

CRIMINALIZE TORTURE

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FOREWORD

Nearly eighteen years have elapsed since the government of Nepal ratified the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) in 1991. However, Nepal has yet to introduce legislation that criminalizes torture and provides adequate redress to victims. A past government did make a half-hearted attempt at fulfilling its obligations under the CAT, but the poorly drafted Torture Compensation Act (TCA) of 1996 proved to be almost totally deficient in addressing the grave problem of torture in Nepal. It completely failed to prevent and remedy widespread and systematic torture and illegal detention in the period of the armed conflict.

Although human rights violations in Nepal are not as severe or frequent today (having subsided considerably after the political change of 2006) torture continues to be widely practiced. Additionally, not a single perpetrator of torture has been prosecuted in civilian courts. As a result, the culture of impunity remains pervasive. Victims of torture, including those victimized during the armed conflict, are languishing in pain and waiting for justice.

The basic principle of state responsibility to act with *due diligence* to prevent, investigate and punish human rights violations forms the cornerstone of all main international human rights instruments. *Due diligence* demands that state parties ensure that all necessary mechanisms to provide adequate redress and reparation to victims are in place. However, the stiffening grip of impunity, aided by inchoate instruments like the TCA and a dysfunctional criminal justice system, is threatening

the aspirations of peace, prosperity and respect for the rule of law envisaged by the People's Movement of 2006.

International law regards torture as among the most serious of all offences, amounting to a crime against humanity under certain circumstances. The severity of the problem of torture in Nepal is confirmed by the experiences of the many torture victims interviewed by our organizations and the devastating injuries, both physical and mental, that thousands of Nepalese people are plagued by. In accordance with international law that governs domestic Nepalese law and in recognition of the continuing occurrence of abuses, we call for the government and the legislature to take genuine steps to prevent and punish the offence of torture.

We, the members of civil society, have made a pragmatic, if somewhat ambitious, attempt to draft model legislation on torture, which, if adopted and forcefully implemented, will catalyze new traditions of transparency, accountability, and sensitivity to each person's fundamental human rights. We encourage the government to table the model legislation on torture in Appendix A of this report (with any additions or amendments which the government and legislature deem necessary) and implement it without further ado.

We would like to thank all those who were involved directly and indirectly in the preparation of this report. We extend our gratitude to Mandira Sharma, Ingrid Massag, Dhiraj Pokhrel, Dilli Neupane, Walker Newell and Martin Sommerfeld for drafting and editing this report. We also acknowledge the valuable input given by organizations such as the NHRC, OHCHR, FOHRID, REDRESS, INSEC, CVICT, PPR, ICJ, INHURED- International, AWC and Advocacy Forum. Finally, we would like to thank the thousands of victims of torture who have had the bravery to share their stories with us over the years. This report is dedicated to them.

INTRODUCTION

In December 2007, the Supreme Court made public a detailed judgment in which it ordered the Government of Nepal to criminalize torture. The decision was initially made in March 2006 in a mandamus case filed by two lawyers demanding the criminalization of torture and the provision of appropriate redress to torture survivors. In its opinion, the court affirmed that Nepal has an international obligation to pass a law criminalizing torture in accordance with Articles 2 and 4 of the United Nations Convention against Torture (CAT). The court held that because Nepal has ratified the CAT, all the treaty's provisions are enforceable in Nepal under Section 9 of the Treaty Act of 1990 and that the document must be adhered to literally. The judgment stated: "It is the constitutional duty of the state to ensure the effective implementation of the fundamental rights enshrined in Article 26 of the present Constitution and to frame laws to punish the perpetrators of torture and compensate the victims."¹

The Supreme Court's ruling adds to many other appeals made to the Nepalese government over the past sixteen years to criminalize torture. Despite being a party to the CAT and other major international human rights treaties since 1991,² Nepal has been categorically remiss in fulfilling its duties under these agreements. In doing so, government after government has disregarded the advice of institutions attempting to bring Nepalese law in line with international standards. While failing

¹ Ghimire & Dahal v. Nepal. Supreme Court Judgment, 17 December, 2007.

² In addition to the CAT, in 1991 Nepal ratified the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Child (CRC) and the Convention on the Elimination of Discrimination against Women.

to criminalize torture, the state has ignored calls from the Committee against Torture, the Special Rapporteur on Torture and many domestic and international non-governmental organizations.

The Committee against Torture first called on Nepal to criminalize torture as far back as 1993, when it examined Nepal's initial report under the CAT. At that time, the government recognized its duty to ensure that "All acts of torture are to be made punishable by appropriate penalties".³ These obligations were not, however, respected, and twelve years later torture was not criminalized and was being systematically practiced with impunity during the armed conflict. After he visited Nepal in 2005, the Special Rapporteur on Torture gave a similar direction to the Committee. He recommended that "the crime of torture [be] defined as a matter of priority in accordance with Article 1 of the Convention against Torture, with penalties commensurate with the gravity of torture".⁴ Amnesty International, in 2001, also urged Nepal to make torture a crime⁵, while Advocacy Forum (AF), together with Human Rights Watch, has made repeated calls for the criminalization of torture.⁶

Notwithstanding years of lobbying by the aforementioned groups and others, Nepal's laws and practices are still not in line with its international commitments to prevent and criminalize torture. The groundbreaking political transformations of recent years have not significantly improved the situation, as torture, ill-treatment and illegal detention are still widely practiced. There is no fully impartial and effective mechanism to investigate allegations of torture and no independent mechanism to systematically monitor government detention facilities. As a result, government officials are not deterred from engaging in their accustomed patterns of human rights violations. Additionally, the myriad of abuses perpetrated against

³ Paragraph 1, Initial Report of Nepal under Article 19 of the UN Convention Against Torture, 1993, also available at http://nepal.ohchr.org/en/resources/Documents/English/other/Support_Of_Victims_Of_Torture/6.pdf

⁴ Paragraph 33(b), Report of the UN Special Rapporteur on Torture, 9 January 2006. (ECN.4/2006/6/Add.5)

⁵ Amnesty International, Nepal. Make Torture a Crime, March 2001, AI Index ASA 31/002/2001, also available at <http://www.amnesty.org/en/library/info/ASA31/002/2001/en>

⁶ Advocacy Forum, Sharing Experiences of Torture Survivors, June 2006, available at www.advocacyforum.org, Human Rights Watch and Advocacy Forum, Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict, September 2008, available at <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0>

civilians during the conflict period remain unpunished as the cycle of impunity continues.

The existing legal system in Nepal fails to provide adequate avenues for torture survivors to seek justice and reparation and almost never holds perpetrators accountable for their crimes. Although the Interim Constitution of Nepal (promulgated in January 2007) established torture as a criminal offence, it is functionally still only a civil offense in that no bill providing criminal penalties for torture has ever been passed by the Nepalese legislature. Criminalizing torture in the constitution was indeed a seminal step, but it is not sufficient of itself. For one, the constitution's provision directly contradicts an important measure of the CAT by only defining torture as harms inflicted on people in detention or remand, and failing to protect those abused by public officials outside of official detention. Further, the Torture Compensation Act (TCA) of 1996, which remains the only domestic law exclusively relating to torture, only allows for civil penalties and does not criminalize the offense. The shortcomings of that Act are numerous and have been documented in detail by AF.⁷ Even those portions of the TCA which might be valuable in the process of deterring torture (such as the power of district courts to order "departmental action" against those found responsible for torture) are seldom utilized in practice.

Victims of torture in Nepal are not only unable to see their tormentors incarcerated; they also face innumerable obstacles which usually prevent them from receiving any fiscal remedy. Owing to the absence of protective mechanisms, victims and witnesses of torture are constantly threatened with reprisals by perpetrators and are therefore often compelled to withdraw complaints. Further, they are not even made aware of the limited legal remedies provided by the state, and the statutory limitation under the TCA of a mere 35 days disqualifies any victim who does not act immediately. In addition, the existing legislation fails to consider the rehabilitative needs of victims and the ceiling fixed for compensation is set at a meager NRs. 100,000 (US \$1,300). As if these barriers to redress weren't enough, a provision imposing monetary penalties on those making groundless claims of torture may deter victims from ever becoming involved with the court system.

⁷ See Advocacy Forum, Hope and Frustration. Assessing the Impact of Nepal's Torture Compensation Act – 1996, 26 June 2008, also available at <http://www.advocacyforum.org/publications/index.php>

Under circumstances such as these, there is an exigency to enact a comprehensive law that criminalizes torture, provides a framework for thorough investigations, ensures reparation for victims and guarantees that torture and other cruel, inhuman or degrading treatment will be deterred and punished. As mentioned above, the Interim Constitution has stipulated that torture must be defined as a crime and the Supreme Court has directed the government to comply with this constitutional directive as well as the requirements of the CAT. Accordingly, the government has a responsibility to demonstrate its commitment to basic human dignity by implementing effective and comprehensive legislation that outlaws the ongoing practice of torture.

In this report, we propose a model anti-torture law which, if adopted and successfully implemented by the government, would be instrumental in making Nepal a torture-free country. We believe that the Bill on the Prohibition of Torture contained in this report would provide Nepal with a strong foundation on which a tradition of accountability and redress for human rights violations can be gradually built. The proposed bill is structured to combat the system of coercion and abuse rife in Nepal's justice system. It adheres to established standards of international law and also contains provisions specifically geared towards ending the practice of torture in Nepal. The law is comprehensive, providing a clear framework whereby perpetrators will be effectively punished, victims of torture will be promptly awarded full reparation, and human rights groups will be empowered to monitor all detention facilities.

The model legislation analyzed and annexed in this report is a product of:

- Suggestions and recommendations by major actors in Nepal's criminal justice system during sectoral meetings and consultations periodically held in different parts of Nepal since 2001 and facilitated by Advocacy Forum
- Torture survivors' perceptions of justice and redress
- Experiences of attorneys and custody monitoring teams since 2001
- Discussions with national and international human rights organizations
- Lessons learnt from international practices and a thorough observance of recognized international standards
- Experiences of different organizations, including NHRC, INSEC, CVICT and FOHRID, over a period of several years

We continue to document incidents of torture and other human rights violations, work to bring about successful prosecutions for past abuses, draw public attention to the ongoing cycle of impunity, and lobby for substantive legal changes. Our efforts on behalf of victims, however, have been largely frustrated by the insufficient procedures and protections provided by the TCA. The proposed bill seeks to address all these shortcomings and to put in place an effective legal framework to combat torture. The government has an opportunity to transform Nepal into a society committed to the rule of law and the protection of individual liberties. We hope they will rise to this challenge and adopt new legislation to curb the practice of torture once and for all.

PATTERNS OF TORTURE

Under international law, torture is considered among the gravest crimes. The consensus is that the crime is so serious that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹ Actors in the Nepalese criminal justice system, however, clearly do not understand or respect the severity of the offence. In detention centres throughout Nepal, torture and other cruel, inhuman or degrading treatment remain common practices. Children are among those most often brutalized while detained by the government.

Advocacy Forum (AF) conducts regular monitoring visits to 65 places of detention (mostly police stations or prisons) in its 18 working districts. The main goals of these visits are deterring abuses through consistent oversight and recording offences which have already taken place. Personnel of the Nepalese police are the main perpetrators of torture, though there are significant differences between districts. Although members of the Nepal Army committed the most offences during the armed conflict period (especially from 2001 to 2006), they are no longer engaged in the practice of torture. On the other hand, members of the Armed Police Force, responsible for many acts of torture during the conflict, are again perpetrating abuses in their role in policing the volatile Terai region.

During the period from June 2008 to the end of May 2009, AF lawyers visited and interviewed 4328 (246 female and 4082 male) detainees. Of them, 19.5% detainees

¹ Article 2(2), UN Convention Against Torture.

claimed that they were subjected to torture and/or cruel, inhuman, or degrading treatment or punishment. (See Appendix C for more details on each district.) Similarly, INSEC documented a total of 294 cases of torture during the year 2008. Likewise, the National Human Rights Commission reported 72 cases of torture during 2065 BS. An analysis of the data shows that most torture victims are criminal suspects abused by police during interrogations. These individuals often end up signing a confession in order to end the pain they are made to suffer.

However, detainees are not only vulnerable to abuse while being held in prisons or police facilities. They are also tortured while in transit to places of detention. This abuse often takes the form of severe beatings. The practice may be a method used by police officers to avoid accountability for torture, since that way they can claim that third parties delivered the beating before they made an arrest. Detainees tortured upon arrest or in transit to detention have reported being kicked, struck with rifle butts, and struck with bamboo sticks.

A worrying trend is the consistently high percentage of juvenile detainees tortured by the police. This pattern was identified in press release by Human Rights Watch last year, and it continues to be a serious problem.² Of the 1105 juvenile detainees visited by AF from June 2008 to May 2009, 275 (24.9%) claim to have been tortured – a percentage which is significantly higher than the average for all detainees.

Additionally, the continuing detention of juveniles in police custody is against the law and in violation of an order of the Supreme Court. On September 10, 2008, AF registered a habeas corpus petition under Public Interest Litigation in the Supreme Court on behalf of Suresh BK and others, all of whom were juveniles. These children were removed, or were at risk of being removed, from a correction home on the grounds that the home had insufficient space and were placed in a police facility where they were detained among adults.

