



# Hope and Frustration

Assessing the Impact of Nepal's Torture  
Compensation Act -1996



Advocacy Forum  
26 June 2008

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Finally, we greatly appreciate the untiring efforts of the lawyers at Advocacy Forum who visit detention centers on a quotidian basis to bring out the agonies and pains suffered by the victims inside the dark custodies and detention centers.



## EXECUTIVE SUMMARY

With the recent political changes that have taken place in Nepal, it is only natural to look to the future with hope for beneficial changes and the quick and successful institutionalization of a Democratic Republic. In the past, Nepal has received national and international criticism regarding its failure to comply with its human rights obligations and has been accused of not having the necessary political will to address the numerous cases of human rights violations, including torture. The deep-rooted culture of impunity is posing a serious threat to the on-going peace process. Perpetrators of human rights violations are promoted by the political system and are not brought to justice.

Nepal has responded to these accusations, especially on torture, by quoting its domestic legislation, the Torture Compensation Act of 1996 (TCA), claiming that this Act places Nepal in compliance with its international obligations. However, a brief examination of this law shows that not only does it fail to meet international standards by neglecting to criminalize the act of torture, but it also is not adequately addressing the needs of the victims of torture it was enacted to assist.

Historically, torture was legally permissible to punish “lower caste” people and those who commit crimes. The rulers of Nepal have used the national security forces to control the population, which unfortunately has often involved methods of torture. The security forces actively controlled the population through shows of authority. Today, they are still using excessive force during political rallies and torturing people held on suspicion of involvement in criminal activities. During the 10 years of conflict, Maoist cadres also tortured civilians to extort money, punish non-cooperation or immorality, and maintain control through fear. Though the country has now entered the peace process and many changes have been made through the people’s movement, torture still continues as those perpetrators continue to remain in the powerful positions they formerly held. Nepal’s domestic laws have no mechanism for holding these perpetrators accountable for actions that have devastated thousands of innocent lives.

Nepal must examine the message it is sending out to the victims of human rights violations, as well as the national and international communities regarding torture. Currently, it seems to be putting up a smoke screen, claiming that its legislation is centered on aiding victims when in actuality the legislation deters the victims from filing their claims. This year AF alone has interviewed 3731 detainees in governmental detention facilities across the country. Out of them, 1228 claimed that they were tortured. However, in the 12-year history of the TCA, only 208 cases of torture compensation have been filed, only 52 victims have been awarded compensation under the TCA, and of those awarded compensation, only 7 victims (13.46%) have thus far actually received their money.

Nepal needs to clarify the definition of torture within the TCA, ideally adopting the definition set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to which it has been a party since 1991. A broader definition of who is a victim of

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*EXECUTIVE SUMMARY*

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torture should also be adopted, and the evidentiary burden of proof should not be placed on the victim. There should be no statute of limitations to file a claim because the nature of the injuries suffered by victims of torture requires significant recovery time. Most notably, the plight of the victims needs to take center stage with any future legislation. Torturers need to be held accountable for their actions on a criminal level. To further demonstrate its dedication and commitment to aiding torture victims, Nepal should ratify the Optional Protocol to the CAT, and the Rome Statute, thus becoming a party to the International Criminal Court, giving the victims of grave human rights abuses another avenue through which to pursue justice.

On the United Nations International Day in Support of Victims of Torture, we urge the government of Nepal to examine its actions through the eyes of the victims. For survivors, justice is much more than an arbitrarily assigned amount of money. It also involves a respectful and understanding legal process, and the ability to hold the perpetrators accountable.

**Mandira Sharma**  
Executive Director  
Advocacy Forum  
26 June 2008



## INTRODUCTION

The purpose of a legal system is to afford citizens the ability to seek justice when they have suffered an injustice. Establishing an effective legal system requires assessing every law and every process to assure that the laws meet this goal. The Torture Compensation Act (TCA) is an important but insufficient piece of legislation in the history of Nepal's turbulent path towards recognizing and respecting universal human rights. In the 12-year history of the TCA, over 208 victims of torture or their decedents have filed compensation cases (57 filed by Advocacy Forum and 151 filed by various other organizations and individuals). However, of those cases, only 52 victims have been decided in favor of the victims. In those cases, the courts have awarded compensation of between NPR. 5,000 (approximately USD \$75) and NPR.100,000 (approximately USD \$1,492). Over the whole of the 12 years, only 7 victims (13.46%) have thus far received this money. Furthermore, so far none of these perpetrators named in these TCA cases have actually been brought to justice.

Nepal has been a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) since 1991. How-

ever, the TCA fails to comply with the standards of the CAT in several essential aspects, first and foremost by failing to criminalize torture. The TCA neither defines torture as a crime nor specifies the legal repercussions to be taken against perpetrators, so those responsible for the acts of torture have never been held criminally accountable. The only exceptions are in cases of excesses, where the victim died as a direct result of torture and perpetrators were charged for murder. Furthermore, the dozens of cases filed under the TCA are not an adequate depiction of the pervasiveness of torture in Nepal, since strict limitations within the TCA have prevented many victims from seeking compensation. Advocacy Forum has visited 13,754 detainees between July 2001 and April 2008. Of those people visited, Advocacy Forum has documented 5,342 who have been subjected to torture. However, because of the many limitations in the Act, only 208 victims were prepared to bring cases demanding compensation under TCA.

In 2006, the Special Rapporteur on Torture concluded that the TCA is “so grossly inadequate that any preventive or deterrent effect that may have been envisaged is meaningless in practice.” The Committee against Torture (CAT Committee), the Special Rapporteur, and concerned NGOs such as Advocacy Forum have continuously pressured the Nepali government for new legislation which accounts for the gravity of torture. Such action has been promised by the government since 2005, but has yet to be realized.

The inadequacy of the TCA has allowed the practice of torture to persist in Nepal as those responsible continue to be blanketed by a culture of impunity. This report, published on the United Nations International Day in Support of Victims of Torture, addresses the history, structural inadequacies and effects the TCA has had in Nepal for over a decade, and suggests some alternative measures that would provide support and relief to the victims of torture in Nepal.

## TORTURE COMPENSATION ACT – CONTEXT AND HISTORY

### **Torture in Nepal**

Torture has been used as a tool of dominance in much of Nepal's recent history. The ruling authorities have historically utilized the security forces to control the population through force, threat, and torture.<sup>1</sup> The pervasiveness of torture increased dramatically during the decade of internal armed conflict as both the security forces and the Maoists systematically used torture to intimidate, suppress, control, and punish victims. Though the end of the conflict has stemmed the use of torture, the prevailing culture of impunity has allowed perpetrators to go unpunished and the trend of torture to continue.

### ***Nepal Police (NP) and Armed Police Force (APF)***

Despite the end of the conflict, torture in police custody continues to be commonplace in Nepal. The NP use torture during interrogation in order to obtain confessions from detainees suspected of criminal activities. Even

<sup>1</sup> See The Centre for Legal Research and Resource Development, "Analysis and Reform of the Criminal Justice System in Nepal" (June 1999).

today as acts of torture continue, suspects are threatened, kicked, and beaten with plastic poles or bamboo sticks, and subjected to *falanga* – torture by beating the soles of the feet.<sup>2</sup> In many instances the detainees also complain of perpetrators walking on their chest and abdomen, cutting skin with razor blades,<sup>3</sup> having been kicked in the groin, having water poured into their nostrils,<sup>4</sup> having been whipped and beaten,<sup>5</sup> having been threatened that their family members would be raped and killed,<sup>6</sup> having been slapped on the cheeks and face, having been made to jump up and down<sup>7</sup>, having been forced to jump like frogs and march up and down,<sup>8</sup> having been forced to eat food mixed with grains of glass, and having been forced to drink human urine.<sup>9</sup> Advocacy Forum has documented numerous cases of torture by the NP between July 2001 and April 2008.

<sup>2</sup> See Bhogendra Sharma and Mark Van Ommeren, “Preventing Torture and Rehabilitating Survivors in Nepal” from the Center for the Victims of Torture, Nepal and the Transcultural Psychosocial Organization (March 1998).

<sup>3</sup> Asian Human Rights Commission, “Nepal: Alleged brutal torture of a man by Kathmandu police” (21 April 2008) (available at <http://www.ahrchk.net/ua/mainfile.php/2008/2824/>).

<sup>4</sup> World Organisation Against Torture, “Three Individuals Arbitrary Detained and Tortured” (28 November 2007) (available at <http://www.omct.org/index.php?id=&lang=eng&actualPageNumber=1&articleId=7373&itemAdmin=article>).

<sup>5</sup> Ibid.

<sup>6</sup> Asian Human Rights Commission, “Nepal: Three members of the Morang police engaged in serial torture” (24 October 2007) (available at <http://www.ahrchk.net/ua/mainfile.php/2007/2627/>).

<sup>7</sup> World Organisation Against Torture, “Threats After Filing a Torture Compensation Act” (3 April 2008) (available at <http://www.omct.org/index.php?id=&lang=eng&actualPageNumber=1&articleId=7714&itemAdmin=article>).

<sup>8</sup> Asian Human Rights Commission, “Nepal: Man forced to drink urine and eat glass in Kohalpur police office” (9 October 2007) (available at <http://www.ahrchk.net/ua/mainfile.php/2007/2607/>).

<sup>9</sup> Ibid.

Additionally, the Armed Police Force (APF) actively controlled the population through force during the conflict, and even now is able to use excessive force during political rallies. Nevertheless, they are still not held accountable.

***Nepal Army (NA)***

During the conflict, the NA was known to systematically arrest and torture not only suspected Maoists and their families, but also others including journalists, lawyers, and human rights defenders accusing them of being the supporters of the Maoist. The NA used methods common in Nepal such as threats, intimidation, deprivation, and beatings. They also used internationally used torture methods associated with the Kubark manual,<sup>10</sup> such as applying electric shocks to the ears, maintenance of stress positions, and prolonged periods of being blindfolded or hooded and handcuffed.<sup>11</sup> Of the 371 military detainees to whom Advocacy Forum interviewed after they were released from several barracks, 100% of them claimed that they were tortured at the hands of army officials.

