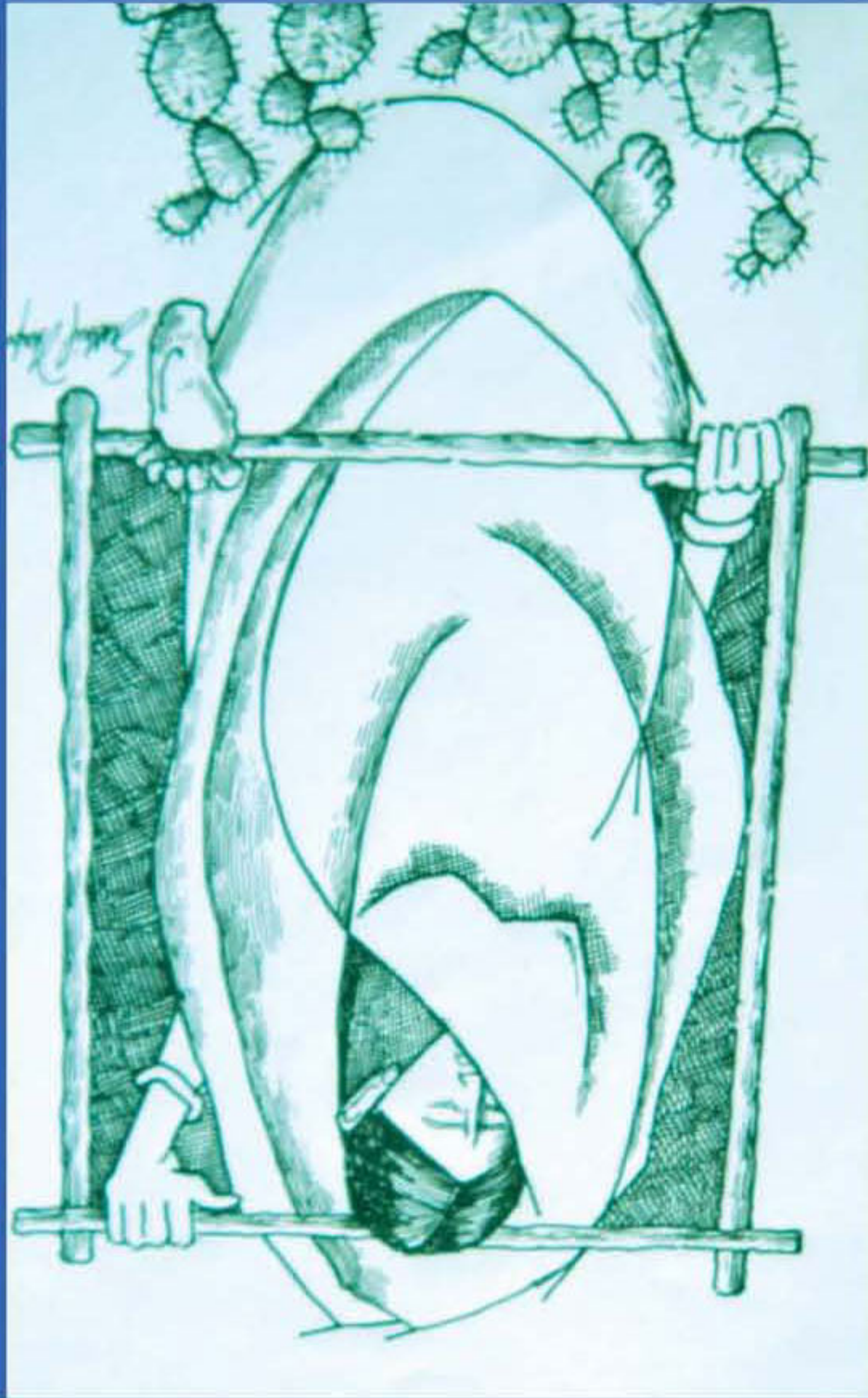




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कानुनी अस्पष्टता र महिलाका पीडाप्रति राज्यको उदासीनता

नेपालमा महिलासहितको यातना

Torture of Women: Nepal's Duplicity Continues

नेपालमा महिलासहितको यातना : कानुनी अस्पष्टता र महिलाका पीडाप्रति राज्यको उदासीनता

TORTURE OF WOMEN

NEPAL'S DUPLICITY CONTINUES



26 JUNE 2012



Advocacy Forum

Torture of Women Nepal's Duplicity Continues



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Torture of Women: Nepal's Duplicity Continues

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PREFACE

The Prevention of Torture and Legal Aid Departments of Advocacy Forum (AF) have been making regular visits to detainees and providing legal aid to them since 2001. AF has been at the forefront of adopting integrated intervention measures to ensure the rights of thousands of detainees. Based on the idea that regular visits to all places of detention are one of the most effective ways to prevent torture, AF visits 57 government detention facilities on a regular basis in the 20 districts in which it operates. The information provided by women detainees during these visits is relied upon extensively in this report.

Our sincere thanks go to Kopila Adhikari, Bhagwati Gautam, Ambar Raut, Kamal Pathak, Bhupendra Khanal and Rabindra Gautam who drafted individual chapters of this report. We are also deeply indebted to Dr. Hari Bansh Tripathi, Director, AF for overall supervision of the report. We would also like to thank Babin Pokhrel for analysis of data and to Bhagwati Gautam also for coordinating the process. Special thanks to Sarah Fulton of REDRESS, AF's longstanding partner organization, who analyzed the April 2012 bill to criminalize torture, Particular thanks to Ingrid Massage for editing the report and to Erin Gregg, Julieclaire Sheppard, Caroline Stover and Dhruva Kumar Shrestha for their support in this task. We would also like to thank Dhruva Kumar Shrestha, Bindesh Dahal and OP Sen Thakuri for translating this report into Nepali.

Our sincere thanks also go to the Pro Victims Foundation for making this work possible. Finally, thank you to all the women detainees and torture victims who agreed to be interviewed and have their views reflected in this report.

Mandira Sharma
Advocacy Forum

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Executive Summary

Since 2001, AF has been visiting police detention centers with the objective of preventing torture and promoting fair trials. The information collected from the detention visits is regularly presented to different stakeholders to raise their understanding on the subject. Findings are presented every year on 26 June. This year AF conducted regular visits to 57 places of detention in 20 districts. AF visited 4,247 detainees (419 females and 3,828 males; of whom 848 were juveniles). 25.6% of male detainees and 15.4% of females claimed that they were subjected to torture or ill-treated. The percentage of children below the age of 18 reporting torture was 34.2%.

This report focuses on how torture of women in detention continues to rise. According to the data collected by Advocacy Forum, torture of women detainees increased from 7% in the first half of 2010; to 13.3% in the second half of 2010, to 14.7% during the first half of 2011, and to 16.2% in the second half of 2011. During the last six years, the percentage of torture among women who were subsequently released without charge has been 17.5%, a sign that police continue to rely on confessions rather than evidence when investigating crimes.

The last year saw some positive developments relevant to addressing torture and Nepal's dysfunctional criminal justice system. Chiefly, the government introduced a draft Penal Code, Criminal Procedure Code and Sentencing Bill in Parliament in January 2011. It also tabled a Torture Bill in April 2012. Additionally, the government adopted a National Action Plan (NAP) to implement United Nations Security Council resolutions 1325 and 1820. Resolution 1325 deals with the inclusion and consideration of the special needs of women in post-conflict reconstruction, and resolution 1820 confronts sexual violence in conflict and post-conflict situations. With the dissolution of the Constituent Assembly and Legislative Parliament in May 2012, these legal reforms are now in jeopardy. The government has also demonstrated very little commitment to implementing the NAP.

The commitment in the NAP to address impunity raised hope among the victims of rape and sexual violence during the conflict, but there is no sign of implementation of the

NAP so far. Instead, women seeking justice and redress face many obstacles. Chiefly among them is the 35-day statute of limitation for complaints relating to rape. This limitation is contrary to international human rights standards, and in 2008, the Supreme Court of Nepal directed the government to amend this provision. As demonstrated by the case of 'Purna Maya' in this report, the police still refuse to admit complaints of rape filed after 35 days. To make matters worse, the Supreme Court denied Purna Maya the right to seek judicial review of this decision.

Systematic breaches of the obligation to investigate, prosecute, and provide full reparation provide an environment in which torture and other ill-treatment remain widespread. It is clear that none of the human rights commitments expressed in the Comprehensive Peace Agreement of 2006 have been implemented. Hence, the National Action Plan or the Universal Periodic Review will not become a reality unless the government starts to properly investigate reports of torture and rape in detention, and bring those responsible to justice. The government should also recognize the harm done to families of the disappeared, specifically the wives of the disappeared, who suffer discrimination at the hands of the state and society at large.

Advocacy Forum urges the government to prioritize the implementation of the following recommendations aimed at preventing torture of women detainees:

1. Recognize the particular risk of abuse that women face in pre-trial detention and adopt appropriate measures in policies and practice to guarantee women's safety during the time they spend in police custody.
2. Initiate independent investigations into all reports of torture and other ill-treatment against women and bring those responsible to justice.
3. Ensure that women in detention are systematically detained separate from men.
4. During arrest, transfer and detention, a female officer should be present. In accordance with the Standard Minimum Rules for the Treatment of Prisoners, women in detention should be supervised by women staff.
5. Enhance the internal accountability of police and implement clear procedures and standards to be followed regarding women in detention.
6. Ensure that all women detainees, while being processed for detention, are informed of their rights, including the right to consult a lawyer.

7. Provide for a comprehensive procedure to ensure health check-ups are compulsory, confidential and undertaken by physicians trained in the Istanbul Protocol procedures.¹
8. Women detainees should be examined by women doctors in private without the presence of police.
9. Revise the policy on interim relief for conflict victims and ensure adequate relief is provided to victims of rape and torture, too.

Advocacy Forum also makes the following general recommendations relating to torture:

10. As soon as a new Parliament is set up, re-introduce the bill to criminalize torture as a matter of priority and make necessary amendments to bring it fully in line with international standards.
11. Put in place an effective and impartial mechanism for the prevention and investigation of torture.
12. Recognize the specific needs of the wives of the disappeared and victims of torture, rape and sexual violence and put in place policies to end the discrimination against them, including in terms of “interim relief”.
13. Implement the recommendations relating to torture, gender-based violence and impunity made during the Universal Periodic Review.
14. Fully implement the Views of the Human Rights Committee in the cases of Surya Prasad Sharma and Yubraj Giri.
15. Immediately sign and ratify the Optional Protocol to the Convention against Torture, putting in place a mechanism for independent monitoring of all places of detention.
16. Criminalize enforced disappearances and ratify the Convention against Enforced Disappearances.

¹ The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) available at <www.ohchr.org/Documents/Publications/training8Rev1en.pdf> accessed on 29 April 2011.

Introduction

Each year, Advocacy Forum (AF) publishes a report on torture in Nepal on the International Day against Torture, 26 June.² In 2011, Advocacy Forum highlighted the rapid increase in torture reported by women detainees during 2010.³ Sadly, this trend continued through 2011, despite the commitments repeatedly expressed by the government to uphold women's rights. The gap between rhetoric and reality has widened so much so that the government's commitments seem to be nothing more than a meaningless lip service.

In 2011, 15.4% of women detainees interviewed by AF reported that they were subjected to torture or other ill-treatment. This demonstrates a stark 5% increase in reports of ill-treatment in detention since AF measured the rate to be 10.4% in 2010. These statistics paint a darker story when trends are analyzed on a half-yearly basis: torture of women detainees increased from 7% in the first half of 2010 to 13.3% in the second half of 2010, to 14.7% during the first half of 2011, and further to 16.2% in the second half of 2011. The percentage of torture among women who were subsequently released without charge is 17.5%, which is, interestingly, notably higher than the average.

In April 2012, the government tabled a bill in parliament to criminalize torture, to provide a mechanism for the investigation and prosecution of torture complaints, and to provide compensation to victims of torture. This was a positive development, and a long overdue step towards Nepal fulfilling its international obligations, more than 20 years after becoming a party to the UN Convention against Torture.

² Since 2001, with the objective of preventing torture in detention and to promote fair trial, Advocacy Forum lawyers have been making regular visits to police detention centres. The information collected from the detention visits are regularly presented to different stakeholders with the objectives of raising their understanding on the subjects. Findings are presented every year on 26 June. During 2011, AF visited 4,247 detainees (419 females and 3,828 males; of whom 848 were juveniles). 25.6 per cent of male detainees and 15.4 per cent of females claimed that they were subjected to torture or ill-treated. The percentage of children below the age of 18 reporting torture was 34.2%.

³ Advocacy Forum, "Torture of women in detention. Nepal's failure to prevent and protect", June 2011, available at <http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf>

The bill's strengths and weaknesses are analyzed in Chapter 7 of this report. This report also highlights specific issues that women face in detention, or when trying to seek redress from the government. Finally, the report makes recommendations on how these specific issues can be better addressed in the bill.

It is the nature of AF's work to be optimistic: AF sincerely hopes that the government will prioritize the tabling of the bill once a new parliament is in place, and will give ample opportunity for parliamentarians to debate its strengths and weaknesses. If this process produces a law in accord with international standards, it has the potential to bring an end to the systematic practice of torture in Nepal. In the interim, the government should also take appropriate measures to formulate necessary policies and infrastructure to ensure the smooth implementation of the bill once it comes into force.

The government also needs to address the widespread and systematic torture that occurred during the 10-year armed conflict that ended in 2006. So far, the needs of torture victims, particularly female victims, have been blatantly ignored. This is manifestly apparent in the "interim relief" policies put together by the Ministry of Peace and Reconstruction, as set out in Chapter 6. The government adopted a National Plan of Action (NAP) to implement United Nations Security Council resolutions 1325 and 1820 in January 2011. The NAP recognizes a need to take legal action against perpetrators of violence, including sexual violence, against women during the conflict, but then states that this will be "very challenging". The following strategic objectives under NAP's pillar of Protection and Prevention are particularly relevant to victims of conflict period sexual violence:

- To end impunity by addressing issues of sexual and gender-based violence cases that occurred during the conflict and transitional period;
- To end impunity by introducing necessary reforms in the justice and security system to enable them to promptly respond to cases of sexual and gender-based violence.

While these objectives are promising, as are the specific actions that are supposed to follow them, the plan remains vague in regards to an actual strategy to what would be the key step towards the prevention of future sexual and gender-based violence (SGBV): the prosecution of perpetrators of past sexual violence human rights violations.

The government has repeatedly promised in both national and international forums that long-awaited transitional justice mechanisms will provide justice to conflict victims. In its April 2011 decision in the case of Yubraj Giri v. Nepal, the Human Rights Committee found that the rights of Yubraj Giri and his family had been violated; and that his wife and two children's right not to be tortured had also been violated by the long-term

incommunicado detention of Mr. Giri and its impact on them. The Committee also held that the latter incident constituted a form of torture in itself.

In terms of providing justice to the victim and his family, the Committee stated clearly that the government cannot rely on any future transitional justice mechanisms to implement the Committee's Views. Therefore, the government of Nepal must:

- ensure a thorough and diligent investigation into the torture and ill-treatment suffered by Mr. Giri;
- prosecute and punish those responsible;
- provide Mr. Giri and his family with adequate compensation for the violations suffered;
- ensure that Mr. Giri and his family are protected from acts of reprisals or intimidation; and
- prevent similar violations in the future.

The proposed bill cannot only focus on the criminalization of torture. It must also address the wider problems in the criminal justice system, which often result in arbitrary arrest and detention, the denial of the right to consult a lawyer, denial of access to a medical doctor, denial of an independent medical examination, violations of the right to be held in adequate detention conditions, the right to be presented before the court within 24 hours, and the right to be informed of the reason for the arrest. As torture has not yet been criminalized in Nepal, there is no reasonable chance of perpetrators being brought to justice in a criminal court. At most, victims can hope for some paltry compensation and maybe some disciplinary action against the perpetrators. Very few of them succeed, and when they do, it is against all odds. This issue will be described in more detail in Chapter 5.

Many governmental bodies theoretically have responsibility for the investigation of torture. They include the National Human Rights Commission, the Human Rights Units of the Nepal Police, Armed Police Force and Nepal Army, and the Attorney General's Office. Their multiple failures to investigate and prosecute acts of torture are addressed in Chapter 2.

