

TORTURE IN NEPAL IN 2019



*The Need for New Policies
and Legal Reform*



June 26, 2020

Publication support:



DKA Austria
Hilfswerk der Katholischen Jungchar



Embassy
of the Federal Republic of Germany
Kathmandu

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First Edition: 2020

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Publisher

Advocacy Forum-Nepal

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Kathmandu, Nepal

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Cover Illustration: Sushil Thapa

Layout & Cover design: Kishor Pradhan

Printed in Nepal

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FOREWORD

Advocacy Forum's (AF) annual report on torture is published every year on 26 June marking the International Day in Support of Victims of Torture. This year, the report will focus on Nepal's compensation and reparation regime for torture survivors while also presenting the trends in reports of torture and ill-treatment which AF has documented in 2019.

AF wishes to acknowledge and express sincere thanks to all the individuals involved in the preparation of this report. In particular, we want to extend our gratitude to Paula Gómez for compiling all the relevant information, conducting data analysis, and drafting the report under the guidance and supervision of Mandira Sharma and Ingrid Massagé. In addition, AF recognises and is thankful for all of the work done by its dedicated staff who collected information during regular visits to detention centres, providing free legal assistance, medical support, key documents and translation.

It is encouraging to signal that reports of torture during 2019 have decreased in comparison to 2018. However, the rate remains significantly high, considering that there had been a declining trend since 2011. Torture survivors who suffered torture during the conflict continue to struggle for justice, as the country passes another year where it has made no progress in amending the legal framework for transitional justice (TJ) and putting in place all

necessary measures to ensure truth, justice and reparations for all those who suffered torture and other human rights abuses during the 10-year-long armed conflict.

Like in previous years, AF could not record any positive story of alleged perpetrators involved in torture being investigated and prosecuted. Thus, impunity for torture and other gross violations for human rights continue to remain a major concern even in the year 2019, despite some new laws (like the Penal Code, which criminalizes torture) having come into place.

Access to detention facilities, continue to be a problem. This year, AF lawyers had access to detention centres in Kathmandu, Banke, and Rupandehi only and collected data from 1,005 detainees. AF would also like to extend its sincere thanks to the authorities in these detention centres for respecting their constitutional obligations. In contrast, AF lacked the possibility to visit detainees in detention centres in other districts, such as Morang, Dhanusha, Kaski and Kanchanpur.

Above all, we are indebted to the victims, their families, and the main stakeholders in the criminal justice system.

Sr. Advocate Hari Prasad Subedi

Chairperson

Advocacy Forum - Nepal

Om Prakash Sen Thakuri

Director

Advocacy Forum - Nepal

EXECUTIVE SUMMARY

The relentless persistence of impunity for those committing gross violations, including torture, remains the main concern for AF. This year, its lawyers visited 1,005 detainees in detention centres from Kathmandu, Banke and Rupandehi. An analysis of the data they collected found that 19.8% of them complained about torture and ill-treatment, as compared to 23.5% in 2018. Among the interviewees, 269 juveniles reported an even higher occurrence of torture than adults at 24.5%.

This year, AF also analysed data on compensation to assess the effectiveness of the laws, policies and practices in place to provide compensation and reparation for victims of torture. Out of 152 cases where AF assisted to file cases seeking compensation, 46 victims were awarded compensation. However, the data also show the arbitrariness among the judges in setting the amount of compensation and the relevant laws' ineffectiveness to repair the harm victims suffer.

KEY FINDINGS IN 2019

- The courts have awarded compensation to only 30.26% of survivors. While the maximum ceiling of compensation is 100,000 NRS (828 US\$), most victims were provided between 10,000 NRS (83 US\$) and 25,000 NRS (207 US\$). Moreover, there is a problem of implementation of court decisions, as only 15.22% survivors have actually received the compensation awarded.
- Survivors remain exposed to threats during judicial procedures due to the lack of legal mechanisms for their protection, as well as for the protection of witnesses.
- Means for reparation other than compensation are not contemplated in domestic laws, including the victims' right to restitution, rehabilitation, satisfaction, and guarantees of non-repetition.
- 19.8% of detainees reported torture in 2019.
- 24.5% of juveniles interviewed claimed to have been subjected to torture and/or ill-treatment.
- Despite most detainees are men, women are more likely to experience torture and ill-treatment. While 19.1% men reported having experienced these practices, the rate among women was 26.32%.
- The excess of inmates in child correction facilities during the COVID-19 pandemic has put juveniles at special risk, especially due to the lack of space, the temporary suspension

of regular health check-ups, the scarcity of drinking water and hygienic products.

- Juveniles in detention are 1.3% more likely to be deprived of food than adults.
- Sensitization of the judiciary and public security authorities on torture as a gross violation of human rights is an urgent need.

RECOMMENDATIONS

- All victims of torture have a right to an effective remedy, which includes the investigation of any allegations of torture, the prosecution and punishment of those responsible, if the evidence warrant so and effective reparation. For this to materialise, those in detention, prone to subject of torture need to have unhindered access to lawyers and their family members.
- Considering the lack of a functioning legal aid system in the country, organisation like AF, providing legal assistance to detainees should be given access to detainees.
- As the present legal framework does not ensure victims' right to effective remedies and reparation, Nepal's legal framework must be amended to meet the country's international obligations,
- To respect the rule of law and to promote confidence in the legal system, court decisions should be fully implemented, and compensation should be readily available to victims.

- Police authorities should register First Information Reports (FIRs) in any allegation of torture and start investigation collecting evidence without polluting it and ensuring perpetrators are not let off the hook.
- The Nepal Police should include training on human rights and procedural safeguards and prevent the use of torture to coerce confessions.
- Statutory limitations for the fulfilment of criminal and compensation claims must be completely removed so that survivors can come forward when they are physically and mentally prepared.
- The Supreme Court of Nepal's order to establish a basket fund to compensate victims of torture needs to be implemented.
- Independence and autonomy of the NHRC must be respected and its recommendations must be implemented.
- Medico-legal training should be part of the medical education.
- Health check-ups should be provided both at the time of detention and upon release, so that the physical conditions of detainees are properly recorded since the first moment they have contact with public authorities.
- Facilities of child correctional homes need to be expanded to all provinces and be used only as last resort for children coming into conflict with the law.
- In light of the Covid-19 pandemic, government authorities should respect and implement the Directives of the Supreme Court.

- Government policies during the pandemic must be in line with international law and guarantee equal access to health provision for all. The most vulnerable groups should receive special attention, including the elderly, prisoners, the poor, women and juveniles in detention.

CHAPTER I

TRENDS OF TORTURE IN 2019

1.1 OVERALL FINDINGS

Access to detention continued to be restricted for AF this year. As a result, it had to limit its visits to sixteen detention centres located across the districts of Kathmandu, Rupandehi, and Banke. Some detainees in other districts were interviewed in detention centers, while they were presented to the court, with limited time and in the presence of other detainees and police personnel. Thus, AF excluded data collected from other districts thinking that the quality of information that AF has gathered from detainees could be jeopardised. Despite these constraints, AF visited 1,005 detainees, out of which 269 were juveniles to continue its assessment of the overall trends and patterns in reports of torture and ill-treatment in police custody in Nepal and also to know how the authorities comply with the minimum standards guaranteed by the Constitution and international human rights treaties that Nepal is a party to.

The reported torture rate for 2019 is 19.8%, with 199 out of 1,005 detainees claiming that they were subjected to torture or other cruel, inhuman or degradant treats during detention. The percentage has gone down by 2.4% in comparison with 2018, but remains high, considering prior trends and international standards.

As our previous reports highlighted, torture practices have a long history in Nepal. Torture dramatically increased during the conflict period (1996 to 2006). Since AF began its operations in 2001 until the end of the conflict in 2006, the average rate was 40.1%, and the highest peak was found in 2002 at 53.8%. A downward tendency followed until 2011, when the percentages jumped from 19.3% to 24.5%. This shift was related to political instability in the districts of the Terai region. It should be noted that the torture rates of 2016 and 2017 are missing because of a lack of sufficient data. The escalation of torture to 23.5% during 2018 could be part of a gradual increase beginning in 2011, so it is good to see the reduction in 2019¹, possibly related to a reduction in instability in the Terai region.

The enactment of the new Penal Code in August 2018 and the criminalisation of torture, the reduction in political instability and the parallel increase in the use of social media, and the wider exposure of human rights violations as compared to previous years are some of the possible explanatory reasons why 2019 has registered a downward trend in reports of torture. That said, there are allegations of police making use of the Electronic Transactions Act (2008) to suppress reports on corruption and

¹ AF interviewed 1,165 detainees from 6 districts in 2018 and 1005 detainees in 2019.

critical movements. There are also concerns about draft legislation that have been proposed to limit freedom of expression and the enforcement of governmental control over human rights organisations and travel of human rights defenders and others the Government sees as inconvenient.²

In August of 2018, a new Penal Code and Criminal Procedural Code came into force. As a result, torture became a criminal offence. Yet, the law remains silent in many aspects: reparation is not regulated, redress is limited to compensation for cases of physical torture – not mental –, the maximum years of imprisonment – currently at five – does not match with the gravity of torture crimes, and the victims' ability to report violations of their rights is limited to six months.

