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NATIONAL SECURITY LAWS AND
HUMAN RIGHTS IMPLICATIONS

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LIST OF ACRONYMS

APF	-	Armed Police Force
CA	-	Constituent Assembly
CAT	-	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
CDO	-	Chief District Officer
CEDAW	-	Convention on the Elimination of All Forms of Discrimination against Women, 1979
CoI	-	Commission of Inquiry
CPA	-	Comprehensive Peace Agreement
CPN(M)	-	Communist Party of Nepal (Maoist)
CRC	-	Convention on the Rights of the Child, 1989
FIR	-	First Information Report
ICCPR	-	International Covenant on Civil and Political Rights, 1966
ICERD	-	International Convention on the Elimination of All Forms of Racial Discrimination, 1963
ICESCR	-	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	-	International Commission of Jurists
IGP	-	Inspector General of Police
INGO	-	International Non-Governmental Organisation
INSEC	-	Informal Sector Service Centre, Nepal
LAA	-	Local Administration Act, 1971
NA	-	Nepal Army
NGO	-	Non-Governmental Organisation
NHRC	-	National Human Rights Commission
OAS	-	Organisation of American States
OHCHR	-	Office of the High Commissioner for Human Rights
PDO	-	Preventive Detention Order
PSA	-	Public Security Act, 1989
SOP	-	Special Operating Procedures
TADA	-	Terrorist and Disruptive (Control and Punishment) Act, 2002
TADO	-	Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004
TCA	-	Torture Compensation Act, 1996
TRC	-	Truth and Reconciliation Commission
UN	-	United Nations

NEPAL: NATIONAL SECURITY LAWS AND HUMAN RIGHTS IMPLICATIONS

EXECUTIVE SUMMARY

The Government of Nepal has a history of using a wide range of stringent laws in the name of protecting national security. These include the *Local Administration Act* (1971), the *Public Offences and Punishment Act* (1971), the *Public Security Act* (1989), the *Offences against State and Punishment Act* (1989), *Arms and Ammunition Act*, and the *Explosive Materials Act*. The use of security laws intensified during the conflict and state of emergency. In response to the “People’s War” declared by the Communist Party of Nepal (Maoist) (CPN (M)), on 26 November 2001 the government declared a state of emergency and adopted the *Terrorist and Disruptive (Control and Punishment) Ordinance* (TADO), which was later adopted as legislation (the *Terrorist and Disruptive (Control and Punishment) Act* (TADA)) by the Parliament in 2002.

International law recognises the duty of the State to protect people against internal or external threats and terrorist acts. Under Article 2(1) of the International Covenant on Civil and Political Rights (hereafter “ICCPR”), States have a legal obligation to take effective measures to prevent and punish those responsible for such acts. Nevertheless, States must ensure that national security and counter-terrorism measures must be within the framework of the rule of law and must comply with standards of international law. Human rights law provides a reasonable margin of flexibility to governments to combat security threats and terrorism without contravening human rights obligations. These measures should be an extension of the rule of law, and not an abrogation of it. This is also recognised by the ICJ in its *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, 2004.

Nepal’s security legislation, including related provisions of the Interim Constitution, criminal law and procedures, and security practices are outdated and contradict a number of international human rights law provisions and standards to which Nepal is a party. The existing legal framework of Nepali law, as well as judicial and administrative practices, raise serious human rights concerns, such as:

- significant powers are granted to the executive, without effective and adequate parliamentary and judicial oversight;
- the existence of vaguely formulated and overly broad definitions of offences relating to security matters;
- broad immunities are granted to security forces from prosecution and a lack of accountability mechanisms;
- extraordinary judicial powers are granted to the administrative authority (the Chief District Officer) without parliamentary and judicial oversight;
- the use of excessive force by police and security forces without safeguards and checks;
- prolonged and incommunicado detentions, preventive detention and lack of judicial oversight;
- the erosion of the right to fair trial, due process, and other fundamental rights

These legislative deficiencies have prevented the establishment of credible justice and security sector institutions in Nepal, perpetuating injustice and debilitating the rule of law. The lack of effective justice and security sector systems, together with the excessive use of national security legislation that intensified during the conflict and emergency periods, led to rampant human rights violations and a climate of impunity.

The Nepalese people have been poorly served by the administration of justice. The practice of unlawful or arbitrary detention and torture of detainees by the authorities is systematic. The remedy of *habeas corpus* is often ineffective as police and government officials have disregarded judicial orders on a number of occasions. Detainees continue to be held incommunicado; beyond access to lawyers, relatives or the courts. There is near total impunity for officials of the Army, Armed Police Forces and Police who frequently engage in serious human rights violations, including torture, unlawful killings and enforced disappearances. Impunity for human rights offenders is nearly absolute.

National institutions that are intended to address human rights concerns are weak and ineffective. Human Rights cells established in the Army, Armed Police Forces, and Police have, thus far, been wholly ineffective, and their establishment appears to be a mere cosmetic gesture. The record shows that these human rights violations worsened during the conflict, causing hundreds of extrajudicial executions, disappearances, arbitrary arrest and detention, torture and ill treatment, as well as excessive use of force.¹

The weakness of law enforcement agencies and delays in security sector reforms have perpetuated a climate of impunity and deepened the security vacuum. These weaknesses continue to prevent the law enforcement and justice systems from operating in conformity with international standards and from advancing the administration of justice and the rule of law in Nepal.

Impunity for gross human rights violations – the failure to bring perpetrators to justice – a feature of both parties to the conflict, had fuelled the conflict and will perpetuate cycles of violence and human rights violations in the future unless it is decisively addressed.

As an integral part of creating a sustainable peace, the government and the Parliament must confront the twin challenges of ensuring justice, truth and reparation for violations of the past, while reforming the law, policies and practices in order to prevent impunity in the future. Therefore, security sector reforms must be carried out to bring this legislation in line with international human rights law and standards and to protect against future impunity and human rights violations.

¹ See generally Report by Special Rapporteur on extrajudicial, summary or arbitrary executions, *Mission to Nepal*, E/CN.4/2001/9/Add.2, 9 August 2000; Report by Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, *Mission to Nepal*, E/CN.4/2006/6/Add.5, 9 January 2006, para. 31; Report of the Working Group on Enforced or Involuntary Disappearances, *Mission to Nepal*, E/CN.4/2005/65/Add.1, 28 January 2005; Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/HRC/10/54, 3 March 2009; Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/HRC/7/68, 18 February 2008; United Nations High Commissioner for Human Rights report, *Human Rights in Nepal: One year after the CPA*, December 2007; Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/HRC/4/97, 17 January 2007; Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, E/CN.4/2006/107, 16 February 2006; Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/60/359, 16 September 2005; ICJ reports, *Human Rights and Administration of Justice: Obligations Unfulfilled*, a Fact-Finding Mission to Nepal, June 2003; *Nepal: the Rule of Law Abandoned*, March 2005; *Nepal: Justice in Transition*, February 2008; HRW, *Nepal: Waiting for Justice, Unpunished Crimes from Nepal's Armed Conflict*, September 2008; HRW, *Nepal's Civil War: The Conflict Resumes*, March 2006; Amnesty International, *Nepal: Human Rights and security*, AI-index: ASA 31/001/2000, 14/02/2000; NHRC-Nepal, *Summary of Human Rights Violations Monitored During the State of Emergency*, 2005, (Nepali version) at: http://www.nhrcnepal.org//publication/doc/reports/Emergency_Report_np.pdf.

Nepal is currently undergoing a historic transition, from a monarchy to a federal democratic republic. After a decade of violent conflict the country is going through a broad peace process. Without credible machinery to enforce the law and provide justice, it is easier to resort to violence and illegal means. People lose faith in a peace process when they do not feel safe from crime. Transparent, accountable, effective and rights-respecting justice and security sectors are integral elements of peace building and the establishment of the rule of law after conflicts of this kind.

A failure to engage in reform of the justice and security sectors, will increase the possibility of a return to extra-judicial measures such as vigilantism, and increase the risk of a recurrence of violent conflict. In order to ensure that the peace process is sustainable, it is important to establish a well-functioning security framework. This is critical in order to prevent future violations, as well as to address past violations effectively. Instituting reforms to the army, police, judicial and penal system, as well as strengthening judicial and parliamentary oversight, are necessary to strengthen democratic accountability and transparency. At the same time new initiatives are needed to fill the legal vacuum and to strengthen the security system. Security sector reform in conformity with international human rights treaties to which Nepal is a party, is therefore key to a sustainable peace process, strengthening the rule of law and enabling the transition to a federal democratic republic.

In the past five years, the ICJ has issued various reports and letters highlighting the problems within the Nepali legal framework while proposing legislative recommendations in order to bring the law into conformity with international human rights law. The report on *Human Rights and Administration of Justice: Obligations Unfulfilled* June 2003 examined the administration of justice and concluded that the human rights situation had lapsed into crisis. In March 2005, the ICJ published *Nepal: Rule of Law Abandoned*, which condemned the suspension of almost all rights following the state of emergency in complete disregard for international law. The ICJ provided recommendations and comments to the Speaker of the Interim Parliament during the drafting of the Interim Constitution, on the proposed Enforced Disappearances legislation, as well as to the office of the Prime Minister on legislative reform of the *Nepal Army Act 2007*.

In March 2009, the ICJ published a briefing paper *Disappearances in Nepal: Addressing the Past, Securing the Future* which provided recommendations to strengthen proposed legislation on Crime and Punishment of Disappearances to bring it into line with international human rights standards, the directives of the Supreme Court of Nepal, and international best practices.

The ICJ welcomes the incorporation of certain recommendations in the amending bills proposed by the Nepal Government. However, the ICJ continues to have a number of serious concerns regarding the gaps in the legal and institutional capacity of the law enforcement and justice system to advance the administration of justice and the rule of law in Nepal.

This report analyses the national legal framework and practices within which the Nepali security agencies and justice system operate. It examines the compatibility of these provisions with the principles of the rule of law and international human rights standards. The report sets out recommendations for the Government of Nepal and the Constituent Assembly to undertake urgent legal reforms that would establish a legal framework in line with international law while advancing the administration of justice.

Key recommendations

- The future constitution of Nepal should incorporate the rights of the person including civil and political, economic, social and cultural rights as well as other fundamental rights enshrined in international treaties to which Nepal is a party.
- The preventive detention provisions under the Interim Constitution of Nepal and the Public Security Act should be amended to ensure that:
 - preventive detention is permissible only under exceptional circumstances as provided under international law;
 - the period of time allowable for preventive detention with a view to either charge or release is limited;
 - immediate or subsequent judicial oversight of each detention is available as provided in accordance with Article 9 of the ICCPR.
- The Interim Constitution and the Local Administration Act should be amended to allow restrictions on the right to freedom of peaceful assembly exclusively in accordance with the principles of legality, necessity and proportionality recognised under Article 21 of the ICCPR.
- The future constitution of Nepal should clearly define the circumstances in which the government may declare a state of emergency, and that such a declaration of a state of emergency is subject to parliamentary control and judicial review, in accordance with Article 4 of the ICCPR and international law.
- The legal role of the Nepal Police and the Attorney General's office should be reviewed and modified in order to strengthen their capacity and obligation to undertake vigorous investigations and the prosecution of those responsible for serious human rights violations.
- Torture, cruel, inhuman and degrading treatment must be criminalized in conformity with international law as well as making sure that such proscribed treatment is subject to individual criminal responsibility.
- Constitutional and legislative prohibitions against torture and cruel, inhuman and degrading treatment consistent with international standards must be enacted to ensure that conduct constituting such proscribed treatment is subject to individual criminal responsibility and that offenders are brought to justice. The legal framework must ensure that any person subjected to torture or ill treatment has access to a full remedy and reparation.
- Adopt legislation on Crime and Punishment of Disappearances by a democratic process following proper consultation and parliamentary debate and amend related legislation to ensure that the definition of enforced disappearance, as well as the Commission to investigate cases of enforced disappearances, are in line with the directives of the Supreme Court and Nepal's international human rights obligations, as well as best practices around the world.
- Ratify the Rome Statute of the International Criminal Court, sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances, and the Optional Protocol to the Convention against Torture.
- Dismantle the system of general immunities for state agents by revoking relevant immunity provisions, especially Section 37 of the Nepal *Police Act*

1955, Section 22 of the Army Act 2007, Section 26 of the Armed *Police Act* 2001 and Rule 83(1) of the Armed Police Force Regulation 2001, and Section 11 of the Public Security Act 1989.

- Issue clear instructions to legally require the Police to register First Information Report (FIR) relating to human rights violations and abuses, whether conflict or post-conflict related, followed by full criminal investigations.
- The vague and broad definitions of offences under various pieces of security legislation should be revised and set out in precise, unequivocal and unambiguous terms, in accordance with the principle of legality and international standards.
- Introduce legislative amendments to ensure that the wide discretionary administrative powers of the Chief District Officer (CDO) conferred under various provisions of existing security legislation should be subjected to effective judicial review. The judicial powers granted to the CDO under the *Local Administration Act*, the *Public Security Act*, and the *Public Offences Act* should be amended to ensure that all judicial powers are vested in judicial bodies, in accordance with the principles of separation of powers, Article 14(1) of the ICCPR and Principle 5 of the Basic Principles on the Independence of Judiciary 1985.
- The right to file *habeas corpus* applications should be extended to the District Courts, in addition to the Appeal Court and Supreme Court, in order to ensure that detainees have a meaningful right to judicial review of their preventive detention order, access to justice and an effective remedy, in accordance with international law.
- Legislative provisions on the use of force and firearms must be brought in line with international standards, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

BACKGROUND

The Armed Conflict

In February 1996 the CPN (M) (Maoists) declared a "People's War" aimed at the abolition of the constitutional monarchy and establishment of a people's republic. It is estimated that over 13,000 people died during the course of the ensuing armed conflict.² Both government forces and officials and the Maoists were responsible for serious abuses of human rights, such as extrajudicial killings, enforced disappearances/abductions and torture.

The security situation was further exacerbated when King Gyanendra twice declared states of emergency – on 26 November 2001 and 1 February 2005. During the 2005 emergency, the King dissolved the parliament and assumed all executive powers, claiming that the civilian government was incapable of resolving the conflict. During the two emergency periods, most human rights guarantees were effectively suspended, and serious restrictions were placed on freedom of expression and association, including political and media expression.³ The government sought to justify these measures as necessary to combat the Maoist insurgency. Following the *Jana Andolan II* (People's Movement II) as well as international condemnation, the state of emergency was lifted on 1 May 2005.

The emergency provisions exacerbated the human rights and rule of law crisis, and prompted the removal of democratic processes. Human rights and fundamental freedoms were curtailed, including the erosion of fair trial and due process rights among others. It also led to the promulgation of the *Terrorist and Disruptive (Control and Punishment) Ordinance* in 2001, adopted into law by the Parliament in 2002, as the *Terrorist and Disruptive (Control and Punishment) Act* (TADA). Due to the sunset clause of two years, TADA lapsed in 2004, and in absence of Parliament, it was re-promulgated repeatedly as an Ordinance by royal decree from October 2004 till September 2006. TADO/TADA expanded the powers of security forces to arrest, detain and interrogate people suspected of or involved in "terrorist activities," authority to preventively detain individuals for prolonged periods without the right to an effective judicial review or oversight; wide powers of search and seizure; and immunity to government officials from prosecution for any "work performed in good faith."

These assaults on the rule of law resulted in systematic and widespread violations of international human rights and international humanitarian law by the police, armed police and military forces, and perpetuated the climate of impunity. Violations such as extrajudicial executions, disappearances, arbitrary arrest and detention, torture and ill treatment, excessive use of force have been well documented by various human rights organisations.⁴ The members of CPN (M) were also responsible for deliberate killings, abductions of civilians and torture during the conflict.⁵ (See the box)

² UN OHCHR report on Nepal, 2005, *op. cit.* n.1, para. 7.

³ ICJ report, *Nepal: Rule of Law Abandoned*, March 2005, *op. cit.* n.1.

⁴ *Op. cit.* n.1.

⁵ *Op. cit.* n.1

Gross Human Rights violations during the conflict

- ✚ Over 12,000 people died (8,200 by the Government and 4,500 by Maoists).
- ✚ Over 100,000 were internally displaced.
- ✚ More than 1300 were subjected to enforced disappearance. Large numbers of disappearances of people arrested on suspicion of being members or sympathisers of CPN (M). Members of CPN (M) were also responsible for hundreds of abductions.
- ✚ Over 15,000 people were arbitrarily arrested and detained. Arbitrary arrest and detention of suspected members or sympathisers of CPN (M) were widespread.
- ✚ Widespread practice of torture, and cruel, inhuman or degrading treatment. Police, Armed Police Force (APF) and Nepal Army (NA), systematically practiced torture.⁶ The CPN (M) cadres in order to extort money, punish non-cooperation and intimidate others, carried out torture, including mutilation.

Source: See, INSEC, Human Rights Violations data, at: <http://www.inseconline.org/hrodata.php>; ICRC, www.familylinks.icrc.org.

The Peace Process, Concerns and Challenges

After the failure of peace negotiations in 2001 and 2003, the most recent peace process formally resulted in the signing of the Comprehensive Peace Agreement (CPA) in November 2006 between the Seven Party Alliance and the CPN (M).⁷ The CPA committed all the parties to an extensive range of civil, cultural, economic, political, and social rights, including ending discrimination, arbitrary detention, torture and ill treatment, unlawful killings and enforced disappearances. This agreement was followed by the historic elections and formation of the Constituent Assembly (CA) on 10 April 2008, of which the CPN (M) emerged as the largest party. Soon after, the monarchy was abolished, and Nepal was declared a federal democratic republic. A president elected by the CA replaced the King. After four months of political impasse, a government was formed on 18 August 2008. In a historic shift, the CPN (M) led the government and its leader, Pushpa Kamal Dahal (Prachanda), became the Prime Minister. However, the Prime Minister resigned on 4 May 2009 following the controversial dismissal of Chief of Army Staff, in absence of political consensus. After weeks of political crisis, leader of CPN (UML) Madhav Kumar Nepal was appointed as the Prime Minister.

