

Nepal Conflict Report

2012

EXECUTIVE SUMMARY

An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006



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© Cover Photo by Ram Prasad Humagai. Candles at the Maiti Ghar Mandala form the number 13,246, the official count of Nepalis killed as of May 2006. This memorial event was organized by citizens' peace group Himsa Birodh as part of a monthly candlelit vigil at the Mandala.

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Chapter 1 – Introduction

Between 1996 and 2006, an internal conflict between the Government of Nepal and the Communist Party of Nepal (Maoist) (CPN (Maoist)) left over 13,000 people dead and 1,300 missing.¹ By signing the Comprehensive Peace Accord (CPA) on 21 November 2006, the Government of Nepal and the CPN (Maoist) committed to establishing the truth about the conduct of the war and to ensuring the victims of the conflict receive both justice and reparations.² To that end, the CPA references commitments to form two transitional justice mechanisms: a Truth and Reconciliation Commission (TRC) and a Commission on Disappeared Persons (CDP).

This Report documents and analyses the major categories of conflict-related violations of international human rights law and international humanitarian law that allegedly took place in Nepal from February 1996 to 21 November 2006. The cases and data presented in the Report come from the Transitional Justice Reference Archive (TJRA), a database of approximately 30,000 documents and cases sourced from the National Human Rights Commission (NHRC), national and international NGOs and from OHCHR's own monitoring work in the country following establishment of its country office in Nepal in May 2005. This data archive was developed by OHCHR with the support of the United Nations Peace Fund for Nepal. The TJRA is an information management tool that allows for elaborated research into the incidents recorded in it and should be considered to be an indispensable partner to this Report. It is freely available on the OHCHR website at www.ohchr.org.

The aim of this Report and the TJRA is to contribute to a lasting foundation for peace in Nepal by advancing the transitional justice process. In each of the categories of violations documented in this report (unlawful killings, disappearances, torture, arbitrary arrests and sexual violence), OHCHR has found that there exists a credible allegation amounting to a reasonable basis for suspicion of a violation of international law. These cases therefore merit prompt, impartial, independent and effective investigation, followed by the consideration of a full judicial process. The establishment of transitional justice mechanisms in full compliance with international standards are an important part of this process, but should complement criminal processes and not be an alternative to them.

At the time of writing this report, the legislation to enact the transitional justice mechanisms had been significantly delayed and remained in draft format. In addition, the Government has moved to empower the TRC to grant amnesties for international crimes and gross violations of international law committed during the conflict. OHCHR recalls that granting of amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes, contravene principles under international law. For this reason, the United Nations has a policy that prevents it from supporting any national processes that run counter to its position on amnesties. Not only do amnesties contravene international human rights law by upholding impunity, they also weaken the foundation for a genuine and lasting peace.

Chapter 2 – History of the Conflict

Nepal was historically governed by a series of royal dynasties until the early 1990s when several political parties launched a popular pro-democracy movement, the *Jana Andolan* (People's Movement). Following a turbulent period of street protests, multiparty democracy was restored in May 1991.

Traditionally, social life in Nepal has been highly stratified, marked by caste and other hierarchies which shaped much of the country's social, economic and political life. The dramatic political changes of 1990 raised popular expectations of social progress and greater equality, but although some statistical indicators from the early 1990s show positive

developments in the economy, the living conditions of most people remained poor. Around this time, some analysts were noting that deep-rooted socio-economic conditions favourable to armed conflict existed in Nepal, and warned of the possibility of a radical movement rising up to channel longstanding grievances.³

In March 1995 the newly named Communist Party of Nepal (Maoist) (“CPN (Maoist)”) ⁴ began to draw up plans to launch an armed struggle, the so-called “People’s War”, against the State. On 4 February 1996, the CPN Maoist submitted a 40-point demand to the Government which addressed a wide range of social, economic and political agendas, and warned that a militant struggle would follow if the demands were not met. Just one week later, on 13 February 1996, the CPN (Maoist) launched an armed insurgency against the Government. Over the course of the following decade, what was initially regarded as a minor problem of law and order in a distant part of rural Nepal developed into an entrenched and often brutal armed conflict that affected the entire country. Violations and abuses by both government Security Forces and by the CPN (Maoist) were widespread throughout the conflict; conflict-related killings were recorded in all but two of Nepal’s 75 districts, Manang and Mustang.

In May 2005, OHCHR established its then largest stand-alone field mission in Nepal following the signature of an agreement with the Government. Human rights monitoring teams immediately began fact-finding missions and investigations into allegations of human rights violations by both parties to the conflict.

In addition to the serious violations and abuses of international human rights and humanitarian law – including unlawful killing, torture, enforced disappearance, sexual violence and long-term arbitrary arrest – which form the substance of this report, thousands of people were directly or indirectly affected by the conflict in other ways. Many individuals and families were displaced from their homes; there were large-scale disruptions to education, health and basic government services across the country; economic hardships were further exacerbated by the conflict; and instability and a climate of fear were widespread.

Chapter 3 – Parties to the Conflict

Chapter 3 presents information on conflict-era institutional structures and chains of command relevant to the investigations of alleged violations or abuses documented elsewhere in this report.

The Royal Nepalese Army: The Royal Nepalese Army (RNA) was primarily regulated by the Army Act 1959 and the 1990 Constitution throughout the majority of the conflict period.⁵ The Commander-in-Chief of the army was appointed by the King on the recommendation of the Prime Minister. As the intensity of the conflict increased in the late 1990s, the Government continued to insist that the Maoists insurgency was a law and order problem and the Nepal Police (NP) was the primary security force deployed to address the situation. However, on 26 November 2001, a state of emergency was declared and the army was ordered to deploy against the Maoists. Subsequently, the RNA expanded to include a Divisional Command in each of the five development regions, in addition to a Valley Command with headquarters in Kathmandu.