In January 2011, when Nepal's human rights record was examined under the United Nations Human Rights Council's Universal Periodic Review process, many member states expressed concerns relating to Nepal's approach to torture.⁴ In response, the government

⁴ Concerns were expressed by Austria, Denmark, Germany, New Zealand, Slovenia, Sweden, Switzerland and the United Kingdom.

of Nepal agreed to update their penal code and penal procedure code; conform to the totality of the provisions of the Convention against Torture (Switzerland); criminalize torture (Denmark); enact specific legislation in domestic law to criminalize the offence of torture which is fully compliant with the requirements of the Convention against Torture (United Kingdom); criminalize torture and enforced disappearances in line with international standards (Slovenia); and to undertake legal and administrative efforts to end torture and related impunity (Germany).⁵

At the time of Nepal's second periodic report under the Convention in November 2005, the Committee against Torture expressed concern about continued allegations of gender-based violence and abuse against women and children in custody, including acts of sexual violence by law enforcement personnel. The Committee against Torture made the following recommendation:

“The State party should ensure that procedures are in place to monitor the behavior of law enforcement officials, and should promptly and impartially investigate all allegations of torture and ill-treatment, including sexual violence, with a view to prosecuting those responsible. The State party should provide to the Committee a list of cases of gender-based violence and abuse against women and children in custody that have been investigated and prosecuted, and the perpetrators punished.”⁶

In 2012, Nepal is expected to submit its third periodic report to the Committee against Torture. Advocacy Forum hopes that the government will implement this long overdue recommendation before reporting to the Committee. A list of more detailed recommendations can be found at the end of this report.

⁵ Human Rights Council, “Report of the Working Group on the Universal Periodic Review of Nepal”, 8 March 2011, para 106.3 and 107.2.

⁶ Committee Against Torture, “Consideration of reports submitted by states parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture, 13 April 2007, paragraph 27, UN document: NEPALCAT/C/NPL/CO/2, available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CAT.C.NPL.CO.2.En?Opendocument>.

Analysis of patterns of torture of women in detention

1- Recent trends

In 2011, Advocacy Forum (AF) lawyers visited 408 women detainees in 57 police detention centers of 20 districts. Among them, 63 (15.4%) women reported that they were subjected to torture or other ill-treatment while in detention. This figure is in stark contrast to figures from the year 2010, when 36 (10.4%) women among 345 interviewed claimed they were victim of torture or other cruel, inhuman or degrading treatment while in detention.⁷ The substantial increase in torture and ill-treatment from 2010 to 2011 indicates the deterioration of the human rights situation in Nepal.

Furthermore, the data collected during the second half of the year 2011 shows a sharp increase in the percentage of torture of women in comparison to the first half. Torture of female detainees increased from 14.7% during the first half of 2011 to 16.2% in the second half of 2011. (The overall percentage of both male and female detainees reporting torture decreased from 25% in the first six months of 2011 to 24.2% in the last six month.)

As the graph below shows, torture as a method of extracting confessions or information from women detainees increased significantly over the last two years. See also Table 1 in Annex for additional information.

⁷ Advocacy Forum, "Torture of women in detention. Nepal's failure to prevent and protect", June 2011, available at <http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf>

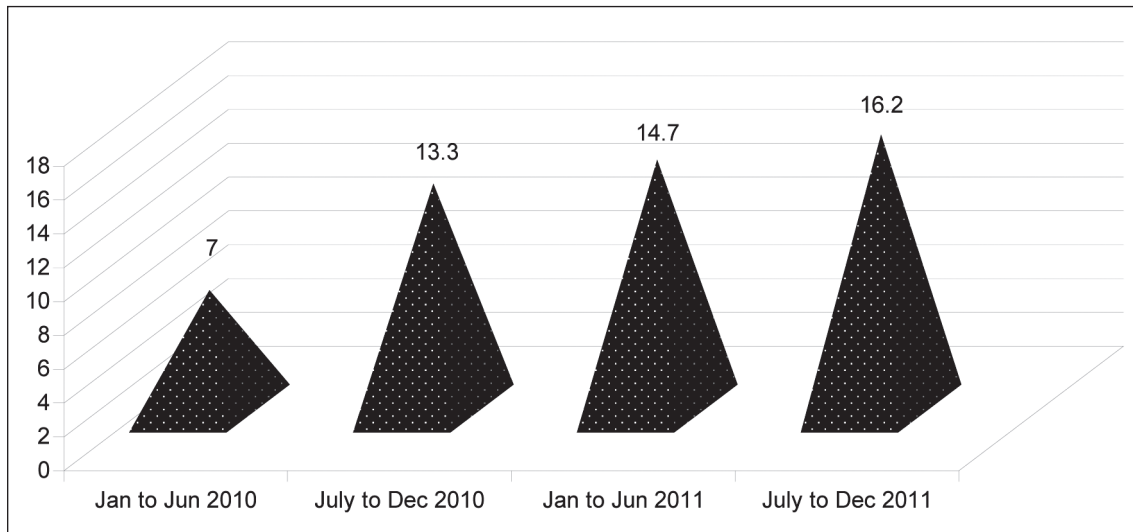


Figure 1: Trend in allegations of torture during 2010 and 2011

2-Longer-term Analysis (2006-2011)

From 2006 to 2011, Advocacy Forum lawyers visited a total of 1516 women in police detention centers. On average, 13.1% (199) women detainees claimed that they were tortured or subjected to other types of ill-treatment. There was a decrease in reports of torture of both men and women in the aftermath of the 10-year-long armed conflict, particularly after the signing of the Comprehensive Peace Agreement (CPA) in November 2006. Between 2006 and 2007, the percentage of detainees reporting torture fell sharply from 21% to 10.2%. Along with the overall post-CPA decrease in the percentage of detainees reporting torture, the percentage of women detainees reporting torture also decreased substantially. In 2006, 21% of women detainees claimed they had been subjected to torture and by 2010 this figure fell down to 10.4%. However, both the overall trend (of torture of male and female detainees) over the last year has shown a significant increase. See the figure below for the longer-term trend in reports of torture by women since 2006:

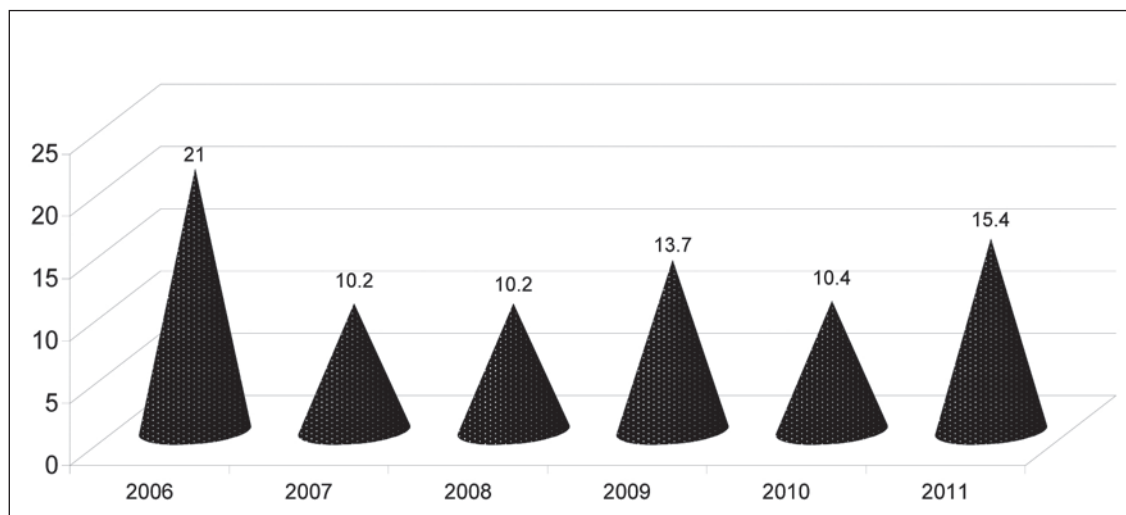


Figure 2: Trends in torture of women during 2006 to 2011

There are several factors contributing to the increase of torture of women detainees since 2007-2008. One of the principal causes is the adoption of the Special Security Plan (SSP) by the government of Nepal in 2009. Releasing a report that identified 109 armed groups operating in the country, the Council of Ministers announced a new Special Security Plan (SSP) on 26 July 2009 aimed at improving law and order across Nepal. The Plan was intended to crack down on highway blockades and organized crime, as well as to strengthen the security situation in the eastern hills, eastern Terai, Kathmandu valley and mid- and far-western Terai.⁸ The increased percentage of torture in the period immediately following the SSP announcement indicates that detainees, including women, were arbitrarily and indiscriminately tortured in the name of peace and security. In addition, the overall number of women being detained increased during this time period (see Table 1 in Annex).

⁸ http://www.gorkhapatra.org.np/detail.gopa.php?article_id=22036&cat_id=4

3-Emerging Patterns

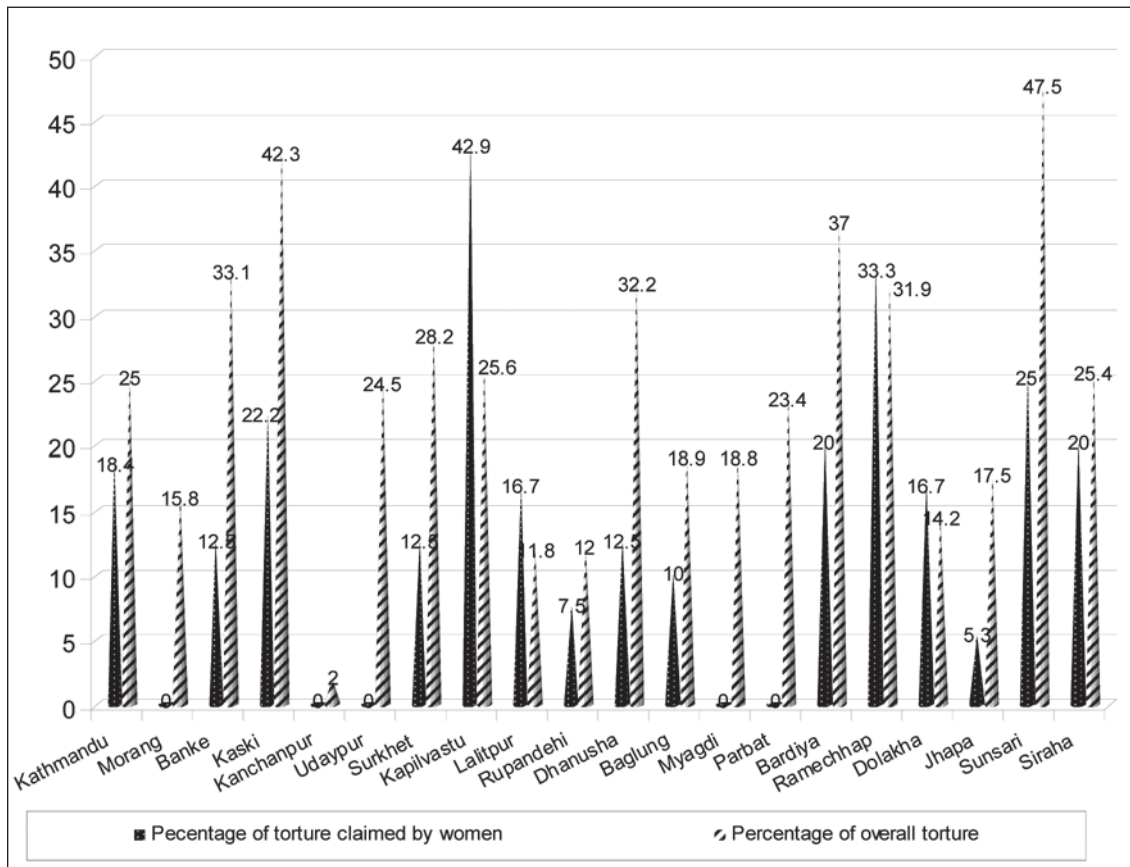


Figure 3: Trends in reports of torture (overall and for women) in 20 districts during 2011

There is considerable variance in the prevalence of torture among Nepal's 75 districts. The above graph shows that in Kapilvastu, Lalitpur, Ramechhap and Dolakha districts, the percentage of women tortured was much higher than the overall percentage, which means that women were more likely to be tortured than men in those districts. During the year 2011, reports of torture of women in detention were highest in the Kapilvastu district, where 3 out of 7 women detainees (42.9%) claimed that they had been subjected to torture and other ill-treatment. In addition to the four districts already named, the percentage of women reporting torture is above the yearly average (15.4%) in the following districts: Kathmandu, Kaski, Bardiya, Sunsari and Siraha. An analysis of the trends of torture over the last 5 years (2007-2011) reveals a significant increase in the percentage of women detainees tortured in Kapilvastu (from 0% to 36.4% to 42.9%), Bardiya (from 9.1% to 0% to 20%) as well as Kaski (from 6.8% to 22.2%).

4-Analysis on Charge Basis

Data analysis shows that the risk of torture varied by the nature of the charge during 2011. Those held under suspicion of involvement in theft were at the highest risk (32%), followed by kidnapping (30%), human trafficking (21.4%) and public offences (20.4%). People later charged with murder (14.3%) were also at high risk of torture. Those arrested without any charge faced a 14.1% of risk of being tortured. (See Table 3 in Annex for more details.)

When comparing charges, the group of women tortured most frequently were those held with no charge at all. Altogether, 17.5% of women in this category reported being tortured in detention. During the period from 2006 to 2010, the three other most common charges against women who were tortured were drug abuse (14.6%), murder (10.4%), and public offenses (7.4%).

There are significant differences across Nepal's 75 districts. As the sample sizes were relatively small, there may be a risk of distortion in respect of some districts. However, in the case of Kaski district, where the sample is sizeable, 20 among 90 detainees claimed that they were subjected to torture and ill-treatment. Most of the detainees who were allegedly tortured were charged in relation to drug abuse or public offenses, and several were released without any charge. In Kaski, most of the women tortured by police during 2011 were involved in the sex industry.

5-Methods of Torture

From 2008-2011, women in detention reported experiencing the following methods of torture:

- Beating on hips, back, thighs, shoulders and hands with plastic pipes or bamboo rods
- Punching, including blows to the back, neck, and face
- Randomly beating on palms, arms, back, bottom, thighs, legs, soles of the feet and other parts of the body with long wooden sticks
- Sitting on the woman's legs while beating the soles of her feet
- Slapping, including slaps to the cheeks
- Kicking the woman's back, chest, head and thighs
- Stamping on/stepping on the woman's body while she is forced to lie down
- Body searches conducted by male policemen

- Death threats
- Abusive language
- Rape
- Forced undressing
- Threats to put *sisnu* (nettle) leaves in the woman's vagina
- Beating the woman's sensitive parts with sticks
- Pouring water over the woman's hooded head ("waterboarding")
- Using a betel nut inserted under the palm of a woman's hand and apply pressure from above
- Pulling hair

6-Caste Group and Ethnic Background

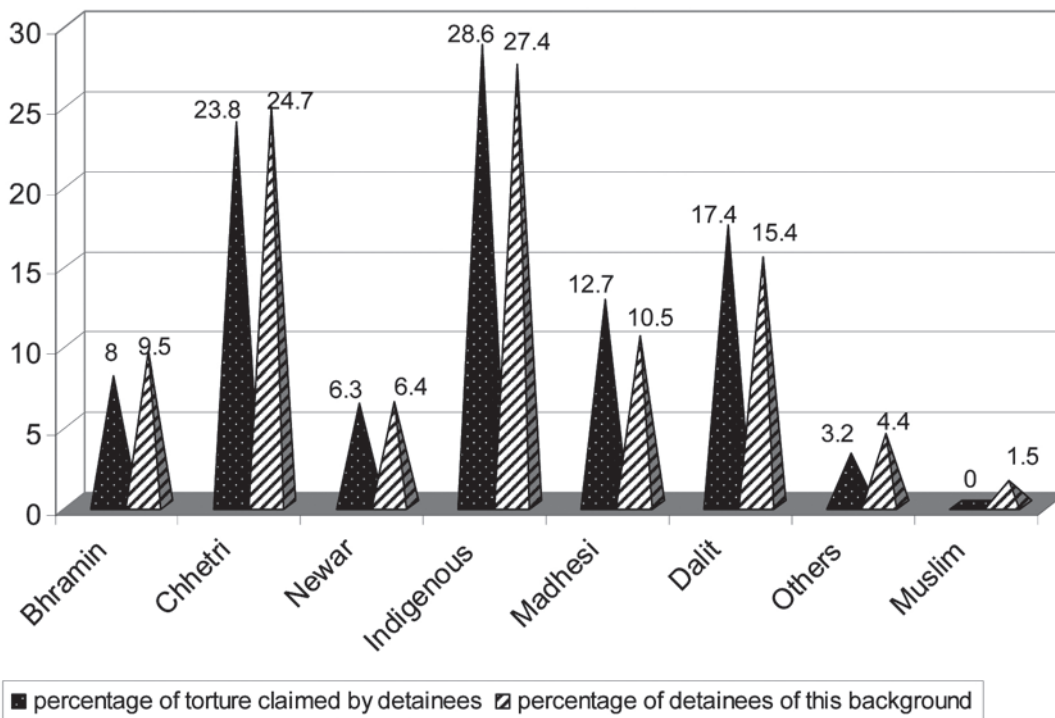


Figure 4: Caste Group and Ethnic Background

During 2011, the data analysis on the basis of caste and ethnic background shows that women from Terai ethnic groups, the Dalit caste, and indigenous groups are particularly vulnerable to torture.

