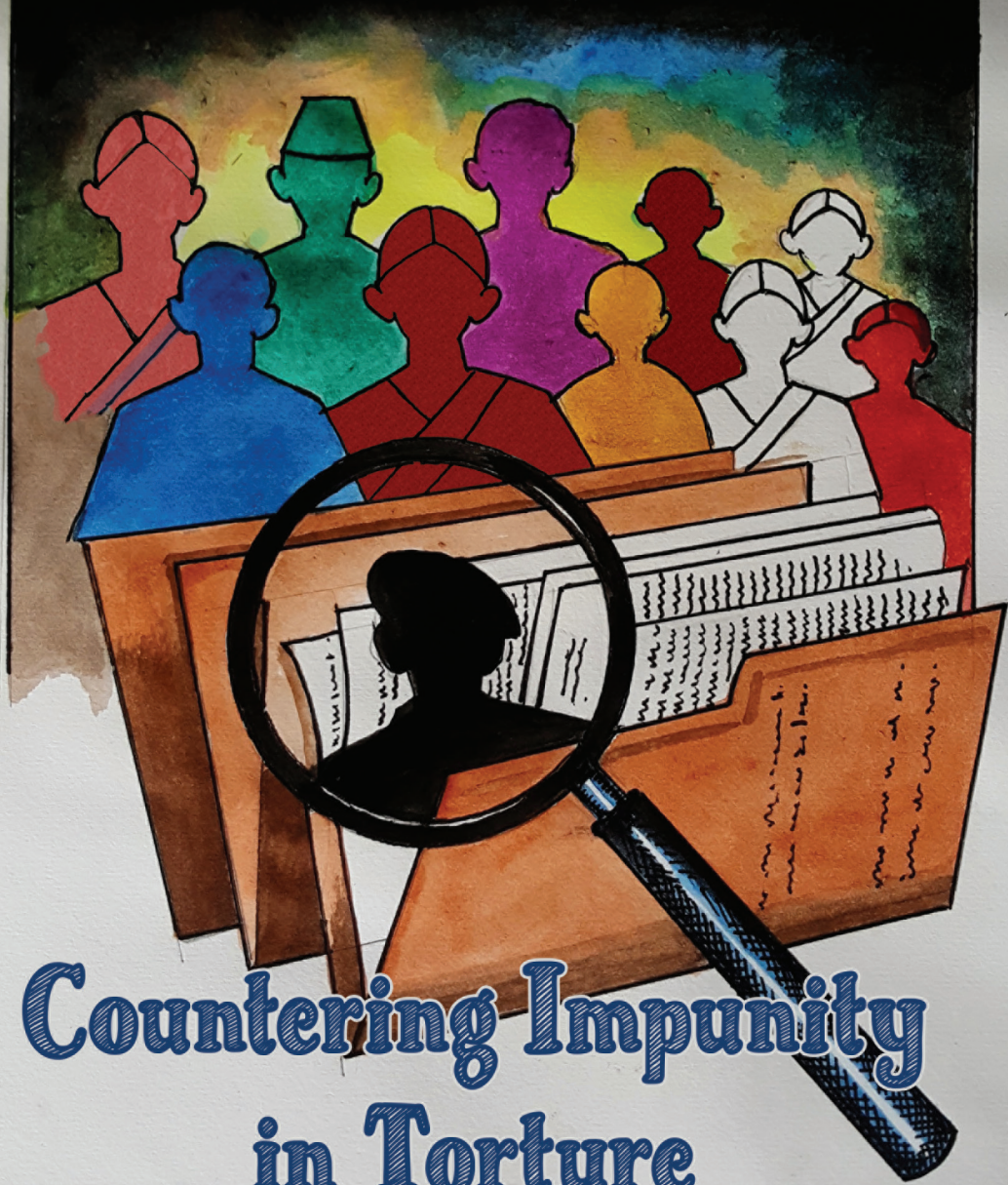




Countering Impunity in Torture

Need for Independent Investigative
Mechanism in Nepal



26 June 2021

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FOREWORD

Each year, on the 26th of June, Advocacy Forum (AF) publishes its annual report on torture on the occasion of the International Day in Support of Victims of Torture. In the year since the last report was published, Nepal experienced the traumatic and unprecedented effects of the COVID-19 pandemic. The country experienced two lockdowns with strict stay-at-home orders.

Since the beginning of the pandemic, AF documented a number of incidents of police brutality against people who were in the streets in defiance of stay-at-home orders. However, AF has been unable to collect data by visiting detention centers throughout the country and interviewing detainees. Without this data and documentation, AF is not able to report on the torture and ill-treatment of detainees in police custody, as it has done for the past 20 years. It is with great sadness that AF acknowledges that the stories of many of this past year's victims will never be told. The statute of limitations to report allegations of torture to the police remains at six months.

While AF assumes that the practice of torture and ill-treatment continued at roughly the same rate it has in the past few years, it identifies the possibility that with less human rights organisations' and public defenders' oversight of police detention centers, its

practice may have increased. Regardless of the exact rate, it is clear that the torture and ill-treatment of detainees continue in many forms. The COVID-19 pandemic has only served to perpetuate the culture of police impunity in Nepal.

The inability of the police to self-police has never been more evident. In 2018, the National Penal Code included a section criminalizing torture. The law asserts that victims may receive compensation while perpetrators can be sentenced to up to five years in prison. Despite this positive change, there still has not been a single successful conviction of a perpetrator of torture despite the significant number of torture cases reported yearly to AF and others.

AF calls on the Government of Nepal to establish an independent mechanism to investigate and prosecute torture claims. The decision of the Supreme Court on 6 January 2020, *Mandamus & Others* (Writ no. 067-WO-1043), reinforces the desire of victims and civil society organisations to have an independent mechanism investigate allegations of gross human rights violations perpetrated by security forces. Many countries have successfully created such agencies and their experiences can serve as a blueprint for Nepal to consider as it creates its own.

Justice does not come quickly or easily but this should not dissuade judges from learning how to be better at recognizing experiences of torture in their courtrooms. It should not dissuade medical staff from receiving a specialized medico-legal education so they may better identify and document signs of torture or ill-treatment while examining detainees. It should not dissuade the government from envisioning and implementing an independent

investigative mechanisms that is completely separate from the police, specially trained to evaluate torture allegations, and empowered to prosecute perpetrators of torture. Finally, the hard work ahead should not dissuade politicians from continuing to reform the current laws as gaps are identified.

AF wishes to acknowledge and express sincere thanks to all who were involved in the preparation of this report. Thank you to Cem Auchinleck-Onal and Sophia Ottoni-Wilhelm for their research and drafting of the report under the direction of Ingrid Massage and Mandira Sharma. To Bikash Basnet for providing inputs and analysis and Kumar Prasad Thapaliya for his collection of information and translation work. Thank you to all the AF lawyers and field officers for their tireless documentation of torture cases and legal support to the victims.

Finally, we are indebted to the victims and their families for their willingness to trust and share their stories with AF.

Om Prakash Sen Thakuri

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EXECUTIVE SUMMARY

This past year, countries around the world suffered immensely from the outbreak of COVID-19. In Nepal, livelihoods have been lost, freedoms curtailed and the government has introduced sweeping restrictions which have inhibited legal proceedings while government critics are detained alongside those who have violated stay-at-home orders. These restrictions and fear of COVID-19 has prevented AF lawyers from visiting detention centers, prisons and Child Correction Homes over the past year. For this reason, it has been impossible to gather complete and up-to-date data regarding the torture and ill-treatment of detainees. Monitoring other human rights violations also has been impossible. However, from what AF could document, it believes that these practices persist while police and other security personnel continue to escape punishment.

Perpetrators of torture have long benefited from widespread impunity in Nepal. Despite the legal framework being refined since 1990 to expand the definition of torture and include provisions for compensation for victims and punishment for offenders, torture persists. Though Section 167 of the 2017 National Penal Code outlaws torture and calls for imprisonment and monetary penalties for torture-related offences, not a single perpetrator has been convicted. Furthermore, none of the cases documented in this report detailing excessive use of force when enforcing

lockdown restrictions has been investigated. Police have become increasingly more protective of their own; refusing to register FIRs and threatening or bribing victims and their families. As a result, perpetrators remain emboldened through systemic impunity while victims have little faith in ever seeing justice.

In order for Nepal to create a just society, AF highlights the need for an independent mechanism to investigate torture allegations and prosecute perpetrators. Such an agency must be: (1) independent of government and police influence; (2) driven by a mission to publicly hold perpetrators of torture to account; and (3) be specially trained to investigate allegations of serious and violent crimes such as extrajudicial killings and torture.

Those seeking compensation for torture continue to be sidelined. Of the 152 cases AF has been involved in, only 46 cases (30.26%) were awarded compensation. To date, out of these 46 cases, only a mere 7 (15.22%) victims actually received the money awarded to them by the courts. The lack of implementation of court orders and many procedural hurdles create victim frustration with the legal system and further undermines the rule of law.

CHAPTER 1

COVID-19 AND HUMAN RIGHTS

The COVID-19 pandemic has impacted most of the globe, forcing governments worldwide to implement lockdown orders to combat its spread. The fear of the pandemic's spread in Nepal prompted the government to announce a nationwide lockdown which came into effect on 24 March 2020. Since then, there have been a series of further lockdowns. The latest was declared a prohibitory order and came into effect on 29 April 2021.¹ It was a response to the second wave of COVID-19 infections which occurred after the alarming rise of cases in India spread across the border into Nepal. Initially, the lockdown was imposed in Nepalgunj in western Nepal because of its designation as a hotspot but soon also applied to those living in the Kathmandu Valley. Local governments were left free to impose their own lockdown orders as needed. Within a

¹ Prasain, S (The Kathmandu Post) 28/04/2021. 'Nepal's Lockdown 2.0, New Covid Curbs on Travel' Available from: <https://kathmandupost.com/money/2021/04/28/explained-nepal-s-lockdown-2-0-new-covid-curbs-on-travel>

month, most of the country was under lockdown and stay-at-home orders were extended regularly.²

As of 20 June 2021, Nepal has experienced 620,156 COVID-19 infections with 8,727 deaths.³ All businesses and public services, including court proceedings that are not considered essential, are closed. Punishments for violating lockdown restrictions vary across the country. The Infectious Disease Control Act of 1964 (§ 3.2) provides for up to six months imprisonment and fines for those who obstruct the implementation of the Act. The definition of obstruction is overly broad.

1.1 COVID-19 AND HUMAN RIGHTS VIOLATIONS

In order to mitigate the outbreak and spread of COVID-19, governments across the world placed unprecedented restrictions on the civil rights and liberties of their citizens. Among others, the freedoms of movement and expression were curtailed in what United Nations Secretary-General António Guterres described

² Ohja, A (The Kathmandu Post) 26/05/2021. ‘Prohibitory Orders in Valley Extended by Another Week with More Restrictions and Big Fines’ Available from: <https://kathmandupost.com/valley/2021/05/26/prohibitory-orders-extended-for-a-week-with-more-restrictions-and-big-fines>

³ https://cdn.who.int/media/docs/default-source/nepal-documents/novel-coronavirus/covid-19_epi-week/dashboard_20210620.pdf?sfvrsn=1034969b_5

as a “[p]andemic of human rights abuses.”⁴ Whilst the initial imposition of these emergency measures may have been in response to the outbreak, there remains a chance that states may hesitate to relinquish them, or even fail to do so, compromising the human rights regime.

