commissioner for Human Rights in Nepal and commends you for your commitment and efforts in bringing about this much-needed development. AHRC was involved in efforts to lobby for the establishment of this office and notes with satisfaction that it is now functioning and well staffed.

The reported agreement between the CPN-Maoist insurgents and an alliance of seven opposition political parties presents new opportunities for the resolution of the country's internal conflict through a democratic process. AHRC appreciates the intervention of the High Commissioner in a press release issued on December 1st, 2005, urging the Maoists to extend their unilateral ceasefire (which they have now reportedly done) and respect human rights, and for the Government of King Gyanendra and the security forces to also call a ceasefire and respect the rights to the freedoms of expression and peaceful assembly.

However, the situation in Nepal continues to be of grave concern, with ongoing widespread and systematic abuses - including arbitrary arrest, illegal and/or incommunicado detention, torture, suspicious custodial deaths, forced disappearances and extra-judicial killings – being perpetrated on a daily basis. Impunity remains total for these acts. The perpetrators are free to continue violating and victims receive nothing but threats of further abuse if they risk complaining.

Currently, the Royal Nepalese Army is acting without civilian control or oversight, even ignoring habeas corpus orders from the Supreme Court of Nepal, and sheltering behind opaque military courts. The police collude with the military to ensure impunity. The OHCHR is fully aware of the scale of human rights violations in the country.

AHRC wishes to bring to your attention the fact that all efforts being made by local and international NGOs and institutions, including the office of the OHCHR, concerning the gravest violations human rights, are currently essentially rendered ineffectual due to the fact that there is no functioning Parliament.

AHRC's experience leads us to believe that for any concrete steps to be taken in terms of preventing abuses (notably torture and forced disappearances), of prosecuting perpetrators and of providing reparation to victims, these practices must be criminalised under domestic legislation. This need has been noted and action urged by both the Committee Against Torture (in its November 2005 session) and the Working Group on Enforced or Involuntary Disappearances (in a report published in January 2005). However, without a Parliament, Nepal has no legal constitutional body that can enact legislation. The authorities in Nepal need to be strongly urged to hold free and fair, fully-participatory, multi-party elections to enable the reinstatement of the legislature.

Torture and forced disappearance will continue unabated unless criminalized, with backing from a judiciary that is able to effectively prosecute violations of the law. With no such laws, the role of the office of the OHCHR is reduced to simply documenting the large number of ongoing cases of torture and disappearances – a situation that is of no succour to victims and no concrete help in protecting human rights in practice. Without these tools, the judiciary is also toothless as regards its ability to independently uphold Nepal's international human rights obligations. AHRC fully supports the OHCHR office in Nepal, and faces similar obstacles in its own actions in the country, but wishes to see improvements to the impact of all actions in favour of human rights in Nepal.

In view of this, AHRC kindly requests your most resolute intervention with the authorities in Nepal, in order to ensure that:

- free and fair, fully-participatory, multi-party elections are held, so that Parliament can resume its functions;
- laws criminalizing torture and forced disappearance are thereafter enacted without impediment;
- the armed forces and police are ordered to immediately and without exception comply with all court orders, including those pertaining to habeas corpus writs;
- an independent and competent body is established to investigate all allegations of human rights violations;
- all recommendations made by UN treaty bodies and special procedures are implemented without fail or delay.

King Gyanendra of Nepal should also be urged to make a clear, unequivocal public statement condemning the practices of torture and forced disappearances, as this will serve to deter future violations. Thank you for the kind consideration that you will give these matters.

Basil Fernando
Executive Director



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FOR IMMEDIATE RELEASE

December 7, 2005

A report by the Asian Human Rights Commission (AHRC) marking International Human Rights Day 2005

NEPAL: A world-leader in disappearances, but no Parliament or laws to enable change

Introduction and Executive Summary

2005 has been a tumultuous year in which the people of Nepal have suffered considerable further erosion of their human rights. The Asian Human Rights Commission (AHRC) acknowledges that the entire register of human rights are being violated in varying degrees in the country, but wishes to concentrate here on those that can be considered most grave and that require the most urgent intervention. They include: arbitrary arrest; illegal and incommunicado detention; torture; forced disappearance; and extra-judicial execution. In fact, these violations do not occur in isolation, but often accompany each other in an interrelated process of abuse, and so it is both relevant and opportune to consider them together.

While there has been a grave human rights crisis in Nepal for a number of years, it has undergone significant degradation during this year, notably since the notorious February 1, 2005 royal takeover. On February 1, 2005, King Gyanendra of Nepal dismissed the government of Prime Minister Sher Bahadur Deuba, declared a nationwide state of emergency and suspended the rights of the people of Nepal to the freedom of expression and assembly and the freedom of the press. The King assumed power by putting armed soldiers and police on the streets and appointed a new 10-member cabinet the next day, composed of royalist supporters, placing himself at the head of the cabinet. The King stated that he would restore democracy and peace in the country in three years. AHRC and its sister-organisation, the Asian Legal Resource Centre (ALRC) were among the many international actors, including States and local and international NGOs, which immediately condemned the King's actions and expressed deep concern for the lives of the Nepalese people.¹ Mass arrests, incommunicado detentions, torture, disappearances, the repression of demonstrations and a media and communications black-out followed the royal takeover.

It is of capital importance to note that as Nepal currently has no functioning Parliament, no laws can be enacted in a legal and constitutional way. The efforts of all persons working against torture and forced disappearances have therefore been stymied by the King's dismissal of the Government earlier this year. This includes local and international NGOs, and the United Nations, notably through the newly-established office of the High Commissioner for Human Rights in Nepal. The implementation of various recommendations made by United Nations bodies should also be considered as impossible to implement due to the absence of a functioning legislature.

¹ NEPAL: Immediate intervention needed to save human lives in Nepal, The Asian Legal Resource Centre, Statement issued on 1st February 2005

<http://www.ahrchk.net/statements/mainfile.php/2005statements/255/>

The international assistance that is being provided concerning human rights in Nepal is, under the present situation, not being used to its full potential. Donor countries, the UN and NGOs must therefore take immediate action to pressure the authorities to hold democratic, transparent, multi-party, all-inclusive elections, through a process agreed upon by all political actors, in order to enable a new government and therefore the legislature to be established. Regardless of the political barriers, civil society groups are urged to begin campaigning on the issues of making torture and forced disappearances criminal offences, in order that they be dealt with as a priority upon the election of a democratic government. Recent developments in the country concerning an agreement between the Maoist insurgents and an alliance of political parties, which are presented below, offer new opportunities for such change.

In having dismissed Parliament, the King must be held personally responsible for all acts of torture, forced disappearance and other human rights abuses that have and are occurring in Nepal, as any tangible progress in the situation requires the legislature to be functioning.

ALRC provided a document on Nepal to the 35th session of the United Nations Committee Against Torture (7 to 25 November 2005).² ALRC staff members attended the session in Geneva. Some important issues raised and recommendations made by CAT Committee members to the official delegation from Nepal have been integrated into this report. Also included are recent recommendations and comments made by: the Special Rapporteurs of the United Nations Commission on Human Rights (CHR) on torture and other cruel, inhuman or degrading treatment and on extrajudicial, summary or arbitrary executions; as well as the CHR's Working Groups on Arbitrary Detention and on Enforced or Involuntary Disappearances.

AHRC recalls that the human rights situation in Nepal is one of the most serious in Asia. Over the last two years the United Nations has reportedly received more documented cases of forced disappearance in Nepal than any other country in the world. The use of torture has been labelled as **systematic** by the Special Rapporteur on Torture, Professor Manfred Nowak, following a visit to Nepal in September 2005.³

The factors that enable the prevailing systematic pattern of human rights violations include: the lack of legal provisions within Nepal's legislation criminalising the practices of torture and forced disappearance; the collapse of the rule of law and state institutions, notably the judiciary; the lack of effective civilian control of the military; rampant impunity; and a lack of avenues for redress for victims. These are enabled or exacerbated by the failings of the Torture Compensation Act and the obstacles put in place to hinder the work of human rights defenders within the country, including the recent Code of Conduct for NGOs, which aims at dangerously curtailing civil society's ability to carry out their work. The Code of Conduct was denounced by AHRC in a

² ALRC Supplementary Document concerning Torture in Nepal in 2005, November 6th, 2005: http://www.alrc.net/doc/mainfile.php/unar_cat_np_2005/

³ United Nations Press Release, September 16th, 2005: Special Rapporteur on Torture says practice of Torture is Systematic in Nepal, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/747EA6831C54890AC125707E00508573?opendocument>

statement and press release.⁴ The discussion of these issues will be based on and supported by cases of violations of individuals' rights that AHRC and ALRC⁵ have documented.

