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Technical assistance and capacity-building

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*

Summary

The present report is the fifth submitted by the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office in Nepal to the Human Rights Council. The report reflects some positive developments since the previous report (A/HRC/13/73), including practical steps to end impunity, such as in relation to discrimination cases. However, some elements of the peace process have stalled due to an extended period of political stalemate, including the establishment of transitional justice mechanisms crucial to progress in ending de facto impunity for serious human rights violations and abuses, and the finalization of a new constitution. While there has been some progress in undertaking the steps necessary to develop an inclusive society, widespread inequality and discrimination, which were root causes of the conflict, persist. With political willingness to implement practical and concerted human rights policies and action, the peace process in Nepal can continue and the prevailing culture of impunity can be overcome.

* Late submission.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–2	
II. Human rights and political situation	3–5	
III. Office of the United Nations High Commissioner for Human Rights in Nepal	6–9	
IV. Impunity and transitional justice	10–40	
A. General overview	10	
B. Institutional and structural challenges	11–25	
C. Legal challenges	26–35	
D. Encouraging developments	36–40	
V. The fight against discrimination	41–67	
A. General overview	41–43	
B. Institutional and structural challenges	44–53	
C. Legal challenges	54–58	
D. Encouraging developments	59–67	
VI. Conclusions	68–70	
VII. Recommendations	71–79	

I. Introduction

1. The continuing fragility of the peace process in Nepal was demonstrated through a year marked by political stalemate. The low point was the failure of the Constituent Assembly to meet the May 2010 deadline to finalize a new constitution. The mandate of the Assembly was thus extended by a further year, until May 2011. The prolonged impasse has meant that a new Prime Minister has not been elected by Parliament more than six months after Prime Minister Madhav Kumar Nepal agreed to stand down, a situation which remained unresolved at the time of submission of the present report, and many important laws remain pending before the Parliament.

2. This has a direct impact on the human rights situation, in particular progress on two of the key long-standing human rights challenges facing Nepal: impunity and discrimination. The present report will examine the institutional, structural and legal challenges regarding both issues. The report also highlights developments which are more encouraging. In its different sections, the report summarizes the activities of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal (OHCHR-Nepal) to support the promotion and protection of human rights.

II. Human rights and political situation

3. The past year has been one of continuing political uncertainty, with a sustained deadlock between the main parties, leading to ongoing tensions and sporadic instances of violence. Of greatest significance were the May 2010 nationwide protests and six-day *bandh*¹ by the Unified Communist Party of Nepal-Maoist (UCPN-M). The protests were organized to demand the resignation of the Prime Minister and advocate for the establishment of a Government of national unity. They were timed to apply pressure on the Government—the deadline to confirm the new constitution was approaching, raising the possibility that the Constituent Assembly would lose its mandate. Although the initial days of the protests were relatively calm, incidents of violence increased as the *bandh* continued, and frustration with its effects grew, leading to significant counter-demonstrations, some of which led to violent clashes between rival demonstrators and with the police. UCPN-M called off the protests without having achieved immediate results; however, the Prime Minister tendered his resignation to the President the following month. While there have since been 17 unsuccessful attempts to elect a new Prime Minister, the recent Supreme Court intervention should facilitate the process and will hopefully end the political deadlock.

4. Failure to finalize the new constitution led to a last-minute political deal to extend the Constituent Assembly, and the deadline to draft the new constitution, by one year until May 2011. Although a high-level political task force was recently formed with the aim of resolving contentious issues, progress to date has been minimal. The political deadlock has further hindered the country's progress on human rights issues central to the peace process: draft bills to establish transitional justice mechanisms remain pending since their submission to Parliament in early 2010, and proposed anti-discrimination laws and new penal and criminal procedure codes have undergone public consultation but have still not been finalized. However, some positive developments have been possible, notably the establishment of the Special Committee Secretariat and adoption of the specific directives in relation to the Maoist Army combatants.

¹ A *bandh* is an imposed shutdown of all businesses, schools, transportation, etc.

5. Armed criminal groups, operating primarily in the southern Terai districts, continue to have a serious impact on the overall security situation. Attacks and abductions targeting members of the business community, local authorities, political parties and the public are frequent, and ransom payments are often demanded. The security forces have responded with methods that have also raised serious concerns, including numerous accounts of alleged unlawful arrests and extrajudicial killings of the members of such groups, notwithstanding the longstanding commitment Nepal has maintained against the death penalty. The Government emphasizes the importance of its code of conduct for security personnel as well as efforts to improve the situation through negotiation with armed groups and regular law enforcement. However, continued uncertainties surrounding the future constitution, particularly in relation to federalism, are likely to lead to continued tensions across Nepal in 2011, particularly in districts where issues related to possible federal structures are highly disputed between different ethnic and ethno-political groups.

III. Office of the United Nations High Commissioner for Human Rights in Nepal

6. OHCHR-Nepal was established in 2005. The current mandate was renewed in June 2010 for a further year. In addition to its formal mandate under the Agreement between the High Commissioner and the Government of Nepal, OHCHR-Nepal is mandated under the Comprehensive Peace Agreement to monitor respect for the human rights provisions contained in the Agreement.