On 29 September, 2008 the Supreme Court gave a positive verdict ordering governmental agencies to improve the physical infrastructure of the existing child correction home and establish more correction homes in other regions. Most

² See Human Rights Watch, End Torture of Children in Police Custody; November 18, 2008, available at <http://www.hrw.org/en/news/2008/11/18/nepal-end-torture-children-police-custody>

significantly, the Court explicitly prohibited child correction homes from returning children to police custody. A similar petition was filed on 15 February, 2009 on behalf of 11 juveniles detained illegally in six different police facilities in Kathmandu and Lalitpur. In a verdict issued on 8 March, 2009, the Supreme Court once again ordered the government to create more child correction homes in Nepal. However, while the Court's increasing concern with these issues is encouraging, much more needs to be done to prevent the mistreatment of juveniles.

AF has also received reports of torture perpetrated by non-state actors, especially by members of the Young Communist League (YCL) and armed groups in Terai. The victims in these cases are generally these groups' political opponents or members of the general public over whom they are trying to exert control. During the period between June 2008 and May 2009, AF has documented 25 and 95 cases of torture by members of the YCL and Terai armed groups respectively. Similarly, NHRC reports that it has documented 39 cases of torture by non-state actors during 2065 B.S.

A. METHODS OF TORTURE

CVICT, which has been working in the field of torture mitigation in Nepal since 1990, has stated that the public officials employ 70 different methods of torture in detention. Advocacy Forum has also recorded many of the same practices. The types of torture and other cruel, inhuman and degrading inflicted on detainees can succinctly be summarized as follows:

- Beaten while hung in between two tables from a stick inserted between the legs and tied with a rope
- Beaten on various body parts with sticks made of cane or bamboo, plastic pipes or rifle butts
- Kicked and punched on various parts of the body, including the back, chest, abdomen and face
- Slapped hard in the face or being expectorated on
- Slapped hard on the ears (boxing of the ears) multiple times
- Threatened with death (including instances of having a revolver pointed at the head)
- Hair pulled out

- Handcuffed and blindfolded while beaten
- Jumping or walking on the body
- Having a rope tightened around the neck
- Handcuffed and forced to sit on a chair all night
- Water poured into the nose while being held on the ground (similar to water-boarding)
- Pinched on various parts of body
- Prodded in the genitalia with a cane
- Threatened with electric shocks and hanging
- Stripped naked and kicked
- Burned with cigarettes
- Threatened with rape
- Sexually molested

B. OTHER VIOLATIONS OF DETAINEES' RIGHTS

While torture is the most egregious practice committed by actors within the Nepalese criminal justice system, other significant human rights violations frequently occur as well. As we have repeatedly emphasized in the past, people are often illegally detained, held incommunicado for substantial periods, and/or denied medical treatment in flagrant defiance of the law. Of 4328 detainees visited during this reporting period, only 195 (4.5%) were given an arrest letter, a right which is explicitly guaranteed under the law. Further, although the Constitution requires that every detainee be produced in court within 24 hours of arrest, only 1857 (42.9%) of those interviewed were produced within the stipulated timeframe. Finally, despite a provision in the TCA that assures access to doctors, 731 (16.9%) of the detainees were denied health check-ups or treatment. While official compliance with these laws has improved over the past year, our figures demonstrate that breaches remain common.

C. THE TORTURE COMPENSATION ACT

The TCA has largely failed in its ostensible goal of compensating victims and deterring offenders. However, signs indicate that the current atmosphere is conducive to the active implementation of a new, more aggressive law. Our lawyers have recently observed that the courts are more active in relation to torture, illegal

detention and juvenile rights. Judges and staff members of the District Courts are cooperating more with victims of abuses and their lawyers. Further, judges have started to express their dissatisfaction with lackluster police investigations. They have also begun giving orders for age verification tests in juvenile cases and physical and mental health check-ups on their own accord, without formal submissions by lawyers. The police, too, seem to be imbued with increased respect for their legal obligations, as they often submit medical reports to the court along with other case materials. But although this is welcome to some extent, there are major concerns regarding the quality of these medical reports. It is therefore necessary that judges not only scrutinize medical reports but also question detainees to check the veracity of each report's details. These developments give hope that deference to the rule of law is growing among public officials, but it is evident that there is much progress still to be made.

D. THE NEPAL POLICE HUMAN RIGHTS CELL

The Nepal Police Human Rights Cell is authorized and required to investigate abuses perpetrated upon detainees by police. However, it has not proven itself to be an effective or impartial actor. It is notable that AF has only submitted 42 complaints of torture to the institution, with a request for the police to investigate, between June 2008 and May 2009. This is because AF only approaches the Nepal Police Human Rights Cell with the consent of the victim. The large majority of victims are afraid of filing an official complaint, as they do not trust the independence or good-faith of the Human Rights Cell.

In addition to the factors deterring victims from bringing complaints in the first place, there are also significant problems with the way the Human Rights Cell handles the few complaints actually made. Between late August 2007 and September 2008, AF made 31 complaints to the Cell requesting investigation into 28 individual cases of torture by the police, one case of torture by members of the YCL, one case of rape by an off-duty Nepal Army soldier, and one case of rape by members of the police. Only 22 of these submissions received any response whatsoever and, of these responses, 20 were mere acknowledgements of the complaints. No less than seven further reminders were sent, but as of June 2009, no substantial responses had been received by AF or the victims themselves.

AF is aware that, in 12 of these cases, a communication was sent by the Human Rights Cell to the relevant DPO. This appears to be the extent of the Cell's understanding of an investigation - sending a letter with details of the complaint provided by AF to the relevant DPO and asking that the DPO respond to the allegations. AF has not discovered a single case in which the Human Rights Cell itself has interviewed a victim to assess the merit of an allegation or interviewed detainees or police officers who may have been witnesses to torture.

Far from helping to bring to light abuses, the Cell's practices may actually put those brave enough to complain at added risk of mistreatment. In at least seven of the complaints lodged with the help of AF, the Cell reported an allegation to the DPO where the torture took place, thus identifying the individuals seeking recourse and singling them out to be coerced. AF is aware of at least six cases where such coercion actually took place as a result of the DPO's awareness that a complaint had been filed. The procedures followed by the Human Rights Cell are not the prompt and thorough investigations required under international human rights treaties. On the contrary, they appear to be mostly window-dressing exercises which at times have put victims at further risk.

Further, in the few instances where sanctions have been imposed on public officials, the punishments have been grossly disproportionate to the gravity of the offences committed. In one case, police personnel involved in the mistreatment of a pregnant woman at Baglung police station were only disciplined by being passed over for promotions for a two year period. The woman, Rama Sris, was arrested in a dispute between her husband and his employer. When she started to go into labour while in detention, the police refused to call a doctor or take her to the hospital. She lost the baby. As a result of an internal police investigation, six police officers were given the aforementioned token punishment. Inspector Sujan Shrestha, who was in charge of DPO at the time of the incident and refused to allow Mrs. Sris to be taken to the hospital, has reportedly been allowed to go on to UN peacekeeping duties. No action has been taken against him.

Adding to the many faults with the Human Rights Cell's procedures, no public official, in our experience, has ever been suspended pending resolution of a complaint. This measure is mandated by international law, and the Cell's failure to implement it is a significant omission in the institution's operation. Due to its serious

flaws and non-compliance with international law, it is necessary that the Human Rights Cell either take a more active role in investigating torture or be dissolved in favor of a more competent apparatus.

F. MOVING FORWARD

Effective resolution of the manifold issues surrounding the abuse of detainees, the flawed Nepalese law relating to torture, and the insufficient investigation of complaints will require many changes to be made. A new paradigm, in which torture and other cruel, inhuman or degrading treatment are tangibly deterred, must be created. Although some governmental actors have recently exhibited increased awareness of their obligations, many others continue to commit gross violations with the assurance that their conduct will go unpunished. The criminal justice system needs to undergo a large-scale transformation, and this development can only proceed with the backing of clearer and more vigorous legislation. The remainder of this report seeks to outline Nepal's international duties regarding the form and function of this legislation with reference to the draft bill in Appendix A.

DEFINITIONS

A. “TORTURE”

It is of the utmost importance that the new legislation includes a clear and exhaustive definition of the word “torture” so as to precisely articulate the types of behaviors which will lead to criminal and financial liability. For this purpose, it is incumbent upon Nepal’s legislators to implement the UN Convention Against Torture (CAT)’s definition or one that is substantially similar in the upcoming act. The legislature must recognize that, due to Nepal’s Treaty Act of 1990, the Convention is a binding domestic law. Therefore, the long-awaited anti-torture legislation needs to be framed so as to conform to the CAT as closely as possible. Definitions of torture similar to that contained in Section 2(11) of the proposed bill found in Appendix A of this report have recently been actively implemented by other state parties to the CAT, including the Philippines and New Zealand. The Nepalese government must follow these examples in building a strong foundation for ending impunity relating to torture and preventing the continued occurrence of this crime.

Presently, Article 26 of the Interim Constitution (2007) provides that:

(1) No person who is detained during investigation, or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment;

(2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by law.¹

While this provision constitutes an important first step in the process of criminalizing torture, its guarantees have not yet been enabled by legislation. Instead, torture has continued virtually unabated over the 2½ years since the Constitution was adopted. Without legislation expressly defining the offense, torturers can only be charged under the assault provisions of the *Muluki Ain* (Country Code). In practice, this rarely occurs, as there is no impartial mechanism for receiving complaints against torture and it's the police (in many cases the torturers themselves) to whom a complaint must be made. Under these circumstances, charges lodged against public officials are infrequently investigated seriously. Further, the *Muluki Ain's* definition of "assault" does not account for the unique nature of torture, including the psychological impact of the offence. Torture must, therefore, be defined and dealt with as a separate issue, in accordance with Nepal's duties under international law and Article 26 of the Interim Constitution.

Further, torture victims' claims for relief continue to be treated solely as civil claims under the Torture Compensation Act (TCA). Therefore, even in the isolated instances where victims have been compensated, the individuals responsible for their injuries hardly ever face punishment. This legal framework is wholly inadequate to satisfy Nepal's domestic and international legal obligations, which require the state to actively combat the ingrained culture of impunity. To fulfill these obligations, the new legislation being considered by the legislature must implement the recommendation of the Committee against Torture, which directs the state to "adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation...are criminal offences".² Section 3 of the proposed bill is a strong example of the way the law can be framed to satisfy the government's responsibility to fully criminalize torture.

The TCA not only fails to criminalize torture; its definition of the offence is ambiguous and does not conform to the standards established by the CAT. In June 2008 Advocacy Forum wrote:

¹ Article 26, Interim Constitution of Nepal, 2007. See http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf

² Paragraph 1, Concluding Observations of the Committee against Torture, 2005. (CAT/C/NPL/CO/2)

Section 2 of the TCA defines torture as “physical and mental torture inflicted on a person who is apprehended in the course of investigation, probe, or for trial, or for any other reason”. First, the TCA uses the term “torture” in its definition of torture, which brews obvious ambiguities. Second, courts have interpreted the term “apprehended” to describe only formal custody in detention centers, in which the definition is tremendously narrow. The Convention against Torture provides a thorough definition of the term; by adopting a vague and narrow definition, the TCA limits its compliance with the Convention.³

Section 2(11) of the proposed bill in Appendix A of this report provides a definition of torture that satisfies Nepal’s obligations under the CAT and ensures that the types of harms that continue to be inflicted in detention centres will be explicitly prohibited. It follows the guidelines of the CAT in prohibiting the intentional infliction of “severe pain or suffering”, whether physical and mental, by public officials or those acting in concert with them. This definition is both strict and fair, establishing a well-conceived framework whereby detainees and government actors are made aware of their rights and obligations.

Severe physical pain will encompass many of the coercive methods used by Nepalese officials, such as beating detainees repeatedly with pipes or sticks, trampling over detainees’ bodies, and applying electric shocks to various parts of detainees’ bodies. Further, the inclusion of mental suffering in the definition will cover cases such as those in which detainees are threatened with death, rape, or other serious harm if they fail to confess to a crime – a practice which has been and continues to be very common. However, since only “intentional” acts will be punishable, inadvertent harms perpetrated by Nepalese officials will not be included. While intention will be presumed in cases where beatings or other physical violence occurs, a police officer would not, for example, be liable for hurting a detainee’s wrists by mistakenly using overly tight handcuffs. Officials are also protected from spurious claims by the fact that torture is limited to “severe” forms of harm. Therefore, a detainee cannot bring a claim solely because of discomfort suffered as a result of, for instance, being made to sleep on the hard ground of a cell for one night.

³ Advocacy Forum.2008. Hope & Frustration:Assessing Impact of Nepals’ Torture Compensation Act . 1996 Annual Report 2008. p 26.

Another important aspect of the CAT's definition is that it not only imposes criminal responsibility on public officials but also on private individuals who "knowingly collaborate or acquiesce" in torture. This measure will be essential to provide recourse to victims such as Tek Bahadur Bohara. Mr. Bohara, while in custody on 23-24 August, 2008, was booted, punched and subjected to *falanga* by police. Additionally, in an interview with AF, he also claimed that a private individual known to him was permitted to enter the office where he was being detained. That individual punched Mr. Bohara 6-7 times. To deter this practice from continuing to occur, it is necessary to ensure that private individuals who collaborate with public officials in inflicting serious harm are also held accountable.