The main areas in which developments are required include, *inter alia* :

- re-establishing the legislature through a democratic process;
- enacting into domestic legislation laws that prohibit torture and forced disappearance - AHRC believes this to be the key to making headway in countering widespread abuses in Nepal;
- the strengthening of institutions and their ability to function, most notably the judiciary – this will permit new legislation to be implemented;
- providing unhindered access to detainees in all places of detention and releasing all persons being detained arbitrarily;
- creating independent bodies able to conduct investigations into allegations of violations and bring the perpetrators to justice – this is vital in challenging impunity;
- setting up mechanisms that provide for adequate protection and timely reparation to victims or their families.

The necessity of criminalising torture and forced disappearance

By enacting legislation that prohibits torture and forced disappearance, a new gamut of opportunities will present itself to actors working in favour of these human rights and the victims of violations thereof. Without such legislation, avenues for concrete legal action are restricted, if not barred all together, as can be seen by the lack of adequate reparation or punishment of perpetrators in Nepal thus far. Human rights will remain in the rhetorical domain until the rule of law is established – there can be no separation of these two notions. By enabling institutions and judicial processes, the rule of law can be re-established in Nepal, and the afore-mentioned and urgently-needed new laws can be implemented. AHRC does not pretend that these changes will come easily, but what is required in Nepal is momentum for change in the realm of human rights, which is best enabled by concrete gains in campaigns with specific and limited aims.

While taking into account the current obstacles presented by the lack of a functioning Parliament, AHRC is engaged in concerted campaigns to call for torture and forced disappearances to be criminalised. Local and international human rights actors - including NGOs, the press, religious groups as well as regional and international institutions - are also urged to lobby and campaign on these specific issues, as well as those embodied in the recommendations found later in this document. Laws criminalising torture and forced disappearance need to be accompanied by an executive order from the highest authorities in the country for the law enforcement and security forces to comply without exception or delay to court orders, notably those resulting from habeas corpus writs.

⁴ AHRC statement: Nepal: Proposed code of conduct an attempt to suppress civil society, November 8, 2005, <http://www.ahrchk.net/statements/mainfile.php/2005statements/368/>; and AHRC press release: NEPAL: Proposed code of conduct an attempt to control NGOs and international cooperation, November 10, 2005, <http://www.ahrchk.net/pr/mainfile.php/2005mr/239/>

⁵ ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, <http://www.article2.org/mainfile.php/0306/> & Vol. 04 - No. 01 February 2005 – Nepal: Time to act, <http://www.article2.org/pdf/v04n01.pdf>

Who can possibly be against making these abhorrent practices recognised as crimes in Nepal – perhaps only the individual perpetrators of these acts? All other persons should be encouraged to join in the movement to have these practices outlawed and accompanied by proportional and appropriate applicable criminal sanctions, which are in line with international laws and standards. Many other targeted campaigns to bring about specific reforms can also be launched. The recommendations presented in this report are destined to highlight the priorities for such actions.

No exceptional circumstances whatsoever can justify torture or disappearance

The armed conflict between the Royal Nepalese Army and the insurgent CPN-Maoist forces in the country is used as a justification by the authorities to excuse the litany of abuses perpetrated against the people of Nepal by the police and notably the armed forces. AHRC recalls that, in the case of torture for example, Article 2, paragraph 2 of the United Nations Convention Against Torture, to which Nepal is party, states that: *“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”*⁶

Concerning this point, the Committee Against Torture (hereafter referred to as the CAT) recalled during its consideration of Nepal’s second periodic report in November 2005, that: *“the Convention was a legally binding instrument for all States parties, and article 2 clearly stated that no exceptional circumstances justified the use of torture. It was therefore incumbent on the Government to take stringent measures to eliminate the culture of violence and torture that appeared to pervade in the reporting State.”*⁷

AHRC wishes here to firmly condemn all violent acts, including threats, torture, killings and forced disappearances committed by the Communist Party of Nepal (CPN) – Maoist forces in the context of the insurgency in Nepal. AHRC calls upon the insurgents to halt all attacks against civilians and abide by international humanitarian and human rights laws and standards at all times.

In view of this, AHRC welcomes the agreement between the CPN-Maoists and an alliance of seven political opposition parties, in which the Maoists have reportedly agreed to abandon violence and join the political mainstream in due course, in order to establish a constituent assembly through the electoral process. Reports also indicate that the Maoists have agreed to have their forces placed under the supervision of the UN, or another accepted international organization, and to abide by international human rights and humanitarian laws and standards. The agreement also reportedly includes calls for the Royal Nepalese Army to also be placed under international supervision. It is hoped that the authorities in Nepal will see this as an opportunity to end the conflict and engage in political rather than violent means to address the concerns and grievances of the people. AHRC points to recent interventions by the UN Secretary General, the UN High Commissioner for Human Rights and the Presidency of the European Union, who all call on the authorities to take this opportunity to bring an end to the conflict in the country.

Most importantly here, current developments represent an opportunity to significantly reduce human rights abuses by the military and the Maoists, and to work on building the institutions in

⁶ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Art. 2, para 2.: <http://www.ohchr.org/english/law/cat.htm>

⁷ UN Committee Against Torture, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4.

the country that safeguard human rights and the rule of law. Of paramount importance is the resumption of the functioning of Parliament, as underlined previously, which will permit the much required legislative changes concerning torture and disappearances to become possible.

It is clear that the most effective means of ending the conflict is by declaring a bilateral ceasefire and holding elections, under a process agreed upon by all parties, to establish a constituent assembly and restore multi-party democracy in the country. The ball is now in the King's court.

Beyond this, however, AHRC believes that the prevalence of human rights violations in Nepal cannot be explained simply by the presence of the internal conflict, but rather, that the cause of these violations lies in the fundamental collapse of institutions and the rule of law in the country. It is also necessary to take immediate steps to dismantle the systematic mechanisms of abuse in the country, without waiting for a resolution to the conflict, as this could spare the suffering and lives of a large number of Nepalese citizens.

A halt to the conflict would, of course, facilitate the process of institution building, and remove some of the justifications for continuing widespread human rights violations. The resumption of multi-party democracy and the end to the emergency powers handed to the military are vital in enabling positive change. However, for real and lasting improvement to the situation and the prevention of future violations, the rule of law must be established. In a country where the institutions, such as the judiciary and the legislature, as well as the policing system, have all but collapsed, they must be rebuilt. It is imperative that this be done with all speed, so as not to lose previously available expertise present within the system. If not done rapidly, a vacuum will be formed in the space normally occupied by such institutions within a functioning State, which will be particularly difficult to remove if established.

The human rights situation in Nepal

AHRC receives a large number of cases of arbitrary arrests, illegal and/or incommunicado detention, torture, forced disappearance and extra-judicial killings from Nepal, and has continued to receive such cases since the royal take-over in February 2005.

This has been possible despite the fact that the ability of local human rights activists to conduct fact finding missions concerning such cases has been greatly curtailed during the period since February 1, 2005, due to the risks to their lives that conducting such work entails. It is worth noting that a significant number of human rights defenders have been threatened into limiting or abandoning their activities, or have even been forced to leave the country during this period, and that the full extent of the use of torture and other grave human rights abuses since the take-over remains hard to ascertain.