7. During the reporting period, OHCHR-Nepal continued to monitor the human rights situation in Nepal, regularly deploying monitoring teams across the country. For example, during the Maoist protests in May, OHCHR-Nepal deployed 21 teams nationwide to monitor developments. The office has further continued to increase its focus on the development of a national protection system, with an emphasis on building the capacity of national human rights institutions and civil society. In this regard OHCHR-Nepal is in the process of finalizing a toolkit for human rights defenders and has continued to closely cooperate with the National Human Rights Commission, National Women Commission and National Dalit Commission.

8. In September 2010, OHCHR-Nepal released a summary of concerns entitled “Investigating allegations of extra-judicial killings in the Terai” that documents 39 incidents which resulted in the death of 57 persons between January 2008 and June 2010; in all cases there are credible allegations of the unlawful use of force by security forces.² OHCHR-Nepal has further engaged in ongoing advocacy regarding emblematic cases of human rights violations and abuses, committed both during and after the conflict, which highlight continuing impunity for such crimes. While little progress was made during the reporting period, the conduct of a successful exhumation in one case, following persistent efforts of the National Human Rights Commission and OHCHR-Nepal, is encouraging, although it remains to be seen whether this will lead to the successful prosecution of the perpetrators.

9. OHCHR-Nepal has continued its advocacy with and assistance to the Government regarding the improvement of several draft bills which are pending in Parliament. It is currently engaged in consultations with civil society organizations in order to submit recommendations regarding the human rights implications of the three draft bills for the

² OHCHR-Nepal has lately received detailed comments from the Government of Nepal on the summary of concerns and many of the cases reported therein, and looks forward to further dialogue with the authorities on the issues and recommendations raised.

future Nepalese criminal law system. OHCHR-Nepal has further engaged in the implementation of projects supported by the United Nations Peace Fund for Nepal, including a project to support the future transitional justice mechanisms, a project focusing on reparations for victims of conflict-related crimes, and a project to monitor the compliance of the UCPN-M party with the proper demobilization of former child soldiers from the Maoist Army, in accordance with Security Council resolution 1612 (2005).

IV. Impunity and transitional justice

A General overview

10. Under the 2006 Comprehensive Peace Agreement the parties committed to establishing transitional justice mechanisms to address the crimes and human rights violations perpetrated during the armed conflict, to maintain the rule of law and to guarantee that impunity will not be encouraged. Nevertheless, four years later, not a single individual has been successfully prosecuted by civilian courts for a conflict-related case, despite a long and well-documented list of allegations of violations and abuses committed by the parties to the armed conflict. Furthermore, impunity remains prevalent with regard to human rights violations committed since the end of the armed conflict.

B. Institutional and structural challenges

1. Political factors

11. Since the end of the conflict, successive governments and key political actors have repeatedly made public commitments to end impunity and improve law and order. In practice, principles of accountability and justice have been subordinate to political imperatives.

12. Although the Government has stated that a number of Army and police personnel have faced departmental and other actions for violations of the Military and Police Acts, respectively,³ steps taken to bring to justice individuals against whom there are credible allegations of human rights and international humanitarian law violations and abuses have been inadequate. In fact, a number of such persons have been promoted, and several have been sent to United Nations peacekeeping missions or to trainings abroad. In October 2010, the Government extended the tenure of an Army officer allegedly responsible for acts of torture and enforced disappearance at Maharajgunj barracks in 2003 and 2004. Furthermore, one of the main suspected perpetrators of similar violations in Bardiya district was promoted to a key post in the Army. To date the Government has taken no steps to repeal such decisions or to suspend the implicated State officials pending credible investigations.

13. The Nepalese Army has repeatedly refused to cooperate fully with police investigations and with orders from judicial authorities, including the Supreme Court. A key example remains the case regarding the torture and killing of 15-year-old Maina Sunuwar by four Nepalese Army officers in 2004. The Government reports that the verdict and statements from an Army court martial were submitted to the Supreme Court. However, the Army not only failed to comply with a September 2009 district court order to

³ In its comments on the present report, the Government of Nepal reports that 169 Army personnel, including officers, have faced punishments for violations of human rights and currently more than 100 cases are under investigation. OHCHR-Nepal is seeking further details of these cases.

suspend from duty one of the accused, it also deployed the officer concerned to the United Nations Mission in the Central African Republic and Chad. Although the officer was repatriated to Nepal in December 2009, the Nepalese Army has refused to hand him over to the police despite the existence of an arrest warrant. Similarly, the Nepalese Army has failed to cooperate with police investigations into a March 2010 incident, when Army personnel used unnecessary and illegal force in Bardiya National Park, killing two women and a child.

14. Similarly, there has been no genuine cooperation by the UCPN-M party or its sister organizations with police investigations into conflict or post-conflict cases that implicate party cadres. In September 2010, rather than cooperate with the police investigation into the killing of a businessman in 2007, UCPN-M instead merely suspended one of its central committee members. The party has also offered no support to the police investigation into the 2007 killing of journalist Birendra Shah despite reports that the main persons accused are actively participating in activities of organizations affiliated with the party. Furthermore, in the case of the killing of civilian Arjun Lama during the conflict, a UCPN-M Constituent Assembly member, one of the main accused, has allegedly threatened lawyers and human rights defenders working on the case.