In 2011, women from indigenous groups represented 27.4% of the female detainee population, and they constituted 28.6% of the women detainees reporting torture. During 2011, while representing 10.5% of women detainees, 12.7% of women from the Terai ethnic groups reported they were tortured. This is in line with a longer-term trend: women belonging to Terai ethnic groups represented 9.4% of the women detainee population in 2009 and 7.8% in 2010, and they reported unusually high levels of torture in 2009, 2010 and 2011. In 2009, 22.8% of women belonging to Terai ethnic groups claimed they had been tortured (though they only represented 9.4% of the women detainee population) and in 2010, 22.2% of women who reported torture or ill-treatment in detention were from the Terai community (though they represent only 7.8% of the women detainee population).⁹

Another vulnerable group is women from the Dalit community. This community represented 15.4% of the women detainee population in 2011, and 17.4% of women detainees claiming torture or ill-treatment. In 2009, 10.7% of women belonging to the Dalit community claimed that they had been tortured (though they represented only 5.3% of the women detainee population) and in 2010, 13.6% reported torture or ill-treatment in detention (though they represented only 8.3% of the women detainee population).

7-Emblematic Cases Reported During 2011

The following three accounts are emblematic of the 63 reports of torture of women detainees Advocacy Forum received in 2011:

⁹ For an analysis on the basis of caste and ethnic background, see Table 3 in Annex.

CASE NO. 1



Summary: Ms. Menaka (name changed), 49, a permanent resident of Bardiya district was arrested at around 12pm on 12 July 2011 on the charge of human trafficking.

Arrest details: According to the victim, on 12 July 2011 she was travelling to Rupaidiya, India to go shopping. On her way she met two women from Sindhupalchowk district. They were travelling to New Delhi, India to look for work overseas. The two women requested Ms. Menaka to accompany them to Rupadiya, India because they were unfamiliar with the area, and Ms. Menaka agreed. When they neared the Indian border, two other women seized Ms. Menaka. They handed her over to the Jamunaha Police Office in Banke district, claiming she was involved in human trafficking.

Torture Details: Four or five hours after her arrest, Ms. Menaka was transferred by police van to the District Police Office (DPO) of Banke and was detained there in a cell. Around midnight, a policewoman took her to a room on the first floor where 3 policemen and 2 police women were already present. An unidentified male police officer (who may have been a police inspector, according to the victim) ordered the two policewomen to beat Ms. Menaka while the policemen left the room.

Using a wooden stick measuring approximately 3 inches thick and 1 meter long, the two policewomen beat her in turn on her palms, arms, back, bottom, thighs, legs, the soles of her feet and other parts of her body. The torture reportedly continued for about two hours. They allegedly ordered her to stretch her legs and one of them sat on her legs while another beat her on the soles of her feet. While detained at the DPO, the police also refused access to the victim's children and a lawyer during the first 2 to 3 days.

On 23 July 2011, 11 days after her arrest and torture, Ms. Menaka was taken to Bheri Zonal Hospital for a medical check-up. A doctor diagnosed her with a broken wrist and referred her to get a plaster. The



police refused to pay for the medical expenses claiming that there was no fund for medical treatment. Instead, Ms. Menaka paid for the requisite X-ray and painkillers. Finally Advocacy Foru for m paid for Ms. Menaka to have her wrist put in plaster and for other medical treatment after the police requested the organization's support.

Effects of torture: When Ms. Menaka met with an AF lawyer two days after she was arrested, her broken wrist was swollen. Blue marks of torture were visible on her left hand and 3 fingers of her left hand were twisted and looked broken. Her feet were swollen and she complained of pain all over her body.

Accusing police of beating and manhandling her during the investigation Ms. Menaka filed a case under the Torture Compensation Act (TCA) – 1996 on 24 August 2011 before the District Court of Banke. The case is sub-judice.

CASE NO. 2

Summary: Ms. Manisha (name changed), 25, a resident of Kaski district was arrested at around 1 or 2 pm on 29 August 2011 at the Butwal Municipality in Rupandehi district. She was not provided an arrest and detention letter until she was remanded on the charge of drug smuggling on 30 August 2011. She had a health check-up on 30 August 2011.

Case Detail: Temporarily staying with her sister Kuruna (name changed) in Butwal Municipality, Ms. Manisha and her sister planned to visit their maternal home to celebrate the Teej festival. In order to prepare for the festival, they went out to shop at the Hatta Bazaar in Butwal. While the sisters were shopping, 2 male and 1 female police officer dressed in civil clothes arrested the sisters at gun-point.

Torture Detail: Ms. Manisha reports that both during the arrest and on the way to the police office the sisters were slapped in the face and kicked on their backs and thighs. In the Area Police Office (APO) at Butwal, they were taken to a computer room where they were forced to lie on their stomachs. In this position, they were reportedly interrogated for about 3 hours regarding their involvement in drug smuggling and human trafficking. While verbally abusing them, 2 female and one male police allegedly restrained the sisters' hands while an assistant sub-inspector (ASI, name not disclosed) kicked their backs with police boots demanding they tell the truth. The ASI reportedly beat Ms. Manisha with a plastic pipe on her back, thighs, hips and the soles of feet more than 50 times. Two or 3 days after her arrest, 2 plainclothes policemen allegedly interrogated and beat her with a plastic pipe for about half an hour on her hips, thighs and back approximately 20-25 times. Ms. Manisha reports that the ASI threatened to apply electric shocks and send her to jail if she did not tell the truth. He reportedly grabbed her by the neck with both hands and lifted her up. After 11 days in detention at the APO, both sisters were transferred to

the Ward Police Office (WPO). In the WPO they were detained for 8 more days. On 19 September 2011, they were brought back to the APO and the torture ceased.

The victim did not file a complaint under the TCA due to fear of reprisal from the police officers involved in her torture.

CASE NO. 3

Summary: Ms. Radhika (name changed), 35, a resident of Kathmandu district, was arrested at 3.30 pm on 28 April 2011 nearby Om Nursing Home Road. The following day she was remanded on a public offence charge.

Case Detail: At 3 pm on 28 April 2011, a motorcycle hit Ms. Radhika's 5-year-old son in front of Gopi Krishna Hall, injuring him badly. When she saw her son's condition, she became very angry, and verbally abused the motorcyclist. During the scuffle the motorcyclist assaulted her. Shortly thereafter, a police van arrived. Some policemen put her in the van, but Ms. Radhika struggled to get free. In response, the police verbally abused her, assaulted her on various parts of her body, and dragged her into the police van. They took her to Gaushala Police Station and charged her under the Public Offences Act. The police also arrested her sister Mita (name changed) who, according to the Ms. Radhika, was innocent of any wrongdoing.

Torture Detail: Both sisters were manhandled, slapped and beaten on various parts of their bodies, and dragged to the police van until there were blue marks on their bodies. They were reportedly tortured in the police van by male police officers. They were beaten with bamboo sticks on their arms, calves and back about 15 or 16 times. Ms. Radhika recounts that she fell unconscious due to the beatings in the police van, and does not remember how she was taken to Gausala police station. When a policeman sprinkled water on her, Ms. Radhika regained consciousness. Despite complaining of severe pain in her body and difficulty sitting down and standing up, she was not provided medical treatment.

Impact of the torture: When Ms. Radhika met with an AF lawyer on 2 May, four days after her arrest, there were black and blue marks of about 2 to 3 inches round visible on her hands, bottom and back.

The Role of NHRC, Human Rights Unit of Nepal Police, Office of the Attorney General and the Women Commission

8-The Limited Role of NHRC on Detention Centers and Women

According to the National Human Rights Commission Act of 2012, the NHRC must monitor detention centers and prisons, and provide suggestions and recommendations to the government and concerned bodies for the reform of each institution.¹⁰ In practice, however, the NHRC visits detention centers very rarely. The NHRC recently publicized a plan to visit detention centers, including it in the NHRC's annual operational plan, but this plan remains ineffective due to a lack of human resources. According to information provided by NHRC, they visit detention centers on an ad hoc basis, and only based on complaints they receive. The NHRC conducts very limited work on women detainees, women torture victims, and victims of sexual violence.

The NHRC's annual report 2067/68 (2010/11) described a total of 64 complaints of torture and ill-treatment during the fiscal year. Of these complaints, 57 were reports of torture by security forces, 7 were reports from security forces about beatings by their colleagues, and 8 were reports of beatings and ill-treatment by Maoists and others. In that fiscal year, the NHRC decided that 16 cases were indeed cases of torture. They recommended that the government of Nepal provide compensation to the victims, and take necessary action against the accused.

In 2011, AF reported 15 cases of torture to NHRC for investigation. At the time of writing, NHRC had not responded to any of these complaints. Many complaints filed during previous years also remain unanswered.¹¹

¹⁰ The National Human Rights Commission (NHRC) was established as a statutory body in 2000 under the 1997 National Human Rights Commission Act. It became a constitutional body under the 2007 Interim Constitution. A new law was passed in January 2012 to accommodate this change. However, it was used to curtail some of the independence of the Commission at the same time.

¹¹ Between 2008 and 2010, AF reported 157 cases of torture to the NHRC. It received responses in 13 cases from the regional NHRC office in Nepalgunj on 31 October 2009. No responses were received from NHRC central office, Kathmandu.

9- Lack of implementation of NHRC recommendations

According to the NHRC, they received over 600 complaints of torture by the end of April 2012 (30 Chaitra 2068). Only 42 of the 600 complaints of torture were investigated and recommendations submitted to the government for monetary compensation and disciplinary action against the perpetrators. Out of the 42 cases recommended to the government of Nepal, only one case was related to torture of women. The NHRC recommended monetary compensation in 22 of the 42 cases, and recommended disciplinary action in 36 of the 42 total cases. So far, the government has provided only 8 torture victims with the full amount recommended by NHRC, and 14 others have received partial monetary compensation. Unfortunately, the government failed to take any disciplinary action against the perpetrators of torture recommended by the NHRC.

The NHRC continually fails to live up to its mandate under the National Human Rights Commission Act of 2012. Part of this mandate enables the NHRC to publicize the names of the institutions or individuals who knowingly do not follow or implement their recommendations. To date, the NHRC has not used this power.

10- Human Rights Unit of the Nepal Police

The Human Rights Unit of the Nepal Police was created in 2003. It has been charged with investigating abuses by police during police operations. From its inception, AF has closely monitored the Human Rights Unit of the Nepal Police in relation to its work on torture and other human rights violations, and has communicated various cases of torture and other human rights violations occurring during police operations to the Human Rights Unit. Unfortunately, the unit is largely ineffective in investigating cases of human rights violations.

In several cases Advocacy Forum sent detailed letters to the District Police Offices concerned requesting more information about work conducted by the Human Rights Unit. During meetings and formal public presentations, representatives from the unit assured AF that they took the appropriate departmental and disciplinary action against the police personnel implicated in abuse cases. AF requested more information regarding the outcome of these investigations, but to no avail.

The Nepal Police website claims that in the fiscal year 2067/068 (2010/11), 20 police personnel were disciplined for violating detainees' human rights during police actions and in detention. Among them, 3 were senior officers and 17 were of lower ranks. The website further claims that since the establishment of Human Rights Unit, departmental action has been taken against 584 police personnel on charges of human rights violations, and among them 86 were senior officers and 485 were of other ranks. However, given the unit's reluctance to supply any information to outside parties about the outcome of specific cases, these figures cannot be verified or substantiated.

11- Office of the Attorney General

As per the Interim Constitution of Nepal, the Office of the Attorney General is required to investigate allegations of ill-treatment in police custody, or complaints that relatives or lawyers were debarred from meeting detained persons. Article 135 (3) (c) specifies that the Attorney General has the power to:

on the basis of complaints or information received by him by any means, to investigate allegations of inhumane treatment of any person in custody, or of refusal to meet his/her relatives directly in person or through legal practitioners, and to give necessary directions under this Constitution to the relevant authorities to prevent the recurrence of such a situation.

During 2010, AF communicated 78 cases of torture (all of which named the officers allegedly involved) to Human Rights Unit of Nepal Police, Armed Police Force (APF), the NHRC and the Attorney General's (AG) office. In 2011, AF reported 15 cases of torture to the AG's Office. To date, AF has only received one response from the Attorney General's Office, which was in relation to the case of Dhan Raj Karki which had been referred by AF to both the Nepal Police and the AG's office. The Nepal Police investigated and sent its report to the AG's Office, but not to AF. The AG then provided the report of the police investigations to AF.

At the request of AF staff, representatives of the AG's Office insist that they "forward AF's communications to the concerned authorities for further investigation." During a meeting with former Attorney General Bharat Bahadur Karki in May 2010, AF raised the issue of lack of responses from the department. The Attorney General in response stated that there was no mandate to send responses to individual organizations and also maintained that the Attorney General's Office is not an investigatory body; rather it has the discretion to monitor investigations by police of cases reported to them. He suggested that AF send cases to the Human Rights Unit of the Nepal Police and to the NHRC for proper investigation, as those are the "competent" investigatory bodies. AF informed him that it is sending cases to those bodies, too.

The State Cases Act of 2049 (1992) elucidates the responsibilities of the Attorney General's Office in the criminal justice system. According to the State Cases Act, interrogations by police must be carried out "in the presence of a Government Attorney."¹² However, detainees are routinely compelled to make false confessions to the police by means of torture and coercion without a government attorney being present.

¹² 12 Section 3(9)(1) of the State Cases Act 1992.

In 2011, AF lawyers appeared on behalf of 135 individuals accused of various crimes who allegedly made incriminating statements to police. Among this 102 confessions were obtained in a way not consistent with the law. Of this 94 individuals said that they were compelled to sign confessions after verbal coercion by the police. Eight said they were tortured and then compelled to sign the statement. Only 31 said they voluntarily signed the statement. In only two cases did the Government Attorney witness the interrogation, as required by the State Cases Act. District-level representatives of the Attorney General's Office routinely countersign statements of prisoners without witnessing the interrogation.¹³

The AG's Office is also responsible for investigating individual cases of human rights violations. They can advise the police on any pertinent legal issues during the investigation, and may give the police permission to release a suspect from custody.

12- National Women Commission

According to its annual report in 2067/68 (2010/11), the National Women Commission (NWC) did not receive any complaints regarding the torture of women in detention. The NWC did not visit any detention centers in 2067/68 with the intention of monitoring the condition of female detainees. The annual report states that the Commission received 273 complaints, where 149 were domestic violence complaints, and 88 were related to violence against women and the remaining were other violence meted out to women. The NWC is primarily focused on cases related to sexual violence and domestic violence, and their monitoring of women in detention centers is rather limited.

In 2011, AF reported 1 case of torture related to women to NWC, but the NWC has not responded yet.

The NWC has not as yet established a strong role for itself among the female victims of discrimination, torture and violence. The NWC has the potential to fill the gaps between laws, policies and practices. It can also create pressure on the government of Nepal to fulfill their obligations under international conventions like CEDAW, CAT and the ICCPR. Unfortunately, the NWC, too, remains ineffective on these fronts.