The ALRC has also documented and published a large number of cases and analysis in its bi-monthly Article 2 publications in December 2004 and February 2005.⁸

Children: no protection against human rights violations

⁸ ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, <http://www.article2.org/mainfile.php/0306/> & Vol. 04 - No. 01 February 2005 – Nepal: Time to act, <http://www.article2.org/pdf/v04n01.pdf>

Children are also subjected to illegal detention and torture in Nepal. There is no working juvenile justice system in the country, with children being subject to the same procedures, detention facilities and laws used with respect to adults. Children are arrested and detained for prolonged periods of time, based on allegations of being terrorists, in the same way that adults are. Their access to the outside world is also restricted in the same way, and they are also subjected to torture.⁹

In one example among many, the Special Rapporteur on Torture, during a visit to the filthy, overcrowded, inhuman detention facilities in Hanumandhoka Police Office, found that the “*detention of several 14 year-old boys among adults was seriously disturbing.*”¹⁰

UN recommendation - Nepal should: take necessary steps to protect juveniles from breaches to the Convention (Against Torture), and ensure a proper functioning of a juvenile justice system in compliance with international standards, differentiating treatment according to age.¹¹

The systematic use of torture by the army and the police

Of particular note is the fact that torture is routinely and systematically used by the authorities, and that failings in legislation and the judiciary afford total impunity for the perpetrators of these acts, and no viable avenues for redress for the victims. Following a visit to the country in September 2005, the Special Rapporteur on Torture has concluded “*unequivocally that torture and ill-treatment is systematically practiced in Nepal by the police, armed police and the RNA (emphasis added) in order to extract confessions and to obtain intelligence, among other things.*”¹²

¹² This is a very damning conclusion.

AHRC is of the opinion that the same can be said of the other violations mentioned above, due to the fact that arbitrary arrest, incommunicado detention, torture and forced disappearance are interlinked within the system of abuse in Nepal.

AHRC’s sources have, despite difficulties, been able to interview many persons who have been detained by the army or the police. In the majority of cases, these persons allege that they have been severely tortured during detention.

Typically, persons are arrested – for the most part arbitrarily – and detained incommunicado. Access to lawyers, medical services and family members are denied for those detained illegally. Of the around 5000 detainees interviewed, some 80% stated that they were not brought before a court within the 24-hour period prescribed by the Constitution of Nepal. A similar proportion of detainees report having been subjected to torture and ill-treatment while in custody. Cases of ill-treatment and torture recorded by AHRC include: lengthy blind-folding and handcuffing;

⁹ Children Treated as Adults in Nepal's Legal Vacuum, Human Rights Solidarity : Vol. 15 No. 02 MAR 2005 <http://www.hrsolidarity.net/mainfile.php/2005vol15no02/2406/>

¹⁰ United Nations Press Release, September 16th, 2005: Special Rapporteur on Torture says practice of Torture is Systematic in Nepal

¹¹ UN Committee Against Torture, Conclusions and Recommendations of the Committee against Torture, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6:

http://www.ohchr.org/english/bodies/cat/docs/CAT_C_NPL_CO_1_CRP.3.doc

¹² Ibid

beatings, including of the genitals; whipping using sticks and pipes on the soles of the feet, the legs and back; strangulation; death threats, including placing a gun to the head; electrocution, in particular via the ears; hanging upside down and repeatedly being dunked under water. The torture is severe to the point that many victims repeatedly lose consciousness.

There is an urgent need for the authorities to clearly and publicly denounce the practice of torture, which they have thus far failed to do. This would send a clear message to would-be perpetrators that such illegal practices will no longer be tolerated. Action is required in order to address the “*prevailing culture of impunity*”¹³ identified by the Special Rapporteur on Torture, who received “*repeated and disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.*”¹⁴

UN recommendations - Nepal should:

- **make a public condemnation of the practice of torture and take effective measures to prevent acts of torture in any territory under its jurisdiction.**¹⁵
- **prohibit the use of incommunicado detention...persons held incommunicado should be released or charged and tried under due process.**¹⁶

Torture by the Royal Nepalese Army

In every recorded case of arrest and detention by the army, the interviewed victims claim to have been tortured severely. In the current context, the army wields significant power in Nepal without any effective, functioning form of civilian oversight. The dissolution of the Parliament by the King, amongst other things, has seen to this.

The CAT, in November 2005, expressed the concerns that “*there seemed to be a lack of control over the security forces, which, in turn, led to their impunity,*” and “*stressed the need to ensure that not only the superior officer who had given the order to resort to torture would be held responsible, but also all other authorities involved, regardless of their rank.*”¹⁷

The army has no specifically expressed constitutional right to arrest and detain civilians –the Constitution clearly limits its jurisdiction to military personnel. The army has previously systematically denied that it was detaining civilians, despite the fact that it is widely known and reported on by NGOs that hundreds of persons were being held in army barracks. It has also reportedly openly lied about having persons in detention to the courts, including the Supreme Court, in cases where *habeas corpus* writs have been lodged. The army now publicly acknowledges that they are detaining people, despite the fact that such detentions are illegal, but have in no way halted the use of illegal detention, which serves as an indicator as to the levels of impunity and the collapse of the rule of law in the country.

In the current context the army and police operate in collusion, with persons arrested by the police being handed over to be detained and tortured in army barracks. Although military courts

¹³ Ibid

¹⁴ Ibid

¹⁵ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3

¹⁶ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6

¹⁷ UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5

do not have jurisdiction over crimes committed against civilians by the army, the armed forces are persistently detaining civilians in their barracks. The military courts claim to be investigating allegations of torture of civilians by the armed forces. The lack of transparency and of results of such investigations continues to foster impunity in Nepal. Further analysis of this can be found below, under the section entitled “The lack of effective and independent investigations into torture.”

Detainees who are released from army barracks are routinely placed under surveillance. In most cases they are threatened with further arrest, torture or even death if they report that they were subjected to torture to anybody or any organization, or if they lodge a complaint before a court. Detainees are also released on the condition that they respect regular summons to present themselves at army barracks, in order to make sure that they have not reported their case anywhere. For examples, please refer to the section below entitled “Re-arrests used to circumvent court decisions”. AHRC has received information concerning victims being further detained and tortured as a result of accusations that they had shared information with outsiders. In many cases, released persons are also threatened with similar punishment if they refuse to work as spies against the Maoists.

UN recommendations – Nepal should:

- **immediately transfer all detainees to legally designated places of detention which conform to international minimum standards.¹⁸**
- **take measures to ensure compliance by security forces of all orders of the Courts, including habeas corpus.¹⁹**
- **(the Government of Nepal and the security forces of Nepal should) ensure that accessible, complete, accurate and fully up-to-date lists of detainees are kept, and shared with families of the detainees and with civilian authorities, including the National Human Rights Commission. These lists should include detainees held in formal detention centres (i.e. Sundarijal) and in informal places of detention such as army barracks. The lists should be held locally, with a national registry created to bring together the names and locations of all detainees.²⁰**

Torture by the police

The use of torture is also endemic and systematic within police detention facilities. In a number of recorded cases, police officials reportedly take bribes from actual criminals, who are then released. Following this, the police need to cover up their illegal and corrupt acts, and so require substitutes for the criminals that they have released. They make use of torture to force confessions from other detainees, who are often being held arbitrarily. Corruption plays a significant role in perpetuating the use of torture in Nepal, with the poor being the major victims of this phenomenon.

The victims of torture are detained illegally and incommunicado, until the physical traces of torture have receded or disappeared. The victims in question are then charged with the offences of the released criminals, based on confessions extracted under torture, and the police prepare

¹⁸ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6

¹⁹ Ibid

²⁰ UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005,

E/CN.4/2005/65/Add.1page 3

documents to show that they were only arrested under 24 hours before this time, before presenting them before the courts. The courts reportedly turn a blind eye to this practice, enabling the semblance of the adherence to the constitutionally prescribed 24-hour period and the use of torture to become endemic and go unpunished. This also causes significant barriers to attempts by victims to gain reparation at a later stage. For reference, see the example of the case of Maiya Tamang under section “The lack of documentation regarding arrest and detention” below.

In addition, the police are effectively subordinate to the army. Since the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) was brought into force in November 2001, the army and the police have been acting under a unified command, with the army taking the lead in heading this command structure. As part of this arrangement, the police are frequently tasked with arresting persons and then handing them over to the army, who then illegally detain and torture them.

UN recommendations – Nepal should: ensure that no recourse is made, under any circumstances by law enforcement personnel to interrogation methods prohibited by the Convention (Against Torture)...and adopt the necessary measures to reduce pre-trial detention wherever possible.²¹

Custodial deaths: torture victims and so-called “suicides”

Since October 2004, five detainees have died in army barracks as the result of “suicides” according to the authorities. ALRC has been informed that there are credible reasons to suspect that these persons in fact died as the result of torture by members of the army. These allegations require thorough investigations.