It must, however, be noted that private individuals acting independently from public officials are not liable under the CAT or the proposed bill. This omission should not be seen to condone severe harms perpetrated by non-state actors. Rather, an effective attack on the established culture of immunity in Nepal requires that anti-torture legislation specifically targets government actors. The Compensation Fund and Interim Relief Sections of the proposed bill, for example, are essential to protect victims of official torture but would not be feasible if private individuals could be charged under the act. Non-state actors inflicting severe harm on others will still be liable under the assault, rape, and murder provisions of the *Muluki Ain*. The majority of incidents of torture occur under official auspices, and it is these crimes which the CAT and the proposed bill seek to specifically punish and deter.

Finally, the framers of Nepal's new legislation prohibiting torture should also consider providing a list of acts constituting torture such as those found in Section 2(13)& (14) of the proposed bill. This list is not exhaustive; it would instead be included as a means of exemplifying the types of behavior which are proscribed under the legislation. Given the widespread usage of many of these techniques in the course of routine interrogations, it may be useful to include a list to put public officials on notice of the types of behavior which will no longer be tolerated. A large percentage of the torture cases documented by our organizations involve detainees suffering extended beatings, either with implements, fists, or kicking with boots. Explicitly including this type of treatment under the offence of torture informs public officials of the limitations on their exercise of authority and does not permit offenders to escape from liability by claiming that such activity does not constitute torture.

B. “OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT”

If the upcoming legislation only criminalizes acts committed with a discriminatory purpose that result in severe pain or suffering, it will not fulfill Nepal’s international obligations. Under the CAT, the state is also required to “prevent...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...”⁴ This will be a particularly significant inclusion in the law prohibiting torture. In addition to the necessity of conforming Nepalese law to the CAT, criminalizing less severe acts will be essential as an affirmation of the government’s respect for each person’s bodily integrity and dignity. A police officer who spits on a detainee or makes discriminatory remarks has not inflicted severe pain, but these acts are reprehensible nonetheless and must be forcefully discouraged by law.

The CAT mandates that cruel, inhuman or degrading treatment or punishment be treated similarly to torture by domestic law. According to its provisions, victims of this treatment should therefore be allowed to file complaints, have these complaints duly investigated, and be protected from intimidation after filing a complaint.⁵ These rights and protections are contained in the proposed bill in relation to torture, and the Convention requires that they apply to lesser mistreatment as well. Additionally, the government has the duty to train its officials and educate the public about the law regarding cruel, inhuman or degrading treatment or punishment.⁶ Other provisions in the proposed bill are meant to apply exclusively to the offence of torture, but the CAT demands that the noted provisions relate to all degrees of ill-treatment. The proposed bill also suggests penalties for these lesser crimes in Section 6, which will be discussed later in the report.

C. “PERSON”

As a state party to the International Covenant on Civil and Political Rights (ICCPR), the Nepalese state must guarantee that all “persons deprived of their liberty...be treated with humanity and with respect for the inherent dignity of the human

⁴ Article 16, UN Convention Against Torture.

⁵ Articles 12, 13, 16, UN Convention Against Torture.

⁶ Articles 10 AND 16, UN Convention Against Torture.

person.” The ICCPR further provides that each human being must be allowed these protections, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷ Section 2(7) of the proposed bill implements these guarantees specific to Nepal and establishes that no-status related justification may constitute a valid excuse for the offence of torture. This provision is necessary both to fulfill Nepal’s international obligations and to affirm the rights of all individuals in this ethnically and culturally diverse nation.

D. “DETENTION FACILITY”

If a law is drafted too loosely, criminals may escape justice by exploiting linguistic loopholes. Section 2(3) of the proposed bill anticipates the occurrence of such problems by firmly defining the term “detention facility”. Without a definition of the term, officials might attempt to escape their responsibilities (such as providing a health check-up and recording each instance of detention) by using unofficial sites to interrogate or torture detainees.

⁷ Articles 2(1) and 2(3), International Covenant on Civil and Political Rights.

CRIMINAL LIABILITY

Almost every alleged instance of torture perpetrated by the police and recorded during the last year has followed a set pattern. A person is detained and accused of a crime. Then multiple police officers collaborate in inflicting harm on that person, often over the course of several episodes. In the meantime, the inspector or superior officer does nothing to prevent the inhuman treatment, sometimes even engaging in the abuse. In targeting these practices, an effective law will deter not only junior officers who actually perpetrate abuses but also commanders who order, encourage, or fail to prevent these crimes. Under international law, any actor who orders, induces, aids, abets, assists, condones or in any other way contributes to the commission of torture or attempted torture is chargeable as a principal offender. Accordingly, the Nepalese government must seek to define culpability for torture in accordance with these provisions. Section 3 of the proposed draft suggests how the law can be framed to achieve this goal.

A. Individual Responsibility

Most fundamentally, Section 3 makes individuals liable for their own actions. Therefore, each member of a group of police that takes turns beating a detainee will be criminally responsible for the torture he or she has inflicted. Further, Sections 3(2)(f) and 3(2) guarantee that an individual guilty of torture cannot invoke any set of circumstances to justify his actions. In many cases, public officials may inflict torture in response to an order from their superior officer, but this does not excuse their guilt for the actual harm they cause. Additionally, extreme

circumstances such as those existing during the armed conflict and the state of emergency will not be legally sufficient reasons to inflict torture. These sections conform to Article 2 of the CAT, and they must be included in domestic legislation to satisfy Nepal's responsibilities as a state party to the Convention.

B. COMMAND RESPONSIBILITY

Just as essential to an effective law criminalizing torture will be the imposition of liability on commanders and superior officers. Given the continuing prevalence of torture throughout Nepal, it is evident that police officers often allow or order their subordinates to mistreat detainees. Sections 3(2)(e) and 3(3)(a) of the proposed bill deal with these situations, providing that an order to commit torture is equivalent to the act itself and denying immunity to actors of high status who might otherwise wield their influence to escape prosecution. Placing criminal responsibility on these individuals will have two significant effects. First, it will serve as an unambiguous condemnation of torture and the cycle of impunity in Nepal, a key recommendation of the Special Rapporteur on Torture that has yet to be implemented. Second, the threat of imprisonment and fines will force commanders to regulate the officers under them and prevent human rights abuses from happening under their watch. Superior officers clearly have the power to both order torture and prohibit its occurrence under their watch. They should be compelled to do the latter.

C. COMPLICITY

Criminal responsibility also needs to be extended to individuals who encourage or aid the commission of torture, even if they do not directly commit the act. Again, if the legislature truly wants to prevent the incidence of torture, it must provide for the criminal prosecution of officials who hold detainees down while others beat them, incite others to inflict cruel, inhuman or degrading treatment, or otherwise help offences to take place. Section 3(2)(e) of the proposed bill is an example of the way legislation prohibiting torture can attach liability to these actors. This measure, providing that anyone who "orders, incites, instigates, or facilitates" torture will be guilty of the principal offense, would cover a wide range of situations while bring Nepalese law in line with international standards.

D. ATTEMPT

In accordance with modern principles of criminal law and the CAT, the Nepalese legislature must provide for the punishment of inchoate as well as completed offenses. Although a police officer who unsuccessfully tries to beat or injure a detainee has not inflicted severe pain or suffering, he has the intent to achieve that result. According to the Rome Statute of the International Criminal Court (ICC) (which the Special Rapporteur recommends Nepal ratify), an attempt is just as reprehensible as the successful commission of a crime since the actor would have succeeded if not for “circumstances independent of the person’s intentions”.¹ In order to respect Nepal’s duties under the CAT, attempt liability as defined by the Rome Statute (which is aligned with other accepted criminal law standards such as the United States’ Model Penal Code) must be included in the new legislation. The Constituent Assembly is legally required under the CAT to criminalize all the acts discussed in this chapter, and robust measures such as those suggested in the proposed bill will indicate the government’s genuine desire to end impunity.

¹ Article 25(3)(f), Rome Statute. See <http://untreaty.un.org/cod/icc/statute/rome.htm>

HEALTH CHECK-UPS

In our experience, victims often have substantial difficulty proving that they were subjected to torture when trying to file a civil case for damages under the Torture Compensation Act (TCA). This is not surprising – the only witnesses to the offense are usually the government officials who inflict the vicious treatment in the first place. Therefore, the most useful evidence detainees have to prove their allegations is the tangible injuries that they have suffered. Unfortunately, except in the most severe cases, these injuries are often not visible by the time the detainee is released or otherwise presented with an opportunity to complain of torture. Sometimes family members are allowed to visit and see signs of abuse, but their testimony has rarely formed the basis for successful claims. Thus, for victims to have any possibility of successfully obtaining justice and reparation, health check-ups must be given to each detainee upon his or her detention and release. While the TCA nominally requires that detainees be given a medical examination, its guarantees are grossly insufficient as evidenced by the following section:

“While placing in detention or releasing any person, his physical condition shall be examined by a physician under government service as far as possible, and by the concerned official himself in circumstances in which no such physician is available...”¹

¹ Section 3(2), Torture Compensation Act, 1996. See <http://www.unhcr.org/refworld/type,LEGISLATION,,NPL,3ae6b4fac,0.html>

Allowing officials themselves to conduct examinations when it is not “possible” for a physician to do so is a shaky system of preventing torture. Further, the language of the TCA is very vague; an examination of a person’s physical condition could, conceivably, be brief and of limited scope. Evidence of the problem is found in Advocacy Forum (AF)’s track record of bringing claims under the TCA. Of 70 torture cases lodged by AF, at least fourteen have been dismissed or quashed by district courts due to weak or unsupportive medical reports.

The case of Pritab Rauniyar is a telling example of the problems faced by tortured detainees throughout Nepal. Mr. Rauniyar, while detained by police at Balaju police station on 16 October, 2008, was beaten on the soles of his feet and vigorously prodded in his genitalia with a cane. The police then forced him to jump up and down to prevent clotting from occurring in his feet, in an apparent attempt to eliminate this potential evidence of torture. When Mr. Rauniyar was taken for a health check-up after he complained of passing blood while urinating, his police escort only allowed him to be treated with a few glasses of glucose water, although the attending physician recommended a urine test and x-ray. Mr. Rauniyar would likely need clear documentary evidence of the injuries he suffered to have a viable claim, and this evidence was made unavailable to him due to insufficient legal protections. Without a law that mandates full and immediate health check-ups for all detainees by licensed physicians without police present, it will continue to be difficult to substantiate charges of torture in the courts.

The Committee Against Torture recognized the need for a more effective health check-up provision more than three years ago, recommending that the state amend the TCA “to ensure that all detainees have access to a proper medical examination at the time of arrest and upon release.”² Indeed, stricter guarantees of medical examinations must be contained in any legislation aimed at criminalizing torture and ending impunity. Section 4 of the draft bill seeks to address this issue by proposing a number of detainee protection measures designed to ensure the health and welfare of prisoners and create easier access to evidence of torture. The section serves as a good example of the types of measures needed to bring Nepalese law in line with international requirements and achieve justice in torture cases.

² Recommendation 10(d). Concluding Observations of the Committee against Torture, 15 December, 2005. (CAT/C/NPL/CO/2)

A. PENALTIES

At the least, the new legislation must include a provision which penalizes the failure to administer health check-ups. Section 6(6) is an example of one way that this aspect of the law might be framed. By providing relatively strict punishments (from permanent dismissal and disqualification from future government service to 1 year imprisonment) for an intentional failure to guarantee a health check-up to any detainee, public officials are incentivized to perform their legal duty. While such punishments might seem harsh, it must be remembered that medical records often provide the only evidence that torture or other cruel, inhuman or degrading treatment was inflicted on a detainee. Further, under the draft, officials have the opportunity to provide a legitimate reason why the check-up was not administered and thus avoid punishment. Therefore, we recommend that the upcoming act impose similar penalties on public officials to compel them to guarantee a health check-up to each detainee.

B. COMPREHENSIVENESS, IMPARTIALITY AND THE RIGHT TO A SECOND OPINION

It is also necessary, as demonstrated by Mr. Rauniyar's case, to ensure that thorough medical examinations are administered outside the presence of the detaining officials. We recommend that health check-ups be defined similarly to Section 2(5) of the proposed bill, which requires a full examination of physical and mental health with particular attention paid to any potential indicators suggesting torture. Additionally, physicians must be allowed to conduct check-ups without any interference from public officials. It is easy to envision the circumstances of Mr. Rauniyar's medical examination reoccurring. If officials who have committed torture are allowed to direct the substance and length of health check-ups, it is doubtful that any incriminating evidence will be uncovered.

Further, it is mandatory that the legislation gives detainees the right to receive a second examination by a physician of their choice to guarantee full exposition of any signs of torture. International law requires that detainees be given this right, along with access to their medical records³ as well as the right to be transferred to

³ Principle 25. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

specialized institutions or civil hospitals when special treatment is needed.⁴ Additionally, the UN Special Rapporteur's recommendation that follow-up examinations should be "repeated regularly and should be compulsory upon transfer to another place of detention" must be implemented.⁵ Including each of these measures in the upcoming law will create a system that fully protects the health of detainees and seeks to uncover all instances of torture and other cruel, inhuman or degrading treatment.

