



April 2011

Advocacy Forum and the Redress Trust

Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence

Introduction

Advocacy Forum (“AF”) and the Redress Trust (“REDRESS”) welcome the opportunity to consider and provide comment on the draft Criminal Code 2066 BS, Criminal Procedure Code 2066 BS and Sentencing Bill 2066. We contend that we are well placed to comment on the draft legislation; AF is a Nepali non-governmental organisation (NGO) which works to promote human rights and rule of law and REDRESS works internationally to assist victims of torture and related international crimes to obtain justice and reparation.

In light of our experience in both campaigning for rights of the victims of human rights violations, as well as working to reform the criminal justice system, we respectfully make the following considered comments and recommendations relating to the draft legislation, particularly from the perspective of defendants and victims¹ of enforced disappearances and sexual violence.

Below follows a short summary of key recommendations in relation to the draft Criminal Code, draft Criminal Procedure Code and draft Sentencing Bill. In Annexes follow a detailed analysis from the perspective of the right to fair trial (Annex 1), the crime of enforced disappearances (Annex 2) and finally in relation to the crime of sexual violence (Annex 3).

¹ The term “victim/s” in this comment is used to include the sense employed by the Human Rights Committee in *Yasoda Sharma v. Nepal* and *S. Jegatheeswara Sarma v. Sri Lanka*, as referring to any person negatively affected by the disappearance, including, but not limited to, family members: No.1469/2006 (6 November 2008) UN Doc. CCPR/C/94/D/1469/2006 available at <<http://www1.umn.edu/humanrts/undocs/1469-2006.pdf>> and No. 950/2000 (31 July 2003) UN Doc. CCPR/C/78/D/950/2000 available at <<http://www1.umn.edu/humanrts/undocs/950-2000.html>>; see also: ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 at para 8, available at <<http://www2.ohchr.org/english/law/remedy.htm>> accessed on 10 March 2011.

SUMMARY OF KEY RECOMMENDATIONS

Draft Criminal Code

Fair Trial Perspective

- Amend **definition of “judge” and “court”** to ensure that **only judicial bodies are empowered** to adjudicate criminal cases in line with the doctrine of separation of powers and to ensure the impartiality of the justice system (s3).
- Wherever the laws of Nepal require that a procedure takes place **“in court” or “before a judge”** it means that the matter should enjoy the **full, undivided and uninterrupted attention** of the **presiding judge** (s3).

Enforced Disappearance Perspective

- We recommend the adoption of a Nepal-specific adaptation of the definition of “enforced disappearance” as contained in the International Convention against Enforced Disappearances (“Disappearance Convention”).²
- The criminalization of command liability for certain offences is welcomed. We submit that **chain of command criminal liability should be applicable to all offences in Chapters 15 (Unlawful Detention) and Chapter 16 (Disappearances)**. In addition, we recommend that it be made clear that the current definition includes criminalization not only of direct acts of disappearance, but also the **criminalization of persons in command who order, incite, instigate, or facilitate** another party to commit a disappearance, or **officials who indirectly support or acquiesce** to the occurrence of a disappearance. ‘Officials’ shall mean **State officials** and particular to the Nepali context, **non-State officials, acting as if they were State officials**.
- We further recommend that in the case that an act of disappearance is part of the **widespread or systematic attack** targeted against civilian population, it shall be **defined as a crime against humanity** as per the Statute of International Criminal Court.³
- To truly recognize both the continuous nature and seriousness of this crime as a crime against humanity,⁴ we recommend the **removal of any limitation period** in relation to making complaints pursuant to Chapter 16: Disappearance of Persons **whilst a person remains disappeared**. In the case that **the person reappears**, we recommend **increasing the limitation period to one year**.
- A minimum penalty for the crime of Enforced Disappearance should be introduced.
- We also take this opportunity to urge the Government of Nepal to consider becoming a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance (“Enforced Disappearances Convention, ICAED”) that entered into force on 23 December 2010.

²International Convention for the Protection of All Persons from Enforced Disappearance 2006, General Assembly Resolution 61/177, UN Doc. A/RES/61/177 (2006), adopted on 20 December 2006.

³ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

⁴ Enforced Disappearance is defined as a crime against humanity at Article 5 of the Rome Statute of the International Criminal Court; n3, above.

Sexual Violence Perspective

- The definition of rape should impose on the perpetrator the onus to prove, on the balance of probabilities that the victim gave her/his unequivocal and voluntary consent to engage in the sexual act.
- The definition of rape should include marital rape and be gender-neutral; i.e. include protection for men and boys and transgendered persons who may also be victims of sexual assault.
(2) If any person commits sexual intercourse with any person, including marriage partner, without his/ her unequivocal and voluntary consent or commits sexual intercourse by taking the consent of any person sixteen years of age or under shall be deemed to have committed "Rape".
- The definition of sexual intercourse should be broadened to include any unwanted penetration of the body by an object to ensure that situations in which objects other than bodily organs are used to commit the offence to ensure that victims are protected from all forms of rape.
- Amend prohibition to commit sexual harassment. The current section criminalizes a wide range of conduct. We recommend dividing the section into two: sexual assault, defined as unwanted physical sexual contact, with a more significant penalty, and sexual harassment defined as any indirect conduct of an unwanted sexual nature.
- The limitation periods and penalties for child marriage (S175) and child sexual abuse (S226) must be amended to reflect the seriousness of these crimes and the particular vulnerability of child victims to intimidation and oppression.

Draft Criminal Procedure Code

Fair Trial Perspective

- Legal representation: The proposed provisions regarding detainees' rights to legal counsel (section 13 and section 130) are not compatible with international standards, Nepal's constitutional guarantee and the case law that the Supreme Court has developed. Upon arrest, the arresting official shall notify the detainee's nominated legal representative and permit a confidential communication to take place. If the defendant's legal representative is uncontactable or the detainee has no nominated legal representative, the official shall contact the court-appointed lawyer or lawyer provided by legal aid committee by telephone and permit a confidential communication to take place. The said court appointed lawyer shall be available 24 hours per day (s13).
- Interrogations shall take place in the presence of a *defence lawyer or other nominated person*; further, all interrogations shall be recorded in audio or video form (s14) to ensure an accused's right to silence is respected and that the risk of torture is reduced (s14).
- There shall be a presumption in favor of bail unless the court is satisfied that there are reasonable grounds to believe that there is a risk of flight, interference with evidence or re-offending by the accused, as per the Human Rights Committee conclusions on the right to liberty in *Van Alphen*⁵ (¶ 67).
- Defendants shall not be required to make a statement at the jail-bail hearing (s109), nor shall a defendant be required to produce any evidence (s99) prior to the close of the prosecution case. A defendant, *only* after hearing the full evidence against him/her, may choose to waive the right to silence and may choose to call evidence. No negative inferences may be drawn from an accused's choice not to call evidence or make a statement; consistent with the practical

⁵ *Van Alphen v The Netherlands* No 305/1988 (1990) UN Doc CCPR/C/39/D/305/1988.

application of two of the fundamental aspects of a fair trial: the right to silence and the presumption of innocence.⁶

- Judges shall perform all judicial tasks personally (s180).

Combined Victim Perspective

- We recommend the inclusion of a positive obligation on the Nepal Police, or other relevant authority, to register *any* complaint made pursuant to section 4. If an official refuses to register a complaint as a First Information Report (“FIR”), the official must provide the reasons for such decision to the complainant *in writing*, a failure to do so shall result in departmental action.
- The Government Attorney should hold the decision-making power and political responsibility in relation to non-investigation of all complaints.
- A special investigative team should be established and utilized wherever there is an apparent conflict of interest between the perpetrator and the investigating authority.
- Guidelines for witness protection measures should be included in the legislation.

Draft Sentencing Bill

Fair Trial Perspective

- Imprisonment shall only be imposed where no other penalty would be appropriate; it shall be a penalty of last resort, in line with the right to liberty (s15).
- Sentencing Guidelines outlining aggravating and mitigating factors in any case shall be enacted as per the Chapter 3 of the previous draft of this Bill (2066BS).
- If an offender is unable to pay the fine immediately, the court shall order to deposit the fine in installments within a stipulated time to ensure that economically disadvantaged Nepalis are not discriminated against, whilst also reducing the stress on the prison system and saving financial and other government resources (S23).

Combined Victim Perspective

- Penalties for rape are significant in the draft Bill; other sexual offences should have similarly strong penalties to ensure consistent deterrence of offenders.
- The Victim Relief Compensation Fund should be established as a matter of priority to ensure that victims are not re-traumatized by having to pursue compensation through the courts.