Text box - A

Dorje Sherpa (male) - a suspected Maoist reportedly committed suicide in Shreejang army camp in Singhdurbar, Kathmanudu on May 27, 2005. The army claim that he hanged himself from a window using his shoes laces.

Chakra Bahadur Sherestha (Male) - a school teacher and suspected Maoist reportedly committed suicide on November 15, 2004 at about 7 pm at the Dhadingbeshi Army Barracks. The army claim that he initially tried using a belt to hang himself and later used a sleeping bag rope to do it.

Dipendra Rayamajhi (male) - a permanent resident of the Panauti area of Kabre district, reportedly committed suicide on June 26, 2005 at Sinhanath Army Camp in Bhaktapur district. He was arrested on suspicion of being a Maoist cadre. The army claim that he hanged himself using an electric wire in the cell in which he was being detained.

Top Bahadur Ale Magar (male) – reportedly killed himself on October 20, 2004 at Bhairabagan Barrack in Maharajgunj, Kathmandu. He was arrested on October 16, 2004, reportedly while collecting donations for the Maoists.

Sadhu Ram Devkota (male and alleged Maoist cadre) - reportedly committed suicide at around

²¹ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 5

3.40pm on December 19, 2004 at the Army Barracks in Balaju, Kathamandu. The army claim that he hanged himself using his shoes laces from a window.

No proper investigations have been launched into these deaths.

Following their release from army barracks, many detainees have reported witnessing the torture of co-detainees, and that those that were tortured until they were in critical physical conditions were taken to the army hospital, but were never brought back, giving rise to fears that they have died as the result of torture. As is widely known, a great number of people disappear following arrest by the army.

The failings of the Torture Compensation Act

The Constitution of Nepal prohibits the practice of torture.²² In furtherance to the ratification of the Convention Against Torture (hereafter referred to as the Convention), Nepal's domestic law, entitled the Torture Compensation Act, 1996 (hereafter the Act), is ineffective as a tool for preventing torture and enabling the prosecution of cases of torture. The Act falls short of the standards set in the Convention.

The Act does not define torture as a crime. The liability cast upon the perpetrator by virtue of the Act and by Article 14 (4) of the Constitution is limited to providing damages. In the absence of any other law to punish the perpetrators of torture, the perpetrators enjoy absolute impunity. Furthermore, as highlighted by the CAT: *"the current definition of torture in State party legislation contained no language regarding the complicity of persons acting in an official capacity who instigated, consented to or acquiesced in torture and was thus narrower than the definition established in the Convention...Pursuant to the Nepal Treaty Act of 1991, international conventions to which Nepal was a party took precedence over domestic legislation. Consequently, the wider definition of torture contained in the Convention should be applied directly."*²³

UN recommendations – Nepal should: adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are a criminal offence punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996, in compliance with all elements of the definition provided by the Convention.²⁴

Given the absence of strict adherence to any legal and procedural framework to ensure the recording of arrests and details regarding detention, the operation of Section 5, which reads *"The victim may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of released from detention,"* is limited in its scope.²⁵ The time span of 35 days and the jurisdictional clause prescribed in the Act often works as an impediment to the lodging of complaints under the Act.

The CAT has noted with concern that *"the burden of proof is upon the victim of acts of torture, under rules provided for in the Compensation Relating to Torture Act of 1996, and (that there*

²² Article 14 (4), Constitution of the Kingdom of Nepal

²³ UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 6

²⁴ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3

²⁵ Torture Compensation Act 2053 B.S (1996)

exists) the provision of a statute of limitations to complain against acts of torture and to institute proceedings for compensation, under TADO within 35 days.”

The provisions contained in the draft of the new Penal Code of Nepal are also insufficient. Concerning this, the CAT expressed concerns that “*the maximum sentence provided for under the new draft Penal Code for resorting to torture was a mere three years’ imprisonment, and that the period within which victims of torture could file a complaint had been limited to three months.*”²⁶

UN recommendations – Nepal should:

- **make available to victims of torture the conclusions of any independent enquiry in order to assist them pursuing compensation claims. The State party should amend its current and planned legislation as to have no statute of limitation for complaints against acts of torture, and to have the period of limitation in respect of actions for compensation to be no less than 2 years from the date of availability of the conclusions of enquiries.**²⁷
- **ensure that compensation awarded by Courts or decided upon by the National Human Rights Commission is paid in a timely manner.**²⁸

Furthermore, the amount of compensation as provided for in the Act and the manner of realisation of compensation also dilutes the concept of *ius cogens* as it applies to torture. The recently promulgated Ordinance on ‘communication’ - which is widely criticised as curtailing the freedom of the press - provides for a higher value fine to be levied from editors and publishers responsible for ‘violating’ the ordinance through alleged acts of defamation, than is prescribed for acts of torture under the Act.²⁹ Any compensation that is to be paid in a case of custodial torture is paid by the state. The rider attached to Section 6 of the Act, which provides for compensatory damages for frivolous litigations, deters anyone who is aware of the existing legal framework in Nepal from approaching the court.³⁰

The intention of the legislative process is further clear from Section 10 of the Act, which provides for defence at the expense of the state for the perpetrators. Neither the Act, nor any other law in Nepal, provides for the concept of burden of proof favouring the victim in cases of torture.³¹

The CAT has raised a number of concerns relating to these issues, including that:

- **under the current legislation, torture was not considered a criminal offence. Victims who filed a complaint but failed to prove their allegations were penalised. There had been reports of victims being arrested and tortured until they agreed to withdraw their complaint.**³²

²⁶ UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5

²⁷ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8

²⁸ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 9

²⁹ Ordinance Amending some Nepal Acts Related to Communication ; promulgated on 9 October 2005

³⁰ Section 6 (2) of the Torture Compensation Act reads “*While trying a complaint pursuant to sub-section (1) if it is found that the complaint was filed with malafide intention the district court may impose a fine up to five thousand rupees on such complaint*”

³¹ Section 10 reads “*Concerning the complaint in accordance with section 5, if the chief of the concerned office requests, the Government Attorney shall appear in the court on behalf of the employee and defend him*”

³² UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4

- sanctions imposed on perpetrators of torture were very light. For example, the three army officers who had been found guilty of torturing and murdering the 15-year-old girl, Maina Sunuwar, had been sentenced to six months' imprisonment in army barracks.
- punishment for acts of torture committed by public officials in Nepal was not commensurate with the gravity of the offence. Given that the Rome Statute of the International Criminal Court codified torture as a crime against humanity, it was unacceptable that sentences ranged from short-term imprisonment to a fine. The statute of limitations for torture cases applicable in the State party contradicted the jurisprudence of the Committee and should be abolished.³³
- (while) the judiciary has rendered a number of decisions to award compensation, the Committee regrets that to date in only one case has compensation been paid out. In addition, the Committee is concerned about undue delays in the awarding of compensation by Courts or the National Human Rights Commission.³⁴
- a provision in the Compensation Relating to Torture Act of 1996 empowering the concerned officer at places of detention to medically examine, at time of arrest and release, a detainee, in the event a doctor would not be available. In particular, the Committee is concerned about reports that medical examinations at the time of arrest and release are not regularly performed,³⁵ and that Nepal should consider amending the relevant section of the Compensation Relating to Torture Act of 1996, to ensure all detainees have access to a proper medical examination at the time of arrest and release.³⁶

Nepal: a world leader – in Forced Disappearances

There is an intrinsic systemic link between torture and forced disappearances. As shown previously in this report, torture is systematic in Nepal. Forced disappearance of endemic proportions is also a feature of the situation in the country. Given the impunity enjoyed by the perpetrators, notably the armed forces, concerning arbitrary arrest, incommunicado detention and torture, there are no effective barriers to prevent innocent persons from being taken into custody, held in secret, tortured to death, involuntarily disappeared or summarily executed, with no trace of their bodies ever being found.