C. EXAMINATIONS MUST BE PROVIDED FREE OF CHARGE

The aforementioned health check-up services must be provided to detainees free of charge. The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment states that "a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."⁶ This provision is of crucial importance in Nepal, as police officials have consistently justified the failure to administer health check-ups by arguing that their budget does not allow for this "luxury". This contention has been at the forefront of agendas raised by officials during periodic meetings with our custody monitoring lawyers, and our organizations have worked to find a solution to the problem.

As a result of our constant lobbying, District Hospitals have started providing free medical check-ups to detainees. This is a main reason why the percentage of detainees receiving examinations has risen considerably in recent years. According to Advocacy Forum's data, the percentage of detainees given health check-ups over the past year has risen to 83.1% in that organization's 18 working districts. The practice had been a rarity in years past. The Nepal Police Human Rights Cell has also assured us that a budget for health check-ups exists in each district police station. The issue, however, is not entirely resolved. For example, Bir Hospital in Kathmandu (which is the main government hospital in the capital) flatly refused to provide the service *gratis* even when approached by police authorities with a

⁴ Rule 22(2) The UN Standard Minimum Rules for the Treatment of Prisoners .

⁵ Paragraph 39(f), Report of the UN Special Rapporteur on Torture, 2001. (UN Doc.A/56/156)

⁶ Principle 24, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. See www.unhcr.ch/html/menu3/b/h_comp36.htm

formal request. Further, some police authorities continue to argue that they have no funds for the purpose. The problem likely stems from a combination of hostility toward the practice of giving free health check-ups as well as legitimate budgetary limitations. Regardless of the source, though, the upcoming legislation needs to create a final solution by guaranteeing funding which ensure that police departments and/or hospitals can afford to give this essential service free of charge.

D. RESPONSIBILITIES AND EDUCATION OF PHYSICIANS

Another problem contributing to the quagmire surrounding medical examinations is that medical data, even when prepared, are often not adequate for the purposes of trial. As noted, many cases have been quashed by the courts, and these outcomes are largely the result of a lack of expertise among medical practitioners and their obvious negligence in preparing medical reports. Also, the doctors are not trained to recognize or document evidence of torture. An analysis of cases dismissed by the courts due to weak medical reports shows that the doctors had not mentioned a word about torture in their reports despite other compelling evidence that abuses took place. The reports in these cases were perfunctory and the physicians who wrote them were either disinterested or unprepared to fully document signs of torture. To remedy this problem, it will be necessary to provide training and education to doctors. (See also: Chapter on Education)

As has been demonstrated throughout this chapter, full, free, and confidential health examinations absolutely must be guaranteed by legislation prohibiting torture. To ensure that this occurs, a number of rules need to be enacted. Primarily, public officials must be forced to provide medical examinations for all detainees by threat of punishment. A law that imposes no sanctions for an official's failure to fulfill this duty will have little utility. Further, for detainees to have any meaningful rights under the new act, they must be given complete and impartial health check-ups free of charge. Merely guaranteeing these rights on paper to detainees, however, will not be enough. Active implementation of these entitlements is mandated by the government's duty to end impunity and will be needed to give victims of torture a fighting chance to obtain justice.

INVESTIGATION AND PROSECUTION

Over the course of eight years of interviews with detainees throughout Nepal, Advocacy Forum (AF) has recorded 5,349 allegations of torture. None of the officials accused of gross human rights violations during this period have been criminally prosecuted before civilian courts. As the Special Rapporteur, Manfred Nowak, noted in 2006, “Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice...”¹ The cycle of abuses and impunity has continued in the 3½ years since those remarks, calling the Nepalese government’s commitment to the rule of law into serious question. The legislature must, to fully legitimize itself and fulfill its international obligations, finally overturn the existing unwritten rule rendering public officials immune from prosecution.

The upcoming legislation criminalizing torture needs to create a robust and comprehensive system for investigating and prosecuting allegations of torture. Section 5 of the proposed draft contains examples of how these procedures might be framed. It conforms to the Convention Against Torture (CAT), implements the recommendations of the Committee against Torture and the Special Rapporteur on Torture, and seeks to establish a system specifically aimed at exposing and prosecuting torture in Nepal.

¹ Paragraph 31, Report of the UN Special Rapporteur on Torture, 2006. (ECN.4/2006/6/Add.5)

A. COMPLAINTS AND THE DUTY TO INVESTIGATE

The right to lodge complaints and to have them investigated will be at the foundation of an effective approach to prosecuting offences and deterring future abuses. Sections 5 of the proposed bill provide detainees with broad rights to lodge complaints of torture and have these complaints looked into. Under the proposed bill, victims can file complaints with any of several authorities, including the detaining officials, the competent court, the National Human Rights Commission (NHRC), and the district government attorney. The legislature should create similar rights for victims (whether still in detention or released) and allow them a full range of opportunities to expose any abuses they have suffered.

However, it may often be the case that a victim is severely injured or otherwise lacks the capacity to lodge a complaint. Section 5 addresses these situations by creating two complementary duties. First, if a public official is aware of any facts suggesting that a detainee has been tortured, he or she has an affirmative duty to bring these facts to the attention of the district government attorney. Second, if a district government attorney has any reasonable ground to believe that the offence of torture has occurred due to information received from any source, he or she has an affirmative duty to begin an investigation. By imposing these obligations on government actors, the new legislation will be consistent with Article 12 of the CAT, which requires that state parties conduct a “prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed.”² Requiring public officials to assume these responsibilities will also allow for the greatest possible opportunity for violations of detainees’ human rights to be exposed.

B. NO STATUTE OF LIMITATIONS AND RETROACTIVE APPLICATION

The Constituent Assembly and Legislative Parliament cannot impose any statute of limitations on torture claims, whether for filing complaints, investigating allegations, prosecutions, or rewarding reparations. The law prohibiting torture must include guarantees that perpetrators of torture will be held accountable even if years have passed since the crimes were committed. This is necessary for two reasons. First, doing so would persuasively indicate that the government is making

² Article 12, UN Convention Against Torture. See http://www.unhchr.ch/html/menu3/b/h_cat39.htm

a bona fide effort to prevent torture, something that the UN has repeatedly urged it to do. Second, if a statute of limitations is imposed, past victims of egregious human rights violations (particularly those abused during the conflict) will be denied compensation and their torturers will escape justice. These instances of torture were, due to the integration of the CAT as domestic law under the Treaty Act, criminal offenses at the time they were committed, and they cannot go unpunished. To successfully dismantle the culture of impunity, the government needs to target past offenders as well as actively prevent the future commission of crimes. Therefore, the new legislation must explicitly ensure that victims of torture can lodge complaints, the government can initiate prosecutions, and offenders can be held liable, criminally and financially, regardless of the amount of time elapsed since the crime occurred. At the least, the law must retroactively apply from 1991 (when Nepal ratified the CAT) to the present day.

C. INVESTIGATIVE AUTHORITY

It is inevitable that public officials who have inflicted torture will attempt to conceal evidence of their crime and otherwise frustrate investigations. Therefore, district government attorneys (or any other parties the legislature decides to empower) must be provided significant powers so that they can effectively look into the legitimacy of allegations. Sections 5(12) and 5(13) of the proposed bill suggest powers which should be guaranteed to investigators under the upcoming act. Measures like these are necessary if the legislature seeks to implement the Special Rapporteur's direction that "All allegations of torture and ill-treatment be promptly and thoroughly investigated..."³

Section 5(13), giving district government attorneys powers equivalent to those enjoyed by police officers, provides a solid basis of authority for investigators. The right to compel witnesses to give evidence is of particular importance to the investigative process. Prosecutors must be able to threaten witnesses refusing to testify (such as public officials seeking to protect their colleagues) with sanctions. To ensure thorough investigations, it is also imperative that attorneys have access to expert opinions. The chances of proving that injuries were caused by torture

³ Paragraph 33(i), Report of the UN Special Rapporteur on Torture, 2006. (ECN.4/2006/6/Add.5)

will be greatly enhanced by allowing medical expertise to be included in trial proceedings. These measures, along with any others the legislature believes are necessary to ensure that comprehensive investigations take place, must be included in the bill.

D. AUTOMATIC SUSPENSION

In accordance with the Special Rapporteur's recommendations, any public official charged with torture must be suspended from duty pending the final adjudication of the case against him or her.⁴ The legislature needs to include this provision, not only to satisfy the state's obligations under the CAT, but also as part of a broader statement indicating that torture will no longer be willfully ignored. By implementing this requirement, the legislature will express that allegations of human rights abuses will be treated with the utmost care and that this government is dedicated to the rule of law. Further, suspending public officials when they are indicted will prevent them from using their power to unduly influence the outcome of their cases. If a police officer is suspended, he will be unable to coerce his victim to drop the case through threats of further incarceration or charges. Finally, the threat of suspension will act as a substantial deterrent to committing torture. Public officials will be subjected to a temporary loss of status, regardless of the final outcome of the charges against them, and this will make all officials wary of engaging in any behavior which might lead to an indictment for torture.

E. WITNESS PROTECTION

Umesh Lama was arrested by members of the Metropolitan Police Range (Hanumandhoka, Kathmandu) on 1 April, 2008. According to testimony he provided to Advocacy Forum, about 5 police officers (including police inspector Sudhir Raj Shahi and police subinspector Sanjaya Timilsina) beat him indiscriminately for several hours, cut him with razor blades, and trampled on his chest. Mr. Lama was severely injured as a result and was eventually transferred to Bir Hospital. He underwent a long and expensive treatment and rehabilitation process spanning several months.

⁴ Paragraph 33(j), Report of the UN Special Rapporteur on Torture, 2006. (ECN.4/2006/6/Add.5)

While Mr. Lama was hospitalized in critical condition, his family filed a habeas corpus petition challenging the detention as well as a claim under the Torture Compensation Act (TCA). Upon learning this, the Deputy Superintendent of Police (DSP), Kanchan Thapa, made overtures to the victim's family, offering first to give them money to cover medical bills. When the family refused these offers, which were insufficient to cover the costs of treatment, the DSP told them that, unless they dropped the case, Mr. Lama would be implicated in other cases and would be held in custody for six to seven years. According to the family, the DSP and other police officials reiterated this threat on several other occasions.

Mr. Lama, fearing further detention and torture, was forced to withdraw his petitions, in exchange for which the police covered medical bills which his family would have been otherwise unable to pay. His sister reported "My brother Umesh says he will die if he has to go back to the police again." The alleged perpetrators of torture in the case of Umesh Lama have not been prosecuted or otherwise subjected to any penalties.

There are innumerable barriers to the successful prosecution of public officials guilty of human rights abuses, many of which are discussed throughout this report. Perhaps the most substantial obstacle among these is the vulnerability of victims to threats and coercion levied by the officials who have tortured them. After being detained (often on baseless charges) and tortured, victims are often silenced by these threats. Mr. Lama, for example, acted rationally in abandoning his claim in exchange for some money; the alternative would have likely been further detention and torture, with slim chances of any recourse. Without legal safeguards in place, it is extremely difficult for victims to stand up against their abusers and pursue justice. The Committee against Torture recognized this problem several years ago, and recommended that the government ensure that "all persons who report acts of torture or ill-treatment are adequately protected."⁵ The Nepalese state's disregard for this recommendation is another black mark on a long list of breaches of international law.

Under these circumstances, the legislature must enact protections, such as those contained in Section 5(23) of the draft bill in the Appendix to this report, to

⁵ Recommendation 17(b), Concluding Observations of the UN Committee against Torture, 2005. (CAT/C/NPL/CO/2)

guarantee that people lodging torture complaints will be free from harm or unlawful deprivation of their liberty. The proposed bill allows for protection to be granted in either of two ways. First, the Attorney General has an affirmative duty to protect victims, their friends and families, and any witnesses who may be at risk. This duty will extend throughout the investigation and prosecution of a case for as long as is necessary. Second, a victim or other interested party may petition the competent court for a protective order if protections have not been provided by the Attorney General. This will allow individuals to actively respond to threats made against them, as they will be entitled to receive court orders restraining the threatening parties from contacting or coercing them. Measures such as these will be one of the most vital aspects of the upcoming legislation.

PENALTIES

While torture has only been defined as a criminal offense by the Interim Constitution for a short time, it is inexcusable that it is not yet legally punishable. Nepal has long been obliged under the Convention Against Torture (CAT) to enact penalties for torturers, and it has long ignored this legal duty. Punishing torture with incarceration according to international standards will therefore be an essential addition to the new legislation.

The key to framing a penalties section for the new law is ensuring that punishment varies according to the gravity of the harm inflicted. Broad principles of proportionality (as well as the recommendations of the Special Rapporteur and the Committee Against Torture) dictate that each offender should be sentenced based on the unique facts of his or her crime, including the length and severity of the torture, whether the offender participated in the violence itself or merely encouraged it, and the extent of the injuries suffered by the victim. However, the law cannot allow unfettered discretion in sentencing – the judiciary and the legislature must both have input into the decision. While the framers of the new act will have the last word on sentencing guidelines, they should be cognizant of the legal provisions other CAT state parties have implemented. In considering the provisions listed below, the legislature should note that the Committee against Torture has sometimes directed states to implement penalties stricter than these.