International human rights law positions a state as sovereign in its ability to exercise authority over its citizens while strictly limiting arbitrary uses of power. The International Covenant of Civil and Political Rights (ICCPR) provides a global legal basis for the derogation of civil rights in times of crisis. However, any such derogation must be time bound and only used temporarily. The ultimate goal is to revert to the same conditions in existence prior to the crisis. Furthermore, such measures must only be taken in specific emergency situations which “*threaten the life of the nation*.”⁵

Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take

⁴ Kelly, A & Pattison, P (The Guardian) 22/02/2021.””‘A Pandemic of Human Rights Abuses’: Human Rights Under Attack During COVID, Says UN Head’, Available from: <https://www.theguardian.com/global-development/2021/feb/22/human-rights-in-the-time-of-covid-a-pandemic-of-abuses-says-un-head>

⁵ OHCHR, 27/04/2020. ‘Emergency Measures and COVID-19: Guidance’ Available from: https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf

measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

In layman's terms, Article 4(1) allows governments to curtail certain rights to the extent considered appropriate by the severity of the crisis. It does not allow for the discrimination and targeting of particular individuals or groups and it must not contradict other legal commitments. Additionally, there are certain rights which may not—under any circumstance—be derogated. Article 4(2) of the International Covenant demands, “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

The right to life is held as sacred in Article 6; this prohibits the arbitrary killing of any person and means that States must neither arbitrarily or extrajudicially kill nor condone the practice of doing so.

Another non-derogable right, outlined in Article 7, is the right to freedom from torture and other forms of ill-treatment. No matter the pressures imposed by a crisis, states cannot subject any person to torture, cruel, inhuman and degrading treatment or punishment for any reason, such as to extract confessions or gather information.

Finally, whilst the ICCPR does not specifically outline crisis management vis-à-vis the powers of arrest and detention, the Human Rights Committee stated that governments must “in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance ... through arbitrary deprivations of liberty.”⁶

Some of these standards have been incorporated in the 2015 Constitution of Nepal. Article 273 (10) of the Constitution confirms that the right to life and the right not to be tortured are non-derogable even in a state of emergency.⁷ Despite this, cases of custodial deaths and deaths at the hands of law enforcement has risen in recent years.⁸ AF has documented and filed torture claims in Nepal for the past 20 years and several cases currently remain in progress.

1.2 TORTURE, ILL-TREATMENT AND EXCESSIVE USE OF FORCE

As mentioned above, a government in a time of crisis may derogate certain rights from its citizens with the exception of rights such as

⁶ UN doc. GAOR, A/56/40 (vol. I), p. 205, para. 11

⁷ <https://www.lawcommission.gov.np/en/wp-content/uploads/2021/01/Constitution-of-Nepal.pdf>

⁸ Human Rights Watch. 20/11/2020 ‘No Law, No Justice, No State for Victims - The Culture of Impunity in Post-Conflict Nepal’ Available from: <https://www.hrw.org/report/2020/11/20/no-law-no-justice-no-state-victims/culture-impunity-post-conflict-nepal>

the right to be free from torture and ill-treatment. Nepal's security forces and law enforcement agencies used excessive force and, in some instances, extreme brutality while enforcing lockdown orders.

Police were deployed throughout urban districts and along the border with India to implement lockdown orders. On duty officers reportedly interrogated, humiliated and severely beat those they found outside; they even forced people to stand in the Sun for hours as punishment.⁹ Medical professionals and health care workers, despite exemption from lockdown restrictions, have also been harassed and ill-treated. Police reportedly assaulted resident doctors at Tribhuvan University Teaching Hospital (TUTH) and Kanti Children's Hospital returning home after their shifts.¹⁰ Police also assaulted doctors returning home after finishing shifts at TUTH-Maharajgunj. Three doctors, Shambhu Khanal, Tej Prakash Shah and Bikash Shah were questioned by police who then beat them even after they showed their hospital ID cards. During another incident, a medical assistant named Chandra Prakash Khanal from Bishnupaduka Health Post of Dharan Sub-Metropolitan City-20 was struck with a stick by an officer who had seen his ID card. The perpetrator was identified

⁹ Singh, R,K, 13/06/2020. 'Made to stand in the sun, mercilessly thrashed: Bihar man detained by Nepal Police narrates ordeal', available from: <https://www.indiatoday.in/india/story/made-to-stand-in-sun-mercilessly-thrashed-bihar-man-detained-by-nepal-police-narrates-ordeal-1688733-2020-06-13>

¹⁰ Adhikari, N 03/04/2020 'Police beat up doctor who returned from duty', available from: <https://nepallive.com/story/214541>

as Bhesh Bahadur Raut, incharge of Panmara Police Station.¹¹ Similar incidents were common throughout Nepal.

Government guidelines permit citizens to leave their homes to buy food and access medical care. However, there were many cases of the police disregarding this. Citizens were assaulted for going shopping for food items such as sugar.¹² The police beat and fractured a 67-year-old's leg for stepping out to buy milk.¹³ Others received beatings and verbal abuse while trying to buy essential medical supplies.¹⁴ In one incident, the police beat three people, one of whom was sick; which caused a major public backlash.¹⁵ Incidents of police publicly humiliating those caught outside have also emerged with many being forced to do push-ups, frog-jumps or crawl alongside busy roads.¹⁶

¹¹ Republica, 17/04/2020 'What is triggering police to go violent?', available from: <https://myrepublica.nagariknetwork.com/news/what-is-triggering-police-to-go-violent/>

¹² The Record 30/05/2020, 'A Violent Curve', available from: <https://www.recordnepal.com/a-violent-curve>

¹³ Yadav, B, 18/05/2020 'Police hit 67-year-old with baton for stepping out to buy milk', available from: <https://kathmandupost.com/province-no-2/2020/05/18/police-hit-67-year-old-with-baton-for-stepping-out-to-buy-milk>

¹⁴ Dhungana, S & Pandey, P (The Kathmandu Post) 18/04/2020 'For citizens out on essential errands, fear of the coronavirus and fear of the police', available from: <https://kathmandupost.com/national/2020/04/18/for-citizens-out-on-essential-errands-fear-of-the-coronavirus-and-fear-of-the-police>

¹⁵ Dhakal, J, 16/04/2020 'Police brutality on people returning to home after making essential medical purchase', available from: <https://healthpati.com/detail/20200416193247>

¹⁶ Advocacy Forum (Press Statement) 23/08/2020. 'AF Condemns ill-treatment and Inhuman behaviour inflicted on Public by Law Enforcement Agencies', available from: <http://www.advocacyforum.com>

In Marchawar Rupandehi, reports described the police charging at local residents with batons.¹⁷ In Saptari, Jayanab Khatun, 62, died of a fracture to the head while trying to protect her son during confrontations between local residents and law enforcement: the police inflicted the wound.¹⁸

Police have been observed using claw-like clamps attached to poles when detaining those suspected of violating lockdown rules.¹⁹ Whilst the device does ensure social distancing is maintained, its use is degrading and treats detainees like cattle.

On 14 May 2020, Parsa District Authorities issued a directive permitting security officials to shoot to kill COVID-19 patients who attempt to flee isolation. Following public outrage at the directive, the administration duped the public into believing the directive was revoked by issuing a new directive the following day, 15 May 2020. However, the new directive maintained the right to use lethal force. It was worded differently than the first but granted security officials the ability to use necessary lethal force as per the Local Administration Act of 1971.²⁰ Whilst

[org/downloads/pdf/press-statement/2020/af-condemns-ill-treatment-inhumane-behavior-inflicted-on-public-law-enforcement-agencies.pdf](https://www.kharpoti.com/2020/05/2639/)

¹⁷ Chauhan, B, K 12/05/2020, 'Baton-charge on Locals at Marachwar', available from: <https://kharipati.com/2020/05/2639/>

¹⁸ Biraj, R 13/04/2020 'Woman dies trying to protect son from Police thrashing', available from: <https://thehimalayantimes.com/nepal/woman-dies-trying-to-protect-son-from-police-thrashing>

¹⁹ Dhungana, S (The Kathmandu Post), 29/03/2020 'Over 2,000 faced action for violating lockdown rules in Valley in the past six days, police say', available from: <https://kathmandupost.com/valley/2020/03/29/over-2-000-faced-action-for-violating-lockdown-rules-in-valley-in-the-past-six-days-police-say>

²⁰ Yadav, B & Dhungana, S (The Kathmandu Post) 15/05/2020, 'Parsa authorities' decision to allow police to fire upon COVID-19

International standards only permit the use of lethal force in order to protect life, i.e. in circumstances where the killing of one will save the lives of others, the Local Administration Act falls short of this requirement by granting the Chief District Officer the power to instruct police to use lethal force in circumstances they deem necessary to maintaining peace and order.²¹ The directive was challenged before the Supreme Court. Subsequently, the Supreme Court issued an interim order prohibiting the Parsa District authorities from implementing such measures pending a final decision.

Some Nepali citizens faced excessive use of force and torture at the hands of security officials while attempting to re-enter Nepal.²² A number of people who tried to cross into India in order to purchase essential goods and medicine for their families were reportedly manhandle and in some cases killed. In May 2021, a resident of West Nawalparasi, Abinash Rajbhar (“Ray”), 23, was shot in the upper thigh and subsequently died from blood loss.²³ Nepali border security officers have occasionally opened fire on

patients fleeing isolation is “utterly wrong”, say rights activists’, available from: <https://kathmandupost.com/province-no-2/2020/05/15/security-personnel-authorised-to-open-fire-at-covid-19-patients-if-they-flee-isolation-wards>

²¹ Local Administration Act, 1971, Section 6 (1) (a)

²² Advocacy Forum (Press Statement) 23/08/2020, AF condemns ill-treatment and inhumane behavior inflicted on public by law enforcement agencies, available from: <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/af-condemns-ill-treatment-inhumane-behavior-inflicted-on-public-law-enforcement-agencies.pdf>

²³ Asian Human Rights Commission, 28/05/2021. ‘NEPAL: Torture and extrajudicial killing by the duty police officer of border out-post’, available from: <http://www.humanrights.asia/news/ahrc-news/AHRC-UAC-006-2021/>

Indian citizens trying to enter Nepal; one was killed in March 2021.²⁴ Similarly, Buddhi Raj Neupane²⁵ was killed in Bardibas when the police opened fire on protesters.