Nepal Police: The Nepal Police (NP) is regulated by the Nepal Police Act 1955, as amended. It falls under the control of the Ministry of Home Affairs and is headed by an Inspector General of Police. According to Section 4 of the Nepal Police Act 1955, the Government of Nepal has oversight and control of the Nepal Police and has the authority to issue orders and directives, which police are duty-bound to follow. Section 8 of the Nepal Police Act 1955 places police at the district level under the authority of the Chief District Officer.

Armed Police Force: The Armed Police Force (APF) is a paramilitary police force first established through an Ordinance in January 2001. The creation of the APF reflected the Government’s need to deploy additional forces against the Maoists given the ongoing escalation of the conflict, then in its fifth year, and the continuing challenges faced by a civil police force not trained to combat an insurgency. The APF falls under the Ministry of Home Affairs and is headed by an Inspector General of Police. The functions of the APF are listed in the Armed Police Force Act 2001 and include: (a) To control an armed struggle occurring or likely to occur in any part of Nepal; (b) To control armed rebellion or separatist activities occurring or likely to occur in any part of Nepal; and (c) To control terrorist activities occurring or likely to occur in any part of Nepal.⁶ The APF is under the operational command of the RNA.⁷ By the end of the conflict the APF numbered approximately 30,000 and were organized into five combat brigades, one in each development region.

Communist Party of Nepal (Maoist): The CPN Maoist was formed in Nepal in 1995. The Party was headed by a Chairman who was also Supreme Commander of the People’s Liberation Army (PLA), the military wing of the CPN (Maoist). The Maoist military was under the leadership of the CPN (Maoist) Party and was meant to further the political goals and interests of the Party.⁸ The formation of the PLA was announced at the first national conference of the Maoist army held in September 2001, though the Maoists had been developing their military capabilities since launching the “People’s War” and had active combatants operating under a chain of command and engaging in military action long before officially forming the Army. While the exact number of active PLA personnel during the conflict remains a matter of dispute, many analysts estimate that there were between 5,000-10,000 active combatants for much of the conflict period. By the end of the conflict, the PLA had expanded to include seven declared divisions countrywide, organized under three commands – Western Command, Special Central Command, and Eastern Central Command – which were in turn under the authority of the Supreme Commander and four Deputy Commanders.

Chapter 4 – Applicable International Law

During an armed conflict, two main international law regimes apply: international human rights law (IHRL) and international humanitarian law (IHL). These two systems are largely complementary and mutually reinforcing, with the shared objective of protecting life and human dignity.

International Human Rights Law

IHRL applies both in peacetime and during armed conflicts. During the period affected by the conflict, Nepal was party to six out of the nine core Human Rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁹ Under these treaties, a range of fundamental rights applied during the conflict, notably:

- **The right to life:** Article 6, ICCPR
- **The right to liberty and security of the person:** Article 9, ICCPR
- **The right to freedom from torture or cruel, inhuman or degrading punishment or treatment:** Article 7, ICCPR and articles 2 & 16 CAT
- **The right to be free from sexual violence:** CAT and CEDAW
- **The right to peaceful assembly:** Article 21, ICCPR
- **The right of children to special protection in armed conflict, including a prohibition on their recruitment into the armed forces:** Article 38, CRC

On two occasions during the conflict, Nepal exercised its prerogative to declare a state of emergency and derogate from certain obligations under the ICCPR. The state of emergency was in place for nine months beginning in November 2001 and for three months beginning in February 2005. On both occasions, the Government notified the UN Secretary-General that the ICCPR-based rights associated with assembly, movement, press, privacy, property, certain remedies, and access to information would be curtailed.¹⁰

International Humanitarian Law

Given that IHL applies only during an armed conflict, it is necessary to specify the time period during which the armed conflict existed, and whether it was international or non-international by nature. For the purposes of this Report, the period under analysis is from February 1996, when the CPN (Maoist) commenced attacks as part of an armed insurgency, and 21 November 2006, on which date the Comprehensive Peace Accord was concluded. Further, based on the fact that the conflict was between governmental forces and a non-governmental armed group, this Report refers to the provisions of IHL applicable to non-international armed conflicts.

IHL governs the conduct of an armed conflict by regulating the behaviour of the parties to the conflict and provides protection for all those not taking part, or no longer taking part, in the hostilities. Nepal ratified the four Geneva Conventions in 1964 and is subject to their provisions, including Common Article 3 of the Geneva Conventions which provides minimum standards governing any non-international armed conflict. Notably, Common Article 3 requires that each party to the conflict protect persons taking no active part in the hostilities, including civilians and “*members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause*”.

Other obligations incumbent on parties to a conflict are those under customary international law, including the obligation to distinguish at all times between civilians and combatants and target only the latter; to refrain from indiscriminate attacks;¹¹ to forego any offensive where the incidental damage expected “*is excessive in relation to the concrete and direct military advantage anticipated*”;¹² and to take all feasible precautions to minimize incidental loss of civilian life and injury to civilians.¹³ The Principle of Humanity requires that civilians and those who are *hors de combat* must be treated humanely, meaning that abuses of such persons, such as killing, torture, rape, mutilation, beatings and humiliation are prohibited. Violations of these rules may constitute violations of the laws and customs of war, and trigger individual criminal responsibility.

Criminal Responsibility under International Law

Certain violations of international law are deemed to constitute “international crimes”, notably, crimes against humanity, war crimes, genocide, trafficking, piracy, slavery, torture and enforced disappearance.¹⁴ Both IHL and IHRL obligate states to investigate allegations of any serious violations of their respective regimes, particularly when they amount to international crimes, and when appropriate, prosecute suspected perpetrators and compensate the victims. International law further specifies that perpetrators of such crimes may not benefit from an amnesty or pardon. The UN has developed guidelines for such investigations that centre around four universal and binding principles: independence, effectiveness, promptness and impartiality.