The Working Group of Enforced or Involuntary Disappearance, in a report following a visit in December 2004 notes that: *“The phenomenon of disappearance in Nepal today is widespread; its use by both the Maoist insurgents and the Nepalese security forces is arbitrary. Perpetrators are shielded by political and legal impunity. Detailed reports that were received from many rural areas suggest that the phenomenon of disappearances is under-acknowledged. We heard consistently from across the country that a culture of silence has sprung up, with villagers too fearful to report disappearances for fear of reprisal from the security forces or the Maoists insurgents. In many cases, relatives who go to army barracks to enquire into the fate of their family members later find themselves caught up in harsh interrogations. Many families have seen multiple disappearances.”*³⁷

³³ Ibid, page 7

³⁴ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8

³⁵ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6

³⁶ Ibid

³⁷ UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005,

E/CN.4/2005/65/Add.1, p. 2

The lack of access of families, lawyers, doctors and local or international monitors to places of detention is one component that facilitates forced disappearances. The failure of the judicial system, notably concerning writs of *habeas corpus*, is another. When such writs are filed, courts, including Nepal's Supreme Court, have reacted by calling for records of arrest. Since these are rarely available, given that the police and armed forces do not keep such registers in anything like a systematic way, the process stops there. It is assumed that the person has not been arrested, due to a lack of records. The case is closed, and the persons remain in detention, typically being tortured or even killed.

ALRC's Article 2 publication in December 2004, entitled "The mathematics of barbarity and zero rule of law in Nepal," contains an in-depth look into forced disappearances, including 20 case studies. The report states that, "Worldwide, mass planned disappearances of persons belonging to an 'undesirable' category in society have been made possible only by a policy that favours the erasing of records and non-registration of prisoners belonging to the targeted group. In Nepal, these are Maoists or those "having links with Maoists". The stories in this report are but a few among thousands that clearly show such a policy is operative in Nepal today. Whereas in official reports disappearances number in the thousands, in reality these are only those cases where relatives of the missing had the courage to report their loss and found some avenue through which to register a complaint. There is at present no way to assess the true number of victims. However, the UN Working Group on enforced and involuntary disappearances recently described Nepal as among the worst countries for human security in the world at present. In response, the government made some symbolic gestures such as uncovering the whereabouts of a few hundred people, without any action to hold the perpetrators accountable and uphold the rule of law. The government instead persists in itself permitting the casual killings that occur after casual inquiries and casual arrests that the Nepalese security forces now contrive to employ daily."

"It is also clear from international experience that a policy to allow mass disappearances is accompanied by tacit approval at the highest levels of state for the use of massive torture. With planned widespread disappearances, new rules apply in all areas of business. In many instances, disappearances are a necessary consequence after torture. Either the person dies during torture or the wounds caused will incriminate the perpetrators if the person is released. Persons arrested by mistake cannot be released for fear of compromising some aspect of a security operation. They will not return home...Nepal is now in a time of approved killing and torture from which no one in the country can escape."³⁸

It must be noted that this was written before the royal take-over in early 2005, since which time the situation in the country concerning forced disappearances is thought to have worsened further still. Access to areas outside the capital, Kathmandu, has been particularly difficult since that time, but there are credible fears that the practices of arbitrary detention, torture and forced disappearance will have accrued throughout the country, as the military has effectively become unrestricted in its activities.

The need to make forced disappearance a crime

As with the practice of torture, there is no specific provision in the Nepalese Penal Code making enforced or involuntary disappearance a crime. Similarly, this is a fundamental flaw that enables the practice to be perpetrated without hindrance, in total impunity. In order to have a chance of

³⁸ ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, Pages 10-11, <http://www.article2.org/mainfile.php/0306/>.

succeeding in combating this abhorrent practice, it needs to be criminalised, and the judiciary needs to be empowered to enable it to effectively and impartially prosecute offenders. Without a criminal law prohibiting forced disappearance, it is impossible to provide an effective deterrent against it or prosecute offenders. Given that forced disappearances in Nepal are for the most part conducted by the Royal Nepalese Army, it is necessary to ensure that the civilian judiciary has jurisdiction over such cases.

UN recommendations – Nepal should ensure that:

- **the Judge Advocate General undertake more aggressive prosecution of army personnel accused under the existing law of kidnapping and torturing civilians³⁹**
- **as soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance.**
- **the Army Act be amended to provide that security forces personnel accused of enforced or involuntary disappearance in relation to a civilian be tried only in civilian courts; that this amendment also cover the crimes of murder and rape when committed by security forces personnel against a civilian; and furthermore, that no exception be made for crimes alleged to have been committed by security force personnel against civilians during a military operation.⁴⁰**

The concept outlined in the previous recommendation should also be specifically applied to jurisdiction of the courts as relates to allegations of torture committed by members of the Royal Nepalese Army.

Access to detainees

Although a few NGOs visit detention centres on a regular basis, access to the rooms in which detainees are being held is not granted. Furthermore, such organisations are not granted permission to interview detainees who have not already been taken to court, and so the statistics relating to around 80% of detainees being subjected to torture only apply to those persons who have been produced before the courts. The most serious cases, where persons are detained incommunicado for lengthy periods and are subjected to the most brutal forms of torture, and potentially to forced disappearance or extra-judicial killing, for the most part remain hidden from external scrutiny. Even the International Committee of the Red Cross (ICRC) has terminated its visits programme to army barracks, due to a lack of unhindered access. The absence of external scrutiny is a major component in permitting ill-treatment, torture, custodial deaths related to these practices, forced disappearances and extra-judicial executions.

The newly-established Nepal Office of the United Nations High Commissioner for Human Rights (OHCHR), which was established following the signing of an agreement between the Government of Nepal and the OHCHR on April 11, 2005, has in its mandate the unrestricted access to places of detention, and has thus far reportedly been granted this access.

AHRC welcomes the access to places of detention being granted to the OHCHR and recommends that it be widened to include the ICRC and other national and international NGOs, including the National Human Rights Commission (NHRC).

³⁹ Ibid, page 3

⁴⁰ UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, p.13

The lack of documentation regarding arrest and detention

There is no credible and functioning mechanism to ensure the maintenance of proper records regarding the arrest and detention of persons. The same applies regarding medical records that could be used in courts to prove physical and psychological injuries suffered while in custody. Medical practitioners refuse to give medical assistance and also to provide records of medical treatment, since they are also under the threat of being falsely accused of helping anti-national activities.

Text box C

The case of **Maiya Tamang**, which began in late 2004, illustrates how the lack of documentation of persons that have been arrested and detained by the police, and the legitimisation of this process by the courts, are enabling incommunicado detention and torture to be conducted in a systematic way in all impunity in Nepal. This process has been accentuated since February 1, 2005, as the number of arrests, both by the police and the army, has increased and human rights monitoring has been further obstructed.

Maiya Tamang was arrested on November 7, 2004, at her residence by members of the police. She was detained at the Boudha police station for two days, where she was severely beaten by police officers using plastic pipes on her thighs and calves. She was subsequently transferred to Kalimati police station, where she was held for another two days. Here she was also beaten for around half an hour with plastic pipes.

Maiya Tamang was then transferred to the District police office in Hanumandhoka. On November 11, she was presented before court. Human rights monitors were finally able to gain access to Maiya Tamang in the District police office on November 16 and noted the presence of contusions and blue scars on her thighs and calves. An application for her to receive medical examination was then filed in the district court in Kathmandu. On December 27, 2004, a compensation case was filed in the same court. On April 14, the court decided that, as the police report shows that she was only arrested on November 11, there was no proof that she was in detention during the time she claims to have been tortured. The case was then closed. This documentation problem has reportedly caused a number of other such cases to also have been lost in court.

UN recommendations – Nepal should ensure:

- **the keeping of standardised records of persons received into custody in all places of deprivation of liberty.**⁴¹
- **that all arrests and detentions are systematically documented, in particular concerning juveniles in detention. The State party should consider creating a central register for**

⁴¹ Working Group on Arbitrary Detention report, November 26th, 1996, page 7:

<http://daccessdds.un.org/doc/UNDOC/GEN/G96/142/61/PDF/G9614261.pdf?OpenElement>

persons deprived of liberty, to be made accessible to national and international monitors.⁴²

Anti-terrorist measures: a major source of illegal arrests, torture and disappearances

Since November 2001, the government has imposed anti-terrorist legislation, giving greater latitude to the security forces to arrest and detain people. It allows the authorities to detain people for a period of one year without judicial scrutiny. The Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) was introduced in November 2001 and was then replaced by the then-Parliament of Nepal by the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA), which ran for two years. Since then the TADO has been successively re-introduced every six months, notably, most recently, in the absence of Parliament, since it was dissolved in February of this year.

