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The United Nations Committee against Torture

35th Session

A Supplementary Document concerning Torture in Nepal by the Asian Legal Resource Centre (ALRC)

**For consideration by the United Nations
Committee against Torture 35th Session in
Geneva (November 7 to 25, 2005)**

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1. Introduction

1.1. The following document has been prepared in order to supplement the information provided to the UN Committee against Torture (herein referred to as the Committee) by other human rights NGOs, in light of the Committee's consideration of the State Party's second periodic report during its 35th session.

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

1.3. The situation in Nepal has undergone significant degradation, notably since the notorious February 1, 2005 royal takeover. The Asian Legal Resource Centre (ALRC) has produced this update document in order to inform the Committee about new barriers to the implementation of the Convention against Torture (CAT) and violations that have occurred in Nepal during this most recent period. The purpose here is not to duplicate the information already provided to the Committee, but to provide additional information, analysis and recommendations in order to assist the Committee in its consideration of the State Party's submission of information.

1.4. On February 1st, 2005, King Gyanendra of Nepal dismissed the government of Prime Minister Sher Bahadur Deuba, declared a nationwide state of emergency and suspended the rights of the people of Nepal to the freedom of expression and assembly and the freedom of the press. The King assumed power by putting armed soldiers and police on the streets and appointed a new 10-member cabinet the next day, composed of royalist supporters, placing himself at the head of the cabinet. The King stated that he would restore democracy and peace in the country in three years. ALRC was among the many international actors, including States and NGOs, which immediately condemned the King's actions and expressed deep concern for the lives of the Nepali

people.¹ Mass arrests, torture, disappearances and the repression of demonstrations and the freedom of expression followed the royal takeover.

1.5. Since then, ALRC and its sister organisation, the Asian Human Rights Commission (AHR), have continued to receive a large number of cases of torture and other human rights violations. This has been possible despite the fact that the ability of local human rights activists to conduct fact finding concerning such cases has been greatly curtailed during this period, due to the risks to their lives that conducting such work entails. It is worth noting that a significant number of human rights defenders have been threatened into limiting or abandoning their activities, or even forced to leave the country during this period, and that the full extent of the use of torture and other grave human rights abuses remains hard to ascertain.

1.6. During the 34th session of the Committee against Torture, the Government of Nepal was requested to provide answers to a list of questions.² These questions included requests for clarifications concerning steps taken to, *inter alia*: bring the definition of torture in line with Convention Against Torture, notably to make torture a criminal offence under the Criminal Code; to ensure the right to be free from torture is upheld; to investigate and prosecute perpetrators of torture, extra-judicial executions and disappearances; to provide witness protection; and to provide adequate compensation and rehabilitation to victims.

1.7. ALRC notes with concern that the collapse of the rule of law in Nepal and the worsening of the human rights situation since February 1st, 2005, mean that there has been at best stasis and most commonly regression concerning these issues, rather than any progress. The following document substantiates these claims.

1.8. Further examples than those included in this document can be provided to the Committee against Torture if requested. The ALRC has documented a large number of cases of torture in Nepal, and published numerous cases and analysis in its bi-monthly Article 2 publications in December 2004 and February 2005.³

2. The failings of the Torture Compensation Act

2.1. The Constitution of Nepal prohibits the practice of torture.⁴ In furtherance to the ratification of the CAT, Nepal's domestic law, entitled the Torture Compensation Act, 1996 (hereinafter the Act), is ineffective as a tool for

¹ NEPAL: Immediate intervention needed to save human lives in Nepal, The Asian Legal Resource Centre, Statement issued on 1st February 2005
<http://www.ahrchk.net/statements/mainfile.php/2005statements/255/>

² Committee against Torture : CAT/C/35/L/NPL, 30-06-2005

³ ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, <http://www.article2.org/mainfile.php/0306/> & Vol. 04 - No. 01 February 2005 – Nepal: Time to act, <http://www.article2.org/pdf/v04n01.pdf>

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

preventing torture and enabling the prosecution of cases of torture. The Act falls short of the standards set in the Convention.

