Nepal Conflict Report 2012

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

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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

FOREWORD

When the Government of Nepal and the CPN (Maoist) signed the Comprehensive Peace Accord in 2006, they committed to ensuring that some of the key tenets of international law would be realised and respected. These included establishing the truth about the conduct of the conflict and ensuring that the victims who suffered serious violations of international human rights law and humanitarian law, receive both justice and reparations.

Six years later, much remains to be done to bring these important aspirations to fruition. At the time of releasing this Report, the enabling legislation for the transitional justice mechanisms envisaged for Nepal: the Truth and Reconciliation Commission and the Commission on Disappeared Persons, have yet to be finalized. Perpetrators of serious violations of international human rights law and international humanitarian law have not been held accountable by the justice system, and the suffering of victims and their families has continued and remains largely unacknowledged by the State.

This Nepal Conflict Report and its accompanying Transitional Justice Reference Archive (TJRA) are intended to be a helpful contribution to the pressing task of ensuring justice for serious violations committed during the conflict. By documenting and analysing the major categories of conflict-related violations of international human rights law and international humanitarian law that took place in Nepal from February 1996 to 21 November 2006, this work provides a research base on which the transitional justice commissions and courts will be able to build. This work is not an investigation, but a preliminary exercise to identify credible allegations with a reasonable basis for suspicion that a serious breach of international law has occurred. These allegations are presented in the context of relevant documentation, international law and domestic law, to offer a sound basis for advancing transitional justice, including through investigation and prosecution by any judicial processes. The TJRA also helps to preserve relevant documentation for posterity, for future truth–telling and accountability.

During the many years I worked for justice and the realisation of human rights around the world, I have seen that both the failure to combat impunity and the denial of justice only served to encourage further serious violations. I therefore offer this Report and the accompanying TJRA to the Government and people of Nepal, to assist them in their essential endeavour of building a sustainable foundation for peace and recovery from Nepal's violent and tragic conflict.

Navi Pillay
United Nations High Commissioner for Human Rights

SUMMARY OF CONTENTS

DETAILED CONTENTS

ACRONYMS

AF	Advocacy Forum
AP	Additional Protocol
APF	Armed Police Force
CRC	Convention on the Rights of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention on the Protection of all Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CMC	Centre for Mental Health Counselling
CPA	Comprehensive Peace Accord
CPN	Communist Party of Nepal
CPN (Maoist)	Communist Party of Nepal (Maoist)
CPN (M-L)	Communist Party of Nepal (Marxist-Leninist)
CPN (UML)	Communist Party of Nepal (Unified Marxist Leninist)
CPN (Unity Centre)	Communist Party of Nepal (Unity Centre)
CVICT	Centre for Victims of Torture
DPH	Direct Participation in Hostilities
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	international humanitarian law
IHRICON	Institute of Human Rights Communication, Nepal
IHRL	International Human Rights Law
IISDP	Integrated Internal Security and Development Plan
INSEC	Informal Sector Service Centre
NC	Nepali Congress
NHRC	National Human Rights Commission
NP	Nepal Police
NRs	Nepali Rupees
NSP	Nepal Sadbhavana Party
OHCHR	Office of the High Commissioner for Human Rights
OHCHR-Nepal	The Office of the High Commissioner for Human Rights country office in Nepal (2005-2012)
PLA	People's Liberation Army
PM	Prime Minister
RNA	Royal Nepal Army
RPP	Rastriya Prajatantra Party
SCR	Security Council Resolution
SPA	Seven Party Alliance
TADA	Terrorist and Disruptive Activities (Control and Punishment) Act
TADO	Terrorist and Disruptive Activities (Control and Punishment) Ordinance
TJRA	Transitional Justice Reference Archive
TRC	Truth and Reconciliation Commission
UCPN (Maoist)	Unified Communist Party of Nepal (Maoist)
UN	United Nations
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund

UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women (now UN Women)
UNMIN	United Nations Mission in Nepal
UPFN	United People's Front Nepal
URPC	United Revolutionary People's Council
VDC	Village Development Committee
WGEID	Working Group on Enforced or Involuntary Disappearances
WOREC	Women's Rehabilitation Centre

EXECUTIVE SUMMARY

Chapter 1 – Introduction

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

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

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

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

Chapter 2 – History of the Conflict

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

Traditionally, social life in Nepal has been highly stratified, marked by caste and other hierarchies which shaped much of the country's social, economic and political life. The dramatic political changes of 1990 raised popular expectations of social progress and greater

equality, but although some statistical indicators from the early 1990s show positive developments in the economy, the living conditions of most people remained poor. Around this time, some analysts were noting that deep-rooted socio-economic conditions favourable to armed conflict existed in Nepal, and warned of the possibility of a radical movement rising up to channel longstanding grievances.[3]

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

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

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

Chapter 3 – Parties to the Conflict

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

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

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

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

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

Chapter 4 – Applicable International Law

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

International Human Rights Law

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

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

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

International Humanitarian Law

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

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

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

Criminal Responsibility under International Law

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

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

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

Chapter 5 – Unlawful Killings

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

The available data shows that unlawful killings occurred throughout the conflict in multiple contexts: for example, during Maoist attacks on Security Force posts and bases, Government buildings, national banks and public service installations; in chance encounters and during ambushes, such as in the *Madi* bus bombing. Other examples were recorded during search operations by the Security Forces made in response to earlier Maoist attacks and in the way that the local PLA and political cadres abducted, abused, tortured and killed suspected spies and informants. Unlawful killings were also perpetrated against enemy combatants and civilians who were in detention or otherwise under the control of the adversary, for example, in execution-style killings. One of the most compelling case is *Doramba*, where 17 Maoists and two civilians were taken by the Royal Nepal Army (RNA), marched to a hillside, lined up and summarily executed.[18] The Maoists also killed captives; for example, three teachers, Muktinath Adhikari, Kedar Ghimire and Arjun Ghimire, were each allegedly executed after abduction in separate incidents in Lamjung District in 2002.[19]

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

Chapter 6 – Enforced Disappearance

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

Enforced disappearances[20] were among the most serious human rights violations committed during the armed conflict in Nepal. Conflict-related disappearances were reported as early as 1997[21] and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.[22] In its 2009 report to the United Nations General Assembly, the United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) stated that during the ten-year conflict in Nepal, the highest number of cases of enforced disappearances it received were in 2002, when it was

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

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

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

An examination of the data in the TJRA by period or by alleged perpetrator of the disappearance tends to show trends and patterns in the commission of these acts. In terms of the rate of incidence, a significant incidence of disappearances by security forces first emerged in 1998, during the Government security operation known as "Kilo Sierra II", which was launched in several districts regarded as Maoist strongholds: Rukum, Rolpa, Jajarkot, Salyan in the Mid-Western Region, Gorkha in the Western Region and Sindhuli in the Central Region.[27] Another significant increase occurred following the issuance of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) in November 2001, and the mobilization of the RNA against the Maoists in November 2001. In Bardiya district, where OHCHR-Nepal investigated 156 of more than 200 reported cases of disappearance, most of the arrests occurred in the aftermath of the declaration of the State of Emergency between December 2001 and January 2003.[28] The WGEID visited Nepal in 2004 and identified a clear pattern of disappearances by the security forces, particularly by the RNA.[29]

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

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

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

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

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

Chapter 7 – Torture

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

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

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

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

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

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

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

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

Chapter 8 – Arbitrary Arrest

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

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

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

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

Recorded cases show that these laws were apparently systematically misused to detain a number of people suspected of involvement in the Maoist movement, without any charge or trial. According to an official source, the total number of political prisoners in custody reached 1,560 in mid-November 1999.[42] Human rights groups widely reported on non-

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

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

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

Chapter 9 – Sexual Violence

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

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

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

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

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

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

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

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

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

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

Chapter 10 – Accountability and the Right to an Effective Remedy

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."
Universal Declaration of Human Rights, article 8[58]

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

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

Accountability Challenges: Seeking justice for Maina Sunuwar

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

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

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

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

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

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

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

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

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

Chapter 11 – Recommendations

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

[1] The Informal Sector Service Centre (INSEC), a leading human rights organisation in Nepal, recorded 13,236 people killed: INSEC Conflict Victim Profile (August 2010), available from www.insec.org.np/victim/. According to the International Committee of Red Cross (ICRC), more than 1,350 individuals who went missing during the conflict remain unaccounted for. International Committee of the Red Cross, "Nepal: Red Cross releases documentary on conflict-related missing." (8 August 2010). Available from www.icrc.org/web/eng/siteeng0.nsf/html/nepal-news-060810. At the time of publishing this Report, the number of persons recorded as killed had increased significantly and can be expected to increase further as investigations continue.
[2] Comprehensive Peace Accord 2006, articles 5.2.4, 5.3.5 and 7.1.3.
[3] R. Andrew Nickson, "Democratization and the Growth of Communism in Nepal: A Peruvian Scenario in the Making?" and Stephen L. Mikesell, "The Paradoxical Support of Nepal's Left for Comrade Gonzalo", in Deepak Thapa ed., *Understanding the Maoist Movement of Nepal* (Kathmandu, Martin Chautari, 2003).
[4] Henceforth, "CPN (Maoist)" or "Maoists". The terms will be used largely interchangeably in this Executive Summary.
[5] The Army Act 2006 was promulgated on 28 September 2006, a little less than two months before the signing of the Comprehensive Peace Accord.
[6] Armed Police Force Act 2001, section 6(1)
[7] Ibid, section 8
[8] "Theoretical Premises for the Historic Initiation of the People's War", September 1995, http://www.ucpnm.org/english/doc3.php: "5.
[9] At the time of writing this report, Nepal has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) or International Convention for the Protection of All Persons from Enforced Disappearance (CED). Although Nepal signed the Convention on the Rights of Persons with Disabilities on 3 January 2008, this Convention is not yet ratified and did not apply during the conflict period.
[10] C.N.270.2002.TREATIES-4 (Depositary Notification), 25 March 2002 and C.N.170.2005.TREATIES-3 (Depositary Notification). 14 March 2005
[11] Jean-Marie Henckaerts and Louise Doswald-Beck for the International Committee of the Red Cross, *Customary International Humanitarian Law* (3 vols.), (Cambridge, Cambridge University Press, 2005).
[12] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 14 (see endnote 11).
[13] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 97, which is derived in part from the IHRL obligation upon states to protect life (see endnote 11).
[14] Fourth Geneva Convention, article 147.
[15] Statute of the International Criminal Court, A/CONF.183/9* (1998), Article 8(2)(c). Nepal is not currently a party to the Rome Statute, however, certain aspects of the Rome Statute represent a codification of customary international law and it is therefore used in this analysis of crimes against humanity to illustrate the application of this crime.
[16] Ibid, Article 7.
[17] Ministry of Peace and Reconstruction website, Emergency Peace Support Operation (available from www.epsp.gov.np/eng/index.php?page=deceased_main).
[18] 2003-08-17 - incident - Ramechhap - _i3381.
[19] Muktinath Adhikari (Ref. No. 5985) was killed after abduction on 16 January 2002, Kedar Ghimire (Ref. No. 5982) was killed after abduction on 19 January 2002 and Arjun Ghimire (Ref. No. 5948) was killed after abduction on 27 June 2002.
[20] In this Report, the terminology "enforced disappearances" is used to refer to state-related disappearances. Further, the phrase "actions tantamount to enforced disappearances" refers to CPN (Maoist) related disappearances, and the term "disappearances" is used in a general sense and to cover both categories of cases.
[21] Informal Sector Service Centre, *Human Rights Yearbook 1997* (1997).
[22] Amnesty International, *Nepal: Escalating 'disappearances' amid a culture of impunity*. Available from www.amnesty.org/en/library/asset/ASA31/155/2004/en/202bdd2f-d59d-11dd-bb24-1fb85fe8fa05/asa311552004en.html, accessed on 2010-06-17).
[23] *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council* (A/HRC/13/31).
[24] *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council* (A/HRC/19/58/Rev.1).
[25] OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, p 5.
[26] Comprehensive Peace Accord, 21 November 2006, sections 5.3.1 and 7.1.3; Interim Constitution 2007, article 33(m).
[27] Amnesty International, *Nepal - Human Rights at a Turning Point?* (1999). Available from www.amnesty.org/en/library/asset/ASA31/
[28] OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008, p 4.
[29] *Report of the Working Group on Enforced and Involuntary Disappearances to the Human Rights Commission: Mission to Nepal* (E/CN.4/2005/65/Add.1), p 12

[30] OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008 and OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004* (May 2006).
[31] Available from http://www.nhrcnepal.org///publication/doc/reports/Disapp-Status-Rep-2008-Nep.pdf, accessed on 2010-06-20
[32] For example, see the pattern of abductions and disappearances by the CPN-M in 2008 reported in OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008.
[33] OHCHR-Nepal, *Human Rights Abuses by the CPN-M: Summary of Concerns*, September 2006, p 5.
[34] CAT articles 12 and 13.
[35] However, some elements of torture are prohibited by national law, for example, physical assault and "battery," (*kutpit*) exist in the Nepali National Code (*Muluki Ain*).
[36] For example, *Madi* bus bombing, Ref. No. 2005-06-06 - incident - Chitwan _0106, emblematic case 5.15. Those involved in this case received only two to three months of 'corrective punishment.' OHCHR-Nepal, *Human Rights Abuses by the CPN (Maoist), Summary of Concerns*, September 2006, p.8. Available from: http://nepal.ohchr.org/en/index.html
[37] See the Maina Sunuwar case below in Emblematic case 7.2.
[38] Nor has anyone been sent to prison for perpetrating any of the other prohibited acts in the Nepali civil code, such as assault, beating, or mutilation.
[39] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Follow-up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan*. A/HRC/19/61/Add.3 (1 March 2012).
[40] *See, e.g.*, United Nations Working Group on Arbitrary Detention, *Fact Sheet No.26:* The Working Group on Arbitrary Detention (9 December 1998) Available from www.ohchr.org/Documents/Publications/FactSheet26en.pdf.
[41] In Nepal, the arresting authority must present the detainee to a judicial authority within a period of 24 hours from the time of arrest, except where the person arrested is a citizen of an enemy state or s/he is detained under preventive detention. This requirement is contained in both the 1990 and 2007 Constitutions (articles 14(6) and 24 (6) respectively), and the State Cases Act in relation to the period of police detention (section 15(1)).
[42] As quoted by Amnesty International, *Nepal: Human Rights and Security* (2000). Available from http://www.amnesty.org/en/library/asset/ASA31/001/2000/en/389533d6-dfc0-11dd-8e17-69926d493233/asa310012000en.html
[43] Amnesty International, *Nepal - Human Rights at a Turning Point?* (see endnote 27)
[44] Ibid.
[45] In cases where the Security Forces denied holding the detainee at all, the elements of the crime of "disappearance" will likely have been met.
[46] Victim of a rape in 2002 speaking to OHCHR-Nepal, UNFPA, Advocacy Forum and Centre for Mental Health Counselling (CMC) during the assessment mission in Achham District in May 2009.
[47] Stop Rape Now, UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence*. *See also* UN Security Council Resolution 1325 (S/RES/1325) (2000), preamble, para 10;
[48] *General Recommendation No. 19 of the Committee on Elimination of Discrimination against Women: Violence against Women* (11th session, 1992).
[49] UN Security Council resolution 1820 (S/RES/1820) (2008) para 4.
[50] UNIFEM, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (New York, UNIFEM, 2002) p.13.
[51] Ibid, p. 1; UNIFEM & SAATHI, "Sexual and Gender Based Violence during Conflict and Traditional Period: Jhapa and Morang Districts: A Research", 2008, p.7; Forum for Women, Law & Development, "Domestic Violence against Women in Nepal: Concept, History and Existing Laws" p. 10, Available from www.fwld.org/article.php.
[52] UNIFEM & SAATHI, "Sexual and Gender Based Violence during Conflict and Traditional Period: Jhapa and Morang Districts: A Research", 2008, p.7, p.10.
[53] Assessment Mission by OHCHR, UNFPA, Advocacy Forum and CMC in Achham District, p. 170.
[54] Nepal adopted a law that legalised abortion in 2002.
[55] Institute of Human Rights Communication, Nepal (IHRICON), *Sexual Violence in the "People's War": The Impact of Armed Conflict on Women and Girl in Nepal"* (Kathmandu, IHRICON, 2007) p.31.
[56] Ibid.
[57] Ibid, p. 49.
[58] This right is also enshrined in article 2 of the ICCPR, which is a right non-derogable during states of emergency.
[59] *See, e.g.*, Maina Sunuwar case, Ref. No. 2004-02-17 - incident - Kavre _0259; *Devi Sunar v. District Police Office, Kabhrepalanchok, Dhulikhel et al.* Nepal Kanoon Patrika, Supreme Court, Case 2064/2007, Vol. 49, Issue 6, at pp 738-749
[60] Interim Constitution of Nepal (2007) article 32 (right to constitutional remedy), article 107 (jurisdiction of the supreme court)
[61] Ibid, Article 33 (c) Obligations of the State.
[62] Comprehensive Peace Accord (2006) Article 5.2.5
[63] For example, physical assault and "battery," (*kutpit*) exist in the Nepali National Code (*Muluki Ain*).
[64] The Nepal Army claims to have conducted military proceedings against its members for IHL or IHRL violations, however, the Nepal Army has never substantiated these claims despite repeated requests by OHCHR to do so.

CHAPTER 1 – INTRODUCTION

1.1 REPORT OVERVIEW

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

The report and the TJRA focus on serious violations of international law observed during the conflict such as unlawful killings, disappearances, torture, arbitrary arrest, sexual violence and lack of effective remedy. In this context, it is important to emphasize that the work that led to this report was conducted as a preliminary exercise to compile and preserve materials and accounts of allegations. This work was not undertaken as a criminal investigation and OHCHR has not independently verified all of the allegations listed in the TJRA or in the Report. Nevertheless, in the recorded cases, OHCHR is stating that there exists a credible allegation amounting to a reasonable basis for suspicion that a violation of international law has occurred. Therefore, these cases therefore merit the prompt, impartial, independent and effective investigation by competent judicial authorities.

To date, the response of the Nepalese authorities and the Maoists in the face of the substantial number of serious allegations of crimes committed during the conflict has been negligible. Police officers, political party leaders and government officials have deflected, postponed or, in some cases, withdrawn examination or prosecution of alleged violations, saying that they cannot or should not be pursued now and that the TRC will deal with them. The apparent lack of political will on the part of the Nepali authorities and the political parties to prosecute those who may have been responsible for serious violations of human rights and international humanitarian law committed during the conflict has only encouraged further serious violations and risks continuing to do so.

This work was undertaken by OHCHR staff and expert consultants based in OHCHR-Nepal and Geneva, with the financial support of the UN Peace Fund for Nepal. The aim of the project is to contribute to a lasting foundation for peace in Nepal by providing the groundwork for the transitional justice process.

By contributing to the documentation and compilation of serious violations of human rights and international humanitarian law committed in Nepal during the conflict, the report aims to assist the Government of Nepal, the National Human Rights Commission, the transitional justice mechanisms and civil society to combat impunity, to provide a remedy and reparations to the victims, and implement a transitional justice strategy. Accordingly, OHCHR offers this Report and the TJRA as a contribution to the important task of establishing the truth about serious violations committed during the conflict, in the interests of consolidating peace and the rule of law.

1.2 BACKGROUND

The Nepal Conflict Report is the culmination of the work of many individuals and organisations, conducted over an extended period of time. During more than ten years of armed conflict in Nepal, Nepali human rights organizations, civil society activists, journalists, the National Human Rights Commission (NHRC), international NGOs and OHCHR actively monitored, made interventions and reported on serious violations of international human rights law (IHRL) and international humanitarian law (IHL). This work included recording information on the violence occurring throughout the country in connection with the conflict. Particularly in the early years of the conflict, those collecting information in the field and writing reports were not well resourced and did not possess sophisticated technological equipment. Rather, a commitment to fundamental human rights principles and a pen and paper provided the impetus and tools for the job.

Although the most pressing purpose was to protect and promote the rights of individuals and to spare civilians from harm during hostilities, this difficult and often dangerous work produced a tremendously varied and extensive number of reports, media articles, testimonials, books, documents and other materials. Cumulatively, this diverse body of literature depicts a detailed (though incomplete) mosaic of conflict related violence.

By signing the Comprehensive Peace Accord (CPA), the Government of Nepal and the Communist Party of Nepal (Maoist) (CPN (Maoist)) committed to establishing the truth about the conduct of the war and to ensuring the conflict's victims receive both justice and reparations. To achieve this aim, the CPA provided for the establishment of two transitional justice mechanisms:

- A Truth and Reconciliation Commission: *to bring the actual facts to the public by investigating the truth on gross violation of human rights, incidents regarding crimes against humanity and the persons involved in such incidents during the course of armed conflict*,[1] and
- A Commission on Disappeared Persons: *to have legal arrangements for the act of disappearance by making it a punishable offence and to punish the persons involved in disappearing people, provide for the reparations to the victims by protecting the right of the family to know the truth relating to the person disappeared, and to find out the truth in relation to the disappeared persons, and those responsible for such acts.*[2]

These commitments, which now have constitutional status, are a concrete and formal acknowledgement that the legacy of the conflict remains to be addressed[3] and that truth, justice and reparations for victims are necessary in securing sustainable peace. As clear as these obligations are, the task confronting the two Commissions will be formidable in terms of the scope and complexity of the inquiry.

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[1] Nepal, Comprehensive Peace Accord, article 5.2.5, 8.4 (2006); Interim Constitution of Nepal (2007), article 33(s).

[2] The Seven Political Parties and the then CPN (Maoist) made an agreement on 8 November 2006 to form a high-level commission of inquiry to look into disappearances. *See also* Interim Constitution of Nepal (2007), Article 33(q).

[3] Transitional justice processes and mechanisms are "associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and to achieve reconciliation." *Report of the UN Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/16), para. 8.

At the time of writing this report, the legislation to enact these Commissions had been significantly delayed, following the failure of political parties to agree on a text, and remained in draft format. In addition, the major political parties have submitted proposals to empower the future Transitional Justice Commission to grant amnesties for international crimes and gross violations of international law committed during the conflict. OHCHR recalls that States should refrain from granting amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes, as such amnesties contravene principles under international law. Further, not only do amnesties violate international human rights law by upholding impunity, they also weaken the foundation for a genuine and lasting peace. In this context, it is notable that the United Nations has a policy that prevents it from supporting any national processes that run counter to its position on amnesties.

Irrespective of the existence and status of these two important Commissions, many of these allegations constitute violations of Nepali laws and merit a prompt, impartial, independent and effective investigation by the competent Nepali judicial authorities.

1.3 PROJECT OUTPUTS AND TOOLS

The primary purpose of this project was to systematically identify violations of human rights and international humanitarian law related to the conflict.[4] As such, the two tools are intended to provide the Government, the National Human Rights Commission and civil society with a basis for advancing the transitional justice process and for monitoring its progress, or lack thereof.

The specificities of each tool and their potential role are explained below.

1.3.1 The Transitional Justice Reference Archive (TJRA)

The TJRA is a fully-searchable structured electronic archive of several thousand documents and other materials relevant to the conflict, in both Nepali and English. It includes allegations of violations distilled from English and Nepali language data that have been deemed, through an impartial assessment by OHCHR, to meet the threshold criteria.[5] Information was compiled from a wide range of credible sources including national and international NGOs as well as OHCHR-Nepal's own reporting over the last six years. Cases contain information about the victim(s) and the perpetrator group, a legal qualification of the alleged violation, the date it occurred (or commenced) and its location. Also included is the narrative of the incident as recorded by source(s). It should be noted that the public version of the TJRA available on the OHCHR website has removed any information, including cases, which were deemed to be confidential. This information may be made available to the transitional justice commissions or courts of law, as appropriate.

OHCHR did not assess whether or not a violation has been committed. The TJRA provides users with information and tools to undertake research and make their own assessments. For example, with the benefit of being able to make preliminary assessments of a range of incidents by reference to, for example, location, type of violation, affiliation of victim or perpetrator, or any combination thereof, users can organise activities and areas of

[4] Other existing data has fallen short for one or more reasons: data (1) has not been countrywide; (2) has not covered the whole period of the conflict; (3) has only focused on a very specific set of violations or phenomena (such as disappearances), or; (4) has not been articulated in a rights-based framework. Both the Ministry of Peace and Reconstruction and the Informal Sector Service Centre (INSEC, a leading Nepali NGO) have compiled conflict-related data but these focused more on casualties, for the purposes of compensation, than the context, victims of the violations or the affiliation of perpetrators.

[5] Refer to Annex Two, p. 229 for detailed information on the methodology of data selection and the threshold criteria.

investigation promptly and objectively. However, it is important to remember that the TJRA is composed of documents from many sources that include often brief and incomplete data that do not employ consistent or controlled language. Accordingly, care should be taken when searching for or using key words or phrases since there is no guarantee that they are exhaustive of all synonyms or alternative language used in documents in the Reference Archive.

The Archive also includes documents available online from national and international organisations, OHCHR and other UN agencies, the media and elsewhere. It also provides data on the chain of command of the parties to the conflict in terms of areas or regions and/or structures where specific units operated. Documents issued by both parties to the conflict between 1996 and 2006, many of which are no longer widely available, have also been included whenever possible.[6] The Reference Archive is therefore important not only as a consolidated planning and reference tool for investigating serious alleged violations, but also for preserving relevant documentation for posterity and for future judicial truth–telling and transitional justice initiatives.

1.3.2 The Report

This Report presents research and analysis of serious violations of human rights and international humanitarian law committed during the conflict including the relevant international law, patterns and trends associated with such violations and recommendations. It consists of eleven chapters, of which four relate directly to categories of violations:[7] Unlawful Killings (chapter 5), Enforced Disappearances (chapter 6), Torture (chapter 7), Arbitrary Arrest (chapter 8) and Sexual Violence (chapter 9).

Each of these five chapters addressing categories of violations commences with the legal elements that define the violation, followed by relevant key issues and patterns and is illustrated with emblematic cases taken from the TJRA. Most emblematic cases are followed by an analysis of how, if the facts were established, they would constitute a legal violation. In order to provide additional information on the impact that the conflict had on various areas and groups, the Chapters on Unlawful Killings, Disappearances and Torture also include a series of visual aids. These present a range of disaggregated data from the TJRA and from INSEC victim profiles[8] according to (1) geographic area, (2) surname, gender, minority, occupation and affiliation of the victim and (3) the group affiliation of the alleged perpetrator. The following visual aids present similar data on a nationwide level.

The other six chapters contain an introduction (chapter 1); a conflict narrative that places the issues discussed in succeeding chapters within a political and military context (chapter 2); an overview of the parties to the conflict and their actions as the conflict unfolded, particularly the Royal Nepal Army and the CPN (Maoist) (chapter 3); a review of the applicable international human rights and humanitarian law that were in operation throughout the conflict (chapter 4); and an assessment of the mechanisms that were in place during the conflict intended to address allegations of wrongdoing (chapter 10). The Report concludes with recommendations to all key parties including the Transitional Justice Commissions (once established), the Judiciary, the Security Forces, the political parties, the NHRC, civil society, the international community and the victims (chapter 11). It must be noted that violations

[6] Press releases issued during the conflict by both the Nepali Army and the CPN (Maoist) are an important record of what was said, and not said, by both parties in relation to particular events (e.g. a clash or other incident) and can be easily cross-checked against other information included in the archive.
[7] Chapter 5, Unlawful killing p. 72, Chapter 6, Enforced Disappearances, p. 109, Chapter 7, Torture (including information on mutilation, other ill-treatment, and arbitrary detention) p. 124, Chapter 8, Arbitrary Detention p. 151 and Chapter 9, Sexual violence p. 158.
[8] The INSEC victim profile is a database of factual data collected on victims of the conflict by the Nepal NGO Informal Sector Service Centre (INSEC), available online at: http://www.insec.org.np/victim/

concerning recruitment of children into armed forces were not considered in this Report, nor in the compilation of the TRJA, due to the existence of a specialized process and the monitoring and reporting mechanism under Security Council Resolution 1612 (2005) including monitoring by the Special Representative of the Secretary General.[9] However, this should not prevent the transitional justice mechanisms, or another competent judicial authority, from considering such allegations in the context of investigations or prosecution of violations of international law.

Additional information is provided in the Annexes. Annex One is a comprehensive timeline of the events leading up to and comprising the conflict. Annex Two gives an overview of the Methodology used in the compilation of both the TJRA and this Report.

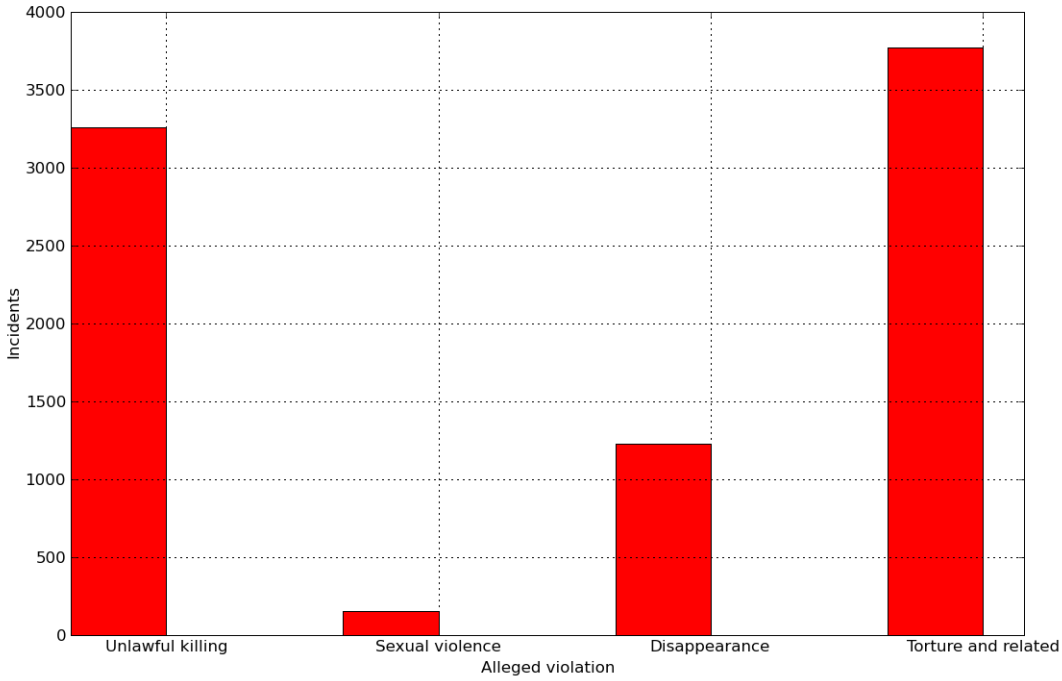

Diagram 1.1: All TJRA recorded incidents by alleged serious violation 1996-2006

[9] UN Security Council, *Security Council resolution 1612 (2005)* 26 July 2005, S/RES/1612 (2005). For further information, see Chapter 4, section 4.5.4 *Children in Armed Conflict.*

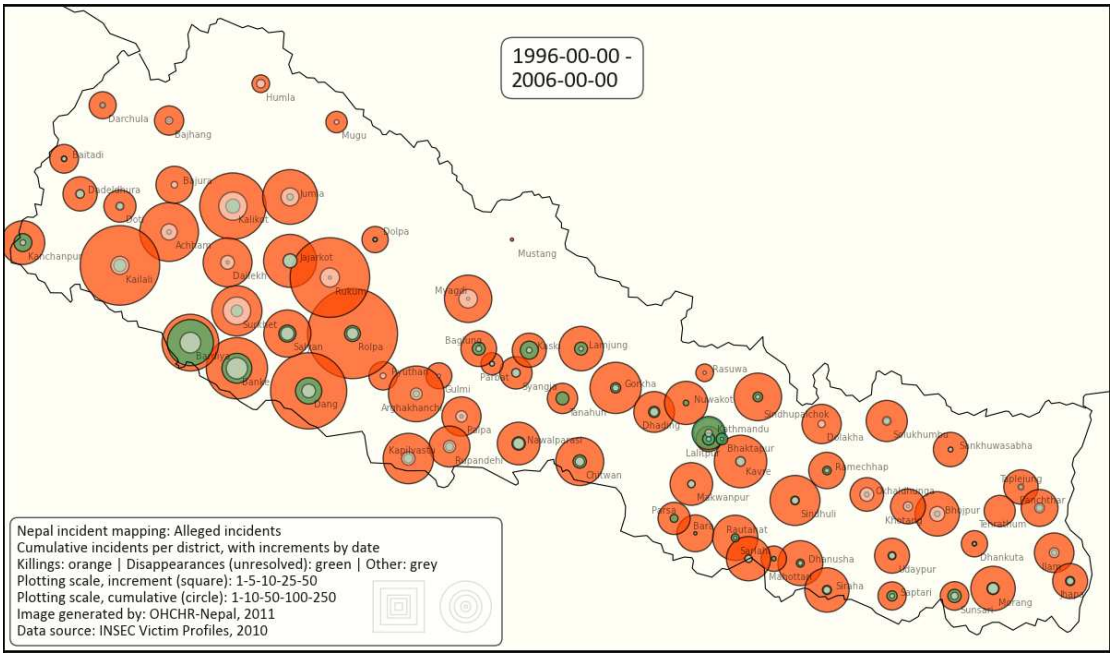

Diagram 1.2: All TJRA Incidents by District 1996-2006

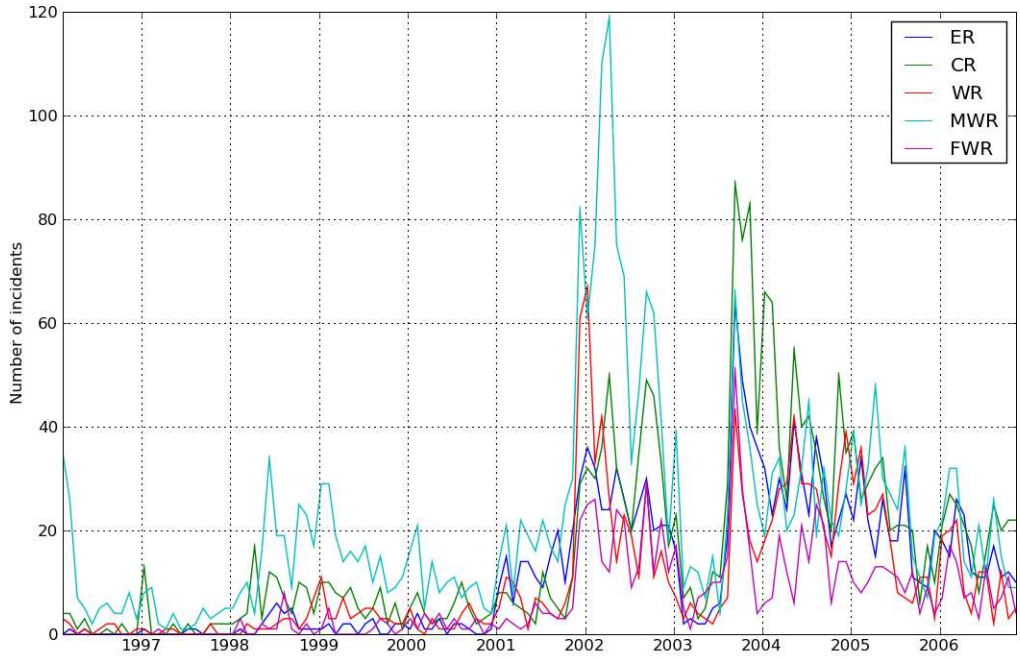

Diagram 1.3: All TJRA incidents by Region 1996-2006

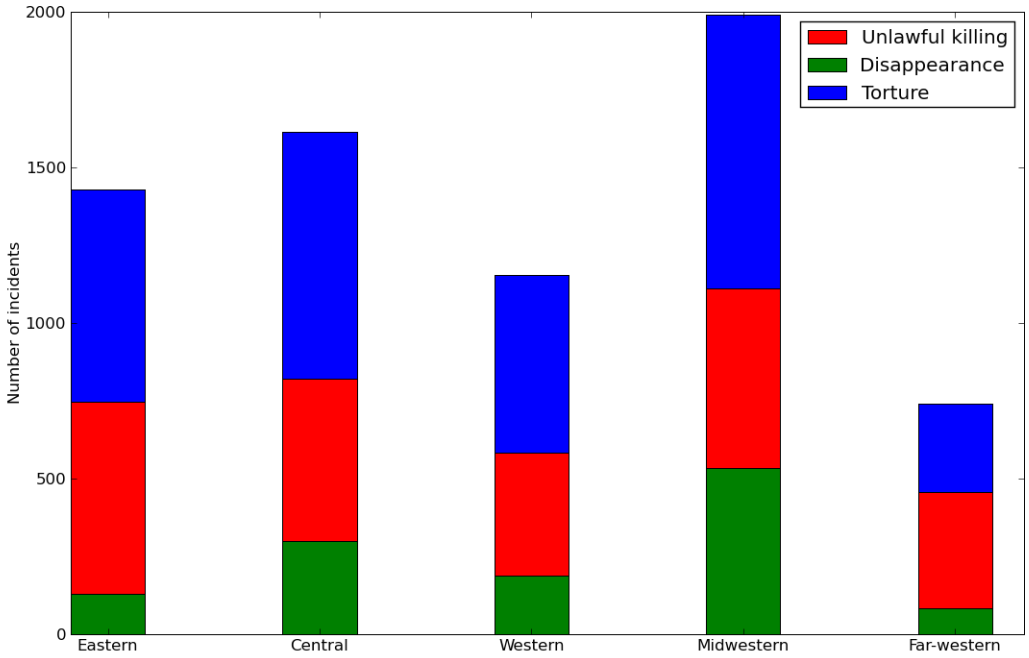

Diagram 1.4: All Reference Archive incidents by Region 1996-2006

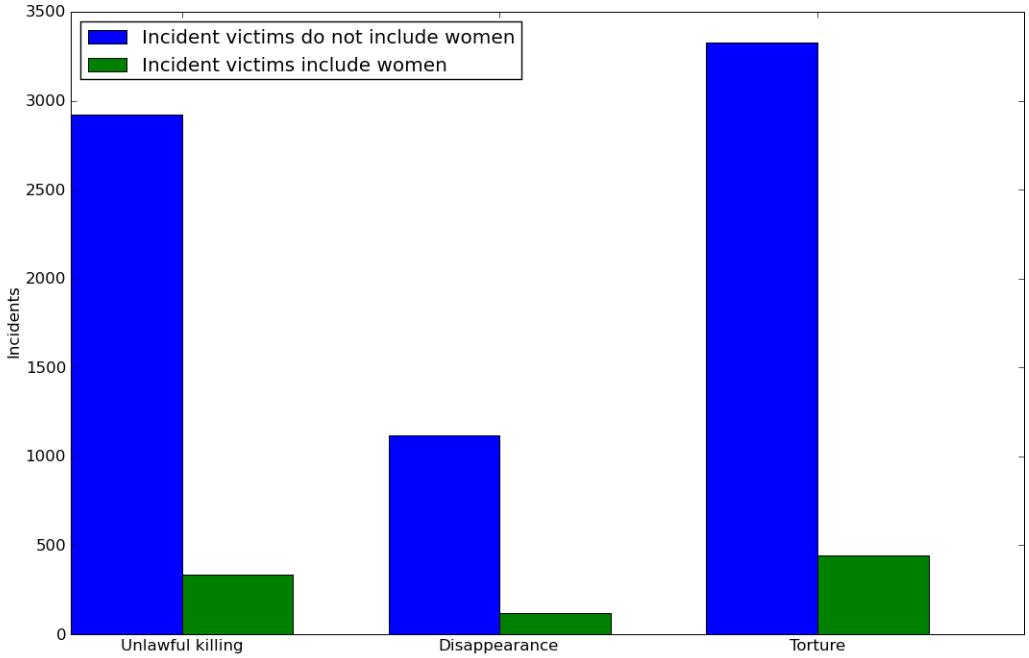

Diagram 1.5: All reference archive Incidents by Gender 1996-2006

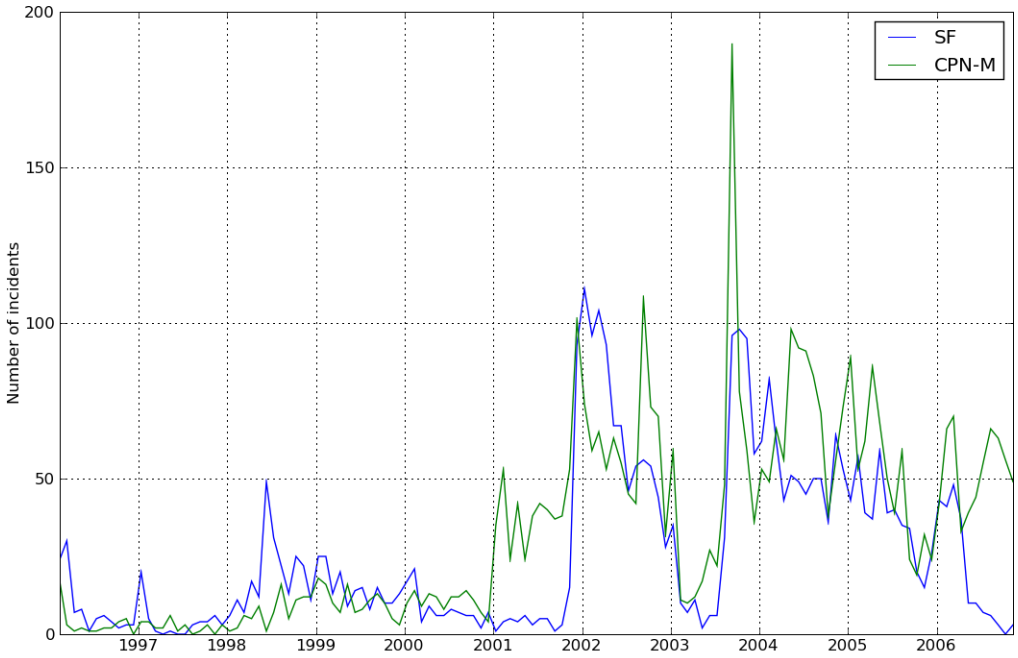

Diagram 1.6: All reference archive incidents by perpetrator 1996-2006

CHAPTER 2 - HISTORY OF THE CONLFICT

2.1 OVERVIEW

On 13 February 1996, the Communist Party of Nepal (Maoist)[10] launched an armed insurgency against the Nepali State. Over the course of the next decade, what was initially regarded as a minor problem of law and order in a distant part of rural Nepal developed into an entrenched and often brutal armed conflict that affected the entire country. While the precise number of conflict–related casualties is not yet available, most current estimates indicate that by the time the conflict came to a formal end on 21 November 2006, with the signing of a Comprehensive Peace Accord between the Government of Nepal and the CPN (Maoist), at least 13,000 people had been killed. To date, more than 1,300 people who "disappeared" during the conflict remain missing.[11]

Human rights violations and abuses by both government Security Forces and by the CPN (Maoist) were widespread throughout the conflict; conflict–related killings were recorded in all but two of Nepal's 75 districts.[12] In addition to the serious violations and abuses of international human rights and humanitarian law – including unlawful killing, torture, enforced disappearance, sexual violence and long-term arbitrary arrest – which form the substance of this report, thousands of people were directly or indirectly affected by the conflict in other ways. Many individuals and families were displaced from their homes; there were large-scale disruptions to education, health and basic government services across the country; economic hardships were further exacerbated by the conflict; instability and a climate of fear were widespread.

This chapter provides a brief narrative of the major aspects of the conflict, highlighting and weaving together significant events and developments that took place between 1996 and 2006 to provide context for the alleged violations and abuses documented in the report. Firstly, the historical context is outlined, followed by a snapshot of the political and socio-economic conditions that existed at the start of the conflict. The chapter then traces the organizational and ideological evolution of the communist parties and factions that contributed to the formation of the CPN (Maoist). An account of the armed conflict then follows, starting with the declaration of what the CPN (Maoist) referred to as a 'People's War.'[13]

2.1.1 Background

Modern Nepal traces its origins to 1769, when the ruler of the small kingdom of Gorkha, in what is now western Nepal, conquered and united the many kingdoms and principalities in the southern hills of the central Himalayas into a single State ruled by the Shah dynasty. Shah Kings ruled Nepal until 1846, when a member of the Rana aristocracy assumed direct power, reduced the Shah King to a figurehead and founded a system of hereditary prime ministers,

[10] Henceforth, "CPN (Maoist)" or "Maoists". The terms will be used largely interchangeably in this chapter, though the former is preferred in contexts which refer specifically to official party policy, statements or actions.
[11] Informal Sector Service Centre (INSEC), a leading human rights organisation in Nepal, records 13,236 people killed. INSEC Conflict Victim Profile (August 2010), available from www.insec.org.np/victim/. According to the International Committee of Red Cross (ICRC), more than 1,350 individuals who went missing during the conflict remain unaccounted for. International Committee of the Red Cross, "Nepal: Red Cross releases documentary on conflict-related missing." (8 August 2010). Available from www.icrc.org/web/eng/siteeng0.nsf/html/nepal-news-060810.
[12] The high mountain districts of Manang and Mustang did not record any conflict related killings.
[13] Whatever the ten-year phenomenon was called by different groups and persons, the Comprehensive Peace Accord (CPA) uses the term 'armed conflict'. While the Maoists called it 'People's War', it was also referred to as 'rebellion', 'terrorism' and other names. 'Insurgency' is used as a neutral word in this chapter, when referring to Maoist action during the armed conflict, such as initiation, expansion and mobilization that did not necessarily involve both sides to the conflict.

which would be led by members of the Rana family over the next century. In 1951, the Rana Prime Minister was overthrown, due in part to efforts by an emerging pro-democracy movement, and the Shah dynasty was returned to power.

Once restored to the throne, the King was successful in sidelining calls for the election of a constituent assembly to draft a new constitution, though there was some gradual expansion of pro-democratic space during the 1950s, resulting in the country's first elected Government in 1959. This period of relative political liberalization was to be short–lived and in December 1960 the King dismissed the elected Government, banned all political parties and put in place the Panchayat system of "partyless democracy" that would prevail for the next 30 years.

In early 1990, several political parties, among them the Nepali Congress party and a coalition of communist parties,[14] launched a popular pro-democracy movement[15]. This movement initiated a turbulent period of street protests which included violent clashes and killings of both demonstrators and police. As a direct result of this action, multiparty democracy was restored from May 1991.

Nepal's multiparty democratic system continued to grow over the next decade. During the 1990s, three general and two local elections were held, and multiple governments were formed by both the NC and the Communist Party of Nepal (Unified Marxist-Leninist) (UML). Gradually though, the democratic system found itself subjected to strains on a number of fronts and faced criticism from a substantial and increasingly disenchanted sector of the population for whom the promises of democracy – good governance, security and prosperity – had failed to materialize.

Traditionally, social life in Nepal has been highly stratified, marked by caste and other hierarchies which shaped much of social, economic and political life. The dramatic political changes of 1990 had raised popular expectations of social progress and greater equality and though some statistical indicators from the early 1990s show positive developments in the economy, the living conditions of most people remained poor. Economic indicators showed an improvement in basic infrastructure and services, such as roads, air traffic and communication networks, and health, education and banking facilities. However, this was contrasted by a deeper economic and development malaise caused by decreased purchasing capacity and access to land, increased disparity within and in comparison to other countries, and a general stagnation of the rural economy.[16] By the early 1990s, some analysts were noting that deep-rooted socio-economic conditions favourable to armed conflict existed in Nepal and warned of the possibility of a radical movement rising up to channel longstanding grievances.[17]

Communist parties have long been a part of the political spectrum in Nepal. The Communist Party of Nepal (CPN) was formed in 1947 in India and won four seats in Nepal's first general elections in 1959. Subsequent splits in the CPN gave rise to a number of leftist parties and factions over the next four decades with sharply different beliefs over key ideological issues,

[14] United Left Front was formed on 15 January 1990. It consisted of Communist Part of Nepal (Marxist-Leninist) (CPN (ML)), CPN (Marxist), Nepal Workers and Peasant's Organization, CPN (Fourth Convention), and communist factions led by Tulsi Lal Amatya, Vishnu Bahadur Manandhar and Krishna Raj Varma. Martin Hoftun, William Raeper and John Whelpton, *People. Politics and Ideology: Democracy and Social Change in Nepal* (Kathmandu, Mandala Book Point, 1999).
[15] The *Jana Andolan*, or "People's Movement".
[16] For social indicators at the start of the armed conflict, see Nepal South Asia Centre, *Nepal Human Development Report 1998* (Nepal South Asia Centre, Kathmandu, 1998).
[17] R. Andrew Nickson, "Democratization and the Growth of Communism in Nepal: A Peruvian Scenario in the Making?" and Stephen L. Mikesell, "The Paradoxical Support of Nepal's Left for Comrade Gonzalo", in Deepak Thapa ed., *Understanding the Maoist Movement of Nepal* (Kathmandu, Martin Chautari, 2003).

including whether or not to take up arms in pursuit of communist goals.[18] This ideological divide was also evident during the People's Movement in the spring of 1990: while some communist parties had officially taken part in the demonstrations along with other parties, others[19] offered only informal support and maintained an ideological commitment to armed struggle.

In November 1990, several leftist parties united as the Communist Party of Nepal (Unity Centre) (CPN (Unity Centre)) under the leadership of Pushpa Kamal Dahal (later known as Prachanda), and in January 1991 the United People's Front Nepal (UPFN) was formed as the Unity Centre's political front. The UPFN contested the general elections in 1991 and won nine seats to become the third largest party, but performed poorly in local government elections in 1992. In 1994 the CPN (Unity Centre) and the UPFN split, the former led by Pushpa Kamal Dahal and the latter by Baburam Bhattarai, and both boycotted subsequent elections.[20] In March 1995 CPN (Unity Centre) was renamed the Communist Party of Nepal (Maoist) and plans were drawn up to launch an armed struggle against the State. The result was entitled *The Strategy and Tactics of Armed Struggle in Nepal* and *Plan for the Historical Initiation of the People's War*, texts which formed the immediate conceptual foundations of the insurgency.

The initial planning and formulation of the insurgency is described in a 1997 CPN (Maoist) publication:

> *[T]he Third Central Plenum of the Party held in March 1995 chalked out a detailed politico-military policy and programme outlining the strategy and tactics of people's war in the country and made a final decision to launch the war. This was followed by six months of hectic preparations primarily to remould the old organisational structure into a fighting machine. Then a Central Committee meeting of the Party held in September, 1995 adopted the "Plan for the Historical Initiation of the People's War", which defined the theoretical basis and goal of the war and formulated a detailed plan and programme for the final preparation and initiation of the war.*[21]

In October 1995, the CPN (Maoist) launched a campaign[22] in Rolpa and Rukum districts to mobilise cadres and expand its support base.[23] Shortly thereafter, in early November 1995, the

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[18] In 1971, a group of communist revolutionaries launched an uprising in Jhapa District which was suppressed by the police, resulting in the death of many cadres. Chastened by this failure, the All Nepal Revolutionary Coordination Committee parted from a 'protracted people's war' line of ideology in favour of non-military means to achieve party goals. It expanded its organization and became the CPN (Marxist – Leninist), and, eventually, the CPN (Unified Marxist – Leninist) when it joined hands with CPN (Marxist), the remnant of the original CPN. Meanwhile, in the CPN there were debates and divisions due to differing views on a number of issues, including whether to pursue a 'popular movement' or a 'protracted war', whether to seek restoration of parliament and call for a constituent assembly or support the monarchy, and whether or not to adopt pro-Soviet Marxism or pro-Chinese Maoism. A group led by Mohan Bikram Singh and Nirmal Lama, called CPN (Fourth Convention), was formed in 1974 and favoured a 'people's movement' that could, at an opportune time, be converted to armed revolt. That group split, mainly on the issue of whether to support conventional Maoism and the Cultural Revolution in China or to follow the reformist agenda of Mao's successors. Splitting from Nirmal Lama, some of the more conservative Maoists formed CPN (Masal), though within two years the leaders of the new party also split: Mohan Bikram Singh, along with Baburam Bhattarai, remained with the CPN (Masal) and Mohan Baidya, along with Pushpa Kamal Dahal, formed the CPN (Mashal). Dahal emerged as a leader of his party, to become its Secretary General in 1989.

[19] CPN (Masal) and CPN (Mashal).

[20] Arjun Karki and David Seddon, "The People's War in Historical Context", in Arjun Karki and David Seddon, eds., The *People's War in Nepal; Left Perspectives* (Delhi, Adroit Publishers, 2003), pp.12-18; Deepak Thapa and Bandita Sijapati, *A Kingdom Under Siege: Nepal's Maoist Insurgency, 1996 to 2003* (Kathmandu, The Print House, 2003).

[21] CPN (Maoist), "One Year of Peoples War in Nepal: Review", *Worker*, (February 1997).

[22] The SiJa Campaign, named after two mountains in Rukum and Rolpa.

[23] Thapa and Sijapati, *A Kingdom Under Siege* (see footnote 20)

police launched an action called Operation Romeo in Rolpa District; additional police personnel were sent to the area to support the operation and new police posts were established. Although Operation Romeo was officially described as a response to an increase in criminal activity in the district, Human Rights Watch and other observers consider the operation to have been designed to dislodge the CPN (Maoist) from the area. The operation resulted in gross violations of human rights.[24] Instead of quelling anti-Government activities in Rolpa District, it drove the already disaffected and impoverished rural population toward the CPN (Maoist), and spurred the kind of resentments the party needed in order to mobilise the rural population against the Government.[25]

In late 1995, the CPN (Maoist) continued with efforts to expand its influence and support. It organized public rallies and meetings in roughly 25 districts across the country, ending with a rally in Kathmandu in December 1995.[26]

2.1.2 The Conflict

On 4 February 1996, Baburam Bhattarai submitted a 40-point demand to the Government in the name of the CPN (Maoist) aligned UPFN.[27] The memo addressed a wide range of social, economic and political agendas, and was accompanied by a warning that a militant struggle would follow if the demands were not met.

Just over one week later, on 13 February 1996, the CPN (Maoist) launched its "People's War" in five districts of the mid-western, western and central regions with attacks on police posts, local administrative offices, wealthy landowners, and members of various political parties. In Rolpa, Rukum and Sindhuli districts, the CPN (Maoist) overran police outposts and claimed to have seized a trove of explosives. In Gorkha District, the CPN (Maoist) attacked the office of the Small Farmer's Development Programme of the Government–owned Agricultural Development Bank and destroyed loan documents; they also blew up a large distillery in the district. The CPN (Maoist) attacked a Pepsi Cola bottling plant in Kathmandu and in Kavre they raided the house of an alleged moneylender.[28] There were also reports of a number of attacks on local offices of international non-governmental organizations.[29]

Violence continued in the weeks that followed, particularly in Rolpa and Rukum districts in the mid-western region. According to a report by Amnesty International, "the [CPN (Maoist)] attacks on politicians and landowners often resulted in serious injuries to their hands or legs. From about March 1996 onwards, however, the pattern changed into one of deliberate killings"[30] of civilians, particularly wealthy landowners and local political leaders, who the CPN (Maoist) declared enemies of the party.

During this period, the responsibility of combating the Maoists was solely that of the Nepal Police – a civil police force neither trained nor equipped for counter-insurgency operations. Police posts were frequent targets and patrols were regularly ambushed, particularly in remote areas where there was little logistical support. The police sometimes retaliated by using

[24] Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War* (October 2004) p. 10. Available from www.hrw.org/reports/2004/nepal1004/
[25] Ibid.
[26] Interview with Dr. Baburam Bhattrai by *The Independent*, vol. V, no. 41, 13-19 December 1995.
[27] The 40-point demand of the United National People's Front Nepal was presented to the Prime Minister of Nepal on 4 February 1996. The memorandum also referred to the growing gap between towns and villages (urban-rural divide). Available at http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm.
[28] CPN (Maoist), "The Historic Initiation and After", *Worker*, (June 1996); International Crisis Group, "*Nepal's Maoists: Their aims, structure and strategy*", Asia Report no. 104, 27 (October 2005) Available from http://www.crisisgroup.org/~/media/Files/asia/south-asia/nepal/104_nepal_s_maoists_their_aims_structure_and_strategy.ashx.
[29] Amnesty International, *Nepal: Human Rights Violations in the Context of a Maoist Peoples War* (10 March 1997). Available from http://www.amnesty.org/en/library/info/ASA31/001/1997/en
[30] Ibid.

methods that appear to have violated human rights. Based on a visit and field–study it conducted within a year of the beginning of the conflict, Amnesty International reported that:

> *[T]he police have repeatedly resorted to the use of lethal force in situations where such force was clearly unjustified, and as an alternative to arrest. Police have also been responsible for torture, such as beatings on the soles of the feet and rolling a heavy weight over prisoners' thighs, and for arbitrary arrest and detention. Some prisoners have died in custody.*[31]

In one of the earliest purported "encounter killings", or summary executions, Amnesty International reported on the killing of six people, including a juvenile, at Leka village, Pipal Village Development Committee (VDC), Rukum District on 27 February 1996.[32]

From May 1998 to May 1999, the Government of GP Koirala responded to the insurgency by launching "Operation Kilo Sierra II" in the districts most affected by the conflict: Rukum, Rolpa, Jajarkot, Salyan, Gorkha and Sindhuli. Officially labelled an "intensified security mobilization," the operation involved the transfer of armed police units from Kathmandu to these districts and the establishment of new police posts; police units were also mobilized in 18 other districts in the mid-western and Far-western Regions. Operation Kilo Sierra II reportedly resulted in approximately 500 deaths at the hands of the police[33] and the serious human rights violations allegedly committed by the police during the operation further served to increase popular support for the CPN (Maoist) movement.[34]

In addition to operational offensives, the Government made some attempts at an integrated response, including by offering an amnesty to those who would lay down their weapons, by planning to mobilise local villagers to form self-defence groups, and by introducing legislative changes to counter the insurgency such as through an increase in police powers. In July 1998, the Government launched the Ganesh Man Singh Peace Campaign and announced a general amnesty for members of the CPN (Maoist) who surrendered. The announcement also referred to compensation that would be paid to victims of CPN (Maoist) violence and to arrangements for rehabilitation and the reinstatement of services curtailed by the insurgency. In August 1999 the State allocated 30 million rupees and convened a task force to implement the campaign, but follow-up was reportedly weak, and it is not clear that many victims benefited from the plan.[35]

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[31] Ibid, 2.

[32] Ibid. See Ref. Nos. 1996-02-27 - incident - Rukum _5685 and 1996-02-27 - incident - Rukum _5688. As will be discussed, victims of torture by the State had little recourse, and though the Torture Compensation Act became law in December of 1996, it has been widely criticized for, *inter alia*, failing to criminalize torture, defining torture too narrowly, and being ineffective overall in curbing torture or providing compensation when it was found to have occurred.

[33] INSEC Conflict Victim Profile (see footnote 11); Sudheer Sharma, "The Maoist Movement: An Evolutionary Perspective", in Thapa, *Understanding the Maoist Movement of Nepal*, p. 372 (see footnote 17); Amnesty International, *Nepal - Human Rights at a Turning Point?* (1999). Available from www.amnesty.org/en/library/asset/ASA31/001/1999/en/0ac795eb-e34a-11dd-a06d-790733721318/asa310011999en.html

[34] Human Rights Watch, *Between a Rock and a Hard Place* (see footnote 24); Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (2 April 2002). Available from www.amnesty.org/en/library/asset/ASA31/016/2002/en/dom-ASA310162002en.html

[35] It was announced that widows of those killed by Maoists would receive an allowance, and scholarships up to secondary level would be provided to children. Although district committees were formed, there was no proper implementation of the rehabilitation plan, which was one of the main objectives of the program. Ibid. "When Amnesty International delegates asked CDOs in November 2000 about the implementation of the Ganesh Man Singh Peace Campaign, they were told that the fund had been used to provide financial assistance to victims of Maoist violence. Amnesty International did not find any evidence that the money had been used to support "rehabilitation"' projects for Maoists who had surrendered to the police. It also found that there was no proper record keeping of how the money was being spent. Through October 2000, according to official figures, 2,506 people had surrendered to the police. By early February 2002, more than 11,000 were said to have done so. Among them were many people who had given food or shelter to the Maoists, often under duress. Others had been active at the lower levels of the 'people's Government' set up by the Maoists." Ibid. The South Asia Analysis Group

The CPN (Maoist) stepped up attacks on political activists, particularly NC members, in the run-up to the second phase of local elections in Rukum, Rolpa, Salyan and Jajarkot districts on 18 December 1998.[36]

In 1998, the International Committee of the Red Cross (ICRC) began monitoring the armed conflict and established a permanent presence in Nepal in June 1999.[37] The ICRC was active in many areas of its traditional mandate, including working to protect civilians and those *hors de combat*, and providing medical support to victims.

According to Amnesty International, by November 1999 public security committees had been formed in 59 villages in five of the affected districts, in addition to existing district security committees.[38] These committees were responsible for appointing guards who, in the event of activity by members of the CPN (Maoist), were meant to alert the nearest police station. The guards were not provided with arms by the Government, but could obtain gun licences, and function – with tacit Government approval – as anti-Maoist vigilantes. These early efforts to promote the use of untrained civilians to serve as proxy forces against the CPN (Maoist) foreshadowed what became known later in the conflict as "*Pratikar Samiti*" – retaliation or defence committees – which in some districts, notably Kapilvastu, Rupandehi, Nawalparasi and Dailekh, were reportedly trained and armed by State Security Forces and responsible for serious human rights abuses against alleged CPN (Maoist) members.

In early December 1999 the Government of KP Bhattarai announced the formation of an "Integrated Security Plan,"[39] one element of which involved setting up a six-member 'High-Level Committee to Provide Suggestions to Solve the Maoist Problem'. Chaired by former Prime Minister Sher Bahadur Deuba, the Committee was tasked to make recommendations to the Government after consulting with all political parties. However, as the Government collapsed shortly after the formation of the committee, the plan had little impact.

Along with the intensified deployment of Security Forces, reports of extrajudicial executions of CPN (Maoist) suspects by police became more frequent as did the killing of innocent civilians.[40] The Special Rapporteur on extrajudicial, summary or arbitrary executions conducted a mission to Nepal in February 2000 and in her report raised concerns about unlawful killings and other human rights violations carried out by the Nepal Police and the CPN (Maoist) during the first years of the conflict.[41] The number of unlawful killings by the

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report of December 1999, also making reference of a Nepali newspaper, states that "some of the Nepali Congress leaders strongly objected to the suggestion as this would encourage people to indulge in terrorist activities while the victims would remain uncompensated. As one local newspaper (*Nepal Jagaran* of 19 July) said "anyone can now pose as a Maoist, surrender before the Government and become rich." South Asia Analysis Group, "Nepal update: The Maoist menace continues" (3 December 1999) Available from www.southasiaanalysis.org. Other reports also suggest that political connection was a determining factor on who received the money. Bandana Shrestha and Som Niroula, "Internally Displaced Persons in Nepal", *Peace and Democracy in South Asi*a, vol. 1, Issue 2 (2005).

[36] Amnesty International, *Nepal - Human Rights at a Turning Point?* (see footnote 33)

[37] International Committee of the Red Cross, Emergency Appeals, 1998 to 2005.

[38] Amnesty International, *Nepal: Human Rights and Security* (2000). Available from http://www.amnesty.org/en/library/asset/ASA31/001/2000/en/389533d6-dfc0-11dd-8e17-69926d493233/asa310012000en.html; Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (see footnote 34)

[39] Ibid.

[40] One of such cases was when police opened fire on a cultural program organized by Maoists at a school in Dhanku VDC, Achham on 14 January 2000: Ref. No. 2000-01-14 - incident - Achham _2110. Police also set fire to a village in Khara VDC, Rukum on 22 February 2000 apparently in reprisal for the killing of policemen by Maoists in Ghartigaun VDC, Rolpa: Ref. No. 2000-02-22 - incident - Rolpa _5540.

[41] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to Commission on Human Rights: Mission to Nepal* (E/CN.4/2001/9/Add2)

State declined in 2000, due in part to international pressure and in part due to the fact that the demoralised and weakened police were reluctant to venture out on patrol.[42]

In April 2000, the National Security Council – composed of the Prime Minister, the Defence Minister and the Chief of the Army Staff – was activated by then Prime Minister Bhattarai with constitutional responsibility to make decisions regarding the army. In September that year, the Maoists attacked Dunai, the headquarters of Dolpa District. They seized temporary control of the District Police Office, the prison, the land revenue office, a bank and other government entities in the District. Approximately a dozen policemen were killed, prisoners were freed and the attackers seized arms and cash. There had been other attacks of a similar nature at this time,[43] but Dunai represented the Maoists' biggest attack to date in a pattern of attacks ever increasing in scale.

After considerable delay, the Nepal National Human Rights Commission (NHRC) was established on 5 June 2000 as an independent national human rights institution pursuant to the Human Rights Commission Act of 1997, albeit with very limited staffing and resources.

By October 2000, the Government had been replaced by one led by GP Koirala. Soon thereafter, in a ground-breaking move, the new Deputy Prime Minister held an informal dialogue with a CPN (Maoist) Central Committee Member on 27 October 2000. In that meeting the CPN (Maoist) reportedly demanded the release of all detainees by the Government as a pre-condition for talks.

On 3 November the Government released two Maoist leaders, Dinesh Sharma and Dinanath Gautam, after bringing them before the press where they publicly renounced violence. When the released CPN (Maoist) leaders later alleged that the Government had forced them to denounce their party, the CPN (Maoist) announced that prospects for dialogue had ended.

At the same time there was an increasing realization that the police were incapable of countering the insurgency alone and the Army was deployed in 16 District Headquarters. In another recognition that the Nepal Police were struggling to cope, on 22 January 2001 the Government issued the Armed Police Ordinance 2057 to create a paramilitary Armed Police Force which would operate in support of the Nepal Police.

NC spokesperson Narahari Acharya revealed on 1 February 2001 that Government and the CPN (Maoist) were holding secret talks through what they called internal channels.[44] The Second National Conference of CPN (Maoist), held in February 2001, indicated that the party was interested in political dialogue as a means to achieve its aims. The CPN (Maoist) called for a "meeting of all political parties, organizations and representatives of mass organizations in the country; election of an interim Government by such a meeting; and a guarantee of a people's constitution under the leadership of the interim Government".[45] Also during the conference, the outlines of a new ideology – the "Prachanda Path"[46] – emerged, along with a Marxist-Leninist-Maoist orientation as guiding principles. Prachanda became Party Chairman.

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[42] Amnesty International, *Nepal: Killing with Impunity* (20 January 2005) Available from http://www.amnesty.org/en/library/info/ASA31/001/2005

[43] Examples include an attack on the Area Police Office in Ghartigaun, Rolpa, on 19 February 2000; the Area Police Office in Taksera, Rukum, on 5 April 2000, and; the police post in Bhorletar, Lamjung, on 27 September 2000.

[44] *The Kathmandu Post*, 2 February 2001.

[45] Thapa and Sijapati, *A Kingdom Under Siege*, pp.113-4 (see footnote 20)

[46] International Crisis Group, *Nepal's Maoists* (see footnote 28). The Prachanda Path seemed an attempt to bring together the two long-debated strategies of communist revolution by complementing the 'protracted people's war' with the 'people's rebellion'. The idea was that the former would take place mainly in rural settings, while the latter would be concentrated in towns and cities. The Prachanda Path called for more focus on urban insurrection while continuing the build-up in rural areas with the view of encircling the towns and cities. The Maoists also revised their approach due to a growing realization that a decades-long struggle along the Chinese line was unlikely to succeed.

In addition to the continued deployment of the police, the Government also took certain emergency legislative initiatives to address the insurgency. It issued an ordinance to amend the Local Administration Act, which gave additional powers to the administrators of the Development Regions[47] and it formed a Special Court[48] to hear charges under the Anti-State Crimes and Penalties Act 1989, which also applied to crimes such as insurrection and treason.

In April of 2001 the Government launched what was called an Integrated Internal Security and Development Plan (IISDP), with a budget of NRs 400 million ($5.3 million). In contrast with the earlier plan launched in 1999 to promote development work in sensitive districts, the new plan involved the deployment of the army to "help create space for development activity." The IISDP aimed to kick-start development work in 11 districts where the Maoists were considered most active. In the first phase the Government introduced the IISDP in Gorkha, Rolpa, Rukum, Jajarkot and Kalikot Districts. Army companies, around 150-strong, were deployed in the districts.[49] A planned second phase was set to include the construction of roads and bridges, the provision of drinking water, and the delivery of medicine. However, the IISDP was short-lived. Shortly after the declaration of a state of emergency on 26 November 2001, and the deployment of the army, the Government suspended the program in all districts except Gorkha.[50]

During 2001, the Maoists launched ever-larger attacks in terms of the number of police killed and taken prisoner. On 1 April, Maoists raided a police post in Rukumkot, Rukum; on 6 April, they launched an attack on a police camp in Toli, Dailekh, in which 31 policemen died and another eight were allegedly summarily executed after they had surrendered.[51] On 6 July, police posts in Lamjung, Nuwakot and Gulmi districts, were overrun; and on 23 July, three police posts in Bajura District suffered the same fate.

The political vacuum created by the postponement of elections at the village and district level allowed the Maoists to consolidate what they referred to as their base areas. Starting with districts in the Mid-Western Region where their influence was strongest, the CPN (Maoist) declared the formation of District "People's Governments".[52] By mid-2001, they had been declared in 22 districts and reportedly conducted elections, imposed their own tax system, ran development work, established 'People's Courts' and imposed strict, and sometimes violent, control over behaviour they regarded as anti-social, including alcohol consumption, extra-marital affairs, violence against women and corruption. Punishment handed down by the "People's Courts" included death sentences.[53] Access to base areas was strictly controlled by the party and permission to enter was required in advance.

On 1 June 2001, King Birendra, the Queen and eight other members of the royal family were shot and killed, according to official reports, by Crown Prince Dipendra, who then reportedly turned a gun on himself. With the deaths of the King and the Prince, the King's brother, Gyanendra, succeeded to the throne. Controversy over the official explanation of the massacre, which linked the killings to a private family dispute, was widespread. While the CPN (Maoist) pushed its longstanding demand for the establishment of a republic in the wake of the killings, the mainstream political parties confirmed their commitment to constitutional monarchy.

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[47] The Ordinance became law in August 2001.
[48] Formed under the Special Court Act of 1974, later replaced by Special Court Act of 2002.
[49] Sudheer Sharma, "The Maoist Movement: An Evolutionary Perspective", in Thapa, *Understanding the Maoist Movement of Nepal* (see footnote 17).
[50] Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (see footnote 34)
[51] OHCHR source confidential Ref No. 5495.
[52] Deepak Sapkota, *Uthalputhal ka Das Barsa (Ten Years of Turbulence)* (Kathmandu, Krantikari Patrakar Sangh, 2008/9); International Crisis Group, *Nepal's Maoists* (see footnote 28).
[53] Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (see footnote 34).

Following a major attack on Holeri police post in Rolpa District on 12 July, the army was directly deployed against the Maoists for the first time. Soldiers were sent to Holeri and Nuwagaun VDCs with directions to obtain the release of 69 police officers and the two civilians who had been taken prisoner. The army reportedly withdrew after several days, without ever engaging the CPN (Maoist), and on 19 July, Prime Minister GP Koirala resigned in what was widely interpreted as a dispute over the chain of command.[54]

The presence of the State in many districts was increasingly limited to District Headquarters; isolated and vulnerable police posts in many districts had either been abandoned or destroyed in Maoist attacks. By July 2001 the number of police posts in Rolpa and Rukum had been reduced from 39 and 23 respectively, to two in each district. Local Government bodies were in a similar predicament, and in much of the country the only State services still available outside of District Headquarters were schools, health posts, agricultural offices and post offices, and even these had been heavily affected.

Sher Bahadur Deuba became the Prime Minister on 23 July 2001, after GP Koirala resigned. He announced a ceasefire with the Maoists immediately after taking office, a move which was reciprocated by CPN (Maoist) Chairman Prachanda. These developments marked the beginning of the first negotiation process.

Representatives from the Government and the CPN (Maoist) initially met on 30 August 2001 in Godavari, Lalitpur District, on the outskirts of the Kathmandu Valley. This was an introductory meeting to deal with logistical matters such as the security of the members of the negotiation team and the disclosure of the details of the negotiations to the press.[55] A second meeting was held in Bardiya District on the 13th and the 14th of September 2001. The Maoists put forward three main demands: firstly a new constitution, secondly, an interim Government, and thirdly, the declaration of a republic. The talks proceeded with a degree of success through compromise. For example, the Government discontinued the Public Security Regulations and freed 68 prisoners, while the Maoists shelved their demand for a republic, leaving it to be dealt with by an elected constituent assembly. The third meeting took place back in Lalitpur, in November, but the two sides failed to reach an agreement on the issues of a constituent assembly.

Throughout the ceasefire period, the Government had continued arresting Maoist sympathizers and the Maoists continued attacking supporters of mainstream political parties. Only the police enjoyed a respite.[56] During the peace talks, speculation continued about whether the Maoists truly wanted a political settlement or were merely biding time, reinforcing their troops, and awaiting an opportune moment to resume the war.

The Government also appeared emboldened by international developments. It had moved to link its campaign against the CPN (Maoist) in Nepal with more global concerns about terrorism in the wake of terrorist attacks in the USA on 11 September 2001, to seek international military support. In November 2001 the Minister of State for Home Affairs disclosed that the US Government had already agreed to supply 10 modern helicopters to Nepal as a part of its commitment to eliminate terrorism,[57] and that the Government of India had labelled the CPN (Maoist) as terrorists.[58] Nevertheless, international support in favour of negotiations remained strong.[59]

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[54] Also according to Ashok K. Mehta and Mahendra Lawoti, "Military Dimension of the 'People's War'", in Mahendra Lawoti and Anup K. Pahari, eds., *The Maoist Insurgency in Nepal: Revolution in the Twenty- First Century* (New York, Routledge, 2010), p. 189.
[55] *Nepali Times*, no.58, 31 August - 6 September 2001.
[56] Thapa and Sijapati, *A Kingdom Under Siege*, p.120 (see footnote 20)
[57] *The Kathmandu Post*, 12 November 2001; *Nepal Press Digest (Weekly)*, vol. 44, no.46, 15 November 2001.
[58] CPN (Maoist) condemned India's label of being terrorists. It warned the rulers of the United States of America and India "not to hatch conspiracies against the Nepali people" and warned of serious consequences: Press release

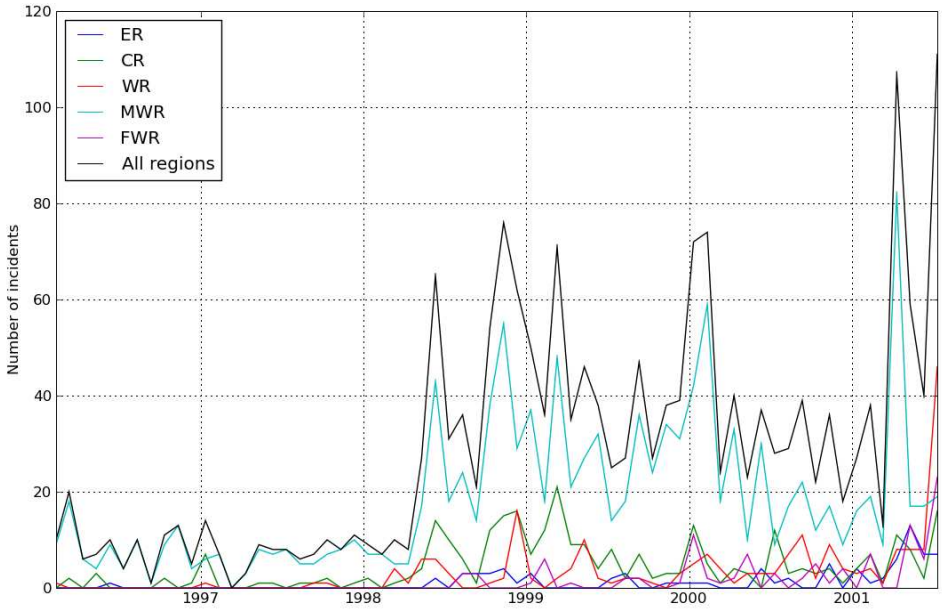

Diagram 2.1: Number of Killings, February 1996 to July 2001, by Region

Meanwhile, the paramilitary Armed Police Force had become operational, while the military arm of the CPN (Maoist) continued to expand its ranks and structure and became formally titled the People's Liberation Army.

On 23 November 2001, the CPN (Maoist) resumed military operations by launching a number of attacks, including the first Maoist attack on an army barracks in Ghorahi, Dang District. The successful attack on the army enabled the Maoists to seize sophisticated weapons – including semi-automatic SLRs,[60] machine guns and rocket launchers – that represented a significant advance over the aging .303 rifles seized from the police in previous years.

Also on 23 November, the Maoists announced the creation of a 37-member United Revolutionary People's Council (URPC) and Central People's Government Organising Committee, representing its leadership at the national level. The URPC was planned as a united front led by the CPN (Maoist) to "guide the struggle to complete the New Democratic or People's Democratic Revolution and to guide the State after the revolution."[61] It was meant to function initially as a shadow government, and ultimately to supplant the existing national Government.

Within a few days, the Maoists staged another large attack, this one on Salleri, the District Headquarters of Solukhumbu District. In addition to killing the Chief District Officer and five soldiers, as well as destroying government buildings, including the nearby Phaplu airport, this attack marked the spread of the insurgency to the eastern region of Nepal.

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on the resolutions passed by the 6 October 2001 Politburo meeting of the CPN (Maoist), Janadesh, issued on 8 October 2001.

[59] A group of European donors, including the Norwegian, the British and the Swiss Governments, under the lead of the UNDP, set up a fund titled Trust for Peace and Development to support a peaceful solution and reconciliation. *The Kathmandu Post*, 5 October 2001, quoting Norwegian Ambassador Ingrid Ofstad. The United States had not negated negotiations. *Rising Nepal*, 8 October 2001; *Nepal Press Digest (Weekly)*, vol. 44, no.41, 11 October 2001.

[60] Thapa and Sijapati, *A Kingdom Under Siege*, pp.121-22 (see footnote 20).

[61] CPN (Maoist), "Common Minimum Policies and Programs of URPC", 2002.

On 26 November 2001, the Government declared a state of emergency and introduced the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), 2058 (2001) (TADO). The State of Emergency provided for the suspension of several constitutional freedoms and rights: the right against preventive detention; the freedoms of opinion, expression, assembly, and movement; the rights to information, property, privacy, protection from media censorship, and the right to constitutional remedy, apart from *habeas corpus*. TADO gave the Security Forces power to arrest and detain suspects with a 'preventive detention order' using broad criteria. TADO led to arbitrary arrests on an enormous scale.[62]

The recently–mobilized army, the Nepal Police and newly–operational Armed Police Force were placed under the unified command of the army during joint operations, though the unified command concept would not be formally announced until November 2003. The newly fortified Security Forces foiled a number of Maoist attacks and in some cases went on the offensive.[63]

In April 2002, the Government replaced the Ordinance with the Terrorist and Disruptive Activities (Punishment and Control) Act 2002 (TADA),[64] announced a reward for the delivery of the leaders of the CPN (Maoist) and a reward for the surrender of weapons.

