



**NEPAL:  
JUSTICE IN TRANSITION**

February 2008

## **EXECUTIVE SUMMARY**

This report documents serious human rights concerns arising from the lack of implementation of the provision in the Comprehensive Peace Accord of November 2006 “not to operate parallel structures or any form of structure in any areas of the State or Government”. “People’s courts” set up by the Communist Party of Nepal (Maoist) (CPN-M) had been very active in certain parts of the country during the armed conflict and CPN-M militia regularly took on a policing role, especially in the period after 2003.

Despite an order in January 2007 from Prachanda, the leader of the CPN-M, to end “people’s courts”, there remain major concerns regarding the lack of law enforcement and the failure to re-establish the rule of law. This is partly due to a lack of clarity regarding the mechanisms, responsibilities and/or procedures for the implementation of the CPA provision on parallel systems. The commitment is stated but nowhere is it made clear how it will be put into action.

This report also documents the work of the CPN-M “justice system” during the time of the conflict, particularly in light of international fair trial standards. It notes some positive elements such as it being cheaper, quicker and more accessible than the state system. The CPN-M system nevertheless fails to meet fundamental standards for fair trial at the pre-trial, hearing, trial and post-trial stages. Some of the shortcomings identified such as poor detention conditions sometimes amounting to torture, bias in favour of complainants, lack of consistency in the application of the system and lack of criteria for the selection of “judges” were acknowledged by CPN-M district-level leaders during visits by the ICJ to 14 districts to examine the impact of the lack of implementation of the CPA provision.

The ICJ found many people were living in governance, law enforcement and justice vacuums – much more pronounced than in the period before the conflict. The impact of the CPN-M “justice system” on the state system can be seen in the lower number of cases coming to the courts throughout the period of the conflict. There was also a marked impact on traditional dispute resolution mechanisms operating at the village level in many communities.

In a few of the districts visited by ICJ, such as Kailali, Kanchanpur, Saptari and Siraha districts, there were reports of how the CPN-M had put pressure on the community-based traditional dispute resolution mechanisms to stop functioning or to perform in the interest of the CPN-M. In some other districts, members of traditional mechanisms were appointed as CPN-M “judges”, often without their clear consent.

The absence of state institutions, such as the police and judiciary at village level in many districts, also forced villagers to use informal dispute resolution mechanisms to address cases which would normally have been dealt with by the state system.

This report focuses on justice issues for ordinary people not directly involved with the conflict during the current period of transition, i.e. on civil cases filed to settle land, water and property disputes as well as family affairs; on those people suspected of petty crime who were “tried” by the CPN-M’s “people’s courts” and for those people who were victims of serious crimes which were not investigated at all. These cases remain in limbo, with resulting dangers of further complications and erosion of trust in the rule of law. More than a year after the CPA was signed much work remains to be done to ensure justice is delivered in relation to these cases. Taking action as a matter of urgency will help to restore the public’s confidence in the rule of law and the judiciary.

The impact of the law enforcement and justice vacuums is particularly tangible in the southern *Terai* area of the country. The ICJ has serious concerns about a lack of public security as the police remain largely absent in rural areas and the work of the courts is often disrupted in this part of the country due to threats to civil servants, including court officials and public prosecutors from the *Pahade* communities.

In addition to the lack of clarity on the implementation of the CPA provision to bring an end to parallel systems, the ICJ found that a divergence in the views of the CPN-M and the other parties as to what would constitute the “new judiciary” in the “new Nepal”. Many ordinary people advocated for the recognition of the community-level dispute mechanisms. In a welcome initiative, the Government in close cooperation with United Nations Development Programme (UNDP) has drafted a Mediation Bill which has some positive features.

The ICJ’s main recommendations are:

- Public security needs to be addressed. This should include a review of the current and future role of the Young Communist League (YCL), the youth wing of the CPN-M, in respect of the maintenance of law and order. If parallel public security forces are eventually merged or YCL or PLA are integrated into government forces, both they and candidates of the security forces should be subject to a thorough human rights vetting process.
- A group of experts should be constituted to advise the Government on how to dispose of cases currently in limbo. They should be asked to put together criteria to be provided to authorities at the district level so they can start

settling these cases. This will assist in re-establishing the rule of law in rural areas and giving people greater confidence that this process is underway.

- The statute of limitations for those cases that were never investigated by police should be extended.
- The Mediation Bill should be amended to rectify its shortcomings and put into practice as soon as possible.

The presence of the state in large parts of the country has always been weak. It was further weakened during the conflict. The state, the CPN-M and others, such as the UN and traditional and community-based mediation systems, have key roles to play to ensure the return of the rule of law.

A draft of this report was sent to the Ministry of Justice and Parliamentary Affairs and to the CPN-M leadership for comment in late September – early October 2007. Unfortunately, no comments were received.

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	i
1. INTRODUCTION .....	1
2. BACKGROUND .....	4
3. THE CPN-M PARALLEL JUSTICE SYSTEM .....	6
<i>Three levels of “people’s courts”</i> .....	8
<i>Right to representation</i> .....	10
<i>Sentencing and punishments in criminal cases</i> .....	11
<i>Positive and negative aspects of the CPN-M “justice system”</i> .....	12
<i>Concerns related to the functioning of the “people’s courts” in the transition since April 2006</i> .....	14
4. INTERNATIONAL STANDARDS .....	16
5. RETREAT OF THE STATE AND TRADITIONAL JUSTICE SYSTEMS .....	19
6. DIFFICULTIES IN DELIVERING JUSTICE IN THE TRANSITION PERIOD .....	22
<i>Transition in the Tarai region</i> .....	23
7. THE FUTURE.....	26
8. CONCLUSIONS AND RECOMMENDATIONS.....	28
Appendix A: .....	31

# NEPAL: JUSTICE IN TRANSITION

## 1. INTRODUCTION

The state in Nepal has struggled to extend its justice system to rural areas of the country and the rule of law has been seen as weak. Law enforcement institutions and the judiciary have been criticised for their lack of effectiveness in tackling crime and dealing with civil disputes, especially in remote areas. The lack of access to justice for marginalised groups such as indigenous communities, lower castes and women, especially in outlying rural areas has also been a longstanding concern. Throughout the recent 10-year armed conflict between the Communist Party of Nepal-Maoist (CPN-M or Maoist) and the Government, the rule of law has been further weakened, including through the establishment of parallel systems of justice by the CPN-M. Despite political setbacks, the current peace process presents a unique opportunity to address the longstanding impediments to justice and specific problems created by the conflict, with the aim of delivering equitable justice for all.

As part of the Comprehensive Peace Agreement (CPA) of 21 November 2006, the Government of Nepal and the CPN-M agreed “not to operate parallel structures or any form of structure in any areas of the State or Government”.<sup>1</sup> Such parallel structures had gradually come into being during the armed conflict. In large parts of the countryside, police posts had been destroyed by the CPN-M. Public prosecutors and district courts, normally based in district headquarters, were technically functioning but in practice very few cases were filed and court officials were severely hampered in conducting normal business (for instance: *subpoenas* could not be delivered; court officials could not visit the field to assess claims in land cases and court decisions could not be executed). Other government officials were also absent in large parts of the countryside. In other parts of the country, especially during the latter part of the conflict, the state’s institutions such as the judiciary and the police were functioning side by side with their counterparts set up by the CPN-M: the “people’s courts” and the militia. The latter regularly took on a policing role. It was replaced by the CPN-M youth wing, the Young Communist League (YCL) in December 2006.

In the CPA, the two sides pledged their commitment to human rights and to people’s right to redress for past human rights violations. The CPA also contains a provision

---

<sup>1</sup> See paragraph 10.1 of the CPA available at <http://www.peace.gov.np/eng/programs.asp?info=Resources/Publications&id=6&menu=1>.

explicitly confirming that the Nepal Police and Armed Police Force will be in charge of “maintaining the legal system and law and order along with criminal investigations”.<sup>2</sup> In line with these provisions, the CPN-M on 18 January 2007 announced the dissolution of all “people’s courts”.