***Communist Party of Nepal (Maoist)***

The Maoists publicly pledged to respect international human rights and humanitarian norms during the conflict, but in actuality Maoist cadres perpetrated serious human rights abuses against those they believed were ‘enemies of their cause’. They tortured civilians to extort money, punish non-cooperation or immorality, and maintain control through fear. Torture methods included beating on the legs with sticks, beatings with rifle butts

<sup>10</sup> KUBARK Counterintelligence Manual, CIA KUBARK Program (July 1963) (available at <http://www.kimsoft.com/2000/kubark.htm>).

<sup>11</sup> See Manfred Nowak, Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/2006/6/Add.5 (9 January 2006).

and mutilation such as amputation of toes.<sup>12</sup> Many of the Maoist victims were subjected to severe forms of torture such as forcing the victims to put their legs on a stone and hammering the legs to break them.

Advocacy Forum has documented 141 cases of torture inflicted by Maoists since the signing of the Comprehensive Peace Agreement in 2006. Maoists and their youth wing, the Young Communists League (YCL), also continue to threaten and humiliate people by using “inhuman behavior,” conduct that violates cultural norms in order to punish immorality or disgrace a political opponent.<sup>13</sup> For instance, perpetrators will smear soot on the victim’s face, hang a garland of shoes around his/her neck and parade him/her through a public place.

One example of such a situation is that of Ram Sing Rai of Bhojpur District. On 29 April 2008, Ram Sing Rai went to the CPN-M’s area chief and inquired about a person abducted by the Maoists. The area chief became furious, called YCL cadres and they began beating Ram Sing with iron rods, hammers, *kebukuris* and bamboo sticks. The torture was so severe that he fell unconscious. When he regained consciousness, he found himself hospitalized and was later transferred to the Tribhuvan University Teaching Hospital in Kathmandu. He had to receive five stitches on his head. Bones in his left hand, left wrist, and both legs were fractured.<sup>14</sup>

<sup>12</sup> Ibid.

<sup>13</sup> See The Informal Sector Service Centre, “Nepal Human Rights Yearbook 2008, (February 2008).

<sup>14</sup> Asian Human Rights Commission, “Nepal: An alleged serious assault of a political activist by Maoists in Bhojpur district” (15 May 2008) (available at <http://www.ahrchk.net/ua/mainfile.php/2008/2855/>).

### Nepal before the Torture Compensation Act: 1990 - 1996

The TCA was enacted only after years of debate between politicians, lawmakers, and civil society. Before 1990, Nepal was ruled under the *Panchayat* (partyless) system, and human rights were not a part of the nation's constitution.<sup>15</sup> A massive popular movement pressurized King Birendra to reinstate a multi-party democracy in 1990, and a new Constitution was promulgated shortly thereafter. Article 14 (4) of the 1990 Constitution expressly prohibited “*physical or mental torture*” and “*cruel, inhuman or degrading treatment.*” It was the first time these phrases appeared in Nepali law. The new constitution, however, only specified that any person so treated would be compensated “*in the manner determined by the law.*” No such law came into being that determined the appropriate compensation for a victim of torture, or legislation that specified the actions to be taken against the persons responsible until 1996.

In 1991, Nepal ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Articles 4 and 14 are especially pertinent to the TCA. Article 4 concerns the criminalization of torture, and specifies that each State Party “*shall ensure that all acts of torture are offences under its criminal law,*” and should be “*punishable by appropriate penalties which take into account their grave nature.*” This places an active burden on the state of Nepal to take necessary steps to make torture a crime in its domestic law and specify the punishment for those who defy the law.

Article 14 relates to compensation for victims of torture or their dependents. According to this article, the State Party “*shall ensure in its legal system*” that

<sup>15</sup> See Report of the Government of Nepal to the Convention Against Torture Committee (January 2005).

the victim of an act of torture “*has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.*” The proposed TCA was to be the legislation that encompassed these standards. In the same year that Nepal ratified the CAT, the parliament also enacted the Nepal Treaty Act - 1990. Section 9 of this Act states “*if any domestic law is found to be inconsistent with a convention to which Nepal is a party, the convention prevails.*” In reports to the CAT Committee, the government has repeatedly cited the Treaty Act as evidence that Nepal’s legal system is consistent with international standards. However, according to the Special Rapporteur, this Act has not had a significant role and “*no evidence exists that its provisions have been invoked in the courts to prosecute perpetrators.*” As the legal requirements of the Nepal Treaty Act have never translated into actual practice, its provisions are not further addressed in this report.

In 1993, the government sent its first report to the CAT Committee describing Nepal’s progress. The document stated:

A Compensation Bill has been tabled at the current session of Parliament. Under this legal framework all kinds of torture and other cruel or inhuman treatment or punishment have been totally prohibited. If such happened, the person concerned would be compensated by law. All acts of torture are to be made punishable by appropriate penalties.

The report did not specify the manner in which an individual would be compensated, or define the appropriate penalties that would be taken against offenders. The CAT Committee responded by encouraging Nepal “*to enact legislation incorporating the definition of torture as contained in the Convention against Torture as soon as possible, together with ancillary compensation legislation.*” The Committee also expressed particular concern with the independence of the judiciary and the lack of evidence of any prosecution of perpetrators.

In 1996, two years after the CAT recommendations were presented to the government of Nepal, the TCA was enacted. (An analysis of the TCA begins on page 21)

The year 1996 is also recognized as the beginning of the decade-long civil insurgency by the Communist Party Nepal (Maoist). In the ensuing war between the Maoists and the security forces the numerous problems with the TCA were revealed with great clarity, as victims suffering torture by both warring factions were without effective legal remedy.

### **The Torture Compensation Act during the Conflict: 1996 – 2006**

The challenges facing victims seeking reparation under the TCA were quickly apparent after the start of the conflict. The TCA does not have a provision for the protection for those filing cases, and complainants and their defense attorneys repeatedly reported receiving threats and intimidation. In 1998 alone, while 12 victims filed reports of torture inflicted in police custody, 6 withdrew their complaints, fearing for their safety.<sup>16</sup> The complaints filed in 1998 were the most obvious and severe cases of torture, frequently where the victim died as a result of injuries sustained. A well-publicized case was that of truck driver, Ale Tamang, detained on the accusation of theft. The police allegedly doused the victim's legs with kerosene and set them on fire, before dipping them in water and burning them again. The government faced considerable public criticism for the death of Tamang, and a high level commission was appointed. No compensation was reportedly awarded, but the court ordered "*departmental action*" as provided for in the TCA and seven policemen were suspended

<sup>16</sup> See United States Department of State Bureau of Democracy, Human Rights, and Labor, "1999 Country Reports on Human Rights Practices" (25 February 2000).

pending investigation though it is not known whether any punishments were actually imposed on them.<sup>17</sup>

It should be noted that in subsequent cases reported to international agencies the courts generally charged perpetrators with murder in cases where victims of torture died. This allowed the courts to hold perpetrators criminally responsible, which they are unable to do under the TCA. The TCA limits the power of the courts to ordering “*departmental action*” to be taken against perpetrators, the severity of which can be determined by the relevant administration and the effects of the order are difficult to monitor. But most importantly, victims of torture who survived their ordeal have not witnessed the state holding the perpetrators criminally responsible.

In 1999, victims and their lawyers filed altogether 20 cases. Out of the twenty, only two victims were successful in winning compensations for the first time in TCA’s three year long history. In one of the cases, a health assistant recorded “bruises and lacerations” on the body of torture victim Hasta Bahadur Chamling in a medical exam in November 1999. The TCA is heavily reliant on the medical examinations, but the experiences of those NGO’s helping victims are that medical professionals often refuse to record injuries consistent with torture out of fear of their safety. In Chamling’s case, the police allegedly tore and threw away the hospital register that contained the details of the examination. The court awarded Chamling NPR. 5,000 (USD \$75) on the basis that the authorities did not

<sup>17</sup> Ibid. This is based on information from 2000. Compensation may have been awarded by the courts at a later date, though Advocacy Forum has not been able to confirm this. Compensation was awarded to the family of Amar Narayan Loniya in 2006 and Ganesh Bahadur Rai case, (see page 34). In the latter case, compensation was paid out on 6 November 2006, eight years after the complaint regarding his death in custody after torture was filed.

produce the medical report.<sup>18</sup> The medical profession also lacks proper training on how to document cases of torture. As a result, even if victims of torture have medical access, the injuries are rarely documented properly.

A number of discussion forums have been organized by various NGOs, including Advocacy Forum, encouraging the government to enact new legislation and to highlight the need to criminalize torture. To date, these efforts have not had any effects. The difficulty for complainants to receive the compensation awarded in court, identified as a concern in 1996, continues to be an obstacle to petitioners.

In 2000, Amnesty International (AI) held a workshop in Kathmandu on torture. AI believed that the “small number of complaints filed” under the TCA in comparison to the “vast number of reports of torture received” indicated “that there is a problem with the law and its application.” As a result of the workshop, AI recommended 12 amendments to the TCA, and 6 changes in the application of the TCA “in order to make the investigation and prosecution of alleged perpetrators and reparation for victims more effective.”<sup>19</sup> No changes were enacted to the TCA as a result of AI’s recommendations.

In their report on why the changes were necessary, AI stated that 9 of the 23 police officers against whom action had been taken for “abuse of authority and human rights violations” such as rape and murder, were only facing disciplinary action. One of the cases involving criminal charges concerned eight police officers charged with the murder of Suk Bahadur Lama in August 1999. He had been tortured for six successive days and a

<sup>18</sup> See Amnesty International, “Nepal: Make Torture a Crime” (1 March 2001) (available at <http://www.amnesty.org/en/library/info/ASA31/002/2001/en>).

<sup>19</sup> Ibid.

post-mortem examination found he had multiple burn injuries on both feet and abrasions on his upper back, thighs and legs. The eight police officers were released on the condition that they appear in court when the case came to trial, and were later reportedly returned to active service.