Peaceful protesters have also felt the wrath of the Police. Security personnel have routinely targeted and beaten citizens peacefully protesting, in clear violation of Article 17(b) of Nepal's constitution. Police on 9 June 2020, used water cannons and batons to disperse peaceful protestors in Baluwatar, who were protesting against a lack of transparency vis-à-vis government handling of COVID-19 funds.²⁶ Again in Baluwatar, this time on the 25th of January 2021, Police baton charged, kicked and used water cannons against peaceful protestors and later unlawfully detaining over 20 rights activists.²⁷ Police have also used electric tasers in Kathmandu, when subduing protesters critical of India's annexation of Lipulekh.²⁸ AF condemns all acts of excessive use of

²⁴ IndiaToday, 05/03/2021. 'Indian national shot by Nepal Police while another goes missing, UP Police on watch as tension grips Pilibhit', available from: <https://www.indiatoday.in/india/story/pilibhit-nepal-police-indian-man-killed-border-tension-1775951-2021-03-05>

²⁵ <https://english.onlinekhabar.com/man-injured-in-bardibas-police-firing-dies.html>

²⁶ Advocacy Forum (Press Statement) 10/06/2020. 'Police intervene in peaceful protest: refrain from using unnecessary or excessive force', available from: <https://www.facebook.com/advocacyforum.org/posts/press-statement10-june-2020police-intervene-in-peaceful-protest-refrain-from-usi/10158438011129534/>

²⁷ Advocacy Forum (Press Statement), 26/01/2021. 'Stop excessive use of force. Respect the right to peaceful assembly and freedom of expression'. available from: <http://www.advocacyforum.org/downloads/pdf/press-statement/2021/joint-ps-of-awc-af-stop-excessive-use-of-force-repect-the-right-to-peaceful-assembly-26-january-2021.pdf>

²⁸ Advocacy Forum (Press Statement, 14/05/2020. 'Stop using Electric Tasers on Protestors – Respect Human Rights and Rule of Law',

force and violence against protesters and call on the Government of Nepal and its police and security services to at all times abide by international human rights law.

1.3 HUMAN RIGHTS CONCERNS

COVID-19 and the ensuing restrictions challenge many liberties we take for granted. Fundamental rights including the freedom of movement, gathering and protesting have been curtailed in the name of public health and safety. Demonstrators have been met with water cannons and police batons.²⁹ Some, including several foreigners, were arrested for public displays of opposition to the government.³⁰ Whilst government guidelines exempt people working in the communication and media sectors during lockdown, journalists have nevertheless been targeted by police officers. Calls by free press advocates urging the government to honour its constitutional obligations³¹ have fallen on deaf ears

available from: <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/stop-using-electric-tasers-on-protesters.pdf>

²⁹ Ojha, A (The Kathmandu Post) 09/06/2020 'Water cannons and batons at protest against government's handling of the pandemic', available from: <https://kathmandupost.com/visual-stories/2020/06/09/protest-at-baluwatar-against-government-s-handling-of-the-pandemic>

³⁰ The Hindu, 13/06/2020, 'Coronavirus: Nepal Police arrest 10. Including 7 foreigners, over anti-govt. protest', available from: <https://www.thehindu.com/news/international/coronavirus-nepal-police-arrest-10-including-7-foreigners-over-anti-govt-protest/article31822760.ece>

³¹ Reporters Without Borders, 08/06/2020 'Nepalese journalists threatened, attacked and censored over COVID-19 coverage', available

with the arrest of at least four journalists during the first lockdown alone.³² A further six were reportedly threatened or attacked by forces intent on suppressing allegations of state malpractice.³³ This continues a trend of worrying developments vis-à-vis the freedom of speech in Nepal, with the introduction of the Information Technology Bill placing severe penalties of up to five years in prison and/or a fine of 1.5 Million NPR (approximately \$13,000 USD) for posting “offensive” content online.³⁴ Activists³⁵ and former bureaucrats³⁶ have been targeted and face intimidation over their social media posts criticizing the government’s mishandling of the pandemic.

The fight against COVID-19 has grossly overburdened the country’s health services. Resources have been reallocated from crucial services such as those dealing with Gender-Based Violence

from: <https://rsf.org/en/news/nepalese-journalists-threatened-attacked-and-censored-over-covid-19-coverage>

³² Baral, S (The Kathmandu Post), 23/04/2020. ‘Mahottari sees rise in illegal mining of construction aggregate during lockdown’, available from: <https://kathmandupost.com/province-no-2/2020/04/23/mahottari-sees-rise-in-illegal-mining-of-construction-aggregate-during-lockdown>

³³ CPJ, 21/05/2020 ‘Nepali reports detained, threatened while reporting on COVID-19 pandemic, available from: <https://cpj.org/2020/05/nepali-reporters-detained-threatened-while-reporti/>

³⁴ Adhikari, Rojita, 13/01/2020, ‘No debate, no democracy : journalists in Nepal fight new threat to press freedom’, available from: <https://www.theguardian.com/global-development/2020/jan/13/journalists-in-nepal-fight-new-threat-to-press-freedom>

³⁵ The Record 22/05/2020, ‘An increasingly intolerant government targets journalists’, available from: <https://www.recordnepal.com/an-increasingly-intolerant-government-targets-journalists>

³⁶ The Kathmandu Post 27/04/2020 ‘Former Secretary Bhim Upadhyay released on bail’, available from: <https://kathmandupost.com/valley/2020/04/27/former-secretary-bhim-upadhyay-released-on-bail>

(GBV) and mental health.³⁷ Despite this, the government still failed to protect citizen's physical health. A number of organisations, including Amnesty International (AI), International Commission of Jurists (ICJ), and Human Rights Watch (HRW) have highlighted concerns over a lack of available vaccines, oxygen and beds in hospitals. They warned that without cross-party support to procure these resources, Nepal could slide further into catastrophe mirroring scenes witnessed in neighboring India.³⁸

COVID-19 restrictions have curtailed work in sectors not deemed essential. In a country where more than 70% of the population are employed in the informal sector³⁹ and survive on daily wages, a lengthy period without work may render large portions of the population vulnerable to destitution and starvation. To mitigate these concerns, the government issued a COVID-19 relief package, which sought to reduce the price of everyday goods such as rice, flour, dal, salt, sugar and oil by 10%.⁴⁰ It also

³⁷ Dahal, M et al, 21/09/2020. 'Mitigating violence against women and young girls during COVID-19 induced lockdown in Nepal: a wake-up call', available from: <https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-020-00616-w>

³⁸ Amnesty International, 14/06/2021 'Struggling to breathe: The second wave of COVID-19 in Nepal', available from: https://amnestynepal.org/press-release/en-nepal-oxygen-vaccines-and-essential-medical-supplies-urgently-needed-amid-devastating-covid-19-wave/?fbclid=IwAR3IMTy7JuDWHRhpb3OTfw5qd2szpV_m46gpjKwe1UHRMirfNNuFrnwTMU, please include the briefing paper of ICJ and press release of HRW.

³⁹ International Labour Organisation, 2019, 'Informal economy in Nepal', available from: <https://www.ilo.org/kathmandu/areasofwork/informal-economy/lang--en/index.htm>

⁴⁰ Nepali Times, 30/03/2020, 'Nepal COVID-19 Relief Package, available from: <https://www.nepalitimes.com/latest/nepal-covid-19-relief-package/>

promised quality food aid for at-risk families. However complaints have arisen over the distribution of rotten food items, causing diarrhea and sickness.⁴¹ Many others have yet to receive their first package.⁴² Furthermore, those without official citizenship papers are refused relief packages altogether which puts them at serious risk as they are often the very poorest in the country.

Victims of Nepal's armed conflict (1996-2006) have long faced discrimination and have had their concerns ignored. Two transitional justice (TJ) bodies - the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) - were established in the wake of peace settlements between the Government and Maoist rebels, to ensure justice for conflict victims and facilitate reconciliation between both sides. However, despite receiving an excess of 60,000 complaints, neither body completed investigations into a single case.⁴³ AF maintains its position that the Government of Nepal has never demonstrably committed itself to the TJ process. Moreover, COVID-19 has provided cover for the government's continued sidelining of important justice issues.⁴⁴

⁴¹ Thapaliya, K.P, 2020 'Local Levels Distributes Rotten rice & potatoes for poor people', available from: <https://ejanakpurtoday.com/local/17767>

⁴² Mandal, C.K (The Kathmandu Post), 25/04/2020. 'Lockdown affected families continue to struggle for relief package as Province 2 retains the relief campaign', available from: <https://kathmandupost.com/province-no-2/2020/04/25/lockdown-affected-families-continue-to-struggle-for-relief-package-as-province-2-retains-the-relief-campaign>

⁴³ Human Rights Watch, 2020. 'Nepal, Events of 2020 - Accountability and Justice', available from: <https://www.hrw.org/world-report/2021/country-chapters/nepal>

⁴⁴ Accountability Watch Committee, 05/06/2020 'Do Not Sideline the Transitional Justice Process under the Excuse of Covid-19' (Press

Conflict victims, especially those living in rural parts of Nepal, have no access to information, education or healthcare. Previously, regular meetings between AF and victim representatives were often the sole avenue victims had to receive updates on the TJ process.

Prohibitory orders during the pandemic have halted these meetings and, because they lack the ability to access virtual platforms of communication, victims have largely been left in the dark. In addition, many are struggling to pay for their medication due to the absence of regular income and those who require regular medical check-ups find it difficult to reach a hospital because transportation services have been halted. AF extended some relief packages to needy conflict victims which consisted of food, medicine and counseling but it was not adequate, considering the number of victims requiring support.

1.4 COVID-19 AND THE CRIMINAL JUSTICE SYSTEM

The pandemic and the restrictions in place have negatively affected the criminal justice system, including the judiciary.

Supreme Court directive 53 issued on 20 March 2020 sought to temporarily suspend non-urgent Court proceedings in all three

Statement), available from: <http://advocacyforum.org/downloads/pdf/press-statement/2020/awc-demands-amendment-of-trc-act-and-justice-for-conflict-victims-english-version.pdf>

court tiers, by limiting their services to hearing writ of habeas corpus and remand hearings related to COVID-19.⁴⁵

Advocacy Forum has documented several cases, highlighting the effect COVID-19 has had on Nepal's criminal justice systems.

Firstly, AF lawyers have found it exceedingly difficult to file First Information Reports (FIRs), even in cases relating to serious offences such as torture and rape. Police authorities have refused to register FIRs on account of the pandemic, voicing fears about infections. Victims have been asked to return with their complaint once lockdown has been lifted.⁴⁶

Secondly, police have been randomly arresting people on different charges and referring their cases to the public prosecutors office, who in turn have been filing charges against them. This is problematic as lockdown restrictions are preventing detainees and prisoners from being able to access their lawyers and legal services, let alone gain access to the case documents. Thus, those detained in police custody, or residing in prison and Child Correctional Homes are facing legal challenges without adequate representation or awareness of their own legal rights.

Furthermore, there are increased risks of unlawful detention as courts are unable to scrutinise the legality of all detention. Normally, courts would reach a decision on a case within a year,

⁴⁵ Press Statement of Supreme Court of Nepal, 20/03/2020, available from: <http://www.supremecourt.gov.np/web/assets/downloads/प्रेस-विज्ञप्ति-२०७६-१२-०७.pdf>

⁴⁶ Advocacy Forum, 2020, 'Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', available from: <http://www.advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

however restrictions have significantly slowed court proceedings leading to lengthier waiting times for cases pending trial. This also increases the number of detainees and prisoners in prison.

The quality of court proceedings has also been jeopardized due to the pandemic. Public prosecutors have used their fear of infection to limit their appearance in courts. Furthermore, in some cases they have refused to appear altogether, and despite not being present to act on behalf of the state, they still requested their names to be mentioned in court decisions.⁴⁷ Such practices undermine the legitimacy and quality of court proceedings and threaten detainees' right to a fair trial. Although some courts have started to hear cases via electronic medium, it is not consistent through the courts. Whilst some district courts have entertained the use of video conference calls during hearings, many others have not.⁴⁸ This creates a postcode lottery whereby a few, fortunate enough to reside in certain districts, can proceed with their hearings in a fair and legal manner, while others are left waiting indefinite periods of time. Implementing such provisions across all courts should be a current focus of the government so as to circumvent the challenges posed by the lockdowns.