Despite these CPA provisions, there is continuing concern about how the rule of law can be re-established in the country during the period of transition following the conflict, specifically in those areas where law and order and the justice system have virtually collapsed. This is partly due to a lack of clarity regarding the mechanisms, responsibilities and/or procedures for implementation of the CPA provision on parallel systems.

Much of the debate regarding justice in the country since the signing of the CPA has so far focused on transitional justice initiatives directly related to human rights violations committed during the conflict, such as accountability for the hundreds of disappearances that occurred. The ICJ strongly supports the calls for transitional justice initiatives and has deplored the lack of clarity, capacity and potentially a lack of genuine commitment resulting in the failure so far to establish effective transitional mechanisms.<sup>3</sup> For example, paragraph 5.1.3 of the CPA provides for the fate or whereabouts of people who disappeared at the hands of both sides during the conflict to be made public and their families to be informed within 60 days of the date on which the CPA was signed. Clearly this provision has not been implemented.

This report highlights the impact of the conflict on justice issues for ordinary people not directly involved with the conflict, i.e. on civil cases filed to settle land, water and property disputes as well as family affairs; on those people suspected of petty crime who were “tried” by the CPN-M’s “people’s courts” and for those people who were victims of serious crimes which were not investigated at all. These cases remain in limbo, with resulting dangers of further complications and erosion of trust in the rule of law. More than a year after the CPA was signed much work remains to be done to ensure justice is delivered in relation to these cases. Taking action as a matter of urgency will help to restore the public’s confidence in the rule of law and the judiciary. Solutions for many of the issues highlighted in this report can be found now, without having to wait for a new constitution to come into being.

This report documents the ways in which the rule of law and the provision of justice outside the immediate context of political and national security issues in the conflict,

---

<sup>2</sup> See paragraph 5.1.6 of the CPA, *ibidem*

<sup>3</sup> See recent ICJ press statements, including *Nepal - Truth Commission Bill disregards victims’ rights: Draft bill fails to meet international human rights standards* of 23 August 2007, *Nepal - ICJ urges Government to ensure “High level Commission of Inquiry on Disappeared Citizens” meets international standards and complies with Supreme Court order* of 16 July 2007 and *Nepal - ICJ provides 13 recommendations on Interim Constitution* of 14 February 2007.

have been affected by the conflict and describes the problems faced by people seeking to obtain justice.<sup>4</sup> It highlights how key institutions are failing to deliver services, particularly in areas that were, and largely continue to be, under the *de facto* control of the CPN-M. It presents the findings of visits to 14 districts, including Sindhupalchowk, Chitwan, Dhanusha, Saptari, Siraha and Kathmandu in the Central Region; Kailali and Banke in the Mid-Western Region; Kanchanpur in the Far-Western Region, Kaski in the Western Region and Jhapa, Morang, Ilam and Dhankuta districts in the Eastern Region. The ICJ met with leaders of the CPN-M, “judges” of the “people’s courts”, Chief District Officers (CDOs), police officers, and members of the judiciary, lawyers and the general public. It also incorporates information obtained during meetings with the Secretary, Ministry of Law, Justice and Parliamentary Affairs; Supreme Court judges and registrar; the CPN-M leadership and with staff of national and United Nations (UN) agencies and projects such as the United Nations Development Programme (UNDP) Access to Justice Project; the United Nations Mission in Nepal (UNMIN) and the United Nations Office of the High Commissioner for Human Rights (OHCHR). The report makes a number of recommendations on ways in which the rule of law and the provision of justice could be re-established in the country during the period of transition.

This report is divided into six sections. The first section describes the background to the issues under examination. The second section sketches the work of the CPN-M “justice system” during the time of the armed conflict. The third section reviews the CPN-M “justice system” in light of international standards. The fourth section describes the impact of the resulting justice vacuum, including on traditional and community-based dispute mechanisms, especially in areas where the CPN-M set up its parallel structures. These include problems emerging from the role played by the Maoist “people’s courts”. The final section looks to the future of justice in the “new Nepal” and puts forward a number of recommendations for actors involved in the peace process and any reform of the justice system.

---

<sup>4</sup> As stated, the report does not address issues of transitional justice in relation to human rights abuses that occurred during the conflict. Neither does it address justice-related issues in relation to the CPN-M’s internal disciplinary processes, the CPN-M’s actions against security forces personnel, nor the role of Chief District Officers in relation to public security cases or general conflict-related crimes. It focuses solely on the impact of the conflict on ordinary civil and criminal cases.



## 2. BACKGROUND

The “people’s war” declared by the CPN-M in February 1996 formally came to an end as part of the CPA signed in November 2006. The signing of the CPA followed a remarkable series of events, most notably a successful mass movement organized in April 2006 by a coalition of seven mainstream political parties (Seven Party Alliance, SPA) together with the CPN-M, which forced King Gyanendra to relinquish direct power he had taken in February 2005.<sup>56</sup> The CPA has set the country on a path to a “new Nepal” and the re-establishment of multiparty democracy.<sup>7</sup>

The CPN-M initially stayed out of the new government formed in late April 2006 by the SPA under Prime Minister Girija Prasad Koirala. After an Interim Constitution was promulgated on 15 January 2007, 83 of its members entered the new interim Legislature-Parliament. This was followed by the formation of an Interim Government in which the CPN-M held five ministerial positions.<sup>8</sup>

As part of the CPA, the parties requested UN assistance with the implementation of key aspects of the agreement, in particular monitoring of arrangements in relation to arms and armed personnel and election monitoring. A UN mission, referred to as the UNMIN was formally established by Security Council resolution 1740 of 23 January 2007.<sup>9</sup> It was extended by a further six months in January 2008.

The establishment of a Constituent Assembly, which would be mandated to draw up a new Constitution and act as an interim legislature, was included in a wider set of agreements between the SPA and the CPN-M, the first of which was a 12-point understanding reached on 22 November 2005 before the conflict ended.<sup>10</sup> Initially, elections to the Constituent Assembly under a mixed electoral system were set for June 2007 though this became obsolete when the Election Commission announced that holding elections by June had become impossible due to security concerns and

---

<sup>5</sup> For more details on the human rights concerns during the King’s rule, see the ICJ report, *Nepal: The Rule of Law Abandoned* of March 2005, available at <http://www.icj.org/IMG/pdf/NepalReport2005.pdf>.

<sup>6</sup> The SPA is made up of the following parties: Nepali Congress, Nepali Congress (Democratic), Communist Party of Nepal (United Marxist Leninist), People’s Front Nepal, United Left Front, Nepal Sadhbavana Party-Ananda Devi and the Nepal Workers and Peasants’ Party. The Nepali Congress and Nepali Congress (Democratic) merged into the Nepali Congress in late September 2007.

<sup>7</sup> The notion of building a “new Nepal” was incorporated in paragraph 10.7 the CPA.

<sup>8</sup> Members of the CPN-M were appointed as Ministers of Information and Communications; Forest and Soil Conservation; Local Development; Works and Physical Planning and Women, Children and Social Welfare. The Minister for Forests resigned in early August 2007. The other Ministers resigned on 18 September 2007.

<sup>9</sup> See [http://www.un.org/Docs/sc/unsc\\_resolutions07.htm](http://www.un.org/Docs/sc/unsc_resolutions07.htm) for the full text of the resolution.

<sup>10</sup> See <http://www.peace.gov.np/eng/programs.asp?info=Resources/Publications&id=6&menu=1> for full text of the 12-point Letter of Understanding.

that a number of political issues needed to be addressed before the elections could be organized.

After it held its fifth expanded central committee (plenum) meeting in Kathmandu in early August, the CPN-M on 20 August 2007 put forward 22 demands, including for the declaration of a republic before the Constituent Assembly elections and for the introduction of a full proportional representation system for these elections. Prime Minister Koirala rejected these demands, after which on 18 September ministers of the CPN-M resigned from the Government and the party announced a series of protests. In early October 2007, a new date for elections to be held on 22 November 2007 was once again postponed.