After persistent lobbying by various national human rights organizations, a National Human Rights Commission was constituted in 2000 to hear complaints about human rights violations and make recommendations for action by the government.

In 2001, 5 of the 7 complainants who filed with the District Court<sup>20</sup> were awarded compensation and in several cases the courts increased the amount of compensation awarded, including NPR.10,000 to a 14-year-old boy who had been arrested by police on suspicion of theft and had been badly tortured during interrogation.<sup>21</sup>

This was also the year Prince Gyanendra was crowned king. On the government's recommendation, Gyanendra quickly declared the Maoists "terrorists," and proclaimed the nation in a state of emergency. By the end of 2002, the House of Representatives was dissolved, the Prime Minister was dismissed, and the Terrorist and Disruptive Activities Prevention and Punishment Act (TADA) was enacted which granted state officials' greater license in their treatment of civilians suspected of supporting the Maoists.

In January 2003, a ceasefire was agreed and in the relative security that followed, 57 complaints were filed under the TCA. Advocacy Forum

<sup>20</sup> See United States Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices - 2001" (4 March 2002).

<sup>21</sup> Ibid.

filed the first case under the TCA against a military official on behalf of Nau Bahadur Tamang, a pro-Maoist freelance journalist, who was arrested by the military in 2002. Tamang had reportedly been kept blindfolded for the first three months of his detention, and severely beaten and given electric shocks. He was eventually charged under TADA, almost six months after his arrest. Advocacy Forum was fearful for the safety of witnesses and Tamang's family members, as they found security forces frequently threatened victims of dire consequences. The District Court of Lalitpur held that the claim could not be established because the medical report did not prove any serious injury. The Appellate Court in Patan, Lalitpur, upheld the original judgment made by the district court.

In 2005, the government submitted its second report to the CAT Committee. The government admitted that "*acts of torture are not offences under the criminal law,*" but assured the Committee that "*a draft Criminal Code, which explicitly makes torture punishable, has been prepared. The Code is waiting for the Parliament to resume.*" The government also directed the Committee's attention to two cases in which the TCA had been challenged before Nepal's Supreme Court in relation to the CAT, and the court had ultimately upheld the TCA's validity. The cases to which the government referred; however, primarily focused on whether the amount of compensation specified in the TCA was consistent with the "*appropriate compensation*" specified in Article 14 of the CAT. They had not comprehensively addressed other Articles.

Nepal received international attention in 2005 when King Gyanendra dismissed the incumbent Prime Minister and proclaimed himself the head of government. He further declared a second state of emergency and revoked many constitutional rights, including freedom of expression and assembly, and rights relating to preventive detention. The UN Special

Rapporteur on Torture, Manfred Nowak, visited Nepal at this time to gauge the overall scenario of torture in Nepal.

This was also an important year for a number of organizations, including Advocacy Forum. Even in an extremely difficult environment AF played significant roles in exposing the atrocities of the state agencies and the Maoists. Documentation of the cases of torture, disappearances and extra-judicial killings and constant applications of habeas corpus and torture compensation cases in the court started to put Nepal's human rights record under the international spotlight.

In November 2005, Advocacy Forum filed a First Information Report (FIR) for the murder of 15-year-old Maina Sunuwar by military personnel in 2004. Maina had been tortured by having her head drenched in water, and the soles of her wet feet and hands electrocuted. The case received enormous public attention and brought the issues of torture and impunity further into the limelight.

In its Concluding Observations of 2005, the CAT Committee expressed grave concerns with many aspects of Nepal's criminal justice system in its response to the government, including the "*marked weakening of the independence and effectiveness of the judiciary,*" and the frequent failure of the State to implement the recommendations of the NHRC or pay out the compensation awarded by the Supreme Court. The Committee was particularly disturbed with the power in the hands of the security forces, namely in their ability to self-investigate and order punishments outside of the criminal court, and their "*contemptuous non-compliance with court orders?*" including re-arrests on the premises of the Supreme Court. In regards to legal provisions on torture, the Committee identified the inconsistencies

of the TCA with the CAT, and recommended that Nepal amend the TCA and any planned legislation to ensure its consistency.

In 2006, the Special Rapporteur concluded in his Country Report<sup>22</sup> that *“torture and ill-treatment are systematically practiced in Nepal by the police, the armed police and the Royal Nepalese Army,”* despite reports to the contrary by government officials. The Rapporteur said he was deeply concerned with the prevailing culture of impunity for torture in Nepal, *“especially the emphasis on compensation to victims as opposed to criminal sanctions against the perpetrators,”* and he found many faults with the legal mechanisms available for victims of torture. He stated, *“the gap between constitutional and legal provisions to safeguard the rights of suspects and what actually happens in practice when a person is arrested was of concern.”* In specific regards to the TCA as a means for victims to receive remedy from the State, the Rapporteur concluded that:

Domestic law, namely the 1996 Compensation Relating to Torture Act, does not contain a definition of torture in line with article 1 of the Convention, nor does it provide for effective remedies; it does not provide for the criminalization of torture, nor the imposition of punishment commensurate with the gravity of torture. According to the Special Rapporteur, the sanction of “departmental action” against perpetrators provided for in Nepali legislation such as demotions, suspensions, fines, delayed promotions, etc. is so grossly inadequate that any preventive or deterrent effect that may have been envisaged is meaningless in practice.<sup>23</sup>

<sup>22</sup> See Manfred Nowak, Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/2006/6/Add.5 at 2 (9 January 2006).

<sup>23</sup> See Manfred Nowak, Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/2006/6/Add.5 at 3 (9 January 2006).

In short, the TCA was deemed insufficient as a legal document because of its incompatibility with the standards outlined in the CAT, completely unable to adequately redress the needs of victims, and an utter failure in preventing or punishing perpetrators of torture.

The People's Movement in April 2006 forced King Gyanendra to renounce his power and reinstate multi-party democracy. The House of Representatives was restored, a Prime Minister was appointed, and the NHRC commissioners who were handpicked during the King's regime resigned *en masse*. In this optimistic environment for human rights activists, the Kathmandu District Administration Office awarded NPR. 100,000 – the maximum amount of compensation allowed under the TCA – to the family of Ganesh Rai, who was falsely accused of theft and tortured to death by police in 1998. The case was lodged by Rai's family members in 1998, compensation was awarded to them in 2003, but the money was actually paid out in November 2006.<sup>24</sup>

In November 2006, the Seven-Party Alliance and Maoists signed the Comprehensive Peace Agreement (CPA), formally ending 10 years of armed conflict. The CPA prohibits arbitrary detention, abduction, disappearances, torture, and ill-treatment, and committed both parties “*not to encourage impunity.*” However, the CPA also states:

Both parties guarantee that they will withdraw accusations, claims, complaints and sub judice cases leveled against various individuals due to political reasons and immediately release those who are in detention by immediately making their status public.

<sup>24</sup> See Nepal News, “After Long Legal Battle, Torture Victim's Family Finally Receives Compensation” (7 November 2006) (available at [www.nepalnews.com](http://www.nepalnews.com)).

Expressing his concern over this clause, the Special Rapporteur on Torture stated that “this clause must not be interpreted as meaning that complaints of torture, killings and other serious human rights abuses currently filed before police or the courts should be closed”. Nor should the CPA’s sole focus be on truth and reconciliation, in his opinion, since this ignores victims’ need for justice.<sup>25</sup> The decade of civil war between the government forces and the Maoist forces had a devastating effect on the minds and bodies of Nepali civilians. These are the people for whom the TCA had the possibility to protect but it failed to do so. In the meantime, the practice of torture continues when people are held in detention.

### Hope and Frustration: The Torture Compensation Act in 2007 - 2008

The year 2006 ended with a flurry of optimism following the People’s Movement in April and the final signing of the Peace Agreement in November. Fueling the momentum of hope, in January 2007 the government promulgated the Interim Constitution which criminalized torture in detention for the first time in Nepal’s legal history. However, the Constitutional provision that torture would be “*punishable by law*” required a new draft of the TCA to legally specify how perpetrators of torture could be held accountable. In its report to the Special Rapporteur on Torture, the government promised a new draft of the TCA was underway that specified legal penalties and was more compatible with the CAT. The government stated:

A draft Torture Act has been prepared which incorporates the definition of torture in the spirit of the Article 1 of the Torture Convention. The draft has

<sup>25</sup> See, Manfred Nowak, Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/4/33/Add.2 at 77 (15 March 2007).

been referred to the Ministry of Law, Justice and Parliamentary Affairs for technical approval. The draft Act Broadens and widens the definition of torture in the spirit of the torture convention.

As far as the allegation of the widespread use of torture is concerned, the democratic government of Nepal does not condone torture of any kind. The laws of the land and the policy of the State are geared to completely ban torture of all kinds. Government does not spare anyone found guilty of involving in torture is who is liable to a stern punishment. Isolated and sporadic incidents cannot be generalized as widespread use of torture.<sup>26</sup>

The government's pledge to reform the TCA in 2007 was reminiscent of its assurance in 2005 to the CAT Committee that the Criminal Code was being reformed. In August 2007, Advocacy Forum organized a conference together with the Association of Prevention of Torture, the National Human Rights Commission and the OHCHR. In the seminar, the representatives from the Minister of Home Affairs publicized the fact that the draft bill currently in discussion will meet Nepal's international standards. However, despite repeated attempts the human rights organizations have failed to obtain the copy of the bill. In Advocacy Forum's experience, there is no serious political will from the government in keeping the promises that it makes to Nepalese people and the international community. In AF's publication "Torture Still Continues" published on 26 June 2007, AF wrote, "though the Torture Compensation Act is being revised, politicians are not holding discussions with relevant stakeholders about the reforms needed," and felt the political elite were missing the opportunity to offer guidance and leadership in overcoming the problem of torture.<sup>27</sup>

<sup>26</sup> Comments by the Government of Nepal to the Committee Against Torture CAT/C/NPL/CO/2 (29 January 2008). [org/pdfcoll/26\\_June\\_publication.pdf](http://www.advocacyforum.org/pdfcoll/26_June_publication.pdf).