⁶ Articles 24(7) and 24(5) of Interim Constitution of Nepal 2063 BS (2007 AD) available at <<http://www.supremecourt.gov.np/ic.pdf>> (The “Interim Constitution”); Articles 14(3)(g) and 14(2) of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, ratified by Nepal May 1991) 999 UNTS 171 (ICCPR) available at <<http://www2.ohchr.org/english/law/ccpr.htm>> (“ICCPR”).

Our detailed comments from Fair Trial Perspective

DRAFT CRIMINAL CODE

s3 - Definition of “Court” and “Judge”

In accordance with the principle of ‘separation of powers’, the third preamble of the Interim Constitution⁷ asserts the importance of an independent judiciary. Further, Articles 33 and 100 of the Interim Constitution require the Nepali judiciary to be independent and the government to adopt a political system respecting that independence.

The currently proposed definitions do not comply with the principle of the separation of powers and thereby undermines the rule of law in Nepal. As per AF’s Public Interest Litigation petition of 26 April 2010 to the Supreme Court, we recommend that the definition of “court” and “judge” comply with the above principle and specifically limit the exercise of judicial powers to judicial officers and tribunals only; expressly stating both are independent of the executive and legislative branches of government. This definition will also ensure the Nepali definition is in accordance with the meaning of ‘tribunal’ as defined by the Human Rights Committee.⁸

Chief District Officers & Judicial Power

This amendment is particularly important as Nepali law currently provides for Chief District Officers (CDOs) to adjudicate criminal cases as well as take responsibility for the District Police Office.⁹ As the CDO plays the leading role in administering each district we submit that it is impossible for them to be seen to be impartial. In the first place criminal cases are brought in the name of the Government of Nepal. To have a representative of that government as a judge in such case is clearly problematic. We rely on the common law principle that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’.¹⁰ Further, it is likely that each case over which a CDO presides will incorporate a substantial quantity of police evidence. To have the local head of the police evaluating such evidence places him or her in an impossible situation. It also makes the CDO concerned partial; s/he has an interest in upholding the values of the force. For these reasons we contend that CDOs are neither independent, nor appear to be so, and therefore our proposed limitation of the definition of ‘judge’ and ‘court’ are necessary to ensure Nepal conducts a fair trial for each citizen.

Undivided Attention of the Judge

Further, the practice of a single judge hearing more than one case at the same time erodes the guarantees of a fair trial contained in the ICCPR and the draft Criminal Procedure Code. In order for a tribunal to be considered “competent” the judge must give his/her personal and undivided attention to the proceedings at hand. Therefore we recommend that an additional section be added to the definition

⁷ Interim Constitution of Nepal 2063 BS (2007 AD) (The “Interim Constitution”) available at <<http://www.supremecourt.gov.np/ic.pdf>>.

⁸ The Human Rights Committee, ‘General Comment 32: Right to equality before courts and tribunals and to a fair trial’ 23 August 2007 [18]: “The notion of a ‘tribunal’ in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.”

⁹ CDOs chair the District Security Committee; CDOs have the duty to administer the jail in their jurisdiction and Section 16 of *Jail Act 2019*. Each CDO is therefore the head of their district’s jail and CDOs are the local officers responsible for issuing detention orders as provided by *The Public Security Act 2046*.

¹⁰ *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256 per Hewart CJ (United Kingdom)).

of judge to ensure that wherever the laws of Nepal require that a procedure takes place “in court” or “before a judge” it means that the matter should enjoy the full, undivided and uninterrupted attention of the court.

General Principles of Criminal Justice

s8 - No Person Shall be Prevented from a Fair Trial

The Government of Nepal (GoN), by enacting Section 9 of the Treaty Act 2047BS,¹¹ has guaranteed that treaty provisions will take precedence over domestic law in case of conflict.

The current drafting of s8 incorporates only the element of competency as required by Article 14(1) of the ICCPR.¹² Article 14(1) provides that a fair trial must be ‘...by a *competent, independent and impartial* tribunal established by law.’ To ensure that the new Criminal Code complies fully with Nepal’s international obligations and human rights norms, we recommend incorporating the complete ICCPR definition of what constitutes a fair hearing; this is particularly pertinent currently in Nepal where CDOs, as an important part of the Executive, also have judicial power in criminal cases, which is a clear breach of Article 14 (1) as submitted above.

Additional Section: s10A - Presumption of Innocence

Article 14(2) of the ICCPR enshrines the principle that everyone has the right to be presumed innocent (and treated as such) until they are convicted, following a fair hearing by an independent, competent, and impartial tribunal.¹³ As a fundamental corollary to presumption of innocence, we recommend the addition of an explicit section clarifying that the burden of proof in relation to each element of an offence shall lie with the prosecution.

Whilst there are provisions of Nepali law that make coerced confessions inadmissible, these place the burden of proof (of proving torture) on the defendant.¹⁴ In line with international practice,¹⁵ we recommend that the legal burden of proof in relation to admissibility of evidence should lie with the prosecution. We submit that once the defendant has raised the issue of evidence being obtained through coercion or torture (the evidentiary burden), that the prosecution shall have to prove on the balance of probabilities (that it is more likely than not) that such evidence *was not* obtained by torture or coercion. For example, the Australian *Evidence Act 1995* provides that:

¹¹ *Treaty Act 2047*: s9(1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision 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.

¹² Article 14(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, ratified by Nepal May 1991) 999 UNTS 171 (ICCPR) available at <<http://www2.ohchr.org/english/law/ccpr.htm>> (“ICCPR”).

¹³ ICCPR, above (n 6), Article 14(2).

¹⁴ See *Sachin Shrestha v The Nepal Government* NKP 2063, Case: Drugs, Vol. 2, Pg 183 and Advocacy Forum and others, ‘Review of the implementation of recommendations made by the Special Rapporteur, Manfred Nowak, after his mission to Nepal in 2005’, (Kathmandu 2009), available at http://www.advocacyforum.org/SubmissiontoNowak_28_August_Final.pdf, accessed 28 June 2010.

¹⁵ Australian Common Law Provision: “Confessions are inadmissible unless the prosecution satisfied the judge on the balance of probabilities that the confession was made voluntarily by the accused: ‘Confessional Evidence’ Peter Zahra, SC, last updated 2 November 2010 available at <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_confessionalevidence> accessed on 23 February 2011.

s84 (1): Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, was not influenced by:

- (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or*
- (b) a threat of conduct of that kind.*

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.¹⁶

If the Parliament enacts a law in which the defendant is clearly obliged to carry the legal burden, we submit that it must be discharged on a lesser burden; the balance of probabilities. This lower standard of proof is necessary to balance the power and resources of the State compared to the individual.

Presumption of Innocence to be Evident in Drafting

s94 - Prohibition to harbor accused or offender

The definition of "offender" in this section clearly breaches the presumption of innocence by including suspected/accused persons as "offenders:"

Current draft: S94 (1) No one shall harbor any accused or offender with intention to save from being arrested or punishment pursuant to law.

Explanation: For the purpose of this section "offender" shall mean suspect, accused or convicted person of the court to an offence.

We do not take issue with the creation of this crime. We do; however, request that the 'Explanation' section be amended to remove the term 'accused' from the definition of "offender". Firstly, sub-section 1 clearly identifies harboring 'accused' persons as an offence. Therefore, including 'accused' persons as a type of "offender" by definition is unnecessary as the crime of harboring an accused has already been created. The Explanation further offends the accused's right to a presumption of innocence by including accused persons in the definition of offender; we consequently make our recommendation to amend the Explanation section.

¹⁶ s84(l) Australian *Evidence Act 1995* available at <<http://www.comlaw.gov.au/Series/C2004A04858>> accessed on 24 February 2011.

s3 Definitions of “Judge” and “Court”

As per our comment in relation to this section of the draft Criminal Code above, we recommend the definition of the terms ‘court’ and ‘judge’ be restricted to judicial bodies only.

s9 - Investigating Authority Power to Arrest

Right to Liberty

In accordance with Article 9(1) of the ICCPR on the right to liberty and protection from arbitrary arrest, a person should only be arrested if necessary and in accordance with the law. The Human Rights Committee has interpreted this right so that the only pre-trial detention consistent with Article 9 is that ‘to prevent flight, interference with evidence or the recurrence of crime’. We therefore recommend amending grounds for arresting a person pursuant to sub-section (1) as follows:

If an investigating official making investigation into an offence enlisted under Schedule 1 or 2 suspects on reasonable grounds that a person is involved in such offence, he/she may, if it is necessary to prevent flight, interference with evidence or the recurrence of crime, apprehend and take him/her into custody.

Maximum Investigation Time

Currently, the maximum time to bring a detained person before the court is 24 hours plus travel time.¹⁷ This time limit is routinely ignored and arrest records falsified.¹⁸ We submit that deterrent measures such as individual penalties for the arresting officers who fail to comply, in addition to making any evidence gathered after the time limit inadmissible, will promote a change in the law-enforcement culture.