After the signing of a 23-point agreement on 23 December 2007 the CPN-M rejoined the Government. After some further delay, the cabinet on 11 January 2008 set a new date of 10 April 2008 for the elections to take place.

In 2005, amid strong international pressure, the Government of King Gyanendra had agreed to the establishment of a human rights field operation by the OHCHR in Nepal. OHCHR addressed human rights abuses by both parties to the conflict and was instrumental in closely monitoring adherence to international standards during the mass demonstrations in April 2006. In September 2006, it published a report documenting its concerns regarding CPN-M abuses, including in the context of “law enforcement” and the “people’s courts”.<sup>11</sup> In response, the CPN-M said it had opened offices at district level, among other reasons to “take immediate public action against those responsible for beatings, abductions or killings carried out against party policy”.<sup>12</sup> In June 2007, OHCHR documented abuses by the Young Communist League (YCL), established by the CPN-M in December 2006.<sup>13</sup> The YCL continues to be the focus of much criticism and concerns about the lack of public security are increasing as the police remain largely absent in rural areas. Furthermore, there are increasing concerns about public security and the rule of law in eight districts of the southern *Tarai* area of the country, where members of the Madhesi communities - plainspeople who claim to represent half of the country’s population - have protested, sometimes violently, because of longstanding grievances that they have been discriminated against and in effect excluded them from public life.<sup>14</sup>

---

<sup>11</sup> See OHCHR-Nepal: *Human rights abuses by the CPN-M. Summary of concerns* of September 2006

<sup>12</sup> See OHCHR-Nepal: *Human rights abuses by the CPN-M. Summary of concerns* of September 2006, p. 1.

<sup>13</sup> See OHCHR-Nepal: *Allegations of human rights abuses by the Young Communist League* of June 2007, p. 3-4 for more details on the YCL’s role as a “militant organisation” and examples of its “law enforcement” activities, including patrols, “arrests” and punishment.

<sup>14</sup> See Hatlebakk, Magnus, *Economic and social structures that may explain the recent conflicts in the Tarai of Nepal*, June 2007, paper prepared for the Embassy of Norway, for more details on the various groups constituting the Madhesi community.

### 3. THE CPN-M PARALLEL JUSTICE SYSTEM

As the CPN-M expanded its presence throughout the country in the late 1990s, it started presenting itself as the “New Regime”. From around 2001, especially after the failure of a first attempt at peace talks in November 2001, the CPN-M gained considerable influence and control over large parts of the rural population. It was however only able to control territory on a permanent basis in a few districts of the Mid-Western Region, including Rukum and Rolpa. Even in those areas, the district headquarters remained under government control throughout the conflict. In most areas, while the state was largely absent (except when the security forces patrolled outside of district headquarters), the CPN-M’s presence was also tenuous. The majority of Nepali people lived in governance, law enforcement and justice vacuums – much more pronounced than in the period before the conflict.

“The state judiciary system is governed by phone, here in Nepal the Act prevails over the Constitution, rules prevail over the Act, regulation prevails over the Rule and a telephone call from a minister or top leader prevails over all law.” *Maoist district leader, Dhankuta District*

The CPN-M increasingly presented itself as the *de facto* ruler of the country, seeking to operate a political-legal system with some attributes of a state, including a judicial system. In 2003, the CPN-M issued a “statute” referred to as the “Public Legal Code, 2060 of the Republic of Nepal”. This “code” contains a Preamble setting out the following:

“Whereas the central feudal state authority is in a state of dissolution because of the people’s war against feudalistic forms of exploitation, injustice and ill-treatment organized cautiously by the leadership of the proletariat’s’ lead organization, the CPN-M guided by Marxism-Leninism- Maoism and Prachanda Path, and the People’s Government is in the process of taking root in the long run and being established at the local level,

Bearing in mind the fulfillment of the interest of the people and having the war as the centerpiece to it, it is expedient, in the specialized wartime and transitional phase of the balance of power, to regulate and systematize the functions that are transferred from the Central State authority,

Now, therefore, the United Revolutionary People's Council has enacted and commenced this brief, wartime and transitional Code."<sup>15</sup>

In the period before the introduction of the "code", the CPN-M was already intervening in disputes among the population residing in their "base areas" by *ad hoc* means and methods. After the code was issued, the CPN-M tried to impose similar systems largely based on the Public Legal Code. The CPN-M also sought to train some Maoist "judges". The "code" was strongly influenced by Nepal's National Code (*Muluki Ain*) and the prevailing legal system. The provision on division of cases, the method of investigation and the trial procedures as set out in the Maoist "code" were largely summarized versions of the prevailing national laws. The preliminary chapter of the "code" is self-explanatory in this respect. It states:

"Fair justice is almost impossible in the state system because they sell justice. In other words, you may say that justice is a trade. That's why our party was compelled to establish the people's court." Judge of "people's court", Kanchanpur District

"This law is a provisional document for a specialized wartime and transitional phase of the balance of power. This law shall come into effect in the territory, on the date and in the manner as specified by the decision of the United Revolutionary People's Council bearing in mind the dynamic character of the law i.e. law is developed, changed and reformed as needed by changes in time, circumstances and situations as well as the peoples' aspirations."

The underlying objectives of the Maoist legal system as expressed in the "code" are:

1. "The bases of the laws of the People's Republic of Nepal are the guiding principles of Marxism-Leninism-Maoism and Prachanda Path and any new constitution will also be based thereon. The law will be developed on the basis of the experience of the oppressed castes and tribes, classes and people's communities and based on the synthesis of a proletariat party. It is to be applied in resolving the conflict with the enemy class by authoritarian measures and resolving the conflict with the friendly class by communist centrality measures, taking into account the basic theoretical standards of the communist power.
2. It shall be the objective of any laws to fulfill the people's aspirations, punish the guilty and protect the innocent by identifying the guilty and controlling them, creating voluntary obedience to the law, with the objective of fighting

---

<sup>15</sup> Translation commissioned by the ICJ

against criminal and illegal behavior, protecting the people's democratic rights and also protecting the cause of the continuous progress of the revolution."<sup>16</sup>

Some provisions in the "code" apparently seek to introduce some principles of natural justice, including that all people are equal before the law. However, it also distinguishes between "friendly class" and "enemy class". One of the first principles explains: "The legal system shall be based on class preference provided that no discrimination shall be made in the application of the law."

### ***Three levels of "people's courts"***

Most of the time during the conflict, the "courts" were mobile, i.e. the "judges" would travel and hear cases on the spot, rather than in any fixed location. This was particularly the case in so-called Maoist "base areas". In other areas, the functions of the "courts" were performed by the CPN-M leadership in the villages, either by representatives of the "people's government" or sometimes by People's Liberation Army (PLA) or militia leaders.

In none of the 14 districts visited by ICJ were there any permanent Maoist "courts" or "judges" functioning during the conflict. In most locations a party member, whose main responsibility was normally political work was assigned additional responsibility to look after the "justice sector". But such person was rarely considered to be a CPN-M "judge" while in some cases he/she may have also worked as a "judge" from time to time, his/her major responsibility was to coordinate the "judicial process", including the allocation of "judges" to hear certain cases.

Local CPN-M leaders often evaded questions about the appointment of women "judges". While some maintained that women were appointed, they were not able to give examples. It is clear at the very least that the appointment of women "judges" was not a common practice.

According to the CPN-M, the "courts" operated on three levels:

- District-level "people's court"
- Appellate Court (consisting of a senior political cadre in the party)
- Court of Last Resort (consisting of three "judges" including one Central Committee member)

---

<sup>16</sup> See Public Legal Code of 2060, Chapter 2, General Principles 7 and 8.