One of the key issues to be addressed during the peace process is discrimination and exclusion of Madhesi, indigenous (*Janajati*) and other marginalised groups. The longstanding practice of exclusion and marginalization has resulted in ongoing, sometimes violent unrest, especially in the Terai region. Further, certain armed groups, such as Young Communist League (youth wing of CPN (M)), have persistently acted outside the law, causing increasing insecurity. Certain abusive practices common during the conflict have occasionally reappeared, mostly while controlling violence by armed groups or incidents of social unrest. The security forces have reacted by using both curfew orders and force to control violence and incidents of social unrest. This has on several occasions led to excessive and unlawful

⁶ Former Royal Nepal Army (RNA).

⁷ The "Seven Party Alliance" refers to the alliance between mainstream political parties namely, Nepali Congress, Nepali Congress (Democratic), Communist Party of Nepal (United Marxist-Leninist), Nepal Sadbhavana Party, Nepal Majdoor Kisan Party, Janamorcha Nepal, and United Left Front.

use of force resulting in death and severe injuries, arbitrary arrest and detention, as well as torture and ill-treatment by the security forces.⁸

Delays in security sector reforms therefore pose one of the biggest threats to sustainable peace. These issues require comprehensive reforms of national security laws and police practices based on human rights standards, in order to prevent such violations in the future, as well as to address past violations effectively.

Another crucial factor that poses a challenge to the sustainability of the peace process is the prevailing climate of impunity. Apart from the lack of political will to address impunity, the legal provisions granting broad amnesties for those responsible for grave human rights and humanitarian law violations, reinforces the cycle of impunity, and undermines the peace process.⁹ It is therefore crucial that the government act to end impunity in order to prevent future violations and to create an environment in which no one is above the law.

Nepal's international human rights obligations

According to Section 9(1) of Nepal's Treaty Act 1990, the provisions of international treaties become part of Nepali law upon ratification, and if the provision of a national law comes into conflict with international law, the latter prevails. Nepal is a party to the following principal human rights treaties:

- ✚ International Covenant on Civil and Political Rights, 1966 (ICCPR) and its two Optional Protocols
- ✚ International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)
- ✚ International Convention on the Elimination of All Forms of Racial Discrimination, 1963 (ICERD)
- ✚ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)
- ✚ Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). Nepal is also a signatory to its Optional Protocol
- ✚ Convention on the Rights of the Child, 1989 (CRC) and as a signatory to both its Optional Protocol on the involvement of children in armed conflict and its Optional Protocol on the sale of children, child prostitution and child pornography.

This report examines Nepal's national security laws and the administration of justice in the context of Nepal's legal framework of national security and emergency powers. It demonstrates how a system of immunities and general amnesties institutionalises the climate of impunity. The report addresses the legal and procedural obstacles that prevent victims of human rights violations from accessing truth justice and reparations. It also examines the legislative regime impacting upon arrest, detention, fair trial, as well as other fundamental human rights, such as freedom of assembly and association, right to freedom of movement and right to privacy.

⁸ OHCHR reports on Nepal, 2007 and 2008, *op. cit.* n.1. See the latest evaluation of the human rights situation in Nepal in the Human Rights Year Book published by INSEC, available at: <http://www.inseconline.org/>

⁹ See Section 11 of the PSA 1989, Section 37 of the Police Act 1955, Section 26 of the Armed Police Act 2001 and Rule 83(1) of the Armed Police Force Regulation 2001, Section 22 of the Nepal Army Act 2006.

National Security - Legal Framework

Constitutional law

The *Interim Constitution of Nepal 2007* provides the following procedural and substantive rights relating to criminal justice:

- Article 24 prohibits retrospective criminalization or penalization, double jeopardy, self-incrimination. It provides that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest, nor shall s/he be denied the right to consult and be defended by a legal practitioner of his choice.
- Article 25 guarantees the right against preventive detention. It provides that no one shall be held under preventive detention unless there are sufficient grounds to believe that there is an immediate threat to the sovereignty and integrity or law and order situation of Nepal. It also provides that anyone detained contrary to law or in bad faith shall be entitled to compensation (Article 25(2)).
By virtue of Article 32 read with Article 107, an exercise of Preventive Detention Order (PDO) can be challenged in the Supreme Court by a writ of *habeas corpus*.
- Article 26 prohibits torture or cruel, inhumane or degrading treatment of those in custody and makes such an act punishable in law as well as provides for compensation to those whose rights have been violated.

Criminal Law

The substantive provisions of Nepali criminal law are primarily based on the *Muluki Ain* (General Code of Law of the Land) 1963, which replaced the *Muluki Ain* enacted in 1853. However, where a statute has been passed by Parliament on the same subject as a part of the General Code, the provisions of the statute prevail.

Some of the statutes are:

- The new *State Cases Act 1993 (Sarkari Muddha Sambandhi Ain)*: provides for cases to be investigated and prosecuted by the State as a party. It introduced the adversarial system of justice in place of the previous inquisitorial system, in which judges investigated a case. It also separated the investigation and prosecution functions by delineating the responsibilities of the police and the prosecution.
- The *Evidence Act 1974*: It lays down rules for the admissibility of confessions, providing that they must have been obtained while the subject was conscious, understanding what s/he had said, and obtained without torture. The Act expressly obliges the prosecution to prove a case beyond reasonable doubt. It also introduced cross-examination of witnesses.
- The *Judicial Administration Act 1991*: provides the jurisdiction of the various levels of courts and make the necessary arrangements regarding judicial matters.

Security Law

The public security legislation in Nepal was enacted during the *Panchayati* days, which included *Public Security Rules of 1962*.¹⁰ These Rules were replaced by the *Public Security Act, 1989 (PSA)*, amended in 1991. The *PSA* sets out the powers of the Chief District Officer (CDO)¹¹ or officials on his behalf to issue a preventive detention or area confinement orders for maintaining public security.¹²

Other statutes are:

- The *Offences against State and Punishment Act, 1989*¹³ (the State Offences Act) criminalise acts such as insurrection and treason carrying punishments of up to life imprisonment and confiscation of property.¹⁴
- The *Local Administration Act, 1971 (LAA)*, with five amendments including the recent one in 2001, is the fundamental law regarding the country's local administration. It prescribes the nature and scope of powers of the CDO to administer all government offices, except the courts and defence related offices, at the local level, and to maintain law and order in the different districts of Nepal. In this regard, Section 6 grants special powers to the CDO for 'maintenance of tranquillity and security,' including power to impose curfew (Section 6A), and power to declare riot-affected area (Section 6B).
- The *Public (Offences and Punishment) Act* (the Public Offences Act) promulgated in 1971 provides a broad definition of public offences, and authorises the police officials to arrest without warrant any person who is found committing a public offence.¹⁵ Under Section 5, a person can be apprehended on a reasonable suspicion of having committed a public offence and trials for public offences are heard by the CDO, who is an executive authority conferred with a quasi-judicial powers and responsibilities.
- Additionally, on 26 November 2001, an emergency was imposed by the then King Birendra, suspending a majority of the fundamental rights under the Constitution. The government also promulgated the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001*.¹⁶ The anti-terrorism legislation (TADO/TADA) empowered the security forces to preventively detain suspects without trial for up to six months, without access to counsel. It also provided an overly broad and vague definition of "terrorist" and "disruptive activities", susceptible to arrest of any individual as a terrorist for committing ordinary crime. Cases instituted under the Ordinance were not subject to any statute of limitations and lacked judicial review and oversight of the detentions. The ICJ repeatedly criticised these

¹⁰ Under Section 14 of the *PSA*, on 4 June 2001, just a few days after the massacre at the Royal Palace, the Government issued *Public Security Regulations 2001*.

¹¹ Under the *LAA 1971*, the CDO is the Chief of the District Administration appointed by the Government of Nepal. The CDO is mainly responsible for maintaining law and order and security in the district and The CDO monitors all offices, except courts and defense related offices, in accordance with the order or direction of the Government.

¹² Section 3 of the *PSA 1989*.

¹³ This Act repeals the *Anti-State Activities (Offences and Penalty) Act 1972*. After the political changes of 2006, some of the provisions of the Act may be considered irrelevant, however they still require an amendment.

¹⁴ Sections 3 and 5 of the *State Offences Act 1989*.

¹⁵ Section 3 of the *Public Offences Act 1971*.

¹⁶ The *Terrorist and Disruptive Activities (Control and Punishment) Act (TADA)* succeeded *TADO 2001* in April 2002, which pursuant to a sunset clause of two years expired in April 2004. However, the then King re-promulgated the ordinance (*TADO*) by a royal decree in October 2004, and renewed it every six-months. The ordinance has not been renewed after it expired in September 2006.

provisions of TADO/TADA as violating provisions of the ICCPR and other international human rights standards.¹⁷

In the following sections, the report critically examines the national legal framework and police practices set out above, in light of international human rights law and standards. It further provides recommendations for security sector reforms aimed to ensure the rule of law and the advancement of the effective administration of justice.

STATES OF EMERGENCY

Under Article 4 of the ICCPR, States may restrict the scope of applicability of certain rights during a state of emergency. However, such derogations are subjected to strict formal and substantive legal requirements. In order to invoke such a provision, the State party has to establish that there exists a “public emergency which threatens the life of the nation” and that any derogating measure is strictly necessary to meet a specific threat¹⁸ The emergency must be formally declared and notice provided with indications as to the particular measures it is taking, why they are strictly necessary and proportionate to the need. Even potentially derogable rights have a non-derogable core and certain rights are identified as being non-derogable (see the box).¹⁹

King Gyanendra twice declared a state of emergency, during which there were documented widespread and systematic human rights violations as well as failure to adhere to even minimal legal restraints.²⁰

The Interim Constitution of Nepal under Article 143 contains provisions allowing for emergency powers and suspension of certain rights in a state of emergency. However, this provision lacks certain safeguards required by international human rights law.

Derogation in a state of emergency under international law

-  In cases where a state of emergency has been declared:
-  The relevant supervisory authority (the UN Secretary General in the case of the ICCPR) must be officially notified of the specific measures derogating from an international treaty
-  The state of emergency and derogations must be of an exceptional and temporary nature;
-  Derogation is permissible only if, and to the extent, that the situation constitutes a threat to the life of the nation (principle of necessity);
-  Derogation is permissible only to the extent strictly required by the

¹⁷ ICJ report, *Nepal: Rule of Law Abandoned*, *op. cit.* n.1. Press release *Nepal – ICJ calls on Nepali Government to not renew anti-terrorism ordinance*, 31 March 2006, available at: www.icj.org

¹⁸ Article 4(1) of the ICCPR 1966.

¹⁹ UN Human Rights Committee General Comment No. 29 on States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 24 July 2001, paras. 4, 6, 8 and 9. See also, *the ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, 2004, adopted on 28 August 2004 by a gathering of 160 jurists, from all regions of the world, convened by the ICJ at its Biennial Conference, paras. 4 and 5. Available at: <http://www.icj.org>

²⁰ NHRC-Nepal, *Summary of Human Rights Violations Monitored During the State of Emergency*, 2005, *op. cit.* n.1.

- situation (the principle of proportionality);
- ✚ The derogation must be lifted as soon as the situation permits; and
- ✚ Some fundamental rights may never in any circumstances be derogated from, even in the times of public emergency. Non-derogable rights under the ICCPR include: the right to life; freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery; freedom from retroactive criminal liability; right to recognition as person before the law; freedom of thought, conscience and religion.
- ✚ Measures taken to derogate from certain obligations under the Covenant should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Definition of “emergency”

Under the ICCPR, the State must establish the existence of "a public emergency which threatens the life of the nation" in order to declare an emergency in respect of which derogations from the ICCPR are lawful.²¹ The UN Human Rights Committee, which constitutes the supervisory body of the ICCPR, has underscored that not every disturbance or violent act creates this level of seriousness. The situation must be of such imminent and actual threat and magnitude that it threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to protect and ensure rights recognized in the ICCPR.²²

Article 143 of the Interim Constitution enables the Council of Minister of the Government of Nepal to proclaim, order or declare a state of emergency in case of a: *“grave crisis to the sovereignty or integrity of Nepal or the security of any part due to war, external invasion, armed rebellion or extreme economic disarray [...] in any specified part or the whole of Nepal.”*²³

The ICJ is concerned that the circumstances in which the government may declare a state of emergency are excessively vague, overbroad, and are not consistent with the requirements of Article 4(1) of the ICCPR. Not every situation that might be characterized as a “grave crisis to ...the security” of Nepal would rise to the level of a threat to the life of the nation, nor would the nebulous notion of “extreme economic disarray.” Indeed, it is not evident as to what conditions would amount to “extreme economic disarray.” Such broad and ambiguous language creates potential for the declaration of states of emergencies and suspension of fundamental rights in situations that would permit derogation of rights in a manner inconsistent Nepal’s international obligations under Article 4 of the ICCPR.

The ICJ recommends that the future Constitution of Nepal should clearly define the circumstances in which the government may trigger a state of emergency, in full conformity with Article 4 of the ICCPR.

²¹ Article 4(1) of the ICCPR 1966.

²² General Comment No. 29, *op. cit.* n.19, paras. 2 and 3.

²³ Article 143 (1) of the Interim Constitution of Nepal 2007.

Parliamentary Control

The need for parliamentary control over decisions of the executive to declare and extend emergencies has been recognized internationally as one of the important guarantees against unnecessary suspension of rights.²⁴ For example, the UN Siracusa Principles provide that: “*The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.*”²⁵

Under the Interim Constitution, a declaration of emergency is required to be approved by Parliament within one month and is valid for three months. Each extension requires a review and approval by Parliament every three months.²⁶

The ICJ welcomes the provision for parliamentary review of the state of emergency, both initially and periodically.²⁷ However, several concerns remain.

First, in the past, there have been periods when Parliament was dissolved, leaving no possibility to review a declaration of a state of emergency or its continued existence. There should be a special provision for reconvening parliament in such circumstances.

Second, while Parliament may resolve to extend a state of emergency, there is no provision for it to end a state of emergency before the expiry of the three-month period. States of emergencies are exceptional measures that should cease as soon as the emergency has passed. Parliament should therefore have the opportunity to promptly review a situation and to revoke emergency powers where they are no longer warranted.²⁸

Third, Article 143 (6) of the Interim Constitution provides that after a state of emergency has been declared, the Council of Ministers “may issue necessary orders to meet the exigencies.” These orders will have the same force and effect as law, as long as the state of emergency lasts. The ICJ is concerned that these orders, which will be the implementing mechanism of emergency powers, are not subject to parliamentary review, either before or after their introduction. The Council of Ministers is an executive body under the chairmanship of the Prime Minister. In a democratic state the Parliament should be able to probe and question the necessity and proportionality of emergency powers before and after their introduction.

The ICJ recommends that the future Constitution of Nepal expressly provide that the declaration of a state of emergency, and the orders or laws adopted during the emergency, must be subject to parliamentary scrutiny before enactment, and at regular periodic intervals thereafter.

Judicial Review and Effective Remedies

An important requisite for observance of the rule of law and human rights during emergency resulting in derogation from or restriction of rights is that both the declaration of a state of emergency and any measures adopted under it be subjected to judicial oversight. The UN Human Rights Committee has considered that removing the power to review the proclamation of a state of emergency, under

²⁴ *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1985, (the Siracusa Principles), U.N. Doc. E/CN.4/1985/4, Annex (1985).

²⁵ *Ibid.*, Principle 55.

²⁶ Article 143 (2) to (5) of the Interim Constitution of Nepal 2007.

²⁷ *The Siracusa Principles*, *op. cit.* n.24, Principle 55.

²⁸ ICJ letter to the Speaker of Interim-Parliament on Interim-Constitution, 11 February 2007, at: http://www.icj.org/news.php?id_article=4116&lang=en.

which measure derogating from human rights obligations are sought or contemplated, from a Constitutional Court undermines the effectiveness of international standards concerning states of emergency and non-derogable rights. It has asserted that that “Constitutional and legal provisions should ensure that compliance with Article 4 of the Covenant can be monitored by the Courts.”²⁹

The UN Special Rapporteur on the States of Emergency and Human Rights also underscored that notwithstanding the political dimension of a state of emergency, “its legal nature is such that the acts which constitute it (proclamation, ratification etc) and the measures which are adopted when it is in force ... must lie within the framework of the principles governing the rule of law and are thus subject to controls.”³⁰

It is unclear as to what extent the declaration of a state of emergency in Nepal can be effectively subjected to judicial review. The Interim Constitution does not expressly allow for the declaration of states of emergency to be challenged in the courts. The ICJ is concerned that the lack of judicial review of emergency powers could lead to arbitrary exercise of the power and the weakening of executive accountability. Judicial oversight of states of emergency is an inherent function of the rule of law.

Further, the Interim Constitution does not provide individuals with effective ways to test or challenge any interference with their rights by the authorities during a state of emergency.

By becoming party to the ICCPR Nepal has affirmed that it will deal with security threats in conformity with its obligations under that treaty. Article 2(3) of ICCPR requires the State to provide “effective remedies” for any violation of the provisions of the Covenant. The Human Rights Committee has underscored that “*it is inherent in the protection of rights explicitly recognized as non-derogable in Article 4(2) that they must be secured by procedural guarantees, including, often, judicial guarantees. Even if the State during a state of emergency may introduce adjustments... to the extent necessary, to the practical functioning of its procedures governing judicial or other remedies, the State must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective.*”³¹

Article 143 (8) provides that where fundamental rights are suspended under Article 143 (7), “no petition may be made in any court of law, nor any question be raised for the enforcement of the fundamental rights conferred by such Article.” By excluding judicial scrutiny, the Interim Constitution severely limits the possibility of challenging the legality of measures taken by the authorities, and an individual will not be able to access court remedies normally provided for under Nepali law. This is in clear violation of Articles 4 and 2(3) of the ICCPR.

