

# UNPACKING THE PROVISIONS OF TORTURE IN CRIMINAL CODE OF NEPAL AND ITS COMPLIANCE WITH INTERNATIONAL STANDARDS

FEBRUARY 2022

*Defending Human Rights for 20 Years*



ADVOCACY FORUM-NEPAL

# **Unpacking the Provisions of Torture in Criminal Code of Nepal and its Compliance with International Standards**

**February 2022**



**Advocacy Forum - Nepal**

Unpacking the provisions of torture in Criminal Code of Nepal  
and its Compliance with International Standards

First Edition: 2022

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*Publisher*

Advocacy Forum-Nepal

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Layout & Cover design: Kishor Pradhan

Printed in Nepal

Publication Support

**ife** Institut für  
Auslandsbeziehungen

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## **ACKNOWLEDGMENT**

Advocacy Forum (AF) would like to extend sincere gratitude to many victims of torture who shared their experiences with us. AF would also like to extend its gratitude to the International Commission of Jurists (ICJ) for providing technical assistance in preparing this briefing paper.

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Executive Director

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## **BACKGROUND**

Nepal is a party to most of the major international human rights instruments, including the ICCPR, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC). These Conventions require that States take specific measures to criminalize torture and provide remedy and reparation for the victims of torture and other ill-treatment.

Several reports including our own monitoring ones expose routine practice of torture in Nepal.<sup>1</sup> International human rights mechanisms, including the UN Committee Against Torture (CAT Committee),<sup>2</sup> the Special Rapporteur

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<sup>1</sup> Advocacy Forum Nepal, “Torture in Nepal in 2019: The Need for New Policies and Legal Reform” Report (26 June 2020) available at: <http://www.advocacyforum.org/downloads/pdf/publications/torture/26-june-2020.pdf>; Terai Human Rights Defenders Alliance (THRD Alliance), “Torture in The Terai, 2020, Torture is a crime; the state continues to commit” ( June 2020), available at: <https://www.thrda.org/wp-content/uploads/2020/06/THRD-Alliance-2020.pdf>; Informal Sector Service Center (INSEC), “Nepal Human Rights Year Book 2021” (19 February 2021), available at: [https://www.insec.org.np/wp-content/uploads/2021/02/Nepal\\_Human\\_Rights\\_Yearbook\\_2021\\_English.pdf](https://www.insec.org.np/wp-content/uploads/2021/02/Nepal_Human_Rights_Yearbook_2021_English.pdf)

<sup>2</sup> UN Committee Against Torture, Report on Nepal adopted under article 20 of the Convention at its 46th session, CAT/C/46/R.2/Add.1, 9 May-3 June 2011 ; Human Rights Committee, Concluding observations on the second periodic report of Nepal, CCPR/C/NPL/CO/2 (15 April 2014),

on Torture<sup>3</sup> and the Human Rights Committee (HRC)<sup>4</sup> have raised serious concerns over the practice of torture in Nepal, impunity associated with it and have repeatedly called on the Government to criminalize acts of serious human rights violations including torture and other forms of ill-treatment in the spirit of international human rights laws and standards.

Prohibition against torture is now a constitutional promise of Nepal. Article 22(1) of the Constitution states that “no person who is arrested or detained shall be subjected to physical or mental torture, or to cruel, inhuman or degrading treatment.” Furthermore, in August 2017, the Parliament of Nepal adopted a much-awaited National Penal Code that criminalizes torture. Although the investigations on allegation of torture under the Criminal Code is yet to be seen, this briefing paper highlights the major provisions in Penal Code, assess compatibility of those provisions with international standards and make recommendations where

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available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/NPL?CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/NPL?CO/2&Lang=En)

<sup>3</sup> Economic and Social Council, “Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak”, (09 January 2006) E/CN.4/2006/6/Add.5, , available at: <http://daccessdds-ny.un.org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf?OpenElement>

<sup>4</sup> *Dev Bahadur Maharjan v Nepal Government* Communication No 1863/2009, Human Rights Committee (12 September 2012); *Giri v Nepal* Communication No 1761/2008, Human Rights Committee (24 March 2011)



the reforms are needed to ensure the compatibility of the Penal Code's provision with Nepal's international obligation.

## **NATIONAL LEGAL FRAMEWORK**

### **I. CONSTITUTION OF NEPAL**

The Constitution of Nepal (2015) guarantees the right to be free from physical or mental torture and cruel, inhuman or degrading treatment when **arrested** or **detained** as a fundamental right.<sup>5</sup> Article 22(2) further states that the acts of torture and cruel, inhuman or degrading treatment shall be punishable.<sup>6</sup> In addition to that, Article 21(2) ensures the right to justice including social rehabilitation and compensation for victim of crime.<sup>7</sup> This article states, "A victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law." The Constitutional provisions seem to limit the right of victims to compensation, not elaborating further to include other forms of reparation like restitution, rehabilitation, satisfaction and guarantees of non-repetition as provided

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<sup>5</sup> See, Article 22, of the Constitution of Nepal (2015), the full text of the Constitution, available at: <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/10272>

<sup>6</sup> See, Article 22(2), of the Constitution of Nepal (2015).