Despite increases in international military aid, the insurgency remained an intractable challenge for Government Security Forces. With little experience in counter-insurgency operations, Unified Command patrols struggled to gain the upper hand while the Maoists, in line with Mao's analogy of fish in water, mixed in undetected among villagers.

Faced with an often-unseen enemy, Security Forces used cordon and search operations, conducting house-to-house searches, often at night and in large numbers. During these operations, according to Amnesty International, Security Forces often arrested people whose names featured on lists provided by the local administration. The lists reportedly contained the names of people who were suspected of having provided food or shelter to the Maoists and who had attended Maoist meetings during the ceasefire.[65]

Allegations of human rights abuses increased dramatically following the declaration of the state of emergency and the mobilization of the army, particularly with respect to extrajudicial killings and disappearances by Security Forces.[66] Nepal had the highest number of new reports of alleged enforced or involuntary disappearances reported to the Working Group on

[62] The Ordinance defined a number of crimes as terrorism. It allowed the security officials to detain individuals up to 90 days on suspicion of being a terrorist without charges, and with further approval of the Ministry of Home Affairs, for another 90 days. By an accompanying order, members of the CPN (Maoists) and individuals involved with or assisting the Maoists could be labelled as terrorists. See Chap 7 – Torture p. 124.

[63] On 8 December 2001, Maoists unsuccessfully attacked an RNA camp positioned with the telecommunications tower in Ratamate, Rank VDC, Rolpa. The following day, 9 December, their attack on another RNA camp positioned at the telecommunications tower in Kapurkot, Salyan, was also unsuccessful. Again, on 23 January 2002, Maoists were vanquished after they attacked the police post in Gopetar, Panchthar. The Maoists who were reportedly returning after the battle in Gopetar were attacked by the army on 27 January 2002, at Sakranti Bazaar, Tehrathum, and several of them were killed.

[64] The TADO gives Security Forces the power to arrest without warrant and allows long pre-trial detention. Suspects could be detained for up to 60 days in police custody for the purpose of investigation, and for up to 90 days in preventive detention, without being presented before a court. The period of detention was decreased from that in the TADO, however, the detention provision anyway contravened article 14(6) of the 1990 Constitution of Nepal which required that detainees be produced before a judicial authority within 24 hours of arrest.

[65] Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (see footnote 34).

[66] Amnesty International, *Nepal: Killing with Impunity* (see footnote 42); Amnesty International, *Nepal: Widespread "disappearances" in the context of armed conflict* (16 October 2003). Available from www.amnesty.org/en/library/info/ASA31/045/2003). During the state of emergency, in force from 26 November 2001 to 28 August 2002, Amnesty International recorded over 100 cases of "disappearances".

Enforced or Involuntary Disappearances (WGEID) in 2002,[67] a phenomenon that repeated in 2003 and 2005.

In addition to alleged extrajudicial killings and disappearances, there were also large-scale attacks and clashes throughout the country,[68] and the resulting casualties made 2002 the bloodiest year in modern Nepal's history.

The Maoists had expressed a desire to resume negotiations with the Government and on 15 May 2002, in the wake of military setbacks, proposed a one-month ceasefire. The Government, clearly bolstered by the recent successes of its Security Forces, did not reciprocate. On 22 May 2002, Prime Minister Deuba dissolved the House of Representatives and recommended that mid-term elections be held in November 2002. There was deep disagreement among senior figures in the NC about how to respond to the CPN (Maoist) at this stage – whether to maintain the State of Emergency or to pursue dialogue with the CPN (Maoist) and end the Emergency – and this contributed to a formal split in the NC party.

Holding elections looked increasingly unlikely given the overall security situation and in October 2002 Prime Minister (PM) Deuba, reportedly in consultation with other political parties, recommended postponing the mid-term elections. The King immediately sacked Deuba on charges of incompetence and by proclamation, nominated Lokendra Bahadur Chand, a Panchayat-era loyalist and former Prime Minister, as Deuba's replacement.

On 3 December 2002, the CPN (Maoist) announced that it was willing to discuss negotiations and there are reports that following the King's takeover, an emissary of the King began clandestinely engaging in talks with the CPN (Maoist).[69]

The Government and the CPN (Maoist) agreed to a ceasefire on 29 January 2003, three days after the high-profile assassination of Krishna Mohan Shrestha, the Inspector General of the Armed Police Force, his wife[70] and bodyguard in Lalitpur District.

The Maoists had reportedly been eager for dialogue prior to the ceasefire and sent senior level leaders to negotiate. The CPN (Maoist) moderated their programmes around the Seventh Anniversary of the People's War in mid-February, and Prachanda issued a statement asking cadres to refrain from forced donations. The Government withdrew the bounties and Interpol Red Corner Notices on senior Maoist leaders, and dropped the 'terrorist' label it had announced previously.[71]

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[67] International Crisis Group, *Nepal Backgrounder: Ceasefire – Soft Landing or Strategic Pause?* Asia Report no. 50 (10 Apr 2003).

[68] Some of the most violent battles in the year 2002 were – attacks by Maoists on the police post in Gopetar, Panchthar (23 January 2002) and reportedly the same Maoist combatants were attacked by the army while returning from Gopetar, in Sakranti Bazaar, Tehrathum (27 January 2002); the attack by Maoists on the Area Police Office in Bhakunde Besi, Kavre (4 February 2002); the Mangalsen, Achham district HQ attack by Maoists (16 February 2002), including at Safebagar, Achham; the attack by Security Forces on labourers working on the construction of an airport at Suntharali, Kalikot district (24 February 2002); the attack by the army and the police on a program of Maoists in Gumchal, Rolpa (17 March 2002) ; the attack by the army in Syalapakha, Rukum (19 March 2002); the attack by Maoists on the APF base camp in Satbariya, Dang (11 April 2002) and the counter attack by Security Forces (14 April 2002); the attack by Security Forces on Maoists in Bachhin, Doti (2 May 2002); clashes in Lisne, Rolpa (2 May 2002); the attack by Maoists on the army camp in Gam, Rolpa (7 May 2002); the attack by Maoists on the APF base camp in Chainpur, Sankhuwasabha (7 May 2002); the attack by Maoists at an army camp in Khara, Rukum (27 May 2002); clashes in in Damachaur, Salyan (12 June 2002), in Katakuti VDC, Dolakha (31 July 2002); the foiled attack by Maoists on RNA personnel deployed at the Rumjhatar, Okhaldhunga airport (27 October 2002); the attack by Maoists on the army barracks and police office in Khalanga, Jumla district HQ and on the Area Police Office in Takukot, Gorkha (14 November 2002).

[69] International Crisis Group, *Nepal Backgrounder* (see footnote 67).

[70] OHCHR source confidential Ref. No. 0541.

[71] International Crisis Group, *Nepal Backgrounder* (see footnote 67).

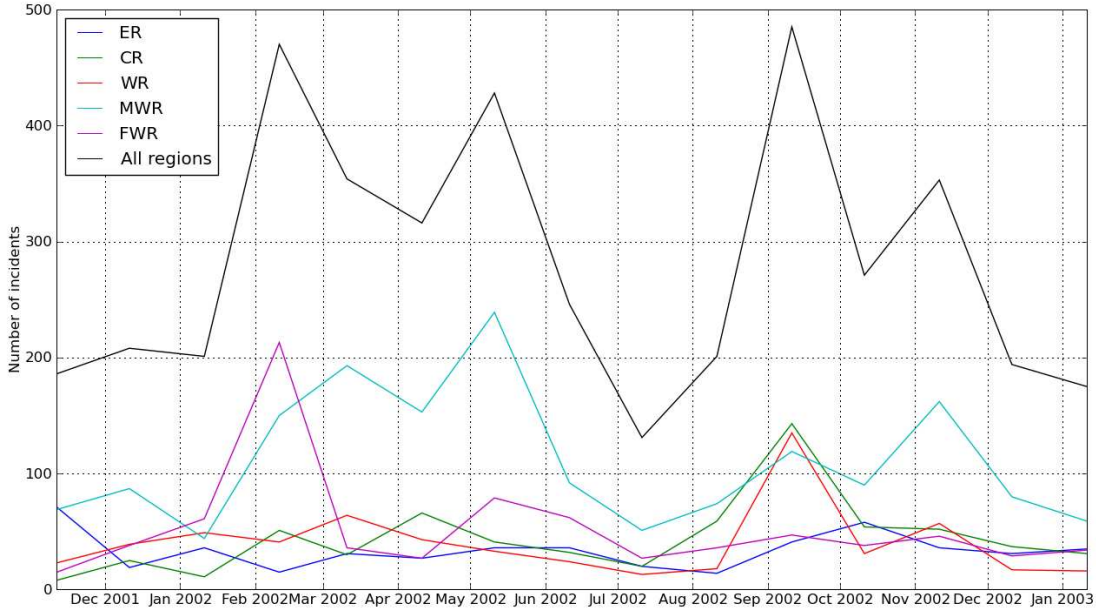

Diagram 2.2: Number of Killings, End of November 2001 to January 2003, by Region

In March 2003, as a precursor to formal talks, the Government and the CPN (Maoist) agreed on a 22-point Ceasefire Code of Conduct. According to the agreement, the army would not take action against the Maoists, and the Maoists would not conduct public programs with arms or create public obstructions or strikes. The agreement called for a neutral monitoring team to observe compliance. However this did not materialise and reports of violations of the code of conduct continued throughout the course of ceasefire.

The first formal meeting between the Government and the Maoists took place in Kathmandu on 27 April 2003. The Maoist team presented what they called a working list, a text that reiterated much of their earlier agenda, which included convening a roundtable conference, the formation of an interim Government, the drafting of an interim constitution, and the holding of constituent assembly elections. In a second meeting in Kathmandu on 9 May 2003, agreements were reached on the contentious issues of releasing detainees and limiting the army to within five kilometres of barracks. Despite these indications of progress, concerns remained about how to move forward on substantive issues. A Human Rights Accord, which might have helped minimize distrust and mutual recriminations, was drawn up by the NHRC in May 2003, but neither the Government nor the CPN (Maoist) signed it.

The parties met for a third time in August 2003 in the mid-western region, first in Nepalgunj, Banke District and then in a remote village in Dang District. The Government presented its agenda paper in response to the Maoist's earlier demands wherein it agreed to the roundtable talks and the formation of an all-party interim Government. However, it rejected the Maoist demand for constituent assembly elections, arguing that changes should be undertaken through amendments to the existing constitution and through gradual reform.

On 17 August 2003, while talks were ongoing, 19 people were detained and summarily executed by an army patrol in Doramba, Ramechhap District. The majority of those killed were affiliated with the CPN (Maoist).[72] The killings were widely interpreted as a deliberate

[72] The NHRC conducted an immediate and careful investigation into the Doramba killings and in its report concluded that the victims were summarily executed by soldiers after being taken under control, and had not been killed in an exchange of fire as reported by the army. The army refuted the allegation of extra-judicial killing and questioned the expertise and the NHRC findings. In return, reports of army investigations were questioned by

provocation aimed at disrupting the peace talks. Ten days after the massacre in Doramba, Prachanda declared in a CPN (Maoist) press release that the "ceasefire, code of conduct and negotiation process have become irrelevant and finished."

In Kathmandu, the day after the ceasefire was ended, Maoists assassinated an army colonel outside his home and shot and wounded another colonel. The following day, they shot and wounded a former deputy home minister who had been outspoken against the Maoists during the State of Emergency. During September 2003, Maoists launched several attacks across the country, leading to casualties on both sides. On 10 and 13 October, they attacked Armed Police Force camps in Banke and Dang districts, but suffered heavy losses in both incidents.

In November 2003, the Nepal Police, Armed Police Force and National Investigation Department were all officially placed under the unified command of the army, though the unified command structure had in practice been operational since the army was first deployed in November 2001. Further, in November, the Government announced a plan to begin training civilian "Rural Volunteer Security Groups" and "Law and Order Committees"[73] to counter the Maoists.[74] These groups, which in practice functioned as a civilian militia, became operational in several districts, particularly in the Western and Mid-Western Regions.

Amnesty International reported that the Government was supporting the defence committees financially, and the military was training them. The Maoists regarded them as legitimate targets and there were several incidents involving both sides between February and April 2005.[75]

On 20 March 2004, Maoists launched a large-scale attack on Beni, District Headquarters of Myagdi District, which resulted in heavy casualties on both sides. Maoists took 37 people captive in the attack, including the Chief District Officer and Deputy Superintendent of Police; they were later released.

Despite the worsening security situation, the Government of Nepal continued to reaffirm its commitment to human rights and in December 2003, the Government established a Human Rights Promotion Centre under the office of the Prime Minister and the Council of Ministers. In March of 2004, the Government published "His Majesty's Government's Commitment on the Implementation of Human Rights and International Humanitarian Law," expressing a commitment to human rights principles. Still, serious allegations of violations by State Security Forces continued to be reported. In April the NHRC issued a statement on human rights assistance to Nepal addressed to both parties to the conflict. In the statement it expressed its concern at the human rights situation and noted its support for the delivery of technical assistance by the Office of the High Commissioner for Human Rights (OHCHR) to enable the Commission to "carry out its mandate, including nationwide monitoring and investigations."[76]

Nepali NGOs and by the international community. An army investigation ultimately admitted "some illegal killings" in the incident. A Human Rights Watch report commented that the Army's final Doramba report acknowledged responsibility for some illegal killings, but was more of a Government concession under international pressure than a transparent and coherent attempt to provide accountability for the killings. Nepal, National Human Rights Commission, "Doramba Incident, Ramechhap" (On-the-spot Inspection and Report of the Investigation Committee, 2003) Available from www.nhrcnepal.org///publication/doc/reports/Reprot_Doramba_R.pdf; Human Rights Watch, *Between a Rock and a Hard Place* (see footnote 24). See also TJRA Ref. No. 2003-08-17 - incident - Ramechhap - _i3381.

[73] These groups were more commonly referred to as *Pratikar Samiti* – literally "retaliation committees".

[74] Friedrich Ebert Stiftung, Nepal Office, "Political, Economic and Social Development in Nepal in the Year 2003" (available from www.fesnepal.org/reports/2003/annual_reports/Political_report_2003.htm). A unit comprised 30 civilian volunteers and 15 armed personnel, and covered 3-4 Village Development Committees (VDC).

[75] Amnesty International, *Nepal: Fractured country, shattered lives* (2 August 2005). Available from http://www.amnesty.org/en/library/info/ASA31/063/2005/en

[76] Nepal, National Commission on Human Rights, Chairperson's statement, "Human Rights Assistance to Nepal" Available from http://ap.ohchr.org/documents/E/CHR/other/OHCHRSTMCHR043.doc

In May 2004, ten international donors issued a joint statement to announce that they were suspending work in six districts in the Mid-Western Region because of threats by local Maoists. Though the CPN (Maoist) had reportedly instructed its cadres not to oppose or harm organizations with affiliations to friendly countries or groups such as the EU, these instructions were not uniformly observed by cadres in practice.

In July 2004, the Government launched a National Human Rights Action Plan as a long-term strategy for promoting a broad range of human rights goals and also established an investigation commission on disappearances (the Malego Commission) under the Home Ministry. Despite the thousands of alleged disappearances which had not been clarified, the Malego Commission was given only one month to conduct investigations, and its final report had little impact.

In October 2004, the Government revised the Terrorist and Disruptive Activities Ordinance (TADO), extending from six months to one year the period in which detainees could be held in preventive detention without being presented before a court. National and international organisations continued to document and express concerns about long-term arbitrary arrests and related abuses by the Security Forces. The UN WGEID made a country visit to Nepal in December 2004.

In January 2005, UN High Commissioner for Human Rights, Louise Arbour, visited Nepal and negotiated the mandate of an OHCHR field mission. The OHCHR mission would have unfettered access to all locations in Nepal – including army barracks – and to any necessary documents. It would be mandated to set up field offices, monitor and investigate allegations of human rights violations and abuses, issue public reports, provide technical assistance to the Government and engage with non-state actors.

On 1 February 2005, the King dismissed yet another Government nominated by him, imposed a state of emergency, jailed or placed under house arrest numerous political leaders, and took over direct rule as the head of the Government.

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

On 6 June 2005, in Madi, Chitwan District, Maoists detonated explosives under a crowded public bus on which soldiers were also travelling – killing 39 persons, including three army personnel. Seventy-two persons, including four army personnel, were injured. The CPN (Maoist) accepted responsibility for the incident and claimed that this attack on civilians did not reflect party policy. OHCHR conducted an extensive investigation into the killings,[77] in the course of which the CPN (Maoist) told OHCHR that four or five cadres were being held accountable for the attack, but OHCHR did not receive clear evidence that anyone specifically was penalised.

A major attack by Maoists on an army camp in Pili, Kalikot District took place on 7 August 2005 wherein the Maoists captured 60 army personnel. The Maoists claimed that the detained soldiers would be treated in accordance with the Geneva Conventions and after five weeks the soldiers were handed over to the ICRC.

CPN (Maoist) announced a three-month ceasefire in September 2005, and extended it by one month even though it was not reciprocated by the Government. When a second negotiation

[77] OHCHR-Nepal, *Attacks against public transportation in Chitwan and Kabhrepalanchok Districts*, (18 August 2005). Available from http://nepal.ohchr.org/en/index.html. *See also*, Ref. No. 2005-06-06 - incident - Chitwan _0106.

process failed, the Maoists decided "to carry forward firmly the Party policy of concentrating attacks on military fascism."[78] However, there were differences within the CPN (Maoist) on whether to collaborate with the King or with the political parties.

In May 2005, Prachanda issued a statement that Baburam Bhattarai and Krishna Bahadur Mahara were on a special assignment to hold meetings with Nepali political parties in order to create an atmosphere conducive to a pro-democracy movement. The Central Committee meeting at Chunwang, Rolpa in October 2005 took a decision to adopt a democratic republic agenda.

The mainstream political parties were increasingly moving in the same direction. In August 2005, a Central Committee meeting of Communist Party of Nepal (Unified Marxist Leninist) CPN (UML) opted for a democratic republic through the election of a Constituent Assembly. The NC also made the decision, in August 2005, to remove the constitutional monarchy from the party statute, which was soon endorsed at its General Convention.

On 22 November 2005 in Delhi, India, the Seven-Party Alliance (SPA) of the political parties and CPN (Maoist) announced their common adoption of a 12-point letter of understanding which put forth a broad road map for ending the armed conflict.

In the letter of understanding, the CPN (Maoist) expressed its commitment to end the armed conflict and to enter peaceful democratic politics. They agreed that the armed force of CPN (Maoist), along with the State army, would be kept under international supervision, possibly by the UN; the displaced would be allowed to return; properties that had been seized would be returned; and they would conduct a self-evaluation and self-criticism of past mistakes, vowing not to repeat them. Both parties also agreed that human rights and freedoms would be respected.

The Maoists ended their four-month ceasefire on 2 January 2006, in advance of the municipal elections scheduled for 8 February. The elections were opposed by the Maoists and by an alliance of seven of the larger political parties and were popularly regarded as an attempt by the King to legitimize his continued hold on power.

There were numerous clashes and attacks by the Maoists in the run up to the municipal elections,[79] and Maoists reportedly threatened and attacked candidates in an attempt to disrupt the process. A candidate for mayor in Janakpur, Dhanusha District, was shot dead in January 2006.[80]

On 1 February 2006, while the SPA organized nationwide protests against the upcoming elections, the Maoists launched a major attack on Tansen, the District Headquarters of Palpa District. They destroyed Government buildings, inflicting a high number of casualties and took some Government officials, including the Chief District Officer, prisoner before releasing them a few days later.

In the two days leading up to the municipal elections, the Maoists attacked the Security Force bases in Kavre and Dhankuta District municipalities and, with the support of the Seven-Party

[78] CPN (Maoist), "Concentrate total force to raise preparations for the offensive to a new height through correct handling of contradictions", supplementary resolution to "Present situation and our historic task", the Politburo of the Central Committee (October 2003).
[79] According to a Defence Ministry statement, Security Forces killed Maoists in Chitre and Aambote areas of Tanahu on 12 January 2006, and in Manakamana, Syangja on 13 January 2006. Maoists and Security Forces clashed in Phaparbari VDC, Makwanpur, on 21 January 2006 resulting in many casualties. Again, on 27 January 2006, Maoists suffered losses after they attacked the army base camp in Ghodetar Bazaar (Ranibas VDC), Bhojpur. Similarly, Maoists were killed in offensives by State Security Forces in Darechowk, Dhading on 20 February 2006 and in Chormara, Rupandehi, on 26 February 2006.
[80] Ref. No. 2006-01-22 - incident - Dhanusha _0090.

Alliance, announced a general strike[81] for a week surrounding the day of the municipal elections. The Government went ahead with the polls but the turnout was low.

A meeting between the SPA and the Maoist leaders in Delhi on 11 March 2006 led to an agreement on the modalities of their cooperation. The Maoists announced a three-week blockade programme on 14 March 2006, which they later called off. They then announced an indefinite unilateral cessation of military hostilities in Kathmandu Valley starting from 3 April in an effort to facilitate the planned protest programmes. However, attacks against Security Forces continued in the districts.

A general strike was called by the SPA from 6 to 9 April 2006, marking the beginning of *Jana Aandolan* (People's Movement) *II*. Before that, the Government had prohibited all kinds of public gatherings and protest programs in the city area of Kathmandu Valley, imposed a night curfew and rounded up political party activists. Demonstrations were organized in many parts of the country centring on District Headquarters. According to reports at the time, the Government resorted to arrests and beatings and in some areas even imposed daytime curfews, which were defied. People were also injured and killed by excessive use of force by the police.[82] As the month progressed, demonstrators increasingly swelled the streets in Kathmandu and in other cities and towns around the country.

On 24 April 2006, after sustained and largely peaceful demonstrations by tens of thousands of a wide cross-section of Nepalis, the King resigned his active role in politics and announced the revival of the House of Representatives, which had been the main demand of the political parties. The SPA welcomed these developments although the Maoists initially criticized the King's offer and its acceptance by the SPA. Instead, the Maoists called for the peaceful protest programmes to continue until a Constituent Assembly was on offer. To back up this demand, they announced a blockade of the capital. However, the Maoists did not hold this position for long and on 26 April 2006, CPN (Maoist) announced a three-month unilateral ceasefire.

When the King stepped down, GP Koirala became the Prime Minister, and the reinstated House of Representatives convened its first meeting on 28 April 2006. On 3 May 2006, the Government announced an indefinite ceasefire and started the process of removing Interpol Red Corner Notices on the Maoist leaders. A week later, it withdrew all terrorism charges against Maoist leaders Matrika Yadav and Suresh Ale Magar, and released them from Nakkhu Jail.

The Government and CPN (Maoist) negotiation teams met in Kathmandu on 26 May 2006 and made public the 25-point Ceasefire Code of Conduct. The Maoist leaders then started to make public appearances. In June 2006, the Government withdrew the Terrorist and Disruptive Activities Ordinance, and the Maoists opened their liaison office in Kathmandu. The second meeting between the negotiation teams of the Government and the Maoists resulted in the formation of a 31-member ceasefire monitoring committee, and a request to OHCHR to assist in human rights monitoring.

On 16 June, an eight-point agreement was signed between the SPA and the CPN (Maoist), and a committee was formed to draft an interim constitution. The Unified Command ended on 3 July 2006. Later, on 22 September 2006, the Military Bill was passed into law, which formally broke the connection between the army and the monarchy, removing the King from the position of Supreme Commander-in-Chief.

[81] In Nepal this is commonly known as a "*bandh*", which in practice generally involves the forced closure of businesses, schools and transportation.
[82] OHCHR-Nepal, "The April Protests: Democratic Rights and the Excessive Use of Force," (September 2006.)

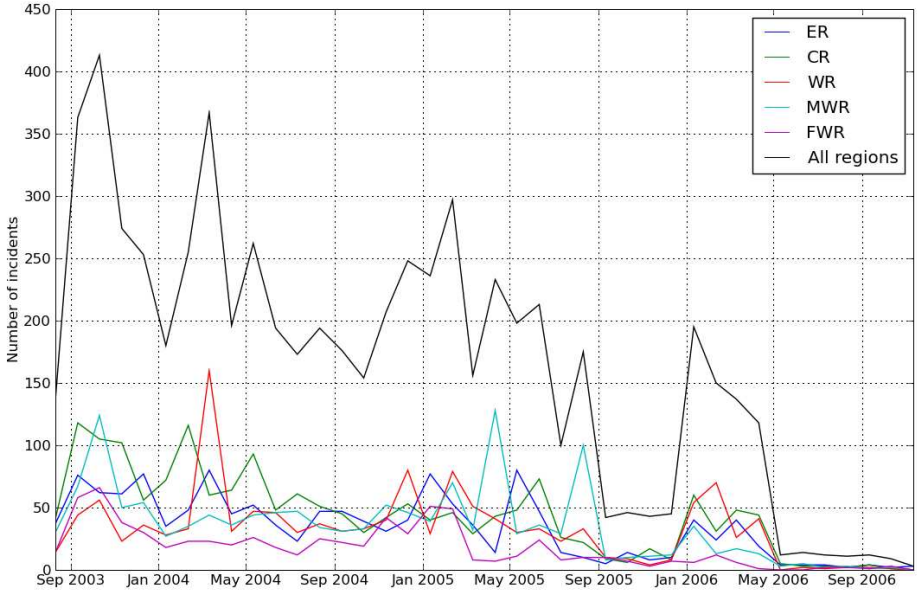

Diagram 2.3: Number of Killings, End of August 2003 to 21 November 2006, by Region

There was a discord, however, between the new Government and the Maoists after the Government sent a letter to the UN Secretary-General about UN involvement in Nepal, without consulting the Maoists. The Government and the Maoists later agreed to send letters to the UN separately but with the same content.

The UN Secretary-General then appointed Ian Martin, who had been the head of OHCHR Nepal, as his Special Representative for Nepal. On 8 November 2006, the leaders of the seven parties and CPN (Maoist) finally reached an agreement and a Comprehensive Peace Accord (CPA) was signed between the Government and the CPN (Maoist) on 21 November 2006. The CPA formally ended the conflict and paved the way for the formation of an interim legislature and interim Government. The interim Government was appointed to oversee the election of the Constituent Assembly, which would have the responsibility of drafting a new Constitution.

The CPA provided a broad roadmap for the peace process and included key provisions on the need to address crimes committed by both sides during the conflict. The parties made a number of important human rights commitments in the CPA and agreed to uncover the truth about violations and abuses alleged to have been committed by both sides, to seek justice for conflict victims and to end impunity.

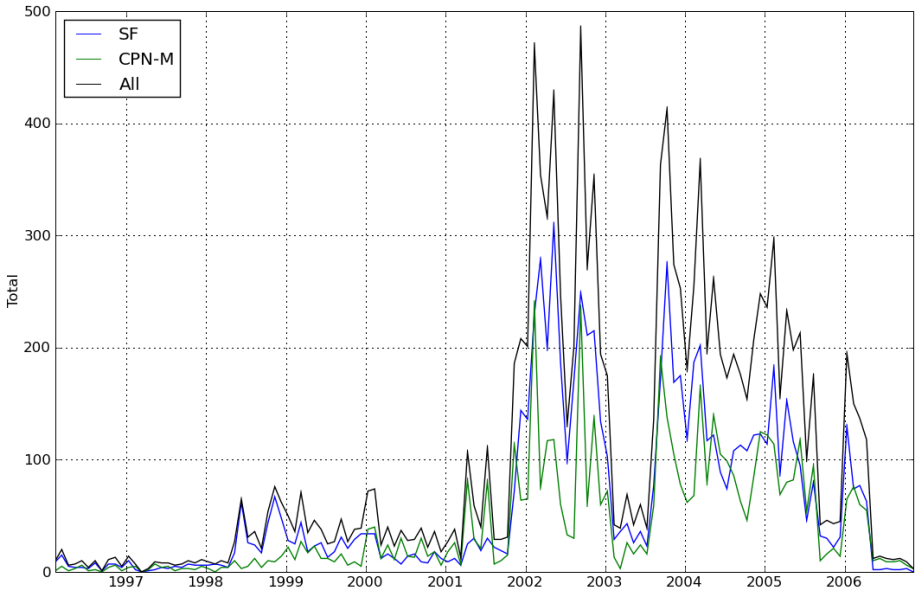

Diagram 2.4: Number of Killings, 1996-2006, by Perpetrators

CHAPTER 3 - THE PARTIES TO THE CONFLICT

3.1. OVERVIEW

This chapter presents information on conflict-era institutional structures and chains of command relevant to the investigations of alleged violations or abuses documented elsewhere in this report. The chapter makes no assertions regarding individual or collective responsibility for any alleged violation or abuse, nor does it seek to establish the name or rank of any individual identified as an alleged perpetrator in a conflict-related incident.

3.2. THE ROYAL NEPALESE ARMY

The Royal Nepalese Army (RNA)[83] traces its history to the 1740s.[84] Prior to the conflict, the army's most recent major restructuring took place in the early 1950s, following the end of Rana rule, when the army underwent a process of modernization and reorganization.[85] This process led to the promulgation of the Army Act 1959, which regulated the RNA throughout the majority of the conflict period.[86] The 1990 Constitution also includes several provisions pertaining to the RNA and regulated the army during the conflict.

Under the 1990 Constitution, the Commander-in-Chief of the army was appointed by the King – who was himself Supreme Commander-in-Chief[87] – on the recommendation of the Prime Minister.[88] The King enjoyed a wide range of powers under the Constitution and under the Army Act 1959, including the power of approval over decisions made by the Commander-in-Chief and the power to dismiss from service anyone regulated by the Act.[89] The Commander-in-Chief was responsible for the day-to-day functioning of the army, though was subordinate to the King, as Supreme Commander-in-Chief, and was required to take an oath before the King prior to assuming his position.[90] The 1990 Constitution provided for the establishment of a National Defence Council, chaired by the Prime Minister, which could make recommendations to the King on the "use" of the army.[91]

RNA Commanders-in-Chief during the conflict period were Dharmapal Barsingh Thapa (15 May 1995- 16 May 1999), Prajwalla Shamsher Rana (16 May 1999 - 9 September 2002), Pyar Jung Thapa (9 September 2002 - 9 September 2006), and Rukmangad Katuwal (9 September 2006 - 9 September 2009).[92] The Supreme Commanders-in-Chief during the

[83] On 18 May 2006, the House of Representatives passed a nine-point proclamation announcing itself the supreme body of the nation, thereby reducing the King's powers and requiring all government bodies, including the Royal Nepalese Army, to delete 'Royal' from their titles. In this Report, references to the Army during the conflict are to the Royal Nepal Army (RNA), while references subsequent to this date are to the Nepal Army (NA).
[84] *Nepalese Army: A Force with History, Ready for Tomorrow*. RNA Directorate of Public Relations, 2008. p. ii, 4.
[85] *Military History of Nepal, vol. 2*. RNA Directorate of Public Relations, 2009. p. 3
[86] The *Army Act* 2006 was promulgated on 28 September 2006, a little less than two months before the signing of the Comprehensive Peace Accord.
[87] Article 118.1: "His Majesty is the Supreme Commander of the Royal Nepal Army," Article 118-2: "His Majesty shall appoint the Commander-in-Chief of the Royal Nepal Army on the recommendation of the Prime Minister." Constitution of the Kingdom of Nepal (1990), English text available at http://www.lawcommission.gov.np/index.php/en/old-constitutions/doc/583/raw.
[88] According to the law, the Commander-in-Chief is defined as the Commander-in-Chief of the Royal Nepalese Army, who is appointed by the King in accordance with Clause 83 A, subsection 1 of the 1990 Constitution. *Commander-in-Chief's Functions, Duties, Powers and Conditions of Service Act 1958* (7th amendment, 27 August 1992) section 2b.
[89] Army Act 1959, sections 14, 69, 72, 73.
[90] Ibid sections 3.1, 3.2
[91] Constitution of the Kingdom of Nepal 1(1990), Article 118.2: "His Majesty shall operate and use the Royal Nepal Army on the recommendation of the National Defence Council."
[92] RNA Directorate of Public Relations press release, 10 September 2009 (retrieved from http://www.nepalarmy.mil.np/pressrelease.php?newsid=64&&lan=np, though no longer available online).

conflict period were King Birendra Shah, until his death on 1 June 2001, and King Gyanendra Shah.

In 1998 the RNA was comprised of approximately 46,000 personnel organized into infantry and other brigades.[93] During the first years of the conflict, up until the time it was deployed in 2001, the RNA's activities within Nepal continued to consist primarily of training, providing security for national parks, conducting rescue operations during natural disasters, infrastructure development (e.g. building roads and bridges in remote areas), and performing ceremonial functions for national and cultural events. The RNA had not been deployed for military operations within Nepal since a short and focused campaign to disarm Khampa rebels in upper Mustang in the 1970s[94] and its last major combat role in Nepal had been in the early 1800s. While many RNA personnel had experience in conflict and post-conflict situations in other countries while serving on UN Peacekeeping Missions, and many officers had received military training abroad, the army as a whole had relatively little experience with, or training in, sustained combat and counter-insurgency operations.

Though public speculation about the deployment of the army against the Maoists increased with the intensity of the conflict in the late 1990s, the Government continued to insist that the Maoists were a law and order problem and deployed the Nepal Police (NP) to deal with them accordingly. At the same time, a cabinet decision on 15 March 1999 tasked the army with providing security for select areas of the Kathmandu Valley and for ministers and other VIPs.[95] Additionally, the years between 1998 and 2000 saw several expansions in army structure, including the establishment of a new brigade and a new battalion, the re-establishment of three battalions, and the expansion of two companies to battalion strength.[96]

While the Government continued to deploy only the Nepal Police against the Maoists, in early 2001 the Government initiated a plan to mobilize the army under a "hearts and minds-style" development programme titled the "Integrated Internal Security and Development Plan" (IISDP) – in seven conflict-afflicted districts.[97] The Finance Minister noted in his 9 July 2001 budget speech to Parliament that "[T]o improve the current situation of peace and security, the Nepal Police, the Royal Nepal Army and other agencies related with peace and security will be linked up with the development programs and mobilized in an integrated way" and that funds in the budget had been allocated accordingly.[98] Though the programme did not provide for offensive operations, the ISDP marked the first time that the RNA had been mobilized from the barracks in the context of the conflict. Also in early 2001, the RNA upgraded one company to an infantry battalion and re-established three infantry companies.

On 23 November 2001, shortly after the end of the ceasefire, the Maoists launched attacks throughout the country, including the first attack on an army barracks in Ghorahi, Dang. On 26 November, a state of emergency was declared and the army was ordered to deploy against the Maoists. Following deployment, the RNA intensified the organisational expansion already underway by establishing, re-establishing or upgrading a number of infantry companies and

[93] "1 Royal Guard Brigade, 7 infantry brigades, 44 independent infantry companies, 1 Special Force brigade, 1 artillery brigade and 1 engineering brigade." Nepali and Subba, "Civil-Military Relations and the Maoist Insurgency in Nepal," *Small Wars and Insurgencies*, Vol. 16, No. 1, 83–110, March 2005, p. 98.
[94] *Military History of Nepal*, p. 643 (see footnote 85).
[95] Ibid, p. 313-14.
[96] Ibid, p. 220-21, 229.
[97] The program initially targeted Rukum, Rolpa, Pyuthan, Salyan, Kalikot, Jajarkot and Gorkha, although the degree to which the program was implemented in the field is unclear. Information posted on the RNA website in 2002 stated that: "At present ISDP is only effective in Gorkha district." Available from http://web.archive.org/web/20020929054959/www.rna.mil.np/exhibition.htm. By Fiscal Year 2003-2004, another seven districts -- Rasuwa, Nuwakot, Dhading, Kavre, Sindhupalchowk, Bhaktapur and Lalitpur – had been included under the program. His Majesty's Government, Ministry of Finance publication, 2005. Available from www.mof.gov.np/publication/budget/2005/pdf/chapter13.pdf.
[98] Budget Speech of the Fiscal Year 2001-2002, His Majesty's Government, Ministry of Finance, 2001. Available from http://www.mof.gov.np/publication/budget/2001/index.php.

battalions, and began a process of expanding its troop strength. Though there is differing information regarding the exact increase in RNA personnel during the conflict period, by the end of the conflict, the size of the army was roughly double than what it had been five years prior.[99]

By November 2001, the army structure had expanded to include a Divisional Command in each of the five development regions, in addition to a Valley Command with headquarters in Kathmandu.

3.3 NEPAL POLICE

The Nepal Police (NP) traces its history to well before the beginning of the 19th century.[100] The NP is regulated by the Nepal Police Act 1955.[101]

The NP falls under the Ministry of Home Affairs and is headed by an Inspector General of Police. Nepal Police Inspector Generals during the conflict were: Achyut Krishna Kharel (February 1996 - March 1996), Dhruba Bahadur Pradhan (March 1996 - December 1996), Achyut Krishna Kharel (again, from December 1996 - September 1999), Pradeep Samsher JBR (September 1999 - December 2002), Shyam Bhakta Thapa (December 2002 - September 2006), and Om Bikram Rana (September 2006 - September 2008).

During the conflict period the Nepal Police had five regional police offices, one for each development region. Below the regional level were zonal police offices, one for each of 14 zones. At the district level, each of the 75 districts has a district police office.

According to Section 4 of the Nepal Police Act 1955, the Government of Nepal has oversight and control of the Nepal Police and has the authority to issue orders and directives, which police are duty-bound to follow.

Section 6.1 of the Nepal Police Act 1955 gives responsibility for police administration at the zonal level to the zonal police offices. In relation to maintaining law and order in the districts, Section 8 of the Nepal Police Act 1955 places police at the district level under the authority of the Chief District Officer. In addition to following orders and directives from the Chief District Officer relating to law and order, Section 8 also requires district-level police to assist the Chief District Officer in other matters in accordance with the law.

As of 2009, the Nepal Police was comprised of approximately 56,000 personnel.[102]

3.4 ARMED POLICE FORCE

The Armed Police Force (APF) is a paramilitary police force first established through an Ordinance in January 2001. The creation of the APF reflected the Government's need to deploy additional forces against the Maoists given the ongoing escalation of the conflict – then in its fifth year – and the continuing challenges faced by a civil police force not trained to combat an insurgency. Shortly after the Ordinance was issued, the APF headquarters was established in Kathmandu. The Armed Police Force Act 2001 was promulgated on 22 August 2001.

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[99] Figures between 92,000 and 96,000 are cited in Narhari Acharya, "The Nepalese Army," in Bishnu Sapkota, ed., *The Nepali Security Sector: An Almanac*. DCAF, 2009. p. 125.
[100] History, Nepal Police, available from http://www.nepalpolice.gov.np/history.html
[101] Amended for a fifth time in 1972.
[102] Govinda Thapa, "The Nepal Police and Armed Police Force", in Bishnu Sapkota, ed., *The Nepali Security Sector: An Almanac*, DCAF, 2009, p.159.

The APF falls under the Ministry of Home Affairs[103] and is headed by an Inspector General of Police. APF Inspectors General during the conflict period were: Krishna Mohan Shrestha (until his death on 26 January 2003), Sahabir Thapa (27 January 2003 - 11 May 2006), and Basudev Oli (12 June 2006 - 15 April 2009).

The functions of the APF are listed in the Armed Police Force Act 2001; the first three functions are explicit about the role of the APF vis-à-vis conflict:

> (a) To control an armed struggle occurring or likely to occur in any part of Nepal,
> (b) To control armed rebellion or separatist activities occurring or likely to occur in any part of Nepal, and
> (c) To control terrorist activities occurring or likely to occur in any part of Nepal.[104]

The Armed Police Force Act 2001 requires that, prior to any mobilization of the APF, the Government of Nepal inform the National Security Council and the Central Security Committee in advance and provide details of the number of personnel and the reason for their deployment.[105]

Though the unified command concept which was announced by the Prime Minister in 2003 placed the Nepal Police and APF under operational command of the army, the Armed Police Force Act 2001 – promulgated prior to the army's mobilization later that year – already provided the RNA with operational command over the APF in the event of deployment on joint operations. According to Section 8:

> *To be under the Control of the Nepal Army: In the case that the Nepal Army is mobilized to maintain peace and order in any part of Nepal, during the period of mobilization of Nepal Army, the armed police of the concerned place shall be under the control of the Nepal Army.*[106]

APF personnel were initially drawn from the RNA and Nepal Police, up until the establishment of the APF Service Commission. By the end of the conflict the APF numbered approximately 30,000 and were organized into five combat brigades, one in each development region. Each combat brigade was composed of several infantry battalions and infantry companies; the number of each varied by region.[107]

3.5 COMMUNIST PARTY OF NEPAL (MAOIST)

The Communist Party of Nepal (Maoist)[108] (CPN (Maoist)) was formed in Nepal in 1995.[109] The Party was headed by a Chairman who, for the duration of the conflict, was Pushpa Kamal Dahal (Prachanda). In addition, Dahal was (and remains), Supreme Commander of the People's Liberation Army, the military wing of the CPN (Maoist).

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[103] The Government of Nepal enjoys overall oversight of the APF, as described in the Armed Police Force Act 2001, section 4(1): "Government of Nepal shall have powers to oversee, control over and provide directions to the armed police." English text available at http://www.lawcommission.gov.np/index.php/en/acts-english/doc/720/raw.
[104] Ibid, section 6(1).
[105] Ibid, section 6(2): "In cases where the Government of Nepal has mobilized armed police in any part of Nepal, the National Security Council and Central Security Committee shall be notified at least once a week about the number of armed police mobilized in that area and the functions and activities carried out by the armed police."
[106] Ibid, section 8
[107] Government of Nepal, Ministry of Home Affairs, Armed Police Force, "Introduction," Available at http://www.apf.gov.np/introduction/introduction.php
[108] The CPN (Maoist) was renamed the Unified Communist Party of Nepal (Maoist) in January 2009.
[109] See Annex 1 – Timeline, p. 209 and Chapter 2 – History of the Conflict, p. 36.

As provided for in the document, "Theoretical Premises for the Historic Initiation of the People's War", adopted by the party's Central Committee in September 1995, the Maoist military fell under the leadership of the CPN (Maoist) Party and was meant to function as per the political goals and interests of the Party.[110] The document also provides for the founding of a "revolutionary united front," likewise under the leadership of the party; the united front – as the United Revolutionary People's Council (URPC), Nepal (URPC-N) – would later serve as the basis for Maoist-declared "people's governments" at the national and sub-national levels, as well as the Maoist-declared "people's courts."[111]

The formation of the People's Liberation Army was announced at the first national conference of the Maoist army held in September 2001,[112] though the Maoists had been developing their military capabilities since launching the "People's War" and had active combatants operating under a chain of command and engaging in military action long before officially announcing the People's Liberation Army's formation. According to the "Central Military Commission, Communist Party of Nepal (Maoist)", in a statement issued on 13 February 1998, there were at the time many active "army squads," though these had not yet reached platoon formation.[113] "Special Task Force" units were reportedly established in 1998-1999 and the first standing company formed in July-August 2000.[114] Formation of the first

[110] "Theoretical Premises for the Historic Initiation of the People's War", September 1995, Available at http://www.satp.org/satporgtp/countries/nepal/document/papers/theoretical_premises.htm: "E. This plan would be based on the theoretical premises of building a revolutionary united front and a revolutionary army under the leadership of the Party of the proletariat in the phase of the new democratic revolution" and point F: "….Armed struggle will be carried out by uniting all strata and categories of anti-feudal and anti- imperialist masses of the people under the leadership of the Party." That the party should control the military and not vice versa is also stressed in "Strategy & Tactics of Armed Struggle in Nepal", adopted by the party central committee in March 1995, available at http://www.satp.org/satporgtp/countries/nepal/document/papers/strategy_and_tattics.htm: "The fundamental principles of this path [People's War] are….above all in the ideological guidance of M-L-M [Marxism-Leninism-Maoism], to establish leadership of the Party over the army and not to permit at any cost to arise a situation where the gun would control the Party." *See also* remarks on this issue attributed to Baburam Bhattarai: "[T]here has been a persistent disinformation campaign about the so-called contradiction between the military and the political wing of the Party. Again we would say this is totally baseless, preposterous and mischievous. Furthermore, we should proudly proclaim that in the contemporary revolutionary world our movement would perhaps be the most unified and centralized, where every military and non-military action takes place according to collective decision and plan.
Rather what our opponents fail to comprehend is that we have an integrated politico-military mechanism and no separate "military" and "political" wing as wildly speculated. Whereas organizationally we are committed to ensure a concentric construction of the Party, the Army and the United Front under the supreme and unified leadership of the Party, the well-known dictum about the relation between the Party and the Army has been: 'The Party commands the gun'." "Rejoinder on Some Current Issues: A Communication from the Revolutionaries in Nepal on the Current (September 2002) Situation in the Civil War." *Monthly Review* (21 September, 2002) available at http://www.monthlyreview.org/0902bhattarai.htm

[111] The formation of the Central People's Government (*Kendriya Janasarkar*) – the URPC, coordinated by Baburam Bhattarai – was announced on 23 November 2001. *See* Lekhnath Neupane, *Akhil Gyan*, Bhijan Publications, 2006, p. 34. For more on the URPC's proposed governmental and judicial roles, *see* "Common Minimum Policy & Programme of United Revolutionary People's Council," available from http://www.bannedthought.net/Nepal/Worker/Worker-08/CommonMinProg-URPC-W08.htm.

[112] Kiyoko Ogura, "Realities and Images of Nepal's Maoists after the Attack on Beni," *European Bulletin of Himalayan Research*, vol 27, 2004, p. 69.

[113] Press Comminuqe of the Central Military Commission, CPN (Maoist), 13 February 2008, available from http://www.bannedthought.net/Nepal/Worker/Worker-04/Statement-CentralMilitaryCommission-980213.htm

[114] Uday 'Dipak' Chalaune, *Janayuddha ra Janamukti Sena: Saidhantik Adhar ra Karyaniti* [*People's War and the People's Liberation Army: Fundamental Principles and Strategy*], People's Liberation Army Nepal, Sixth Division, (2009) p. 11-13. In an undated interview published on 20 February 2000, Pushpa Kamal Dahal (Prachanda) is quoted as saying that the Maoist army was then organized at the platoon level and aspiring to form companies. "In the theoretical sense we use the term people's army. But as a formal name of the army, we are not saying, 'This is our PLA, People's Liberation Army.' We have a people's army, but we have not called this form of organization the 'People's Liberation Army.' Now we have a goal of forming companies. We are organized now, up to the platoon. And you saw the Special Task Force-this is a step, moving toward forming companies. When we sustain a company formation, when there are two, three, four companies, and, at the same time, there are platoons elsewhere-then we will say this is our strong army. Our vision is that when we have companies, then we will have a strong army to have a base area," "Red Flag Flying on the Roof of the World -Part 3, Inside the

battalion-level structure was announced at the September 2001 conference noted above.[115] In June-July 2002, the People's Liberation Army had reportedly constituted its first brigade and in June-July 2004 reportedly expanded to division level with the formation of an Eastern Division and a Western Division.[116] While the exact number of active People's Liberation Army personnel during the conflict remains a matter of dispute, many analysts estimated a number between 5,000-10,000 active combatants for much of the conflict period.

By the end of the conflict, the People's Liberation Army had expanded to include seven declared divisions countrywide, organized under three commands – Western Command, Special Central Command, and Eastern Central Command – which were in turn under the authority of the Supreme Commander and four Deputy Commanders.

Revolution in Nepal: Interview with Comrade Prachanda," *Human Rights Server*, available from http://www.humanrights.de/doc_en/archiv/n/nepal/politics/200200_prachand_interview_c1.htm

[115] Chalaune, *Janayuddha ra Janamukti Sena* p. 17. (see footnote 114)

[116] Ibid. 20-21.

CHAPTER 4 - APPLICABLE INTERNATIONAL LAW

4.1 OVERVIEW

The purpose of this chapter is to outline international laws that were applicable during the period of the conflict. These norms have been used as the framework to analyse and compile this report, and provide an important framework of analysis to be considered by the domestic courts of Nepal when complying with it obligations and investigating, prosecuting and judging crimes committed during the conflict period.[117]

During armed conflicts of all types, a substantial body of law – with both international and domestic origins – is in operation. In terms of international law, two mains systems applied during the conflict – international human rights law (IHRL) and international humanitarian law (IHL). These two systems are largely complementary and mutually reinforcing, with the shared objective of protecting life and human dignity. The primary difference between them is when they apply. IHRL provides protection during times of peace and times of war, while IHL applies only during periods of armed conflict. Both systems of law consist of treaties ratified by states parties, and of customary international law.

Certain particularly grave violations of IHRL or of IHL are deemed to constitute international crimes, for instance, crimes against humanity, war crimes, genocide, trafficking, piracy, slavery, torture and enforced disappearance. Under international law, states have an obligation to ensure that alleged perpetrators of such crimes are investigated, prosecuted and held criminally responsible for these acts.

4.2 INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

4.2.1 General Principles

IHRL applies both in peacetime and during armed conflicts.[118] It consists of the provisions of international human rights treaties to which a country is a party, international human rights customary law, and other principles and standards. This body of law covers a wide range of issues, but operates primarily by placing obligations on state actors.

During the period affected by the conflict, Nepal was party to six out of the nine core Human Rights instruments:[119]

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[117] Provisions of international treaties which Nepal has ratified do not automatically form part of Nepalese law unless and until those provisions have been validly incorporated into domestic law by statute. Therefore, a treaty provision by itself cannot operate as a direct source of individual rights and obligations under that law. However, the *Nepal Treaty Act* 1990 has the effect of making some treaty provisions able to be applied as national law to the extent that there is a conflict between the provisions of international law and Nepali law. Decisions of the Supreme Court also demonstrate a growing use of international law to influence and shape Nepali law. *See, e.g, Lily Thapa and Others v. HMG Cabinet Secretariat and Others*, NKP (2005), Vol. 9, P-1054, Writ No. 34/2061; *Punyabati Pathak and others v. Ministry of Foreign Affairs*, NKP 2062 (2005) Vol. 8, P-1025, Writ No. 3355/2060 D.D. 28/11/2005

[118] This point is not without debate. Two persistent objectors to this principle are the United States of America and Israel. See *Concluding Observations of the Human Rights Committee: Israel* (CCPR/C/79/Add.93) (1998); *Concluding observations of the Human Rights Committee: Israel* (CCPR/CO/78/ISR)(2003); *Consideration by the Human Right s Committee of Reports Submitted by State Parties under Article 40 of the Covenant: Untied States of America* (CCPR/C/USA/3)(2005), Annex I; *Concluding observations of the Human Rights Committee: United States of America* (CCPR/C/USA/CO/3)(2006), para3.

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

Human Rights Convention	**Signature**	**Ratification [Accession (a)]**	**Entry into Force**
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	-	30 January 1971 a[120]	1 May 1971
Convention on the Rights of the Child (CRC)	26 January 1990	14 September 1990	14 October 1990
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	*8 September 2000*	*3 January 2007a*	*3 February 2007*
Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography	*8 September 2000*	*6 January 2006a*	*20 February 2006*
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	5 February 1991	22 April 1991	22 May 1991
Optional Protocol to CEDAW	*18 December 2001*	*15 June 2007*	*15 September 2007*
International Covenant on Civil and Political Rights (ICCPR)	-	14 May 1991a	14 August 1991
Optional Protocol to the ICCPR	-	*14 May 1991a*[121]	*14 August 1991*
Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty	-	*4 March 1998a*	*4 June 1998*
International Covenant on Economic, Social and Cultural Rights (ICESCR)	-	14 May 1991a	14 August 1991
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	-	14 May 1991a[122]	13 June 1991

Under these treaties, a range of fundamental rights applied during the conflict, which included:

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

[120] Nepal has not made the necessary declaration under Article 14 which recognizes the competence of the Committee on the Elimination of Racial Discrimination to consider individual complaints.
[121] Accession to this Optional Protocol allows the Human Rights committee to receive individual complaints.
[122] Nepal has not made the necessary declaration under article 22 which would recognize the competence of the Committee against Torture to consider individual complaints, nor under article 28 which would recognize the competence of CAT to undertake enquiries.

4.2.2 Derogation and States of Emergency

The provisions of human rights conventions continue to apply during internal armed conflicts. Article 4 of the ICCPR authorizes states to take measures derogating from their obligations under the Covenant only when they officially proclaim a public state of emergency that threatens the life of the nation. The state must file that declaration with the UN Human Rights Committee and must "immediately inform" the other treaty parties via the Secretary General of the UN.

Declaring a state of emergency allows a state to derogate from international legal obligations with respect to a very limited number of human rights. Under the ICCPR's derogation provisions, rights to freedom of expression and opinion, movement, privacy and effective remedies may all be temporarily curtailed, subject to the stringent conditions provided in article 4 of the covenant. These conditions include that such measures must not be inconsistent with the other obligations under international law and must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[123] Moreover, there can be no derogation from the Covenant's articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition on slavery), 11 (ban on imprisonment through inability to fulfil a contractual obligation), 15 (no penalty without law), 16 (right to legal status) and 18 (freedom of thought, conscience and religion).[124]

Nepal declared a state of emergency on two occasions during the conflict, for nine months beginning in November 2001 and for three months beginning in February 2005. On both occasions, the Government notified the UN Secretary General that the ICCPR–based rights associated with assembly, movement, press, privacy, property, certain remedies, and access to information, would be curtailed.[125]

4.3 INTERNATIONAL HUMANITARIAN LAW (IHL)

4.3.1 Armed Conflict

In determining which aspects of IHL were relevant to the armed conflict in Nepal, it is firstly necessary to specify the time period during which an armed conflict existed, and to determine whether it was international or non-international by nature.

This report does not seek to specifically determine the period of the armed conflict in Nepal, which is an assessment to be undertaken based on the intensity of "protracted armed violence" between at least two parties.[126] Nevertheless, it appears on these principles that the period under review in this Report, from February 1996 when the CPN (Maoist) commenced attacks as part of an armed insurgency, to 21 November 2006, on which date the Comprehensive Peace Accord was concluded, qualify as an armed conflict.

When an armed conflict is not between two or more opposing states, but between governmental forces and non-governmental armed groups, it is considered to be "non-international" in character.[127] There is broad consensus that the armed conflict in Nepal was

[123] ICCPR article 4(1).
[124] ICCPR article 4(2).
[125] C.N.270.2002.TREATIES-4 (Depositary Notification), 25 March 2002; C.N.170.2005.TREATIES-3 (Depositary Notification). 14 March 2005.
[126] *The Prosecutor v. Dusko Tadic*, IT-94-1-A, ICTY Appeals Chamber, 38
[127] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Note that the second Additional Protocol to the Geneva Conventions specifically addresses non-international armed conflicts but Nepal has not ratified this instrument and so it is not discussed in detail in this Report. However, it should be noted that some aspects of the second Additional Protocol reflect customary international law as it stood in 1996 when the conflict in Nepal

non-international, and the analysis in this Report is therefore based on the provisions of IHL applicable to a non-international armed conflict.

4.3.2 Common Article 3

Common Article 3 of the four Geneva Conventions, to which Nepal is a state party,[128] stands as the source of law governing conduct during non-international armed conflicts.

Common Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- *(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- *(b) taking of hostages;*
- *(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*
- *(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The parties to the conflict are also bound by the provisions of customary international law.[129] The following interrelated core principles of customary international law that are relevant to the conduct of any armed conflict include:

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began, and therefore these provisions would have applied throughout the hostilities. In this regard, the features of a non-international armed conflict, as set out in article 1, provide a useful guide. In particular, article 1 also notes that it does not apply to "…situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

[128] Nepal ratified the four Geneva Conventions on 7 February 1964. It should be noted that Nepal has not ratified the additional protocols I and II to the Geneva conventions. Therefore, their provisions, in particular those of Additional Protocol II, are not directly applicable to the armed conflict in Nepal.

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

- ***Distinction***: At all times during an armed conflict, the parties to the conflict must distinguish between civilians and combatants, and target only the latter. The principle also requires a distinction between combatants and those persons hors de combat and those who do not take a direct part in hostilities (ie civilians). In addition, civilian objects must be distinguished from military objectives, and again only the latter attacked.

- ***Proportionality***: A party is required to forego any offensive where the incidental damage expected "is excessive in relation to the concrete and direct military advantage anticipated."[130]

- ***Precautions in Attack (and Against Effects)***: Prior to any attack, all feasible precautions must be taken to ensure that the subject of the attack are legitimate military objectives, and to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Where a civilian population is reasonably expected to be affected by the attack, "effective advance warning" must be given to the civilian population unless the prevailing circumstances do not allow such a warning. Further, parties must take "all feasible precautions" to protect those civilian populations under their control from the effects of an attack by the opponent. Each party must avoid locating objects that could be considered "legitimate military objectives" in populated areas. Similarly, the use of human shields to protect certain objects or individuals is prohibited.[131]

- ***Humanity***: Civilians and those who are hors de combat must be treated humanely: any killing, torture, rape, mutilation, beatings, humiliation, and similar abuses are prohibited. In addition, methods or means of combat should not cause "unnecessary suffering". The International Court of Justice has defined unnecessary suffering as "harm greater than that unavoidable to achieve legitimate military objectives."[132]

4.4 CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW[133]

4.4.1 Obligation to Investigate and Prosecute

Under both IHL and IHRL, states are required to investigate allegations of serious violations of these two bodies of law and, when appropriate, prosecute suspected perpetrators and provide reparations for the victims. The UN General Assembly expressed the obligation in the clearest of terms when it declared in the "Basic Principles on the Right to Remedy,"

> *In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*[134]

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[130] See International Committee of Red Cross, *Customary International Humanitarian Law*, rule 14 (see footnote 129).
[131] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 97, which is derived in part from the IHRL obligation upon states to protect life (see footnote 129)
[132] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para 78.
[133] This section discusses international criminal law, but the reader is reminded that domestic criminal law is also applicable in the contexts mentioned, and nothing prohibits a domestic criminal code from criminalizing conduct equally or less serious than that discussed here. At the time of writing, Nepal's civil code does not criminalize all of the "international crimes" crimes listed in this Report; for example, torture is not illegal under Nepali law.
[134] *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*, General Assembly resolution 60/147, article 4.

The obligation is founded in part on Article 2 of the ICCPR,[135] but is confirmed in the interpretation given that provision by the UN Human Rights Committee. For example, the Committee has repeatedly held that the failure to investigate and punish perpetrators of IHRL violations constitutes a separate violation of the ICCPR. Already in 1995, in *Bautista de Arellana* v. *Colombia*, the Committee ruled that Colombia was under a duty to investigate thoroughly allegations of forced disappearances and to criminally prosecute those responsible for such violations.[136] The 1984 CAT, which Nepal ratified in 1991, obliges State Parties to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[137]

Under IHL, perpetrators bear individual responsibility for serious violations they commit, and must be prosecuted and punished. For instance, the four Geneva Conventions of 1949 set forth explicit obligations on states parties' regarding criminal punishment of serious violations of the rules of IHL in armed conflict.[138] This has been reaffirmed on several occasions by the UN Security Council, specifically in relation to the conflicts in Afghanistan, Burundi, Democratic Republic of the Congo, Kosovo and Rwanda.[139] In a resolution on impunity adopted without a vote in 2002, the UN Commission on Human Rights recognized that perpetrators of war crimes should be prosecuted or extradited.[140] The Commission has similarly adopted resolutions – most of them without a vote – requiring the investigation and prosecution of persons alleged to have violated IHL in Sierra Leone, the Republic of Chechnya of the Russian Federation, Rwanda, Sudan, Burundi, and the former Yugoslavia. It is now broadly regarded as a customary international legal obligation to investigate and punish alleged perpetrators of IHL violations – in either international or non-international armed conflicts.[141]

Concerning the nature of the investigation that must be conducted in order to satisfy this obligation, the UN has developed guidelines for such investigations that centre around four universal principles: independence, effectiveness, promptness and impartiality.[142] These four principles lie at the heart of human rights protection and are binding on UN members in that they have been relied upon and further developed in the jurisprudence of UN-backed

[135] Article 2 of ICCPR requires a state party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in it and also to ensure an effective remedy for any person whose rights have been violated.

[136] Human Rights Committee, *Bautista de Arellana* v. *Colombia*, communication no. 563/1993, 27 October 1995, para 8.6. *See also* Human Rights Committee, *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* v. *Colombia*, communication no. 612/1995, 29 July 1995, para 8.8; Human Rights Committee, *Rajapakse* v. *Sri Lanka*, communication no. 1250/2004, 14 July 2006, para 9.3.

[137] Convention Against Torture and Other Cruel, Inhuman or Otherwise Degrading Treatment or Punishment (1987) article 12.

[138] The obligation is contained in the "grave breaches regime," set out in the four Geneva Conventions, as well as in customary international law. *See* article 49 of the First Geneva Convention; article 50 of the Second Geneva Convention; article 129 of the Third Geneva Convention; and article 146 of the Fourth Geneva Convention. The 'grave breaches regime' contains a specific list of crimes that, whenever violated, oblige the state to 'try or extradite' the perpetrator.

[139] Security Council resolution 978 (1995), Security Council resolution 1193 (1998) Security Council resolution 1199 (1998).

[140] United Nations Commission on Human Rights, resolution 2002/79, para 11.

[141] International Committee for the Red Cross, *Customary International Humanitarian Law*, rule 158 (see footnote 129).

[142] *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Economic and Social Council resolution 1989/65, annex, Available from www1.umn.edu/humanrts/instree/i7pepi.htm; *The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly resolution 55/89 Available fromwww2.ohchr.org/english/law/investigation.htm. Note that the investigation need not be conducted by a court or even a judicial body, administrative investigations, where appropriate, may equally comply with the four principles.

international courts and also have been agreed upon by the States represented within the relevant United Nations bodies.

4.4.2 International Crimes

Certain violations of international law are deemed to constitute "international crimes", notably, crimes against humanity, war crimes, genocide, trafficking, piracy, slavery, and gross violations of human rights such as torture and enforced disappearance. In accordance with the duty of states to investigate and prosecute, these crimes should be prosecuted before competent courts, notably by those of the state with primary jurisdiction over the matter.

In some instances, notably when the crimes attract "universal jurisdiction", they can also be tried in domestic courts of other states. Universal jurisdiction exists on the premise that some international norms are *erga omnes*, meaning that the obligation is owed to the international community as a whole.[143] While some debate remains about the full scope of crimes captured by universal jurisdiction, it is well settled that, at a minimum, domestic courts of all states have the power to prosecute under international law, those responsible for crimes against humanity, war crimes (such as serious violations of Common Article 3), genocide, and torture.[144]

4.4.3 Crimes against Humanity

The prohibition against crimes against humanity is entrenched in international customary law and is deemed to constitute a peremptory norm or *jus cogens*. This means that the prohibition is accepted by the international community of states as a norm from which no derogation is ever permitted.

According to the definition codified in the Rome Statute, crimes against humanity occur where certain listed acts are undertaken "*as part of a widespread or systematic attack against any civilian population, with knowledge of the attack*".[145] Nepal is not currently a party to the Rome Statute of the International Criminal Court (ICC) of 1998, however, certain aspects of the Rome Statute represent a codification of customary international law and it is therefore used in this analysis of crimes against humanity to illustrate the application of this crime.

Article 7, paragraph 1 of the Rome Statute lists the 11 acts that represent the most serious violations of human rights. These include:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of the population;
- Torture;
- Rape, sexual slavery or any other form of sexual violence of comparable gravity;

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[143] The concept of *erga omnes* was recognized by the International Court of Justice in the *Barcelona Traction* case (Belgium v Spain) (Second Phase) ICJ Rep 1970 3, at paragraph 33: "*… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character*."

[144] Where such crimes are *jus cogens*, for example torture, the courts of a state are not only allowed to, but are obliged to, exercise their jurisdiction over the act.

[145] Rome Statute of the International Criminal Court, A/CONF.183/9* (1998), Article 7.

- Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious or gender grounds;
- Enforced disappearance of persons;
- Any other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

For these listed acts to be classified as crimes against humanity, they must be committed as part of a widespread or systematic attack. The Rome Statute specifies that an attack consists of multiple acts of violence such as those listed. Nonetheless, a single act can constitute a crime against humanity if it is part of a larger attack. In addition, an attack does not need to be a military attack or part of an armed conflict.[146] The widespread nature of the attack is based on its scale, the number of people targeted or "*the cumulative effect of a series of inhumane acts or [through] the specific effect of a single, large-scale act*".[147] The systematic nature of the attack is inferred from the "organised character of the acts committed and [from] the improbability of their being random in nature".[148]

It is also a requirement of a crime against humanity that it is directed against a civilian population. A civilian population includes people who are not in uniform and have no link to the public authorities, as well as persons who are "out of combat" and thus are not, or are no longer, taking part in the conflict.[149] The expression "civilian population" needs to be understood in its broad sense and refers to a population that is primarily made up of civilians. A population may be classified as "civilian" even if it includes non-civilians, provided that civilians are in the majority.[150]

4.4.4 War Crimes

The term "war crimes" is generally used to refer to any serious violations of IHL directed at civilians or enemy combatants during an international or non-international armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Such crimes are derived primarily from the four Geneva Conventions, their additional protocols, the Hague Conventions of 1899 and 1907 and international customary law. Although Nepal is not a party to the Rome Statute, an examination of article 8 of the Rome Statue, which distinguishes several categories of war crime provides useful guidance.[151] Relevant to non-international armed conflict are the following categories:

- Serious violations of Common Article 3 in an internal armed conflict, in particular murder, mutilation, cruel treatment and torture directed against people taking no active part in the hostilities;[152]
- Other serious violations of the laws and customs applicable in an internal armed conflict, such as intentional attacks on the civilian population, rape and sexual slavery, and conscripting, enlisting or using child soldiers.[153]

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[146] Ibid, article 7, Elements of Crimes
[147] *Prosecutor v. Kordić and Cerkezs,* ICTY, Appeals Chamber, no. IT-95-14/2-A, 17 December 2004, para. 94
[148] Ibid.
[149] *Prosecutor v. Mrkšić et al.* , ICTY, Appeals Chamber, 5 May 2009, para. 32 and 33.
[150] *Prosecutor v. Limaj*, ICTY, Trial chamber, no. IT-03-66-T, 30 November 2005, para. 186.
[151] Rome Statute, article 8(2)(c) (see footnote 145).
[152] It is now clearly established that serious violations of Common Article 3 entail criminal liability. The ICTY in *Tadić* ruled that "Customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict . . ." *Prosecutor v. Tadić*, ICTY, Trial Chamber, no. IT-94-1-T, Opinion and Judgment, 7 May 1997. That 1997 decision was upheld on appeal confirming that under current rules of customary international law, violations of Common Article 3 in internal armed conflicts impose individual criminal responsibility on the persons who committed the act.
[153] Ibid, article 8(2)(e).

To be identified as a war crime, it is necessary that the crime occurred during an armed conflict and that there is sufficient nexus between the prohibited act and the armed conflict. The nexus requirement means that the perpetrator of the act was aware of the existence of the armed conflict at the moment he/she committed the act, that the act took place in the context of the armed conflict and that it was "associated" with it.[154]

4.5 PRINCIPLES IN THE APPLICATION OF INTERNATIONAL LAW

4.5.1 Responsibility for obligations under International Law

IHRL primarily imposes obligations on the government of a state and relevant state actors, such as law enforcement agencies, the courts and other public officials. However, armed groups should also respect IHRL. An armed group can be considered to be the *de facto* authority of the territory if it effectively exercises government-like functions such as police powers, the power to arrest, and the enforcement of its rules within the territory.[155] IHRL places certain obligations on the *de facto* authority, which bears responsibility for violations within that territory.[156] For example, *de facto* regimes are obliged to respect the prohibition on torture or the arbitrary deprivation of life. It must be emphasized that the primary obligations under IHRL, placed on the state party, continue to operate simultaneously with and irrespective of the obligations on the *de facto* authority.

Also, United Nations Special Procedures mandate holders have emphasized the on-going obligation of "every individual and every organ of society" to respect and promote human rights under the Universal Declaration of Human Rights, to address the actions of armed groups.[157]

During a non-international armed conflict, armed groups are also obliged to respect IHL, notably the minimum protections under Common Article 3 to the four Geneva Conventions which apply to "each Party to the conflict".

During the conflict in Nepal, the country's IHRL responsibilities remained in force in all areas where the Government exercised *de facto* control.[158] In addition, throughout the period qualifying as an armed conflict, IHL also applied. In areas where and for as long as the Maoists held the *de facto* authority, IHRL obligations were their responsibility.

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[154] Ibid, article 8, Elements of Crimes. *See also Prosecutor v. Kunarac et al.*, ICTY, Appeals chamber, no. IT-96-23/1-A, 12 June 2002, para. 58: "A link between cause and effect is not required between the armed conflict and the perpetration of the crime but at the very least, the existence of the armed conflict must have had a significant influence on the capacity of the perpetrator of the crime to commit it, their decision to commit it, the manner in which they committed it or the purpose for which they committed it."

[155] "*De facto* regimes resemble states in that they exercise control over territory and all the functions of a sovereign government in maintaining law and order ... courts of justice, adopting or imposing laws, regulating the relations of the inhabitants of the territory to one another and to the government." Lord Atkin, Arantzazu Mendi case, House of Lords, at 65 et seq, cited in The Redress Trust, "Not Only the State: Torture by Non-State Actors: Towards Enhanced Protection, Accountability and Effective Remedies" (May 2006) p. 14, Available from www.redress.org/downloads/publications/Non%20State%20Actors%209%20June%20Final.pdf/

[156] *De facto* control can be compared to *de jure* control, the latter being the authority 'according to law.' While an authority might be legally (i.e., *de jure*) in control of a territory according to the applicable legislation, the facts on the ground might be such that it cannot effectively exercise its authority.

[157] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston*, 27 March 2006, E/CN.4/2006/53/Add.5; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kalin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, UN Doc. A/HRC/2/7, 2 October 2006, para. 19.

[158] Including in areas where the Government regained "effective control" that had previously been forfeited to the CPN (Maoist).

4.5.2 Simultaneous application of IHRL and IHL - Lex Specialis

Where both IHL and IHRL apply, and can be applied consistently, parties to a conflict are obliged to do so. Where they cannot, for example where IHL would require or allow different behaviour than that of IHRL in the same situation, the principle of *lex specialis* applies. *Lex specialis* provides that when two different legal standards may be applied to the same subject-matter, the more specific standard applies.[159]

Such situations are rare and the overall convergence and complementarity of the two regimes has been noted by both the International Court of Justice[160] and the UN Human Rights Committee in its General Comment 31.[161] In 2005, the UN Human Rights Committee reviewed this issue with a view to further clarification. The Committee affirmed that the two legal regimes are complimentary and not mutually exclusive, and that the principle of *lex specialis* governs in the case of conflict. It further declared that IHL does not automatically take precedence over IHRL in all situations of armed conflict:

> *In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the* lex specialis *will have to be identified and applied.*[162]

According to the UN Human Rights Committee, therefore, the determination as to which regime governs a specific situation depends not solely on whether there is an armed conflict, but upon which regime has the more specific rule applicable to a given situation. For example, IHRL has more detailed laws with regard to situations of 'low intensity' conflict where the state party's operations are comparable to policing and law enforcement, rather than military-style combat.

In any case, it will be on rare occasion that the two regimes cannot be interpreted as mutually reinforcing. Notably, when the question being addressed pertains to civilians not taking direct part in hostilities or combatants *hors de combat*, the protections afforded under each regime are essentially identical.

4.5.3 Children in Armed Conflict

Both IHL and IHRL have unique provisions concerning the treatment of children during armed conflict, which often give protection beyond that of adults.[163] For example, the death penalty may not be applied on anyone below the age of 18, irrespective of their crime.[164]

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[159] Report of the Study Group of the International law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th session of the International Law Commission, A/CN.4/L.682 (2006).
[160] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice Advisory Opinion, General List No. 131, 9 July 2004, para 106.
[161] "The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive." *General Comment No. 31 of the Human Rights Committee: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, sect. 11.
[162] Working Group on Arbitrary Detention, *Mr. Abdul jabber al-Kubaisi v. Iraq and the United States of America*, Opinion No. 44/2005, A/HRC/4/40/Add.1, (2006), para 13.
[163] The legal aspects of specific violations (including torture and disappearance) are treated at length in the following thematic chapters. Accordingly, they are not addressed here.
[164] International Covenant on Civil and Political Rights (1976) article 6(5); Fourth Geneva Convention, article 68; Additional Protocol I to the Geneva Conventions, 1949, article 77(5); Additional Protocol II to the Geneva Conventions, 1949, article 6(4).

Particularly relevant to the conflict in Nepal is the requirement that children must not be enlisted r conscripted into armed forces or armed groups, and must not be allowed to take part in hostilities. This is clearly set out in article 38 of the Convention on the Rights of the Child, to which Nepal became a signatory in 1990, as well as a number of other international instruments, and is deemed to be part of international customary law.[165]

Concerning the minimum age for recruitment and participation in hostilities, while the Convention on the Rights of the Child and the Additional Protocols I and II specify the minimum age for recruitment into the armed forces or armed groups as 15,[166] the Optional Protocol to the Convention raises the age for military recruitment, use and participation in hostilities to 18.[167] For children between the ages of 15 and 18, the Protocol prohibits only compulsory recruitment.[168] Importantly, for other protections in the IHRL regime, the definitional age of a child is 18.[169]

The recruitment of children into armed groups was a significant issue during the conflict in Nepal and it was addressed by the parties to the conflict and the United Nations within the framework of Security Council Resolution 1612 (2005) on children in armed conflict.[170] Notably, an Action Plan for the discharge of disqualified Maoist army personnel was agreed to between the Government of Nepal, the Unified Communist Party of Nepal – Maoist (UCPN-M) and the United Nations on 16 December 2009. The Action plan included the establishment of a UN Monitoring Mechanism to monitor and report on the implementation of commitments made regarding Maoist army personnel, who at the time of verification were minors. Due to the existence of this already established mechanism to address this issue, it was decided not to include violations concerning recruitment of children into armed forces in the terms of reference for this Report, nor in the compilation of the TRJA. However, this should not prevent the transitional justice mechanisms, or another competent judicial authority, from considering such cases in the context of investigations or prosecution of violations of international law.

[165] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC OP-armed conflict) (2002); International Committee for the Red Cross, Customary International Humanitarian Law, vol.1 (see footnote 129), rules 135-137; The Rome Statute, article 8 (2) (e) (vii) (see footnote 145); Additional Protocol I to the Geneva Conventions, 1949, article 77; Additional Protocol II to the Geneva Conventions, 1949, article 4. Note also that the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), ILO Convention No. 182, which Nepal ratified in 2002, prohibits the "forced or compulsory recruitment of children for use in armed conflict" in its article 3(a). See also International Committee for the Red Cross, Customary International Humanitarian Law, vol.1 (see footnote 129), p. 487

[166] Additional Protocol I to the Geneva Conventions, 1949, article 77(2). Additional Protocol II to the Geneva Conventions, 1949, article 4(3)(c); Convention on the Rights of the Child (1990), article 38(3). By implication, it is not a violation to recruit or to permit participation in hostilities of those persons 15 and over under the international legal framework in effect at the time.

[167] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, article 2. Nepal signed the Optional Protocol in 2000, but only ratified it in 2007.

[168] Ibid.

[169] CRC article 1 (see footnote 166), that is, unless "under the law applicable to the child, majority is attained earlier."

[170] UN Security Council, *Security Council resolution 1612 (2005)* 26 July 2005, S/RES/1612 (2005).

CHAPTER 5 - UNLAWFUL KILLINGS

5.1 OVERVIEW

According to Government figures, between the launch of the "People's War" in February 1996 and the formal end of the armed conflict on 21 November 2006, a total of 12,686 individuals - including both combatants/fighters and civilians – were killed in the conflict.[171] While IHRL and IHL may have been respected in many cases, it is clear by reference to the available data that serious violations of international law in the form of unlawful killings may have occurred in a variety of circumstances.

The Transitional Justice Reference Archive (TJRA) catalogues over 2,000 incidents which raise suspicions that one or more killings occurred in circumstances amounting to a serious violation of international law. Of these, the majority are alleged to have been committed by Maoists, followed closely by the Security Forces and several where the perpetrator is unknown. In this chapter, these cases are analysed in relation to standards of IHL and IHRL under the collective title of "unlawful killings".

The available data shows that unlawful killings occurred throughout the conflict in multiple contexts: for example, during Maoist attacks on Security Force posts and bases, Government buildings, national banks and public service installations; in chance encounters and during ambushes, such as in the *Madi* bus bombing; during search operations by the Security Forces mounted in response to earlier Maoist attacks; and in the way that the local People's Liberation Army and political cadres abducted, ill-treated/tortured and killed suspected spies and informants. Unlawful killings were also perpetrated against enemy combatants and civilians who were in detention or otherwise under the control of the adversary, for example in execution-style killings. The most compelling case is *Doramba* where 17 Maoists and two civilians were allegedly taken under control by the Royal Nepal Army, marched to a hillside, lined up and summarily executed. The Communist Party of Nepal (Maoist) (CPN (Maoist)) also allegedly killed captives, for example three teachers, Muktinath Adhikari, Kedar Ghimire and Arjun Ghimire, who were each allegedly executed after abduction in separate incidents in Lamjung District in 2002.[172]

As noted elsewhere, the conflict comprised relatively few large-scale attacks, and the recorded cases confirm that the majority of alleged unlawful killings were apparently perpetrated in low-intensity, low-casualty circumstances. During the decade-long conflict there is only one record of ten or more people dying during a single 29 day period, as a result of allegedly unlawful killings connected to the conflict.

Geographically, the conflict started from, and impacted most severely, the Mid-Western Rolpa and Rukum Districts, and it was here that the highest number of alleged unlawful killings were recorded. As a low-intensity conflict, the killing gradually spread throughout the Mid-Western Region and later engulfed most of the country, especially after the collapse of the ceasefire in November 2001. When the second ceasefire collapsed in August 2003, the geographic centre of unlawful killings shifted to the Central Region.

The number of alleged unlawful killings at any given point generally corresponded to the intensity of the conflict at that time. For example, during ceasefires in 2001 and 2003, the

[171] Information previously obtained from the Ministry of Peace and Reconstruction website, Emergency Peace Support Operation.
[172] Muktinath Adhikari (Ref. No. 5985) was killed after abduction on 16 January 2002, Kedar Ghimire (Ref. No. 5982) was killed after abduction on 19 January 2002 and Arjun Ghimire (Ref. No. 5948) was killed after abduction on 27 June 2002.

number of conflict-related killings and alleged unlawful killings were both low. When the negotiations broke down there was a dramatic rise in violence with corresponding spikes in (1) the total number of people killed and (2) the number of allegations of unlawful killings by both sides to the conflict.

Incidents of alleged unlawful killings that resulted in five or more victims have been attributed to both Security Forces and the Maoists. However, the incidence of such events where the Security Forces were the alleged perpetrator increased noticeably during states of emergency.

An examination of notable increases in the number of alleged unlawful killings by each party to the conflict reveals that they did not occur at the same time. Rather, the picture that emerges is one of Maoist attacks leading to responses by the Security Forces where both interventions entailed allegations of unlawful killing. For example, the largest number of alleged unlawful killings attributed to the Security Forces occurred in March 2002 in the aftermath of a series of Maoist attacks in Rolpa, Salyan, Panchthar, Kavre and Achham Districts during the preceding three months. Similarly, a spike in alleged unlawful killings by Security Forces was recorded in October 2003 after high profile shootings by Maoists in Kathmandu and a series of attacks spanning districts in the Western, Mid-Western and Far-Western Regions that followed the collapse of peace talks in August 2003.