While the Interim-Constitution excludes judicial review of suspension of fundamental rights during emergency, Article 143 (9) provides for compensation for damage caused by an official to any individual in a state of emergency, after the emergency has ended. It further provides that “*the affected person may, within three months from the date of termination of the Proclamation or Order, file a petition for compensation for the said damage, and if the court finds the claim valid, it shall award compensation.*”

²⁹ See Human Rights Committee, Concluding Observation on Colombia, CCPR/C/79/Add.76, paras.38 and 23; and on Sri Lanka, CCPR/C/79/Add.56, para.13

³⁰ Report of the UN Special Rapporteur on the States of Emergency and Human Rights, E/CN.4/Sub.2/1993/23, para. 51.

³¹ General Comment No. 29, *op. cit.* n.19, para. 15.

The limitation period of three months for filing complaints, even for serious violations, is not consistent with the requirements of an “effective” remedy under Article 2(3) of the ICCPR, and as elaborated in *the UN Principles and Guidelines on the Right to a Remedy and Reparation* (UN Principles and Guidelines on Reparations).³² The UN Human Rights Committee recognised that “unreasonably short periods of statutory limitation in cases where such limitations are applicable” is an impediment to establishing legal responsibility, which should be removed.³³

In addition, compensation is not the only form of remedy or reparation that may be appropriate. As provided under the UN principles, and taking account of individual circumstances and the gravity of the violations, the appropriate forms may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Principles 18-23).

The lack of effective remedies itself constitutes a violation of the ICCPR. Effective remedies must be provided even in states of emergencies. Therefore, such prerequisites of the right to an effective remedy should be placed in the Constitution, in order to make this remedy meaningful and effective.

The ICJ recommends that

- **Judicial review of states of emergency is an inherent consequence of the principle of legality and rule of law, and should not be limited or restricted. The future Constitution of Nepal should ensure that the Supreme Court of Nepal has the power to review the lawfulness of the declaration of a state of emergency, as well as any measures adopted under it.**
- **The future Constitution of Nepal should guarantee the right to an effective remedy as well as judicial review during a state of emergency, in conformity with Article 2(3) and 4 of the ICCPR.**

LEGAL IMPUNITY

Under international law States are obliged to conduct prompt, effective, impartial and independent investigations³⁴ into human rights violations and to bring to justice those responsible for violations constituting crimes.³⁵ Under the UN *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, “impunity” is defined as the “impossibility, de jure and de facto, of

³² *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*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Also, see *the ICJ's Practitioners' Guide on the Right to Remedy and to Reparation for Gross Human Rights Violations*, Practitioners' guide series No.2, 2006.

³³ UN Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Article 2), adopted on 29 March 2004, HRI/GEN/1/Rev.7, p.192, para. 18. Similarly, Principle 7 of the *UN Principles and Guidelines on Reparations* recognise that “domestic statutes of limitation for ... violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”

³⁴ See e.g. Report of the Special Rapporteur on the question of Impunity of Perpetrators of Human Rights Violations, E/CN.4/Sub.2/1997/20/rev.1, para. 27; UN Human Rights Committee General Comment No. 20 on prohibition of torture and cruel treatment and punishment (Article 7), adopted on 10 March 1992, HRI/GEN/1/Rev.7, p. 150, para. 14; UN Human Rights Committee, Concluding Observations on *Peru*, 25 July 1995, CCPR/C/79/Add.62, para. 22.

³⁵ See e.g. UN Human Rights Committee, *Bautista de Arellano v. Colombia* (563/9), at para. 8. See *the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 2005, E/CN.4/2005/102/Add.1, adopted on 8 February 2005, Principle 1.

bringing the perpetrators of violations to account – whether in criminal, civil or administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”³⁶

States are required to provide effective remedies,³⁷ which include providing reparations to victims of violations of human rights,³⁸ including gross violations, such as the right to life, freedom from torture, cruel, inhuman and degrading treatment and enforced disappearances.³⁹

Impunity in Nepal is facilitated by the absence of an adequate legislative framework ensuring accountability. . Instead, Nepal has a comprehensive system of immunities, guaranteed by different pieces of national legislation, which protects officials from prosecution for human rights violations; one that provides for full or partial immunity of State officials from prosecution in law and practice. In addition to *de jure* impunity, the lack of political will to take effective measures against gross human rights violations further entrench the prevailing culture of impunity.

Inadequate Legal Framework

In Nepal, the legal framework concerning investigation and prosecution of serious human rights violations remains inadequate. It is of particular concern that many serious human rights violations, which should give rise to individual criminal responsibility, are still not made subject to the criminal legislation. For instance, Nepal is a party to the Convention Against Torture, which requires under Article 4 that all acts or attempts to commit torture, or complicity or participation in such acts, be criminalized. Article 26(2) of the Interim Constitution criminalizes torture; however, there is presently no law in force to permit effective prosecutions of those suspected of having committed torture.

Any successful exercise of criminal accountability requires the capacity of the courts to access evidence and for the parties to test that evidence. The effectiveness of reliable testimony in this respect is contingent on a legal framework, which provides for robust disincentives to provide false information under oath. Under the *Muluki Ain*, witnesses can be tried for perjury, but perjury is almost never treated as crime in Nepal. In addition, the Nepali courts have interpreted these provisions narrowly, granting an exemption for government officials, including army and other security force (who are responsible for many of the most serious violations). As a result, there is little countervailing threat of legal sanction to overcome the reluctance of official to testify truthfully in highly charged cases.

Similarly, other laws, rules and regulations regarding civil servants fail to provide any sanction for perjury.⁴⁰

No credible mechanisms have yet been put in place to address a number of broader impunity issues, including the right to truth and the substantive crime of enforced disappearance. The draft Truth and Reconciliation Commission Bill was circulated

³⁶ UN Commission on Human Rights, Report of the Independent Expert to update the set of principles to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, p.6. The UN Human Rights Commission in resolution 2005/81 commended the Set of Principles to States.

³⁷ See Article 2(3) of the ICCPR, 1966 and General Comment No. 31, *op. cit.* n.33, para. 14.

³⁸ General Comment No. 31, *op. cit.* n.33, para. 16.

³⁹ See the *UN Principles and Guidelines on Reparation*, *op. cit.* n.33, para. 18 et seq., according to which the right to reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

⁴⁰ ICJ, *Human Rights and Administration of Justice: Obligations Unfulfilled*, *op. cit.* n.1, pp. 41 and 65. Also see, HRW, *Nepal: Waiting for Justice, Unpunished Crimes from Nepal's Armed Conflict*, *op. cit.* n.1, p. 7.

by the government in July 2007. This draft contains many provisions which conflict with international standards, including provisions providing for what are in effect an amnesty to those responsible for serious human rights violations. These concerns have been raised by many human rights organisations.⁴¹ The Peace and Reconstruction Ministry has been reviewing the comments received on the Bill, and the government had announced that, given the gravity of the issues, broad consultations were still necessary. However, at the time of this report, no substantial progress had been made in this regard.

Similarly, many conflict-related cases of enforced disappearance remain unresolved. Since the end of the armed conflict, the Government of Nepal has publicly expressed its commitment to address the issue of forced disappearance.⁴² The government also took initiatives to adopt legislation to address the issue of forced disappearances; however, they were widely criticised for their failure to comply with international human rights standards.⁴³

On 12 February 2009, the Cabinet decided to introduce the government Bill on *Enforced Disappearance (Crime and Punishment) Act 2008*, by executive ordinance rather than present the bill for parliamentary discussion and debate. Despite the opposition of the coalition partner CPN (UML), the main opposition parties in the Nepali Parliament, and most national and international human rights organizations, the President promulgated the Ordinance on 12 February 2009.⁴⁴ The Ordinance criminalized the acts of enforced disappearance, and provided for establishment of a commission to investigate past cases from 1996 to 2006, and prosecution of perpetrators and reparations for victims. However, certain provisions of the Ordinance failed to meet international legal standards.⁴⁵ Pursuant to article 88 of the Interim Constitution which requires adoption of Ordinances within 60 days from the commencement of a session of Parliament, the government's failure to adopt the legislation at the last Parliamentary session of the CA resulted in lapse of the Ordinance.⁴⁶

⁴¹ ICJ, HRW and AI joint press release, *Nepal - Truth Commission Bill disregards victims' rights: Draft bill fails to meet international human rights standards*, on 23 August 2007, at: http://www.icj.org/news.php3?id_article=4201&lang=en. Also see, OHCHR Comments and Recommendations on draft Truth and Reconciliation Bill, 6 August 2007; AI, *Truth, justice and reparation: Establishing an effective truth commission*, 11 June 2007, AI Index: POL 30/009/2007; Comment by ICTJ on the draft Bill by MOPR Task Group for the establishment of a Truth and Reconciliation Commission, 31 August 2007.

⁴² The Comprehensive Peace Agreement (CPA) of 12 November 2006, Articles 5.2.2, 5.2.3, 12 November 2006, available at: <http://nepembseoul.gov.np/doc/nov21.doc>; Point 8 of the 23-Point Agreement of 23 December 2007 between the Government and CPN-M; Article 33(q) of the interim Constitution, 15 January 2007. Also, in the Common Minimum Programme announced on 21 August 2008, the three governing parties have reiterated their commitment to ending impunity, and to establish a TRC and a COI into Disappearances.

⁴³ ICJ letter to the Speaker of Interim Legislature-Parliament regarding Bill to provide amendment to the Civil Code to add Chapter 8A on "causing disappearance," 30 May 2007, available at: http://www.icj.org/news.php3?id_article=4164&lang=en; ICJ, *Nepal: ICJ urges Government to ensure "High level Commission of Inquiry on Disappeared Citizens" meets international standards and complies with Supreme Court order,* July 16, 2007, available at: http://www.icj.org/news.php3?id_article=4194&lang=en; ICJ letter to the Chairperson of the Constituent Assembly and press release on 25 November 2008, *New Bill on Enforced Disappearances proposed by Government of Nepal fails to meet human rights obligations*, available at: http://www.icj.org/news.php3?id_article=4419&lang=en.

⁴⁴ ICJ press release on 30 January 2009, *Nepal: Government should allow Parliament to debate*, available at: http://www.icj.org/news.php3?id_article=4443&lang=en. Also see,

⁴⁵ ICJ briefing paper and press release on 9 March 2009, *Nepal: ICJ calls for amendments to Ordinance on Disappearances to Ensure Human Rights*, available at: http://www.icj.org/news.php3?id_article=4460&lang=en.

⁴⁶ ICJ press release on 2 June 2009, *Nepal: After two years, Government still in non-compliance with Supreme Court Order on Enforced Disappearance*, at: http://www.icj.org/news.php3?id_article=4503&lang=en.

Recently in July 2009, the Ministry of Peace and Reconstruction made public Bill on Disappearances (Crime and Punishment) Act, 2009. It criminalizes the acts of enforced disappearance, establishes a commission to investigate past cases from 1996 to 2006, and provides for the prosecution of perpetrators and reparations for victims. However, these welcome steps could be undermined in practice by certain provisions that fail to meet international legal standards, including the definition of “enforced disappearances”, “victims”, and “principal offenders”, the continuing nature of the crime, the responsibility of superior and subordinate officers, the proportional severity of sentences, the mandate of the Commission and its relationship with other legal bodies, the appointment and removal process of Commissioners, witness and victim protection, and effective implementation of the Commission’s recommendations.⁴⁷ The legislation in its current form will not be able to fulfil the promise of ending impunity for gross human rights violations and strengthening respect for the rule of law.

Various Commissions of Inquiry (CoI) have been set up under the *Commission of Inquiries Act, 1969*, to investigate killings during protests and demonstrations.⁴⁸ However, such CoIs suffer from several legal deficiencies and the Act which provides the framework for such commissions does not provide for the necessary safeguards to meet internationally established criteria for CoIs. They have failed to meet the minimum requirements to ensure the competence, independence and impartiality of the members of the commission. They also lack prosecutorial powers, and provisions for the protection of victims and witnesses.⁴⁹ In practice, no report of the commission has been made public, in contravention of the *Inquires Act*.

The potential for further impunity exists in the past failure of the Government of Nepal to respect the decisions of the judiciary. In cases where courts have made findings and decisions regarding serious human rights violations, the government has not carried out its judgements. In early June 2007, the Supreme Court issued a landmark decision in relation to a number of pending disappearances cases (see the box). However, those directives are yet to be implemented by the government. The failure of the government to carry out decisions of the court contravenes international standards on the independence of judiciary.⁵⁰

“Disappearances Decision”
THE SUPREME COURT OF NEPAL
*Rajendra Dhakal and Others v. The Government of Nepal*⁵¹

The Government must

-  Enact a law to criminalize enforced disappearances in line with *the UN International Convention for the Protection of all Persons from*

⁴⁷ ICJ letter to the Minister of Peace and Reconstruction and press release on 16 July 2009, *Nepal: ICJ calls for amendments to Bill on Disappearances to address the Past and Securing the Future*.

⁴⁸ For instance, *Rayamajhi* Commission in context of April 2006 *Jana Andolan* (Protest Movement); the 27 Guar killings and some 24 deaths that occurred during the *Madhesi Andolan*. UN OHCHR report, *Human Rights in Nepal: One year after the CPA*, *op. cit.* n.1, pp. 26-27.

⁴⁹ HRW, *Nepal: Waiting for Justice, Unpunished Crimes from Nepal’s Armed Conflict*, *op. cit.* n.1.

⁵⁰ Principles 1, 3, and 4 of the *UN Basic Principles on the Independence of the Judiciary* 1985 (endorsed by GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

⁵¹ *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration dated Jan 21, 1999, decision June 1, 2007, known as “Disappearance case.”

- Conduct investigations and prosecutions of persons responsible for enforced disappearances; and
- Provide adequate reparation to victim's families.

The ICJ recommends that

- To immediately promulgate a law criminalizing torture and cruel, inhuman and degrading treatment and excluding cases of torture compensation from the statute of limitations. Further, Government of Nepal should revise the *Torture Compensation Act* to make it compatible with Convention against Torture and other international standards.
- Amend *Muluki Ain* to ensure State officials, including members of the security forces, are subject to criminal prosecution for perjury and contempt of court.
- TRC Bill should be amended to ensure that the legislation is in line with the international standards. The government should also develop a comprehensive programme of participatory consultations with all stakeholders with regard to the nature, composition and mandate of the Truth and Reconciliation Commission.
- Fully implement the Supreme Court decision of 1 June 2007 (*Rajendra Dhakal and Others v. the Government of Nepal*) in relation to disappearance cases, including the presentation for adoption of the *Ordinance on Crime and Punishment of Disappearances* at the next session of the Constituent Assembly, and to make amendments to ensure that the legislation is in line with the directives of the Supreme Court and the international standards, regarding the investigation and prosecution of cases of enforced disappearances during the conflict.
- Ratify the Rome Statute of the International Criminal Court; as well as sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances and accede to the Optional Protocol to the Convention against Torture.

Immunity provisions

The ICCPR and other international standards firmly establish the duty of States to prosecute and punish those guilty of human rights violations that give rise to criminal responsibility.⁵² The UN Human Rights Committee considers that amnesty laws, or other similar measures, help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, in breach of the ICCPR.⁵³ It has stressed that

⁵² Article 2 of the ICCPR, 1966. UN Human Rights Committee, Decision dated 13 November 1995, Communication N° 563/1993, *Nydia Erika Bautista* (Colombia), CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication N° 612/1995, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8; *Maria Fanny Suarez de Guerrero v. Colombia*, Communication 45/1979, para 13.3, UN Doc. CCPR/C/15/D/45/1979 of 31 March 1982). See also the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights, para. 60.

⁵³ See e.g. UN Human Rights Committee, Preliminary Conclusions on *Peru*, CCPR/C/79/Add.67, para. 10.

States should not provide immunities or amnesties for human rights violations: “[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”⁵⁴

Exceptional circumstances such as political instability or public emergencies do not justify exempting law enforcement or other officials from possible criminal or civil liability for violation of human rights during emergency operations.⁵⁵ This is particularly the case for those violations recognized as criminal under either domestic or international law; such as torture and similar cruel, inhuman and degrading treatment, as well as summary and arbitrary executions and enforced disappearance.⁵⁶

This principle is also reflected in international legal instruments, such as *the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, which states: “In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.”⁵⁷ States are required to adopt domestic laws and safeguards to prevent abuse of rules aimed at shielding the perpetrators from justice, and thus foster or contribute to impunity. Principle 22 of the *UN Impunity Principles* stipulates that States must prevent the use of rules relating to:

“prescription, amnesty,...*non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military tribunals...that fosters or contributes to impunity.”⁵⁸

In Nepal, various pieces of legislation grant full or partial immunities to State authorities, effectively making them unaccountable for human rights violations.

Section 11 of the *PSA* provides, “No question shall be raised in any Court regarding any order issued under this Act.” Section 13 envisages “departmental action” against any local official who is proved to have issued an order (preventive detention or area confinement order) with *malafide* intentions. However, the Act does not provide for any judicial action, including criminal prosecution, against the official for such unlawful actions or orders. The sanction of “departmental action” against perpetrators is wholly inadequate. To the extent that the Act has any preventive or deterrent purpose, that purpose cannot be reconciled with the immunity provisions that undermine the accountability of officials.