2. Delays in transitional justice

15. One of the key impediments to the rule of law in Nepal, and a justification given for the absence of action on conflict-related crimes, is the belief of many political actors that the transitional justice mechanisms contemplated by the Comprehensive Peace Agreement are to be the *de jure* institutions to deal with conflict-related crimes, and that prior to their establishment no criminal action should be taken against alleged perpetrators of human rights or humanitarian law violations and abuses, and that decisions on their promotions or other rewarding measures should not be impeded. However, a commitment to establish transitional justice mechanisms cannot constitute an excuse for not investigating and prosecuting cases in accordance with the law. The Supreme Court has reiterated this principle through several decisions requiring immediate investigation and prosecution of serious human rights violations committed during the conflict, including enforced disappearances and extrajudicial executions.

16. Bills for the establishment of the relevant mechanisms – a truth and reconciliation commission and a commission of inquiry on disappearances – were introduced in Parliament in early 2010 following extensive consultation with stakeholders but remain pending before its legislative committee, which is considering more than 80 amendment proposals. Furthermore, in their current form the bills do not provide for mechanisms with prosecutorial powers or for the direct handover to the criminal justice system of those cases that reveal crimes under national or international law, limiting their competence to addressing such matters to the Attorney General. In reality the criminal justice system is paralysed pending the establishment of transitional justice mechanisms that themselves may not have the powers to take appropriate action on conflict crimes if laws are adopted as currently drafted.

3. Weakening of rule of law institutions

17. The prevalence of impunity has a negative effect on the criminal justice system and the administration of justice. Although the Supreme Court plays a positive role through important judgments on human rights cases, the failure to hold persons to account for serious crimes erodes public faith in the ability of rule of law institutions to enforce the law fairly and without political bias. Concurrently, the lack of accountability emboldens those who engage in criminal activity and the use of violence.

18. During the reporting period the Nepal Police remained unwilling to proceed with criminal investigations involving the Army, the Armed Police Force, members of the Maoist army or its own members as alleged perpetrators. Police officers consistently refer to the need for policy decisions at the highest level, refusing to proceed with investigations despite a clear legal process to be followed. Similarly, public prosecutors, responsible for advising the police on investigations and presenting cases to the courts, frequently fail to properly utilize established procedures to promote the proper conduct of investigations.

4. Withdrawal of criminal cases, pardon and clemency

19. The fact that principles of accountability and justice are increasingly subordinated to political imperatives is further illustrated by the large number of criminal cases withdrawn by the Government in recent years under pressure from various political parties and ethnic groups.

20. This practice began in 2008 with the initial justification that withdrawing “politically motivated” cases was required by the Comprehensive Peace Agreement. However, it has since expanded to cases occurring after the conflict, with political parties, armed groups and indigenous and ethnic groups demanding that criminal cases against their supporters be withdrawn. Successive governments have agreed to withdraw cases under such pressure, including some carrying serious charges such as murder and rape, and have made proactive offers of amnesties while conducting negotiations with armed groups in the Terai. The practice has continued despite a Supreme Court interim order in 2008 directing the suspension of further withdrawals.

21. The practice encourages political interference in the rule of law, demoralizing police officials, prosecutors and judges working on such cases, contributing to public insecurity by allowing alleged criminals to escape prosecution, and further eroding public confidence in law and order institutions and the Government. It is also of concern that the Constituent Assembly has proposed a provision for the new Constitution allowing the President to grant pardons without specifically excluding clemency for persons who have committed serious human rights violations. The Government reports that the new draft criminal procedure code contains a number of restrictions in relation to withdrawal of cases.

5. Lack of an effective oversight mechanism

22. In countries emerging from conflict, reforming national security institutions is an important step in the transition to lasting peace and democracy, and a vital element in this regard is the establishment of credible and effective oversight mechanisms. However, the existing oversight mechanisms and processes in Nepal do little to challenge impunity.

23. In its summary of concerns on alleged extrajudicial killings perpetrated by security forces (see para. 8 above), OHCHR-Nepal found that committees and special courts formed to inquire into allegations often appeared to serve as instruments to cover up incidents. For example in June 2009, following a fatal shooting by a police officer in Dhanusha district, rather than investigating the incident in application of criminal law procedures, the police established a special court which merely imposed a financial disciplinary penalty on the accused police official.

24. The Ministry of Home Affairs also regularly establishes commissions of inquiry to investigate important incidents involving police personnel. However, these commissions have proven to be flawed on a number of levels: their members are often from the same police forces as those under investigation, creating significant conflicts of interest; the work of such commissions is not transparent; and their terms of reference and final reports are generally not made public. Similarly, a provision in the Army Act provides for court martial procedures that in effect prevent the further prosecution of human rights violations.

For example, the Army has consistently maintained that the decision of its court martial proceedings in the Maina Sunuwar case, which sentenced the responsible officers to temporary suspensions, constituted appropriate punishment.

25. Finally, the failure of the Government to implement National Human Rights Commission recommendations is also a significant obstacle to addressing impunity. In the 10 years since its establishment, such recommendations have been fully implemented by government bodies in less than 9 per cent of cases and only to the extent of providing financial compensation to victims rather than leading to actual prosecutions. The Government reports that it has established a follow-up mechanism to improve the implementation rate of National Human Rights Commission decisions.

C. Legal challenges

1. Criminalization of international crimes

26. The domestic legal framework for prosecution of serious human rights violations and abuses remains inadequate. Serious human rights violations, such as torture, enforced disappearances, and crimes against humanity, which should be prosecuted in accordance to the State's international legal obligations, are still not criminalized under Nepalese law. Nevertheless, the Government is currently drafting a comprehensive penal code with provisions criminalizing torture, enforced disappearances and crimes against humanity.