⁴⁷ Advocacy Forum, 2020, 'Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', page 9, available from: <http://www.advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

⁴⁸ Available from: https://www.newsofnepal.com/2020/05/28/321229/#.Xs_SDxNVDV1.facebook,

1.5 COVID-19'S IMPACT ON DETENTION CENTERS, PRISONS AND CHILD CORRECTION HOMES

The condition of Nepal's detention centers, prisons and child correction homes have long been criticized by domestic and international bodies. Prior to the pandemic, governmental reports⁴⁹ as well as those from human rights groups⁵⁰ have repeatedly highlighted poor detention conditions in these facilities. Overcrowding is rife and inmates are often residing in inhumane living conditions, all of which is a health concern without factoring in COVID-19.

Nepal has a total of 74 prisons, which in 2020 were housing 26,118 prisoners, despite only having an official capacity to house 15,466 inmates.⁵¹ The Central Jail in Kathmandu alone houses 3,100 inmates but only has capacity for 1,400. Furthermore, most prisons do not have dedicated quarantine or isolation centers. Overcrowded prisons render social distancing impossible and the poor management of these prisons puts most inmates at risk of infection. These fears have come to fruition as 757 prisoners among 1,929 across 17 prisons who underwent real time

⁴⁹ Office of Attorney General, Nepal, 'Prison and Detention Monitoring Report 2019, available from: <https://ag.gov.np/publication>

⁵⁰ Office of the High Commissioner for Human Rights- Nepal, 'INSIDE: Prison and the Rights of Detainees A Photo Exhibition on Prison Conditions in Nepal', available from: https://nepal.ohchr.org/en/resources/publications/PrisonDayBrochure_Eng.pdf

⁵¹ WPB, 2020. 'Nepal', available from: <https://www.prisonstudies.org/country/nepal>

polymerase chain reaction tests, tested positive for COVID-19. A further 8 prisoners had succumbed to the virus by October 2020.⁵²

At least 1,655 police officers have tested positive.⁵³ Officers do not live in detention centers, but instead come and go, thus raising the possibility of an unwitting spread of virus within centers which are ill prepared for any such outbreak. Overcrowding presents a serious threat to the safety of both prisoners and prison staff. For example, Lumbini Province houses 780 prisoners whilst only having a capacity for 350. The lack of beds, coupled with the heat and prevalence of mosquitoes are causing great distress and misery to all those residing there. A prisoner in Rupandehi District Prison tested positive for COVID-19 and recovered in isolation, with no further reports of infections. The jailer of said prison informed AF that all prisoners had received their COVID-19 vaccinations. Furthermore, in Sudurpaschim Province, Kanchanpur District Prison reports that 303 out of 401 prisoners have received their first dose of the vaccine.

Some police detention places, fearful of outbreaks have been reducing the number of detainees. For instance, Area Police Office. (APO) Kohalpur, despite only having capacity for 15 detainees, usually houses between 30-40 detainees. This reduced to 13 in mid-2021. Similarly, there were only 2 detainees in the APOs

⁵² Ghimire, B (The Kathmandu Post), 07/10/2020. 'Overcrowded prisons pose challenge for keeping inmate safe', available from: <https://kathmandupost.com/national/2020/10/07/overcrowded-prisons-pose-challenge-for-keeping-inmates-safe>

⁵³ Sharma, B. 02/09/2020. 'Tension runs high in Nepal's overcrowded prisons after first inmate dies of Covid-19', available from: <https://www.recordnepal.com/tension-runs-high-in-nepals-overcrowded-prisons-after-first-inmate-dies-of-covid-19>

of Bhagwanpur and Dhanauli, Banke district. Sub-Inspector Nim Bahadur Gham of APO Butwal informed AF lawyers that 3 detainees and 3 policemen there have been infected with COVID-19.

Child Correction Homes (CCH) are also in danger of becoming hotspots for COVID-19. Previous investigative work carried out by AF found that across the 8 CCHs in Nepal, overcrowding was rife and on average each room housed 10 children at one time,⁵⁴ and in one CCH, 87 children were crammed into one hall for a significant period of time. The quality of healthcare in the CCHs have deteriorated since the start of the pandemic with health workers no longer providing health checks due to fears of infection. Furthermore, only those deemed seriously ill are taken to nearby government-run facilities, where juveniles have to pay for their treatment. In addition, lockdown restrictions prevented visits from families, which took a great toll on the juveniles' mental welfare.

More recent updates vis-à-vis CCH's, show that in Morang the CCH, which houses 155 children despite only having the capacity to hold 50, reported 25 infections, who in turn have been sent to isolation centers in Morang and Biratnagar. Other CCHs across the country report being seriously overcrowded, with a lack of beds and available vaccines causing serious worry both for detainees and staff.

⁵⁴ Advocacy Forum Factsheet on COVID-19 and its effect on Juvenile Justice System in Nepal, available from: <http://www.advocacyforum.org/downloads/pdf/publications/factsheet-on-covid-19-and-it-s-effect-on-juvenile-justice-system-in-nepal.pdf>

CHAPTER 2

THE NATIONAL PENAL CODE'S CRIMINALIZATION OF TORTURE

The widespread use of torture and ill-treatment by police and security forces in Nepal dates back several decades. A range of national and international human rights organisations have documented the violence. AF has been involved in this continually during its 20 year existence. It has repeatedly noted a lack of implementation of legislation and an accompanying failure to both achieve a significant decline in cases of torture and to successfully prosecute of perpetrators of torture.

AF identifies two overarching explanations. First, there is a history of lackluster and ineffectual legislation passed by the Government of Nepal and its Parliament. This law predominantly awards nominal compensation for victims and does not allow for the prosecution of offenders. Second, Nepal is plagued by corruption and a culture of impunity; this slows down legal proceedings and discourages victims and their families.⁵⁵ The two combined generate an atmosphere where the odds are stacked

⁵⁵ <https://www.transparency.org/en/countries/nepal>

against victims. Victims must struggle against both bureaucracy and police intimidation and often this renders the whole process, in their minds, as not worth the effort.

As previously stated, legislation regarding the prevention, investigation and prosecution of torture in Nepal has long been ineffectual. Nepal became a signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1991. This meant Nepal was obligated to render all acts of torture, including attempts, as criminal offences.⁵⁶ It also ensured victims access to redress and compensation.⁵⁷ However, domestic legislation did not reflect these international commitments for decades.

Article 14(4) of the 1990 Constitution outlawed the torture of detainees and provided loose legal grounds for compensation. It was ambiguous in regards to the amount that should be awarded and provided no legal accountability for offenders. Five years later, in 1996, Nepal passed the Compensation Relating to Torture Act (TCA). It was limited to providing nominal compensation for torture victims; they could receive up to 100,000 NPR (approximately \$850 USD).⁵⁸ It did include provisions for departmental action against government employees who tortured detainees but it did not facilitate their prosecution in a court of law—it actually served to defend alleged perpetrators in court.⁵⁹

⁵⁶ Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 4(1).

⁵⁷ Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment. Article 14(1).

⁵⁸ Torture Compensation Act 1996. Article 6(1).

⁵⁹ *Id.* at Article 4.

The Act narrowly defined torture as the “physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her.”⁶⁰ Compensation was reserved only for those who were tortured in government facilities.

Additionally, victims of torture or their legal representatives could only file a claim within a narrow window of 35 days from the date the torture occurred, or their release from detention.⁶¹ If a victim did file a case, the burden of proof fell entirely on him/her and the claim had to include the following information: (1) the reason for detention and the period of time spent in detention; (2) a description of the torture inflicted while in detention; (3) a description of losses resulting from torture; (4) the amount of compensation claimed; and (5) any other details which may be ancillary to substantiate the claim. With regard to item (4), Section 8 outlined that the following factors must be considered in determining the amount of compensation awarded: (i) physical, mental pain and suffering inflicted on the victim and its gravity; (ii) depreciation that occurred in the victim’s income-earning capacity as a consequence of physical or mental injury; (iii) in the case of physical or mental injury of an incurable nature, the age of the victim and his/her family obligations; (iv) in the case of an injury of curable nature, estimated expenditure for its treatment; (v) in the event of the death of the victim as a result of torture, the number of his/her family members dependent on his/her income and the minimum expenditure required for their livelihood; and

⁶⁰ Torture Compensation Act 1996. Article 2(a).

⁶¹ *Id.* at Section 5(1).

(vi) whether the matters claimed by the victim could be deemed proper and just.

Of all the cases of documented torture, only a fraction are ever heard in court. Those that do are rarely successful. The level of bureaucracy can seem daunting and the 35 day window does not leave much time to gather all the necessary documents such as medical reports and arrest papers. Furthermore, obtaining such documents and legal proceedings can be financially costly and often outweighs any compensation a victim may receive (maximum of 100,000 NPR). Likewise, if a victim is unsuccessful in proving their case they risk a monetary penalty.⁶² Victims and their families also fear police threats, intimidation and violence in response to their bringing a case. These limitations have largely rendered the TCA ineffective. It is in dire need of reform.

Nepal's most recent 2015 Constitution contains stronger protection against torture. Article 22 prohibits the use of torture and ill-treatment of anyone arrested or detained.⁶³ It also states that perpetrators of torture can be punished under the law and victims have the right to be compensated.

To give effect to this constitutional protection, the Parliament passed a National Penal Code in 2017, which more concretely than ever outlawed torture and for the first time prescribed sentencing of offenders. Section 167, "The Prohibition of Torture," states:

⁶² Torture Compensation Act 1996. Section 6(2).

⁶³ Nepal's Constitution of 2015. Page 20, Art. 22(1). English Translation by Nepal Law Society, International IDEA, and UNDP. Available from: https://www.constituteproject.org/constitution/Nepal_2015.pdf.

No authority who is competent under the law in force to investigate or prosecute any offence, implement law, take any one into control, or hold any one in custody or detention in accordance with law shall subject, or cause to be subjected, any one to physical or mental torture or to cruel, brutal, inhuman or degrading treatment.

However, defining torture solely in regard to violations occurring during detention is too limited. It does not account for the realities of Nepal, where torture and abuse is prevalent in both public and private spheres. AF has previously documented instances where juveniles were tortured in private residences away from formal detention and interrogation centers.⁶⁴

Section 167 continues by defining torture as the infliction of physical or mental pain or suffering from cruel, brutal, inhuman or degrading treatment or punishment on anyone under police control in any form for the following five reasons:

- A. To get information on any matter;
- B. To extort confession of any offence;
- C. To punish for any act;
- D. To show fear, intimidation or coercion; or
- E. To do any other act contrary to law.

⁶⁴ “Torture of Juveniles in Nepal: A Serious Challenge to the Justice System.” Page 16. *Advocacy Forum*. 26/06/2010. Available from: http://www.advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf.

Defining torture only when applied to above criteria is a major shortcoming. It goes against the spirit of the CAT which clearly uses phrase “for such purposes as” in a context that demonstrates the list is intended to be illustrative rather than exhaustive. Moreover, not all acts committed against detainees in contradiction to the law amount to torture and, thus, the provision risks watering down the definition of torture.

Section 167(2)(1) of the National Penal Code details that those found guilty of the above are liable to imprisonment of up to five years and/or a fine of no more than 50,000 NPR (approximately \$450 USD) which is dependent on the severity of the torture.