2.2. The Act does not define torture as a crime. The liability cast upon the perpetrator by virtue of the Act and by Article 14 (4) of the Constitution is limited to providing damages. In the absence of any other law to punish the perpetrators of torture, the perpetrators enjoy absolute impunity.

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

2.4. Furthermore, the amount of compensation as provided for in the Act and the manner of realization of compensation also dilutes the concept of *ius cogens* as it applies to torture. The recently promulgated Ordinance on 'communication', which is widely criticized as curtailing the freedom of the press, provides for a higher value fine to be levied from editors and publishers responsible for 'violating' the ordinance through alleged acts of defamation as compared with compensation for acts of torture under the Act.⁶ Any compensation that is to be paid in a case of custodial torture is paid by the state. The rider attached to Section 6 of the Act, which provides for compensatory damages for frivolous litigations, prevents anyone who is aware of the existing legal framework in Nepal from approaching the court.⁷

2.5. The intention of the legislative process is further clear from Section 10 of the Act, which provides for defence at the expense of the state for the perpetrators. Neither the Act, nor any other law in Nepal, provides for the concept of burden of proof favouring the victim in cases of torture.⁸

⁵ Torture Compensation Act 2053 B.S (1996)

⁶ Ordinance Amending some Nepal Acts Related to Communication ; promulgated on 9 October 2005

⁷ Section 6 (2) of the Torture Compensation Act reads *"While trying a complaint pursuant to sub-section (1) if it is found that the complaint was filed with malafide intention the district court may impose a fine up t five thousand rupees on such complaint"*

⁸ Section 10 reads *"Concerning the complaint in accordance with section 5, if the chief of the concerned office requests, the Government Attorney shall appear in the court on behalf of the employee and defend him"*

3. Torture by the Army and Police Forces

3.1. ALRC and AHRC have documented a large number of cases of arbitrary arrests, illegal and incommunicado detentions, torture, extra-judicial killings and forced disappearances in Nepal over recent years. The prevalence of such practices have continued and increased since February 1st, 2005. Of particular note, is that fact that torture is -routinely and systematically used by the authorities, and that failings in legislation and the judiciary afford total impunity for the perpetrators of these acts and no viable avenues for redress for the victims.

4. The systematic use of torture by the army and the police

4.1. ALRC has provided a number of case descriptions in the annexes to this document concerning such cases. ALRC's sources have, despite difficulties, been able to interview many persons who have been detained by the army or the police. In the majority of cases, these persons allege that they have been severely tortured during detention.

4.2. Typically, persons are arrested – for the most part arbitrarily – and detained incommunicado. Access to lawyers, medical services and family members are denied for those detained illegally. Of the around 5000 detainees interviewed, some 80% stated that they were not brought before a court within the 24-hour period prescribed in the Constitution of Nepal. A similar proportion of detainees report having been subjected to torture and ill-treatment while in custody. Cases of ill-treatment and torture recorded by ALRC include: lengthy blind-folding and handcuffing; beatings, including of the genitals; whipping using sticks and pipes on the soles of the feet, the legs and back; strangulation; death threats, including placing a gun to the head; electrocution, in particular via the ears; hanging upside down and repeatedly being dunked under water. The torture is severe to the point that many victims repeatedly lose consciousness.

4.3. It must be added that although a few organisations visit detention centres on a regular basis, access to the rooms in which detainees are being held is not granted. Furthermore, such organizations are not granted permission to interview detainees who have not already been taken to court, and so the afore-mentioned statistics only apply to those persons who have been produced before the courts. The most serious cases, where persons are detained incommunicado for lengthy periods and are subjected to the most brutal forms of torture, and potentially to forced disappearance or extra-judicial killing, for the most part remain hidden from external scrutiny. Even the ICRC has terminated its visits programme to army barracks, due to a lack of unhindered access.