27. There have been some positive developments in relation to the criminalization of enforced disappearances, with a draft enforced disappearances bill introduced in Parliament in early 2010. Nevertheless, the draft is not fully in accordance with international standards and has yet to progress through Parliament. Furthermore, existing legislation fails to criminalize acts of torture and ill-treatment despite a Supreme Court ruling of 2007 requiring this. The Government announced a new draft bill criminalizing torture, but the document was not made public or tabled before Parliament and there was no consultation during the drafting process.

28. Despite numerous civil society initiatives and a Parliamentary resolution adopted in 2006 directing the Government to accede to the Rome Statute of the International Criminal Court, a proposal for accession has yet to be presented.

2. Establishment of transitional justice mechanisms

29. Despite constitutional requirements and other commitments the transitional justice mechanisms have yet to be established. The Government's early 2010 submission to Parliament of draft bills for the establishment of the two commissions constituted a positive step, but no further progress has been made, with both bills pending at the Legislative Committee stage.

30. Before submission to Parliament, the draft truth and reconciliation commission bill was revised following a series of public consultations held by the Ministry of Peace and Reconstruction in cooperation with OHCHR-Nepal. While notable improvements to the draft resulted, further changes remain necessary to bring it into line with relevant human rights standards, including the addition of provisions to ensure a transparent process for the selection of commissioners and the commission's independent ability to appoint staff. Furthermore, the current text includes amnesty provisions which could undermine State obligations under international law to investigate and prosecute serious crimes under national or international law. The emphasis on a reconciliation approach may undermine the rights of victims and the need for protection of witnesses and victims.

31. The draft enforced disappearances bill submitted in early 2010 has been strengthened compared to previous drafts, including by taking into account recommendations submitted by OHCHR-Nepal and other organizations. However, it continues to show serious weaknesses with regard to the criminalization of the offence and the legal framework to establish a commission of inquiry on enforced disappearance. These weaknesses include the shifting of the burden of proof to the accused; a definition of the offence inconsistent with international law; inadequate sanctions which do not reflect the severity of the offence; a restrictive statutory limitation for the filing of complaints; and the failure to declare enforced disappearance as a crime against humanity. Regarding the future commission, the draft similarly fails to set out a transparent process for the selection of commissioners. The passage of strong and appropriate legislation and the rapid formation of the two transitional justice commissions remains a critical element of the peace process and should be prioritized and expedited.

3. The draft constitution

32. The ongoing constitution-making process offers a historic opportunity to build strong foundations for a State built on respect for human rights and justice, paving the way for dealing with past human rights violations and abuses, and building in guarantees for preventing the repetition of such acts. The section on fundamental rights in the current draft has a number of important strengths that can contribute greatly to the effective promotion and protection of human rights in Nepal. However, a number of contentious areas will need to be addressed during future debates in order to promote accountability within the framework of the future constitution. For example, the draft contains a general prohibition of retroactive criminal laws but fails to recognize an exception for international crimes, as permitted under the International Covenant on Civil and Political Rights.

33. The future constitution should also address the impermissibility of any measure which provides for de facto or de jure amnesties for serious crimes under national and international law, including pardons and the withdrawal of criminal charges, to protect the right of victims to an effective remedy and reparations, and to confirm the supremacy of civilian courts over all offences except those of a purely military nature.

4. The draft National Human Rights Commission act

34. The National Human Rights Commission of Nepal has the potential to play an important role in the fight against impunity, as demonstrated this year with the Dhanusha exhumation (see paras. 36-37 below). However, the Government has not yet committed to creating an institution able to effectively protect and promote human rights, and Parliament has yet to pass the necessary legislation for an effective functioning Commission.

35. A new draft law was registered by the Government at the Parliament in August 2009 but has yet to progress further. While the Government has stated its commitment to making the Commission strong and vibrant, OHCHR-Nepal and the National Human Rights Commission have identified a number of concerns regarding the extent to which the draft provides a strong legal basis for a competent, independent and credible National Human Rights Commission in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). For instance, the draft does not expressly establish an “independent and autonomous” institution and does not provide sufficient operational independence for the Commission, including the ability to directly recruit and appoint its own staff. In addition, the foreseen procedure of appointment of Commissioners is dominated by the executive branch, with no inclusive mechanism to ensure pluralistic representation among the Commissioners. Furthermore, the bill foresees a weak, advisory function of the National Human Rights

Commission rather than stipulating its recommendations as binding and does not obligate Parliament to consult with the Commission on draft laws with human rights implications.

D. Encouraging developments

1. The Dhanusha exhumation

36. In October 2003, five male students were reportedly disappeared by members of the security forces; credible allegations suggested that they had been killed and their bodies buried at a site in Dhanusha district. Despite persistent and continued efforts by the students' relatives to obtain justice, the police continued to oppose the registration of a criminal complaint until September 2009, and did so only after being instructed by the Supreme Court. The police had delayed undertaking the investigation despite detailed directions from the relevant public prosecutor, including on conducting an exhumation.

37. However, on 4 September 2010, nearly seven years after the incident, and following sustained advocacy with the Government, the National Human Rights Commission initiated an exhumation at the alleged burial site together with the police and international and national forensic experts, which led to the recovery of the remains of four human bodies and other pieces of evidence. It is expected that forensic examinations will clarify the fate of the victims.