<sup>27</sup> See Advocacy Forum, "Torture Still Continues" (2007) (available at <http://www.advocacyforum.org>).

During this period of political inertia nothing had been achieved in resolving the delay in achieving compensation either as in the case of Ram Kumar (name changed), a 14-year old boy, who had been working at a canteen. On 1 September 2007, three police officers arrested him on the charge of stealing some money and a bicycle. His hands and legs were tied and he was beaten up with a leather belt and coal tongs. He was kicked and punched and was thrown up against the wall. They also threatened to give him electric shock treatment and forced him to jump up and down with his legs tied. Ram cried and begged them for mercy. The police constable shut his mouth with his hand and they continued beating him. The compensation claim was filed on 5 October 2007 and is still sub judice in the District Court of Sunsari.

Previously, the Special Rapporteur had expressed his concern that while the Interim Constitution offered great promise, the implementation of the new constitutional and legal provisions in many cases is still flawed and that torture of suspects persists in police detention in Nepal.<sup>28</sup> With regards to the TCA, the Special Rapporteur wrote:

Compensation awards have been made in a few cases under the Torture Compensation Act, but have not always been disbursed to victims or their families, and usually without proper investigations to establish causes and responsibilities. Whilst reparations are important, they must not be regarded as a substitute for prosecutions.<sup>29</sup>

While the government has pledged to the CAT Committee and the Special Rapporteur on Torture that it is drafting a new TCA which is consistent

<sup>28</sup> See Manfred Nowak, Follow-up to the recommendations made by the Special Rapporteur in the report of his visit to Nepal in September 2005, E/CN.4/2006/6/Add.5 at paras. 33-35 (9 January 2006).

<sup>29</sup> Ibid.

with the CAT and will adequately account for the needs of victims of torture and deter possible perpetrators, this bill has yet to be released and torture continues to destroy the lives of many Nepalis.

In June 2007 Advocacy Forum wrote:

Notwithstanding the hope and jubilation following the *Jana Andolan*, many Nepalis continue to voice concerns about the country's human rights and political situation. Though the Interim Constitution prohibits torture, the systematic practice of torture and the inability of victims to seek justice are still widespread in Nepal. The Government has failed to properly investigate and prosecute a single case of extrajudicial execution, enforced disappearance, or torture. Despite changes in leadership, the Nepal Army has failed to cooperate with investigations about the fate of hundreds of disappeared Nepalese and other cases of human rights violations. Though the military's power to detain civilians has been restrained, many victims who were apprehended by the security forces still struggle with the mental and physical wounds of torture. Moreover, torture in detention centers remains rampant to this day.<sup>30</sup>

This is still true in 2008. The 2008 United Nation's International Day in Support of Victims of Torture is a time to frankly examine how the TCA has failed to help hundreds of frustrated Nepalis struggling with the effects of torture for over a decade. Considering the recent political changes in Nepal, now is the time to expand the avenues Nepal makes available for the victims of torture to seek justice. It is time for a new TCA, one which will facilitate Nepal meeting its international obligations under the Convention against Torture. It is also the moment to examine other possible means of addressing the needs of Nepal's many of victims.

<sup>30</sup> See Advocacy Forum, "Torture Still Continues" (2007) (available at [http://www.advocacyforum.org/pdfcoll/26\\_June\\_publication.pdf](http://www.advocacyforum.org/pdfcoll/26_June_publication.pdf)).

## THE LIMITATIONS AND FAILURES OF THE TORTURE COMPENSATION ACT, 1996

The Torture Compensation Act of 1996 (TCA) does not live up to its professed intentions, nor meet international standards, nor significantly decrease the incidence of torture in Nepal. This breakdown of the TCA highlights its inadequacies and provides illustrative statistics and specific case examples of how the TCA falls short of its goals and the standards of the CAT.

### **Intentions and Gross Failures of the TCA**

In its reports to the Committee against Torture (CAT Committee), the government of Nepal has repeatedly referred to the Torture Compensation Act of 1996 (TCA) as an indicator of its compliance with the Convention against Torture (CAT). In its Preamble, the TCA professes only the intention to pay compensation to victims of torture. In this report we assess how ineffective the TCA is and how it fails to comply with both sets of standards – those required by the CAT and those professed in its preamble.

The shortcomings of the TCA have been sharply criticized from the time that the first draft was made available to the present day. The familiar list of specific concerns with the TCA has been put forward by domestic lobby groups, the international community, and United Nations treaty bodies and special mechanisms, including the Special Rapporteur on Torture. The two decisive failures of the act (listed here in order of importance) are:

- 1) The TCA is grossly inadequate in its provisions to deter the practice of torture.
- 2) The TCA is insufficient and dysfunctional in its provisions to offer recompense and rehabilitation to victims of torture.

As stated by Manfred Nowak, Special Rapporteur on Torture, in his 2008 report on Nepal:

*“Whilst reparations are important, they must not be regarded as a substitute for prosecutions.”*

### **Failure to Deter Torture**

The TCA does not contain provisions which substantially deter the practice of torture in Nepal. In this regard there is a disparity between the preamble of the TCA and how TCA has been referred to by Nepal’s government in its reports to international treaty bodies. The preamble of the TCA makes no avowal to deter torture and confines itself to providing compensation for specific cases of torture:

**Preamble:** *Whereas it is expedient to make provisions on providing compensation for physical or mental torture or cruel, inhuman and degrading treatment inflicted on the person apprehended for the purpose of investigation, inquiry or trial, or for any reason whatsoever.*

The Preamble to any Act, sans any qualm, reveals its purpose and intent; it is extremely important in determining how the Act is interpreted by courts, legislators and potential violators. The absence of any mention of torture deterrence in the aforesaid preamble sends a clear message – this act does not seek to prevent torture, merely to have the appearance of abiding by international standards. In contrast to the preamble, Nepal's reports to the CAT Committee have referred to the TCA as sufficient legislation to eliminate torture and see that cases of torture are appropriately addressed. As early as 1993, when the TCA draft bill was tabled in the parliament, the government reported to the CAT Committee:

A Compensation Bill has been tabled at the current session of Parliament. Under this legal framework all kinds of torture and other cruel or inhuman treatment or punishment have been totally prohibited. If such happened, the person concerned would be compensated by law. All acts of torture are to be made punishable by appropriate penalties.<sup>1</sup>

The “*appropriate penalties*” written into the TCA against perpetrators of torture do not comply with the CAT. On the global scale, individual criminal accountability for acts of torture is the primary deterrence mechanism. In ratifying the Convention against Torture, Nepal has committed to criminalizing torture. Article 4 (1) of the CAT clearly states that “Each State Party shall ensure that all acts of torture are offences under its criminal law.” This and the next six articles in the Convention deal specifically with mechanisms designed to detect and prosecute offenders. Compensation is mentioned only once, in article 14. The CAT's central focus is on criminal prohibition of torture; no claim to fulfilling the obligations of this treaty can be made without the clear criminalization of torture under domestic

<sup>1</sup> See Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, CAT/C/16/Add.3 (16 December 1993).

law. The overriding failure of the TCA, and the principal reason that it cannot serve to prove that Nepal's domestic laws are in line with its international obligations, is the fact that torture is not criminalized.

Nepal has been party to the CAT for 17 years, yet torture is still not defined as a criminal offense under its domestic laws. The Interim Constitution of 2007 made a move in the right direction by declaring in article 26 (2) that perpetrators of torture “shall be punished by law.” However, the necessary final step of criminalizing torture has not been taken. The provisions of the TCA makes this problematic because punishment can be defined by current domestic laws, in which case, a judge would look to Section 7 of the TCA which stipulates that the “...Court *may* pass the order to the concerned authority for taking *institutional action*...if any government official is proved to be involved in inflicting torture against the provisions of this Act.”

By including the word, “may,” the TCA has relieved the court of its obligation to prosecute proved offenders. Second, by providing for institutional action rather than criminal action, the TCA contravenes article 4(2) of the CAT, which requires that “*Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.*” The nature of the act of torture is so severe that the international community requires Nepal to recognize and address it, which is a greater burden than that of something which only requires “institutional action.”

One example of a penalty which failed to take into account the grave nature of the crime occurred in the cases of Shiva Chauhan, Antiraj Tamang, Jitman Rai, Hom Bahadur Tamang and Chandra Bahadur Thapa. A team of police personnel from Janasewa Police Bishal Bazaar, Kathmandu, arrested all five people under the charge of robbery. Hom Bahadur Tamang

mentions they were arrested at Balaju, Kathmandu, and then transported to the police station. They were tortured from midnight to 6 o'clock in the morning at the police station where they were beaten with bamboo sticks on their backs, feet, and chest. The officers also stood on their faces making it difficult for them to breathe.

In Shiva Chauhan's case, the police inspector was named as the only defendant and was charged with torture. Advocacy Forum filed this complaint on 4 June 2003. In the cases of the four others arrested by the police, the police inspector and accompanying junior officers were named joint defendants. Advocacy Forum filed complaints in these cases on 6 June 2003 (Jitman Rai), 13 June 2003 (Antiraj Tamang and Chandra Bahadur Thapa), and 18 June 2003 (Hom Bahadur Tamang).

In Shiva Chauhan, Jitman Rai, Antiraj Tamang, and Chandra Bahadur Thapa's cases, the judgment was entered on 1 November 2004. In Hom Bahadur Tamang's case, judgment was entered on 3 December 2006. All five were awarded NPR. 10,000 in compensation and each judgment recommended departmental action to be taken against the inspector.

The public prosecutor has made an appeal on behalf of the defendants which is currently under consideration before the appellate court. However, this fact does not need to stop the department from taking action as determined by the District Court. As is the case with many similar judgments, Advocacy Forum has not been able to confirm that any departmental action has been taken against the perpetrator.