Section 9 of the TADO provides that if there are grounds to believe that the person might commit terrorist activities if not prevented from doing so, he or she can be detained preventively for a maximum period of one year. Please see the following (non-official) translation of Section 9 of the TADO for reference:

Section 9. Power to keep under Preventive Detention

In case there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and destructive act, the Security Officer may issue an order to keep him under preventive detention up to 6 months in a humane place. If there are reasonable grounds to believe that the person has to be prevented from committing any terrorist activities for longer than that, on the approval of the His Ministry the Government's Home Ministry, the Security Officer can issue additional six months order of preventive detention.

The wording used in this provision enables loose interpretation and therefore abuse by the security forces. The burden of proof of innocence is on the person accused of terrorist activities. The power to detain persons for a year without judicial scrutiny has enabled the practice of torture to flourish in Nepal. Persons being held under preventive detention have no access to their lawyers. ALRC has received information that many detainees are held for more than a year under these provisions (see the case of Govinda Ghimire below).

The provisions included in the TADA and the TADO are limited to the arrest of persons suspected of terrorist activities. The army does not have any powers allowing it to detain persons and is supposed to hand persons over to the police for detention in cases where they make arrests. Terrorist activities are considered as crimes against the State, and should be dealt with under the State Cases Act.

Under this Act, the police investigate cases and have the power to arrest persons. The arrestees are then to be brought before the Appellate Court of Nepal within 24 hours. After completing the preliminary investigation and having collected primary evidence, the case is to be handed over to the public prosecutor, who brings the charges against the person in court. The Appellate Court

⁴² UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3

then decides on whether to give permission for the detention of persons for a maximum period of 60 days. Only the court has the power of decision on whether the person should remain in detention for further investigation or can be released on bail.

In practice however, all those arrested in relation to allegations of being involved in terrorist activities are detained by the army for prolonged periods of time, without having any formal allegations or charges made against them. Under such circumstances, the detainees are systematically subjected to torture. The CAT has raised concerns about the “*extensive resort to preventive detention, up to 15 months, and the lack of fundamental guarantees of the rights of persons deprived of liberty under the Terrorist and Disruptive (Control and Punishment) Ordinance 2005.*”⁴³ Furthermore, “*the maximum period for which an individual could be held in preventive detention, namely 15 months, was too long. Another matter of concern was the fact that individuals could be arrested without a warrant, and detained for over a year without access to a lawyer, doctor or family members, or possibility of challenging the legality of their detention.*”⁴⁴

Text box - B

For example, 21-year old **Govinda Ghimire**, a resident of Bethan VDC- 1 Ramechap District, Nepal, was reportedly arrested by a group of plainclothes army personnel on August 29, 2003, and detained incommunicado. A writ of habeas corpus was filed in the Supreme Court of Nepal on October 12, 2003. A complaint was also lodged at the National Human Rights Commission on November 14, 2003.

In response to the writ of habeas corpus, the next day, the Supreme Court issued the Police, Army, Home Ministry, Defence Ministry and Chief Divisional Officer’s responses, all of which reported to the court denying Govinda Ghimire’s arrest and detention.

On October 8, 2004, over one year after his arrest, his family members received a phone call from an unidentified source saying that Govinda Ghimire was being held in the newly established Sundarijal Interrogation and Investigation Centre, and was going to be released. When his family members contacted the Sundarijal Centre, they were asked to come on Sunday October 10, as he was allegedly going to be released on that day. The release did not take place, however.

Later, they again went to Sundarijal where they were in fact allowed to visit Mr. Govinda Ghimire. Following this, the family members were asked to come on October 16, as he was allegedly going to be released on that day. They were also asked to inform the ICRC and other human rights organisations of this fact.

On October 16 the family members again went to Sundarijal. Family members of other disappeared people, namely: **Narayadhoj Mahat, Ramesh Prasad Guragain, Binod Dhakal, Naresh Chaudhari, Khadka Bahadur Rai**, were also present. They had also been asked to come for the release of their family members. However the presence of a police van, believed to be there to re-arrest those who were going to be released, was noted. The family members were then told by Sundarijal interrogation centre staff that they would not take any responsibility for the released persons, following their release.

⁴³ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3

⁴⁴ UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 6

The family members were therefore scared to sign for the release of these detainees, for fear of them being re-arrested for longer periods, or even forcefully disappeared.

The preventive detention of persons under the TADO for one year is a significant violation of provisions within Nepal's Constitution and of Nepal's international obligations, notably the International Covenant on Civil and Political Rights. Is it open to abuse and its duration is unjustifiable in terms of preventing or investigating alleged terrorist activities. It is also fundamental in enabling torture.

UN recommendations:

- the Terrorist and Disruptive Activities (Control and Punishment) Ordinance be rescinded immediately by the Government of Nepal.⁴⁵
- the State Party should bring the practice of preventive detention in line with international human rights norms and ensure fundamental rights of persons deprived of liberty are guaranteed, including the right to habeas corpus, the right to inform a relative, access to a lawyer and to a doctor of one's choice. The State party should ensure that any measure taken to combat terrorism is in accordance with the relevant Security Council resolutions 1373 (2001) and 1566 (2004), which require (...) that anti-terrorist measures be carried out with full respect of (...) international human rights law...⁴⁶

Barriers to justice

The lack of effective and independent investigations into allegations of human rights abuses

There is no alternative mechanism in Nepal that can provide for impartial investigations into cases of torture, forced disappearances and other human rights abuses. Inquiries are conducted by the State police, if at all. Torture and forced disappearances are reported as being mainly perpetrated by the Royal Nepalese Army. Article 86 (1) and Article 88 (2) (a) of the Constitution of Nepal means that the jurisdiction of even the Supreme Court of cannot be invoked in cases where the Royal Nepal Army is accused of torture. It is precisely for this reason that a writ of *habeas corpus* cannot effectively be invoked in cases of illegal detention and torture whenever the army is alleged to have committed torture in custody or forced disappearance.

Text box - D

32- year old **Mr. Kumar Khadgi**, from Shivadhara, Bhaktapur, was arrested from his house on September 17, 2003 at around 1 p.m. by a group of 50-60 armed Royal Nepalese Army personnel. His younger brother, Ram Khadgi and five other villagers were also arrested from the village on the same night. Kumar was released on April 13, 2004 after having been detained for 8 months in two different army barracks, on the condition that he had to report every week to the Rajdal barracks, Lagankhel. Kumar and his brother were severely tortured, and his brother is yet to be released. A *habeas corpus* writ petition filed on his behalf on September 24, 2003 was

⁴⁵ UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, p. 3

⁴⁶ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 4

dismissed on the grounds of a lack of jurisdiction.

The army also employs various means by which the reasons for the arrests and details regarding detention are not provided to detainees' relatives. In the absence of the express power to arrest civilians, the army is reported to be employing measures including directing the local police to perform arrests. The army then takes custody of the detainees, before sheltering themselves behind the powers enjoyed by the army, ousting the jurisdiction of all civilian courts in Nepal. In cases where the relatives of detainees have moved a court for the production of the said detainees, the court has turned down the requests on the grounds of a lack of jurisdiction.

The military courts, to which concerns about detainees are therefore to be addressed, suffer from a lack of impartiality and transparency. A case where a military court has taken any impartial and independent action on complaints of torture and custodial violence is yet to be recorded. This has resulted in absolute impunity being enjoyed by the army in cases of torture.