War crimes refer to any serious violations of IHL directed at civilians or enemy combatants during an international or internal armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Notably, these include serious violations of Common Article 3, particularly murder, mutilation, cruel treatment and torture directed against people taking no active part in the hostilities.¹⁵ Crimes against humanity occur where certain acts,

including murder, torture and rape, are undertaken “as part of a widespread or systematic attack against any civilian population, with knowledge of the attack”.¹⁶

Chapter 5 – Unlawful Killings

According to Government figures, between the launch of the “People’s War” in February 1996 and the formal end of the armed conflict on 21 November 2006, a total of 12,686 individuals - including both combatants and civilians – were killed in the conflict.¹⁷ While IHRL and IHL may have been respected in many cases, it is equally clear by reference to the available data that serious violations of international law may have occurred in a variety of circumstances. The TJRA catalogues over 2,000 incidents that raise a reasonable basis for suspecting that one or more killings occurred in circumstances amounting to a serious violation of international law. In Chapter 5, these cases are analysed in relation to standards of IHL and IHRL under the collective title of “unlawful killings”.

The available data shows that unlawful killings occurred throughout the conflict in multiple contexts: for example, during Maoist attacks on Security Force posts and bases, Government buildings, national banks and public service installations; in chance encounters and during ambushes, such as in the *Madi* bus bombing. Other examples were recorded during search operations by the Security Forces made in response to earlier Maoist attacks and in the way that the local PLA and political cadres abducted, abused, tortured and killed suspected spies and informants. Unlawful killings were also perpetrated against enemy combatants and civilians who were in detention or otherwise under the control of the adversary, for example, in execution-style killings. One of the most compelling case is *Doramba*, where 17 Maoists and two civilians were taken by the Royal Nepal Army (RNA), marched to a hillside, lined up and summarily executed.¹⁸ The Maoists also killed captives; for example, three teachers, Muktinath Adhikari, Kedar Ghimire and Arjun Ghimire, were each allegedly executed after abduction in separate incidents in Lamjung District in 2002.¹⁹

Taken collectively, allegations of unlawful killings and discernible patterns relating to such killings by both the Security Forces and the Maoists raise the question of whether certain patterns of unlawful killings were a part of policies (express or condoned) during the conflict. Of particular note are the numerous reports of deliberate killings of civilians by both sides, in particular those who were perceived as having supported or provided information to the enemy. In these circumstances, the leaders of the parties to the conflict at the time could attract criminal responsibility for these acts.

Chapter 6 – Enforced Disappearance

Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 (1992), article 1

Enforced disappearances²⁰ were among the most serious human rights violations committed during the armed conflict in Nepal. Conflict-related disappearances were reported as early as 1997²¹ and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.²² In its 2009 report to the United Nations General Assembly, the United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) stated that during the ten-year conflict in Nepal, the highest number of cases of enforced disappearances it received were in 2002, when it was

notified of 277 cases.²³ The WGEID has transmitted 672 cases to the Government of Nepal and, as of 2 March 2012, no further information had been received on 458 of these cases.²⁴

Both IHL and IHRL define “enforced disappearance” in a similar way, with the core elements of the crime being an apprehension followed by a denial of that apprehension. Under IHRL, the responsibility is with the state and state actors, while under IHL the responsibility extends to ‘parties to the conflict’, which implies that armed groups and their respective political organizations may be held liable for enforced disappearances and that the criminal responsibility of specific individuals may also be established.

Disappearances were instigated by both parties to the conflict, the security forces and the CPN (Maoist).²⁵ Data in the TJRA indicate that security forces are implicated in the majority of disappearances, though the CPN (Maoist) is also implicated in a significant number of cases of disappearance following abduction. Both parties to the conflict have made clear and repeated commitments to address and clarify disappearances allegedly committed by the Security Forces and by the CPN (Maoist) and to ensure justice for victims and their families.²⁶ Despite various investigations and considerable documentation by national and international human rights organizations, to date no person has been prosecuted in a civilian court in connection with an enforced disappearance in Nepal.

An examination of the data in the TJRA by period or by alleged perpetrator of the disappearance tends to show trends and patterns in the commission of these acts. In terms of the rate of incidence, a significant incidence of disappearances by security forces first emerged in 1998, during the Government security operation known as “Kilo Sierra II”, which was launched in several districts regarded as Maoist strongholds: Rukum, Rolpa, Jajarkot, Salyan in the Mid-Western Region, Gorkha in the Western Region and Sindhuli in the Central Region.²⁷ Another significant increase occurred following the issuance of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) in November 2001, and the mobilization of the RNA against the Maoists in November 2001. In Bardiya district, where OHCHR-Nepal investigated 156 of more than 200 reported cases of disappearance, most of the arrests occurred in the aftermath of the declaration of the State of Emergency between December 2001 and January 2003.²⁸ The WGEID visited Nepal in 2004 and identified a clear pattern of disappearances by the security forces, particularly by the RNA.²⁹

Many reports of disappearances attributed to the security forces allegedly occurred as follows: suspected members or supporters of the CPN (Maoist) were arrested from their homes, often at night, by security force personnel who typically arrived in villages in groups. Victims were frequently beaten before being blindfolded and taken away to police stations or army barracks, and held in *incommunicado* detention. When families made inquiries about their whereabouts, the authorities would allegedly deny any knowledge of the arrest.