In the separate case of Karna Bahadur Thapa v. Ministry of Home Affairs, the Kathmandu District Court granted NPR. 15,000 (USD \$224) as

compensation for the torture inflicted on him. However, the court failed to recommend any departmental action be taken against the defendant. If the court viewed torture as a crime, then it seems strange that the court would not recommend action be taken against the torturer. This case shows that it is not only police but also the courts that are reluctant to impose penalty on the torturer.

In addition to failing to criminalize torture, the TCA fails to define torture in line with the standards set out in the CAT. Section 2 of the TCA defines torture as “physical or 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 case 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.

Considering these limitations and the importance of criminal prosecution as a means of deterring torture, it is clear that the TCA fails to meet international standards regarding the prosecution of torture offenders. Unfortunately, this is not particularly surprising owing to the fact that there is no mention of an intention to deter torture was made in the preamble, but it does firmly dismiss any claim that the TCA brings Nepal into compliance with its international obligations.

### **Insufficient and Dysfunctional Compensation Mechanism**

The Preamble of the TCA mentions the intention to establish a mechanism to compensate victims of torture. The apparent disparity between the

cases of victims attempting to lodge complaints under the TCA and the empirical quantities of the number of Nepalese who receive compensation makes it clear that the professed purpose is greatly dysfunctional.

To put this issue into perspective, Advocacy Forum has documented 5,342 cases of torture since 2001, with firm reason to believe that there are hundreds of undocumented cases occurring in the same period.<sup>15</sup> In the 12 year history of the TCA, only 208 cases of torture compensation have been filed, 52 victims have been awarded compensation under the TCA, and of those awarded compensation, only 7 victims (14%) have thus far actually received their money. The Minister of Home Affairs claimed in November 2000 that “the fact that only 2 people were awarded compensation is proof that no one is being tortured in Nepal and that prisoners make false accusations against the police.”<sup>2</sup> In the experience of Advocacy Forum, and as confirmed by the Special Rapporteur during his visit to Nepal in 2005, torture is undeniably prevalent in Nepal. In order to settle this discrepancy, we offer below other explanations for why thousands and thousands of victims of torture have been unable to seek legal remedies under the TCA for the violations committed against them.

***35-Day limitation, Intimidation, and Lack of Victim Protection Mechanisms***

Section 5 of the TCA stipulates that a victim of torture must file their complaint “within 35 days from the day the torture is inflicted on him or the day he has been released from custody.” This provision is the single most significant factor in denying compensation to thousands of victims of torture. In effect, the 35-day limitation means that perpetrators of torture need only to ensure the silence of victims for 35 days after torture

<sup>2</sup> See Amnesty International, “Nepal: Make Torture a Crime” (1 March 2001) (available at <http://www.amnesty.org/en/library/info/ASA31/002/2001/en>)

is inflicted or the victim is released. This is most effectively done through intimidation, violence, or re-arrest.

The 35-day limitation encourages intimidation and, lacking any mechanisms to protect victims, consequently Nepal fails to ensure victims any appropriate means of redress. In addition, the 35-day limitation has other practical problems which render this period of time much too short.

First, torture is extremely disturbing to a victim and renders him unable to think about seeking legal recourse until the victim has recovered from his mental wounds. In addition, owing to Nepal's geographical barriers, victims have extreme difficulty traveling to district courts in the stipulated period of time, particularly if their feet or legs are injured as a result of torture. Furthermore, many victims are unaware of the possible legal recourses available to them after torture, and may learn of the TCA after their period has expired. It can also be time consuming for a victim to find appropriate legal counsel during this period, as the victim and her family may rely on her daily livelihood for sustainability.

Further still, Section 5 of the TCA requires that the original complaint declare the amount of compensation required. This must "include the reason and duration of the detention, particulars of torture inflicted during the period of detention, particulars of the harm caused due to torture, amount of compensation claimed, matters incidental and auxiliary to prove the compensation claimed." Collecting this data is time consuming and often impossible.

Section 8 of the TCA requires the following be taken into account when claiming compensation:

Physical and mental trauma and its intensity that the victim faced due to torture, deficiency caused in ability to earn out of the torture inflicted on the victim, age and family accountability of the victim if he/she has sustained untreatable trauma, tentative cost involved in treatment if the trauma sustained is treatable, number of dependent family and minimum cost involved in their livelihood if the victim has already died due to torture, other things claimed by the victim that is due and appropriate.

This data, particularly the “tentative cost involved in treatment” – which often requires repeated hospital visits and medical analysis – and the “deficiency in ability to earn” are extremely difficult, if not impossible, to determine in only 35 days.

One final concern involved with the 35 day stipulation is that Section 5 (1) requires the complaint be filed “within 35 days from the torture is inflicted on her or him, or the day she/he is released from custody.” No mention is made of the effect of re-arrest on this process, after the victim has been initially released from custody.

In the absence of a suitable victims/witness protection mechanism, victims frequently find themselves or their families in danger if they lodge a formal complaint under the act. The threat of further harm is enough to convince most victims that it is best to suffer quietly than to seek legal recourse. The circumstantial likelihood of intimidation of torture victims who wish to seek prosecution or compensation under this provision is a breach of Article 13 of the CAT which requires that, “steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” No such steps have been taking in this or any other Act.

For example, upon being arrested, Umesh Lama, a fugitive in an abduction case, was subjected to severe physical torture while he was detained at the

Metropolitan Police Range, Hanumandhoka, Kathmandu. His sister lodged a complaint before the Kathmandu District Court on his behalf, seeking compensation pursuant to the TCA. The victim himself and his family members continued to receive threats and intimidation from police officers and consequently withdrew the case three days after it was filed.

In terms of addressing the disparity between the number of cases of torture documented and the number of victims who receive compensation, we believe cases like Umesh Lama show one of the most significant factors - intimidation to not file or withdraw a case. There are a number of victims like Umesh Lama in Nepal who have clearly suffered torture at the hands of state officials but who have been intimidated out of their brief opportunity to seek legal redress.

This lack of appropriate measures to protect complainants against ill-treatment or intimidation is further demonstrated by the case of Teksu Rai. In this case, the victim did file a complaint under the TCA but was then confronted with threats and intimidation. Teksu Rai, the victim of torture, was a restaurant owner by profession. A police inspector from a nearby police station harassed him at his restaurant by asking for money on monthly basis. The victim refused to yield before the inspector's demands. The furious inspector arrested the victim, brought him to the police station and beat Teksu up with an iron rod. With the help of Advocacy Forum, Teksu filed a torture claim before Kathmandu District Court. Despite being the victim, he withdrew the case due to the threats and intimidations.<sup>3</sup>

<sup>3</sup> See Asian Human Rights Commission, "Update (Nepal): Torture victim harassed and threatened with fabricated charges" (18 August 2006) (available at <http://www.ahrchk.net/ua/mainfile.php/2006/1918/>).

Article 14 (1) of the CAT requires that Nepal “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation...” In 1998, the first year where any complaints under the TCA are on record, 12 complaints of torture compensation were filed. Of these complaints, 6 were withdrawn before being heard by the district court owing to intimidation of victims. As is evidenced above, the police always try to arrest a victim even after he files the case. By failing to address the intimidation the police put on victims who file torture complaints, Nepal is not meeting its obligations under the CAT.

***Medical Checkups and the Burden of Proof***

Section 3 of the TCA requires that, “to the extent possible, a person who is being detained and released be made to undergo her/his physical check-up.” The intention of this stipulation is to provide victims a mechanism to prove that they were tortured. However, the vagueness surrounding the expression, “to the extent possible” has limited the situation. This wording allows for exceptions, and in doing so the TCA leaves substantial opportunity for victims of the worst cases of torture to go without a medical checkup. Advocacy Forum consistently finds that the most severe victims of torture tend to be the least likely to have a documented medical checkup.

More concerning, Section 3 goes on to say that while detaining and releasing a person, as far as possible, the concerned officer must maintain the record of such person’s physical condition by having a medical practitioner who is in government service examine the person and by examining him on his own if such practitioner is not available. This clause gives police officers the authority to conduct the medical examination, allowing for the possibility that the same officer who ordered or conducted the torture can be the one to conduct and record the medical report. The conflict of interests in this

case is clear. If a victim's medical records belie the severity of his or her injuries, it is extremely difficult for them to prove that they were tortured.

Such was the situation with Mobail Lama's case. The Kathmandu District Court held on 16 March 2004 that compensation could not be awarded due to lack of medical evidence to prove that torture was inflicted on him. In this case, the plaintiff's health check-up report of Bir Hospital Kathmandu stated 'No abnormality detected' on the plaintiff's body. As there was no concrete evidence that the plaintiff was subjected to any form of torture, the court denied his compensation claim, and no penalty against the perpetrator was taken.

The TCA establishes no authority to investigate torture cases. If torture were a criminal offence, the police would be obliged to actively investigate torture and evidence that they discover would be extremely useful for a victim to seek compensation. Under the TCA the victim is solely responsible for proving that torture occurred. By leaving the burden of proof firmly on the victim, the TCA does not satisfy Article 12 of the CAT which requires that Nepal "shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed..." Of the 57 torture compensation demands filed by Advocacy Forum on behalf of victims, 8 have been quashed owing at least in part to a lack of evidence to prove that the torture took place – most frequently owing to insufficient or missing medical records.

***Payment and Proper Rehabilitation***

Section 6 of the TCA places a ceiling on the amount of compensation a victim can receive at NPR.100,000 (approximately USD \$1,565). This

ceiling is far too low to be considered “fair and adequate compensation, including the means for as full rehabilitation as possible,” under Article 14 (1) of the CAT. Considering the fact that the forms of torture frequently practiced by Nepal Police and Military officials often leads to chronic and severe physical and psychological health problems, which can require numerous expensive treatments, in many instances NPR.100, 000 cannot provide the means for as complete of a rehabilitation as possible as required in the CAT.