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

In its discussion of unlawful killings, this chapter will firstly articulate the relevant international legal framework applicable to killings during the conflict in Nepal. Based on the incidents contained in the TJRA, a discussion follows on the major patterns of killings. As with other chapters in this report, emblematic cases are employed to illustrate the pattern and also to show the application of the relevant international laws to the described facts.

5.2 GOVERNING LEGAL FRAMEWORK

While Chapter 4 of this report presented the framework of international sources of law relevant to armed conflicts in general, this section provides a more detailed presentation of the international law governing unlawful killings.

In the context of armed conflict, eliminating the enemy – including by killing them – is generally considered permissible. Stated otherwise, so long as all applicable IHL and international human rights law (IHRL) requirements are met, killing one's enemy during an armed conflict is not unlawful.[173] Yet, clearly, not all killings are permitted even during armed conflict.

[173] See Chapter 4 - Applicable International Law p. 61, IHL considers enemy combatants/fighters to be "legitimate targets," unless they are *hors de combat.* See *supra* section 4.3.2: Common Article 3 p. 63. *See also* Robert K. Goldman, "Certain Legal Questions and Issues Raised by the September 11th Attacks", *Human Rights Brief: A Legal Resource for the International Human Rights Community*, vol. 9, issue 1, available at www.wcl.american.edu/hrbrief/09/1sept.cfm: "Combatants may lawfully target and kill enemy combatants, as well as civilians who directly participate in the hostilities. As these persons are legitimate targets of attack, their deaths are treated as justifiable homicide for which the attacker incurs no liability under domestic or international law. Such killings do not . . . violate, in principle, the prohibition against arbitrary deprivation of life in human rights law."

The governing legal framework surrounding the use of lethal force during armed conflicts is discussed below with a view to setting out the contours of each category of violation. The aim of the analysis that follows is to assist in determining the legality of the conflict related deaths alleged in the remainder of this chapter.

5.2.1 Unlawful Killing under International Humanitarian Law: War Crimes

a) Murder

In specific circumstances, killing another person during an armed conflict amounts to murder and constitutes a war crime. The war crime of murder is established under both treaty law and customary international law and has been further recognised in the Rome Statute. In non-international armed conflict, under international criminal law, the elements comprising the war crime of murder in a non-international armed conflict have been defined as follows:

i. *The perpetrator killed one or more persons.*
ii. *Such person or persons were either hors de combat,*[174] *or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.*
iii. *The perpetrator was aware of the factual circumstances that established this status.*
iv. *The conduct took place in the context of and was associated with an armed conflict not of an international character.*
v. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*[175]

Thus, in the context of an armed conflict, murder is the intentional killing of a protected person when the perpetrator is aware of the circumstances of the victim and of the conflict itself. International criminal jurisprudence on the elements that constitute murder largely mirror those usually recognised under domestic criminal law. For example, even where the perpetrator does not directly kill the victim by his own hand, the act(s) of the perpetrator must at least be a "substantial cause of the death" of the victim, unless the perpetrator's responsibility is as a superior or commander.[176] Note that premeditation does not appear as a required element.

It is noteworthy that when a perpetrator intends to commit a different crime, for example torture or cruel treatment, but the victim of that crime (inadvertently) dies as a direct result of the perpetrator's conduct, a conviction for murder would be unlikely. Also, "lesser" crimes such as manslaughter or negligent homicide,[177] are not foreseen under international criminal law.[178] Thus, in the example of torturing a victim who (inadvertently) dies, if it cannot be proven that the perpetrator intended at the time to cause the death of the victim or that the perpetrator knew that his or her actions would result in the victim's death, then, under international criminal law, the charge would remain that of torture, and not of murder.

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[174] The definition of *hors de combat* is provided in Chapter 4- Applicable International Law, section 4.3.2, p. 63.
[175] Rome Statute, article 8 (2) (c) (i)-(iv), Elements of Crime (see footnote 145). Note that the mental element (*mens rea*) is not listed among these elements because the Rome Statute sets out "knowledge and intent" as the *mens rea* generally for all crimes.
[176] *Čelebići Case: Prosecutor v. Mucic et al.*, ICTY, Trial Chamber, no. IT-96-21-T, 16 November 1998, para 424. *See also International Criminal Court*, Elements of Crimes, ICC-ASP/1/3(part II-B) (2001) footnote 31 (equating the term "killed" with "caused death")
[177] These "lesser" crimes have a "lower" *mens rea*, for example recklessness or negligence. Although they do not comprise part of international criminal law, they are set out in many domestic criminal codes.
[178] Certainly a domestic legal system with jurisdiction over the acts committed could try such a case, assuming its applicable code contained those "lesser" crimes.

Conversely, when the perpetrator knows that his or her torture (or ill-treatment or mutilation) will result in the victim's death, murder is the appropriate charge.

b) Attack Against Civilians

This crime encompasses, for example, the acts of a commander who intentionally directs at least one attack against a civilian or population of civilians, as opposed to directing that attack against a military target. It is important to note that civilians are only protected from this type of attack for as long as they do not directly participate in hostilities. Further, "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[179] Therefore, even where enemy combatants are mixed in with a civilian population, it is a war crime to attack that civilian population.

Attacks against civilians are prohibited under international humanitarian law and qualify as a war crime, as also specified under the Rome Statute. To be established, the following elements must be proven:

i. *The perpetrator directed an attack.*
ii. *The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.*
iii. *The perpetrator intended the civilian population as such, or individual civilians not taking direct part in hostilities, to be the object of the attack.*[180]

It remains unclear under international law as to whether, for this crime to be complete, it is necessary that the attack results in a death. However, the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that customary international law requires proof that actual injury occurred, i.e., that there was death or at least injury to civilians.[181]

c) Indiscriminate attacks

Indiscriminate attacks are prohibited under IHL in both international and non-international armed conflicts. An attack is indiscriminate when it is not directed at a specific military objective;[182] employs a method or means[183] of combat which cannot be directed at a specific military objective; or employs a method or means of combat the effects of which cannot be limited as required by IHL. In these circumstances, where the nature of the attack is such that it could strike military objectives and civilians or civilian objects without distinction, it is indiscriminate.[184]

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[179] Additional Protocol I to the Geneva Conventions, 1949, article 50. The Appeals Chamber of the ICTY in *Kordić and Cerkez* confirmed that the definition of civilian population in article 50 of Additional Protocol I has reached the status of customary international law. *Kordić*, ICTY, Appellate Chamber (2004) (see footnote 147). *See also Prosecutor v. Kupreskic* et al., ICTY, Appellate Chamber, no. IT-95-16, Judgement, 14 January 2000, para 549: "[T]he population must be predominantly civilian"; *Limaj*, ICTY, Trial Chamber, (2005) para 186 (see footnote 150)

[180] Rome Statute, article 8 (2) (e) (i) "War crime of attacking civilians." (see footnote 145) Again, the final two elements have been purposefully omitted as they are identical to those of the above crimes.

[181] *Kordić*, ICTY Appellate Chamber (2004), para 67 (see footnote 147)

[182] The definition of "Military Objective" is set out in International Committee of Red Cross, *Customary International Humanitarian Law*, rule 8: "Military objectives are to limited those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage." Rule 9 states that "Civilian objects are all objects that are not military objectives." (see footnote 129)

[183] 'Means' of combat refer to weapons of warfare, instruments, tools and similar, such as a landmine, artillery piece, or rifle. 'Methods' of combat refer to how those instruments are employed. Both methods and means can be indiscriminate, giving rise to a violation of the rule.

[184] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 12 (see footnote 129)

An attack may be properly labelled as indiscriminate even if no death results. If anyone protected dies as a result of such an attack, that death may constitute a separate war crime.[185]

d) Disproportionate attacks

Similarly, in accordance with the principle of *proportionality* in attack, any military offensive must be foregone where the incidental damage expected "is excessive in relation to the concrete and direct military advantage anticipated."[186] Thus, where the military advantage is outweighed by the potential damage or death to civilians and/or civilian objects, the attack is forbidden. This rule applies despite the recognition that incidental injury to civilians, so-called "collateral damage", may occur even when an attack is lawful. Collateral damage does not in itself render an attack unlawful under IHL; rather, the damage is to be weighed in proportion to the significance of the military advantage that would be achieved in a successful attack.

e) Attacks lacking necessary precautions

IHL also obliges that "all feasible precautions" be taken to ensure that the objective of the military strike complies with IHL, and that the damage to civilians and civilian objects is kept to a minimum. The obligation extends for the duration of the attack, requiring that any attack be cancelled or suspended if it becomes apparent that the target is not a legitimate military target or that its status has changed.

A failure to take all feasible precautions does not *per se* mean that there has been an unlawful killing. However, the killing of a protected person that could have been avoided had the attacker undertaken all feasible precautions is unlawful under IHL.

f) War crime of sentencing or execution without due process[187]

However, in punishing perpetrators, a party may only carry out a sentence of death where all the "judicial guarantees generally recognized as indispensable" have been respected.[188] Where a person receives a death sentence without these protections, or is otherwise executed summarily, a war crime has been committed. The elements of this crime under the Rome Statute are as follows:

i. *The perpetrator passed a sentence or executed one or more persons.*[189]
ii. *This person or persons were either* hors de combat, *or were civilians, medical personnel or religious personnel taking no active part in the hostilities.*
iii. *The perpetrator was aware of the factual circumstances that established this status.*
iv. *The court*
    a. *Had not previously pronounced a judgment in the case, or*
    b. *The court that rendered judgment was not 'regularly constituted', that is, it did not afford the essential guarantees of independence and impartiality, or*

[185] Due to the gravity threshold, incidents of indiscriminate attack were recorded in the TJRA only when they resulted in the loss of life. Refer to Annex Two p. 229for detailed information on the methodology used to compile the TJRA.
[186] See International Committee of Red Cross, *Customary International Humanitarian Law*, rule 14 (see footnote 129).
[187] Rome Statute, article 8 (2) (c) (iv) "War crime of sentencing or execution without due process". (see footnote 145)
[188] For the list of such guarantees, see Chapter 4 – Applicable International Law p. 61.
[189] Recall that there are different forms of individual criminal responsibility. See Chapter 4 section 4.4 International Criminal Law and International Criminal Responsibility p. 65.

c. *The court that rendered judgment did not afford all other judicial guarantees generally recognized as indispensable under international law.*[190]

v. *The perpetrator was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial*[191]

g) Treacherously killing or wounding

IHL prohibits the use of treachery, for example, indicating to an adversary that if they surrender, they will be treated humanely and then killing that adversary when they do in fact surrender. This prohibition is criminalised, in both international and non-international armed conflicts, notably under the Rome Statute. The Elements of Crimes from the Rome Statute set out the following elements for this offence:

i. *The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.*
ii. *The perpetrator intended to betray that confidence or belief.*
iii. *The perpetrator killed or injured such person or persons.*
iv. *The perpetrator made use of that confidence or belief in killing or injuring such person or persons.*
v. *Such person or persons belonged to an adverse party.*[192]

h) Mutilation causing death

Mutilation as a separate crime is discussed in Chapter 7 on torture. When the mutilation causes the death of the victim - as cases in the TJRA allege - it may constitute an unlawful killing, as provided for under the Rome Statute, which provides the following constitutive elements:

i. *The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.*
ii. *The conduct caused death or seriously endangered the physical or mental health of such person or persons.*
iii. *The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.*
iv. *Such person or persons were in the power of another party to the conflict.*[193]

[190] With respect to elements iv and v, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.
[191] As above, the final two elements have been omitted as they are identical in each of the crimes mentioned here based on the Rome Statute.
[192] Rome Statute, article 8 (2) (b) (xi) "Elements of Crime" (see footnote 145). As above, the final two elements are purposefully omitted to avoid duplication.
[193] Rome Statute, article 8 (2) (e) (xi)-1 "Elements of Crime" (see footnote 145). There are two remaining elements which have been purposefully omitted simply because they are identical to the last two elements (4 and 5) of the crime of murder above.

i) International Humanitarian Law on Dealing with the Deceased

A related area of customary IHL deals with the treatment of the deceased during armed conflict. IHL requires that whenever circumstances permit, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate those killed.[194] The mutilation of bodies is strictly prohibited, and in fact the parties must undertake all possible measures to prevent the dead from being despoiled. These measures include facilitating the return of the remains of the deceased to their next of kin upon request, or returning them to the party to which the deceased belonged.[195] Personal effects must also be returned. Importantly, the conflicting parties are required to record all available information concerning the dead prior to disposing the body and they must mark and record the location of graves.[196] Failure to undertake these measures may contravene IHL.

5.2.2 Unlawful Killing under International Human Rights Law

The Right to Life under article 6 of the ICCPR is a right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.[197] The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee on Civil and Political Rights has elaborated on the application of this right during periods of armed conflict and noted that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life:

> *The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.*[198]

Specific attention has been given to the phenomenon of "targeted killings" and its legality under international human rights law, in light of increasing use of this practice by states arguing that they are fighting "terrorist" threats. A "targeted killing" occurs where lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals identified in advance by the perpetrator.[199] Outside of armed conflict, human rights standards, particularly those concerning the use of lethal force, determine the legality of the killing. A state-sponsored deprivation of life will be arbitrary in the legal sense unless it is both necessary and proportionate.[200] Therefore, when a state actor employs lethal force it must be in order to protect life (i.e., it must be proportionate). And, there must also be no other means available, such as capture or incapacitation, to curtail that threat to life (i.e., it must be necessary). Only under these limited circumstances is the resort to lethal force by the state legal.[201] This principle has also been elaborated as follows:

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[194] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 112 (see footnote 129).
[195] Ibid, rule 113.
[196] Ibid, rules 115-116.
[197] Derogation is allowed under article 4, ICCPR. Refer to the discussion in Chapter 4 – Applicable International Law, section 4.2.2 p. 63.
[198] *General Comment No. 6 of the Human Rights Committee: The Right to life* (CCPR General Comment No. 6), para 3.
[199] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council* (A/HRC/14/24/Add g) para 9.
[200] Ibid, para 32. These principles hold even within the realm of judicially-sanctioned capital punishment.
[201] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council* (A/HRC/14/24), para 32-33.

> *The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture…This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal.*[202]

IHRL obligations remain in effect during armed conflict and operate to limit the circumstances when an individual acting on behalf of the state actor, including a soldier during a non-international armed conflict, can employ lethal force. This is particularly the case where the circumstances on the ground are more akin to policing than combat. For example, in encountering a member of the opposing forces in an area far removed from combat, or in situations where that enemy can be arrested easily and without risk to one's own forces, it may well be that the IHL regime is not determinative. In such situations, combatants should ensure their use of lethal force conforms to the parameters of IHRL

5.3 PATTERNS OF ALLEGATIONS OF UNLAWFUL KILLINGS

The discussion now turns to patterns of unlawful killings identified during the compilation of this Report. Rather than attempting to provide a comprehensive or systematic listing of all unlawful killings allegedly perpetrated during the conflict, this Report presents common and observable elements such as the identity or affiliation of victims and perpetrators, the means and methods of killing, the context in which the killing occurred and the reported motive for killing. These patterns identified below are divided according to the alleged perpetrators.

5.3.1 Targeted Killings by Security Forces

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, a targeted killing occurs when a person deliberately and with pre-meditation employs lethal force against another individual or individuals identified by the perpetrator beforehand.[203] As noted in the above section, such deliberate killings in the course of hostilities are not necessarily unlawful. Assuming all other legal parameters are met, killing an enemy combatant can be a permissible under both IHL and IHRL. Conversely, the targeted killing of a civilian or a person *hors de combat* is clearly unlawful. Similarly, when the state kills an enemy combatant in certain circumstances, for example, when an arrest could be easily made with no risk to one's own forces, this act may be in violation of IHRL.

Early in the conflict, police alone conducted searches of suspected Maoists and affiliates. After the deployment of the Royal Nepal Army and the establishment of the Armed Police Force in 2001 and later the formal announcement of Unified Command, search teams were often a mixture of one or more of the three branches, with search operations tending to take place in locations from where the Security Forces could return to base without having to make an overnight camp. Whereas some operations were prompted by specific intelligence information, others were in response to Maoist attacks, and others took place during more general, routine search operations in areas believed to be Maoist-strongholds or to contain Maoist elements.

An examination of the TJRA indicates that victims of what appear to be targeted killings by the Security Forces do not fall into an easily discernible group. Victims included Maoist combatants, Party members, sympathizers and others suspected of being Maoists, but it also

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[202] Ibid.
[203] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council* (A/HRC/14/24).

included victims with more tenuous Maoist connections or no connection at all. Thus, the TJRA includes as victims of alleged unlawful killing local intellectuals, teachers, politicians, human rights defenders, farmers, relations of suspected Maoists and civilians who – willingly or not – provided Maoist cadres with food and shelter.

a) In Search Operations or Patrols

Unlawful killings in the context of search operations or patrols appear to have occurred both as a result of specific and pre-determined targeting, and during more sweeping operations where the Security Forces were acting on general information focused on Maoist strongholds or locations with known or reputed Maoist sympathies.

In situations where the Security Forces appeared to enter a selected locality with a specific target in mind, incidents included in the TJRA typically refer to the Security Forces going to the house of a named target, identifying the person and killing them on the spot, usually by gunshot. The alleged summary execution of Ramadevi Adhikari by the Unified Command Security Forces in 2005 is an illustrative case.

Emblematic Case 5.1 [204]

Narrative: On the night of 3 July 2005, Security Forces in civilian clothes woke up Ramadevi Adhikari and her husband at their home in Jhapa District. The victim was kept in the house while her husband was taken outside. From there, Security Force members were heard accusing Ramadevi of providing food to Maoists, the victim pleading for her life and then the sound of gunfire from within. The victim was found shot to death.

Analysis: In this case, the victim appears to have been targeted because she was believed to have provided assistance to the Maoists. The narrative indicates that the victim was a civilian who at the time of her killing was not taking "direct part in the hostilities," and thus was not a legitimate target under international law. Moreover, the victim was at home at night, and there is no suggestion of her having been armed, resisting the control of the Security Forces, or in any other way posing an imminent threat to the Security Forces personnel or anyone else.

That the Security Forces separated the victim from her husband, spoke with her, and then allegedly executed her, suggests a level of planning and premeditation as well as the required intent (*mens rea*) to kill the victim. If these facts were proven in a competent court, the perpetrator(s) could be convicted of murder as a war crime and of serious breaches of IHRL. Those also present with the perpetrator(s) who assisted in the killing could be convicted in the role of accomplice, while the superior officer(s) of this unit should be investigated as to whether they "knew of or should have known" of this unlawful act and whether they took the steps required under international law to prevent or punish the act.

At times, the Royal Nepal Army could be seen bringing "informants" (such as detained Maoist suspects) to locations, forcing them to point out other Maoists and Maoist supporters.[205] Accounts indicate that such use of informants included torture by Security Forces in advance, with threats of further ill-treatment if the detainee failed to deliver the names of Maoist cadres and supporters. According to one account, during the course of an

[204] Ref. No. 2005-07-03 - incident - Jhapa _1552
[205] OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, p.31-32.

alleged torture, a Royal Nepal Army soldier told the alleged victim: "Give us names. Any name you can give. Then we will not beat you."[206]

Materials examined during the compilation of this Report raise suspicions that the Security Forces may have deliberately killed combatants of the People's Liberation Army, Maoist cadres and other affiliates during periods when the victims were not engaged in fighting and where circumstances suggest that less lethal means of force could have accomplished the intended objective. An example is the killing of CPN (Maoist) affiliate Nirajan Thapa in Mahamadpur Village Development Committee (VDC)[207], Bardiya District.

Emblematic Case 5.2 [208]

Narrative: During one of the frequent patrols in Mahamadpur VDC in late February 2004, approximately sixty armed Nepal Army soldiers in uniform entered a village in pursuit of four suspected Maoists. Two were captured and one fled. A third suspect, Nirajan Thapa, who was reportedly unarmed, was located attempting to hide by a bamboo tree near one of the houses in the village. Two soldiers found him while many other soldiers were nearby. Standing approximately 1-5 meters away, and despite Thapa reportedly pleading for his life, the two soldiers fired three rounds into the victim, killing him.

Analysis: If Thapa was a civilian, his killing in this incident was manifestly unlawful unless he was directly participating in hostilities when killed. If it was unclear to the Nepal Army whether Thapa was a member of the CPN (Maoist) fighting forces, they should have presumed he was a civilian and treat him humanely. If he was clearly a member of the CPN (Maoist) fighting forces, the facts give rise to the question of whether Thapa was *hors de combat*, as he would have been if he was either "under control" of the Nepal Army at the time of the shooting, or if he had surrendered. If so, he should have been treated in accordance with Common Article 3 of the Geneva Conventions. Moreover, the facts suggest that Thapa could easily have been arrested by the soldiers who were well in control of the area.

b) In collective retaliation

Another type of targeted killing appears in circumstances of a spontaneous and retaliatory nature. These killings occurred in response to action taken by the Maoists against the Security Forces, but the retaliatory killings were not against the individual Maoist(s) in question. Instead, the target may have been an individual associated with the original attacker, or someone who simply may have been at the wrong place at the wrong time. The following incident is an example.

[206] OHCHR confidential source Ref. No. 0739. For more details about the reality of intelligence-gathering, *see* Kiran Nepal, *The Nepali Security Sector: An Almanac* (Hungary, Brambauer Publishers, 2009), pp. 191-206.
[207] During the Panchayat regime VDCs were called Village Panchayats. On 26 April 1990, all the Village Panchayats, Municipal Panchayats and District Panchayats were dissolved and the names were changed into Village Development Committee (VDC), Municipality and District Development Committee respectively. Nepal Gazette, Part 40, 26 (April 1990). The constituting Acts (Village Panchayat Act and District Panchayat Act were replaced by the Village Development Committee Act and the District Development Act. Since April 29 1999, an umbrella law called the Local Self-Government Act, 1998 has replaced all the VDC, Municipality and DDC Acts.
[208] Ref. No. 2004-02-00 - incident - Bardiya_5225.

Emblematic Case 5.3[209]

Narrative: On 20 February 2002, during the first state of Emergency and three days after Maoists attacked Mangalsen, the District Headquarters of Achham District, a group of Maoists shot at an army helicopter trying to land at the remote Suntharali airport strip in Kalikot District. At the time, a group of labourers were doing construction work at the airfield. On 24 February, Nepal Army personnel arrived at the place the labourers were staying. Two representatives attempted to present the workers' identity cards to the Army, but they were allegedly shot and killed. According to reports, Nepal Army soldiers then took all 35 labourers out of their huts and shot them dead.

Analysis: On its face, there appears to have been no reason for this killing other than retaliation for the attacks on the helicopter and on Mangalsen. The multiple victims were unarmed civilians, not directly participating in hostilities. The event occurred several days after a helicopter was shot at, and at the time of the killing, there is nothing to suggest that the victims posed a threat to Nepal Army personnel or on anyone else. Nor does there appear any attempt on the part of the Nepal Army to distinguish Maoist combatants from the civilian labourers. This case, if the facts are proven in a competent court, may amount to a serious violation of IHL and IHRL, including the war crime of murder.

c) Deaths in Custody

i) Deaths in Army Barracks and Police Detention Facilities

Regardless of the status of the victim, killing someone after taking him/her under control is unlawful. Throughout the conflict, victims were allegedly unlawfully killed after arrest, during detention, or otherwise when under the control of the Security Forces. The vast majority of such cases involved torture or ill-treatment, mostly during interrogation inside the barracks and police stations across the country. These methods of ill-treatment are set out in detail in Chapter 7 on Torture. Even if the Security Forces did not deliberately kill the alleged victims, it appears that certain detainees died as a direct consequence of the torture they allegedly suffered. The following case is an example.

Emblematic Case 5.4[210]

Narrative: On 10 June 2002, a large group of police officers, some in uniform and the others in civilian clothes, conducted a search and arrest operation in Jammunitole village, Kohalpur VDC, Banke District, in response to a suspected Maoist arson attack on a nearby forestry ranger station about a month before. Amongst the group of suspects arrested was a 14-year old civilian, Narda (or Nanda) Ram Gharti. All the detainees, both adults and minors, were taken to Kohalpur police station, and then to Chisapani Barracks, where they were allegedly severely beaten while being questioned about the arson attack. After 11 days, most of the detainees were taken back to the Kohalpur police station, but by that time, Narda reportedly had swelling all over the his body. Although he was later taken to Nepalgunj Zonal Hospital for treatment, he reportedly died from his injuries on 8 July 2002.

[209] Ref. No. 2002-02-24 - incident - Kalikot _5419
[210] Ref. No. 2002-02-24 - incident - Banke _5419

Analysis: In this case, the victim was a civilian minor who did not appear to be taking direct part in hostilities at the time of his arrest and thus was not a legitimate target under international law. Being a minor, his detention should have been undertaken only as a last resort. Even if his detention was necessary, the authorities should have done their utmost to meet the particular needs of minors, including by separating him from the adult detainees.

The narrative indicates that state agents allegedly perpetrated the beating. If established, the maltreatment inflicted may amount to torture and possibly unlawful killing. An investigation is necessary to determine whether members of the Security Forces hierarchy either knew or should have known about the incident and, if they did, whether they failed to take adequate measures to prevent or suppress the crimes.

Incident data reveals that the Security Forces apparently disposed of the bodies from similar incidents in various ways. In some cases the bodies of those killed were returned to relatives, in other instances bodies were allegedly disposed of in the jungle, buried in graves, burned or, in some cases, never identified.

ii) Killings After Apprehension But Before Detention

The TJRA contains incidents where the Security Forces allegedly perpetrated killings after taking people under control but before formally detaining them in detention facilities or barracks. The phenomenon was especially noted during the earlier years of the conflict. At least one human rights observer attributes this pattern to the Police simply not wanting to deal with the arrestee.[211] Some cases allege that after the Security Forces apprehended individuals, they took them to secluded places and shot them dead. According to witness accounts and evidence taken from the bodies, a significant majority of the alleged victims experienced torture or ill-treatment before being killed. The well-documented *Doramba* case is indicative of this pattern.

Emblematic Case 5.5 [212]

Narrative: On 17 August 2003 during a ceasefire, Nepal Army personnel pretending to be Maoists asked some villagers for directions to the house where Maoists were holding a meeting in Doramba VDC, Ramechhap District. When they arrived, the Nepal Army surrounded the house in which Maoist members were gathered.

When the occupants realized that they were surrounded, a few fled the scene, one of whom was shot dead by the Nepal Army on the spot. Nineteen people (reportedly 17 Maoists and two civilians), including five women, were allegedly taken under control and, with hands tied, forced to walk to nearby Dandakateri hill. They were lined up and summarily executed from close range with rifle shots to their heads and chests. Their bodies were allegedly tossed over a slope close to the execution site.

[211] Amnesty International illustrated this point by citing a Deputy Superintendent of Police who reportedly reprimanded a subordinate for bringing a suspected Maoist into a police station saying, "Why did you not kill him on the way?" Amnesty International, 1997, *Nepal: Human rights violations*, p. 13 (see footnote 29).
[212] Ref. No. 2003-08-17 - incident - Ramechhap - _i3381.

Analysis: In this case, the Nepal Army took victims that were clearly under their control and *hors de combat* to a secluded place and killed them. Although 17 of the 19 captured were reportedly Maoists, there was no attempt to distinguish those Maoist members from others who did not take direct part in hostilities. In any case, the intentional killing of anyone after taking them under control violates IHL. If established by a competent court, the circumstances of this mass killing may amount to the war crime of murder, in breach of both IHL and IHRL

Claims have been made that these persons were allegedly "killed while escaping,"[213] allegedly killed by other Maoists who attacked the patrol,[214] or allegedly killed during a Maoist ambush. In this regard, it is noted that in the case above, the RNA initially made a public claim that the deaths in *Doramba* resulted from a Maoist ambush, even though no injuries were apparently sustained by RNA personnel involved. Although these killings appear to have been usually committed in secrecy, some cases recorded in the TJRA involved allegedly marching the victim(s) into a village prior to execution and even executing victims in front of villagers.

Emblematic Case 5.6 [215]

Narrative: On 13 July 1996, a college student Rabi Khatri Chhetri was allegedly arrested by the police in Magma VDC, Rukum District during which he was shot in the leg. After being taken alive to the VDC office, police officials allegedly discussed what to do with him. Following the discussion, he was reportedly shot in the chest and died.

Analysis: In this case, although whether Rabi Khatri Chhetri directly participated in the hostilities is unknown, he reportedly was under the control of police personnel, injured, and at the time of the killing, apparently posed no threat to the life of the police or anyone else. Therefore, provided that these facts are proven, the alleged killing of Rabi Khatri Chhetri may amount to the war crime of murder, under both IHL and IHRL.

d) Killings of Surrendered Maoists

The Government made public calls for Maoist cadres to surrender and published a policy paper, *Call upon from His Majesty's Government, Ministry of Home Affairs*, in December 2003. It guaranteed the life and security of the surrendered Maoists and their family members, and offered a general amnesty. Subsequent policies also offered rewards for handing over weapons and armaments.[216] According to reports, some who surrendered were incorporated into underground or vigilante groups[217] and others were used as informants. However, there are cases where cadres who presented themselves to the Security Forces, indicating an intention to surrender, were allegedly killed.

[213] The TJRA records at least 44 incidents of unlawful killings by Security Forces, which involve a claim that the victim(s) was/were trying to escape when killed.
[214] *See, e.g.*, the killing of Maoist cadre [name withheld] after his arrest in Budhathum VDC, Gorkha District, on 6 February 2006. OHCHR confidential source.
[215] Ref. No. 1996-07-13 - incident - Rukum _5652.
[216] *See, e.g.*, Nepal Government, "Government's Policy for Surrender", 18 December 2003.
[217] International Crisis Group, *Nepal's Maoists*, p 3 (see footnote 28): "Reports quote RNA commanders as confirming they have co-opted at least 39 Maoists into a 'village security force' to fight their former comrades."

Emblematic Case 5.7 [218]

Narrative: In the afternoon of 19 February 2004, five or six armed men, believed to be Maoist combatants, were inside a house in Pedari Village, Bankotuwa VDC, Banke District. A group of army personnel surrounded the house and snipers reportedly positioned themselves in nearby trees. Reportedly, the army called out to the Maoist combatants that they had surrounded the house and assured them that they would be safe if they surrendered. After some time, the door opened and two unarmed persons apparently emerged with their hands up in the air one after another. Allegedly, the first one was immediately shot dead by the army snipers, and upon the shooting, the rest of the Maoist combatants started to flee. All were allegedly shot dead while fleeing.

Analysis: This case appears to contain several alleged violations of international law. While the victims appear to be Maoist combatants - meaning they could have been legitimately targeted during hostilities - the first cadre who exited the house reportedly showed a clear sign of surrender. A genuine attempt at surrender places a combatant *hors de combat*, and thus no longer a legitimate target. The deliberate killing of someone *hors de combat* is a war crime. In addition, communicating to an enemy that by surrendering they will be spared, and then deliberately killing them, amounts to "killing treacherously a combatant adversary," an act prohibited under IHL. If these facts are proven in a competent court, this killing may amount to a war crime under IHL and represent a serious breach of IHRL.

e) Unlawful Killings by the Security Forces in Violation of Customary International Law

i) Failing to Discriminate Among Targets

Incidents catalogued in the TJRA include cases where the Security Forces allegedly failed to distinguish between combatants and civilians, where the attacks allegedly conducted by the Security Forces appear disproportionate, and where the Security Forces allegedly failed to take necessary precautions during an attack to protect the civilian population.

There appears to have been a pattern of indiscriminate attacks conducted in villages or crowds in the context of searching for and arresting suspected Maoists. The TJRA contains a number of incidents of this nature, at least ten of which took place following an attack by Maoists on a police outpost or army barracks and where the Security Forces allegedly fired without aiming at a specific target or not in pursuit of a particular military objective.

Alleged unlawful killings of a similar nature occurred during or subsequent to a political, educational or cultural programme organized by Maoists, or student gatherings, festivals, or even peaceful demonstrations. At times, security Forces allegedly shot into a crowd composed at least largely of civilians. This pattern is well illustrated in Emblematic Case 5.8.

There are other cases that raise questions as to whether or not the use of force, resulting in civilian casualties, was "excessive" when weighed against the concrete military advantage anticipated.[219]

[218] OHCHR confidential source

[219] *See, e.g.*, OHCHR-Nepal, *Investigations into violations of international humanitarian law in the context of attacks and clashes between the Communist Party of Nepal (Maoist) and Government Security Forces, January – March 2006*, pp.15-16: Case 9 relating to a clash between RNA and People's Liberation Army on 26 and 28 February 2006; and Case 12 relating to the People's Liberation Army's attack and Security Forces' response in Ilam District Headquarters, Ilam District, on 5 March 2006.

Emblematic Case 5.8[220]

Narrative: On 14 January 2000, around 60 villagers, including a number of women and children, who had been instructed by Maoists to attend, gathered for a cultural programme at a school in Dungal village, Dankhu VDC, Achham District. After a 14-person police patrol team approached, a Maoist lookout reportedly fired a warning shot whereupon all but two of the Maoist cadres fled the venue. Villagers also ran from the school and took shelter in nearby houses and tea shops. Police allegedly opened fire indiscriminately in the direction of the houses and shops. At least two civilians hiding in a tea shop were killed by police rifle shots and others were shot while running for a place to hide. In the incident, seven civilians including two minors were reportedly killed. Two Maoists were arrested. Altogether, 11 civilians were allegedly injured.

Analysis: This case indicates a possible failure to distinguish Maoist combatants (legitimate targets) from civilians (illegitimate targets). Whether the Security Forces undertook the necessary precautions to minimize the threat to civilian lives is unclear. The failure to distinguish their targets and take necessary precautions is a violation of IHL and IHRL. If proven, this case could result in multiple counts of the war crime of murder, or unlawful attack on civilians or a civilian population.

ii) Aerial bombing

In incidents that were investigated by OHCHR-Nepal between January and March 2006, it was found that while conducting attacks in civilian areas, Maoist used and hid in residences and premises such as schools, shops and shopping streets. This tactic made it difficult for the Security Forces to resort to ballistic weapons without harming civilians.[221] Such action, however, does not alter the unlawfulness of aerial bombing if it is the case that the RNA failed to distinguish between combatants and civilians. An example case is as follows.

Emblematic Case 5.9[222]

Narrative: During the night of 8 May 2005, siblings, Lukhidevi Shah aged five, and Sanjeev Shah aged eight, were killed by an 81-mm mortar bomb dropped from a Nepal Army helicopter in a civilian residential area in Siraha District. Another bomb was dropped and hit a nearby house killing two civilians, including one pregnant woman. Two other bombs were dropped but did not cause fatalities. As a result of the aerial bombing and shooting into the civilian area by Security Forces, nine civilians were killed and 19 civilians injured. In this case, it was reported that the Maoists did not allow the villagers to leave the village while they engaged in hostilities with the army.

[220] Ref. No. 2000-01-14 - incident - Achham _2110.
[221] See footnote 219.
[222] Ref. No. 2005-05-08 - incident - Siraha _1567.

Analysis: There is no information on the number of Maoist combatants who were engaged in the hostilities, nor the positions that those combatants occupied in the Maoist structure. There is also no objective information available on the number of Maoist combatants who were killed or captured in the operation. Without such, it is not possible to weigh the proportionality of the military advantage anticipated against the number of civilian casualties. However, the Maoists' engagement in hostilities in a civilian residential area, while forcing civilians to stay in the village, could be found by a competent court to amount to using humans as shields. Intentionally co-locating military objectives and civilians in an effort to prevent the targeting of those military objectives is a violation of the customary rules on the distinction of legitimate from illegitimate targets. It gives rise to a serious violation of IHL on the part of the Maoists, if the facts are proven.

On the other hand, one conflict party's use of humans as shields does not lessen the obligation on the adverse party to distinguish between legitimate and illegitimate targets, to refrain from attacking indiscriminately, to protect civilians and to give precautions. The Nepal Army's aerial bombing in a civilian residential area at night, without vacating the civilians, could amount to an "indiscriminate attack" for two reasons. First, precautions could have been taken, such as alerting and/or evacuating the civilian population in advance. Second, it may be that the weapon chosen was not or was not capable of being targeted at a specific military objective, with the resulting civilian casualties. Considering these points, a competent tribunal could determine that a violation of the laws and customs of war occurred.

5.3.2 By the CPN (Maoist)

a) Targeted killings

Cases recorded in the TJRA indicate that, in some instances, the CPN (Maoist) also killed civilians deliberately.[223] The civilians targeted include those who were seen to be an enemy of the "People's War", such as "feudalists" or "royalists"; rival politicians; local authority personnel, such as secretaries of Village Development Corporations; intellectuals and teachers; those who left CPN (Maoist) or surrendered; family members of Security Forces; human rights defenders and journalists; and those who provided food, shelter, medicine or any other service to Security Forces. In addition, those who committed serious crimes, according to Maoist values and rules (such as alleged murderers, rapists, thieves, bigamists, those accused of incest and those who ill-treated others of a low caste), were also victims of targeted killings during Maoist parallel activities relating to law and order and administration of justice.

Foremost in this category were "spies" and "informers," people who the Maoists believed to be providing information to the enemy.[224] Over 1,000 incidents containing allegations of unlawful killings are recorded in the TJRA and amongst these cases, several hundred cases

[223] It is noteworthy that distinguishing members of the Security Forces from civilians is comparatively easier than distinguishing between the various roles within the CPN (Maoist) structures (such as cadres and combatants) from civilians, especially early in the conflict when the CPN (Maoist) did not have readily distinguishable uniforms.
[224] Kiran Nepal claims that as little as less than 5 per cent of those killed by the Maoists on the charge of intelligence-gathering were bona-fide State spies. "As per the statistics of the National Investigation Department, some hundred and fifty spies were killed by the Maoists. Among the total killed, only 21 were declared martyrs by the Government. The names of others were not disclosed as they were undercover." Nepal, *The Nepali Security Sector*, p. 203 (see footnote 206)

appear to involve some allegation of spying on the part of the victims. Cases indicate that some victims were made to suffer before being killed.[225]

Because the Maoists had a clear and open policy of eliminating their enemies, whether civilians or combatants, such targeted killings were often public and no attempt was made to cover up the act. Indeed, some of these targeted killings took place in public places or in front of gatherings,[226] in broad daylight[227] or in circumstances where family members were forced to watch.

Emblematic Case 5.10[228]

Narrative: On 15 August 2004, Lal Bahadur Roka, who had been staying at Baglung Bazaar in Baglung District after being displaced, was abducted by Maoists along with his son. They were taken to Hill VDC, where Lal Bahadur was beaten to death with a wooden implement. His son was forced to watch and was then warned that he would be killed as well if he refused to help the People's War.

Analysis: This case involves the war crime of murder. It is a war crime to deliberately kill a civilian or person *hors de combat*. The beating of the victim may itself also constitute torture. In addition, being obliged to watch the execution of his father would most likely amount to psychological torture or ill-treatment of the son, if the facts are proven in a competent court. There should also be an investigation as to whether the perpetrators' superiors "knew or should have known" that this crime was committed and whether they took appropriate measures.

The weapons used and lethal injuries sustained in such killings varied. Victims were beaten to death, killed with an axe or a *khukuri* (traditional Nepalese knives), and limbs were severed with a knife or saw. Some died of multiple broken bones and others were beheaded or burned to death. Still others were killed with explosives.

[225] *See, e.g.*, the killing of Dhana Raj Rokaya on 15 May 2004 in Rara VDC, Mugu District. His hands and legs were cut off before he was shot dead. Ref. no. 2004-05-15 - incident - Mugu _5202.
[226] *See, e.g.*, the case of Karna Bahadur Rawat, who was abducted in the District Headquarters of Humla District on 17 January 2003. He was made to talk in front of the people's gathering and shot dead, allegedly leaving the CPN (Maoist) party and surrendering to the administration. Ref. no. 2003-01-17 - incident - Humla _5303.
[227] *See, e.g.*, the case of Bijaya Lal Das, of the Nepal Sabhavana Party (NSP) and mayoral candidate in Janakpur, Dhanusha District. He was reportedly shot during the afternoon of 22 January 2006 by two individuals while sitting outside NSP's office. The CPN (Maoist) acknowledged their responsibility alleging he was shot because he was a State informer. Ref. no. 2006-01-22 - incident - Dhanusha _0090.
[228] Ref. No. 2004-08-15 - incident - Baglung _5830.

Emblematic Case 5.11[229]

Narrative: In an incident in Bhandariya village, VDC, Banke District in June 2003, a group of men who identified themselves as Maoists rounded up about 14 villagers. They were taken to a public spot and tied up. In front of the public, including family members and children, the perpetrators accused the group of providing information that assisted the Nepal Army in killing three CPN (Maoist) cadres. Three of the victims were later found dead with their arms and legs broken and with gunshot wounds. Another of the victims suffered injuries to his feet which left him disabled.

Analysis: The facts in this case, if proven, would support a guilty verdict on the war crime charge of "sentencing or execution without due process." Irrespective of the gravity of the charge against them, these 14 individuals, and especially the four that were killed or injured, should have been subject to an adjudicative process that afforded all core judicial protections. Alternatively, killing or injuring any of these 14 after having brought them under control was a violation of Common Article 3 of the Geneva Conventions and was manifestly unlawful.

b) Killing Upon Apprehension

Especially early in the conflict when the Maoists had fewer sophisticated weapons at their disposal,[230] the means they employed to engage the Security Forces usually required their enemy to be within reach, if not fully under their control. Such circumstances may explain the high number of persons recorded in the TJRA who were allegedly killed by Maoists after being apprehended. However, what is not explained or excused is the high number of civilians that were victims of such killings, nor the ill-treatment and/or torture they reportedly suffered prior to their death. IHL prohibits deliberately taking the life of a person who is under the control of a party to the conflict, regardless of the victim's status.[231]

Collected cases indicate that victims in this category suffered beatings, severed limbs and body parts, mutilation and fractured bones.

Emblematic Case 5.12 [232]

Narrative: On the night of 3 July 2002, a number of CPN (Maoist) cadres surrounded the house of a civilian, Chandra Bahadur Khatri, in Kunathari VDC, Surkhet District and took him away. The victim's wife and children found him the next morning in a nearby empty building. He was severely injured and begging for water. He told his family that he had been beaten by over 50 Maoists with sticks and axe handles. His feet were mutilated. He died five hours later. The reason for his killing is unknown.

[229] Ref. No. 2003-06-19 - incident - Banke _5288. See section 5.2.1 (f) for a discussion of judicial protections.
[230] International Crisis Group, *Nepal's Maoists*: *Their aims, structure and strategy*, Asia Report no.1104, 27 October 2995 [hereinafter International Crisis Group, *Nepal's Maoists*] p.1 (see footnote 28). Early on, the Maoists tended to carry implements such as axes, pitchforks, and pickaxes, as well as *khukuris*, *lathis* and similar.
[231] With the sole exception of a death sentence handed down by a regularly constituted court after a trial at which the entire range of fundamental judicial guarantees were afforded. See Chapter 4 - Applicable International Law p. 61.
[232] Ref. No. 2002-00-00 - incident - Surkhet _5441.

Analysis: The victim in this case is reportedly a civilian and appears not to have been engaging in hostilities. The deliberate killing of a civilian is a war crime. Even if he had been a combatant, he was under the control of the Maoists, which would have made him a person *hors de combat*. It was thus a war crime deliberately to kill him in any event. It appears that both torture and mutilation were perpetrated due to the severe beating and cutting of his feet, respectively. Therefore, multiple violations of customary and treaty international law, both IHL and IHRL, appear to have been perpetrated and the facts should be investigated by a competent tribunal.

Another case illustrative of this pattern:

Emblematic Case 5.13 [233]

Narrative: In June 2004, a large number of Maoist cadres surrounded the house of Kamal Poudal, a "peon" from Gadi VDC-4, Surkhet District. The Maoists ordered Kamal to come with them while they locked his remaining family members into the house. Later on the same day, the same cadres visited his family again, and told them that they had killed Kamal because he was a spy. The family found his body nearby.

Analysis: In this case, the victim was not a member of the Security Forces, nor was he taking direct part in the hostilities at the time of killing. Accordingly, he was not a legitimate target under the laws of armed conflict. The facts indicate a deliberate killing, judging from the information that was passed on to the victim's family members by the perpetrators. This case would amount to a war crime of murder, if the facts are proven in a competent court.

c) Summary executions as a result of a quasi-judicial procedure – i.e. Capital punishment in the People's Court

In certain areas during the conflict, the CPN (Maoist) provided or imposed law and order functions parallel to those of the State. The Maoists exerted their authority to enforce their criminal code, other Maoist rules and values, and also to remove obstacles to their "People's War".

When the "People's Court" decided who it wished to interrogate or punish, they were summoned by various means: by visits of CPN (Maoist) cadres to their homes;[234] directly from the court in written form or by a notice pinned to the door or wall of their residence; verbally, by someone representing the court or via a neighbour or family member or by phone. Reports suggest that, particularly in rural areas, such summons were well heeded by recipients since to ignore them meant to risk both forcible abduction and a separate punishment. The TJRA contains cases of persons who were killed allegedly for failing to appear as directed.[235] The "crimes" in such cases included "spying" or assisting the State,[236]

[233] Ref. No. 2004-06-00 - incident - Surkhet _5198.
[234] *See, e.g.*, Ref No. 2006-10-18 - incident - Kathmandu _0011. The victim, who was visited by 25 to 30 people in civilian clothes on 17 October 2006, was told to report to Sangla VDC (where the People's Liberation Army was reportedly based) within seven days.
[235] *See, e.g.*, case of Bhim Bahadur Khatri, 18-years-old, of Laxminagar VDC, Doti District, who was killed by Maoists on 30 March 2004, allegedly after he failed to appear in response to a summons. Ref. No. Ref. No. 2004-03-30 - incident - Doti _2001.
[236] *See, e.g.*, the case of Bhadra Sanjyal, executed in mid-July 2001, following a judgment by a People's Court in Kalikot District. Ref. No. Ref. No. 2001-07-00 - incident - Kalikot _5484.

posing as Maoists, collecting donations in the name of Maoists,[237] rape,[238] theft,[239] burglary,[240] corruption,[241] incest[242] and disobeying orders.[243]

When the "People's Court" delivered a "sentence," the accused was liable to various forms of severe punishment, including beating,[244] forced labour[245] or death.[246] In certain cases where capital punishment was inflicted, the body was left with a note saying that the victim was executed due to a crime that he/she committed[247] or a notice was posted in a public place[248] or an announcement made on the radio.

The formation and function of the "People's Court" varied from place to place. In some areas, it appears to have consisted of little more than the local CPN (Maoist) leadership, such as the District-in-Charge, who determined the verdict and punishment. In other cases, there were "judges" - sometimes only one - who were legally trained and who sat and discussed the case and delivered a sentence to the accused. The court in theory applied its own legal code, the "Public Legal Code," which the Maoists promulgated in 2003.[249]

Emblematic Case 5.14[250]

Narrative: In 2001, Bhadra Simkhada, a civilian woman from Kalikot District, was abducted by CPN (Maoist) cadres. She was reportedly taken in front of the "People's Court" on the suspicion of providing information about the Maoists to the police. She was sentenced to death and was subsequently executed. Following the court's decision, a notice was posted in the village.

[237] *See, e.g.*, the case of Santosh Bishwakarma of Medebas VDC, Dhankuta District, who was executed in August 2004 as punishment on charges of collecting donations while posing as a Maoist, as well as of committing incest. Ref. No. 2004-08-00 - incident - Dhankuta _1643.
[238] *See, e.g.*, the case of Ause Tamata, of Taranga VDC, Surkhet District, who was abducted by Maoists on 10 June 2006 on allegation of rape. Ref. No. 2006-06-10 - incident - Surkhet _4892.
[239] *See, e.g.*, the case of Santa Bahadur Bishwakarma, who was abducted by Maoists on 6 September 2006 in Ishaneshwor VDC, Lamjung under accusation of theft. Although available information does not explicitly state the involvement of People's Court, it is reported that he was interrogated, beaten and died. Ref No. 2006-09-07-incident - Lamjung _5720.
[240] *See, e.g.*, the case of Bikaram Rana and Furse Surya Thapa, who were abducted by CPN (Maoist) cadres on 13 March 2006 from two different places in Rupandehi District in relation to a burglary case. While there is no clear indication of People's Court's involvement, information suggests that there was a group of CPN (Maoist) cadres who investigated the burglary case after receiving a complaint. Ref. No. 2006-03-13 - incident - Rupandehi _5738.
[241] *See, e.g*, the case of Raghu Bir Joshi, who was killed by Maoists on 16 April 2005 after being abducted in Mahendranagar, Kanchanpur District. Maoists blamed him for corruption and extortion. There is no clear indication of the direct involvement of the People's Court, but he was targeted by Maoists for alleged corruption. Ref No. 2005-04-16 - incident - Kanchanpur _1954.
[242] Case of Santosh Bishwakarma, Ref. No. 2004-08-00 - incident - Dhankuta _1643.
[243] *See, e.g.*, the case of Sushil Gyawali and his wife Rekha Gyawali, who were allegedly stabbed by Maoist cadres in Motipur VDC, Bardiya District, on 13 February 2006, on charge of disobeying orders. Ref. No. 2006-02-13 - incident - Bardiya _4935. *See also* Netra Bahadur Dangal of Irkhu VDC, Sindhupalchok District, was allegedly shot dead by Maoists on 26 December 2001 on the charge of opposing the CPN (Maoist). Ref No. 2001-12-26 - incident - Sindhupalchok _1166.
[244] *See, e.g.*, the case of Prem Bahadur Thokar , who was abducted in Jagatpur VDC, Chitwan District on 12 May 2006, allegedly beaten and tortured to death. CPN (Maoist) District Secretary stated that the decision had been to subject him to torture but not to kill him. Ref. No. 2006-05-12 - incident - Chitwan _0064.
[245] There are 42 cases in the TJRA that involve forced labour.
[246] *See* Bhadra Sanjyal, *supra* footnote 236.
[247] OHCHR source confidential Ref. No. 5742.
[248] OHCHR source confidential Ref. No.5484.
[249] For details about the "People's Court" and the "Public Legal Code", see Chapter 9 - Accountability and the Right to an Effective Remedy p. 176.
[250] Simkhada is the name in the INSEC victim's profile, in the TJRA the surname is Sanjyal. 2001-07-00 - incident - Kalikot _5484.

Analysis: It is a war crime to pass a sentence and carry out an execution "without a previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable". OHCHR is unaware of a single instance where the full panoply of judicial protections was afforded to a defendant charged by the "People's Court". A competent tribunal should investigate this and similar cases to determine whether such fundamental judicial guarantees were in fact provided. Where they were not, a war crime may have been committed.

d) Unlawful Deaths During Combat

The above violations were premised upon the targeting of specific individuals. However, the TJRA also records incidents alleging unlawful death, which occurred in more traditional combat operations. If proved, these cases may amount to violations of the IHL governing the conduct of actual hostilities. As with similar violations involving the Security Forces, the discussion in this section centres both on who and what can be targeted, as well as how to conduct hostilities within the boundaries of the laws of war. Examples of violations in this regard include instances where the Maoists failed to distinguish between civilians and combatants, conducting disproportionate attacks in comparison to the concrete military advantage anticipated, failing to take necessary precautions during an attack to protect the civilian population, as well as killing an enemy serviceman in a way that causes unnecessary suffering.

A pattern that appears to have occurred based on the cases recorded in the TJRA shows instances of killings of individuals who were not targeted by virtue of their actual or perceived membership, affiliation or support of the enemy, but simply to create terror and/or to strengthen the Maoist control over the population. Common to this pattern was the use of explosives, either by aiming them at a certain target or by throwing or leaving explosives in a place where civilians frequent.

The best-known case is the *Madi bus* bombing case.

Emblematic Case 5.15: The Madi Bus Bombing Case [251]

Narrative: At around 6am on 6 June 2005, an overcrowded public bus left a bus station in Chitwan District with approximately 150 passengers, including a large number of children. Twelve RNA personnel in civilian clothes, some carrying side arms, were also on the bus. While the bus was stationary at a riverbank in the Madi area, there was a large explosion which lifted the bus in the air. The middle section of the bus was completely destroyed. Thirty-nine passengers were killed in the blast: three RNA soldiers and 36 civilians. A further 72 persons were injured, including four RNA personnel. The CPN (Maoist) admitted responsibility for the incident and described the explosive as a "bucket bomb" linked with wires to a site about 200 meters away from which it was detonated electronically. The incident took place in the morning daylight and the remote detonation site offered a clear view of the traffic, enabling the perpetrators to see the presence of a large number of civilians on board.

[251] 2005-06-06 - incident - Chitwan _0106.

It was later claimed by CPN (Maoist), and confirmed by other sources, that the CPN (Maoist) had repeatedly warned the Nepal Army personnel not to use public transport and also that the CPN (Maoist) had cautioned civilians not to board a public bus together with RNA personnel.

Analysis: If a tribunal finds that the civilians on this bus were directly and deliberately targeted, as it appears to be from the facts of this case, then multiple counts of the war crime of murder will have been committed. Prosecution for the war crime of "attack against civilians" may be warranted for the commander who ordered the act. Further, if the civilians were not the target, but were instead "collateral damage" in an attack aimed at the RNA aboard the bus, then an assessment as to whether the civilian casualties were "excessive in relation to the concrete and direct military advantage anticipated" should be undertaken. The presented facts do not indicate the rank or any other information about the targeted Nepal Army personnel. Even assuming that the army personnel were high ranking or otherwise of a high military value, the number of civilian casualties (36 dead and 72 wounded) could be found by a competent tribunal to be in excess of the military advantage anticipated by killing the 12 soldiers present on the bus. The principle of distinction appears also to have been breached.

e) Indiscriminate Use of Explosives

Another circumstance where civilian lives may not have been adequately protected according to the requirements of IHL was in the Maoists' use of explosives.[252] As well as using improvised explosive devices (IEDs) to attack Security Forces personnel and military installations, the Maoists left IEDs at places where civilians frequented, such as water sources,[253] schools,[254] civilian houses,[255] residential areas[256] and on buses, as in Madi. The TJRA also records dozens of incidents where the Maoists planted bombs in civilian Government offices. The TJRA includes more than 100 cases that raised the question of an IHL violation in this respect.

In a number of cases, explosives left by the Maoists attracted the attention of children who were killed or injured while playing with or touching the devices.

Emblematic Case 5.16[257]

Narrative: On 12 February 2001 in Mangalsen VDC, Achham District, a bomb placed by Maoists at a public water spout exploded killing two minors, Prakash Dhungana and Khem Raj Dhungana. It injured two other minors and five adults. No Security Forces personnel were killed or injured in the incident.

[252] The manner in which the Maoists deployed explosives raises the question, as above, of excess civilian casualties in comparison to anticipated military advantage. However, due to the limited information available, this report will not make an assessment of proportionality in each such Maoist attack.
[253] *See, e.g.*, 2001-02-12 - incident - Achham _2102.
[254] *See, e.g.*, 2006-02-25 - incident - Achham _1902.
[255] *See, e.g.*, 2003-09-01 - incident - Siraha _1743. There are 32 allegations of incidents whereby a civilian house was bombed by the CPN (Maoist), causing serious injury or death of (a) civilian(s).
[256] *See, e.g.*, 2005-01-29 - incident - Khotang _1591.
[257] 2001-02-12 - incident - Achham _2102.

Analysis: The use of explosives such as grenades, socket bombs and pressure cooker bombs is not *per se* unlawful, however their use must conform to IHL standards, particularly that of distinction. Placing such explosives in civilian objects or in places where civilians frequent does not appear to satisfy this requirement, unless (1) there is a military advantage to be gained and (2) any resulting civilian casualties are not "excessive" by comparison. Such cases require further investigation to determine whether a violation may have been committed.

f) Causing Unnecessary Suffering

There is also an indication from cases in the TJRA that Maoists used weapons in a way that caused the victim to suffer unnecessarily in violation of customary IHL. They used *khukuris*, other types of knives, iron bars, sticks, axes and other sharp weapons, but did not necessarily immediately kill the victim with those weapons even when they could have. Rather, they chose to maim the victim or otherwise kill him or her in a manner that caused the victim unnecessary suffering. Data indicating "beating to death" of victims by Maoist cadres also raises a question of unnecessary suffering even in cases where the victim was a legitimate target.[258]

Emblematic Case 5.17[259]

Narrative: On 13 September 2002, Birendra Kumar Shah, a teacher in Athbisot VDC, Rukum District, was assaulted by Maoist cadres with a saw. Unable to bear the pain, the victim requested them to shoot him if they wanted to kill him. The Maoists reportedly shot him dead following which they are alleged to have requested the victim's wife to pay NR 525 as the cost for the three bullets used to kill him.

Analysis: In this case, not only was the killing unlawful because the victim was a civilian not taking a direct part in hostilities, but also the manner in which the victim was killed was unlawful. The perpetrators caused the victim unnecessary suffering in violation of customary IHL. If the facts are proven in a competent court, the acts of the Maoist cadres would amount to the war crime of murder. A case for torture and mutilation might also be made.

5.3.3 Unlawful Killing by Vigilante Groups

Reports of the formation of armed civilian defence groups emerged in mid-2003: An early report from 25 May 2003 refers to "villagers" retaliating against Maoists in Sarlahi District. Complete and reliable information on the origin, formation, funding and training of such groups as a response to the Maoist conflict was not available to those compiling this report, yet there is evidence of State sponsorship,[260] which may have extended throughout the *Tarai* from Bardiya to Ilam Districts. Certainly there was State acquiescence and encouragement in the formation and functioning of these groups.[261]

[258] See chapter 4 – Applicable International Law p. 61.
[259] Ref. No. 2002 – 09 – 13 – incident – Rukum.
[260] In February 2004, a RNA spokesperson argued the need for arming villagers in order for them to respond to Maoist violence more effectively. In November 2004, Prime Minister Surya Bahadur Thapa announced the Government's plans to arm villagers to "help defend against Maoists" at a press conference in Kathmandu. Also, according to a Human Rights Watch report, they received arms and ammunitions, training and licenses as members of "Village Peace and Development Volunteer Mobilization Groups".
[261] On 21 February 2005, Home Minister Dan Bahadur Shahi, Labour Minister Ramnayaram Shing and the Minister for Education Radhakrishna Mainali visited Ganeshpur, where three civilians were burnt alive on 17

The strength and organization of vigilante groups (sometimes referred to as *Pratikar Samiti* Retaliation Groups) varied from place to place, though they appear to have been particularly well-organized in Dailekh, Kapilvastu, Nawalparasi and Rautahat Districts. There is some evidence to suggest that killings by such groups may have been ordered by the RNA.[262] Notwithstanding the lack of reliable and detailed information in relation to *Pratikar Samiti*, it is clear that these types of groups – which to some extent appear to have been armed by the State and contributed to the escalation of violence – were not subject to a clear chain of command. Their engagement further weakened any sense of formal accountability for serious violations.

In February 2005, Kapilvastu District became the scene of intense and violent conflict between Maoists and "Village Defence Forces." The defence force attacked suspected Maoist sympathizers in retaliation for an earlier Maoist attack on two village officials. Violence quickly spiralled out of control and fighting continued for three days. According to reports, between 31 and 51 people were killed, mostly unarmed civilians. Three women, two of them minors, were raped. Reports of arson indicate that between 305 and 800 houses were burned.[263]

In response, Maoists targeted and killed suspected members of vigilante groups, with violence being recorded in a number of districts, including: (in the *Tarai*), Kapilvastu, Nawalparasi (Western Region), Rautahat, Sarlahi, Parsa, Bara (Central Region) and Bardiya and Banke (Mid-Western Region); and in the hilly districts, Bajura (Far-Western Region), Dailekh (Mid-Western Region), Baglung (Western Region), Dhading, Sindhupalchowk, Ramechhap (Central Region) and Terhathum and Ilam (Eastern region).[264]

Representative cases include targeted attacks by *Pratikar Samiti*, and retaliatory killings by the Maoists, in Somani VDC, Nawalparasi District in March 2005. According to press accounts and CPN (Maoist) statements, on 26 March 2005, *Pratikar Samiti* members tortured Ramkishore Chamar of Somani VDC, forcing him to consume part of his own burned and amputated hand before killing him. This attack was followed by the retaliatory killing of 11 individuals by around 300 Maoists,[265] including a 14-year-old boy on 15 April 2005. At the same incident, 11 houses were burned and at least 1,000 people fled to India.

If it is the case that civil defence force groups were formed with the direct support of Government Security Forces, to the extent that their cadres participated directly in the hostilities and were acting as proxies for or in collaboration with the Security Forces, their members would have lost the protection normally afforded to civilians. Moreover, the State would be responsible for any violations of international law that were perpetrated by them. If, on the other hand, these groups were not acting on behalf of the State, the individual actors will be liable to prosecution according to the criminal law of Nepal, which the State has a responsibility to enforce.

February 2005 in response to earlier mass protest against Maoists, and congratulated the villagers for successfully defending themselves. They further encouraged the villagers to organize and defend themselves. The news was covered in various media.

[262] Ref. No. 2006-04-07-Kapilvastu_5734.

[263] There is a conflicting account of the number of people killed and the number of houses burned. OHCHR-Nepal, "*Pratikar Samiti* (Retaliation Group) in Kapilvastu, Nawalparasi and Dailekh", preliminary report, October 2005 p.8 - 10; Amnesty International reported that there were 31 deaths and 708 houses were burned. Amnesty International, *Nepal: Fractured country, shattered lives*, p. 3-4 (see footnote 75).

[264] OHCHR-Nepal, *Pratikar Samiti* (see footnote 263)

[265] Ibid, p.7.

5.3.4 Impact on Women

Women were directly involved in the hostilities, mostly as members of the People's Liberation Army.[266] Whereas fewer women were the alleged victims of unlawful killings in incidents in the TJRA, they faced additional threats, such as sexual violence, mainly rape.

One pattern that emerged from reports of killings of women is rape prior to summary execution by Security Forces, in particular by the RNA. The TJRA recorded at least 12 allegations where a rape was followed by the unlawful killing of the victim, all involving the RNA. Victims included actual or suspected Maoists,[267] family members of Maoists,[268] sympathizers and supporters.[269] Of the 12 victims, two were under the age of 18.[270]

The majority of such cases were perpetrated in the vicinity of the victim's residence: Typically, a group of security personnel went to the victim's house at night and forcibly took the victim from their house to a more secluded place, such as a cowshed, raped or gang-raped the victim and then shot her dead.

As is generally the case with sexual violence, the small number of catalogued incidents may be indicative of a larger number of unknown or unreported cases rather than a low frequency of such crimes. In light of the relatively small number of reported cases, this Report is unable to identify a geographic aspect to this pattern or changes over time. However, the "rape and kill" pattern appears to have been more frequent in remote locations, in areas where the RNA had a base.

Emblematic Case 5.18[271]

Narrative: At around 9pm on 25 April 2006, a civilian, [name withheld], 22-year-old, was knitting at her residence in Belbari VDC, Morang District. Her daughter was in the same room. During a search operation, three soldiers from a 15-member Unified Command patrol entered the room and took her to a nearby Telecommunication repeater tower. She was raped and then, at around 9:30pm, killed by a single bullet to her chest.

Analysis: Rape is not justified under any circumstances. Raping a person in the context of armed conflict may be a war crime, provided that the rape is related to the conflict. In this case, the victim was arrested and was clearly under the control of the Security Forces. The war crime of murder is committed upon taking the life of someone who is arrested or otherwise under control of a party to the conflict. This case thus involves multiple violations of customary and treaty law, both IHL and IHRL, most importantly war crimes, if the facts are proven by a competent court.

[266] International Crisis Group estimates that about a third of People's Liberation Army combatants were women by early 2004. International Crisis Group, *Nepal's Maoists*, p.16 (see footnote 28)
[267] For example, Ref. No. 2002-09-22 - incident - Chitwan _0189.
[268] For example, Ref. No. 2004-02-13 - incident - Kavre _0262.
[269] *See, e.g.*, Ref. No 2005-04-25 - incident - Udaypur _1570.
[270] Ref. No. 2004-07-15 - incident - Dhading _2801 and 2004-02-13 - incident - Kavre _0260.
[271] Ref. No. 2006-04-25 - incident - Morang _1482.

5.3.5 Impact on Children

a) No Distinction

Children[272] were also victims of unlawful killings during the conflict. This Report finds no evidence to suggest that different means and methods were used for killing children, or that extra precautions were taken to safeguard their lives.

> *On 3 September 2004, three schoolgirls, Hira Ram Rai aged 15, Jina Rai aged 16 and Indra Kala Rai aged 16, were allegedly summarily executed by Security Forces who followed the three from their school in Basikhora village, Bhojpur District. The Security Forces allegedly shot them in the nearby a forest and buried them there. The unarmed victims had been members of a local CPN (Maoist) cultural group. A Government radio station later announced that the three had been killed in an encounter in a different district.*[273]

The CPN (Maoist) also committed targeted killings against children. For example:

Emblematic Case 5.19[274]

Narrative: In August 2004, Maoists shot and killed 15-year-old Santosh Bishwakarma of Medebas VDC, Dhankuta District. A CPN (Maoist) source later acknowledged the killing, stating that the victim had been killed as punishment for committing incest and collecting donations while posing as a Maoist cadre.

Analysis: In each of the above cases, the war crime of murder appears to have been perpetrated. Whether the victims were Maoist supporters (1st case), or allegedly guilty of a crime (2nd case), is irrelevant because international law prohibits the imposition of the death penalty on children. The perpetrators in each of these cases should be tried for the war crime of murder.

If the version of events proffered by the Government is correct, and the girls were participating in armed forces of the CPN (Maoist) at the time they were killed, then the CPN (Maoist) cadres involved would be guilty of the war crime of recruiting children and allowing them to take part in hostilities, in violation of customary international law. As combatants, however, they would still have been entitled to the protection of IHL.

At times, children simply got caught up in the fighting involving their parents:

[272] A child is defined as a person below 18 years of age.
[273] Ref. No. 2004-09-03 - incident - Bhojpur _1635.
[274] Ref. No. 2004-08-00 - incident - Dhankuta _1643.

Emblematic Case 5.20[275]

Narrative: On 28 May 2005, in Chauraha, Dhangadhi, Kailali District, Maoists entered the room of police head constable Kaushalya Majhi (Chaudhary) and allegedly killed her and her four-year-old son, Kiran, by firing at them.

Analysis: Here, the police station attacked by the Maoists may have been a legitimate military target, particularly if the Nepalese Police forces were participating in the conflict. If so, then the head constable could be considered a "member" of the opposing forces. If the Maoists were unaware of the presence of the child at the station during the attack, and the child died inadvertently as a result of gunfire aimed elsewhere, it may be that the son's death was not a war crime. However, to the extent the perpetrators in fact intentionally shot and killed the child, a tribunal would most likely determine that the war crime of murder had been committed. Such a tribunal would most likely take the age of the victim as an aggravating factor in determining the appropriate punishment.

b) Killings Suffered Disproportionately by Children

There were certain means and methods of warfare that actually may have not been targeted at children, but nevertheless killed a disproportionate number of them. One example is where small explosives were left in a public location.

Case reports on this issue examined for the preparation of this Report did not typically contain sufficient information to distinguish between deaths that involved legitimate targets or were civilians. Nevertheless, the scale of deaths, coupled with the small number of cases that do suggest a serious violation, allow for the conclusion that deaths of children due to the explosion of an improvised explosive devise should be a matter of concern for the Truth and Reconciliation Commission (TRC).

Emblematic Case 5.21[276]

Narrative: On 20 November 2004, Muga Dharalala and Dhiraj Dhara, both aged five, were playing with a socket bomb that Maoists left on the window of a classroom of Bhairab Primary School, Jumla District. The Maoist cadre who brought the bomb was playing football outside. The bomb exploded and killed the two children on the spot.

Analysis: It is unlikely that the war crime of murder could attach to these unfortunate facts. The cadre responsible for bringing the bomb did not (apparently) intend to kill the children. His mental state (*mens rea*) was more likely that of "recklessness" or "negligence." It was certainly foreseeable that such an incident could occur by leaving a bomb where children are likely to be playing. However, unlike many domestic criminal codes, international criminal law does not foresee negligent homicide (or manslaughter) as a prosecutable crime. Such cases are best prosecuted under domestic criminal law.

[275] Ref. No. 2005-05-28 - incident - Kailali _1946. Under international law, "civilian" police forces are not generally considered legitimate "military" targets unless and until they participate in hostilities. The Nepal Police force was under the "Unified Command" at the time of this attack, rendering reasonable a belief that it was participating in hostilities. Whether or not this particular head constable was in fact participating is not mentioned in the narrative. In any case, the analysis with respect to the child is the same. If this is not a war crime, it presumes that the other elements of international law were met, for example taking all feasible precautions to protect civilian life.

[276] Ref. No. 2004-11-20 - incident - Jumla _5151 Negligent homicide (manslaughter) is prosecutable in Nepal under section 5 of the Muluki Ain (National Code) 1963, which states that "A person is guilty of 'accidental death' when his or her actions result in the death of another person; but he or she did not intend fir his or her actions to

5.4. INTERNATIONAL CRIMES

The Interim Constitution of Nepal requires the Government to constitute a TRC to "*investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict*"[277]. Although most of the emblematic cases cited in this chapter may constitute grave violations of human rights, the Nepali judicial authorities will need to determine those which also constitute crimes against humanity.

There are a number of elements that constitute a "crime against humanity".[278] Proving each of these elements in a court of law is an important part of this endeavour, including identifying the "civilian population" that was the object of attack. The following example provides a case in point:

Emblematic Case 5.22[279]

Narrative: Bardiya District experienced some of the most prolific unlawful killings and disappearances of anywhere in Nepal. As described above and elsewhere in this Report, human rights organizations have documented several hundred such cases. The patterns indicate that the Security Forces targeted both specific individuals and members of groups that were perceived as opposing the Security Forces. For example, among those murdered and disappeared are members of the Tharu ethnic group, suspected collaborators, spies, members of non-governmental organizations, individuals philosophically aligned with the Maoists, and others caught up by mistake. At times the victims were killed immediately upon capture. Others were taken to barracks and interrogated, tortured, and then killed. However, some detainees were released.

Analysis: As noted, individual acts of murder and disappearance can be prosecuted as crimes against humanity when the following elements are met:

(a) There must be an attack.
(b) The attack must be directed against any civilian population.
(c) The attack must be widespread or systematic.
(d) The acts of the perpetrator must be part of the attack.
(e) The perpetrator must know that there is an attack on the civilian population and know, or take the risk that his acts comprise part of this attack

The ICTY has tried cases with factual scenarios similar to those in Nepal. One such case is *Prosecutor v. Limaj*, et al, wherein the Albanian guerrilla force in Kosovo, the Kosovo Liberation Army abducted and sometimes killed a number of "suspected collaborators" in circumstances similar to those described above.[280] The court examined whether those targeted individuals, of which there were between 100 and 200 during the six-month conflict, formed part of a targeted "civilian population" for the purposes of a crime against humanity. After determining that "suspected collaborators" – unless proven to be actually working for the opposing forces – are in fact civilians,[281] the court ruled that targeting individual

result in the death of the other person, or his or her acts were not seen as reasonably likely to result in the death of the other person".

[277] Interim Constitution of Nepal (2007) section 33(s).

[278] See Chapter 4 - Applicable International Law, section 4.4.3, Crimes Against Humanity p. 67

[279] *See, e.g*, OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008, p. 2. *See also* Ref. No.s 2002-04-11 - incident - Bardiya _5399, 2002-04-11 - incident - Bardiya _5400, 2002-04-23 - incident - Bardiya _5393, 2002-06-18 - incident - Bardiya _5377.

[280] *Limaj*, ICTY Trial Chamber (2005) (see footnote 150)

[281] Or they should be assumed to be civilians in cases of doubt. *Limaj*, ICTY Trial Chamber (2005) (see footnote 150), para 223-224: "Taking account of these considerations and in light of the evidence before the Chamber

civilian/collaborators was not the same as targeting a "civilian population" as such, for the purposes of this crime.

A key fact in the determination was that the Kosovo Liberation Army released some of the detainees, while others were killed. This convinced the court that the Kosovo Liberation Army were making decisions on an individual basis and were not "attacking a civilian population as such."[282] In addition, the court noted:

> *At least in most cases of which there is evidence, the individuals who were abducted and then detained were singled out as individuals because of their suspected or known connection with, or acts of collaboration with, Serbian authorities - and not because they were members of a general population against which an attack was directed by the* Kosovo Liberation Army.[283]

An important element of this decision, in relation to defining the "civilian population" that was allegedly targeted, was that the court found that "Kosovo Albanian collaborators and perceived or suspected collaborators and other abductees to not be "of a class or category so numerous and widespread that they themselves constituted a 'population' in the relevant sense."[284] Thus, the *Limaj* judgement stands for the proposition that targeting a (relatively small) number of collaborators is insufficient for the purposes of the third element, "attack directed against a civilian population."

While this ruling is clear, it should be compared with that of the *Alberto Fujimori* case in Peru.[285] The former President was charged with, and ultimately convicted of, *inter alia*, murder and causing grievous bodily harm as crimes against humanity. Although such crime did not exist in the penal code of Peru at the time of the offence, the country's Supreme Court relied on customary international law as well as the Rome Statute to determine the elements.[286] With specific reference to the civilians targeted, the Peruvian Supreme Court observed,

> *The murders and grievous bodily harm committed in the cases of Barrios Altos and La Cantuta are also crimes against humanity, fundamentally, because they were committed within the framework of a State policy of selective but systematic elimination of alleged members of subversive groups. This policy, on one hand, was designed, planned and controlled at the highest levels of State power, and carried out by State agents—members of military intelligence—who used the military apparatus to do so; in addition, in accordance with their objectives, it affected a significant number of defenseless members of the civilian population.*[287]

5.5 DEALING WITH THE DECEASED

The way victims' bodies were disposed of, and the actions of the alleged perpetrator after a killing, can be revealing of several things. For example, it may show the perpetrator's intention, the existence of premeditation and/or cover up, organization, command

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concerning those apprehended and detained because of their alleged or suspected acts of collaboration, the Chamber concludes that, at least as a general rule, perceived collaborators abducted by the Kosovo Liberation Army were entitled to civilian status."

[282] *Limaj*, ICTY Trial Chamber (2005) para 227 (see footnote 150)

[283] Ibid.

[284] Ibid., para 226.

[285] *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Sala Penal Especial de la Corte Suprema* [Special Criminal Chamber of the Supreme Court], case no. AV 19-2001, 7 April 2009 (Peru), translated in *American University International Law Review*, vol. 25 (2010).

[286] Ibid., para 714.

[287] Ibid., para 717.

responsibility, and communication and cooperation between different branches of a conflict party.

As described above, a frequent pattern of behaviour by both sides to the conflict was for a targeted victim to be taken to a secluded place, such as the jungle, before the killing. Bodies in such cases were allegedly either left behind or buried there. In some cases, victims, family members or villagers were reportedly forced to dig a hole prior to the killing.

Particularly during the earlier part of the conflict, bodies were allegedly burned or buried immediately by Security Forces,[288] an act that avoided a post mortem and irretrievably destroyed incriminating evidence. Reports indicate that Security Forces also refused to send the bodies for a post-mortem examination[289] or that post-mortem examinations omitted incriminating facts due to pressure or fear.[290] At other times, Security Forces reportedly allowed family members to conduct the rituals, but subject to the condition that Security Forces supervised the funeral.[291]

Later in the conflict, a more sophisticated pattern was reportedly attributed to Security Forces. Whereas bodies might be returned, family members, witnesses and villagers were reportedly asked to sign papers acknowledging the deceased was a Maoist and/or was killed in an encounter. The Reference Archive Team catalogued nearly 20 cases of alleged unlawful killings by Security Forces, after which people in the area were required to sign such a paper. Some of these reported incidents include affidavits signed by individuals who could not read,[292] or who were not allowed to read the contents of the form,[293] or who were coerced to sign a blank paper.[294]

Catalogued incidents also include allegations that Security Forces tampered with evidence so that it appeared the deceased had been killed in an encounter, for example, by planting arms or ammunition at the scene of a killing or simply stating that arms and ammunition had been recovered from the deceased.[295]

5.6. OFFICIAL RECORDS AND RESPONSES

Some differences can be seen between the Government's responses to allegations of unlawful killings and those of the Maoists.

5.6.1. Government

In response to allegations of unlawful killing made by United Nations bodies and other human rights defenders, the Government has stated on several occasions that the victim was a "Maoist" or a "terrorist" and that he or she was killed in an "encounter" with Security Forces.[296] However, it frequently appears that only the Maoists sustained casualties in such

[288] There are several reports of police burying of dead bodies in a toilet pit. For example, Satya Dev Devkota, of Darmakot VDC, Salyan District was arrested on 23 February 2000, allegedly shot dead by police inside the Pharula police post and buried in the toilet. Ref. No. 2000-02-24 - incident - Salyan _5537.
[289] For example, Lali Roka and Dil Man Roka from Thawang VDC, Rolpa District were arrested and killed by police on 18 January 1997. Police cremated the corpse without post-mortem. Ref. No. 1997-01-17 - incident - Rolpa _5632.
[290] For example, Ref. No. 2006-09-27 - incident - Parsa _0021.
[291] For example, Ref. No. 2004-29-10 - incident - Banke _5134.
[292] Ref. No. 2006-03-09 - incident - Nawalparasi _5739.
[293] Ref. No. 2004-29-10 - incident - Banke _5134.
[294] Ref. No. 2006-05-18 - incident - Rautahat _0062.
[295] *See, e.g.*, Ref. No. 2002-09-10 - incident - Banke _5352.
[296] *See, e.g.,* the *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council* (A/HRC/4/20/Add.1), p.231-237. There are 14 cases in the TJRA of alleged unlawful killings by Security Forces which include an announcement on the radio or newspaper that Maoists were killed in an encounter or clash.

clashes. Given the frequency and consistency of such claims, combined with the improbability that only one side suffered casualties, one could reasonably suspect that the incident did not occur according to the account provided by the Government. OHCHR considers that further scrutiny by the TRC, or another competent judicial authority, is warranted in such cases. Similar such scrutiny should be applied in instances where the RNA claimed a killing took place after the victim tried to escape.[297]

5.6.2. Communist Party of Nepal (Maoist)

In contrast, the CPN (Maoist) often admitted responsibility for killings. The Maoist leadership stated a clear policy to exterminate enemies of the "People's War".[298] Maoist cadres implemented the policy all over Nepal, but especially in their strongholds.[299] Announcements in various ways were made before and/or after a killing, often claiming that the targeted victim was a spy or a criminal.[300]

5.6.3. "Suicide" in Custody

A number of deaths were claimed to be suicide but this is disputed by other facts or accounts by witnesses. For example, a detainee in Biratnagar jail, Morang District, attempted to escape from prison in October 2005, but was caught. He was allegedly taken to a room and was beaten by guards until he eventually died. The guards then allegedly put a rope around his neck and claimed the death was a suicide.[301]

A similar claim can also be made against the Maoists. For example, Man Bahadur Karki was allegedly abducted by two Maoists from his residence in Lekhgaun VDC, Surkhet District on 10 June 2006. On the following day, his body was found hanging outside the house of a neighbour in the same locality. A local CPN (Maoist) cadre told the deceased's family that he had committed suicide. Conflicting accounts suggest that he was beaten to death by four villagers affiliated with the CPN (Maoist) and that his dead body was then hanged.[302] Further, on 28 March 2006, Maoists allegedly abducted Man Bahadur Bohara of Thehe VDC, Humla District on suspicion that he had killed his wife. He was beaten and on 31 March and reportedly died from injuries sustained in Maoist captivity. The Maoists claimed that Man Bahadur committed suicide by throwing himself in the Karnali River. In each of these cases,

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[297] For example, in the *Maina Sunuwar* case (Emblematic case 7.2) the RNA initially submitted that she was killed when she tried to escape.