DOMESTIC SENTENCING PROVISIONS OF TORTURE OF STATE PARTIES TO CAT

*Australia _____ Maximum of 10 – 20 years (varying with State)

*United States _____ Maximum of 20 years

*Sri Lanka _____ Minimum of 7 years

*Dominican Republic _____ Between 10 and 30 years

*Germany _____ Maximum of 10 years

*Egypt _____ Between 3 and 10 years

*UK _____ Life Imprisonment

REPARATION

Of 70 cases registered by Advocacy Forum (AF) under the Torture Compensation Act (TCA), only 14 have resulted in victim compensation. Not one of these “lucky” plaintiffs, however, has been paid yet, due to pending appeals against district court judgments or failures of Chief District Officers (CDOs) to disburse their awards. Likewise, in 50 cases adjudicated in favor of victims under CIVICT’s representation, only eight victims have actually been able to receive the compensation amount. CIVICT has documented 38,747 cases of torture and ill-treatment between 1990 and 2008.

That victims have little chance of recourse under the TCA is discussed throughout this report. But of particular significance is the fact that in eight of the 14 “successful” cases filed by victims with the assistance of AF under that Act, the compensation initially awarded by the district courts was only between NRs. 10,000-15,000 (\$133-200 US) despite the gravity of the harms the victims suffered. Unfortunately, the TCA does not allow for the full scope of damages suffered by victims of torture to be accounted for in its awards. It is necessary for civil damages to compensate for both tangible harms (such as lost wages and medical bills) and intangible harms (such as physical pain and fear, anguish, or other mental distress). The TCA, however, absolutely limits reparation to NRs. 100,000, while only vaguely defining the considerations to be taken into account in allocating damages.¹

¹ Sections 4,5, 6, Torture Compensation Act, 1996. See <http://www.unhcr.org/refworld/type,LEGISLATION,,NPL,3ae6b4fac,0.html>

In accordance with Article 14 of the CAT, which requires Nepal to ensure that victims of torture receive “fair and adequate” compensation², the legislature has a duty to bolster the insufficient reparation provisions of the TCA and entitle victims to a broader range of monetary remedies. Also mandated by this duty is an implicit requirement that funds be perpetually available for compensation purposes. Finally, procedures for awarding interim or immediate relief should be created to sustain victims who have been severely incapacitated. In sum, the new legislation should create a system whereby claimants may promptly recover all proven damages, both physical and mental, that they have suffered as a result of torture.

A. PECUNIARY AND NON-PECUNIARY DAMAGES

The term torture includes some of the most vicious acts that one human being can perpetrate on another. In addition to long-term physical ailments which are often caused by beatings and other abuses, victims of torture can suffer debilitating psychological problems. The fear, lack of control, and extreme pain experienced by tortured detainees create mental scars which can be worse than lingering physical pains. Parikchyan Yadav, a farmer beaten by police for several hours on 27 December, 2008, explained the mental toll exacted by the abuse he suffered in an interview with AF as follows:

“While being tortured this way, I had wished them to kill me with the gun shot rather than inflicting unbearable torture. I had never been beaten before by anyone.”

Victims need to be compensated for *all* harms they suffer as a result of torture, including devastating feelings of terror and helplessness such as those experienced by Mr. Yadav. Section 10(7) of the proposed bill frames two types of damages which must be awarded – pecuniary and non-pecuniary damages. Pecuniary damages will allow victims to recover all monetary losses they have incurred, including treatment and rehabilitation costs and lost wages, and will remedy any other detrimental financial impacts. Non-pecuniary damages serve to compensate a wide range of difficult to measure injuries, ranging from pain and suffering, social stigmatization as a result of mutilation or rape, and other similar harms.

² Article 14, UN Convention Against Torture. See http://www.unhchr.ch/html/menu3/b/h_cat39.htm

Each victim of torture is uniquely harmed by abuse and courts must therefore be conscious of all possible compensable injuries.

B. COMPREHENSIVE REPARATION

Section 10(2) of the proposed Bill provides for all possible forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Each of these terms denotes a type of remedy (sometimes overlapping with one another) which must be provided to victims under international law.³ A section guaranteeing reparation, rather than merely compensation or restitution, must be included in the upcoming legislation, and reparation must be understood to include each of the five components defined in the following section.

The term restitution entails that victims will be restored, insofar as is possible, to the physical and mental situation they occupied prior to the infliction of torture. Compensation is a similar concept, specifically referring to any and all measurable damages suffered, whether physical, mental, or fiscal. Rehabilitation is a somewhat separate category which only includes funds required for a victim's healing process. Effective reparation must also incorporate satisfaction, which indicates measures such as public apologies and full exposition of the facts surrounding a particular case. Finally, guarantees of non-repetition are systematic rather than specific to a victim. This term imposes a duty on the government to strengthen the justice system and actively prevent future incidents of torture. These categories, taken as a whole, define adequate reparation as related by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. According to Nepal's obligations under the CAT, provisions guaranteeing reparation to torture victims must be tailored to include each of the aforementioned categories.

C. COMPENSATION FUND AND INDIVIDUAL FINANCIAL LIABILITY

As noted, to date none of the 14 victims of torture represented by AF and awarded compensation under the TCA have actually been paid. This failure to promptly

³ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. See <http://www2.ohchr.org/english/law/remedy.htm>

disburse awards is a blatant breach of Recommendation 18 of the Committee against Torture, which directs the government to ensure that compensation be “paid in a timely manner.”⁴ To ensure that this requirement is met, it will be imperative for the new anti-torture act to create a compensation fund. The damages suffered by torture victims are often substantial, and large sums will be needed to provide adequate reparation. It may be difficult to extract this money from individual offenders, as many torturers simply will not have the means to fully compensate their victims. Therefore, it is necessary that the government assumes the initial responsibility of promptly providing reparation to victims who have successfully proven their cases.

Examples of the types of rules and procedures needed for such a fund can be found in Section 8 of the proposed bill. Two aspects of this Section are of particular note and will be essential additions to upcoming legislation. First, the law should contain a provision requiring that the compensation fund never be exhausted and that, in the event of insufficient monies, payments will be made from other governmental sources. To supplement this rule, a short timeframe within which compensation shall be awarded must be established. These measures are required in order to satisfy the state’s obligations to guarantee prompt and adequate reparation.

But while expediency and full compensation require the government to create a fund to compensate victims, the criminals themselves should not escape all fiscal responsibility. A middle ground can be found in the creation of a mechanism whereby the government can compel individual offenders to pay into the fund. Sections 10(3) and 10(4) contain some guidelines and limitations that would equitably govern the process. For example, it is advisable that the upcoming law include a provision similar to 10(4), which allocates financial responsibility in proportion to criminal responsibility. We recommend imposing a presumption of substantial responsibility on superior officers convicted of torture, as they will normally be best positioned to prevent abuses from occurring.

Although torturers should be responsible for repairing all harm they have committed, this may not be a workable rule in practice. Section 10(3) allows for

⁴ Recommendation 18, Concluding Observations of the Committee against Torture, 2005. (CAT/C/NPL/CO/2)

the amount of recourse required from a criminal to be challenged if paying the sum would have dire effects on the wellbeing of his or her family. Under the proposed bill, a successful challenge (which would only be granted in extreme circumstances) would result in a reduction in the amount of recourse recoverable from an offender. Justice dictates that the guilty should pay their debt, but the law cannot pursue this goal at the expense of the innocent dependants of offenders.

D. INTERIM RELIEF

Lastly (but certainly not least), legislation providing reparation for torture victims must include the right to interim or immediate relief and procedures for awarding it. This requirement is not explicitly mandated by international law, but it would be a key component of a just and effective system of reparation. Recall, for example, the case of Umesh Lama, who was forced to drop his torture claim due to a combination of financial coercion and threats of incarceration. Victims who, like Mr. Lama, suffer serious injuries and have difficulty paying medical bills or living expenses must be given some immediate relief on the basis of compelling *prima facie* evidence that torture has taken place.

Allocation of such relief will have two important effects. First, it will render victims less susceptible to bribery by the offending public officials, and encourage them to air their grievances by filing complaints. Second, it will sustain victims during what may be lengthy trial and appellate proceedings and ensure that the final award of reparation does not come too late to cover, for instance, urgent medical treatment. Along with punishing offenders and preventing future crimes from occurring, guaranteeing the welfare of victims of torture must be one of the primary aims of the upcoming legislation. To effectively pursue this goal, the legislature needs to provide for interim relief.

EDUCATION AND TRAINING

Incorporating the principles and concrete rules of the Convention Against Torture (CAT) and the upcoming torture legislation into, at a minimum, the training of all public officials will be a vital component of a campaign aimed at ending impunity. The Convention itself, as well as both UN bodies who have made recommendations specific to torture in Nepal, requires the state to:

“...ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”¹

This duty is a substantial one and the government will need to take vigorous action to fulfill it. Simply including a paragraph about the prohibition of torture in the training manuals of governmental agencies will not achieve the desired effects. If an ingrained culture of impunity is to be dismantled and public officials are to be sensitized to the effects of their behavior, a broad range of educational measures must be included in the upcoming legislation.

To satisfy its most basic obligations under the CAT, the government needs to commission new training materials to be written for all institutions responsible for detaining, interrogating, or otherwise taking citizens into custody. As noted,

¹ Article 10, UN Convention Against Torture. See www.unhchr.ch/html/menu3/b/h_cat39.htm

this will entail the creation of a substantial literature that clearly indicates officials' responsibilities and limitations in regard to interrogation, detention, and torture. Further, full education will necessarily include classes that employ some degree of participation and interaction. Incumbent and newly hired officials must be granted the opportunity to ask questions about the law and their duties. Advocacy Forum (AF) already conducts forums with judges, lawyers, and police for the purposes of education and discussion and trains doctors on proper, legally sufficient documentation of torture. AF and other competent human rights groups would certainly be up to the task of helping public officials to learn about the prohibition of torture, and the government should consider enlisting our expertise to aid the educational process.

The public also needs to have access to education and materials explaining the new legislation criminalizing torture. Almost four years ago, the Special Rapporteur directed the state to conduct awareness-raising campaigns about the principles of the CAT.² This has not yet occurred, but the government presently has a unique opportunity to bring the problem of torture into the public eye. A law in accordance with the CAT is soon to be enacted domestically. The public will be aware of the legislation, and they will view information about the law as immediately relevant and engaging. In this climate, the government should propagate a broad range of materials informing citizens of their rights under the new act. Additionally, it will be necessary to insert materials related to the prohibition of torture in all levels of school curriculum throughout Nepal. The process of educating the society about and sensitizing it to issues relating to torture must be a long-term effort.

² Paragraph 33(q), Report of the UN Special Rapporteur on Torture, 2006. (ECN.4/2006/6/Add.5)

OTHER NECESSARY PROVISIONS

A. NON-REFOULEMENT

Article 3 of the Convention Against Torture (CAT) prohibits Nepal from extraditing or returning any person to another country when it is likely he or she will be in danger of being tortured.¹ The state's dedication to this provision must be affirmed by its inclusion in the upcoming legislation, especially given the many Tibetan refugees present in this country who may be at risk of torture if returned to China. The government has a duty to permit these individuals, and others at risk of persecution if extradited, to remain in the country if deporting them would create a reasonable chance that they would be subjected to torture or other violations of their human rights. Under the CAT, such a risk should be assumed if individuals are being considered for extradition to a state with a "consistent pattern of gross, flagrant or mass violations of human rights". This procedure must be included in the new bill and actively applied.

B. MONITORING SYSTEM

A transparent and accountable justice system can be created in Nepal through the enactment and vigorous enforcement of the provisions suggested throughout this report. But to actively ensure that torture and illegal detention indeed cease, the National Human Rights Commission's right (provided for by the NHRC Act²) to monitor all detention centres throughout the country must be reaffirmed under

¹ Article 3, UN Convention Against Torture. See www.unhchr.ch/html/menu3/b/h_cat39.htm

² National Human Rights Commission Act. See <http://www.nhrnepal.org/legislation.php>

the new law and respected by all government actors. This measure is required by the UN Special Rapporteur and the Committee against Torture, and it will be essential to the effective prevention of torture.

Section 13 of the draft bill proposes some rules which will be necessary to the successful operation of such a monitoring system. First, the NHRC must be allowed to visit government facilities unannounced and at any hour. This will guarantee that the Commission is exposed to the true condition of detention centres, without giving officials the opportunity to hide incriminating evidence. Additionally, public officials who deny NHRC members access to facilities must be punished. The imposition of full transparency will not be an easy process for many officials who have a history of committing or condoning human rights abuses. Therefore, there must be some additional “incentive” provided to these individuals.

Other rules necessary to ensure that the NHRC is allowed a broad range of monitoring rights must also be drawn up under the upcoming act, as the current scope of the institution’s oversight is not yet sufficient to fully deter torture from occurring. The Nepalese government might find guidance in this process by ratifying the Optional Protocol to the CAT (OPCAT). The OPCAT provides for the establishment of a national preventative mechanism in clear terms, and we strongly recommend its immediate ratification.

It is also desirable that the legislation prohibiting torture give competent non-governmental organizations the same rights afforded to the NHRC. Many local Nepalese organizations and international institutions present in the country have expertise and long experience in visiting detainees and monitoring detention centres. Human rights abuses are pervasive throughout Nepal’s detention centres. Authorizing many knowledgeable institutions to record and prevent these crimes will promote transparency and more effectively deter the incidence of torture.