The acquisition of data is constantly hampered by threats and police hostility. As in past years, lawyers have had to adapt to the culture, practices, and procedures that take place within detention

² Main concerns are the 2017 amendments to the Penal Code, and the draft Media Council, Mass Communications, and Information Technology Bills currently before parliament. For more information, see the letter of Human Rights Watch to Prime Minister K. P. Oli, 4 September 2019, available at: https://www.hrw.org/sites/default/files/supporting_resources/190904_nepal_pm_letter.pdf. Although these bills have not been approved by the government and published yet, the National Assembly has accepted the Media Council Bill. The Information and Technology Bill was proposed in February 2019 before the House of Representatives and it was passed by the Parliament Committee on Information and Technology in December 2019. However, the Parliament's official website shows that it is still under discussion. For more information on the status of these bills, see: <https://na.parliament.gov.np/np/bills/8hEexwfi>; <https://myrepublica.nagariknetwork.com/news/house-panel-endorses-disputed-it-bill/> and <https://hr.parliament.gov.np/np/bills/Za1OEE23>

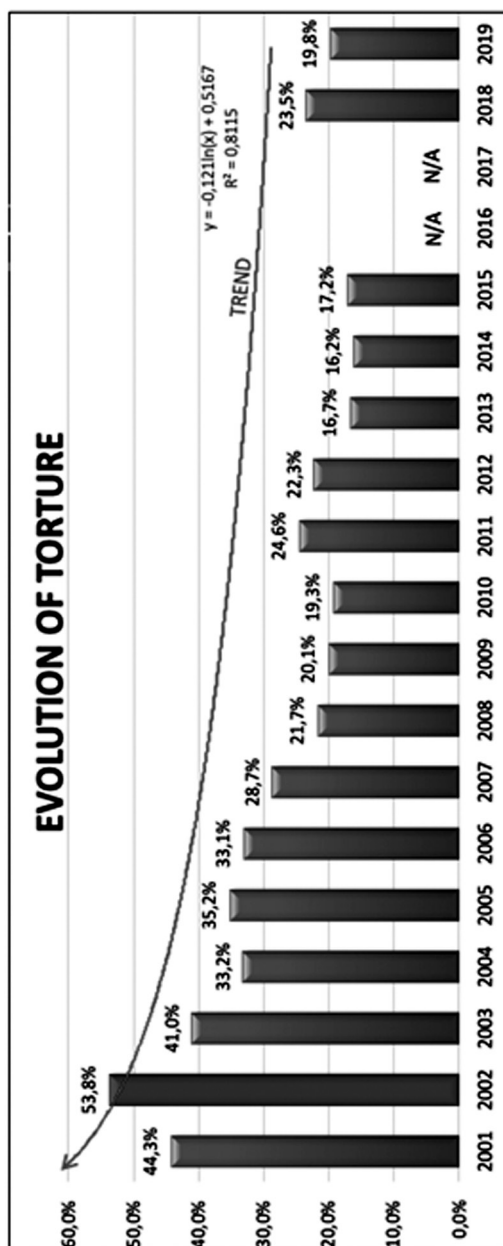


Figure 1: Overall annual torture rates since the collection of data began in 2001

N/A = Not Applicable

centres. Issues surrounding interviewees' ability to privately speak with their lawyers persist. That said, documenting trends in reports of torture or other cruel, inhuman or degrading treatment is essential for the fight against impunity and the promotion of social justice and wellbeing. AF seeks to engage with past, present and future victims respecting their right to an effective remedy and the State's fundamental duty to protect.

Figure 1 shows the evolution of torture trends since 2001. Further analysis will reveal torture methods and findings in respect of juvenile detainees.

CHAPTER II

TORTURE METHODS

The 1996 Torture Compensation Act defines “torture” as physical or mental torture inflicted on a person who is detained for investigation or any other reason, and this notion includes cruel, inhuman, or degrading treatment.³ In police detention centres and correction facilities, torture is exercised through both physical and psychological means. According to data collected from interviewees, it is a general practice amongst police officers to slap detainees on the cheeks two to three times, kick them with boots for two or three times, step on their feet, pluck hair from their heads, moustaches, etc. Some are forced to clean dishes, rooms, toilets, and offices of police, or even to beat other detainees. More severe forms of torture include beatings with bamboo sticks, plastic pipes filled with sand or iron rods on the soles of their feet, legs, arms, back, and other body parts.

³ Torture Compensation Act, 1996, Section 2(a).

Within interrogation rooms, police try to coerce confessions by kicking, slapping, and punching detainees. Physical fatigue is also enforced by making prisoners do pull-ups and push-ups, jumping up and down (sometimes beating the soles of their feet first), forcing them to stand for hours in odd positions, etc. Psychological torture includes use of dirty words and insults, threats of defamation or filing of fake charges, death threats, threats of spreading fake information on social media, and so on. In addition, some detainees are asked about their last wishes after being threatened they will be shot. Police combine these torture methods with promises of future jobs, freedom, and benefits which would be offered in exchange for confessions.

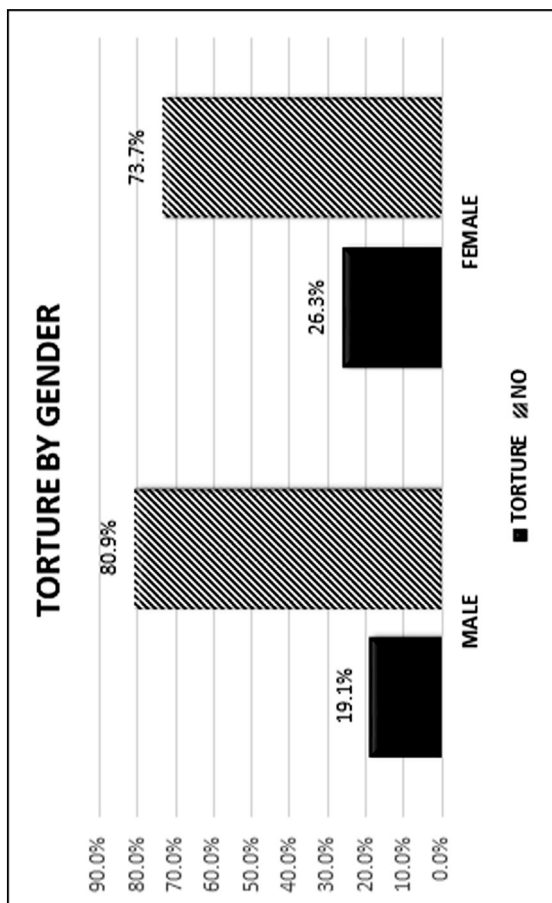
Sexual harassment is frequent, especially against juveniles. Despite being the most vulnerable, under-aged inmates are not only abused by police officers, but also by adult detainees confined with them. In some detention centres, boys are forced to watch pornography, have homosexual relationships, wear girl dresses and makeup, touch their sexual organs, etc. Adults teach them how to conduct sexual intercourse and teach them how to do “Bhauju Flying Kiss” (flying kiss to sisters-in-law). One juvenile complained that there were many pieces of porn literature and comics in his detention cell and in the toilet he used, but police did not react.

Women detainees complained of public authorities who verbally abuse with offensive words, gazes and touches on sensitive parts, catching their hands, etc. In order to prevent them from reporting these facts, officers threaten them with fake charges and torture.

2.1 GENDER ANALYSIS

Similar to previous years, men made up 90.5% of the detainees interviewed by AF. While 174 out of 910 men were exposed to torture and ill-treatment (19.1%), the percentage was considerably higher amongst women. Throughout 2019, 25 out of 85 women detainees reported torture (26.32%), which represents an increase of 3.2% in comparison to 2018. This is significant since it suggests that women are increasingly vulnerable to torture or other ill-treatment.

The methods used to torture men and women are not the same. Namely, women are more exposed to sexual assaults, forced undressing, and beating of sensitive parts. While both male and female inmates fear police brutality, rates show that women are more likely to experience torture and ill-treatment of a sexual nature. Gender, thus, is increasingly becoming a determining factor of personal exposure. Meanwhile, women are also more likely to be stigmatized when they get out of prison.

*Figure 2. Torture by gender*

2.2 FINDINGS ON JUVENILES

Nepalese juvenile law is applicable to those under eighteen years old. Children are the foundation stone of economic and social development and should grow up in safe environments. Despite their physical and mental immaturity, torture is more common against juveniles than adults. Since it was created, AF has contributed to the documentation and awareness-raising on torture and ill-treatment of juveniles. Below we document the juvenile legal landscape of Nepal and the torture trends in 2019.

2.2.1 JUVENILE LEGAL LANDSCAPE

Nepal has ratified the 1989 Convention on the Rights of the Child (UNCRC), which compels state parties to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment. In line with Article 37 of this Convention, arrests, detentions or imprisonments must be done in conformity with the law and used for the shortest period of time possible. Additionally, Nepal has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), which set out international standards within human rights law. Domestically, Nepal has enacted the Children's Act – 2075 (2018), Juvenile Justice Procedural Rules – 2076 and the Penal Code – 2074 (2017), which came into force in August 2018. However, proper implementation of these legal instruments is a serious problem.

Despite the criminalization of torture and other forms of ill-treatment,⁴ international obligations have not been met fully to date. In Nepal, the minimum age of criminal responsibility is ten years old, despite international standards set at twelve. In addition, the Children's Act in Article 21 provides that children can be taken "under control" by authorities if information of an offence is received. Subsequently, it is made clear that public officers "shall not use force while taking a child under control". Article 26 guarantees children the right to obtain information on the charges against them, their right to receive prompt and fair justice, to have confidentiality in the judicial process and to be informed of their constitutional and legal rights. Further, a child "shall not be compelled to give testimony against him or herself".⁵ Any person who violates these provisions should be taken to the concerned High Court to have children rights enforced.⁶

Nepal has ratified most of the human right conventions and optional protocols. Although Nepal has made some progress in putting some legal and policy measures in place in recent years to meet its international standards, AF's monitoring data shows many of these national laws and policies are being flouted in practice.

⁴ Penal Code, 2017, Section 167.

⁵ The Act relating to Children, 2018, Chapter 4, Article 26(2).

⁶ The Act relating to Children, 2018, Chapter 7, Article 65.

2.2.2 GENERAL FINDINGS

In 2019, AF interviewed 269 under-aged detainees. 24.5% of them reported that they had experienced some level of torture or ill-treatment. This rate represents an increase of 1% in comparison to 2018, 4.5% with 2017, and 7.1% in comparison to 2016. Although this may in part be because of AF's increasing outreach to children in detention, it is alarming to see that the highest percentage has been registered since 2012, which indicates a deterioration in the treatment provided to the youngest inmates. There is also a noted 6.4% difference between juvenile and adult torture rates, suggesting that the practice of torture of adults has declined, the torture of juveniles remains more prevalent. In 2018, the difference margin between both rates was 1.7%, while it oscillated between 5-10% in past years.

Male juveniles accounted for 87.7% of the total of children interviewed. Most of those who were tortured or ill-treated were older than 14 years, with only two younger interviewees reported being subjected to these practices. This may represent some progress in this aspect, considering that 9% of juveniles under 14 years old were subjected to torture or ill-treatment in 2018, while the rate in 2019 is 0.8%.