[298] "As per the physical liquidation of class enemies and spies, our Party's policy has been: to practice it on the selected ones and to the minimum, by informing the masses and obtaining their consent as far as possible and by not resorting to any ghastly methods. The current need of the development of the movement, particularly in the rural areas, has necessitated introducing refinement even in this method. Of course, we should not be unduly carried away by the vicious propaganda of the enemy and the opportunists about the physical annihilation of the enemy. However, while annihilating somebody if we fail to develop and observe concrete policy on class analysis, nature of his/her crime, democratic legal process to establish the crime and the method of annihilation, it may have negative consequences. It can't just be dismissed as a baseless charge of the enemy & the opportunists that in the past some of the annihilations have taken place flimsily on the grounds of not giving enough donations, not providing shelter & food, having politically opposed our movement, suspicion of being a spy, or having enmity with our local team members. Hence, if one has to resort to annihilation in the rural areas henceforth, it is essential to ensure that it is not done directly by a particular team or its definite members but a certain minimum legal method is adhered to. It should be strictly expressed in both our policy and practice that red terror does not mean anarchy." CPN (Maoist), "On Annihilation of Class Enemies and Spies", supplementary resolution (October 2003) available from www.ucpnm.org/english/doc10.php.

[299] See the diagram 1.3, Section 1.3.2, p. 31.

[300] See above section 5.3.2 (c), Summary executions as a result of a quasi-judicial procedure – i.e. Capital punishment in the People's Court p. 90 for more details.

[301] Ref. No. 2005-02-26 – Morang_1582. The case is of an earlier death in custody described by a victim of alleged torture.

[302] 2 Ref. No. 006-06-10 - incident - Surkhet _4893

if the facts were proven, a competent tribunal could find that the war crime of murder has been committed.[303]

Disaggregated data on Unlawful Killings

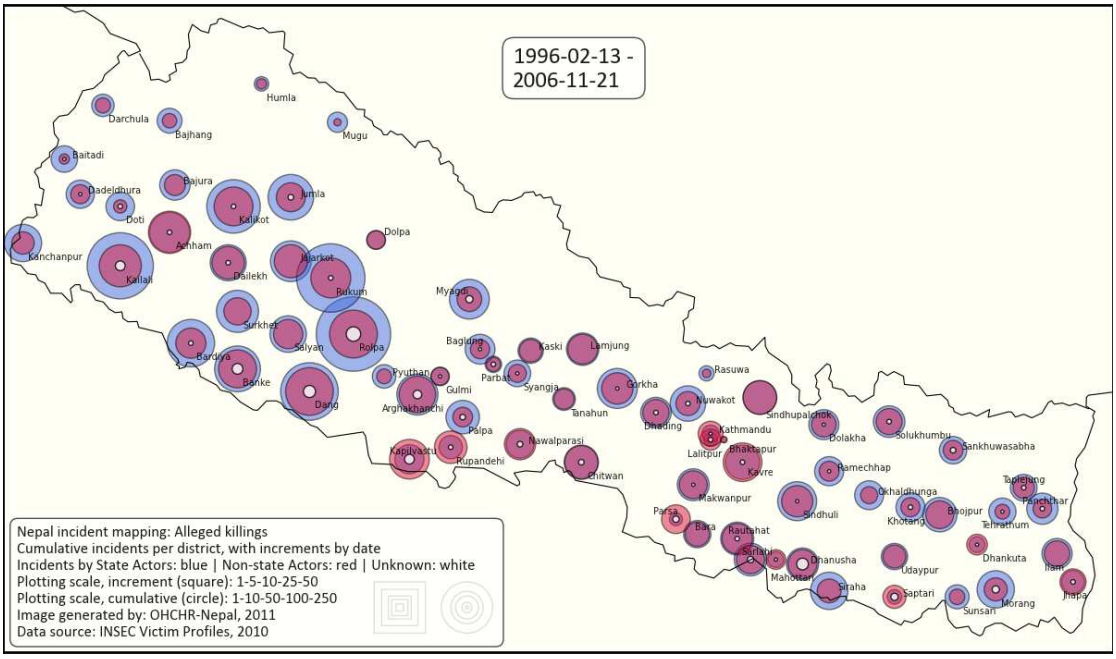

Diagram 5.1: Incidents of Unlawful Killings by Region, 1996-2006

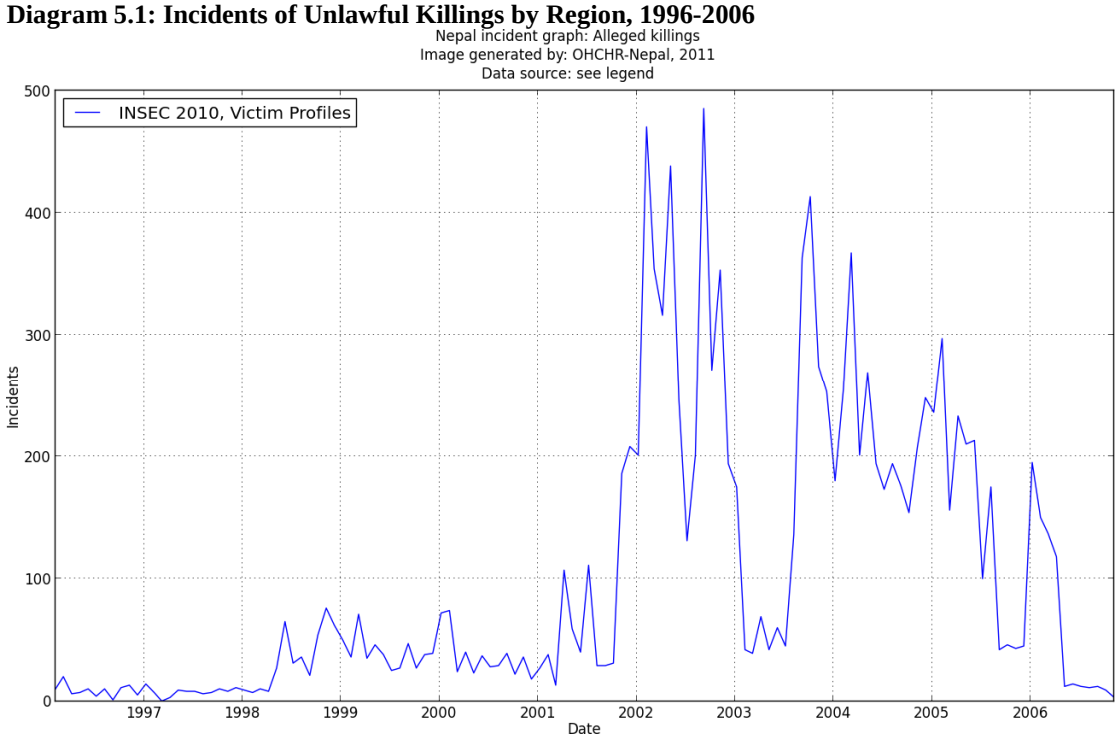

Diagram 5.2: Incidents of Unlawful Killings, 1996-2006

[303] Ref. No. 2006-03-31 - incident - Humla _4912

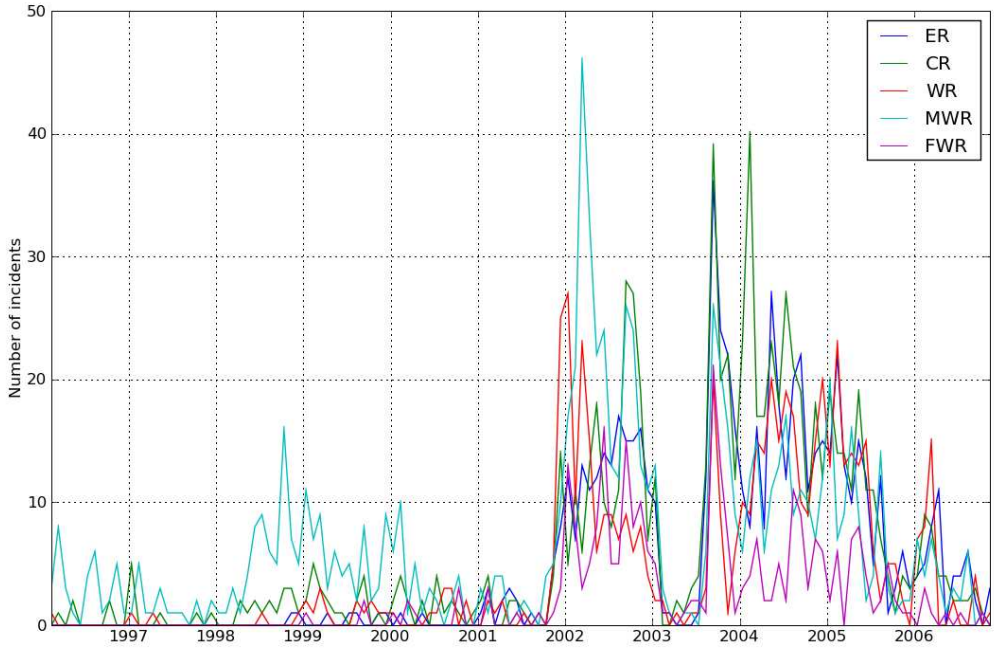

Diagram 5.3: Incidents of Unlawful Killings by Region, 1996-2006

Incidents of Unlawful Killings by each year, 1996 – 2006

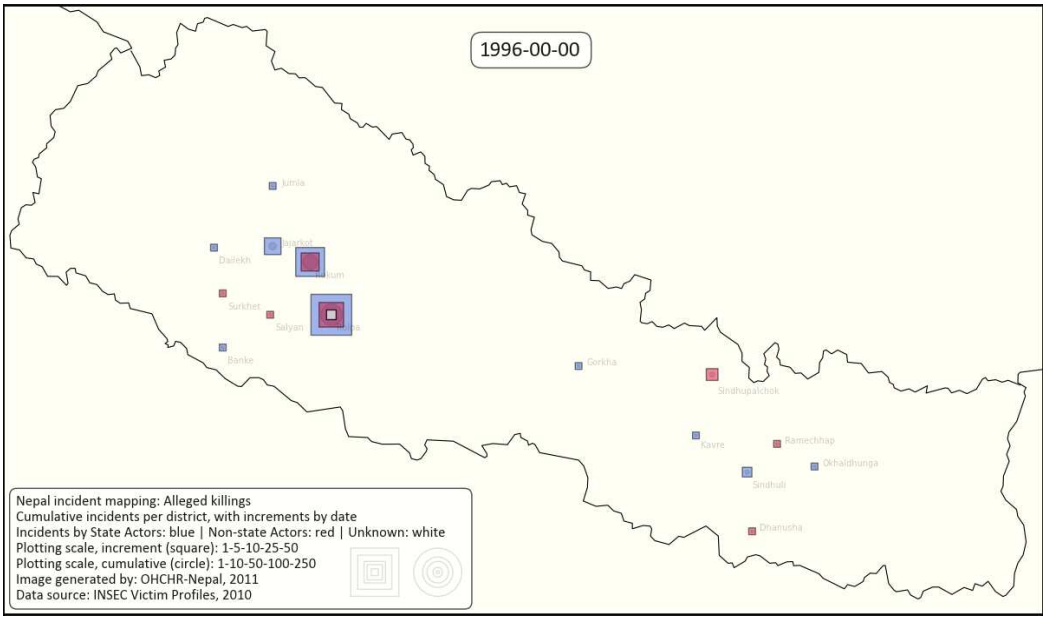

Diagram 5.4: Unlawful Killings 1996

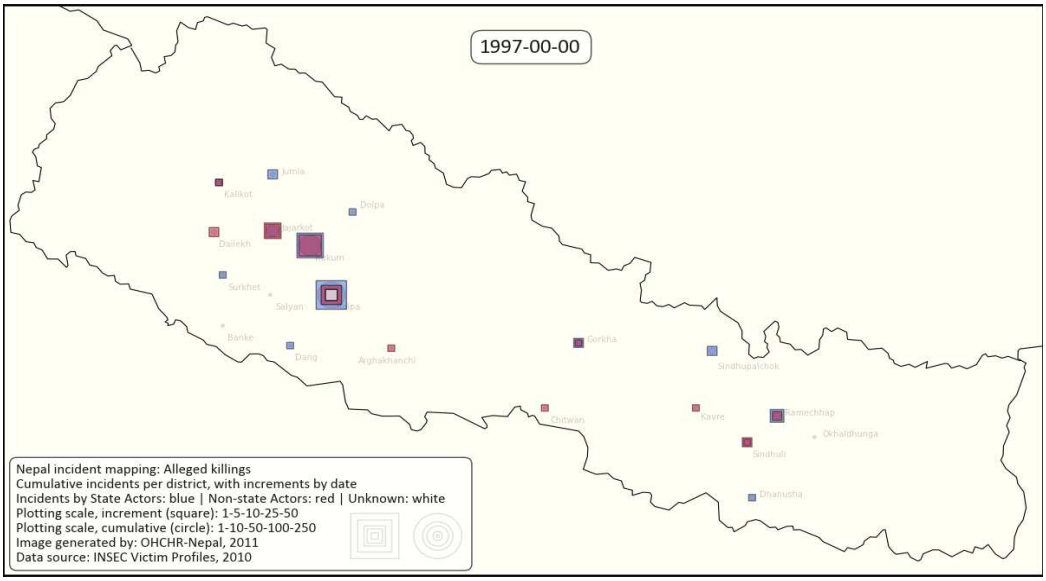

Diagram 5.5: Unlawful Killings 1997

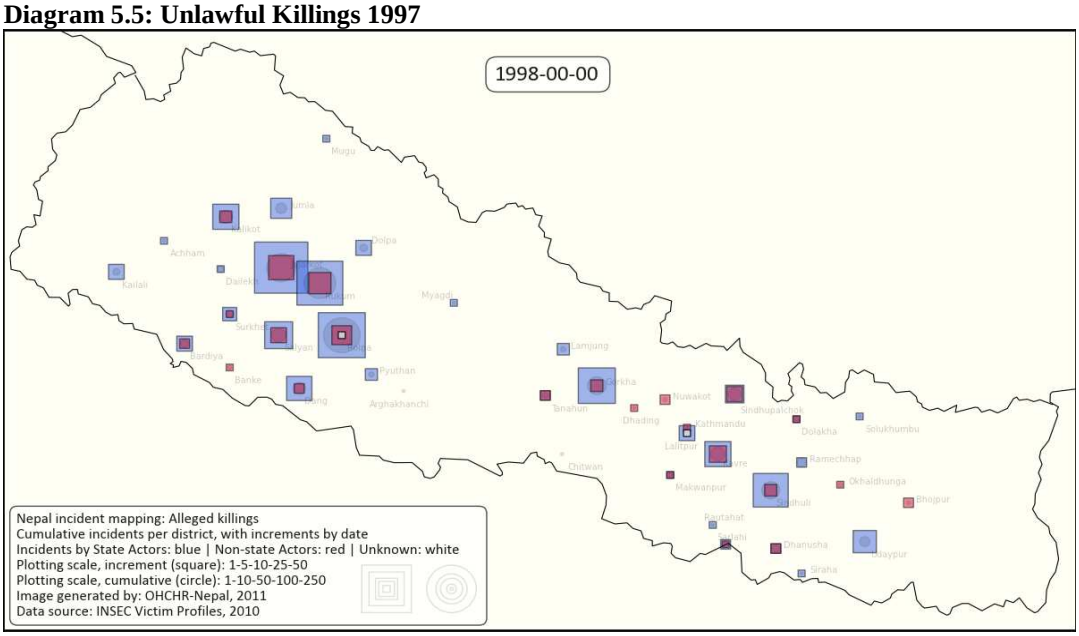

Diagram 5.6: Unlawful Killings 1998

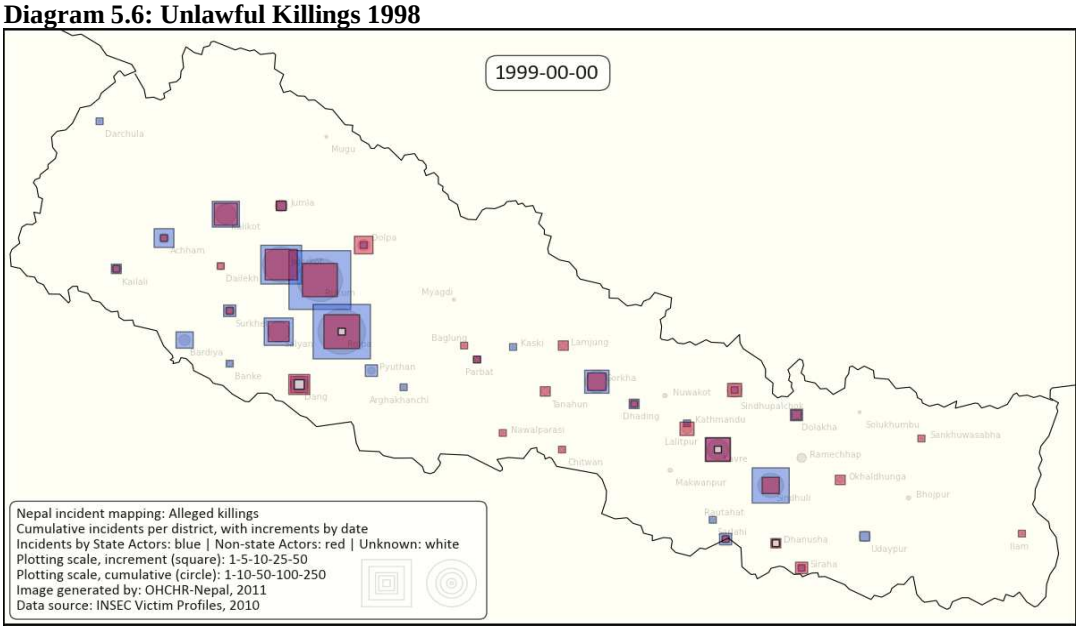

Diagram 5.7: Unlawful Killings 1999

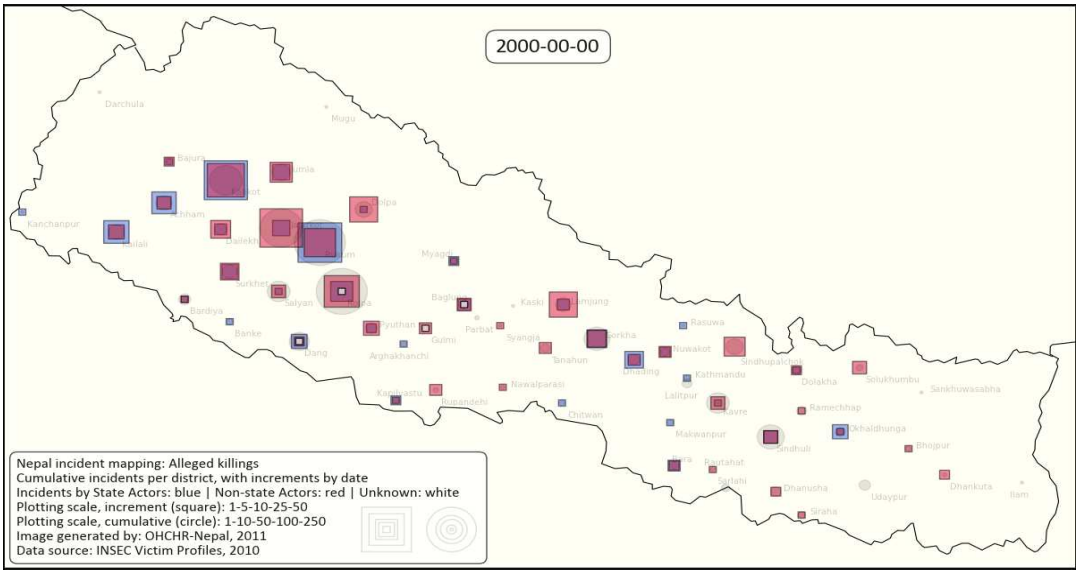

Diagram 5.8: Unlawful Killings 2000

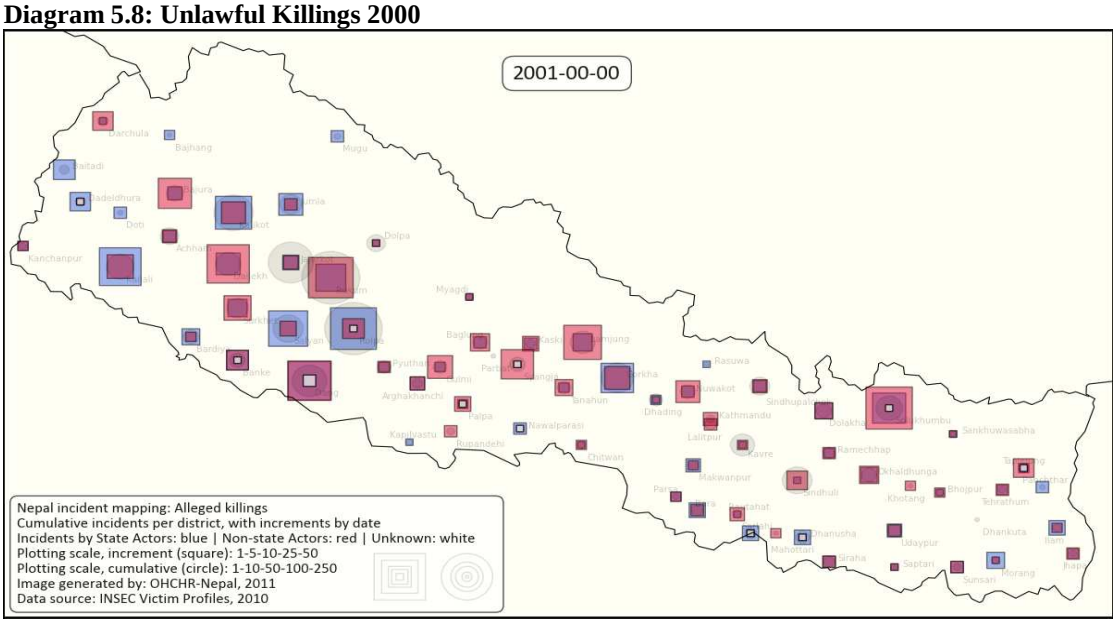

Diagram 5.9: Unlawful Killings 2001

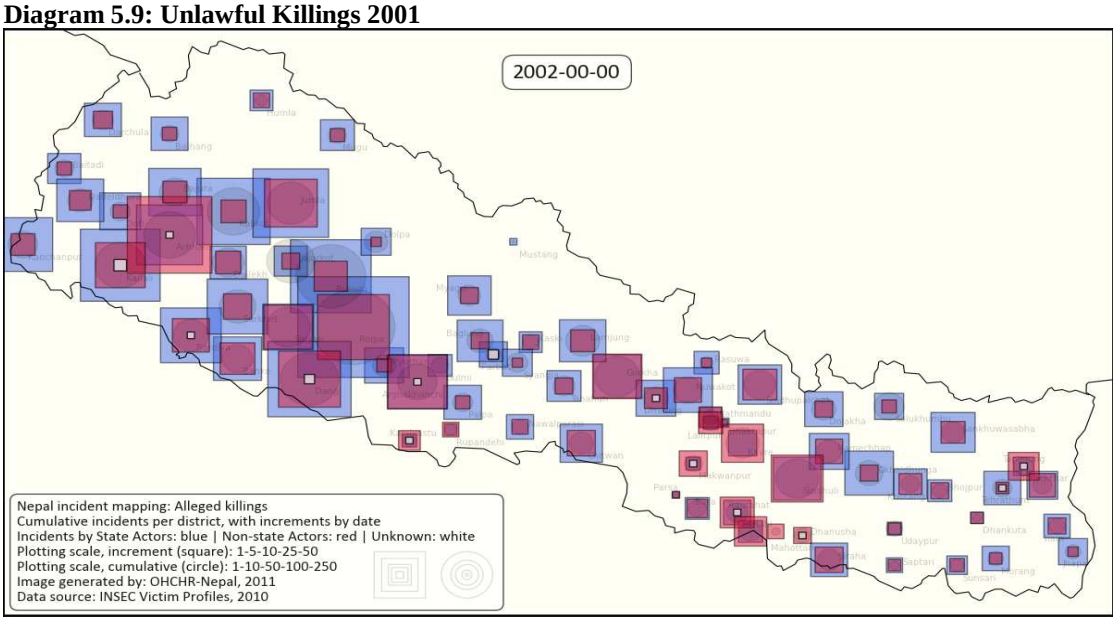

Diagram 5.10: Unlawful Killings 2002

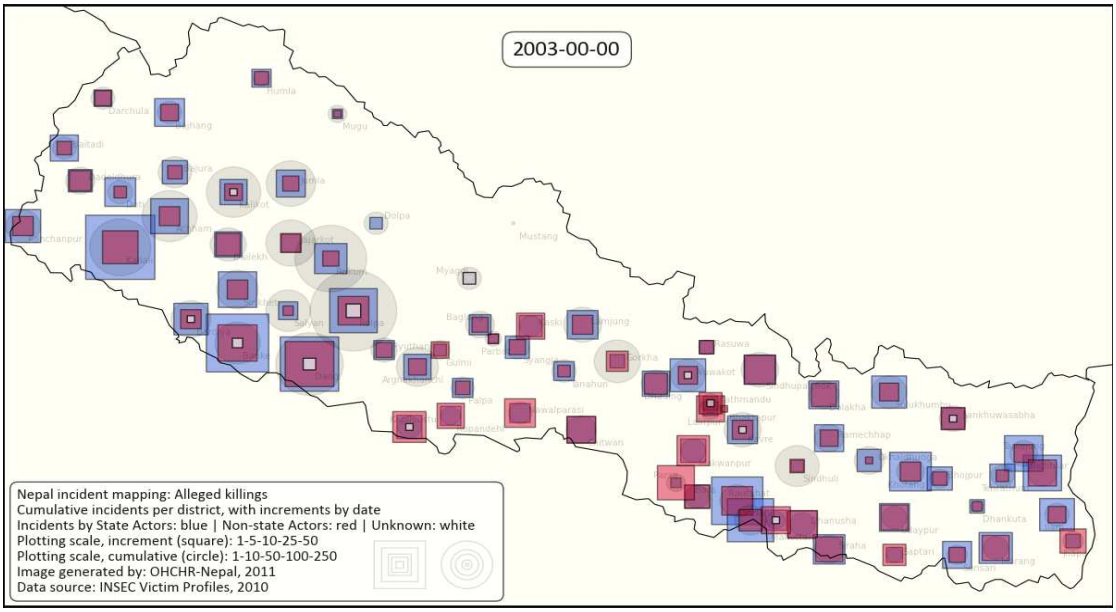

Diagram 5.11: Unlawful Killings 2003

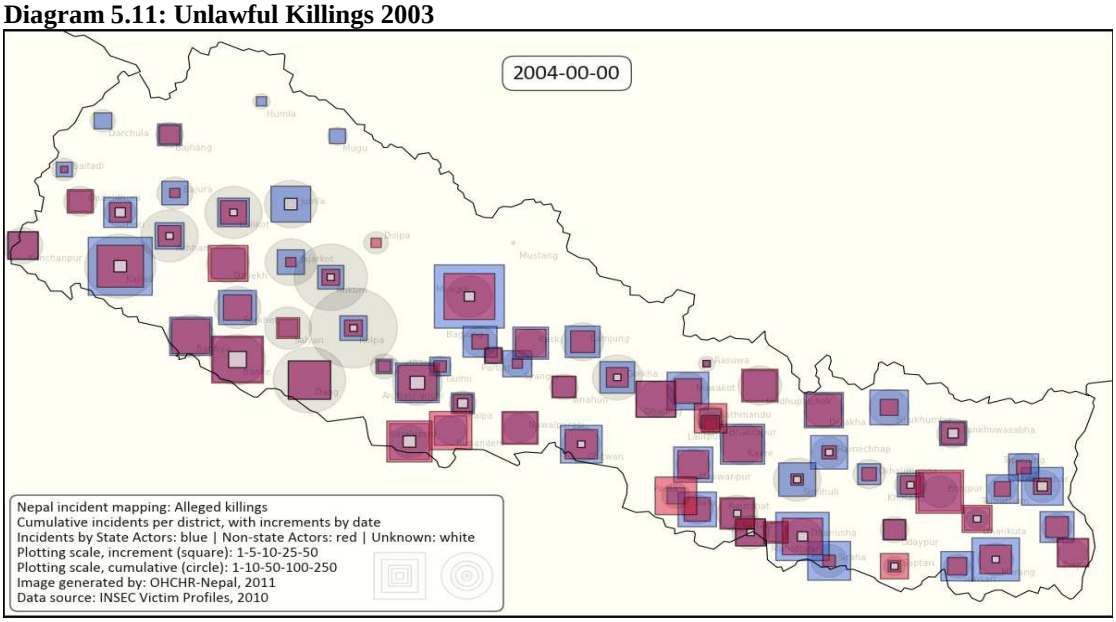

Diagram 5.12: Unlawful Killings 2004

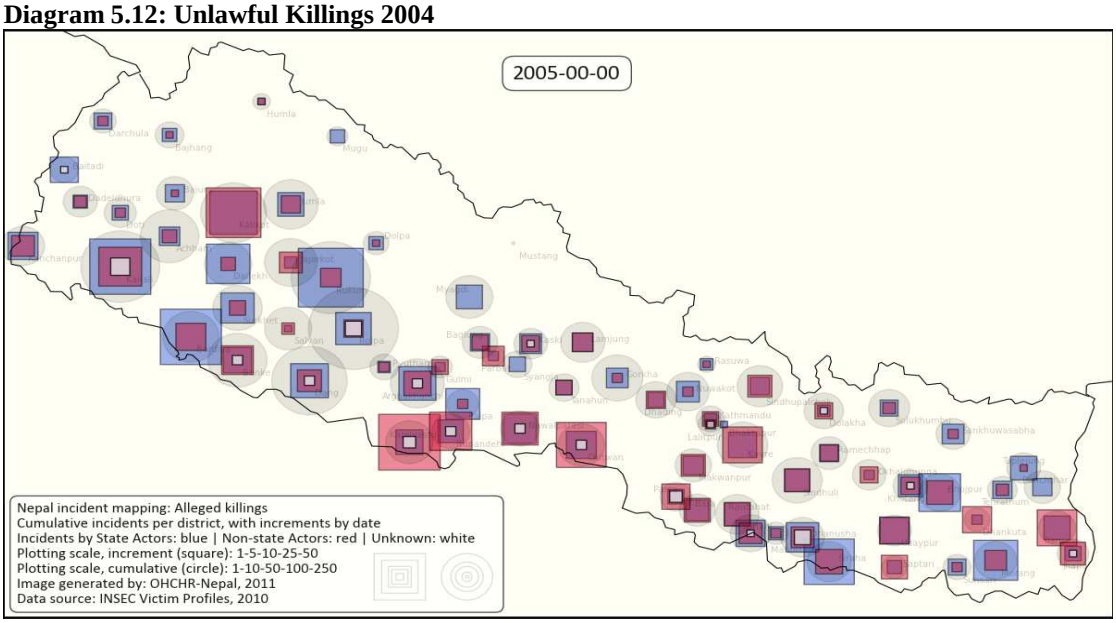

Diagram 5.13: Unlawful Killings 2005

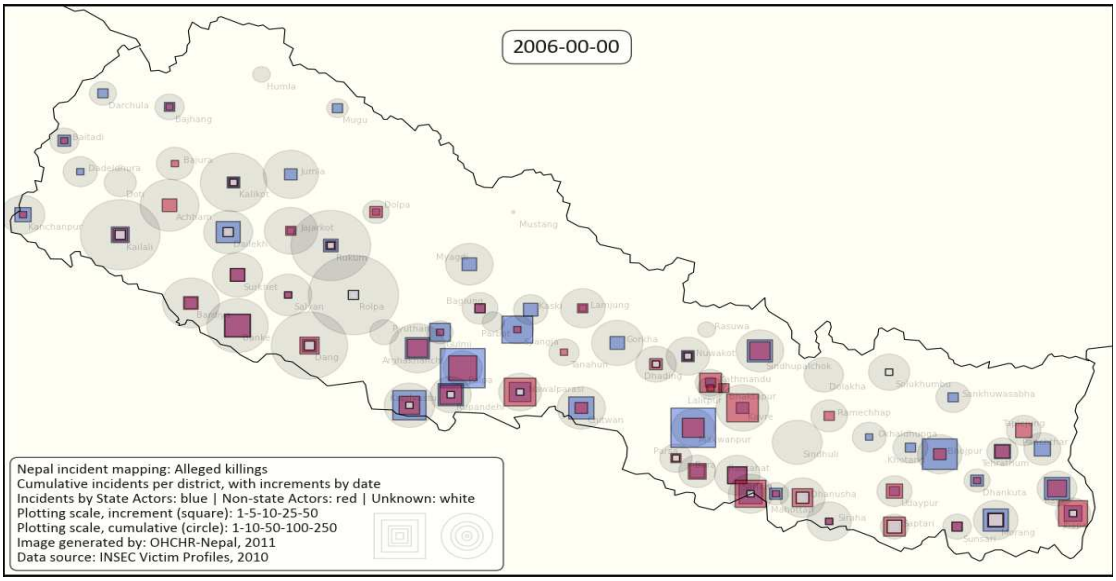

Diagram 5.14: Unlawful Killings 2006

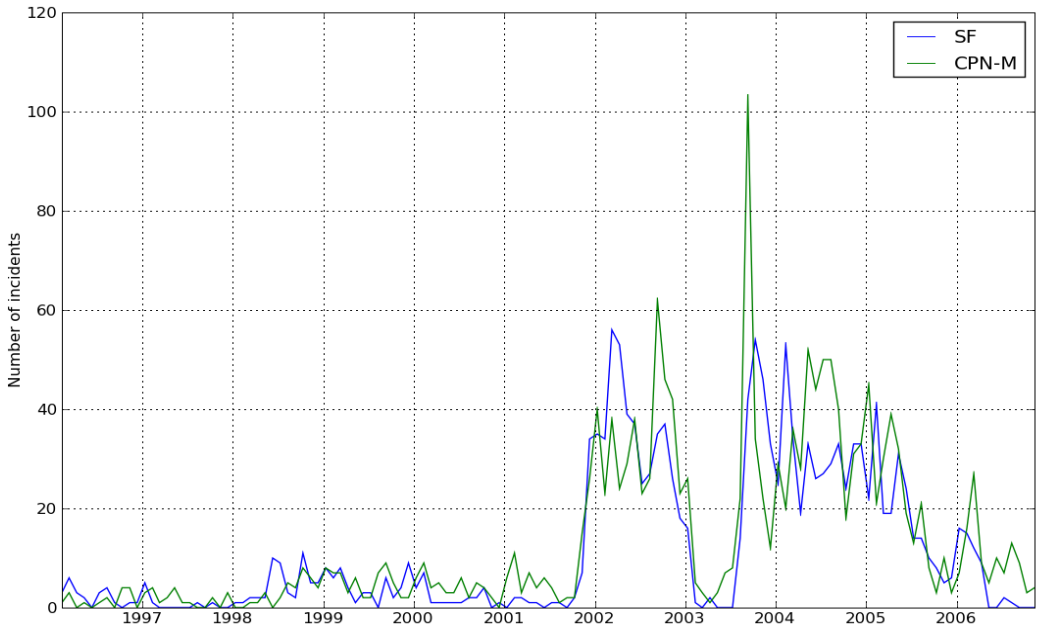

Diagram 5.15: Incidents of Unlawful Killings by Perpetrator, 1996-2006

CHAPTER 6 - ENFORCED DISAPPEARANCES

6.1 OVERVIEW

Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.[304]

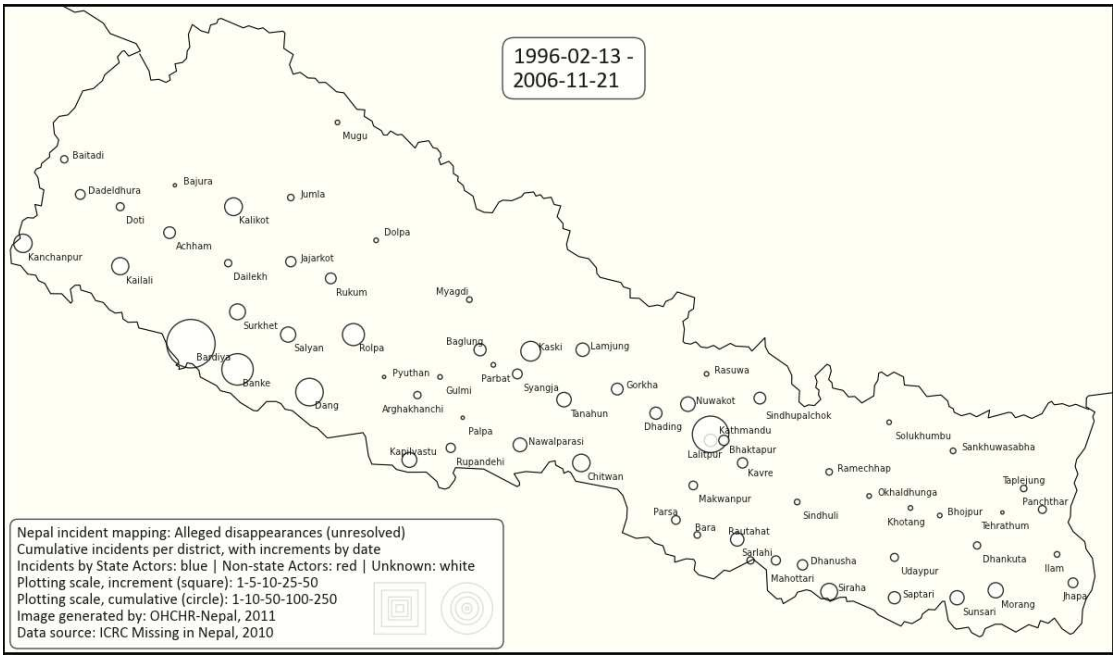

Diagram 6.1: Unresolved Disappearances, 1996-2006

Enforced disappearances[305] are among the most widespread human rights violations committed during Nepal's armed conflict.[306] The International Committee of the Red Cross

[304] Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 (1992), article 1.

[305] Following the distinction reflected in the General Comments of the United Nations Working Group on Enforced or Involuntary Disappearances, OHCHR-Nepal's practice (adopted by OHCHR-Nepal in its report *Conflict Related Disappearances in Bardiya District*, December 2008), the terminology "enforced disappearances" is used to refer to state-related disappearances. Further, the phrase "actions tantamount to enforced disappearances" refers to CPN (Maoist) related disappearances, and the term "disappearances" is used in a general sense and to cover both categories of cases. Refer to the "Governing Legal Framework" section below for the elements of the crime of enforced disappearance.

[306] Enforced disappearances during Nepal's conflict have been extensively documented by various human rights organizations. See for example, Nepal, National Human Rights Commission, *Human Rights in Nepal: A Status*

(ICRC) reported having received more than 3,400 reports of individuals who went missing in the context of the conflict[307] and to date more than 1,300 people remain unaccounted for.[308]

Conflict-related disappearances were reported as early as 1997[309] and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.[310] In its 2009 report to the United Nations General Assembly, the United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) stated that during the ten-year conflict in Nepal, the highest number of cases of enforced disappearances it received related to the year 2002, when it was notified of 277 cases.[311] The WGEID has transmitted 672 cases to the Government of Nepal and as of 2 March 2012, there has been no further information on 458 of these cases.[312]

Disappearances by both parties to the conflict – the security forces and the Communist Party of Nepal (Maoist) (CPN (Maoist)) – were part of a broader pattern of widespread serious human rights and International Humanitarian Law (IHL) violations that occurred nationwide during the conflict.[313] Data gathered for the TJRA indicate that security forces are implicated in the majority of disappearances; the CPN (Maoist) is also implicated in a significant number of cases of disappearance following abduction.

Despite various investigations and considerable documentation by national and international human rights organizations, to date no person has been prosecuted in a civilian court in connection with an enforced disappearance in Nepal. The establishment of a body or jurisdiction that is credible, competent, impartial and fully independent, such as the proposed Commission on Disappeared Persons, is a necessary step forward in ensuring accountability for disappearances and in resolving the fate or whereabouts of the disappeared. In addition to clarifying outstanding cases, it is critical to pursue accountability for cases in which the victims were eventually released or died in custody. An enforced disappearance is a violation whether or not the fate of the victim was somehow clarified, and justice for the persons who disappeared and their families will therefore require truth and accountability both for disappearance cases which are outstanding and those which have been resolved.

6.1.1 Methodology

OHCHR-Nepal began investigations into conflict-related disappearances shortly after its office was established in May 2005, and has investigated disappearance allegations in all regions of the country. This chapter draws upon qualitative information compiled by OHCHR, including disappearance case files and extensive public reports on alleged

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Report 2003, (September 2003); Amnesty International, *Nepal: A Spiralling Human Rights Crisis* (see footnote 34); Amnesty International: *Nepal: A Deepening Crisis: Time for international action* (19 December 2002) Available from www.amnesty.org/en/library/info/ASA31/072/2002; Human Rights Watch, *Clear Culpability: "Disappearances" by Security Forces in Nepal* (28 February2005) Available at ; Informal Sector Service Centre, *Human Rights Yearbook 2002* (2003); Informal Sector Service Centre, *Human Rights Yearbook 2003* (2004).

[307] List of names of people being sought by their relatives, ICRC – FamilyLinks, "Nepal- Missing, the Right to Know," Available at http://www.icrc.org/Web/doc/siterfl0.nsf/htmlall/familylinks-nepal-2007-eng

[308] ICRC – FamilyLinks, "List of Names," available at http://www.icrc.org/Web/doc/siterfl0.nsf/htmlall/familylinks-nepal-2007-eng

[309] Informal Sector Service Centre, *Human Rights Yearbook 1997* (1997).

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

[311] *Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council* (A/HRC/13/31). ICRC data on missing persons during Nepal's conflict also indicate that the highest number of persons (482) went missing in 2002. ICRC – FamilyLinks, "Nepal – Missing, the Right to Know" (see footnote 307)

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

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

disappearances in Kathmandu and Bardiya, released in 2006 and 2008 respectively.[314] Publicly available reports and information issued by national and international human rights organizations were referred to, including Amnesty International, Human Rights Watch, Advocacy Forum and the Informal Sector Service Centre (INSEC). This project also consolidated quantitative data from OHCHR-Nepal, Advocacy Forum and the INSEC. This consolidation into the Transitional Justice Reference Archive (TJRA) of detailed *qualitative* information together with the comprehensive, though less-detailed, *quantitative* information enables a more extensive examination of patterns of disappearance than would be possible by relying on either qualitative or quantitative information from a single organization.

Given that enforced disappearance involves the deliberate attempt to conceal or eliminate information about an individual's whereabouts, investigations into enforced disappearance must often rely on fragmentary information gathered after the fact from a wide range of sources, including official records that have may be falsified or incomplete, and interviews with former detainees who may have known the victim by another name or alias. The ability to work efficiently with and across hybrid collections of information – name lists and reports and interviews compiled from multiple sources, in multiple languages, in some cases recorded according to different calendar systems, in relation to one or more victims – is therefore especially crucial for the investigator, and an appropriate set of data management tools is critical. The TJRA has a structured but flexible architecture that allows the user to quickly sort and filter both micro- and macro-level details of multiple disappearance cases according to common elements, while enabling the user to access quickly the complete documentation of any individual case. This will be an important tool for the future Commission on Disappeared Persons, once it is established, or another judicial authority with the task of reviewing cases on disappeared persons.

6.2 GOVERNING LEGAL FRAMEWORK

6.2.1 Definition

"Enforced disappearance" is defined in a similar way under both IHL and International Human Rights Law (IHRL). Following is a comparison of the elements of enforced disappearance under IHL, as defined in the Rome Statute, with a definition of enforced disappearance taken from key texts within the human rights legal arena.

The similarity of the two regimes is particularly evident with respect to two elements which comprise the core of the offence: an apprehension followed by a denial of that apprehension.

The two regimes differ in that IHRL imposes its obligations only upon the State and on State actors. For its part, the Rome Statute definition applies to 'parties to the conflict'[315] and thus broaden the categories of individuals who may be held liable for enforced disappearances. Note also that the Rome Statute definition also requires proof of an intention to keep the victim disappeared "for a prolonged period of time," a requirement absent from the IHRL definition.

[314] Ibid; OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004* (May 2006).
[315] See Chapter 4 Applicable International Law, section. 4.3, International Humanitarian Law p. 63

Rome Statute[316]	**IHRL**[317]
the arrest, detention or abduction of one or more persons,	*a person is arrested, detained, abducted or otherwise deprived of his or her liberty;*
[no equivalent requirement]	*such deprivation of liberty is undertaken by State agents/officials, or by persons or groups authorised by, or with the support or acquiescence of the State; and,*
followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons	*there is a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person which places such person outside the protection of the law.*[318]
with the intention of removing them from the protection of the law for a prolonged period of time.	*[no equivalent requirement]*

6.2.2 International Humanitarian Law

Under Common Article 3 of the Geneva Conventions, which, as discussed in chapter 4 of this Report, applies equally to all sides of an armed conflict, persons taking no active part in hostilities (including members of armed forces who are placed *hors de combat* by detention or any other cause) are entitled to be treated humanely. Enforced disappearance is not humane treatment and a prohibition against enforced disappearance can be, and has been, read into Common Article 3.[319]

Customary international law[320] also addresses situations of enforced disappearance during conflict and is applicable to both state and non-state actors. For example, customary international law prohibits the arbitrary deprivation of liberty, and requires that a register be kept of persons deprived of their liberty.[321] Similarly, where a party to a conflict detains persons, the party must respect the detainees' family life, permit visits of detainees by their close relatives and allow correspondence by detainees with their families.[322] Customary international law also requires each party to take all feasible measures to account for persons reported missing as a result of the conflict and to provide their family members with any information it has regarding their fate.[323] The cumulative effect of these obligations amounts to a prohibition on enforced disappearance (committed by either side to a conflict) under customary international law.[324]

If during the course of the conflict in Nepal, a civilian population was the subject of attack, and that attack had dimensions that were either widespread or systematic, then any individual

[316] Note that the Rome Statute, in article 7 (1)(i), only criminalizes enforced disappearance when perpetrated as a crime against humanity (see footnote 145). The definition is similar under customary law. S*ee* Lisa Ott, *Enforced Disappearance in International Law* (Intersentia, 2011).
[317] As reflected in the Declaration on Enforced Disappearances and in the International Convention on the Protection of all Persons from Enforced Disappearance (2006) (Hereafter CED).
[318] These key elements are taken from the preamble to CED and article 2 of CED (see footnote 317)
[319] International Committee for the Red Cross, *Customary International Humanitarian Law*, vol.1 (see footnote 129). The Human Rights Commission, as well as the European Court of Human Rights, have ruled that the enforced disappearance of a close family member constitutes 'inhuman treatment' of the next-of-kin.
[320] See chapter 4 Applicable International Law, p. 61
[321] International Committee of Red Cross, *Customary International Humanitarian Law*, rule123 (see footnote 129).
[322] Ibid, rules 118-128.
[323] Ibid, rule117.
[324] Ibid, p. 340-341.

act(s) of enforced disappearance perpetrated within that attack may constitute a crime against humanity.[325]

6.2.3 International Human Rights Law

According to the UN General Assembly, "enforced disappearance is a grave and flagrant violation of human rights."[326] Such disappearances represent violations of key human rights guarantees under the International Covenant on Civil and Political Rights (ICCPR), to which Nepal has been party since 1991. These include the right not to be subjected to inhuman and degrading treatment (article 7); the right to liberty and security (article 9), and the right to recognition as a person before the law (article 16).[327] Moreover, enforced disappearance is often a precursor to other rights violations; once detained outside the law, a disappeared person is more vulnerable to acts such as extrajudicial execution, torture, and inhuman and degrading treatment.

Indeed, the subject of enforced disappearance has been regarded as sufficiently serious to warrant the adoption of the 1992 UNGA Declaration on the Protection of all Persons from Enforced Disappearance, and in 2006, the adoption of a human rights treaty on disappearances, the International Convention on the Protection of all Persons from Enforced Disappearance (Convention on Enforced Disappearance or CED).

While Nepal has not yet ratified the CED, it remains under an obligation to desist from enforced disappearances by virtue of its ratification of the ICCPR. As noted elsewhere, IHRL applies in times of peace and war and it applied throughout the conflict, except where IHL rules were more specifically applicable.[328] The UN Human Rights Committee confirmed this when it ruled on a communication from a petitioner in Nepal concerning an alleged enforced disappearance that took place during the conflict. The Human Rights Committee concluded that the case was substantiated, and that Nepal was in violation of its obligations under Article 2(3), 7, 9 and 10 of the ICCPR.[329]

Under the ICCPR and the instruments on Enforced Disappearance, the state is the party held responsible for crimes. This includes a duty on the state to investigate and bring to justice those responsible for acts of disappearance committed by persons/groups acting without state consent or acquiescence.[330] Moreover, disappearances are ongoing violations as long as the whereabouts of the disappeared person remain unknown. Thus, States parties to the ICCPR, including Nepal, retain the obligation to remedy this violation, irrespective of who committed it and when.[331] Even a state of emergency officially declared by the government does not lessen the obligations vis-à-vis enforced disappearances.[332]

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[325] Rome Statute, article 7 (see footnote 145). See also discussion in Chapter 4, section 4.4.2.
[326] CED (see footnote 317)
[327] *See, e.g., Berzig v. Algeria*, Human Rights Committee, Communication 1781/2008, CCPR/C/103/D/1781/2008, 31 October 2011, para. 8.5-8.7, 8.9; *Ouaghlissi v. Algeria*, Human Rights Committee, Communication 1905/2009, CCPR/C/104/D/1905/2009, 26 March 2012, paras 7.5-7.7, 7.9
[328] See discussion of *lex specialis*, Chapter 4 section 4.5.2, p. 70
[329] *Sharma v. Nepal*, Human Rights Committee, Communication no. 1469/2006, CCPR/C/94/D/1469/2006, 6 November 2008.
[330] CED, article 3 (see footnote 317). *See also* the jurisprudence of the Human Rights Committee concerning the obligation on the State to take steps to protect persons from acts of private parties/organisations that impair the enjoyment of the rights in the ICCPR. *General Comment No. 31 of the Human Rights Committee: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), para 8.
[331] *General Comment No. 31 of the Human Rights Committee: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), para 15: "Cessation of an ongoing violation is an essential element of the right to an effective remedy."
[332] *General Comment No. 29 of the Human Rights Committee: State of Emergency (Article 4)* **(**CCPR/C/21/Rev.1/Add.11): "[T]he absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law."

So well-established is the duty of a state to prohibit enforced disappearances and to punish those who perpetrate them that the Inter-American Court of Human Rights ruled, "the prohibition of forced disappearance . . . and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."[333] The Human Rights Committee has also concluded that the effects of enforced disappearance on the victim is tantamount to torture and ill-treatment. The comparison supports the view that to commit enforced disappearance is to commit one of the most serious crimes in international law.[334]

While the provisions of the ICCPR are the primary source of binding obligations relevant to disappearances in Nepal during the armed conflict, the State is also party to other conventions and treaties which provide a framework for related violations. These include the International Convention on Economic, Social and Cultural Rights which requires the State to respect, protect, and fulfill the rights to adequate food, an adequate standard of living, health and education.[335] In addition, the Convention on the Rights of the Child (CRC) provides the framework of principles for the protection of children against, *inter alia*, enforced disappearance. This report includes a number of cases where children were the victims of disappearance. Part II of this chapter provides an overview of countrywide trends in allegations of enforced disappearance during the conflict, including summary information on victims by gender, age, affiliation, region and other factors.

6.2.4 Commitments by the State and the CPN (Maoist)

As noted elsewhere in this report[336], both parties to the conflict have made clear and repeated commitments to address and clarify disappearances allegedly committed by the Security Forces and by the CPN (Maoist) and to ensure justice for victims and their families.

In section 5.1.3 of the Comprehensive Peace Accord (CPA), signed by the Government of Nepal and the CPN (Maoist) on 21 November 2006, the parties pledged the following: "Both sides agree to make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed." In section 7.1.3 of the CPA, the parties pledge: "Both sides express the commitment that impartial investigation and action shall be carried out in accordance with law against the persons responsible for creating obstructions to exercise the rights envisaged in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure rights of the victims of conflict and torture and the family of disappeared persons to obtain relief."

The Seven Political Parties and the then CPN (Maoist) made an agreement on 8 November 2006 to form a high-level commission of inquiry to look into disappearances – the Commission on Disappeared Persons. The Interim Constitution 2007 adds several responsibilities in relation to conflict-era violations, including the provision of relief to the families of the disappeared[337] and forming a Truth and Reconciliation Commission (TRC) to investigate serious conflict-related violations.[338] The Interim Constitution further requires the

[333] *Goiburu et al. v. Paraguay*, Inter-American Court of Human Rights, 2006, para 84 (cited in Ott, *Enforced Disappearance in International Law* (see footnote 316). As described in Chapter 4 – Applicable International Law (p. 61), a breach of *jus cogens* is a serious breach of international law over which any court in the world can exercise "universal jurisdiction" and prosecute perpetrators.
[334] Ott, *Enforced Disappearance in International Law* (see footnote 316).
[335] Much has been written about the impact of disappearances on the economic and social situation of the family members and the lack of State support to assist the families in meeting basic needs. See for example, OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008; International Committee of the Red Cross "Families of missing persons in Nepal: a study of their needs," (30 June 2009) Available from www.icrc.org/eng/resources/documents/report/nepal-missing-persons-report-300609.htm
[336] See Chapter 9 – Accountability and the Right to an Effective Remedy p. 176
[337] Interim Constitution of Nepal (2007), article 33(q).
[338] Ibid, 33(s).

State to effectively implement international treaties to which Nepal is a party.[339] By virtue of this, Nepal is constitutionally bound to take steps to ensure the right of the victim to an effective remedy as guaranteed under the ICCPR and the Convention Against Torture (CAT), to which Nepal is a party.

In response to numerous petitions submitted by family members of disappearance victims and by disappearance victims who were subsequently released, the Supreme Court of Nepal issued a ground-breaking decision on 1 June 2007. This decision noted that "the State cannot, in light of the international legal instruments mentioned above [including the ICCPR], the foreign and human rights-related decisions made by regional courts, and our constitutional provisions, escape from its obligation to identify and make public the status of disappeared persons, to initiate legal action against those persons who appear to be the perpetrators, and to provide appropriate remedies to the victims".[340] Further, the decision found that the State had failed to meet these responsibilities and ordered the State to, *inter alia*, form a Commission with sufficient powers to investigate conflict-related disappearances.

Despite these and other obligations, neither party to the conflict has honoured its commitments and responsibilities in relation to alleged disappearance cases. Pending formation of the Commission, the need to preserve witness testimonies and to preserve, review and synthesize all relevant disappearance-related information compiled by national and international organizations remain especially critical tasks.

6.3 TRENDS IN ENFORCED DISAPPEARANCES DURING THE CONFLICT

An examination of the data by period or by alleged perpetrator of the disappearance shows clear trends and patterns in the commission of these acts.

Disappearances by the security forces in Nepal have been reported to WGEID since 1985.[341] Following the start of the conflict in 1996, a significant cluster of disappearances first emerged in 1998, during the Government security operation known as "Kilo Sierra II", which was launched in several districts regarded as Maoist strongholds: Rukum, Rolpa, Jajarkot, Salyan in the Mid-Western Region, Gorkha in the Western Region and Sindhuli in the Central Region.[342] National and international human rights groups reported an "alarming increase" in human rights violations, such as sexual violence,[343] unlawful killings and disappearances during this operation[344] and calls for independent investigations into the allegations of human rights violations pressured the authorities to respond. The Home Minister assigned the responsibility of dealing with complaints and investigating reports of human rights violations to the 25-member Parliamentary Foreign Affairs and Human Rights Committee. However, the Government also stated that it could investigate human rights violations only when raised in the House of Representatives by individual members of Parliament, which had the effect of limiting the scope of possible investigations.[345]

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[339] Ibid, Article 33(m).
[340] *Rabindra Prasad Dhakal on behalf of Advocate Rajendra Prasad Dhakal v. Nepal Government, Council of Ministers' et al. Nepal Kanoon Patrika*, Supreme Court of Nepal, Case 2064/2007, Nepal Law Reporter, Vol.49, Issue 2, at p. 169.
[341] See *Report of the Working Group on Enforced and Involuntary Disappearances to the Human Rights Commission: Mission to Nepal* (E/CN.4/2005/65/Add.1).
[342] Amnesty International, Nepal - *Human Rights at a Turning Point*? p 4 (see footnote 33)
[343] Informal Sector Service Centre, *Human Rights Yearbook 1998* (1998) and *Human Rights Yearbook 1999* (1999).
[344] Amnesty International, *Nepal - Human Rights at a Turning Point?* p 4 (see footnote 33)
[345] Ibid.

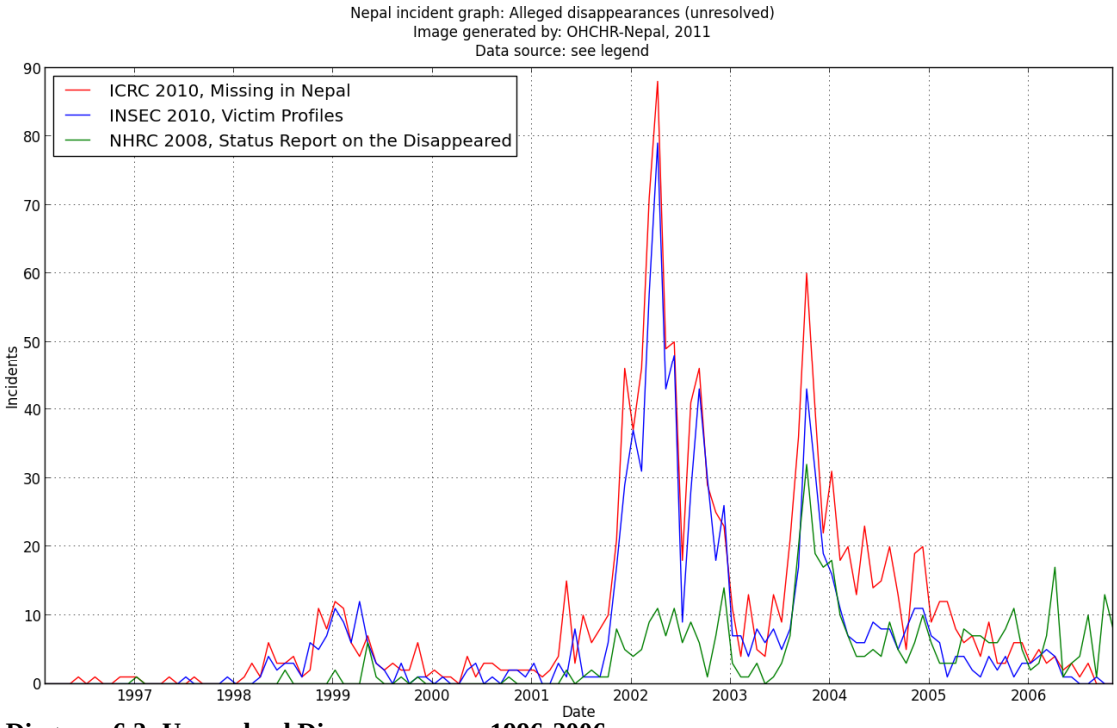

Diagram 6.2: Unresolved Disappearances, 1996-2006

Numbers and names of victims of disappearances produced by Nepali and international NGOs during the early years of the conflict are not fully consistent, but the upward trend is clear. In 1997, seven cases of disappearances were reported by the INSEC; by 1998, the figure had increased to 47, including disappearances by both the police and the Maoists.[346] Amnesty International recorded 37 disappearances in 1998 and 61 in 1999.[347] Though there is little information regarding the initial years of the conflict, currently available data indicates that as a part of their counter-insurgency operations, the Nepal Police were involved in the arrests and subsequent disappearance of suspected members and supporters of the CPN (Maoist), particularly after 1998.[348]

Many reports of disappearances attributed to the police occurred as follows: suspected members or supporters of the CPN (Maoist) were arrested from their homes, often at night, by police who typically arrived in villages in groups. Once located, individuals would be accused of being a Maoist, or of having been involved in an attack on security personnel. The victim would sometimes be beaten in front of his or her family members before being taken away; on other occasions, he or she was quietly taken away with little or no explanation. Victims were reportedly blindfolded and taken to police stations, sometimes in unmarked vehicles or with masked registration plates. They were held in incommunicado detention and subjected to ill-treatment or torture. When families made inquiries about the whereabouts of the persons at the police stations or with the Chief District Officer of the district, the authorities would reportedly deny any knowledge of the arrest.

[346] Informal Sector Service Centre, *Human Rights Yearbook 2000* (2000).
[347] Amnesty International, *Nepal: Fear for safety/possible disappearance/fear of torture/possible extrajudicial execution: Surya Prasad Sharma*, 12 February 2002. Available from www.amnesty.org/en/library/asset/ASA31/015/2002/en/139fa983-d88a-11dd-ad8c-f3d4445c118e/asa310152002en.html.
[348] National and international human rights organizations have documented the pattern of disappearance and arbitrary arrests during this period. *See, e.g.*, Amnesty International, *Nepal: Widespread "disappearances" in the context of armed conflict* (see footnote 66); Amnesty International, *Nepal: A Deepening Crisis* (see footnote 306).

Following the Government's suspension of several fundamental rights, including the right not to be arbitrarily detained and the right to a constitutional remedy,[349] the issuance of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO),[350] and the mobilization of the RNA against the Maoists in November 2001, there was a subsequent and alarming rise in the number of reports of disappearances. In Bardiya district, where OHCHR-Nepal investigated 156 of more than 200 reported cases of disappearance, most of the reported arrests occurred in the aftermath of the declaration of the State of Emergency between December 2001 and January 2003.[351] According to WGEID, Nepal 'recorded the highest number of new cases' of enforced disappearances in 2003 and 2004.[352] The Working Group visited Nepal in 2004 and identified a clear pattern of disappearances by the security forces, particularly the RNA. It found that a group of security personnel would arrest a suspected Maoist or someone suspected of being associated with the Maoists by arriving in plain clothes at the suspect's home, around midnight. The individual would be blindfolded and his or her hands tied behind the back and taken away in a military vehicle.[353]

In the majority of cases of illegal detention and disappearances documented by OHCHR-Nepal, alleged victims were kept in army barracks in incommunicado detention without access to family or lawyers. They were allegedly subjected to torture and ill-treatment during their detention in different military barracks for varying periods; when families made inquiries to local barracks, the army generally denied knowledge of the individual or of their detention. Based on the consistent testimonies from across the country, OHCHR found that torture and ill-treatment of detainees during interrogation at army barracks may have been systematic, particularly in the first few days of their detention. Testimony suggests that the majority of the ill-treatment occurred with the involvement, knowledge and/or acquiescence of commanding officers.[354]

Information recorded in the TJRA indicates that the CPN (Maoist) was also responsible for cases of disappearance following abduction, including of civilians they suspected of collaborating or spying for the security forces. The 2008 report by Nepal's National Human Rights Commission (NHRC) titled *Status Report on Individuals Disappeared During Nepal's Armed Conflict* listed 970 unresolved cases of disappearances. Of these, 299 cases of disappearances are attributed to the CPN (Maoist).[355]

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[349] Note that the right to the remedy of *habeas corpus* was not suspended and was widely used to challenge cases of illegal detention and disappearances. For example, according to Amnesty International, during the 2001-2002 state of emergency, 72 habeas corpus petitions were filed in the Supreme Court, and when the state of emergency lapsed in August 2002, 120 and 105 habeas corpus writs were filed in the Nepalgunj and Biratnagar Appellate Courts respectively. However, these proceedings resulted in only partial gains in relation to cases of disappearances. In the majority of cases, judges only examined the legality of the detention and did not seek to establish the whereabouts of the prisoners. In addition, security forces consistently failed to provide information in relation to habeas corpus applications, which further limited their effectiveness.

[350] In November 2001, the Government proclaimed a state of emergency and promulgated "The Terrorist and Disruptive (Control and Punishment) Ordinance" (TADO) as one of the emergency measures. TADO was re-enacted by Parliament into "The Terrorist and Disruptive Activities (Control and Punishment) Act, 2002 (TADA)" which went into force on 10th April, 2002 with a validity of two years, which expired in 2004. Subsequently, it was re-promulgated five times through Ordinances, each lasting six months. The last re-promulgation was 27 March 2006 which expired on 26 September 2006.

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

[352] *Report of the Working Group on Enforced and Involuntary Disappearances to the Human Rights Commission* (E/CN.4/2004/58).

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

[354] See Chapter 7 -Torture p. 124; and OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008 and OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004* (May 2006), which describe the form of torture and ill-treatment detainees were subject to during their detention in army barracks.

[355] Available from http://www.nhrcnepal.org///publication/doc/reports/Disapp-Status-Rep-2008-Nep.pdf, accessed on 2010-06-20

Cases involving actions tantamount to disappearances by the Maoists often took place under similar circumstances: individuals were taken away during the day or at night from their homes, places of work, or local markets by a group of CPN (Maoist) cadres in civilian clothes. In the majority of the cases OHCHR documented, there were witnesses to the abduction. A group would approach the victim; one or more of the group was often a known Maoist cadre.[356] In many instances, alleged victims were first blindfolded, then violently beaten and then taken away with little or no explanation.

OHCHR investigation of cases of abductions and subsequent disappearances indicate that, depending on the nature of the case, abductions may have been carried out by members of the CPN (Maoist) political, district or area committee members, the "People's Government", the People's Liberation Army or local militia.[357] OHCHR's previous investigations into allegations of alleged disappearances by the CPN (Maoist) indicated that some of those abducted and disappeared were subsequently killed or died in suspicious circumstances.[358]

6.4 CASE EXAMPLES

Since May 2005, OHCHR-Nepal received a large number of testimonies from individuals across the country whose family members were allegedly disappeared by the Security Forces or by the CPN (Maoist). None of the cases have been sufficiently investigated by police and not a single member of security forces or the CPN (Maoist) has been brought to justice for these violations before a civilian court. OHCHR-Nepal repeatedly expressed grave concern with the Government of Nepal and the CPN (Maoist) leadership about the ongoing failure to properly investigate serious human rights violations committed during the conflict and to hold persons accountable.

On 26 May 2006, OHCHR released a report on its findings in relation to 49 alleged cases of disappearance and torture linked to the RNA's 10th Brigade at Maharajgunj Barracks beginning in 2003.[359] To date, the Nepal Army has not acknowledged any role in the torture, or disappearance of the 49 individuals as reported by OHCHR nor taken any action against personnel implicated either directly or through chain-of-command responsibility. On the contrary, the Army has publicly denied responsibility and in fact promoted officers who were in positions of responsibility when these violations allegedly occurred.[360]

On 19 December 2008, OHCHR released a report on its findings in relation to alleged cases of disappearance and torture in Bardiya district, the district with the highest number of conflict-related disappearances. During the compilation of its report, OHCHR-Nepal received information relating to more than 200 cases of conflict-related enforced disappearances linked to both the Security Forces and the CPN (Maoist), and conducted detailed investigations into 156 cases. There is substantial evidence that the Security Forces were responsible for the clear majority of these cases, but as with the Maharajgunj disappearances, Security Force cooperation with investigations by OHCHR and other institutions has been poor. Further, as

[356] For example, see the pattern of abductions and disappearances by the CPN-M in 2008 reported in OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008.
[357] OHCHR-Nepal, *Human Rights Abuses by the CPN-M: Summary of Concerns*, September 2006, p 5.
[358] Ibid; OHCHR-Nepal, *Conflict Related Disappearances in Bardiya District*, December 2008.
[359] OHCHR-Nepal, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003 – 2004* (May 2006).
[360] In particular, it is noted that in December 2009, the Government promoted Major General Toran Bahadur Singh to Lieutenant General of the Nepal Army. Kosh Raj Koirala, "Toran Promoted at Last," *Republica* (24 December 2009). Available from http://www.myrepublica.com/portal/index.php?action=news_details&news_id=13198. Further, in July 2011, the Nepal Army promoted Brigadier General Victor Ranat to Major General. *See* OHCHR press release, "UN concerned over recent Govt. decisions to appoint, pardon and promote alleged perpetrators of human rights violations," (10 November 2011) Available at http://nepal.ohchr.org/en/resources/Documents/English /pressreleases/Year%202011/November/2011_11_10_PR_Dhungel _pardpn_E.pdf

OHCHR publicly stated in its report to the Human Rights Council in 2010, the leadership of the CPN (Maoist) has failed to cooperate with the criminal investigations into human rights abuses, including cases of abduction tantamount to enforced disappearance committed by party cadres.[361]

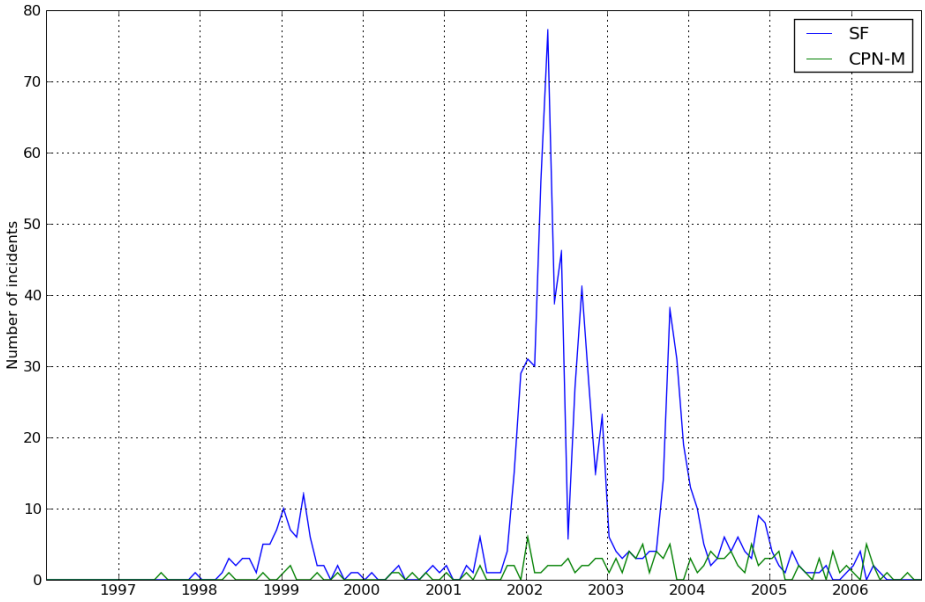

Diagram 6.3: Unresolved Disappearances, 1996-2006, by Alleged Perpetrator

The case examples from OHCHR's investigations into disappearances in Maharajgunj barracks and Bardiya district listed below are illustrative of trends or practices reported throughout the country and documented in the TJRA.

Emblematic Case 6.1[362]

Narrative: OHCHR investigations indicate that Jalandhar Bastola of Sindhuli (originally Solukhumbu) district was arrested in Kathmandu during or before September/October 2003 and illegally detained and severely tortured by Army personnel at the Bhairabnath Battalion barracks in Maharajgunj. Jalandhar Bastola's current whereabouts have not been clarified.

The Nepal Army Task Force writes in its 2006 report that according to police records, Jalandhar Bastola died on 15 August 2004 when a pressure cooker bomb he was planting in the Thumka area of Bidur Municipality, Nuwakot district suddenly exploded.

OHCHR investigations indicate that the information contained in the RNA Task Force report regarding the death of Jalandhar Bastola is not accurate. Multiple sources affirm that Jalandhar Bastola was not one of the two people killed in the 15 August 2004 explosion in Nuwakot. Therefore, the clarification contained in the RNA Task Force report is not considered to be sufficient by OHCHR, and the whereabouts of Jalandhar Bastola remain unknown.

[361] *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal* (A/HRC/13/73), p 8.
[362] Ref. No. 2003-00-00 - incident – Kathmandu; *Dhakal* Nepal Supreme Court (2007) (see footnote 340).

Information published since June 2006 which confirm OHCHR's investigations into the ongoing disappearance of Jalandhar Bastola is available in public reports and statements issued by multiple organizations.

Analysis: In addition to the issues outlined above, close assessment of the accuracy and integrity of documents maintained by all branches of the Security Forces during the conflict, including the police, must remain a high priority for any investigation. The Supreme Court's June 2007 decision notes that the practice of keeping detainees in illegal detention in *ad hoc* detention centres such as army barracks, combined with poor documentation by Security Forces of detainees held in custody, are contributing factors to the commission of enforced disappearances:

> *Regardless of the gravity of the detainee's offence, the treatment of the detainees must be humane and meet established human rights standards. The physical conditions of the centres where detainees have been kept and the abhorrent quality of treatment to which they were exposed, evidence the dismal attitude of the concerned offices towards detainees. As detainees were subjected to degrading treatment in inadequate detention centres, the risk of their loss of life and the deterioration of their physical and mental health remained quite high. As a result, the security agencies' violations of the detainees' human rights were incentives for these agencies to disappear the detainees. Furthermore, given the lack of record keeping or other forms of information dissemination, a policy of disappearing individuals is easy to implement and likely to occur.*

The alleged incidents of disappearance included in the TJRA indicaate a high correspondence between the holding of detainees in illegal detention, on one hand, and torture and enforced disappearance on the other. It should be a high priority for a transitional justice mechanism, or another competent judicial authority, to clarify the fate or whereabouts of victims of outstanding disappearance cases and to hold perpetrators of all disappearances accountable, regardless of whether or not the case has been clarified. It is further important to investigate the factors that contribute to or otherwise enable the practice of enforced disappearance in Nepal, including those outlined in the Supreme Court decision above.

Emblematic Case 6.2[363]

Narrative: OHCHR investigations indicate that Hira Bahadur Rokka of Nuwakot district was disappeared on two distinct occasions. In relations to the second instance, information shows he was arrested on 6 December 2003 in Kathmandu, illegally detained and severely tortured by army personnel at the Bhairabnath Battalion barracks in Maharajgunj. Hira Bahadur Rokka's current whereabouts have not been clarified.

The Royal Nepal Army Task Force writes in its 2006 report that it received information that "Hira Bahadur Rokaya" [sic] of Nuwakot was released from the District Police Office, Nuwakot on 5 July 2003, and that the Nepal Police had been in contact with the WGEID regarding the release.

[363] Ref. No. 2003-12-06 – incident – Kathmandu – 1215a; OHCHR-N letter to the Prime Minister of Nepal, 26 July 2009, Ref no; 458/2009, Available from http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202009/September2009/Letter_To_The_PM_E.pdf. *Dhakal*, Nepal Supreme Court (2007) (see footnote 340); OHCHR was not provided with an official copy of the Nepal Army Task Force report.

OHCHR investigations indicate that the information contained in the RNA Task Force report is not relevant to the 6 December 2003 disappearance of Mr. Hira Bahadur Rokka, of Nuwakot district, which remains unresolved. The clarification contained in the 2006 RNA Task Force report is not deemed sufficient by OHCHR. The whereabouts of Hira Bahadur Rokka remain unknown.

Information published since June 2006, which corroborates OHCHR's investigations into the ongoing disappearance of Mr. Rokka, is available in public reports and statements issued by multiple organizations.

Analysis: This case reflects an individual who was subject to an enforced disappearance on multiple occasions. Despite the involvement of WGEID in relation to the first disappearance, the individual was subsequently disappeared on a second occasion and his whereabouts remain unknown. Information concerning this case that was included in a report by a Nepal Army Task Force following OHCHR's May 2006 report on disappearance and torture in Maharajgunj was not relevant to the second enforced disappearance. It is noteworthy that the second disappearance was documented and corroborated by multiple independent sources. The Nepal Army denied to OHCHR and other organizations the allegation that the victim was detained in the Bhairabnath Battalion barracks in or around December 2006. The Supreme Court's 1 June 2007 decision offers a clear assessment of the Nepal Army's response to allegations of disappearance and torture at Maharajgunj and other barracks:

> *On the basis of the … reports and statements given by the individuals detained at the Bhairab Nath Battalion, it is now beyond dispute that a large number of detainees were held captive there.… If an institution is being used for different purposes other than its original purpose of establishment, the officials and institutions should be held accountable for any adverse outcomes. In this context, it is the responsibility of the Nepal Army to respond to all allegations. Yet instead, the Nepal Army defended itself by systematically denying all of the facts submitted by the petitioners. Given the facts claimed in the petitions, which have been corroborated by statements of detainees and other eyewitnesses, the responsibility for these human rights violations clearly lies with the Army, and ultimately the Government.*

The Nepal Army's refusal to provide complete and accurate information regarding detainees held at army barracks during the conflict is also reflected in a letter sent by the OHCHR-Nepal Representative to the Prime Minister on 26 July 2009. The letter notes that cooperation by the Nepal Army with OHCHR investigations into the Maharajgunj disappearances was poor, and the Army provided

> *OHCHR with incomplete and misleading information regarding detainees during OHCHR's 2005 and 2006 investigations into the disappearances at Maharajgunj barracks. For example, the official lists of former detainees which Major Bibek Bista of Bhairabnath Battalion provided OHCHR on 30 March 2006 did not include the names of Nirmala Bhandari, Renuka Ale Magar and Rup Narayan Shrestha, all of whom the Nepal Army Task Force report acknowledged had been detained by the Bhairabnath Battalion.*

The RNA Task Force report offers clear evidence that it is in possession of additional documentation regarding conflict-era detainees held at the Maharajgunj barracks. The scrutiny of all relevant documentation in possession of the Nepal Army and other Government institutions should be a high priority for any investigation.

Emblematic Case 6.3[364]

Narrative: Khadga Bahadur Gharti Magar was arrested without warrant from his home in Kusunti, Lalitpur on the night of 22 September 2003 and taken to the Bhairabnath Battalion barracks in Maharajgunj by Army personnel. There, he was reportedly severely tortured and endured mistreatment over a period of six months. Mr. Gharti Magar died in Army custody at Birendra Military Hospital, Chhauni on 1 March 2004 while being treated for a medical condition apparently unrelated to his torture and ill-treatment.

With regard to Khadga Bahadur Gharti Magar, the Nepal Army Task Force writes in its 2006 report that he was arrested from his home in Kusunti, Lalitpur on the night of 23 September 2003, that he became ill while in the custody of the Bhairabnath Battalion in Maharajgunj, and that he died in Birendra Hospital in Chhauni on 1 March 2004. The Nepal Army Task Force further writes that according to the post-mortem and a report by the Department of Forensic Medicine, Kathmandu Autopsy Centre, the cause of death was hypertensive heart disease.

Analysis: In addition to the issues outlined above, the alleged death of a detainee in the custody of either the Security Forces or the CPN (Maoist) is documented in multiple cases in the TJRA. Though Nepal has not ratified the CED, it is relevant to recall that under its rubric, the death of the disappeared person may be considered an aggravating circumstance when determining appropriate punishment for persons implicated in the commission of an enforced disappearance.