There are no practical means by which civilian oversight is possible upon the actions of the armed forces in Nepal. Since the declaration of a state of emergency, a series of Ordinances have been promulgated by the King, giving enormous powers to the armed forces on the pretext of countering the insurgency. Functioning public offices, including the National Defence Council, have been further corrupted due to nepotism and a lack of transparency in dealings. Even the National Human Rights Commission has not been immune to this degradation.⁴⁷

UN recommendations – the Nepalese authorities should: take effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and punished. In connection with prima facie cases of torture, the accused should be subject to suspension or reassignment during the investigation...the State party should establish an independent body to investigate acts of torture and ill treatment committed by law enforcement personnel.⁴⁸

Re-arrests used to circumvent court decisions

In cases where the courts entertain applications and the releases of persons are ordered, such persons are immediately re-arrested on further charges, ensuring that they remain in custody indefinitely.⁴⁹ AHRC has encountered numerous cases where released detainees are re-arrested by the security forces, including within the court's premises, making a mockery of the justice dispensation system in the country.⁵⁰

Text box - E

⁴⁷ Asian Human Rights Commission Urgent Appeals Programme; FORWARDED APPEAL (Nepal): Human rights groups question the legality of the National Human Rights Commission (NHRC) of Nepal <http://www.ahrchk.net/ua/mainfile.php/2005/1106/>

⁴⁸ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 7

⁴⁹ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Re-arrest of Nepalese citizens undermines official court orders and rule of law <http://www.ahrchk.net/ua/mainfile.php/2005/1098/>

⁵⁰ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Confirmed re-arrest of at least 32 political activists and human rights defenders in violation of court orders following the royal takeover <http://www.ahrchk.net/ua/mainfile.php/2005/1134/>

41-year old **Kumar Rai**, an employee in the carpet industry, was first arrested from his room on February 27, 2004 at around 3 p.m. by a group of four of five security personnel dressed in civilian clothes. After nine days of illegal detention and torture, he was released on the condition that he had to report to the army barracks on a daily basis. He was rearrested on March 15, 2004 and later released from Mahabir Gan, Chauni the next evening. On March 17, Kumar was once again arrested and subjected to torture while in detention. A *habeas corpus* writ was filed on August 5, 2004 by his wife, with assistance from local NGO Advocacy Forum, which was dismissed. On January 4, 2005, Advocacy Forum again filed a *habeas corpus* on Kumar's behalf and on January 31, the Supreme Court issued orders for him to be released. However, Kumar was given another detention order under TADA and Advocacy Forum filed a third *habeas corpus* on May 2, 2005. He was finally released on May 16, 2005 on the Supreme Court's orders. The reasons for his arrests are unknown.

38-year old **Mr. Jeewan Shrestha**, a resident of Sankhuwa Sabha District, Wana Village Development Council ward no 1, who had been staying in Kathmandu municipality for three years, was first arrested on September 15, 2003 from his shop at Lokanthali, Bhaktapur. Although he was released on November 16, 2004 on court orders, after a *habeas corpus* was filed by Advocacy Forum, he was rearrested the same day. Another *habeas corpus* was filed on his behalf and Jeewan was released on November 24 after international pressure on the detaining authorities. He was arrested once again on December 15, 2004 and then released on December 23 after the international community took up his case. Jeewan was alleged to have been collecting donations in support of the Maoists, according to the security personnel, and was therefore tortured while in detention.

In one case where officers of the National Human Rights Commission and the lawyers appearing on behalf of a detainee insisted upon his release, once the bail application had been allowed, the security forces surrounded the court premises and threatened to use force to take the released detainee into custody on new charges. This is not an uncommon incident.⁵¹

The CAT has expressed that the “consistent disregard of the security forces for the rule of law was of great concern. There were reports of detainees being repeatedly arrested after having been released by the court. For example, on 19 September 2000, 11 detainees had been arrested immediately after having been released by the Kanchanpur District Court in the town of Mahendranagar. That was the third time security forces had rearrested the group, despite repeated court orders for their release. The individuals were believed to be at risk of torture.”⁵² During deliberations, the CAT’s Country Rapporteur also added that “such contempt of court illustrated the unchecked power exercised by the police and the security forces, and measures must be taken to address that situation.”⁵³

Limited access to courts in Nepal

Accessibility to the courts in Nepal is also hindered, creating a barrier to justice. Very few lawyers are willing to take cases of torture to court, given the death threats that they would likely receive and the absolute impunity enjoyed by the perpetrators. Those who dare to accept briefs

⁵¹ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Two recent incidents involving threats to a Teachers' Union leader and the re-arrest of citizens despite Supreme Court release orders <http://www.ahrchk.net/ua/mainfile.php/2005/1130/>

⁵² UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4:

⁵³ UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5:

are threatened by the perpetrators directly and indirectly so that they are forced to withdraw from providing their professional help to their client. Since torture is not defined as a crime in law, the courts treat a case of compensation for torture as one of a civil nature, and the victims are directed to pay huge amounts in court fees prior to adjudication.⁵⁴

Apart from the procedural traps emanating from the Act itself, there is a consistently demonstrated lack of proper understanding about the purpose of the Convention Against Torture and the basic concept of torture among the members of the judiciary.

Members of the judiciary frequently state that the use of force is justified under the current circumstances in the country. This attitude also explains why the amount of compensation given concerning acts of torture is often far below that which has been prescribed in the Act. It is also a predominant view amongst judicial officers that the Act can only be applied to under-trial prisoners, but not to convicts.

The **District Court of Morang** had dismissed applications filed by the wife of a torture victim on the ground that the Act only applies to under-trial prisoners and not to convicts, as was the case of the petitioner's husband in question. Such poor and mistaken interpretation of the Act and the lack of understanding about the very purpose of the Convention pose further hindrance to the realisation of the spirit of the Convention at the domestic level.

The absence of witness protection

On occasions where there are direct eye witnesses to cases of illegal arrests and detention, the witnesses are precluded from deposing before courts due to the fear for their lives. In the absence of any witness protection programs or other legislative or procedural measures to ensure the safety of witnesses, there is no chance of having individuals present themselves before courts in order to depose against the police or any other officer of the armed forces.

UN recommendation – Nepal should: consider adopting witness protection legislative and administrative measures, ensuring that all persons reporting acts of torture or ill treatment are adequately protected.⁵⁵

The National Human Rights Commission

The National Human Rights Commission is vested with the authority to inspect places of detention and to process cases of human rights violations, but is often prevented from discharging its duties. Requests for inspection of army facilities are turned down by the officers in charge of detention centres. The adjudication of cases by the Commission involving army officers is obstructed due to a lack of cooperation. The officers of the National Human Rights Commission who are engaged in field visits and investigation of cases are often threatened and intimidated by the armed forces. The Committee Against Torture has recalled that *“the OHCHR Field Office in Nepal had recommended that the State party should grant the NHRC of Nepal full and unimpeded*

⁵⁴ Sanji Danel vs. Shanti Ram filed before the District Court Kathmandu

⁵⁵ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8

access without prior notice to places of detention, which would help prevent disappearances, executions, arbitrary arrests and torture."⁵⁶

There are numerous cases where the National Human Rights Commission, in response to complaints that it has received, has assisted the relatives of the victims in making applications for bail before the courts. The courts, including the Supreme Court, have frequently declined to consider such petitions for bail on the grounds of a lack of proof of arrest.

Persons concerned about the custody of their relatives and friends have sought help from the National Human Rights Commission for the release of these persons. The National Human Rights Commission has in certain cases ascertained through its own independent inquiry that detainees are indeed being held illegally. When the Commission makes bail applications before the courts, they are turned down, as the courts give more weight to the false statements submitted by the armed forces, denying the arrest and detention of the persons in question, than to the National Human Rights Commission's requests. Since the Supreme Court is reluctant to accept writs of *habeas corpus* against the army, the armed forces enjoy total impunity regarding arbitrary arrest, illegal detention, torture and forced disappearance of civilians.

UN recommendations – Nepal should ensure:

- **that the necessary measures (are taken) to support the work of the National Human Rights Commission, ensuring its recommendations are fully implemented.**⁵⁷
- **that the National Human Rights Commission be given unhindered access to all places of detention, including all army barracks, without prior notification or permission.**
- **the Government continue to make every effort to strengthen the role of the National Human Rights Commission...and ensure the continuity of the Commission even in the absence of the regular parliamentary appointments process.**⁵⁸

Threats to human rights defenders

Where various human rights organisations have been involved in providing assistance to victims, they have been isolated and targeted by the security forces. Human rights organisations are constantly under observation. The observation extends to wiretapping of conversations and the tailing of human rights defenders. There are many cases where human rights activists are threatened and intimidated by telephone. The most commonly used method for intimidation is to falsely accuse a person of Maoist activities, an offence for which bail is not available.⁵⁹

One particular area of concern is the potential adoption of a Code of Conduct for NGOs. Under the pretext of transparency, the provisions of the conduct restrict the receiving of international aid, the type of work allowed, the prospect of remuneration, political affiliation and financial transactions. The message given to civil society as well as international organisations is that they should either work with the authorities of Nepal or not at all. AHRC has urgently intervened to

⁵⁶ UN CAT, Summary of the 66th meeting, November 16th, 2005, CAT/C/SR.669, page 6:

⁵⁷ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 4

⁵⁸ Report UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, page 3

⁵⁹ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Restriction of movement of activists can prevent human rights monitoring <http://www.ahrchk.net/ua/mainfile.php/2005/1139/>

denounce the Code of Conduct.⁶⁰ Following further intervention by the United Nations, the Supreme Court of Nepal has issued a stay of execution concerning the adoption of the Code. The attempt to have this Code enforced is symbolic of the Nepalese authorities' continuing disregard for human rights – it in fact represents a significant attack on civil society's ability to work in favour of these rights. There remain concerns that, as in other cases, the Supreme Court may be ignored concerning this.