¹³ Center for Legal Research and Resource Development, 2002: xvii. According to that survey, 50 per cent of suspects had their depositions recorded in the absence of government lawyers.

A glimpse of conflict and ill-treatment endured by the wives of the disappeared and the state response to their suffering

During the 10 years of the “people’s war”, Nepal experienced grave human rights violations, including arbitrary arrest and detention, “disappearances”, extrajudicial executions, abductions and torture committed by both the security forces (especially the Royal Nepalese Army) and the Maoist rebels. Such human rights violations escalated after the then King announced a state of emergency in 2001, and the Royal Nepalese Army was deployed. The security forces enjoyed complete legal immunity for any human rights abuses they inflicted. For example, the Terrorist and Disruptive Activities Act (TADA) was used to arbitrarily arrest and detain thousands of people who were suspected of being sympathetic to Maoist party. This led to adverse social and psychological consequences for thousands of Nepalese across the nation.

According to the UN Working Group on Enforced or Involuntary Disappearances, Nepal reported the highest numbers of “disappearances” in the world in both 2003 and 2004. Many who were arrested are still missing. Most detainees were subjected to severe torture, which was “systematically practiced,” according to the UN Special Rapporteur on Torture.¹⁴

The Maoists abducted all kinds of civilians, even teachers and school children, for the purpose of ‘political indoctrination.’ They were also responsible for the killing of civilians considered “enemies of the revolution.” Many reports documented how the Maoist rebels engaged in regular intimidation and extortion, which created an intense climate of fear and suspicion among local villagers.

Following the Comprehensive Peace Agreement of 2006, Nepal experienced a gradual increase in the incidence of depression, post-traumatic stress disorder (PTSD), and suicide among wives and family members who lost loved ones during the conflict.¹⁵ The long-

¹⁴ Manfred Nowak, Mission to Nepal, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. No. E/CN.4/2006/6/Add.5 (9 January 2006), paras. 17, 25 and 31.

¹⁵ Nepali Times, “Self-destruct. An alarming number of Nepali women are killing themselves”, Issue 489, 12-18 February 2010, available at <http://www.nepalitimes.com/issue/2010/02/12/Nation/16792>

term repercussions of torture and other human rights abuses by both sides on the health and psychological well-being of the Nepali people are devastating.

Women and children experienced the worst of the conflict. The protracted violence negatively impacted women's rights, particularly the right to an adequate standard of health. The Maoists capitalized on the plight of women, who were already marginalized in Nepali society. Exploitation of women was not limited to civilians— nearly half of Maoist rebel fighters were women, and they, too, suffered frequent sexual exploitation at the hands of their fellow Maoist fighters.¹⁶

The conflict also led to an increase in human trafficking, mostly of Nepali women and girls. Young men fled the country in large numbers, leaving women and children behind. The wives and daughters of the disappeared were even more vulnerable, and often fell prey to both the security forces and the PLA (specifically in the form of sexual exploitation).¹⁷ This violence left emotional scars and physical maladies.

Torn between hope and despair, families of the disappeared continue to struggle on with the ambiguity of their loss and a host of other problems. The reactions to the loss of family members created feelings of frustration, sadness, rage and depression. Many report feeling that they are losing touch with reality. Some even report that they lost their sense of purpose in life. *"I had lost all hope of receiving any kind of justice"*, said Yashoda Sharma, wife of Surya Prasad Sharma, who was disappeared on 14 January, 2002.¹⁸ The firmly rooted culture of impunity in Nepali society and deep-seated fear instilled during the conflict still remain a serious problem for many survivors. Meeting the economic, psychological, social and legal needs of thousands of families of missing persons should be addressed as a matter of urgency by the Government of Nepal.

The needs of the families of the disappeared cannot be generalized; they depend upon individual family circumstances, such as their level of education and economic situation. Most families do, however, agree on their priorities: they want an answer regarding the fate of the missing, and are in immediate need of economic support. The loss of a family breadwinner can be a substantial burden for the families of the disappeared. And, above all, these families want justice to be done in the name of their lost loved ones.

¹⁶ Advocacy Forum and International Centre for Transitional Justice (ICTJ), 'Across the Lines: The Impact of Nepal's Conflict on Women', December 2010, available at: http://www.peacewomen.org/assets/file/Resources/NGO/justvaw_acrossthelines_ictjandnpl_december2010.pdf

¹⁷ Advocacy Forum and International Centre for Transitional Justice (ICTJ), 'Across the Lines: The Impact of Nepal's Conflict on Women', December 2010, available at: http://www.peacewomen.org/assets/file/Resources/NGO/justvaw_acrossthelines_ictjandnpl_december2010.pdf

¹⁸ Advocacy Forum, "Yashoda Sharma: A wife's fight for justice, a report carried out by Advocacy Forum", 2012: <http://www.advocacyforum.org/downloads/pdf/publications/impunity/yashoda-sharma-a-wife-fight-for-justice-english.pdf>

Families of the disappeared often suffer severe psychological trauma. This trauma is aggravated by difficult economic circumstances following the loss of a primary breadwinner. Many are reduced to living a hand-to-mouth existence, and find it very difficult to manage a living. The wives and mothers of the disappeared are left to take care of the remaining members of the family. The majority of them lack the education necessary to get good paying jobs, so they perform odd jobs like taking care of other people's houses, washing other people's clothes, selling food and other items and commodities.

In Nepali society, a woman's rights are often derived from her marriage or marital status. Many women suffer adverse social consequences because they do not know the fate of their disappeared husbands. Because there is no solid evidence of their husbands being alive, these women cannot access the social benefits given to widows. Some wives of the disappeared have been disowned by their parents-in-law, making it difficult to take care of themselves and their children. Sometimes they are labeled "debased" women when they are forced to seek work. Remarrying is also difficult for wives of the disappeared, because a new husband will often treat the children from the first marriage as outsiders.

The report jointly published by AF and ICTJ titled *Across the Lines: Impact of Nepal's conflict on women*¹⁹ documents the sufferings of women during the conflict like unwanted pregnancies, gynecological abnormalities, and other physical maladies which women experienced during the conflict. Many wives of the disappeared remain in precarious financial situations, and continue to suffer from the physical, mental and social consequences of the disappearance of their loved ones. These women are left to take care of the remaining members of the family, who are often traumatized themselves, compounding the litany of problems faced by the wives and children of the disappeared.

The UN Human Rights Committee issued several decisions on individual petitions indicating that "disappearances" amount to torture under international law. According to the Working Group on Enforced Disappearances, a "disappearance itself constitutes *ipso facto* torture or other prohibited ill-treatment."²⁰ The very nature of being detained as a disappeared person, isolated from one's family for a long period, is certainly a violation of the right to humane conditions of detention. In the cases *Sharma vs. Nepal* and *Giri vs. Nepal*, the UN Human Rights Committee affirmed this position, and asked the government of Nepal to provide an effective remedy to families of the disappeared (see also below).

¹⁹ Advocacy Forum and International Center for Transitional Justice, "Across the Lines. Impact of Nepal Conflict on Women", http://www.advocacyforum.org/_downloads/across-the-lines-the-impact-of-nepal-conflict-on-women.pdf

²⁰ See UN doc. E/CN.4/1983/14, para 131.

13- The Supreme Court of Nepal orders the Government of Nepal to draft a law that criminalizes the act of enforced disappearances

There is no specific prohibition on enforced disappearances under the 2007 Interim Constitution. In 2007, however, the Supreme Court of Nepal ordered the government to criminalize enforced and involuntary disappearances. In its landmark 1 June 2007 judgment, the Supreme Court noted that the government has consistently failed to undertake any serious efforts to address the issue of disappearances and ordered that the government form a Commission to investigate the fate of disappeared persons and to formulate a law on enforced disappearances. In November 2007, Nepal's Interim Legislature-Parliament (the Constituent Assembly) also instructed the government of Nepal to draft a law for the protection of all Persons from enforced disappearances. Five years later, the government has yet to act on the Supreme Court's order.

In January 2011, a draft Penal Code was submitted to the Constituent Assembly proposing to criminalize disappearance. Unfortunately, political bickering stalled the bill and it lapsed following the dissolution of the Constituent Assembly and Legislative Parliament in late May 2012. The bill itself fell far short of international standards. The definition of enforced disappearances (which is not in line with the definition as set out in the International Convention for the Protection of All Persons From Enforced Disappearances²¹) and the statute of limitation (which was set at six months in the bill submitted to Parliament) would need to be amended to be in accord with international standards. The bill must be amended to recognize that a disappearance is an ongoing violation of international law, and should recognize the trauma forced disappearances cause to the victims (who may not be able to submit a complaint immediately upon release).

Most cases of disappearance remain unresolved, despite the halfhearted efforts of the Nepali government to institute investigations. National and international human rights organizations have urged the government of Nepal to ratify the Convention on Enforced Disappearances. However, the government has not prioritized this, and no action has been taken towards ratifying the Convention on Enforced Disappearances.

Draft bills were submitted to the Constituent Assembly for the establishment of a Truth and Reconciliation Commission (TRC) and for a Commission on Inquiry about Disappearances, which are supposed to criminalize the acts of enforced disappearance. Parliamentarians had registered nearly 100 proposals for amendments to each of these

²¹ The UN Convention defines enforced disappearance as follows: "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Article 2).

bills. Earlier government attempts to draft such bills faced strong opposition from civil society because they allowed the government of Nepal to grant amnesty to perpetrators. This resulted in several maneuvers by the government, including a decision to merge the bills proposing a TRC and a Disappearances Commission. At the time the Legislative Parliament lapsed in May 2012, the government's request to withdraw the TRC and Disappearances Commission bills was pending. It was tabled without providing any reasons or rationale. This suggests that the government of Nepal wants to retain the power of amnesty, even for the most serious crimes.

In response to the state's indifference towards the families of the disappeared, AF focused on assisting the families by helping them find psychosocial counseling, job training and community based discussion groups to help integrate them back into society. AF also works to empower these families, specifically the wives and mothers of the disappeared, by raising their level of awareness on various issues so that they can understand the context of their loved ones' disappearance. Most importantly, AF provides the victim families with free legal aid, para-legal services, and counseling.

14- Victims reaching out to International Body: Surya Prasad Sharma and Yubraj Giri Cases

As already mentioned earlier, disappearance has not been defined as a crime in Nepali law. In addition, there are so many deficiencies in Nepal's criminal justice system that any attempts to provide remedies to the victims of disappearances are doomed to fail.²²

The victims of disappearances cannot file First Information Reports (FIRs) because "forced disappearance" is not designated as a crime in Schedule 1 of the State Cases Act, 1992. Therefore, it remains impossible for the families of the disappeared to obtain justice within the existing criminal justice system.

The crime of enforced disappearance is comprised of various other human rights violations, including torture, deprivation of liberty, the right to a fair trial, and the right to life. However, there is no remedy available for these human rights violations. Even though the act of torture is considered a criminal offence under the Interim Constitution, there is no law providing criminal penalties for the crime of torture. In practice, therefore, torture is only a civil offence. Thus, it is impossible under the existing Nepali legal system for the families of disappeared to seek redress for the disappearance of a loved one

²² See Advocacy Forum and Human Rights Watch, 'Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict' (September 2008) available at: <http://www.hrw.org/reports/2008/09/11/waiting-justice-0> (Waiting for Justice); 'Still Waiting for Justice: No End to Impunity in Nepal' (October 2009) available at: <http://www.hrw.org/reports/2009/10/15/still-waiting-justice-0> (Still Waiting for Justice); and 'Indifference to Duty: Impunity for Crimes Committed in Nepal' (December 2010) available at <http://www.hrw.org/reports/2010/12/14/indifference-duty-0> (Indifference to Duty).

because there is no mechanism through which such a family could submit a complaint to the appropriate authorities. In cases of disappearances where there is some evidence that the victim was killed, but his/her body was not found, it is unlikely that any charges of murder will be brought against the alleged perpetrator(s).

Some victims have tried to obtain justice at the international level. Yashoda Sharma, the wife of Surya Prasad Sharma who was disappeared in 2002, was the first individual to file a communication regarding disappearance against the government of Nepal before the Human Rights Committee, the body set up under the International Covenant on Civil and Political Rights (ICCPR). Yashoda Sharma faced significant obstacles in obtaining information about her husband's fate or whereabouts. The authorities blatantly ignored her repeated requests for information. After exhausting all possible remedies at the national level, Yashoda Sharma demonstrated remarkable strength and determination by invoking the individual complaint procedures set out in the Optional Protocol to the ICCPR, and forwarded her case to the Human Rights Committee.²³

The findings of the Human Rights Committee have significant implications for the government of Nepal in relation to Surya Prasad Sharma's case and other unpunished cases of serious human rights violations from the conflict period. The Committee unreservedly found Surya Prasad Sharma and his family to be victims of multiple extremely serious violations of the ICCPR, and subsequently called on Nepal to fulfill its obligation under the Covenant to provide Mr. Sharma and his family with an effective remedy.

Based on the communication made by the victim and in response to the argument presented by the Government of Nepal, the Committee found that the acts against Mr. Sharma violated articles 2 (3) and 6, 7, 9, and 10 of the ICCPR. Mr. Sharma was arbitrarily arrested, detained and held in incommunicado detention in appalling conditions, and subjected to ill-treatment, making him effectively "disappeared" since 2002. The Committee also noted the anguish and stress that the disappearance of Mr. Sharma caused to his family. The Committee further states as per its General Comment No. 31 that, "failure by a state party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."²⁴

The Committee makes it abundantly clear that the government of Nepal cannot shirk its responsibility to investigate the disappearance of Mr. Sharma and to provide an effective remedy to his family. Therefore, it is clear that under international law the crimes of torture and the enforced disappearance must be criminalized in Nepal without further delay.

²³ Advocacy Forum, "Yashoda Sharma: A Wife's Fight for Justice", 2012, available at <http://www.advocacyforum.org/downloads/pdf/publications/impunity/yashoda-sharma-a-wife-fight-for-justice-english.pdf>

²⁴ Human Rights Committee, General Comment No. 31, para 15, 26 May 2004, UN document CCPR/C/21/Rev.1/Add. 13, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>

Mr. Yubraj Giri was arbitrarily arrested and detained, held in incommunicado detention in appalling conditions, tortured repeatedly, and subjected to ill-treatment in 2004 to 2005 during the conflict. Despite attempting to file a complaint and bringing his case to the attention of the police and court authorities, no investigation was carried out in Mr. Giri's case. No person was prosecuted for the abuses Mr. Giri suffered, and no compensation was provided to his family.

Mr. Giri took his case to the Human Rights Committee, represented by Advocacy Forum Nepal and supported by REDRESS. In April 2011, the Committee found Mr. Giri and his family to be victims of violations of the ICCPR, and called on Nepal to fulfill its obligation under the Covenant to provide Mr. Giri and his family with an effective remedy. Specifically, the Committee has stated that Nepal must:

- ensure a thorough and diligent investigation into the torture and ill-treatment suffered by Mr. Giri;
- prosecute and punish those responsible;
- provide Mr. Giri and his family with adequate compensation for the violations suffered;
- ensure that Mr. Giri and his family are protected from acts of reprisals or intimidation; and
- prevent similar violations in the future.

Most importantly, the Committee decided that the government of Nepal cannot rely on any proposed future transitional justice mechanisms to implement the Committee's Views (as it has attempted to do in other cases). Not only would waiting for their establishment amount to further unacceptable delay, but as non-judicial mechanisms they are unequipped to provide an adequate and effective remedy as required by the Covenant.²⁵ The Office of the High Commissioner for Human Rights in Nepal also supports this position.²⁶ Further, transitional justice mechanisms will not have judicial powers, and will not be able to punish perpetrators. The normal criminal justice system is the appropriate mechanisms to investigate and try these crimes, and it is available now. Therefore, it should be utilized.

²⁵ Human Rights Committee, *Giri v Nepal*, no. 1761/2008, CCPR/C/101/D/1761/2008, 27 April 2011 paragraph 6.3, in relation to the National Human Rights Commission, where the Committee made the point that the appropriate remedy in such a case is a judicial remedy.