We propose an additional section be inserted after sub-section (2):

In the event that a person arrested and held in custody is not produced in court within 24 hours of arrest (without reasonable excuse), the court shall:

- a) Hold the relevant police officials in contempt of court; and*
- b) Decline to admit any statements alleged to have been made by the accused during his time in custody as evidence.*

Onus on Authorities to Contact Lawyer

The way this section is currently drafted gives great potential for Police to disregard their obligations. We recommend a more onerous provision to ensure that a positive obligation lies on the arresting officer to facilitate access to a lawyer:

*Amended s9(15): Upon arrest, the arresting official shall contact the detainee’s nominated legal representative and permit a confidential communication to take place, prior to any interrogation of the accused. If the detainee’s legal representative is uncontactable or the detainee has no nominated legal representative, within 24 hours of the arrest, **the official shall contact the court-appointed lawyer or lawyer provided by legal aid committee by telephone** and permit a confidential communication to take place.*

¹⁷ State Cases Act 2042 BS (1992 AD) s 15(2).

¹⁸see *Inter Alia*, Advocacy Forum and others ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005’ (Kathmandu 2009) available at <<http://www.advocacyforum.org/publications/index.php>> accessed 28 June 2010.

To achieve this goal, legislations such as legal aid Act, District, Appellate and Supreme Court Regulations need to be amended, further funding would be required to ensure this protection against torture and protection of the right to silence is made available.

s14 -Taking of Statement and Interrogation

Safeguards for Interrogation Procedure

In his addendum to his 2010 Report to the Human Rights Council the Special Rapporteur on Torture, Manfred Nowak, expressed concern that, “the judicial process is not very functional or respected, since for example some suspects ...*have to confess in the absence of their lawyer.*”¹⁹ We therefore recommend that during an interrogation a defence lawyer or support person (if a defence lawyer is unavailable, impractical or unwanted) should be present. Further, an audio and/or visual recording should be made of the interrogation, where resources are available to make such a recording. Both of these strategies would be practical and appropriate safeguards against any possible coercion and/or torture; in addition to protecting the accused’s right to silence as guaranteed at section 9 of the draft Criminal Code and art 24(7) of the Interim Constitution.

The audiovisual recording will also ensure that where an accused makes a contradictory statement in court, the judge can more easily and fairly assess the truth of the statement by being able to view the initial statement to police.

Coerced Evidence

In order to strengthen the current provisions in the *Evidence Act* we submit that this additional section is necessary to give effect to the Supreme Court decision in *Netra Bahadur Karki v His Majesty’s Government*,²⁰ in which it was held that an uncorroborated confession is inadmissible at trial:

(1) Any statement or evidence obtained from an accused by coercion of any kind shall be inadmissible as evidence in court.

Explanation: If the defendant raises the issue of evidence being obtained by coercion, the onus to prove such evidence was not obtained by coercion lies on the prosecution.

The proposed sub-section is necessary to be consistent with the presumption of innocence and our proposed additional provision s10A, by explicitly placing the onus of proof on the prosecution, in contrast to the current position in Nepali law.

s22 - Examination of Wound

The issue of torture in detention is closely linked to that of fair trial, as coerced confessions are not admissible as evidence.²¹

Further, it our experience that deterrent effect of departmental action under the *Police Act 1955*²² as a penalty is not strong. Without clear and serious punishments set out in law, the police have no fear of repercussions and continue to inflict torture.²³ We recommend introducing a compulsory mechanism

¹⁹ UNHRC ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’ (26 February 2010) UN Doc A/HRC/13/39/Add.6, Para 55.

²⁰ NKP. 2062, Case: Murder, Decision No. 7555 Pg 742.

²¹ s9 of the *Evidence Act 1974*.

²² Chapter 3 of the *Police Act 1955*.

²³ The 2008 addendum report of the Special Rapporteur on Torture found that ‘the torture and arbitrary detention of criminal suspects by police has persisted’: UNHRC ‘Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal’ (9 January 2006) UN Doc E/CN.4/2006/6/Add.5 Para. 20 available at <<http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm>>. More recently, in an AF survey of 4,328 detainees interviewed in 65 places of detention in 18 districts over the course of one year, 19.5%

whereby evidence of torture must be provided to the Government Attorney and/ or special investigative team. Further, prosecution must be possible. These potential repercussions will be a much greater protection for victims of torture, while at the same time protect an accused's fundamental right to silence.

Grounds for Detention Pending Trial: Bail

s67- The Accused Person to be Detained

Article 12(2) of the Interim Constitution guarantees that, 'No person shall be deprived of his/her personal liberty unless in accordance with law'.²⁴ This is in compliance with international law also; Article 9(1) of the ICCPR states: 'Everyone has the right to liberty and security of person. 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 Human Rights Committee in *Van Alphen v The Netherlands* has concluded that the only pre-trial detention consistent with Article 9 is that 'to prevent flight, interference with evidence or the recurrence of crime'(the *Van Alphen* reasons').²⁵

As currently drafted, the Code does not *prima facie* provide for the granting of bail. We are also concerned that the draft Procedure Code follows the provisions of the *Muluki Ain* by making pre-trial detention automatic for some offences. In our opinion there is no ICCPR compliant reason for this. We therefore recommend amending this section to include a presumption in favor of granting bail, as follows:

s67- Presumption in Favor of Bail:

(1) *A person accused of any offence shall be released on bail or ordinary court date, unless the court is satisfied that there are reasonable grounds to believe that:*

- (a) *the accused may flee from the geographical jurisdiction of the court if released; or*
- (b) *the accused may interfere with evidence or intimidate witnesses; or*
- (c) *there is an appreciable risk that the accused may continue to offend if released on bail.*

s68, s70 & s71 Bail Amounts & Additional Bail Amounts May be Ordered

S68 permits the court to grant bail even "if there is reasonable ground for proving the accusation against such accused." As discussed above, we submit that the only reason a person should *not* be released on bail is for one or more of the *Van Alphen* reasons mentioned above. The strength of the evidence is only relevant to whether the accused may have a stronger incentive to flee (as he/she may be facing imprisonment, which may make the desire to flee stronger); as suggested above, we recommend a presumption on favor of bail be enacted, which would render this section unnecessary.

Sections 70 and 71 grant the court power to order the defendant to pay additional bail at any time during the proceedings. Again, we submit that the only grounds for detaining a person are *Van Alphen* grounds. The sections as currently drafted do not provide any permissible reasons for ordering additional bail and thus the section grants the court an unfettered discretion to detain a person. This detention would therefore be arbitrary in the Article 14 of the ICCPR sense. We submit that a person released on bail should only be remanded in custody at a later stage in cases where new information (i.e. information that was not discoverable at the time of the initial jail-bail hearing) is provided by the Prosecution that may persuade the court that due to a newly discovered risk of flight, interference with evidence or risk of re-offending that the person should now be detained.

of all detainees suffered torture while in custody: 'Coalition against Torture, *Criminalize Torture*, 1st Edition, Kathmandu, 2009.

²⁴ Interim Constitution (n 7) Article 12(2)

²⁵ *Van Alphen v The Netherlands*, No 305/1988 (1990) UN Doc. CCPR/C/39/D/305/1988.

We are pleased with the inclusion of s71(2) that permits the court to release a remanded person if it becomes clear that he/she is not the offender; however we would submit that for consistency that *any* release should be clearly based on the aforementioned *Van Alphen* grounds, ie that the evidence indicates the defendant is likely to be acquitted and he/she has little reason to flee the country, interfere with witnesses or commit further crime; therefore his/her release is warranted.

s81 - Fixation of Due Date With Reason

Notification of Court Date to All Parties

In terms of case management, the fixing of a date for the next hearing in the presence of all parties is welcomed. We recommend amending s81(3) to ensure the defendant and his/her representative must be informed of changes in court date. This amendment protects the defendant's right to meaningful legal representation, which we submit must be read into the interpretation of the right to legal counsel. Further, written notice to all parties will ensure that parties are notified and cannot claim otherwise. We are also encouraged that this section includes an implicit guarantee that defendants should be brought to every hearing, which is reinforced by the following section.

s85 - Presence of the Parties in the Fixed Due Date

Defendant's Presence in Court

We welcome s85(1) explicitly requiring the defendant's presence at all dates fixed for hearing in his/her case, as a necessary provision to fully implement the accused's right to know the case against him/her, particularly in the context of detained defendants. We do, however, recognize that defendant's who are released on bail or ordinary court date may live 1 or more days walk from the court. We recommend inserting a discretion permitting the judge to excuse the defendant from attending court, with reasonable cause.