38. This successful operation demonstrates the important role that the National Human Rights Commission can play in tackling impunity, lobbying for the police to properly discharge its legal function. The exhumation also establishes the precedent that future transitional justice mechanisms do not replace regular legal processes, emphasizing police obligations to undertake investigations into all such pending cases. This progressive step must now be built upon and the police investigation closely monitored to ensure that public prosecutorial instructions are complied with and perpetrators brought to justice. It is also critical that the National Human Rights Commission, with the support of relevant partners, is further empowered to perform its important role, including by properly clarifying its mandate regarding exhumations and the central role of the police in the conduct of such processes.

2. Assistance to future transitional justice mechanisms

39. As it will have only two years to complete its work, it is crucial that once established the truth and reconciliation commission be in a position to plan its work promptly and with reference to objective data. Recognizing both the historic importance and technical demands of such a task, OHCHR-Nepal is implementing a project under the United Nations Peace Fund for Nepal to conduct a data-gathering, compilation and analysis exercise designed to assist the strategic planning and work of the commissions.

40. Having consulted with the Ministry of Peace and Reconstruction and with civil society, in 2010 a team of Nepali and international experts developed a data set of approximately 7,000 incidents from the conflict period where there is a reasonable basis for suspecting that serious violations and abuses of human rights or international humanitarian law have been committed. The compilation of disaggregated data distilled from reports by credible organizations, including OHCHR-Nepal, will provide the commissions with a tool that can be immediately used for strategic planning and for referencing to support investigations. The team has further compiled a reference archive of over 25,000 documents relating to the conflict which may provide the basis for a national archive of materials. The exercise will culminate in a report providing the commissions with key information and research, including guidance on the applicable international law; factual information on the chains of command of the parties to the conflict; and chapters providing

case-based research and analysis of patterns and international law relevant to unlawful killings, disappearances, torture and sexual violence.

V. The fight against discrimination

A. General overview

41. There continue to be considerable gaps in the enforcement and implementation of anti-discrimination laws; marginalized groups, including the Dalit⁴ caste, and victims of gender-based violence face many obstacles to access justice. Caste-based and ethnicity-based discrimination in Nepal is broadly recognized as one of the root causes of the 10-year conflict, and such practices persist throughout Nepali society, particularly in less developed and more remote areas. The Government reports that it has increased expenditure on social measures at the local government level and implemented awareness-raising programmes in addition to enforcing legal safeguards. Nevertheless, Dalits are often denied access to vital resources, such as public water taps, and to temples and other public places. Occupational segregation impairs Dalits' access to employment, restricting them to traditionally assigned jobs and creating societal bars to alternative employment. Those who oppose the practices not only face the risk of being further ostracized, but are also subjected to acts of violence. OHCHR-Nepal has catalogued examples of physical assaults, arson, forced displacement, sexual violence and labour exploitation targeting individuals who have opposed such traditional discriminatory practices.

42. Sexual and gender-based violence also remain prevalent in Nepal. While the Government, civil society and other stakeholders are placing greater focus on these issues, a number of factors, including religious and cultural customs, discriminatory legal provisions and a patriarchal institutional approach to the status of women, inhibit access to justice. Consequently OHCHR-Nepal has found that many alleged cases of gender-based violence are not even reported to the authorities concerned, as victims, fearing rejection by their family and reprisals, are unwilling to register a complaint.

43. The lack of access to justice for victims of caste-based discrimination and sexual and gender-based violence is often a result of the failure by State authorities to treat criminal cases in the manner prescribed by law, and the propensity to resort to "mediation" processes outside the criminal justice system. Such an approach contributes to widespread impunity for the perpetrators of discriminatory acts.

B. Institutional and structural challenges

1. Lack of access to justice: failure to treat offences as criminal acts

44. Under current laws, caste-based discrimination constitutes a criminal offence, subject to imprisonment or fines, as do offences related to violence against women, including rape and the victimization of persons accused of practicing "witchcraft". However, while discriminatory practices remain widespread across Nepal on grounds of caste, gender and sexuality, the paucity of prosecutions of these offences demonstrates both the lack of access to justice for victims and the failure on the part of State authorities, particularly the police, to adequately deal with such offences as crimes.

⁴ According to beliefs in Hindu culture, Dalits are considered to be "impure and polluting" and stigmatized as "untouchable".

45. When prima facie evidence that a crime has been committed exists, the police are obliged to register a case of caste-based discrimination ex officio, even when no formal complaint is registered by a victim. However, the police usually require victims to provide direct testimony before they will consider registering a case, and even when a victim does come forward, the proper registration of the case by the police remains a challenge. For example, in September 2010 in Kanchanpur district a “higher caste” man allegedly subjected a Dalit woman to a serious assault and later burned down her house, destroying most of her family’s possessions, all because she was Dalit. Rather than investigate the case, the police sent the victim to the local administration to acquire written confirmation of the property destruction. The police only registered the case following the return of the victim’s husband to the village from abroad, and then only on public offence charges and not the more serious criminal charges of discrimination, arson and attempted rape. In November 2010, the alleged perpetrator set fire to what remained of the victim’s property, leaving two of her family members injured.