²⁶ OHCHR-Nepal, "The Relationship between Transitional Justice Mechanisms and the Criminal Justice System", 30 March 2011, available at <http://www.un.org.np/report/relationship-between-transitional-justice-mechanisms-and-criminal-justice-system>

Continuous state failure to investigate and prosecute cases of rape and sexual violence

Access to justice and legal remedies are crucial to the protection of human rights. Prosecution followed by impartial investigation is essential to the protection of victims, and to prevent further human rights violations while maintaining the rule of law. As stated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, “victims should be treated with compassion and their dignity should be respected. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.” If the justice system is discriminatory and fails to ensure equal access to justice for all, the most vulnerable and marginalized members of society suffer. Unfortunately, Nepal’s justice system consistently fails to deliver justice to victims of rape. This chapter will analyze the state’s failure to investigate and prosecute cases of rape and sexual violence during the conflict.

Perpetrators of sexual violence generally avoid prosecution under the existing criminal justice system. Criminal investigations in Nepal begin with a First Information Report (FIR) filed according to the State Cases Act, 1955, and can then proceed into the legal system. FIRs on cases of sexual violence are frequently not registered in the first instance. The entrenched culture of impunity and inequality, where the law does not protect everyone equally and those who are in power are above the law, results in a very low number of sexual violence cases being reported. There is no formal mechanism to educate women of their legal rights, providing legal assistance and mechanism to access information about seeking justice. Therefore, many female victims of sexual violence do not know which institution they should approach in order to seek justice. This makes Nepal’s criminal justice system effectively inaccessible to many disadvantaged and vulnerable people.

Women do not openly speak about incidents of sexual violence because they fear social disgrace and humiliation. Even if they speak, there is no guarantee that their case will be investigated and that they can obtain remedies. Nepal also lacks a functional witness and victim protection mechanism. The few courageous women who do speak out about their

experiences and demand justice are labeled as 'loose' women. This leaves female victims of sexual violence to suffer in silence. This silence shields the perpetrators and the state officials who do not want to recognize incidences of sexual violence. Though Nepal's judiciary has developed limited jurisprudence protecting victims of sexual violence and the identities of witnesses, the right to an in-camera trial and hearing during a case of sexual violence is mostly not implemented.

During Nepal's 10- year civil war, women suffered abuse from both the then Royal Nepal Army (NRA) and from Maoist rebels (the People's Liberation Army). Rape and sexual abuse was very common. Victims were scared to file FIRs to commence legal action because they feared reprisals and further violence from their assailants. Six years after the Comprehensive Peace Agreement of 2006 (CPA), the victims of rape during the conflict are still waiting for justice. The government of Nepal has paid little or no attention to the plight of rape victims. For instance, it failed to include victims of rape in the statutory definition of "victims of conflict" in its "interim relief" policy (see Chapter 6). This demonstrates the state's reluctance to provide justice and redress to rape victims, even in the face of hundreds of reported cases of rape occurring during conflict.

A key obstacle is obtaining medical reports detailing the evidence of rape. There is evidence of medical doctor refusing to administer medical examination to victims of rape in the absence of a police report. There is further evidence that the police often refuse to file an FIR without a medical report. This leaves the victim trapped in a vicious cycle. Under the State Cases Act it is clear legal duty of the police to accept the FIR and initiate the investigation of the case, regardless of the presence of a medical report.

The procedures for the investigation, prosecution and adjudication of rape cases as set out below also pose difficulties for victims seeking legal redress. There are often inane legal requirements which reflect a very male-based gender perspective. In most cases, only male staff is involved in investigation, prosecution and adjudication.

15- 35-day statutory limitation: a hurdle for access to justice for rape victims in Nepal

A number of legal and policy issues impede female rape victims' attempts to seek justice. Foremost among them is the 35 day statutory limitation for filing complaints of rape with the police.²⁷

²⁷ A "statute of limitations" refers to the period of time during which a legal action may be initiated following an offending incident. Each crime carries a different statute of limitations, generally based on the potential sentence attached to that crime.

Despite the scores of reported incidents of sexual violence during the conflict, the 35 day statutory limitation for the crime of rape created a significant obstacle for victims intending to commence legal action.²⁸ The police often invoke the statutory limitation as a reason for refusing to accept an initial FIR. International law prohibits a statute of limitation on the crime of rape because it is such a grave offence.²⁹

In 2008, the Supreme Court of Nepal issued an order directing the government of Nepal to amend Section 11 of the Rape chapter in the State Code (Muluki Ain).³⁰ Though the Supreme Court did not declare the 35 day statutory limitation null and void, it identified the provision as “unreasonable” and “unrealistic” and directed the Constituent Assembly to amend it as soon as possible. Noting that the 35 day statute of limitation is a major weakness of the Nepali criminal justice system, the Office of the Attorney General also recommended that the Government of Nepal extend the statute of limitation in accord with the directive order from the Supreme Court of Nepal.³¹ To date, however, the statute of limitation for rape remains unchanged.³²

The statute of limitation prescribed in domestic law protects the perpetrators instead of ensuring justice for victims of rape. Many victims of rape are women and girls belonging to disadvantaged and illiterate groups of society. Most are unaware of the statute of limitation for the crime of rape. In a country like Nepal where so many citizens are disadvantaged or illiterate, there should not be such a restrictive statute of limitation in rape cases. The international community supports this notion, as it considers rape as one of the most serious crimes. A perpetrator should not be allowed to escape prosecution based on an administrative pretext like the 35-day statute of limitations.³³

Many women were raped by both sides during the 10 year conflict. Despite the gravity of the offence, no perpetrators have been prosecuted. At this point, even if the victim wanted to file complaint for redress, the relevant authorities could simply deny their requests based on the extremely short statute of limitation.

²⁸ No. 11 of the rape chapter of Country Code provides for 35 days law of limitation in the cases of rape.

²⁹ International Committee of the Red Cross, “Practice Relating to Rule 160. Statutes of Limitation”, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter44_rule160

³⁰ Sapana Pradhan Malla Vs. Government of Nepal, Nepal Law reporter 2065, volume 11, page 1358-1366.

³¹ Annual Report, Office of Attorney General 2065/66, page 67.

³² The non-implementation of Supreme Court directives is a common occurrence in Nepal. There is no statute in Nepal criminalizing sexual abuse in the work place. The Supreme Court, for instance, issued guidelines for the protection against sexual abuse in the work place for workers involved in night cabin restaurants, dance bars, and massage centers. The court said that the guideline was a temporary measure until a law can be properly enacted by the legislature. This demonstrates the Supreme Court’s willingness to step in when the government has been ineffective in protecting women’s rights.

³³ For example, the US State of New York recently eliminated its 5 year statute of limitation for rape in its criminal code. See <http://www.gothamgazette.com/article/law/20060630/13/1897>

16- Purna Maya

Purna Maya (name changed), a resident of Jumla district, supported her children and herself by running a small tea shop. During the Maoist insurgency, the Maoists and security forces used to pass and order tea from time to time. Purna Maya provided the following account of what happened to her: "At nights, bombs explosion and shooting were common in the nearby jungles. The next morning, the army used to come to my tea shop and ask about the Maoists and their activities. They used to verbally abuse me. On 23 November 2004, at around 3 pm, a 6 feet tall fat army man called Kalo Thole alias Lieutenant Jibesh Thapa who had dark complexion and thick lips came again to my house along with 50-60 soldiers under his command in army uniform carrying arms and asked about my husband. They accused my husband of being involved in the Maoist party. They told me to go with them to the barracks for further interrogation. They took me to Bhawani Baks Barracks in Narayan Municipality, Dailekh district. At the barracks gate they blindfolded me with my shawl. I was scared. They took me inside the barrack and then took me upstairs in a house situated inside the army camp. Because of being blindfolded, I had to crawl up the stairs touching it with my hands. They gave me a chair to sit on after reaching a room on the upper floor. The army men who had arrested me were present there at that time; I recognized their voices. Then, I was kept in the room alone for 2 to 2 ½ hours until an army man (name and position not known to me) entered the room and asked me if my husband had joined the Maoists. I denied knowing anything about his involvement with the Maoist group and told him that I stay with my daughter without having any relationship with my husband after his second marriage. He stopped the interrogation, left the room and closed the door. I heard someone opening the door. This person asked me about the time period of my husband's involvement with the Maoist group and the activities he is engaged in. From his voice I recognized that he was Jibesh Thapa, the person who had arrested me. He interrogated me continuously for about an hour. Every time when he asked I denied knowing anything about my husband's involvement with the Maoists. At one point he got furious and started scolding me with filthy words. Then he punched me with his fists and kicked me with his boots on my stomach, back, legs, thighs 30-35 times. The pain was unbearable. Then, he told me he would rape me. In the name of further interrogation, he tortured me and also pulled off my *saree*. I became so afraid and nervous that I shouted. Then I asked for water just to find a way to escape. He became so angry that he told me to urinate and drink it to quench my thirst. After some moment, he forcefully grabbed me and attempted to rape me. To escape, I kicked him once and tried to protect myself. However, he pulled and pushed me here and there in the room. While pushing me to the wall my head was banged against a door and got injured. It started bleeding. When I was too tired to fight back, he pulled off my clothes and raped me. While raping, he bit my nose, cheek and both shoulders. The scar of the bite is still visible on my nose. Because of his several kicks on my body, I had several cuts and bruises on my thighs, knees, calves, back, and forehead. It was bleeding from my forehead and vagina. I still have the scar on my legs,

calves and forehead as remnants of this torture. After raping me, he got out of the room and ordered the junior army men to throw me outside the army gate. Then three unidentified army men entered the room and raped me in turn. I could only remember three men raping me after which I lost consciousness. When I came round, I heard an army man opening the door and entering the room. He supported me to the gate of the barracks and left me near a shop. It was almost 8 pm. The shopkeeper saw me and called an ambulance. I was admitted to Dailekh hospital where I spent 5 days but the bleeding from my vagina did not stop. Dailekh hospital referred me to Surkhet District Hospital where I was admitted for 7 days but the bleeding still did not stop. Surkhet District Hospital referred me to Lucknow Hospital in India but due to financial constraint, I could not visit Lucknow Hospital. I had to sell my land, which I received from my parents. Only after that was I able to visit Lucknow Hospital in September 2005. With the doctor's recommendation, I had to undergo a hysterectomy in Lucknow Hospital. After the operation, I got an infection and I had to be further hospitalized in Surkhet District Hospital for 10-12 days after my return from Lucknow.

When my husband heard the news about the incident of rape, he stopped making telephone calls and even stopped sending me my food allowances. When I went to the DAO to make a claim for compensation, I found a gathering in the DAO and joined it out of curiosity. Coincidentally, Jibesh Thapa was also present there. I dared to point at him stating about the torture inflicted by him after arbitrary arrest. A member of staff of the DAO Tilak Neupane (position unknown) asked him why he tortured an innocent person like me. The Chief District Officer (CDO) made a remark that he should only torture after knowing the nature/personality of the person. Lt. Jibesh Thapa could not speak and stayed lowering down his head. I stayed in my house in Dailekh for about three months before returning to Surkhet with my daughter in June 2005 (2062 Asadh). I could not stay in Dailekh any longer due to the regular flashbacks of the dreadful incident and the threat received from Maoists to explode my house by planting explosives in my house allegedly for supporting the army as a messenger."

On 30 September, 2011, Purna Maya tried to file a First Information Report (FIR) with the Dailekh police. She was accompanied by a number of women's rights organizations supporting her application. In her application, she explained the delay:

"I went to the police several times requesting an investigation of my case but nothing happened. After being victimized during the internal armed conflict, I could not do anything more to seek justice, as this meant risking my life. Moreover, it was also not possible due to my poor health condition. Now that the conflict is over and my health condition has somewhat recovered, I have come here seeking for justice. Hence, I humbly request you to investigate and charge those responsible..."

The Dailekh police, however, refused to accept her complaint despite strong evidence presented by her. The police argued that Purna Maya came to register the case too late as the law requires victims to come to register the case within 35 days of the incident. They also argued that conflict related cases would be dealt by the Truth and Reconciliation Commission. Purna Maya and the women's organizations then approached the Dailekh Chief District Officer, but he also refused. This statutory limitation was questioned in the Supreme Court through a Public Interest Litigation a long time ago but has not been amended to date. The Supreme Court in 2008 ordered the government to amend the law related to this and change this provision as this limits victims' access to justice. The court repeated the same judgement in Suntali Dhami's case in 2010.

After the DPO and CDO refused to register the FIR and start the investigation, some human rights organisations formally approached the Supreme Court, seeking Certiorari to nullify the acts of the DPO and DAO and a writ of Mandamus which would mandate the registration of the FIR. But the court Registrar said that Purna Maya had failed to seek an alternative remedy as per Section 3(5) of the State Cases Act, under which a case can be brought before a higher authority like the Chief District Officer (CDO) if the police refused to register an FIR. However, the petitioners had clearly mentioned that Purna Maya approached the CDO invoking Section 3(5), but that the CDO had not accepted her petition, nor had he responded in writing.

The authorities' refusal to file the FIR due to the statute of limitation is fallacious, as the victim had orally informed the Dailekh Police Office and the Dailekh DAO about the incident within the 35 day statute of limitation following the incident. Section 3 (1) of State Cases Act, 1992 clearly mentions that an FIR can be filed in any form - oral or written. When Purna Maya orally reported the crime to the police in Dailekh, they told her that they would not register the FIR because they feared army reprisals. When she visited the DAO, the officers sent her away telling her that they could not do anything while Nepal remained in conflict.

The Supreme Court of Nepal continues to deny justice to Purna Maya 6 years after the conclusion of the conflict, even though the Government of Nepal's National Action Plan (section 7.3.2 Protection and Prevention) specifically endeavours to address issues of sexual/gender-based violence cases that occurred during the conflict and the post-conflict transitional period. By refusing to register an FIR about a case of rape which occurred during the conflict, the state is failing to fulfil its obligations under the National Action Plan.

17- Kalpana Bhandari

Some women who were directly affected during the conflict have continued to suffer even after the conflict came to an end in 2006. One example is Kalpana Bhandari who worked with the Nepal Police for 8 years and has been suffering enormously as a result. Her husband, a Sub-Inspector of Police, was killed by the Maoists in an exchange of fire with them. Soon after, she was also threatened by the Maoists to quit her job from the police organization lest they would kill all her family members. The Maoists also demanded one hundred thousand rupees from her father-in-law one week after her husband was killed. When her father-in-law could not pay the amount he was abducted and killed by the Maoists. Her mother-in-law died a few months later, unable to bear the grief.

After the death of three members of her family, the Maoists continued to threaten Kalpana Bhandari to leave her job. Fearing the Maoist's regular threats, she left her job and started living as a displaced person in Kathmandu. She supported her family by working as a driver for a private company.

While in Kathmandu, on 17 May 2007, Kalpana Bhandari was arrested by police on suspicion of setting a government vehicle on fire during a demonstration by victims of Maoist violence during the conflict. She was tortured and sexually harassed by police personnel at the time of her arrest. The police officers also threatened to rape her. After the arrest she was taken to the Singha Durbar Metropolitan Police Circle (MPC), Kathmandu.

Kalpana Bhandari reported that Police Inspectors Jayram, Hira Bahadur and Deepak came to her hut in order to arrest her. Some 30 to 40 unidentified policemen surrounded the hut. Inspector Jayram grabbed Kalpana by the hair and manhandled her. He said, "We will kill you here. Today is your last day. Boys, rape her turn by turn." Other unidentified policemen reportedly beat her with sticks and kicked her with their boots on various parts of her body. They also verbally abused her. Then some policemen dragged her for about 500 meters and loaded her into a police van. Inside the police van she was laid upside down with her legs bent and then kicked with boots on her stomach 15-20 times. She was also beaten with sticks on her arms and head on the way to the police station. She asked for water on the way to the police station but was not provided any. One of the police personnel told his colleague to urinate into her mouth.