Similar immunity provisions are contained in a number of laws relating to the security forces. Employees of the Nepal Police, including officers and other personnel, are not subject to any penalties for actions taken in “good faith” while discharging their duties.⁵⁹ Similarly, the APF personnel cannot be held liable for acts performed in good faith while exercising their duties. Moreover, under the *Armed*

⁵⁴ See e.g. General Comment No. 20 *op. cit.* n.34, para. 15.

⁵⁵ See e.g. General Comment No. 29, *op. cit.* n.19, para. 14; *the ICJ Berlin Declaration*, *op. cit.* n.19, para. 9; *the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 8: “Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.”

⁵⁶ General Comment No. 31 *op. cit.* n.32, para. 18.

⁵⁷ Principle 19, *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Recommended by Economic and Social Council resolution 1989/65, 24 May 1989.

⁵⁸ *The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, *op. cit.* n.35, Principles 22 and 27.

⁵⁹ Section 37 of the Police Act 1955.

Police Force Regulation 83(1), a criminal case cannot be filed against APF personnel without prior approval from an authorized officer.⁶⁰

Section 22 of the *Army Act* is the most problematic and objectionable part of the Act, providing as it does blanket immunity from legal proceedings for members of the Nepal Army for “acts committed in good faith in the course of discharging duties”. The ICJ welcomes that Section 22 of the Army Act explicitly excludes homicide, rape, torture, enforced disappearance, theft and corruption from being protected by Section 22 immunity. However, other serious crimes - such as cruel, inhuman and degrading treatment not amounting to torture - may be subject to immunity.⁶¹

Also, According to international human rights principles, only civilian courts should exercise jurisdiction over ordinary crimes, including those that amount to human rights violations committed by military personnel.⁶² This is because such acts, by their very nature, cannot fall under the scope of official duties.⁶³ Under the old Army Act 1959, both court martial and civilian courts had jurisdiction to try army personnel for homicide and rape committed during a military operation. Section 66 (1) of the new Army Act provides that the crimes of rape and homicide fall within the jurisdiction of the civilian courts; whether or not they were committed during a military operation. If a dispute arises as to whether a case falls under the jurisdiction of a court martial or a civilian court, the case must be filed in a civilian court.⁶⁴ However, the specific procedures for filing a case already under investigation or adjudication by the Nepal Army are not clear. This causes real practical difficulties, as there are currently on-going cases involving serious human rights violations by Nepal Army personnel.

These provisions undermine the possibility of holding the security forces and government officials unaccountable for their actions, and allow them to act with impunity, in contravention of the provisions of the ICCPR.⁶⁵

The ICJ recommends that

- **The Government of Nepal dismantle the system of general immunities for State agents regardless of their official status or function by revoking relevant immunity provisions, specifically Section 37 of the *Nepal Police Act 1955*, Section 22 of the *Army Act 2007*, Section 26 of the *Armed Police Act 2001* and Rule 83(1) of the *Armed Police Force Regulation 2001*, as well as Section 11 of the *Public Security Act*.**
- **The *Nepal Police Act and Regulations*, the *Armed Police Force Act and Regulations*, and the *Army Act* should be amended to provide the ordinary courts specific jurisdiction over prosecutions of the police or army officials accused of serious violations, such as extrajudicial killings, rape, torture and cruel, inhuman and degrading treatment, enforced disappearances and arbitrary detention.**

⁶⁰ Section 26 of the Armed Police Act 2001 and Rule 83 (1) of the Armed Police Force Regulation 2001.

⁶¹ See, ICJ report, Nepal: Recommendations for amendments to the Draft Army Act, 7 September 2006, at: http://www.icj.org/news.php?id_article=4010&lang=en.

⁶² See Principle No. 9, *Draft Principles Governing the Administration of Justice through Military Tribunals*, adopted by the United Nations Sub-Commission on Human Rights and forwarded to the Human Rights Council, E/CN.4/2006/58.

⁶³ *Draft Principles Governing the Administration of Justice through Military Tribunals, ibid.*, Principle No. 8.

⁶⁴ Section 69 (1) of the Army Act 2006.

⁶⁵ Article 2 (3)(a) of the ICCPR 1966.

Entrenched Practice

In addition to *de jure* impunity, the systemic impunity enjoyed by Nepali security forces in practice and their disregard for the few existing safeguards, reinforces the climate of impunity. The NA, the APF and the Police have each established “Human Rights Cells” within their respective units in order to monitor and prevent human rights abuses. However, these units in practice have been ineffective; and security forces responsible for systematic or widespread abuses are seldom in a position to be self-regulating. The Human Rights Cells have been a toothless entity, designed to disarm critics rather than a serious institution contributing to the process of reform.

Some national Commission of Inquiries reports⁶⁶ have recommended legal action against members of the security forces, but these recommendations have not been pursued in a meaningful way. Security forces in Nepal are used to operating in a culture of impunity, without threat of being held accountable in the courts for actions that violate human rights, including crimes under international law. To date, despite inquiries and investigations into unlawful killings, enforced disappearance and use of excessive force by security forces, no case has resulted in a prosecution.⁶⁷ Similarly, no member of the CPN (M) has been held criminally accountable and convicted for killings, abductions, torture and ill treatment and other abuses in the civilian courts.⁶⁸ In some cases *ex gratia* payments have been offered without actual disbursements to the victims and their families, usually without a proper investigation to establish legal responsibility.⁶⁹

The attempts by the victims or their families to file a First Information Report (FIR) for past or on-going human rights violations by the security forces or members of CPN (M) have been denied by police.⁷⁰ Even where a FIR has been filed, it has not lead to a full criminal investigation, prosecution or conviction of any member of the security forces or CPN (M) alleged to have committed serious human rights violations.⁷¹

The ICJ recommends that

- **The *Civil Rights Act* should be amended to provide individuals with the right to claim compensation from the government in cases where damage or injury has been caused by unlawful actions by or on behalf of the government or its officials.**
- **The government should provide legal recognition of the legal liability of commanders and other superiors for human rights violations committed by their subordinates.**
- **The government should issue clear instructions to the Police that they must register a First Information Report relating to human rights violations and abuses, whether conflict or post-conflict related, including any alleged perpetrators. Such FIRs must be followed by full criminal investigations**

⁶⁶ Notably the *Mallik* Commission (which was established to inquire into the atrocities committed during the 1990 People's Movement) Report 1991; and reportedly the *Rayamajhi* Commission (which was established to inquire the atrocities committed during April 2006 People's Movement) have identified the persons to be prosecuted or against whom departmental actions should be taken.

⁶⁷ HRW, *Nepal: Waiting for Justice, Unpunished Crimes From Nepal's Armed Conflict*, *op. cit.* n.1, p. 22.

⁶⁸ OHCHR, *Human Rights in Nepal One Year After the Comprehensive Peace Agreement*, December 2007, *op. cit.* n.1.

⁶⁹ OHCHR Nepal report 2008, *op. cit.* n.1.

⁷⁰ *Ibid.*, p.17.

⁷¹ See *Maina Sunuwar case*; and *Manoj Basnet's case* in Biratnagar, Marong District, available at: <http://nepal.ohchr.org/index.htm>.

and police should be given the technical support (including forensic science facilities) to carry out the investigations effectively.

Political Pressure and Interference

Leading human rights authorities in the international community, including the UN human rights system, have repeatedly denounced the pervasive climate of impunity in Nepal.⁷² The UN High Commissioner for Human Rights in a recent report on human rights situation in Nepal stressed “the importance of ending impunity if future violations were to be prevented and an environment in which no one was above the law was to be created. The continuing lack of political will to take effective measures to address this issue is deeply disturbing.”⁷³

There is considerable political pressure on the police and judicial system, including threats and intimidation, aimed at inhibiting investigations or arrests of anyone linked with the major political parties, or making unfavourable decisions against them.⁷⁴ This tendency towards political interference is in conflict with the commitments made by the parties under the CPA, and is a serious setback to ending the cycle of impunity. Under the CPA “[b]oth sides express the commitment that impartial investigation and action shall be carried out in accordance with law against the persons responsible for creating obstructions to exercise the rights envisaged in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure rights of the victims of conflict and torture and the family of disappeared persons to obtain relief.”⁷⁵

The ICJ has recommended to the Government of Nepal and to all political parties that they take immediate and concrete steps to end impunity for serious violations of human rights, including by investigating alleged violations and prosecuting those responsible.⁷⁶ To this end, it is important to give priority to reforming the security laws providing for broad immunities to officials, and to strengthen internal and external oversight mechanisms.

The ICJ recommends that all the political parties and other stakeholders should refrain from exerting political pressure on police or the courts and allow them to carry out their function independently, and take immediate and concrete steps to end impunity for serious human rights violations, including by investigating alleged violations and prosecuting those responsible.

⁷² See e.g. UN Committee against Torture, Conclusions and recommendations on the Second Periodic Report of Nepal, CAT/C/NPL/CO/2, 13 April 2005, paras. 24 and 25; Report by Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, *Mission to Nepal*, op. cit. n.1, para. 26; Report by Special Rapporteur on extrajudicial, summary or arbitrary executions, *Mission to Nepal*, op. cit. n.1, paras. 43–50; Report of the Working Group on Enforced or Involuntary Disappearances, *Mission to Nepal*, op. cit. n.1, paras. 33–36.

⁷³ UN OHCHR, *Human Rights in Nepal: One year after the CPA*, op. cit. n.1, paras. 66 and 67.

⁷⁴ UN OHCHR report on Nepal, 2009, op. cit. n.1, para. 45, p.12. Also see, Supreme Court Bar Association, *Study on public faith in the judiciary*, 2008, pp. 134-177.

⁷⁵ Point 7.1.3 of the CPA, 2006.

⁷⁶ ICJ report, *Nepal: The Rule of Law Abandoned*, op. cit. n.1, p. 4, para. 6; ICJ report, *Human Rights and Administration of Justice: Obligations Unfulfilled*, op. cit. n.1, p. 59, para. 220; ICJ Press releases, *ICJ calls on Nepali Government to not renew anti-terrorism ordinance*, http://www.icj.org//news.php3?id_article=3885&lang=en, Nepal - Fear of escalating human rights violations as political turmoil increases, 1 October 2005, http://www.icj.org/news.php3?id_article=3786&lang=en, *Prosecute Army Killings and End Climate of Impunity*, 15 October 2003,

VAGUE DEFINITIONS AND SWEEPING POWERS

Vague Definitions under Security Laws

The principle of legality requires that laws be clear and ascertainable. Correlating to this principle is *nullum crimen lege*, which prohibits the imputation of criminal responsibility unless the conduct was legally defined as criminal at the time of its commission. The rule is a universally recognised general principle of criminal law⁷⁷, which is also reflected in human rights treaties.⁷⁸ According to the principle, the definitions of criminal offences must be precise, unequivocal and unambiguous.⁷⁹ This allows individuals to know what acts can lead to a criminal liability. As an obligation of international human rights law, it must be respected at all times, including in the context of armed conflict and states of emergencies.⁸⁰

The UN Human Rights Committee has stressed that vague, imprecise and ambiguous definitions of the offence of terrorism in domestic legislation breach the principle of legality and has urged States to adopt precise definitions of such offences.⁸¹ According to the Inter-American Court of Human Rights: "Ambiguity in describing crimes creates doubts and the opportunity for abuse of power [...]".⁸²

The ICJ is concerned that some of the public security laws in Nepal contain definitions which are overbroad and vague, creating the potential for abuse. For instance:

- *Public Security Act*: The PSA allows for people to be held in preventive detention for prolonged periods of time, to prevent them from taking any action, which could have an adverse effect on, among other areas, "the security or order and tranquillity of the country."⁸³ The phrase 'security or order and tranquillity of the country' is not defined in the Act and is thereby subject to overbroad interpretations and abuse. This broad definition has facilitated the arrest and detention of many persons under the PSA in relation to conduct engaged in the context of the "people's war."⁸⁴ It was reported that

⁷⁷ See, for example, Article 22 of the Rome Statute of the International Criminal Court and the reports of the International Law Commission to the UN General Assembly, 1993 (Supplement N° 10 (A/48/10), p.81) and 1994 (Supplement N° 10 (A/49/10), p.321).

⁷⁸ Article 15 of the ICCPR; Article 7 of the European Convention on Human Rights; Article 7.2 of the African Charter on Human and Peoples' Rights; Article 15 of the Arab Charter on Human Rights, and Article 9 of the American Convention on Human Rights.

⁷⁹ See e.g. General Comment No. 29, *op. cit.* n.19, para. 7; the Human Rights Committee, Concluding Observations on: *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 20; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. European Court of Human Rights: Judgment of 25 May 1993, *Kokkinakis vs. Greece*, Series A, N° 260-A, p.22, para. 52; and Judgment of 22 June 2000, *Cöeme vs. Belgium*, para. 11; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, "Recommendations", N° 10 (a).

⁸⁰ See Article 4 (2) of the ICCPR; Article 15 of the European Convention on Human Rights; Article 4(b) of the Arab Charter on Human Rights; and Article 27 of the American Convention on Human Rights. See also: UN Human Rights Committee, General Comment No. 29, *op. cit.* n.19, para. 7; Concluding Observations of the Human Rights Committee: *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. vs. Peru*, para. 119 *et seq.*; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* n.79, para. 218.

⁸¹ Concluding Observations of the Human Rights Committee on: *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 14; *Estonia*, CCPR/CO/77/EST, 15 April 2003; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; and Observations and recommendations of the Human Rights Committee on: *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12.

⁸² Judgment of 30 May 1999, *Case of Castillo Petruzzi et al vs. Peru*, para. 121.

⁸³ Section 3(1) of the PSA 1989.

⁸⁴ ICJ, *Nepal: The Rule of Law Abandoned*, *op. cit.* n.1, p.2 and 17-19; Amnesty International, *Nepal: Human Rights and security*, *op. cit.* n.1.

during the conflict several political activists suspected of being members or sympathetic to the CPN (M) were repeatedly arrested and detained without charge or trial under the *PSA* despite court orders for their release.⁸⁵

- *State Offences Act: The State Offences Act 1989*, amended in 2007 after the political changes, includes crimes such as insurrection, treason⁸⁶ and rebellion against a friendly State.⁸⁷ The definition of the offence of treason/sedition comprises a number of vaguely described acts, with punishments ranging from ten years to life imprisonment. The definition includes broad phrases such as conduct jeopardising “the independence or sovereignty or integrity of the Democratic Republic of Nepal,” without defining in specific terms what precise acts would be considered to constitute a crime of sedition. Such vaguely worded definitions give excessive discretionary power to law enforcement officials and create the risk of arbitrary or elastic interpretations based on political expediency. During the conflict, the authorities also increasingly used provisions of this Act to prevent the interim release of suspects on bail pending trial.⁸⁸
- *Public (Offences and Punishment) Act: The Public Offences Act* provides a wide definition of public offences.⁸⁹ For instance, a “public offence” is defined in very broad terms as “behaving irresponsibly in public places” without providing further explanation as to what forms of behaviour can be considered “irresponsible.” Such vague terms give arbitrary power to law enforcement officials and create the risk of abuse, including those persons may be considered to be behaving “irresponsibly” when exercising fundamental rights such as freedom of speech and assembly.

The ICJ recommends that existing security legislation be amended to provide that no conduct, which constitutes a lawful exercise of fundamental rights and freedoms under international law and standards, may be subjected to criminal sanction. In addition, the definitions of the grounds for preventive detention under the *PSA*, offence of treason under the *State Offences Act*, and public offences under the *Public Offences Act* should be amended in accordance with the principle of legality, and international standards, to provide definitions of offences in precise, unequivocal and unambiguous terms,

Extraordinary Powers of the Chief District Officer (CDO)

The Chief District Officer (CDO), the highest-ranking civil servant in each of the country's 75 districts, is granted extraordinary powers under the *LAA*, as well as some other Acts.⁹⁰ Under the *LAA*, the CDO has primary authority for the maintenance of law and order and security at the district level. The CDO also supervises and issues orders to the police in order to maintain law and order and “tranquillity” in the districts.⁹¹ The CDO monitors all government offices, except courts and defence-related offices, and thus supervises, controls and issues directives to those offices.⁹²

⁸⁵ *Ibid.*

⁸⁶ Section 4 of the State Offences Act 1989.

⁸⁷ *Ibid.*, Section 5.

⁸⁸ Lori Anderson, “Emergency and public safety laws in Nepal,” *Seminar*, Issue No. 512, April 2002, available at: <http://www.india-seminar.com/2002/512.htm>.

⁸⁹ Section 2 of the Public Offences Act 1971.

⁹⁰ See, ICJ report, ‘*Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*’, *op. cit.* n.1, para. 95.

⁹¹ Section 5(5) of the *LAA* 1971.

⁹² *Ibid.*, Section 5(2) and (4).

Administrative powers

In relation to security issues, the CDO is vested with wide discretionary powers, without being subject to judicial review or parliamentary oversight. Under Section 6A (1) of the *LAA*, the CDO has the power to impose a curfew if there is a possibility that “tranquillity” will be disturbed in any area as a result of agitation or disturbance. Once the curfew is imposed in an area, under Sections 6A (3) and (4) of the *LAA* respectively, the police have the authority to:

- arrest anyone who contravenes a curfew order and produce him immediately before the CDO; and
- open fire on any individual or mob violating the curfew.

The lack of a definition for what constitutes “disturbance of tranquillity” results in the CDO having wide powers to impose curfews without prescribing their scope, and thus violates the principle of legality, as well as the right to security of the person. Moreover, the authority of the police to effect arrests and detention, or to open fire may impair enjoyment of the right to life and right not to be arbitrarily detained under Articles 6 and 9 of the ICCPR respectively, and increases the risk of serious police abuse.