This was the first time in the history of Nepalese law that torture was explicitly criminalised and a detailed punishment for the offence given. Despite this important development in the law, no perpetrators of torture have been convicted under Section 167.

Section 167(3) facilitates the prosecution of those who either order or assist in acts of torture. The code states that they are to be held equally liable under the law (i.e., they must be sentenced the same as the principal offender). Section 167(4) states that no perpetrator can use the defence that they committed the offence in pursuance of an order. Even if they were ordered to torture a detainee, they are still guilty to the fullest extent of the law. This ensures that those at the most senior levels of law enforcement are as liable as the subordinates they order to inflict torture. In theory this should dissuade higher ups from giving these orders. However, as previously mentioned, courts have yet to convict a perpetrator of torture so these new legal provisions pose no immediate threat to those in power. This serves to highlight the need for a more

substantial changes in both laws and their implementation as will be described in Chapter 4 of this report.

Section 169 calls for payment of compensation for the injury or pain caused by torture and ill-treatment as defined under Section 167. It states that any compensation paid to the victim must be paid by the perpetrator individually. Whilst it is necessary to hold perpetrators of torture accountable, rendering them solely responsible for compensating the victim is problematic. The perpetrator may not have the financial resources necessary to compensate the victim so the victims' recovery is dependent on circumstances that are entirely arbitrary. Furthermore, holding perpetrators solely responsible for damage awards removes necessary state responsibility. Under the current National Penal Code, the government and security services have no financial stake in torture cases and, therefore, no incentive to quickly and broadly end its practice. Article 14 of the CAT clearly states that states are dutybound to compensate victims. The Nepalese law fall short of this commitment and are in violation of international law.

Section 170(2) outlines the statute of limitations with regard to filing complaints of torture. It states that victims and their families have six months from the date of the torture or the victim's release from detention. Whilst six months is an improvement from the 35-day provision of the TCA, it still substantially limits victims' abilities to claim and receive compensation. Victims and their families may suffer from trauma and fear reprisal and may require longer time to be ready to file a claim. Furthermore, the cost of acquiring the required legal documentation renders the six month statute of limitations much too short as victims and their families may need additional time to gather financial resources.

CHAPTER 3

INVESTIGATION AND PROSECUTION OF CASES INVOLVING TORTURE

3.1 EMBLEMATIC CASES

Since its founding in 2001, AF has consistently highlighted cases of torture and ill-treatment of detainees at the hands of police. Torture has been, and continues to be, used as a form of punishment and as a tool to extract a confession or information. The world is at a critical juncture in the midst of the COVID-19 pandemic and cases of torture and custodial deaths continue to occur in detention centers across Nepal.

Frustratingly, such cases do not receive the adequate due diligence they deserve. Regardless of the huge pressure from victims, their families, local activists and human rights organisations, law enforcement remain reluctant to file First Information Reports (FIRs) to initiate investigation of an allegation of torture. Often, they explicitly refuse to do so. The police frequently abuse their power by protecting allegedly guilty officers and threatening victims and their relatives with severe

consequences for speaking out. While these issues are not new in Nepal, police authorities have become even more defensive and protective of their own since the National Penal Code of 2017 criminalized torture and enforced disappearances.

The following are emblematic cases documented by AF in 2020/21.

Case No. 1: Bijay Ram Mahara, Torture and Death Case

The case of Bijay Ram Mahara garnered attention in Nepal and became a media sensation. The 19-year-old so called Dalit (i.e., “untouchable”) man was arrested during the middle of the night on the 16th of August 2020 because he was a suspect in the murder of his neighbor and relative Niranjan Ram. Niranjan Ram was murdered during an overnight stay at a nursery where he worked. Following the arrest of two of Niranjan’s colleagues, the nursery owner’s son and a coworker, police forces raided Bijay Ram’s village. They beat and arrested him alongside eight other young local men. According to eye witnesses, the detainees were beaten with sticks and kicked and thrown like “sacks of vegetables” into the back of a police vehicle.

They were taken to a location undisclosed to their concerned families. The following morning, families learned that their sons were being held at the Area Police Office, Garuda, in the Rautahat District. Some of the young men who were later released told an AF lawyer that their friends had been tortured during detention and that Bijay was kept separate and severely beaten. They said that police electrocuted his fingers. The marks on his body were clearly visible and the extent of his internal

injuries were discovered through the appearance of blood in his urine and defecation. Medical professionals immediately referred him to a hospital well-equipped to treat his injuries.



Image 1: Bijay Ram's family mourning (photo by AF).

However, the police officers were reluctant to accommodate his injury and initially stalled taking him to receive medical attention. Eventually, on the 20th of August 2020, they took Bijay to Birgunj National Medical College. Two days after he was admitted to the hospital, his condition became critical. Six days after that Bijay died in the hospital.

Before his death, he described on video how and why he was tortured. Bijay accused the police of using extreme torture in order to extract a confession for the murder of Niranjan Ram. Bijay described how police kicked him with heavy boots. They punched him and used both sticks and metal rods to beat his

head, back, legs, neck, waist and hips. Bijay claimed that he was hung in a stress position that made it impossible for him to sit, eat or sleep for three days. The marks across his body are a testament to the severity of the torture he endured.



Image 2: Bijay Ram during treatment (photo by family).

After Bijay's death, police initially refused when his father, Pannilal Ram, attempted to file an FIR. Pannilal was successful in filing an application at the District Public Prosecutor's Office, who in turn ordered the police to register the FIR. As per a report on the case, a Home Ministry Secretary Level meeting resulted in a decision to suspend Inspector Nabin Kumar Singh for six

months and Head Constable Hiroz Miya Dhuniya and Mannu Kumar Singh until the investigation was complete. However, no action or inquiry was undertaken against SP Rabi Raj Khadka, the person in charge of the District Police Office at Rautahat nor against DSP Gyan Kumar Mahato, the person in charge of the local Police Office in Garuda, under whose command the investigation was conducted. Panilal Ram filed an FIR against them, as well. The suspended junior staff are at large and have written a joint letter to the authorities claiming that they were used as scapegoats by the real perpetrators.

Pannilal further alleged that when his son died, his body was taken to Kathmandu-TUTH Teaching Hospital for a postmortem. Pannilal was asked to go to the Teaching Hospital and, on the way to the hospital, he was made to sign six documents without knowing what the documents were for. When he asked to read out those documents, the police man threatened him with jail term and other consequences including that, if he refused to sign, he would not receive dead body of his son. After signing the documents, Pannilal was taken to the TU Teaching Hospital where four policemen were waiting him. There, they made him to sign three more documents before taking his son's dead body to Pashupati Aryaghat, Kathmandu, where everything was prepared for Bijay's cremation. After a lot of threats, pressures and hurdles, Panilal is no longer interested in continuing to pursue the case.

Some local media reported on Niranjan Ram's murder and declared it was a romantically- motivated response to an inter-caste love affair. Media claimed Niranjan was murdered by his lover's brother, Azad Sheikh. However, the underage

girl in question denied these allegations and stated that police attempted to coerce her into this story and verbally abused her when she refused to cooperate.⁶⁵

Sikendra Paswan, another arrestee in the case, developed a serious mental condition as a result of the torture he endured. Paswan was taken for treatment at Patan Mental Hospital where he stayed for one week. Today, he requires medication and is serving time in jail for trial at the District Prison Office, Rautahat. To date, no significant steps have been taken to open an investigation and no one has been prosecuted.

Case No. 2: Raj Kumar Chepang, Torture and Death Case

A second case which gripped the country this year was the torture and eventual death of Raj Kumar Chepang. Raj and six of his friends, five men and two women in total, decided to celebrate the Nepalese festival of Makar Shankranti by visiting Chitwan National Park to forage for wild fruits and *ghongi* snails. At approximately 1 p.m. on the 16th of July 2020, the group was approached from behind by a lone soldier who wasted no time in beating the men while demanding to know why they were there. He ordered the men to line up while he beat them with sticks he found nearby. When one broke under the force of the assault, he found another. The beatings lasted for at least 15 minutes. The soldier verbally abused the two

⁶⁵ Mishra, D. “Niranjan Ram Murder Case: Allegations of Not Arresting the Culprit.” 24/08/2020. Available from: <https://ejanakuprtoday.com/17095/>.

women of the group. Despite their persistent plea to be let go, the soldier insisted on marching them to the National Park Camp Office where he accused them of fishing illegally.

During the forced march, the group was repeatedly beaten and made to carry logs usually reserved for elephants. The group was joined by five more soldiers, which empowered the first soldier to make the group lie down on rocks where he could strike their backs in a criss-cross motion with a stick for about 20 to 25 minutes. They were then made to lie down and stand up over 100 times for his amusement. Upon arrival at the Camp Office, the group was detained and questioned for two hours until an Administrative Officer took their information and demanded they pay a 1,000 NPR (approximately \$10 USD) fine each.



Image 3: Raj Kumar before death (photo by family).

After some negotiation they were permitted to leave under the condition that they would return the following day to pay a reduced fine of 500 NPRs (approximately \$5 USD) each. When the first soldier was not around, the Administration Officer told them that they should not have been beaten like that.

After being released, Raj Kumar's beating began to visibly take a toll and he had to be carried home. In an attempt to ease the pain, his mother applied oil and massaged his bruises across his back to no avail. His condition began to deteriorate and he started coughing up blood. Medical staff insisted that he should be treated at a hospital, but his family could only afford some basic medicine.

Several days later, on the 22nd of July 2020, Raj's health had deteriorated to the point where he had to be rushed to hospital where he was pronounced dead upon arrival. The following day, Raj's father, Bishnu Lal Chepang, filed an FIR at the DPO Chitwan. His body was kept by police for two days who then decided it was necessary to send his body to Kathmandu for a postmortem. This took place on the 27th of July 2020.

Following disagreements regarding justice for the deceased and punishment for the perpetrator, Raj's family returned home without his body. Finally, consensus was reached and Raj's body was returned to his family. They were promised the following: (1) an impartial investigation and prosecution under to the law; (2) the provision of materials to repair Raj's home for his family; and (3) the payment of his daughters school fees and the compensation of NPR 10 Lakhs (approximately \$8,500 USD). An investigation on the 12th of October 2020 found the Army soldier Chiran Kumar Buda responsible for Raj Kumar's

death. Infuriatingly, his father and others were asked to soften their testimonies by an Army Major. AF was later informed that some witnesses succumbed to the pressure and had altered their statements regarding the severity of Raj's torture. AF's lawyers were also informed that once Raj's family had received their compensation of 10 Lakhs NPR, they became reluctant to continue with the case. Bishnu Lal Chepang reportedly stated,

“We have received the compensation, how long can we spend our time and effort for justice. It is better to move on.”⁶⁶

A government attorney assured AF that the perpetrator is currently in detention and, if proven guilty, he will face punishment regardless of whether or not the victim's family continues with the case. However, there has been no progress in the case thus far.

Case No. 3: Shambhu Sada Musahar, Extrajudicial Killing Case

Tractor driver Shambhu Sada Musahar was arrested after hitting two women with his vehicle, killing one and seriously injuring the other. He has subsequently died in police custody. The 23-year-old surrendered himself to local police authorities at the APO Dhanushadham on the 26th of May 2020 but was

⁶⁶ Statement by Shanta Lal Chepang during a phone conversation with an AF lawyer on 7 January 2021.

transferred to the APO Sabaila where he was found dead in the detention room's toilet at approximately 1 a.m. on 10 June 2020.