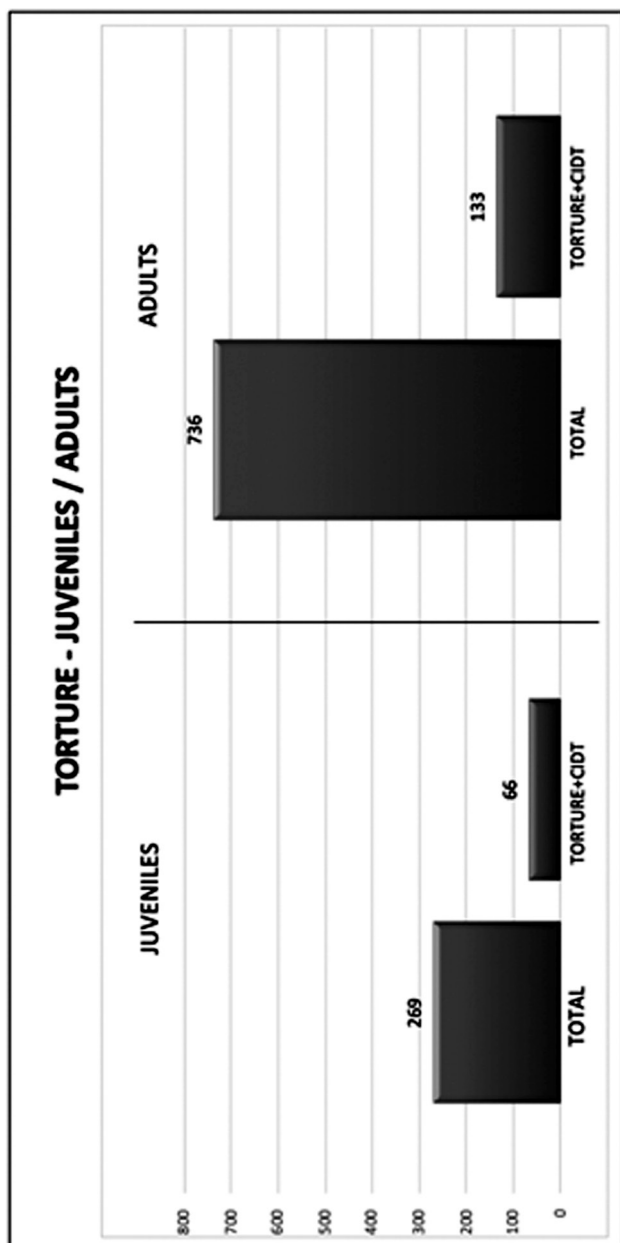


Figure 3: Juvenile vs. adult torture rates

2.2.3 PRESENTATION BEFORE THE COURT

Procedural guidelines for detention are still not being fully enforced. More specifically, only 81% of juveniles were brought to the relevant court within 24 hours after detention. The rate is 1.7% lower to that of adults, and it has decreased by 0.9% since 2018.

2.2.4 HEALTH CHECK-UPS

Health check-ups are crucial to analyse the health status of detainees, if they are treated according to legal standards and how the living conditions in detention centres affect them. According to Article 3(2) of the 1996 TCA, public medical practitioners shall examine detainees both at the moment of detention and release. In practice, however, this provision has not been implemented in a meaningful way.

Having two health check-ups allows for the documentation of the physical state of a detainee upon arrival and release, which would provide strong evidence of torture if it takes place during detention. In contrast, having one single examination opens up the chance for police to deny responsibility and situate torture before detention. Generally, it is likely that health check-ups take place soon after detention, but not at the time of release.

Overall, 98.9% juveniles and 97.8% adults report being medically observed after being admitted to detention. Hence, juveniles receive health check-ups at a rate 1.1% higher than adults. Sometimes, policemen bring detainees to hospitals before

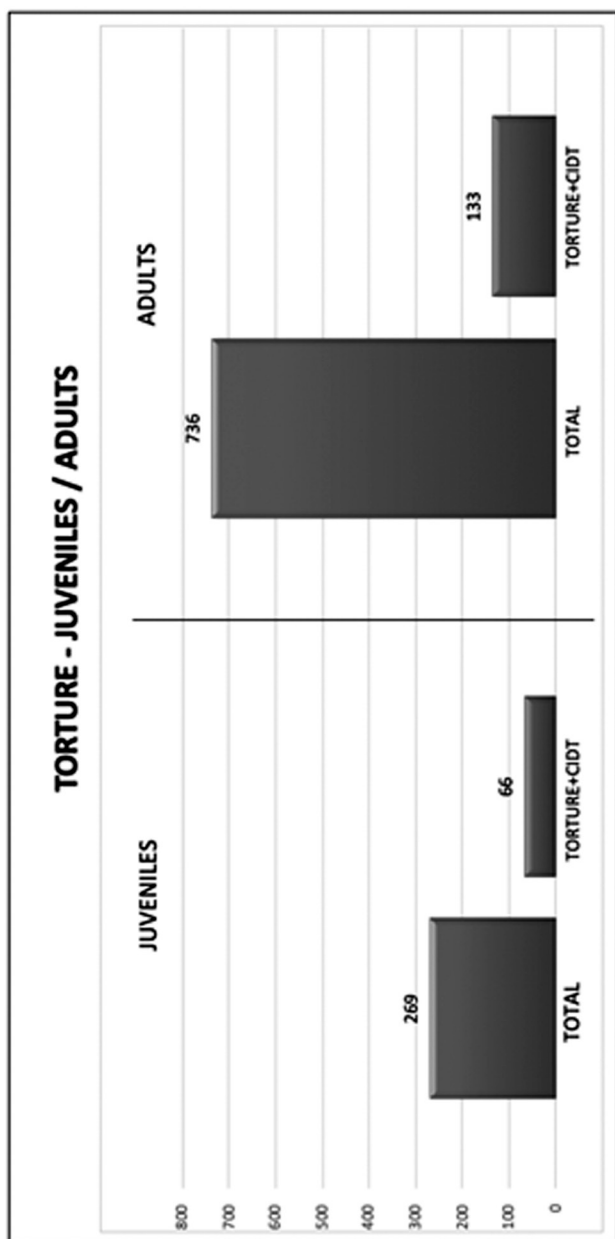


Figure 4: Juvenile medical check-up rate vs. Adult medical check-up rate

they take them to the detention centre, but the most common practice is that detainees are provided a health check-up after they are detained. While 16% juveniles were taken to a hospital right before they were brought to the police station, 82.9% only received a health check-up after arrest and detention. It is noteworthy to signal that 1.1% did not receive a health check-up during the time of interview. As per law, the detainees should be provided health check-up before release from detention but non of the detainee reported going through the health check up on their release.

Lawyers have highlighted that police presence during health check-ups intimidates medical workers and distorts the way examinations are carried out and the medico-legal documentation provided by the doctors. In addition, one of the major problems for the legal punishment of those responsible of torture is the lack of medical reports. Hence, training health care professionals to overcome pressures and assert their legal rights and responsibilities is a must. For the past couple of years, AF has been providing medico-legal training to health care professionals regarding the documentation of injuries sustained by torture victims, be it physical or mental.

As a matter of fact, most child correction facilities are overcrowded. There are currently eight such facilities operating in Morang, Parsa, Makwanpur, Bhaktapur, Kaski (Pokhara), Rupandehi, Banke and Doti districts. Establishing one in each district is still a pending duty. In May 2020, members of AF visited the child correction home in Banke to monitor the situation of juveniles amid fear of Covid-19, and whether their human rights were respected, and whether they were provided access to safety and security measures. The monitoring team observed that:

- More than thirty children were forced to share a single room due to lack of space.
- Only forty-six children were released from the child correction home as per the decision of the Supreme Court.
- The district-level judiciary seems to be insensitive towards juvenile justice and juvenile diversion. Instead of handing over juveniles awaiting trial to their parents, courts often issue decisions to send them to correction homes, especially when they are suspected of having committed grave offences such as rape.
- Juveniles are unaware of the status of their case proceedings.
- Regular health-check-ups have been temporarily suspended.
- There is scarcity of clean drinking water.
- Lack of proper management of septic tanks.
- Lack of access to formal education, books, and stationery.
- Lack of sufficient sporting equipment for children to play.
- Despite the Covid-19 spread throughout the district, children are not provided masks and sanitizers.
- Out of 100 juveniles, around half of them are suffering from skin diseases but have not received medical care. If they ask for medical support, they need to pay themselves.
- An 11-year-old child suffers from mental illness, and another child suffers from a disease causing him to faint occasionally. No specialized treatment is available.

In this context, AF urges stakeholders to pay attention to the issues in child correction homes and address them as early as possible.

2.2.5 FAMILY ACCESS

Social, economic, cultural, educational, and psychological problems all contribute to the rise of delinquency.⁷ In Nepal, children are often exposed to unfavourable conditions that affect the development of their personality. The proper management of juvenile delinquency is key for the prevention of crime in society. At this juncture, allowing juveniles living within child correction homes to have access to family members – or guardians, if they are under social care – may keep them from developing anti-social behaviours. According to Article 37(c) of the 1989 UNCRC, every child deprived of liberty has the right to maintain contact with his or her family, save in exceptional circumstances. Article 6(2) of the Act Relating to Children (2018) refers to these particular circumstances and limits the Juvenile Court's ability to separate children from their parents only when it is necessary for the best interests of the child.