5. Torture by the Royal Nepalese Army

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

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

5.3. In the current context the army and police operate in collusion, with persons arrested by the police being handed over to be detained and tortured in army barracks. Although military courts do not have jurisdiction over crimes committed against civilians by the army, the army is persistently detaining civilians in their barracks and the courts claim to be investigating allegations of torture of civilians by the military. The lack of transparency and results of such investigations continue to foster impunity in Nepal. Further analysis of this can be found later in this document, under the section entitled: *"The lack of effective and independent investigations into torture"*. These factors combine to enable systematic torture to be carried out in total impunity, without any workable prospects for effective investigation or for the victim to receive adequate reparation.

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

6. Torture by the police

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

6.2. The victims of torture are detained illegally and incommunicado, until the physical traces of torture have receded or disappeared. The victims in question are then charged with the offences of the released criminals, based on confessions extracted under torture, and the police prepare documents to show that they were only arrested under 24 hours before this time before presenting them before the courts. The courts reportedly turn a blind eye to this practice, enabling the semblance of the adherence to the constitutionally prescribed 24-hour period, and the use of torture to become endemic and go unpunished, while causing significant barriers to attempts by victims to gain reparation at a later stage. For reference, see the example of the case of Maiya Tamang under section *“The lack of documentation regarding arrest and detention”* of this document.

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

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

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

Text box - A

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

Chakra Bahadur Sherestha (Male) - a school teacher and suspected Maoist reportedly committed suicide on 15 November 2004 at about 7 pm at the

Dhadingbeshi Army Barracks. The army claim that he initially tried using a belt to hang himself and later he used a sleeping bag rope to do it.

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

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

Sadhu Ram Devkota (male and alleged Maoist cadre) - reportedly committed suicide at around 3.40pm on the 19th of December 2004 at the Army Barracks in Balaju, Kathmandu. The army claim that he hanged himself using his shoes laces from a window.

No proper investigations have been launched into these deaths.

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

8. Torture of children

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

9. Anti-terrorist measures and torture

9.1. Since November 2001, the government has imposed anti-terrorist legislation, giving greater latitude to the security forces to arrest and detain people. It allows the authorities to detain people for a period of one year without judicial scrutiny. The Terrorist and Disruptive Activities (Control and Punishment) Ordinance

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

(TADO) was introduced in November 2001 and was then replaced by the then-Parliament of Nepal by the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA), which ran for two years. Since then the TADO has been successively re-introduced every six months, notably, most recently, in the absence of Parliament, since it was dissolved in February of this year.

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

9.3. **Section 9. Power to keep under Preventive Detention**

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

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

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

9.6. Under this Act, the police investigate cases and have the power to arrest persons. These arrestees are then to be brought before the Appellate Court of Nepal within 24 hours. After completing the preliminary investigation and having collected primary evidence, the case is to be handed-over to the public prosecutor, who brings the charges against the person in court. The Appellate Court then decides on whether to give permission for the detention of persons for a maximum period of 60 days. Only the court has the power of decision on whether the person should remain in detention for further investigation or can be released on bail.

9.7. In practice however, all those arrested in relation to allegations of being involved in terrorist activities are detained by the army for prolonged periods of time, without having any formal allegations or charges made against them. Under such circumstances, the detainees are systematically subjected to torture.

Text box - B

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

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

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

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

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

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

9.8. The preventive detention of persons under the TADO for one year is a significant violation of provisions within Nepal's Constitution and of Nepal's

international obligations, notably the International Covenant on Civil and Political Rights. Is it open to abuse and its duration is unjustifiable in terms of preventing or investigating alleged terrorist activities. It is also fundamental in enabling torture.

10. The lack of documentation regarding arrest and detention

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

Text box C

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

Maiya Tamang was arrested on November 7th, 2004, at her residence by members of the police. She was detained at the Boudha police station for 2 days, where she was severely beaten by police officers using plastic pipes on her thighs and calves. She was subsequently transferred to Kalimati police station, where she was held for another 2 days. Here she was also beaten for around half an hour with plastic pipes.