Witness Non-Attendance

The right to a speedy trial is a fundamental aspect of fair trial, closely linked to the right to liberty. The Human Rights Committee has interpreted Article 9 to provide that unnecessarily prolonged detention can be considered arbitrary, even if it complies with domestic law.²⁶

Subsection (1) of this provision permits a witness to fail to attend court on 4 occasions, which could delay a person's trial by up to 4 months, (as subsection (1) permits a 30 day delay on each occasion). We recommend reducing the number of times a witness can fail to attend to ensure a defendant's detention does not become arbitrary in an Article 9 sense.

Vulnerable Defendants

Persons who are unable to mount a meaningful defence, due to disability, particularly vulnerability (such as children) or illiteracy shall be provided with a lawyer and no case should proceed without a legal representative. We recommend the insertion of an additional section:

(5) The Court shall not entertain or decide a criminal charge brought against a Child or other vulnerable person unless there is a legal practitioner to defend him/her.

(a) In circumstances referred to in sub-section (5), the concerned Court shall make available the service of a legal practitioner appointed on behalf of Government of Nepal or of any other legal practitioner willing to provide such service.

²⁶ The Human Rights Committee has confirmed that 'arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law': *Mukong v Cameroon* No 458/1991 (1994) UN Doc CCPR/C/51/D/458/1991.

(b) 'Vulnerable person' in this section includes, but is not limited to, disabled persons, mentally ill persons, illiterate persons and persons who do not speak Nepali as a first language.

This provision complements s19 of the *Children's Act 1992* and would place Nepal in line with best practices in anti-discrimination legislation.

A Language He Understands: Right to an Interpreter

Lastly, a fundamental right of fair trial is to be able to understand the proceedings that shall determine a person's liberty. We submit that Nepal has an obligation to incorporate Article 14(3) (f) of the ICCPR: "To have the free assistance of an interpreter if he cannot understand or speak the language used in court," and thus we recommend a section placing an onus on the court to ascertain whether a defendant requires and interpreter and to provide an interpreter for each hearing. This ensures Nepal is again at the forefront of inclusive legislation, and further, more fully compliant with its obligations pursuant to the *Treaty Act*.

s99 - Production of Evidence

Read together, the accused's right to silence and presumption of innocence provide that the prosecution shall bear the burden of proof in any criminal matter.

The current practice in Nepal is for the defendant to make a statement at the time of the jail-bail hearing, which is prior to oral evidence being given by witnesses, as per the adversarial process. Asking the accused to defend himself/herself before a case has been established is a clear breach of an accused's right to a fair trial.

The drafting of this section continues this systematic breach of the accused's right to fair trial by requiring him/her to not only forego his/her right to silence and make a statement in court, but further asks for the defendant to identify and produce any evidence, including witnesses, at the time of making his/her statement.

To ensure that Nepal not only codifies the right to a fair trial, but also complies fully with all that a fair trial includes, this section must be amended. We recommend as follows:

Insert after sub-section 2:

(a) Only after all evidence has been submitted to the court by the prosecution, may the court invite an accused person to respond with a statement or any other evidence.

(b) An adjudicating body shall not draw any negative inferences from the fact that an accused does not choose to make a statement or to call evidence.

Finally, the right to a legal representation and the right to know the case against you encompass the right to mount a meaningful defence. We are pleased that the draft includes an onus on persons producing evidence to provide a copy to their opponent and the court; however, we recommend inserting sub-section mandating that the Prosecutor provide to the Defendant, or his authorized representative, all the documents relied upon by the prosecution for at least 7 working days prior to any hearing. This will ensure that not only are documents provided, but they can be examined properly by the defence before a hearing takes place.

Accused's Right to Know the Case Against Him/Her and to Cross Examine Witnesses

s109 - Witness May Examine through Video-Conference

The provision as it is currently drafted only provides a discretion for parties to be present at a witness examination, which does not safeguard the accused's rights protected in Article 14(3)(e) of the ICCPR.²⁷

We therefore recommend amending sub-section (3) to provide that an accused person and their representative must be present for the video-conference and permitted to cross examine the witness as per the law. The right to cross examine witnesses, as provided for in Article 14(3)(e) of the ICCPR, an accused and their representative must know the case against him/her in order to be able to mount a meaningful defence.

s122 - The Statement of the Accused Shall be Made

As per our recommendation regarding s99 above, we submit that by only giving the accused the opportunity to make a statement before the prosecution evidence has been presented and tested, is an abuse of the accused's right to silence and presumption of innocence.

As it is currently common practice for a defendant to make a statement at the jail bail hearing, we recommend an onus be placed on the presiding judicial officer to make the accused aware of his/her rights in the proceedings, including the right to hear all prosecution evidence before deciding to waive his/her right to silence by giving a statement to the court, as follows:

(1) After stating all the particulars of offence of which the accused is charged pursuant to section 118, the court may permit the accused to record his statement regarding the accusation or any answer given by him regarding the questions put before him by the court:

...

(4) The judge shall inform the accused that he/she shall have the opportunity to make a statement and call any evidence at the close of the prosecution case.

Finally, in light of the common practice of police personnel being present in court when the defendant makes a statement, we recommend giving legislative effect to General Order no 222 of the Nepali Supreme Court, by adding a section to prohibit police involved in the case from being present during the defendant's court hearings, particularly when a defendant is giving evidence. This section would not apply if any Police Officer is summoned to the court as a witness.

Presence at Appeal

s142 - Not necessary to follow date:

The defendant has a right to follow his/her appeal, as part of the right to a fair trial. Whilst in custody a defendant must rely on the Prison Service for his/her information about court dates and travel to court.

If the Prison Service perceives it is not necessary to take the detained person to an appeal hearing, it is unlikely they will be advised or brought. We recommend an additional provision to ensure that where an appellant or respondent is detained in custody, he/she must be brought from the detention centre for each hearing of his/her appeal.

²⁷ Article 14(3)(e) of the ICCPR: To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Competent Tribunal: Tasks of the Judge

s180 - Tasks to be Performed by Judge himself:

The justice system must share duties if the court is to function. AF encourages the smoothest and fastest case management system possible, within the limits of providing a fair hearing to accused persons. As discussed in relation to s8 of the draft Criminal Code above, a competent tribunal is a prerequisite for a fair trial. The practice of court clerks recording crucial evidence, without the judge giving his or her undivided attention to evidence at hand, is unacceptable if Nepal is to guarantee its citizens a fair trial by an impartial, independent and competent tribunal. We therefore recommend deleting s180(2), and amending sub-section (3) to ensure that it does not offend the competency of the court. We are particularly concerned by the significant responsibility given to non-judicial officers to make orders in relation to a person's liberty as provided for in s180(2)(a-b); we submit that these sections particularly must be revoked.

DRAFT SENTENCING BILL

s2 - Definitions

As per our comment above, we recommend the definition of the terms 'court' and 'judge' be restricted to judicial bodies only.

Sentencing Guidelines

Removed Chapter: Chapter 3 - Circumstances in which seriousness of offence increase and decrease

We recommend the re-insertion of Chapter 3 from the previous draft of the Sentencing Bill (2066) to ensure that victims have a transparent sentencing procedure, as well as convicted persons being sentenced consistently in accordance with established principles. Inconsistency in sentencing has long been an issue in Nepal; this has partially been due to the lack of guidance in sentencing and partly due to the fact that District Court decisions are not generally published. Our recommendation addresses the consequences of these issues.

s15 - Bases to determine the punishment

We recommend specifically providing for imprisonment as a penalty of last resort, only to be imposed in appropriate cases as decided by the policies of GoN, in line with the right to liberty enshrined in Article 14 of the ICCPR. The current sub-section 2 offends this principle in that it provides for imprisonment without first considering whether alternative penalties (e.g. fine, community service, suspended sentence) would suffice to achieve the objectives of imposing the penalty. We therefore recommend amending s15(2):

(2) Imprisonment shall only be imposed where:

(a) any other sentence would be inappropriate, having regard to the gravity or circumstances of the offence; or

(b) if a sentence of imprisonment is necessary to give proper effect to the policies of the criminal law elsewhere stated in this section.

s23 - Fine to be paid immediately

It costs the Nepali justice system to house people in jails; the cost of security, resources and food. Requiring people to pay fines immediately or go to jail, increases the stress on the penal system, which has been used as a reason for providing sub standard care for prisoners.

A long-term fine payment system would allow convicted persons to go back to work, to earn an income which would then allow them to pay a fine. This option would be cheaper for the GoN and would reduce

the stress on the prison system. We submit that an amendment permitting the offender to deposit the fine in installments within a reasonable stipulated time, if they are unable to pay the fine immediately, is a viable practical option.

s31 - Imprisonment may be suspended

The purpose of suspended sentencing is to provide an opportunity for the offender to prove he/she can rehabilitate into law-abiding society, and also, to save money and resources by limiting the number of people the State must support in jail.