Similarly, under Section 6B of the *LAA*, the power of CDO to declare areas to be “riot-affected” includes areas affected by “violent or subversive acts.” Once the area has been declared as such, under Sections 6(B) (a) and (b) of the *LAA*, the police will have the authority to:

- arrest without warrant any “suspicious persons” in that area and detain them under the *PSA*;
- shoot on sight any person who indulges in looting, commits violence in such area, sets fire to residential houses and shops, destroys public property, or commits any other “violent or subversive act”

The vague and imprecise meaning as to what constitutes a “subversive act” in both the *LAA* and the *PSA* contravenes the principle of legality. The authority to arrest and detain without a warrant any “suspicious person” under the *PSA* is inconsistent with the requirement of Article 9 of the ICCPR to which Nepal is a party. In failing to clearly define “suspicious persons”, this provision opens the possibility of widespread abuse by the police. Also, Section 6B in its present form, without adequate controls and limits, may permit the police to commit unlawful killings amounting to extrajudicial executions, in direct violation of Article 6 of the ICCPR which prohibits arbitrary deprivation of life.

In addition, the ICJ is concerned that these administrative measures are not subject to judicial scrutiny or oversight. While the CDO is required to notify the Regional Administrator and/or Home Ministry of such declarations, there is no provision for oversight or scrutiny of these orders or measures taken by the CDO either during the curfew period or within the “riot-affected areas.” Any law enforcement official must act within the confines of legislation, including oversight in the form of adequate checks and balances on the exercise of his/her authority. However, there are no safeguards to prevent abuse of these special powers by the CDO.

The ICJ recommends that the *LAA* should be revised to ensure that the CDO’s wide discretionary powers relating to the maintenance of law and order, especially curfew and area confinement orders, are clearly defined and are subject to effective judicial review, thus making the CDO accountable in law.

Judicial powers

Article 14 of the ICCPR provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The Special Rapporteur on the independence of judges and lawyers has underscored that “[t]he separation of power[s] is the bedrock upon which requirements of judicial independence and impartiality are founded....executive respect for such separation is a sine qua non for a democratic State.”⁹³ The Human Rights Committee has also stressed the obligation of all State parties to the ICCPR [...] to ensure that there is a clear distinction between the executive and judicial branches⁹⁴ and that “where the competences of the judiciary and the executive are not clearly distinguishable, it is incompatible with the notion of an independent and impartial tribunal.”⁹⁵

In addition to executive functions, the CDO in Nepal is entrusted under the *LAA* and other legislation with wide judicial powers.⁹⁶ Some of these powers are inconsistent with the executive function and contravene the principle of separation of powers. Their exercise violates the right to fair trial guaranteed under Article 14 of the ICCPR. Under the *LAA*, the CDO is authorized to fine and imprison for up to one month anyone who violates curfew. The CDO may fine and imprison up to three months anyone considered to be committing acts of obstruction or non-violent offences such as participating in meetings of five or more persons in the “riot-affected areas.”⁹⁷ Also, the CDO has the power to sentence people arrested under the *PSA* with imprisonment up to a maximum of six months.⁹⁸

Further, under Section 8 of the *LAA*, the CDO is granted original and appellate judicial authority whereby large numbers of relatively minor cases, such as theft, pick-pocketing, cheating are tried not by the Courts, but by the CDO, an administrative official. Also, the *Fire Arms and Ammunitions Act 1963*, amended in 2008, provides for the CDO to act as the court of first instance for all offences committed under this Act, including those which are sentenced with up to 5 years of imprisonment.⁹⁹ Similarly, human rights monitors have expressed concern that the *Public Offences Act* vests too much discretionary power in the CDO. The Act authorizes the CDO to specify fines and other punishments for misdemeanours without judicial review.¹⁰⁰

The CDO’s jurisdiction over the adjudication of offences constitutes a breach of the general principle of separation of powers; a cornerstone of the Interim Constitution of Nepal. It also contravenes the principle of the independence of the judiciary and an individual’s right to fair trial and due process under Article 14 of the ICCPR, which provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and

⁹³ Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, para. 55.

⁹⁴ Concluding Observations of the Human Rights Committee on *Romania*, 28 July 1999, CCPR/C/79/Add.111, para 10. See also the Concluding Observations of the Human Rights Committee on *Peru*, 15 November 2000, CCPR/CO/70/PER, para 10; on *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para 15; on *Tunisia*, CCPR/C/79/Add.43, 10 November 1994, para 14; and *Nepal*, 10 November 1994, CCPR/C/79/Add.42, para 18.

⁹⁵ Decision of 20 October 1993, Communication No 468/1991, Case of *Angel N. Oló Bahamonde v. Equatorial Guinea*, para. 9.4, UN doc. CCPR/C/49/D/468/1991, 10 November 1993.

⁹⁶ ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1, paras. 94 and 95.

⁹⁷ Section 6A (3) and 6B (3) of the *LAA* 1971.

⁹⁸ Section 10(1) of the *PSA* 1989.

⁹⁹ Section 24(1). As amended in Nepal Gazette, on 6 January 2008, Supplementary no.47 (Gha).

¹⁰⁰ Section 6 of the *Public Offences Act* 1971.

public hearing by a competent, independent and impartial tribunal established by law.” The CDO does not constitute an independent tribunal; rather the CDO is the head of the executive in the district. By conferring to the CDO judicial powers in relation to criminal matters, the District Officer exercises joint executive and quasi-judicial functions without appropriate checks and balances. In practice the CDO have been prone to abuse such authority, including by harassing opponents with unwarranted prosecutions and convictions.

The ICJ recommends that the laws be amended to ensure that all the judicial powers are vested in courts and not the CDO, in accordance with the principles of separation of powers, independence of judiciary and an individual’s right to a fair trial by a competent and independent tribunal guaranteed under Article 14(1) of ICCPR and Principle 5 of *the Basic Principles on the Independence of the Judiciary, 1985.*

ARREST, DETENTION AND DUE PROCESS

Arbitrary Arrest and Detention

International human rights law prohibits the arbitrary detention of any person. Under Article 9 of the ICCPR, States must ensure that any arrest or detention is based on grounds and procedures established by law (Article 9 (1)); information of the reasons for the detention be given (Article 9(2)); judicial supervision of the detention is made available (Article 9(4)); and compensation is provided in the case of a breach (Article 9(5)). If, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14 concerning the right to a fair trial, must also be guaranteed.

Article 24 of the Interim Constitution contains guarantees of certain rights relating to arrest and detention. Article 24(2) guarantees that anyone arrested must be able to consult a lawyer “at the time of the arrest,” and Article 24(3) requires every person arrested to be produced before a judicial authority within 24 hours. However, proviso to Article 24(2) and (3) excludes preventive detention from the scope of this provision. The ICJ welcomes these important safeguards. However these provisions in their present form are insufficient to meet Nepal’s obligation to guarantee freedom from arbitrary detention. See the discussion in sections “*access to legal counsel*” and “*preventive detention.*”

Article 24(1) provides that no person who is arrested shall be detained without being informed of the grounds of such arrest. This provision does not expressly require the person to be informed of the grounds *at the time of arrest.*

Further, Section 3(2) of the *Public Offences Act* authorizes the police to arrest a person based on “a reasonable suspicion” that s/he has committed a public offence, and “may” issue an arrest warrant. The language used in the law does not make it mandatory for the police official to arrest pursuant to an arrest warrant. Similarly, the *State Cases Act* permits the arrest of a person based on “reasonable ground of suspicion” and not to be *detained* without a “detention letter” containing reasons of arrest.¹⁰¹ It does not expressly require the person to be informed of the grounds *at the time of arrest.*

¹⁰¹ Section 14(1) of the State Cases Act 1993.

There is therefore an absence of clear and specific provisions under the law requiring that anyone who is arrested be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Arrest of a person without a warrant, followed with detention without any court order, has been held by the UN Human Rights Committee to amount to a violation of the right to freedom from arbitrary arrest and detention set forth in Article 9(1) of the ICCPR.¹⁰² Nepal must provide for the full scope of Article 9 rights to be implemented in its domestic law.

Given the well-documented pattern of abuse of arrest and detention procedures during the conflict in Nepal, and the resulting enforced disappearances and torture and ill treatment of detainees, it is critical that clear and precise language fully reflecting essential legal safeguards relating to arrest and detention are incorporated in the law.¹⁰³

In Nepal, experience shows that upon arresting suspects, the police systematically hold them in unlawful detention, without respecting basic procedural rights, thereby making them easy targets of human rights violations, including torture or other ill-treatment. Contrary to the requirements contained in Nepali constitution and legislation, arrests generally occur without an arrest warrant and without providing reasons for arrest. This practice has been used by the police to gather evidence during custodial interrogation.¹⁰⁴ Typically no notice of the grounds of arrest and/or detention has given to the detainee, in clear violation of Article 9(1) of ICCPR which requires that an arrest must be based on grounds and procedures clearly established by law, and Article 9(2) of ICCPR, which provides that all persons must be informed of the charges brought against them.

Under Section 3(2) of the *Public Offences Act* and Section 6(1)(d) and 6(2) of the *LAA* an arrested person must be brought before the CDO immediately or within 24 hours. However, as discussed above, the CDO is not a judicial authority or an acceptable substitute. Under the present law, the arrest and initial period of detention of a person is not subject to judicial control and supervision, in contravention of Article 9(3) of the ICCPR. Moreover, during the conflict detainees were typically kept in detention for 7 to 14 days or more without a formal remand order from the CDO, and without maintaining a record of the place of detention. It was also reported that during the initial period of detention, detainees were often subjected to torture and ill treatment, including beatings. The police officials generally avoided recording the date of arrest until the day before detainees had been taken before the CDO, so as to convey the impression that such person had been produced within 24 hours, as prescribed by the Constitution and other legislative provision.¹⁰⁵ These practices of unlawful detention, including unacknowledged detention, recording the arrest date as the day they appeared before a judge, torture and ill-treatment, failure to observe court orders regarding releases, continue even today.¹⁰⁶

While Article 24(3) of the Interim Constitution, Section 15(2) of the *State Cases Act* and Section 17(2) of the *Police Act* require that a detainee be taken before the court within 24 hours of arrest, this right is often ignored in practice. During his visit to

¹⁰² Communication No. 90/1981, *L. Magana ex-Philibert v. Zaire* (Views adopted on 21 July 1983), in UN doc. GAOR, A/38/40, p. 200, paras. 7.2 and 8.

¹⁰³ ICJ reports, *Human Rights and Administration of Justice: Obligations Unfulfilled, Nepal: The Rule of Law Abandoned*, *op. cit.* n.1, OHCHR Nepal report, 2006, *op. cit.* n.1; HRW, *Nepal's Civil War: The Conflict Resumes*, *op. cit.* n.1.

¹⁰⁴ OHCHR Nepal report 2009, *op. cit.* n.1, paras. 43-44, pp. 11-12; OHCHR Nepal report 2008, *op. cit.* n.1, para. 38, p.10. ICJ report, *Human Rights and Administration of Justice: Obligations Unfulfilled*, *op. cit.* n.1.

¹⁰⁵ *Ibid.*, p. 28.

¹⁰⁶ OHCHR Nepal report 2009, *op. cit.* n.1, para. 43, p.11; and OHCHR Nepal report 2008, *op. cit.* n.1, paras. 38-40, p.10.

Nepal, the UN Special Rapporteur on Torture observed that most people arrested were not brought before a court within the 24-hour period.¹⁰⁷

Under Section 17(3) of the *Civil Rights Act* 1955, any person arbitrarily detained can file a compensation claim with the Appellate Court. However, this remedy has proved to be ineffective, as in practice very few claims have been filed, and those few remain pending.¹⁰⁸

The pattern of such practices appears to be continuing in Nepal. For instance, since December 2007, in response to the activities of armed groups and criminal gangs, special task forces, which included Nepal Police and APF personnel, have become increasingly involved in their arrest and detention. They were deployed to eight Terai and three Kathmandu districts. It is reported that at times, the obligation to respect legal procedures, especially arrest and detention procedures, appeared to have been ignored.¹⁰⁹

*Rajendra Dhakal and Others v. The Government of Nepal*¹¹⁰

The Nepali Supreme Court noted the following regarding need for “the rights of detainees” to be incorporated in the disappearances legislation:

The law must incorporate provisions on the right of detainees, the obligations of detaining authorities, the determination of the place of detention, the relationship and access of the lawyer and families to the detainee, and the right of the detainee to be informed of the reason of his detention. In addition, there must be provisions on judicial remedies available a detainee; the availability of remedies to the detainee who is put in illegal detention as well as concerned persons and families who have become victims of illegal detention or disappearance; the right to compensation; a flexible statute of limitations that does not hinder the investigation process; the availability of a complaint filing mechanism and its role with respect to illegal detention or disappearance; the creation of formal detention centres with the stipulation that such centres are the only places where individuals may be detained; humanitarian treatment while in detention; adequate documentation of detention conditions including the time of the detention, the, name, title, address and other relevant details of the person who ordered detention; the obligation to uphold such provisions when transferring the detainee; the right of the families to know all conditions of the detainee; the implementation of a process that ensures that those detainees who were allegedly released were, in fact, released; and adequate record keeping regarding his/her mental and physical condition.

The failure of Nepal to incorporate fully the safeguards enshrined under Article 9 (1) to (3) of the ICCPR also increases the risk of other human rights violations, such as torture and cruel, inhuman and degrading treatment. In light of the pattern of arbitrary arrest and detention in Nepal, it is important to ensure that these protections, as set out in Article 9(1) to (3) of the ICCPR are included as fundamental rights in the Constitution.

¹⁰⁷ Report by Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, *Mission to Nepal*, *op. cit.* n.1, para. 20.

¹⁰⁸ Amnesty International, *Nepal: Human Rights and Security*, *op. cit.* n.1.

¹⁰⁹ OHCHR Nepal report 2008, *op. cit.* n.1, para. 40.

¹¹⁰ The Disappearance case, *op. cit.* n. 51.

The ICJ recommends that

- **The future Constitution of Nepal, the *Public Offences Act*, and the *State Cases Act* are amended so as to guarantee respect of personal liberty and security of detainees as provided under Article 9 of the ICCPR.**
- **All persons presently detained in military custody should immediately either be released or handed over to the custody of the police or, where appropriate, to the CDO, and released from custody unless charged with a cognisable crime and denied bail by a judicial authority.**
- **To take immediate steps to review the APF and NA arrest powers in order to establish proper procedures, including Standard Operating Procedures (SOPs), for arrest and transfer of arrestees to the NP.**

Access to Legal Counsel

The right to be defended by counsel of one's choosing is an inherent part of the right to a fair trial, pursuant to sections 14 (3) (b) and (d) of the ICCPR. The right to have prompt access to a lawyer is universally recognised and protected under international law.¹¹¹ The Human Rights Committee has held that "all persons who are arrested must immediately have access to counsel"¹¹² and that "the use of prolonged detention without any access to a lawyer or other persons of the outside world violates Articles of the Covenant (Articles 7, 9 10 and 14(3)(b))."¹¹³

International law provides that all detained persons have the right to consult and communicate with a lawyer throughout all stages of the legal process.¹¹⁴ A number of international human rights bodies and procedures have stressed the fundamental role played by access to counsel in protecting the detainee and preventing enforced disappearances, unacknowledged detention and torture.¹¹⁵

The Interim Constitution provides that an arrested person has the right to be consulted by a legal practitioner of their choice.¹¹⁶ However, the Interim Constitution only refers to the right of access to a lawyer "at the time of the arrest."¹¹⁷ Limiting the detainee's right of access to legal counsel "at the time of arrest" is inconsistent with the requirements of Article 14(3)(b) of the ICCPR, to provide adequate time and facilities to prepare a defence, including communication with counsel. In addition, the Interim Constitution fails to provide specific provisions on informing arrested

¹¹¹ For instance, Principle 11(1) of the *UN Body of for the Protection of All Persons under any Form of Detention or Imprisonment* 1988, adopted by General Assembly resolution 43/173 of 9 December 1988 (UN Body of Principles on Detention and Imprisonment); and Principle 7 of the *UN Basic Principles on the Role of Lawyers* 1990 stipulates that "all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention," Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹¹² Concluding Observations of the Human Rights Committee on *Georgia*, CCPR/C/79/Add.75, 5 May 1997, para. 27.

¹¹³ Concluding Observations of the Human Rights Committee on *Israel*, CCPR/CO/78/ISR, para. 13.

¹¹⁴ See Article 14(3) (b) and (d) of the ICCPR, 1966 and Principle 17 and 18 of the *UN Body of Principles on Detention and Imprisonment* 1988.

¹¹⁵ See, the Human Rights Committee, Concluding Observations on *Tunisia*, CCPR/C/79/Add.43, para.15, *Algeria*, CCPR/C/79/Add.95, para. 12, and *India*, CCPR/C/79/Add.81, para. 23, Communication No. 326/1988, Case of *Henry Kalenga v. Zambia*, CCPR/C/48/D/326/1988, para. 6.3, Report of the UN Special Rapporteur on Torture, A/57/173, 2 July 2002, para. 18, also see E/CN.4/2004/56, para. 32. See also, Articles 17(3) and 18 of the *International Convention for the Protection of All Persons from Enforced Disappearance* 2006, General Assembly Resolution 61/177, U.N. Doc. A/RES/61/177 (2006), adopted on 20 December 2006.

¹¹⁶ Article 24(2) of the Interim Constitution 2007. See also Section 15 (1) (b) of the Civil Rights Act 1955.