⁷ See UNICEF (n.d.), *A case study: Indra Lal Singh*, UNICEF-Kathmandu, available at: https://www.unicef-irc.org/portfolios/documents/486_nepal.htm

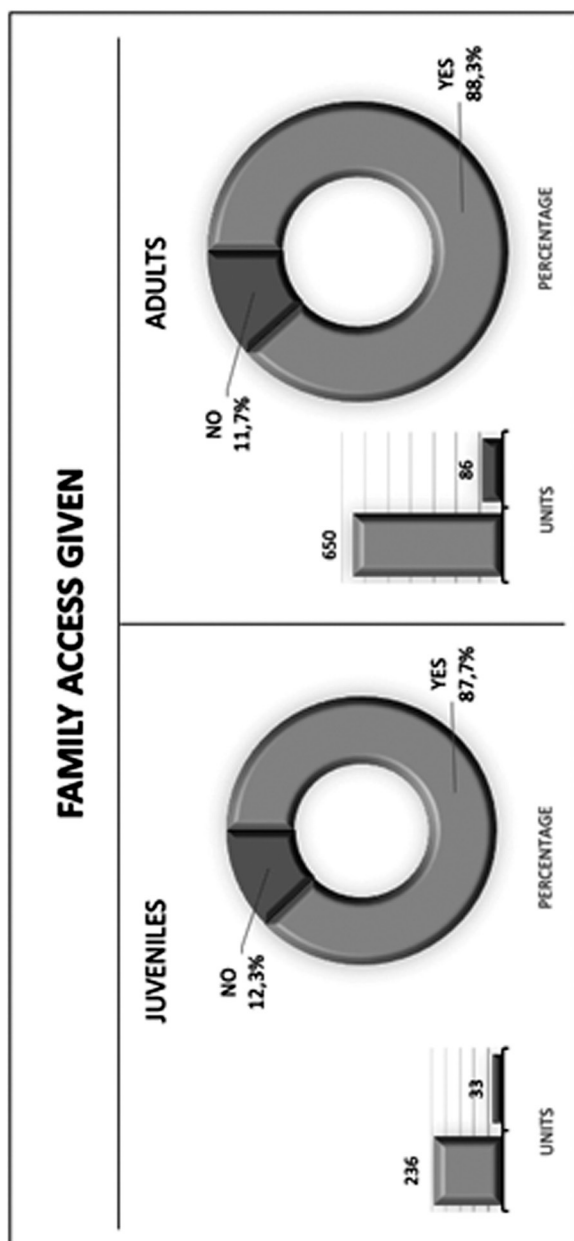


Figure 5: Juvenile family access rate vs. Adult rate

In 2019, 12.3% juveniles in government custody facilities were denied contact with their families, 0.6% more than adults. The juvenile rate has risen by 0.8% compared to last year. Although there are still a considerable number of detainees who lack familial visits and communications, there has been some improvement in this matter. The reasons why not all juveniles have access to their families are complex. In some cases, relatives cannot easily get to the child correction facility, or they lack time and resource to visit. Many juveniles are interned within child correction homes away from their hometowns, and relatives willing to visit them may be constrained by both personal circumstances and the lack of communication and travel related infrastructure.

2.2.6 FOOD PROVISION

It is worrisome that detainees are allowed food at the cost of the State only after remand, which indicates that they could have lacked food for a few hours up to 24 hours before they were brought to court, or even more time if policemen exceeded the 24 hours limitation, if detainees cannot afford to pay for food themselves. As aforementioned, some policemen bring detainees to the hospital, so they receive a health check-up before being brought to the detention facility. While detainees remain there, their names are not registered in police records. Officers take advantage of that time and look for evidence, witnesses, complaints, etc. to support the remand of the detainee. If there are not enough evidence or statements that could incriminate the person arrested, they refuse to register his/her name at the police station, exceeding the time

limitation for detention. Namely, a person could be detained on 2 June without the arrest being arrested until the 3rd or 4th. Most torture cases happen within 24 hours after the time of arrest, which is also the time in which some detainees are kept without food. Public authorities have 24 hours to ask the court for remand and once remanded, then only the detainees become reachable for their lawyers..

The right to food is guaranteed by the Article 36(2) of the 2015 Constitution and Article 13(1) of the 2018 Children's Act. Internationally, it is protected by Articles 11(1) and 8(2) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), ratified by Nepal in 1991. It seeks to protect citizens from hunger, food insecurity, and malnutrition.

When food is provided, 58% of juveniles receive it before remand, while 38.7% receive it afterwards. In contrast, 35.3% of adults get food before remand and 62.6% at a later stage. The difference between rates could be explained because food has to be paid before remand, but not afterwards. Those not being able to afford need to rely on other detainees for their food during the pre-remand period. The following figure shows the percentage of detainees that received food before and after remand, along with those juveniles and adults that still needed to be remanded to become eligible for food.

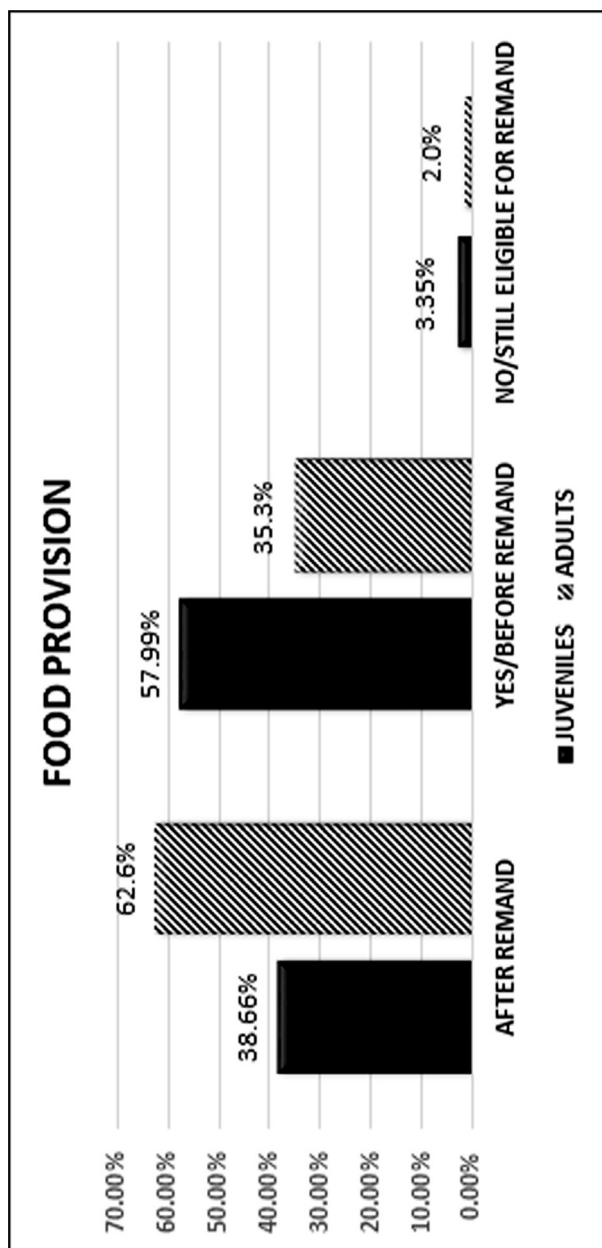


Figure 6: Juvenile food provision percentage vs. Adult food provision percentage

Devnand Pokhrel (pseudonym) is seventeen years old and works as a waiter. On 22 November 2019, two policemen in civil dress arrested him and his friend on charge of mobile phone theft. According to Devnand, police beat them since the time of arrest. The two police officers who performed the detention kicked Devnand and his friend with police boots and beat them with bamboo sticks randomly on different parts of their body including elbows, arms and back. After that, Devnand and his friend were taken to the police station, where they had to wait for a while before the two policemen who had arrested them took them to an interrogation room. They were ordered to lie down on the floor, and once again, the two officers beat both detainees with bamboo sticks on the soles of their feet, thighs, and other parts of their body. Meanwhile, they asked questions about the mobile phones that Devnand and his friend had stolen. Despite Devnand telling the policemen that he had a neurological problem on his right leg and requested them not to beat him there, none of the officers listened to his plea; instead, they continued to beat Devnand's right leg and accused him of pretending to have health problem. Physical torture was inflicted upon both for about half an hour. Then, police officers made them jump up and down, and beat the victims on their back for two to three times.

Once the officers were done interrogating Devnand and his friend at Nayabasti Police Station, Jorpati, they brought them to Metropolitan Police Station in a taxi that they made the victims to pay. The two juveniles were presented at the district court so that the time of detention could be extended. As Devnand was limping, the judge asked him if he had any problems. The victim, however, was afraid by the presence of the policemen responsible for torture, so he remained silent about what happened at the interrogation room and told the judge that his difficulties to walk were caused by a neurological problem.

Subsequently, the judge ordered the authorities to take Devnand to a hospital so that he could receive medical treatment. He received no treatment because the public authorities refused to pay.

After a few days, Devnand's condition deteriorated. On 11 December 2019, he was admitted in a hospital where he received treatment for one day. The day after, police officers took him to Kathmandu District Court, where the judges sent him to Kathmandu Child Reform Home.

Resulting from torture practices, Devnand had difficulties walking and sitting properly. Moreover, the correctional home, in which he stayed lacks clean water supply, so he developed infections in both hands, as the wounds that police inflicted on him could not be treated properly. At present, he is receiving medical treatment and his health condition is improving gradually.



Figure 7: Devnand's hand marks from bamboo sticks – Credit: Advocacy Forum

CHAPTER III

REPARATION AND COMPENSATION ON TORTURE CASES

Although monetary compensation for victims of human rights violations has long been implemented in Nepal, the legal system is yet to develop an understanding on victims' right to reparation. International law recognises that victims of human rights violations have a right to reparation, which includes restitution, rehabilitation, satisfaction, and guarantees of non-repetition, alongside compensation.⁸ Indeed, states should remove the consequences of human rights violations and re-establish the conditions prior to the time they were committed to the extent possible.⁹ Although it is important to provide compensation, it is a very limited way to redress torture victims and recognise the harm inflicted upon them. It should be provided alongside

⁸ '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.

⁹ Case concerning the Factory at Chorzow (Merits), PCIJ, Series A, No. 17, 1928, p. 47.

the right to rehabilitation, public apologies and improvements in the provision of services, among other things. In this sense, a legal framework of structural reparations that goes beyond mere financial compensation is still a pendant duty.

There are currently three different ways through which victims of torture could try seeking compensation: 1) filing case under the TCA; 2) filing a complaint before the NHRC; and 3) filing an FIR with the police. However, victims of torture continue to largely rely on the TCA. As AF representatives have jointly observed, having torture-related criminal offence provisions in the Penal Code, and compensation claims regulated in the TCA is often problematic for a number of reasons: it prolongs judicial processes as it compels survivors to present two separate claims, while it compels their lawyers to consult scattered laws.