Shambhu's family claims that he was murdered during his detention. They told AF that they were coerced into signing his death certificate. The police deny any involvement, instead saying he committed suicide by hanging himself. When his family were presented his body, Shambhu was still hung up and had black rags stuffed in his mouth. Upon seeing his body, Shambhu's mother collapsed out of shock which prompted an opportunistic police officer to obtain her thumb print while she was subconscious.

The family suspect foul play, stating Shambhu was murdered to relieve his boss of any blood money owed as a result of the accident. They had been made aware that the owner of the tractor was related to the woman killed and believed Shambhu was murdered because it absolved the owner of any financial responsibilities.

Shambhu's family attempted to register an FIR at the DPO, Dhanusha, but were repeatedly refused. The police administration denied any involvement and argued that there was no motive to kill him as he was not a serious criminal and neither was he in a case involving high profile or rich people.

Regardless, the incident deserve a thorough and independent investigation, a comprehensive post-mortem and justice for Shambhu's family if malpractice comes to light. AF, through its Province Office in Janakpurdham, has consistently followed the case and is monitoring whether the legal interventions are in line with the laws protecting human rights.

Because the District Police Office refused to register the FIR, Shambhu's family members with the help of lawyers decided to submit an FIR at the District Attorney's Office. They were again denied registration. A delegation then met with the Attorney General, Agni Prasad Kharel, who ordered the District Attorney of Dhanusha to register the FIR. The District Attorney is responsible providing legal advice to District Police.

As there was no progress on registering an FIR to initiate the investigation, on 29 April 2021, Devi Sada, Sambhu Sada's mother, filed a writ of mandamus at the High Court of Janakpur against District Police Office-Janakpurdham. It demands the filing of an FIR and fair and thorough investigation of the incident. Responding to the writ petition, on 30 April 2021, a single bench comprised of Justice Rajyalaxmi Bajracharya issued an order that defendants must furnish a written response via the High Court Government Attorney Office within 15 days. However, because of the COVID-19 lockdown, none of these public offices have furnished their responses to the court.

Case No. 4: Govind, Torture Case

Govind (pseudonym), 47, was arrested for attempted rape of a minor on the 29th of March 2021. He was detained at Patthari Area Police Office. During the morning of the 3rd of April, Govind's family was informed that he had been injured in a fight at the detention center. His family had been previously denied access to him but were allowed to visit him in hospital.

During their visits, his family and AF lawyers found him to be severely bruised, with visible signs of torture all over his body. His family attempted to file an application twice for medico-legal documentation at Koshi Hospital where he was being treated. However, Govind's family were refused both times on the grounds that it was an active police case and, thus, without explicit police permission, the hospital could not honor their request. Further, the victim was kept in illegal detention for six days, from the 6-12th of April 2021 without extension of remand.



Image 4: Gobind during treatment (photo by family).

On 6 April 2021, the victims' family members visited DPO, Morang, to complain about torture at the area's police office in

Pathari. However, before they could say anything, SP Santosh Khadka, who is in charge of DPO, Morang, reportedly said, “Which human rights organization sent you here? I am trying to settle the case and provide him medical treatment by requesting different organizations but you come here and argue with us. If you do so, I will file such a case against him that he will be imprisoned for life.” The victims’ family members returned later but saw no progress. Local journalists also visited the victim at the hospital but no media outlets published reports of his torture.

The Police filed an attempted rape charge against Govind at the Morang District Court and the Morang District Court issued an order to send him to jail while awaiting trial.

Case No. 5: Tamang, Attempted Extra-judicial Killing.

Tamang (pseudonym), 28, was arrested in Boudha, Kathmandu at around 3:30 p.m. on 12 January 2020 under suspicion of being a fugitive. After his arrest, Tamang was put in a taxi and taken to the Gokarna Forests instead of being taken to the nearby police station. Once in the jungle, police handcuffed him and waited for evening. The taxi driver who drove them there was afraid and requested that the police allow him to return to the city or let him go. Finally, they brought him back to the Jambudada by that evening when it was almost dark.

According to the locals, a white vehicle stopped by the roadside and four or five persons got out. After a while, locals reported hearing a loud gun shot. Eyewitnesses gathered after hearing Tamang’s screams and stopped the police from firing

another round of shots. According to the eyewitnesses, when they reached the scene, a man with handcuffs was falling to the ground and crying. They reported that around four policemen surrounded him and one was about to fire another round of shots. When they tried to stop the police, the police told them that Tamang was a murderer. The locals challenged the police by saying, **“Even if he is a murderer, you cannot shoot him like this.”**⁶⁷

When more people started to gather, police hurriedly took Tamang away in a police van. They took Tamang to the Trauma Center at Bir Hospital where police refused to allow any visitors, including his family and AF lawyers. Tamang’s brother, however, managed to force his way into his room where he discussed Tamang’s ordeal.



Image 5: Tamang during treatment (photo by family).

AF, in conjunctions with other human rights organizations, visited the Bouddha Police Station but were unable to meet

⁶⁷ Taken from a statement made by two witnesses: a 45-year-old woman and a 20-year-old woman.

the officer in charge. When questioned, two sub-inspectors of the Area Police Office, Jambu Danda, stated that they were unaware of the incident. However, the place where the incident occurred is just about 100 meters away from the police post. Local eyewitnesses claim that undercover policemen dressed in civilian clothing were scanning the area where Tamang was shot. Locals wondered if they were searching for bullets shells.

The fact-finding report, available evidence, and the statement of local people indicate that police officers shot Tamang unlawfully. However, this unlawful use of firearms has yet to be investigated.

3.2 UPDATE ON IMPLEMENTATION STATUS OF COURT ORDERS ON TCA CASES

The Compensation Relating to Torture Act of 1996 (TCA) provides victims of torture with the legal right to claim and receive compensation. The Act set a limit of 100,000 NPR (approximately \$850 USD) as the maximum amount of compensation to be awarded in torture cases and allows for departmental action to be taken against the perpetrators if the case is severe one.

Although it has a number of flaws, since its inception the Act has assisted victims in their efforts to seek compensation under the TCA. AF so far has assisted in 152 cases and, out of these cases, only a total of 46 cases (30.26%) were awarded compensation.⁶⁸

⁶⁸ See “Torture in Nepal in 2014.” Advocacy Forum. 2014. Available from: <http://www.advocacyforum.org/downloads/pdf/publications/torture/TORTUREINNEPALIN2014EnglishVersion.pdf>.

One of the key barriers to the prevention of justice in Nepal is the non-implementation of court orders. As previously mentioned, out of the 152 cases administered by AF only a total of 46 cases (30.26%) were awarded compensation. To date, out of these 46 cases, only 7 (15.22%) victims actually received the money they were awarded.

Some of the victims decided to file an application at the District Administration Office (DAO), who in turn forward it to the Home Ministry. Once approved, the DAO would be provided with the monetary amount and then deliver it to the plaintiff. The constant follow-up and administrative hurdles in actually ensuring victims receive the amount awarded by the court can take more than a decade. This past year has seen no progress with regard to the implementation of court orders. Although the law provides that the compensation amount should be provided within 35 days of filing an application with a copy of the court decision, only a few victims have actually received the compensation they are entitled to.

CHAPTER 4

NEPAL'S URGENT NEED FOR INDEPENDENT INVESTIGATIVE MECHANISM TO EVALUATE TORTURE CLAIMS

4.1 EXISTING MECHANISM

ADOPTED INTERNATIONAL STANDARDS

Nepal ratified the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture (UNCAT) on 14 May 1991. These treaties require that states treat citizens with respect and dignity, regardless of race, religion, class, or other status.⁶⁹ Under each treaty, a supervisory body has been established. The Human Rights Committee (HRC) was established under the ICCPR.⁷⁰ The HRC both interprets the

⁶⁹ *The International Covenant on Civil and Political Rights*. Part II, Art. 2 § 1. United Nations, Office of the High Commissioner of Human Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1996. Entry into force 23 March 1976, in accordance with Article 49.

⁷⁰ *Id.* at Part IV, Art. 28.

treaty's provisions and provides an opportunity for individuals to bring their complaints before the Committee under three conditions: (1) the individual's rights under the ICCPR were violated; (2) they exhausted all domestic remedies; and (3) the individual is a citizen of a country party to both the ICCPR and its first Optional Protocol. In interpreting Article 2(3) of the ICCPR, the HRC declared that victims of torture have the right to an "effective remedy, including compensation."⁷¹

The UNCAT created the Committee against Torture which has similarly articulated the rights of victims of torture. It asserts that these individuals have the right to as full a reparation as possible which may include: rehabilitation, the guarantee of non-repetition, restitution, satisfaction, and compensation.⁷² The United Nations stresses that care must be taken by member states throughout legal proceedings so that victims of violence are not re-traumatized while seeking justice.⁷³ There is also a requirement that party states have domestic laws that mirror their international commitments.⁷⁴

⁷¹ See Advocacy Forum-Nepal, *Torture in Nepal in 2019: The Need for New Policies and Legal Reform*, 51 (26 June 2020) (citing *Ramírez v. Mexico* (2012) UN Human Rights Committee Communication No. 500/2012).

⁷² *Id.*

⁷³ *Id.* at 54 (citing UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparations 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 from: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>).

⁷⁴ *Id.*

*POST-CONFLICT PROGRESS: 2017 NATIONAL PENAL CODE
CRIMINALIZATION OF TORTURE*

After a decade-long armed conflict (1996–2006) between the Government and the Maoists (CPN)—a time when the torture of detainees was witnessed on both sides of the violence—Nepal has struggled to reach a place of political and legal stability.⁷⁵ While it has struggled in many areas of human rights, Nepal has been particularly slow to provide remedies for victims of torture.

In 2015, the Constitution of Nepal was adopted by the Constituent Assembly. Among others, the right to be free from torture was listed among the most fundamental rights and freedoms of the society.⁷⁶ Article 22(1) states, “No person in detention shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.”⁷⁷ Article 22(2) continues by guaranteeing victims of torture the right to reparations in the form of monetary compensation while perpetrators face punishment under the law.⁷⁸ The freedom of children from torture and women from “physical, mental, sexual and psychological” abuse are articulated in Articles 39(7) and 38, respectively.⁷⁹

⁷⁵ Thapa, Gaurab Shumsher. *Political Instability and Uncertainty Loom Large in Nepal*. 16 February 2021. Originally published in South Asian Voices, available from: <https://www.stimson.org/2021/political-instability-and-uncertainty-loom-large-in-nepal/>.

⁷⁶ Nepal’s Constitution of 2015. Page 20, Art. 22(1). English Translation by Nepal Law Society, International IDEA, and UNDP. Available from: https://www.constituteproject.org/constitution/Nepal_2015.pdf.

⁷⁷ *Id.* at 20, Article 22(1).

⁷⁸ *Id.* at 20, Article 22(2).

⁷⁹ *Id.* at 25–26, Article.

Until 2018, the anti-torture sentiment embodied in both the 2007 Interim and 2015 Constitution had no teeth. As discussed in an earlier chapter, Nepal passed the Torture Compensation Act (TCA) in 1996 which was found to be grossly inadequate at reducing torture rates or helping victims.