C. NO USE OF EVIDENCE OBTAINED THROUGH TORTURE

There are many reasons why public officials inflict torture on people who are often not even guilty of a crime. Most relevant among these reasons is the fact that physical and mental coercion often gains interrogators the confession they seek. Looking at the frequent incidence of torture in Nepal and the system’s current

inability to expose this coercion, it is likely that evidence gained via torture is used all too often in day-to-day criminal proceedings. This practice must stop immediately.

The Special Rapporteur recognized the problem of forced confessions, and recommended strict guidelines to ensure that detainees' statements are made based on their own free will. He encouraged the creation of rules whereby admissions of guilt "made by persons in custody without the presence of a lawyer and that are not confirmed by a judge not be admissible as evidence against the persons who made the confession."³ While Nepalese law provides some related procedures, the act criminalizing torture is an appropriate forum to introduce more stringent measures that satisfy the state's obligation to comply with these basic protections for detainees as guaranteed in the ICCPR and CAT.

Section 14 of the draft bill proposes the creation of an effective mechanism through which statements known or believed to have been compelled by torture will be discarded from court proceedings. Further, the section mandates that a trial which has admitted faulty evidence is declared a mistrial and that a new trial with a different judge is ordered. This provision will be necessary to prevent judges' rulings from being influenced by inadmissible evidence. At the least, rules similar to these must be included in the new law, and more rigid guidelines for interrogation should soon follow.

³ Paragraph 33(q), Report of the UN Special Rapporteur on Torture, 2006. (ECN.4/2006/6/Add.5)

CONCLUSION

The draft bill contained in this report is only a proposal. The legislature inarguably retains the authority (derived from a democratic political process) and discretion to frame the upcoming legislation to fit its collective understanding of the issues surrounding the criminalization of torture. However, almost all of the measures suggested in this report are responses to Nepal's legal obligations under the treaties and the corresponding recommendations made by the expert bodies noted throughout the report. Therefore, while the legislature does not need to adhere to the letter of the proposed bill, it does have an affirmative duty to fulfill the aforementioned obligations. Doing so will require that the upcoming legislation include most of the provisions contained in this draft, which was prepared with a great deal of consideration and input from numerous individuals and organizations.

It is our hope that the passage of the law prohibiting torture will be a watershed event for Nepal, ushering in a new era of collaboration between the government and NGOs, increased protections of human rights, and an effective, transparent legal system. These processes will, of course, be gradual, but their genesis may be found in the enactment of strict and comprehensive legislation criminalizing practices that have too long remained a prevalent aspect of the criminal justice system in this country. We look forward to the legislature's creation of this strong legal foundation and to continued dialogue and cooperation in the future.

APPENDIX-A

BILL ON THE PROHIBITION OF TORTURE, 2009 (2066)

PREAMBLE

Considering that the dignity of the human being is the highest value of human society,

Taking into account the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Nepal on 14th May 1991 and thus forming part of the law of Nepal,

Considering that it is the fundamental duty and responsibility of each State Party to the UN Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to implement effective legislative, administrative, judicial and other measures to prevent all acts of torture and other forms of cruel, inhuman and degrading treatment or punishment and to ensure accountability and redress for all acts of torture,

Recognizing the fundamental importance of securing a society free from torture, and that, for this to occur, the cooperation of all citizens and public officials is necessary,

Noting the vital importance of ensuring that victims of torture are treated with dignity and respect and that their interests in safety, security and participation are ensured throughout the legal process.

Be it enacted by the parliament.

§1. SHORT TITLE AND COMMENCEMENT

- (1) This Act shall be called “Act on the Prohibition of Torture, 2009 (2066).”
- (2) This Act shall come into force immediately on signature of the President.

§2. DEFINITIONS

In this Act, unless the subject or the context otherwise requires:

- (1) “Detainee” shall denote a person who is deprived of personal liberty.
- (2) “Detention” shall denote the condition of a detainee as defined in Section 2(1).
- (3) “Detention facility” shall denote any location where any person as defined in Section 2(7) is kept as a “detainee” as defined in Section 2(1), or subjected to interrogation.
- (4) “Domestic partner” of the victim shall denote a person (not necessarily a spouse) with whom he/she cohabits and shares a long-term intimate relationship.
- (5) “Health check- up” shall denote a full examination of a detainee’s physical and mental health.
- (6) “Physician” shall denote a physician certified by the Nepal Medical Council or a medical practitioner certified by the Health Professionals’ Council.
- (7) “Person” means every human being, regardless of his/ her religion, caste, ethnicity, gender, sexual orientation, political affiliation or citizenship.
- (8) “Prescribed” or “as prescribed” shall denote procedures prescribed or as prescribed in this Act or the Rules framed under this Act.
- (9) “Public official” shall denote an official in public service who may exercise authority or has an obligation to fulfill certain duties or responsibilities under

the Constitution, other laws or decisions, or under an order of an agency of the Nepali government. The term specifically includes, but is not limited to, the officials or staff of the Nepal Army, Nepal Police, Armed Police Force, Forest Guards, and other authorities working for wildlife preservation, incumbent or retired, as well as any other person acting in an official capacity.

(10) “Reparation” shall denote restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to be provided to the victim by the state and the offender.

(11) “Torture” shall denote any act through which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person detained or controlled in any way by a public official or officials, or by any other person acting in an official capacity or a person with whom a public official knowingly collaborates or acquiesces, with the purpose of obtaining a confession or information from the victim or a third person, punishing the victim for an act committed or suspected of having been committed by the victim or a third person, or intimidating or coercing the victim or a third person for any reason based on discrimination of any kind.

(12) “Cruel, inhuman or degrading treatment or punishment” shall include:

(a) Any of the acts set out in §2(13) or 2(14) below, irrespective of whether the said acts were perpetrated for any of the purposes listed in §2(11); or

(b) Any act causing pain or suffering of significant gravity irrespective of whether the said act amounts to “severe pain or suffering” as per §2(11).

(13) Acts of physical torture shall include acts such as, but not limited to, the following:

(a) Systematic beating, headbanging, punching, kicking striking with truncheons, rifle butts, or jumping or walking on a person’s body;

- (b) Deprivation of food or water, or forced feeding with spoiled food or drink, animal or human excrement, wine or other noxious substances;
 - (c) Electric shocks;
 - (d) Cigarette burning, burning by electrically heated rods, hot oil, or acid;
 - (e) Water treatment or the submersion of the head in water until, or almost to, the point of suffocation;
 - (f) Tying-up, hanging or forcing to assume fixed and stressful bodily positions;
 - (g) Rape, including the insertion of foreign objects into the sex organ or rectum, or electrocution of the genitals, nipple, breast or rectum, and all other forms of sexual abuse;
 - (h) The amputation of any body part;
 - (i) Forced extraction of teeth;
 - (j) Harmful exposure to elements such as extreme heat or cold, animals or insects; or
 - (k) Suffocation, including using plastic bags or other implements placed over the head to deprive air almost or up to the point of asphyxiation.
- (14) Acts of mental torture shall include acts such as, but not limited to, the following:
- (a) Prolonged blindfolding;
 - (b) Threatening a detainee or a detainee's family member or friend with death, rape, abuse, or other severe harm;
 - (c) Arbitrary and extended confinement in solitary cells;

- (d) Extremely prolonged interrogation;
 - (e) Unscheduled or arbitrary transfers from one place to another so as to create a reasonable belief of execution;
 - (f) Demeaning a person's dignity by, for example, forcing him or her to strip or to engage in acts reprehensible to his or her religion or belief system;
- (15) "Victim" shall denote a person subjected to torture or other cruel, inhuman or degrading treatment. The term "victim" shall also denote the immediate family, dependants or domestic partner of the direct victim insofar as they have suffered harm or distress directly or indirectly caused by the unlawful treatment of the victim. Additionally, the term shall denote other persons who have suffered harm while intervening to assist victims in distress or to prevent victimization.

**§3. PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT**

- (1) No one shall inflict torture or cruel, inhuman or degrading treatment or punishment. Torture and cruel, inhuman or degrading treatment or punishment constitute crimes punishable in accordance with this Act.
- (2) A person shall be criminally responsible and individually liable for punishment of the offences of torture or cruel, inhuman or degrading treatment or punishment if that person:
 - (a) inflicts torture or cruel, inhuman or degrading treatment or punishment;
or
 - (b) attempts to inflict torture or cruel, inhuman or degrading treatment or punishment; or
 - (c) inflicts or attempts to inflict torture or cruel, inhuman or degrading treatment or punishment jointly with another party; or

- (d) inflicts or attempts to inflict torture or cruel, inhuman or degrading treatment or punishment through another party, regardless of whether that other person is also criminally responsible; or
 - (e) orders, incites, instigates, participates in or is otherwise complicit in the inflicting of torture or cruel, inhuman or degrading treatment or punishment, or an attempt to do so by another party; or
 - (f) acts on the instruction, supervision, order or will of a public official or other person acting in an official capacity in inflicting or attempting to inflict torture or cruel, inhuman or degrading treatment or punishment.
- (3) No circumstances whatsoever may be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment including, for example, war, or threat of war, national emergency threatening the life of the nation, terrorism, internal political instability or armed conflict, riots or any other type of public emergencies. Such circumstances will never give rise to a valid legal defense against the offence of torture or cruel, inhuman or degrading treatment or punishment.
- (a) An order from a superior officer or a public authority may not be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment.
- (4) No person, as a result of their position, capacity or for any other reason, shall be immune from investigation or prosecution for torture or cruel, inhuman or degrading treatment or punishment.

§4. RECORD OF HEALTH CHECK-UP

- (1) While a person is detained, health check-ups shall be administered in accordance with this Act.
- (2) All health check-ups shall clearly record the physical and mental condition of the detainee and especially all possible evidence of torture and be

administered in accordance with any standards set by the Nepal Medical Council and the Health Professionals' Council and in keeping with international standards such as the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the " Istanbul Protocol") and the Principles of Medical Ethics adopted by UN General Assembly resolution 37/194..

- (3) A health check-up of a person shall be administered by a physician as promptly as possible after the person is arrested. Thereafter, health check-ups, medical care and treatment shall be provided at regular intervals and whenever necessary. Sick detainees, those who complain of illness, injury or ill treatment, and any detainee to whom a physician's attention is specially directed shall be seen regularly by a physician. A health check-up shall be administered to each detainee upon his/her transfer to another place of detention and/or upon release from detention. The health check-ups, care and treatment provided for by this Act shall be provided free of charge.
- (4) A detainee or his or her counsel shall have the right to request and appoint a second physician to provide a medical examination or opinion. Additionally, the competent court may order an independent medical examination or opinion, in which case the examination or opinion shall be provided free of charge.
- (5) All examinations shall be carried out in private, unless an examination within sight (but not within hearing) of public officials is expressly requested by the detainee or physician. The detaining officials and all other public officials shall fully respect doctor-patient confidentiality.
- (6) The fact that a detainee received a health check up, the name of the physician, any other persons present at the check-up and the results of such an examination shall be duly recorded. Upon request of the detainee or his/her counsel, a copy of the aforementioned medical record shall be produced by the competent public official.
- (7) When a detainee is produced in court, the court shall receive and preserve the sealed envelopes containing health records as defined

by§4(6), and they shall be attached to the dossier of the case after the charge-sheet is lodged.

- (8) If there is any reason to believe that torture has been inflicted on a detainee, the detainee, his or her immediate family members or domestic partner, guardian, authorized representative or counsel, may petition the competent district court to order an immediate additional health check-up. The competent district court may, when making such an order, require the physician to provide the examination findings directly to the court and, when appropriate, to the National Human Rights Commission (NHRC) as well.
- (9) If a public official responsible for the detention of the detainee intentionally fails to guarantee health check-ups in accordance with this Act, he/she shall be punished in accordance with §6(6) of this Act. Intentional failure to conform to the aforementioned health check-up provisions of this Act shall be assumed, unless an honest failure to conform to said provisions can be proven by the public official.

§5. INVESTIGATION AND PROCEDURE

- (1) An investigation into an allegation of torture or cruel, inhuman or degrading treatment or punishment shall be initiated by the filing of a complaint by the victim or some other person or institution acting on his or her behalf, or on the own motion of the district government attorney or competent judge.
- (2) The Nepalese Government has the duty to investigate and prosecute those responsible for acts of torture and cruel, inhuman or degrading treatment or punishment whenever there is reasonable grounds to believe that such offences have taken place.
- (3) The Nepalese Government shall take such measures as may be necessary to establish its jurisdiction over any act of torture or cruel, inhuman or degrading treatment or punishment when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered to Nepal, when

the alleged offender is a national of Nepal or when the victim is a national of Nepal. In addition, in cases of torture, the Nepalese Government shall also take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him to any other State.