The National Human Rights Commission Act of 2012 enforces the need to provide compensation to victims of human rights violations and urge the Commission to make recommendations along these lines. It recognizes victim as a person who has died or had sustained damage as a direct result of an offence committed against him/her, including victims of all crimes, along with their immediate family and guardians – in case of minors. Further, it allows the NHRC to recommend compensation up to a maximum of 300,000 NRS (2,550 US\$), depending on the condition of the victim.¹⁰

However, the Act also included a statutory limitation of six months to report human rights violations. It is widely recognised that victims of torture and other abuses need time

¹⁰ The National Human Rights Commission Act, 2012, Section 16.

to feel psychologically prepared to file cases. There should be no restriction of time to denounce the facts of how they were treated, nor to claim compensation. In Nepal, the infrastructure of transportation is weak, and many people live in remote areas. The geographic presence of the NHRC is also limited. Restricting victim's access to the NHRC to seek compensation under these circumstances is a clear failure on the part of the state.

The Penal Code provides for compensation in addition to the criminal sanction. Section 169 provides that the victims should be provided appropriate compensation, in proportionate to the loss and pain s/he has suffered, from the perpetrator/s. However, the law doesn't clarify what if the perpetrator/s do not have property to provide compensation to the victim. So, the victims have so far mainly relied on the TCA to obtain compensation, as the conviction of the alleged perpetrator is necessary to obtain compensation under the Penal Code, which is difficult in many cases. As of today, both the determination of criminal liability and to obtain compensation under the Penal Code seems to be challenging for victims.

3.1 COMPENSATION UNDER THE TCA

Torture victims have a right to compensation under the TCA, 1996. The maximum compensation was set at the time the Act was passed in Parliament at 100,000 NRS (850 US\$), and victims' ability to claim monetary redress and departmental action is limited to thirty-five days. While the ceiling on monetary amounts restricts the courts' ability to redress the psychological and

physical impact that torture has on survivors – and their relatives –, means of reparation different to compensation are not regulated. In addition, the Act provides for an arbitrary range of possible amounts of compensation that can be paid from the state treasury, lacking determinations on how damages should be calculated.

The TCA allows victims to file complaints in the court of the district where the alleged torture took place, with evidence of the claim. If the court finds that the victim has suffered from the violation and awards compensation, it establishes the amount according to the provisions of the TCA. Departmental action, too, can be taken against the perpetrator following the conditions of the Act.

Although AF has consistently highlighted a number of flaws in the TCA,¹¹ it has assisted victims in their efforts to seek compensation under the TCA since its inception. Under the TCA, victims can file claims for compensation and seek disciplinary action against the alleged perpetrator directly to the district court. In this chapter, we analyse more than 150 cases filed with the help of AF under the TCA.

3.2 DATA ANALYSIS OF CASES FILED UNDER THE TORTURE COMPENSATION ACT, 1996

Since the establishment of AF, its lawyers have assisted 152 torture victims to file cases under the TCA. Adults accounted for 84.21%

¹¹ See AF, 2014, *Torture in Nepal in 2014*. Available at: <http://www.advocacyforum.org/downloads/pdf/publications/torture/TORTUREINNEPALIN2014EnglishVersion.pdf>

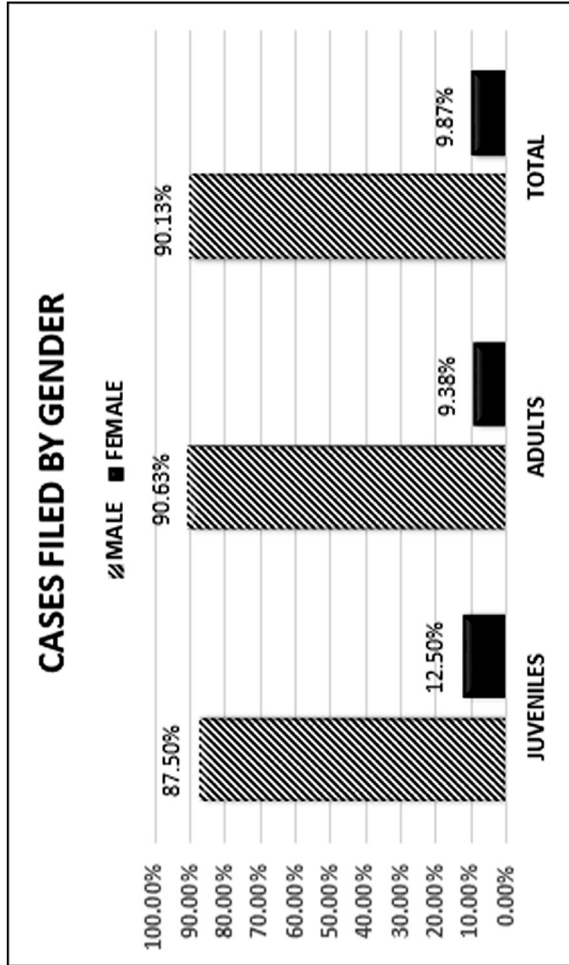


Figure 8: Compensation files percentage by gender

of the total, and 15.79% were juveniles. Overall, 90.13% were men and 9.87% were women. Boys made up 87.5% of juveniles, while girls constituted 12.5%. Among adults, 90.63% adults were men and 9.38% were women.

3.2.1 COMPENSATIONS AWARDED

In total, only in 30.26% cases did courts award compensation. Within this group, 22.73% victims were provided 10,000 NRS (82,71 US\$), 15.91% were provided 15,000 NRS (124 US\$), and 13.64% were provided 25,000 NRS (206,77 US\$), all of which do not constitute effective amounts destined to cover their needs represent symbolic court decisions. Decisions in which other compensation quantities were established accounted for less than 10%.

It should be noted that survivors can be kept waiting for a number of years before they can actually get compensation. AF is aware of more than a dozen torture survivors who have been waiting for near or over a decade.

3.2.2 DEPARTMENTAL ACTION

Under the TCA, the Court can order departmental action – also known as disciplinary action – against those alleged to have been responsible for torture.¹² However, the law allows the alleged

¹² Compensation related to Torture Act, 1996, Section 7.

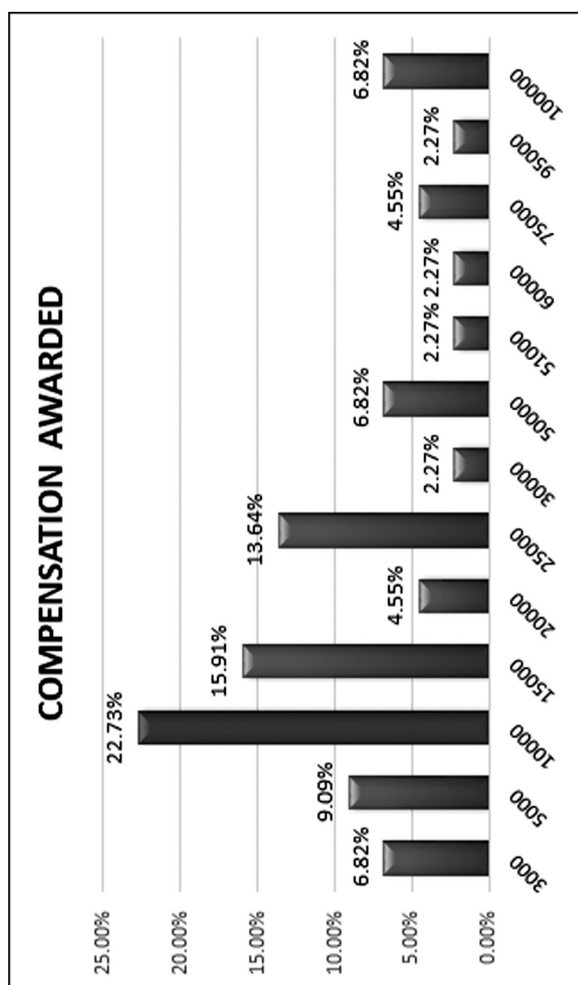


Figure 9. Compensation quantities awarded

perpetrator to be defended by a public prosecutor at public expenses. Departmental actions, in addition, can vary from institution to institution. But it is important that redress for torture includes measures beyond monetary compensation. Departmental action, in this sense, could include measures such as a caution or removal from a job.

Analysis of all the cases where AF assisted victims to file cases under the TCA reveal that the courts ordered departmental action in 50% of the compensation claims that were successful. In 45.45% cases, compensation was awarded but no departmental action was taken. The remaining 4.55% concerns cases in which compensation was awarded and a notice (caution) was issued that perpetrators could be removed from the job. That said, there is no mechanism at the court to follow up or any practice at police department to report to the court on what departmental action was taken against the perpetrators. As victims are not given information about this, it is unclear what disciplinary measures were taken.

3.2.3 MEDIATION

In 2019, 1.32% of TCA court decisions (two cases) were based on mediated agreements between victims and perpetrators. As torture is one of the gravest violations of human rights, there should be no scope for mediation. However, in some cases, the court has advised both parties to go for mediation. These procedures follow the Mediation Act of 2011, which determines how to appoint mediators, how mediations should be conducted and disputes settled, among other issues. Yet, as there are no legal means to

control that victims' consent to mediation agreements is freely given, they are easily exposed to threats and pressures. As a matter of fact, one of the two victims who went through the process of mediation was threatened to agree to a settlement.

.3.4 CASES DISMISSED

As stated above, 63.16% of cases that reach the courts end in a dismissal. Within this group, causes of dismissal include the lack of medical/sufficient evidence (77.08%), victims denying torture before the court for unknown reasons (12.5%) or due to police threats (1.04%), the case has exceeded statutory limitation (5.21%), the absence of the plaintiff before court caused by police threats (3.13%), and plaintiff's providing contradictory statements (1.04%). It is not surprising that the lack of medical evidence motivates most verdicts of dismissal, since the legal obligation to examine detainees before and after detention¹³ is rarely implemented. Moreover, the lack of sufficient medico-legal training for health personnel often results in poor medico-legal documents.

After they were tortured, many victims are unable to make it to a hospital without help. Some have to wait for a few days before they are physically and mentally prepared, and when public authorities do not provide medical examinations, they rely on their own resources to cover the costs. Moreover, the TCA statute of limitation restricts their ability to prove torture to thirty-five days.¹⁴

¹³ TCA, Section 3(2).