In the majority of cases of illegal detention and disappearances documented by OHCHR-Nepal, victims were kept in army barracks in *incommunicado* detention without access to family or lawyers. Based on consistent testimonies gathered across the country, it appears that in the majority of cases of disappearances, victims were also allegedly subjected to torture and ill-treatment while held at the army barracks. Testimony suggests that the majority of the ill-treatment occurred with the involvement, knowledge and/or acquiescence of commanding officers.³⁰

Information recorded in the TJRA indicates that the CPN (Maoist) was also allegedly responsible for cases of disappearance following abduction, including of civilians they suspected of collaborating with or spying for the security forces. The 2008 report by the NHRC, titled *Status Report on Individuals Disappeared During Nepal's Armed Conflict* listed 970 unresolved cases of disappearances. Of these, 299 cases of disappearances are allegedly attributed to the CPN (Maoist).³¹

Cases involving actions tantamount to disappearances by the Maoist often took place under similar circumstances: individuals were taken away during the day or at night from their homes, places of work, or local markets by a group of CPN (Maoist) cadres in civilian clothes.³² In many instances, victims were blindfolded, violently beaten and taken away with little or no explanation. OHCHR investigation of cases of abductions and subsequent disappearances show that, depending on the nature of the case, abductions were allegedly carried out by members of the CPN (Maoist) political, district or area committee members, the “People’s Government”, the PLA or local militia.³³

It remains a high priority for a transitional justice mechanism, such as a specially formed commission, or a competent judicial authority, to clarify the fate or whereabouts of victims of disappearance and to hold perpetrators of all disappearances accountable. It is further important to investigate the factors that contribute to or otherwise enable the practice of enforced disappearance in Nepal, including those outlined in the Supreme Court decision above.

Chapter 7 – Torture

“No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.” Universal Declaration of Human Rights, article 5

International law unambiguously prohibits torture. Nepal has ratified and is a party to at least four treaties that expressly prohibit torture: The Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). Notably, under CAT, the Government of Nepal is obliged to promptly and impartially investigate credible allegations of torture and ill-treatment, and to punish the perpetrators.³⁴ The 1990 constitution of Nepal prohibited torture, as does the current interim constitution. However, torture *per se* is not a criminal offence under Nepali domestic law.³⁵

Torture, mutilation, and other sorts of cruel and inhumane and degrading treatment appear to have been perpetrated extensively during the conflict, according to available data, by both the security forces and the Maoists. Altogether, the TJRA recorded well over 2,500 cases of such alleged ill-treatment over the decade-long insurgency.

Alleged cases show that the motive of the Security Forces in perpetrating acts of torture appears primarily to have been to extract information about the Maoists from anyone who might have had something to reveal. The methods were consistent across the country and throughout the conflict. Reports indicate that the techniques generally were allegedly intended to inflict pain in increasing measure or over a prolonged period until the victim divulged whatever information they were believed to have.

The TJRA also records cases of mutilation and instances of cruel, inhuman or degrading treatment allegedly perpetrated on behalf of the Maoists. The alleged Maoist usage of torture and ill-treatment falls into two general, and sometimes overlapping, patterns. First, the Maoists allegedly perpetrated violence as a means of coercion, typically at the local level. For example, violence was used against Nepalis who refused to observe Bandhs (strikes), who failed to make financial contributions to the Maoists (often called “donations” irrespective of whether they were given voluntarily), or who were believed to have spoken out against the Maoists. In addition to affecting the victim, such action had a general coercive effect by spreading a fear among the population that to oppose or be indifferent risked physical punishment.

Maoists also allegedly used torture and ill treatment as a punishment. Whether through the “People’s Court” or simply by decisions of local commanders, Maoists regularly, and often violently, punished persons deemed to have “misbehaved” according to the Maoist code, or those targeted because of their active or symbolic opposition to the Maoist movement. The most notable group of victims were those that the Maoists suspected of being spies or ‘informants.’

Available data suggests that some Maoist cadres were dismissed from the party or reportedly sentenced to labour camps in response to allegations of torture from outside organizations.³⁶ Similarly, there are examples of certain Security Force personnel being punished through internal disciplinary measures, including court martial.³⁷ Yet, at the time of writing this report, no one from either party to the conflict has been sentenced to a term in prison for having perpetrated torture, mutilation, or ill-treatment during the conflict.³⁸

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has made several recommendations to Nepal on issues within his mandate. In March 2012, the Special Rapporteur stressed that several of his recommendations made in 2005 had not been implemented. In particular, he emphasized the need to include a definition of torture in the penal code, and ensure that no persons convicted of torture be given amnesty or benefit from impunity. He also stated that the National Human Rights Commission (NHRC) has not been able to carry out investigations of torture, and encouraged the Government to strengthen its capacity in this area.³⁹ At the time of writing this report, these recommendations remain pending.

Chapter 8 – Arbitrary Arrest

Arbitrary arrest was a significant feature of the conflict in Nepal. Thousands of people from both sides of the conflict were detained in a manner that amounted to arbitrary detention under international law. While suffering the injustice of arbitrary arrest, persons held beyond the reach of the law were easy targets for additional forms of ill-treatment, including torture.

That detention must not be arbitrary is a fundamental principle of both IHL and IHRL and is clearly set out in article 9 of the ICCPR. International law aims to prevent arbitrary detention by specifying the grounds for detention as well as providing certain conditions and procedures to prevent disappearance and to supervise the continued need for detention.

When the legality of detention is regularly reviewed by a judicial or other authority that is independent of the arresting authority, or where the imprisonment has been pronounced by a court as a lawful sanction under the domestic legal regime, the act does not generally amount to arbitrary arrest.⁴⁰ Under Nepali law, in non-conflict circumstances, these requirements have been legislatively enacted so that a detainee must be brought before a judicial authority within 24 hours.⁴¹

During the conflict, Security Forces often used the mechanism of “preventive detention” as the legal basis for apprehending Maoist cadres and supporters because it circumvented judicial oversight and other due process rights. Under Nepali law, preventive detention could be initiated under a “preventive detention order” pursuant to the Public Security Act 1989 or the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) passed in 2002. The TADA widened the scope of arrest, decreased judicial oversight, and lengthened detention deadlines.