- (4) If a district government attorney receives information of a possible offence or has otherwise reasonable ground that an offence under this act may have been committed, he must start an investigation ex officio.
- (5) All detainees, while being processed for detention, shall be informed of their right to file a torture complaint and the procedure for filing complaints.
- (6) Complaints may be filed orally or in writing with the official in charge of the place of detention, another body carrying out independent monitoring of places of detention, the National Human Rights Commission, the competent judge reviewing the legality of detention, or directly with the district government attorney.
- (7) All complaints filed shall, immediately on receipt, be forwarded to the district government attorney. A central log of all complaints received by the district government attorney shall be kept, and shall include the date on which the complaint was made, the nature of the complaint, and the follow up. Annual statistics of the central log shall be produced by the Attorney General and publicly disseminated.
- (8) If a detainee dies in detention, suffers mutilation, or there is other evidence or information to suggest that torture or other cruel, inhuman or degrading treatment or punishment may have taken place, the detaining public officials are immediately required to inform the district government attorney and the National Human Rights Commission.
- (9) Upon receiving information of a possible offence or upon otherwise having reasonable ground to suspect that torture or other cruel, inhuman or degrading treatment or punishment may have been committed, an investigation shall be immediately opened by the district government attorney. The district

government attorney shall have the obligation to carry out the investigation promptly, thoroughly and impartially.

- (10) The district government attorney shall keep the Attorney General regularly informed of all torture and cruel, inhuman or degrading treatment or punishment investigations. The district government attorney shall immediately advise the Attorney General of any real or perceived conflicts of interest which may affect the impartiality of the investigation. In cases of conflicts of interest, the Attorney General shall immediately designate another investigative officer to carry out the investigation.
- (11) While conducting investigations and prosecutions of torture and cruel, inhuman or degrading treatment or punishment cases, the district government attorney or other competent authority shall conduct a full and thorough investigation of the facts surrounding the incident, with regard to all potential witnesses of the incident, and any documentary or other evidence obtainable from all possible sources,
- (12) The district government attorney can request and receive assistance from experts for investigation and prosecution, as is necessary to conduct a full investigation and prosecution.
- (13) For the purpose of investigations, the district government attorney or other competent investigation officer shall enjoy all the rights similar to that of a police officer as set forth in Nepal law including: access to custody records, permission to interrogate and compel witnesses and full access to all material and information relevant to the investigation.
- (14) The burden of proof shall be on the detaining officials to demonstrate that the death or injury of the detainee was not caused as a result of torture or other cruel, inhuman or degrading treatment or punishment.
- (15) After completion of an investigation, the district government attorney shall, where the evidence discloses the commission of a crime, prepare a charge sheet and file a public criminal case on behalf of Nepal government as plaintiff in the court and also prosecute it.

- (16) If, after completion of an investigation, the evidence does not disclose the commission of a crime, the Attorney General may decide that the case cannot be prosecuted as a public case according to this Act or other Nepal law. In this event, the Attorney General shall issue a motivated decision and the district government attorney shall, within 5 days of the issuance of the decision, inform the victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents, and his counsel.
- (17) The victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents, may file an appeal against the decision of the Attorney General not to pursue the prosecution as a public case. The request for appeal shall be filed within 60 days from the notification of the decision of the Attorney General.
- (18) In case the Attorney General decides, according to the provisions of §5(16), that a case cannot be filed as a public case, the victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents may file a case as plaintiff on behalf of the victim in the district court.
- (a) The conversion of a torture or cruel, inhuman or degrading treatment or punishment case into a private plaintiff criminal case under this subsection shall not otherwise affect the prescribed legal procedures governing the case.
- (19) Legal aid shall be provided as prescribed in the Nepalese Legal Aid act 1997.
- (20) Unless a case is brought as a private plaintiff criminal case according to §5(18), the Nepalese government shall be the plaintiff in all torture and cruel, inhuman or degrading treatment or punishment cases brought under this Act.
- (a) If a victim of torture believes that the government is not adequately representing his/her interests while acting as plaintiff, the victim may

step in as the plaintiff at any stage in the case, in which event the proceedings will continue as a private plaintiff criminal case in accordance with §5(18).

(21) For the purpose of facilitating the investigation and prosecution of torture and cruel, inhuman or degrading treatment or punishment under this Act, the district government attorney, Investigation Officer, members of the investigation team, defense lawyers, plaintiff's lawyers, and any persons authorized by the competent court shall each have the authority to inspect all detention facilities throughout Nepal.

(a) Consent from the public official or officials responsible for detention facility shall not be required in order for the aforementioned inspection and monitoring activities.

(b) Public officials who prevent authorized persons from inspecting or monitoring detention facility shall be subject to penalties as prescribed by §6(7) of this Act.

(22) The victim, the victim's lawyer or, in case of death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents must regularly be kept informed of the progress of the investigation. A written report about the progress of the investigation shall be sent to the victim or the victim's lawyer at least every 30 days.

(23) Protection of the witness.

(a) Victims shall be considered to be witnesses of the plaintiff in the adjudication of claims under this Act.

(b) Victims of torture and other cruel, inhuman or degrading treatment or punishment and witnesses of the offence shall be protected as prescribed in Section 23, Subsection (c).

(c) The office of the Attorney General is entitled and obliged to take all appropriate measures to guarantee the personal security and safety of

the victim, all witnesses, and the victim's lawyer, relatives of those and any other endangered as a result of any proceedings under this Act before, during and after the investigation and until such time as protection measures are no longer necessary. The victim or any other person endangered as a result of any such proceedings may apply to the Court for a protective order when necessary if such order has not otherwise been provided by the attorney general.

(24) Automatic suspension and disciplinary sanctions. Upon commencement of an investigation for an offence under this Act,

- (a) Any incumbent public official shall be automatically suspended from his/her position upon commencement of an investigation into accusations against him/her of an offence under this Act. Such suspension shall remain in effect until the final adjudication of the case.
- (b) Any public official indicted for an offence under this Act shall be immediately suspended from duty pending trial and duly prosecuted.

(25) No Statute of Limitations for Prosecution or Reparation.

- (a) There shall be no statute of limitations for the investigation or prosecution of cases under this Act.
- (b) There shall be no statute of limitations to file complaints and claims under this Act, including initial complaints of torture and other cruel, inhuman or degrading treatment or punishment and claims for interim relief.
- (c) Nothing in this Act shall affect any right of victims of torture and other cruel, inhuman or degrading treatment or punishment or any other persons to receive reparation which they are otherwise entitled to under Nepalese law.

- (26) All other procedures governing the investigation, prosecution and proceedings of claims under this act shall be as prescribed by Nepalese law.

§6. PENALTIES

- (1) The following provisions shall serve as guidelines governing the sentencing of public officials convicted under this Act.
- (2) Public officials guilty of torture as defined by §2(11) of this Act shall be sentenced to:
- (a) 20 years imprisonment, if the victim of said torture dies as a result;
 - (b) A minimum of 10 and a maximum of 20 years imprisonment, if the victim of said torture is permanently disabled or severely disfigured;
 - (c) A minimum of 10 and a maximum of 20 years imprisonment, if the victim of said torture is raped or sexually assaulted;
 - (d) A minimum of 3 and a maximum of 20 years imprisonment in all other cases.
- (3) When sentencing public officials under §6(2)(d) of this Act, judges shall impose punishment proportional to the harm inflicted in each individual case, taking into account:
- (a) the method, duration, and cruelty of the torture or other cruel, inhuman or degrading treatment;
 - (b) the duration and severity of the pain or suffering, both mental and physical, suffered by the victim ;
 - (c) whether the offender actually inflicted the torture or merely encouraged the commission of the crime; and

- (d) any other circumstances or factors relevant to the relative culpability of each individual offender.
- (4) Public officials guilty of cruel, inhuman or degrading treatment or punishment as defined by §2(12) of this Act shall be sentenced to:
 - (a) A minimum of 6 months and a maximum of ten years imprisonment proportional to the harm inflicted in each individual case.
- (5) When sentencing public officials under §6(4)(a) of this Act, judges shall impose punishment proportional to the harm inflicted in each individual case, taking into account:
 - (a) the method, duration, and cruelty of the treatment or punishment;
 - (b) the duration and severity of the pain or suffering, both mental and physical, suffered by the victim ;
 - (c) whether the offender actually inflicted the torture or merely encouraged the commission of the crime; and
 - (d) any other circumstances or factors relevant to the relative culpability of each individual offender.
- (6) Public officials guilty of the intentional failure to provide health check-ups in accordance with §4(9) of this Act shall be punishable by a minimum of permanent dismissal from their positions with the government and automatic disqualification from any future government service and a maximum of 1 year imprisonment.
- (7) Public officials guilty of refusing authorized persons access to detention facilities in accordance with §5(21) and §13 of this Act shall be punishable by a minimum of permanent dismissal from their positions with the government and automatic disqualification from any future government service and a maximum of 1 year imprisonment.

§7. RIGHT TO APPEAL

- (1) The victim and, in case of death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependants, and the defendant shall each have the right to appeal the District Court's decision, in relation to whether the offence of torture was committed, whether an appropriate penalty was imposed and regarding the amount and form of compensation awarded.
- (2) Other rules and procedures governing appeals under this Act shall be as prescribed by Nepalese law.

§8. COMPENSATION FUND

- (1) The Nepalese government shall create and sustain a Compensation Fund for the purpose of providing compensation to victims of torture and other cruel, inhuman or degrading treatment or punishment under this Act.
- (2) A Compensation Fund Management Committee comprised of the following shall be formed to manage the Compensation Fund:
 - (a) Law Secretary - Convener
 - (b) Assistant Registrar designated by Registrar of the Supreme Court - Member
 - (c) Assistant Secretary designated by Secretary of the Finance Ministry - Member
 - (d) A member of civil society, working in the area of human rights, appointed by the Human Rights Committee of the parliament
- (3) Annual allocations by the government, donations from national and international donor agencies or individuals, and fines collected from individual offenders under this Act shall be collected in the Fund.

- (4) All expenses incurred related to reparation awarded to victims of torture and other cruel, inhuman or degrading treatment or punishment, as prescribed by §9 and §10 of this Act, will be written expenses under the Fund.
- (5) The compensation fund must never be exhausted.
 - (a) insufficient funds within the Compensation Fund shall not prevent the prompt payment of reparation to any victim.
 - (b) in case the compensation fund is exhausted, the Nepalese Government must immediately provide reparation from other sources.
- (6) Other provisions regarding the Compensation Fund will be as prescribed by the Rules promulgated under this Act.

§9. INTERIM RELIEF

- (1) If a victim has been rendered unable to support his or her family or domestic partner due to injuries allegedly suffered as a result of torture or other cruel, inhuman or degrading treatment or punishment, requires funds to pay for urgent medical care required to treat injuries allegedly suffered as a result of torture or other cruel, inhuman or degrading treatment or punishment, or is otherwise in dire need of financial assistance due to any circumstances brought about by alleged crime, the Investigation Officer, the victim, the victim's counsel, or the victim's immediate family or domestic partner may petition the competent court for interim relief.
- (2) If the competent judge determines that interim relief is required, he or she shall issue an order to the Chief District Officer of the district of the alleged victim to provide relief out of the Compensation Fund.
 - (a) The Chief District Officer must promptly provide the determined amount of relief to the alleged victim after receiving such an order.

- (3) In determining the amount of interim relief necessary to sustain an alleged victim under this Act, the judge should, among other factors, consider the following:
- (a) The scale and gravity of physical or mental torture or other cruel, inhuman or degrading treatment or punishment alleged to be suffered by the victim;
 - (b) The age, familial responsibility and condition of the alleged victim's dependents;
 - (c) Expenses incurred or likely to be incurred during treatment of the alleged torture-related injuries;
 - (d) Duration and necessary means and resources for the rehabilitation of the victim.
 - (e) Urgent funds for medical treatment and financial supply of the victim's family, domestic partner or other dependants.
- (4) All further procedures governing awards of interim relief shall be as prescribed by the Rules promulgated under this Act.

§10. PROVISIONS AND PROCEDURES OF REPARATION

- (1) The Nepalese Government shall pay and/or provide the full cost and service of reparations to victims of torture and other cruel, inhuman or degrading treatment or punishment promptly after the amount and form of reparations has been determined. Such payment and/or provision shall, in no event, be awarded more than one month after sentencing.
- (2) A victim of torture or other cruel, inhuman or degrading treatment or punishment shall promptly receive adequate, substantial and effective reparation as set forth in this Act. Reparation shall be granted in the form of restitution, compensation, rehabilitation, satisfaction, guarantees of non-

repetition or other measures which are adequate to secure the victim's health, property and security.

- (3) The Nepalese government has the right to recourse from an individual offender for all costs incurred as a result of his/her unlawful actions.
- (a) Such recourse shall be limited in cases wherein forcing an individual offender to repay the full amount of reparation would subject any member of the offender's immediate family, dependents and/or domestic partner to a substantial risk of danger to their health or life due to said financial burden.
 - (b) The immediate family, dependents and/ or domestic partner shall have the right to apply to the district court rendering judgment if they believe they will be subjected to a substantial risk of danger to their health or life due to the financial burden imposed upon the offender.
 - (i) The court, in considering such applications, shall evaluate the applicants' financial situation and, if it is found that the mandated recourse would expose the applicants to a substantial risk of danger to their health or life, reduce the amount of recourse accordingly.
 - (ii) There shall be no right for the offender's immediate family or domestic partner to protect or restore their usual living standard, as before the recourse.
- (4) In the case that multiple offenders are found guilty of torturing or otherwise committing cruel, inhuman or degrading treatment or punishment to a single victim, the aforementioned costs shall be shared by all offenders sentenced under this Act. These costs shall be divided relative to each offender's guilt and responsibility for the committed offence. The court shall decide each offender's guilt and responsibility during sentencing. That an offender held a position of command or significant responsibility, in the police, army, or another security institution, shall be considered an indicator of substantial responsibility.