¹⁴ Compensation Related to Torture Act, 1996, Section 5(1).

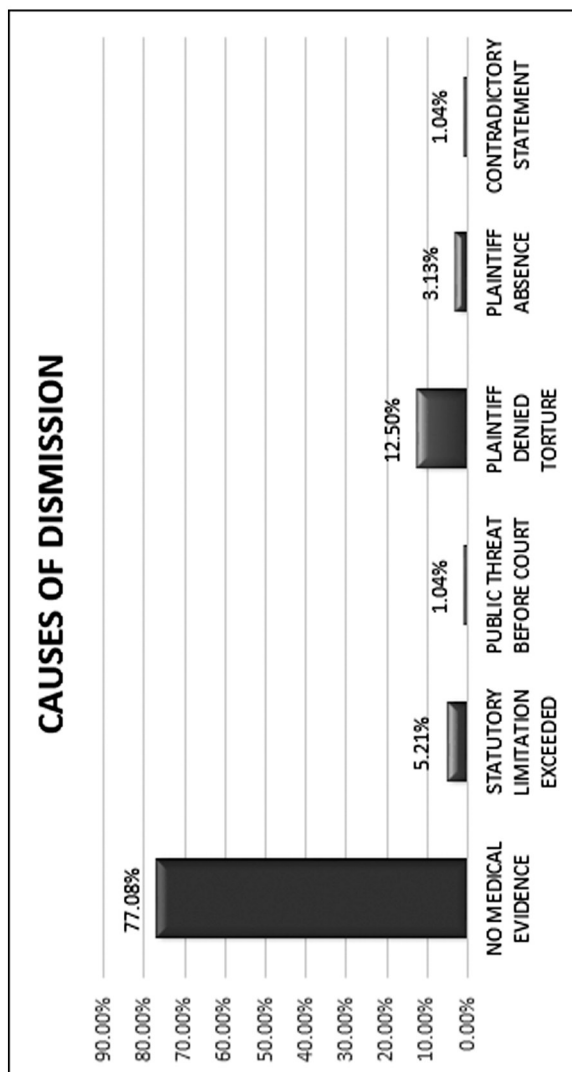


Figure 10: Causes of dismissal percentage

Survivors of torture frequently experience feelings of shame and a loss of dignity, and they need time to feel able to take legal action and compile evidence. Considering these issues and granting protection against threats is essential to motivate the victims to file compensation claims. Lack of security for victims and witnesses causes many of them to retract the information they provided, to not appear before the court, contradict prior statements, etc., causing the dismissal of cases. The figures also reflect the need to sensitize judges from a human rights perspective, considering the gravity of torture and its devastating consequences.

3.2.5 CASES WITHDRAWN

Out of 152 cases filed with the help of AF, 6.58% torture survivors withdrew their complaints. 20% of them freely negotiated conditions, probably motivated by the low amount of compensation claims that make it to court and the legal ceilings on compensation, which sometimes take victims to accept higher out-of-court payments. Meanwhile, 20% survivors were moved by reasons unknown, and a notable 60% reported fearing for their safety due to anonymous threats. In this sense, survivors are afraid of reprisals and further abuse by police officers if they report torture.

In a bid to stop torture victims from going to court, it is often the case that police bribe them. Some victims have reported AF that they are offered money, manifold more than what they would get through a court decision. Often, threats causing insecurity and

economic condition play forcing victims to be susceptible to such offers and to withdraw the formal cases.

3.2.6 CASES APPEALED

The right to appeal judicial decisions is key to assert the right to effective judicial protection and a due process. Out of 152 cases, 35 (25%) judicial decisions of compensation and dismissal were appealed at Appellate courts. Within the cases appealed, 88.57% decisions of the district court were upheld, while in 11.43% cases the decisions of the district court decisions were quashed in favour of victims.

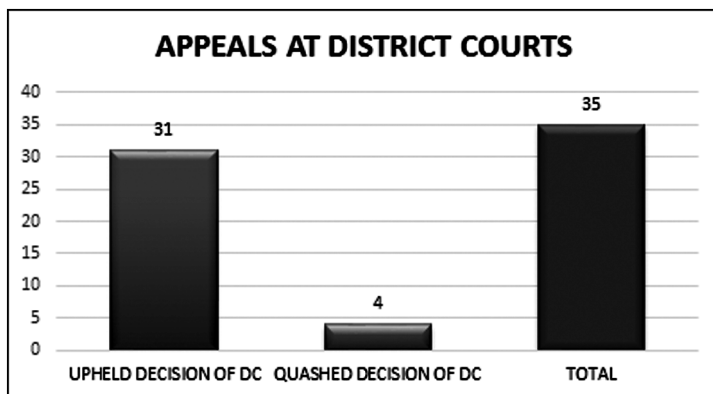


Figure 11: Total appeals at district courts vs. Appealed decisions percentage

At the next stage, 5 (14.29%) appellate cases were presented to the Supreme Court for further revision. Out of the cases presented to the Supreme Court, only 2 (40%) were awarded compensation. The remaining 3 (60%) were quashed or rejected due to weak evidence and lack of jurisdiction.

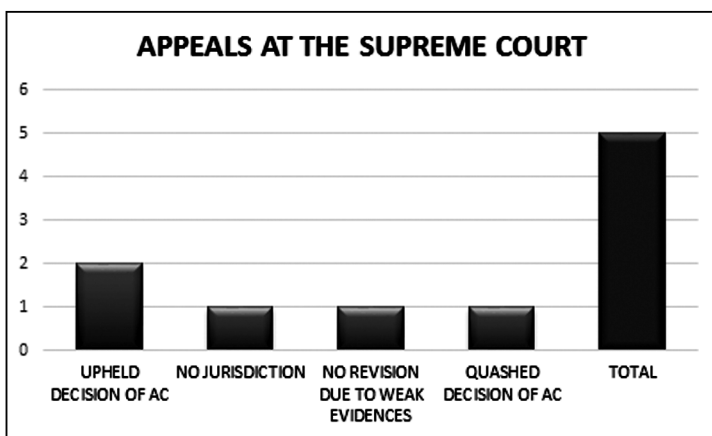


Figure 12: Percentage of appeals at the Supreme Court vs. Decision percentages

3.2.7 IMPLEMENTATION STATUS OF COURT ORDERS

One major problem in Nepal is the non-implementation of decisions of the Courts. Out of 152 cases, 30.26% (46 cases) were awarded compensation¹⁵; 95.65% by district courts, and 4.35% by appellate courts.

¹⁵ This percentage accounts for torture survivors that were awarded compensation by court decision and mediation.

To date, out of the 46 victims who were awarded compensation only 7 (15.22%) actually received the money. In some cases, victims filed an application at the District Administration Office (DAO), who had to forward it to the Home Ministry who would then provide the monetary amount to the DAO, the authority in charge of delivering it to the plaintiff. The constant follow up and administrative hurdles in actually ensuring victims receive the amount awarded by the Court takes years. As per the law, victims must fill applications at the DAO within one year after the court decision has been made, while the DAO is supposed to provide them the monetary compensation within thirty-five days of the application registration.¹⁶ However, in a number of cases, DAO has informed victims that it not receiving amount from the ministry as per their request.

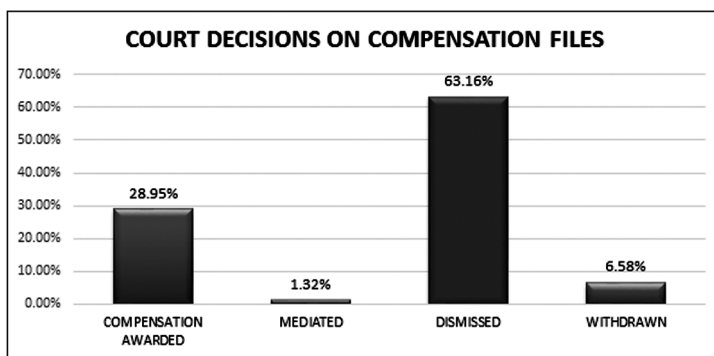


Figure 13: Court decisions of compensation percentage

¹⁶ TCA, Section 9.

Emblematic cases: Raj Kumar Mahaseth, Karbir Singh Sahu, Dharmendra Barai

AF would like to highlight the case of Advocate Raj Kumar Mahaseth, a human rights activist who was beaten up by police while monitoring a political event. That day, police injured about eighty people who were striking. An armed officer hit Advocate Mahaseth with a bamboo stick until other police stopped him. He had been unable to walk and do his chores since the incident happened in 2008. He claimed compensation and provided medical evidence that he had been injured and was receiving treatment. The defendant, on the other hand, was unable to prove that police personnel under his command did not beat the plaintiff. As a result, the court awarded compensation, but only of 25,000 NRS.

To date, the plaintiff has not received any monetary compensation. Despite filling an application and asking for the court decision to be implemented for several times, he was not given the compensation. Thereupon, lawyers from AF assisted him to file a claim at the Supreme Court, which on 29 January 2018 ordered the implementation of the judicial verdict. Another application was filed along with the Supreme Court decision, but Mr. Mahaseth is still waiting to be compensated.¹⁷

In contrast to Mr. Mahaseth, Karbir Singh Sahu is another survivor who did receive monetary compensation. His case, however, is an example of arbitrary verdicts and contradictory decisions between courts of different levels. In the first instance, the district court of Kathmandu ordered the state to provide the victim 100,000 NRS and departmental action to be taken against the three police officers responsible for torturing him. The sentence was appealed by the defendants, so the appellate court requested each perpetrator to pay 10,000 NRS to Mr. Sahu and dismissed the

¹⁷ Full decision of the Supreme Court is available at: <http://supremecourt.gov.np/cp/#listTable>

prior court's decision of departmental action. Against the decision of the appellate court that reduced the compensation amount to a total of 30,000 NRS and rejected to take departmental action, Mr. Sahu appealed to the Supreme Court. Finally, the Supreme Court awarded him 50,000 NRS and re-ordered departmental action to be taken against two of the perpetrators. The third alleged perpetrator was absolved.