Recorded cases show that these laws were apparently systematically misused to detain a number of people suspected of involvement in the Maoist movement, without any charge or trial. According to an official source, the total number of political prisoners in custody reached 1,560 in mid-November 1999.⁴² Human rights groups widely reported on non-

compliance with legislative requirements for arrest during the early part of the conflict. Amnesty International, for example, noted that none of the former detainees they interviewed were given warrants at the time of arrest, nor were they presented before a judicial authority within the stipulated 24-hour period, as required under the Constitution of the Kingdom of Nepal.⁴³ Amnesty International found that many had been kept in police custody for periods longer than the 25 days allowable under the State Cases Act 1992 and the majority of ex-detainees interviewed were not informed of the specific charges against them.⁴⁴ While exploiting these public security laws, especially during the initial period of detention, the Security Forces frequently denied members of the detainee's family access to them, or denied the detainee access to a lawyer.⁴⁵

For the purposes of recording incidents in the TJRA, and for providing an appropriate basis for analysis in this report, it was decided that a gravity threshold was required for alleged incidents of arbitrary arrest. Given that there were countless arbitrary arrests where the victim was released after a period of days or even hours, the threshold was set at one year. Based on information in the TJRA, 43 incidents of arbitrary arrest by Security Forces were recorded that met the one-year threshold. Of those, three cases concerned the arrest of minors, and at least seven concerned women.

“Arbitrary arrest” is reserved by definition for acts perpetrated by someone acting on behalf of a state. While the Maoists, as a non-state actor, also apprehended persons for a variety of reasons throughout the conflict, these unlawful detentions do not technically fit the definition of arbitrary arrest under IHRL. In this report such incidents are termed “abductions tantamount to arbitrary arrest” and were recorded in the TJRA when they met the one-year gravity threshold. With the exception of those sentenced to work in labour camps as the result of the quasi-judicial “People’s Court,” recorded incidents show that Maoists did not tend to detain persons for lengthy periods. While the Maoists allegedly perpetrated innumerable arbitrary arrests during the conflict, few met the one-year threshold. With such a small sample, no particular patterns were discernible.

Chapter 9 – Sexual Violence

My family did not overreact to whatever happened to me because almost every woman here has been raped, some countless times. Some have been so badly injured by repeated rapes by different army personnel that they are barely able to stand.⁴⁶

Even though other serious human rights violations committed during the conflict period have been extensively investigated and reported, the documentation of sexual violence remains scarce. This is a reflection of the reality that sexual violence is often under-reported. Social and cultural taboos make victims reluctant to share their stories out of shame or for fear of being blamed. This is exacerbated by a lack of support, protection and redress mechanisms that existed during the conflict period, and the fear of repercussions or further victimization if perpetrators were reported.

Both IHRL and IHL prohibit acts of sexual violence in peace time and during conflict. IHL prohibits rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of similar gravity, which can include assault, trafficking, and strip searches.⁴⁷ Under IHRL, gender-based violence including sexual violence “is discrimination within the meaning of article 1” of CEDAW.⁴⁸ Sexual violence can constitute a war crime, a crime against humanity, a form of torture, or an element of genocide.⁴⁹

The extreme violence that women suffer during conflict does not arise solely out of the special conditions of war. Rather, such violence is directly related to the violence that is experienced by women during peace time.⁵⁰ Research in Nepal indicates that a strong

patriarchal element in Nepali society lies at the root of social and gender discrimination.⁵¹ Further, research suggests that patriarchal socio-cultural norms and practices tolerate sexual violence against women, thereby legitimising the use of such violence.⁵²

Cases recorded in the TJRA indicate that Security Forces appear to have perpetrated the majority of cases of sexual violence. Out of over one hundred cases catalogued, 12 list Maoist personnel as alleged perpetrators. Among the cases reportedly committed by Security Forces, an almost equal number refer specifically to the Nepal Police and the RNA, whereas other cases refer to the APF, the Security Forces, the Unified Command or generically to the “police” as alleged perpetrators. The incidents allegedly perpetrated by Nepal Police are evenly distributed throughout the conflict period, whilst those by the RNA took place mostly after 2001, which coincides with the date of their deployment.

The violence by security forces was allegedly committed in the course of searching for and interrogating Maoists, with women suspected of being Maoists or supporting Maoists, having faced particularly severe violence. There is currently not enough information to establish whether sexual violence committed by Security Forces was institutionalized or systematized. However, it does appear that implicit consent was given at higher ranks which served to encourage a culture of impunity for opportunistic sexual violence, and suspicion of Maoist affiliation was used as an excuse to avoid scrutiny or accountability. Most violations concern alleged rape, gang-rape and attempted rape with some cases of forced nudity.⁵³ Several cases identified during the reference archive exercise, allegedly perpetrated by Security Forces, involve rape of female Maoists where they suffered particularly brutal sexual violence and were eventually killed.

The data available indicates that children, i.e. girls under 18 years old, were particularly vulnerable during the conflict period. More than one third of the victims of sexual violence were children, with many under 15 years old. There are even cases where the victim was under ten. A number of cases affected multiple victims, often when sexual violence was reportedly committed by Security Forces personnel in the course of search operations. There are cases where victims were allegedly sexually abused when pregnant, and of victims with mental disabilities. Further, some victims lost their life as a result of unwanted pregnancy caused by rape or during the course of abortion following such pregnancies.⁵⁴

Research undertaken by the Institute of Human Rights Communication, Nepal (IHRICON) found that when offences of sexual violence or rape allegedly committed by Security Forces were reported to any level of authority, actions were rarely taken.⁵⁵ IHRICON reports that a small amount of money would be given to those who lodged a complaint to “keep quiet”, including in one case where a 13-year-old girl was allegedly raped by Security Forces personnel.⁵⁶ Collaborative research by the Advocacy Forum-Nepal and the International Center for Transitional Justice concluded that both Maoists and Security Forces personnel perpetrated sexual violence but that the majority of allegations were made against the Security Forces.⁵⁷ The research also found that rape was a “common practice” adopted by the RNA to punish female Maoist cadres and sympathizers.