¹¹⁷ Article 24 (2) of the Interim Constitution of Nepal 2007.

persons of their right to a lawyer, or the modalities for providing legal advice or representation to arrested persons.¹¹⁸

The right to prompt access to a lawyer without delay includes the right to consult and communicate with him or her, without interception, censorship and in full confidentiality.¹¹⁹ Police officers in Nepal typically lack training and knowledge with regard to the right to privacy and confidentiality of a lawyer and client during their communications throughout the process.¹²⁰ The law requires that the police must take the statement of a suspect in the presence of the Government Attorney.¹²¹ In practice, however, the Government Attorney is not generally present during the recording of statements. It also appears that the accused rarely requests to be represented by a lawyer during interrogation. Denial of access to legal counsel during detention is a widespread violation in Nepal. Police have used this lack of access as a technique to interrogate detainees and prompt them to give “confessions”, sometimes by coercive or other unlawful means.¹²²

The ICJ recommends that

- **All persons upon arrest should be informed of their right to legal counsel of their choice. Access to counsel should be granted at all stages of custody and proceedings, including prior to interrogation, and without interception, censorship and in full confidentiality in conformity with Articles 14(3)(a) and (d) of the ICCPR, and Principle 18 of the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.**
- **Under no circumstances should any person be tried without legal representation for an offence that carries a sentence of more than six months.**

Place and Register of Detention

In order to protect the personal security of persons deprived of their liberty, including from being subjected to torture or other cruel, inhuman or degrading treatment, international standards require that they must be held exclusively in officially recognized places of detention. In General Comment No. 20 on Article 7 of the ICCPR, the Human Rights Committee stated that “to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention...”¹²³

Further, international standards require humane treatment of detainees and set out detailed provisions to achieve this goal. Article 10(1) of the ICCPR requires that all detained persons shall be treated with humanity and personal dignity. The Human Rights Committee has recognised that poor conditions of confinement are

¹¹⁸ Section 3(1) of the Legal Aid Act 1997, provides that persons with an annual income of less than 40,000 Rs. are entitled to free legal assistance. However, the Legal Aid Act does not specify when such assistance is to be provided.

¹¹⁹ Principle 18 (3) of the *UN Body of Principles on Detention and Imprisonment* 1988, and Principle 8 of the *UN Basic Principles on the Role of Lawyers* 1990, *op. cit.* n.111.

¹²⁰ See ICJ report, *Human Rights and Administration of Justice: Obligations Unfulfilled*, *op. cit.* n.1, para. 107.

¹²¹ Section 9(1) of the State Cases Act 1993.

¹²² See ICJ report, *Human Rights and Administration of Justice: Obligations Unfulfilled*, *op. cit.* n.1, para. 109.

¹²³ General Comment No. 20, *op. cit.* n.34, p. 140, para. 11. Article 17(2)(c) of the *International Convention on the Protection of All Persons from Enforced Disappearance* 2006, Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* 1989, and Principle 12(1)(d) of the *UN Body of Principles on Detention and Imprisonment* 1988 contain similar requirements with regard to the holding of detained persons in officially recognized places of detention.

inconsistent with State's obligations under Article 10(1) of the ICCPR.¹²⁴ These standards are not reflected in Nepal's law or in practice at places of detention.

There are no clear and adequate provisions in Nepali law relating to places of detention and treatment of detainees. The *PSA* contains a reference to holding a person under preventive detention at "a specified place."¹²⁵ However, the *Act* nowhere provides a definition of what is considered as a "specified" place of detention. The Special Rapporteur on torture in his mission report noted that the lack of clear and specific definition of a legal place of detention, among other provisions, had been used by the military to hold detainees in informal places of detention such as military barracks without proper detention facilities, and has resulted in the denial of access to lawyers and family.¹²⁶

Conditions in most places of detention do not conform to international standards. The *Prison Act* and Regulations provide that those arrested on criminal charges generally be held in police custody cells. However, as the UN Committee against Torture in its Concluding Observations on Nepal noted that in some circumstances they may also be held in prisons,¹²⁷ although it is not clear in what circumstances a detainee can be held in prison. It also provides for inspection of prisons by judges and the CDO.

The risk of human rights violations is significantly increased when detainees are held in locations that are not recognised places of detention or without regularized procedures and safeguards to protect detainees. Evidence from Nepal strongly suggests that the absence of regularized training, combined with lack of adequate legal safeguards, contributes to regular reports of ill treatment of detainees.¹²⁸

In addition to the requirement that persons deprived of their liberty must be held in officially recognized places of detention, the UN Human Rights Committee has held that provision must be made for "their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."¹²⁹

The *Nepal Police Act* requires police officials to maintain a daily log of detainees at each police station, and the CDO has the authority to inspect these logs.¹³⁰ However, in practice the police logs are not generally properly maintained. The UN Working Group on Enforced or Involuntary Disappearances recommends that the

¹²⁴ See *Carmen Amendola Massiotti and Graciela Basritussio v. Uruguay*, (25/1978), 26 July 1982, *Human Rights Committee, Selected Decisions under the Optional Protocol, ICCPR (Second to sixteenth Sessions)*, UN Publication, Sales No. E.84.XIV.2, vol. I, p. 136. The *Standard Minimum Rules for the Treatment of Prisoners* of 1957 and 1977, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; and the *UN Body of Principles on Detention and Imprisonment* 1988 also contain extensive and detailed protections for the physical condition of all detainees.

¹²⁵ Section 3(1) of the *PSA* 1989.

¹²⁶ Report by Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, *Mission to Nepal*, *op. cit.* n.1, para. 30. See also, OHCHR Nepal report 2008, *op. cit.* n.1, para.40, p.10; ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1. Also, Report by Special Rapporteur on extrajudicial, summary or arbitrary executions, *Mission to Nepal*, *op. cit.* n.1, para. 49.

¹²⁷ Section 2 and 3 of the *Prison Act* 1963. See also Conclusions and recommendations of the Committee against Torture, *Nepal*, CAT/C/NPL/CO/2*, 2007, Para 21 (b) and (c).

¹²⁸ See ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1.

¹²⁹ General Comment No. 20, *op. cit.* n.34, p. 140, para.11. This duty is also spelled out in Article 17(3) of the *International Convention on the Protection of All Persons from Enforced Disappearance* 2006, Rule 7(1) of the *Standard Minimum Rules for the Treatment of Prisoners* 1957 and 1977, and Principle 12(1) of the *UN Body of Principles on Detention and Imprisonment* 1988.

¹³⁰ Section 23(2) of the *Police Act* 1956.

Government of Nepal maintain a national registry of detained persons.¹³¹ However, despite the announcement by the government in December 2005 that it would establish a fully functioning national central detention register, no legal and structural measures have been undertaken to this effect. The absence of a national registry, as well as the lack of accurate record-keeping at many prisons, police stations and places of detention, including army barracks around the country makes it difficult to monitor the legal status and release of detainees and remain an issue which needs to be addressed. Also, poor record keeping of detentions in police custody and delays in handing over detainees to judicial authorities facilitated arbitrary detention.¹³²

The ICJ recommends that

- **The *Police Act* and *Prison Act* be amended, and new legal provisions be adopted if necessary, to ensure that detained persons be held only at official places of detention that are publicly notified, accessible to inspection and meet the minimum standards prescribed by the *UN Minimum Standard Rules for the Treatment of Prisoners*.**
- **The government ensure that the NP and military detaining authorities keep comprehensive and updated records of all persons held in their custody, in accordance with the international standards. The records should contain personal details of the detainees sufficient to allow for identification, the date of arrest, the reason for arrest, factual circumstances surrounding the arrest, medical conditions and treatment, and a record of the chain of custody.**

Access to Medical Treatment

The right to have prompt access to medical personnel and medical assistance is an essential safeguard recognised under international standards, such as, Principle 24 of the *UN Body of Principles*, and Rules 37 and 92 of the *Standard Minimum Rules for the Treatment of Prisoners*. This protection also acts as a safeguard against torture and ill treatment of detainees and unacknowledged detention.

In Nepal, the *Torture Compensation Act* provides that, as preventive measure against torture, all detainees must be examined by a doctor prior to their detention.¹³³ Thereafter, the medical examination report of each detainee must be sent to the District Court.¹³⁴ In practice, however, it appears that medical examinations are not always carried out and there is no legal provision for independent medical examination of a detainee.¹³⁵ The Interim Constitution has authorized the Attorney General to issue orders in cases of inhuman behaviour, or if a family member or lawyer is denied access to a detainee.¹³⁶ However, in order to delegate this power to the District Government Attorney, there is a need for an express legal provision.

¹³¹ See Report of the Working Group on Enforced and Involuntary Disappearances, *Mission to Nepal*, *op. cit.* n.1, para. 40.

¹³² UN OHCHR report on Nepal 2007, *op. cit.* n.1, para. 27.

¹³³ Section 3(2) of the Torture Compensation Act 1996 (TCA) requires that the medical examination be conducted as far as possible by a Government doctor, and where a Government doctor is not available, by the detaining officer.

¹³⁴ Section 3(2) and (3) of the Torture Compensation Act 1996.

¹³⁵ See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Mission to Nepal*, *op. cit.* n.1, para. 16. See also Conclusions and recommendations of the Committee against Torture, *Nepal*, *op. cit.* n.127, para. 21 (d).

¹³⁶ Article 135(3) (c) of the Interim Constitution of Nepal 2007.

The ICJ recommends that

- **Judges and prosecutors should routinely inquire of persons brought from police custody as to the condition of their treatment. Even in the absence of a formal complaint from the detainee, an independent medical examination should be ordered.**
- **Access to appropriate medical assistance should be available at all times, and should be provided upon request of the detainee. In addition, the detainee should be granted a medical examination on a regular periodic basis.**

Preventive detention

According to international legal standards, administrative detention on security grounds is an extraordinary measure, only permissible under exceptional circumstances, such as in the event of a lawful derogation and pursuant to declaration of state of emergency under the ICCPR.¹³⁷ To that end, the UN Human Rights Committee has confined permissibility of the practice to very limited and exceptional cases¹³⁸ and for very limited period of time limited, and under no circumstance be indefinite.¹³⁹ The ICJ in its study on states of emergency recommends that *“administrative detention should not be resorted to other than under states of emergency. Accordingly the constitution or legislation should provide that a formal proclamation of a state of emergency is a precondition for the use of administrative detention.”*¹⁴⁰ Experience in different countries shows that administrative detention often results in abuses, such as torture, cruel, inhuman and degrading treatment and enforced disappearance, because it does not provide the usual legal safeguards to protect detainees.¹⁴¹

Effective legal and practical safeguards must be in place to protect administrative detainees. The UN Human Rights Committee has stated that

*“if administrative detention is used, for reasons of public security, it must be controlled by the same provisions governing detention while under arrest or awaiting trial. Meaning, it must not be arbitrary, and must be based on grounds and procedures established by law (Article 9 (1) of ICCPR), information of the reasons must be given (Article 9(2), ICCPR) and court control of the detention must be available (Article 9(4), ICCPR) as well as compensation in the case of a breach (Article 9(5), ICCPR). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14, must also be granted.”*¹⁴²

¹³⁷ See e.g. *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN document E/CN.4/826/Rev.1, paras. 783-787; the European Court of Human Rights, Judgment of 1 July 1961, *Lawless vs. Ireland* (paras. 13, 15 and 20), Judgment of 18 January 1978, *Ireland vs. The United Kingdom* (para. 214), and Judgment of 26 May 1993, *Brannigan and McBride vs. The United Kingdom*; the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.* n.79, para. 138; the Concluding Observations of the Human Rights Committee on *Jordan*, UN document CCPR/C/79/Add.35, A/49/40, paras. 226-244, and on *Morocco*, UN document CCPR/C/79/Add.44, para. 21.

¹³⁸ Concluding Observations of the Human Rights Committee on *Jordan*, *ibid.*, paras. 226-244, and on *Morocco*, *ibid.*, para. 21

¹³⁹ Concluding observations of the Human Rights Committee on *Zambia*, CCPR/C/79/Add.62, para. 14.

¹⁴⁰ ICJ report, *State of Emergency – Their Impact on Human Rights*, Geneva, 1983, p. 429.

¹⁴¹ See, *inter alia*, Concluding Observations of the Human Rights Committee on *Egypt*, CCPR/C/79/Add.23, para. 10; and on *Ukraine*, CCPR/C/79/Add.52; A/50/40, paras. 305-333.

¹⁴² General Comment No. 8, Right to liberty and security of persons (Article 9), adopted on 30 June 1982, U.N. Doc. HRI/GEN/1/Rev.6 at 130 (2003), paras. 1, 2 and 4.

Human rights safeguards during preventive detention

According to international standards,¹⁴³ States must provide the following safeguards when they use administrative detention for security reasons in the context of fighting terrorism:

- ✚ Detainees have the right to be informed of the reasons for their detention; to have prompt access to legal counsel (within 24 hours), family and, where necessary or applicable, medical and consular assistance; to receive humane treatment; to have access to *habeas corpus* and the right of appeal to a competent court;
- ✚ There must be legal guarantees against prolonged incommunicado and indefinite detention;
- ✚ Detainees must be held in official places of detention and the authorities must keep a record of their identity;
- ✚ The grounds and procedures for detention must be prescribed by law and reasonable time limits set on the length of preventive detention;
- ✚ Any such detention must continue only as long as the situation necessitates and appropriate judicial bodies and proceedings should review detentions on a regular basis when detention is prolonged or extended.

The Interim Constitution of Nepal allows preventive detention in situations where a person poses a threat to the sovereignty, integrity or law and order situation of the country.¹⁴⁴ Also, the *PSA* grants authority to the CDO to issue a preventive detention order initially for 90 days which may be extended for another 90 days on the approval of the Ministry of Home Affairs, and yet another six months on the approval of the Advisory Committee.¹⁴⁵ The *PSA* allows preventive detention of individuals in order “to maintain sovereignty, integrity or public tranquillity and order.”¹⁴⁶

Neither the Interim Constitution nor the *PSA* clearly state what actions would constitute a threat to sovereignty, integrity, or public tranquillity and order. There must be sufficient grounds of existence of an immediate threat, and according to international standards such preventive detention must not be arbitrary. It should be based on grounds and procedures established by law and the court control of the detention must be available.¹⁴⁷ These deficiencies are in clear violation of the Article 9(1) of the ICCPR and Principle 2 of the *UN Body of Principles*.

During the conflict, the *PSA* served as an alternative means to the TADO for police and security forces to hold persons in preventive detention for prolonged periods without charge, where the conduct did not meet the definition of “terrorist act.” Scores of political activist and opponents suspected of being sympathetic to the CPN

¹⁴³ See ICJ, *International Legal Framework on Administrative Detention and Counter-Terrorism*, Geneva, March 2006, available at: <http://www.icj.org>.

¹⁴⁴ Article 25 (1) of the Interim Constitution of Nepal 2007.

¹⁴⁵ Sections 5(2), 7 and 8 of the *PSA* 1989.

¹⁴⁶ Section 3(1) of the *PSA* 1989.

¹⁴⁷ General Comment No. 8, *op. cit.* n.142, para. 4.

(M) were repeatedly arrested and detained unlawfully, without charge or trial under the *PSA*.¹⁴⁸

Detainees who claim they have been unlawfully detained under the *PSA* can, under Article 25(2) of the Interim Constitution and Section 21A of the *PSA*, file a complaint at the District Court claiming compensation. In practice, however, only a very few cases have been filed and in those cases inadequate compensation has been provided. Moreover, in order to ensure deterrence from such practices, effective procedures must be established to prosecute and punish the security officials responsible for these human rights violations. The Interim Constitution and the *PSA*, therefore, must be amended in line with the international obligation in respect to preventive detention.

The ICJ recommends that

- The Interim Constitution and the *PSA* be amended to ensure that preventive detention on security grounds is confined to very limited and exceptional cases, in accordance with international law.
- The Interim Constitution and *PSA* should be reviewed to assess its compatibility with international standards on preventive detention, and be amended to reduce the period of time allowable for preventive detention with a view to charge or release; to provide immediate or subsequent judicial oversight of each detention; and provide other necessary safeguards to the detainee.
- The *Police Act* and *Prison Act* should be amended, and new legal provisions be adopted if necessary, to ensure that persons held under any forms of detention only be detained at official places of detention that are publicly notified, accessible to inspection and meet the minimum standards prescribed by the *UN Minimum Standard Rules for the Treatment of Prisoners*.
- The overly broad definition of “public offence” should be revised to make the definition precise and provide for lawful detention. It is also recommended that the jurisdiction of these cases must be given to a judge rather than an administrative officer.
- The NP and military detaining authorities should keep comprehensive and updated records of all persons held in their custody under any form of detention, in accordance with the international standards.

Habeas Corpus and Judicial Supervision

Habeas corpus, or the right to access to a competent and independent court to challenge the legality of any detention, is a fundamental principle of law. The right is enshrined in Article 9(4) of the ICCPR, which provides that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention, and order his release if the detention is not lawful.”

Although parts of the ICCPR Article 9 may be subject to derogation, judicial access to challenge the lawfulness of detention must be made available, even during a time of

¹⁴⁸ ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1, para. 106; ICJ report, *Nepal: Rule of Law Abandoned*, *op. cit.* n.1, p.20.

emergency.¹⁴⁹ The UN Human Rights Committee has affirmed these principles,¹⁵⁰ and has held the suspension of *habeas corpus* is a violation of Article 9 (4) of the ICCPR.¹⁵¹ Prolonged or delayed *habeas corpus* proceedings are also incompatible with Article 9 of the ICCPR.¹⁵²

The right to *habeas corpus* also constitutes an element of the right of a detainee to an effective remedy, as provided in the ICCPR Article 2(3). General Comments 31 states that individuals should have an “accessible and effective remedy to vindicate those rights”.¹⁵³ The UN Human Rights Committee has consistently affirmed that the right to a remedy must be provided even in times of a state of emergency threatening the life of the nation.¹⁵⁴ Such a remedy serves to maintain the rule of law and provides a safeguard to protect those arrested from grave human rights violations, such as torture and enforced disappearance,¹⁵⁵ *incommunicado* detention¹⁵⁶ and other human rights violations.