46. With regard to gender-based violence, both sexual assault and violence against women accused of practicing witchcraft are also criminal offences that require the police to register a case ex officio. However, instances of the police taking proactive steps in this regard are rare, and even when a victim manages to report a crime to the police, there are frequent examples of the police delaying the registration process, including by insisting upon a medical report, even though this is not a legal requirement for the registration of a case. In February 2010 a 10-year-old Dalit girl was allegedly raped in Kailali district; although a relative submitted a complaint to the police two days later, the case was not registered by the police within the 35-day statute of limitations period, and no criminal action was taken against the alleged perpetrator.

2. Further shortcomings in the criminal justice system

47. In the rare instances where investigations or prosecutions are undertaken in discrimination cases, progress through the criminal justice system tends to be slow and ineffective. In some instances the shortcomings may be of a technical nature: for example, the lack of police officers trained to properly assist victims of gender-based violence and deal with cases involving caste-based discrimination. The actions of law enforcement officials reveal a lack of gender sensitization and a failure to follow due process of law. In the Nepali context, where traditional discriminatory practices have been accepted as a normal aspect of societal life for centuries, clear and detailed instructions and procedures for handling the issue, whether or not complaints have been submitted, are essential if progress is to be made.

48. In the rare instances which have led to a court decision, the perpetrators have rarely actually served a custodial sentence. This is largely due to the failure of the police to circulate arrest warrants or to take proactive steps to locate the perpetrators. For example, in a landmark ruling in January 2009 in Baitadi district, a person was found guilty of practicing untouchability and was sentenced to two years’ imprisonment and fined. However, at the time of writing, more than 15 months after the verdict was upheld on appeal, the perpetrator not only remained at large, with his fine unpaid, but was actually nominated by a Government ministry to a public position. Two years after the district court judgment, the district police office had still failed to circulate arrest warrants to the police in other districts. Another perpetrator found guilty by the Baitadi district court in a similar case in March 2010 also remained unpunished at the time of writing.

49. The existence of national human rights institutions with specific mandates to focus on such issues, including the National Dalit Commission and the National Women Commission, as well as the National Human Rights Commission, presents additional possibilities for action to be taken to address issues of discrimination. However, while 2010

has seen some positive developments in this regard, including efforts by the Dalit and Women's Commissions to engage and respond to issues at the local level, all three Commissions remain significantly under-resourced and the implementation rate of their recommendations remains low.

3. Resort to measures beyond the criminal justice system: "mediation"

50. Rather than register cases as required by law and initiate a formal criminal investigation, it is far more common for the police to encourage the victims or complainants to seek informal settlements to criminal discrimination cases, normally through a "mediation". Although such processes take place outside the criminal justice system, it is usually the police or local authority figures who encourage victims to seek a settlement with the alleged perpetrator, often under pressure from local political parties, particularly if a party affiliate is involved. For example, in relation to the February 2010 rape of a 10-year-old girl mentioned above (para. 46), upon pressure by local politicians (due to the affiliations of the perpetrator's family) the case was settled through the informal payment of compensation following a mediation brokered by the district police office. In the discrimination case of attempted rape and arson of a Dalit woman reported above (para. 45), the victim received 40,000 Nepalese rupees as "compensation", following mediation by the district police. The lack of clear guidance on the procedures for such cases certainly contributes to this practice, as do misguided beliefs that this is necessary to maintain "social harmony" within the community.

51. While the use of mediation mechanisms can complement the law in specific circumstances, in cases of serious criminal offences such as caste-based discrimination and gender-based violence, they contravene the criminal law of Nepal and the victim's right to an effective remedy under international human rights law. As such these practices perpetuate a cycle of discrimination, violence, indignity and impunity.

4. Socio-economic and cultural barriers to justice

52. In addition to the role played by the authorities, there are numerous socio-economic and cultural barriers to accessing justice. Long-standing social taboos, fear of being ostracized within the community, lack of information, geographic remoteness and financial challenges deter victims from filing complaints with the police and seeking legal redress.

53. Victims of caste and gender-based discrimination are often from the poorest strata of Nepali society. They generally lack access to information regarding their rights and face inherent difficulties, including language barriers, in gaining access to the police authorities to initiate a criminal case. Furthermore, Dalits also face perceived or actual threats to their security when considering or undertaking action or challenging the discriminatory practices; most are trapped in unequal power relationships and a dependency on neighbours from higher castes. The risks of initiating action include social ostracism, economic boycott and actual physical violence. For example, in May 2010 a Dalit woman sustained serious head injuries in an attack by a higher-caste man over shared use of a public water tap. Furthermore, despite a 2008 government directive "freeing" *Haliyas* from their bonded labour relationships with landowners, many remain in the same debt labour agreements perpetuated for generations, fearing economic destitution if they leave.

C. Legal challenges

1. Criminalization of caste-based discrimination

54. Both the Interim Constitution and the Civil Code criminalize discrimination on the basis of caste, penalizing, with an imprisonment or fine, acts that perpetuate untouchability.

Earlier legislation, such as the 1963 General Code, attempted to end caste-based discrimination; however, the current legal framework has proved inadequate to effectively curb caste-based discriminatory practices or to hold perpetrators to account. Due to the vagueness of the provision in the Civil Code, government officials fail to view specific acts of discrimination as crimes and consequently do not take appropriate action. The prescribed penalties and 35-day statutory limitation are insufficient, and there is no provision for the payment of compensation, despite this being a constitutional requirement. Although the Legal Aid Act provides for free legal aid and immediate relief for victims with limited financial resources, the Act is poorly enforced and in most cases the victims are unaware of such support.