AHRC urges the Nepalese authorities to immediately abandon plans to bring into force the proposed Code of Conduct.

UN recommendations – Nepal should: consider amending the Code of Conduct for NGOs to be in line with international human rights standards on the protection of Human Rights Defenders. The State party should ensure national and international monitors are granted permission to carry out regular, independent, unannounced and unrestricted visits to all places of detention. The State party should facilitate, for example, visits by the International Committee of the Red Cross, OHCHR, NHRC, and national and international Non-Governmental Organizations.⁶¹

Impunity

In Nepal, there are various enactments and other ordinances in force that promote impunity for state agents who could face allegations of having perpetrated custodial violence (see the aforementioned TADO and TADA). As mentioned earlier, if an officer is challenged in court in a torture case, it is very easy for the officer to make fabricated charges against the victim in another case and get that case handled by a quasi-judicial tribunal.⁶²

The provisions of these laws provide vast powers to the concerned officers to conduct inquiries and adjudicate upon their own inquiries. Furthermore, this facilitates a process by which anyone who challenges an officer alleging custodial torture is at the mercy of the same officer, who can then lodge false charges against the complainant. In practical terms, a person who complains concerning an act of torture is at risk of putting his life and freedom at the disposal of the very same officer against whom the allegation of torture has been made. Under the current circumstances, it is highly difficult for a victim or anybody concerned about the victim, to establish a case of custodial torture in Nepal.

Conclusion and recommendations

The breakdown in systems and institutions, compounded by the total collapse in the rule of law that has been accentuated by the Royal takeover, mean that torture is endemic, systematic and conducted with total impunity in Nepal. Claims to the contrary by the authorities should be viewed as nothing more than fabrication. As previously stated, the threats proffered and

⁶⁰ AHRC statement: Nepal: Proposed code of conduct an attempt to suppress civil society, November 8, 2005, <http://www.ahrchk.net/statements/mainfile.php/2005statements/368/>; and AHRC press release: NEPAL: Proposed code of conduct an attempt to control NGOs and international cooperation, November 10, 2005, <http://www.ahrchk.net/pr/mainfile.php/2005mr/239/>

⁶¹ UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 7

⁶² The Public Security Act 1990; The public Offence and Punishment Act 1970; The Police Act 1955; The Terrorist and Destructive Activities (Control and Punishment) (TADA) Act 2001

restrictions imposed on the human rights community in Nepal, especially since February 1, 2005, have led to an inability to document and act concerning a significant number of cases of arbitrary detention, torture, extra-judicial killing and/or forced disappearance, yet those already documented place Nepal in the top echelons of human rights violators on the globe.

Despite the numerous cases of violations that have been documented during this period, effective action to prosecute perpetrators and gain redress for victims is virtually impossible. This can be explained by the fact that grave violations such as torture and forced disappearance are not considered crimes under the current Penal Code of Nepal. Despite the best attempts of local lawyers, and the multitude of recommendations by local and international NGOs and institutions, notably the UN, there is a void that simply blocks all attempts at legal remedy.

The absence of a functioning Parliament since the royal take-over on February 1 of this year, means that legislative measures required to counter this problem are not available. This can only be seen as a purposeful policy on the part of the King of Nepal. AHRC considers the legitimacy of the authorities void given this situation. The inability to effect real change concerning human rights also seriously undermines the work of the Office of the UN High Commissioner for Human Rights in Nepal. AHRC firmly supports this office, but sees no way in which it can fulfil its mandatory role of improving human rights under the present circumstance. Similarly, while welcomed, all other forms of human rights assistance being provided by the international community are being derided by this state of affairs. Involved actors have the moral duty to ensure that their efforts have concrete impact, rather than fuelling empty rhetoric. In order to enable such impact, these actors must use whatever means they have at their disposal to pressure the authorities in Nepal to hold transparent, multi-party, all-inclusive elections, in a format that is agreed upon by all, as a matter of urgency. The King has already laid plans for elections to be held, but these will not be able to deliver a democratic and acceptable result, due to restrictions on the participation of certain political parties, amongst other things.

In the case of the election of a credible government, the Parliament needs to immediately enact laws that criminalize torture and forced disappearance, in line with the recommendations of the Committee Against Torture and Nepal's obligations under international law. The implementation of the provisions of these laws needs to be made possible in courts, or risks being futile. The judiciary, therefore need to be strengthened, most notably through orders obliging the police and the military to respect court orders without exception or delay. The rule of law is a prerequisite for the respect of all human rights. Without the rule of law, even the most sophisticated Constitution and domestic legislation is worthless in practice.

As the timing of the required political developments is subject to unpredictability, civil society should not wait to begin campaigning on the primordial issue of legislation prohibiting torture and forced disappearances as crimes. In a society where torture and forced disappearances are widespread, systematic and accompanied by total impunity, what hope can there be for the respect of other human rights. Conversely, in a society where such practices are criminal offences and where perpetrators are prosecuted in fair trials and sentenced in accordance with the law and international standards, then there is hope that the enjoyment of all human rights can be achieved.

The armed insurgency should not provide any justification for the continuing perpetration of violations, or as a barrier to reforms. The end to the conflict, when it comes, will also not necessarily engender sustainable improvement in the human rights situation in the country. This can only be brought into being through reforms to the judicial, administrative and legislative institutions, as well as to the policing system, through concrete measures, as outlined below.

Recommendations

AHRC urges the highest authorities in Nepal to:

- **Publicly condemn the practices of torture and forced disappearances;**
- **Immediately abolish the TADO and ensure that anti-terrorist measures are carried out with full respect of international human rights law;**
- **Hold free and fair, all-inclusive multi-party elections, and restore Parliament as a priority;**
- **Then, adopt legislation criminalizing torture and forced disappearances, and amend the Torture Compensation Act and Army Act to bring them in line with international laws and standards regarding torture and forced disappearance;**
- **Annul all provisions in domestic law legitimising pre-trial detention beyond 24 hours;**
- **Issue orders to the police and armed forces to comply immediately and without exception to court orders, including those pertaining to habeas corpus writs;**
- **Immediately transfer all detainees to legally designated places of detention;**
- **Ensure that all persons being detained incommunicado be immediately released or charged and tried under due process;**
- **Ensure that all detainees have access to family members, legal representation, and access to medical examinations (in the alter case, particularly at the time of arrest and release);**
- **Ensure that accessible and accurate lists are kept of all arrests and persons in detention;**
- **Create independent, competent bodies for investigating all allegations of arbitrary arrest, illegal and/or incommunicado detention, torture, custodial sexual violence or death, forced disappearance and summary or extra-judicial killings;**
- **Abolish all statutes of limitations for complaints of acts of torture;**
- **Adopt witness protection legislative and administrative measures;**
- **Ensure that all allegations violations of civilians' human rights committed by the armed forces are tried by independent, impartial and competent civilian courts;**

- **Ensure that punishments for acts of torture are commensurate with the gravity of the offence and in line with international standards;**
- **Ensure that adequate compensation is awarded to victims or their families, and in a timely manner;**
- **Support the work of the NHRC, ensuring that its recommendations are fully implemented;**
- **Ensure the protection of Human Rights Defenders and abandon all plans to bring into force the Code of Conduct for NGOs. AHRC welcomes the access to places of detention provided to the OHCHR office in Nepal and urges the authorities to grant the same access to the ICRC, NHRC and other national and international NGOs and institutions.**

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About AHRC The Asian Human Rights Commission is a regional non-governmental organisation monitoring and lobbying human rights issues in Asia. The Hong Kong-based group was founded in 1984