These are the circumstances that Kalpana Bandari, a 30 years old widow who was suspected of setting fire to a government vehicle, faced. She was arrested by a group of armed, uniformed male policemen from the Gausala Metropolitan Police Sector on 17 May 2007. The police entered the tent where she and her children were preparing lunch. She was manhandled, verbally abused and insulted, kicked all over her body, and threatened to be killed in front of her children. One police officer was also told to rape her. She was eventually dragged to the police van where the kicking escalated and she was also beaten with a stick. She asked for water and instead one police officer was told by a commanding officer to urinate in her mouth. While in police custody, she was severely kicked with boots on her groin and breast by male police officer to the point that she began bleeding from her uterus. She filed a compensation complaint before the Kathmandu District Court on 11 June 2007. On 15 June 2008, the court returned a judgment granting her NPR. 60,000 (USD \$872). Considering that the cost of medical and psychological treatment and the possibility of a loss of ability to work, and the heavy expenses endured during the trial process, this award is not sufficient in order for Kalpana to make a full recovery, especially considering that she has children to care for and support.

In addition, the case of Ganesh Bahadur Rai is an example of an instance where compensation was awarded only after a long legal struggle. Ganesh Bahadur Rai, was tortured to death by police in Kathmandu in 1998. The parents who were informed that their son was undergoing medical treatment at hospital were shocked to find the son's dead body when they arrived in Kathmandu from their home. A torture compensation claim was lodged before Kathmandu District Court the same year. The court took almost five years time to reach a judgment. The court held that the victim's family was entitled to receive NPR. 100,000 - the highest amount of the compensation the victim of torture can be awarded pursuant to the TCA. The family had to make several travels to the District Administration Office as well as the Ministry of Home Affairs with the support of human right activists to try to obtain the compensation. The family actually received the compensation amount only in 2006, eight years after the complaint was lodged and 3 years after the court had ordered for it to be paid.

An additional problem which greatly confounds a victim's opportunity for full rehabilitation is the delays in the compensation process. While victims are allowed only 35 days to prepare their torture compensation complaint, the courts typically takes several years to see a complaint through and award compensation. Then, the government typically takes several more years to actually pay the compensation. By the time this extremely lengthy process is concluded, it is often too late to hope for a full rehabilitation of victims who might have fully recovered had they been able to pay for specialized medical treatment shortly after the torture was inflicted.

### **A Summary of the Shortcomings of TCA 1996**

The cases, statistics and analysis of the TCA above provide a rounded impression of its shortcomings. To summarize, there are two central failures: There is no effort to deter torture by clearly classifying it as a criminal offence; and the compensation mechanism is obstructed by a medley of impediments, and ultimately results in very few torture victims actually receiving compensation.

There can be no argument that the TCA fails to bring Nepal in line with the obligations required by the CAT. There is little evidence to imply that the TCA has resulted in any substantial reduction of the practice of torture thus far. And there is no question that thousands of victims of torture remain frustrated, isolated, unrecognized, and with little hope of finding a just redress for the crimes committed against them.

## JUSTICE FOR THE VICTIMS OF TORTURE

The ultimate goal of any effective law should be making justice readily available to torture victims. This will be evidenced by its actions through the TCA and by other channels. To a person who has suffered extensively at the hands of another, this means adequate compensation as provided for by law, which would minimally cover all necessary expenses, ease and expediency when going through the court system, the prosecution of the perpetrators, and sympathy and understanding of their plight.

### **Suggested Amendments to the Torture Compensation Act**

In light of all of the shortcomings of the TCA, substantial pressure has been accumulating from domestic and international organizations to amend the Act. Yet to gain a clear picture of what amendments would be best for the victims, one must first consider the lasting effects the endured torture has on the victim.

The purpose of torture “is to induce psychological regression in the subject by bringing a superior outside force to bear on his will to

resist.<sup>1</sup> The psychological make-up of the individual is completely shaken up. The victim's sense of self is completely shattered. The physical and psychological pain treatment that the victim has endured result in a feeling of powerlessness and helplessness.

It is with this minimal description of the long lasting consequences of torture endured that one must examine the demands the legal system is placing on the victim.

The initial problem, the TCA's inability to prevent the act of torture, stems from the title "Compensation of Torture Act." This title does not take any action towards preventing future acts of torture. In a broad interpretation, this title could be said to consent to torturous acts as long as compensation is made available to the victims. This should not be the message that Nepal conveys to its own citizens or the international community. Future versions of the TCA should have a more proactive title, designed to reflect an understanding of the seriousness of the acts committed. One such title would be the Prevention of Torture and Inhuman and Degrading Treatment Act. Nepal can draw from the titles of regional human rights instruments, such as the Sri Lankan Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Act of 1994, or the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment of 1987.

Second, the definition of torture needs to be clearly stated. Additionally, the definition for the term "victim" should be construed broadly. Nepal should draw from the definitions contained within CAT. Clarity with these

<sup>1</sup> Harper's Magazine, "Human Resource Exploitation Training Manual – 1983" (rerinted April 1997).

definitions will ensure that the courts apply proper standards and procedures to these cases, that victims are able to receive necessary compensation and fulfillment of justice, including holding the torturers accountable for their actions.

Third, the 35-day statute of limitations to file a complaint is too restrictive considering the state the victim is in during that period. At this point, the victim is a shell of a person. He is still suffering physical repercussions of the torture and may be severely limited to what he can physically accomplish. Expecting a physically beaten, mentally broken individual to travel to a courthouse, and ask him to relive his experience is unrealistic. Clearly under these extreme circumstances, there should be no statute of limitations. It should also be made explicitly clear that there is no such statute of limitations if the victim is re-arrested after he is released.

Next, the Evidence Act of 1974 places the burden of proof on the victim in Chapter 4, Section 25 by saying “the burden of proving the guilt of the accused in a criminal suit shall lie on the plaintiff.” Expecting the victim to identify in his complaint “matters incidental and auxiliary to prove the compensation claimed”<sup>2</sup> places the victim in a situation completely disproportionate to that of the state. Furthermore, there are crimes in Nepal, such as drug trafficking, where the burden of proof rests on the state. Based on the gravity of the crime and the nature of the injuries sustained by the victim, it would follow that the burden of proof in a torture case should rest on the state party.

There also need to be systems in place to provide adequate justice for the victims. Since the police commit many of these acts of torture, it is unrealistic

<sup>2</sup> Compensation of Torture Act, 1996 (2053 B.S.) § (5)(4)(e).

to expect them to also adequately investigate these claims. Thus, it is imperative that the Constituent Assembly assigns an independent Special Investigation Unit for instances of torture to conduct a full and fair investigation into all torture allegations. With such a system in place, lawyers for victims and other human rights advocates can bring evidence to the Special Unit and be confident that it will not be ignored. In furtherance of these investigations, the Constituent Assembly should also implement a system by which efficient and adequate detention records are kept, thereby facilitating the efforts of the Special Unit and other investigators in accessing the information they need to fully investigate torture claims.

Furthermore, it is imperative that victims and their families be protected during the process of bringing a claim of torture. Additionally, the people allowed to bring claims of torture forward for investigation should be broadened to include the victims themselves, the family members of the victims, and also those who have witnessed or know of the specific cases of torture. Since victims and their families are often intimidated or fear retribution and retaliation by the police and the army, they are unlikely to bring claims forward. Those victims who have filed claims are often silenced or subjected to various intimidation methods and quickly withdraw their claims after having filed them. Moreover, witnesses and victims should have some sort of protection while their cases are pending. This will ensure that victims receive compensation without also fearing for their lives or the lives of witnesses or family members to their torture and will increase claims for redress under an improved Torture Compensation Act. Finally, suspects in investigations by the Special Unit proposed above should be suspended from their jobs throughout the duration of the investigation in order to ensure that torture does not continue and to give the victims

peace of mind that they will not receive intimidation and harassment from someone in an official capacity.

Next, the compensation that should be awarded to a victim should not be an amount which is arbitrarily assigned. It needs to be linked to various mathematical formulas in order to best determine the “material damages and loss of earnings, including loss of earning potential.”<sup>3</sup> Additionally, to give the victim the best chance at some kind of recovery, this compensation should take on the form of reparations that not only cover the basic costs of care following the violation but also cover the symbolic costs to society of a continued system of torture and acknowledge that recovery for victims can never be full and the damage done can never be completely repaired. In deciding how reparations should be allocated and in what form they should come, the individual victims’ wishes should play a key role, and the system of reparations should as much as feasible individualize compensation.

Furthermore, it would be appropriate to establish a procedure by which a victim could have access to some expected compensation as soon as possible after torture has been suspected. This would afford the victim the greatest amount of time possible to use the money for recovery purposes.

Finally, a trained professional, outside of the detention center, must give a medical exam upon the beginning of the detention, at regular intervals during the detention as well as at the time of release. This then creates a basis for comparison of medical exams that must be administered during

<sup>3</sup> General Assembly Resolution, 60/127 , “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” Article 20 (12 March 2006).

the detention and especially after release so that the victim has medical records which can show that torture was sustained.

### **International Standards and the International Criminal Court**

In international law, the prohibition on torture is considered part of *jus cogens*, the peremptory norms that underlie the international system.<sup>4</sup> These norms trump all international and national laws, and states are not permitted to derogate from them in any way. Noncompliance with *jus cogens* norms is the gravest of international law violations, threatening to disturb the peace and security of every state, and thus violations of *jus cogens* fall within the realm of “international crimes.”

The International Criminal Court (ICC), a judicial body created by the international community in response to impunity all over the world, allows for international criminal prosecution of the worst crimes and violations of human rights, including violations of *jus cogens*. The Rome Statute, which codifies the ICC, currently lists three major crimes that can be prosecuted in the Court: genocide;<sup>5</sup> crimes against humanity;<sup>6</sup> and war crimes.<sup>7</sup> In prosecuting these crimes, the ICC provides retribution for victims whose countries are unwilling or unable to do so and deters future commission of these crimes by those who might otherwise commit them with impunity.

<sup>4</sup> See Prosecutor v. Furundžija, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213 (2002) (stating that torture is within the realm of *jus cogens* norms of international law).

<sup>5</sup> See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 at Art. 6 (1 July 2002).