The first law criminalizing torture was adopted as a part of the National Penal Code in 2017. It came into force on 17 August 2018. Section 167 states the “intentional infliction of physical or mental pain or suffering” or “cruel, brutal, inhuman or degrading treatment or punishment” of any person who is in the control or custody of the police or military constitutes an act of torture.⁸⁰ Torture is strictly forbidden under Nepalese law and may bear a sentence of up to five years in prison or a fine of up to 50,000 NPR (approximately \$450 USD), or both, if the gravity of the offense calls for it.⁸¹ Whether the mistreatment of the person in custody is for the purpose of punishment, intimidation, coercion, or to extract a confession, gain relevant information, or for any other reason that contravenes the law, its practice is illegal.⁸²

Individuals who ordered the act of torture and those who were accomplices to the crime will receive the same punishment as the principle offender.⁸³ Additionally, the principle offender cannot use as a defense the argument that the act of torture or mistreatment was ordered by a superior.⁸⁴ Section 169 asserts that whatever

⁸⁰ National Penal Code. § 167(1).

⁸¹ *Id.* at § 167(2).

⁸² *Id.* at § 167(1)(a)-(e)

⁸³ *Id.* at § 167(3).

⁸⁴ *Id.* at § 167(4).

amount the Court decides is “reasonable compensation” must be paid by the person who committed the offense.⁸⁵

The National Criminal Procedure Code, Section 4, stipulates that a person who knows that torture occurred, is occurring, or likely will occur, must register a First Information Report (FIR) with any evidence they have at the nearest police office.⁸⁶ The FIR serves to initiate an official investigation.

Furthermore, the law requires a medical admission examination of all detainees upon arrest.⁸⁷ This is an important procedure because that exam can be contrasted with the health status of an individual upon release from custody. A shocking decline can be used as evidence of torture or mistreatment. It is of utmost importance that a detainee receives two thorough medical examinations, one immediately after arrest and another immediately upon release. If one exam is omitted or the police wait several days after an arrest to bring a detainee for their medical examination, the results cannot be used to prove torture. No police or other detainees should be present at either exam as detainees should be free to respond truthfully if a health care professional asks about mistreatment and torture. Victims of torture must be treated for any injuries or pain at the time of identification.

⁸⁵ *Id.* at § 169.

⁸⁶ National Criminal Procedure Code, § 4 (2017).

⁸⁷ *Submission to the Universal Periodic Review*, 37th Session of the Working Group, January-February 2021. Submitted by: International Commission of Jurists, Advocacy Forum-Nepal, Terai Human Rights Defenders Alliance, and University of Passau (9 July 2020).

4.2 EXISTING GAPS AND CHALLENGES FACED

LEGAL SHORTCOMINGS OF THE NATIONAL PENAL CODE'S CRIMINALIZATION OF TORTURE

There are many inadequacies in the National Penal Code itself. One example is that an FIR must be filed at the nearest police facility which is often the same police facility where the torture occurred, which creates serious conflicts of interest.⁸⁸ There are documented cases of police refusing to register an FIR and others in which police have threatened or bribed family members and victims not to pursue legal action.⁸⁹ Fundamentally, the proximity of the police facility jeopardizes witnesses and compromises the safety of victims.

Another shortcoming is that the National Penal Code generally states that compensation must be “reasonable.” There is no scale or compensation structure in place to provide judges with a clear idea of how much to award in a case. By failing to define reasonable compensation, there is no cohesion among similar cases and victims cannot tell whether or not their award is fair. Without this knowledge, a victim cannot know if it makes sense to appeal their case outcome. Finally, because the burden is on the perpetrator to pay the award, there is a strong incentive for police involved to threaten and commit violence toward the victims. The Government

⁸⁸ Penal Procedure Code, § 4 (2017).

⁸⁹ See Advocacy Forum-Nepal, *Torture in Nepal in 2019: The Need for New Policies and Legal Reform*, 51 (26 June 2020), available from: <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-june-2020.pdf>.

of Nepal should be responsible for making these payments so victims are not re-traumatised during their pursuit of justice.

Medical examinations, an imperative cornerstone of proving a torture case, are rarely thorough. Health care professionals generally do not receive training specific to inquiring about and identifying signs of torture. The exams are also not systematic; often a victim of torture will not receive a second comparator examination upon release. Furthermore, police officers are frequently present during the exams and victims do not report abuse out of fear of reprisals. The law must be amended to stipulate that medical examinations must take place without the police present. Victims must be free to report their experiences so that medical professionals can gather evidence necessary to building a case.

Judges are expected to ask detainees if they were tortured while in police custody. However, this remains a mere ritualistic process and judges very often fail to catch cases of detainee mistreatment and torture. Because of their lack of technical training, judges have limited knowledge and are unable to understand and interpret medical documents. Without further training in these areas, victims of torture will continue to be deprived of justice.

Another example of the law's inadequacies is that it does not codify superior command accountability.⁹⁰ It also defines torture

⁹⁰ *Submission to the Universal Periodic Review* by ICJ, Advocacy Forum-Nepal, Terai Human Rights Defenders Alliance, and University of Passau. Page 3, § 14. *See also; Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agents*. Open Society Justice Initiative, 32-33 (2021).

too narrowly.⁹¹ The definition encompasses only acts of torture that occur in police custody and ignores sexual assault as a form of torture despite it being a common experience among women and youth detainees.⁹² The definition of torture must be amended to explicitly include sexual assault and harassment as forms of torture.⁹³ Additionally, the six-month statute of limitations on torture cases is much too short.⁹⁴

The current legal framework only allows reparations in the form of compensation. A holistic approach to torture victims' rights must include reparations in the form of restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁹⁵ Under the National Penal Code, compensation is reliant on the perpetrator's criminal conviction and that individual's economic status. Because they are limited in the type of remedy they receive and the amount of compensation awarded is mostly arbitrary and varies drastically among similar cases, it is clear that victims of torture are not treated with the dignity and respect they deserve.

⁹¹ *Submission to the Universal Periodic Review* by ICJ, Advocacy Forum-Nepal, Terai Human Rights Defenders Alliance, and University of Passau. page 3, para 15.

⁹² Report to the Office of the High Commissioner for Human Rights, Compilation on Nepal, Page 8 § 58 (18-29 January 2021) (citing CEDAW/C/NPL/CO/6, para. 21 (a) and (c)).

⁹³ *Id.*

⁹⁴ *Submission to the Universal Periodic Review* by ICJ, Advocacy Forum-Nepal, Terai Human Rights Defenders Alliance, and University of Passau. Page 3 § 14.

⁹⁵ *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 by UN General Assembly, resolution 60/147 (16/12/2005).

*THE URGENT NEED FOR AN INDEPENDENT INVESTIGATIVE
MECHANISM*

While all these legal shortcomings need to be addressed by amendments to the National Penal Code, there is an even more pressing need. Nepal must create a truly independent investigative agency to evaluate torture claims. The number of torture cases brought under the new laws demonstrate this point. According to the Attorney General's Annual Report: 16 cases were filed in district courts in 2012-16, 27 in 2016-17, 19 in 2017-18, and 8 in 2018-19.⁹⁶ It stated that "departmental action" was taken against 158 police personnel and 22 Army personnel but failed to specify the exact nature of the action.⁹⁷ According to prior reports by AF, departmental action can take the form of a transfer from one place to another.⁹⁸

In 2019, AF lawyers visited 1,005 detainees in detention centers in Kathmandu, Banke, and Rupandehi. Of those visited, 20% of adults and nearly 25% of children reported that they had been tortured or otherwise mistreated by police while they were in custody.⁹⁹ Since this small sample indicates that hundreds, if not

⁹⁶ National Report, Nepal. Submitted to the United Nations Human Rights Committee, Working Group for Universal Periodic Review, Page 6, Part E § 29. 37th Session, 18-29 January 2021 (citing *Annual Report of Office of the Attorney General*, FY 2015/17, 2016/17, 2017/18 and 2018/19).

⁹⁷ *Id.*

⁹⁸ Advocacy Forum-Nepal, *Torture in Nepal in 2019: The Need for New Policies and Legal Reform* (26 June 2020), available from: <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-june-2020.pdf>.

⁹⁹ *Id.*

thousands, of detainees were tortured in 2019, the eight cases filed in district court which the Attorney General's Office described in its annual report falls grossly short of any semblance of justice. There were no convictions. Clearly, an independent investigative and prosecutorial mechanism is required if victims of torture can have any hope of justice.

The path to creation of an independent investigative agency has been riddled with obstacles. In its Universal Periodic Review (UPR) National Report in 2015, the Nepal Government announced it was in the process of creating an independent investigative police agency.¹⁰⁰ In the subsequent six years, this self-regulating body has not been formed, nor should it as it presents an obvious conflict of interest. As the recent incidents of police brutality toward the public indicate, the police in Nepal are completely unable of self-policing.

During Nepal's UPR, several countries recommended that Nepal ratify the Optional Protocol to the Convention Against Torture (OPCAT), that would require the creation of a National Preventative Mechanism (NPM) to independently monitor detention centers. While Nepal has acknowledged this recommendation, it has yet to act on it and ratify its existing treaties. It has cited its National Human Rights Commission (NHRC) and the Office of Attorney General as sources of justice

¹⁰⁰ *Submission to the Universal Periodic Review* by ICJ, Advocacy Forum-Nepal, Terai Human Rights Defenders Alliance, and University of Passau. Page 3 § 11 (citing UN General Assembly, "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*" Nepal, UN Human Rights Council, (6 August 2015) para 55 and para 56.

that are responsible for investigating and prosecuting cases of torture.¹⁰¹

The previous chapter highlighted a number of challenges that victims face. This, in addition to the low number of cases that have been reported and the absence of a single conviction, exemplifies the gross inefficiencies of the current mechanisms. Nepal must immediately adopt the Optional Protocol to the Convention against Torture and create a completely independent investigative agency.

4.3 SUPREME COURT DECISION HIGHLIGHTING THE NEED FOR INDEPENDENT INVESTIGATIVE MECHANISM

A recent Supreme Court decision expressed the failure of the current system and the urgent need for Nepal to set up an investigative agency to investigate cases involving security personnel.¹⁰² In response to a writ filed in regard to the lack of investigation into cases of extrajudicial execution in the Terai region by security forces, Justices Ishwor Prasad Khatiwada and Kumar Regmi issued a mandamus order against the Government of Nepal (GoN) requiring it to have an independent mechanism to investigate allegations against security personnel. Cognizant of

¹⁰¹ Nepal Response to Working Group, Page 3.

¹⁰² *Mandamus et Others* (6 January 2020) (Writ. No. 067-WO-1043). Writ filed: 5 May 2011. Petitioners: Sunilranjan Singh et al. Defendants: Government of Nepal, Council of Ministers, National Human Rights Commission, Attorney General's Office including others). Translated by Bikash Basnet, Advocacy Forum-Nepal.

the lack of investigation in cases involving the security personnel, the Court stated the following:

1. The GoN must form an independent agency with specially-trained experts to investigate allegations of a serious and violent nature, such as extrajudicial killings.
2. The GoN must establish a legal and institutional framework to facilitate investigations that are independent, impartial, and effective.
3. There must be thorough investigations of allegations of extrajudicial killings by the Central Investigation Bureau of the Nepal Police until the institutional framework described above is in operation.
4. The NHRC must release the names of perpetrators of human rights violations to the public and it must keep a record of these names; the record must be published and the NHRC must monitor the progress of the implementation of its recommendations.