In addition, in the east of the country, the courts were also said to be functioning at the Area-level.<sup>17</sup> The Area- and District-level “courts” did not have permanent “judges”, but “judges” were nominated by local Maoist political leaders or the person in charge of the “judicial process” (see above). There were no specific qualifications for being a “judge” set out in the “code” or elsewhere. According to local CPN-M leaders interviewed by the ICJ, the main virtues looked for in a “judge” were that he/she supported the party, had some knowledge of the judicial system, was acceptable to the local community and was moved to follow party orders.

“Judges” usually came from the local community, nominated following the above process and subsequently endorsed at a gathering of local people by nodding of heads or raising of hands. There were no fixed numbers of “judges” hearing each case. The number depended upon the party leader and people reported that cases were decided by one to five “judges”.

While the “code” in principle allows appeals, in practice this was rarely invoked by the parties. Furthermore, there is no specific written procedure setting out conditions for an appeal. In Kaski and Sindhupalchowk districts, the Maoist leader in charge of the “judicial sector” said that the CPN-M considered provisions of prevailing state law as reference where there were no specific provisions in the CPN-M “code”.

The “code” gave some latitude to the “judges” by means of the following provisions:

1. “The prevailing laws shall be applied creatively in the context of wartime and the nature of the crime.
2. Real justice instead of legal justice shall be pursued as the model of our society, and the making, development, extension and application of law shall be emphasized in accordance with the same sense and spirit.”<sup>18</sup>

The “code” does not contain any specified procedures for investigation, trial and hearing. In none of the districts visited by the ICJ were formal records of cases heard by the “justice system” available. Although, in every region, local CPN-M leaders told the ICJ that decisions were delivered in written form, they did not provide copies of such decisions. The CPN-M only provided one written judgment in a case decided by a party decision and not a “people’s court.”<sup>19</sup> On the basis of some other documents (i.e. copy of appeals) obtained by the ICJ from parties in a dispute, it appears that written decisions were prepared, including in some “criminal” cases in districts such as Kailali and Kaski. However, it is clear that in practice, most

---

<sup>17</sup> In the CPN-M system, an area indicated a group of villages, below the level of the district.

<sup>18</sup> See CPN-M Public Legal Code of 2060, Chapter 2, General Principles 5 and 6.

<sup>19</sup> The case concerned a dispute over the ownership of the “Kumudani Children’s Home”, a private school in Pokhara, Kaski district. The decision was taken by the leadership of the Tamuwan Autonomous Region on 13 January 2007.

“judgments” were delivered verbally by the local “judge(s)”. Several members of the CPN-M interviewed by the ICJ confirmed that when the local party leader was not sure about the possible impact of a judgment on the party in the area he/she did not allow the “judges” to decide or announce the judgment without approval of, or coordination with, the party.

There were no significant procedural differences between the hearings in civil and criminal cases. Truth-seeking methods in both cases (criminal or civil) involved:

- Seeking information from party members,
- Seeking information from local people, and
- Asking someone from the party to investigate and provide findings.

Other features of the method by which the “people’s court” evaluated the evidence included:

- Evidence about the character of the witness and accused was admissible,
- The credibility of the accused or witness was assessed on the basis of their relationship with the party,
- Witnesses were not required to take any form of oath before giving evidence.

The “code” gives the accused the right to defend him/herself. Statements were often taken from the accused in an open place in front of a hostile crowd. Though most of the leaders interviewed by the ICJ defended the fairness of hearings, they also acknowledged that on some occasions slapping or intimidating the accused by the judges had been considered acceptable practice.

In addition to CPN-M “judges”, different party entities were involved in dispensing “justice”. In some instances, the party by-passed the “people’s court” and decided cases themselves. In several cases, where disputing parties had not approached the CPN-M or “people’s court”, the CPN-M nevertheless intervened in the case, claiming this was in the public interest.

### ***Right to representation***

The “code” is silent on the right to counsel; lawyers are rarely mentioned. The word “lawyer” is used in section 19.1 as someone who can file a case on behalf of someone else. Though the word “lawyer” is used in the section, it denotes someone acting as an agent rather than as a lawyer defending the interests of his/her client.

After the enactment of the “code”, the CPN-M in the Mid-Western Region organized a seminar to introduce their legal system in April or May 2004. More than 50 lawyers from Banke, Bardiya and Dang districts took part. The main objective of the seminar was to demonstrate the CPN-M “judicial” system, rather than to invite lawyers to become actively involved with it. During interviews with various CPN-M officials, lawyers and parties to a “proceeding”, no one was able to give an example of a case where a lawyer had been present during a hearing to defend or support his/her client. The main reason given by local Maoist leaders is that the “courts” did not have a permanent location and most of the cases were tried summarily by mobile “courts”, therefore, it was not practically possible for an accused or party to a civil dispute to appoint and bring a lawyer. They insisted that parties were allowed to bring any person capable to represent them, irrespective of whether or not such person was a lawyer. This was borne out in several cases studied by the ICJ.

### **Sentencing and punishments in criminal cases**

In the “code” only three types of punishments are mentioned:

- Imprisonment,
- Imprisonment with labour,
- Fine.

In minor cases like destruction or theft of forest products, the “code” prescribes a specified term of imprisonment, such as “imprisonment of not more than one year”. Serious “crimes” such as “offences against the people’s government” were punishable by periods of imprisonment up to 10 years. Generally, the punishments imposed were more lenient than in the state system. As in the state system, no death sentences were provided for.<sup>20 21</sup> During its research, the ICJ did not find any case in which the accused was sentenced to more than five years’ imprisonment. According to local leaders, “judges” exercised their discretion in fixing the term of imprisonment by taking into account *mens rea* (mental element of a crime) and the motive of the offender.

---

<sup>20</sup> According to the *Nepal Samacharpatra* of 22 June 2001, the CPN-M had given directives to impose and carry out the death penalty, but this was in the period before the “code” was issued.

<sup>21</sup> Local Maoist leaders denied that any state security personnel or political opponents were executed following a judgment of a “people’s courts”. They said any such deaths were legitimate killings in the course of the armed conflict.



## **Positive and negative aspects of the CPN-M “justice system”**

The CPN-M appears to be aware of some of the shortcomings of the system put in place. When district-level leaders were asked to identify negative aspects of their judicial system, they repeatedly mentioned the following points:

1. The system lacked adequate resources to detain criminal suspects and detention conditions could be said to amount to cruel, inhuman or degrading treatment. One CPN-M leader interviewed by the ICJ acknowledged that the conditions in which accused /offenders were kept could sometimes be said to “amount to torture”;
2. The person first coming to seek justice was usually considered the victim and presumed to be innocent, thus prejudice against the defendant and bias towards the complainant were very common;
3. Poor case management, including lack of records;
4. Lack of consistency in the application of the system;
5. No formal criteria for the selection of “judges”.

The Maoist judicial system has been severely criticized by victims of the system, mostly in relation to its criminal investigations and trial procedures. However, in some family and matrimonial cases, the parties involved gave the ICJ some positive comments. Some lawyers also expressed their appreciation of the CPN-M’s role in such cases, notwithstanding the negative impact the functioning of the “courts” had on their income.

It has to be recognized that in some areas, the local population actively sought to use the CPN-M’s “judicial” mechanisms as they did not trust the state’s structures, or because the latter were largely absent. People interviewed by the ICJ explained how they found the “people’s courts” to be much faster in delivering justice than the state’s courts; how they preferred going to the “people’s courts” as they did not have to engage often expensive lawyers, how they appreciated cases being heard in their own, local language and how easily accessible the “people’s courts” were in comparison to district courts situated in distant places.

“I went to the Maoists to get justice. At that time, it was very difficult for police to enter the villages. So I did not ask any police because I knew that if I would inform them, the Maoists would torture me ...”