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

11. The lack of effective and independent investigations into torture

11.1. There is no alternative mechanism in Nepal that can provide for impartial investigations into cases of torture. Inquiries are conducted by the state police, if at all. Under the existing circumstances, cases of torture and custodial violence are reported as being mainly perpetrated by the Royal Nepalese Army. The express bar by virtue of the rider attached to Article 86 (1) and Article 88 (2) (a) of the Constitution of Nepal means that the jurisdiction of even the Supreme Court of the country cannot be invoked in cases where the Royal Nepal Army is accused of torture. It is precisely for this reason that a writ of *habeas corpus* cannot effectively be invoked in cases of illegal detention and torture whenever the army is alleged to have committed torture in custody.

Text box - D

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

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

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

11.4. There are no practical means by which civilian oversight is possible upon the actions of the armed forces in Nepal. Since the declaration of a state of emergency, a series of Ordinances have been promulgated by the King, giving enormous powers to the armed forces on the pretext of countering the insurgency. Functioning public offices, including the National Defence Council, have been further corrupted due to nepotism and a lack of transparency in

dealings. Even the National Human Rights Commission has not been immune to this degradation.¹⁰

12. Re-arrests used to circumvent court decisions

12.1. In cases where the courts entertain applications and the releases of persons are ordered, such persons are immediately re-arrested on further charges, ensuring that they remain in custody indefinitely.¹¹ The AHRC, the sister organisation of the ALRC, has encountered numerous cases where released detainees are re-arrested by the security forces, including within the court's premises, making a mockery of the justice dispensation system in the country.¹²

Text box - E

41-year old **Kumar Rai**, an employee in a carpet industry, was first arrested from his room on 27 February 2004 at around 3 p.m. by a group of 4-5 security personnel dressed in civilian clothes. After 9 days of illegal detention and torture, he was released on the condition that he had to report to the army barracks on a daily basis. He was rearrested on 15 March 2004 and later released from Mahabir Gan, Chauni the next evening. On 17 March, Kumar was once again arrested and subjected to torture while in detention. A *habeas corpus* writ was filed on 5 August 2004 by his wife, with assistance from local NGO Advocacy Forum, which was dismissed. On 4 January 2005, Advocacy Forum again filed a *habeas corpus* on Kumar's behalf and on 31 January, the Supreme Court issued orders for him to be released. However, Kumar was given another detention order under TADA and Advocacy Forum filed a third *habeas corpus* on 2 May 2005. He was finally released on 26 May 2005 on the Supreme Court's orders. The reasons for his arrests are unknown.

38-year old **Mr. Jeewan Shrestha**, a resident of Sankhuwa Sabha District, Wana Village Development Council ward no 1, who had been staying in Kathmandu municipality for 3 years, was first arrested on 15 September 2003 from his shop at Lokanthali, Bhaktapur. Although he was released on 16 November 2004 on court orders, after a *habeas corpus* filed by Advocacy Forum, he was rearrested the same day. Another *habeas corpus* was filed on his behalf and Jeewan was released on November 24 after international pressure on the detaining authorities. He was arrested once again on 15 December 2004 and then released on December 23 after the international community took up his case. Jeewan was alleged to have been collecting donations in support of the Maoists,

¹⁰ Asian Human Rights Commission Urgent Appeals Programme; FORWARDED APPEAL (Nepal): Human rights groups question the legality of the National Human Rights Commission (NHRC) of Nepal <http://www.ahrchk.net/ua/mainfile.php/2005/1106/>

¹¹ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Re-arrest of Nepalese citizens undermines official court orders and rule of law <http://www.ahrchk.net/ua/mainfile.php/2005/1098/>

¹² Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Confirmed re-arrest of at least 32 political activists and human rights defenders in violation of court orders following the royal takeover <http://www.ahrchk.net/ua/mainfile.php/2005/1134/>

according to the security personnel, and was therefore tortured while in detention.