The limiting circumstances in which suspension of a prison sentence can be ordered in the current draft remove this opportunity for many persons. We submit that in each case leaving the decision of whether to suspend a sentence to the judge's discretion (in accordance with legislative guidelines) in terms of its appropriate application would be of more benefit to the justice system and society in general.

Comments from the Perspective of Victims of Enforced Disappearances

DRAFT CRIMINAL CODE

Chapter 16 – Disappearance of Persons

s207 – Prohibition against Causing Disappearance of Persons

We welcome the Government of Nepal (GoN)'s decision, in line with Article 4 of the ICAED, as well as the Supreme Court Judgment in *Rajendra Dhakal v Government of Nepal*,²⁸ of criminalizing enforced disappearances, whether committed by the State [S207(2)(a)] or by any other group [S207(2)(b)]. We make following recommendations to make the provisions in the chapters compatible with Nepal's international obligations.

Definition of Disappearance of Persons

In the current draft, the elements of the S207(2)(a) offence are not clearly defined and each element is drafted in the alternative, leading to the creation of several offences in each sub-section; with respect to the S207(2)(b), the definition is very broad and overlaps with the offences of kidnapping/abduction.

The ambiguity in each definition may lead to the acquittal of a perpetrator on the basis that the section fails to comply with the principle of legality.²⁹ To ensure that perpetrators of this crime are uniformly prosecuted and do not escape punishment, we suggest the adoption of a Nepal-specific definition, based on international human rights norms:³⁰

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, or by non-State agents, acting as State agents, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, failing to provide accurate information as to the whereabouts and fate of the person deprived of their liberty, which place such a person outside the protection of the law.

Crime against Humanity

We further recommend that in the case that an act of disappearance is part of the widespread or systematic attack targeted against a civilian population, it shall be defined as a crime against humanity as per the Statute of International Criminal Court.³¹

²⁸ *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date Jan 21, 1999, decision June 1, 2007, known as the "Disappearance case."

²⁹ The principle of legality is also known as the Latin maxim *nullum crimen sine lege*; it mandates that no one shall be tried for a crime that is vague or unclearly defined, nor shall a person be punished for a crime that did not exist at the time of commission of an alleged offence (non-retrospectivity).

³⁰ This is an adaptation of the definition contained in Article 2 of the Enforced Disappearances Convention, which takes into account the specific post-conflict context of Nepal.

³¹ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

In addition, we recommend a section explicitly setting out that the entirety of the provisions of this Chapter are non-derogable under any circumstances, including states of emergency, to assist in the event that any ambiguity as to its application arises in future.

Chain of Command Criminal Liability: Principal Offender

We commend the GoN for recognizing and acting on the experience of those affected by disappearance that it is often an act ordered down a chain of command where the persons who ordered or acquiesced to the occurrence of a disappearance are as culpable as the persons who carried it out.

The current drafting is somewhat confusing in identifying the principal offender, due to the repetition of the differing definitions of “principal offender” at Sections 207 (3-6).

We therefore recommend the adoption of our proposed drafting, below, to clearly establish criminal liability of all participants in a disappearance, from those directly involved, to those persons who are less obviously involved in inducing or ordering the disappearance, as well as persons in authority who choose to ‘look the other way’ or indirectly sanction the actions of subordinates who are involved in disappearances.

(1) A principal offender is defined as follows:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit or participates in a disappearance of persons; or

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit a crime of disappearance of persons;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of disappearance of persons; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of a disappearance of persons or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

(2) No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of disappearance of persons.

By phrasing command liability in this way, we can ensure that all levels of authority are equally responsible and liable for ensuring that disappearances do not occur.

We further recommend that chain of command criminal liability is extended to all offences of unlawful detention (Chapter 15), as per our recommendation below.

Punishment- S207(7)

AF and REDRESS commend the taskforce on providing a significant penalty (up to 15years and 5 lakh rupees) for offenders under this section; however, despite the detailed provisions in the Sentencing Bill,

we would recommend the introduction of a minimum penalty for consistency with the punishment provisions for kidnapping/abduction and other serious offences.

When disappearances are carried out as a widespread or systematic policy, it should be defined as a crime against humanity as per our recommendation above. We submit that, proportionate to the gravity of the offence, life imprisonment should be the maximum penalty.

s209 – Compensation

We welcome the establishment of a Victim Relief Compensation Fund. We recommend a clear, consistent system whereby the Fund compensates the victims, and recovers the money from the offender at a later date. This would ensure that victims are not suffering further by having to wait for the offender to have sufficient means to pay compensation. It is also consistent with the terms of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.³²In the interim, we support the direct system of compensation as provided for in this section.

s211 - Limitation

International jurisprudence³³ has clearly established that the act of disappearance of a person is a continuous crime and therefore the limiting of a period in which to make complaints is not appropriate whilst a person remains disappeared. We further recommend that in circumstances in which a person is released, to recognize seriousness of this crime (constituting a crime against humanity when widespread or systematic), that the limitation period be extended to 1 year and begin from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature, consistent with Article 8 of the Disappearance Convention.

We acknowledge the provision in this Chapter, which provides the court with discretion to allow a complaint to be lodged outside the limitation period. Nonetheless, the reported difficulty that victims face when trying to register complaints about disappeared persons³⁴ will not be eased by the insertion of this provision as there are no guiding criteria as to when a complaint may be accepted by the court. We recommend the insertion of such criteria in an inclusive (not limiting) manner.

Provisions relating to Chapter 15 - Unlawful Detention

We welcome the inclusion of this chapter. Unlawful detention is relevant to disappearances, as it represents a “gateway” for disappearances to occur. Non-compliance with procedural law, such as failing to present accused persons to court within 24 hours³⁵ or detention of persons in unauthorized places

³²UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle IX, para 15, 16, at: <http://www2.ohchr.org/english/law/remedy.htm>.

³³“Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.” Working Group on Enforced or Involuntary Disappearances General Comment on Enforced Disappearance as a Continuous Crime, <<http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf>> accessed 3 January 2011.

³⁴ December 2010 ‘Indifference to Duty: Impunity for Crimes Committed in Nepal,’ Human Rights Watch/Advocacy Forum Report available at <<http://www.hrw.org/node/94902>> accessed 3 January 2011.

³⁵The State Cases Act 2042 BS (1992 AD) s 15(2).

(secret detention) encourages a perceived “bending” of the law, increases the vulnerability of an accused person to torture and supports a culture of impunity in law enforcement.³⁶

Proposed Additional Provision: Chain of Command Criminal Liability

To ensure that a systematic prohibition on unlawful detention is developed, the support and acquiescence of persons in authority must be addressed. We submit that providing for chain of command criminal liability would assist to reduce overall levels of impunity currently pervading the law-enforcement system, referred to above.

s195 – Prohibition to detain anybody in any manner except as provided by law

Criminal sanctions against persons who detain anybody in an illegal manner are a welcome addition to the Code and address the concerns raised in the above paragraph. In our experience there will often be cases where the criminal investigation and sanctions will involve a conflict of interest, i.e. investigation and possible laying of charges against members of the Nepal Police or other government representatives *by* the Nepal Police.

As per our recommendation regarding S11 of the Criminal Procedure Code below, we would encourage the establishment of an independent commission/special investigative team to recommend disciplinary action and charges, directly to the Government Attorney, in cases where a conflict of interest exists.

s196 - Prohibition of Detention without Minimum Humane Facilities

AF and REDRESS are pleased to see this addition to the Criminal Code; however, the term “minimum humane conditions” would preferably be defined so as to provide a comprehensive guide for judges as well as for detention centre staff and prisoners. AF suggests that “minimum humane conditions” be interpreted by reference to the “Standard Minimum Rules for the Treatment of Prisoners.”³⁷ We further recommend that sanctions apply for a failure to comply with this section.

s198 –Prohibition against Secret Detention

This provision is positive to the extent that it recognizes the uncertainty and danger secret detention involves for a person detained in an unauthorized and/or unofficial place. However, it would be useful to clarify that secret detention is prohibited even when it occurs in official places of detention (e.g. unofficial holding cells in recognized detention facilities). The Committee against Torture (“CAT”) has declared that secret detention, in itself, may amount to torture.³⁸ AF and REDRESS welcome the inclusion of criminal sanctions against perpetrators; however, considering the international definition of secret detention as a

³⁶ See, *inter alia*, December 2010 ‘Indifference to Duty: Impunity for Crimes Committed in Nepal Human Rights Watch/Advocacy Forum Report available at <<http://www.hrw.org/node/94902>> accessed 3 January 2011; Advocacy Forum and others ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005’ (Kathmandu 2009) available at <<http://www.advocacyforum.org/publications/index.php>> accessed 3 January 2011.