A primary conclusion of this chapter is that more research is needed to understand the scale of sexual violence during the conflict. Further information needs to be sought in a manner that is culturally and gender sensitive, responds to the needs of victims and empowers victims in the process. Above all, investigation and prosecution of sexual violence allegedly committed by both Maoist personnel and Security Forces personnel must be carried out as a matter of urgency.

Chapter 10 – Accountability and the Right to an Effective Remedy

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Universal Declaration of Human Rights, article 8⁵⁸

Accountability Challenges: Seeking justice for Maina Sunuwar

A lack of cooperation by security forces has presented significant obstacles to investigations. The case of the torture and death of Maina Sunuwar illustrates this situation.

On 17 February 2004, officers of the Royal Nepal Army took 15-year-old Maina Sunuwar from her home in Kavre District to the Birendra Peace Operations Training Centre in Panchkhal. At the Training Centre, she was subjected to severe torture in the presence of seven RNA officers and soldiers, including two captains. She later began vomiting and foaming at the mouth, and then died. In an apparent effort to cover up the killing, the army personnel involved took her body outside the compound and shot it in the back.

An initial Court Martial convicted three men with “employing improper interrogation techniques” and ordered minimal punishments. The family of Maina Sunuwar sought justice from the Supreme Court which issued a mandamus order requiring an investigation to be completed within 3 months. Subsequently, on 4 December 2007, the Nepal Police requested the Nepal Army to present for investigation four Army officials implicated in the crime.

During 2007, the Nepal Army Adjutant General stated to OHCHR-Nepal that the Army had already taken action against the officials, and thus there was no need for them to act. This determination was apparently based on the constitutional prohibition of prosecuting the same case twice. The Nepal Army considered that the court-martial proceedings instituted against the suspects were sufficient to deal with the matter. However, murder and torture charges had not been raised in the initial court-martial.

Although a summons for the murder charge was issued in January 2008, the Nepal Army has repeatedly failed to comply with court orders in relation to the officials within its ranks. On 13 September 2009, the Kavre District Court ordered Nepal Army Headquarters to proceed immediately with an automatic suspension of one of the serving majors implicated, and to submit to the court all the files containing the statements of the people interviewed by the Military Court of Inquiry. Although some documents were submitted in December 2010, many others have not been provided to the Court. Furthermore, the Nepal Army sent one of the alleged perpetrators on a UN Peacekeeping mission. He was recalled in 2010. But he re-joined the Nepal Army upon his return and, at the time of writing, has not been handed over to the Nepal Police.

Documentation examined in the course of compiling this Report indicates that up to 9,000 serious violations of IHRL or IHL may have been committed during the decade-long conflict, most of which fall within the themes outlined in previous chapters. However, at the time of writing this report, no one in Nepal has been prosecuted in a civilian court for a serious conflict-related crime. It is therefore reasonable to conclude that there has been a systematic failure on the part of responsible authorities to bring individuals to justice, and that this lack of accountability served to perpetuate the commission of additional abuses during the conflict. Accountability therefore remains a matter of fundamental importance to Nepal as it deals with its legacy of conflict.⁵⁹

The Government, the major political parties and the Security Forces have repeatedly made commitments to combat impunity. Paramount is the embodiment of this commitment in the Interim Constitution, drafted through political consensus and ratified by the Interim legislature, which guarantees the right to a constitutional remedy for those whose fundamental rights have been violated.⁶⁰ It also imposes on the State the obligation to “adopt a political system fully compliant with the universally accepted basic human rights... rule of law... accountability in the activities of political parties, public participation and the concepts of impartial, efficient and fair bureaucracy, and to maintain good governance while ending corruption and impunity...”⁶¹ This commitment follows the CPA of November 2006 which explicitly foresees the role of the TRC as “finding out the truth about those who committed the gross violations of human rights and

were involved in crimes against humanity in the course of the armed conflict”.⁶² The current Draft Bill to establish the Truth and Reconciliation Commission, which has yet to be finalized and adopted, states that one of the purposes in passing the legislation is: “*To put an end to impunity by bringing persons involved in serious violations of human rights and crimes against humanity within the law...*”

Primary responsibility for redressing serious criminal acts rests with Nepal’s justice system. As mentioned in the various chapters of this Report, many but not all offences that amount to serious violations of human rights or IHL have an equivalent prohibition in Nepal’s domestic law and therefore may be prosecuted in its domestic courts. Unlawful killings and rape are notable examples. Other crimes, such as disappearances and torture, are more problematic because they have not been explicitly criminalized in Nepal. Acts comprising incidents of torture or disappearance, however, often include elements that are criminally prohibited by other provisions.⁶³ Despite these multiple layers of accountability mechanisms already in place, there is a notable absence of cases where police or army personnel have actually been held accountable and given a punishment proportionate to the gravity of the offence: several years after the formal end of the hostilities no one has been criminally prosecuted in a civilian court for serious human rights or IHL violations.⁶⁴

An in-depth analysis reveals examples of where accountability mechanisms have failed to bring justice for violations and pinpoints the obstacles that were encountered by victims and their families as they pursued a remedy for alleged violations. Gaps exist in applicable laws, both in terms of criminalizing violations of international law such as disappearances and torture, and in relation to ensuring the necessary procedural rules for disclosure of information, public investigation and facilitating initiation of proceedings against security personnel or other government employees. These gaps are compounded by a lack of cooperation from security forces and the Maoists in relation to conflict related violations and the failure of the Government to pursue cases involving conflict violations.