*Complainant to “people’s court” Kanchanpur District*

People from local communities raised with the ICJ a number of aspects of the CPN-M “justice system” that they considered were positive and better than the state system:

1. The truth was more likely to be established because decision makers were local.
2. Justice was prompt and decisions were implemented.
3. Accessing justice was inexpensive.
4. The poor and those living in remote areas had good access to the system.
5. The decisions were often more culturally sensitive.
6. Procedures were less complicated and the parties themselves were able to write petitions like appeals, using every day language.
7. Proceedings were carried out in local languages.

Some people in remote villages who had no previous interaction with the state justice system stressed how their experiences with the “people’s courts” had “connected” them to the justice system. As a result, they felt more “capable” of approaching the state court system in the future.

The preferred mode of concluding civil (and on rare occasions, criminal) cases was to find a compromise between the parties involved. CPN-M estimates in various parts of the country are that between 75% and 85% of all cases before the CPN-M system were concluded through mediation and compromise. However, in some cases parties felt implicitly coerced into reaching a compromise, rather than genuinely reaching a win/win outcome for both parties.

One major concern about the CPN-M system relates to its handling of cases involving gender-based violence. The ICJ learned of incidents where women were made to give detailed evidence in front of large crowds, thereby being re-victimized. In at least one case, a woman accused of being a sex worker was said to have been particularly traumatised by her public “trial”. Her neighbours considered that her subsequent suicide was a result of this experience.

“Our case was running in the Supreme Court. We were waiting for a decision. The long time it took made us very unhappy as we had started the case in 1984. All family members were suffering. The local Maoists knew our case very well. They encouraged us to go to the ‘people’s court’. They called us and asked lots of questions. They prepared case details. They went to view the state court files in the district court and Supreme Court... Finally, they gave their verdict [in June 2005]. After that we compromised with the other party. We submitted their verdict to the Supreme Court and the court concluded the case after that.” *A party to a property dispute in the Far-Western Region. The CPN-M threatened to confiscate the property if the two parties did not come to a compromise.*

Cultural prejudice and traditional insensitivity prevailing in the society were sometimes amplified in the name of “justice”. One CPN-M leader in Saptari District, for instance, recounted how the “people’s court” in the district had compelled an “offender” to marry a rape victim as a form of punishment and reparation.

“In the traditional *panchayat* system, women were never involved in decisions. It would be better if women could be involved. Now they are not even present in the gatherings. They need to uphold the tradition of *pardah*. Slowly it could change.” *Dalit woman activist, Siraha District*

### **Concerns related to the functioning of the “people’s courts” in the transition since April 2006**

In the immediate aftermath of the April 2006 protest movement and the subsequent ceasefire, the CPN-M moved into government-controlled areas and set up “people’s courts” in urban areas. They were mostly functioning from newly-opened political offices in district headquarters. Amid widespread protests, including from OHCHR, the CPN-M Chairman Prachanda issued a directive on 3 July 2006 that “people’s courts” were to cease to function in “big cities and Kathmandu”. In some case, the “people’s courts” were subsequently transferred from the district headquarters to a nearby Village Development Committee (VDC), apparently to circumvent the instruction. At the village level, the “people’s courts” continued to function in many areas after the ceasefire, the CPA and the directive of the CPN-M leadership of January 2007.

There was also increasing criticism, including from OHCHR, of human rights abuses committed by the CPN-M in the context of its “law enforcement” activities. In recognition of these criticisms, the CPN-M initially issued oral directives in late August – early September 2006 in which it, among other things, instructed its members at the district level “to take immediate public action against those responsible for beatings, abductions or killings carried out against party policy”. In one such case of public action in Sindhupalchowk district which reportedly took place in late 2006, nine cadres of the CPN-M accused of murder were said to have been allowed to escape during a public meeting. Rather than bringing them to “justice” they were reportedly transferred to another district.

Despite the specific directives to close the “people’s courts”, some villagers have continued to lodge complaints with the CPN-M. The ICJ was informed in most districts that the CPN-M encouraged complainants to go to the police if the case

involved crimes. The CPN-M would seek to resolve complaints of a civil nature by mediation, with cases kept pending, or people were encouraged to go to the state court system, when no agreement was reached.

While the “people’s courts” stopped functioning in most parts of the country in the months after the January 2007 directive by Prachanda, there are reports that as late as May 2007, cases continued to be heard by CPN-M “judges” in districts such as Rolpa and Rukum. From around mid-September 2007, after the CPN-M left the government and the peace process faced difficulties, there were increasing reports of the CPN-M hearing disputes being brought to its attention at the district level. CPN-M leaders maintain the disputes are handled on a mediation basis rather than as a judicial process. However, the ICJ is concerned that the processes used do not adhere to fundamental principles of mediation such as its essential voluntarily nature. In addition, abductions, related investigations and punishments continued to be carried out by CPN-M sister organizations and the YCL. These organizations are unable to provide due process or justice and should not perform any law enforcement or judicial functions. Their conduct raises serious concerns about the right to liberty and security and, in some cases, the right to physical integrity and the right to life.

#### **4. INTERNATIONAL STANDARDS**

It is clear that the CPN-M “justice system” is not in line with customary law rules. It fails to meet fundamental standards for fair trial at the pre-trial, hearing, trial and post-trial stage. It is equally clear that the state’s court system has failed to provide justice, especially for disadvantaged groups, and needs a full overhaul to overcome the many problems that have dogged the system from well before the start of the armed conflict.

Internationally accepted standards of fairness, independence and impartiality against which trials conducted by armed opposition groups during a time of armed conflict are assessed in terms of fairness are set out in Article 3 Common to the Geneva Conventions. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The International Committee of the Red Cross (ICRC) has concluded that the rule according to which “No one may be convicted or sentenced, except pursuant to a fair trial affording all essential guarantees” is a rule of international customary law applicable to non-international armed conflict.<sup>22</sup> This rule implies the existence of at least the following guarantees:

- Independent and impartial tribunal;
- Right to information on the nature and cause of the accusation
- The right and means of defence
- The principle of individual responsibility
- The principle of non-retroactivity
- The principle of the presumption of innocence
- The right of the accused to be present at his own trial
- The right not to be compelled to testify against oneself or to confess guilt
- The right to be informed of judicial remedies and of the time-limits in which they must be exercised.

These judicial guarantees reflect in a general way what is set out in detail in Article 75 (4) of Additional Protocol I to the Geneva Conventions and in Article 6 of Additional Protocol II. It has to be noted that Nepal is not a party to these Additional Protocols and that in any event only Additional Protocol II applies to internal armed conflicts. These provisions are relevant as they assist in defining the exact scope of

---

<sup>22</sup> Rule No. 100 in International Committee of the Red Cross, Customary International Humanitarian Law, Volume I, Rules, Cambridge University Press, 2005, p.353 and ff.

Common Article 3 and the rules of international customary law referred to above, and the duties of the parties in an armed conflict.

Others rules of international customary law must also be taken into account:

- No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.
- No one may be convicted of an offence except on the basis of individual criminal responsibility.<sup>23</sup>

The ICRC has identified several rules of international customary law applicable to a non international armed conflict<sup>24</sup>, which also need to take into consideration in the case of Nepal:

- Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention.
- Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women.
- Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units.
- Pillage of the personal belongings of persons deprived of their liberty is prohibited.
- The personal details of persons deprived of their liberty must be recorded.
- Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities.
- Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.
- The personal convictions and religious practices of persons deprived of their liberty must be respected.

On the issue of reparation for acts committed by non-state actors (including by the “justice” system of a non-state actor), there is a possibility for victims to obtain reparation for acts committed by non-state actors through civil suit for damages

---

<sup>23</sup> See Rules 101 and 102 in Customary International Humanitarian Law, Volume I, Rules, Op. Cit.

<sup>24</sup> See Rules 118, 119, 120, 122, 123, 125, 126 and 127 in Customary International Humanitarian Law, Volume I, Rules, Op. Cit., p.429 and ff.

against the offenders before the State's courts. Principle 15 of the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* states that: "In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim."

The development of the parallel CPN-M "judicial" structures during the years of the conflict raises important issues that will need careful consideration if the Government is to be successful in establishing and re-establishing the people's trust in the rule of law.