12.2. In one case where officers of the National Human Rights Commission and the lawyers appearing on behalf of a detainee insisted upon his release, once the bail application had been allowed, the security forces surrounded the court premises and threatened to use force to take released detainee into custody on new charges. This is not an uncommon incident.¹³

12.3. There are numerous cases where when an application is filed for bail and, if the release is ordered, officials from the National Human Rights Commission are forced into taking the released detainee to a different place under the cover of darkness, to enable the person to be released out of the view of the armed forces.

13. Limited access to courts in Nepal

13.1. Accessibility to the courts in Nepal is also a pertinent issue which needs to be mentioned at this juncture. Very few lawyers are willing to take cases of torture to court, given the death threats that they would likely receive and the absolute impunity enjoyed by the perpetrators. Those who dare to accept briefs are threatened by the perpetrators directly and indirectly so that they are forced to withdraw from providing their professional help to their client. Since torture is not defined as a crime in law, the courts treat a case of compensation for torture as one of a civil nature, and the victims are directed to pay huge amounts in court fees prior to adjudication.¹⁴

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

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

13.4. The **District Court of Morang** had dismissed applications filed by the wife of a torture victim on the ground that the Act only applies to under-trial prisoners and not to convicts, as was the case of the petitioner's husband in this case. Such poor and mistaken interpretation of the Act and the lack of understanding

¹³ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Two recent incidents involving threats to a Teachers' Union leader and the re-arrest of citizens despite Supreme Court release orders <http://www.ahrchk.net/ua/mainfile.php/2005/1130/>

¹⁴ Sanji Danel vs. Shanti Ram filed before the District Court Kathmandu

about the very purpose of the Convention pose further hindrance to the realisation of the spirit of the Convention at the domestic level.

14. The absence of witness protection

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

15. The National Human Rights Commission

15.1. The National Human Rights Commission is vested with the authority to inspect places of detention and to entertain cases of human rights violation, but is often prevented from discharging its duties. Requests for inspection of army facilities are turned down by the officers in charge of detention centres. The adjudication of cases by the Commission involving army officers is obstructed due to a lack of cooperation. The officers of the National Human Rights Commission who are engaged in field visits and investigation of cases are often threatened and intimidated by the armed forces.

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

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

16. Threats to human rights defenders

16.1. Where various human rights organisations have been involved in providing assistance to victims, they have been isolated and targeted by the security forces. Human rights organisations are constantly under observation by the security forces. The observation extends to wiretapping of conversations and the tailing of human rights defenders. Cases are also common where human rights activists are threatened and intimidated by telephone. The most commonly used method for intimidation is to falsely accuse a person of Maoist activities, an offence for which bail is not available.¹⁵

17. Impunity

17.1. In Nepal, there are various enactments and other ordinances in force which promote impunity for state agents who might face allegations of having perpetrated custodial violence (see the afore-mentioned TADO and TADA). As mentioned earlier, if an officer is challenged in court in a torture case, it is very easy for the officer to book the victim in another case and get that case handled by a quasi-judicial tribunal.¹⁶

17.2. The provisions of these laws provide vast powers to the concerned officers to conduct inquiries and adjudicate upon their own inquiries, which negates the fair trial principles of *nemo iudex in sua causa* on the one hand. On the other hand, this facilitates a process by which anyone who challenges an officer alleging custodial torture, is at the disposal of the same officer, who can then lodge false charges against the complainant. In practical terms, a person who challenges an act of torture is at risk of putting his life and freedom at the disposal of the very same officer against whom the allegation of torture has been made.

17.3. The cases reported from Nepal, which are included as an annex to this report, show the nature and extent of torture and the manner in which arrests are made. They also highlight the various ways in which the authorities circumvent domestic laws as well as the judiciary's inability to address this.