Emblematic Case 6.4[365]

Narrative: Krishna Prasad Adhikari was a 26-year-old soldier with the Royal Nepalese Army of Deudakala Village Development Committee (VDC) Bardiya district. He was allegedly abducted by the CPN-M on 18 July 2004 while he was home on leave. According to OHCHR's information, he was playing karam at Laxmana chowk in his home VDC, when a group of around ten Maoists arrived, blindfolded him and tied his hands behind his back before they took him away in the direction of the forested area north of the chowk. His family has not seen him since. In July 2008, the CPN-M district leadership acknowledged to OHCHR that Mr. Adhikari was killed by the CPN-M but has yet to provide information on the whereabouts of the body.

Analysis: This alleged abduction of an off-duty Security Force member by the CPN (Maoist) is indicative of a practice documented in multiple cases recorded in the TJRA, of abduction tantamount to enforced disappearance of both civilians and members of the Security Forces. The CPN (Maoist)'s failure to cooperate fully into the investigations of disappearances in Bardiya district, as noted above, and their failure to cooperate fully with investigations into other alleged incidents committed during the conflict, should remain a high priority for any investigation.

[364] Ref. No. 2003-12-03 - incident – Lalitpur; CED article 7.2 (b) (see footnote 317).
[365] Ref. No. 2004-07-18 – incident - Bardiya – 1215b.

Emblematic Case 6.5[366]

Narrative: [Name Withheld], then 14 years old, was arrested reportedly without warrant by the Nepal Army from a relative's home in Kathmandu on the night of 15 November 2003. Ms. [withheld] was taken to the Bhairabnath Battalion barracks in Maharajgunj where she was interrogated and tortured by Nepal Army personnel. She was allegedly illegally detained at Maharajgunj barracks from 15 November 2003 until her release on 3 June 2004.

With regard to a female under the age of 16 with the family name similar to that of the victim, the RNA Task Force writes in its 2006 report that it learned through questioning during the course of its investigation that [name withheld], a 14-year old girl from Lalitpur district, had been arrested and detained by the Bhairabnath Battalion "E" Company on 15 November 2003. The RNA Task Force also writes that the army's Psychological Operations Division broadcast an interview with Ms. [name withheld] on Nepal Television on 28 June 2004 and that she had been handed over to her family in the presence of ICRC representatives.

OHCHR is concerned to note that though the RNA Task Force report acknowledges that [name withheld] was arrested by the Bhairabnath Battalion "E" Company on 15 November 2003, Ms. [withheld]'s name does not appear anywhere in the official lists of former detainees given to OHCHR by a Bhairabnath Battalion officer on 30 March 2006.

Although the RNA did eventually release [name withheld], OHCHR has emphasized that this does not in any way absolve the Army of responsibility for her alleged illegal detention, torture, and ill-treatment during the seven months she was allegedly disappeared at the Maharajgunj barracks.

Analysis: In This case reflects a disappearance victim who was eventually released to her family and whose case has been clarified. The victim was a minor at the time she was allegedly disappeared and, although Nepal has not currently ratified the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention would require a competent tribunal to consider as an aggravating circumstance the fact that the disappeared person was a minor.

[366] OHCHR source confidential Ref. No 1215c; CED, article 7.2 (b) (see footnote 317). "Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons."

CHAPTER 7 - TORTURE

Including Mutilation and Other Forms of Ill-Treatment

7.1 OVERVIEW

No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.[367]

The prohibition of torture is one of the clearest and strongest norms in international law.[368] It has attained the status of *jus cogens*, which means that it is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted. [369] Indeed, torture is so thoroughly and universally condemned under international law that, as with genocide and crimes against humanity, any court in the world can prosecute torture and, if found guilty, punish a perpetrator for acts of torture committed wherever they occurred.[370]

Nepal has ratified and is a party to at least four treaties, in addition to the Universal Declaration of Human Rights, which expressly prohibit torture: the Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). The 1990 constitution of Nepal also prohibited torture, as does the current, interim constitution.

However, torture is not a criminal offence under Nepali domestic law.[371] Nepal's National Code of 1962 (and its antecedent, the *Muluki Ain)* does contain a prohibition on 'mutilation' which carries a maximum eight-year sentence. The closest offenses are physical assault (two-year maximum sentence) and "battery," (*kutpit*) for which the perpetrator might be given up

[367] Universal Declaration of Human Rights, article 5.

[368] Anthony Cullen, "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights", *California Western International Law Journal*, vol. 34, (2008). *See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/HRC/13/39/Add.5): "The absolute nature of the prohibition of torture means that the right to personal integrity and dignity — the freedom from torture — cannot be balanced against any other right or concern. As such, the prohibition of torture goes further than the protection of the right to life which may be balanced, such as in the case of the lawful killing of a hostage taker in order to rescue his hostages. Torture must not be balanced against national security interests or even the protection of other human rights. No limitations are permitted on the prohibition of torture."

[369] This status is known as *jus cogens* or "peremptory norm." The proscribing of torture as a peremptory norm of international law is confirmed by the judgement of the ICTY in *Furundžija*: "[T]he prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency . . . . [T]he prohibition on torture is a peremptory norm or *jus cogens*…" *Prosecutor v. Furundžija*, ICTY, Trial Chamber, no. IT-95-17/1, 10 December 1998, para 144. It is also recognized by the Committee Against Torture (CAT) itself in its *General Comment No. 2 of the Committee Against Torture: Implementation of article 2 by States parties* (CAT/C/GC/2): "Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention . . ."

[370] Refer to the discussion of Universal Jurisdiction in Chapter 4 – Applicable International Law section 4.1.1 p. 65.

[371] Although the Torture Compensation Act of 1996 did not criminalize torture directly, section 7 provides for departmental action against the perpetrator. The parent provision of this Act was article 14 (4) of the Constitution of the Kingdom of Nepal (1990), which stated: "*No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law*". Using these provisions, Nepali courts have, in practice, been dealing torture as a criminal act. This has been notable in the District Courts, where case are initiated, which have interpreted the provisions of the Torture Compensation Act in the light of the former Constitution and article 4 of the CAT.

to one year in prison.[372] This gap may go some way to explaining why, despite their universal condemnation, torture, mutilation, and other sorts of cruel and inhumane and degrading treatment were perpetrated during the conflict – and extensively so, according to available data. According to an official from Centre for Victims of Torture (CVICT), the leading Nepali NGO for torture and trauma counselling and rehabilitation, more than 30,000 individuals experienced some form of torture, ill-treatment, or trauma during the conflict.[373] Both parties to the conflict are allegedly implicated.

Violations of both IHRL and IHL covered in this chapter fall into four broad categories: torture, mutilation, other forms of ill-treatment, and arbitrary detention. Included under "other forms of ill-treatment" are both "cruel treatment" and "outrages against personal dignity" from Common Article 3 of the Geneva conventions, as well as the prohibitions of "cruel, inhuman and degrading treatment" under international human rights law (IHRL). Altogether, the TJRA recorded well over 2,500 cases of such alleged ill-treatment over the decade-long insurgency.[374]

Broadly speaking, the apparent motive of the Security Forces in perpetrating acts of torture and ill treatment would have been primarily to extract information about the Maoists from anyone who might have had something to reveal. The methods were reportedly consistent across the country and throughout the conflict. Reports indicate that the techniques generally were intended to inflict pain in increasing measure or over a prolonged period until the victim divulged whatever information they were believed to have. Instances of ill-treatment that were intended simply to humiliate the victim were also recorded.

The Maoist alleged usage of torture and ill-treatment was of a different nature, falling into two general, and sometimes overlapping, patterns. First, the Maoists allegedly perpetrated violence as a means of coercion, typically at a local level. For example, violence was used against Nepalis who refused to observe Bandhs (strikes), who failed to make financial contributions to the Maoists (often called "donations" irrespective of whether it was freely given), or who were believed to have spoken out against the Maoists. As well as coercing the victim, such action also would have a more general, coercive effect by spreading fear among the population that to oppose or be indifferent risked physical punishment.

The second general pattern of alleged maltreatment by the Maoists concerned giving out punishments. Whether through the "People's Court" or simply by decisions of local commanders, Maoists allegedly regularly, and often violently, punished persons deemed to have "misbehaved" according to the Maoist code, or those targeted because of their active or symbolic opposition to the Maoist movement. The most notable group of victims were reportedly those that the Maoists suspected of being spies or 'informants.' The TJRA also records cases of mutilation, instances of cruel treatment and cases of inhuman or degrading treatment, allegedly perpetrated on behalf of the Maoists.

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[372] Amnesty International, *Nepal: Make Torture a Crime*, 1 March 2001, p. 4, Available from http://www.amnesty.org/en/library/info/ASA31/002/2001/en: "Under the *Muluki Ain*, victims of crimes such as assault by police or others can directly file a case against the alleged perpetrator as a civil suit in the local court in order for charges to be brought under the above provisions." Battery or ***Kutpit*** cannot amount to torture as defined in Article 1 of the CAT as the crime requires that the perpetrator must not be a public officer or performing a public duty. Under the terms of the Convention, the perpetrator of the torture must be a public official and performing a public duty.

[373] Interview with Jamuna Poudyel, Centre for Victims of Torture (CVICT) Program Director, 3 August 2010 (Notes on file with OHCHR). Nepal's National Human Rights Commission reported more than 12,000 cases of torture (and arrest) in their 2003 report on the human rights in Nepal, covering a period of 1998-2002. *See* Nepal, National Human Rights Commission, *Human Rights in Nepal: a Status Report, 2003* (NHRC, Kathmandu, 2003), pp. 35-36. However it appears the Commission relied primarily on data from the CVICT rather than their own cases.

[374] It is noted that there is a substantial difference between the figures from the CVICT and the figures based on the data in the TJRA. This could be due to underreporting. Many allegations of torture, for a wide array of reasons, will not have been reported to the human rights organizations that were the primary sources for the TJRA.

Available data suggests that some Maoist cadres were dismissed from the party or reportedly sentenced to labour camps in response to allegations of torture from outside organizations.[375] Similarly, there are examples where certain Security Force personnel were punished via internal disciplinary measures, including court martial.[376] Yet it remains the case that, at the time of writing this report, no one from either party to the conflict has been sent to prison for having perpetrated torture, mutilation, or ill-treatment during the conflict.[377]

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has made several recommendations to Nepal on issues within his mandate. In March 2012, the Special Rapporteur followed up to recommendations made in 2005, and stressed that several had not been followed. In particular, he emphasized the need to include a definition of torture in the penal code, and ensure that no persons convicted of torture will be given amnesty or benefit from impunity. He also stated that the National Human Rights Commission (NHRC) has not been able to carry out investigations of torture, and encouraged the Government to strengthen its capacity in this area.[378]

Before turning to the discussion of the trends and patterns that characterized this category of violation during the conflict, the legal elements applicable to each party are set out. The IHRL and International Humanitarian Law (IHL) legal regimes governing torture, mutilation, arbitrary detention and other ill-treatment are largely congruent, although the differences warrant attention and are examined in the following section.

7.2 GOVERNING LEGAL FRAMEWORK

7.2.1 Torture

Torture committed during armed conflict is simultaneously a human rights violation, a humanitarian law violation, and an international crime.

a) International Human Rights Law

The CAT defines torture[379] as follows (emphasis added):

> *any act by which <u>severe pain or suffering, whether physical or mental</u>, is intentionally inflicted on a person for such <u>purposes</u> as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain*

[375] For example, see discussion of accountability of those involved in the *Madi* bus bombing (Ref. No. 2005-06-06 - incident - Chitwan _0106, emblematic case 5.15) in section 10.4.12 p. 199.
[376] See the Maina Sunuwar case below in Emblematic case 7.2.
[377] Nor has anyone been sent to prison for perpetrating any of the other prohibited acts in the Nepali civil code, such as assault, beating, or mutilation.
[378] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Follow-up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan*. A/HRC/19/61/Add.3 (1 March 2012).
[379] Neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights define torture. *See General Comment No. 20 of the Human Rights Committee: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7)* (International Covenant on Civil and Political Rights General Comment No. 20), para 4: "The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts . . ."

> *or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[380]

The severity of the pain necessary to qualify as torture – as opposed to lesser types of ill-treatment – has been the subject of debate for many years. The question is how much pain, be it physical or mental, the ill-treatment must cause before it is 'severe' enough to be labelled torture. For example, CAT jurisprudence has held that severe beating can amount to torture. The Committee has held that a victim had been tortured when she was beaten and received a severe blow to the head, requiring two weeks recovery, in addition to anxiety, loss of short term memory, and psychiatric problems. [381] Another victim of torture was hit repeatedly, dragged up a flight of stairs, sprayed with tear gas, and given severe spinal injuries, for which doctors recommended back surgery.[382] Even where it is unclear exactly what the ill treatment entailed, it can qualify as torture if the consequences are sufficiently severe. In *Hanafi v. Algeria*, the victim eventually died from injuries sustained while he was in custody. He was only able to report that he had been beaten, but the Committee judged that this was a violation of Article 1. [383] It is important to note that in all of these cases, the victims were subjected to torture for one of the reasons described in the CAT definition.

However, beating is not always classified as torture, if it is not sufficiently severe. A victim who was kicked, beaten, strangled and threatened with being shot was judged not to have experienced 'severe pain and suffering' to amount to torture.[384] Therefore, each case must be considered individually.

Article 7 of the ICCPR also prohibits torture, as well as cruel, inhuman or degrading treatment or punishment.[385] Despite the fact that all of these provisions are listed under the same Article, and therefore actions need not be classified strictly as torture to be violations of the Covenant, the Human Rights Committee "considers it appropriate to identify treatment as torture if the facts so warrant."[386] In this determination, the Committee is guided by the definition in Article 1 of the CAT.[387] The Committee has found that keeping a victim in incommunicado confinement, while bound with handcuffs for many months, subjecting him repeatedly to beatings, rubbing him with ice blocks, poking him in sensitive areas with needles, and threatening or telling him that he would be killed constituted torture.[388] Another victim of torture, as determined by the Human Rights Committee, was subjected to electric shocks, beaten, given the sensation of suffocating or drowning, hung by his hands from the ceiling, threatened to be attacked by dogs, injected with drugs, deprived of sleep, and anally raped.[389]

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[380] CAT article 1. Although the ICCPR makes no such reference, the addition of the "public official" element in the CAT definition is in line with traditional human rights doctrine that places its obligations upon states, as opposed to private individuals or organizations. This onus on government sets the human rights definition apart from its IHL counterpart – the latter of which is binding on both parties to an armed conflict regardless of any "governmental" or "public official" involvement. Jurisprudence at ICTY, for example, has made clear that IHL does not require torture to be perpetrated by a public official. *Kunarac et al*., ICTY, Appeals Chamber, (2002) para 148 (see footnote 154); affirmed in *Limaj*, ICTY Trial chamber (2005), para 240 (see footnote 150). Note as well that the definition of torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[381] *Saadia Ali v. Tunisia*, CAT Communication no. 291/2006, 21 November 2008, para 2.6 and 15.4.
[382] *Ali Ben Salem v. Tunisia*, CAT Communication no. 269/2005, 7 November 2007, paras 2.3, 2.4 and 16.4.
[383] *Hanafi v. Algeri*, CAT Communication no. 341/2008, 3 June 2011, para 9.3.
[384] *Keremedchiev v. Bulgaria*, CAT Communication 257/2004, 11 November 2008, paras 2.2 and 9.3.
[385] ICCPR, article 7 (see footnote 164)
[386] *Giri v. Nepal*, Human Rights Committee 1761/2008, 24 March 2011, para 7.5
[387] Ibid.
[388] Ibid, paras 2.4, 2.5 and 7.9.
[389] *Hagog v. Libya*, Human Rights Committee 1755/2008, 17 March 2012, paras 2.3 and 8.6.

b) International Criminal Law

The Rome Statute of the International Criminal Court (ICC) defines in straightforward terms the elements comprising torture (emphasis added):

- *The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.*
- *The perpetrator inflicted the pain or suffering for such purposes as:*
  a. *obtaining information or a confession;*
  b. *punishment;*
  c. *intimidation or coercion; or*
  d. *for any reason based on discrimination of any kind.*[390]

As in IHRL, the severity of the pain necessary to constitute torture must be determined by the court. However, certain acts have been found to constitute torture *per se*. At the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Court in *Kvočka* observed,

> *The UN Special Rapporteur on Torture, human rights bodies, and legal scholars have listed several acts that are considered severe enough* per se *to constitute torture . . . Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as torture.*[391]

The ICTY also classified prolonged isolation, such as in extended solitary confinement as torture *per se*.[392] All these acts constitute torture under IHL irrespective of any subjectively experienced pain of the victim.

In other circumstances, determining whether the severity threshold has been met requires some form of measuring what are ultimately subjectively perceived phenomena. Only an examination of the impact of the mistreatment on the victim will reveal whether the pain caused was sufficiently severe to be labelled torture.[393] Courts recognize the difficulty of such a subjective evaluation, and international tribunals have so far not articulated a more precise definition of the threshold[394] other than to note that the evaluation must be made by considering the totality of the circumstances. In *Kvočka*,

> *A precise threshold for determining what degree of suffering is sufficient to meet the definition of torture has not been delineated. In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in*

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[390] Rome Statute, article 8 (2) (c) (i)-4 "Elements of Crime" (see footnote 145).
[391] *Prosecutor v. Kvočka, et al.*, ICTY, Trial Chamber, no. IT-98-30/1, 2 November 2001, para 144, (citing UN Doc A/56/156, 3 July 2001, para 8).
[392] OHCHR, "International Legal Standards for the Protection of Persons Deprived of Their Liberty" in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series no.9 (United Nations, 2003), chap. 8, sect. 4.6, p. 355 Available from www2.ohchr.org/english/about/publications/docs/CHAPTER_8.pdf.
[393] Chris Ingelse, *The U.N. Committee Against Torture: An Assessment* (The Hague, Kluwer Law International, 2001).
[394] With the notable exception of a ruling by the European Court of Human Rights from 1978. In *Republic of Ireland v. The United Kingdom*, the Court adopted a "very serious and cruel suffering" threshold of pain in holding that the cumulative effects of hooding detainees, subjecting them to constant and intense 'white' noise, sleep deprivation, giving them insufficient food and drink, and making them stand for extended periods in a pain-inducing posture, was inhuman treatment, but importantly did *not* rise to torture. *Republic of Ireland v. The United Kingdom*, European Court of Human Rights, App. No. 5310/71, 2 Eur. H.R. Rep. 25, 1978, para 167. The court found these techniques not to deliver the intensity of pain required under a "very serious and cruel suffering" threshold.

> *some cases, factors such as the victim's age, sex, or state of health will also be relevant. . .*[395]

It is clear that in examining whether torture has occurred, both subjective and objective elements are to be considered, and that conduct in one instance and with one victim might amount to torture whereas similar conduct with a different victim might be a lesser form of ill-treatment, or may fall outside the prohibition entirely.

To date, international tribunals and human rights bodies have found the following acts to constitute torture: kicking, beating, hitting, "*falanga*," (beating on the soles of the feet), flogging, shaking violently, inflicting electric shocks, burning, extracting finger or toe nails and/or teeth or dumping acid on the victim. Subjecting the victim to "water treatment,"[396] extended hanging from hand and/or leg chains, the "thumb press,"[397] deprivation of food/water/sleep, suffocation/asphyxiation, denial of medicine, prolonged denial of sufficient hygiene, forcing one to stand for great lengths of time, and prolonged solitary confinement,[398] and rape[399] have also been held to constitute torture. Mental torture has been found where the perpetrator threatens the victim with death or simulates an execution, while having the means to carry it out.[400] It is important to note that while each of these actions may have been found to be torture in the past, it does not necessarily follow that every action of this nature will amount to torture. The severity and other circumstances must be considered.

7.2.2 Mutilation

Mutilation is specifically prohibited in Common Article 3(1)(a) of the Geneva Conventions as well as being a specific offence in the Rome Statute.[401] Its elements are as follows:

- *The perpetrator mutilated a person,*[402] *in particular by*
  - *permanently disfiguring, or;*
  - *permanently disabling, or;*
  - *removing an organ or appendage.*

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[395] *Kvočka*, ICTY Trial Chamber (2001), para 143 (see footnote 391) (citing *Čelebići Case*, ICTY, Trial Chamber, (1998) para 469).

[396] Covering the victim's face with a cloth and pouring water over it, or simply dunking the victims head in water, in order to provoke the sensation of drowning.

[397] Also known as a 'thumb screw,' the thumb press is a tool much like a nutcracker or a vice that squeezes the victim's thumb or fingers. Pressure can be increased at the whim of the perpetrator until the digit is essentially crushed.

[398] *Hagog v. Libya*, Human Rights Committee 1755/2008, 17 March 2012, paras 2.3 and 8.6. *See also* Communications of the Human Rights Committee; *Muteba v. Zaire* (124/1982), *Miango Muiyo v. Zaire* (194/1985) *Kanana v. Zaire* (366/1989), *Grille Motta* (11/1977), *Lopez Burgos* (52/1979), *Sendić* (63/1979), *Angel Estrella* (74/1980), *Arzuaga Gilboa* (147/1983), *Cariboni* (159/1983); *Berberretche Acosta* (162/1983) and *Herrera Rubio v. Colombia* (161/1983). *See also Prosecutor v. Dragan Nikolic*, ICTY, Trial Chamber, no. IT-94-2-S, Sentencing Judgement, 19 December 2003; *Furundžija*, ICTY Trial Chamber (1998) (see footnote 369); *Prosecutor v. Akayesu*, ICTR, Trial Chamber, no. ICTR-96-4-T, Judgment, 2 September 1998; *Aydin v. Turkey*, European Court of Human Rights, App. no. 57/1996/676/866, 25 September 1997; *Selouni v. France*, European Court of Human Rights, App. no. 25803/94, 28 July 1999.

[399] *Kunarac et al.*, ICTY, Trial Chamber, (2001) para 656 (see footnote 154)

[400] Human Rights Committee, *General Comment 20*, para 5; *Maritza Urrutia Case*, Inter-American Court of Human Rights, (Ser. C) No. 103, 27 November 2003, para 78(c). *See also* Torture Abolition and Survivors Support Coalition International, *TASSC's Definition* (2006) Available from www.tassc.org/index.php?sn=78 (defining mental torture to include death threats). IHL also refers to "mental torture" and contains prohibitions against threats of torture or other cruel treatment.

[401] Rome Statute, article 8 (2) (c) (i) "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". (see footnote 145)

[402] Unlike "Outrages upon personal dignity" below (see footnote 419) the term "person" here implies a living person, or at least a person who was living while the mutilation was committed. Concerning mutilation of the deceased, it is prohibited both by the mentioned prohibition on "Outrages," as well as customary IHL. *See* International Committee of Red Cross, *Customary International Humanitarian Law*, rule 113 (see footnote 129)

- *The person was protected under the Geneva Conventions (i.e. was a civilian or* hors de combat*).*
- *The act was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.*

Mutilation implies a physical aspect, meaning that mental or psychological harm are not prosecuted as mutilation. To meet the definition the mutilation need not result in permanent damage, although it usually does. As with similar crimes, 'attempts' to mutilate a victim that are unsuccessful (inchoate) are prosecutable.

The Special Court for Sierra Leone has found amputation of limbs and carving initials into a victim's flesh to be examples of mutilation.[403] The International Criminal Tribunal for Rwanda (ICTR) found that cutting off a woman's breast met the elements of the crime, and in so doing, sentenced the perpetrator to life in prison.[404] Other cases include permanently disabling the reproductive capacity of a man (piercing genitals),[405] and cutting off an ear.[406]

In human rights instruments, mutilation is not separately defined. Generally, acts that would fit the IHL definition of mutilation set out above – when committed by a State actor – would also meet the definition of torture or cruel, inhuman or degrading treatment under IHRL. Indeed the UN Human Rights Committee has described mutilation as a form of torture on several occasions.[407]

Examples of mutilation in the context of the war in Nepal are described later in this chapter.

7.2.3 Other Forms of Ill-treatment

Other forms of ill-treatment described in this chapter encompass cruel treatment and inhuman and degrading treatment. The definitions and jurisprudence with respect to each of these can be inconsistent across human rights and judicial institutions, so what appears below is a distillation of the primary approaches to each. 'Cruel treatment,' for example, is generally treated as a violation similar to torture, but consists of acts that do not amount to torture either because they are missing the "purposive" element,[408] or because the intensity of pain is something less than that required for torture.[409]

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[403] *Prosecutor v Sesay, et. al. (RUF Case)*, Special Court for Sierra Leone, no. SCSL-04-15-T, Judgement, 2 March 2009.

[404] *Prosecutor v. Musema*, ICTR, Trial Chamber, no. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para 828. The mutilation therein was conducted as part of a crime against humanity.

[405] *Prosecutor v. Nahimana*, *Barayagwiza* and *Ngeze*, ICTR, Trial Chamber, no. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, para 812.

[406] *Prosecutor v. Haradijaj et al.*, ICTY, Trial Chamber, no. IT-04-84-T, Judgement, 3 April 2008, para 72.

[407] *See, e.g., Concluding Observations of the Committee on the Rights of the Child: Sierra Leone* (CRC/C/15/Add.116), para 44, the language of which includes "amputations and mutilations" committed against children as violations of the ICCPR, article 12 (see footnote 164). A frequent example of mutilation in the IHRL context is that of female genital mutilation. It also has been described by the HRC as a violation of prohibition on torture and other ill-treatment. See *Concluding comments of the Committee on the Elimination of Discrimination against Women: Cameroon* (CEDAW/C/CMR/CO/3), para 29.

[408] Rome Statute of the International Criminal Court, article 8 (2) (c) (i)-3 "Elements of Crimes" (see footnote 145). *See also Čelebići Case: Prosecutor v. Mucic et al.*, ICTY, Trial Chamber, no. IT-96-21-T, 16 November 1998, para 424: "Trial Chamber finds that cruel treatment constitutes an intentional act or omission, . . . which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. . . Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment" (emphasis added). See also *Prosecutor v. Krnojelac*, ICTY, Trial Chamber, no. IT-97-25-T, Judgement, 15 March 2001, para 209.

[409] See *Prosecutor v. Krstić*, ICTY, Trial Chamber, no. IT-98-33-T, Judgement, 2 August 2001, para 516 (citing *Čelebići Case*, ICTY, Trial Chamber, (1998) para 552 (see footnote 408)) "Cruel . . . treatment has been defined in the jurisprudence of the Tribunal as 'an intentional act or omission, which, judged objectively..., causes serious mental or physical suffering or injury . . .'" (emphasis added). The ICTY and the International Criminal Court diverged with respect to the necessary pain threshold. Where the ICTY employed a definition of cruel treatment that required "serious pain" be inflicted by the perpetrator, the Rome Statute employs the same threshold as that of

In fact, the violations addressed in this chapter – particularly with respect to torture and other forms of ill-treatment – are to a degree locatable on a hierarchy, in that the legal difference between torture and the lesser categories of violence rests in part on the level of severity of the pain or suffering inflicted.[410] Generally speaking, other forms of ill-treatment not rising to torture have a lower threshold of pain or suffering. But apart from this simple characterization, courts, treaty bodies and scholars have been reticent to draw lines between the various categories. What is clear is that torture requires severe pain and suffering inflicted for a purpose, and other, lesser ill-treatment requires something less than that.[411]

Detainees are particularly vulnerable to cruel treatment and appear frequently in the case law as its victims. Cruel treatment has been found where poor conditions such as overcrowding, lack of hygiene, inadequate toilet facilities, inadequate food, water, and health care, etc. affront a person's dignity.[412] Other detention-related behaviour, such as frequent strip searches,[413] or weak monitoring of psychologically impaired detainees,[414] has also been found to be cruel treatment. The CAT has determined that body searches are contrary to Article 16 of the Convention.[415] Poor and/or inadequate detention conditions and facilities are often a feature in situations of conflict and available records and testimony show that this was the case in Nepal.

Incommunicado detention, where the detainee is denied access to the outside world, including family and friends, can also be cruel treatment if it occurs for an extended period. Incommunicado detention also violates article 7 of the ICCPR.[416] The UN Human Rights Committee has found that "prolonged incommunicado detention ... can in itself constitute a form of cruel, inhuman or degrading treatment," and can in some circumstances constitute torture.[417] Forced labour, a human rights violation in its own right, has also been found as a factor in the cruel treatment of detainees, at least under certain conditions.[418]

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torture, i.e., "severe pain." Whether a measurable difference exists between serious and severe pain, and if so, how to determine which acts belong in either category, is beyond the scope of this discussion.

[410] CAT article 16 (making a distinction between torture and other forms of ill-treatment that do not amount to torture). This view is supported in *General Comment No. 2 of the Committee Against Torture: Implementation of article 2 by States parties* (CAT/C/GC/2) which acknowledges a hierarchy between torture and the remaining types of treatment by observing, "[i]n comparison to torture, ill-treatment may differ in the severity of pain and suffering . . .." Also, torture requires the act be committed for a specific purpose – for example to obtain a confession or punish the victim – whereas other forms of ill-treatment have no such requirement.

[411] Jurisprudence from the ICTY supports the notion as the court in *Kvočka* ruled that "severe pain" is the "distinguishing characteristic of torture that sets it apart from similar offences." *Kvočka,* ICTY Trial Chamber (2001) para 142 (see footnote 391). Interpreting the European Convention on Human Rights in, *Ireland v. United Kingdom*, the court noted that the distinction between torture and degrading treatment "[D]erives principally from a difference in the intensity of the suffering inflicted." *Republic of Ireland v. The United Kingdom,* European Court of Human Rights (1978), para 167 (see footnote 394)

[412] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Togo* (A/HRC/7/3/Add.5), para 85; Commission on Human Rights, Economic and Social Council**,** *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt: Situation of Detainees at Guantánamo Bay* (E/CN.4/2006/120), para 87.

[413] *Van der Ven v. The Netherlands,* European Court of Human Rights, App. no. 50901/99, Judgement, 4 February 2003.

[414]*Keenan v. The United Kingdom*, European Court of Human Rights, App. no. 27229/95, Judgment, 3 April 2001

[415] *Concluding Observations of the Committee Against Torture: France* (CAT/C/FRA/CO/4-6), para 28

[416] *General Comment 20* (HRI/GEN/1/Rev.9) para 11. See also *Sharma v. Nepal,* Human Rights Committee Communication 1469/2006, 28 October 2008, para. 7.2

[417] *El-Megreisi v. Libyan Arab Jamahiriya,* Human Rights Committee, communication no. 440/1990, 23 Mar 1994.

[418] *Prosecutor v. Blaškić,* ICTY, Trial Chamber, no IT-95-14-T, Judgment, 3 March 2000, paras 186, 713 and 716 (forcing detainees to dig trenches near the frontlines amounts to cruel treatment).

'Outrages upon personal dignity' and 'inhuman and degrading treatment' do not generally consist of physically violent acts, but rather may be acts intended to humiliate and undermine the dignity of the victim. Under the Rome Statute, the crime of "outrages upon personal dignity" is committed when the perpetrator has:

- *Humiliated, degraded or otherwise violated the dignity of one or more persons.*[419]
- *The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.*

As with the other violations above, both objective and subjective aspects are relevant in the determination of the severity of the humiliation. For example, a sensitive victim may be more grievously affected by certain degrading treatment or humiliation as compared to others. The element pertaining to "general recognition" ensures that treatment falling under this prohibition is in some manner objectively humiliating or degrading. For example, courts have found that forcing a father and son to beat each other and forcing captives to perform sexual acts on each other in front of other prisoners constitute inhuman treatment.[420] Similarly, forcing captive women to dance on a table or using detainees as trench or grave diggers has been found to be degrading or humiliating treatment. [421] Stunning captives with a cattle prod and causing them to beg for mercy out of fear was also judged to be an affront to human dignity.[422]

7.3 ALLEGATIONS OF TORTURE

Nepal's leading human rights organizations, including the NHRC, recorded credible allegations of torture during the conflict. According to available data, both parties allegedly employed it routinely during interrogation and as punishment for perceived wrongs. The methods and means of torture ranged widely and were without doubt effective in their infliction of pain. Following a brief summary of these methods and means, discussion turns to a description of the patterns surrounding the use of torture. Each pattern is illustrated by one or more emblematic cases.

7.3.1 Methods and Means

By far the most common method of inflicting pain was manual, simply by kicking, hitting, slapping, or punching the victim. According to reports, victims were frequently subjected to unrestrained violence where their captor unleashed blows to whatever part of the body was accessible. Such blows were also inflicted with various tools. Detainees described being beaten with pipes, poles, and sticks made of wood (*lathis)*, polyurethane, and metal, or strips of rubber, (for example, a windshield wiper), and rifle butts.[423]

Knives were employed as instruments of torture, most typically the traditional Nepali knife, the *khukuri*, which was used both for stabbing, cutting and for disfiguring victims. Although less frequent, axes and mattocks[424] were similarly used. More brutally, bombs and improvised explosive devices are reported to have been placed in a victim's mouth, placed beneath a bound victim, or simply thrown at a victim. Other implements employed in inflicting torture

[419] For this crime, 'persons' can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.
[420] *Čelebići Case*, ICTY Trial Chamber (1998) para 1067, 1066 (see footnote 408)
[421] *Kunarac et al.*, ICTY, Trial Chamber, (2001) para 772 (see footnote 154); Prosecutor v. *Aleksovski*, ICTY, Trial Chamber, case no. IT-95-14/1-T, 25 June 1999, para 229.
[422] *Čelebići Case*, ICTY Trial Chamber (1998) para 1058 (see footnote 408)
[423] There were also quite frequent reports of victims being whipped with stinging nettles or the leaves of those nettles being rubbed on sensitive body parts causing painful swelling. The plant is known locally as *Sisnu.*
[424] A mattock is similar to an axe or a pickaxe, but with one end suitable for digging or hoeing.

or mutilation were handsaws, hammer and nails, needles (into the finger tips), spades/shovels, and cigarettes, lighters and candles (for burning victims).

Nearly all victims were blindfolded and handcuffed during their experience, many for months at a time. The experience of disorientation and vulnerability when one is controlled in such a manner is well-documented.[425] Once subdued, the techniques varied widely, from the well-known beating on the soles of the feat (*falanga*), to the lesser-known *belana* – rolling a weighted pipe/bar/stick over body, legs or back – causing bone and muscle damage. There are allegations that hands, limbs or fingers were broken and that metal nails or needles were forced under fingernails, or pounded into extremities. Other reports allege that victims were made to stand in water for lengthy periods and at times electric currents were passed through the water.

'Simulated drowning' was also a frequently alleged technique wherein the victim was hung with their head lower than their body and their mouth either taped shut or their whole face covered with a cloth. Water was then poured in their nose or over a wet towel that had been placed on their face.[426] This, and similar simulated drowning techniques and suffocation, has been described as torture by various bodies.[427] Some victims were allegedly forced to carry heavy loads for a great distance, or forced to stand in the sun, to stand with tires draped on their shoulders, or buried in a hole up to their necks.

Cases in the TJRA also identify another method of ill-treatment prevalent during the conflict: suspending the victim in various positions ("strappado") but usually upside down, either within the confines of an interrogation room, or from a tree or pole outside. Most often that was the precursor to some other form of torture or ill-treatment such as beating the victim or submitting them to electric shocks. Also identified were two cases wherein victims allegedly had acid thrown into their eyes, and at least one case where eyes were gouged out.[428] Victims were reportedly dragged with a rope in at least three cases.[429]

7.3.2 Alleged Torture by Security Forces in the Course of Investigating and Pursuing Maoists

Information available allegedly implicates each of the three branches of the Security Forces in instances of torture. Reports collected indicates that the Security Forces generally employed the methods giving rise to allegations of torture with the aim of extracting information from victims, and, to a lesser extent, to inflict punishment. Typical of this pattern are allegations of torture that occurred in the aftermath of Maoist attacks on the Security Forces or a "feudal" target and in the context of following up intelligence leads.[430]

Following a Maoist attack, the Security Forces would move into the surrounding villages and "sweep up" persons whom they presumably thought may have been involved in the attack or had information relating to those involved. Upon arrest, the individuals would be brought to the respective Security Forces base, barrack or station, and Security Forces members would reportedly employ various techniques to coerce the victim into divulging information.

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[425] *See, e.g*, Physicians for Human Rights, *Interrogations, Torture and Ill Treatment: Legal Requirements and Health Consequences*, 14 May 2004, p. 6-7, Available from physiciansforhumanrights.org/library/documents/reports/iraq-medical-consequences-of.pdf. *See also Concluding Observations of the Committee Against Torture: Israel* (A/52/44), para 257, describing "hooding" as cruel treatment.
[426] The TJRA records more than 20 such incidents.
[427] Human Rights Watch, *Open Letter to Attorney General Alberto Gonzales*, 5 April 2006. Available from www.hrw.org/en/news/2006/04/05/open-letter-attorney-general-alberto-gonzales). *See also Concluding Observations of the Committee Against Torture: Israel* (A/52/44), para 257.
[428] Ref. No. 2004-06-06-incident-Kalikot_5193
[429] OHCHR source confidential Ref. Nos. 4872, 5788. Ref No. 2004-02-15-incident-Bardiya_ 5224.
[430] OHCHR source confidential.

Detainees were asked about their activities, family and political connections and about the names, activities, locations, and personal details of others, including Maoist structures, operations, or the existence and location of weapons caches. The alleged torture during such interrogation would continue until some kind of information or admission was extracted from the victim. Reports indicate that if there was a suspicion that a particular victim had in fact participated in the attack, Security Forces may have inflicted torture as a means of punishment or retribution.

The most frequent method that the Security Forces allegedly used was beating the victim with fists or sticks around the head and body and/or kicking or stamping on the victim. The level of physical intensity varied from victim to victim, ranging from small pin pricks to beating a victim to death. In between were instances of simulated drowning, cigarette burns, *falanga*, and *belana* and mock execution.

Reports include instances of Maoist supporters who had been arrested being seen later in the company of Security Forces outside the barracks, allegedly being used to identify locals with Maoist affiliations. These "informants" were at times subsequently killed by the Security Forces after they were no longer of use, or, if released, risked the consequences suffered by those labelled "informants" by the Maoists.[431]

Women and children also suffered torture at the hands of the various Security Forces. Many reports recording instances of torture included torture of a sexual nature.[432]

Emblematic Case 7.1[433]

Narrative: OHCHR-Nepal recorded eight cases of torture at the RNA barracks in Khalanga, Pyuthan. These cases followed a similar pattern.

The victims, all suspected of being Maoist cadres or supporters, were arrested by the RNA between 19 March 2004 and 28 December 2005. In individual interviews, they reported having been blindfolded and handcuffed upon their arrest and then beaten, kicked and hit with an assortment of fists, *lathis*, belts, plastic pipes and rifle butts. The maltreatment lasted between 30 minutes and a few hours and sometimes occurred at intervals over several days. Four of the detainees reported to have been subject to "water treatment" wherein water was poured over the nose and mouth and the detainee experienced the sensation of drowning. One of the eight detainees reported being threatened to be buried alive and was placed in a trench while dirt was poured over him. Detainees were asked questions concerning Maoist activities in the area, asked to identify other Maoists, and coerced into confessing to crimes. Several of the detainees were allegedly threatened with death if they did not comply. Death threats are a violation of the prohibition on psychological torture under the CAT.

[431] See Chapter 5 - Unlawful Killings p. 72
[432] Incidents of sexual violence are discussed in Chapter 8 p. 158.
[433] OHCHR source confidential Ref. Nos. 5209, 5195, 5196, 5184, 5108, 4954, 5021, 4959; OHCHR – Nepal; *Giri v. Nepal*, Human Rights Committee Communication 1761/2008, 27 April 2011 para 9.

Analysis: Treatment that inflicts severe pain or suffering for a prohibited purpose is torture. Some treatment, particularly beating, kicking and punching/hitting, has been found by human rights bodies to constitute torture *per se*. The accounts of the eight detainees at Khalanga Barracks are consistent in many respects. The individuals reported similar types of beating and at similar intervals. They all reported being handcuffed and blindfolded, and the described nature of the ill-treatment was also consistent. Whether the "water treatment" inflicted pain sufficient to reach the severity threshold requires an examination of the impact on the victims themselves, including factors such as their age, gender, sensitivities, medical condition and others – taken in totality. An inquiry into this incident should examine these subjective factors in addition to the objective factors, in line with the "governing legal framework" set out in section 7.2 above. If, as this Report has concluded, that a reasonable basis exists to suspect that torture was committed, the investigation of this incident (and others) is obligatory under international law, as is the punishment of any person found guilty of torture and the payment of compensation to the victims. The Human Rights Committee has stated that the state party is obligated under the ICCPR to provide the victim and his family with an effective remedy, but also to ensure a thorough and diligent investigation into the torture and ill-treatment, the prosecution and punishment of those responsible, and an adequate compensation for

Emblematic Case 7.2: Torture and death of Maina Sunuwar[434]

Narrative: RNA officers took 15-year-old Maina Sunuwar from her home in Kavre District to the Birendra Peace Operations Training Centre in Panchkhal on 17 February 2004. At the Training Centre, she was subjected to torture in the presence of seven RNA officers and soldiers, including two captains. According to well-documented reports, the officers ordered that Maina Sunuwar's head be submerged in a large pot of water for one minute, six or seven times. The soldiers then allegedly administered electric shocks to her wet hands and feet four or five times. This alleged torture continued for one-and-a-half hours, after which she was detained in a building on the premises of the Training Centre, where she was left blindfolded and handcuffed. She reportedly later began vomiting and foaming at the mouth, and then died. In an apparent effort to cover up the killing, the army personnel involved took her body outside the compound and shot it in the back. She was buried nearby.

[434] Ref. No. 2004-02-17 - incident - Kavre_0259. Due to the tenacity of the victim's mother in the pursuit of truth and justice, this is perhaps the most infamous and reported death during the conflict. Consequently, the available data from a number of credible sources is particularly detailed and compelling. OHCHR, "*The torture and death in custody of Maina Sunuwar - Summary of Concerns*," (December 2006) Available from http://nepal.ohchr.org/en/resources/Documents/English/reports/IR /Year2006/2006_12_01_HCR%20_Maina%20Sunuwar_E.pdf; *Devi Sunar v. District Police Office, Kabhrepalanchok, Dhulikhel et al.* Nepal Kanoon Patrika, Supreme Court, Case 2064/2007, Vol. 49, Issue 6, at pp 738-749; Rome Statute, article 28(a) (see footnote 145). For a full description of the incident see Advocacy Forum, "*Maina Sunuwar – Separating Fact from Fiction*", 2010.

When confronted, the Army initially claimed that Maina Sunuwar had been shot in an attempted escape. However, upon the insistence of several organizations, both domestic and international, a "Court of Inquiry Board" was convened in the spring of 2005, followed by a Court Martial. Three men were eventually convicted of "employing improper interrogation techniques" and "failing to follow the standard procedures and orders" with respect to disposal of Maina's body. The men were sentenced to the time they had served awaiting trial and ordered to pay sums ranging from $330 - $675 to the family. The family rejected the payments and attempted to re-initiate legal proceedings, but the District Police Office refused to register the First Information Report. The family then approached the Supreme Court, which issued a mandamus order requiring an investigation to be completed within 3 months. Following this order, the police instituted murder investigations in the Kabhrepalanchok District Court against the four army officials implicated in the case. The Nepali Supreme Court also ordered the Army to hand over one of the suspects and cooperate with the civilian investigation, an order that remains unfulfilled at the time of writing this report.

Analysis: Under international criminal law, individual criminal responsibility attaches to those in a position of authority over the perpetrator – when the former "knew or should have known" of the violations and they failed to take appropriate action. The facts of the Maina Sunuwar case appear to establish that those in effective command of the Birendra Peace Operations Training Centre, and those further up the chain of command, knew about the allegations of torture and the death of Maina Sunuwar. The question is whether the individual superiors – at each level of hierarchy – undertook "all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution". The materials in this case indicate that the army leadership submitted the case to a Commission of Inquiry Board after the fact, and subsequently to a Court Martial. However, nothing in the materials suggests preventive or repressive actions that might have prevented the crimes in the first place. In light of the punishment the Court Martial delivered, the narrow list of accused, and the subsequent failure to cooperate with the civilian justice investigations, it is unlikely that these actions by Army leadership satisfy international obligations under either IHL or IHRL.

Maoists and their supporters were not the only alleged victims of torture. Several groups operating during the conflict were philosophically aligned to the Maoists to varying degrees, such as the Dalit Liberation Front, the All-Nepal National Free Students Union, (ANNFSU), the Nepal Trade Union Federation, and the All-Nepal Women's Association.[435] Throughout the conflict, people who were or were perceived as being sympathetic to the Maoist cause, or those otherwise connected to Maoists (for example relatives of Maoists), were also allegedly targeted by Security Forces.

Reports show that others with no connection to the Maoists were also mistreated. For example, the TJRA records 40 incidents where journalists allegedly suffered maltreatment for reporting unfavourably on the Security Forces,[436] and another nine incidents[437] where medical personnel were reportedly tortured (beaten) or killed as punishment for having treated Maoists.[438] Perhaps most at risk were teachers, students, and human rights defenders.

[435] For a list of additional such organizations and entities and an analysis of their operations, see International Crisis Group, *Nepal's Maoists*, p. 11 (see footnote 28)
[436] OHCHR source confidential Ref. No. 4964.
[437] OHCHR source confidential Ref. No. 2443.
[438] This latter act would constitute a two-fold violation of international law. Article 10 of Additional Protocol II to the Geneva Conventions provides that "persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol." The rule has become part of the

Fourteen Human Rights Defenders and 130 teachers were reportedly tortured by Security Forces according to available data. In one notable case, a journalist and a Human Rights Defender walking together in Manma were allegedly viciously attacked by the RNA.[439]

While the reported political affiliation of a victim was most often with the Communist Party of Nepal (Maoist) (CPN (Maoist)), there are 24 cases recorded in the TJRA where the victim was reportedly affiliated to the Communist Party of Nepal (Unified Marxist Leninist) CPN (UML).

7.3.3 Alleged Torture by Maoists as an Instrument of Punishment or Coercion

As a party to the conflict, the CPN (Maoist) were required to respect the provisions of Common Article 3 of the Geneva Conventions. The People's Liberation Army, political cadres and all other members of the Maoist apparatus were required under IHL to treat anyone they took under control humanely. Once an individual was apprehended or otherwise subdued, that person should not have been harmed physically or mentally. The prohibition applied equally whether the victim was a civilian or an enemy combatant *hors de combat*.

a) Torture as an Instrument of Policing and 'People's Justice'

Maoist party cadres would apparently frequently apprehend people who they suspected of criminal activity.[440] Most of these alleged victims were ordinary civilians. However, members of the Security Forces, such as police personnel, and even Maoist cadres themselves, also became victims of the police powers exercised by the CPN (Maoist). The primary targets were those individuals the Maoists suspected of being spies or informants. In addition, victims included those accused of thievery, murder, bigamy/polygamy, 'immoral conduct,' corruption, making/selling/consuming alcohol, mistreating workers and smuggling timber.

There are cases where the alleged torture was the result of a quasi-judicial procedure,[441] wherein the suspect was tried in front of "the people", and the sentence passed down was some form of pain infliction sufficiently severe to amount to torture. Other times, the punishment was impromptu; cadres would accost the accused and simply carry out the punishment on the spot.[442] A small number of cases included the Maoists punishing police officers who attempted to "interfere" with Maoist activities, in particular policing.

In the cases recorded, beating was the most common method of torture. No instances of inflicting physical pain in methods other than with the hands, feet, rifle butts or sticks were recorded. Instances of psychological torture were recorded wherein certain victims were threatened with execution.[443]

Although available data suggests it was not widespread or especially common, there are cases where Maoist cadres allegedly tortured members of the Security Forces. Victims who were members of the army, the police and Armed Police Force were typically captured while on home leave or in transit, especially later in the conflict.[444] The most frequent motive for torture appears to have been to convince the victim to leave the Security Forces, to punish

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body of customary international humanitarian law. *See, e.g.*, United States Senate Committee on the Judiciary, Human Rights and the Law Subcommittee, Statement for the Record from Physicians for Human Rights "The 'Material Support' Bar: Denying Refuge to the Persecuted?" 19 September 2007.

[439] Ref. No. 2006-02-13-incident-Kalidko_4934.

[440] OHCHR source confidential Ref No 1861.

[441] See section 9.3.5, The Maoist "Justice System" p. 187

[442] OHCHR source confidential Ref Nos 1885, 5396.

[443] OHCHR source confidential Ref No 0003.

[444] OHCHR source confidential Ref. No 1806.

them for having joined in the first place, or as retribution for any anti-Maoist actions they may have undertaken.

Emblematic Case 7.3:[445]

Narrative: A group of eight to nine armed, camouflaged Maoists broke the legs of a 74-year old man in Parbat District. Reportedly, the Maoists accused him of being close to the District Development Committee President, of financial embezzlement of local committees' funds, and of having persuaded eight Maoists to surrender. The man was taken to Gandaki Hospital in Pokhara with a compound fracture in both his legs.

Analysis: Clearly pain was inflicted in this case, and because this was allegedly done with the purpose to punish, it will be classified as torture if the pain inflicted meets the level of severity required by IHL. As stated above, the inquiry into whether this case meets the severity threshold is at once a subjective and objective inquiry. The victim's age would be a significant factor on the subjectivity test, and it is likely that double compound fractures would meet the objective criteria of severity. A court hearing this case would be likely to find that this incident constituted the war crime of torture.

b) Torture as an Instrument of Coercion

In addition to instances of quasi-criminal justice, the Maoists also allegedly perpetrated torture for the purposes of advancing their cause, whether politically or militarily motivated. For example, the TJRA records cases where people were allegedly beaten for violating a Maoist-declared Bandh (strike);[446] cases of people being tortured for not vacating a building or home; for not surrendering land; for not cooking food for Maoist cadres; for not contributing money or taxes to the Maoists; for refusing to join the Maoists; as punishment for having a family member in the Security Forces or for not revealing information as to that person's activities or whereabouts; for political or ideological differences – for example, being a member of the Nepal Congress or UML, or for otherwise speaking out against the Maoists; or for joining a group not aligned or in opposition with the Maoists, such as *Pratikar Samiti*. Beating, breaking arm and leg bones, and shooting victims were common methods of inflicting pain. The TJRA contains several cases of persons being deliberately shot, but not killed.[447]

Still others suffered torture for no known reason. Maoists themselves, or former Maoists, were also reportedly tortured for misbehaviour or for attempting to leave the party. Women and children were also not spared. No particular patterns were detected where women or children were tortured differently, or for different purposes.

[445] OHCHR source confidential Ref. No. 5751.
[446] The TJRA records cases of violence resulting in death during the attempts to enforce *bandhas*.
[447] *See, e.g.*, 2001-01-13-incident-Dhanusha_1388, 200311-07-incident-Rupandehi_5883.

Emblematic Case 7.4:[448]

Narrative: The victim had worked as a teacher for 11 years and had served as Secretary of the Village Development Corporation (VDC) for 28 years. In February 2002 the victim was asked for a donation of 25,000 rupees by four armed members of the People's Liberation Army who came to his house. The victim refused to give the donation and the demand was increased to 50,000 rupees, which was again refused. Later, the victim was abducted from his home and brought to the VDC office. Inside there were some 27 armed members of CPN (Maoist) who asked again for a donation. The victim responded that he had no money; they increased the amount to 100,000 rupees. When the victim still refused he was beaten. Two logs were placed above and below his thighs when he was in a sitting position and the logs were stepped on and rolled down his legs. He was made to stand and sit repeatedly and was beaten with a rifle butt on the back of his head and on his back. He lost consciousness. The CPN (Maoist) shaved four parts of the victim's head in front of the villagers, smeared him in black, and forced him to wear shoes around his neck and walk around four VDCs.

After two months of recovery, the victim fled to the District Headquarters. His eldest son was abducted and held for nine days and was allegedly beaten in captivity. The CPN (Maoist) proceeded to record the amount of gold, silver and other belongings in the family house. Shortly after the elder son's release, the victim's youngest son, age 14 at the time, was abducted. He was kept for one night while the Maoists demanded that he either bring his father, give over his father's property, or be killed. The son agreed to bring his father and was released. When the father received the message from his son, he believed he would be killed if he returned and so sent a reply message to give over his property. In December 2002 some 45 CPN (Maoist), including three Area Commanders, took over the victim's house. The family was displaced and lived in the District Headquarters following the incident. The victim was given compensation of 23,000 NRs from the Government.

Analysis: These alleged facts give rise to a reasonable suspicion that the CPN (Maoist) tortured the victim. The beating, particularly with a rifle butt on the head, would most likely amount to torture *per se*. The log rolling (*belana*) on the legs could also meet the "severe pain" threshold, although a consideration of other factors (such as the length of time and the intensity with which it was inflicted, as well as the age and health status of the victim) would need to be considered. Coercion, as appears to be the motive here, is one of the listed prohibited purposes in the definition of torture in the Rome Statute. Thus, a court might find that both the pain threshold and the prohibited purpose requirements have been met, leading to a violation of Common Article 3.

7.4 ALLEGATIONS OF MUTILATION

As described above, mutilation is prohibited under Common Article 3 of the Geneva Conventions. It is also prohibited within the anti-torture provisions in IHRL. When a person intentionally disfigures another, or if they otherwise permanently disable or remove an organ or appendage of another person (assuming that act is not in the best interest of the victim, such as in a *bona fide* emergency surgical operation), then the crime of mutilation has been committed.

[448] OHCHR source confidential Ref. No. 5396. Note that in Nepali society, shoes are considered filthy and are symbolic of the "lowest" echelon of a person – that which is next to the ground.

7.4.1 Mutilation by Security Forces

According to the recorded data, mutilation perpetrated by the Security Forces was not a frequent occurrence, and while there were incidents no discernible pattern emerged. When it occurred, it was usually as a means of severe torture, as punishment for alleged Maoist activity, or as an inducement for disclosing the whereabouts of Maoist cadres. In the course of extracting statements from victims, Security Forces would at times break the bones of the detainee, usually in the hand.[449] Some victims would be cut with a knife on the hands, legs, or neck.[450] In one case a piece of the victim's big toe was reportedly cut off.[451] In another, the victim's buttocks were repeatedly sliced.[452]

7.4.2 Mutilation by Maoists as Punishment and Coercion

As with torture by Maoists, mutilations were inflicted on both individual civilians and members of the Security Forces. The mutilation victims catalogued in the TJRA were almost exclusively male and the majority died of their wounds.[453] Mutilation was generally employed as a gruesome means of punishment, as described in the torture section, above.

In addition to the similarity of motive, Maoists allegedly typically employed a *modus operandi* akin to that when perpetrating unlawful killings. They would go to the victim's home or otherwise abduct him, then take the victim to an isolated place, inflict the mutilation, and then leave the victim alone with his injuries. On occasion, the alleged perpetrators would return to the home and inform the family or village of the act and why it was committed - and where they could find the victim. The villagers and/or family members would eventually recover the victim and provide assistance. The TJRA records incidents where Maoists allegedly either cut, or cut off entirely, the arms, hands, legs or feet of victims.[454] Limbs were broken either with an axe, a hammer, or by crushing them with stones.[455] The eyes of at least one victim were gouged out[456] and others had a nose or ears hacked off.[457] Another means of disfigurement was pouring acid on the face of the victim.[458]

Emblematic Case 7.5:[459]

Narrative: A teacher, [name withheld], in Rasuwa District had been approached repeatedly by the Maoists with the request either to join them, or to pay a donation. He refused both. In September 2002 at around 9pm, a group of CPN (Maoist) cadres came to his house and called for him to come out. When he did so, the Maoists cadres tied his hands behind his back and blindfolded him. They then asked him whether he wanted to remain alive and informed him that they were going to 'take action' against him. One kilometre from his house, the Maoist cadres stopped, held him down and severed his right leg with a sharp weapon. The victim spent 52 days in hospital and now has an artificial leg

[449] Ref. Nos. 2005-06-12-incident-Jhapa_1557; 1996-05-06-incident-Sindhuli_0294; 2001-12-30-incident-Krave_0199.
[450] OHCHR source confidential Ref. No. 0189.
[451] OHCHR source confidential Ref. No. 0181.
[452] OHCHR source confidential Ref. No. 1742
[453] See Chapter 5 Unlawful Killings.
[454] OHCHR source confidential Ref. No.1380.
[455] OHCHR source confidential Ref. No. 5773.
[456] Ref. No. 2004-06-06-incident-Kalikot_5193.
[457] Ref. No. 2005-08-07 - Kalikot _4984, genitals also mutilated. Note that this victim was eventually killed.
[458] Ref. No. 1998-07-00 - Rukum _5593.
[459] OHCHR source confidential Ref. No. 0279.

Analysis: The facts as presented give rise to a reasonable suspicion that the Maoists maimed the victim to the extent of permanent disfigurement. Whether or not the victim was a civilian (teacher), or whether he was in fact a member of the enemy party, would be irrelevant. Once taken under control, this victim should have been treated humanely under Common Article 3 to the Geneva Conventions, and mutilating him in the manner suggested was, if proven, a serious violation of IHL.

7.5 ALLEGATIONS OF OTHER ILL-TREATMENT[460]

For the purposes of this discussion, the types of ill-treatment that do not amount to torture or mutilation will be divided into two categories. As set out above, cruel treatment encompasses most types of physical or mental ill-treatment that either fall below the severity threshold or the prohibited purpose that would otherwise make it torture. Further, "inhuman and degrading treatment"[461] does not generally entail physical pain, but is otherwise objectively "humiliating, degrading or otherwise violates the dignity" of the victim.[462] Many wartime incidents perpetrated by both parties to the conflict rose to the level of cruel, inhuman and/or degrading treatment.

7.5.1 Cruel or Humiliating Punishment by Maoists

Most often, alleged cruel and humiliating punishment by Maoists occurred when they were conducting their quasi-judicial/policing activities. Individuals 'convicted' of various forms of misbehaviour could be 'sentenced' to a punishment that was by its very purpose cruel, humiliating or degrading.[463] In addition, forced labour was allegedly one of the more common sentences handed down by Maoists people's courts.[464] International agreements put strict limits on the use of forced labour by a state, and prohibit its use by non-state bodies and individuals. It has also been held to be cruel or inhuman treatment in certain circumstances.[465] The Maoists employed various methods and means when subjecting their victims to these forms of ill-treatment. Humiliating or degrading treatment occurred when a Maoist cadre would smear black substances (oil, tar, soot) over the face of the victim. The victim would then be paraded around the village for all to witness. The TJRA records five such cases where this purposefully humiliating treatment was inflicted as punishment for various misdeeds, usually suspected criminal behaviour.[466] Incidents were also recorded of Maoists shaving victims' hair,[467] and parading them around naked. Another common method of humiliation was the "shoe garland",[468] in which a string of shoes was placed over the victim's head while s/he was paraded around the village. In Nepali culture, all of these acts were deeply humiliating and often caused victims to leave their village or, in more extreme cases, commit suicide.

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[460] Including cruel treatment, outrages upon personal dignity and inhuman and degrading treatment or punishment.
[461] Included in this reference is "outrages upon personal dignity" from Common Article 3.
[462] Incidents of degrading treatment of a sexual nature are addressed in Chapter 8, Sexual Violence p. 158.
[463] Recall that if the pain from the punishment was "severe," then the threshold for torture will likely have been met. Punishment is one of the prohibited purposes of torture.
[464] The TJRA catalogues over 70 instances of punishment by Maoists to forced labour. The circumstances surrounding the punishment (nature of work, duration, conditions) were not available in all instances and would require further investigation to determine whether a reasonable suspicion exists that "cruel treatment" was perpetrated.
[465] *Prosecutor v. Blaškić*, ICTY, Appeal Chamber, no IT-95-14-A, 29 July 2004, paras 186, 713 and 716 (forcing detainees to dig trenches near the frontlines amounts to cruel treatment).
[466] Ref. Nos. 2002-04-18-incident-Jumla _5396, 2003-04-14-incident-Darchula _2035, 2006-09-17-incident-Darchula _1864, 2006-05-23-incident-Darchula _1883, 2001-07-18-incident-Chitwan _1377.
[467] OHCHR source confidential Ref. Nos.5560, 5983.
[468] OHCHR source confidential Ref. No. 5917.

Emblematic Case 7.6[469]

Narrative: Along with the victim, [name withheld], Maoists allegedly abducted three others in connection with an alleged rape. The Maoists reportedly humiliated the four captives by parading them in public with their faces smeared with ash and their heads shaved. The victim committed suicide on 8 October 2006 after being detained in captivity.

Analysis: The presented facts raise a reasonable suspicion that the Maoists purposefully humiliated the group of men they suspected of having been involved in a rape case. Notwithstanding that alleged perpetrators of rape should be tried by a competent court and, if found guilty, appropriately punished, the lack of any indication that due process rights were afforded the captives in the first instance would be a clear and serious human rights violation. More relevant here, the method of punishment is in violation of both IHL and IHRL because it consists of treatment that is both humiliating and degrading in Nepali culture.

7.5.2 Cruel or Humiliating Treatment by Security Forces in the Course of Interrogation

Less common were incidents where the Security Forces interrogated detainees, usually suspected Maoists and affiliates, using tactics that were allegedly cruel or humiliating. Examples of the ill-treatment along these lines include detainees being buried up to their necks in a hole,[470] thrown into a river,[471] forced to stand extended periods bearing weight and forced to stare at the sun,[472] forced to eat dirt,[473] and made to run like a dog on a leash.[474] These and similar examples of ill-treatment found in the TJRA reflect either an ignorance of applicable international law, or a cruel and purposeful disregard for it.

Emblematic Case 7.7:[475]

Narrative: During September 2000, as many as 14 people, including a primary schoolteacher [name withheld], were arrested by police on suspicion of participating in Maoist activities. They were allegedly beaten with gun butts and boots, made to crawl around on a cement floor for an hour and threatened with death.

Analysis: This short description depicts a detention environment wherein the detainees were not being treated humanely, as a minimum, and, in light of the beatings with gun butts and boots, a case for torture might be made. However, it is not clear from the facts as provided whether the ill-treatment was to punish, to extract information or a confession. In any event, forcing a detainee to crawl around on the floor for an hour and threatening to kill them could be found by a court to amount to cruel, inhuman or degrading treatment, if not torture.

7.6 OBLIGATIONS OF THE STATE

All States are bound by international law, both IHL and IHRL, to investigate credible allegations of torture and ill-treatment and to punish the perpetrators.[476] This binding legal

[469] OHCHR source confidential Ref. No. 1864.
[470] OHCHR source confidential Ref. No. 5340.
[471] OHCHR source confidential Ref. No. 5478.
[472] OHCHR source confidential Ref. No. 5340.
[473] Ref. No. 1996 -02-29-incident-Jajarkot_5684.
[474] OHCHR source confidential Ref. No. 1546.
[475] OHCHR source confidential Ref. No. 2104.

requirement applies to Nepal, *inter alia*, by virtue of its ratification of the CAT in 1991. Under Article 12 of this Convention,

> *Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*

Article 12 requires that the investigation be prompt, but it is not otherwise limited temporally, meaning that the obligation remains in place irrespective of when the torture was committed. Because Nepali law states that international legal obligations arising from treaties override contrary provisions in domestic law,[477] the obligation remains despite any domestic legal provisions that might be interpreted so as to prohibit or nullify the obligation.[478]

Similarly, State parties to the CAT are obliged to provide a remedy to individuals who present an allegation of torture. Article 13 states:

> *Each state party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.*

This provision operates to trigger an obligatory examination of the allegation. Importantly, it is not limited by time or by the standard of "reasonable grounds." It therefore means that any person presenting such an allegation in "any territory under the jurisdiction" can invoke this right and, once so done, if the competent authority examining the allegation determines that "reasonable grounds" exist to believe torture was committed, then the full investigation foreseen in Article 12 must follow.

However, the Committee monitoring implementation of the CAT noted that state officials not only have an obligation to refrain from committing torture themselves, but also to ensure others do not commit it.

> *Where state authorities . . . know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such . . . actors . . ., the state bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention.*[479]

Thus, state officials are not free from international legal obligations because they themselves do not commit torture. Officials who do not enforce prohibitions of this international crime, irrespective of who committed it, can themselves be complicit.

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[476] CAT, article 6; International Committee of Red Cross, *Customary International Humanitarian Law*, rule 158: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects." (see footnote 129). Neither the role of the perpetrator nor the victim, nor any justification based upon concerns such as national security, states of emergency, or counter-terrorism, excuse such acts. As a peremptory norm of international law, torture allegations must be investigated.

[477] Nepal Treaty Act 1990, section 9 (1): "In case of the provisions of a treaty to which Nepal or the Government of Nepal is a party, upon its ratification, accession, acceptance or approval by the Parliament, where the treaty is inconsistent with the provisions of prevailing laws, the inconsistent provisions of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws."

[478] Such domestic legal provisions would include a statute of limitations or an amnesty.

[479] *General Comment No. 2 of the Committee Against Torture: Implementation of article 2 by States parties* (CAT/C/GC/2), para 18.

7.7 OFFICIAL RESPONSES

At the time of writing this report, State responses to the obligation to investigate credible allegations of torture and the various forms of other ill-treatment during the conflict in Nepal have been weak. Discussed below are some of the most common institutional responses to allegations of torture.[480]

The most common response recorded in available data has been that the justice system has simply ignored a credible allegation, particularly when raised by the victim's family or by civil society.[481] Also common was a denial by authorities that the violation had taken place without an investigation to verify the situation. Some cases also revealed instances where Security Forces threatened the victim not to reveal the alleged maltreatment to avoid being subjected to more of the same or worse.[482] Issuing the same threats to others, such as the victim's family or friends, meant even those one step removed from the violation feared reporting torture or ill treatment.

Several victims reported being forced to sign a paper stating that they were not mistreated. Refusing to sign meant risking further torture, or a delay in being released. Another common tactic, presumably intended to hide evidence, was to ensure the release of the victim only after any visible wounds had sufficiently healed.

Cases also show that the CPN (Maoist) denied credible allegations, but also commonly justified the action as a necessary part of the "People's War". On rare occasions, in particular later in the conflict and only after intervention from international agencies or domestic human rights defenders, the Maoists claimed to have punished certain cadres following allegations of torture. The TJRA records a small number of such cases where certain cadres were allegedly sentenced to serve time in a labour camp.[483] However, in no recorded instance are the facts sufficiently clear that the CPN (Maoist) instituted the type of investigation and punishment foreseen by international standards.

Disaggregated data on Torture, Including Mutilation and Other Forms of Ill-Treatment

[480] This is discussed in more detail in Chapter 9 – Accountability p. 176.
[481] In addition to information in the TJRA, *see* Asian Human Rights Commission, Urgent Appeal 16 November 2005; Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict*, September 2008, p. 24. Available at http://www.hrw.org/sites/default/files/reports/nepal0908web_0.pdf; ~~and~~ Human Rights Watch, *Still Waiting for Justice: No End to Impunity in Nepal*, October 2009, p. 3. Available at http://www.hrw.org/sites/default/files/reports/nepal1009webwcover.pdf
[482] OHCHR, "Report on Disappearances Linked to Maharanjgunj", May 2006, p. 5.
[483] See, e.g., Ref. No. 2006-06-10-incident-Sindhupalchowk _0058; 2005-07-25-incident- Bardiya_4993.

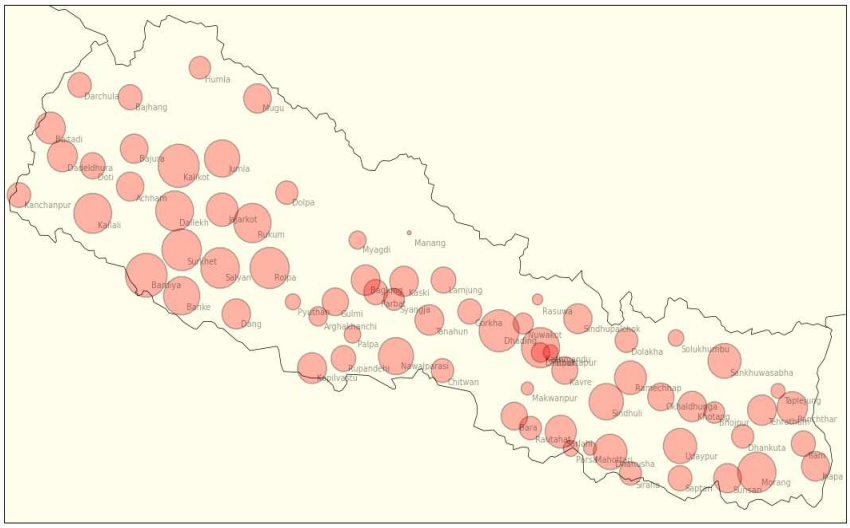

Diagram 7.1: Incidents of Torture, 1996-2006

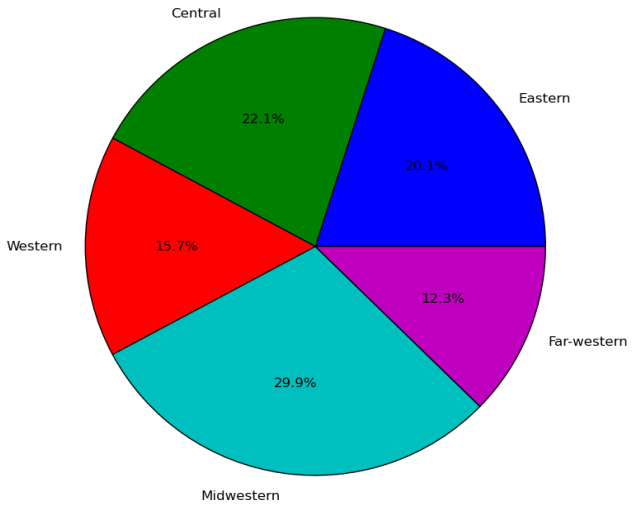

Diagram 7.2: Total Incidents of Torture by Region, 1996-2006

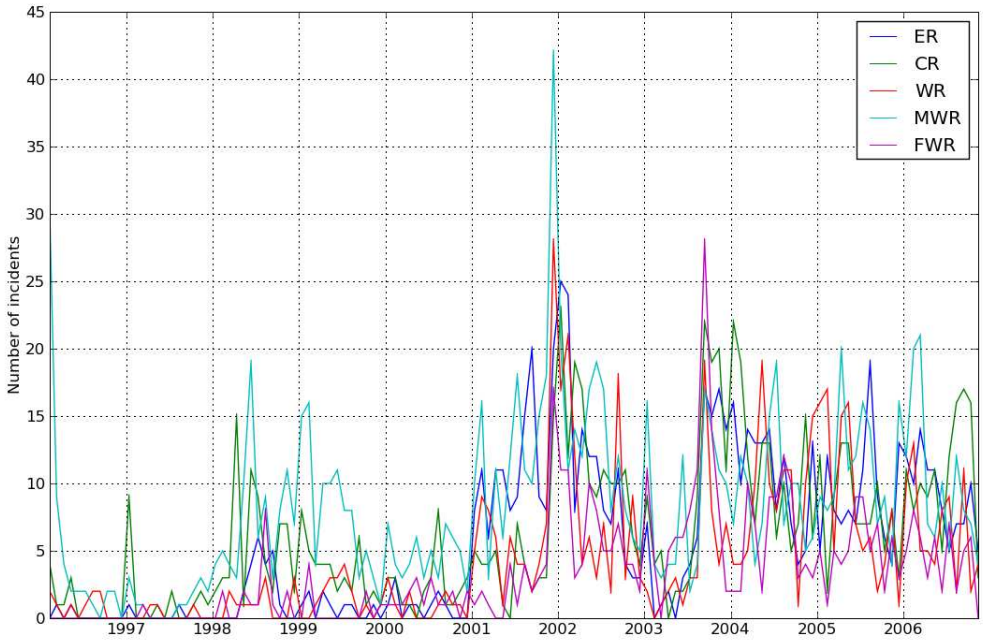

Diagram 7.3: Incidents of Torture by Region, 1996-2006 (added because in original chapter)