Nepal faces the challenge of introducing a uniform justice system throughout the country as well as finding mechanisms to deal with cases that have remained unresolved at the time the parallel structures were at least formally disbanded. Compounding this is the need to deal with thousands of violations directly related to the conflict. At the same time, the ICJ believes that with the necessary political will on all sides, creative solutions can be found, and the opportunities presented by the transition can be used in a constructive way, to improve the capacity of the justice system to deliver justice to all.

The SPA and the CPN-M have repeatedly pledged their commitment to uphold human rights. They did so in November 2005 as part of a 12-point Letter of Understanding reached between both sides. On 17 April 2006, in its Statement of Commitment to Human Rights and Humanitarian Principles, the CPN-M further reiterated its "fundamental respect and commitment to the principles and norms of international humanitarian law and international human rights enshrined in the Universal Declaration of Human Rights and in the Geneva Conventions and their additional protocols." In the CPA, both parties have also pledged their commitment to the rule of law and to adopt a political system which fully upholds it.

## 5. RETREAT OF THE STATE AND TRADITIONAL JUSTICE SYSTEMS

As the conflict intensified, it started to impact on the functioning of district courts. For instance, it became difficult and sometimes impossible to deliver *subpoenas* to parties in dispute; court officials could not visit the field to assess claims in land cases and the execution of judgments in cases requiring the physical presence of court staff, such as in cases involving the partition or repossession of properties, became very difficult. Similarly, it became very difficult to arrest and detain absconded offenders and to execute penalties and punishments.

Throughout the years of the conflict, there was a marked reduction in the number of cases handled by different levels of state courts in CPN-M influenced areas.<sup>25</sup> In contrast, case loads clearly increased in urban districts such as Kathmandu, Lalitpur and Bhaktapur. For example, the case load in Kathmandu District Court increased from 8,581 in 2002/3 to 11,174 in 2005/6. Despite the increase in the number of cases in these district courts, the total number of cases in all district courts declined from 65,765 in 2002/3 to 64,283 in 2003/4 and 58,902 in 2004/5; a clear sign of the overall impact of the conflict.

The conflict also had a clear impact on informal dispute resolution mechanisms at the village level in many communities.<sup>26</sup>

Traditional means of dispute resolutions historically could be classified as:

- Mediation by community leaders;
- Decision-making processes by community leaders, and
- Ordeal (*Divya Pariksha*).<sup>27</sup>

In more recent times, new categories of “mediators” such as political party leaders, heads of women's organisations or forestry users' groups have engaged in

---

<sup>25</sup> See Supreme Court statistics in Appendix A for some examples.

<sup>26</sup> Nepal has more than eighty spoken languages and different cultural communities. Indigenous populations like the Tharu and Danuwar in the Tarai and Tamang, Jaad, Gurung, Magar, Sherpa and other Mongolian communities in the hill areas have historically resolved most of the disputes arising within their community by traditional cultural means. Nepal's immigrant Hindu communities such as Khas, Kumauni, Ghadwalis and Purvias have also had their traditions of dispute resolution within the community.

<sup>27</sup> ‘Ordeal’ refers to the practice of making an accused undergo a prescribed physical test to prove their guilt or innocence.



“community-based” mediation.<sup>28</sup> The procedures of some of those “community-based” mediation practices differ significantly from traditional mediation practices. “Community-based” mediation procedures were largely designed by donor agencies and NGOs. The major difference is that at the community level, cases are not only mediated but decisions are also taken on the merits if amicable solutions cannot be found. In addition to the systems of traditional and community-based mediation, there are institutions or positions such as *Badghar* and *Chaukidar* in the Tharu indigenous communities in the Mid- and Far-Western Regions and the *Mukhia* in the remote district of Mustang, and *Khata Yangi* traditional dispute resolution method in the Sherpa community of upper Solukhumbu district. These positions or systems were initially set up to handle issues such as security of a village and distribution of irrigation waters but later took on a wider mediation role.

There have been some attempts to include these non-judicial dispute resolution mechanisms within the laws related to local government. The word *panchayat* traditionally refers to a gathering of five local reputed persons who are supposed to adjudicate in disputes within the communities. It was used by King Mahendra to describe the party-less political system designed in 1961. During the *panchayat* system, the village-level *panchayats* and town *panchayats* were given power in law to hear petty cases such as those relating to land disputes, payment of alimony and use of irrigation water.

“The traditional system is better than the Maoist or state system. There is more possibility of justice. The old people sitting on the *panchayats* know the facts. They have no other interests.” *Two lawyers, Siraha District*

The Local Self-Governance Act, 1999 (LSGA) has elaborate provisions for mediation and arbitration to be carried out by Village Development Committees and Municipal Development Committees in some civil cases. They were to start from a date to be notified by the Government. However, due to the armed conflict, as well as major political developments at the national level, to date they have not been put into effect.<sup>29</sup>

<sup>28</sup> A number of international donor agencies such as UNDP, The Asia Foundation and DFID (through its Enabling State Programme) have funded programmes and worked with some government agencies and NGOs to implement community mediation projects in several districts of Nepal.

<sup>29</sup> See, Part 2, Chapter 5, Sections 33 to 42 of the LSGA for a description of the judicial powers of Village Development Committees and Part 3, Chapter 5, Sections 101 to 110 regarding the judicial powers of Municipalities. The House of Representatives was dissolved in May 2002 and was only reinstated after the April 2006 mass movement. Local bodies stopped functioning after their five-year term ran out in 2002.

In a few of the districts visited by the ICJ, such as Kailali, Kanchanpur, Saptari and Siraha districts, there were reports of how the CPN-M had put pressure on the community-based traditional dispute resolution mechanisms to stop functioning or to perform in the interests of the CPN-M. In some other districts, members of traditional mechanisms were appointed as CPN-M “judges”, often without their clear consent.

The absence of state institutions such as the police and judiciary at village level in many districts also forced villagers to use informal dispute resolution mechanisms to address cases which would normally have been dealt with by the state system. The lack of freedom of movement was a key factor in this respect, as the CPN-M in many districts required villagers to obtain permission to travel to district headquarters. In addition, the general deterioration of the security situation stopped villagers in remote areas from undertaking what often would be several days’ travel to district headquarters to make complaints to the police about incidents of a criminal nature.

As a result, there have been many cases of serious crimes such as murder and rape which have not been investigated by the police or the CPN-M. In some of these cases (including rape and causing bodily harm), the law requires a charge sheet to be filed within 35 days, a period which has long expired. As a result, no justice has been done and it is unclear how the injustice could be rectified without the law being amended or interpreted so that the period (35 days) is understood not to have run while it could not be complied with at the time of the conflict.<sup>30</sup> Other such serious cases have been dealt with by the “people’s courts” and have often resulted in inadequately light punishments being imposed. Other cases were pending at the time the “people’s courts” stopped functioning. There are also concerns that the “trials” before the “people’s courts” did not comply with fair trial standards and a significant number of innocent people may have suffered as a result.

In addition, the CPN-M has interfered with cases filed in different levels of courts, including the Supreme Court. The withdrawal of a case concerning the “Kumudani Children’s Home’s” from the Appellate Court in Pokhara, Kaski District and the decision by the CPN-M leadership of the *Tamuwan Autonomous Region* to settle a dispute about ownership of the school is one example of such interference (see above).

---

<sup>30</sup> During a meeting with the Secretary, Ministry of Law, Justice and Parliamentary Affairs, ICJ delegates were informed that a new law on limitations is being drafted by the Law Commission. The Secretary suggested this process could be used to address the problems described here.

## 6. DIFFICULTIES IN DELIVERING JUSTICE IN THE TRANSITION PERIOD

The lack of clarity on how law and order and justice issues will be dealt with in the transition period has led to tension on the ground, especially between the Nepal Police and the CPN-M. This was especially so in the period immediately after the police started to rebuild police posts in remote areas and to re-deploy police officers to them. For instance, in Sindhupalchowk District, the ICJ was informed in late May 2007 that all 22 police posts were back in operation, although several of them continued to need major reconstruction. Concerns were also expressed about actions by the YCL and other organizations related to the CPN-M, such as the All Nepal Women's Association (Revolutionary) demonstrating outside the new police posts and calling for them to be closed again.