In recent years there has been an increasing trend of case withdrawals on the basis that they were of a “political nature”. However, a large number of cases recommended for withdrawal are of a serious criminal nature, and many occurred outside the period of the conflict. The withdrawal of cases where serious international crimes have been alleged is contrary to both IHL and IHRL. In December 2011, the major political parties submitted proposals to empower the future TRC to grant amnesties for international crimes and gross violations of international law committed during the conflict. As indicated above, granting amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes, contravene principles under international law. The United Nations has a policy that prevents it from supporting any national processes that run counter to its position against such amnesties.

Chapter 11 – Recommendations

The final chapter of this Report includes a comprehensive range of recommendations addressed to all major stakeholders in the Nepali transitional justice process. The recommendations are based on the primary findings of the Report and highlight the key areas that require attention to ensure that all violations of human rights and IHL are properly addressed. In addition to addressing the Government and its Ministries and the future transitional justice mechanisms, recommendations are also made to the Security Forces, the Maoist leadership, political parties, the NHRC, civil society and the international community. Finally, the victims themselves are encouraged to support the prosecution of emblematic cases involving those responsible for the worst offences, and to seek reparation which they are entitled to receive under international law.

¹ The Informal Sector Service Centre (INSEC), a leading human rights organisation in Nepal, recorded 13,236 people killed: INSEC Conflict Victim Profile (August 2010), available from www.insec.org.np/victim/. According to the International Committee of Red Cross (ICRC), more than 1,350 individuals who went missing during the conflict remain unaccounted for. International Committee of the Red Cross, “Nepal: Red Cross releases documentary on conflict-related missing.” (8 August 2010). Available from www.icrc.org/web/eng/siteeng0.nsf/html/nepal-news-060810. At the time of publishing this Report, the number of persons recorded as killed had increased significantly and can be expected to increase further as investigations continue.

² Comprehensive Peace Accord 2006, articles 5.2.4, 5.3.5 and 7.1.3.

³ R. Andrew Nickson, “Democratization and the Growth of Communism in Nepal: A Peruvian Scenario in the Making?” and Stephen L. Mikesell, “The Paradoxical Support of Nepal’s Left for Comrade Gonzalo”, in Deepak Thapa ed., *Understanding the Maoist Movement of Nepal* (Kathmandu, Martin Chautari, 2003).

⁴ Henceforth, “CPN (Maoist)” or “Maoists”. The terms will be used largely interchangeably in this Executive Summary.

⁵ The Army Act 2006 was promulgated on 28 September 2006, a little less than two months before the signing of the Comprehensive Peace Accord.

⁶ Armed Police Force Act 2001, section 6(1)

⁷ Ibid, section 8

⁸ “Theoretical Premises for the Historic Initiation of the People’s War”, September 1995, <http://www.ucpnm.org/english/doc3.php>: “5.

⁹ At the time of writing this report, Nepal has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) or International Convention for the Protection of All Persons from Enforced Disappearance (CED). Although Nepal signed the Convention on the Rights of Persons with Disabilities on 3 January 2008, this Convention is not yet ratified and did not apply during the conflict period.

¹⁰ C.N.270.2002.TREATIES-4 (Depositary Notification), 25 March 2002 and C.N.170.2005.TREATIES-3 (Depositary Notification). 14 March 2005

¹¹ Jean-Marie Henckaerts and Louise Doswald-Beck for the International Committee of the Red Cross, *Customary International Humanitarian Law* (3 vols.), (Cambridge, Cambridge University Press, 2005).

¹² International Committee of Red Cross, *Customary International Humanitarian Law*, rule 14 (see endnote 11).

¹³ International Committee of Red Cross, *Customary International Humanitarian Law*, rule 97, which is derived in part from the IHRL obligation upon states to protect life (see endnote 11).

¹⁴ Fourth Geneva Convention, article 147.

¹⁵ Statute of the International Criminal Court, A/CONF.183/9* (1998), Article 8(2)(c). Nepal is not currently a party to the Rome Statute, however, certain aspects of the Rome Statute represent a codification of customary international law and it is therefore used in this analysis of crimes against humanity to illustrate the application of this crime.

¹⁶ Ibid, Article 7.

¹⁷ Ministry of Peace and Reconstruction website, Emergency Peace Support Operation (available from www.epsp.gov.np/eng/index.php?page=deceased_main).

¹⁸ 2003-08-17 - incident - Ramechhap - _j3381.

¹⁹ Muktinath Adhikari (Ref. No. 5985) was killed after abduction on 16 January 2002, Kedar Ghimire (Ref. No. 5982) was killed after abduction on 19 January 2002 and Arjun Ghimire (Ref. No. 5948) was killed after abduction on 27 June 2002.

²⁰ In this Report, the terminology “enforced disappearances” is used to refer to state-related disappearances. Further, the phrase “actions tantamount to enforced disappearances” refers to CPN (Maoist) related disappearances, and the term “disappearances” is used in a general sense and to cover both categories of cases.

²¹ Informal Sector Service Centre, *Human Rights Yearbook 1997* (1997).

²² Amnesty International, *Nepal: Escalating ‘disappearances’ amid a culture of impunity*. Available from www.amnesty.org/en/library/asset/ASA31/155/2004/en/202bdd2f-d59d-11dd-bb24-1fb85fe8fa05/asa311552004en.html, accessed on 2010-06-17).

²³ *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council* (A/HRC/13/31).

²⁴ *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council* (A/HRC/19/58/Rev.1).

²⁵ OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, p 5.