Incidents of Torture by Year

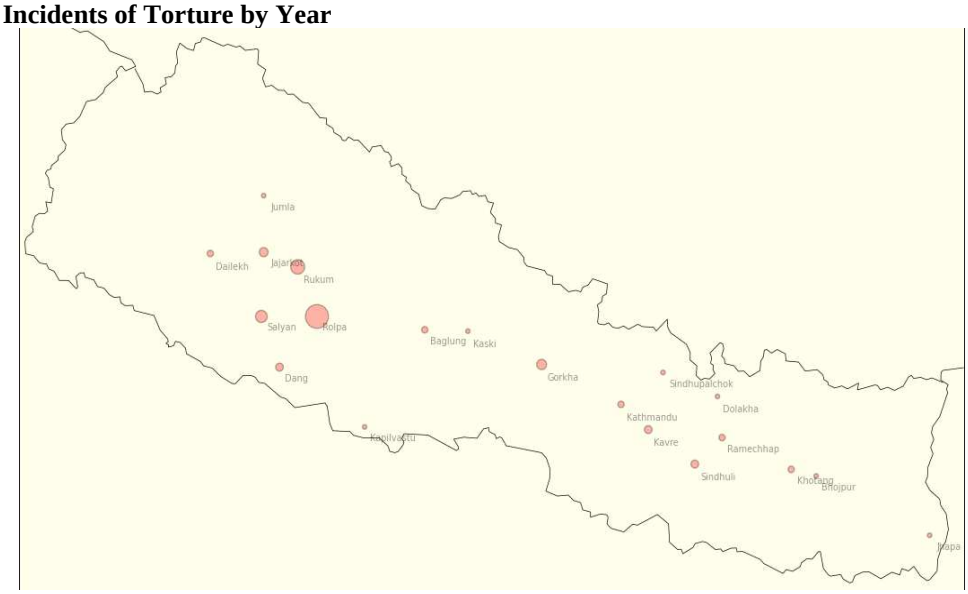

Diagram 7.4: Incidents of Torture 1996

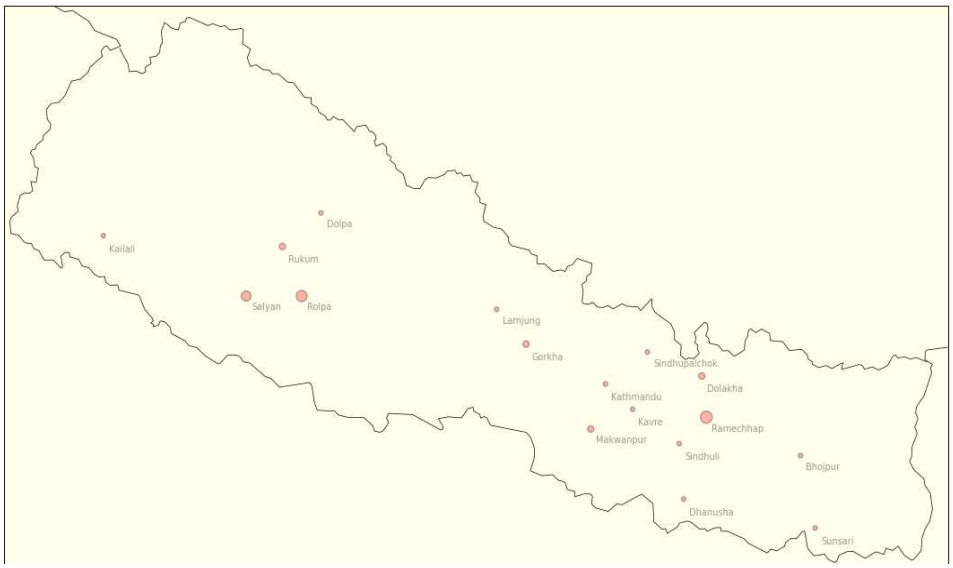

Diagram 7.5: Incidents of Torture 1997

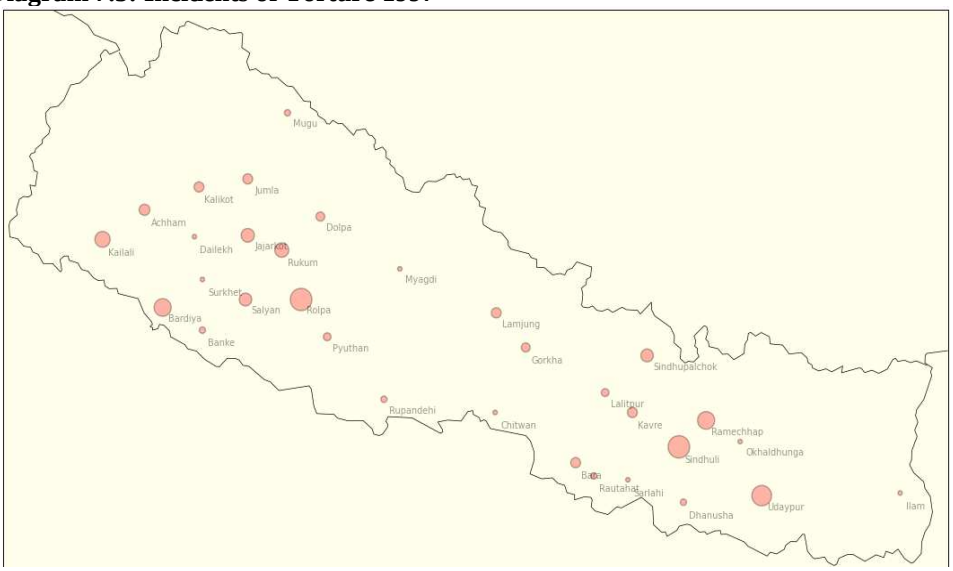

Diagram 7.6: Incidents of Torture 1998

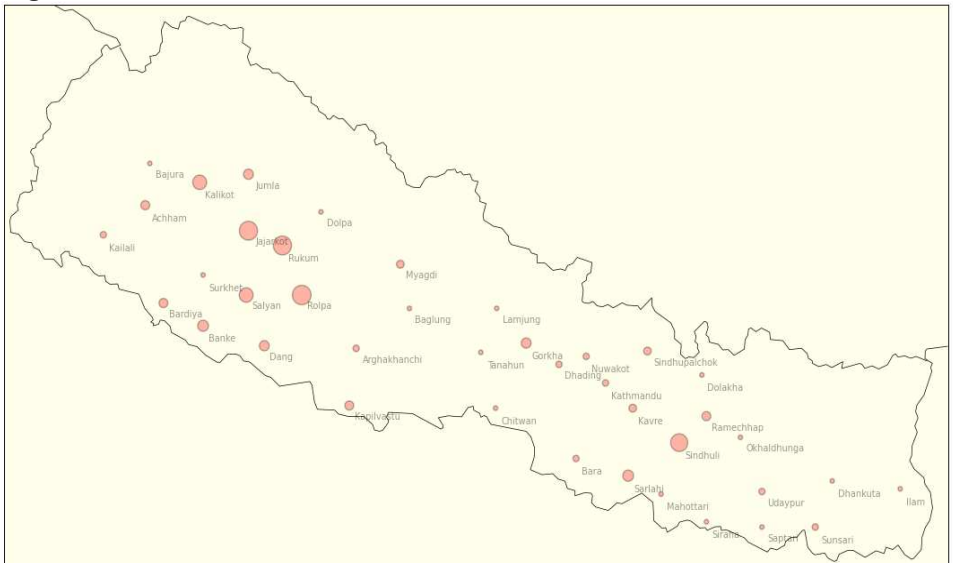

Diagram 7.7: Incidents of Torture 1999

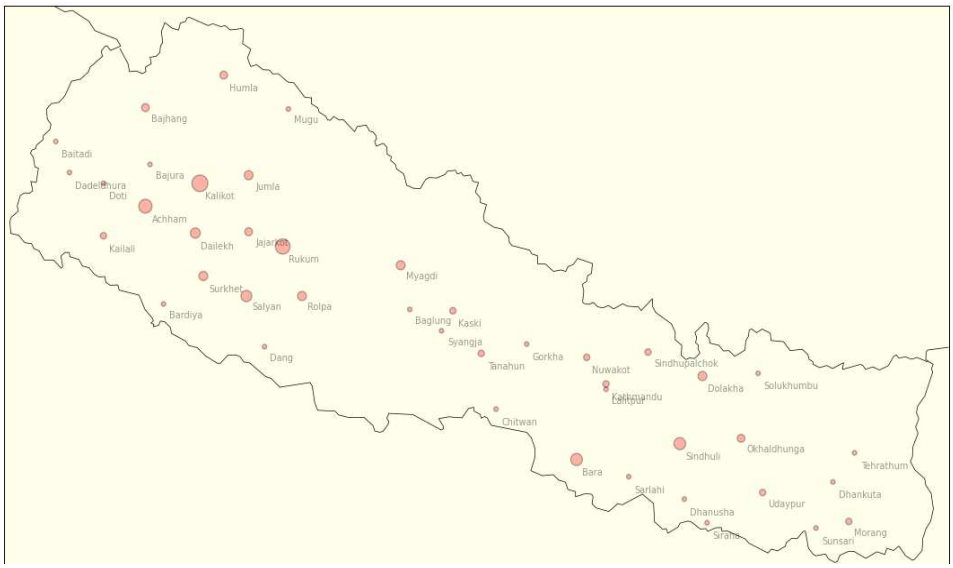

Diagram 7.8: Incidents of Torture 2000

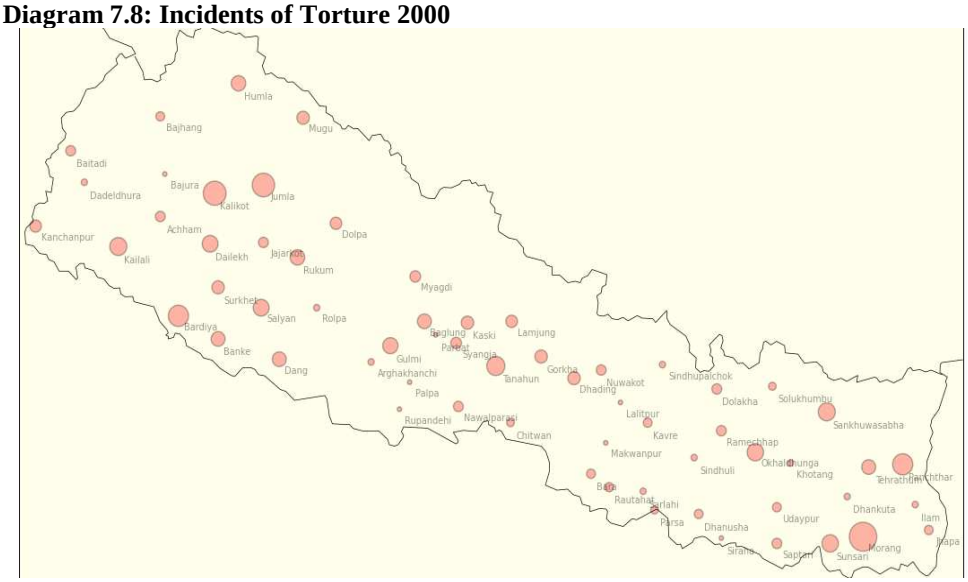

Diagram 7.9: Incidents of Torture 2001

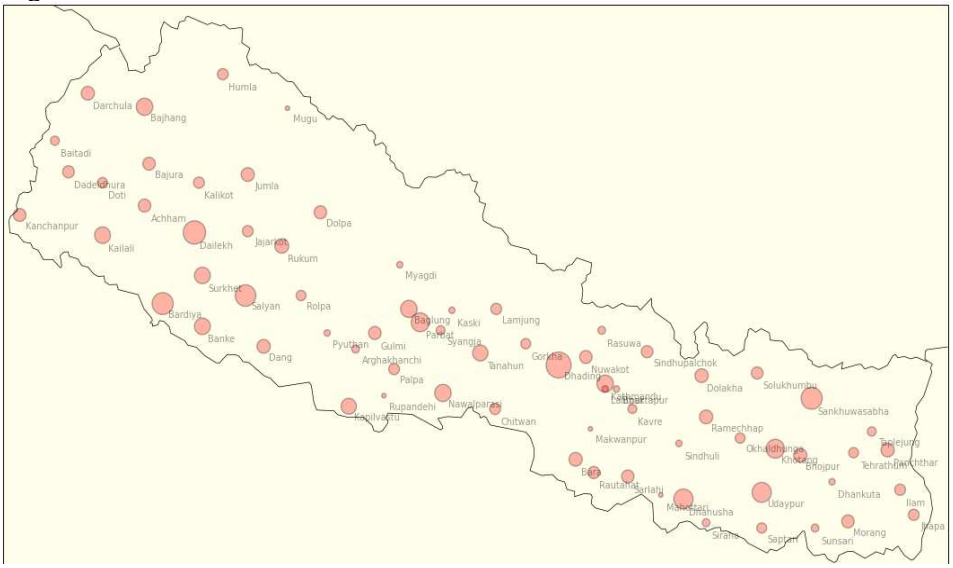

Diagram 7.10: Incidents of Torture 2002

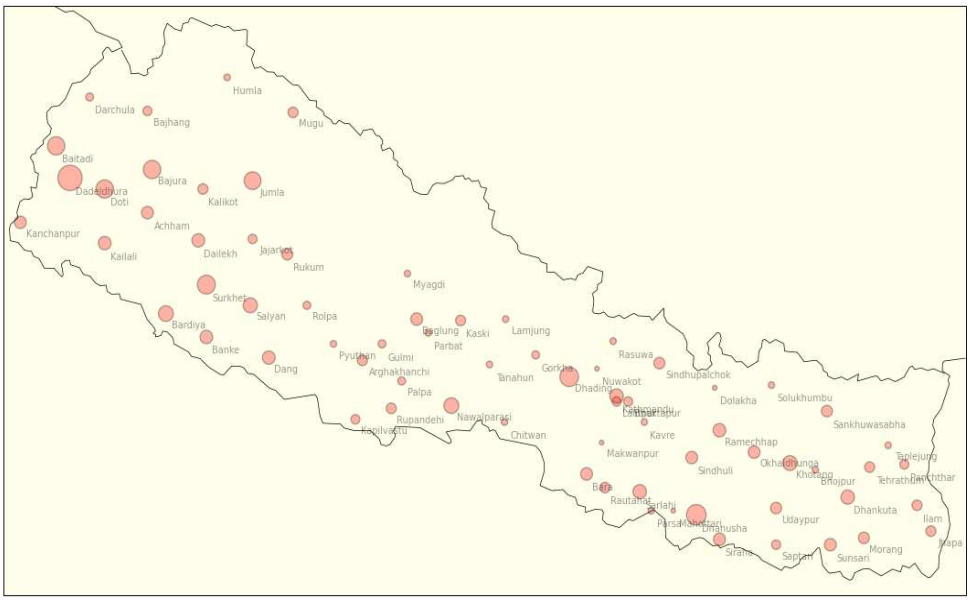

Diagram 7.11: Incidents of Torture 2003

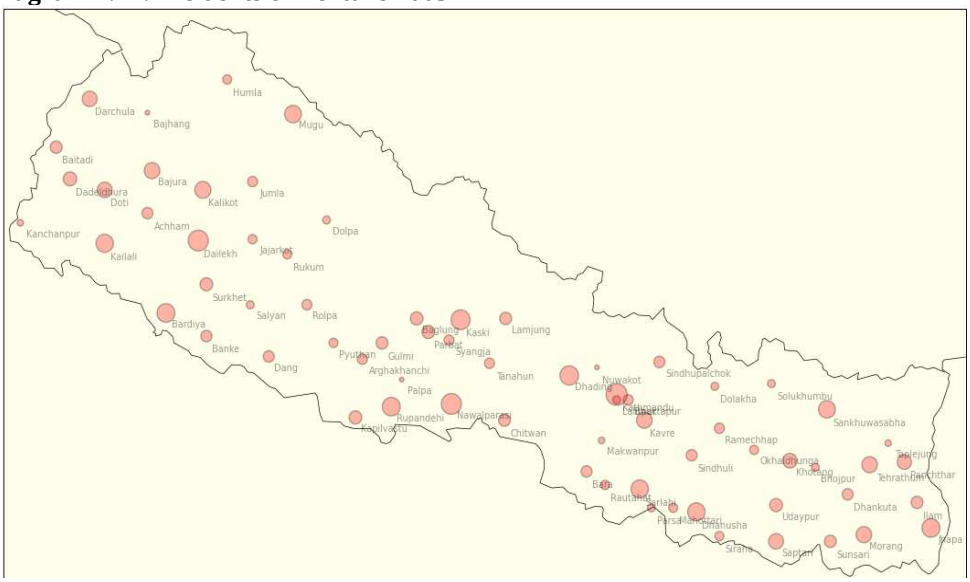

Diagram 7.12: Incidents of Torture 2004

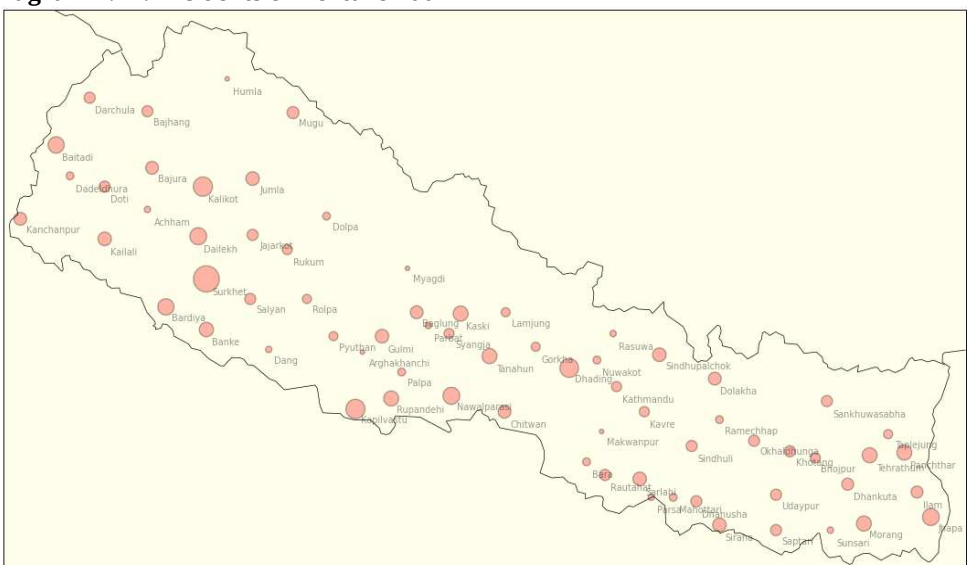

Diagram 7.13: Incidents of Torture 2005

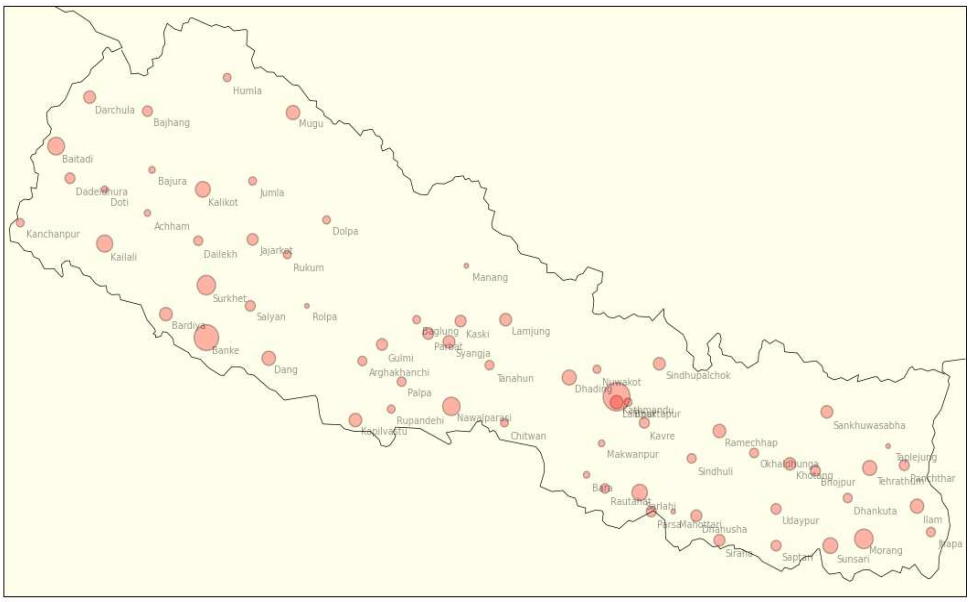

Diagram 7.14: Incidents of Torture 2006

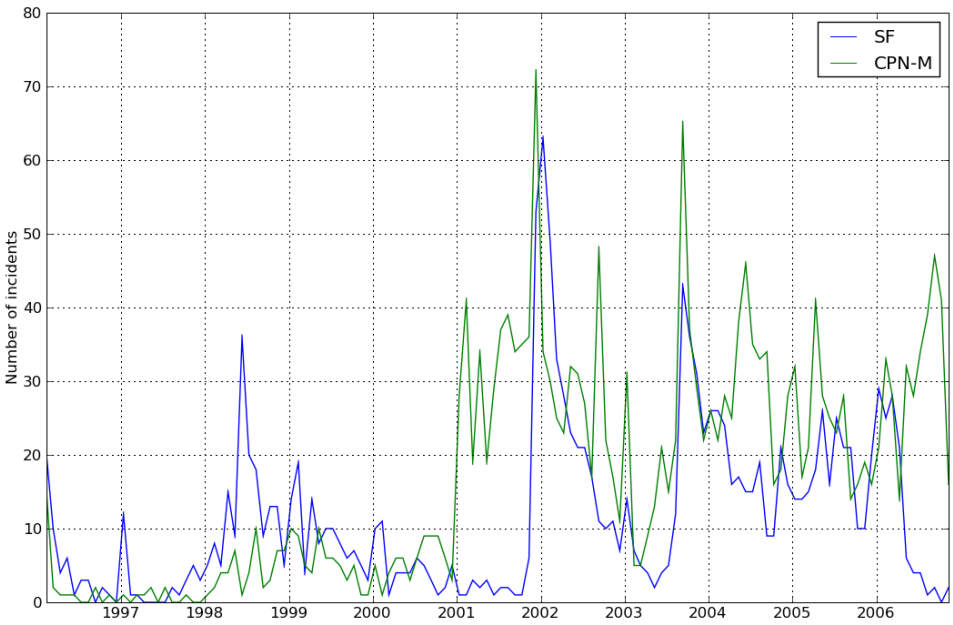

Diagram 7.15: Incidents of Torture by Perpetrator, 1996-2006

CHAPTER 8 - ARBITRARY ARREST

No one shall be subjected to arbitrary arrest, detention, or exile.
– Universal Declaration of Human Rights Art. 9

8.1 OVERVIEW

That detention must not be arbitrary is a fundamental principle of both IHL and IHRL. Both legal regimes aim to prevent arbitrary detention by requiring the grounds for detention be based upon needs, in particular security needs, as well as by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention. Arbitrary arrest violates the right to liberty and to due process of law and erodes the arrestee's dignity. Such arrests may compound economic hardships suffered by family members who continually seek the release of their loved one, who is often the primary breadwinner.[484]

Arbitrary arrest was a significant feature of the conflict in Nepal. Thousands of people from both sides of the conflict were detained in a manner that fell within the scope of the international definition. As well as suffering the injustice of arbitrary arrest, persons held beyond the reach of the law were easy targets for additional forms of ill-treatment, including torture.

8.2 GOVERNING LEGAL FRAMEWORK

By definition, 'arbitrary arrest' is said to occur when a person is

- *apprehended*
- *by one acting on behalf of the State*
- *the detention is not based upon:*
  - *law, or*
  - *upon a specified security need, or*
  - *the protection of the person detained from a specific or imminent threat*
- *Or the detention continues beyond that provided for by law*[485]

Where an arrested person has the legality of their detention regularly reviewed by a judicial or other authority that is independent of the arresting authority, or who has had his or her imprisonment pronounced by a court as a lawful sanction under the domestic legal regime, the act does not generally amount to arbitrary arrest.[486] Under Nepali law, in non-conflict circumstances, a detainee should be brought before a judicial authority within 24 hours.[487]

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[484] "Any detention by the State places a detainee's life effectively 'on hold', and creates hardship for the detainee's family. Detaining someone denies a person the full enjoyment of a number of rights, such as the rights to family life, and to earn a livelihood (on which family members may be dependent). In many instances, detention also risks exposing detainees, and eventually their families, to disease and other health problems." UNAMA, *Arbitrary Detention in Afghanistan – a Call for Action*, vol. 1 (2009) p. 1.

[485] ICCPR, Article 9 (see footnote 164). The UN Working Group on Arbitrary Detention has broadly defined arbitrary detentions as detentions that: A. Have no valid legal basis; B. Are intended to deny the detainee the exercise of the fundamental rights guaranteed by either domestic or international law; or C. Occur in such a manner that essential procedural guarantees are not observed so that the arrest and detention gains an arbitrary character, even if it was legal originally.

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

[487] In Nepal, the arresting authority must present the detainee to a judicial authority within a period of 24 hours from the time of arrest, except where the person arrested is a citizen of an enemy state or s/he is detained under

8.2.1 International Humanitarian Law

Although not specifically prohibited under Common Article 3, arbitrary deprivation of liberty is prohibited under customary IHL.[488] Scholars have observed that the underlying "humane treatment" provision in Common Article 3 would forbid such arrests during both international and non-international armed conflicts.[489]

8.2.2 International Human Rights Law

A number of international and regional instruments contain provisions against subjecting anyone to arbitrary arrest or detention: the Universal Declaration of Human Rights, the ICCPR, the CRC,[490] the European and American Conventions on Human Rights. The ICCPR states unequivocally that,

> *No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

The ICCPR does not list the prohibition against arbitrary arrest among the rights that can be waived during times of emergency. It is recognized that such arrests are prohibited even during a declared state of emergency.[491]

8.2.3 Domestic Law

During the conflict, Security Forces often used the mechanism of "preventive detention" as the legal basis for apprehending Maoist cadres and supporters. Under Nepali law, preventive detention could be initiated under a "preventive detention order", and during the conflict these Orders had two legal bases. The first was the law in effect when the conflict began, particularly the Public Security Act 1989 which was a carryover from the Panchayat era.[492] The second was an Act passed in 2002 (which was later renewed as an Ordinance) known as the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA). The TADA widened the scope of arrest, decreased judicial oversight, and lengthened detention deadlines. Each of these legal instruments will be addressed briefly below, after a short examination of the constitutional basis for detention.

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preventive detention. This requirement is contained in both the 1990 and 2007 Constitutions (articles 14(6) and 24 (6) respectively), and the State Cases Act in relation to the period of police detention (section 15(1)).

[488] See International Committee of Red Cross, *Customary International Humanitarian Law*, rule 99 (see footnote 129).

[489] See International Committee of Red Cross, *Customary International Humanitarian Law*, vol. 1 (see footnote 129). "[C]ommon Article 3 of the Geneva Conventions . . . require[s] that all civilians and persons *hors de combat* be treated humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement."

[490] Nepal signed the CRC in 2000 and ratified it in 2007.

[491] Arbitrary detention is not listed in article 4 as one of the "non-derogable" rights under the Convention. Chapter 4 – Applicable International Law, p. 61 for a discussion on derogation. Yet,
General Comment No. 29 of the Human Rights Committee: State of Emergency (Article 4)
(CCPR/C/21/Rev.1/Add.11): "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence" (emphasis added).

[492] As amended in1991.

a) Constitution

The Constitution of Nepal (1990), which was in effect during the conflict, allowed for "preventive detention"[493] only when there were sufficient grounds to believe that a person posed an immediate threat to the sovereignty, integrity or law and order situation of the country. The Constitution also contained a corollary right, called the "Right against Preventive Detention,"[494] and by virtue of the right to a constitutional remedy conferred by articles 23 and 88, a Preventive Detention Order could be challenged in the courts. The presiding court examined whether the requirement of an "immediate threat" had been satisfied with respect to the individual detainee.

As noted, the human right to be free from arbitrary detention cannot be suspended during a declared state of emergency.[495] With some exceptions, Nepal's courts generally respected this right during the conflict via the mechanism of writ of *habeas corpus.*[496] Preventive Detention Orders were challenged and many challenges were successful. Still, the Security Forces were less diligent with respect to this right and at times failed to honour a release order, or re-arrested a detainee whom the courts had released.[497]

b) Preventive Detention Orders under the Public Security Act

The Public Security Act allowed Chief District Officers to issue a Preventive Detention Order for a period of 90 days, renewable for another 90 days, and finally renewable for a further 180 days (12 months in total).[498] The purpose of the Order was to prevent people from undertaking any activities that could impact on the security and tranquillity of the country. The arresting authority was normally required to submit any detention order to the concerned District Court within 24 hours under Article 14.6 of the Constitution. However, the 24-hour rule was exempted in cases of Preventive Detention Orders issued under a valid law, such as under the Public Security Act.[499]

The Public Security Act provided that Preventive Detention Orders issued pursuant to its provisions by a Chief District Officer could not be challenged in any court. However, the Constitutional articles cited above prevailed over that provision, and the legality of an arrest or Order could always be challenged in the Supreme Court or in the Appellate Courts.[500]

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[493] Constitution of the Kingdom of Nepal (1990) article 15 on the Right Against Preventive Detention provides as follows:

(1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal.

(2) Any person held under preventive detention shall, if this detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law.

[494] Constitution of the Kingdom of Nepal (1990) Article 15.

[495] See footnote 491.

[496] Constitution of the Kingdom of Nepal (1990) article 115.8, listing the State's emergency powers, but declaring that "the right to the remedy of *habeas corpus* under Article 23 shall not be suspended".

[497] *See, e.g.*, *Nepali Times*, 4 December 2003, p. 5. Security forces also threatened lawyers not to file them: see Amnesty International, "A long ignored human rights crisis is now on the brink of catastrophe,"18 February 2005, p. 5, Available from http://www.amnesty.org/en/library/info/ASA31/022/2005/en

[498] The initial 90 day order is issued by the Chief District Officer and such order may be extended up to six months with the approval of the Ministry of Home Affairs, and, if the Advisory Committee approves, for another six months *(total duration of detention is one year).* The Advisory Committee should be presided over by a sitting judge of the Supreme Court with two additional members comprising of sitting or retired judges of the Supreme Court. However, such a committee has not been formed since 1990. See sections 5.2, 7 and 8 of the Public Security Act.

[499] Constitution of the Kingdom of Nepal (1990) article 14 (7).

[500] Ibid article 23; Judicial Administration Act 1991, section 8(2).

c) Preventive Detention Orders under Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO)

Preventive Detention Orders issued under TADO were valid for six months, and renewable once for a total of twelve months.[501] However, the orders could only be issued where reasonable grounds existed to believe that a person had to be prevented from an act that could result in terrorist and disruptive activities. Importantly, the TADO did not have a provision requiring the court be informed within 24 hours.[502] That gap allowed Security Forces and/or the Chief District Officers to detain any person incommunicado, and if compelled to release a detainee, would allow them to easily "back date" a Preventive Detention Order.[503] Again, however, the legality of these TADO arrests could be – and frequently were – challenged in the Supreme Court or in the Appellate Courts. TADO provided the (only) legal basis for the RNA to arrest suspects during the conflict.

Parliament later adjusted TADO when it promulgated TADA in April 2002. The new version gave the Security Forces the power to arrest without warrant and to detain suspects for up to 60 days in police custody for the purpose of investigation. In addition, under this Act, persons could be detained in preventive detention for 90 days, in a place "suitable for human beings," without being presented before a court.

While the Security Forces tended to use the Public Security Act in issuing Preventive Detention Orders against the leaders and cadres of the political parties and members of civil society, TADO was reserved for arrests of anyone suspected to have an affiliation with the Maoists.

d) Re-Arrest

A significant number of persons, who successfully challenged their detention via the writ of *habeas corpus*, were subsequently re-arrested by the Security Forces, even at times, while still in or leaving the courthouse.[504] Although legally the Security Forces could arrest a person based on the Security Forces' belief that the arrestee posed a threat to security – irrespective of the fact that a court just ruled the opposite – it is an obvious sign of disrespect for rule of law and the time-honoured institution of *habeas corpus* to do so. In the absence of some additional evidence to support a finding of "immediate threat," such a re-arrest appears manifestly unlawful.[505]

Concerning preventive detention, the Human Rights Committee stated in its General Comment No. 8, referring to Article 9 of the ICCPR, that:

> *[I]f so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such*

[501] The first six month Order is issued by the Chief District Officer and the next six month Order can be issued by the Chief District Officer with the approval of the Ministry of Home Affairs.
[502] Although article 14 (6) of the Constitution of the Kingdom of Nepal (1990) required that detainees be produced before a judicial authority within 24 hours of arrest, article 14 (7) stated that "Nothing in clauses (5) and (6) shall apply to a citizen of an enemy state, and nothing in clause (6) shall apply to any person who is arrested or detained under any law providing for preventive detention."
[503] See, e.g, OHCHR confidential source Ref. No. 1504.
[504] The TJRA records more than 20 such instances.
[505] Similarly, the Security Forces were known to transfer detainees to new facilities when their period of legal detention expired in order to begin a new period of detention in the new facility, *see, e.g.*,, ref. No. 2003-11-21 - incident - Kathmandu _0163.

cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.[506]

8.3 ALLEGATIONS OF ARBITRARY ARREST

For the purposes of recording incidents in the TJRA, and for providing an appropriate basis of analysis in this report, it was decided that a gravity threshold was required for alleged incidents of arbitrary arrest.[507] Given that there were countless arbitrary arrests where the victim was released after a period of days or even hours, a minimum period of detention was set before a case was recorded. Due regard was given to the outer limit of legal detention under the Public Security Act and TADO.[508] Thus, while recognizing that any incident of arbitrary arrest is a serious violation of the law, the threshold was set at one year. However allegations of other serious violations, such as torture or ill-treatment, have been included in the TJRA notwithstanding that such abuse is alleged to have occurred during a detention period of less than one year.

8.3.1 Arbitrary Arrest by Security Forces

Security Forces detained persons on various conflict-related grounds throughout the period of the conflict. Although the 1990 Constitution of the Kingdom of Nepal had a number of safeguards, police arrested and detained suspected Maoist members and sympathizers under the Public Security Act, before the imposition of the state of emergency in November 2001. The use of Preventive Detention Order under the Public Security Act to arrest, as opposed to arresting under the criminal law, enabled the Security Forces to circumvent the otherwise applicable legal thresholds and allowed for the interrogation of the detainee without judicial scrutiny. It further allowed the Security Forces to avoid the burden of bringing evidence against the detainee in front of a judge who might be inclined to release the suspect if the evidence was found wanting, or if in the judge's opinion, the person in fact posed no threat to national security. Finally, it allowed the Security Forces to avoid respecting other due process rights.

The Public Security Act also allowed people suspected of involvement in the Maoist movement without any charge or trial. According to an official source, the total number of political prisoners in custody reached 1,560 as at mid-November 1999.[509] Human rights groups widely reported on the non-compliance with legislative requirements for arrest during the early part of the conflict. Amnesty International, for example, noted that none of the former detainees they interviewed were given warrants at the time of arrest, nor were they presented before a judicial authority within the stipulated 24- hour period, as required under the then Constitution .[510] The organization found that many had been kept in police custody for periods longer than the 25 days allowable under the State Cases Act 1992 and the majority of ex-detainees interviewed were not told of the specific charges against them.[511] While exploiting these public security laws, especially during the initial period of detention, the Security Forces frequently denied members of the detainee's family access to them, or denied the detainee access to a lawyer.[512]

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[506] *General Comment No. 8 of the Human Rights Committee: Right to liberty and security of persons (Article 9)* (CCPR General Comment No. 8), para 4.
[507] Refer to Annex Two for a detailed discussion of the methodology used in compiling the TJRA and this Report.
[508] Notwithstanding serious reservations as to the regime's legality voiced by human rights observers. *See, e.g., Report of United Nations Working Group on Enforced and Involuntary Disappearances on Nepal* (E/CN.4/2005/65/Add.1), p. 16-18 (calling for the immediate rescission of TADO).
[509] As quoted by Amnesty International, *Nepal: Human Rights and Security* (see footnote 38)
[510] Amnesty International, *Nepal - Human Rights at a Turning Point?* (see footnote 33)
[511] Ibid.
[512] In cases where the Security Forces denied holding the detainee at all, the elements of the crime of "disappearance" will likely have been met. Such cases are addressed in Chapter 6 Enforced Disappearance p. 109.

Based on information in the TJRA, 43 incidents of arbitrary arrest by Security Forces were recorded that met the one-year threshold. Of those, three cases concerned the arrest of minors, and at least seven concerned women.

In many cases, the Security Forces repeatedly issued new detention orders when the specified maximum detention periods of 90 or 60 days had expired. Although only the most senior district-level Government officers, known as Chief District Officers, were empowered to issue Preventive Detention Orders under Section 9 of the TADA, "Chief District Officers apparently issued the Security Forces with blank detention orders signed in advance. This gave the Security Forces wide ranging powers to arrest whomever they wanted for whatever period they wished," according to an Amnesty International report. [513]

Emblematic Case 8.1:[514]

Narrative: [Name withheld], a Human Rights activist from Pokhara, was arrested in January of 2004 by the Unified Command. He was taken to the Fulbari Army Barracks in Pokhara where he was detained for five months. He was moved to the Setidoban Barracks in Syangja District before being transferred three days later to the District Police Office in Makwanpur District. He was subsequently taken to Bhagar ward police station in Parbat District the same day before finally being transferred to Kaski jail where he stayed two years. In January 2006, he was transferred from Kaski Jail to Sundarijal Interrogation Centre, in Kathmandu.

The detainee had received five consecutive Preventive Detention Orders: the first two were for 90 days each, April and August 2004 respectively, and then for a period of six months, until 17 November 2004. These were repeated at six-month intervals twice more, with one delivered on 16 May 2005, and a final one on 16 November 2005, before his release in January of 2006. All the orders were signed by the then Chief District Officer of Kaski District, while the last one had the approval of the Home Ministry.

Emblematic Case 8.2:[515]

Narrative: The victim, a minor, was detained in Bhairabnath Barracks for 18 months after his arrest in September of 2003 by the Royal Nepal Army. He was transferred to then District Police Office at Hanuman Dhoka Central jail in February of 2005. In May or June of 2005 he was transferred to Nakkhu Jail. His detention period was extended twice (in February 2005 and July 2005). Yet, despite the expiry of the Preventive Detention Order at the end of 2005, he was not released.

While still in detention in the spring of 2006, he managed to publish an article in a local weekly journal about torture and unlawful killings taking place in Bhairabnath barracks, something he had experienced firsthand during his many months of detention there. The Royal Nepal Army allegedly threatened him, via the jail administration, shortly after the article came out.

[513] Amnesty International, *Nepal Escalating 'Disappearances'*, p. 6-7. (see chap.6 section 6.1 Overview)
[514] OHCHR source confidential Ref. No. 5871.
[515] OHCHR source confidential Ref. No 0177.

His father went to the District Administration Office in Kathmandu and asked the Chief District Officer on two occasions to ask why his son was detained even after his detention period had expired. He was told that his son would be released after an investigation was completed. The family challenged his detention at the Supreme Court with the help of a private lawyer. He was released in March of 2006 by court order.

Analysis: Based on the facts available, it appears likely that the detainee was held in detention beyond the expiry of his Preventive Detention Order(s). Whether a different basis for his continued detention was in fact in place is not clear from the above description, however, when a person is detained after the legal basis for that detention has expired, the continued detention is *per se* arbitrary. The lengthy detention and the apparent absence of a legal basis for its continued extension, merit a review of this case as a potential violation of international law.

8.3.2 Abductions Tantamount to Arbitrary Arrest by Maoists

As set out above, "arbitrary arrest" is reserved by definition for acts perpetrated by someone acting on behalf of a state.[516] While the Maoists, as non-state actors, also apprehended persons for a variety of reasons throughout the conflict, these unlawful detentions do not technically fit the required definition. In this report such actions are termed "abductions tantamount to arbitrary arrest." The one-year gravity threshold was maintained for cataloguing Maoists abductions in the TJRA.

With the exception of those sentenced to work in labour camps as the result of the quasi-judicial "People's Court," recorded incidents show that Maoists did not tend to detain persons for lengthy periods. While they allegedly perpetrated innumerable arbitrary arrests during the conflict, only a handful of cases in the TJRA met the one-year threshold . With such a small sample, no particular patterns were discernible.

[516] For the definition of arbitrary arrest see section 7.8.1 Governing Legal Framework p. 151.

CHAPTER 9 - SEXUAL VIOLENCE

9.1 OVERVIEW

> *My family did not overreact to whatever happened to me because almost every woman here has been raped, some countless times. Some have been so badly injured by repeated rapes by different army personnel that they are barely able to stand.*[517]

Even though other serious human rights violations committed during the conflict period have been extensively investigated and reported, the documentation of sexual violence remains scarce. This does not indicate that sexual violence was not committed. Rather, it is a reflection of the reality that sexual violence is often not reported. Social and cultural taboos make victims reluctant to share their stories out of shame or for fear of being blamed. A lack of support, protection and redress mechanisms necessary for victims to be able to speak out, exacerbates this situation, and many incidents occured in geographically remote areas where reporting was difficult. Further, during the conflict period, the fear of repercussions or further victimization if the perpetrators were reported, was widespread.

This chapter begins by identifying the international legal standards relevant to sexual violence during conflict. Thereafter, it describes the social and cultural context in which sexual violence has taken place in Nepal, and the consequences of such violence for the victims, their families and communities. The chapter then identifies various obstacles to seeking justice in Nepal and touches upon why such violence has been under-reported. Following is a review of existing research on sexual or gender-based violence against women perpetrated by personnel from both parties to the conflict in Nepal. Finally, a selection of cases from the Transitional Justice Reference Archive (TJRA) are reviewed and analysed.

Based on the information currently available, the majority of reported cases of sexual violence allegedly committed during the conflict period allegedly implicate Security Force personnel as the perpetrators. Such violence was allegedly committed in the course of searching for and interrogating Maoists, with women suspected of being Maoists or supporting Maoists, having faced particularly severe treatment. There is currently not enough information to establish whether sexual violence committed by Security Forces was institutionalized or systematized. However, it appears that an implicit consent may have been given at higher ranks, which would have served to encourage a culture of impunity for opportunistic sexual violence.

The key conclusion of this chapter is that much more needs to be known and understood about the perpetration of sexual violence during the conflict. Further information needs to be sought in a manner that is culturally and gender sensitive, responds to the needs of the victims and empowers them[518] in the process.

9.2 GOVERNING LEGAL FRAMEWORK

The World Health Organisation (WHO) defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise

[517] Victim of a rape in 2002 speaking to OHCHR-Nepal, UNFPA, Advocacy Forum and Centre for Mental Health Counselling (CMC) during the assessment mission in Achham District in May 2009.
[518] OHCHR has not received any reports of male victims of sexual violence. This does not necessarily indicate that there were no instances of sexual violence against men, but that there are currently no reports available. Cultural stigma surrounding sexual violence, particularly against men, is likely to discourage men from reporting any incidents.

directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting".[519]

International human rights law (IHRL) and international humanitarian law (IHL) have now clearly established a prohibition on acts of sexual violence in conflict. Under IHL, sexual violence in armed conflict has been defined by the statutes and case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), Special Court for Sierra Leone, and Extraordinary Chambers of the Courts of Cambodia. The definition includes rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of similar gravity, which can include assault, trafficking, and strip searches.[520] Under IHRL, which continued to apply during the conflict, gender-based violence including sexual violence "is discrimination within the meaning of article 1" of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[521] Women's rights and freedoms include the right to equal protection according to humanitarian norms in time of international or internal armed conflict; the right to liberty and security of person; and the right to the highest standard attainable of physical and mental health.[522]

Sexual violence can constitute a war crime, a crime against humanity, a form of torture, or an element of genocide.[523] The UN Security Council has recognized that sexual violence may impede international peace and security "when used or commissioned as a tactic of war in order to deliberately target civilians, or as part of a widespread or systematic attack against civilian populations". Sexual violence may be deemed a tactic of war when it is linked with military or political operations associated with the conflict, but it nevertheless remains a violation.[524] While there will often not be direct orders regarding sexual violence, it is evident that sexual violence is used as a tactic when armed forces are able to prevent other offenses by soldiers, but make no effort to prevent or punish sexual offences. Acts of sexual violence as tactics must be temporally, geographically, and causally connected to the conflict at hand.[525]

In Resolution 1325 (2000) of 31 October 2000, the United Nations Security Council called on "all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls" and "to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse".[526] The Resolution emphasized the responsibility of all States to end impunity and to prosecute those responsible for sexual and other violence against women and girls.[527] Further, in Resolution 1820 (2008) of 19 June 2008, the Security Council demanded that "all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from

[519] Stop Rape Now, UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence*, p. 1.
[520] Ibid. *See also* UN Security Council Resolution 1325 (S/RES/1325) (2000), preamble, para 10; OHCHR, *Democratic Republic of the Congo, 1993–2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (2010)*, para 546-50. "The combined action of national and international, conventional and customary legal instruments should therefore enable the acts of sexual violence committed in the DRC between 1993 and 2003 to be punished."
[521] *General Recommendation No. 19 of the Committee on Elimination of Discrimination against Women: Violence against Women* (11th session, 1992).
[522] Ibid, para 7(b), (c), (g).
[523] Stop Rape Now, UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence*, p. 1-2; UN Security Council resolution 1820 (S/RES/1820) (2008) para 4.
[524] UN Security Council Resolution 1820 (S/RES/1820) 2008.
[525] Stop Rape Now, UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence*, p. 2-3
[526] UN Security Council Resolution 1325 (S/RES/1325) (2000), paras 9 and 10.
[527] Ibid, para 11.

all forms of sexual violence".[528] The resolution also stressed the need to exclude sexual violence crimes from amnesty provisions in conflict resolution, and called on Member States "to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice."[529] Resolutions 1888 and 1960 reiterated these concerns, and established several mechanisms to address this violence, including appointing a Special Representative of the Secretary General to coordinate these efforts, and the development of a list of all parties suspected of using sexual violence in armed conflict.[530] Important for the subject at hand, the resolution emphasized the significance of ending impunity for such acts "as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation".[531]

The following section sets out the legal framework governing sexual violence during conflict, based on these Security Council resolutions and the standards established by IHRL and IHL. The examination begins with an analysis of rape, primarily because the sexual violence cases documented TJRA consist mainly of allegations of rape, gang-rape or attempted rape. The legal aspects of other forms of sexual violence, including crimes such as sexual assault and molestation, are subsequently considered.

9.2.1 Rape

The rape of women is a criminal offence in Nepal. Section 1 of the Nepali National Code defines it as "sexual intercourse with a woman without consent**,** and in case of a girl below the age of 16, with or without her consent." A proviso to this definition explains that consent obtained by using fear, intimidation, threat, coercion, undue influence, fraud, force, abduction or holding the victim in captivity shall not be considered consent. Similarly, consent obtained when the victim is not in a stable mental condition shall not be considered consent.

The ICTY and ICTR have both ruled that rape constituted torture[532] where the perpetrator's conduct during rape satisfied the "infliction of severe pain or suffering whether physical or mental" element required of torture.[533] In addition to the pain suffered during the act itself, the courts recognized that the psychological suffering could be "exacerbated by social and cultural conditions that can be particularly acute and long lasting".[534] Rape also constitutes a war crime,[535] and international criminal courts have also employed the Common Article 3 prohibition of "outrages upon personal dignity" as the basis for a rape conviction.[536]

The ICRC considers that the prohibition of rape during conflict has attained the status of customary international law, meaning that, irrespective of whether the party to the conflict is a party to the Geneva Conventions, rape committed by one of their members is a punishable crime.[537]

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[528] UN Security Council Resoultion 1820 (S/RES/1820) (2008) para 3.
[529] Ibid, para 4.
[530] UN Security Council Resolution 1888 (S/RES/ 1888) (2008), UN Security Council Resolution 1960 (S/RES/1960) (2010).
[531] Ibid, para 4.
[532] *Prosecutor v. Semanza*, ICTR Trial Chamber, no. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para 483; *Kunarac et al.*, ICTY Trial Chamber, (2001) para 655 (see footnote 154); *Kvočka*, ICTY Trial Chamber (2001) para 561(see footnote 391).
[533] See Chapter 7 – Torture p. 124
[534] *Čelebići Case*, ICTY, Trial Chamber, (1998) para 495 (see footnote 408)
[535] Statute of the International Criminal Tribunal for Rwanda (1994), article 4(e); UNTAET Regulation 2000/15, section 6(1)(e)(vi); Statute of the Special Court for Sierra Leone (2002) article 3(e). See also, e.g., UN Security Council Resolution 1820 (S/RES/1820) (2008)
[536] *Prosecutor v. Furundžija*, ICTY Trial Chamber (1998) para 267 (see footnote 369).
[537] International Committee of Red Cross, *Customary International Humanitarian Law*, rule 93 (see footnote 129). Rape and other forms of sexual violence are prohibited.

The Rome Statute defines the elements of the crime of rape in non-international armed conflicts for the ICC are as follows:

- *The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*

- *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*

- *The conduct took place in the context of and was associated with an armed conflict not of an international character.*

- *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*[538]

This definition is purposefully detailed and comprehensive, and may not correspond with the definitions found in many traditional criminal law jurisdictions.[539] Two elements will be examined more closely below, the "physical invasion of a sexual nature", and "coercion".

a) Invasion

The element of 'invasion' is akin in most respects to the traditional criminal law element of 'penetration'. However, the Rome Statute drafters employed the term invasion in an effort to make the term gender neutral.[540] Still, the concept of invasion in the Statute is closely linked to penetration, since the invasion of the body must still result in a penetration of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body, however slight.

b) Force, Threat of Force, or Coercion

A closer examination is necessary of the second element surrounding the lack of consent. It is clear that the terms "force, threat of force or coercion" of the Rome definition should not be interpreted narrowly: a specific coercive act is not required to be proven, rather the 'overall circumstances' of coercion are relevant. The Rules of Procedure and Evidence of the ICC state the principle in this manner:

> *In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:*

[538] Rome Statute, article 8 (2)(e)(vi)-1 "War crime of rape" (see footnote 145)
[539] The elements of rape traditionally appear in a form similar to:
1. The sexual penetration, however slight
2. Of the vagina or anus of the victim
by the penis of the perpetrator
or any other object used by the perpetrator;
or of the mouth of the victim by the penis of the perpetrator;
3. by coercion or force or threat of force against the victim or a third person.
[540] See Rome Statute, article 8 (2)(e)(vi)-1 "War crime of rape" (see footnote 145). Penetration could be interpreted as involving only a male as the actor.

> (a) *Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent"(emphasis added).*[541]

The *ad hoc* tribunals also apply this element, and have interpreted these terms to ensure they address all situations where the sexual invasion is not voluntary or is otherwise non-consensual.[542] The International Criminal Tribunal for Rwanda for example, has ruled that "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion".[543] The Special Court for Sierra Leone has also ruled that "coercive circumstances'" are not limited to evidence of physical force, particularly during armed conflict:

> *[I]n situations of armed conflict, coercion is almost always universal. Continuous resistance of the victim and physical force or even threat of force by the perpetrator is not required to established coercion.*[544]

In fact, there are circumstances where the victim's non-consent can be presumed. In *Prosecutor v. Furundžija*, for example, the court held that "any form of captivity vitiates consent."[545]

Another point to be made with respect to coercion and consent is that international law also recognizes that certain individuals may be incapable of giving genuine consent.[546] On this point, the Rome Statute's Elements of Crimes states that "a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[547] It could also cover situations where the victim has a disability or is under the influence of drugs.

9.2.2 Other Sexual Violence

"Other sexual violence" is generally understood to be a broader category than rape, encompassing acts that do not meet the latter's definitional requirements. It is not limited to physical invasion of the human body and may include acts that do not include physical contact.[548] It serves as something of a *"'safety net' by assuring the punishment of sexual offences that are often difficult to capture in a mechanical description."*[549] For example, crimes such as serious sexual assault or molestation are included in this category.[550] With respect to non-international armed conflicts such as that in Nepal, the Rome Statute contains the separate crime of 'sexual violence' with the following elements:

- *The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or*

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[541] ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3 (2002) rule 70
[542] *Kunarac*, ICTY Trial Chamber (2001) para 460 (see footnote 154), (ruling that force, threat of force and coercion mean "where such sexual penetration occurs without the consent of the victim.")
[543] *Akayesu*, ICTR Trial Chamber, (1998) para 688 (see footnote 398).
[544] Ibid.
[545] *Furundžija*, ICTY Trial Chamber (1998), para 271 (see footnote 369).
[546] The point here is the capacity to give one's consent, not the consent itself.
[547] Rome Statute, Article 8 (2) (e) (vi)-1 "War crime of rape" (see footnote 145) Children below the age of 14 cannot give valid consent; *Prosecutor v. Brima et al. (AFRC Case)*, SCSL, Appeal Chamber, no. SCSL-04-16-A, Judgment, 22 February 2008, para 694.
[548] *Akayesu*, ICTR Trial Chamber (1998), para 598 (see footnote 398).
[549] Ibid, para 596.
[550] *Kvočka*, ICTY Trial Chamber (2001), para 180 (see footnote 391).

another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

- *The conduct was of gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.*
- *The perpetrator was aware of the factual circumstances that established the gravity of the conduct.*[551]

As is clear in the first element, no invasion or penetration is necessary to complete the crime. Otherwise, these elements are similar to those of rape, especially with regard to the level of coercion required – precisely the same as that of rape. Importantly however, 'other sexual violence' is not a category intended to allow prosecution of sexual acts that are somehow less serious. On the contrary, it encompasses only acts that are of "comparable gravity" to other serious Common Article 3 violations. The purpose is to capture serious and coercive sexual misbehaviour during war time that for some definitional reason does not constitute rape.

9.2.3 Individual Criminal Responsibility

Any individual who ordered, solicited, induced, aided, abetted, assisted, or attempted the commission of crimes of sexual violence can be, and should be, prosecuted.[552] Similarly, where individuals contribute to the commission of a crime (or its attempt) by acting in concert with others and with a common purpose, then each individual may be held liable for the acts committed by the group.[553] The *ad hoc* Tribunals have repeatedly employed this form of liability to establish guilt in the context of sexual violence, especially with regards to accused who occupied senior political or military functions.[554] The same goes for 'command responsibility' as a mode of liability. Tribunals have found individuals in positions of authority responsible for acts of sexual violence perpetrated by subordinates.[555]

9.3 BACKGROUND

9.3.1 Overview

As is pointed out by a United Nations Development Fund for Women (UNIFEM) expert study on the impact of war on women,[556] the extreme violence that women suffer during conflict does not arise solely out of the special conditions of war. Rather, such violence is directly related to the violence that exists in women's lives during peace time.[557] Many societies carry the idea that women are the vessels of community honour and men are its protector. These kinds of gender–specific concepts of honour find their ultimate expression in time of war.[558]

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[551] Rome Statute, article 8 (2) (e) (vi)-6 "War crime of sexual violence" (see footnote 145) (final two elements have been removed as repetitive). There are also other crimes of a sexual nature, including forced pregnancy, sexual slavery, enforced sterilization, and enforced prostitution.
[552] Ibid, article 25(3).
[553] This includes liability for all crimes that were "foreseeable." At the ICTY, this mode of liability is labelled "Joint Criminal Enterprise."
[554] *Tadić*, para 536 (see footnote 152); *Prosecutor v. Furundžija*, ICTY, Appeal Chamber, no. IT-95-17/-A, Judgement, 21 July 2000; *Krstić*, ICTY, Trial Chamber (2001) para 2 (see footnote 409); *Kvočka*, ICTY Trial Chamber (2001) (see footnote 391).
[555] *Blaškić*, ICTY, Appeal Chamber, (2004) para 613 (see footnote 465) (Overturned on other grounds).
[556] UNIFEM was the United Nations agency dedicated to advancing women's rights and achieving gender equality. From July 2010, UNIFEM was incorporated into UN Women, which works on thematic areas that include, *inter alia*, ending violence against women and advancing gender justice in democratic governance in stable and fragile states. For more information, see www.unwomen.org
[557] UNIFEM, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (New York, UNIFEM, 2002) p.13.
[558] Women, Law & Development International, "Gender Violence: The Hidden War Crime" (Washington, D.C., 1998).

As violence against women so often goes unpunished, it becomes an accepted norm and tends to escalate during conflict as violence in general increases.[559] The Special Rapporteur on Violence Against Women has stated that, during war, "*women and girls have been raped by government forces and non-state actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. . . .Women and girls have been forced into "marriages" with soldiers, a euphemistic term for what is essentially repeated rape and sexual slavery*".[560] Often, this treatment is linked to the "*patriarchal notions of female sexual purity with honour. . . . These values attached to female sexuality legitimize sexual regulation of "one's" women, and the sanctioning of sexual violence against transgressors as well as women belonging to the "other*"".[561]

9.3.2 The Social and Cultural Context of Sexual Violence in Nepal

An unequal gender relation that is pervasive in the Nepali society has been a key in legitimizing violence against women.[562]

Research in Nepal indicates that a strong patriarchal element lies at the heart of Nepali society. This patriarchal foundation is also reportedly at the root of social and gender discrimination in Nepal.[563] Further, research suggests that patriarchal socio–cultural norms and practices tolerate sexual violence against women, thereby legitimating the use of such violence.[564]

A patriarchal society is a society which privileges males and legitimizes gender hierarchy within a family.[565] In Nepal, deep-rooted patriarchal attitudes, conduct based on the assumed superiority of men in public and private spheres and the strong perception that women are weak and vulnerable, all undermine a women's position within the family and the community.[566] The CEDAW Committee has expressed concern regarding "*patriarchal attitudes and deep-rooted stereotypes that discriminate against women remain entrenched in the social, cultural, religious, economic and political institutions and structures of Nepalese society and in the media*".[567] A woman's position is determined by her relationship with the men under whose relational or legal protection she remains, her father when a women is young, and later her husband.[568] Thus, marriage continues to be seen as essential for a girl, across class, caste, religion and ethnicity, and the sexuality of a girl and its transference to the husband is considered to be of primary importance for the parents.[569]

According to research undertaken by leading Nepali human rights NGO, Women's Rehabilitation Centre (WOREC), violence against women is socially accepted as "normal"

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[559] Ibid.
[560] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, *Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)*, E/CN.4/2001/73,
[561] The United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences, *Fifteen Years of the United Nations Special Rapporteur on Violence Against Women (1994-2009), A Critical Review*, p. 15
[562] WOREC, *Violence against Women in Nepal: A Complex and Invisible Reality* (Kathmandu, WOREC, 2006), p.4.
[563] Ibid, p. 1; UNIFEM & SAATHI, "Sexual and Gender Based Violence during Conflict and Traditional Period: Jhapa and Morang Districts: A Research", 2008, p.7; Forum for Women, Law & Development, "Domestic Violence against Women in Nepal: Concept, History and Existing Laws" p. 10, Available from www.fwld.org/article.php.
[564] UNIFEM & SAATHI, "Sexual and Gender Based Violence during Conflict and Traditional Period", p.10 (see footnote 563)
[565] Ibid.
[566] WOREC, *ANWESI: A Year Book on Violence Against Women 2008* (Kathmandu, WOREC, 2008) p.40.
[567] CEDAW, *Concluding Observations: Nepal*, CEDAW/C/NPL/CO/4-5, para 17
[568] Advocacy Forum and International Centre for Transitional Justice, *Across The Lines: The impacts of Nepal's Conflict on Women* (2010), p.34; WOREC, *ANWESI 2008*, p.40 (see footnote 566)
[569] FWLD, "Domestic Violence against Women in Nepal," p. 8 (see footnote 563)

and remains high in Nepal.[570] Research conducted by WOREC in Udayapur and Morang Districts found that "[*S]exual violence is a very common phenomenon in rural Nepal*".[571] Adolescent girls and married young women are exposed to various forms of sexual harassment at home, in villages, schools, as well as during public events.[572]

9.3.3 Consequences of Sexual Violence for the Victim, Family and Community

> *The consequences of sexual violence such as social stigmatization, isolation, disowning from the family are fully functional, thus [sexual violence] always gets swept under the carpet giving more power to the violators.*[573]

Sexual violence has consequences on several levels, both for the individual victims, but also for her/his family, community and society at large. It can have a disastrous impact on health, causing injuries, unwanted pregnancies, sexual dysfunction, HIV/AIDS and other sexually transmitted infections.[574] Significantly, in Nepal it has been found that many women are unaware of such effects and that sexual health problems are not considered problems unless they become visible.[575] Sexual violence also has psychological effects, including anxiety, post-traumatic stress disorder, depression and suicide.[576]

Social and cultural consequences of sexual violence on the victim can be at least as severe as the health or psychological consequences. As discussed above, much individual and collective cultural identity is woven around women's sexuality in Nepal,[577] and female victims of sexual violence can be considered as having lost their honour.[578] A girl's honour is perceived as a delicate asset that must be preserved, even at high cost,[579] and "[i]f a girl fails to protect herself or gets victimized, not only she loses respect, but also the family and even the entire village feel a sense of shame."[580] As a consequence, there are cases related and unrelated to the conflict where women have been doubly victimized for having reported violence they suffered and stigmatized within their own communities. Many of those who could rely on the support of their families, local or international organisations, have moved to Kathmandu or abroad to start a new life.

9.3.4 Obstacles to Securing Justice in Nepal

Though sexual violence as a strategy of war and as a human rights issue has received increasing global attention, the direct support needed by women who are victims of such violence is still inadequate,[581] and Nepal is no exception. One of the main obstacles for women seeking justice in Nepal the limited, and in some places non-existent, support structures for victims of sexual violence.[582]

Furthermore, the existing legal framework for addressing sexual violence has been criticised by human rights and other organizations as inadequate. Firstly, the definition of rape is

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[570] WOREC, *ANWESI 2008*, p.12 (see footnote 566), WOREC, *Adolescents and Youth Speak about Violence and its Impact: A Case Study in Eastern Nepal* (Kathmandu, WOREC, 2003) p.5.
[571] Ibid, p.44.
[572] Ibid.
[573] WOREC, *Violence against Women in Nepal*, p.19 (see footnote 562).
[574] UNIFEM, *Women, War, Peace* (see footnote 557),
[575] WOREC, *ANWESI 2008* (see footnote 566) .
[576] UNIFEM, *Women, War, Peace* (see footnote 557),
[577] WOREC, *Adolescents and Youth Speak* (see footnote 570)
[578] Ibid.
[579] Ibid.
[580] Ibid.
[581] UNIFEM, *Women, War, Peace* (see footnote 557).
[582] UNCT-Nepal, "Joint UNCT Input on Nepal for the Report of the Secretary General to the Security Council on the Implementation of SCR 1820 on Women, Peace and Security", April 2009, para 50.

narrow and focuses on issues of "consent" rather than "invasion of body".[583] Secondly, rape includes only penetration by sexual organ, and does not allow for other forms of penetration, such as oral sex or penetration by objects.[584] Thirdly, the 35-day statute of limitations is too short, especially where a victim is often too traumatized and frightened to come forward within such a short period of time.[585] In cases where women do try to press charges, they often face pressure by the perpetrators and in some cases their communities to withdraw the charges in the name of "social harmony". In some instances the police refuse to file a case because there is no medical report, while the doctor refuses to do a forensic examination in the absence of a First Information Report.

As pointed out by the Nepal WOREC, complicated and expensive legal processes, where confidentiality is lacking, prevent women from seeking justice.[586] Sexist attitudes that downplay the seriousness of violence against women also appear to influence decisions to arrest, prosecute and convict perpetrators.[587] The apparent failure of the police and judicial system to support investigation and prosecution of cases of sexual violence reinforces the culture of impunity on which sexual violence thrives.[588] Reportedly, political protection of the perpetrators forces victims and their families to withdraw cases or remain silent in the face of life-altering threats.[589] There are also are reports of cases where monetary benefits have been provided to the family of the victim to prevent the case from being filed and becoming public.[590]

With regards to justice sought for acts of sexual violence committed during the conflict, the Institute of Human Rights Communication, Nepal (IHRICON) found that when offences of sexual violence or rape allegedly committed by Security Forces were reported to any level of authority, actions were rarely taken.[591] IHRICON reports that a small amount of money would be given to those who lodged a complaint to "keep quiet", including in one case where a 13-year-old girl was allegedly raped by Security Forces personnel.[592] In most cases, IHRICON found that no real investigation was undertaken.[593] CEDAW also urged the Government of Nepal to take action to address instances of sexual violence during the conflict, stating that,

> *[T]he Committee remains deeply concerned that cases of sexual violence, including rape allegedly committed by both security forces and Maoist combatants during the armed conflict, are not being investigated and perpetrators have not been brought to justice. The Committee is also concerned that a large number of women affected by the conflict face difficulties in accessing justice and that the statute of limitations on filing complaints relating to rape and other sexual offences could obstruct access to justice by women victims of rape and other sexual offences during the conflict. The Committee is further concerned that many survivors of sexual violence during the conflict are suffering from acute post-traumatic stress disorder and other mental and physical health problems. In addition, the Committee expresses its concern about the lack of women's participation in peace and reconstruction processes.*[594]

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[583] Ibid.
[584] Ibid.
[585] Ibid para 36; CEDAW, *Concluding Observations: Nepal*, CEDAW/C/NEPAL/CO/4-5, para 35
[586] WOREC, *ANWESI 2008* (see footnote 566).
[587] Ibid, p.33.
[588] UNCT-Nepal, "Joint UNCT Input on Nepal" , para 50 (see footnote 582).
[589] UN Country Team (UNCT), Nepal, "Joint UNCT Input on Nepal for the Report of the Secretary General to the Security Council on the Implementation of SCR 1820 on Women, Peace and Security", April 2010, para 50.
[590] Ibid.
[591] Institute of Human Rights Communication, Nepal (IHRICON), *Sexual Violence in the "People's War": The Impact of Armed Conflict on Women and Girl in Nepal"* (Kathmandu, IHRICON, 2007) p.31.
[592] Ibid.
[593] Ibid.
[594] CEDAW, *Concluding Observations: Nepal*, CEDAW/C/NEPAL/CO/4-5, 29 July 2001, para 35.

During the conflict, access to legal aid was limited or non-existent.[595] Access to psychosocial support was also extremely rare, especially in rural areas or remote districts. Today, Nepal still lacks an integrated support model for victims of sexual violence, encompassing access to healthcare, psychosocial support and legal aid.

9.3.5 Under Reporting of Sexual Violence

Taboos surrounding sexual violence in Nepali society and the general culture of silence are the biggest challenge to data collection.[596] These taboos make it difficult to document sexual violence without risk of causing harm to the victims, which is a fundamental principle in human rights monitoring.

As discussed above, many women were silenced by the stigma attached to sexual violence both in war and peacetime.[597] WOREC reported that the registration of cases of violence against women was lowest in the Far-Western Region, primarily because of a lack of support mechanisms for women.[598] In the Central Region, the support mechanism was relatively better for female victims; hence they were reportedly more open about violence they had faced.[599]

Not surprisingly, information on conflict-related sexual violence is still scarce. The fact that most violence, including rape, during the conflict allegedly took place in rural and remote areas has contributed to this.[600] The culture of silence is said to have been reinforced by the militarization of the country, further discouraging women from speaking up about the reality of abuses they faced during the conflict.[601]

Fear of retaliation and further victimization has also reportedly contributed to the under-reporting of sexual violence. WOREC found that women at community level were afraid to register complaints in cases of violence allegedly by Security Forces.[602] Even if they did, it was perceived as useless to lodge a complaint because state institutions, such as the police, would not investigate or intervene in relation to allegations against the army.[603] As well as the attendant stigmatization, women who complained also risked being branded as a Maoist,[604] with all the consequences that might entail.

9.4 ANALYSIS: INDICATIONS OF TRENDS

This section examines cases of sexual violence that occurred during the conflict. Given the very limited number of cases of alleged sexual violence in the available data, the first part reviews existing major research. The second part examines cases recorded in the TJRA.

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[595] USAID, *Nepal Rule of Law Assessment, Final Report* (19 August, 2009) Available at http://nepal.usaid.gov/downloads/all-downloads/category/16-evaluation-reports.html
[596] UNCT-Nepal, "Joint UNCT Input on Nepal" para 4 (see footnote 582)
[597] IHRICON, "Sexual violence in the "People's War" (see footnote 591)
[598] WOREC, *ANWESI 2008*, p.13 (see footnote 566).
[599] Ibid.
[600] FWLD, "Domestic Violence against Women in Nepal" (see footnote 563), See also CEDAW, *Concluding Observations: Nepal*, CEDAW/C/NEPAL/CO/4-5, para 36(d).
[601] WOREC, *Violence against Women in Nepal*, p.1,19 (see footnote 562).
[602] Ibid, p.2.
[603] Ibid.
[604] Ibid.

9.4.1 Existing Research by NGOs and the United Nations

a) Research by Advocacy Forum-Nepal and International Center for Transitional Justice[605]

Collaborative research by the Advocacy Forum-Nepal (AF) and the International Center for Transitional Justice (ICTJ) was undertaken with the aim of understanding "the impact of the armed conflict on women in Nepal" and suggesting "strategies to assist women affected by war and their communities".[606] The research was conducted in 16 districts across the country from January to June 2009[607] and included in-depth interviews with victims of human rights violations with deliberate efforts to reach women in marginalized groups.[608]

The AF/ICTJ research concluded that both Maoists and Security Forces personnel perpetrated sexual violence, including rape. However, the majority of allegations were made against the Security Forces.[609] During the earlier period of the conflict, women in the Mid-Western and Western Regions became victims of sexual violence following Nepal Police operations, such as "Operation Romeo" and "Operation Kilo-Sierra II".[610] However, the most egregious acts of sexual violence during the conflict period were, according to the AF/ICTJ research, allegedly committed by the RNA after their deployment in 2001, and by the Nepal Police under Unified Command between 2003 and 2006.[611]

AF/ICTJ found that Security Forces personnel "frequently" subjected girls and women to sexual violence during search operations and on regular patrols.[612] AF/ICTJ also concluded that victims of sexual violence by Security Forces were "often" accused of supporting the Maoists or with some affiliation with them.[613] It is alleged that Security Forces subjected female Communist Party of Nepal (CPN (Maoist)) cadres to particularly brutal forms of sexual violence.[614] Rape, the AF/ICTJ study claimed, was a "common practice" adopted by the RNA to punish female Maoist cadres and sympathizers.[615]

In general, women who lived close to army barracks or in areas perceived to be the Maoist strongholds were said to be more vulnerable to sexual violence by Security Forces.[616] Women and girls were found particularly vulnerable while undertaking daily livelihood activities outside the home, such as collecting firewood or thatch, fetching water, going to the market or performing domestic work at home alone.[617] The report also alleges that individual Security Forces personnel took advantage of the climate of impunity which existed during and following the conflict where they were rarely held accountable for criminal actions, including sexual violence.[618]

AF/ICTJ research also found an upward trend of false marriages and a phenomenon of 'conflict wives'.[619] The research opined that because of a sense of insecurity, girls and their

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[605] AFN and ICTJ, *Across The Lines* (see footnote 568).
[606] Ibid, p. 13.
[607] Ibid, p. 15, Far-Western region; Kailali, Dadeldhura, Achham, Mid-Western region; Bardiya, Kalikot and Rolpa, Western region; Baglung, Kapilvastu and Palpa, Central region; Dhanusha, Dolakha and Makwanpur, and Eastern region; Morang, Okhaldhunga, Siraha, Saptari Districts.
[608] Ibid.
[609] Ibid, p. 49.
[610] Ibid, pp. 49-50. See Conflict Timeline for information on date and locations of these operations.
[611] Ibid, p. 49.
[612] Ibid, p.51.
[613] Ibid.
[614] Ibid, p.48.
[615] Ibid.
[616] Ibid, p. 47.
[617] Ibid, p. 53.
[618] Ibid.
[619] Ibid. at p. 55.

families believed that having the status of a married person would provide some sort of protection against sexual violence and abuse by Security Forces as well as from recruitment by the CPN (Maoist).[620] Presumably for similar reasons, AF/ICTJ research found an increase in child marriage. Many girls were reportedly abandoned while pregnant, and left to face severe social and economic difficulties.[621]

Concerning the low number of allegations of sexual violence against Maoists, the AF/ICTJ report commented that sexual violence was against the norms and ideology and counterproductive to the overall political strategy of the Maoists.[622] However, the AF/ICTJ report noted some cases where women affiliated to the Government or Security Forces had been allegedly subjected to sexual violence by Maoist cadres.[623] AF/ICTJ's research also found several cases where Maoist commanders reportedly committed rape by forcing females to enter sexual relationships with them.[624] Forced and unsafe abortions were also allegedly performed on pregnant female cadres.[625]

b) Research by the Women's Rehabilitation Centre[626]

In its report entitled *Violence against Women in Nepal: A Complex and Invisible Reality*, WOREC documented cases of violence against women between October 2005 to April 2006.[627] Although the period covered was during the conflict, the research covered not only conflict-related sexual violence, but also non-conflict-related violence, such as domestic violence. The research covered 62 of Nepal's 75 districts spanning all regions of the country.

WOREC research concluded that State forces were the main perpetrators of sexual violence, though the report acknowledged its contributors had difficulty in piercing "the depth of the community" in relation to documenting Maoist misconduct.[628]

The report also cautioned that, out of fear, women who had suffered violence by Security Forces were not willing to file complaints[629] and that women captured by the Security Forces who were suspected of being Maoists were ill-treated.[630] Further, WOREC research found that the existence of an allegation of being Maoist could legitimise sexual violence and even the killing of the victim:

> *Even if RNA abuse and kill them (community women), they can be labelled as Maoist and every act becomes legitimate.*[631]

As with other similar public reports, WOREC research also found evidence of the "conflict wives" phenomenon[632] where some Security Forces personnel reportedly kept a women partner during their period of assignment, and then left them when they moved on to the next duty post.[633] Such "wives" were considered impure and immoral in the community once their "protectors" left, resulting in ostracization and stigmatization for them and any children from the relationship. WOREC also found evidence of forced sex workers near army barracks[634]

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[620] Ibid.
[621] Ibid.
[622] Ibid, p. 56.
[623] Ibid., p. 49.
[624] Ibid., p. 56.
[625] Ibid., p. 57.
[626] WOREC, *Violence against Women in Nepal* (see footnote 562)
[627] Ibid, p. 1.
[628] Ibid, p.17.
[629] Ibid.
[630] Ibid., p.16.
[631] Ibid., p.17, quoting a Women Development Officer in Western Region.
[632] Ibid., p.17.
[633] Ibid., p.3.
[634] Ibid.

with the suggestion that internally displaced women were particularly vulnerable to such trafficking or coercion given their lack of economic security and support system.[635]

c) Research by the Institute of Human Rights Communication, Nepal (IHRICON) [636]

Research on sexual violence during the conflict undertaken by IHRICON was aimed at identifying the incidence of rape and sexual violence among young women and girls in the vicinity of Maoist and Security Forces barracks and to assess its consequences.[637] IHRICON conducted its research in Banke, Bardiya, Jumla, Rolpa and Achham Districts between September and November 2006 through interviews as well as focus group discussion.[638] In each district, the research sites were chosen based on the presence of an army barrack as well as those areas in villages and schools where both Security Forces and Maoist cadres were based.[639]

The research also reported rape cases,[640] and concluded that all levels of army personnel had been involved in sexual violence. IHRICON observed that lower ranking offenders were almost never punished.[641] The particular vulnerability of women while they were out collecting fodder or firewood was emphasized,[642] and that threatening women with the accusation of being Maoists meant all manner of ill-treatment was justified.[643] IHRICON confirmed the prevalence of "conflict wives" of the State Security Forces, in findings similar to those of WOREC.[644]

d) Research by UNIFEM and SAATHI in Jhapa and Morang Districts[645]

Though limited in its geographical coverage to two districts of the eastern-most *Tarai*, a study by UNIFEM and SAATHI examined sexual and gender–based violence in the conflict and post–conflict periods. The research covered cases of 498 girls and women, aged 11-74 years, of varied caste and ethnicity.[646]

The research found that sexual violence committed by non-family members, (which included parties to the conflict as well as neighbours), was found to be higher during the conflict period.[647] Of all the respondents, 18 per cent had faced some type of sexual violence committed by non-family members.[648] Significantly, the research found that the vulnerability of girls and women during the conflict period increased, due to lack of or limited security systems at the community level, absence of male members at home and increased authority of insurgents and armed forces, making them prime target of sexual and gender based violence.[649]

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[635] Ibid.
[636] IHRICON, *Sexual Violence in the "People's War"* (see footnote 591)
[637] Ibid., p. viii.
[638] Ibid.
[639] Ibid., p. xvi.
[640] Ibid., p. 3.
[641] Ibid., p. 32.
[642] Ibid., p. 6.
[643] Ibid., p. 3.
[644] Ibid., p. 9.
[645] UNIFEM & SAATHI, "Sexual and Gender Based Violence during Conflict and Traditional Period" (see footnote 563)
[646] Ibid., p. 17.
[647] Ibid., p. 4.
[648] Ibid., p. 43.
[649] Ibid., p.21.

e) Assessment Mission by OHCHR, UNFPA, Advocacy Forum and Centre for Mental Health Counselling in Achham District

In 2009, OHCHR received information from a women's NGO based in the Far-Western Region that a number of women in a particular village in Bhatakatiya Village Development Committee (VDC), Achham District had been raped by RNA soldiers following a Maoist attack on the District Headquarters in Mangalsen, in 2002. As a result, OHCHR conducted a preliminary assessment mission in February 2009 that indeed provided evidence of previously unreported conflict-related sexual violence cases in that area following a Maoist attack. The assessment also found that many of the alleged rape victims also faced a range of subsequent reproductive health problems.

In May 2009, OHCHR, United Nations Population Fund (UNFPA), Advocacy Forum-Nepal and Centre for Mental Health Counselling (CMC) jointly undertook a mission to Bhatakatiya VDC to set up a temporary women's reproductive health camp to assess pressing health needs and to provide basic and immediate medical and psychosocial support to victims. Crucially, in the course of treatment and counselling, those who indicated having experienced sexual violence were referred to documentation personnel.

The three-day assessment mission found that many people were still reluctant to talk about the issue of sexual violence and that it had never been openly discussed in the community. Of the 322 women who visited the camp, a total of 14 cases of serious sexual violence (nine cases of rape and five of attempted rape) were documented.

Remarkably, the team also found that none of the cases had been filed with the police or at the district administration office. OHCHR assessed that the victims of sexual and gender-based violence were not receiving any support, either from the Government or other organizations. Considering the sensitive nature of sexual violence, OHCHR remains convinced that there are more cases of conflict-related sexual violence that remain unreported and undocumented.

Based in part on the experience of this pilot mission, UNFPA and United Nations Children's Fund (UNICEF) initiated a joint project in 14 of the most conflict-affected districts, combining reproductive health camps with documentation, psychosocial counselling services and provision of legal aid. The report is to be published at the end of the two-year project and is expected to shed further and much-needed light on sexual violence during the conflict period and the needs and demands of the survivors.[650]

9.4.2 Analysis of Incidents Identified During the Reference Archive Exercise

a) Overview

Cases recorded in the TJRA indicate that Security Forces appeared to have perpetrated the majority of reported cases of sexual violence. Out of over one hundred cases catalogued, 12 list Maoist personnel as perpetrators. Among the cases reportedly committed by Security Forces, an almost equal number refer specifically to the Nepal Police and the Neal Army, whereas other cases refer to the Armed Police Force, the Security Forces, the Unified Command or the "police" as perpetrators. The incidents perpetrated by Nepal Police are evenly distributed throughout the conflict period, whilst those by the RNA were mostly after 2001, reflecting their date of deployment.

[650] UNCT-Nepal, "Joint UNCT Input on Nepal 2010," p.8 (see footnote 589); UNFPA/UNICEF, "UN Peace Fund Proposal on UNSCR 1612 and 1820", 2010, on file with OHCHR-Nepal.

Most violations concern alleged rape, gang-rape and attempted rape with some cases relating to forced nudity.[651] Several cases identified during the reference archive exercise, allegedly perpetrated by Security Forces, involve rape of female Maoists where they suffered particularly brutal sexual violence and eventually were killed.

The data available indicates that children, i.e. girls under 18 years old, were particularly vulnerable during the conflict period. More than one third of the victims were children, with many of those victims under 15 years old. There are even cases where the victim is under 10. A number of cases had multiple victims, often when sexual violence was reportedly committed by Security Forces personnel in the course of search operations. There are cases where victims were allegedly sexually violated when pregnant, and of victims with mental disabilities. Further, some lost their lives as a result of unwanted pregnancy caused by rape or during the course of abortion.[652]

b) Alleged Sexual Violence by Security Forces

With the limited number of reported cases, it is difficult to establish trends in terms of how rape and other acts of sexual violence were committed. However, from the information available, it appears that there was a pattern of sexual violence apparently committed by Security Forces personnel in the course of searching for and interrogating Maoists. Reported incidents took place in and around the house of the victim as well as after the victims were taken into custody. There are indications that female Maoist cadres faced particularly brutal sexual violations and were sometimes subsequently killed. Security Forces also allegedly committed opportunistic sexual violence, where the perpetrators appear to have taken advantage of the vulnerability of the victims during the conflict period and the climate of impunity, using the suspicion of a link to the Maoists to justify their actions.

i) Alleged Sexual Violence by Security Forces in the Course of Searching For and Interrogating Maoists

Rape and other forms of sexual violence were allegedly committed in the course of searching for Maoists often in and around the victim's home. The TJRA identifies numerous cases where the victim was raped at her home during search operations or forcibly taken from her home and then raped at a nearby location. In a typical case, a number of Security Forces personnel would visit the victim's residence during the night, asking for certain male family members suspected of being linked to the Maoists. While in the house, Security Forces personnel would allegedly rape female victims, sometimes in the presence of children or other family members. Victims were also forcibly taken out of their house to a nearby location, such as a cowshed or the jungle, where they were raped. There are many cases of alleged gang-rape. There are also recorded instances where women were forced to strip during house searches by Security Forces personnel.

Emblematic Case 9.1*:* [653]

Narrative: Between May and August 1998, 15 women of Mahadevsthan VDC, Sindhuli District, including a 16-year-old girl and four women of ages 20, 27, 28 and 40 were reportedly raped by the Police. The alleged rapes were committed during the course of "Kilo Sierra II" Police Operation. The Police entered the victims' houses in search of Maoists and raped and sexually assaulted the victims.

[651] See section 8.4.1(e), Assessment Mission by OHCHR, UNFPA, Advocacy Forum and CMC in Achham District, p. 171 The absence of allegations of sexual violence other than rape should be seen as a reflection of the under-reporting of such violence rather than its absence during the conflict period.
[652] Nepal adopted a law that legalised abortion in 2002.
[653] OHCHR source confidential Ref. No i0261

Emblematic Case 9.2: [654]

Narrative: In February 2002, in Achham District, a large number of Nepal Army personnel came to the victim's house after the Maoist attack in Mangalsen, the District HQ. Earlier in the day, they had come to the victim's house to collect food and *ghee*. At night, three Nepal Army soldiers in uniform came again to the victim's house while her husband was not home. The soldiers kicked the door open, and said "Daughter of a whore, take off your clothes." They forcefully stripped the victim, laid her down and, in front of her children, raped her, accusing her of being a Maoist.

Also in February 2002, in Achham District, another victim was allegedly gang–raped by members of the Nepal Army who came to the victim's house. They took her upstairs and raped her, reportedly in order to coerce her to identify Maoists.

In yet another case, in February 2002, Achham District, the house was surrounded by Nepal Army soldiers. They yelled, "Come out of your house, you swine Maoists." The locked door was forced open by soldiers. The victim's mother, younger brother and sister were taken out of the house after which the Security Forces questioned the victim about her father's affiliation to the Maoists. They slapped her and dragged her by her hair. They also beat her mother unconscious with a wooden club. The victim believes that about five soldiers raped her, saying that it was the result of her being a Maoist. Later, another three soldiers entered the room, raped her and subjected her to more beating.

Emblematic Case 9.3 [655]

Narrative: In 2004 at midnight in Kavre District, around ten plain-clothed Security Force personnel came to the victim's house. They told the victim's father to open the door on the pretext that they were friends of his son who had joined the Maoist party. Out of fear, the father did not open the door. Security Force personnel broke the door in and entered the house. After searching the house, they pulled the victim, an 18-year-old student, from her bed. She cried out "I am not a Maoist. I am a student of grade seven and social worker in Rural Energy Development Centre, Kavre." About five security personnel took her to the cowshed. Members of her family were prevented from entering, but they could hear her painful crying and moaning voice for the next five hours.

Around 5am, Security Force personnel removed the victim from the cowshed and her father and other family members heard three or four rounds of gunfire about 100 metres away. Later, they found the victim's naked body with her bloodstained clothing and underwear nearby. Her body had bullet and other wounds to the head and injuries to her stomach and chest.

Rape and other forms of sexual violence committed during the course of interrogating Maoists also allegedly happened in custody. In several reported cases, the victims were arrested and detained or taken to a police station or an army barrack. During the detention, they were sexually assaulted and/or raped. In one case in 2000 in Kailali District, a 27-year-old victim was arrested from her house by four policemen. She was allegedly raped after being taken to the police post.[656]

[654] OHCHR source confidential Ref. Nos. 2072, 2075, 2078.
[655] Ref. No. 2004-02-13 - incident - Kavre _0262.
[656] OHCHR source confidential Ref. No. 4024.