The Interim Constitution provides for the right to file a writ petition of *habeas corpus*.¹⁵⁷ However, in the past, due to the lack of a constitutional provision on *habeas corpus* jurisdiction for the Appellate and District Courts,¹⁵⁸ a number of cases of illegal detention during states of emergency have gone unheard. This shortcoming denies the right of detainees to challenge the lawfulness of their detention and severely limits the right of a detainee to an effective remedy, as guaranteed under Article 2(3) of ICCPR.

In Nepal, during the course of the conflict and thereafter, Nepali lawyers have invoked *habeas corpus* several times in cases of arbitrary detention, however many of the orders issued were ignored by the police or other authorities. The courts lack enforcement capacity, and repeated instances of disregard or delay in implementation of court release orders severely eroded authority of the judiciary in Nepal. In some cases, detainees who were released pursuant to a *habeas corpus* order were immediately re-arrested without warrant or stated reason.¹⁵⁹

This practice clearly contravenes international standards, which requires not only the availability of a remedy against unlawful detention, but also that such remedy is effective.¹⁶⁰

¹⁴⁹ See Article 17(2)(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance* 2006; Principle 32 of the *UN Body of Principles on Detention or Imprisonment* 1988; and Article 9 of the *Declaration on the Protection of All Persons from Enforced Disappearances* 1992, General Assembly resolution 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), adopted on 18 December 1992.

¹⁵⁰ General Comment No. 29, *op. cit.* n.19, paras. 14 and 16.

¹⁵¹ See, among others, the Concluding Observations of the Human Rights Committee on *Nigeria*, CCPR/C/79/Add.64, para. 7; Views of 26 October 1979, Communication No. 9/1977, *Edgardo Dante Santullo Valcada vs. Uruguay*, CCPR/C/8/D/9/1977; Views of 29 July 1980, Communication No. 6/1977, *Miguel A. Millan Sequeira vs. Uruguay*, CCPR/C/10/D/6/1977; and Views of 27 March 1981, Communication No. 37/1978, *Esther Soriano de Bouton vs. Uruguay*, CCPR/C/12/D/37/1978.

¹⁵² Concluding Observations of the Human Rights Committee on *Dominican Republic*, CCPR/CO/71/DOM, 26 March 2001.

¹⁵³ General Comment No. 31, *op. cit.* n.33, para. 15.

¹⁵⁴ General Comment 29, *op. cit.* n.19, paras. 14 and 16.

¹⁵⁵ *Ibid.*, para. 15.

¹⁵⁶ See, among others, the European Court of Human Rights, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, paras. 62-63, and *Öcalan v. Turkey*, 12 March 2003, para. 86.

¹⁵⁷ Article 32 and 107(2) of the Interim Constitution of Nepal, 2007.

¹⁵⁸ See Article 107(2) of the Interim Constitution of Nepal 2007, and Judicial Administration Act 1991. Neither the Interim Constitution nor the Judicial Administration Act provides the jurisdiction to the District Court to hear the writs of *habeas corpus*.

¹⁵⁹ OHCHR report 2008, *op. cit.* n.1, paras. 38-40, p.10. ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1, paras. 105 and 106; ICJ Report *Nepal: The Rule of Law Abandoned*, *op. cit.* n.1.

¹⁶⁰ Article 2(3) of the ICCPR 1966.

Further, Article 9(3) of ICCPR guarantees the right of anyone “arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power.” The Committee has clearly stated that the guarantees contained in Article 9(3) and 9(4) (concerning habeas corpus) must be effectively enforced at all times, even in public emergencies threatening the life of the nation.¹⁶¹

The Human Rights Committee has affirmed that where preventive detention is used, it must be based on grounds and procedures, information concerning the reasons should be given, and court control and supervision of the detention must be available.¹⁶²

For the purpose of judicial supervision, there is no legal provision either under the Interim Constitution or the PSA that an arrested person must be brought before a judge or a competent authority after the arrest. Such a provision is necessary to meet Nepal's international obligations under ICCPR Article 9(3).¹⁶³ The PSA provides merely that the Local Official shall inform the CDO within 24 hours about the preventive detention order issued by him.¹⁶⁴

Judicial supervision provides a vital safeguard against human rights violations, including torture and enforced disappearances, as it allows the judge to actually see the detainee and consider the allegations made by the detainees. The UN Committee against Torture has specifically recommended to Nepal that the PSA be brought in line with Nepal's international obligations regarding arrest and necessary safeguards should be provided to a detained person.¹⁶⁵ Only in the most exceptional situations, when it may be impossible to access a court, such as when the judiciary collapses because of an emergency, would a delay in bringing a detainee before a judge be justified. This situation does not apply in post-conflict Nepal, where the courts are once again functioning and active. In any event, any suspension of this important right beyond 48 hours would be not be justifiable, as arrangements for transfer to another jurisdiction could be effectuated.¹⁶⁶

Given that many persons allegedly detained in custody during the conflict were subjected to enforced disappearance and that their lack of a guarantee to judicial oversight greatly facilitated enforced disappearances, the Supreme Court in a landmark decision issued directives to the government to improve the law on detention.¹⁶⁷ However, those directives are yet to be implemented by the government.

ICJ recommends that

- **The power to hear *habeas corpus* cases should be extended to the District Courts, in addition to the Appellate Court, in order to ensure that the detainees’ right to judicial review of the preventive detention order, effective remedy and access to justice are in conformity with the international standards.**
- ***Habeas corpus* orders must be enforceable by a proper officer of the court, as presently provided in law, but not followed in practice. Officials failing**

¹⁶¹ General Comment No. 29, *op. cit.* n.19, paras. 14 and 16. See also, the Concluding Observations of the Human Rights Committee on Albania, CCPR/CO/82/ALB, 2 December 2004, para. 9.

¹⁶² General Comment No. 8, *op. cit.* n.142, paras. 1, 2 and 4.

¹⁶³ Article 9(3) of the ICCPR 1966.

¹⁶⁴ Section 4(2) of the PSA 1989.

¹⁶⁵ Conclusions and recommendations of the Committee against Torture, *Nepal, op. cit.* n.127, para 14.

¹⁶⁶ See e.g. *Aksoy v Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417, and Concluding Observations of the UN Human Rights Committee on Thailand, CCPR/CO/84/THA (13), 28 July 2005.

¹⁶⁷ See *Rajendra Dhakal and Others v. The Government of Nepal, op. cit.* n.51.

to comply with such orders should be subject to sanctions such as in the nature of contempt of court.

- The court before which a *habeas corpus* writ is returned should be granted the power to prohibit re-arrest, unless new evidence is produced to the satisfaction of the court that such re-arrest is appropriate.

Torture and Detention

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) is a *peremptory* norm of international law (*jus cogens*), guaranteed in all major general human rights treaties and numerous other human rights instruments, including the Convention against Torture (CAT) and the ICCPR (Article 7). The peremptory nature of this right is underlined by the fact that this right cannot be derogated from under international human rights law under any circumstances.¹⁶⁸ The prohibition against torture and ill-treatment “is complemented by the positive requirements of Article 10, paragraph 1, of the Covenant, which stipulates that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.”¹⁶⁹ Torture is a crime under international law and States are under an obligation to ensure that all acts of torture are offences under its criminal law (Article 4 of CAT) and to provide for universal jurisdiction to ensure that offenders present on its territory are brought to justice (Article 5 of CAT). States must ensure that victims are ensured a remedy and reparation, including compensation and rehabilitation for violations (Article 14 of CAT and Article 2 of ICCPR). States are under an obligation to ensure that information gained by prescribed ill-treatment is not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made (Article 15 of CAT).

Article 26(1) of the Interim Constitution guarantees the right not to be subjected to torture and ill-treatment, and stipulates that “No person who is detained during investigation, or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment,” and that any such action is punishable in law and the victim is entitled to claim compensation.¹⁷⁰

The ICJ welcomes the protection against torture guaranteed as a fundamental right in the Interim Constitution. However, it is of grave concern that torture, like enforced disappearance, has not been made a specific criminal offence under any law and legal mechanisms and procedures concerning prosecution of these serious human rights violation remain absent. Nepali law does not prohibit the admission of evidence obtained through torture.¹⁷¹ In practice, officials responsible for acts of torture, cruel, in human or degrading treatment are almost never held accountable for their abuse of power, either by way of criminal prosecution or civil accountability.

Moreover, the *Torture Compensation Act* 1996, under which victims of torture or their families could make claims for compensation, has failed to provide an effective remedy. Under this Act, prosecutors are not mandated to prosecute officials for acts of torture, but rather to defend police officials in compensation cases. In addition, the compensation granted to the victims is not levied on the perpetrators, but is paid from State funds. There is no individual responsibility specifically for acts of torture

¹⁶⁸ Article 4(2) of the ICCPR and Article 2(2) of the CAT.

¹⁶⁹ Human Rights Committee, Concluding Observations on *Poland*, UN doc. GAOR, A/55/44, p. 22, para. 94.

¹⁷⁰ Article 26(2) of the Interim Constitution 2007.

¹⁷¹ Section 17(2)(b) of the Evidence Act 1974.

under Nepali law. Also, to date, many cases filed under the Act are pending in the courts and only in three cases has small and inadequate compensation been paid.¹⁷²

Article 2 of the CAT provides that "each State Party shall take effective legislative, administrative, judicial or other measures to **prevent** acts of torture in any territory under its jurisdiction." According to Article 12 of the Convention, each State party shall "ensure that its competent authorities proceed to a **prompt and impartial investigation**, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction"(emphasis added). The Human Rights Committee, in General Comment No. 20, also pointed out that Article 7 of the ICCPR should be read in conjunction with Article 2(3) thereof concerning the obligation of the States parties to provide **effective remedies** to persons whose rights and freedoms are violated.¹⁷³

The UN Special Rapporteur on torture, in his report on Nepal concluded that torture was systematically practised by police, APF and NA. He stressed that legal safeguards were routinely ignored and expressed deep concern about the prevailing culture of impunity for torture, especially the emphasis on compensation to victims as an alternative to criminal sanctions against the perpetrators.¹⁷⁴

Therefore, the lack of definition of torture and ill-treatment, the absence of criminalisation of torture, the lack of legal procedures to prosecute the acts of torture and other ill-treatment, and the failure to provide an effective remedy to the victims of torture and their families, amounts to a failure of the Nepal Government to discharge its obligations under international law.

The ICJ recommends that

- **Legislative and constitutional prohibitions against torture and cruel, inhuman and degrading treatment consistent with international standards be enacted ensuring that conduct constituting such proscribed treatment is subject to individual criminal responsibility and that offenders are brought to justice. Ensure that any person subjected to torture or ill treatment has access to a full remedy and reparation.**
- **Repeal Section 9(2)(a) of the *Evidence Act* which authorises judges to accept evidence obtained through illegal means and which in effect legalises torture, and introduce a provision prohibiting the use of evidence in any proceeding of statements made as a result of torture, except against a person accused of torture where it may constitute evidence that the statement was made, but not proof of its contents.**
- **Judges confronted with a *prima facie* indication of torture or inhuman or degrading treatment should exercise the power to order an independent investigation.**

Bail

Article 9 (3) ICCPR provides that, "It shall not be the general rule that persons awaiting trial shall be detained in custody [...]."¹⁷⁵ The UN Human Rights Committee has held

¹⁷² OHCRC report on Nepal, 2006, *op. cit.* n.1., para. 37.

¹⁷³ General Comment No. 20, *op. cit.* n.34, p. 141, para. 14.

¹⁷⁴ Report by Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, *Mission to Nepal*, *op. cit.* n.1. Also see, OHCHR reports on Nepal 2009, paras.43-44, pp.10-11; and OHCHR report on Nepal 2008, paras.38-40, p.10, *op. cit.* n.1.

¹⁷⁵ Also see, Rule 1.5 of the *United Nations Standards Minimum Rules for Non-custodial Measures* (The Tokyo Rules), 1990.

that pre-trial detention should be the exception and that bail should be granted except where the accused would abscond, destroy or interfere with evidence, influence witnesses, or prevent commission of further offences.¹⁷⁶ The procedure of bail hearing must be made mandatory so that all accused have the right to be heard by a judge or a competent authority according to international standards.¹⁷⁷

Under the present Nepali legal system, there is no provision regarding police bail or anticipatory bail. The law does not provide uniform criteria for the grant or denial of bail and bail is not considered as a matter of right in minor offences. The detainees are remanded to custody almost systematically during the investigation phase. The bail proceeding is available only during the pre-trial session in the court after the charge sheet is registered, immediately followed by the deposition of the accused.¹⁷⁸ The deposition should be recorded, but judges do not always follow this procedure. Bail may be granted as a privilege for offences for which the punishment is less than three years. However, bail is often only granted against the deposit of a monetary value bond.¹⁷⁹ As a consequence, bail is generally only available to those who have the means to afford the required sum, making it a privilege of the relatively wealthy.

This discriminatory policy with regard to bail is also arbitrary and violates the principle of equality before the law. It is problematic that bail is only granted for offences carrying a maximum penalty of less than three years, because it increases the instances of unnecessary incarceration and calls into question the presumption of innocence for those not accorded bail.¹⁸⁰

In deciding whether to grant bail, the District Court has wide discretion to evaluate the evidence presented. Generally the orders of the presiding judge in matters of bail are largely subjective, as the bail proceeding is confined to *prima facie* evidence submitted by the prosecution. Also, no documents relating to the investigation or prosecution are made available to the defence attorney in advance, therefore not allowing sufficient time to prepare a response.¹⁸¹

Moreover, bail hearings under the *Acts* where the CDO is granted judicial powers without any judicial scrutiny over its decisions, such as the *Public Offences Act*¹⁸² and the *PSA*,¹⁸³ violate the principal of separation of powers underlying the Interim Constitution of Nepal as well as the principle the independence of judiciary and individual's right to fair trial under Article 14 (1) of ICCPR. If the CDO denies bail, the arrested person may be detained for up to 35 days pending the completion of the investigation.¹⁸⁴ As discussed above, the CDO is not an independent tribunal, but rather the head executive authority in a district.

The ICJ recommends that

- **The Section 118 of *Muluki Ain*, Section on Court Management regarding bail be amended and provision for police bail or anticipatory bail should be included.**

¹⁷⁶ UN Human Rights Committee, cases of *Hill v. Spain* (CCPR 526/99) and *W. B. E. v. The Netherlands* (CCPR 432/90)

¹⁷⁷ Article 9(3) and 14(1) of the ICCPR 1966.

¹⁷⁸ Section 118 of the *Muluki Ain*, chapter on Court Management 1963.

¹⁷⁹ *Ibid.*, Section 118(4) and (5).

¹⁸⁰ ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, *op. cit.* n.1, para. 190.

¹⁸¹ Section 118(4) of the Civil Code, Chapter on Court Management 1963.

¹⁸² Section 5(1) and (2) of the Public Offences Act 1971.

¹⁸³ Sections 5 and 6 of the Public Security Act 1989.

¹⁸⁴ Section 6(1) of the Public Offences Act 1971.

- **Bail or conditional release laws should be expanded to include offences carrying a maximum of three years' imprisonment, to reduce unnecessary incarceration and to strengthen the presumption of innocence. In serving a sentence, credit should automatically be given for time spent in detention pending trial.**
- **To amend the *PSA* and the *Public Offences Act*, so as to give effect to right of the accused to be heard by an independent and competent judicial authority, in accordance with international standards.**
- **The law should contain an express provision ensuring the right to consult with and be represented in court by legal counsel during pre trial detention and a bail hearing.**

OTHER FUNDAMENTAL HUMAN RIGHTS

FREEDOM OF ASSEMBLY

Freedom of assembly is guaranteed under the ICCPR (Article 21). The restrictions on the right of assembly must cumulatively meet the following conditions: provided by the law; "necessary in a democratic society" in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others (Article 21(2)).¹⁸⁵ The Human Rights Committee has affirmed that the possibility of restricting this right pursuant to the express terms of Article 21 of ICCPR provides sufficient latitude to States, and no derogation from the right would generally be justified.¹⁸⁶

Invocation of these restrictions must meet the tests of necessity and proportionality. To restrict the right to peaceful assembly and association there must be a direct causal link between the exercise of the right to assemble and an essential security purpose, and that no other means exist to adequately address the risk to security. A clear distinction has to be drawn between legitimate, peaceful assemblies, and organisations, and those that could incite violence or threaten national security.

Limitations that are "so broad and numerous as to restrict severely the effective exercise of such right," are not in compliance with Article 21 of the Covenant.¹⁸⁷ Any wholesale ban on demonstrations or other forms of assembly on the grounds of "public safety and national security" is incompatible with the right to freedom of assembly under Article 21 of the Covenant.¹⁸⁸

The Interim Constitution of Nepal (Article 12(3)(c)) guarantees freedom of assembly peacefully and without arms. However, this right is subject to reasonable restrictions to prohibit any act that may "undermine the sovereignty, integrity or law and order situation of Nepal."¹⁸⁹ The vagueness of the terms used, absence of a specific requirement for the government to justify such restrictions, and the significant discretion involved, are inconsistent with the principles of necessity and proportionality.

¹⁸⁵ *Viktor Korneenko and others v. Belarus*, Communication No 1274/2004, 31 October 2006, para. 7.2 UN Doc. CCPR/C/88/D/1274/2004.

¹⁸⁶ General Comment No. 29, *op. cit.* n.19, para. 5.

¹⁸⁷ *Mongolia*, UN doc. GAOR, A/47/40 (1992), p.151, para.601.

¹⁸⁸ *Lebanon*, UN doc. GAOR, A/52/40 (vol.1), pp. 56-57, para. 356.

¹⁸⁹ Article 12(3) (c) (2) of the Interim Constitution of Nepal 2007.