³⁷ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at <<http://www2.ohchr.org/english/law/treatmentprisoners.htm>>

³⁸ UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11; UN Commission on Human Rights, UN Doc. E/CN.4/RES/2005/39, 19 April 2005, article 9.

form of torture we recommend an increase in the maximum penalty³⁹ to reflect the seriousness of the crime.

s199 –Limitation

We are concerned by the brief limitation period provided for in this section for the additional reasons that: firstly, a person who has been unlawfully detained could be in fear of further repercussions from the perpetrator should they make a complaint, and secondly, if a person’s detention subsequently becomes lawful, i.e. an accused person is brought before the court and remanded, they may not see a lawyer in custody to be able to make a complaint, or become aware of their rights, within the 3 month limitation period. To prevent this occurring, we recommend that the limitation date for each offence be extended to at least one year, that the limitation date begin from the date of release from *any* form of detention, and further, that the court should have the discretion to allow a complaint at any time.⁴⁰

Miscellaneous Provisions

S2 - Extra-territorial Jurisdiction

As a step against impunity we are encouraged to see that the taskforce has included legal responsibility for any criminal misconduct by government officials acting outside Nepal’s borders by providing for universal jurisdiction of Nepali courts in such cases [S2(1)(e)]. The following recommended wording aims to strengthen this provision and avoid technical legal argument as to whether a Government official is ‘acting in his/her official capacity’, or in fact, ‘in an organization’ at all:

S2(1)(e) “Any offence committed by a person representing the Nepal Government in any capacity whatsoever.”

We further recommend adding war crimes, genocide and crimes against humanity, as well as any individual act of enforced disappearance or torture as crimes for which Nepali courts have universal jurisdiction; the nature of the crime of enforced disappearance is so heinous that all states have an interest and indeed an obligation to ensure that suspects do not escape justice, even when they are located outside of the countries in which the crimes were committed.

DRAFT CRIMINAL PROCEDURE CODE

s4 – Duty to Give Information or Application Relating to Commission of an Offence-

We recommend the imposition of a positive onus on Police/CDOs to register and investigate any complaint submitted to police and that the Government Attorney (GA) should hold the decision-making power and political responsibility in relation to non-investigation of complaints. We make this recommendation in light of the number of mandamus petitions lodged to the Supreme Court by AF and others seeking a writ to have the Police register complaints and begin investigations, and the consequent misuse of judicial time and resources.

Further, the Criminal Procedure Code provides a mechanism whereby erroneous, false or fictitious complaints need not be investigated on the advice of the GA: S10(1); S8(8). The draft Criminal Code

³⁹S198(2): less than 4 years imprisonment and a fine.

⁴⁰As provided for under Chapter 16.

further provides a prohibition on creating false evidence at S88, with a penalty providing for up to 5 years imprisonment. The deterrent against presenting false evidence, combined with the mechanism by which the GA can decline to investigate a complaint, efficiently provides protection against the police potentially wasting time and resources in investigating baseless complaints. We recommend the following insertion after sub-section (5) of section 4:

Police are to Register All FIRs and Conduct a Preliminary Investigation

(6)An authorized government official, including a Chief District Officer, must register any complaint made under this section. If an authorized government official refuses to register a complaint, he/she must provide reasons for the refusal to file the complainant in writing; any person who fails to comply with this section shall be subject to departmental action on the recommendation of the Attorney General to the concerned office.

We also recommend the removal of proviso in S4(3), which permits a delay in investigating postal complaints, or complaints ‘by proxy’ until they can be verified in person. The S4(3) proviso is unduly restrictive and discriminatory towards persons residing in remote communities and those without means of transport. Persons in the deepest poverty are often those with the least access to justice; we therefore recommend removing this provision in order to achieve equality before the law.

s5 - Complaint Procedure in case of refusal to record FIR

We are pleased that there is provision made for complaints in case of a refusal to register an FIR. In order to further address the issues of accountability to victims in terms of registering complaints above, we recommend the following strengthening measures:

- empowering only the GA with the decision of whether to investigate and prosecute;
- requiring that the GA be accountable in writing to the complainant;
- providing more significant penalties for government representatives who fail to comply with procedural law, to enable the legislation to lead the way for cultural change in the law enforcement area.

In a case where the GA recommends further action pursuant to S5(2), the police office must be legally obliged to follow the directive pursuant to S5(3). We recommend the addition of the following:

S5(2): “...and an investigating official from the concerned police station shall be bound to follow the lawful direction of the Government Attorney issued pursuant to sub-section (2).”

S5(3): “In cases in which the Government Attorney recommends no further action, the Government Attorney is to provide written reasons for declining to investigate to the FIR, including a list of evidence provided by the investigating officer; departmental action shall be imposed on any person failing to comply with the above procedure.”

Complaints to the Chief District Officer

In relation to the procedure for complaints of Schedule 2 offences to the administrative offices or the Chief District Officer (“CDO”), the CDO retains a discretion to decline to register complaints: S5(5). In accordance with our comments above, we submit that all complaints should be registered by the relevant office; and in the event that any refusal is made, recourse to the GA (not the CDO or Home Ministry), should be available. We make this recommendation to create a more independent procedure and to cross check the decision-making of the CDO by a legal practitioner in the GA.

Refusal to Investigate on Grounds of Alternative Justice Mechanism Available

During the course of AF's work we have received information from a variety of sources that the debates relating to the establishment of the Truth and Reconciliation Commission and Disappearances Commission has been invoked by Police as a reason not to accept an FIR, even though these bodies have not been formally established nor will they have the same prosecutorial competence once established.

This rationale for refusal to investigate has been rejected by the Supreme Court of Nepal on several occasions. In addition, the aforementioned Commissions are not currently operational; further, they do not set out any requirement for the competence, independence, impartiality of the members of the commissions, nor do they include any provision for the protection of victims and witnesses. In addition, they will not have prosecutorial powers. We therefore seek the insertion of a specific section excluding this as a ground to refuse to investigate.

s10 – Sending of Preliminary Report

We are encouraged to see that a 3-day time limit for an investigating officer to send the preliminary report to the GA has been considered and implemented.

We are further encouraged to see that what constitutes "preliminary investigation" is defined; the set criteria on the measures that the police should reasonably take in terms of investigation is welcomed from the perspective of victims. AF has been compelled to file mandamus petitions due to a failure by police to investigate; therefore we recommend the adoption of a provision requiring the investigating official to carry out the preliminary investigation *in good faith and with due diligence*, with departmental action as a penalty to ensure that investigations are thoroughly carried out in a timely manner.

Onus on Police to Keep Victim's Informed

To place Nepal at the forefront of victim's right legislation, and to supersede current international practice in investigations,⁴¹ we submit that placing a legal onus on the investigating officer to keep complainant(s) informed of progress of the case should be added.

s12 – Special Investigative Teams

Currently the draft legislation gives discretion to the head of Police/Superior Authority to choose whether to investigate a complaint against one of their own staff or not. Granting the Head of Police the discretion to maintain control of an investigation that may be a conflict of interest is not appropriate as it leads to a strong perception of bias and is insufficient to protect victims of offences that are carried out by Police or other government authorities.

We submit that a special investigative team should be established and utilized wherever there is a conflict of interest, i.e. where there is a private or professional relationship between the individual(s) under investigation and those carrying out the investigation, to ensure independent and thorough investigations are carried out and public confidence in the justice system is maintained.

⁴¹ Articles 7.2 and 7.3 of the Code of Practice for Victims of Crime (Crown Prosecution Service Operational Guidance) (UK) provide that victims must be directly informed of important decisions during an investigation and prosecution; however, it is a guide only and not legally enforceable. In Australia, the *Victims' Charter Act 2006* is an Act governing the treatment of victims by the police, the Office of Public Prosecutions and victim support services; the provisions of which are legally enforceable and include the right to be kept informed.

To practically ensure that the teams can function effectively, we recommend a sub-section be added mandating the co-operation of government officials with special investigating authorities.

S53(4) – Government Officials’ Immunity to Prosecution

Qualified immunity for government officials acting *in good faith* in the course of their official duties is generally accepted. However, this provision as currently drafted provides an impermissible degree of immunity for government official and essentially provides a “loophole” for officials to mask any illegal behaviour. Government officials are not above the law and should not be able to hide behind the required permission of GoN to avoid prosecution for illegal acts. We suggest that the phrase “without written sanction of Nepal Government” be replaced by an objective standard:

“No government employee to be tried for any act done by him in the course of discharging his official duty insofar as his/her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

This makes the conduct of the government official, even whilst in the course of his/her duty, subject to the laws of Nepal, as well as the constitutional rights of other citizens. The jurisdictional question turns on whether a hypothetical reasonable person, in the government official’s position, would have known that his/her actions violated clearly established law. The phrasing of the immunity in this way ensures that the rights of citizens are protected, while still allowing officials to perform public duties.