17.4. Under the current circumstances, it is highly difficult for a victim or anybody concerned about the victim, to establish a case of custodial torture in Nepal. This is also reflected in the issues identified by the UN Committee against Torture which are to be addressed while considering the second state party report.¹⁷

¹⁵ Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Restriction of movement of activists can prevent human rights monitoring <http://www.ahrchk.net/ua/mainfile.php/2005/1139/>

¹⁶ The Public Security Act 1990; The public Offence and Punishment Act 1970; The Police Act 1955; The Terrorist and Destructive Activities (Control and Punishment) (TADA) Act 2001

¹⁷ Committee against Torture : CAT/C/35/L/NPL, 30-06-2005

18. Conclusion and recommendations

18.1. The breakdown in systems and institutions, compounded by the total collapse in the rule of law that has been accentuated by the Royal takeover, mean that torture is endemic, systematic and conducted with total impunity in Nepal. Claims to the contrary by the State Party to the Convention against Torture before the Committee should be viewed as nothing more than fabrication. The cases included in the annexes to this document only represent a fraction of the actual cases that have taken place in the country, especially in 2005. As previously stated, the threats proffered and restrictions imposed on the human rights community in Nepal, especially since February 1st, 2005, have led to an inability to document a significant number of cases of arbitrary detention, torture, extra-judicial killing and/or forced disappearance.

19. Recommendations:

1. The ALRC urges the Committee to recommend that the Government of Nepal immediately produce the necessary legislative changes to make the 'act of torture' a crime. The domestic law must be amended in accordance with the spirit of the Convention so that any proceedings initiated under the Torture Compensation Act 2053 B. S. (1996) are considered and dealt with as a criminal case of a grave nature, prescribing imprisonment as a punishment in the case of proven guilt.
2. The Government of Nepal must be urged to take immediate steps to ensure that all arrests and detentions are systematically documented. The Committee should immediately intervene to ensure the release of all those who are illegally detained by the police or the security forces. The lack of documentation of arrests and detention is the one of the most prominent hindrances for any judicial intervention in cases of illegal arrests, detention and torture in Nepal.
3. The Committee is requested to urge the Government of Nepal to provide immediate steps for witness protection. In the absence of any existing witness protection programme, all steps taken to reduce torture and custodial violence will fail to deliver results, thereby resulting in the continuing lack of confidence in the system by the people of Nepal. Steps must also be taken to ensure that anyone found to be threatening or engaged in intimidating a witness is severely dealt with through strictly enforced laws.
4. The conduct of the Royal Nepal Army at the domestic level must be immediately reviewed and the army must be given strict instructions not to detain civilians illegally and unconstitutionally. The army must be immediately instructed to release all detainees, notably those who are minors and thus to follow the Kingdom's obligation to the international conventions to which it is a State Party, notably the Convention on Rights

of the Child. The engagement of an international body to ensure compliance of such orders is advisable.

5. ALRC requests that the Committee urge the Government of Nepal to withdraw all legislation, including the TADO, and provisions in domestic law that legitimizes pre-trial detention beyond a period of 24 hours. Current legislative provisions including those contained in the Ordinances, which enable incommunicado detention and torture, must be immediately withdrawn. They allow for violations of Nepal's obligations under international conventions - more specifically the CAT and the ICCPR - and the Constitution of Nepal.
6. The Committee should request the Government of Nepal to enact adequate legislative changes to increase the compensation to be paid to victims of torture. The compensation must be paid by the perpetrator, though an additional liability should be provided for by the state. The domestic law must be amended accordingly.
7. The Committee should also urge the Government of Nepal to provide an adequate legislative framework to enable the reverse presumption regarding the burden of proof in all cases of torture.
8. The Committee is requested to recommend that the Government of Nepal provide all necessary assistance to the National Human Rights Commission and Human Rights Organisations in Nepal, into inquiring cases of custodial violence and torture. All instances of intimidation against the Human Rights Defenders must be seriously dealt with.
9. Last but not least, the Committee must ensure that adequate resources are provided by Nepal to ensure that those involved in the justice dispensation mechanisms and medical professions in Nepal receive adequate and appropriate training, with the assistance of the United Nations

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