After the CPA, people reported that they had seen some increase in cooperation between CPN-M and Nepal Police. For instance, the CPN-M handed over people suspected of having committed crimes to the police in Sindhupalchowk, Kaski and Saptari districts. However, this was by no means a common pattern across the country. In many districts, the CPN-M continued to investigate complaints filed at its offices, especially when it concerned civil disputes such as family disputes, debts, water, land and other property-related cases. Recently, the CPN-M and more specifically the YCL are increasingly reported to be carrying out parallel "police" patrols. The CPN-M on 4 August 2007 announced a decision to establish United Revolutionary People's Councils (URPC) to "resolve people's problems and help provide justice to the people."

On 3 April 2007, the Home Ministry issued instructions requiring Chief District Officers (CDOs) and police to strengthen their operations with regard to maintaining law and order. However, during trips to the districts in May to July 2007, the ICJ found few signs of improvement. International agencies have also pointed to the lack of public security in the country. In a report published in June 2007, OHCHR called upon the Government to "develop a coordinated strategy to address public security and law enforcement, with full consultation with and the support of all parties to the CPA. Without it, there risks being a further deterioration of law and order with inherent risks to respect for human rights."<sup>31</sup> Police have told OHCHR that they feel under pressure from political parties whenever YCL/CPN-M cadres are suspected of having committed crimes. Such cases are often resolved through mediation and an agreement to either investigate or pay compensation, rather than holding individuals criminally accountable. The lack of political and institutional support for police on

---

<sup>31</sup> OHCHR, *Allegations of human rights abuses by the Young Communist League*, June 2007, page 15.

the ground to take action against perpetrators continues to be of serious concern.<sup>32</sup> Furthermore, the ICJ believes that unless fundamental structural changes are made to the Nepal Police, the intelligence agencies and other forces involved in maintaining law and order, the situation will likely deteriorate. There is also an urgent need to address the YCL's current and future role in respect of the maintenance of law and order. Any review of the security sector should include a review of the current and future role of the YCL in respect of the maintenance of law and order. If parallel public security forces are eventually merged or YCL or PLA are integrated into government forces, both they and candidates of the security forces should be subject to a thorough vetting for any past actions in violation of international human rights and humanitarian law.

Another outstanding issue concerns those who were "sentenced" to corrective punishment such as "forced labour" by the "people's courts".<sup>33</sup> Though, most such people have returned to their villages or communities, it appears that the CPN-M has not released some of them and that others, after they returned home, were pressurized by the CPN-M to work for the party or for community-level services like schools and health posts. According to ICJ research, 18 people in Sindhupalchowk district continued to serve their punishment in May 2007. One of the CPN-M "judges" interviewed by the ICJ stated that the CPN-M was ready to transfer these people to district jails; while police and CDOs stated they would initiate their own investigations into the alleged crimes committed, possibly resulting in charges being brought and trials taking place before the state's courts. In late July 2007, a CPN-M leader at the national level indicated that people in other districts in addition to Sindhupalchowk may have been performing labour as a form of punishment. He claimed these people were doing this out of their own free will in recognition of a need to provide service to the community for a crime committed. He stressed they were not in captivity as such.

### ***Transition in the Tarai region***

The restoration of the rule of law during the current transition period has been particularly problematic in eight southern districts, where the majority of the population belongs to the *Madhesi* community. In the context of the drafting of the Interim Constitution and the planned Constituent Assembly elections, members of this community became increasingly vocal in demanding political representation at

---

<sup>32</sup> Ibidem, page 13.

<sup>33</sup> The term "forced labour" is commonly used in Nepal to describe a form of punishment imposed by the CPN-M where those found "guilty" by the "people's courts" are made to work on community-based projects or to help farmers or other villagers with planting, harvesting, building works, etc.

the national level commensurate with the size of the community.<sup>34</sup> A number of armed groups have also emerged in these areas that have deliberately targeted members of *Pahade* communities, especially those working as government employees and living in these Tarai districts.<sup>35</sup>

During visits to Siraha and Saptari districts, two of the most affected districts, the ICJ found that many police posts in rural areas in the southern parts of the Tarai, near the Indian border had not been re-established. The police confirmed they found it difficult to access these areas. Even when villagers managed to inform the police about a crime, the police officers explained that the police would only visit the village if it could do so with the assistance of the Armed Police Force (APF), a paramilitary force created in 1998 to counter the “people’s war”. The APF has repeatedly been accused of grave human rights violations.<sup>36</sup> Both the police and the APF have been responsible for excessive use of force in the context of the Madhesi movement in the Tarai.<sup>37</sup>

On the other hand, the work of the police in these districts is also made more difficult by political interference. Police and government officials at the district level complained to the ICJ that they were under constant pressure from the main political parties to release people arrested in the context of the *Madhesi* movement.

The targeting of members of the *Pahade* community by armed *Madhesi* groups has resulted in hundreds of civil servants, including court officials and public prosecutors, fleeing these districts. This has been particularly so after the *Janatantrik Tarai Mukti Morcha* (Jwala faction) in early July 2007 threatened to kill Village Development Committee Secretaries from the *Pahade* community if they did not leave the area. Overall, while there have been closures of the courts from time to time, they have continued to function, albeit with limited staff. In some cases, hearings have been delayed as a result. For instance, while the Appellate Court in Saptari district has continued to hear *habeas corpus* petitions, hearings in other cases have been postponed repeatedly.

---

<sup>34</sup> There are major disputes regarding the size and composition of the Madhesi community. For more details, see International Crisis Group, *Nepal’s troubled Tarai region*, Asia Report No. 136, 9 July 2007.

<sup>35</sup> *Pahade* is a term normally used to refer to people originating from the hills of Nepal to the north of the Tarai region.

<sup>36</sup> See OHCHR reports, *Findings of OHCHR Nepal’s investigations into the 21 March killings in Gaur and surrounding villages* of April 2007; *The April Protests. Democratic rights and the excessive use of force* of September 2006 and *Human Rights in Nepal – One year after the Comprehensive Peace Agreement* of December 2007.

<sup>37</sup> See OHCHR report, *Findings of OHCHR Nepal’s investigations into the 21 March killings in Gaur and surrounding villages* of April 2007.

Immediately after the CPA, the district court in Siraha saw an increase in the number of cases filed. Some sources suggested this was due to people taking cases to the district court that had been dealt with before by the “people’s courts”. Others however maintained that the large majority of the newly-brought cases concerned the transfer of land ownership and may have been filed by landowners fearing that the prospective inclusion of the CPN-M in the government would result in land reform and stringent land ceiling laws. As the security situation has deteriorated, with frequent prohibitions on the use of transport (*bandhs*), people are increasingly reluctant to travel to the district headquarters to file cases in the court.

A further specific problem in the transition has arisen in Saptari District as a result of an arson attack on the CPN-M office in May 2007. The CPN-M claimed that its records regarding more than 500 cases pending before the “people’s court” were burned. Among the records were copies of land ownership deeds and deeds of individual transactions.

At the village level, the *panchayat* non-formal dispute resolution mechanism, which has traditionally been strong in the *Madhesi* community, was badly affected during the “people’s war”. In large parts of the region, such mechanisms stopped functioning altogether due to pressure from the CPN-M. In the southern parts of Siraha and Saptari districts, they reportedly continue to be inactive, while they have reportedly started functioning again in more northern areas.