The case of Dharmendra Barai is representative of how impunity is maintained by the state system, while justice is sought away from judicial procedures. He was tortured and killed in police detention in July 2010.¹⁸ In order to investigate the crimes, the Home Ministry and the DAO formed two separate teams, but no report was made public. His relatives tried to file a case against the perpetrators, but police refused to register the first information report. Despite the DAO had promised to provide them compensation, the plaintiffs were offered 150,000 NRS in exchange for dropping their demands. With the support of AF, the victim's family members tried to register the first information at the local police station, but police refused to register the FIR. Thereupon, the FIR was posted through post office, but no police officers initiated the investigation. With the support of AF, the victim's family members filed a mandamus at the High Court, which led the Court to order the police to both register the FIR and investigate the case. But instead of following this order, the police filed a writ at the Supreme Court so that the High Court's decision could be reversed. Despite the Supreme Court uphold the decision of the High Court, no investigation has been initiated by police. These events may not have taken place if justice was guaranteed by legality and enforced by the judiciary. It is intolerable that human rights violations are covered up with money, while victims and their families are affected by long-term devastating consequences.

¹⁸ Case study is available at: <https://www.hrw.org/report/2010/12/14/indifference-duty/impunity-crimes-committed-nepal>

CHAPTER IV

ANALYSIS OF INTERNATIONAL LAWS ON REPARATION

The right to reparation for victims of human rights violations is a fundamental principle of international law. To this extent, acts or omissions that are not in conformity with international obligations are transnational, because they effect at the international level. However, determining whether a state has failed to implement its obligations requires an identification of those obligations. The right to reparation is contained in several treaties; it features a number of measures that will be described hereafter.

As a matter of fact, each treaty uses a different language and interpretations of what the right to reparation entails have developed gradually. This section merges those binding international legal provisions with pronunciations from human rights treaty bodies that monitor implementation of the obligations.

4.1 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

The ICCPR does not regulate the right to obtain reparation explicitly, but it provides a reference to the right to an “effective remedy” in Article 2(3). The remedy is to be determined by “competent authorities”, although there is no further description of what a remedy should entail. The Covenant mentions compensation only in relation to victims of unlawful arrest, detention and conviction in Articles 9(5) and 14(6).

Article 28 created the Human Rights Committee (HRC) to guarantee the implementation of the Covenant at the national level. Since it began its operations, the HRC has interpreted its content in the context of individual petitions, concluding remarks from state reports, and general comments. It does not have authority to issue legally binding judgements, but it adopts decisions in cases from individuals who claim that particular state parties have violated their rights. According to the Committee, the right to reparation is part of the right to an effective remedy.¹⁹ Despite

¹⁹ Article 2.3 of the International Covenant on Civil and Political Rights, adopted and ready for signing, ratification and joining by the General Assembly in its resolution 2200 A (CCl) of December 16, 1966: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”

the fact that non-compliance with HRC Views being considered a violation of Article 2(3), there is a lack of formal mechanisms for the enforcement of the Committee's Views.

In its interpretations of Article 2(3), the HRC has stated that torture victims have a right to an effective remedy, including compensation, and that state parties are obliged to prevent those violations from occurring. At times, it uses other terms such as “full reparation”, “adequate compensation” or “as full rehabilitation as possible”.²⁰

4.2 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984

Article 14.1 of the UNCAT compels state parties to ensure that victims of any act of torture obtain redress and have an “enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The Committee against Torture, the treaty body set up under the UNCAT, describes the concept of full reparation in terms of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²¹

The UNCAT reminds state parties that redress and reparation should be provided in accordance to the specificities and

²⁰ Ramírez v. Mexico [2012] UN Human Rights Committee Communication No. 500/2012.

²¹ CAT. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3..., *op. Cit.*, para. 6.

circumstances of each case, the needs of the victim, and in proportion with the gravity of the violations.²² In addition, proceedings for seeking reparation should not involve financial burdens upon victims that would discourage them from seeking redress.²³

Apart from the guidelines established for the implementation of reparation, the UNCAT highlights the principle of non-discrimination as basic for the protection of human rights and fundamental for the application of this legal provision. More specifically, Article 32 orders states to “ensure that, access to justice and mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, gender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction, and including those marginalized or made vulnerable on bases such as those above.” As long as compensation depends on the financial capabilities of the perpetrator, however, discrimination between victims of rich and poor perpetrators will prevail.

In light of the political transition that Nepal is going through, it is noteworthy to highlight that, in the words of the Committee, “The failure of a State party to provide the individual victim of torture with redress may not be justified by invoking a State’s

²² UNCAT, Article 6

²³ UNCAT, Article 29.

level of development. The Committee reminds that change of government as well as successor states still have the obligations to guarantee access to the right of redress”.²⁴

4.3 INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, 2006

According to Article 24.4 of this treaty (which Nepal has not ratified to date), “[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation”. Reparation and compensation are not described as alternatives, but cumulative measures for redress. In a similar way, Article 24.5 establishes that the right to obtain reparation includes material and moral damages and, where appropriate, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.

4.4 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, 2005

The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

²⁴ UNCAT, Article 37.

Rights Law and Serious Violations of International Humanitarian Law” require state parties to ensure that their domestic law is consistent with their international legal obligations, amongst other things, by “[m]aking available adequate, effective, prompt and appropriate remedies, including reparation”.²⁵ Further, they should ensure that victims who suffered violence or trauma benefit from special attention and care to avoid their re-traumatization during legal procedures.²⁶

According to Principle 11, the right to reparation is part of the right to remedies for violations of human rights, which also contains the right to equal and effective access to justice, and access to relevant information. Similar to Article 6 of the UNCAT, Principle 18 establishes that victims of gross violations of international human rights and international humanitarian law should be provided with reparation according to their individual circumstances and in proportion to the gravity of the violation and circumstances of each case.

As aforementioned, the right to reparation can be translated in measures of restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. Court decisions regarding

²⁵ UN, *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*, Resolution adopted by the General Assembly on 16 December 2005, principle 1. Available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>

²⁶ UN, *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*, Resolution adopted by the General Assembly on 16 December 2005, principle 10.

the measures that are to be implemented should rely on the circumstances of each case and the needs of the victim. In Nepal, however, the lack of legal mechanisms for granting means of reparation different to compensation constrain their implementation, while ceilings on compensation prevent courts from considering the particular needs of each victim.

Restitution refers to the restoration of the original situation before the violation of human rights took place. It can take different forms in individual cases, namely: the “restoration of liberty” in case of unlawful detention, “enjoyment of human rights, identity, family life and citizenship”, “return to one’s place of residence” for forcibly displaced persons, “restoration of employment” and “return of property” that were lost as a consequence of the violation.²⁷

Specifically, compensation describes the economic redress destined to cover physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, containing loss of earning potential, moral damage, costs of legal or expert assistance, medicine and medical services, and psychological and social services. It extends to burdens of this nature that victims could have faced in the past, that they may be facing in the moment of concession, and future loads, all resulting from the violation of their human rights.²⁸

²⁷ UN, *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*, Resolution adopted by the General Assembly on 16 December 2005, principle 19.

²⁸ UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human*

The UNCAT was the first instrument of the UN that stated that compensation should include the means necessary to achieve the fullest rehabilitation possible of torture victims.²⁹ Later on, the ICCPR would only refer to it related to imprisonment. But from the perspective of the HRC, rehabilitation is a form of reparation that derives from the right to an effective remedy under Article 2 of the ICCPR.³⁰ According to Principle 21, rehabilitation refers to the provision of medical and psychological care, along with legal and social services necessary to reverse the effects of the violation of the victim's human rights.³¹ Such medical treatment requires informed consent on behalf of the victim; it shall have a multidisciplinary approach driven by experts sensitized in human rights violations, and also a collective approach.³²

Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005, principle 20.

²⁹ REDRESS, *Rehabilitation as a Form of Reparation Under International Law*, December 2009, available at: <https://www.refworld.org/docid/4c46c5972.html>

³⁰ Human Rights Committee, *General Comment 31, Nature of the Legal Obligation Imposed on State Parties to the Covenant*, 26/05/2004, para. 16, available at: <http://docstore.ohchr.org/Sel fServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2F VaVzRkM jTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbeJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvm QGVHA%3D%3D>

³¹ UN, *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*, Resolution adopted by the General Assembly on 16 December 2005, principle 21.

³² IACtHR, *Case of the Massacres of El Mozote...*, Judgement of October 25, 2012, para. 353.

If applicable, satisfaction should come with effective mechanisms for the cessation of continuing violations, verification of the facts and public disclosure of information to the extent that it causes harm or threatens the interests or security of the victim or relatives, witnesses, or those who have assisted the victim, the search of the disappeared, the restoration of the victim and people connected with them, public apologies, judicial and administrative sanctions against perpetrators, commemorations and tributes to the victims, and spread of an accurate amount of the violations.³³

Finally, guarantees of non-recurrence constitute preventive measures against torture and ill-treatment, featuring: “civilian control of military and security forces”, enhancement of “international standards of due process, fairness and impartiality”, “independence of the judiciary”, protection of human rights defenders in all professions, “human rights and international humanitarian education of society and training for enforcement officials as well as military and security forces”, “codes of conduct and ethical norms” in accordance with international standards, “mechanisms for preventing and monitoring social conflicts and their resolution”, and “reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law”.³⁴

³³ UN, *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*, Resolution adopted by the General Assembly on 16 December 2005, principle 22.

³⁴ UN, *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*,

As of to date, Nepal is remiss in its obligation to put in place all forms of reparation provided for in international law to which it is a party. Only compensation is incorporated into national law, but the practise is flawed as demonstrated above. Further, new measures of reparation other than compensation are needed to implement international obligations and guarantee that torture survivors are redressed.

Resolution adopted by the General Assembly on 16 December 2005, principle 23.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

The criminalisation of torture under the Penal Code that came into force in August 2018, along with a reduction in political instability in some parts of the country, and the wider exposure of human rights violations explain the decrease in torture in 2019 as compared with 2018. Nevertheless, results from this year still prove that torture remains a very present reality within the criminal justice system. Juveniles remain the most vulnerable inmates, having been subjected to torture and ill-treatment at a rate considerably higher than adults. Likewise, women experience these practices more often than men, although they account for a minority of detainees.