We note that there can be no circumstance in which a government official’s involvement in disappearance of persons can be considered a lawful exercise of authority.

We further recommend that an explicit section be inserted stating that no written sanction of GoN is necessary to investigate or prosecute a complaint made against a government employee under this Code.

s114 – Witness Protection Measures

AF and REDRESS are pleased that the GoN has taken measures to ensure witness attendance through providing means of protection. AF has anecdotal evidence that often intimidation of witnesses occurs after the making of the complaint, but before giving evidence. Witness protection measures need to take this into account and applications for specific forms of protection should be able to be made at the earliest stage of proceedings.

We acknowledge the insight and initiative of the legislature for the inclusion of in-camera proceedings and prohibition of publishing the names of vulnerable witnesses, including the complainant [S178 CPC]; and the ability to give evidence via audio-visual recording [S179 CPC]. We further suggest listing protective measures to ensure that law enforcement officials and judges are aware of the range of protections available, such as: the provision of safe houses for victims and their families; the introduction of restraining (protection) orders preventing the suspect contacting the victim or their family (if suspect on bail); prosecute persons who threaten or intimidate complainants⁴²; accompaniment by a friend or victim-support person at the time of giving evidence; the option to give evidence without facing the defendant,

⁴²s170 draft Criminal Code: ‘Prevention to Commit Inhumane Treatment.’

i.e. in a witness protection box (physically separated from defendant); and providing separate waiting areas for complainants and police escorts for complainants, if required.

Complainant's Right to Information

The right to information is important to victims. We therefore recommend placing an onus on investigating officials to make the range of protections known to victims, so that they can make any necessary or desirable requests.

s116 - Not Withdrawal of the Case:

Chapter 16 (Disappearance of Persons) offences are able to be withdrawn pursuant to the exceptions provided for in sub-section(2)(a); in light of the seriousness of enforced disappearances signified by their definition as a crime against humanity, as well as the necessary element of State agents as perpetrators of this crime, it is inappropriate to give the discretion to other State agents (GA) to decline to prosecute such a case. We therefore recommend removing Chapter 16 (Disappearance of Persons) from sub-section(2)(a).

Suggested Further Provision - Duty to Ensure Accurate Information is Kept

We strongly urge adding the following provision, which clearly outlines what information should be kept and disseminated in terms of detained persons, and provides for sanctions, including fines, against individuals/police units who fail to do so. This provision is particularly pertinent to protecting victims of unlawful detention, enforced disappearances and torture and provides a clear standard of information to be kept in relation to detainees. We submit that such a provision would be a strong protective and preventative measure against any future crimes of disappearances.

Proposed to be inserted after s13 – Power to Apprehend and Take into Custody:

s13A – Provision to ensure accurate information kept and disseminated

(1) The officer in charge of any State agency entrusted with arrest and detention of any person shall ensure:

- a) the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose; and*
- b) guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:*
 - i) The authority that ordered the deprivation of liberty;*
 - ii) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;*
 - iii) The authority responsible for supervising the deprivation of liberty;*
 - iv) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;*
 - v) The date, time and place of release;*
 - vi) Elements relating to the state of health of the person deprived of liberty;*
 - vii) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.*

- (2) *A failure to comply with sub section (1) shall be an offence, punishable by up to 5 years imprisonment and a fine. Any government agent or employee shall also be liable to departmental action for a failure to comply with sub section (1).*
- (3) *Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate shall be an offence.*
- (4) *Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met shall be an offence.*
- (5) *Any person committing an offence pursuant to sub sections (3) or (4) above, shall be punished by up to 5 years imprisonment and a fine, and shall also be liable to departmental action.*

DRAFT SENTENCING BILL

Parole, Suspension and Reduction of Sentence: Enforced Disappearance

Considering the gravity of the crime of enforced disappearance, as emphasized throughout this comment, and in order to better protect potential victims and to deter perpetrators, we recommend including 'enforced disappearance' as an offence for which neither parole nor reduction of sentence is available.

For clarity and consistency in penalty with the offences of 'kidnapping and abduction' and enforced disappearance, we recommend the addition of the crime of 'enforced disappearance' be explicitly provided for as an offence for which suspension of imprisonment is not available.

Our Detailed Comments in relation to the Crime of Sexual Violence

DRAFT CRIMINAL CODE

Chapter 18- Offences relating to Sexual Intercourse

s220 - Prohibition to cause an act of rape

Definition of Physical Act of Rape

Firstly, we recommend amending the definition to be gender-neutral, in order to protect the entire Nepali community from sexual crime, recognizing that males, females and third gender can be victims of rape. This can be achieved by amend sub-section (2):

(2) If any person commits sexual intercourse with any person, including marriage partner, without his/her unequivocal and voluntary consent or commits sexual intercourse by taking the consent with any person under sixteen years of age shall be deemed to have been committed "Rape".

Secondly, the definition of sexual intercourse should be broadened to include the unwanted penetration of the body *by an organ or an object* to ensure that situations in which objects other than bodily organs are used to commit the offence are included and to ensure that victims are protected from all forms of rape.

As guaranteed by Nepal's Interim Constitution Article 13, the right to equality before the law and in line with recent developments in Indian law,⁴³ we further recommend the inclusion of a specific section stating that consensual same sex intercourse is not to be an offence under this section. This amended section is designed to replace S227 (Prevention to Unnatural Sex) of the Code to ensures that consenting adults of the same sex are not falsely prosecuted.

Consent

The current definition of what does *not* amount to consent is informative and a welcome addition to the law; however, it still raises concerns about the level of physical resistance a victim must show to prove 'lack of consent'. 'Lack of consent' has often been interpreted by courts across the world to require the victim to physically defend himself/herself during the commission of the crime. We submit that placing an onus on the defendant to prove that he/she took reasonable steps to ensure the victim's *unequivocal and voluntary consent* to the act would minimize the re-victimization of the complainant by reversing the onus of proof in relation to the element of consent; this is in line with the practices recommended in the UN Report on Good Practices in Legislation on Violence against Women.⁴⁴

⁴³ On 2 July 2009 the Delhi High Court decriminalized homosexual intercourse between consenting adults and found that a provision that criminalized sexual activity "against the order of nature" (Section 377 of the Indian Penal Code) to be in violation the fundamental right to life and liberty and the right to equality as guaranteed by the Constitution of India: *Kusum Ingots v. Union of India*, (2004) 6 SCC 254.

⁴⁴ *Report on Good Practices in Legislation on Violence against Women*, Expert group meeting organized by United Nations Division for the Advancement of Women, United Nations Office on Drugs and Crime, United Nations Office at Vienna, Austria (26 to 28 May 2008), available at

Marital Rape

We recommend that the draft Penal Code fully comply with the 2002 decision of the Supreme Court of Nepal in the case of *Forum for Women, Law and Development v His Majesty's Government/Nepal* in which the court found that the failure to criminalize marital rape in the *Muluki Ain* was unconstitutional and contrary to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Despite the enactment of the *Gender Equality Act*, which amended the *Muluki Ain* to criminalize marital rape, a concession still exists in the relative penalty provided for this crime versus any other adult rape. We recommend deleting this section and specifically including marital partner as a person who can be a victim under s220, as suggested above.

Penalty

In terms of penalty we recommend an increase in penalty for an adult rape to a minimum of 5 years up to maximum 15 years to reflect the seriousness of the crime and in line with international practice.⁴⁵ We recommend providing a basic penalty for an offence of rape and provide for an additional penalty if certain aggravating circumstances exist. Such aggravating circumstances may include the age of the victim; the relationship of the perpetrator and victim; the use or threat of violence; the presence of multiple perpetrators; the perpetrator commits rape with knowledge that he himself is suffering from HIV positive or other sexually transmittable disease; the offender knew, or ought to have known, that the victim was pregnant, disabled or suffering from any physical or mental illness; or grave physical or mental consequences of the attack on the victim.

The closed categories of aggravating circumstances included in the current draft legislation are limited; by amending the draft to give some examples of aggravating circumstances, but not limiting them, will allow judges to take into account the entirety of the circumstances of the case in deciding penalty.

s221 - Prohibition to Commit Incest:

Definition of Incest

Currently, this section only protects female victims and we recommend making this section gender-neutral to recognize that incest can involve both male and female victims. The definitions of incestuous family relationships [at S221(2)] include many male and third gender persons, who may also be involved as victims as well as perpetrators.