- (5) If a person requires diagnosis or treatment for physical or mental health problems suffered due to torture at the hands of public officials, treatment shall be provided at the expense of the Nepal government. Financial assistance shall also be provided to the dependents or family members if immediate relief is required to sustain such persons in the event of the torture-related death or incapacitation of a victim.
- (6) A person determined to be a victim under this Act shall receive reparations as determined by the court.
- (7) Reparation must include all pecuniary and non-pecuniary damages suffered due to torture and other cruel, inhuman or degrading treatment or punishment, insofar as they are not covered by the immediate relief granted by the investigation officer. Reparation, at the least, must include:
 - (a) adequate compensation for all non-pecuniary damages, including pain, anguish, fear and any other emotional distress suffered by the victim;
 - (b) all costs of necessary medical treatment and all material losses suffered by the victim due to torture-related harms. Material losses shall include, but are not limited to, loss of income, loss of economic opportunities, expenses incurred in procuring legal or expert assistance, insofar as these costs are not covered by the free legal aid or interim relief; and
 - (c) compensation for all non-pecuniary damages suffered by a victim.
- (8) Each court, when awarding reparation, must clearly indicate the amount of the total sum to be used for each of the categories outlined in §10(7)(a-c). Each court shall give a reasonable explanation for this allocation.
- (9) Considering international compensation standards, the reparation shall be proportional to the gravity of the acts of torture or other cruel, inhuman or degrading treatment, and to the harm suffered. The reparation will be limited by the actual damages caused by torture or other cruel, inhuman or degrading treatment and further punitive damages shall not be awarded to victims.

(10) Procedures for Reparation

- (a) When a case under this Act proceeds with the Nepalese government as plaintiff, the district government attorney must include a claim for reparation according to the guidelines set forth in §10(7)(a-c).
 - (b) When a case under this Act proceeds as a private plaintiff criminal case, the victim's attorney must include a claim for reparation according to the guidelines set forth in §10(7)(a-c).
 - (c) A victim can apply independently to the District Court demanding reparation related to emotional distress suffered due to torture or other cruel, inhuman or degrading treatment of the victim.
 - (d) After a court decides to award reparation to a victim under this Act, a letter along with a copy of the amount and form of reparation shall be sent to the Compensation Fund Management Committee.
 - (e) Upon receipt of a letter detailing reparation as outlined in §10(10)(d), the Compensation Fund shall disburse the ordered compensation to the victim within one month.
- (11) A rehabilitation centre with adequate medical and rehabilitation facilities shall be established to take care of those who are mutilated or have sustained physical or mental injuries requiring treatment and care. The Nepal government shall bear the cost of its operation.

§11. TRAINING OF PUBLIC OFFICIALS

- (1) The Nepal Government shall take effective legislative, administrative, judicial or other measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment contained in this Act shall be incorporated into all the curriculum and relevant textbooks for competitive examinations and training for entry into public service and shall

include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

- (2) Those working in civil or military law enforcement, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention shall be trained on the basis of a common curriculum stressing all relevant duties and obligations under this Act.
- (3) The training of concerned medical personnel shall specifically emphasize the rules established in the Principles of Medical Ethics relevant to the Role of Health Personnel. Particularly, physicians shall be trained in the protection of detainees and prisoners against torture, and other cruel, inhuman or degrading treatment or punishment.
- (4) Incumbent personnel and future recruits of the police, armed police and Royal Nepalese Army shall undergo extensive and thorough training including human rights education, training in effective interrogation techniques and the proper use of policing equipment.
- (5) The Nepalese government shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture and other cruel, inhuman or degrading treatment or punishment.
- (6) The Nepalese government shall incorporate the prohibition on torture and other related human rights issues into the primary, secondary and university level curriculum within 5 years of the passage of this Act.
- (7) To promote the rule of law in Nepal, the government shall organize regular and at least once per year human rights awareness campaigns to raise awareness of the general public on the importance of human rights protections and the rights of citizens. The government may seek advice and

assistance from the NHRC, human rights NGOs and civil society in the conceptualization and/or implementation of such programs.

§12. NON-REFOULEMENT

(1) No one at risk of torture or other cruel, inhuman or degrading treatment or punishment shall be extradited, returned or expelled from Nepal.

(a) Whatsoever written elsewhere in Nepalese law, the Nepalese government shall not expel, return (“refouler”) or extradite a person to another state when there are substantial grounds for believing that he/she would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

(b) For the purpose of determining whether such circumstances exist, the competent authorities shall take into account all relevant considerations including, where applicable, a consistent pattern of gross, flagrant or mass violations of human rights in the state concerned.

§13. MONITORING SYSTEM

(1) Under this Act, the National Human Rights Commission (NHRC) is mandated to monitor all detention facilities and other places where individuals are detained throughout the country. The condition of such places of detention, as well as any human rights abuses, breaches or other compliance issues under this Act shall be recorded in the Annual Reports of the NHRC.

(a) Competent civil society organizations may apply to the NHRC to receive monitoring rights and, if approved, will be entitled to rights equivalent to those guaranteed to the NHRC under this Section.

(2) To facilitate the monitoring process, unrestricted access to all places of detention shall be granted to officials of the NHRC and all organizations approved under §13(1)(a) of this Act.

- (3) The NHRC and all organizations approved under §13(1)(a) of this Act shall be entitled to visit all detention facilities unannounced, immediately and at any time. The NHRC shall have access to all existent data, detention facilities, detainees, and available personnel.
- (4) The monitoring shall be carried out impartially, independently and with all necessary care.
- (5) In the event that the NHRC or any organization approved under §13(1)(a) of this Act finds evidence of the possibility of torture, they must immediately inform the Attorney General and advise that an investigation be launched.
- (6) Public officials who prevent authorized or approved persons, organizations, or institutions from inspecting or monitoring detention facilities shall be subject to penalties as prescribed by §6(7) of this Act.

§14. NO USE OF EVIDENCE OBTAINED THROUGH TORTURE

- (1) No information or any other evidence obtained through torture or other cruel, inhuman or degrading treatment can be used in any proceedings in accordance with the Evidence Act of 1974 except in proceedings against a person accused of torture as evidence that the statement was made..
- (2) A court shall regard such information or any other evidence as nonexistent. In the event that a court or other adjudicating body receives notice, during or after proceedings, that any information has been obtained through torture, the proceeding shall be declared a mistrial and a new trial, under a new judge, shall be ordered.
- (3) Upon notice that any information has been obtained through torture, the competent judge shall order the opening of a criminal investigation for torture under this Act, in accordance with §5 of this Act.

§15. FRAMING OF RULES

- (1) The Nepalese Government shall promptly frame Rules necessary for implementation of this Act.

§16. REPEAL

- (1) The Torture Compensation Act of 2053 (1996) has been repealed.
- (2) Past cases tried under the Torture Compensation Act of 2053 (1995) shall be regarded as having been tried under this Act and pending torture cases, at the time of this Act's passage, shall proceed in accordance with this Act.
- (3) Past cases of torture and other cruel, inhuman or degrading treatment or punishment which took place after Nepal ratified the Convention against Torture can be investigated, prosecuted and tried under this Act.

Appendix-B

EXCERPTS FROM THE SUPREME COURT'S VERDICT ON CRIMINALIZATION OF TORTURE

Verdict Issued by: The Supreme Court of Nepal, Division Bench Comprising of Justice Balaram KC and Justice Tahir Ali Ansari

Date of Verdict: Dec 17, 2007

Petitioners: Advocate Rajendra Ghimire and Advocate Kedar Prasad Dahal

Respondents: Office of Prime minister and Council of Ministers; Ministry of Law, Justice and Parliamentary Affairs; the Ministry of Foreign Affairs; Parliament Secretariat; Nepal Law Reform Commission

Case: Mandamus

EXCERPTS OF THE VERDICT

“The demand of the petitioners reflects that perpetrators of torture should be punished and victims of torture rehabilitated by assuming torture a criminal offence. The Constitution has recognized right against torture as a fundamental right. Section 26 (2) of the Interim Constitution of Nepal provides for punishment to those involved in inflicting physical or mental torture, or any cruel, inhuman and degrading treatment, and adequate compensation (as determined by law) to those victimized by such acts. Section (4) article 33 (c) provides for the ending of impunity via strict observance of the universally accepted concept of fundamental human rights and also (m) of the same article provides for the implementation of international treaties and agreements to which Nepal is a party. It is the constitutional duty of the state to ensure the effective implementation of the fundamental rights enshrined in article 26 of the present constitution and to frame laws to punish the perpetrators of torture and compensate the victims.

Not only the Interim Constitution of Nepal but the International Covenant on Civil and Political Rights (1966) and Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984), to which Nepal is a party, and especially article 2 and 4 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, obligates Nepal to assume torture as a criminal offence and legislate accordingly to punish the perpetrators of torture and compensate the victims of torture.

The article 14 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984) reads as follows:

“Each state party shall ensure in its legal system that the victims of an act of torture obtains redresses and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victims as a result of torture his dependents shall be entitled of compensation”

This article holds that it the obligation of a state party to establish legal provisions to provide adequate compensation to victims by criminalizing torture. Nepal can't remain immune to it.

Therefore, as no legislation has been drafted till date in line with the Convention against Torture and Other cruel, Inhuman and Degrading Treatment or Punishment (1984), albeit a considerable amount of time has elapsed since Nepal ratified the convention, and as Nepal has treaty obligations to implement and adhere literally to the Convention against Torture and Other cruel, Inhuman and Degrading Treatment or Punishment (1984), and as it is the constitutional duty of Nepal to draw up legislation that ensures punishment of the perpetrators of torture to deliver the provisions expressed in article 26 and 33 (m) of the Interim Constitution, a directive order hereby has been issued in the name of the respondent the Government of Nepal to criminalize torture and make provisions to punish the perpetrators of torture as demanded by the petitioners.

APPENDIX-C

TORTURE RELATED DATA

Advocacy Forum

From June 08 to May 09

Total visit detainees: 4328

TORTURE INFLECTION

	Frequency	Percent
Yes	844	19.5
No	3484	80.5
Total	4328	100.0

DISTRICT WISE TORTURE INFLECTION CROSS TABULATION

Detention Place	Torture infliction				Total
	Yes	%	No	%	
Kathmandu	249	24	788	76	1037
Rupendehi	110	21.2	408	78.8	518
Danusha	41	27.5	108	72.5	149
Baglung	6	6.7	84	93.3	90
Myagdi	4	18.2	18	81.8	22
Parbat	8	22.9	27	77.1	35
Bardiya	18	15.9	95	84.1	113
Morang	41	17	200	83	241
Ramechhap	10	23.8	32	76.2	42
Dolakha	6	4.3	134	95.7	140
Jhapa	38	17.4	181	82.6	219
Banke	65	21	245	79	310
Kaski	94	15.4	517	84.6	611
Kanchanpur	12	7.5	149	92.5	161

APPENDIX-C

Detention Place	Torture infliction				Total
	Yes	%	No	%	
Udayapur	14	13.9	87	86.1	101
Surkhet	64	27.1	172	72.9	236
Kapilbastu	26	16.7	130	83.3	156
Patan	38	25.9	109	74.1	147
Total	844	19.5	3484	80.5	4328

HEALTH CHECKUP

	Frequency	Percent
Yes	3597	83.1
No	731	16.9
Total	4328	100.0

TORTURE TO JUVENILES

	Frequency	Percent
Yes	275	24.9
No	830	75.1
Total	1105	100.0

CAST GROUP

	Frequency	Percent
B/C group	1423	32.9
Dalit group	426	9.8
Indigenous group	1332	30.8
Newar group	214	4.9
Other group	381	8.8
Terai Ethnic group	552	12.8
Total	4328	100.0

SEX

	Frequency	Percent
Female	246	5.7
Male	4082	94.3
Total	4328	100.0

RECEIVED NOTICE OF ARREST?

	Frequency	Percent
Yes	195	4.5
No	4133	95.5
Total	4328	100.0

KNOWLEDGE OF RIGHT TO COUNSEL WITH LAWYER?

	Frequency	Percent
Yes	945	21.8
No	3383	78.2
Total	4328	100.0

ANY PAPER PROVIDED TO READ?

	Frequency	Percent
Yes	669	15.5
No	3659	84.5
Total	4328	100.0

PRODUCING DETAINEES TO COURT WITHIN 24HOUR?

	Frequency	Percent
Yes	1857	42.9
No	1596	36.9
Total	3453	79.8
Not taken to the Court	875	20.2
Total	4328	100.0

IF TORTURED WHEN?

	Frequency	Percent
Before Remand	840	19.4
After Remand	4	0.1
Total	844	19.5

CAST GROUP * TORTURE INFLECTION CROSSTABULATION

Cast Group	Torture infliction				Total
	Yes	%	No	%	
B/C group	232	16.3	1191	83.7	1423
Dalit group	100	23.5	326	76.5	426
Indigenous group	256	19.2	1076	80.8	1332
Newar group	41	19.2	173	80.8	214
Other group	94	24.7	287	75.3	381
Terai Ethnic group	121	21.9	431	78.1	552
Total Count	844	19.5	3484	80.5	4328