55. In this light the submission of the draft bill on the elimination and punishment of caste-based discrimination and untouchability crimes to Parliament in July 2009 is a positive development towards properly codifying offences and the steps that must be taken. The draft bill details acts which amount to discrimination and criminalizes incitement to commit such offences and the obstruction of investigations, and increases punishment for perpetrators who hold public office and the compensation of victims. That said, aspects of the bill require strengthening for the act to be fully effective. OHCHR-Nepal has identified a number of recommendations that will strengthen the draft bill in line with international human rights law and best practices.⁵ These include: incorporating a full classification of acts that amount to discrimination, indicating the seriousness of each offence and prescribing punishments accordingly; detailing the specific role and responsibilities of the police with regard to undertaking investigations; extending the statute of limitation to at least one year to take into account the challenges in filing a complaint; and setting out positive State obligations to actively enforce the act, including the requirement to educate State officials and the general public about the act and the illegality of caste-based discriminatory practices.

56. While the National Dalit Commission has been operational since 2002, it was established on the basis of a governmental proclamation rather than through enabling legislation. The absence of a full-fledged legislative basis remains an additional obstacle to the proper development and functioning of a national mechanism for addressing caste-based discriminatory practices. A draft bill was registered with the Parliament in July 2009 but no progress has been made towards its adoption.

2. Gender-based discrimination and violence

57. In relation to sexual offences, Nepalese law definitions focus on “consent” rather than on acts committed, and limit such acts to penetrative sexual intercourse. Furthermore, the statute of limitations in the Civil Code remains 35 days from the date of the commission of the crime, a wholly inadequate time frame considering the gravity of the offence, lack of access to the criminal process for many and the cultural barriers to reporting such cases. The Supreme Court issued a directive order in 2008 to the Government to extend the statute of limitations, and while the Government reports that it is drafting a bill, this has yet to be finalized.

58. Legislation pertaining to acts of violence against persons accused of practicing witchcraft also remains inadequate despite amendments to the Civil Code in September 2006 which classified such acts as a criminal offence. The provision fails to differentiate between the gravity of offences and does not provide redress for injury or loss suffered by victims. In response, the National Women Commission drafted a bill to criminalize and

⁵ In its comments to the present report, the Government announced that suggestions for improving the bill will be incorporated as appropriate.

punish such acts and submitted it to the Ministry of Women, Children and Social Welfare in August 2010. The draft penal code further includes provisions criminalizing witchcraft and other gender-discriminatory social practices.

D. Encouraging developments

1. Positive decisions by district courts in the Far West region of Nepal

59. The registrations of caste-based discrimination cases by the police, and groundbreaking court decisions in the Far West region, where discriminatory practices remain prevalent, represent encouraging developments. Such developments follow concerted advocacy by a coalition of human rights organizations, with the support of OHCHR, which engaged in joint missions and initiatives, including press statements, with the National Dalit Commission and civil society.

60. The Baitadi district court sent a strong message on the illegality of “untouchability” practices by issuing two decisions on caste-based discrimination cases in 2009 and 2010, in which they notably cited relevant international instruments. In neighbouring Darchula district, the court issued its first verdict on caste-based discrimination charges in July 2010 and in Kanchanpur district, also in the Far West region, court proceedings are ongoing in another case relating to a May 2010 assault of a Dalit woman over access to water. District court decisions have also been upheld at the appellate court level in the region, with custodial sentences for perpetrators confirmed.

61. These steps are to a certain extent exceptions; nevertheless, they demonstrate the potential role of the criminal justice system in the fight against discriminatory practices and in curbing impunity. While significant problems remain – for example, only one perpetrator has actually served a custodial sentence to date – the activities of particular judges to implement anti-discrimination laws in remote areas, in the face of significant traditional societal pressures, should be commended and supported.

2. Action by civil society and national institutions to address discriminatory practices

62. The development of civil society networks that focus on tackling discriminatory practices, often through innovative campaigns and targeted activities, has contributed both to improved understanding of the issues and to reducing specific discriminatory activities. In Baitadi district a group of 23 civil society organizations, known collectively as the Caste-Based Discrimination Elimination Network, have been working together for more than three years in the fight against discrimination. Since a series of violent incidents during the *Dashain* religious festival in 2007, in relation to traditional practices performed by Dalits, the network has run awareness-raising campaigns and organized workshops for key actors in the district. Incidents reduced significantly in 2008 and 2009, and in 2010 no incidents were recorded.

63. During 2010 the National Women Commission and the National Dalit Commission also extended their engagement at the local level. The Dalit Commission has increased collaboration with local-level networks and the Women’s Commission has established a national network for the monitoring of women’s rights and is present in 30 districts to date. OHCHR-Nepal is supporting both commissions in strengthening these networks and their overall capacity to monitor and investigate human rights.

3. Progressive decisions of the Supreme Court

64. The Supreme Court has recently delivered several important decisions on discrimination and gender-based violence cases, which contain clear directive orders to the Government to amend legislation accordingly. For example, in February 2010 it delivered a

decision requiring the establishment of fast-track courts to review cases involving violence against women and children and ordering the authorities to undertake steps necessary for the creation of such courts. The Government has stated that a task force has been formed to implement the directive order for establishing fast-track courts.