While taking her to a detention cell, Inspector Sanuram Bhattarai verbally abused Kalpana Bhandari, and kicked her into a detention cell. Due to the police beatings and kicking of her groin and stomach, her vagina started to bleed after a while. Kalpana Bhandari asked for water, but was again refused. She lay in a pool of her own blood, and soon lost consciousness. Around 11 pm on the same day she was taken to the Maternity Hospital in Thapathali, Kathmandu for treatment. The doctor prescribed some medicines and advised her to come for a follow-up check-up the next day. At around 4 am the following morning, on 18 May, 2007, police transferred her to the Metropolitan Police Range (MPR), Hanumandhoka where she was detained for 6 days. During her detention in MPR,

Hanumandhoka, Kalpana Bhandari fell sick again. On 21 May, 2007 she was taken to Maternity Hospital, Thapathali in Kathmandu for treatment and brought back to MPR, Hanumandhoka. On 23 May, 2007 she was transferred to MPC, Singha Durbar. The doctor advised her to come for another appointment on 25 May 2007, but the police refused to take her to the hospital. On 25 May, 2007 the government withdrew the charges against her and she was released at 4 pm the same day from MPC, New Baneshwor. At the time of her arrest, the police had seized her goods and money such as her mobile phone, NRs. 10,000 cash, her driving license and the certificate of internally displacement. But these items were never returned to her.

*Filing a case under the Torture Compensation Act
and the decision of the Court*

Kalpana filed a case under the Torture Compensation Act in the Kathmandu District Court on 11 June, 2007. She identified the police officers who had tortured her by name.

After she registered the case, Kalpana was threatened by police officers. On 28 June 2007, police inspector Hira Bahadur Pandey of New Baneshwar MPC, Kathmandu called Kalayan Budhathoki, another Maoist victim, at his office and told him to pass a message to Kalpana Bhandari to withdraw the case or otherwise he would charge her in another case and arrest her again. On the next day, 29 June, Kalayan Budhathoki conveyed this message to Kalpana.

Despite strong medical reports confirming the heinous act of torture, the Kathmandu District Court gave the following decision: "The medical report of victim clearly states that there were wounds and blue marks of torture on the victim's body. The medical report too confirms that those wounds and blue marks are due to custodial torture. The defendant Police Inspector Hira Bahadur Pandey's has accepted arresting the victim and that there is no other evidence justifying that the victim had sustained the wound and blue marks from means other than custodial torture. It is, therefore, clear that the victim was tortured during the arrest and detention. The plaintiff, however, could not clarify and produce evidence pinpointing the perpetrator involved in inflicting torture on her neither was she able to clarify in her petition in which situation and with what objective she was tortured. In this condition, the proofs and claim in the petition requesting departmental action against the perpetrators are not enough."

The victim and the eye-witnesses had clearly mentioned in the petition and the testimony about the perpetrators and had given the names of the perpetrators including mentioning how, when, and with what object they tortured her. It seems the court was deliberately evasive and unwilling to order departmental action against the perpetrators.

The District Court mentioned about the past of the victim. In its decision the court observed, “The petitioner’s husband was killed by the Maoists just because he was serving the police force, petitioner’s father-in-law was also killed by the Maoists, and the petitioner was also threatened by the Maoists to kill her children if she didn’t leave the police job. So, the victim had left the police service. In this condition, the petitioner is entitled to NRs 60,000 (US \$670) compensation from the Nepal government under Section 6 of the Torture Compensation Act.”

On 13 November, 2008, Kalpana filed an appeal against the decision of the District Court before the Patan Appellate Court demanding departmental action against the named perpetrators. But the Appellate Court on 12 April, 2011 dismissed the case, upholding the decision of the District Court without taking serious consideration of the evidence presented against the individual police officers identified by Kalpana as being responsible for the torture inflicted on her. In its judgment, the court did not elaborate on the precise grounds on which it dismissed the petition.

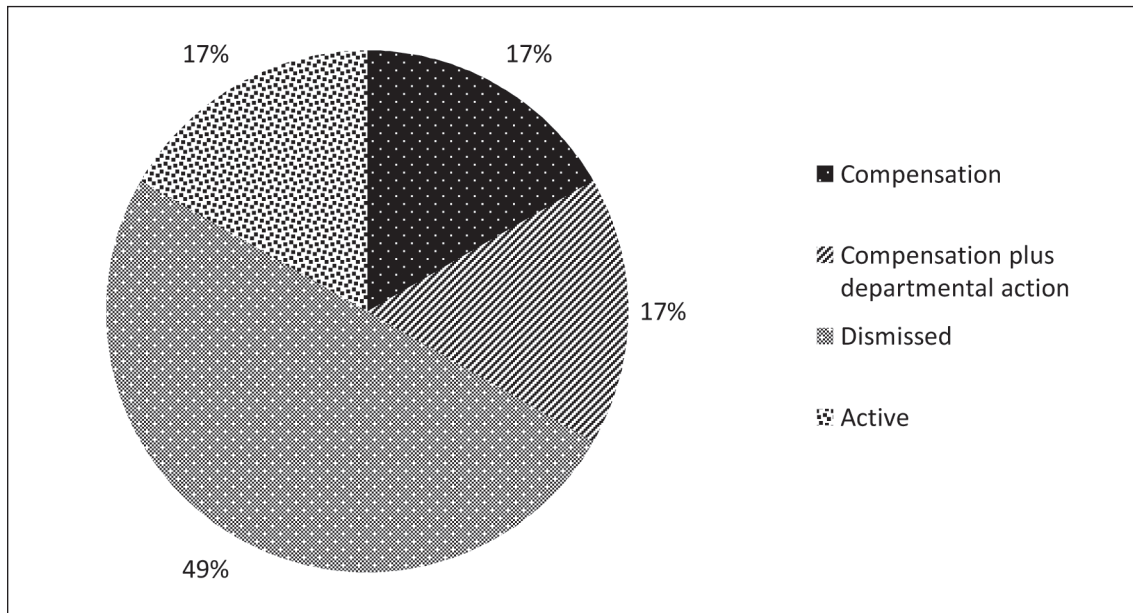
Faced with the decision whether to file a further appeal at the Supreme Court level, Kalpana decided against it, saying she was tired of chasing justice for nearly four years without any successful outcome. She also had financial difficulties, having spent lots of money on medical treatment, not all of which was covered by the compensation money awarded to her by the District Court.

Decisions in Women Torture Cases under the Torture Compensation Act

The Torture Compensation Act of 1996 is the only legal mechanism that provides a way for torture-related cases to be considered before the courts of Nepal. The Torture Compensation Act (TCA) prescribes several remedies for victims of torture, including remedial compensation and disciplinary action against the perpetrators. The TCA basically treats torture cases as civil suits, where the plaintiff must hire a private lawyer and government attorneys appear on behalf of the state agents (who are alleged to have committed torture). However, Nepal has international and constitutional obligations to make torture a criminal offence. Despite a Supreme Court order in 2007, the government has yet to enact a law criminalizing torture.

More than 300 torture cases have been filed before different District Courts since the TCA came into force in 1996. Unfortunately, only a handful of those cases have resulted in judgments favoring the torture victims. However, victims seeking disciplinary action against named perpetrators have received only a few favorable judgments from the Nepali court system.

The following chart documents judgments in cases filed by women under the Torture Compensation Act according to AF's in-house statistics:



According to AF statistics, the number of female torture survivors who file cases is relatively lower as compared to all victims seeking assistance under the TCA. Generally, most torture survivors are hesitant to visit the court and file a case against the police. In addition to the social and familial stigmas and economic challenges attached to filing a case in court, torture survivors are often threatened by the police. According to reports of female torture victims, the police routinely threaten and intimidate them to prevent them from filing reports against their perpetrators. Despite these considerable obstacles, some women torture survivors have come forward to file cases against perpetrators. Unfortunately, their courage goes unrewarded by the Nepali judiciary, which continues to hand down retrogressive and unfavorable judgments.

In fact, the TCA, in substance and in practice, is not in accordance with Nepal's international treaty obligations.³⁴ An analysis of the TCA cases filed by women torture victims illustrates various recurring themes, examined in detail below.

18 - Delayed and cumbersome court procedure resulting in quashing of the case

Section 6 of the Torture Compensation Act provides that TCA cases fall under the purview of the Summary Procedure Act, 1972. A defendant in a TCA case has a maximum of 14 days to submit a response after receiving the complaint from the court. Section 10 of the

³⁴ For more details, see for instance, Advocacy Forum, "Hope and Frustration. Assessing the Impact of Nepal's Torture Compensation Act", June 2008, available at <http://www.advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf>

Summary Procedure Act provides that once the defendant submits a response, the case must be decided within 90 days. Section 8 of the Summary Procedure Act provides that either party can request the postponement of a case twice, for a maximum of 15 days each time. Therefore, no TCA case should be delayed for longer than six months. In practice, however, TCA cases are often postponed for much longer periods of time, and with the defendant repeatedly missing deadlines without any reprimand from the court. Such delays cause much difficulty for torture victims, as they are required to attend court for each scheduled hearing, but often arrive there just to learn their hearing has been postponed again. Women, who traditionally have many tasks in the home, find it particularly hard to attend court for these hearings. The physical and mental maladies associated with being a victim of torture make appearing in court for hearing even more burdensome. There have been instances where the court has quashed cases when women torture victims had failed to attend a hearing.

Sumitra Khawas was tortured in 2007 while in detention in the District Police Office in Morang. She sustained injuries which required medical treatment for a long period of time, and Sumitra continues to suffer till date from psychological problems. Despite this, Sumitra decided to proceed with her case under the TCA. She regularly visited the court for her scheduled hearings, in spite of unnecessary procedural delays. When Sumitra fell ill and was not able to attend the court on an assigned hearing date, the court quashed her case.

Noorjan Khatun is another torture victim whose case was quashed due to procedural technicalities. She filed a TCA case in the Morang District Court in October 2007. In February, 2010, after diligently attending hearings over the past three years, she was not able to attend one hearing due to illness. On her behalf, an AF lawyer requested that the court re-schedule the hearing date as Noorjan was ill and could not attend the court. The AF lawyer requested a 13-day extension of the hearing date. The Registrar approved the request from the lawyer and a new date of hearing was set. However, the new date was challenged by the defendant and the judge quashed the case, saying that the request for the new hearing date was unacceptable. The court further decided to fine Noorjan for "filing a false complaint," as the case could not be sustained in the court. Local police also threatened her not to appeal against this decision, telling her that if she filed an appeal they would bring false charges against her. Consequently, Noorjan Khatun did not file an appeal after her case was quashed.

19 - No action against those in command

Mahima Kusule, arrested on suspicion of theft in July, 2010, was physically and mentally tortured by both male and female police officers.³⁵ According to Mahima, an Assistant Sub-Inspector (ASI) by the name of Rajiv K. C., ordered police officers to beat her. Head Constable Nirmala Pokhrel beat her on the soles of her feet with a black plastic pipe with a rod inside it for about 20 minutes, while ordering Mahima to confess to the crime. The police also threatened to apply electric shocks if she did not confess. When they could not find any proof against Mahima or get her to confess, the police released her without any charge. She filed a case under the TCA with a medical report demonstrating very strong evidence that torture was inflicted on her. The doctor who prepared the report was reprimanded by police, and put under extreme pressure to change the content of the report. In its 26 May, 2011 decision, the Dolakha District Court acknowledged that the police had applied the wrong method of investigation, and that they had tortured the victim to extract a confession. The court ordered the District Police Office in Dolakha to prevent its police personnel from repeating such mistakes in the future, and Mahima was awarded NRs 15,000 (USD \$170) as compensation. However, the court ruled that the police officer in-charge, identified as of the perpetrators, was not responsible for the torture because of the prevalent legal provision that a Deputy Superintendent of Police (DSP) does not directly investigate a case, but rather appoints other officials to do the investigation. Therefore, the court held that there was no reasonable ground to believe that the DSP took interest in the case, or that he had ordered his subordinates to investigate it by torturing Mahima.

This ruling highlights the judicial system's poor understanding of torture cases. The judiciary fundamentally misunderstands the principle of command responsibility, and has no comprehension of the proportionality of the harm suffered relative to the paltry compensation that the system offers. While Mahima Kusule was provided NRs 15,000 compensation by the court, she estimates that she already spent around NRs 50,000 on medical treatment, and is still incurring more medical costs associated with the torture. Finally, the judicial system fails to link the minimal accountability among individual perpetrators with the guarantee of "non-repetition:" in its verdict, the court ordered the "non-repetition" of such crimes, but at the same time failed to impose any punishment on the perpetrators. When there is no punishment for torture, there is little deterrence to desist from perpetrating such crimes.

³⁵ For more details on the case, see Advocacy Forum, "Torture of Women in Detention. Nepal's Failure to Prevent and Protect", June 2010, page 11, available at <http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf>

Mahima Kusule refused to accept the compensation money awarded to her out of protest against the court's ruling. She has also appealed against the court decision, and is awaiting the outcome of that appeal.

20 -Compensation awarded and disciplinary action ordered; but no information on the outcome of disciplinary action

Padam Maya Sunuwar was arrested in January, 2010 by the District Police Office in Ramechhap. Padam Maya was detained for 8 days, during which time she was continuously tortured by male police officers. She was also sexually assaulted. After the police failed to establish a case against her, Padam Maya was released without any charge. She was not provided with an arrest warrant or a detention letter or any other proof of her arrest and detention.

After her release, on 16 February, 2010, Padam Maya filed a case under the TCA at the Ramechhap District Court. Despite constant threats and intimidation by the police, Padam Maya pursued her case. The District Court of Ramechhap found that Padam Maya suffered both physical and mental torture at the hands of the District Police in Ramechhap. The court also found that as a single woman in detention, accompanied by male police officers to a health check-up by a male doctor, it was likely that Padam Maya was hesitant to explain the results of torture associated with the more private areas of her body. When Padam Maya was re-examined by a female health worker, the report catalogued signs of torture such as blue marks on her hips, swelling on the palms of her hands, and blue marks on both legs. The report states that the wounds were likely due to the torture while Padam Maya was in detention.

The court ruled that the police inflicted physical and mental torture on Padam Maya while she was under their control, in blatant disregard of their official duty and responsibility. The court referenced Nepal's international obligations under the Convention against Torture (CAT), and ruled that the treatment meted out to Padam Maya by the police was patently illegal. Padam Maya was awarded NRs 20,000 (USD \$227) as compensation and ordered departmental action against the perpetrator. Padam Maya Sunuwar received the compensation awarded to her on 7 June, 2012.

Two years after the initial incident, Padam Maya Sunuwar is still waiting to hear of any departmental action being taken against the perpetrator in her case. At the time of writing, Padam Maya was preparing to file an application in court to obtain information regarding the outcome of the disciplinary action ordered against the police officer by the court. She continues to undergo regular medical treatment (especially for back problems) and is still suffering from psychological problems. She estimates that she has spent around NRs. 50,000 seeking medical treatment so far, more than double the amount of her NRs. 20,000 compensation award.

“Interim relief” denied to women victims of rape and torture

The Comprehensive Peace Agreement (CPA) promised relief and rehabilitation to those who were killed, tortured, disappeared and/or displaced during the armed conflict.³⁶ The government initially developed different compensation schemes related to killings, disappearances and loss of property that occurred during the insurgency period. However, after the Constituent Assembly election in April 2008, the new government amended this policy, and came up with a new “Interim Relief Program” (IRP). Under the IRP, the families of those killed, disappeared and those who lost property were entitled to “interim relief.”³⁷ The interim relief package included major discrepancies in the amount of “interim relief” allocated to the wives of the disappeared (NRs 25,000) compared to those whose spouses were killed (NRs 100,000), but this was changed after protests from the families of the disappeared and some civil society organizations, including Advocacy Forum. In 2011, all relief packages were brought together and named “Procedure on Civil Relief, Compensation and Economic Assistance (First Amendment), 2011.”³⁸

The government has defined “conflict victims” differently in different policies, and its definitions are markedly narrower than in international standards.³⁹

“Victims” means persons who have, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment

³⁶ There is no one place in the CPA where this is set out. Section 5.2.4 provides for a National Peace and Rehabilitation Commission, which among other aims, would provide relief and rehabilitation to war-affected and displaced persons. Under Section 5.2.8, displaced people would be rehabilitated and socialized back in society. Section 7.1.3 provides for conflict and torture victims and families of those who have been disappeared to be provided with relief. Under Section 7.5.3, the parties express their commitment to treatment and rehabilitation of people injured in the course of the conflict. Finally, in Section 7.6.1, both parties agree to protect the rights of women and children “in a special way”.

³⁷ Under the policy the families of the killed or disappeared are entitled to 100,000NRP per person, as are those that lost their property as a result of the conflict.

³⁸ A widow of a person killed or disappeared during the conflict is entitled to 25,000NRP.