<sup>6</sup> See Rome Statute, Art. 7.

<sup>7</sup> See Rome Statute, Art. 8.

Because of its nature as a *jus cogens* norm of international law, the prohibition on torture plays a major role in the ICC's jurisdiction, and thus the Rome Statute provides two major avenues by which to prosecute this crime. Under "crimes against humanity," the Statute allows for prosecution of systematic torture against civilian populations committed within the territory of state parties.<sup>8</sup> Its reasonable definition conforms to international standards, stating that torture includes "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused..."<sup>9</sup> Additionally, under "war crimes," the ICC has jurisdiction over torture or inhuman treatment committed in violation of the Geneva Conventions, which codify the laws of war.<sup>10</sup> This section allows the ICC to prosecute instances of torture in non-civilian populations, ensuring adherence by state parties to international humanitarian law.

Currently, Nepal is not a party to the Rome Statute. Therefore, as torture is not criminalized in Nepal and the TCA does not provide meaningful redress for victims, those who commit the international crime of torture against both civilian and non-civilian populations cannot be prosecuted in the ICC either. This means that grave violations of a *jus cogens* norm of international law go unpunished in Nepal, creating a system of impunity that threatens not only the stability of the country but also its role and reputation in the international community. The ICC prevents impunity by ensuring that the most heinous violations of human rights are prosecuted, providing not only an avenue by which victims can seek justice in an impartial and independent system but also a deterrent for future acts of torture, threatening perpetrators with a meaningful punishment that is proportional to the crime.

<sup>8</sup> Ibid. Art. 7 § 1(f).

<sup>9</sup> Ibid. Art. 7 § 2(e).

<sup>10</sup> Ibid. Art. 8 § 2(a)(ii).

We encourage the Constituent Assembly to immediately sign onto the Rome Statute and, under Article 12. § 3, allow the Court to have jurisdiction over crimes committed during the conflict, including torture. This will show the international community that the Assembly is committed to providing justice for victims of the Civil War, preventing impunity throughout the country, and dealing with the past so that it can move on to a successful democratic future.

### Further integration into the CAT System

Further recognizing the *jus cogens* status of torture, the Constituent Assembly should improve protection from torture for Nepal's citizens by become a party to CAT in its entirety. Currently Nepal has neither made a declaration under article 22 allowing individual complaints nor ratified CAT Optional Protocol, which provide for an international mechanism of inspections to places of detention.

Nepal has ratified the Optional Protocol to the ICCPR allowing individual complaints to the Human Rights Committee. However the CAT has much wider obligations regarding the prevention of torture compared to the ICCPR. For example CAT provides states keep under review their systems of detention and interrogation rules, and practices<sup>11</sup>, further is the obligation to conduct a prompt, impartial investigation by competent authorities whenever there is reasonable suspicion that torture has taken place.<sup>12</sup> While these specific provisions are already binding on Nepal, the declaration under article 22 would allow a UN treaty body to examine the issues during an

<sup>11</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) Art. 11.

<sup>12</sup> CAT, Article 12 (See Also: Article 13 on the right to complain and have it promptly and impartially examined).

individual complaint and decide whether Nepal is in breach, something the Human Rights Committee under the ICCPR cannot.

The issue of investigating torture is particularly stark in Nepal as currently the police do not investigate torture because since torture is not a crime, it is not listed in the State Cases Act which is where the police derive the list of crimes they can investigate. Further the CAT Committee in its jurisprudence has interpreted very strict requirements regarding the quality and promptness of investigations, for example in *Blanco Adad v Spain (CAT 59/96)*, 18 days before an investigation began was considered in breach. Taking into account the Police's record of not registering complains and victims being forced to get court writs to force investigations to commence the declaration under article 22 would be allow this to be condemned and force the state would be under greater pressure to improve the system.

The optional protocol would also be powerful tool in ending torture in Nepal. Under article 12 of the protocol Nepal would be bound to accept an international team of inspectors into all places of detention. Access to places of detention can only be limited by "urgent and compelling grounds of national defense, public safety, natural disaster or serious disorder in the place to be visited."<sup>13</sup> The very presence of international observers in Nepal's places of detention should help put an end to torture. Further, as reports of the sub-committee on prevention, the investigative body, are generally confidential unless the state party publishing part of the report<sup>14</sup> or if the Committee against Torture decides, by majority vote, that Nepal has not

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol, (2002) Article 14 (2).

<sup>14</sup> CAT Optional Protocol, Article 16 (2).

been cooperating with the Sub-committees or taking steps to improve the situation in light of its recommendations.<sup>15</sup>

Further the Optional Protocol also provides for National Preventive Mechanisms. These mechanisms have a similar mandate to the Sub-committee and Nepal would be obligated to provide the mechanism with information on and access to places of detention.<sup>16</sup> While the NHRC already carries out this function, and would be the obvious choice to carry out this role under the Optional Protocol, its ratification would give the NHRC international weight to its roles and hopefully wider access to places of detention and information would be granted. There is also UN funding available for the education of the National Preventive Mechanisms.<sup>17</sup>

<sup>15</sup> CAT Optional Protocol, Article 16 (4).

<sup>16</sup> CAT Optional Protocol, Article 20.

<sup>17</sup> CAT Optional Protocol, Article 26.

## ANNEX I

### Advocacy Forum's Experiences: District Based Information

Guided by the belief that human rights can best be defended through diligent vigilance if state agencies and officials are not upholding the constitutional and legal provisions, Advocacy Forum documents the cases of human rights violations and abuses; provides legal aid and counseling to the victims and lobbies for the rights of those whose rights have been violated or likely to be violated. Regular visits to the detention facilities of the government in various districts of the country forms a part our regular work. Currently AF is operating in 16 districts and has been visiting 40 detention centers regularly. This section provides the district wise status of the treatment of detainees in detention centers.

In our visits, we are basically concerned to safeguard the rights of the detainees that have been enshrined in the constitution: whether they are made aware of the grounds behind their arrest; whether they are produced before the judicial authority for remand within 24 hours of their arrest; whether they are provided with medical check-ups, proper food, water and sanitation facilities; and whether they are being subjected to torture, inhumane or degrading treatment.

Torture is widespread in Nepal. AF documents cases of torture on a daily basis by visiting detention centers in the places it operates. However, because of the number of limitations, only few victims can bring their stories out through filing cases under the Torture Compensation Act.

Of 57 cases Advocacy Forum filed on behalf of torture survivors before District Courts across the country since 2002, so far 20 have been adjudicated. Of those

adjudicated, the courts held that the claim could not be established in 8 cases, owing to various reasons. And compensations have been awarded in 12 cases. Five judgments have been made by district courts and 1 by appellate court between July 2007 and May 2008.

The data below presents various forms of violations of individual rights including the torture inflicted on the detention centers. It is based on a scientific questionnaire that AF lawyers fills out with the information they glean from the detainees at the government detention facilities.

### Summary of the Data from all Advocacy Forum District Offices

Advocacy Forum uses the questionnaire to elicit responses from the detainees in detention centers. This questionnaire was prepared considering the constitutional and legal rights of the detainees and the obligations of the security personnel while holding anyone in detention for pre-trial period. This clearly shows how the law enforcement agency violates the law.

The figures below presents the percentage of the detainees tortured.<sup>1</sup>

Districts	Percentage of Detainees Tortured
All	32.91
Baglung	25.9
Banke	37.9
Bardiya	41.2
Dhanusha	26.6
Dolakha	8.8

<sup>1</sup> Article 26 of Interim constitution of Nepal 2007 reads: “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”

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Districts	Percentage of Detainees Tortured
Kailali	96.0
Kanchanpur	6.0
Kapilvastu	18.9
Kaski	26.7
Kathmandu	36.2
Lalitpur	31.2
Morang	43.6
Ramechhap	0.0
Rupandehi	23.8
Surkhet	26.0
Udayapur	12.0

The figure below presents the percentage of detainees who were provided with medical check ups.<sup>2</sup>

Districts	Percentage
All	87.11
Baglung	90.7
Banke	91.3
Bardiya	89.7
Dhanusha	85.2
Dolakha	44.1
Kailali	56.0
Kanchanpur	88.6
Kapilvastu	90.2
Kaski	59.2
Kathmandu	52.2
Lalitpur	92.4
Morang	86.9
Ramechhap	26.3
Rupandehi	82.3
Surkhet	96.5
Udayapur	88.0

<sup>2</sup> Section 3 (2) of Torture Compensation Act, 1996 provides: “While detaining and releasing a person, as far as possible, the concerned officer must maintain the record of the person’s physical condition by having a medical practitioner who is in government service examine the person and by examining him on his own if such practitioner is not available.”

The figure below presents the percentage of detainees who are produced before the court for remand within 24 hours from their arrest.<sup>3</sup>

Districts	Percentage
All	52.54
Baglung	48.8
Banke	49.6
Bardiya	72.9
Dhanusha	41.5
Dolakha	70.4
Kailali	48.0
Kanchanpur	49.7
Kapilvastu	40.8
Kaski	34.2
Kathmandu	49.4
Lalitpur	60.1
Morang	43.2
Ramechhap	5.3
Rupandehi	32.3
Surkhet	38.8
Udayapur	50.6

The figure below presents the percentage of the detainees who were asked by the judge at the time of remand if they were tortured.

Districts	Percentage
All	11.58
Baglung	4.7
Banke	9.7
Bardiya	18.6
Dhanusha	0.9

<sup>3</sup> Article 24 (3) of Interim Constitution of Nepal, 2007 reads: “ Every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such a person shall be detained in custody beyond the said period except on the order of such authority.”