Consistent impunity makes all our efforts futile. Despite the fact that the new Penal Code has come into force, no cases have been investigated under it, despite the efforts of victims to lodge complaints, already showing signs of the continuing uphill battle ahead in establishing accountability and challenging impunity in cases related to torture.

Police compliance with procedural safeguard provisions is another source of concerns. As these safeguards help to prevent torture and ill-treatment, their strict observance is important. While the rate of detainees who were brought before the court within 24 hours after detention has improved since last year, more detainees were denied family access than in previous years. In addition, health professionals are usually intimidated by the presence of police authorities that monitor health check-ups and the documentation of torture in medico-legal reports, regular check-ups have been temporarily suspended in the core of the Covid-19 pandemic, and the right of food is denied to many inmates until they are remanded.

Despite many flaws, the TCA continues to be the main law many victims rely on for claiming torture. Although its main objectives are to provide compensation to torture victims, it is highly restrictive. It establishes a 35-day limitation for making claims, requires that torture occurs in a place of detention, that public employees are involved, sets up ceilings on compensation, and indirectly links compensation for victims to punishment of perpetrators.

As a matter of fact, many torture survivors have been awarded compensation since the TCA was enacted. That said, courts award compensation in less than half of the cases, compensation amounts are not enough to meet the needs of the victims, and more importantly, the lack of implementation of court orders is a big problem in Nepal. Judicial decisions are based on confusion and arbitrariness, and even when compensation is awarded, only 15.22% of the victims have received it, despite many years having gone by since the court awarded it.

Similarly, the new Penal Code maintains a statute of limitation of six months for victims or their relatives to claim for criminal responsibility, and it makes courts rely on the prosecution of perpetrators and their financial capabilities to award compensation.

AF has been working with other organisations to promote a new anti-torture law that would suppress ceilings on compensation and statutory limitations. Further, new measures of reparation other than compensation are needed to implement international obligations and guarantee that torture survivors are redressed. For all these measures to produce results, however, political will is a must.

In part, the success of compensation claims relies on a careful balancing of political pressures. Survivors must feel confident to report these cases and feel able to overcome any repercussions before they file claims, but the lack of repercussions for most perpetrators undermines confidence in the legal system. For torture cases to be heard, legal reform must be promoted that combats impunity and guarantees the protection of victims and witnesses.

It is noteworthy to stress that while monitoring efforts are based on instances of police abuse and procedural failure, this is not to find sole responsibility among public security forces. AF wishes to share the complex realities in which torture takes place, along with the needs of the victims and society as a whole. Namely, we must develop resources so that police authorities do not need to worry for the price of health check-ups and medical treatments, with a system that reimburses any expenses during detention. The persistence of torture, in this sense, does not only result from power abuses, but a multiplicity of factors that include political indifference, lack of implementation of court decisions, and the justice system itself.

ANNEXES

Annex I: Torture/CIDT

TORTURE/CIDT	TOTAL
YES	180 17,9%
NO	806 80,2%
CIDT	19 1,9%
TOTAL	1,005 100%

Annex II: Torture/CIDT Infliction – Juveniles/Adults

AGE SECTION	TOTAL	TORTURE/ CIDT	NO
10-18	269 26,8%	66 24,5%	203 75,5%
19-70	736 73,2%	133 18,1%	603 81,9%
TOTAL	1.005	199	806

Annex III: Torture/CIDT – Gender

GENDER	TORTURE	NO	CIDT
Male	162	736	12
	17,8%	80,9%	1,3%
Female	18	70	7
	18,9%	73,7%	7,4%
TOTAL	180	806	19

AGE	MALE	FEMALE
10-18	236	33
	87,7%	12,3%
19-70	674	62
	91,6%	8,4%

Annex IV: Juvenile torture/CIDT Infliction – Age

AGE	TORTURE	NO	CIDT
10	0	1	0
	0,0%	0,4%	0,0%
11	0	1	0
	0,0%	0,4%	0,0%
12	1	2	0
	0,4%	0,7%	0,0%
13	1	4	0
	0,4%	1,5%	0,0%

AGE	TORTURE	NO	CIDT
14	6	10	2
	2,2%	3,7%	0,7%
15	9	31	1
	3,3%	11,5%	0,4%
16	15	41	2
	5,6%	15,2%	0,7%
17	20	68	5
	7,4%	25,3%	1,9%
18	4	45	0
	1,5%	16,7%	0,0%
TOTAL	56	203	10

Annex V: Brought to Court within 24 hours

AGE SECTION	TOTAL	NO	YES
10-18	269	51	218
	100,0%	19,0%	81,0%
19-70	736	127	609
	100,0%	17,3%	82,7%
TOTAL	1,005	178	827

Annex VI: Provided a Health Check-up

HEALTH CHECK-UP	10-18	19-70	TOTAL
Yes/after Detention	223	677	900
	82,9%	92,0%	89,6%
Before Detention	43	43	86
	16,0%	5,8%	8,6%
No	3	16	19
	1,1%	2,2%	1,9%
TOTAL	269	736	1,005

Annex VII: Provided Family Access

AGE SECTION	TOTAL	NO	YES
10-18	269	26	243
	26,8%	9,7%	90,3%
19-70	736	93	643
	73,2%	12,6%	87,4%
TOTAL	1.005	119	886

Annex VIII: Provided Food

FOOD PROVIDED	10-18	19-70	TOTAL
After Remand	104	461	565
	38,7%	62,6%	56,2%
Yes/before Remand	156	260	416
	58,0%	35,3%	41,4%
No/still Eligible for Remand	9	15	24
	3,3%	2,0%	2,4%
TOTAL	269	736	1,005

Annex IX: Torture files under the Criminal Code

DECISION	CASES FILED
Refused to Register FIR	5
	62,50%
Under Consideration	1
	12,50%
Dismissed	1
	12,50%
Victim Compromised	1
	12,50%
TOTAL	8
	100,00%

Annex X: Torture Compensation Act cases – Gender and age

GENDER	JUVENILES	ADULTS	TOTAL
Male	21	116	137
	87,50%	90,63%	90,13%
Female	3	12	15
	12,50%	9,38%	9,87%
TOTAL	24	128	152
	100,00%	100,00%	100,00%

Annex XI: Torture Compensation Act cases – Perpetrators

PERPETRATORS	CASES FILED
Nepal Police	142
	93,42%
Nepal Army	4
	2,63%
Forestry Office	1
	0,66%
Prison Office	5
	3,29%
TOTAL	152
	100,00%

Annex XII: Torture Compensation Act cases – Court decisions

COURT DECISION	CASES
Compensation Awarded	44 28,95%
Dismissed	96 63,16%
Mediated	2 1,32%
Withdrawn	10 6,58%
TOTAL	152 100,00%

Annex XIII: Compensations awarded – monetary amounts

COMPENSATION AWARDED	CASES
3,000	3 6,82%
5,000	4 9,09%
10,000	10 22,73%
15,000	7 15,91%
20,000	2 4,55%

COMPENSATION AWARDED	CASES
25,000	6 13,64%
30,000	1 2,27%
50,000	3 6,82%
51,000	1 2,27%
60,000	1 2,27%
75,000	2 4,55%
95,000	1 2,27%
100,000	3 6,82%
TOTAL	44 100%

**AAnnex XIV: Compensations awarded
– Departmental action**

COMPENSATION AWARDED	CASES
Compensation and Departmental Action	22 50,00%
Compensation and Issued Notice	2 4,55%
Compensation but no Departmental Action	20 45,45%
TOTAL	44 100,00%

Annex XV: Dismissed cases – Causes action

CAUSE OF DISMISSION	CASES
No Medical Evidence	74 77,08%
Exceeded Statutory Limitation	5 5,21%
Police Threat before Court	1 1,04%
Plaintiff Denied Torture for Unknown Reason	12 12,50%

CAUSE OF DISMISSION	CASES
Plaintiff Absence dur to Police Threat	3 3,13%
Plaintiff Contradiction Statement	1 1,04%
TOTAL	96 100,00%

Annex XVI: Withdrawn cases – Causes

CAUSE OF WITHDRAWAL	CASES
Threat	6 60,00%
Negotiation	2 20,00%
Unknown	2 20,00%
TOTAL	10 100,00%

Annex XVII: Mediated decisions – Conditions

CONDITIONS OF MEDIATION	CASES
Under Threat	1 50,00%
Free Mediation	1 50,00%
TOTAL	2 100,00%

Annex XVIII: Torture appeals

APPEALED AT APPELATE COURT (AC)	CASES
Upheld Decision of DC	31 88,57%
Quashed Decision of DC	4 11,43%
TOTAL	35 100,00%

APPEALED AT SUPREME COURT	CASES
Upheld Decision of AC	2 40,00%
No Jurisdiction	1 20,00%
No Revision due to Weak Evidence	1 20,00%
Quashed Decision of AC	1 20,00%
TOTAL	5 100,00%



June 26, 2020

The protection against torture and other cruel, inhuman, or degrading treatment is an absolute right recognised in international law. In Nepal, the 2006 Comprehensive Peace Agreement put an end to a decade of conflict between the Maoist and the government forces. It set up the scenario for transitional justice and a return to the rule of law, but twelve years had to pass until torture was criminalised. Despite torture becoming a crime under the new Penal Code which came into force in August 2018, AF has documented how torture has continued since.

This report explores the patterns of torture in Nepal's detention centres in 2019, and whether international standards are legally enforced or not. The starting point is a comparison of trends from past years with findings from 2019 (Chapter I). Subsequently, torture methods will be analysed with a reference to gender issues and findings on juveniles (Chapter II). Analytical data from detainees will reveal how many torture victims make it to court, how many are awarded compensation, and the implementation status of court decisions (Chapter III). Arguments in support of the reparation of survivors will be described in relation to international laws (Chapter IV). Finally, a number of conclusions will precede annexes from analytical data, summarising the multiplicity of factors that contribute to the persistence of torture in Nepal. It concludes that the last legal reforms, the reduction of political instability, the use of social media and the wider exposure of human rights violations may be some of the reasons why the overall torture rate has decreased in 2019. However, there is still much to do when it comes to prevention and full implementation of these legal provisions.

Publication support:



DKA Austria
Hilfswerk der Katholischen Jungscha



Embassy
of the Federal Republic of Germany
Kathmandu