Girls or women who were suspected of being Maoists appear to have faced particularly brutal sexual violence with several cases where rape allegedly preceded unlawful killings. For example, in 2001, a Maoist cadre, [name withheld], aged 25 years, was arrested in a village in Humla District. It was reported that after the arrest, 25 RNA soldiers raped her, and subsequently shot her dead.[657] In another similar case, in 2001, Humla District, a female Maoist Cadre, [name withheld], was chased by a combined force of the RNA and Nepal Police. At the time, she was reportedly seven to eight months pregnant. The RNA caught her in Kirmi village and allegedly first raped her, beat her severely and then shot her in the back.[658]

Emblematic Case 9.4:[659]

Narrative: In another case, [name withheld] was allegedly raped then murdered. At the time of the incident in September 2002, the victim was in hiding fearing that she might be arrested by Security Forces personnel due to her affiliation with Janmorcha. At around midnight, uniformed Nepal Army personnel came to the house where she was staying. The victim's sister who opened the door was taken out by two soldiers. With a pistol aimed at her head, the sister was led to a nearby vehicle. After her sister was forced to identify the victim, who was now blindfolded, one of the soldiers said that they should kill the sister. Another said, "We will do it later." They then led the sister back to the house and threatened her not to come out. After some time, gun shots were heard. In the morning, the victim's almost naked body was found lying 200 metres away from the house. Her breasts had been cut off. Her body had gunshot wounds to the head and her eyeballs were protruding from their sockets. She was wearing a *lungi* – traditional wrap skirt, and T-shirt that night. However, when her body was found, the clothes were just thrown on her to cover her naked body. Her genitals were swollen.

ii) Opportunistic sexual violence allegedly committed by Security Forces

Reported cases show that sexual violence was committed by Security Forces personnel in an opportunistic manner, using the claim that the victim was a Maoist. Several cases recorded in the TJRA follow the same pattern: In 2004 in Sarlahi District, a 23-year-old woman was raped by police in her own house.[660] In 2002, in Udaypur District, a 30-year-old woman was asked to come out of her home at night by people identifying themselves as Security Forces personnel from Taraghari Barracks. After taking her a little further away from her house, she was raped.[661] In February 2002, in yet another case from Achham District, the victim was returning home from the jungle after collecting grass for her cattle. She encountered a group of approximately ten RNA personnel. After assaulting her and accusing her of being a Maoist, one of the personnel dragged the victim away and raped her while others waited at a distance.[662]

c) Alleged Sexual Violence by the Maoists

The number of reported sexual violence cases allegedly committed by the Maoists is low compared to that of those allegedly committed by Security Forces personnel. Given the limited number of cases, it is not possible to discern any clear patterns or trends. However, in

[657] OHCHR source confidential Ref. No 5479.
[658] OHCHR source confidential Ref. No 5475.
[659] OHCHR source confidential Ref. No 0189.
[660] OHCHR source confidential Ref. No 2882.
[661] OHCHR source confidential Ref. No i3161.
[662] OHCHR source confidential Ref. No 2069.

contrast to sexual violence allegedly committed by multiple Security Forces personnel against suspected Maoists, sexual violence allegedly committed by Maoists (which include reports of rape, attempt to rape and gang-rape) appear to be more opportunistic in nature and committed by individuals rather than groups of cadres.

In one case in September 2001, in Nuwakot, a 12-year-old girl who had been cutting grass was allegedly raped by a member of the Maoist Village People's government.[663] In another case, in August 2005, in Saptari District, the perpetrator, an alleged Maoist cadre, appeared at the victim's house demanding food late at night while her husband was not at home. After eating the food, the perpetrator left but returned two hours later, forced the door open and, armed with a *khukuri* knife at the victim's throat, reportedly raped her.[664]

In yet another case, in the late evening of January 2006, in Jumla District's District Headquarters, four drunken Maoist cadres entered the victim's room and raped her and three other women.[665]

Also in January, 2006 in Kanchanpur District, a Maoist cadre, who had previously made advances towards the victim, allegedly lured her into the jungle, tied her up and raped her. Fearing for her life, the victim did not struggle. The victim's family initially filed a complaint with the Maoists. However, in a hearing that neither the victim nor her family were permitted to attend the hearing, it was decided intercourse had been consensual. When asked by OHCHR why the family had not complained earlier about the cadre, the father responded that he was unable to do so against an active Maoist cadre.[666]

Investigation and prosecution of sexual violence allegedly committed by both Maoist personnel and Security Forces personnel must also be carried out as a matter of urgency. The victims of such reprehensible violence deserve justice.

[663] OHCHR source confidential Ref. No 0941.
[664] OHCHR source confidential Ref. No 1210a.
[665] OHCHR source confidential Ref. No 1210b.
[666] OHCHR source confidential Ref. No 1210c.

CHAPTER 10 – ACCOUNTABILITY[667] AND RIGHT TO AN EFFECTIVE REMEDY

10.1 OVERVIEW

According to the available documentation that has been examined in the course of compiling this Report, it is reasonable to suspect that up to 9,000 serious human rights or international humanitarian law (IHL) violations may have been committed during the decade-long conflict, most of which constitute the categories of violations reviewed in previous chapters. However, at the time of writing this report, no-one in Nepal has been prosecuted in a civilian court for a serious conflict-related crime. It is therefore reasonable to conclude that there has been a systematic failure on the part of responsible authorities to bring individuals to justice, and that this lack of accountability served to perpetuate the commission of additional abuses during the conflict. Accountability, therefore, remains a matter of fundamental importance to Nepal as it deals with its legacy of conflict.[668]

This chapter begins by recalling the many public commitments to accountability by relevant actors and institutions. Secondly, it sets out the international legal framework related to the obligation of the authorities to provide victims of violations and their families with an effective remedy, since this is crucial to ensuring that violators are held accountable for their criminal actions. Thirdly, the institutional measures, powers and obligations that existed in Nepal during the conflict to ensure accountability for serious criminal conduct are identified, to set out which institutions and officials had the duty to provide an effective remedy. Finally, based on OHCHR-Nepal's own experience and on available information included in the TJRA, various obstacles encountered by victims and their families as they sought to pursue a remedy for alleged violations are also presented.[669]

It is hoped that this report will equip the future Truth and Reconciliation Commission (TRC) and the Commission on Disappeared Persons to better plan their activities and to explore the problems surrounding impunity. This may be done, for example, by integrating accountability issues and lines of questioning into inquiries generally and in the choice of which officials in the chain of command to interview. It may also assist in making recommendations for:

> *…policy, legal, organisational, administrative and practical reforms necessary to ensure non-repetition of such incidents… and measures to be adopted, forthwith and in future, by the Government of Nepal in relation to the promotion of human rights, strengthening of the justice system and the creation of an environment of reconciliation….*[670]

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[667] Institutional accountability of conflict parties or accountability in a broader sense that includes restitution, compensation, rehabilitation, satisfaction, institutional reform and guarantees of non-recurrence is beyond the scope of this report. For the broader accountability concept, *see Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher*, UN Doc. E/CN.4/2005/102, 18 February 2005.

[668] Accountability and impunity may be viewed as being at opposite ends of a spectrum of respect for the rule of law. Thus, the greater the impunity the lesser the accountability, and vice versa. Accordingly, 'impunity' and 'lack of accountability' are used interchangeably in this chapter.

[669] The purpose in this regard is to provide examples that indicate the practice in light of international standards related to the victim's right to remedy and accountability and not to make a comprehensive evaluation of then-existing practices.

[670] Draft Truth and Reconciliation Bill, 2011, s.27 paras (f) and (h).

10.1.1 Public Commitments to Truth and Accountability

In addition to the unequivocal language in the Interim Constitution, the Government, the major political parties and the Security Forces have repeatedly made commitments to ensure truth and accountability.

a) The Interim Constitution

The Interim Constitution, drafted on the basis of political consensus and ratified by the Interim legislature, guarantees the right to constitutional remedy for those whose fundamental rights have been violated.[671] It also imposes on the State an obligation to " adopt a political system fully compliant with the universally accepted basic human rights… rule of law… accountability in the activities of political parties, public participation and the concepts of impartial, efficient and fair bureaucracy, and to maintain good governance while ending corruption and impunity…"[672]

b) The Comprehensive Peace Accord

The CPA of November 2006 speaks explicitly to the role of the TRC as "finding out the truth about those who committed the gross violations of human rights and were involved in crimes against humanity in the course of the armed conflict".[673]

c) The Government

The Government has repeatedly declared its intention to end impunity and to enforce the rule of law. During the conflict period, the Government issued a public statement, *His Majesty's Government's Commitment on the Implementation of Human Rights and International Humanitarian Law* on 26 March 2004, which included a promise to "investigate past human rights violations and prosecute those responsible".[674] Subsequently, on 26 September 2008, the then Prime Minister Pushpa Kamal Dahal "Prachanda" stated to the UN's General Assembly , that the Government was committed to ending the environment of impunity, and that the proposed TRC would seek to reach a necessary balance between peace and justice.

d) The Major Political Parties

The 12-point Letter of Understanding between the Communist Party of Nepal (Maoist) (CPN (Maoist)) and Seven Party Alliance from November 2005 states: "Regarding… [cases of] inappropriate conduct… [that have occurred between] the parties in the past, a common commitment has been expressed to investigate the incidents … and take action over the guilty [parties, and publish information] publicly." [675]

In their Constituent Assembly election manifestos, the Nepali Congress, CPN (UML) and the CPN (Maoist) each made the following statements and commitments:

[671] Interim Constitution of Nepal (2007) article 32 (right to constitutional remedy), article 107 (jurisdiction of the supreme court)
[672] Ibid, Article 33 (c) Obligations of the State.
[673] Comprehensive Peace Accord (2006) Article 5.2.5
[674] *His Majesty's Government's Commitment on the Implementation of Human Rights and International Humanitarian Law* (2004) Point 23
[675] Agreement and Understandings on Peace Negotiation of Nepal, point 12, Available at http://www.peace.gov.np/uploads/Publication/cover%20and%20con.pdf

NC:[676]

> *The main responsibility of the nation shall be to end impunity through the rule of law.*
>
> *[T]he Nepali Congress expresses its commitment to guarantee good governance… and justice shall be guaranteed in society by ending impunity.*
>
> *A trustworthy environment with mutual goodwill shall be created by ending possibilities of repetition of impunity as per the provisions of the Truth and National Reconciliation Commission.*

CPN (UML):[677]

> *End to Impunity: All crimes against humanity shall be liable to punishment.*
>
> *Impunity shall be brought to an end and an environment for reconciliation shall be established in society. The whereabouts of the disappeared shall be made public by carrying out necessary investigations.*

CPN (Maoist):[678]

> CPN (Maoist) *shall put forward… Formation of 'Truth and Reconciliation Commission' as mentioned in the Comprehensive Peace Accord to initiate action against the culprits.*

Additionally, in April 2006, the CPN (Maoist) publicly acknowledged the right of the victims of violations to appropriate remedies.[679] The CPN (Maoist) published directives in a press statement on 2 September 2006, which clarified that beatings, abductions and killings were prohibited under party policy and announced they were setting up offices at the district level to "take immediate public action against those responsible for beatings, abductions or killings carried out against party policy".[680]

e) The Security Forces

The Security Forces repeatedly made public commitments on accountability. The Chief of Army Staff issued several directives on human rights, a number of which include accountability issues. For example, Directive No.01/061 (10 January 2005) requires all RNA personnel to "carry out prompt and detailed investigations of the cases related to human rights violations".[681] The Special Instructions issued by the Chief of Army Staff on international human rights law (IHRL) and IHL likewise acknowledge the need for "carrying out detailed, prompt and timely investigation of the allegations on Human Rights and IHL violations against the Nepalese Army."[682] An "IHL and IHRL Integration Order for the Nepalese Army", issued on 22 February 2008, requires "the full integration of human rights and IHL in doctrine, education, training and sanctions," although it does not describe what is meant by "sanctions".[683]

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[676] Constituent Assembly Election Manifesto of the Nepali Congress, issued by Central Publicity Committee, 10 March 2008. (Unofficial translation).
[677] Constituent Assembly Election Manifesto of the CPN (UML), issued by the Chief Secretary, 2008. (Unofficial translation).
[678] Constituent Assembly Election Manifesto of the CPN (Maoist), issued by the Central Committee, February/March, 2008. (Unofficial translation).
[679] CPN (Maoist), *Statement of Commitment to Human Rights and Humanitarian Principles*, 16 April 2006, Point 14.
[680] CPN (Maoist), *Press Statement*, 2 September 2006.
[681] Human Rights Journal 2008, Directorate of Human Rights, Nepal Army, p.79.
[682] Ibid, p. 80.
[683] Ibid, p.81-83.

The Nepal Police and Armed Police Force have both made public commitments to remedy violations on multiple occasions. The most detailed commitments are expressed in the respective handbooks that bind all their personnel. The Nepal Police published the "*Nepal Police Human Rights Standing Order*" with the endorsement of the then-Inspector General of Police, in 2007. Amongst the detailed directions therein, it orders superior officers to "ensure that all reports and complaints of human rights violations are fully and properly investigated and actions taken against those found to be guilty of such violations, which ensures accountability."[684] An equivalent clause is contained in the Armed Police Force Human Rights Handbook.[685] At the launch of this Handbook on 18 June 2009, the Inspector General spoke publicly about the agency's commitment to "holding the officers and Armed Police Force recruits responsible personally and initiating necessary departmental action if a violation of human rights takes place."

10.2 GOVERNING LEGAL FRAMEWORK

10.2.1 International Human Rights Law

a) The Right to an Effective Remedy

International human rights standards on accountability are based on a well-established right of victims and their families to an effective remedy: article 8 of the Universal Declaration of Human Rights states:

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

It is also protected in article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires States to "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."[686]

This right requires accessible and effective remedies so that other protected rights can be realized. Above all, it requires that allegations of violations are promptly, thoroughly and effectively investigated through independent and impartial bodies.[687]

The State's obligation to ensure respect for the right to an effective remedy also includes the obligation to protect individuals under its jurisdiction from third parties. Thus, there may be circumstances where this right is violated because a State failed to take appropriate measures, or to exercise due diligence, to prevent, punish, investigate or redress the harm caused by private persons/entities. Reparation must be provided to individuals who suffered a violation as part of the remedy. Moreover, the remedies provided must function effectively in practice.[688]

The right to an effective remedy is non-derogable during public emergency, as the obligation is inherent in the Covenant as a whole.[689]

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[684] Human Rights Standing Orders, Nepal Police, 2007.
[685] Armed Police Force Human Rights Handbook, Armed Police Force, 2009.
[686] ICCPR article 2(3)(b) (see footnote 164). Corresponding rights are also in the CRC, CEDAW, CERD, and CAT.
[687] Human Rights Committee, General Comment 31, para 15
[688] Ibid. para 8, 16, 20.
[689] Human Rights Committee, General Comment 29, para 14: "This clause . . . constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical

b) The Duty to Prosecute

> *[I]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*[690]

The duty to prosecute crimes against humanity, war crimes and genocide is a part of customary law, as reflected in the preamble of the Rome Statute.[691] In relation to torture and cruel, inhuman or degrading treatment, summary and arbitrary killing, enforced disappearance and other violations of a similar nature recognized as criminal under domestic or international law, State parties to the ICCPR, including Nepal, are obliged to ensure that those responsible for violations are brought to justice. This means that amnesties, immunities and indemnities do not relieve perpetrators from personal responsibility.[692]

When prosecuted, the accused should be presumed innocent until the court finds otherwise.[693] Due process rights must also be guaranteed including that the accused has a legal representative and a fair and public hearing by an independent, impartial and competent court established by law without undue delay.[694] Fair trial rights are non-derogable during emergency situations.[695]

A failure to investigate or a failure to bring the perpetrators to justice may give rise to a separate human rights violation in addition to those acts that form the subject matter of the original violation.[696]

10.2.2 International Humanitarian Law

Corresponding requirements can be found in IHL. Individuals can be held criminally responsible for war crimes whether or not they were obeying orders when perpetrating the acts.[697] Commanders and superiors are also individually criminally responsible if they knew, or should have known, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had already been committed, to punish the persons responsible.[698] States are obliged to investigate allegations of war crimes committed by their nationals or State forces, or on their territory, and to prosecute the suspects if warranted.[699]

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functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."

[690] "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 (16 December 2005) Principle 4.

[691] For more detailed analysis, see Chapter 4 – Applicable Law p. 61.

[692] General Comment 31, para18, General Comment 20 (44).

[693] ICCPR, article 14(2) (see footnote 164).

[694] *See* CCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) (1984).The requirements of due process are largely reflected in Interim Constitution of Nepal (2007) article 24. For the undue delays in proceedings, see Human Rights Committee, *Munoz Hermoza v. Peru*, Communication No. 203/1986.

[695] Human Rights Committee, General Comment 29, para16.

[696] Human Rights Committee, General Comment 31, para 18. *See also* Chapter 4 - Applicable International Law chapter, p. 61

[697] International Committee of the Red Cross, *Customary International Humanitarian Law,* Rule 151 (see footnote 129)

[698] Ibid. Rule 153.

[699] Ibid. Rule 158.

Elements of the right to a fair trial are also guaranteed under IHL during armed conflict, either international or non-international. For example, no one may be convicted or sentenced without a fair trial affording all essential judicial guarantees.[700]

10.3 ACCOUNTABILITY MECHANISMS

10.3.1 Nepal's Criminal Justice System

The primary responsibility for redressing serious criminal acts rests with Nepal's justice system. This justice system is an integrated, rule-bound process designed to counteract crime where cases are investigated by the police, charged by a Government attorney, and adjudicated in the courts. While protecting the rights of all involved, the justice system determines whether an illegal act has been committed, and if so, who committed it, and what punishment or remedy should follow.

As mentioned in the various chapters of this Report, many but not all offences that amount to serious violations of human rights or IHL have an equivalent prohibition in Nepal's domestic law and therefore may be prosecuted in domestic courts. While unlawful killings and rape are clear examples of this, other crimes, such as disappearance and torture, are more problematic because they have not been explicitly criminalized in Nepal. Acts comprising incidents of torture or disappearance, however, often include elements that are criminally prohibited by other provisions.[701]

a) Initiation of Investigations

In Nepal, a First Information Report triggers action by the justice system. Any person[702] who has knowledge that a crime has been or will be committed must report such to the nearest police office, orally or in writing, at which point the Report should be created and registered. First Information Reports can be filed at the nearest police office.[703] Police are obliged to register the First Information Report in the Crime Registration Book, also called "Diary 10,"[704] but if for some reason the police refuse to register this Report – as did occur with respect to conflict-related violations – the complainant shall lodge the Report with a superior police office or the Chief District Officer.[705] Once registered, the Police conduct an initial assessment of the matter and submit a Preliminary Report relating to the crime to the District Government Attorney. If the latter decides the case warrants an investigation, he or she issues directions to that effect back to the police.[706]

b) Police Investigation

Nepal Police have the sole responsibility to attend a crime scene and to do so as soon as possible to begin collecting evidence.[707] The police are required to take statements from any person[708] who may have relevant information, and they may conduct searches of premises.[709]

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[700] Ibid. Rule 100.
[701] For example, physical assault and "battery," (*kutpit*) exist in the Nepali National Code (*Muluki Ain*).
[702] State Cases Act, section 3 (1). It is understood that "a person" includes police officials, and thus police themselves must file a First Information Report when they learn of a crime, in particular a serious crime. If a First Information Report is submitted orally, the police must take the statement of the person filing the Report, read out the contents and obtain his/her signature. State Cases Act section 3 (6).
[703] State Cases Act, 1992, section 3 (1) states that "(1) Any person who knows about a crime stipulated in Schedule 1, committed, being committed or going to be committed shall verbally or in writing inform about such crime to nearby Police Office with necessary information or evidence s/he possesses relating to the crime."
[704] State Cases Act, section 4. *See also* State Cases Regulation, Rule 3 (4).
[705] The Chief District Officer is then obligated to send the first Information Report to the relevant police station with binding, written instructions on necessary actions. *See* State Cases Act section 3 (5) and (6).
[706] State Cases Act, section 6 (1) and (2).
[707] Ibid, section 7 (1), (2), (3) and (4); State Cases Regulation Rule 4 (5).
[708] State Cases Act, section 9.

When they take a statement from any arrested suspect they must do so in the presence of the District Government Attorney.[710] They may also request that the arrested person be examined by a government doctor, as well as have any organ of his or her body examined.[711]

The police have the authority to arrest when there are "reasonable grounds" to suspect that a person has been involved in a crime,[712] but they must provide the detainee with a Detention Letter that sets out the legal basis for their detention.[713] At each police station, the police are required to maintain a Daily Log that includes the names of the arrested persons, the names of complainants, the offences suspected, and any items recovered during arrest.[714]

The police are required to present the arrestee before the concerned judicial authority, normally a District Court Judge, within 24 hours,[715] together with an Application to further detain the person. Those arrested have the right to be represented by a legal practitioner of their choice,[716] and if they have an annual income below a prescribed amount, they are entitled to free legal assistance.[717] After examining the evidence, the judicial authority may permit detention for up to 25 days during the investigation, or may order the suspect's release.[718]

If the case concerns homicide, an accidental or suspicious death, or suicide, the police must go to the site where the body is located and prepare a Body Examination Report which must, as far as possible, include photographs and a record of relevant data, such as a description of wounds and possible causes of death.[719] If the examination of the body indicates that the death was caused by criminal activity or it occurred under suspicious circumstances, the police must send the body for a post-mortem and include the Autopsy Report in the file.[720]

When they have collected as much information as they can on a case, the investigators send the file to the District Government Attorney.[721]

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[709] Police can search a premises if there are reasonable grounds to believe they will find material evidence relevant to the crime under investigation. They must present a notice containing the reasons for the search to the owner, resident or custodian of the premises. Ibid, section 8; National Code, Chapter "Of Court Management", No. 172 (1)-(5).

[710] State Cases Act, section 9.

[711] Such an examination may take place only if there are reasonable grounds to believe that evidence relevant to the crime may be found by such an examination. State Cases Act, Sections 9 (1), (2); State Cases Regulation Rule 4 (6); State Cases Act, section 10 (1); section 12. The Torture Compensation Act, 1996, section 3 (2) also has a mandatory provision that the arresting authority must conduct a physical and mental examination of each person arrested immediately after arrest and before his/her release by the medical doctor. In the event that the doctor is not available, the arresting officer himself or herself must perform this task. The report of the examination must be sent to District Court in accordance with clause (3), section 3 of the Torture Compensation Act. Such an examination may be particularly relevant when torture has been alleged.

[712] State Cases Act section 14 (1). Other grounds that allow the police to make arrests are described in Police Act, section 17 (1); Public Offences Act, section 3 (1), and TADO/A during the conflict.

[713] State Cases Act section 14 (1); State Cases Regulation Rule 9 (3).

[714] Police Act section 23 (1). The Chief District Officer has a power to examine such logs. *See* Police Act section 23 (2).

[715] Constitution of Nepal (1990), Article 14 (6); Civil Rights Act, section 15 (2); State Cases Act, section 15; Interim Constitution of Nepal (2007) article 24 (3).

[716] Constitution of Nepal (1990), Article 14 (5); Civil Rights Act, section 15 (1) (b); Interim Constitution of Nepal (2007), section 24 (2).

[717] Currently set at an annual income less than NRs 40,000. Legal Aid Act, section 3 (1). However, Nepalese law is silent on the police's obligation to inform the arrestee of such rights.

[718] State Cases Act, section 15 (2) and (4). Note the exceptions to this rule under TADO/A.

[719] State Cases Act section 11 (1). If the police cannot reach the site on time, the Village Development Corporation or Municipality may prepare the Body Examination Report. Civil Code, Chapter on Homicide, section 2 (1).

[720] State Cases Act, section 11 (3); Civil Code, Chapter on Homicide, section 2 (4); State Cases Regulation Rule 7 (1).

[721] The Government Attorney has the obligation to advise the police on the conduct of an investigation, and the police can seek such advice. State Cases Act section 6 (2) and 7 (5).

c) The District Government Attorney

Upon receipt of the police's Investigation Report,[722] the District Government Attorney decides whether further action should be taken.[723] If he or she believes that the evidence gathered supports a charge, then a Charge Sheet (indictment) is filed.[724] The accused must be present in court when the indictment is filed if he or she is in custody. If the accused is not in custody, the court will issue a summons, and if the accused has absconded, the court may issue a warrant for his or her arrest.[725]

d) Trial Hearings

As noted, the Constitution provides all accused with the right to consult and be defended by the legal practitioner of their choice,[726] but there is no legal provision requiring that the accused be provided legal assistance or legal representation in court unless he or she is under the age of 16.[727]

During trial the District Court hears evidence presented by the Government Attorney, and by the defence if the latter so chooses. Witnesses are summoned to appear in court, and a judge may issue a warrant if an important witness fails to appear.[728] All witnesses must take an oath to testify truthfully, must be examined in the presence of both parties to the case, and may be cross-examined.[729] However, there are no legal provisions for witness protection in Nepal.

e) Judgment, Appeal and Sentencing

Normally, where all relevant parties have appeared at the hearing, the District Court must hear the case and issue its judgement within one year from the date on which the indictment was filed.[730] Judgements may be appealed, and where an appellate court fully or partially overturns the verdict of the District Court, or the punishment exceeds 10 years imprisonment, a further appeal may be made to Nepal's Supreme Court.[731] If the Appellate Court approves the District Court's judgment or punishment is less than 10 years of imprisonment, the person convicted can lodge a special leave petition, based on matters of law, before the Supreme Court under section 12 of the Judicial Administration Act.

The justice system foresees a range of sentencing options for those found guilty, the most serious being a sentence of life imprisonment and confiscation of the entire property of the

[722] The Investigation Report has to be filed at least three days prior to the expiration of a detention order, if the suspect is in detention, and otherwise 15 days in advance of the expiration of the statute of limitations. State Cases Act section 17 (1). This obligation to file Investigation Reports is the same even if the police find that no crime has been committed, or cannot identify the culprit or has insufficient evidence to support a charge. State Cases Act section 17 (1).
[723] Ibid section 17 (2).
[724] Ibid section 18 (1). The Charge Sheet must contain the name, caste and address of the accused; the particulars of the First Information Report; particulars of the crime; charges against the accused, a summary of the relevant evidence; the applicable law; penalties sought, and; the amount of compensation, if any, to be provided to the victim(s). State Cases Regulation Rule 13 (1).
[725] Civil Code, Chapter on Court Management, section 94 and 98.
[726] Constitution of Nepal (1990), 14 (5); Interim Constitution of Nepal (2007), section 24 (2).
[727] Children's Act, section 19.
[728] Civil Code, Chapter on Court Management, section 115.
[729] Evidence Act, Sections 49 (1) and (2), 51, 52 and 47. Also note that there is no legal requirement for the police to testify truthfully.
[730] The National Code, no 14(1).
[731] Judicial Administration Act, sections 9(b) and (c).

person convicted.[732] The sentences prescribed in the law are generally proportionate to the gravity of the offence. There is no death penalty in Nepal.[733]

f) Additional Remedies of the Higher Courts

i) Writ of Habeas Corpus

A *habeas corpus* petition requests a court to rule on the legality of detention. This remedy may be sought by a detainee, or anyone acting on his or her behalf, by filing a petition at an Appellate or Supreme Court. The petition is free of charge and is available to anyone at all times.[734] The petition should contain basic information about the detainee (who they are, and when, where, and why they were detained, if known).

The court issues the writ when convinced that the reasons for detaining a person violate the Constitution and/or the law. It may then order the detainee's immediate release.[735] The right of *habeas corpus* cannot be suspended even during Government-declared States of Emergency.[736] In both such declarations during the conflict in Nepal, it was explicitly mentioned that *habeas corpus* would not be affected.[737]

ii) Writ of Mandamus

The *writ of mandamus* is an order issued by a superior court requiring a lower court or Government official to perform a particular duty. The order may be to conduct an act or to refrain from an act, but it is normally issued when the relevant authority is required by statute to perform a duty but has refused or failed to do so. For example, a *writ of mandamus* can be sought to order the police to file a First Information Report. *Mandamus* petitions are an important recourse for victims of human rights violations.

10.3.2 Chief District Officer

In each of Nepal's 75 districts, the Chief District Officer, appointed by the Ministry of Home Affairs, leads the local administration. He or she plays a particularly important role in governing the district because the office is vested with a broad range of administrative, executive, security and judicial functions – many of which have human rights implications.[738] The Chief District Officer is responsible for maintaining peace, order and security in the district, and has powers related to public offences; arms and ammunitions; use of force; declaring curfews and riot-affected areas; offences under the Terrorist and Disruptive Activities (Control and Punishment) Act/Ordinance (TADA/TADO); and Preventive Detention Orders under the Public Security Act (when they were in force). The Chief District

[732] However, it must be approved by the Appellate Court before taking effect. *See* Judicial Administration Act, section 10.
[733] The death penalty in Nepal was abolished by article 12(1) of the Constitution of the Kingdom of Nepal (1990). The same provision was integrated into article 12(1) of the Interim Constitution of Nepal (2007).
[734] See Constitution of Nepal (1990), Art. 88(2); Interim Constitution of Nepal (2007), article 107(2).
[735] Supreme Court Regulation (1992) Art. 31-37.
[736] Constitution of Nepal (1990), Art. 115(8) – listing the State's emergency powers and stating that "the right to the remedy of *habeas corpus* under Article 23 shall not be suspended." *See also* Interim Constitution of Nepal (2007), article 143(7) containing the same. The ability of a detained person to challenge the legality of his/her detention and to have the request reviewed by a judge or similarly qualified independent body (i.e., habeas corpus) is a non-derogable human right and one that has achieved customary international law.
[737] Reference: C.N.270.2002.TREATIES-4 (Depositary Notification), 25 March 2002, "Nepal: Notification Under Article 4 (3)," par. 1 ("However, the right to the remedy of habeas corpus has not been suspended."), and Reference: C.N.271.2005.Treaties-5 (Depositary Notification), 14 March 2005, par. 4, "Derogation from Article 2.3 of the International Covenant on Civil and Political Rights following the suspension of Article 23 of the Constitution (right to constitutional remedy except the writ of habeas corpus)" (emphasis added).
[738] Local Administration Act, section 5 (1).

Officer is also the head of the District Security Committee, a district-level coordination body in charge of the maintenance of tranquillity, security and order.[739]

As noted earlier, the Chief District Officer can instruct the relevant police station to file a First Information Report.[740] Chief District Officers also have an obligation to review detention logs and can inspect detention facilities. In fact, they are obliged to inspect the District Police Offices, Area Police Offices, and police posts annually and to report the findings to the Home Ministry. Importantly, the Chief District Officer has the power to adjudicate certain types of criminal and civil cases.[741]

10.3.3 Executive and Parliamentary Remedies

Both the Government and the Constituent Assembly can avail themselves of various accountability mechanisms. For example, members of Parliament have recourse to a 25-member Parliamentary Committee on International Relations and Human Rights.[742] By virtue of the parliamentary rules, the Committee can examine any type of human rights issue and can call individuals to present themselves in front of the Committee.[743] The Committee may also issue orders to the Government.

a) Commissions of Inquiry

The Government is empowered under the law to create commissions of inquiry. While head of State, the King could form commissions of inquiry to examine practically any matter. A commission under his authority could be led by a judge of the Supreme Court or the chief judge of an appellate court, and could have any number of additional members that the King desired. Similarly, since the enactment of the Commissions of Inquiry Act 1969, the Government could also form commissions of inquiry to look into "any matter of public importance".[744]

Such commissions have powers equivalent to the courts in summoning any person and recording statements, ordering the production of documents, receiving evidence, and ordering Governmental or public offices or courts to produce a document. They can also search a person or area or order such a search.[745] The actions and proceedings of the commissions are confidential, but the reports are to be made public except in cases where they "might have an adverse effect on the sovereignty, integrity or matters of military importance or public peace and order or on the amicable relations among different castes or communities or relations with friendly countries."[746] The 1969 Act requires a commission of inquiry, upon completion of its mandate, to submit a report to the authority that established the commission.

On 1 June 2007, the Government announced its decision to establish a Commission on Disappeared Persons to address the enforced disappearances that occurred during the armed conflict. However, at the time of finalising this Report, the Commission had not yet been established.

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[739] Local Administration Act, section 6 (7).
[740] State Cases Act, section 3 (5)
[741] These include offences under Public Offences Act, the Arms and Ammunitions Act, the Essential Materials Protection Act, and the Essential Commodities Protection Act.
[742] Also referred to as the Parliamentary Committee on Human Rights and Foreign Affairs, or the Parliamentary Committee on Foreign Relations and Human Rights. It was established by the Constituent Assembly Rules (2008).
[743] Ibid, Art. 127(1).
[744] All the matters mentioned in the proviso of Article 92 of the Constitution of the Kingdom of Nepal (1990), as described in Commission of Inquiry Act, Article 3 (1).
[745] Commission of Inquiry Act, 1969, Articles 4 (2), 4(3) and (5) (a).
[746] Ibid., Article 8(A).

b) Oversight of Security Forces

The 1990 Constitution identified the King as the Supreme Commander of the then-Royal Nepalese Army.[747] He appointed the Commander-in-Chief based on a recommendation by the Prime Minister. Currently, under the Interim Constitution, the Council of Ministers is responsible for appointing the Commander-in-Chief and for controlling, mobilizing and managing the army.[748] The Ministry of Defence has oversight over the Nepal Army and the Ministry of Administration and Finance Section receives complaints concerning wrongdoing.[749]

The Ministry of Home Affairs has oversight of the two police forces (the Nepal Police and the Armed Police Force) and the National Investigation Department. The Ministry of Home Affairs receives annual police performance reports from the Chief District Officers.[750] Since January 2003, there has been a Human Rights Cell in the Home Ministry charged with monitoring reports of human rights violations by the Nepal Police, the Armed Police Force and the National Investigation Department.

10.3.4 National Human Rights Commission

The National Human Rights Commission (NHRC) was set up as an independent and autonomous statutory body in 2000 under the Human Rights Commissions Act 1997, which was replaced by the National Human Rights Commission Act 2012 on 20 January 2012. It became a constitutional body under the Interim Constitution of 2007. The President, upon the recommendation of the Constitutional Council, appoints the Chairperson and members of the NHRC.[751]

The NHRC conducts inquiries and investigations into potential human rights violations either upon receiving a complaint or on its own initiative. It can visit and monitor any authority, detention place, or any Government institution, and submit recommendations to the Government with the aim of ensuring that institutions function in accordance with human rights standards.[752]

In support of its function, the NHRC has powers similar to those of a court. It can summon any person to appear before it, hear witnesses, request and receive evidence, order the presentation of documents, request copies of public documents, and carry out or facilitate any searches it considers appropriate.[753] It can also recommend that court proceedings be conducted against human rights violators.[754]

Whereas the National Human Rights Commission Act and the Interim Constitution place most matters covered under the Army Act outside the Commission's jurisdiction, article 132(4) of the Interim Constitution explicitly states that there is no bar to the Commission proceeding with investigations that concern violations of IHRL or IHL, irrespective of any limitations under the Army Act.[755]

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[747] Constitution of the Kingdom of Nepal (1990), Art. 119.
[748] Interim Constitution of Nepal (2007), article 144 (2)(3).
[749] Ministry of Defence website, http://www.mod.gov.np/aboutmod.php, accessed 17 August 2010.
[750] See sub-section 9.3.2 on Chief District Officers p. 184
[751] Interim Constitution of Nepal (2007), article 131 (3).
[752] National Human Rights Commission Act, section 9; Interim Constitution of Nepal (2007), article 132.
[753] National Human Rights Commission Act, section 11.
[754] National Human Rights Commission Act, section 11; Interim Constitution of Nepal (2007), article 132.
[755] "(4) Notwithstanding anything contained in this Article, the National Human Rights Commission shall have no jurisdiction with respect to any matter which falls within the jurisdiction of the Army Act. Provided that nothing shall be a bar to proceedings in respect to cases of violations of human rights and humanitarian laws."

The NHRC can make recommendations to the Government and public offices on actions to be taken on a case. Its reports can be made public, including the name of any official, individual or institution that fails to obey or implement one of its recommendations or directives. Furthermore, the NHRC can name an official, individual or institution as the perpetrator of a human rights violation,[756] although there is no enforcement mechanism associated with this power.

10.3.5 The Maoist "Justice System"

The Maoists created their own, parallel system of justice during the conflict, but little is known about its institutions, functions and practices. Late in the conflict, the CPN (Maoist) published a "Public Legal Code, 2060, of the Republic of Nepal"[757] as a foundational legal document. It describes the law as something that is "developed, changed and reformed as needed by changes in time, circumstances and situations, as well as the people's aspirations." The code appears to have been significantly influenced by the criminal provisions in the *Muluki Ain*,[758] but adjusted to suit Maoist ideology, for example by prescribing lighter punishments.

During the conflict "People's Courts" tried alleged offences. The courts were mostly mobile, with "judges" travelling to hear cases on location.[759] In a few districts, including Bardiya, Banke, Kailali and Kanchanpur, the "People's Courts" operated out of stand-alone, sign-posted buildings.[760] In other areas, especially those more remote, judicial functions were performed by the CPN (Maoist) leadership, either by the "People's Government" representatives, the People's Liberation Army or militia leaders.[761]

Judges were not normally appointed permanently nor did they work full-time. In most cases, CPN (Maoist) members with political functions served in the judicial sector. According to reports, a judge was nominated and then "endorsed" by the local people through a system of raising hands or nodding heads. Between one and five judges sat on each case.[762] A United Nations Development Programme (UNDP) study from 2005 found that the "People's Courts" at the (lowest) village level were made up of local people with two judges, an advocate, two security staff from the local "People's Government" and a female member. [763]

The Public Legal Code is silent on the procedures for investigation, trial and hearing. In most cases, decisions were delivered verbally within a single day,[764] and only on rare occasion was a written judgement prepared. At least some decisions appear to have required the approval of the party, and there were instances where entire cases were taken over by the party.[765]

The CPN (Maoist) has stated that there were three levels of "People's Court": the district level, Appellate Court and Court of Last Resort. Appellate Courts consisted of a senior political cadre, and the Court of the Last Resort consisted of three judges including one Central Committee member.[766]

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[756] Interim Constitution of Nepal (2007), article 132.
[757] Public Legal Code 2060 (2003/2004) of People's Republic of Nepal, United Revolutionary People's Council of Nepal, Central Office, Article 1.
[758] Kishore Nepal, "The Maoist Service Provision in Parts of Mid and Far West Nepal", (Centre for Professional Journalism Studies, March 2005).
[759] International Commission of Jurists (ICJ), "Nepal: Justice in Transition," (2008) p.8.
[760] OHCHR internal report, *CPN (Maoist) people's courts and criminal justice in the Mid and Far-Western Regions* (December 2006) p. 1.
[761] ICJ, "Nepal: Justice in Transition," (2008) p.8.
[762] Ibid, p.9.
[763] "Access to Justice During Armed Conflict in Nepal," Unpublished Study Commissioned by UNDP, (June 2005), p.30.
[764] Ibid.
[765] ICJ, "Nepal: Justice in Transition," (2008) p.10.
[766] Ibid, p. 8-9.

Three types of punishment were listed in the code: imprisonment, imprisonment with labour, and imposition of a fine.[767] "Serious offences", such as "offences against the People's Government" were to be punished with up to 10 years imprisonment.[768] Otherwise, as noted, penalties tended to be less than those under the State justice system. The code does not mention the death penalty.

Those who were sentenced to "imprisonment with labour" were sent to labour camps, which appear to have existed throughout much of the conflict period. The camps included construction sites for Maoist schools, roads and hospitals and other infrastructure, farms, and Maoist-run offices or the residences of Maoist political cadres.[769]

On 3 July 2006, Maoist Leader Pushpa Kamal Dahal ('Prachanda') publicly issued a directive that "People's Courts" were to be dissolved in "big cities and in the capital".[770] The CPA formalized the agreement not to have parallel structures,[771] and the CPN (Maoist) announced the dissolution of "People's Courts" in January 2007.[772]

10.3.6 Internal Accountability Mechanisms

In addition to the civilian criminal proceedings described above, the State security forces, and to a lesser extent the Maoist apparatus, operated internal judicial and disciplinary mechanisms that were designed to address both the criminal and non-criminal misconduct of its members. While it is beyond the scope of this report to describe those procedures in detail, a summary description follows that is intended to aid an understanding of what tools the various forces had at their disposal throughout the conflict to remedy serious violations of international law.

a) The Royal Nepal Army

The RNA had three tiers of internal accountability mechanisms applicable to its personnel: Courts of Inquiry, disciplinary proceedings, and courts-martial.[773] These mechanisms could be initiated against army personnel for "military offences," a category that included disciplinary wrongdoing and most crimes.[774]

i) Courts of Inquiry

A Court of Inquiry is an *ad hoc* internal investigative body formed at the behest of the military leadership to look into specific complaints and allegations made against Nepal Army personnel. Traditionally comprised solely of military staff,[775] the Army Act 2006 added a civilian, the Deputy Attorney General, to assist investigations by Courts of Inquiry in more serious cases, including international crimes.[776]

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[767] Ibid, p.11
[768] Public Legal Code 2060, Chapters 4-10 (2003/2004).
[769] ICJ, "Nepal: Justice in Transition," (2008) p. 23. OHCHR internal report, *CPN (Maoist) people's courts and criminal justice in the Mid and Far-Western Regions* (December 2006) "Those visited by OHCHR are farming, serving in tea shops, digging trenches in schools, working as peons in CPN (Maoist) offices and assisting at CPN (Maoist) events."
[770] CPN (Maoist), Central Committee, *Press Statement*, 3 July 2006.
[771] Comprehensive Peace Accord (8 November 2006) para 10.1; Government-Maoist understanding, paragraphs 3(c) and 7(a).
[772] Communist Party of Nepal (Maoist), Central Committee, Press Statement, 18 January 2007.
[773] "Military proceedings" is used hereinafter when referring to these three mechanisms collectively.
[774] For example, mutiny, desertion-related offences, falsifying official documents, disobeying lawful orders, and arrest-related offences fall under a disciplinary rubric. Army Act 1959, Sections 27-59; Army Act 2006, Sections 38-61, 63.
[775] Confirmed in the OHCHR-Nepal's meeting with Human Rights Directorate, Nepal Army, 5 March 2007
[776] Army Act 2006, section 62 (2).

When a Court of Inquiry completes an investigation, it communicates the results to the Judge Advocate General, who reviews the file and makes a recommendation to the Chief of Army Staff as to whether the matter should be closed, or whether disciplinary proceedings or a court-martial should be initiated.[777] The choice between disciplinary proceedings and courts-martial depends on the gravity of the offence.[778]

ii) Courts-Martial

Court-martial was the primary mechanism for punishing conflict-related violations perpetrated by the army. Under the 1959 Army Act, which was in effect during the conflict, an army official who committed an offence, including murder or rape, was brought before a court-martial.[779] Due in large part to its inability to deliver justice in such serious crimes, the Army Act 2006 introduced significant changes to this regime, including to its jurisdiction. Homicide and rape in all circumstances currently lie outside the jurisdiction of a court-martial.[780] Corruption, theft, torture and disappearance are newly listed as offences in the 2006 law; civilian courts also deal with these crimes.[781] That noted, offences under the civilian code committed by military personnel against other military personnel remain punishable under the Act by court-martial.

Courts-martial operate in ways similar to civilian courts.[782] Witnesses may be heard during the process,[783] and the rights of the accused are to be protected throughout the proceedings, including the right to produce evidence in one's defence.[784] The accused may request a member of the Nepal Army Legal Section to assist with the defence, and upon such request, the Army Act of 2006 requires that assistance be provided.[785] Initially, sessions were closed, but the 2006 Act requires that sessions are open to the public "except for reasons of national security, public order and rights of victims."[786]

As in civilian courts, penalties for the offences under the Army Act vary depending on the nature of the offence. Capital punishment was foreseen in the 1959 Act, but was abolished by the 1990 Constitution. Other punishments range from a reprimand to life imprisonment with confiscation of the accused's entire property.[787]

After the Army Act 2006 entered into force, the decisions of the Special Court-Martial in cases involving theft, corruption, torture and disappearance, became appealable to the Supreme Court.[788]

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[777] Nepalese Army, "Human Rights in NA," Available at http://www.nepalarmy.mil.np/human_right.php
[778] Army Act 2006, section 105 (1). Equivalent sections under Army Act 1959, are sections 71, 72, 73 and 74.
[779] During peacetime, murder and rape were exceptions. They were to be tried in civilian courts. However, if a murder or rape was committed during the period army staff was engaged "in military operations" the court-martial retained its jurisdiction. Army Act 1959, section 61
[780] Army Act, 2006, section 66.
[781] However, the law did not define these crimes or prescribe any penalties. Neither torture nor disappearance has been criminalized under any other domestic laws from which guidance on their elements might be given. Nor are there penalties provided elsewhere.
[782] There are various types of court-martial. The 1959 Army Act had four; the 2006 Act added one more – the "specialized" Court-Martial. Army Act, 2006, Sections 67, 68, 73, 80, 119 (3), 82, 81 (1); Army Act, 1959, section 97.
[783] Army Act, 1959, section 122 (1); Army Act, 2006, section 86 (1).
[784] Army Act, 2006, section 84 (4). The 1959 Army Act did not expressly guarantee the rights of the accused to a defence, mentioning only that proceedings were to be in accordance with due process. Army Act, 1959, section 150 (2).
[785] Army Act 2006, section 81 (2). There is no mention of the right of the accused to have a legal representative in the 1959Army Act.
[786] Army Act, 2006, 79 (2).
[787] Army Act, 1959, section 62 (1); Army Act, 2006, section 101(1).
[788] Army Act, 2006, section 119 (4).

iii) Disciplinary Proceedings

Disciplinary proceedings deal with less serious misconduct by army personnel and may result in the imposition of penalties such as short periods of detention, the assignment to additional guard duty, removal from duty, freezing or deduction of salary or allowances, reprimand, a fine, or preventing a promotion for up to two years.[789] Disciplinary proceedings have fewer procedural safeguards, and in certain cases an accused may elect to have a disciplinary case heard instead by court-martial.[790]

iv) Nepal Army Human Rights Directorate

Another mechanism within the ranks of the army is the Human Rights Directorate. The Human Rights Cell was established in 2002,[791] and was upgraded to a Division in January 2005 and to a Directorate in March 2007. It is headed by a General.[792] On the Army's official website, the Human Rights Directorate is said to study allegations and "pass them on to the concerned establishment."[793]

b) Nepal Police and Armed Police Force

Both the Nepal Police and the Armed Police Force have similar mechanisms to those of the army, although unlike the army, their mechanisms are entirely separate from criminal proceedings (except as under the Special Court as described below). Because the Codes of Conduct for the respective police forces provide the content of disciplinary offenses, serious international crimes such as those that are the subject of this report would not generally come under the jurisdiction of a disciplinary mechanism. Therefore, such proceedings are only described in brief.

i) Disciplinary Proceedings (Departmental Action)

Nepal Police and Armed Police Force employees who violate their respective codes of conduct or who otherwise fail in the performance of their duties are subject to disciplinary proceedings, also known as "departmental action."[794] Proceedings may be initiated against Nepal Police or Armed Police Force personnel upon a complaint by any person or upon the observations of any police officer. [795] Superior officers investigate the incident,[796] and the officer concerned is ordinarily given sufficient opportunity to submit a defence.[797] However, if the police officer is arrested and detained for a criminal offence, he or she is automatically suspended from the date of the arrest.[798]

After the investigation, the superior evaluates the evidence as well as any defence and may impose a penalty.[799] Disciplinary punishment may include a warning, physical work, temporary confinement, a salary or promotion freeze, demotion, suspension, a fine, dismissal,

[789] Army Act 1959, sections 69-74; Army Act, 2006, section 105 (1).
[790] Army Act, 2006, section 105(2).
[791] The Judge Advocate General branch of the Nepal Army dealt with human rights and IHL issues prior to 2002.
[792] Nepal Army Human Rights Yearbook, 2008, pp.1-2.
[793] Nepalese Army, "Human Rights in NA," Available at http://www.nepalarmy.mil.np/human_right.php
[794] The Nepal Police Code of Conduct is set out in Chapter 8 (Rule 68-83) of the Police Regulation. The Armed Police Force Code of Conduct is set out in Chapter 8 of the Armed Police Regulation.
[795] Meetings between OHCHR-Nepal and Nepal Police/Armed Police Force. OHCHR-Nepal was informed that, for the Nepal Police, it is based on observation "by any police officer"; while for the Armed Police Force, it is based on observation "by a senior police officer".
[796] Police Regulation, Rule 93; Armed Police Force Regulation, Schedule 6.
[797] There are exceptions to this rule. See Police Act, section 10 (1); Police Regulation, Rule 89 (2); Armed Police Force Act, section 21; Armed Police Force Regulation, Rule 91; Armed Police Force Regulation, Rule 94; Armed Police Force Regulation, Rule 96 (1).
[798] Police Regulation, Rule 89 (6); Armed Police Force Regulation, section 20 (3).
[799] Police Regulation, Rule 90; Armed Police Force Regulation, Rule 96 (1).

or exclusion from any other Government jobs.[800] An appeal is available to those punished.[801] Importantly, departmental action does not bar any other prosecution initiatives.[802]

ii) Special Court Proceedings

"Special Courts" hear cases against police personnel who are suspected of committing criminal offences that arise from the specific duties and obligations of police. They include, for example, the crimes of selling or surrendering Government arms and ammunition, using such arms against the police, or offenses related to the loss or destruction of Government property or equipment.[803] As noted, Special Courts do not hear allegations of serious IHL or IHRL violations, which, upon their discovery by police, should be subject to civilian criminal proceedings.

iii) Human Rights Unit/Cell, Legal Unit and Other Components

The Inspector-General's Office of the Nepal Police contains an Inspectorate that oversees the general conduct of police officials and examines grievance claims. The Inspectorate is composed of three units: a Grievances Handling unit, a Complaints Investigation unit, and a Human Rights Unit. The Grievances Handling Unit accepts and looks into internal grievance claims by the police personnel, such as relating to deployment, promotion, and work conditions. The Complaints Investigation Unit receives and examines external complaints, particularly regarding police conduct, including lack of progress on investigations. The Human Rights Unit receives and investigates complaints of human rights violations involving Nepal Police personnel.[804] It is understood that if a credible allegation of a serious IHL or IHRL violation is brought to the attention of the Human Rights Unit, it will be investigated and, if found to have merit, eventually turned over to a Government Attorney for prosecution.

The Armed Police Force also has a Human Rights Cell; it is located within its Department of Operations. Its task is to monitor cases of human rights violations and commend them for proceedings when necessary. It also has an advisory role to the Inspector-General on human rights matters.[805]

10.3.7 CPN (Maoist)

Generally, the Maoists were reticent in discussing internal accountability mechanisms and procedures; therefore, as with the people's "justice system," little is known about their actual operation. No information about formal disciplinary mechanisms or procedures has ever been made public. In a 2006 meeting with OHCHR, CPN (Maoist) legal advisors acknowledged that there was no disciplinary code in the party.[806]

Still, the CPN (Maoist) clearly had the means to enforce discipline among its ranks. Regardless of official divisions or titles, Prachanda's overall authority and influence seemed to run throughout the Maoist movement, and central leadership retained a firm grip over all matters.[807] It is also said that the dual leadership of military commanders and political commissars was designed to ensure discipline. Commanders of the People's Liberation Army

[800] Police Act, section 9 (3) and (4); Police Regulation, Rule 84-88; Armed Police Force Regulation, Rules 84 (A) and (B), 85-86.
[801] Police Regulation, Rule 92-94; Armed Police Force Regulation, Rules 98 (1), 98 (2) (d); Rule 99; Schedule 6.
[802] Police Act, section 10A; Armed Police Force Act, section 22.
[803] Police Act, section 33 A and B; Armed Police Force Act, section 27.
[804] Police Mirror, Nepal Police Publication, available from http://www.nepalpolice.gov.np/images/dpcuments/police_mirror_2009.pdf, last accessed 28 October 2010.
[805] Government of Nepal, Ministry of Home Affairs, Armed Police Unit, "Human Rights," Available at http://www.apf.gov.np/humanrights/humanrights.php.
[806] OHCHR's meeting with legal advisors, June 2006.
[807] International Crisis Group, *Nepal's Maoists,* p.13 (see footnote 28)

made decisions on military actions, but the commissars' party rank was higher than that of the commanders, and significant decisions at each level had to be made jointly.[808]

The party appears to have taken action against cadres for carelessness and mistakes, but such disciplinary measures, when they occurred, were normally only publicized after external pressure.[809] For example, in response to OHCHR's findings on human rights abuses, CPN (Maoist) said that it had opened offices at the district level, partly to "take immediate public action against those responsible for beatings, abductions or killings carried out against party policy."[810] CPN (Maoist) also publicly stated that action was taken against those who were responsible for certain high-profile cases.[811]

There was reportedly also a Human Rights Department at the central level of the CPN (Maoist), but observers claimed that it was mainly an attempt to shadow similar structures of State entities, and that there is little evidence of any activity.[812] Presumably the "people's justice system" would have been the venue for adjudicating serious violations of IHL and IHRL perpetrated during the conflict. The data collected during the preparation of this Report, however, did not reveal such cases.

10.4 FAILURE TO HOLD INDIVIDUALS ACCOUNTABLE

Despite the multiple layers of accountability mechanisms in place, no one has actually been held accountable and given a punishment proportionate to the offence: several years after the formal end of the hostilities, no one has been criminally prosecuted in a civilian court for serious human rights or IHL violations.[813]

This section provides some examples of where the relevant mechanisms failed to ensure accountability. It should be noted that this section does not attempt to provide an exhaustive list of such problems, but rather to provide examples of how the system of remedies failed both during the hostilities and since.

10.4.1 Legislation

A number of laws exist that allow State officials, particularly members of the Security Forces, to act outside human rights and/or IHL requirements and are in breach of Nepali's international human rights obligations. In other areas, it is a lack of legislation or gaps in the law that pose the problem.[814]

10.4.2 Use of Force

National legislation in effect during the conflict set out circumstances when the use of force, including lethal force, was acceptable. However, these provisions allowed for practices that went beyond what was allowed by international standards.

Under the Local Administration Act, the Chief District Officer had the power to allow the use of force and to declare a curfew in "riot-affected areas". Moreover, the Chief District Officer

[808] Ibid, p.14.
[809] Ibid, p.13; Dekendra Raj Thapa, Ref. No. 2004-08-11 - incident - Dailekh _5179.
[810] OHCHR-Nepal, *Human Rights abuses by the CPN (Maoist), Summary of Concerns*, September 2006, p.1.
[811] *See, e.g.*, *Madi* bus bombing case, Ref. No 2005-06-06 - incident - Chitwan _0106, emblematic case 5.15
[812] International Crisis Group, *Nepal's Maoist* (see footnote19).
[813] The Nepal Army claims to have conducted military proceedings against its members for IHL or IHRL violations, however, the Nepal Army has never substantiated these claims despite repeated requests by OHCHR to do so..
[814] For example, the Committee Against Torture has expressed concern about the lack of legislation prohibiting torture, and recommended that the Nepali government ensure accountability. *Conclusions and Recommendations of the Committee Against Torture: Nepal*, CAT/C/NPL/CO/2, para 24.

had the authority to issue an order to "shoot on sight" any person who violently broke curfew[815] or engaged in looting or assault, set fire to residential houses or shops, destroyed public property, or committed any other violent or disruptive act in a riot-affected area.[816] These provisions ignored the IHRL requirement of using the minimum necessary force to protect life. The Chief District Officer was obliged to issue orders in writing for firearms to be used.[817]

Police officials repeatedly raised with OHCHR-Nepal the impracticality of having the Chief District Officer deciding on the use of force in cases of urgency. It led to the Officer giving vague verbal instructions to police officials on the ground to use their discretion, which further complicated the issue of accountability.[818]

After 2002, under TADA/TADO, Security Forces were permitted to use force or firearms in a wide range of circumstances, for example, if any armed or unarmed person or group of persons obstructed Security Forces while they were discharging their duties.[819]

10.4.3 Disclosure of Information

Whereas the *Muluki Ain*, Nepal's civil and criminal code since 1963, sets out perjury as a prosecutable offence,[820] the Evidence Act 1974 states that Government employees shall not be compelled to disclose any information they obtain in their official position if they believe that such disclosure will be "against the public interest."[821] The courts have interpreted these laws to mean that public officials cannot be prosecuted for perjury in "public interest" matters.[822]

10.4.5 Lack of Appropriate Legislation

The two most significant legislative shortcomings in Nepal stem from the fact that disappearance and torture have not been criminalized. As discussed above, torture and disappearance are prohibited by the Army Act 2006 and formally fall under the jurisdiction of civilian courts. However, the Act does not define these offences, nor provide for applicable penalties. The Torture Compensation Act is related only to a torture victims' right to seek a civil remedy and suffers from a short statute of limitation period of only 35 days.

10.4.6 Immunity

The Police Act, Armed Police Act and the Army Acts grant broad immunity to police and army personnel. The 1959 Army Act stated that no case should be filed against army personnel for acts undertaken in the course of duty that result in death or loss suffered by any person.[823] The 2006 Army Act amended this provision. While retaining immunity for acts that result in death or loss, those acts must be made "in good faith." Also, there is no immunity under the new law for acts of corruption, theft, torture, disappearance, homicide, rape and other such offences.[824] The Police and Armed Police Force Acts also grant immunity to Nepal

[815] Local Administration Act, section 6A(4).
[816] Local Administration Act, section 6B(1)(b).
[817] In cases of urgency, the order may be made orally provided it is confirmed in writing within 24 hours. Local Administration Act, section 6(1)(d).
[818] Interview with former OHCHR official, Kathmandu, 30 November 2010.
[819] Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2002, section 5 (j)
[820] *Muluki Ain*, section 169.
[821] Evidence Act, 1974, section 44.
[822] UN Working Group on Enforced and Involuntary Disappearances Report, 2005, E/CN.4/2005/65/Add.1, para42; Human Rights Watch, *Waiting for Justice*, p.63 (see footnote 481)
[823] Army Act, 1959, sections 24A.
[824] Army Act, 2006, sections 22, 62 and 66.

Police and Armed Police Force employees who act with "good intention" while discharging their duties.[825]

During the conflict, any act conducted in good faith under the TADA/TADO, led to immunity from punishment.[826] The Public Security Act had a provision that prevented "any question to be raised at any court"[827] in relation to preventive detention and other orders issued pursuant to its provisions. However, for orders considered *mala fide*, a compensation claim was possible at the District Court[828] and departmental action was to be taken against the official who made such an order.[829]

10.4.7 Police Investigations

There were a number of gaps in police investigations that are set out below, although it is acknowledged that police posts were often targeted during the hostilities. While it would be unreasonable to expect the police to function as if under normal circumstances, the issues identified below are nevertheless relevant to IHL and IHRL.

a) First Information Reports[830]

Most individuals and their families who believed a crime had been committed did not attempt to file a First Information Report. This may reflect a lack of public confidence in the police because, in many instances, police refused to file the Reports when an attempt was made: multiple accounts identified during the Reference Archive Exercise indicate that the police were uncooperative in this respect.[831]

Court orders to the police to file a First Information Report or to conduct an investigation were ignored.[832] Police justifications for refusing to register First Information Reports included "insufficient evidence",[833] "no authority",[834] the belief that such cases would be dealt with by the TRC,[835] and the fact that the implicated army personnel were still in the district.[836]

Victims or their families were coerced or harassed by security forces or the CPN (Maoist) not to file a First Information Report or to withdraw the complaint if they had already filed it.[837] At times, this appeared to occur in combination with an offer of compensation.[838]

Police also resorted to mediation in order to avoid having to register a First Information Report or to undertake an investigation.[839] During the conflict, mediation cases were also brought before the Chief District Officer.[840] Whereas mediation can be an effective means of achieving justice in a timely, consensual manner, it should not be imposed and not used in

[825] Police Act, section 37; Armed Police Force Act, section 26; Armed Police Force Regulation, Rule 83 (1).
[826] Terrorist and Disruptive Activities (Control and Punishment) Act/Ordinance, section 20.
[827] Public Security Act, section 11.
[828] Ibid, section 12A.
[829] Ibid, section 13.
[830] Fewer than one hundred FIRs have been filed with the Nepal Police relating to cases that may involve serious crimes related to the conflict.
[831] *See, e.g.*, the case of Arjun Bahadur Lama, Ref. No. 2005-04-19 - incident - Kavre _0111. Human Rights Watch, *Still Waiting for Justice* (see footnote 481), states that at the time of publishing in 2009, in ten of the 62 cases described, police still refused to register First Information Reports.
[832] OHCHR source confidential Ref. No. 5352.
[833] OHCHR source confidential Ref. No. 0109.
[834] Ref. Nos. 2004-09-27 - incident - Morang _1628 and 2003-09-28 - incident - Morang _1722.
[835] OHCHR source confidential Ref. No 0111.
[836] Ref. No. 2003-12-27 - incident - Kavre _0158.
[837] Ref. No. 2004-06-06 - incident - Chitwan _0137.
[838] Human Rights Watch, *Waiting for Justice*, p.34 (see footnote 481); Ref. No. 2003-10-13 - incident - Dhanusha _0171.
[839] UNDP Access to Justice During Armed Conflict in Nepal Report, p.42 (see footnote 763).
[840] Ibid. p.43.

relation to serious violations and abuses. Mediation may place victims, especially women, at a disadvantage relative to local power structures. It is particularly inappropriate as a substitute to accountability for serious crimes.

In some cases, when First Information Reports were filed, they were recorded at the police station in a register other than "Diary 10" and no action was taken by the police.[841] Suspicious deaths caused by security forces were reported in First Information Reports as "accidental".[842]

b) Investigations

Noncooperation of the CPN (Maoist) presented significant obstacles to police investigations. Like the Army, the CPN (Maoist) claims that it has taken action against cadres involved in misconduct, but it has not handed over cadres to the Nepal Police, or otherwise cooperated with criminal investigations.[843] The case of the killing of Arjun Bahadur Lama reported by Human Rights Watch, and included in the TJRA[844] is illustrative of this practice:

> "Maoists abducted Arjun Bahadur, a secondary school management committee president, on 19 April , 2005 from his school in Chhatrebanjh Village Development Committee (VDC), in Kavre District. According to witnesses, the men reportedly marched Arjun Bahadur through several villages before killing him. Following protests by his wife, the CPN (Maoist) claimed that Arjun was killed during a RNA aerial strike. An investigation by the NHRC concluded that Arjun had been detained and deliberately killed. Police in Kavre initially refused to investigate, fearing Maoist reprisals, but eventually responded to a Supreme Court order and filed a First Information Report on 11 August 2008. Among the six Maoists mentioned as perpetrators in the Report is Agni Sapkota, a Central Committee member, originally from Sindhupalchowk District, on whose orders Arjun Bahadur Lama was allegedly killed. On 4 February, 2009, Kavre police told Advocacy Forum they had corresponded with the Sindhupalchowk district police office on 19 June 2008, to search for and arrest defendants from that district. The police said that they received a letter from Sindhupalchowk district police office on 25 July, stating that Agni Sapkota had not been found in their district."[845]

Two of the alleged perpetrators named on the First Information Report are Constituent Assembly members and have been appointed to ministerial positions. Agni Sapkota served as the Minister for Information and Communications from May-July 2011 and Suryaman Dong was appointed for Minister for Energy in November 2011.

A lack of cooperation by the security forces has also presented significant obstacles to investigations. The case of the torture and death of Maina Sunuwar illustrates this situation.[846] On 4 December 2007, the Nepal Police requested the Nepal Army to present the four Army officials implicated in the crime for investigation. At this time, the Nepal Army Adjutant General stated to OHCHR-Nepal that it had already taken action against the officials and thus there was no need for further action. This determination was apparently based on the constitutional prohibition of prosecuting the same case twice. The Nepal Army considered that the court-martial proceedings instituted against the suspects were sufficient to deal with

[841] Ref. No. 2002-01-08 - incident - Myagdi _5991. See supra section 10.3.1 (a) Initiation of Investigations p. 181 for the role of "Diary 10" in initiating criminal investigations.
[842] OHCHR source confidential Ref. No. 5780.
[843] OHCHR-Nepal, Human Rights Abuses by the CPN (Maoist), p.8.
[844] Ref. No. 2005-04-19 - incident - Kavre _0111.
[845] Human Rights Watch, *Still Waiting for Justice*, p. 30-31(see footnote 481)
[846] Ref. No. 2004-02-17 - incident - Kavre _0259. This case is discussed in more detail in Chapter 7 – torture p. 124.

the matter.[847] Despite this, the suspects are currently being investigated by the Kavre District Court in relation to murder, charges that were not raised in the court-martial.

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

It was difficult for police officers to investigate their own personnel, particularly where a junior officer had responsibility for investigating serious allegations against more senior colleagues, including colleagues in the same chain of command.[848] Further, because detention records were not properly kept and/or procedural requirements were not followed, there was no means of verifying the presence of an alleged detainee beyond the word of officials.[849]

In some cases involving death, bodies were disposed of without undergoing a proper post-mortem examination. Even when the body was handed over to the family, the security forces pressured family members not to conduct a post-mortem, or to do so only under their supervision.[850] Police stated that a post-mortem had been conducted, but victims' families were unable to obtain or view a copy.[851]

10.4.8 Judiciary

The Supreme Court has played a significant role in human rights and IHL related cases. This was particularly the case in relation to *habeas corpus* petitions, pursuant to which the Court regularly ordered relevant security forces to present detainees in court during the conflict period.[852] As mentioned above, the Supreme Court issued a landmark ruling on 83 *habeas corpus* writs in June 2007, and in so doing ordered the Government to set up a commission of inquiry to investigate allegations of disappearances in accordance with human rights standards (which at the time of writing has not been established). In May 2008, the Supreme Court also made a significant ruling that, in order to comply with its international legal obligations, the Government needed to enact a comprehensive law to address human rights violations resulting from the excessive use of force.[853] The families of 22 victims sought assistance through *mandamus* writs from Appellate Courts and the Supreme Court in forcing the police to proceed with investigations.[854] Nevertheless, there have been a number of serious obstacles to the court's effectiveness and independence:

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[847] As described elsewhere, the three were convicted of procedural offenses and "improper interrogation techniques."
[848] Ref. No. 2003-10-13 - incident - Dhanusha _0171 (the Dhanusha Five).
[849] *See, e.g.*, OHCHR-Nepal, *Conflict-Related Disappearances in Bardiya District*, December 2008, p.41, and *Report of Investigation into Arbitrary Detention, Torture and Disappearance at Maharajgunj Royal Nepal Army Barracks* (May 2006), p. 46. *See also* Ref. No. 2003-09-13 - incident - Kathmandu_1213b.
[850] Ref. No. 2005-07-03 - incident - Jhapa _1552, 2004-07-11 - incident - Baglung _5835 and 2002-03-01 - incident - Baglung _5968.
[851] Ref. No. 2005-10-15 - incident - Morang _1527.
[852] Human Rights Watch, *Waiting for Justice*, p. 45 (see footnote 481)
[853] Kantipuronline, "SC to govt: Enact law against excessive force," May 12, 2008, Available at http://www.kantipuroneline.com/kolnews.php?&nid=146782.
[854] Human Rights Watch, *Waiting for Justice*, p.45 (see footnote 481)

- Defiance of court orders by the police, army and the CPN (Maoist) severely undermined and continues to undermine the judiciary.[855]
- Parallel justice systems operated during the conflict with each party to the conflict rejecting the legitimacy of the other's courts. Where Maoist courts operated, individuals either preferred or were compelled to settle disputes in the "People's court" rather than in the State's judiciary[856]
- Several courts were destroyed during the conflict, including in Jumla, Jajarkot, Achham, Arghakhanchi, Myagdi and Bara Districts. All or part of the court records were also destroyed.[857]
- Habeas corpus petitions had to be filed with the Appellate Court or the Supreme Court, although from 29 March 2011, following amendments to the Judicial Administration Act, it became possible to also lodge a habeas corpus petition in the District Court. This requirement limited access to such petitions by the rural population.
- Since 2004, in light of a mounting backlog of cases, courts started to refer cases for mediation.[858] In some cases, the courts themselves rejected victims' families' claims, agreeing with police that the cases should be investigated by a transitional justice body.[859]
- In recent years there has been an increasing trend of case withdrawals by the Government, citing clause 5.2.7 of the Comprehensive Peace Agreement of 2006 and on the basis of other subsequent political agreements.[860] This was first used in October 2008 when the then Cabinet ordered the withdrawal of 349 cases of a "political nature" that had been filed against political party cadres. Most of these cases have since been successfully withdrawn. Government bodies have repeatedly decided to withdraw cases for this reason: In October 2009 under the CPN-UML led Government, the Cabinet withdrew 24 cases; in Nov 2009 the CPN–UML Government withdrew a further 282 cases; and in March 2012 the UCPN-M led Government requested the withdrawal of 34 cases against at least 300 individuals. On this occasion the withdrawals were part of an additional September 2011 political agreement between the UCPN-M and the United Democratic Madhesi Front. In all these instances of case withdrawals, no clear and accurate definition of a "political case" was ever provided, and it is apparent that many of the accused persons have political links with members of the Government. A large number of cases recommended for withdrawal are of a serious criminal nature, and many fall outside the period of the conflict. The withdrawal of cases where serious international crimes have been alleged is contrary to both IHL and IHRL.

10.4.9 Chief District Officer

The responses of Chief District Officers to the families of victims who attempted to file First Information Reports varied widely; some refused to register the Reports.[861]

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[855] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir*, E/CN.4/2001/9/Add.2, 9 August 2000; par 39-45; UNDP Access report, p.47 (see footnote 763).
[856] UNDP Access Report, p.49 (see footnote 763).
[857] Ibid.
[858] Ibid.
[859] Human Rights Watch, *Waiting for Justice*, cases 37, 41-44 and 46-47, in relation to Biratnagar Appellate Court (see footnote 481).
[860] In accordance with clause Comprehensive Peace Agreement section 5.2.7: "Both sides guarantee to withdraw accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately." The cases to be withdrawn are supposed to have taken place inside a clear timeline, i.e. a period from 13 February 1996 to 21 November 2006.
[861] Ref. Nos. 2003-12-27 - incident - Kavre _0158, 2005-02-12 - incident - Dadeldhura _1965, 2004-09-29 - incident - Banke _5164 and 2002-05-30 - incident - Bardiya _5383.

10.4.10 Government and Ministries

The Government's responses to allegations of violations of IHL/IHRL in general have been *ad hoc*, for example, the establishment of Commissions of Inquiry on particularly serious incidents as a response to external pressure. There are a number of drawbacks to using such Commissions as an effective mechanism for investigations. Under the Commission of Inquiry Act, the Commissions do not have prosecutorial powers and the Act is silent on the required competence, independence and impartiality of members of such Commissions. There are also no witness and victim protection provisions.[862] Despite the general requirement for Commission of Inquiry reports to be public under the Act, most reports were in fact not made public.[863] For example, the report of a Commission of Inquiry into the killing of 27 Maoist cadres in Gaur in 2007 has never been made public. The content and any follow up actions have been withheld from public scrutiny as a consequence.

Even when the report of a Commission of Inquiry was published, the recommendations have not been implemented. For example, the *Mallik* Commission implicated over 100 officials and politicians in serious misconduct relating to *Jana Andolan I* people's movement, yet no action was taken on its recommendations. Similarly, another high-level Commission of Inquiry, the *Rayamajhi* Commission, examined alleged violations during the *Jana Andolan II* protests in April 2006. Although it recommended action against 202 officials, including prosecution of 31 Security Forces personnel, no criminal prosecution has taken place. However, some security personnel reportedly faced disciplinary action.[864]

In early June 2006, the Ministry of Home Affairs set up a one-person "Disappearances Committee" whose findings were presented to the then-House of Representatives in July 2006. Relying on uncorroborated information provided by the Security Forces, the Committee member stated that the more than 100 disappeared persons had been determined to be either "released" or "killed in crossfire". In relation to the 601 persons still unaccounted for, the Committee member concluded that he did not have the capacity to conduct investigations.[865]

The Human Rights Cell in the Ministry of Home Affairs is a small unit consisting of one or two individuals who also have other administrative responsibilities. The officers face difficulties in taking up human rights issues due to insufficient rank and a lack of delegated authority.[866]

The Parliamentary Committee on International Relations and Human Rights has discussed issues related to violations of IHRL/IHL; for example, in the aftermath of the release of OHCHR-Nepal's report on arbitrary detention, torture/ill-treatment and disappearance in Maharajgunj. However, the Committee lacks the legal powers to enforce its invitation to individuals to present themselves in front of the committee and to put its recommendations into effect. The same is true for the Parliamentary Committee on State Affairs, which oversees the Ministries of Defence and Home.[867]

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[862] The Supreme Court ruling on disappearance cases on 1 June 2007 acknowledged the shortcomings of the Commission of Inquiry Act, and ordered the Government to introduce new legislation to ensure the establishment of a "credible, competent, impartial and fully independent commission." Human Rights Watch, *Waiting for Justice*, p.56 (see footnote 481)
[863] OHCHR-Nepal, *One year after CPA* Report, p.27.
[864] Ibid.
[865] OHCHR-Nepal, *Report to the Human Rights Council 2007*, para 48
[866] Observations made at the OHCHR-Nepal, Nepal Police and Armed Police Force's joint workshop: Workshop on the Role and Responsibilities of Law Enforcement Agencies during Public Protests, Godavari Resort, 17-20 March, 2009.
[867] Parliamentary Rules (2008), par. 115.

10.4.11 Maoist "justice system" during the conflict

In its February 2008 Report entitled *Nepal: Justice in Transition*, the International Commission of Jurists made an evaluation of the Maoist justice system in 14 Districts in Nepal against the requirements of international standards. Although it noted some positive aspects, such as the fact that the "People's Courts" were accessible, swift and inexpensive, it also found that the CPN (Maoist) system failed to meet fundamental fair trial standards at the pre-trial, hearing, trial and post-trial stages.[868] More specifically, the International Commission of Jurists found that there was:

- No mention of procedures for investigations, trials or hearings in the Maoist's "Public Legal Code" introduced in 2003;
- No formal criteria for the qualification or selection of "judges";
- No defence lawyer present in most proceedings;
- A lack of consistency in the application of the system;
- Poor case management and a lack of formal records kept by the courts;
- No written procedures setting out conditions for an appeal;
- A common bias in favour of the complainant, particularly if they had an affiliation to the CPN (Maoist) or, simply because that was the person who first brought the case to the attention of the "People's Court";
- A practice of allowing evidence about the character of the witness and accused;
- No requirement for witnesses to take any form of oath before giving evidence;
- Acceptance of judges slapping or intimidating the accused,[869] and
- Poor conditions of detention that sometimes amounted to torture.[870]

In addition, although the "Public Legal Code" did not provide for the death sentence or beating as a punishment, cases where such punishments were given, were reported.[871] In May and June 2006, OHCHR-Nepal recorded eight killings following actions by "People's Courts" in the Central Region. The killings were attributed directly to Maoists, or indirectly attributed to them through the cadres' encouragement of villagers.[872]

10.4.12 Problems of internal proceedings

a) Security Forces

There is no provision for civilian involvement in a court-martial except as provided by the Special Court-Martial under the 2006 Army Act.

The Judge Advocate General acts in multiple roles, which raises concerns about potential conflicts of interest. For example, the Judge Advocate General forwards cases from military units to the Chief of Army Staff and advises on any investigation by a Commission of Inquiry. The Judge Advocate General also advises whether or not to prosecute cases and provides advice on "law and justice" matters to the chairperson of a court-martial. He acts as

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[868] International Commission of Jurists, Nepal: Justice in Transition, p. i.
[869] Ibid, p. 9-12.
[870] Ibid. There were no formal detention facilities and abducted people were held in private houses. OHCHR-Nepal, *Human Rights Abuses by the CPN (Maoist), Summary of Concerns*, September 2006, p.4, Available from: http://nepal.ohchr.org/en/index.html; UNDP Access Report, p.30 (see footnote 763).
[871] For example, Ref. No. 2001-07-00 - incident - Kalikot _5484 ("Among those known to have been 'sentenced to death' and 'executed' was Bhadra Sanjyal, a woman from Ward No. 2, Siuna VDC, Kalikot district. She was killed in mid-July 2001 after she was found 'guilty' by the 'people's court' of passing information to the police. A notice was posted in the village announcing the decision.") (Original Source: Amnesty International). *See also* UNDP Access Report, p.30 (see footnote 763).
[872] Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal, A/60/359 (16 September 2005), paras 32-33.

an administrator for the courts, defends an accused when requested, and implements the punishment/decision.

The process is not transparent. Until 2006, court-martial proceedings were, by law, conducted behind closed doors. Even after the introduction of the 2006 Army Act, hearings are still conducted confidentially unless they are proceedings of the Special Courts-Martial. One improvement since the end of the conflict has been that court-martial verdicts are published in the form of Army Orders, and, for some public interest cases, in Nepal Army publications.[873]

Unlike courts-martial, the Police Special Court and the Armed Police Force Special Court include a member of the judicial service. A superior officer also sits on the court.[874] There is no requirement, however, that those individuals are independent of the matter under consideration,[875] nor is there a requirement for an independent prosecutor. The proceedings are open to the public subject to permission.

b) CPN (Maoist)

It is generally unclear how far CPN (Maoist) investigated and punished its cadres, commanders and political leaders for serious misconduct since their internal proceedings are not made public. Where CPN (Maoist) members were said to have been disciplined, OHCHR has not been able to obtain the details of the investigation or proceedings that led to the decision.[876]

Where information about action taken against perpetrators was made public, the punishment was not proportionate to the seriousness of the offence. For example, those involved in the *Madi* bus bombing case, where CPN (Maoist) cadres killed 36 civilians, three soldiers and injured a further 72 passengers, received only two to three months of "corrective punishment".[877]

[873] Human Rights Yearbook, Human Rights Directorate, Nepal Army, 2008, p.17.
[874] A Deputy Inspector General for the Armed Police Force Special Court, and a superior office to the personnel in question in the Police Special Court.
[875] Armed Police Force Act, Chapter 8, para28 (3); Special Court Act, 2002, Chapter 2.
[876] OHCHR-Nepal, *Human Rights Abuses by the CPN (Maoist), Summary of Concerns*, September 2006, p.8. Available from: http://nepal.ohchr.org/en/index.html
[877] Ibid.

CHAPTER 11 - RECOMMENDATIONS

11.1 TO THE TRANSITIONAL JUSTICE COMMISSIONS (ONCE ESTABLISHED)

11.1.1 General

- Call a roundtable of the heads of institutions and organizations to discuss and decide on key issues of collaboration and jurisdiction in relation to the work and mandate of the Commissions. This should include the Police, the Attorney General's office and the National Human Rights Commission (NHRC), the National Dalit Commission (NDC) and the National Women's Commission (NWC).
- Make clear cooperation protocols between the two Transitional Justice Commissions and with each Commission and the Office of the Attorney General, the Nepal Police, the NHRIs and the Courts.
- Use this Report and the Transitional Justice Reference Archive (TJRA) to assist planning work and methodology. The Office of the High Commissioner for Human Rights (OHCHR) remains ready to share its expertise and experience for this purpose.
- Hold hearings in public unless witness protection issues require otherwise.
- Ensure effective witness protection.
- Investigate the alleged violations contained in the TJRA.
- Organize consultations, investigations and public hearings on specific themes, such as women, children, unlawful killings, disappearances, torture and sexual violence.
- Hold sessions and hearings in all parts of Nepal including remote and rural locations, so as to engage all Nepalis.
- Set up contact offices, primarily with an administrative function but with the mandate to hold sessions and hearings, in all districts.
- As early as possible in the establishment of the Commissions, initiate networks for dissemination and gathering of information.
- Hire an investigator with international experience in war crimes and Crimes against Humanity investigations to advise the Commission.
- Use the information contained in the TJRA to identify additional patterns and specific areas for further investigation, including geographic, institutional, or thematic targets. Specifically, examine whether the use of unlawful killings, disappearances, torture, sexual violence and any other serious violation of international law was in fact widespread and systematic, and if so, whether the remaining elements of Crimes against Humanity can be proven.
- Require the Government to produce all published and unpublished Commissions of Inquiry reports as well as the results of other investigations conducted during the conflict.
- Ensure personnel from all ranks of the Security Forces and the Community Party of Nepal (Maoist) (CPN (Maoist)) are called and give testimony.
- In examining cases, ensure that sufficient information is collected concerning those in command responsibility during the conflict.
- Examine critically all documents purporting to be signed confessions and witness testimonies procured by alleged perpetrators in light of the numerous allegations of false statements and statements made under coercion.