³⁹ Advocacy Forum, “Discrimination and Irregularities. The painful tale of interim relief in Nepal”, 2010, available at http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf

of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁴⁰

These provisions are applicable to all people, without distinction of race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, or disability. Although the government of Nepal has framed certain policies regarding the issues of the conflict victims, none of these policies have specifically addressed the conflict issues of rape and torture.

The UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also include a non-discrimination provision and call for compliance with international norms of non-discrimination.⁴¹ Thus, policies that appear neutral on their face must also be examined to ensure that discrimination is not allowed to continue in practice.

The government of Nepal’s definitions are:

“Conflict victims” also includes the family members of those deceased and disappeared or disabled or internally displaced persons during the period of the armed conflict.⁴²

In the National Action Plan (NAP) “conflict affected women and children” includes women and children who, due to the impact of armed conflict or as a result thereof, have suffered from the following conditions (notwithstanding their present status):

- Women or girls displaced from their habitual place of living
- Single women
- Mentally affected women and girls
- Women or girls who suffered from sexual exploitation or rape
- Women or girls who because of sexual exploitation or rape became pregnant and were compelled to give birth or to become mothers,

⁴⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985. This definition is also contained in the 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.

⁴¹ UN General Assembly resolution 60/147, Dec. 16, 2005, XI.

⁴² “Guidelines for providing employment/ self-employment services to victims of armed conflict, 2067” section 2 (b).

- Women or girls who are in detention or in prison or who have undergone imprisonment.

The Government of Nepal has limited itself to the narrow confines of merely offering pecuniary compensation to conflict victims so that they may develop or re-develop sustainable livelihoods. Upon approval by the Cabinet in 2007, the Ministry of Peace and Reconstruction (MoPR) began offering financial relief and assistance with specified amounts that “conflict victims” are to be compensated.⁴³

Different compensatory measures include scholarships for the children of those who were killed, medical treatment for people injured during the conflict, skill development training for conflict victims, and arrangements for economic assistance to people and institutions for properties that were damaged during the conflict.

From the very outset of the Interim Relief Program, government and policy makers have neglected to include torture and rape victims as victims of the armed conflict. Civil society and conflict victims’ families raised their voice to incorporate them in the IRP, but the government and leading political parties paid no attention. The government led by Dr. Baburam Bhattarai further altered the guidelines in August 2011, but the survivors of torture and rape are still not recognized.

Instead of making amends to victims of rape and torture, the Government of Nepal has merely expressed its commitment to work according to its Human Rights Action Plan that emphasizes the need to “rehabilitate and reintegrate conflict victims in the theme of promotion of peace. For this theme, the government has promised to collect statistics of individuals and families affected by the armed conflict and provide them reparations; but the government has not yet concluded on the exact number of people who suffered from torture and rape during the insurgency period.”⁴⁴

With the collapse (at least in the short-term) of the initiative to set up a Truth and Reconciliation Commission and a Commission to Investigate Disappearances, the two bodies which may have been able to provide redress to conflict-era victims, the right to reparation remains to be addressed. In the meantime, there is no rigorous process of identification of “conflict victims” and verification of individual claims under the existing schemes.

An analysis of the IRP guidelines reveals the categorical exclusion of certain types of conflict victims and the unequal treatment of others. The IRP appears to disregard the

⁴³ For example, the family of the dead and disappeared could receive financial compensation, and compensation would be awarded to the handicapped depending on the level of injury.

⁴⁴ National Human Rights Action Plan 2010-2013.

level of harm as a relevant criterion for relief. The blatant exclusion of torture, rape, and sexual violence victims is inexplicable. The presence of property damage, agricultural loss, vehicle damage, or misappropriation by security agents sends a contradictory message to the society about what is valued the most—that is, loss of property is a more serious offense than torture and sexual violence.

The IRP is silent on the right of victims of torture to receive interim relief. Unlike victims of sexual violence, torture victims have approached every possible authority, including the DAOs, to try to file applications. But since there is no provision in the IRP, and thus no mechanism mandating a government body to listen to them, these victims remain unheard. This results in adverse consequences for the individual victim and their family. The Supreme Court of Nepal ordered the government to formulate clear legislation and make appropriate arrangements to address the needs of conflict victims according to the international standard of the right to equality.⁴⁵

Following a change in policy introduced by the government of Prime Minister Baburam Bhattarai, a Task Force has been mandated to collect names of those who were detained illegally and kept in detention for more than 24 days (by both parties) during the conflict. Because torture often occurred in the context of illegal detention, the Task Force will undoubtedly be gathering some data on torture victims. Whether this will ultimately result in victims of torture and rape receiving “interim relief” and other reparation remains to be seen.

⁴⁵ Bhim Prakash Oli and Others vs. His Majesty’s Government and others, Writ No. 3394 (2061).

Some Positive Initiatives, including the Torture Bill

During 2011, the government took a number of important steps to reform Nepal's criminal justice system. Chiefly among them were the drafting of a new Penal Code, Criminal Procedure Code, Sentencing Bill and a Torture Bill. The National Action Plan to implement the recommendations of Nepal's Universal Periodic Review was also a welcome policy initiative during 2011, which has been briefly discussed below.

21 - Draft Penal Code and Criminal Procedure Code

Nepal's criminal justice system is based primarily on confessions rather than evidence. The debate about reforming the criminal justice system has a long history. A new Penal Code, Criminal Procedure Code and Sentencing Act were finally submitted to parliament in January, 2011. A notable provision of the draft Criminal Procedure Code is Section 229, which extends the statute of limitation for rape from 35 days to one year. Another notable provision is Section 169, which criminalizes the act of torture. Specifically, Section 169 provides for a 5 year prison sentence for those convicted of torture, and a fine of up to NRs 50000 or both, depending on the gravity of the offense.⁴⁶

The draft Criminal Code was pending in a bill form before the Secretariat of the Legislature Parliament at the time the Constituent Assembly and Legislative Parliament lapsed on 27 May, 2012. Therefore, the draft Criminal Code will not become law until a new Legislature is established and the bill is voted upon.

22 - UPR Recommendation and Action Plan

The Universal Periodic Review of Nepal took place on 25 January, 2011. Many other government delegations raised serious concerns regarding Nepal's human rights record,

⁴⁶ For a detailed analysis of Advocacy Forum's comments on the draft codes and bill, including from a sexual violence perspective, see <http://www.advocacyforum.org/news/2011/04/af-redress-submit-key-recommendations.php>

including in relation to torture, gender-based violence and impunity. Following the Universal Periodic Review, the Government of Nepal published a National Action Plan on how it intended to implement the UPR recommendations. The National Action Plan lists specific actions to be taken, and the government bodies in charge of implementation. Although the National Action Plan is theoretically a welcome move, it does not specify any timeframe for implementation of the recommendations other than in “due course of time” or “on-going”, nor does it include measurable indicators of results.

23 - Torture Bill

The Government of Nepal took another positive step towards protecting victims of human rights abuses by introducing the Torture Bill in April, 2012. The Ministry of Home Affairs introduced a bill in Parliament to criminalize torture, to provide a mechanism for the investigation and prosecution of torture complaints, and to provide compensation to the victims of torture.

The Torture Bill contains provisions which would help Nepal fulfill its obligations under the Convention against Torture and other international treaties on human rights. The analysis of the Torture Bill below is interspersed with quotes from Padam Maya Sunuwar, who was tortured in January, 2010 and who fought to obtain justice (see her story above, Chapter 5). The quotes contain Padam Maya’s reflections on whether or not she feels the Torture Bill would uphold her right to justice and reparations as guaranteed by international law.

As its main features, the Torture Bill:

- Criminalizes torture, and cruel, inhuman or degrading treatment (Arts. 3 and 5), and prescribes punishment for the crimes, including imprisonment (Art. 22);
- Defines torture and cruel, inhuman or degrading treatment (Art. 2), and provides an illustrative list of acts that would amount to torture (Art. 4);
- Provides a rebuttable presumption that bruises, wounds or scars visible on a person in detention were inflicted by torture (Art. 6);
- Puts a positive duty on officers in charge to prevent torture or ill-treatment, and a rebuttable presumption of responsibility of the superior officer where torture or ill-treatment by those under his or her command is proved (Art. 7);
- Imposes a positive duty on all officials to inform a superior if they have knowledge that torture is to be inflicted (Art. 8);

- Provides for command responsibility, and prohibits the defense of “acting under orders” (Art. 10);
- Sets out a system of receiving complaints, and the investigation and prosecution of complaints, including the possibility of detaining those under investigation (Arts. 14-20);
- Provides the possibility of awarding compensation to the victim up to 500,000 NRs (Art. 23) and a 35 day time limit within which such awards must be executed;
- Provides for a system of health check-up of detainees (Arts. 25-26) and the possibility for witnesses to apply to the Court for protective measures (Art. 28);
- Incorporates the rule of *non-refoulement*, meaning that the government of Nepal is prohibited from extraditing persons to another state where it is reasonably likely that he or she would be subject to torture or ill-treatment (Art. 36).

If enacted and properly implemented, these provisions would effectively contribute to the prevention of torture in Nepal, and significantly improve the prospects of victims of torture receiving justice and reparation.

However, there are some key provisions in the Torture Bill which fundamentally undermine its objectives, and other provisions which must be strengthened in order to fully reflect Nepal’s obligations under international law (to be addressed below). These issues will have a major impact on whether the Torture Bill is able to provide justice to victims of torture and ill-treatment. Many of these issues apply to all victims – male and female – although for the reasons outlined in the previous Section[s], some may have an even greater impact in cases concerning women survivors.

Though the Torture Bill was a positive, concrete step towards Nepal fulfilling its international obligations, the dissolution of the Constituent Assembly in May, 2012 means that the Bill has been again put on hold. The Torture Bill should be a top priority once a new parliament is in place.

24 - Significant barriers to be redressed in the Bill

Four aspects of the Torture Bill are very discomfoting, considering the difficulties faced by female survivors of torture in seeking justice under the previous laws.

Time limit for filing complaint and statute of limitation

Like previous legislation, the Torture Bill requires a victim of torture to file a complaint within 35 days of the date of his or her torture or ill-treatment, or upon release from

detention (Art. 13). The impracticability and patented unfairness of a 35 day statute of limitations has been addressed in previous chapters, and recognized by the Supreme Court of Nepal.

The Torture Bill also imposes a limitation period of six months from the date of offence within which the charge sheet must be filed. This provision can be used as a significant obstacle to justice against victims (for the reasons outlined above) and provides a loophole by which, if action is not taken promptly by officials concerned, it will be possible for those accused of torture to evade accountability.

The Committee against Torture has consistently stated that torture should not be subject to *any* limitation period, and any limitation period for ill-treatment must be for a “significant duration.”⁴⁷ The Human Rights Committee has also made it clear that impediments to the establishment of legal responsibility for the crime of torture, including unreasonably short periods of statutory limitation, must be removed for a State to comply with its obligations under the ICCPR.⁴⁸

As this report demonstrates, short limitation periods for filing complaints and filing charges are serious barriers to accountability, and impede the ability of victims of torture – particularly female torture victims– to seek justice. There should be no time limit for filing complaints, and no statute of limitations under the Torture Bill for the prosecution of offences or the provision of reparations. Even if such provisions are included, they should specify a longer period and the Court must be given the discretion to extend the period where reasonable grounds do exist. Thus retaining the provision as it is will stand as a real and effective barrier to the objectives of the Torture Bill and the pursuit of justice for victims.

Protection for acting in good faith and lack of provision prohibiting amnesty

Although the Torture Bill does not permit defendants to use ‘superior’s orders’ as a defense to the crime of torture or ill-treatment, it does provide that ‘no public official shall be charged or otherwise punished for fulfilling his/her official duty in good faith under current laws’ (Art. 35).

⁴⁷ See, eg. Concluding Observations on Slovenia, CAT/C/CR/30/4, 27 May 2003, paras. 5 (Subjects of Concern) and 6(b) (Recommendations); Concluding Observations on Turkey, CAT/C/TUR/CO/3, para. 24 (where it expressed concern at a limitation period of 15-40 years). This reflects developments in general international law, see, eg. ‘Report of Diane Orentlicher to update the Set of Principles to combat impunity’, E/CN.4/2005/102, par. 47. See also the 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, para. 6.

⁴⁸ Human Rights Committee, General Comment No. 31, par. 18.

The prohibition of torture is absolute in international law, so there can be no defense or justification on the basis that a person was “acting in good faith.” The Committee against Torture frequently criticizes countries which allow such a defense in relation to torture,⁴⁹ and has made it clear that such a provision is not compatible with the CAT. This provision should be removed from the Torture Bill.

Similarly, although the Torture Bill specifically prohibits pardons for those convicted of torture without the consent of victims, it does *not* outlaw the provision of an amnesty to an accused *prior* to conviction. As Advocacy Forum previously reported, the granting of amnesties by successive governments has proved a significant barrier to the prosecution of perpetrators of grave human rights violations, further entrenching a culture of impunity in Nepal. This issue should be addressed specifically in the Torture Bill, disallowing amnesties for torture and ill-treatment prior to trial or conviction and pardons after conviction.

Punishment for filing false complaint

The Torture Bill includes a provision allowing for the imposition of a fine on a person who files a false complaint of torture (Art. 34).

Because of the secretive way in which torture is often carried out, it is extremely difficult to prove the allegation. In cases of sexual assault and rape, which affect many women victims of torture, providing proof is even more difficult.

Provisions providing punishment for filing false complaints are routinely used to punish even some genuine victims of torture who have difficulty in attending relevant court sessions or providing sufficient evidence to convince the Court that torture or ill-treatment occurred.

The inclusion of this provision in the Torture Bill will dissuade genuine victims of torture from making a complaint, contrary to Nepal’s obligations under Article 13 of the CAT, and may disproportionately affect women who have suffered sexual assault. If it is proved that a person did make a false complaint, mechanisms already exist under the current law to address that. Therefore, this specific provision should be removed.

25 - Problems with penalties and reparation

Although the Torture Bill (as drafted) is a significant step forward because it criminalizes torture and provides a mechanism for the provision of compensation, the punishments

⁴⁹ See, for example, Concluding Observations on Israel, UN Doc. A/64/44 (2009), page 96, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/64/44

and maximum levels of compensation prescribed in the Torture Bill do not adequately reflect the seriousness of the crime or the harm torture causes to victims.

Insufficient punishments

The Torture Bill provides a maximum five year prison term for somebody who has committed or ordered torture, and/or payment of a fine of NRs 50,000 (separate from any order the person may face to reimburse the State for reparation awarded to the victim, the limit of which is set at NRs 500,000). This prescribed penalty is increased by 10 percent if the victim has been mutilated, raped or sexually assaulted, or where other listed aggravating factors are present (Art. 22).

Under the CAT, Nepal must provide appropriate penalties for torture that reflect the grave nature of the crime (Article 4(2)). While the Committee has not prescribed a rule for the required length of punishment, it has made it clear that a maximum penalty of five years is not sufficient.⁵⁰

“Based on what happened during the torture, a 5 year punishment is inadequate. 20 years is a better punishment.”

Furthermore, the imposition of a fine is not an appropriate penalty in the case of torture. The Committee has made it clear that a significant custodial sentence is more appropriate.

Compensation and reparation

Although the Torture Bill includes a provision for compensation to victims of torture, it imposes an arbitrary cap of NRs 500,000 on the amount of compensation that may be awarded (Art. 23). In addition, although it foresees the possibility of other types of reparation being provided for in other legislation (including restitution, rehabilitation, satisfaction, and guarantees of non-repetition), they are not addressed in the Bill.

Both international law and the Convention against Torture indicate that compensation alone is an insufficient remedy for victims of torture. Under the CAT, Nepal must ensure that victims of torture or ill-treatment receive reparation that is adequate, effective,

⁵⁰ Manfred Nowak & Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, 2008, pp. 249-250.

appropriate and proportionate to the gravity of the crime and the physical and mental harm suffered.⁵¹ Such reparation should be holistic and comprehensive.⁵²

A holistic appreciation of the adequacy and appropriateness of reparation measures requires consideration of survivors' perspectives what may be an appropriate form of reparation in one case may not be appropriate in another. For example, women and their dependents may have particular needs or face particular types of discrimination that means that one form of reparation (such as the provision of rehabilitation services, or educational scholarships) may be more appropriate in one circumstance than in another (such as monetary compensation).