## 7. THE FUTURE

The CPA of November 2006 lacks clarity on how the general agreement to bring an end to parallel bodies will be implemented. The ICJ found that the interpretation of the CPN-M and the other parties are divergent. The CPN-M's view is to amalgamate existing structures (the state's court system with the CPN-M's "people's courts") into a new judiciary "for and by the people". Among its main features would be the introduction of a system of local and lay judges at trial level. It was described by one senior Maoist leader as an "improved model" of the traditional dispute resolution mechanisms in the country. On the other hand, the SPA interprets the CPA provisions to indicate that the CPN-M must dissolve its structures and that the state institutions would resume the role they played prior to the start of the armed conflict.

Though the practice of mediation as described above has been a feature of Nepali society for centuries, it has had limited legal recognition to date. In addition to the mechanisms described above, the notion of court-referred mediation was introduced in Nepal around 2001 by the Nepal Bar Association with the support of UNDP. Its focus was on mediation in court-referred cases rather than community-based ones. To date, more than 700 mediators have been trained and more than 7,500 court cases have been concluded after mediation.<sup>38</sup> Moreover, it has encouraged the Supreme Court to change the courts' procedural rules to recognize court-referred mediation.

One of the most important outcomes of the UNDP's Access to Justice (A2J) Project is the drafting of a Mediation Bill. It was subsequently reviewed by the Ministry of Law, Justice and Parliamentary Affairs and underwent a wider consultation process. The principal objectives of the initial draft were to introduce various methods of mediation as alternative dispute resolution and to recognize community, local government and court-referred mediation as legal ways of resolving disputes. However, the Bill was not tabled in the interim Legislature-Parliament before its last session ended in mid-January 2008.

The ICJ views mediation as a useful tool in helping to settle disputes. It advocates that all existing and any future systems of mediation should comply with international human rights standards.

The Secretary of the Ministry of Law, Justice and Parliamentary Affairs, in a meeting with the ICJ on 2 August 2007, acknowledged that mediation "may be a more effective legal instrument to settle disputes". He accepted that the current legal system is slow, expensive and that the judiciary is often too elitist. The Ministry

---

<sup>38</sup> Shukhu Pun and Gehendra Lal. *Local Mediation Practices in Kaski, Mustang, Bardia and Solukhumbu District*, published by UNDP / Access to Justice Programme (NEP/02/M01), 2005.

organized a study tour to districts where community-based mediation projects are functioning, and on 27 August 2007 organized a national-level consultation on the Mediation Bill.

The proposed bill, as of 27 August 2007, included provisions related to the:

- Formation of a Central Mediation Coordination Committee, chaired by a Supreme Court Judge,
- Process for recruitment of mediators,
- Guaranteed representation of vulnerable groups such as women and dalits, among mediators,
- Qualifications or disqualifications for mediators,
- Appointment process for mediators in specific cases,
- Code of conduct for mediators,
- Process of mediation, including specific phases and techniques,
- Formation of Local Government level mediation committees,
- Mediation as a prerequisite before petty cases can be filed in court,
- Punishment (including imprisonment) for non-cooperation in mediation processes,

Regrettably, the bill did not retain the suggestions made by UNDP's A2J's project that community-level mediation would be formally recognized.

During the consultation meeting on the bill, stakeholders made several suggestions, including the following:

- The Bill should recognize community-level mediation.
- Making mediation a prerequisite in petty cases was appreciated in general but concerns were raised about women, dalits, the elderly, disabled persons and other marginalised communities who could be exploited by such local systems. Therefore, provisions to enable such persons to choose another forum if they are not confident that the mediation mechanisms would give them a fair hearing should be included in the bill.
- The voluntary nature of the mediation should not be undermined and parties should not be threatened with punishment if they do not cooperate in a mediation process.

The Ministry of Law, Justice and Parliamentary Affairs agreed to revise the draft and formed a committee of five experts to incorporate suggestions made at the consultation meeting. However, as stated above, the new draft was not tabled in the interim Legislature-Parliament before the end of its last session in mid-January 2008.



## **8. CONCLUSIONS AND RECOMMENDATIONS**

There is no doubt that the CPN-M “justice system” did not uphold international standards. At the same time, however, it should be recognized that it had some positive impact, especially in remote rural areas and that it served to highlight many of the shortcomings of the state justice system.

The peace process has so far given little attention to justice issues (both in terms of transitional justice and the justice issues described in this report). Concerns about the lack of public security are increasing. Despite obstacles in the process leading to a Constituent Assembly elections and a new constitutional framework, it is vital that the rule of law is strengthened at the earliest opportunity.

The ICJ recommends that the Government implements the following measures in the short-term to provide justice and redress for people affected by the justice vacuum during the conflict:

1. Development of a coordinated strategy to address public security and law enforcement. Without such a strategy, an improvement in the law and order situation is unlikely. Any review of the security sector should include a review of the current and future role of the YCL in respect of the maintenance of law and order. If parallel public security forces are eventually merged or YCL or PLA are integrated into government forces, both they and candidates of the security forces should be subject to a thorough human rights vetting process.
2. Development of policies and guidelines to resolve the many cases affected by the functioning of parallel structures.
3. An advisory panel of experts could be set up to draw up criteria to advise relevant authorities at the local and district level on how to resolve in a timely and visibly equitable manner the various problems that have arisen during the conflict as a result of the justice vacuum. Among the experts could be cultural and legal anthropologists, sociologists and lawyers. The policy and guidelines should take into account international human rights standards. As a minimum, the principles of natural justice, including the main principle that all people are equal before the law would have to be upheld.
4. Any people who continue to serve punishments imposed by the “people’s courts” should be released and information regarding their alleged crimes should be passed to the police with a view to initiate criminal investigations and possible prosecutions.

5. In addition to the state's obligation to ensure no statutes of limitations apply to crimes against humanity and war crimes and those responsible for such crimes are brought to justice, in those civil or criminal cases where legal limitation periods have expired due to the insurgency, special arrangements need to be made to extend the limitations on an exceptional basis, possibly through statutory amendments or interpretation of the law. This could be done in the context of a thorough review of the statute of limitations legislation already initiated by the Ministry of Law, Justice and Parliamentary Affairs.
6. Procedures to ensure the right to an effective remedy and reparation for any victims of "miscarriages of justice" by the CNP-M "justice system" should be put in place.
7. In relation to the Mediation Bill, ICJ recommends that the various existing forms of alternative dispute resolution, including the traditional and community-based mediation mechanisms should be considered in a positive light as methods to achieve the wider objectives of increasing public trust, fairness and effectiveness of the key institutions such as the police, public prosecutor's office and the judiciary and to transform them into independent, accountable and accessible institutions.<sup>3940</sup>

The Mediation Bill, currently under consideration should be amended to include:

- The recognition of the various dispute resolution mechanisms as the first tier of the new Nepal's justice system in civil cases.
- Adequate training to be provided to all mediators including community and tribal leaders.
- Minimum standards, including on representation of minorities, Dalits and women, to be introduced into all these mechanisms.
- All people, especially those from vulnerable groups, should have the right to choose their forum of preference.

---

<sup>39</sup> Article 9 of the Convention No. 169 of the International Labour Organisation of 1989 (which entered into force in 1991 and has so far been ratified by 19 countries) provides that "to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected" and "the customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases." Nepal ratified this Convention on 14 September 2007,.

<sup>40</sup> The ICJ plans to address the need to reform the judiciary, in a separate report to be produced in the coming months.

- An effective mechanism should be developed to protect parties from threats and intimidation.

## Appendix A:

## Supreme Court data regarding number of cases filed before district courts

District Court	2002/3	2003/4	2004/5	2005/6
Taplejung	293	224	153	170
Morang	2626	2548	2113	1813
Sunsari	2622	2588	2265	1813
Solukhumbu	106	45	26	35
Siraha	2472	2305	2170	2189
Sindhuli	192	196	161	146
Makwanpur	575	445	366	376
Dolakha	264	248	186	157
Lamjung	212	205	149	156
Palpa	246	215	173	165
Dang	844	778	650	578
Rukum	72	73	43	71
Bardiya	724	541	497	363
Jajarkot	38	16	16	14