- In examining individual incidents, bear in mind the broader legal implications regarding the establishment of Crimes against Humanity and War Crimes.
- Maintain a public repository and means of accumulating additional information relevant to the conflict.
- As is required by international law, provide an "effective remedy" to victims by
    - Investigating the credible allegations set out in this Report
    - Prosecuting suspected perpetrators wherever suspicion exists that they have either directly participated in violations, or are responsible due to their command responsibility at the time
    - Providing reparations to victims

11.1.2 Thematic

It is recommended that the Transitional Justice Commissions (or other competent judicial authorities) seek to undertake the following tasks:

a) Unlawful Killings

- Ensure the full investigation of all allegations of extra-judicial killings during the conflict.
- Pay particular attention to the earlier killings between 1996 and 1999 in Rolpa, Rukum and Jajarkot Districts.
- Adopt concrete measures to ensure the full implementation of NHRC recommendations and Supreme Court decisions in cases involving allegations of extra-judicial killings during the conflict.
- Analyze further the link between killings and other violations.
- Review policies that ordered, supported, assisted, worked in favour of and acquiesced in unlawful killings or means and methods used for them.
- Analyze the link between relevant laws and unlawful killings, particularly the Terrorist and disruptive Activities (Control and Punishment) Ordinance (TADO), the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) and the Public Security Act.

b) Disappearances

- Develop a strategy for addressing cases that occurred in the early part of the conflict where there is less documentary evidence.
- Engage relevant advisory expertise, such as the International Commission on Missing Persons, or a similar body with experience in the investigation of missing persons and the identification of mortal remains.
- Carefully evaluate and utilize existing data, documentary evidence and lists of the disappeared before launching field investigations.

c) Torture

- Compile a list of treatment that the Transitional Justice Commissions will consider to amount to torture per se, in line with similar findings by tribunals elsewhere. Also, compile a list of standard questions that victims should be asked to elicit whether the objective and subjective elements of torture and other ill-treatment have been reached

(NB avoid encouraging victims to characterize their treatment as torture, rather elicit from them a description of the actual treatment they experienced).

- Carefully consider the protection and humane, victim-oriented treatment of any victims or witnesses associated with these allegations. Re-traumatization and/or re-victimization of those who dare to come forward must be avoided.
- Ensure the presence of properly qualified professionals in relation to the physical and psychological aspects of torture and other ill-treatment. Take advantage of the advice of international experts on torture, such as the Committee against Torture and the Special Rapporteur on Torture, particularly in light of his visit to Nepal in 2006.
- Be mindful of the difference impact of violations on men and women, adults and children.

d) Arbitrary Detention

- Ensure the full investigation of allegations of arbitrary detentions during the conflict and provide adequate compensation to the victims or their families
- Review and amend the Public Security Act in line with Nepal's international human rights obligations.
- Ensure full implementation of NHRC recommendations and Supreme Court decisions related to cases of arbitrary detention during the conflict.

e) Sexual Violence

- The Transitional Justice Commissions should establish a process to discover and document the truth about sexual offences committed during the conflict. This should include the recruitment of appropriately skilled female staff with experience in working with victims of sexual violence and ensure systematic management of data that incorporates appropriate victim and witness protection measures.
- Integrated support mechanisms for victims and survivors of sexual and gender-based violence should be developed prior to the collection of information. They should include health care, psychosocial support, legal counselling and assistance, safe homes, emergency funds and state social services, such as reinforced community protection mechanisms.
- The National Action Plan on United Nations Security Resolutions 1325 and 1820 should be fully taken into account by the Transitional Justice Commissions.
- A register with the names of army personnel accused of committing sexual violence should be established to ensure their exclusion from any peace keeping duties in line with the UN Secretary General’s policy on zero-tolerance against sexual abuse.

e) Legal

- Investigators and legal advisors with international experience in the application of international humanitarian law (IHL) and international human rights law (IHRL) in internal armed conflicts should be included as part of the staff of the Commissions.
- Commission members should avail themselves and their staff of the opportunity to receive briefings and trainings on the application of IHL and conflict-related IHRL in specific cases.
- Commission members should have available resources, including books, materials and jurisprudence, on international humanitarian legal principles, particularly with regard to

non-international armed conflicts, and the International Criminal Court (ICC) Case Matrix.

- The Commission should ascertain whether and at what point the Maoist insurgency achieved non-international armed conflict status such that the prohibitions of Common Article 3 applied.

11.2 TO THE OFFICE OF THE PRIME MINISTER AND THE MINISTRY OF HOME AFFAIRS

- In compliance with international law, ensure that no perpetrators of serious violations of IHL and IHRL, especially those bearing the greatest responsibility in these violations, benefit from amnesty or pardon.
- Identify past reports of Government commissions formed to investigate alleged serious crimes during the conflict and make them available to the public and to the Transitional Justice Commissions.
- Adopt measures to ensure rigorous vetting of all Security Forces personnel before they are promoted or nominated for United Nations Peacekeeping duties.
- Give clear instructions to the Nepal Police that they should register all First Information Reports relating to the conflict in accordance with the law.
- Cancel all decisions to withdraw conflict-related cases involving allegations of serious crimes.
- Form a liaison office with the Transitional Justice Commissions to deal with overlapping jurisdictions and similar issues.

11.3 TO THE GOVERNMENT AND THE MINISTRY OF PEACE AND RECONSTRUCTION

- Establish independent Transitional Justice Commissions that are free from political pressure and are in full compliance with international human rights standards.
- Take all necessary steps to establish the Transitional Justice Commissions, including the fair and transparent selection of Commissioners and staff, following consultation with the population, in particular victims.
- Ensure that the withdrawal of cases from the court does not affect the Transitional Justice Commissions' power to look into them.
- Ensure that effective witness and victim protection mechanisms are in place for each Transitional Justice Commission.
- Ensure that all the steps to establish the Transitional Justice Commissions respect and incorporate different gender perspectives.
- Support to victims of sexual violence should be included in the Ministry of Peace and Reconstruction's programme of support to conflict victims.
- Develop reparation schemes in accordance with 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.[878]

[878] UN General Assembly Resolution 60/147, which provides that in accordance with domestic law and international law, and taking account of individual circumstances, as appropriate and proportional to the gravity of

11.4 TO THE DEFENCE MINISTRY

- Fully cooperate with any investigations by the police or proceedings undertaken by judicial authorities, including the future transitional justice mechanisms.
- Make available to the public all information related to complaints received concerning the army, including the number and nature of any procedures undertaken as a result of such complaints, and the results.

11.5 TO CONSTITUENT ASSEMBLY MEMBERS

- Enact the legislation necessary for the creation of the two Transitional Justice Commissions and provide them with a mandate that fully complies with international standards and is the result of a consultative process involving civil society and the public at large.
- To pass a law acknowledging (or otherwise granting) jurisdiction of Nepali courts to preside over serious violations of IHL and IHRL.
- Define torture as a crime in the Nepali criminal code, in line with the Convention against Torture (CAT). Ensure that – with respect to violations of this peremptory norm of international law – the proceedings are not inappropriately blocked by a misunderstanding of the *non bis in idem* principle.
- For the purpose of ensuring clarity, the Constitution should be amended so that the principles of non-retroactivity cannot act as a bar against prosecutions for war crimes, crimes against humanity, genocide and other serious violations of IHL and IHRL.
- Define Enforced Disappearances as a crime in the Nepali criminal code in line with the International Convention on the Protection of all Persons from Enforced Disappearances (CED).

11.6 TO THE OFFICE OF THE ATTORNEY GENERAL

- Establish a liaison office between the Office of the Attorney General and the Transitional Justice Commissions.
- Establish a special investigations and prosecutions unit under the leadership of a special prosecutor. This special prosecutor should have functional autonomy within the Office of the Attorney General and the unit should be comprised of competent, impartial, and well-trained staff, capable of conducting prompt and thorough investigations into alleged serious crimes related to the conflict.
- Analyze information received, whether independently or via the Transitional Justice Commissions, in light of elements of Crimes against Humanity and War Crimes.

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the violation and the circumstances of each case, victims should be provided with full and effective reparation which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

11.7 TO THE JUDICIARY

- Continue to exercise oversight as appropriate, including through issuing mandamus orders, to ensure that the police comply with their responsibilities to register and investigate FIRs.
- Look into the patterns of unlawful killings and their broader legal implications as potential Crimes against Humanity and War Crimes.
- Develop clear means and methods of cooperation between the Court and the Transitional Justice Commissions.

11.8 TO THE NEPAL POLICE COMMAND

- Conduct prompt, thorough and impartial investigations into allegations of serious crimes committed during the conflict.
- In respect of allegations involving police officers:
    - Investigations should be conducted by officers outside the chain of command of the alleged perpetrators.
    - Take immediate departmental action, such as suspension from service, against individuals implicated in the use of unlawful force resulting in a death until an independent and impartial investigation has been completed.
- Ensure that internal departmental disciplinary procedures are transparent.
- Ensure that internal disciplinary action taken against those who violate police procedures relating to extra-judicial killings is made public including any interference with ongoing investigations such as the falsification of documents and the intimidation of witnesses.

11.9 TO THE NEPAL ARMY AND ARMED POLICE FORCE COMMAND

- Ensure the full cooperation of staff from all ranks with the Transitional Justice mechanisms and ensure that all relevant documents are made available to them.
- Cooperate with police investigations into alleged unlawful killings, including making personnel available to the Nepal Police during investigations.
- Assist in identifying potential gravesites and locations of mortal remains.
- Make public the results of Courts Martial or other disciplinary proceedings against those alleged to have been involved in conflict-related unlawful killings.
- Make public the procedure for selection of army personnel to join the United Nations Peacekeeping Operations and those who have been barred from taking part.
- Immediately suspend the members potentially implicated in serious crimes related to the conflict until an independent and impartial investigation clears them from the allegations.

11.10 TO THE MAOIST LEADERSHIP

- Cooperate fully with the Transitional Justice Commissions and judicial authorities, including making available documents and staff of all ranks to cooperate with their processes.

- Cooperate with police investigations into alleged serious crimes related to the conflict.
- Assist in identifying potential grave sites and locations of mortal remains.
- Make public any internal proceedings against alleged perpetrators of serious crimes related to the conflict.
- Make public all available records of cases decided by the "People's justice system."

11.11 TO POLITICAL PARTY LEADERSHIP

- Publicly commit to non-interference in the operational activities of the police, prosecutors and judiciary, and publicly denounce and take appropriate action against members who do attempt to exert such influence or fail to cooperate with police investigations.
- Promote the legislation necessary for the creation of the two Transitional Justice Commissions and provide them with a mandate that is in line with international standards and which is the result of a consultative process involving civil society and the public at large.

11.12 TO THE NATIONAL HUMAN RIGHTS COMMISSION

- Engage in a process of monitoring institutions with responsibility for transitional justice mechanisms.
- Make public the conclusions and recommendations of past investigations into extra-judicial killings by the NHRC, and use all means to advocate for the full implementation of the recommendations by the Government, including the initiation of criminal prosecutions.
- Establish a clear line of communication and cooperation with Transitional Justice Commissions and provide them with all NHRC reports and material of investigations.

11.13 TO CIVIL SOCIETY

- Advocate for the passage of the enabling law for the Transitional Justice Commissions and for the commencement of their work.
- Establish co-ordination mechanisms for civil society monitoring of their work.
- Promote public awareness and shape opinions towards promoting accountability for serious IHRL and IHL violations.

11.14 TO THE MEDIA

- Devote staff to undertake daily coverage of the work of the Transitional Justice Mechanisms, for example, a daily column in newspapers and radio updates.
- Produce television and radio programmes providing information on and analysis of the work of the Commissions and Transitional Justice generally.
- Facilitate the participation of victims, survivors and affected communities in transitional justice proceedings, subject to witness protection needs.

11.15 TO THE INTERNATIONAL COMMUNITY

- Consider providing long-term and flexible support to the Transitional Justice Commissions and relevant programmes, provided that the Commissions are established in accordance with international standards.
- Continue to exclude Security Forces personnel against whom there are credible allegations of involvement in unlawful killings, from participation in training programmes and UN peacekeeping missions until such time as those cases are adequately resolved.
- Monitor Transitional Justice proceedings.

11.16 TO VICTIMS

- Cooperate with official investigations and participate in proceedings of the Transitional Justice Commissions subject to witness protection concerns.
- Support the prosecution of emblematic cases involving those responsible for the worst offences.

ANNEX ONE - TIME LINE OF THE ARMED CONFLICT IN NEPAL

The Timeline of the Armed Conflict in Nepal sets out the chronological flow of the armed conflict. It lists political developments at the national level and significant instances of violence[879] that had a bearing on the armed conflict. In order to provide some historical context to the conflict, the timeline also surveys significant constitutional and political events in Nepal's history prior to 1996.

1949	
September 1949	Communist Party of Nepal (CPN) is formed.
1950	
July 1950	Signing of the 1950 treaty, the Treaty of Peace and Friendship, between Nepal and India.
1951	
7 February 1951	Delhi Compromise, which makes way for the Rana-Nepali Congress (NC) coalition Government, is signed.
15-18 February 1951	King Tribhuvan returns from Delhi. Rana Regime formally ends and the coalition Government is established.
11 April 1951	Interim Government of Nepal Act, 1951 is promulgated.
1952	
22-23 January 1952	Raksha Dal mutiny, leading to the banning of the Communist Party.
1956	
16 April 1956	Ban on the Communist Party is lifted.
1959	
12 February 1959	King Mahendra proclaims the Constitution of the Kingdom of Nepal, 1959.
18 Feb-3 April 1959	First general elections in Nepal are held. The NC wins more than two-thirds of the seats.
27 May 1959	The NC forms the first elected Government, led by Prime Minister (PM) B.P. Koirala.
1960	
15 December 1960	King Mahendra removes the NC Government and imposes direct royal rule.
1961	
5 January 1961	King Mahendra imposes a ban on political parties, marking the beginning of the partyless Panchayat System of Government, which will remain in place until 1990.
1962	
September 1962	Keshar Jung Rayamajhi's moderate group of the Communist Party expel the more radical leaders Pushpa Lal Shrestha, Tulsi Lal Amatya and Hikmat Singh, formalizing the split in the Party. In

[879] Incidents of violence have been included where the number of deaths were five or more. Incidents where there were fewer deaths have been included where other factors made the incident relevant to the conflict, such as the identity of the victim (e.g. killing of IGP Krishna Mohan Shrestha) or the impact of the incident (e.g. the first ambush in a series of ambush attacks).

	mid-May that year, the Pushpa Lal faction had announced the expulsion of ten moderate Central Committee Members.
8 November 1962	NC leader Subarna Shamsher suspends armed movement that the Party was attempting to pursue.
December 1962	Tulsi Lal Amatya elected General Secretary of radical wing of Communist Party.
17 December 1962	The Constitution of Nepal, 1962 is promulgated.
1963	
April 1963	Radical communists split into Tulsi Lal Amatya and Pushpa Lal Shrestha factions.
1968	
May 1968	Pushpa Lal Shrestha establishes a new Communist Party faction by holding a Party convention in Gorakhpur, India.
1971	
6 May 1971	The Government quickly suppresses the start of the Jhapa uprising, an armed communist rebellion.
December 1971	Man Mohan Adhikari, Mohan Bikram Singh, and Nirmal Lama establish the Central Nucleus that will later become a communist political party.
1973	
4 March 1973	Jhapa group insurgents are killed while being transferred between jails.
10 June 1973	NC activists hijack a Nepali airplane to Forbesgunj in Bihar, India.
1974	
16 March 1974	Bhim Narayan Shrestha, Yagya Bahadur Thapa and Girija Prasad Koirala are indicted for attempting to kill King Birendra in the Biratnagar bomb attempt
12 December 1974	Members of the NC armed group, led by Yagya Bahadur Thapa, are arrested in Okhaldhunga.
1975	
April 1975	The Akhil Nepal Communist Revolutionary Co-ordination Committee (Marxist-Leninist), the forerunner of the Communist Party of Nepal (Marxist-Leninist) (CPN (M-L) is established.
June 1975	A conference that leads to the formation of the All Nepal Communist Coordination Committee is held. The Committee will gather other localized communist movements over the years to form the CPN (M-L) in December 1978.
1978	
26 December 1978	The CPN (M-L) is established.
1980	
2 May 1980	Following public protests, the Government holds a referendum to introduce a multiparty system, but the proposal is defeated.
1983	
November 1983	Mohan Bikram Singh sets up the Communist Party of Nepal (Masal), separate from the Fourth Convention.

1985

November 1985	The CPN (Mashal) splits from Mohan Bikram Singh's CPN (Masal).

1989

August 1989	The CPN (M-L) conference agrees to work for parliamentary democracy as an interim goal.

1990

1 February 1990	A Joint Coordination Committee between NC and United Left Front is announced.
14 February 1990	The formation of the United National People's Movement by radical communist groups is announced.
18 February 1990	The NC and United Left Front start the *Jana Andolan* (People's Movement).
8 April 1990	In the wake of the *Jana Andolan*, the ban on political parties is lifted.
16 April 1990	Rastriya Panchayat is dissolved.
19 April 1990	The Interim Government takes office.
9 November 1990	The Constitution of the Kingdom of Nepal, 1990 is introduced.
23 November 1990	The CPN (Unity Center) is established. It includes Mashal, Fourth Convention and CPN (Peasant's Organization).

1991

8 January 1991	CPN (Marxist) and CPN (M-L) merge to form the Communist Party of Nepal (Unified Marxist Leninist).
12 May 1991	In the general election the NC wins 110 seats, the UML wins 69 seats, and the United Peoples' Front Nepal (UPFN) wins nine seats.

1992

February 1992	Radical communist groups Unity Center/UPF, CPN (Masal), CPN (MLM) and the Nepal Communist League form the Joint People's Agitation Committee.
6 April 1992	Several people are killed in a police shooting during a protest program organized by the Joint People's Agitation Committee in Kathmandu.
28, 31 May 1992	The NC wins over half the number of seats (50.14%) in local level elections.

1993

February 1993	The UML Conference approves *Janatako Bahudaliya Janabad* (People's Multiparty Democracy) as its ideology.

1994

22 May 1994	The United People's Front splits into Baburam Bhattarai and Niranjan Gobinda Baidhya factions.
10 August 1994	The Baburam Bhattarai group of the UPF boycotts the mid-term election.
15 November 1994	The mid-term general elections are held after the NC fails to manage internal dissent. The Communist Party of Nepal (Unified Marxist Leninist) CPN (UML) wins the largest number of seats (88) but there is no overall majority.
29 November 1994	CPN (UML) forms the Government with Man Mohan Adhikari as PM and Madhav Kumar Nepal as the Deputy PM.

1995

March 1995	The factions of the former Communist Party of Nepal (Unity Centre) CPN (Unity Centre) and the UPFN unite as CPN (Maoist). The party adopts 'The Strategy and Tactics of Armed Struggle in Nepal'.
September 1995	CPN (Maoist) adopts the 'Plan for the Historical Initiation of the People's War'.
October 1995	The Maoists launch SiJa Campaign (named after Sisne and Jaljala, the two most prominent mountains in Rukum and Rolpa respectively) to promote their ideology.
11 September 1995	Sher Bahadur Deuba becomes the PM, heading the NC -Rastriya Prajatantra Party -Nepal Sadbhavana Party coalition.
4 November 1995	Police launch Operation Romeo against Maoist supporters in Rolpa, Rukum and Dang.

CONFLICT PERIOD

1996

4 February 1996	The UPFN, led by Baburam Bhattarai, presents its 40-point demand to the Government, warning of a resort to armed struggle if the Government does not show any positive response by 17 February.
12 February 1996	The PMs of Nepal and India sign the Mahakali treaty in New Delhi.
13 February 1996	The CPN (Maoist) launches an armed insurgency, and attacks the police posts in Holeri of Rolpa, Athbiskot of Rukum and Sindhuligadhi of Sindhuli. The Agricultural Development Bank in Chyangli of Gorkha is commandeered and an attack takes place on the Pepsi Cola bottling factory in Kathmandu, and on Manakamana Distillery in Gorkha. The house of Daulat Bikram Dong in Kavre is appropriated on the allegation that he is a usurper. Five days later, the CPN (Maoist) General Secretary Prachanda issues a press statement taking responsibility for these actions.
27 February 1996	Six Maoists are killed by the police in Pipal, Rukum. Two are arrested in Nalsingh and Jajarkot and subsequently killed.
22-29 April 1996	The Chairman of the UN Working Group on Arbitrary Detention visits Nepal.
6 May 1996	First ambush targeting the police by the Maoists in Taksera, Rukum occurs. Two police personnel are killed and the Maoists seize two rifles.
June-July 1996	The Second Plan of the People's War passes after a meeting of the Central Committee of CPN (Maoist) with the slogan – Let's Develop Guerrilla War in a Planned Way.
18 December 1996	Parliament passes the Torture Compensation Act.

1997

3 January 1997	Maoists commandeer a police post in Bethan, Ramechhap.
8 January 1997	Nepal's Parliament passes the Human Rights Commission Act (1997) 2053 B.S.
12 March 1997	Lokendra Bahadur Chand of Rastriya Prajatantra Party (RPP) becomes the PM of the new coalition Government consisting of RPP, CPN (UML) and Nepal Sadbhavana Party (NSP).
April 1997	The Government sets up a task force under the chairmanship of CPN (UML) Member of Parliament Prem Singh Dhami to conduct a study on the armed insurgency and make recommendations.

17, 26 May 1997	Local level elections are held. CPN (UML) candidates gain 51% of the seats, NC 30%, and RPP 12.6%.
26 May 1997	The Central Committee Meeting of CPN (Maoist) passes the Third Plan with the slogan – Let's Raise the Guerrilla Warfare to Another New Height of Development.
6 October 1997	Surya Bahadur Thapa is appointed as the PM of a new coalition Government of the RPP, NC and NSP.

1998

13 February 1998	On the second anniversary of the start of the insurgency, the formation of Central Military Commission of CPN (Maoist), led by Prachanda, is formally declared.
5 March 1998	CPN (UML) splits over the signing of the Mahakali Treaty.
26 March 1998	G.P. Koirala is appointed as the new PM. He extends the cabinet to include the ML and later the UML.
26 May 1998	The Government launches an "intensified security mobilization" (Kilo Sierra II) operation in the districts most affected by the insurgency.
3 June 1998	Five Maoist cadres are arrested and killed by the police in Panchkhuwa Deurali Village Development Committee (VDC), Gorkha.
5 June 1998	Police intervene during a programme at a school in Laha VDC, Jajarkot. Eight persons, including a health worker, teachers, and students are killed.
19 June 1998	Eight people are arrested by the police from Daha VDC, Jajarkot and killed in Himane jungle.
5 August 1998	Maoists ambush a police patrol in Bhalakcha, Rukum, killing two police personnel. The police kill four Maoists in the same VDC on the same day.
August 1998	The Fourth Extended Meeting (Plenum) of the CPN (Maoist) Central Committee makes its main slogan "Let's Advance in the Direction of Base Area Formation" and decides on the Fourth Plan.
19 October 1998	Five people are killed by the police in Simti, Rukum.
26 October 1998	CPN (Maoist) announces the start of the fourth phase (Fourth Plan) of the Strategic Defence stage of the war, establishing Base Zones.
3 November 1998	Five people are killed by the police in Jhangajholi, Sindhuli.
9 November 1998	Police shoot and kill seven Maoist cadres, including Maoist district leader Madhav Ghimire in Hapur, Dang.
29 November 1998	Twelve people are killed by police in Lurka Nipane in Daha VDC, Jajarkot.
12 December 1998	Eight Maoist cadres are killed by the police after they are surrounded in a house in Thumi VDC, Gorkha.
19 December 1998	Five people are killed by the police in Ranma Maikot VDC, Rukum.
28 December 1998	Nine people are killed by the police in Kerabari VDC, Gorkha.

1999

1 January 1999	Five people are killed by the police in Khalanga Timile, Jajarkot.
3 March 1999	Maoists attack a police post at Chiraghat, Dang. Seven police personnel and at least four Maoists are killed.
5 March 1999	Yadu Gautam, a CPN (UML) candidate for House of Representatives, is killed while canvassing in Garaiela VDC, Rukum during the parliamentary election campaign. He had been taken captive by the Maoists three times prior to his killing and had reportedly been warned not to get involved in politics.

19 March 1999	Police kill seven Maoists artists of the *Akhil Nepal Jana Sanskritik Sangh* (All-Nepal People's Cultural Association) in Anekot, Kavre.
3, 17 May 1999	General elections are held in two phases. NC wins majority with 110 seats. UML wins 71.
22 May 1999	Maoists attack a police post in Takukot village, Gorkha district. Five police officers and one Maoist are killed.
27 May 1999	The NC Government, with K.P. Bhattarai as PM, is formed.
14 June 1999	The police base camp in Lahan, Jajarkot is attacked by Maoists. At least nine people, including five police personnel, are killed.
22 June 1999	Police kill 11 members of a cultural troupe of CPN (Maoist) in Bhawang, Rolpa.
29 June 1999	Six people are killed by the police in Jagatipur, Jajarkot on allegation of being Maoists.
20 July 1999	Six people, including Maoist District Member, Indra Lal Acharya, are killed by police in Jagatipur, Jajarkot.
August 1999	The Government announces NR's 30 million budget to finance implementation of the Ganesh Man Singh Peace Campaign aimed at rehabilitation of Maoist activists who agree to surrender and the payment of relief to victims of abuses by the CPN (Maoist).
8 September 1999	Maoist Alternative Politburo Member Suresh Wagle (Basu) and Platoon Commander Bhimsen Pokhrel are killed by the police in Gankhu, Gorkha.
22 September 1999	Deputy Superintendent of Police Thule Rai is taken captive by the Maoists during an attack on a police checkpoint in Mahat, Rukum. Maoists demand the release of a number of Maoist prisoners in exchange for his return.
26 September 1999	The police post in Bhimkhori, Kavre is attacked by Maoists. Three police personnel and two Maoists are killed.
August 1999	Beginning of the Fifth Plan in the Strategic Defence stage of the insurgency by CPN (Maoist).
1 December 1999	Government forms the High Level Consensus Seeking Committee chaired by Sher Bahadur Deuba in an attempt to address the armed insurgency.
4 December 1999	Maoist leader Dinesh Sharma is arrested by police in Banasthali, Kathmandu.
14 December 1999	Police attack the Maoist training center in Iribang VDC, Rolpa, killing 11 Maoists.
20 December 1999	Deputy Superintendent of Police Rai is released. Dev Gurung, a senior Maoist leader, is released soon after.

2000

3 January 2000	The Maoists attack a police station at Raralihi VDC, Jumla. Nine police personnel are killed.
14 January 2000	Police exchange fire at a cultural program organized by Maoists at a school in Dungal village, Dhanku VDC, Achham, killing nine people. Their bodies are burned. Police later admit that seven of those killed were innocent bystanders.
22 January 2000	Six police personnel are killed in a Maoist ambush in Pipe, Jajarkot.
11 February 2000	Maoists torch and destroy a helicopter belonging to a private company and used by Nepal Police in Jiri, Dolakha.
15 February 2000	Five Maoist cadres are killed by the police in Maintada, Surkhet.
19 February 2000	The Area Police Office in Ghartigaun, Rolpa is attacked by Maoists. Fifteen police personnel and one Maoist are killed.
22 February 2000	Police kill 18 people in Khara VDC, Rukum and set fire to the village, burning down some 300 houses, apparently in a reprisal for

	the killing of 15 policemen during a Maoist attack on a police station at Ghartigaun, Rolpa, three days before.
5-14 February 2000	The UN Special Rapporteur on extrajudicial, summary or arbitrary executions visits Nepal.
5 April 2000	The Area Police Office in Taksera, Rukum is attacked by Maoists, eight police personnel are killed.
12 April 2000	Six police personnel are killed in a Maoist ambush on police patrol in Sangrahi Khola, Surkhet.
April 2000	PM G.P. Koirala activates the National Defence Council, which has constitutional responsibility for making decisions regarding the deployment of the army.
26 May 2000	Five Maoists are killed when Security Forces surround and torch a house in Urma-7, Kailali. A sixth is killed after surrendering.
5 June 2000	The National Human Rights Commission (NHRC) is established, nearly four years after legislation was passed in the Parliament.
7 June 2000	The Area Police Office in Panchkatiya, Jajarkot is attacked by Maoists. Eleven police personnel, two Maoists and seven civilians are killed.
June 2000	CPN (Maoist) begin the Sixth Plan in the Strategic Defence stage of the insurgency.
17 July 2000	The Government declares bonded labour illegal and declares the Kamaiyas to be free.
24 September 2000	Maoists attack and seize control of the District Police Office, prison, land revenue office, and other Government establishments, as well as a bank in Dunai, Dolpa. Fourteen police personnel are killed, 12 are abducted and later released. Maoists seize arms and cash.
27 September 2000	Maoists attack the Bhorletar police post in Lamjung. Eight police personnel and three Maoists are killed. Amnesty International reports that seven wounded policemen were shot and killed while lying on the ground.
October 2000	The Government decides to station the army in 16 District Headquarters after the Maoist attack on Dunai, Dolpa District.
27 October 2000	The Deputy PM Ram Chandra Poudel and CPN (Maoist) Central Committee Member Rabindra Shrestha hold an informal dialogue. The Maoists demand the release of all detainees by the Government as a pre-condition for talks.
3 November 2000	The Government releases two Maoist leaders, Dinesh Sharma and Dinanath Gautam, after placing them in front of the press where they renounce violence.
4 November 2000	Prachanda announces that the prospects for dialogue have ended, accusing the Government of spoiling the environment.
29 November 2000	Maoists attack a police post in Kotbada, Kalikot, killing 11 police personnel.

2001

22 January 2001	The Government issues Armed Police Ordinance 2057 B.S., intended to create an Armed Police Force and make arrangements for its functioning.
3 February 2001	A police vehicle escorting the Chief Justice is ambushed by the Maoists in Chhaisaththi, Surkhet. Five police personnel are killed. The Maoists later claim that they did not intend to attack the judiciary.
February 2001	The Second National Convention of the CPN (Maoist) is held in Punjab, India. The ideology 'Prachandapath' is adopted and

	Prachanda is elected Party Chairman. The concept of South Asian Federation is passed.
1 April 2001	Maoists attack a police post in Rukumkot, Rukum, killing 35 policemen and taking 16 prisoners. Eight Maoists are killed.
2 April 2001	Maoists attack the Area Police Office in Mainapokhari, Dolakha, where five police personnel and three Maoists are killed.
5 April 2001	Maoists attack a police camp in Naumule/Toli, Dailekh, in which 31 policemen and six Maoists are killed. Another 28 policemen reportedly surrender. Maoists summarily execute eight of the captives.
April 2001	The Government launches the Integrated Internal Security and Development Plan (IISDP) allocating a budget of NRs 400 million ($5.3 million). The plan involves the deployment of the army to help carry out development activities.
1 June 2001	King Birendra and ten other members of the Royal Family are killed in the Royal Palace.
4 June 2001	Gyanendra Shah, brother of King Birendra, is declared the new King after the death of Dipendra Shah, who was earlier declared King.
1 July 2001	The formation of Coordination Committee of Maoist Parties and Organisations of South Asia (CCOMPOSA) is announced. It was initially organized in June 2001 as a common forum of Maoist parties and organizations in South Asia.
6 July 2001	On the new King Gyanendra's birthday, Maoists attack police posts in three separate locations, killing 21 policemen in Bichaur, Lamjung, ten in Bami Taksar, Gulmi, and ten in Taruka, Nuwakot.
12 July 2001	Maoists attack a police post in Holeri, Rolpa, killing one and taking 69 police as prisoners. They demand the release of half of all Maoist prisoners in custody at the time.
13 July 2001	For the first time, the army is given deployment orders against the Maoists. Soldiers are sent to Holeri and Nuwagoan VDCs, Rolpa, to release police personnel taken prisoner in Holeri, Rolpa the day before. After several days, the army withdraws without engaging in combat.
19 July 2001	PM G.P. Koirala resigns.
23 July 2001	Sher Bahadur Deuba becomes the new PM. Maoists attack three police posts in Bajura District, killing 15 policemen.
25 July 2001	The Government, followed by CPN (Maoist), announces a ceasefire.
15 August 2001	Dialogue occurs between various communist parties and the Maoists in Siliguri, India.
30 August 2001	The first round of Government-CPN (Maoist) talks is held in Godavari, Lalitpur. An agreement on a ceasefire code of conduct is formed.
13,14 Sept 2001	The second round of talks between Government and CPN (Maoist) negotiation teams is held in Thakurdwara, Bardiya.
24 October 2001	The Armed Police Force is formed, initially with the aim of countering the Maoist insurgency, after promulgation of the Armed Police Act, 2058 (2001) on 22 August 2001.
13 November 2001	Third round of negotiations is held in Godavari, Lalitpur.
21 November 2001	CPN (Maoist) issues a statement that the dialogue is about to collapse due to Government actions.
23 November 2001	The Maoists launch a series of surprise attacks on the police, army, and other Government facilities. In Dang, they overrun the army barracks (Gorakh Bahadur Battalion and the Bhagawati Prasad Company) and attack two police posts. About two dozen are killed on all sides. The Maoists also seize arms and cash.

	In Syangja, Maoists attack the District Police Office in Putali Bazaar and police office in Galyang, killing 14 policemen. They also attack the police post in Majare, Morang. The formation of the 37-member United Revolutionary People's Council (URPC) Nepal is announced. It is headed by Baburam Bhattarai and a Central People's Government Organising Committee.
24 November 2001	The People's Liberation Army Nepal is officially declared, with Chairman Prachanda as its Supreme Commander.
25 November 2001	The People's Liberation Army attacks the army, police and Government office locations in Salleri and Phaplu airport, Solukhumbu. Thirty-four people die, including the CDO and 11 soldiers.
26 November 2001	Declaration of a State of Emergency by the Government. Army mobilizes and takes command of the Security Forces in operations against the Maoists. The Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2058 (2001) is promulgated. Six Security Forces personnel are killed in a Maoist ambush in Gokuleshwor, Darchula. The offices of the *Janadisha* Daily and the *Janadesh* Weekly are raided by police in Kathmandu. A dozen journalists with Maoist sympathies are arrested.
28 November 2001	Eleven unarmed farmers working in a field in Bargadi of Ghorahi, Dang, are killed by Security Forces personnel.
30 November 2001	Five civilians are reportedly killed by shots from an army helicopter while they are observing the Baraha pooja religious festival in Khumel VDC-4, Rolpa district.
7 December 2001	Maoist combatants launch an unsuccessful attack on an RNA camp with a telecommunications tower in Ratamate, Rank VDC, Rolpa. Seventeen or more Maoist combatants are killed.
8 December 2001	Unsuccessful attack by Maoist combatants on an RNA camp positioned at a telecommunications tower in Kapurkot, Salyan. Twenty-three or more People's Liberation Army combatants are killed.

2002

23 January 2002	Maoist combatants launch an unsuccessful attack on a police post in Gopetar, Panchthar. Five police personnel and six Maoist combatants are killed. Police pursue and kill approximately 17 fleeing Maoists.
5 February 2002	Maoists attack an Area Police Office in Bhakunde Besi, Kavre. Sixteen police personnel and one Maoist combatant are killed.
16 February 2002	Maoists attack all Government establishments, including the RNA barracks and the District Police Office, in Mangalsen District Headquarters and an Area Police Office at the Sanfebagar Airport, Achham. Fifty-five RNA personnel, 77 police personnel, four Government officials including the Chief District Officer and Officer of National Investigation Department, and two civilians are killed in the attacks. Many Maoist casualties are suspected, with 20 Maoist casualties identified on the spot. Maoists also take arms and NRs 60 million from the bank, as well as set fire to the District Administration Office, District Court, District Police Office and other Government buildings.
21 February 2002	Parliament extends the State of Emergency by three months.

	Maoists destroy a police post at Shitalpati, Salyan, killing more than 30 policemen.
24 February 2002	Four days after an army helicopter is shot at while trying to land at Suntharali airport, Kalikot, NA reportedly drag 35 airport construction workers from their huts and execute them.
17 March 2002	Government Security Forces attack a Maoist training programme in Gumchal, Rolpa and kill 44 persons, 39 of whom are identified. Radio Nepal news report that 65 Maoists have been killed in crossfire. According to Maoist sources, 30 Maoist cadres and 16 civilians are killed.
19 March 2002	Fourteen civilians and Maoists are arrested and shot dead by army personnel in Syalapakha, Rukum. Maoists attack the Area Police Office in Lamki, Kailali. Eight police personnel and three Maoist combatants are killed.
25 March 2002	After the Maoists explode an Improvised Explosive Device in Fagam VDC, Security Forces kill eight women and one man while they are farming in the area.
10 April 2002	The Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) 2002 replaces TADO.
11 April 2002	Maoists attack an Armed Police Force base camp in Satbariya and police office in Lamahi, Dang. Approximately 36 police personnel, mostly from the Armed Police Force, and approximately ten Maoist combatants are killed. Three civilians are also killed. Subsequent attacks by the army on the returning Maoist combatants in Murkatti of Loharpani VDC, Dang, kill more Maoists.
23 April 2002	The Government announces a bounty on Maoist leaders and payments for weapons handed in.
2 May 2002	Army attacks a Maoist training programme in Barchhen, Doti. Around 15 Maoists and some civilians killed. Clashes occur when the army advances towards Maoist combatants assembled in Lisne, Rolpa. Five army personnel and six Maoist combatants are killed in clashes.
7 May 2002	Maoists attack an army camp in Gam, Rolpa. More than 70 Security Forces personnel and six civil servants are killed. Thirty-five combatant casualties from the Peoples' Liberation Army are identified at the scene. Maoists unsuccessfully attack the Armed Police Force base camp in Chainpur, Sankhuwasabha. More than 20 Maoists and four policemen are killed.
22 May 2002	PM Deuba dissolves the House of Representatives and recommends mid-term elections for 13 November 2002.
26 May 2002	In opposition to his decision to dissolve Parliament and announce elections, NC suspends Prime Minsiter Deuba from party membership for three years. Deuba faction later convenes and forms NC (Democratic).
27 May 2002	An attack by Maoists on an army camp in Khara, Rukum, is repelled, and heavy Maoist losses are inflicted. One civilian and five RNA personnel are killed. According to Security Forces, 250 Peoples Liberation Army personnel are killed. According to Maoists, 35 of their combatants are killed. The State of Emergency is imposed for three more months, two days after it expires.
12 June 2002	Maoists attack a Government Security Force patrol in Damachaur, Salyan and 53 Maoist combatants and two civilians are killed. Four army personnel are killed and many are injured.

19–20 June 2002	The UK Government organizes the International Conference on Nepal in London, focusing on the armed conflict. On 11 October 2002, a follow-up meeting is held in Kathmandu, chaired by British Parliamentary Under-Secretary of State Mike O'Brien.
26 June 2002	Media report that police in Kathmandu have killed Krishna Sen, a Maoist Central Committee member and editor of the Maoist newspaper *Jana Disha*, while he was being held in police custody.
8 July 2002	The RNA establishes the first Human Rights Cell and subsequently sets up other such cells in their division and brigade headquarters.
31 July 2002	Government Security Forces attack Maoists in Katakuti VDC, Dolakha. Maoists claim that 15 Peoples Liberation Army combatants are killed.
28 August 2002	The state of emergency lapses.
8 September 2002	Maoists attack a police post in Bhiman, Sindhuli where 49 policemen and 22 Maoist combatants are killed.
9 September 2002	Maoists attack Sandhikharka, the District Headquarters of Arghakhanchi, killing 58 Security Forces personnel.
3 October 2002	PM Deuba recommends postponing the announced mid-term elections by 14 months, citing security conditions.
4 October 2002	The King dismisses PM Deuba and seizes power by proclamation.
12 October 2002	The King nominates Lokendra Bahadur Chand as PM.
27 October 2002	RNA personnel are deployed at Rumjhatar airport, Okhaldhunga, and repel a Maoist attack. Approximately 50 Maoist combatants and two RNA personnel, including the commanding Captain, are killed.
14 November 2002	Maoists attack the RNA barracks, district police office, Government offices and prison in District Headquarters Khalanga, Jumla. The Chief District Officer, 34 police personnel, four RNAofficers, two prisoners, two attendants and four local civilians are killed. According to Security Forces, 108 Peoples Liberation Army combatants were killed, though only 57 bodies were recovered; according to Maoists, 15 combatants were killed at the scene and 12 died en route. Maoists attack and briefly take control of an Area Police Office in Takukot, Gorkha.
3 December 2002	A Politburo meeting of CPN (Maoist) is held, and it is decided that negotiations with the "Operators of the Old State" should be pursued.
5 December 2002	The Maoists attack an Area Police Office and a bank in Lahan, Siraha. Approximately six police personnel and three Maoist combatants are killed.
18 December 2002	Maoists attack the Koilabas Area Police Office, Dang and kill six police personnel.
24 December 2002	Human rights Cells in the Armed Police Force are established.

2003

16 January 2003	A Nepal Police Human Rights Cell is established at police headquarters.
26 January 2003	Maoists kill the Inspector General of the Armed Police Force, Krishna Mohan Shrestha, with his wife and bodyguard in Kathmandu.
29 January 2003	The Government and the CPN (Maoist) announce a ceasefire.
13 March 2003	The Government and CPN (Maoist) sign the 22-point code of conduct.

27 April 2003	The first round of formal talks between the Government and CPN (Maoist) is held in Kathmandu. A ceasefire code of conduct is agreed upon.
9 May 2003	The second round of talks are held in Kathmandu.
30 May 2003	Lokendra Bahadur Chand resigns from the post of PM.
4 June 2003	Surya Bahadur Thapa is nominated as PM after Lokendra Bahadur Chand's resignation.
5 August 2003	Four soldiers, one policeman, and a civilian are killed, and another 23 injured, when Maoists detonate an Improvised Explosive Device under a non-military truck carrying 35 Security Forces personnel in Nagi VDC, Panchthar.
17-19 August 2003	The third round of talks between the Government and the CPN (Maoist) are held in Nepalgunj, Banke and Hapure of Purandhara VDC, Dang.
17 August 2003	Two civilians and 17 Maoists are killed by the RNA in Doramba, Ramechhap. Nineteen were lined up with their hands tied and killed some hours after arrest. An NHRC investigation concludes that the victims were summarily executed, a finding initially disputed by the RNA. Later, the RNA admits to "some illegal killings".
20 August 2003	Maoist Politburo Member CP Gajurel is arrested in Chennai, India.
27 August 2003	Maoists unilaterally announce an end to the ceasefire.
28 August 2003	Maoists kill RNA Colonel Kiran Basnet outside his home and injure Colonel Ramindra KC in Kathmandu.
29 August 2003	Maoists shoot and wound former Deputy Home Minister, Devendra Raj Kandel,.
1 September 2003	Prachanda writes to the UN Secretary-General Kofi Annan expressing his commitment to a peaceful solution to the conflict and requesting UN and international community involvement.
9 September 2003	CPN (Maoist) starts FM radio transmission in Nepal.
17 September 2003	Security Forces attack Maoists at their training areas in Bhawang, Rolpa. Security officials claim more than 100 Maoists are killed. Maoists claim only seven Maoist fatalities. Four soldiers and one policeman are killed.
18-20 Sept 2003	CPN (Maoist) organizes a nationwide strike.
10 October 2003	Maoists unsuccessfully attack the Armed Police Force Base Camp in Kusum, Banke and suffer heavy losses.
13 October 2003	Maoists make an unsuccessful attack on an Armed Police Force camp in Bhalubang, Dang. Government Security Forces open fire at a secondary school in Mudbhara, Doti, where teachers and students are compulsorily attending a Maoist cultural program. Four students and six Maoists are killed. Five Maoists are killed by Security Forces in Baksila VDC in Khotang.
14 October 2003	At least 25 Maoists are killed by the Security Forces in Sodasa VDC, Achham.
15 October 2003	Maoists ambush RNA personnel in Gaira, Ghanteshwor VDC, Doti and claim more than 20 RNA personnel are killed.
27 October 2003	Maoists ambush Security Forces in Chyangli, Gorkha. Four people, including SP Surya Kumar Shrestha, are killed.
31 October 2003	In a notice published in the Federal Register, the United States Government declares CPN (Maoist) a threat to national security, entailing sanctions and freezing of assets. Five civilians are killed by Security Forces after being arrested in Khairala VDC, Kailali.

2 November 2003	Maoists ambush army personnel from Bhimkali Division, Birgunj, at Bahuari Khola, Belawa VDC-8, Parsa, killing 13 and injuring five.
5 November 2003	Two Improvised Explosive Devises, allegedly planted by Maoists, explode outside Nirmal Niwas, the residence of Crown Prince Paras.
12 November 2003	The Government announces its decision to provide loans without collateral to Maoist victims for foreign employment and reserve quotas for "Maoist-affected" and underprivileged groups.
15 November 2003	Brigadier General Sagar Bahadur Pandey, along with three others, is killed in a Maoist ambush in Makwanpur. He is the highest ranking officer of the RNA to be a casualty of the conflict.
20 November 2003	UML General Secretary M.K. Nepal meets Maoist leaders in Lucknow.
4 November 2003	The Nepal Police, the Armed Police Force and the National Investigation Department are officially placed under the unified command of the RNA.
17 December 2003	Maoists ambush Government Security Forces personnel and an armoured vehicle in Dhankhola, Goberdiha VDC – 1, Dang. Five soldiers and five police are killed.

2004

9 Jan – 2 Feb 2004	CPN (Maoist) declares eight People's Governments – Magarat, Tamang, Bheri-Karnali State, Madhes, Seti-Mahakali State, Tharuwan, Tamuwan, and Kirat.
5 February 2004	Security Forces personnel kill 14 Maoist cadres, including the Parsa District leader, in Bhimad, Makwanpur.
8 February 2004	Maoist leaders Matrika Yadav and Suresh Ale Magar are arrested by Indian Security Forces and extradited to Nepal the following day.
15 February 2004	Ganesh Chiluwal, the leader of the Maoist Victims' Association, is killed by two armed men, believed to be Maoists, in Kathmandu.
17 February 2004	Sixteen-year-old Maina Sunuwar is arrested and taken to Birendra Peace Operations Training Centre in Panchkhal, Kavre where she is tortured by RNA officers. She dies in custody.
19 February 2004	Government Security Forces attack Maoists in a house in Pedari village in Banke. Five Maoists are killed.
20 February 2004	Government Security Forces overwhelm Maoists in a clash in Ainselukharka, Khotang, a strategic location close to Okhaldhunga and Solukhumbu districts. At least seven Maoist combatants, including a Battalion Commander and Deputy Commander, are killed. Three Security Force personnel are killed.
2 March 2004	Maoists attack Government Security Forces at a telecommunications tower in Bhojpur District Headquarters. The tower, the District Administration Office, District Police Office, Rastriya Banijya Bank office and office of Bal Mandir are destroyed. More than 30 Security Forces personnel and more than 20 Maoists are killed.
12 March 2004	The RNA issues a statement summarizing the findings of its investigation into the Doramba killings of 17 August, 2003. The statement announces that a few of those killed in Doramba were killed unlawfully, but that the larger number were killed in lawful combat situations.
20 March 2004	Maoist insurgents launch a large-scale attack on Security Forces in Beni, Myagdi. Maoists take 37 hostages, including the Chief District Officer and the Deputy Superintendent of Police. They will be released on 6 April 2004. Both sides claim to have inflicted over 100 fatalities.

26 March 2004	The Government publishes "His Majesty's Government's Commitment on the Implementation of Human Rights and International Humanitarian Law".
29 March 2004	Mohan Baidhya 'Kiran,' second ranking leader of CPN (Maoist) and Eastern Command Leader, is arrested by Indian police in Siliguri, India.
12 April 2004	Government Security Forces launch a helicopter attack over a Maoist cultural programme in Binayak, Achham. Seven people are killed.
9 May 2004	Maoists ambush a Security Forces patrol in Mainapokhari, Dolakha. Six RNA members, one Police officer and six civilians are killed.
10 May 2004	Ten international donors issue a joint statement announcing they are suspending work in six districts of Mid-Western Nepal because of demands and threats by local Maoists.
19 May 2004	Six Security Force personnel are killed in a clash with Maoists in Hagulte and Ghanteshwar, areas on the highway between Dadeldhura and Doti. Security Forces claim more than 20 Maoists were killed, though their bodies were not recovered.
2 June 2004	Sher Bahadur Deuba, NC (Democratic) president, is nominated as PM. Later, the UML, RPP and NSP join the Government. Six Maoist leaders, including Politburo Member Lokendra Bista and Kul Bahadur Chhetri, are arrested by Indian police in Patna, Bihar, India.
14 June 2004	Maoists ambush Security Forces on the highway at Khairikhola, Banke. Twenty-two Government Security Forces personnel are killed.
17 June 2004	Clash between Maoists and *Pratikar Samiti* (Retaliation Group) in Pipara, Kapilvastu. Five *Pratikar Samiti* cadres are killed.
19 June 2004	Maoists ambush patrolling Armed Police Force personnel in Gobardhiha VDC, Dang and kill 14 personnel and four civilians.
5 July 2004	A Maoist ambush kills 12 police personnel and one civilian in Bahurbamatha VDC, Parsa.
6 July 2004	Government and Maoist forces clash in the Gangate area of Kalimati Kalche, Salyan. More than ten are killed on each side. Six Maoists are killed by Security Forces in Toli VDC-1, Dailekh.
15 July 2004	The Government launches the National Human Rights Action Plan as a long-term strategy for promoting a broad range of human rights.
31 August 2004	A press release of the Plenum of the CPN (Maoist) Central Committee announces the decision to launch the Strategic Offensive stage of its insurgency.
24 August 2004	Maoists and Security Forces clash in Chehere, Sindhupalchowk. More than five Security Forces personnel are killed.
13 October 2004	The Government again promulgates TADO. The Act had expired in April 2004 two years in force.
3 November 2004	Security Forces kill six Maoists in Humsekot VDC, Nawalparasi.
16 November 2004	Maoists ambush and attack trucks of Security Forces in Dhading during a Maoist bandh. At least four RNA personnel and one Peoples Liberation Army combatant are killed. Maoist and Government forces clash in the Amkhaiya jungle area in Pahalmanpur, Kailali. At least six Security Forces personnel are killed and the bodies of two Maoists are found. The RNA claims as many as 35 Maoists died in the fight.
20 November 2004	Mahabir (Ranger) Battalion of the RNA attacks a Maoist base in Pandaun, Kailali. Ten soldiers and 16 Maoists are killed. The army claims that there were hundreds of Maoist casualties.

30 November 2004	Baburam Bhattarai presents his 13-point document of differences in the party. The differences include a stand on the democratic republic, opposition to the monarchy, and points explaining the communist ideology and practice within CPN (Maoist).
4 December 2004	Maoists ambush Security Forces on the highway at Suraina on the border between Kapilvastu and Dang. Six Security Forces personnel are killed.
6-14 Dec 2004	The UN Working Group on Enforced or Involuntary Disappearances (WGEID) visits Nepal.
15 December 2004	Maoists and Security Forces clash in Siddhara, Arghakhanchi. At least 21 Security Forces personnel and six Maoists are killed. Both sides claim a higher casualty count on the opposing side.
16 December 2004	In Mouwaghari of Naumule VDC, Dailekh, Maoists attack a Security Force patrol. Seventeen Maoists are killed. Maoists attack a RNA camp at a telephone repeater tower in Bhirpustun of Bahundanda, Lamjung, but are repelled. At least ten Maoists are killed.
19 December 2004	Maoists attack a Security Forces patrol at Lamosanghu-Jiri road in Lakuridanda VDC-3, Dolakha. At least ten Security Forces personnel and three Maoist combatants are killed.
22 December 2004	Maoists attack RNA personnel at Chisapani, Baliya VDC, bordering Kailali and Bardiya. At least five Security Forces personnel, one Maoist and five civilians are killed.
23 December 2004	At Siddhara VDC, Arghakhanchi, bordering Pyuthan, at least 22 Maoists and two soldiers are killed in an aerial offensive by the army after Maoists ambush a security patrol.

2005

17 January 2005	Nine soldiers and five policemen are killed in Phalametar of Bhedetar VDC-3, Dhankuta, when Maoists attack them as they arrive to remove Maoist barricades. One Maoist is killed.
19 January 2005	Maoist and Government Security Forces clash in Puwakhola, Ilam. At least six Maoists and 23 Security Forces personnel are killed.
20 January 2005	Home Secretaries of Nepal and India sign the updated Nepal India Extradition and Mutual Legal Assistance Treaty, an amendment to the 1953 treaty.
23 – 26 Jan 2005	Louise Arbour, the UN High Commissioner for Human Rights, visits Nepal amidst concerns about the escalation of human rights violations and negotiates a mandate for the Office of the High Commissioner for Human Rights (OHCHR) to open a field mission inNepal.
26 January 2005	A clash follows a Maoist ambush of a Security Forces vehicle in Bajung VDC, Parbat. At least five Security Forces personnel and one civilian are killed.
28 January 2005	A report by WGEID states that in 2003 and 2004 Nepal recorded the highest number of new cases of disappearances in the world.
1 February 2005	King Gyanendra imposes a three-month state of emergency, dismisses the Government of Sher Bahadur Deuba and announces he will rule directly for three years as Chairman of the Council of Ministers. Leaders of political parties are detained or kept under house arrest.
2 February 2005	Ten members are inducted to form a Council of Ministers. A 21-point programme of the new Government is passed at its first meeting chaired by the King.

5 February 2005	Maoists abduct and murder two people from Ganeshpur VDC, Kapilvastu, sparking violence.
9 February 2005	Maoists attack a prison in Dhangadhi, Kailali and release approximately 150 prisoners. The RNA claims that five policemen are killed. Maoists claim a higher number of police casualties.
14 February 2005	Dr. Tulsi Giri and Kirti Nidhi Bista, two former PMs of the Panchayat System, are appointed as Vice Chairmen of the Council of Ministers.
17 February 2005	Nine people are killed and three suspected Maoists are taken to army barracks when protests in Ganeshpur VDC, Kapilvastu, become violent. The three suspected Maoists are released into the crowd where they are lynched in front of the soldiers. Six more suspected Maoists are killed the following day. Killings and wide-scale burning of houses of those suspected of having Maoist links continue in Kapilvastu. Thirty-one people are killed and 708 houses are burnt down between 17 and 23 February.
22 February 2005	India and the UK suspend military aid to Nepal.
28 February 2005	Government Security Forces and Maoists clash in Ganeshpur village of Mohammadpur VDC, Bardiya. More than 30 Maoists and two policemen are killed.
15 March 2005	Reports surface that Baburam Bhattarai and his wife Hisila Yami are expelled from the CPN (Maoist) party, along with politburo member Dina Nath Sharma. Later, on 18 July, Prachanda will disclose that the action taken has been revoked and the leaders have been reinstated.
18 March 2005	The UK Government stops aid to three projects relating to the Nepal Police, the prison service and the PM's office.
31 March 2005	Chinese Foreign Minister Li Zhaoxing makes a two-day visit to Kathmandu. Four Security Force personnel are killed in a clash with Maoists at Mele of Khiji Phalate VDC, Okhaldhunga. Bodies of two Maoists are recovered at the site. More bodies are believed to have been removed by the Maoists.
7 April 2005	Maoists attack the RNA camp in Khara, Rukum, suffering a heavy loss for the second time in Khara. More than 100 Maoist combatants are believed to have been killed, based on claims by the Army and other observers. Maoists claim the number to be only around 50. At least three Security Forces personnel are killed.
10 April 2005	The Government of Nepal and the High Commissioner for Human Rights conclude an agreement mandating OHCHR to set up a field mission to monitor, investigate and report publicly on the observance of human rights and international humanitarian law (IHL) in Nepal. The agreement grants authority to OHCHR to engage with non-State actors, to access all places of detention and interrogation without prior notice and to interview detainees without supervision.
29 April 2005	United Nations High Commissioner for Human Rights Louise Arbour appoints Ian Martin as head of OHCHR operation in Nepal. The King lifts the three-month State of Emergency two days before it is due to expire.
6 May 2005	OHCHR-Nepal establishes its office in Nepal and starts work on the implementation of its mandate.
9 May 2005	U.S. Assistant Secretary of State for South Asian Affairs, Christina Rocca, visits Nepal.

16 May 2005	Maoist and Security Forces clash at Tapli in Lekhgaun village, Udayapur. At least nine Security Forces personnel are killed.
28 May 2005	Prachanda issues a statement that Baburam Bhattarai and Krishna Bahadur Mahara are on special assignment to hold meetings with the Indian Government and political parties towards creating an atmosphere conducive to a pro-democracy movement.
6 June 2005	Maoists detonate an Improvised Explosive Device under a bus in Madi, Chitwan, killing 39 persons, including 36 civilians and three RNA personnel. In addition, 72 persons are wounded, mostly civilians.
10 June 2005	Two civilians, seven Security Force personnel and one Maoist are killed in a clash on the Banepa-Bardibas highway at Narke Bazaar in Mangaltar VDC, Kavre, after Maoists attack a public bus.
19 June 2005	Maoists attack and destroy Government offices in the Diktel, Khotang, District Headquarters. Five policemen and three Maoists are killed. Fourteen offices are destroyed and more than 60 prisoners are freed.
25 June 2005	At least six Maoists and one Security Forces member are killed in a clash at Rambapur highway checkpoint in Bardiya. Locals claim to have witnessed Maoists carry away no less than 50 bodies. Maoists simultaneously detonate explosives in Gulariya, Nepalgunj and at places along the highway leading to the incident site.
26 June 2005	Maoist and Security Forces clash in Khandaha, Arghakhanchi. At least 12 Security Forces personnel and two Maoists are killed.
10 July 2005	Lakhdar Brahimi, Special Advisor to UN Secretary-General, begins a six-day visit to expedite efforts to help find a resolution to Nepal's conflict.
18 July 2005	CPN (Maoist) Chairman Prachanda announces that leaders Baburam Bhattarai, Dina Nath Sharma and Hisila Yami, against whom action had been taken, have been reinstated.
22 July 2005	Maoists attack Security Forces at Kamala Kola, Goltakuri VDC-6, Dang, killing seven.
7 August 2005	Maoists attack a RNA camp in Pili, Daha VDC, Kalikot. According to the army, 55 soldiers were killed and 60 abducted. Some local residents claim that 41 Maoist bodies were recovered. Maoists claim only 26 were killed. According to the Informal Sector Service Centre (INSEC) Yearbook, 68 Security Forces personnel and 22 Maoists were killed. On 14 September 2005, Maoists release the 60 RNA captives to the International Committee of the Red Cross (ICRC).
25 August 2005	The Ninth Central Committee meeting of CPN (UML) decides to pursue democratic republicanism through the election of a Constituent Assembly.
26 August 2005	Maoists ambush Security Forces on the highway in Khairendrapur, Kapilvastu. Five soldiers are killed. The army claims that many Maoists are also killed.
29 August 2005	The NC decides to remove constitutional monarchy from the party statute. The General Convention of the NC endorses this position on August 31.
3 September 2005	CPN (Maoist) announces a three-month ceasefire which is unreciprocated by the Government. It is later extended by one month.
October 2005	The Central Committee meeting of CPN (Maoist) at Chunwang, Rolpa (Chunwang meeting) adopts democratic republicanism.

22 November 2005	The Seven-Party Alliance (SPA) and CPN (Maoist) announce their common adoption of a 12-point letter of understanding.
28 November 2005	Maoists make public the decision by their Central Committee on the Second Plan of Counterattack.
2 December 2005	CPN (Maoist) extend their unilateral ceasefire by one month.
31 December 2005	As the unilateral ceasefire of the CPN(Maoist) nears expiration, the UN Secretary-General appeals to the Government to reciprocate and to the Maoists to extend it. The European Union makes a similar statement and calls for the UN or another appropriate external body to help broker and monitor a ceasefire agreement and to facilitate a peace process.

2006

2 January 2006	The CPN (Maoist) end their four-month ceasefire. A statement addressed to the UN, the European Union and others seeks to assure them of the CPN (Maoist)'s commitment to peace.
5 January 2006	Maoists raid a security base camp in Ranjha airport, Nepalgunj, and kill three Armed Police Force personnel.
11 January 2006	Maoists and Security Forces clash in Dhangadhi, Kailali, after Maoists simultaneously attack police offices, unified command army barracks, and Government buildings.
12, 13 January 2006	Security Forces carry out offensives in the Chitre and Aambote areas of Tanahun, and the Chitre Bhanjyang area of Syangja. According to a statement made by the Defence Ministry, at least ten Maoists are killed.
14 January 2006	Maoists simultaneously attack a security check post and police post at Thankot, the entry to Kathmandu and Dadhikot, Bhaktapur. Eleven policemen are killed in Thankot and one in Dadhikot. Improvised Explosive Devices are also detonated at Municipal Ward Offices in Chyasal, Lalitpur and Bouddha, Kathmandu.
20 January 2006	Maoists attack a police post, a security check post and a customs office in the urban areas of Nepalgunj, Banke. At least six policemen are killed.
21 January 2006	Maoists detonate an Improvised Explosive Device at Biratnagar Sub-Metropolitan City Office, damaging vehicles. Maoist and Security Forces clash overnight after Maoists initiate an attack in Phaparbari VDC, Makwanpur. Thirty-five are killed: five soldiers, one policeman, three civilians and 26 Maoists.
22 January 2006	A local leader of the NSP and mayoral candidate for Janakpur Municipality, is killed.
24 January 2006	Maoists attack security posts in Nepalgunj, killing two Security Forces personnel.
27 January 2006	Maoist and Security Forces clash after Maoists launch an unsuccessful attack on an RNA base at Hatuwagadhi of Ranibas VDC, Bhojpur. At least 11 Maoists and two Security Forces personnel are killed.
31 January 2006	Maoists attack Government offices and Security Forces in Tansen, Palpa the night before the anniversary of King's takeover.
1 February 2006	The SPA holds nationwide protests to mark the anniversary of the royal takeover as "Black Day". The King delivers a televised address.
5-11 February 2006	Maoists announce nationwide Bandh, supported by the major political parties. The Bandh ends after polling on 8 February.
6 February 2006	Maoists attack a security base at the Gaighat, Udayapur and Panauti municipality office, Kavre. Five Security Forces personnel are killed

	in Gaighat, and at least two Maoists, two Security Force personnel and a civilian are killed in Panauti. Earlier that day, a taxi driver is killed in Gwarko, Lalitpur.
7 February 2006	Maoists attack Dhankuta District Headquarters, including the district and regional administration office, the RNA Brigade and all security agencies, the day before municipal elections. At least two Maoists and one soldier are killed.
8 February 2006	The Government holds municipal elections, which are boycotted by the major political parties and the Maoists. A CPN(UML) demonstrator is killed by the RNA in Dang.
9 February 2006	Maoists attack Security Forces at the Ramwanpur area of Sunwal VDC-4, Rupandehi, which had gone to clear a Maoist roadblock. Bodies of 21 people, including 17 Security Forces personnel, one civilian and three Maoists are found at the site. Maoists claim that four of their combatants died. Twelve Security Forces personnel are abducted by the Maoists and released. Four Security Force vehicles are destroyed.
28 February 2006	Maoists and Security Forces clash in the district border areas of Tingire, Palpa and Panena VDC, Arghakhanchi. At least 12 Security Forces personnel and 18 Maoists are killed.
5 March 2006	Maoists attack Ilam District Headquarters Bazaar, destroying Government offices and releasing prisoners. An attack on a security patrol in Ilam leaves three Security Forces personnel, four People's Liberation Army combatants and two civilians dead.
11 March 2006	SPA and Maoist leaders meet in Delhi and agree to coordinate activities. They agree that the SPA will announce a nationwide strike and non-cooperation with the Government and, in response to a public appeal by the SPA, the CPN (Maoist) will support the SPA programmes and withdraw its own programmes, including the blockade.
13 March 2006	The Government announces Surrender and Rehabilitation Policy that promise cash rewards to surrendering Maoists.
14 March 2006	Maoist-announce a three-week blockade of Kathmandu Valley and District Headquarters. CPN (Maoist) Central Committee members Rabindra Shrestha and Mani Thapa are expelled from the party.
20 March 2006	Maoists and Security Forces clash in Daregaunda area of Chhatraibanjh VDC, Kavre. Thirteen Security Forces personnel and one People's Liberation Army combatant are killed.
21 March 2006	Security Forces offensive against Maoists in Chautara, Darechowk VDC-6, Dhading. Twenty-two Maoist bodies are recovered although local residents report seeing more. An RNA operation after the incident leads to the displacement of villagers from Chautara. Maoists attack Area Police Post in Birtamod, Jhapa. Nine policemen and three Maoists are killed.
27 March 2006	A civilian and two Maoist cadres are killed after Security Forces launch an aerial attack from helicopters on different parts of Thokarpa VDC, Sindhupalchowk, where the Maoists had gathered.
3 April 2006	The Government announces that all kinds of public gatherings and protest programs inside the Ring Road are banned, to be effective from 5 April. Mass arrests of political leaders and political and human rights activists follow. Indefinite unilateral cessation of military hostilities by the CPN (Maoists) in Kathmandu Valley starts on the night of 3 April to facilitate the protest programs.

5, 6 April 2006	Maoists attack Government offices and Security Forces in Malangawa, Sarlahi and RNA barracks in Nawalpur, a town connecting Malangawa to the highway. At least five policemen and five Maoists are killed. Maoists also attack an RNA MI-17 helicopter sent to Malangawa, which crashes and kills 11 soldiers. Maoists abduct the Chief District Office, jail superintendent and 19 policemen, and free prisoners including Maoists.
6-9 April 2006	The SPA calls a general strike to start the *Jana Andolan II*.
7 April 2006	Maoists attack different security installations in Butwal and District Police Office and Forest Office in Taulihawa, Kapilvastu. One hundred six prisoners are freed from the Kapilvastu District Jail. Seven Maoists and one civilian are killed in Butwal, and one soldier, two policemen and one civilian are killed in Taulihawa.
23 April 2006	Maoists attack security and Government offices and the District Hospital in Chautara, Sindhupalchowk. At least four People's Liberation Army combatants, one civilian and one RNA member are killed.
24 April 2006	The King resigns from an active role and announces the revival of the House of Representatives. The SPA welcomes the King's decision.
26 April 2006	After initially calling for peaceful protests and a blockade of Kathmandu, CPN (Maoist) announces a three-month unilateral ceasefire.
27 April 2006	Girija Prasad Koirala becomes PM.
28 April 2006	The reinstated House of Representatives convenes its first meeting and a Constituent Assembly election is proposed. The CPN (Maoist) organizes a mass meeting at Khula Manch, Kathmandu.
3 May 2006	The Cabinet announces an indefinite ceasefire, starts the process of removing Interpol Red Corner Notices on CPN (Maoist) leaders, and annuls the 8 February Municipal election results. It dismisses District Development Committee nominees, and decides to provide NRs 1 million to each family of those killed during the *Jana Andolan II* and form a commission to investigate atrocities committed during the *Jana Andolan II*.
11 May 2006	The Government withdraws all terrorism charges against Matrika Yadav and Suresh Ale Magar, who are released from Nakkhu Jail.
18 May 2006	The House of Representatives unanimously passes a nine-point proclamation announcing itself supreme body of the nation and reducing the King's powers. The Government is now to be called the Nepal Government and Government bodies are to delete 'Royal' from their titles. A council headed by the PM is to control and mobilize the army. The country is to hold elections to a Constituent Assembly. Nepal is declared a secular state, sparking protests by Hindu organizations, especially in the Tarai.
26 May 2006	The first round of negotiations between the Government and the Maoists is held at a resort in Gokarna. They agree on a 25-Point Ceasefire Code of Conduct.
30 May 2006	Prachanda and Baburam Bhattarai make public appearances at a mass meeting at Chakari, Handikhola VDC, Makwanpur.
11 June 2006	Home Minister Krishna Prasad Sitaula meets Prachanda and Baburam Bhattarai in Shiklesh, Kaski.
12 June 2006	The Government withdraws the Terrorist and Disruptive Activities Ordinance. The CPN (Maoist) opens its liaison office in Kupondole, Lalitpur.

15 June 2006	A second round of talks between the Government and Maoists is held. They decide to hold summit talks, to form a 31-member ceasefire monitoring committee, request OHCHR to assist in human rights monitoring and to allow five civil society leaders to observe the talks.
16 June 2006	The SPA and the CPN (Maoist) reach the conclusion of an eight-point agreement. Prachanda makes a public appearance alongside other political party leaders to announce the agreement. An interim constitution drafting committee, led by Laxman Prasad Aryal, is formed.
2 July 2006	The Government sends a letter to the UN Secretary General requesting monitoring of the People's Liberation Army, without consulting the Maoists.
3 July 2006	The Government cabinet ends the Unified Command.
24 July 2006	Prachanda writes to the UN Secretary -General protesting the Government's letter of 2 July that requested the UN to monitor and decommission only Maoist arms and army.
27 July-3 Aug. 2006	The UN assessment mission, led by Staffan de Mistura, visits to discuss the nature of possible UN support.
28 July 2006	The CPN (Maoist) extends the ceasefire for three months.
9 August 2006	The Government and the CPN (Maoist) overcome their disagreement on the UN role and send separate letters to the UN with the same five-point request.
25 August 2006	The UN Secretary-General appoints Ian Martin as his Personal Representative for Nepal.
22 September 2006	The Parliament passes the Military Bill-2063, officially de-linking the army and the monarchy. The King is removed as supreme commander, fixed terms for all senior officers including the Chief of Army Staff are introduced, and the selection procedure for army officers is brought under the control of the Public Service Commission.
8-12 Oct 2006	Talks are held between the negotiation teams of Government and Maoists.
13-15 Oct 2006	CPN (Maoist) leaders Prachanda and Baburam Bhattarai meet Girija Prasad Koirala. The second meeting also includes M.K. Nepal and Sher B. Deuba.
29 October 2006	The CPN (Maoist) extend their ceasefire by three months.
8 November 2006	Leaders of the seven parties and CPN (Maoist) reach a six-point peace deal.
21 November 2006	The Comprehensive Peace Accord is concluded between the Government of Nepal and CPN (Maoist).

ANNEX TWO - METHODOLOGY

1.1 OVERVIEW

The creation of the Transitional Justice Reference Archive (TJRA) and the Nepal Conflict Report was undertaken as a project by Office of the High Commissioner for Human Rights (OHCHR) staff and consultants based in OHCHR-Nepal and Geneva. The work was undertaken as a preliminary exercise in the broader transitional justice process. This means that this exercise did not seek to gather evidence that would be admissible in court, but rather to compile and preserve materials and accounts of serious incidents and to offer a starting point for transitional justice processes and/or potential future investigations. This work functions as a preliminary step, providing the groundwork for the proposed transitional justice mechanisms or for the consideration of these potential violations by relevant judicial bodies.

The methodology described in this Annex was used to compile both the TJRA and the Nepal Conflict Report. Primarily, the methodology was based on the tools for post–conflict states addressing transitional justice issues that have been developed and implemented by the UN and in particular OHCHR in many countries.[880] Specific parameters were developed for: the gravity threshold for the selection of serious violations; the standard of evidence required; considerations surrounding the identity of perpetrators and groups; confidentiality concerns; and witness protection. Primary considerations in the development of the methodology were that it allowed coverage of the entire territory of the country and the entire period of the conflict – from 1996 to 2006; that it enabled the recording and analysis of only credible and serious violations of international human rights law (IHRL) and international humanitarian law (IHL); that the security of any individuals providing information was not compromised; and that any confidential information collected was appropriately secured.

Within the resources available to this project, it was not possible for primary research to be conducted, meaning that systematic fact–finding or investigation of incidents was not possible. However, OHCHR–Nepal's own files and records compiled from extensive field-based monitoring were an important source of information used in the TJRA and in this report. Further, some serious violations were recorded based on credible secondary sources. In addition, the conflict time-line in Annex I marks key events such as military operations, clashes and political developments to aid the identification and analysis of patterns associated with the serious violations.

1.2 CRITERIA FOR INCLUSION

1.2.1 Gravity Threshold

One criterion for this project was to catalogue only the "most serious" crimes. For this purpose, a "gravity threshold" was used to identify cases of a sufficiently serious nature to warrant further examination. A gravity threshold is by no means a precise tool, but rather a set of criteria against which any particular alleged violation can be weighed. The threshold's criteria were inter–dependant and no single criterion decisive, although any one alone could support a decision for inclusion. The criteria used can be divided into three main categories:

(a) The nature of the crime: This criterion considers the type of offence itself, for example whether it involves violence against a person, an administrative decision or

[880] OHCHR, *Rule-of-Law tools for post-conflict states: Prosecution initiatives* (United Nations, New York and Geneva, 2008.)

the confiscation of property. The criterion emphasizes crimes against the person (life, torture) as inherently more serious than crimes involving property or materials. The continuum flows along the following points in order of priority:

- Violation of the right not to be arbitrarily deprived of life: Covering murders, unlawful killings, assassinations, massacres and similar;
- Violation of the right to personal integrity (physical and mental): Covering torture, rape, sexual violence, causing serious bodily or mental harm, mutilation, inhumane acts and similar;
- Violation of the right to liberty and security of person and to the right not to be held in servitude: Covering disappearances/abduction, arbitrary detention, forced displacement, and similar;
- Violation of the right to own property and not be arbitrarily deprived of it: Covering destruction of property without military necessity, property seizure and extortion.

(b) The scale of the crime: Each allegation documented is associated with one or more victims. Both the number of crimes and the number of victims is considered in establishing the gravity of the incident. In order of priority:

- Incidents consisting of the alleged commission of numerous serious crimes were considered high on the gravity scale;
- Next were incidents that resulted in numerous victims in terms of individuals killed, injured, tortured or sexually assaulted, or persons who had disappeared, were displaced or their properties destroyed. The higher the number of victims or casualties, the higher it was placed on the gravity scale;
- Conversely, the lower number of victims, or a lesser amount of property looted or destroyed, the lower it was placed on the scale.

(c) The manner of commission: Crimes committed systematically, following a certain pattern, crimes of a widespread nature, crimes targeting a specific group of individuals (vulnerable groups, ethnic groups, etc.), attacks committed indiscriminately and/or disproportionately, are all elements that would raise the level of the incident on the scale.

Amongst these criteria, it was decided to give primacy to the nature of the crime and to prioritise alleged violations involving loss of life, physical and mental harm, deprivation of liberty for more than one year and disappearance. In addition, a special focus was given to allegations of property confiscation and forced displacement of more than ten persons, where the allegations appeared in conjunction with allegations involving loss of life, physical and mental harm, deprivation of liberty for more than one year and disappearance.

1.2.2 Sufficiency and Credibility of Information

In addition to determining which incidents were of sufficient gravity for inclusion, the following criteria was used to determine whether the information surrounding an alleged incident was sufficiently complete and credible:

Cases where one (or more) of the sources records information that

(a) expressly alleges or indicates actions related to the conflict that would, if proved, amount to a serious violation of international humanitarian law or international human rights law, and;

(b) Includes at least two out of four of the following:

(1) victim(s) name(s);

(2) alleged perpetrator group affiliation;

(3) location; and/or
(4) date.

1.2.3 Reliability of Sources

Where incident–related information was found to be sufficiently complete and credible, the inquiry then moved on to an examination of the credibility and reliability of the source. The determination of credibility comprised two different inquiries: Firstly an examination of the source itself, and secondly, whether, considered in totality, the information satisfied a minimum standard of proof.

As a general proposition, the clearer and more systematic the methodology and the greater the use of witness testimony and documentary evidence gathered at a local level, the greater the credibility that was accorded to the information cited. Where the source was an organization, the methodology and standing in Nepal and internationally was examined to ascertain adherence to international standards applicable to recording such incidents. Other sources, such as individuals or the media, were assessed on a case by case basis in light of information available regarding that source, their history, their motivation and similar factors.

1.2.4 Standard of Proof

Current international jurisprudence and consideration of the parameters of this project, the standard of proof adopted was that of a "reasonable basis for suspicion."[881] Accordingly, if after undertaking research on a particular incident, and considering the credibility of the source(s) and the sufficiency of the information, it was deemed to have a "reasonable basis" for suspecting that an incident had occurred as described, that incident was catalogued in the TJRA.

It is acknowledged that this standard is less than would be expected in a case brought before a criminal court. However, the purpose of the TJRA and this report is to provide support to the transitional justice process, in particular the work and planning of the two Transitional Justice Commissions or to the bringing of cases before the domestic courts. This standard of proof was considered the most appropriate for fulfilling this purpose.

1.3 IDENTIFICATION OF PERPETRATORS

Given the low standard of evidence employed for this project, it was not considered to be appropriate, nor fair, to suggest individual criminal responsibility for the crimes committed. However, to the extent possible, the group affiliation of alleged perpetrators involved in a reported incident has been identified. This identification has been done without infringing any individual's right to the presumption of innocence. On the same principle, any confidential information that identifies perpetrators, victims and witnesses, has been removed in the public version of the TJRA available on the OHCHR website. This information will be made available to the transitional justice mechanisms and judicial authorities, in accordance with UN policies and practice.

[881] ICC Pre-Trial Chamber II Decision No.: ICC-01/09, 31 March 2010 "Situation in The Republic of Kenya" p. 16, defining the prosecutorial threshold of "reasonable basis to proceed" in order to initiate investigations as requiring "a sensible or reasonable justification for a belief" that a crime has been or is being committed.

1.4 PROJECT IMPLEMENTATION AND CONSULTATION

OHCHR-Nepal ensured transparency and broad based support for this project and was in regular contact with the Ministry of Peace and Reconstruction, the National Human Rights Commission and key members of civil society to provide updates, seek input and to develop strategies for its use. Other relevant Government ministries and security agencies were informed of the project in writing.

Promptly after the commencement of this project in February 2010, the Representative of OHCHR–Nepal and the project leader formally met with the then Minister for Peace and Reconstruction, Mr Rakam Chemjong, to present the project and its objectives. Over the following months, the team was in contact with the Ministry from time to time at the Joint–Secretary level as the work developed, for example to explain and demonstrate an early version of the TJRA when it was available.

Meetings and/or briefings were also held with the National Human Rights Commission (NHRC), diplomatic representatives in Nepal, Amnesty International, the International Center for Transitional Justice (ICTJ), the International Commission of Jurists and a number of Nepali NGOs involved in human rights and justice in Nepal, such as Informal Sector Service Center (INSEC), Advocacy Forum and Centre for Victims of Torture (CVICT).

During the course of the project, interviews and consultations were undertaken with key individuals from the human rights community. The purpose of these consultations was threefold: Initial consultations presented the project and explored possibilities for cooperation, avenues of inquiry and views on securing particular points of information. Subsequent consultations were held to collect further information. Towards the end of the project, consultations sought to engage with civil society on the potential uses of the TJRA and this Report, as well as to cultivate support amongst these groups and interlocutors to further the transitional justice agenda.

Letters introducing the project were sent to the chiefs of institutions comprising the Security Forces (the Nepal Army, Nepal Police, Armed Police Force and the National Investigation Department) and the Unified Communist Party of Nepal (Maoist) (UCPN (Maoist)), inviting them to provide information to assist the exercise. At the time this Report was finalized, only the Armed Police Force had responded. In a letter dated 10 October 2010, the Inspector General of the Armed Police Force reinforced the commitment of the organisation to the protection, promotion and respect for human rights and noted the organisation’s availability to deliberate with the team of personnel working on this project.