Nepali law provides wide regulatory powers regarding public gatherings under the LAA. Under this Act, the CDO is granted extensive powers to prevent and disperse gatherings. S/he may prohibit gatherings in certain specified areas declared as “riot affected areas.”¹⁹⁰ The LAA also allows the CDO to take wide ranging actions in the “riot affected area,” including the arrest of any suspicious person without an arrest letter and preventive detention under the PSA; police powers to shoot on sight; the prohibition of assemblies, procession, meetings or demonstrations of any kind, or the affixing of signs or protects, or the dissemination of leaflets or other propaganda materials; the prohibition on the assembly of more than five persons at the same place in such area and time.¹⁹¹ The CDO can also restrict the movement of persons in specified places¹⁹² and breach of which may result fine up to Rs. 1000/- (approx. USD 15).¹⁹³ In the past, the CDO has imposed restrictions in several areas of Kathmandu and other parts of the country applying this provision. However, instead of imposing fines, preventive detention orders under the PSA were issued to those who violated this provision.

The ICJ is concerned that unfettered powers granted to the CDO to prohibit and prevent assembly, even peaceful gatherings, with no effective oversight on the exercise of these powers, results in severe restrictions on the right to assemble. Given the extraordinary nature of powers conferred on the CDO, without any independent judicial review, the provisions of the LAA could lead to arbitrary detention of demonstrators, suppression of non-violent assemblies and other peaceful expressions of opinion.

The broad restrictions allowed under the Interim Constitution of Nepal as well as the LAA on freedom of assembly are not in line with the international law under the ICCPR. Past experience has shown that extensive restrictions, even blanket bans, were imposed on peaceful public demonstrations, despite lifting of the state of emergency, and challenges to these restrictions have increasingly involved acts of violence by demonstrators and excessive use of force by police in breaking up demonstrations and carrying out arrests. The ICJ has repeatedly condemned unlawful limitations on the right to freedom of peaceful assembly, and expressed concerns regarding the apparent use of the *State Offences Act* to restrict freedom of assembly, in violation of international standards on freedom of assembly guaranteed by the Covenant.¹⁹⁴

The ICJ recommends that

- **The future Constitution of Nepal should limit any restrictions on the right to freedom of peaceful assembly strictly in accordance with requirements of Article 21 of the ICCPR.**
- **The LAA should be revised to set out objective criteria to determine the nature and scope of restrictions that may be imposed on right to freedom of assembly, with strict adherence to the principles of necessity and proportionality as recognized under international law and the court must be provided right to review such criteria on a case-by-case basis.**

¹⁹⁰ Section 6B (1) of the LAA 1971.

¹⁹¹ *Ibid*, Section 6B (2).

¹⁹² *Ibid*, Section 6 (3)

¹⁹³ *Ibid*, Section 6 (4)

¹⁹⁴ ICJ press releases, *Arbitrary detention of 69 lawyers unlawful, ICJ calls for immediate release*, 13 April 2006, and *ICJ calls for immediate release of lawyers and lifting of ban on public gatherings*, 5 April 2006. Also see, OHCHR report on Nepal 2005, *op. cit.* n.1, para. 58, OHCHR report on Nepal 2006, *op. cit.* n.1, paras. 74-77.

- **The government should provide adequate personnel, equipment and infrastructure, and political support to strengthen the Nepal Police so that it can perform its duty to protect the civilian population and maintain law and order, with full respect for the rights to freedom of assembly and movement.**

Excessive Use of Force and the Right to Life

The right to life is a non-derogable right, protected under Article 6 of ICCPR. International standards limit the use of force by authorities in controlling peaceful or non-peaceful assemblies. While the use of force while policing demonstrations may be warranted in certain circumstances (e.g. dispersing violent assemblies), there are restrictions on its use, especially in respect of lethal force. Law enforcement officials must use force only as a last resort, in proportion to the threat posed (meaning least intrusive measures to achieve the objective), and in a way to minimize damage or injury.¹⁹⁵ Intentional lethal use of force or firearms is forbidden except when strictly unavoidable in order to protect life.¹⁹⁶

Under the LAA the CDO, in order to handle any meeting, procession or political demonstration [likely to result in violence], may order use of force by the police or army (as the case may be) against the demonstrators. The law allows use of *lathi* charge, teargas, water cannons, blank fire, and according to the necessity and circumstances, use of necessary force, including open fire.¹⁹⁷ Also, the *Vital Installations Protection Act, 1955* grants authority to the head constable of police or the sergeant of army or any other officer in-charge to use fire arms if a person, accused of damaging or attempting to damage any vital installation, tries to abscond during the arrest. In such case if the accused dies in an attempt to arrest, the concerned government official will not be held guilty.¹⁹⁸ The authorities while handling protests and demonstrations have used this provision, which resulted in deaths, and no case was instituted against any official due to immunity granted under the provision.¹⁹⁹

As noted earlier, militarisation of police functioning, particularly during the conflict, and even now in the Terai Region, and the absence of effective training and capacity of Nepal Police and security forces to deal with the crowd control, has resulted in excessive use of force at various occasions. Although conflict-related violations by the security forces have ceased since the end of hostilities, excessive use of force has been reported at various instances during protests and demonstrations. For instance, during demonstrations in April 2006 a group of demonstrators were killed as well as many severely injured.²⁰⁰ A high level commission of inquiry was formed to investigate violations during April demonstrations, and the commission found that the killings were unlawful, as a result of excessive use of force, made a number of recommendations including investigation and prosecution against officials responsible.²⁰¹ However, in practice no action has been taken for implementation of Commission's recommendations. More recently, in March 2008, reports of excessive

¹⁹⁵ Principles 13 and 14 of the *Basic Principles on the Use of Force and Firearms* 1990, *op. cit.* n.55; Article 3 of the *Code of Conduct for Law Enforcement Officials*, 1979, adopted by General Assembly resolution 34/169 of 17 December 1979.

¹⁹⁶ Principle 9 of the *Basic Principles on the Use of Force and Firearms* 1990.

¹⁹⁷ Section 6(1)(a) of LAA 1971.

¹⁹⁸ Section 6 of the *Vital Installation Protection Act* 1955.

¹⁹⁹ For instance, seven people were killed during *dashdhunga* demonstration in 1993 and no case was filed against any official responsible for the deaths. See, INSEC Human Rights Year Book 1993, Page No. 220.

²⁰⁰ OHCHR report on Nepal 2009, para. 37, 41 and 42, pp.10-11; OHCHR report on Nepal 2008, para. 33, p.9; OHCHR report on Nepal 2007, para. 21, p.7, *op. cit.* n.1; OHCHR report on Nepal, Addendum, Visit of High Commissioner to Nepal, A/HRC/4/97/Add.1, 6 March 2007, para. 11, p. 4.

²⁰¹ Rayamajhi Commission report, para. 5, p. 608. Also see, "From Malik to Rayamajhi," *Nepali Times*, 10 – 16 August 2007, at: <http://www.nepalitimes.com.np/issue/2007/08/10/StateOfTheState/13826>.

and unlawful use of force by the Nepali police during arrests and in dispersing demonstrations of peaceful Tibetan protesters.²⁰²

The Government of Nepal must ensure that the law as well as the practice complies with the international standards.

The ICJ recommends that

- **Provisions on the use of force and firearms in the LAA must be brought in line with the international standards, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.**
- **Detailed rules of engagement for the use of force and for dealing with demonstrations of all kinds should be drawn up for each branch of the security forces, taking into account the experiences drawn from policing demonstrations in the past, and provide training on their implementation.**
- **Internal NA, NP and APF regulations should be amended to include excessive use of force against civilians as an offence. In cases of death or injury resulting from the use of force by the NA, NP or APF, domestic laws and regulations should require an independent investigation to be carried out, and criminal responsibility for those responsible, in accordance with the international human rights standards.**
- **The respective laws and regulations should be amended to require the NA, NP and APF to submit to the competent authorities responsible for administrative and judicial review, detailed reports regarding any deaths, serious injury or other grave consequences resulting from the unlawful or excessive use of force. As required by international standards, clear reporting procedures should be developed and employed for any use of force by security forces.**
- **The law should provide victims or their families with the right to claim reparation, including compensation from the government in cases where security forces are found to have been responsible for killing or injuring as a result of excessive use of forces, in accordance with international principles.**
- **All security forces should be fully trained on the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* as well as how to implement them in practice.**

RIGHT TO FREEDOM OF MOVEMENT

Article 12 (1) of the ICCPR guarantees freedom of movement and residence. Under Article 12(3), this right may only be restricted in exceptional circumstances, if provided by law, “necessary to protect national security, public order..., public health or morals or the rights and freedoms of others”. Such restrictions also must be consistent with other ICCPR rights.²⁰³ In describing the obligation that any restriction be necessary and proportionate, the UN Human Rights Committee has required that

²⁰² HRW report, *Nepal – restricting rights of Tibetans*, June 2008.

²⁰³ Article 12(3) of the ICCPR 1966. See also UN Human Rights Committee General Comment No. 27 on freedom of movement (Article 12), adopted at sixty-seventh session on 2 November 1999, HRI/GEN/1/Rev.7, p. 173, paras. 11 to 18.

restrictions must be appropriate to achieve their purpose, the least intrusive measure among the available options, and proportionate to the interest to be protected.²⁰⁴ There is therefore a heavy burden on the government to justify limitations on freedom of movement, and there should be effective ways to challenge such decisions.

Confinement Orders

The *PSA* allows the CDO to issue Area Confinement Order against any person on 'reasonable and sufficient grounds' to prevent any act against the public interest, or that destabilizes the amicable relations of various caste, creeds or communities. Such an order may require the person against whom it is issued 'not to reside in any place of Nepal', 'not to enter any place of Nepal', and 'to reside only in specific place of Nepal'.²⁰⁵

This provision has in the past been used by the government for house arrest of the leaders of opposition political parties. The *PSA* also allows for travel restriction outside Nepal to any person in order to stop the commission of any acts against the security of Nepal, law and order, the amicable relation with friendly nations, or amicable relations of various classes or regions. The CDO is authorised to deprive the liberty of a person and there is no provision for judicial review.

The CDO, while issuing the orders for preventive detention and area confinement, must provide the reasons and grounds for issuing such an order to the person concerned. However, the Act is not clear as to when the order is to be provided - at the time of arrest, or at the time of detention. Similarly, a notice, including a copy of the order, of a person detained under preventive detention must be provided to the District Court of the concern district.²⁰⁶ This provision appears to have been adopted for the judicial oversight, but ignores a fundamental provision that any person who is detained must be brought before the judicial or competent authority.²⁰⁷

The ICJ recommends that the *PSA* should be amended to clearly define the legal grounds to impose the area confinement and travel restriction orders, in accordance with Article 12(3) of the ICCPR, and must comply with the requirements of the permissible restrictions (legality, necessity and proportionality) under the international law.

Curfews

Under Section 6A(1) of the *LAA*, if there is a possibility that peace may be breached as a result of demonstrations or riots, the CDO may order a curfew prohibiting persons from moving about, assembling or taking any other actions in certain areas during certain hours. However, the curfew order is not subject to review by a judicial authority, either before the declaration or after.

The legal provisions suggest that the CDO can impose a curfew independently, but as the CDO is an officer under the Ministry of Home Affairs, he/she has to abide by the policy of the government. In practice, it appears that the Central Security

²⁰⁴ General Comment No. 27, *ibid.*, para. 14.

²⁰⁵ Area Confinement Order remains valid up to thirty days from the date of issue. However, in case of approval of the Ministry of Home Affairs, the order may be extended up to ninety days. See Section 6(1) and 6(2) of the *PSA* 1989.

²⁰⁶ Section 4(2) of the *PSA* 1989.

²⁰⁷ Article 9(3) of the ICCPR 1966.

Committee established under the *Armed Police Act*²⁰⁸ was providing direction decisions concerning crowd control measures to the respective security organizations and the local administration was an executing agency. This was generally the pattern witnessed during *Jana Andolan II*.²⁰⁹ This provided wide powers to the army without full civilian control and scrutiny, and the army usually treated the curfew order to in effect give them blanket authority to fire on the crowd.

As with other restrictions on freedom of movement, there will be a heavy burden on the government to justify that stopping or placing restrictions on a person from leaving home is strictly necessary and proportionate for security reasons. The longer such a restriction is in place, the heavier the burden is on the government to justify it, and a prolonged or indefinite curfew could never be deemed legitimate. Moreover, any decision to impose a curfew should be subject to judicial review or appeal. No such safeguards are contained in the emergency regulations or the *LAA*.

The ICJ recommends that the *LAA* should be revised to clearly define the objective grounds for exercise of power to impose curfew, and to ensure that measures taken to enforce curfew are in the full conformity with the international standards under Article 12(3) of the ICCPR. The imposition of curfew must comply with the requirements of the permissible restrictions (legality, necessity and proportionality) under the international law.

RIGHT TO PRIVACY

Search and Seizure

The ICCPR (Article 17) prohibits “arbitrary and unlawful interferences” with privacy.²¹⁰ The concept of arbitrariness requires that the interference be lawful under national law and necessary and proportionate to the need.

The UN Human Rights Committee has emphasized that “searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. In the case of personal or body searches, States must take effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched.”²¹¹

The Nepali legal framework relating to powers of search and seizure is vague and inadequate. The *State Cases Act* provides that search should be carried out in accordance with procedure prescribed by the law.²¹² However, the Act does not set

²⁰⁸ See Section 7 of the Armed Police Force Act 2001. The Home Minister is the chairperson of the Committee and Chief of the Operation Department of the Nepal Army, Defense Secretary, Home Secretary, IGP of Nepal Police, IGP of Armed Police, Chief of the National Department of Investigation and Joint Secretary of the Ministry of as member Secretary of the Committee. The Act does not provide any Terms of Reference, functions or set out the powers of the Committee.

²⁰⁹ See, *The April Protests, Democratic Rights, and the Excessive Use of Force*, Findings of OHCHR-Nepal Monitoring and Investigation, September 2006.

²¹⁰ Article 17 of the ICCPR 1966, provides:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

It should be noted that this is one of those examples where the fact that an intrusion is unlawful under domestic law may be sufficient to make it a violation of human right law even if the Human Rights Committee would not otherwise have found the search to be unlawful.

²¹¹ UN Human Rights Committee, General Comment No. 16 on Right to Privacy (Article 17), adopted at thirty-second session on 8 April 1988, HRI/GEN/1/Rev.7, p. 142, para.8.

²¹² The State Cases Regulation 1998 only provides a format of search and seizure report, without enumerating the procedures relating to search and seizure.

out the legal procedures relating to authorization of and scope of search and seizure powers. Some of these procedures are enumerated in the Chapter of Court Management under the Civil Code and the *Police Act 1956*.

Clause 172 in the chapter on Court Management of the new Civil Code empowers the police official to conduct search and seizure based on “a reasonable cause.” The law requires that the police official should provide notice to the person of the reason for the search, and that the search should be followed with a report providing reasons and details of search to a judicial authority within three days. However, no prior authorization from a judicial or administrative authority is required and the exercise of this power is arguably based on the police official’s own decision based on a ‘reasonable cause.’

Further, while the *Police Act 1956* authorizes the CDO to issue a search and seizure warrant to the police officer, this is of little significance in practice, as the language of Section 16 of the Act does not make it mandatory. In effect, this remains an independent function of the investigating authority without prior judicial authority and review. Except in cases relating to *habeas corpus*, no prior court approval is required to conduct search and seizure. The practice shows that mostly the police officials, in complete disregard of the law, conducted house searches without producing any search warrants.²¹³ Moreover, lack of independent authority to investigate violations committed by the police or security forces in this regard contributes to the cycle of impunity.

The ICJ welcomes safeguards such as the requirement in Clause 172 of the Court Management chapter of the Civil Code, to issue a notice for property searched and seized and to provide report to the judicial authority, and that searches of women should be made by another women. However, the ICJ is concerned that on the whole these provisions remain imprecise, insufficient and lack adequate safeguards against arbitrary or unlawful interference with privacy, in particular, the exercise of such powers without judicial authorization and judicial review. The national laws do not meet the required international standards and the application of those laws in individual cases have resulted in violations of the right to privacy and other human rights standards.

The ICJ recommends that

- **The *PSA, State Cases Act, Police Act, and Muluki Ain* chapter on Court Management laws should be amended to clearly define the nature and scope of the exercise of search and seizure powers and include the necessary legal safeguards, in accordance with Article 17 of the ICCPR. The exercise of these powers should meet the standards of necessity and proportionality, and should be subject to judicial review, as required under Articles 2(3) and 17 of the ICCPR.**
- **To establish independent oversight mechanisms to investigate and punish allegations of human rights violations and abuse of search and seizure powers by the police and other security forces.**
- **The law should provide victims with the right to claim compensation in cases where the security forces are found to have been responsible for acts of unlawful search and seizure.**

²¹³ ICJ report, *Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled*, op. cit. n.1.

CONCLUSION

The positive developments since 2006, including the Comprehensive Peace Agreement, the establishment of the new government and the Constituent Assembly, have created great expectations, particularly with regard to resolving long-standing human rights issues, including ending impunity. This urgently requires a comprehensive and coherent reform of the national security framework to strengthen law enforcement and the administration of justice.

The ICJ considers that the government needs to begin instituting medium term reforms in relation to the prevention of and response to public security challenges. These reforms, introduced through a plan approved at a high level of government and implemented according to a firm timetable, should address structural, policy, legislative, operational and training issues and should be aimed at developing capacity among all responsible agencies, under democratic oversight and in accordance with international human rights standards.

This requires the Government of Nepal to undertake a comprehensive and coherent review of the national security laws of Nepal with a view to reform the laws in accordance with Nepal's international human rights obligations. The Government of Nepal should review the structural deficiencies of both law enforcement agencies and the justice system to establish more effective institutions of administration of justice, democracy and rule of law.

The recommendations provided in the report set out the beginning of an agenda for reform of the national security law and administration of justice in Nepal. This would ensure that the State's response to security and terror threats is in accordance with international human rights standards, and strengthen the respect for the rule of law and human rights.