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<b>Districts</b>	<b>Percentage</b>
Dolakha	33.3
Kailali	0.0
Kanchanpur	3.1
Kapilvastu	13.3
Kaski	10
Kathmandu	3.9
Lalitpur	2.5
Morang	0.8
Ramechhap	0.00
Rupandehi	19.7
Surkhet	10.6
Udayapur	31.0

The figure below presents the percentage of the detainees from whom statements were obtained involuntarily.<sup>4</sup>

<b>Districts</b>	<b>Percentage</b>
All	23.64
Baglung	24.1
Banke	34.9
Bardiya	7.4
Dhanusha	26.6
Dolakha	29.4
Kailali	60.0
Kanchanpur	17.5
Kapilvastu	9.1
Kaski	18.1
Kathmandu	24.2
Lalitpur	8.2
Morang	18.4
Ramechhap	21.1
Rupandehi	8.0
Surkhet	8.7
Udayapur	15.2

<sup>4</sup> Article 24(7) of the Interim Constitution of Nepal reads: “No person accused of any offence shall be compelled to be a witness against oneself.”

The figure below shows the percentage of detainees who were given arrest letter at the time of arrest.

Districts	Percentage
All	6.56
Baglung	1.9
Banke	4.0
Bardiya	2.9
Dhanusha	0.0
Dolakha	11.8
Kailali	0.0
Kanchanpur	4.8
Kapilvastu	15.9
Kaski	0.2
Kathmandu	3.3
Lalitpur	6.5
Morang	14.9
Ramechhap	10.5
Rupandehi	9.1
Surkhet	1.7
Udayapur	4.3

## ANNEX II

### Compensation of Torture Act, 1996 (2053 B.S.)

An Act to make arrangements for the compensation to be paid for the person on whom the torture is inflicted under the detention

**Preamble:** Whereas it is expedient to make arrangements as regard to pay the compensation to the person who is under detention for the purpose of investigation, probe or trial, or for any other reason and the physical or mental torture is inflicted on her/him or on whom the cruel, inhuman or degrading treatment is furnished in the custody.

Be it enacted by the Parliament in the Twenty-Fifth Year of the regime of His Majesty the King Birendra Bir Bikram Shaha Dev as follows:

**(1) Short Title and Commencement:**

- (a) This Act may be called the “Compensation of Torture Act, 1996 (2053 B.S.)”
- (b) This Act shall come into force with immediate effect.

**(2) Definition:**

In this Act, unless the context otherwise requires,

- (a) “Torture” means physical or mental torture inflicted on a person who is apprehended in the course of investigation, probe, or for trial or for any other reason and the term also includes cruel, inhuman or degrading treatment furnished to such person.
- (b) “Victim” means the person on whom the torture is inflicted.

**(3) Torture Prohibited:**

- (1) Any person, who has been detained for the purpose of investigation, probe or trial, or for any other reason, is not subjected to torture.

**Clarification:** For the purpose of this sub-section, the term ‘detained’ includes such a state of affairs wherein a person is kept in remand as per the prevalent Nepalese Law.

- (2) To the extent possible, a person who is being detained and released be made to undergo her/his physical check-up, which is to be recorded after and kept accordingly, by the medical practitioner in service of the government and by the concerned person himself who has the authority to detain, if such medical practitioner is unavailable.

**Clarification:** For the purpose of this sub-section, the term ‘Medical Practitioner’ includes a medical doctor, an ayurvedic doctor (*Kabiraj*), a health assistant, an assistant health worker or any ayurvedic practitioner (*Baidhya*) in service of the government.

- (3) A copy of the report of the physical or mental check-up to be carried out under sub-section (2) shall have to be made available to the concerned District Court.

**(4) Compensation Paid:**

A person, if it is proved that s/he has been subjected to torture by any of the official of His Majesty’s Government, shall be paid compensation under this Act.

**(5) Complaint may be made for the Compensation:**

- (1) Victim may make a complaint of torture claiming the compensation to be paid to her/him within the jurisdiction of the District Court wherein s/he is detained. Such complaint shall have to be made within 35 days from the day the torture is inflicted on her/him or the day s/he has been released from the custody.

- (2) Notwithstanding anything contained in sub-section (1), the complaint to be made of torture may be made by any other person, who has attained the age the law stipulates for the legal capacity to do so, of the victim's family or her/his legal counsel if the victim is already dead or in a situation wherein the victim is not in a position to make the complaint for one reason or the other. The complaint to be made on behalf of the victim, however, may only be made upon if the incapacity of the victim to proceed for the complaint is duly satisfied.
- (3) If there is valid reason to believe that the detainee has been inflicted the torture, the relative of the victim who has attained the age the law stipulates for the legal capacity to sue, or the legal counsel of the victim, may initiate the complaint to the concerned District Court. The concerned Court, upon received such complaint, may pass the order for physical or mental check-up of the detainee within three days of such complaint received. While undergoing physical or medical examination if the detainee requires further treatment then such treatment shall have to be provided by His Majesty's Government.
- (4) The complaint to be made under sub-section (1) and (2) shall, to the extent possible, include the following:
  - (a) Reason and the duration of the detention
  - (b) Particulars of torture inflicted during the period of detention
  - (c) Particulars of the harm caused due to torture
  - (d) Amount of the compensation claimed
  - (e) Matters incidental and auxiliary to prove the compensation claimed

**(6) Trial of Complaint and Compensation:**

- (1) The District Court shall follow the Summary Procedure Act, 2028 B.S. for the trial of the case to be registered under Section (5) and the victim shall be awarded up to Rs. 100,000/- as compensation to be obtained from His Majesty's Government if the claim made under the complaint stands as proved.

- (2) If, on the trial proceeding of the case to be administered as per the sub-section (1), the complaint made stands as proved that it has been registered with ill-intention then the person who has initiated such groundless complaint shall be fined up to Rs. 5,000/-.

**(7) Prosecution of the Perpetrator:**

The District Court may pass the order to the concerned authority for taking the institutional action to be initiated in pursuance of the prevalent Nepalese law if any government official is proved to be involved in inflicting the torture against the provisions of this Act.

**(8) Imputation of the Compensation Amount:**

For the purpose of sub-section (1) of the Section (6), the matters worth considering for the imputation of the compensation amount shall be as follows:

- (a) Physical or mental trauma and its intensity that victim faced due to torture,
- (b) Deficiency caused in ability to earn out of the torture inflicted on the victim,
- (c) Age and family accountability of the victim if s/he has sustained the trauma that is untreatable,
- (d) Tentative cost involved in the treatment if the trauma sustained is treatable,
- (e) The number of the dependant family and the minimum cost involved in their livelihood if the victim has already dead due to torture inflicted on him,
- (f) Other things claimed by the victim that is due and appropriate.

**(9) Execution of the Decision:**

- (1) An application for obtaining the compensation shall, once the final decision to that effect is delivered, be filed by the victim, or his relative if the victim is already dead, to the Chief District Officer (CDO) in whose jurisdiction the victim was detained. The copy of the final decision of the concerned District Court with regard to pay the compensation to the victim is desirable for making the complaint and such complaint has to be made within one year of the notice attained of the final decision delivered.

- (2) The Chief District Officer (CDO) shall be obliged to pay the compensation to the applicant within 35 days of the application received under the sub-section (1).
- (3) No compensation shall lie if the complaint to that effect is not lodged within the deadline provided in sub-section (1).

**(10) Defense by the Public Prosecutor:**

As regard to petition made under section (5), the Public Attorney shall defense the government official, who is alleged to have been involved in inflicting the torture, in the court if request to that effect is made by the head of the concerned government office.

**(11) Protection of Action taken on good faith:**

Notwithstanding the provision this Act otherwise provides for, the hardship that is caused automatically due to the arrest made, which is in good faith done in pursuance of the prevalent Nepalese Law, shall not be considered as torture for the provisions of this Act.

**(12) Protection of the proceeding of the offence under the separate Act:**

No difficulty as such will lie for the proceeding of the trial in other offence that the prevalent Nepalese Law specify as being the offence under the separate Act only by the reason that the case has been initiated for the compensation or the execution to that effect has been done under this Act.

**(13) Power to make Rules:**

His Majesty's Government may make Rules to carry out the purpose of this Act.

## ANNEX III

### Evidence Act, 1974

(For private study and research only)

#### History

October 21, 1974	First Promulgated. Nepal Rajapatra, Vol. 24, 31 (Extraordinary), Kartik 5, 2031.
September 12, 1977	First Amendment. Nepal Rajapatra, Vol. 27, No. 28 (Pre -Extraordinary), Bhadra 27, 2034

#### Consolidated Text

**Preamble :** Whereas it is expedient to make timely provisions relating to evidence by amending and consolidating Nepal law pertaining thereto. Now therefore, His Majesty King Birendra Bir Bikram Shah Dev has enacted this law on the advice and approval of the National Panchayat.

#### ***Chapter-4***

##### **Burden of Proof**

##### 25. Burden of Proof

The burden of proving the guilt of the accused in a criminal suit shall lie on the plaintiff.

##### 26. Burden of Proving Claim

In civil suits, the burden of proving the claim shall lie on the plaintiff.

27. Burden of Proof to Lie on Defendant

- (1) In case the defendant argues that he deserves the commutation, reduction, or withdrawal of any punishment under current Nepal law, the burden of proving such argument shall on him.
- (2) The burden of proving that the plaintiff has been paid or given anything due under current Nepal law shall lie on the defendant.

28. Burden of proving any Specific Fact

The burden of proving a fact shall lie on the person who wants the court to believe in the existence of such fact, unless any current Nepal law imposes the burden of proving any specific fact on any specific person.

29. Burden of disproving Presumption of Court

In case any party desires to disprove any fact presumed by the court under this act, the burden of proof shall lie on such party.

30. Burden of Proving Fact within Special Knowledge

In case it becomes necessary to prove any fact in order to attest a second fact, the burden of proving such second fact shall lie on the party wishing to prove the first fact.

31. Burden of proving that a person is Alive

In case a question arises as to whether any person is alive or dead, and in case it is proved that he has not been heard of for 12 years by any person who naturally possesses information about his whereabouts, the party who affirms that he is alive shall prove that is so.

32. [Missing]

33. Burden of proof of Ownership of Property in Occupation or Possession of any Person.

In case a question arises as to whether or not any person is the owner of any property under his occupation or in his possession, the burden of proving that he is not the owner of such property shall lie on the person who affirms that he is not the owner.