The Torture Bill could be significantly strengthened, and will only meet Nepal's international obligations, if it gives the opportunity to award other types of reparation. Furthermore, the arbitrary cap on the amount of compensation that can be awarded should be removed as the harm inflicted on victims may require a higher amount of monetary assistance.

"In the two years since filing my complaint, I have had many expenses. Advocacy Forum paid for the initial medical bill and legal services but I still have pain in some parts of the body. It is difficult for me to regain my previous health condition. What is there to do with one time compensation? The government should provide long term compensation considering the lengthy treatments."

26 - Positive steps to address barriers to redress for women and girls

A number of additional steps should be taken in the Torture Bill to address barriers to access to justice that women and girls, among others, face in relation to complaints of torture or ill-treatment. Some key issues are briefly outlined below.

⁵¹ 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 ("Basic Principles"), Principle 15: ("Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered"). The Committee has referred to the need for particular forms of reparation to be "adequate" and "appropriate": see, eg. Conclusions and recommendations on Russia (2007) (UN Doc CAT/C/RUS/CO/4), para. 20. See also HRCtee, General Comment No. 31, paras. 16 and 20, referring to "appropriate" remedies.

⁵² See the Basic Principles, Principle 18. See also Juan Mendez, Remarks at conference on "Strengthening the Prohibition against Torture: The Evolution of the UN Committee against Torture", Panel II: Ensuring Reparations for Victims of Torture and Other Ill Treatment, reproduced in (2010) 17 Human Rights Brief 26-27 at 26, referring to the work of Theo Van Boven, as Independent Expert concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, and subsequently reaffirmed in the reports of Rapporteurs Joinet, Bassiouni and Orentlicher.

Complaints procedure

As drafted, the Torture Bill provides that complaints of torture must be filed before a Court (Art. 13). However, as discussed in previous sections, it can be very difficult for many women and girls to access Courts.

Nepal has the obligation under CAT to ensure that any person who alleges he/she has been tortured has the right to complain to competent authorities, and that such right is available and effective in practice (Art. 13). Nepal could only ensure that such a right is effective in practice by recognizing a wider range of bodies to which a person may complain, and by recognizing the right of those in detention to be informed of their right to make a complaint and the mechanisms to do so. Bodies to which complaints could be made should include the official in charge of the place of detention, another body carrying out independent monitoring of places of detention, the National Human Rights Commission, or the district attorney.

The filing of the complaint should then implicate a duty to pass that complaint on to the prescribed investigative mechanism. Under the current version of the Torture Bill, the investigative process is instituted and supervised by the Court and carried out by the normal criminal justice system (Chapter 3). However, this could be significantly strengthened by setting up a specialized investigative mechanism within the police and district attorney's office to deal with complaints of serious human rights violations.

Legal aid and the rights of victims

The Torture Bill allows the victims to hire their own legal representative to represent their interests during the prosecution of their torture complaint (Art. 21). However, as discussed in this report, many victims – and particularly many women and girls - lack the necessary financial resources to employ their own lawyer. Access to justice would be significantly increased – and really made effective in practice – if the Torture Bill provided for legal aid to cover the costs of the victim's legal representative.

“Having a lawyer is very important, but it is difficult to hire one because they are so expensive. Without an organization like Advocacy Forum it would be difficult to access the court.”

Advocacy Forum has represented various victims of torture who have filed complaints, yet they have not been provided with information on the progress of the proceedings in their case. In effect, the victims do not have enough information to be able to protect their own interests. To ensure that victims are able to adequately protect their own interests, the Torture Bill should also specifically set out their rights – including the rights

to information on the progress of the investigation, to participate in proceedings, and to appeal decisions of prosecution authorities.

Health check-ups

Considering the difficulties in obtaining evidence of torture, and the particular difficulties women experience in procuring an accurate and affordable medical exam., a reliable system of health check-ups in detention is a key strategy both to prevent and to provide redress for victims of torture.

The Torture Bill provides for the provision of health check-ups ‘as far as possible,’ when a person has been kept in or released from detention (Art. 25). To ensure that such a system of health check-ups is effective, the Torture Bill should make health check-ups mandatory as soon as possible after a person is arrested, and upon his/her release (and/or if there is any reason to believe torture has been inflicted). If a detainee or his/her legal representative requests an examination by an independent physician (as allowed under the current Bill), such examination is to be provided free of charge.

“After I was released I couldn’t move my fingers, hands, and legs. I was terrified of the police, discouraged, and afraid that I would be imprisoned again.”

Privately inflicted harm

Although the obligations under the Convention against Torture are linked to torture committed by or with the consent or acquiescence of public officials, there is nothing inherent in the notion of torture which limits it to government officials. Severe pain or suffering intentionally inflicted by *any person* may amount to torture or ill-treatment in some circumstances. Crimes including rape, domestic violence, and child sexual abuse, which disproportionately affect women and children, can also reach this threshold.⁵³

The Committee against Torture, along with other international human rights bodies, makes it clear that states’ obligations to prohibit, prevent and redress torture and ill-treatment are not limited to people in the state’s custody, but also in “*contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.*”⁵⁴

⁵³ For an overview of the relevant jurisprudence see Alice Edwards (2011), ‘Torture and other cruel, inhuman or degrading treatment or punishment’, in *Violence Against Women Under International Human Rights Law*, Cambridge: Cambridge: 198-262.

⁵⁴ Committee Against Torture, General Comment No. 2, par. 15. See also Human Rights Committee, General Comment No. 20, par. 2 (“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”)

The Nepali legislature should specifically criminalize torture committed by non-state actors, with or without state involvement, so that such conduct will be recognized as torture when it reaches the required threshold.⁵⁵

⁵⁵ For an example of such a provision see Queensland Criminal Code, s 320A.

Critique of the National Action Plan

As a member of the UN, Nepal acknowledges that every country should be guided by the fundamental principles enshrined in the Charter of the United Nations, including basic human rights, the individual's right to dignity and respect, and equal rights of women and men.⁵⁶ The Resolutions of the United Nations Security Council are binding upon all member states of the United Nations. UN Security Council (UNSC) Resolution 1325 calls for the inclusion and consideration of the special needs of women in post-conflict reconstruction, while UNSC Resolution 1820 focuses specifically on sexual violence against women during conflict.

The government of Nepal created an 18 member High Level Steering Committee for implementing the UNSCR 1325 and 1820, with the Minister for Foreign Affairs as the Chair.⁵⁷ To address the special needs of women and girls in post-conflict reconstruction, the Nepal Ministry of Peace and Reconstruction delivered the National Action Plan for the Implementation of the United Nations Security Council Resolutions 1325 & 1820 (NAP) in February 2011.

The NAP acknowledges the crucial role women play in the all-round development of the country. It states that it is "the responsibility of the State to increase their participation and ownership in the peace building process and to provide them security. It is equally necessary to increase the women's participation at the policy formulation and implementation level."⁵⁸ The key objective of the NAP is to "ensure proportional and meaningful participation of women at all levels of conflict transformation and peace building processes; and protection of women and girls' rights,"⁵⁹ and is structured around five pillars; Participation, Protection and Prevention, Promotion, Relief and Recovery,

⁵⁶ United Nations Charter Article, 25.

⁵⁷ Cabinet decision of 21 September 2009.

⁵⁸ National Action Plan 2011.

⁵⁹ Ibid.

Resource Management, and Monitoring and Evaluation. While the introduction of the NAP is an encouraging development for women's rights in Nepal, it remains unclear whether the proposals touted in this plan will actually amount to positive changes for women affected by violence during the conflict.

The Government of Nepal declared a commitment to the implementation of the UNSCR 1325 & 1820 by producing the NAP, intending it to be a mechanism for strengthening women's participation and involvement in the promotion of peace and security in the post-conflict context. The NAP presents the contextual framework and analysis of the peace and security situation as well as the specific impact on Nepali women that prompted its development. The overarching goal of the NAP is to achieve sustainable peace and a just society.

Each of the NAP's five focus areas ('pillars') has a corresponding general objective, strategic objectives, specific actions and then lists desired results and indicators. The NAP goes on to identify responsible actors and a timeframe for each action.

The Ministry of Peace and Reconstruction (MoPR), established in 2007, is the lead Ministry mandated to oversee the implementation of the NAP on UNSCR 1325 & 1820. Since its inception, in partnership with UN Women and other UN agencies, bilateral partners and women's organizations, the Ministry has initiated discussions with concerned government officials, security sector actors, Constituent Assembly Members, political parties and civil society. The MoPR conducted various programs to enhance understanding of UNSCR 1325, and on the need to have a NAP and how it could be effectively implemented. It also conducted trainings and developed publicity materials. Further, an inter-ministerial Implementation Committee was constituted under the HLSC to orchestrate the process of implementation (National Action Plan 2011).

The NAP recognizes a need to take legal action against perpetrators of violence, including sexual violence, against women during the conflict, but states that this will be "very challenging".

Particularly relevant to victims of sexual violence during the conflict era are a number of specific strategic objectives under the pillar of Protection and Prevention. The following analysis of the implementation of just one of these strategic objectives demonstrates the failure of the NAP to deliver any tangible remedies to victims to date:

Strategic objective:

To end impunity by instituting necessary reforms in the justice and security system to enable them to promptly respond to cases of sexual and gender-based violence (SGBV).

Specific Actions:

1. Put in place necessary mechanisms with required reforms for carrying out immediate investigations and action in incidents of SGBV by maintaining confidentiality and dignity;
2. Provide prompt and free legal service to women and girls affected by conflict;
3. Build capacity of office bearers in the justice and security sector for providing prompt and effective services to victims of SGBV;
4. Make necessary legal provisions for prosecuting perpetrators of sexual violence during the conflict period;
5. Make changes in existing laws extending statutory limitation for filing complaints in connection with incidents of rape.

The expected time frame for a number of these actions to be fulfilled was within the first year, i.e. by February 2012.

As of June 2012, the implementation status of these five actions is:

1. This vague specific action is due to be completed within 5 years. The first year of its implementation couldn't meet the target that it had intended to achieve within the year. No specific mechanisms for the implementation of its target were put in place.
2. As yet, no legal aid has been provided to victims by the Government.
3. The Ministry of Defense and the Ministry of Home Affairs developed and initiated trainings for security forces, but the government has not begun investigations to identify victims of SGBV during the conflict.
4. The Government has not yet prepared any draft laws or policies to implement this specific action.
5. The Government has not yet amended the *Muluki Ain* provision relating to the 35-day limitation for complaint filing.

While the Strategic Objectives of the NAP are promising, and the corresponding Specific Actions are ambitious, the plan remains vague in regards to an actual strategy to what would be the key step for the prevention of future SGBV: the prosecution of perpetrators of past sexual violence related human rights violations.

There are numerous risk factors identified that may hinder effective implementation of the NAP, notably that the relief and reparation programs are limited to cash compensation. Practically, the NAP requires collaboration and effort from many levels, from the Ministries at the central level through to various District Offices, meaning that each level has to cooperate in order to produce results.

Providing a genuine and informed critique of the implementation of the NAP is difficult, as at this stage no official information is available about the progress of implementation. There are three independent organizations the government has ordered (via the NAP) to monitor the implementation of the NAP: Forum for Women, Law and Development (FWLD), the Legal Aid and Consultancy Center (LAAC) and SAATHI (meaning 'Friend') are required to report on their observations of the implementation of the NAP, and to make recommendations to the government. So far, no information is publically available about the effectiveness and implementation of the NAP. Though these organizations are mandated to report to the Ministry, at this stage, the Ministry has not released its report. There is little to no evidence to show that any of the strategic objectives of the NAP have been put into practice. Desk research does not reveal any information about the progress of the NAP, either from the Ministry of Peace and Reconstruction or from independent sources. The most substantial evidence of the failure of the Government of Nepal to follow through on the promises contained within the NAP is in the absence of new legislation to address issues of impunity and SGBV and an ongoing failure to address gender considerations with regard to relief and reparation, along with the non-fulfillment of the promise to create a Truth and Reconciliation Commission.

Conclusions and Recommendations

Advocacy Forum is concerned about the increasing incidence of torture reported by women detainees in 2011 and the lack of effective gender-specific policies to counter this trend. Amid an on-going lack of criminalization of torture, inadequate safeguards and severely deficient detention monitoring and complaint mechanisms, the government's repeatedly pledged commitments to protect women's human rights are sounding hollow, if not duplicitous.

The government systematically breaches their obligation to investigate, prosecute and provide remedies to victims of torture and other ill-treatment, which creates an environment where such behaviour remains widespread. It is clear that none of the commitments expressed in the Comprehensive Peace Agreement, the National Action Plan and the Universal Periodic Review will become reality unless the government starts to properly investigate reports of torture, including rape and bring those responsible to justice.

To enable the required investigation to be completed impartially and diligently, and in accordance with international human rights law, Advocacy Forum Nepal calls on the Government of Nepal to:

- Form an independent police unit under the command of the highest police authority to carry out investigations into all reports of torture;
- Ensure the transparency of these investigations and that victims be informed of the progress and result of the investigation;
- Ensure that investigations are carried out without delay;
- In relation to the cases of Surya Sharma and Yubraj Giri examined by the Human Rights Committee, ensure the full implementation of the Committee's Views, including in relation to the breaches of the rights of their wives and children under the ICCPR;

Conclusions and Recommendations

- Ensure the Nepal Army and retired army personnel, cooperate with police investigations;
- Develop suitable plans and safeguards in consultation with victims and potential witnesses in any investigations to ensure that they are protected from any potential intimidation or reprisals;
- Require the NHRC to step up its investigations of complaints of torture and rape and generally become more gender-sensitive in its policies and programs;
- Require the NHRC to use its powers to publicize the names of institutions or individuals who knowingly do not follow or implement their recommendations for compensation and prosecution of named perpetrators.
- Revise the policy on “interim relief” for “conflict victims” and make relief accessible to victims of rape and torture.

Annex

Table 1 : Trends in torture of women, 2006 - 2011

	2006	2007	2008	2009	2010	2011
Total number of women detainees interviewed by AF	124	186	197	256	345	408
Number of women claiming torture	26	19	20	35	36	63
% of women claiming torture	21%	10.2%	10.2%	13.7%	10.4%	15.4%

Table 2 : Trends in torture during 2011

	January – June 2011	July – December 2011
Overall number of detainees visited	2268	1919
Number of detainees claiming torture	567	464
% of detainees claiming torture	25%	24.2%
Number of women visited	217	191
Number of women claiming torture	32	31
% of women claiming torture	14.7%	16.2%

Table 3 : Analysis of Torture in Relation to the 7 Most Common Charges

		2006	2007	2008	2009	2010	2011	Total and average percentage over six years
Public Offense	Number of women claiming torture within charge	3	9	3	9	8	22	54
	% claiming torture within charge	9.7%	16.1%	6.8%	13.2%	7.4%	20.4%	12.27%
	Total charge	31	56	44	68	108	108	415
Drugs	Number of women claiming torture within charge	4	1	4	4	6	6	25
	% claiming torture within charge	14.3%	2.3%	18.2%	12.1%	14.6%	12.5%	12.33%
	Total charge	28	44	22	33	41	48	216
No charge	Number of women claiming torture within charge	4	3	5	7	7	11	37
	% claiming torture within charge	40%	11.1%	11.6%	18.9%	17.5%	14.1%	18.87%
	Total charge	10	27	43	37	40	78	235
Murder	Number of women claiming torture within charge	1	1	2	5	5	6	20
	% claiming torture within charge	9.1%	4.5%	8%	14.7%	10.4%	14.3%	10.17%
	Total charge	11	22	25	34	48	25	165

		2006	2007	2008	2009	2010	2011	Total and average percentage over six years
Human Trafficking	Number of women claiming torture within charge	6	0	0	1	0	6	13
	% claiming torture within charge	46.2%	0%	0%	5.3%	0%	21.4%	12.15%
	Total charge	13	4	14	19	30	28	108
Kidnapping	Number of women claiming torture within charge		1	0	0	2	3	6
	% claiming torture within charge		100%	0%	0%	40%	30%	28.33%
	Total charge		1	6	3	5	10	25
Theft	Number of women claiming torture within charge	4	2	3	5	2	8	24
	% claiming torture within charge	66.7%	33.3%	30%	29.4%	15.4%	32%	34.47%
	Total charge	6	6	10	17	13	25	77

Figure 1: Torture trends of men, women and children