Justice Kumar Regmi dissented against Justice Khatiwada's position that international criminal law should apply to the case. However, he concurred that there were potential applications of international human rights law. Writing a separate opinion, Justice Regmi directed the GoN to form a special investigation team involving experts within the scope of Section 12 of the Criminal Procedural Code to investigate the allegations impartially, effectively, and truthfully.

4.4 WHAT INTERNATIONAL EXPERIENCE SUGGESTS

Nepal is not the only country struggling to create an independent agency to investigate gross violations of human rights by state actors. A regional conference organized by Advocacy Forum with the International Commission of Jurists (ICJ), Terai Human Rights Defenders Alliance (THRDA), and the Open Society Foundation noted that this is a problem among countries throughout South Asia. The Open Society Justice Initiative has recently published a report titled, “Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agents.” It explores the experiences of 11 countries to offer some guidance regarding how an independent investigative mechanism should function. Each of these countries have an independent agency that embodies transparency and competence in at least one element listed below. The following elements provide a blueprint for conducting an “effective investigation and prosecution of state agents” who commit crimes against those whom they are supposed to protect and serve:¹⁰³

Independence: There must be legislation that supports an independent investigative agency (IIA) with an adequate budget and physically separate premises from state agencies.¹⁰⁴

¹⁰³ *Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agents*. Open Society Justice Initiative. Pages 11, 13-15 (2021).

¹⁰⁴ *Id.* at 19-20.

Leadership: The agency's director must be independent of and protected from the government's operations. He/she must be chosen through a rigorous and transparent process and should be in the position for a fixed term that is sufficiently long to attract senior candidates but not that long either. The dismissal process of an agency director must be safeguarded against those who seek to undermine the work they stand for. It is preferable that this person has the authority to charge a state actor directly, rather than recommending it to another body to do so.¹⁰⁵

Investigative Authority/Jurisdiction: The IIA must have exclusive jurisdiction over "a limited number of the most serious incidents or allegations of crimes." To protect public confidence in the agency, it must not allow itself to merely monitor or supervise a state agency's investigation. Supervision of the investigation and the investigation itself must be undertaken by the IIA.¹⁰⁶

Training and Competence of Independent Body: Because the practicalities of staffing an IIA suggest that there will be employees with bias toward or for state agencies, it is important that training is thorough and rigorous. While IIAs often do employ former law enforcement officials, there should be knowledge and openness about this bias during the hiring process and beyond.¹⁰⁷

¹⁰⁵ *Id.* at 22-26.

¹⁰⁶ *Id.* at 27-36.

¹⁰⁷ *Id.* at 37-40.

Power: The IIA must be immediately notified when an incident falling under its jurisdiction occurs. Its investigators must have same authority as law enforcement officials including the right to arrest and they must be able to go into any law enforcement establishment and seize evidence relevant to the investigation without prior notice. All state actors involved must abide by a duty to cooperate with the IIA's investigations and comply with directions they are given. Sanctions must exist and be enforced for involved state actors not doing so. Additionally, a crime scene must be secured until an IIA investigator reaches it, involved state actors must be separated from each other and post-incident notes, statements, and physical evidence must be made secure. State actors must preserve data and records and supply these documents to the IIA upon request.¹⁰⁸

Victim Rights During Procedures: Victims must have the right to participate in criminal proceedings, they must have the right to information about their case, and the right to review decisions made by the IIA on their case. It is particularly important that NGOs, INGOs, and Public Defenders Offices support this element.¹⁰⁹

Evidentiary Practices: It is imperative that IIAs have appropriately skilled specialists in the areas of forensic analysis, post-mortem

¹⁰⁸ *Id.* at 41-48.

¹⁰⁹ *Id.* at 49-53.

autopsies, medico-legal trained health care professionals who can identify and gather evidence of torture when it is alleged.¹¹⁰

Thorough and Timely Investigations: Cases of gross human rights violations must be investigated quickly but also carefully.¹¹¹

Protection Against Retaliation Toward Whistleblowers and Witnesses: Whistleblowers and witnesses must not face reprisals or interference by a state agent. If a state agent does interfere with one of these persons, they must face severe sanctions for doing so. Transfer of the victim elsewhere, transfer of a complainant to another district or detention center, and witness protection programs are all options that other countries have utilized in protecting whistleblowers and witnesses from retaliation. Some state agents or other witnesses must be allowed to be granted immunity in return for information relevant to the IIA investigation.¹¹²

Transparency: Public statements must be made by the IIA both at the opening and close of the investigation. Additionally, a report must be made if charges are withdrawn in an investigation. An annual report should also be made by the IIA. The IIA may choose to complete a pattern analysis or conduct demographic data collection.¹¹³

¹¹⁰ *Id.* at 54-56.

¹¹¹ *Id.* at 57.

¹¹² *Id.* at 58-60.

¹¹³ *Id.* at 61-64.

Prosecution and Trials: The IIA must pursue justice at all stages of investigation and legal proceedings, despite there being inherent conflicts of interest in a state agency investigating another state agency. The United Nations asserts that everyone must answer to the rule of law in a state, including state actors. The law must be “equally enforced and independently adjudicated.”¹¹⁴

¹¹⁴ *Id.* at 65-69 (citing *UN System and Rule of Law*. Available from: <https://www.un.org/ruleoflaw/un-and-the-rule-of-law/>).

CONCLUSIONS AND RECOMMENDATIONS

COVID-19 and the ensuing restrictions have put the issue of human rights largely at the bottom of the pile, vis-à-vis government priorities. While international law does allow for the curtailing of certain freedoms in times of crisis—notably freedom of movement and expression—it clearly rejects the infringement of fundamental rights such as the right to life and freedom from torture. Despite this past year’s prohibitory orders preventing AF from visiting detention centers, prisons and CCHs, a stream of victim testimonies, reports, media coverage and social media posts have shown that law enforcement agencies routinely violates international law. Cases of custodial deaths, extrajudicial killings and torture (Chapter 3), continue to stain Nepal’s human rights record. There are allegations that the police responsible for implementing lockdowns were excessively heavy-handed in their dealings with the public. Civilians, journalists, shopkeepers and even medical professionals have been targeted. Many have been seriously beaten and tortured merely for stepping out to buy food or medicine.

In addition to widespread allegation of police brutality, Nepal has seen a drastic deterioration in the function and capabilities of its criminal justice system. Courts are reduced to hearing only writs of habeas corpus and remand hearings for COVID-19

violations. Restrictions have rendered many defendants incapable of accessing legal advice, leaving them vulnerable to arbitrary detention and imprisonment. Some of the worst affected are Conflict Era victims who have largely been left out in the cold as their legal proceedings have been halted. The government is using the pandemic as an excuse to sideline victims' concerns. This, coupled with restrictions preventing AF from holding meetings with victim representatives have left them vulnerable and without access to case updates and oblivious to COVID-19 advice.

Although the National Penal Code criminalises torture, providing some redress for victims of torture, one of the main barriers to justice continue to be police denial to register FIRs, leaving victims of torture with little avenues for legal action. The National Penal Code requires FIR's to be filed at the nearest police facility, however these are often where the alleged torture takes place. It is therefore no surprise that victims routinely describe Police threats or acts of bribery to dissuade victims and their families. Other instances where police flat out refuse to register FIRs are also common.

One of the main barriers to justice remains the non-implementation of court orders. Out of 152 cases administered by AF, only 46 cases (30.26%) were awarded compensation and just 7 (15.22%) actually received money. The past year has seen no progress in regards to the realization of these awards and hopes for change seems futile.

Police continue to insist medical examinations, crucial in proving torture, are conducted in the presence of police officers, leaving many victims fearful of retribution and thus silent with

regard to their torture. Moreover, medical staff are seldom trained in identifying signs of torture and victims are often denied a comparator examination. The law must be amended, stipulating that medical examinations are to be conducted free from the presence of police officers. Victims should be at liberty to report their experiences so that medical professionals may gather evidence for their case. Furthermore, the definition of torture as found in the National Penal Code limits the crime to abuses inflicted during police custody. AF recommends the National Penal Code be amended to define all acts of violence and brutality at the hands of police, anywhere and at any time as torture.

The severe lack of cases brought under the National Penal Code has highlighted the urgent need, both for a separate law regarding the prevention of torture in Nepal as well as an independent investigative mechanism. Previous attempts to establish such an agency have never come to fruition. However, a recent SC decision has expressed its dismay about the failure of the current system and calls for the development of an investigative agency, independent of the Nepalese Government. Justice Ishwor Khatiwada and Kumar Regmi in their decision directed the Government of Nepal to form an independent agency with specially-trained experts to investigate allegations of a serious and violent nature, such as extrajudicial killings.

Based on the above developments, Advocacy Forum makes the following recommendations:

1. The GoN must establish a legal and institutional framework to facilitate investigations that are independent, impartial, and effective.

2. There must be thorough investigations of allegations of extrajudicial killings by the Central Investigation Bureau of the Nepal Police until the institutional framework described above is in operation.
3. The NHRC must release the names of perpetrators of human rights violations to the public and it must keep a record of these names; the record must be published and the NHRC must monitor the progress of the implementation of its recommendations.
4. The National Human Rights Commission and Office of the Attorney General must make regular unannounced detention monitoring visits and make the reports public.
5. The Supreme Court's decision should be implemented as a matter of priority.
6. Court decisions awarding compensation to victims of torture in cases filed under the Torture Compensation Act should be implemented fully.
7. The Government should not use the measures necessary for addressing the COVID-19 pandemic to curtail the non-derogable rights of people, including the right against torture and judicial recourse for those suffering torture and other gross violations.
8. The Government should prioritise the establishment of TJ mechanisms after the amendment of the TRC Act as decided by the Supreme Court and after meaningful consultations with victims and civil society.



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COVID-19 has disrupted daily life and emboldened governments the world over in restricting cherished rights and liberties. While international law does allow for the restriction of certain rights, others including the right to life and freedom from torture and ill-treatment are fundamentally exempt from any such derogations. Despite this, extrajudicial killings, custodial deaths and torture are still prevalent in Nepal.

This report examines how the Nepalese government and its security services have used the COVID-19 pandemic as a smokescreen with which to perpetuate excessive acts of violent abuse and torture with impunity. It begins by detailing how human rights and civil liberties have been side-lined in Nepal under rolling prohibitory orders, and how those found in breach of it have fallen victim to heavy-handed policing (Chapter I). Through a critical analysis of Nepal's anti-torture legislation, with specific attention to the 2017 National Penal Code the reader is informed of the legal provisions against torture, whilst highlighting its fundamental flaws (Chapter II). Several current emblematic cases of torture in Nepal are presented alongside an update on the implementation status of court orders under the Torture Compensation Act (Chapter III). Thereafter, a review of the current mechanisms adopted by Nepal, both international and domestic are presented. Gaps and faults are highlighted and the case for the urgent implementation of an independent mechanism to investigate claims of torture is made (Chapter IV). Finally, the report concludes by briefly summarising COVID-19's impact on the trends of torture. It makes several recommendations which if adopted would allow for a more encompassing, independent of government interference and transparent platform with which to combat the scourge of torture and provide justice to its victims. Lastly, a brief summary of a multitude of cases of torture administered by AF is presented in the annexes.

As lockdown restrictions indefinitely prevent AF and other human rights organisations from conducting visits to places of detention and imprisonment, it is crucial that those suffering in silence are not forgotten. AF will continue to highlight their plight so that one day they may receive justice.

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