65. The Supreme Court has also taken positive steps regarding the alleged gang-rape of a female police officer by colleagues in Achham district in September 2009. Although the District Attorney's Office had decided not to prosecute three of the six alleged perpetrators, on 1 December 2010 the Supreme Court ordered the District Attorney's Office to bring charges against those three suspects. In its decision, the Court emphasized that the power to halt criminal proceedings is limited by the victim's right to an effective remedy, a decision that is significant for future reform of the criminal justice system. While the progressive judgments of the Supreme Court should be commended, the lack of progress in implementing decisions minimizes their impact.

4. Potential role of the Government in combating gender-based violence

66. Although legislation to criminalize domestic violence was enacted in 2009, it did not come into force until September 2010 when the Government finally passed the necessary regulations. As a result persons accused of domestic violence can now be tried and punished in court, although it remains to be seen whether the law will be properly implemented.

67. During 2010 the Office of the Prime Minister and Council of Ministers made progress in the implementation of the National Plan of Action on the Year against Gender-based Violence, including: the establishment of gender-based violence desks in most districts; the establishment of service centres and community centres for the protection and rehabilitation of victims; the inclusion of the topic of gender-based violence into the police training curriculum; and the development of standard procedures, supported by civil society and OHCHR-Nepal, for the prevention of and response to gender-based violence by State actors, defining respective roles and responsibilities. The Government has finalized the National Plan of Action on Security Council Resolutions 1325 and 1820, making Nepal the first country in South Asia to take such a step.

VI. Conclusion

68. **Despite the political stalemate, Nepal has managed to preserve the main achievements of the peace process. While the Constituent Assembly failed to promulgate the constitution by May 2010, an agreement to extend the mandate was reached and suggestions of presidential rule or a declaration of a state of emergency did not materialize. Through the adoption of more conciliatory approaches, the political parties of Nepal would have all the elements necessary for the Constituent Assembly to complete its work by May 2011.**

69. **The present report raises significant concerns regarding the prevailing impunity for human rights violations and highlights the effect the political situation is having on progress towards human rights commitments. However, OHCHR-Nepal notes some progress in these areas, and the fact that important draft bills dealing with issues to address impunity and strengthen the national human rights protection mechanism are currently pending before Parliament. Initiatives taken by national human rights institutions and important decisions by the Supreme Court and courts at the local level demonstrate the potential role of an effective national protection system in curbing human rights violations and impunity. Similarly, efforts undertaken**

by the Government to implement the national plans of action on gender-related issues should be commended.

70. Ensuring proper accountability for human rights violations will remove substantial obstacles to the enjoyment of human rights, foster the rule of law and ultimately strengthen democracy. With the necessary political will to design and implement practical policies and undertake concerted actions, and with law enforcement agencies that have the capacity and determination to fully discharge their legal duties, Nepal will be in a position to overcome the problem of impunity that undermines its institutions and the stability of the peace process.

VII. Recommendations

71. The High Commissioner for Human Rights urges the political parties in the Constituent Assembly to make concrete progress on drafting the new constitution and to adopt important pending draft legislation consistent with the Government's commitments under international law. The adoption of a new constitution and the bills for establishing transitional justice mechanisms should not be contingent on the resolution of other contentious political issues. Further legislative and practical measures are encouraged, including the adoption of comprehensive legislation criminalizing untouchability and the extension of the statute of limitation for rape.

72. Acknowledging the fundamental role played by national law enforcement bodies for the protection of human rights, the High Commissioner calls on the Government to ensure that the relevant actors conduct prompt, thorough and independent investigations into human rights violations, regardless of the status of suspected perpetrators. Prosecutions and criminal investigations into serious conflict-related crimes should be continued regardless of the future establishment of transitional justice mechanisms.

73. The High Commissioner calls upon the Nepalese Army and the Unified Communist Party of Nepal-Maoist to respect the rule of law and undertake efforts towards promoting accountability for violations committed during the conflict, in particular by respecting the independence of the judiciary and implementing its decisions.

74. As a consequence of the large number of allegations of abuse against members of the security forces, the High Commissioner recommends the expeditious establishment of an external civilian oversight mechanism for the security forces. Similarly, the Government should enforce appropriate sanctions in cases where security forces fail to complete or cooperate with criminal investigations, to implement court decisions, or to implement the recommendations of national human rights institutions.

75. The High Commissioner calls upon the Government to undertake further efforts to increase the capacity of all State bodies which form the criminal justice system, particularly regarding the proper conduct of criminal investigations, and to improve the understanding of situations in which the resort to informal justice mechanisms constitutes a violation of international human rights law.

76. The High Commissioner recommends that the Office of the Attorney General fully discharge its legal obligation to supervise criminal investigations by the police. At the same time the Government should pursue its commitment to the independent and effective functioning of that Office.

77. The High Commissioner encourages the Government to revise the draft bill on the National Human Rights Commission to provide a strong legal basis for a competent, independent and credible national institution in accordance with the Paris Principles, and to improve the rate of implementation of National Human Rights Commission decisions.

78. The High Commissioner encourages the Government to strengthen the key provisions of the draft bill on the elimination and punishment of caste-based discrimination and untouchability crimes in line with international standards, and to ensure its prompt passage.

79. The High Commissioner further requests the Government to implement its commitments to strengthen protection for victims of caste-based discrimination and sexual and gender-based violence, including by strengthening the National Women Commission and the National Dalit Commission, proceeding with draft legislation to make the latter a statutory authority, and ensuring access to justice and protection for victims and witnesses.