²⁶ Comprehensive Peace Accord, 21 November 2006, sections 5.3.1 and 7.1.3; Interim Constitution 2007, article 33(m).

²⁷ Amnesty International, *Nepal - Human Rights at a Turning Point?* (1999). Available from www.amnesty.org/en/library/asset/ASA31/

²⁸ OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008, p 4.

²⁹ *Report of the Working Group on Enforced and Involuntary Disappearances to the Human Rights Commission: Mission to Nepal* (E/CN.4/2005/65/Add.1), p 12

³⁰ OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008 and OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004* (May 2006).

³¹ Available from <http://www.nhrnepal.org//publication/doc/reports/Disapp-Status-Rep-2008-Nep.pdf>, accessed on 2010-06-20

³² For example, see the pattern of abductions and disappearances by the CPN-M in 2008 reported in OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008.

³³ OHCHR-Nepal, *Human Rights Abuses by the CPN-M: Summary of Concerns*, September 2006, p 5.

³⁴ CAT articles 12 and 13.

³⁵ However, some elements of torture are prohibited by national law, for example, physical assault and “battery,” (*kutpit*) exist in the Nepali National Code (*Muluki Ain*).

³⁶ For example, *Madi* bus bombing, Ref. No. 2005-06-06 - incident - Chitwan_0106, emblematic case 5.15. Those involved in this case received only two to three months of ‘corrective punishment.’ OHCHR-Nepal, *Human Rights Abuses by the CPN (Maoist), Summary of Concerns*, September 2006, p.8. Available from: <http://nepal.ohchr.org/en/index.html>

³⁷ See the Maina Sunuwar case below in Emblematic case 7.2.

³⁸ Nor has anyone been sent to prison for perpetrating any of the other prohibited acts in the Nepali civil code, such as assault, beating, or mutilation.

³⁹ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Follow-up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan*. A/HRC/19/61/Add.3 (1 March 2012).

⁴⁰ See, e.g., United Nations Working Group on Arbitrary Detention, *Fact Sheet No.26: The Working Group on Arbitrary Detention* (9 December 1998) Available from www.ohchr.org/Documents/Publications/FactSheet26en.pdf.

⁴¹ In Nepal, the arresting authority must present the detainee to a judicial authority within a period of 24 hours from the time of arrest, except where the person arrested is a citizen of an enemy state or s/he is detained under preventive detention. This requirement is contained in both the 1990 and 2007 Constitutions (articles 14(6) and 24 (6) respectively), and the State Cases Act in relation to the period of police detention (section 15(1)).

⁴² As quoted by Amnesty International, *Nepal: Human Rights and Security* (2000). Available from <http://www.amnesty.org/en/library/asset/ASA31/001/2000/en/389533d6-dfc0-11dd-8e17-69926d493233/asa310012000en.html>

⁴³ Amnesty International, *Nepal - Human Rights at a Turning Point?* (see endnote 27)

⁴⁴ *Ibid.*

⁴⁵ In cases where the Security Forces denied holding the detainee at all, the elements of the crime of “disappearance” will likely have been met.

⁴⁶ Victim of a rape in 2002 speaking to OHCHR-Nepal, UNFPA, Advocacy Forum and Centre for Mental Health Counselling (CMC) during the assessment mission in Achham District in May 2009.

⁴⁷ Stop Rape Now, UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence*. See also UN Security Council Resolution 1325 (S/RES/1325) (2000), preamble, para 10;

⁴⁸ *General Recommendation No. 19 of the Committee on Elimination of Discrimination against Women: Violence against Women* (11th session, 1992).

⁴⁹ UN Security Council resolution 1820 (S/RES/1820) (2008) para 4.

⁵⁰ UNIFEM, *Women, War, Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building* (New York, UNIFEM, 2002) p.13.

⁵¹ *Ibid.*, p. 1; UNIFEM & SAATHI, “Sexual and Gender Based Violence during Conflict and Traditional Period: Jhapa and Morang Districts: A Research”, 2008, p.7; Forum for Women, Law & Development, “Domestic Violence against Women in Nepal: Concept, History and Existing Laws” p. 10, Available from www.fwld.org/article.php.

⁵² UNIFEM & SAATHI, “Sexual and Gender Based Violence during Conflict and Traditional Period: Jhapa and Morang Districts: A Research”, 2008, p.7, p.10.

⁵³ Assessment Mission by OHCHR, UNFPA, Advocacy Forum and CMC in Achham District, p. 170.

⁵⁴ Nepal adopted a law that legalised abortion in 2002.

⁵⁵ Institute of Human Rights Communication, Nepal (IHRICON), *Sexual Violence in the “People’s War”: The Impact of Armed Conflict on Women and Girl in Nepal*” (Kathmandu, IHRICON, 2007) p.31.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p. 49.

⁵⁸ This right is also enshrined in article 2 of the ICCPR, which is a right non-derogable during states of emergency.

⁵⁹ See, e.g., Maina Sunuwar case, Ref. No. 2004-02-17 - incident - Kavre_0259; *Devi Sunar v. District Police Office, Kabhrepalanchok, Dhulikhel et al.* Nepal Kanoon Patrika, Supreme Court, Case 2064/2007, Vol. 49, Issue 6, at pp 738-749

⁶⁰ Interim Constitution of Nepal (2007) article 32 (right to constitutional remedy), article 107 (jurisdiction of the supreme court)

⁶¹ *Ibid.*, Article 33 (c) Obligations of the State.

⁶² Comprehensive Peace Accord (2006) Article 5.2.5

⁶³ For example, physical assault and “battery,” (*kutpit*) exist in the Nepali National Code (*Muluki Ain*).

⁶⁴ The Nepal Army claims to have conducted military proceedings against its members for IHL or IHRL violations, however, the Nepal Army has never substantiated these claims despite repeated requests by OHCHR to do so.