The section: "...such woman shall also not let incest happen" does not clearly articulate the elements of an offence of a person "not rejecting" an incestuous sexual encounter. We recommend the amendment of the wording of this section to remove the current ambiguity in relation to this element of the offence:

s221(1): A person who knowingly and consensually has sexual intercourse with any person to whom marriage is prohibited due to the degree of relationship according to the existing tradition practice shall commit the offence of incest.

<[http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf)> at page 28.

⁴⁵For example, Maximum Imprisonment Penalty Range: life imprisonment (minimum penalty 7 years) [S376 Indian Penal Code]; 15 - 20 years [S5.2.1Australian Model Criminal Code]; 15 years to life [French Penal Code]; 10-15 years [Norwegian Penal Code § 192].

Penalty for Incest

We further recommend that the definition of incestuous relationships at S221(2) be made gender-neutral to ensure that any perpetrator of incest shall not be protected due to a failure by of the legislation to recognize the possibility of same sex incest.

s225 - Prohibition to commit Sexual Harassment

This section encompasses a wide range of threatening sexual behaviour and we submit it would be more appropriate to separate it into to 2 offences. Sexual assault has the potential to be more harmful than the acts comprising sexual harassment - though the criminalization of sexual harassment is necessary and encouraging to see - therefore we recommend the separation of the 2 crimes, as shown below:

s225 - Prohibition to commit sexual assault:

(1) Any person who sexual assaults another shall be guilty of an offence and shall be liable to a term of 2 to 10 years imprisonment.

'Sexual assault' in this part means violating the bodily integrity of another person by means of sexual conduct, this includes, but is not limited to, touching or attempting to touch any sensitive organ of a person, opening or attempting to open his/her inner dress, obstructing or attempting to obstruct to change his/her inner dress, forcing a person to touch or to hold a sexual organ, asking a person to do so.

s226 - Prohibition to commit sexual harassment:

(1) Any person who sexual harasses another shall be guilty of an offence and liable to up to 3 years imprisonment.

'Sexual harassment' in this part means unwelcome sexually-determined behaviour, which includes, but it not limited to, direct or indirect physical conduct and advances; a demand or request for sexual favors; sexually colored remarks and/or use of sexually vulgar words; displaying sexually explicit pictures, posters or graffiti; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

We further submit that the mental element of 'with an intention to have sexual intercourse;' in the current draft is unnecessarily limiting in the definition and may, in fact, amount to attempted rape. Our recommendation allows the court to grade the crimes of sexual assault and sexual harassment in line with Nepali and international standards.

s226 - Prohibition to sexually abuse children

The limited definition of a child in this section, in terms of being less than 10 years old, is in clear contravention of Nepal's international obligations under the Convention on the Rights of the Child⁴⁶ and contrary to the Recommendation 89(a) of the Committee on the Rights of the Child that GoN should 'enact appropriate legislation that ensure protection from sexual abuse and exploitation for boys and girls under 18 years.'⁴⁷ We encourage the amendment of the definition of a child in line with the Committee's recommendation.

⁴⁶ On 14 September 1990 Nepal ratified the United Nations Convention on the Rights of the Child (Dec. 12, 1989, UN General Assembly Document A/RES/44/25).

⁴⁷ Concluding Observations of the Committee on the Rights of the Child, Nepal, U.N. Doc. CRC/C/15/Add.260 (2005) available at <<http://www1.umn.edu/humanrts/crc/nepal2005.html>>.

The penalty for sexual abuse of children (less than 2years) is glaringly inadequate considering the vulnerability of children and the devastating impact such behaviour can have on a child and their development. Persistent sexual exploitation of children is a particularly heinous crime; it is Nepal's legal duty to protect children from exploitation and to deter perpetrators with an appropriately strict penalty.

s227 - Prevention to have unnatural sex:

We infer that section 227 (1)&(2) refer to homosexual rape, which, as per our recommendation in relation to the definition of rape above, should be included as an offence at S220. The ambiguous drafting may offend the principle of legality and may therefore lead to acquittals in cases where rape victims are of the same sex as the perpetrator. To ensure consistent treatment and access to justice of all victims of sexual offences, we recommend the inclusion of homosexual rape in the main definition at S220 and the deletion of S227 (1)&(2).

s228 - Compensation

As recommended above in relation to victims of enforced disappearances, we support the establishment of a Government-supported Victim Relief Compensation Scheme, once established, and the direct payment of compensation in the interim.

s229 - Limitation:

We concede that a 1 year limitation date for a majority of offences under this Chapter is an improvement on the current 35 day limitation; however, factors of intimidation, shame and fear may still have an impact on the victim's ability to make a complaint within that time.⁴⁸ As such, we submit that a general discretion permitting the complaint to be heard at the discretion of the court, as is available in cases of enforced disappearances, is also necessary taking into account the factors above.

We note that laying a complaint in relation to the sexual abuse of children must be made within 3 months of the offence occurring. A child is especially vulnerable to coercion and intimidation, is unlikely to be aware of her/his rights at law and therefore may be unable to seek help within 3 months. We recommend, in line with international law, that the beginning of a limitation period for a child to complain begin once they attain majority, i.e. 18years.

We further recommend that the limitation period be consistent with other offences under this section (1 year); 3 months is inadequate and contrary to Nepal's international obligations referred to above.

Chapter 11 - Provisions relating to Marriage

s175 - Prevention to do child marriage

UNICEF has documented that 'It [child marriage] represents perhaps the most prevalent form of sexual abuse and exploitation of girls.'⁴⁹ As such we submit that the penalty is grossly inadequate.

⁴⁸ Across the Lines - The Impact of Nepal's Conflict on Women' Advocacy Forum/International Center for Transitional Justice December 2010, available at

⁴⁹ UNICEF, Child Protection Information Sheet, Child Marriage, May 2006
<http://www.unicef.org/protection/files/Child_Marriage.pdf> accessed on 22/12/10.

Further, the term "causes" needs to be defined to include the guardian(s) who have a duty of care to protect the child. It may be interpreted narrowly here to include only the person performing the marriage ceremony.

Consistent with the Preliminary OHCHR Comment released in July 2010, we recommend that this section provide for compensation and counseling to be available to the child victim.

s176 - Prevention to transact in the marriage

We are encouraged to see this new legislation and suggest a minor amendment to prevent any ambiguity arising as to whether a person's behaviour was both inhumane and degrading. Sub-section (3) prohibits any 'inhumane and degrading behaviour' against a bride for non-payment of dowry, we recommend making this statement in the alternative: *'inhumane and/or degrading behaviour'*.

s178 - Marriage Offences Limitation:

As per our comments on the limitation for offences concerning sexual abuse of children, the limitation period under this section is inadequate and violates Nepal's legal obligations to Nepali children. Victims of child marriage in particular are unlikely to be aware of their right to pursue criminal charges against their spouse, nor know where to go for legal assistance and may be subject to undue pressure from both families to keep silent about the relationship. In cases of adult complainants, the social pressures on victims of marriage-related crimes to stay silent is also strong; in light of these factors we submit that the limitation period should be extended to 1 year from the date of the offence or the complainant obtaining majority.

Miscellaneous Provisions

s170 - Prevention to commit inhuman treatment

This protection is particularly welcome as women who come forward with complaints of sexual violence are often subject to social exclusion and stigma, which deters victims from making complaints. It is also encouraging to see a nominally increased penalty for public servants who engage in this type of behaviour. This is a good example of the GoN's sensitivity to vulnerability of victims of sexual violence.

s120 - Prohibition to misdemeanors

We recommend this section be deleted as we submit it is incorporated in our recommendation of section regarding sexual harassment above.

DRAFT CRIMINAL PROCEDURE CODE

Our detailed recommendations in relation to criminal procedure from a victim's perspective are contained in our comment on the draft Criminal Procedure Code from the perspective of victims of enforced disappearance (Annex 2, p9).

In particular we stress the importance of comprehensive witness protection measures as per our recommendations regarding s114.

Victim Relief Compensation Fund

The Victim Relief Compensation Fund [s48] should be established as a matter of priority to ensure that victims are not re-traumatized by having to pursue compensation through the courts.

Consistency between Sentencing Considerations

‘Chapter 3 - Circumstances in which seriousness of offence increase and decrease’

We recommend the re-insertion of Chapter 3 from the previous draft of the Sentencing Bill (2066BS) to ensure that victims have a transparent sentencing procedure and so that convicted persons are sentenced consistently in accordance with established principles.

Penalties for Sexual Offences

Penalties for rape are significant in the draft Bill; other sexual offences should have the similarly strong penalties to ensure consistent deterrence of offenders.