<sup>7</sup> See, Article 21(2), of the Constitution of Nepal (2015).

by Basic Principles on Right to Remedy and Reparations.<sup>8</sup> However, it can be argued that this can be elaborated further in laws and policies by progressive interpretation of right to justice that the constitution provides and the right to social rehabilitation that the crimes victims are entitled to have under the constitution.

However, the Constitution also promises for enacting legislation to implement fundamental rights guaranteed by the Constitution providing opportunity to include aspects required elaboration. Accordingly, the human rights organisations including Advocacy Forum has been demanding enactment of national legislation providing legal foundation for prevention of torture, protection of victims and promotion of evidence based investigation in the country.

## **II. THE NATIONAL PENAL CODE, 2074 (2017)**

In October 2017, Nepal adopted a new penal code, The National Penal Code (hereby Penal Code) that came into effect from 17 August 2018.

The Code expressly criminalizes torture and some forms of cruel, brutal, inhuman or degrading treatment which was

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<sup>8</sup> UN Basic Principles on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147 (16 December 2005).

the long due demands of legal and human rights community of Nepal.

Section 167(1) of the Penal Code states “no authority who is competent under the laws in force to investigate or prosecute any offence, implement law, take any one into control, or hold any one in custody or detention in accordance with law shall subject, cause to be subjected, any one physical or mental torture or to cruel, brutal, inhuman or degrading treatment”.

A set of objectives are required to make any acts to constitute torture.<sup>9</sup> Furthermore, acts of inhuman and degrading treatments are also prohibited.<sup>10</sup> Its sub-section (1) says “No person shall subject, or cause to be subjected, any one to inhuman and degrading treatment.”

Depending on the gravity of the offence of torture and cruel, brutal, inhuman, or degrading treatment, the Court can

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<sup>9</sup> Section 167(1), **Explanation:** “For the purposes of this Section, intentional inflicting of physical or mental pain or suffering on any person who is arrested, taken into control, held in custody, detention, imprisonment or under preventive detention or security or any other person interested in such person or subjecting such person to cruel, **brutal**, inhuman or degrading treatment or punishment for the following purpose shall be considered to constitute act of torture or cruel, **brutal**, inhuman or degrading treatment or punish **against/to** such person (a) to get information on any matter, (b) to extort confession of any offence, (c) to punish for any act, (d) to show fear/**intimidation** or coercion, or (e) to do any other act in contravention of law.”

<sup>10</sup> Section 168.

impose a maximum punishment of five years of imprisonment or a fine of up to fifty thousand rupees (Approximately 450 USD) or both.<sup>11</sup>

The Code makes a principal offender to the official who makes the order for the commission of the offense<sup>12</sup> or assist in the commission of offense of torture and ill-treatment.<sup>13</sup> It does not accept superior order as the excuse for act of torture and ill-treatment.<sup>14</sup> This provision ensures an individual liability for an offence of torture.

Subsection (3) of Section 168 has included a couple of other acts as a prohibited offence including banishing a woman to a shed (*Chaupadi*) during menstruation or delivery.<sup>15</sup> Subsection (5) of Section 168 provides an additional sentence to

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<sup>11</sup> Section 167(2): “A person who commits an offence under subsection (1) shall be liable to a sentence of imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand rupees or both sentences depending on the gravity of the offence.”

<sup>12</sup> Section 167(3): “A person who orders the commission of an offence under sub-section (1) or accomplice who aid in the commission of an offence under this section shall be liable to the same as is imposable on the principal offender.”

<sup>13</sup> Ibid

<sup>14</sup> Section 167(4): “No person who commits an offence under subsection (1) shall be allowed to plea that he or she has committed the offence in pursuance of an order by the authority superior to him or her, and, on such ground, he or she shall not be exempted from the sentence imposable on him of her for the commission of such offence.”

<sup>15</sup> Section 168(3): “Banishing a woman to a shed (Chhaupadi) during menstruation or delivery, or subjecting, causing to be subjected, her to

a public servant for his or her involvement in these offence of inhuman and degrading treatments.<sup>16</sup>

Section 169 of the Code provides reasonable compensation to victims for the injury and pain caused.<sup>17</sup> This provision however puts the burden of paying compensation to victims on perpetrators. Although there are some positive developments, these provisions fall short in meeting international standards.

### *LIMITED AND NARROW DEFINITION OF TORTURE*

Section 167(1) forbids torture by “authority who is competent under the laws to investigate, prosecute, implement laws or to arrest and detain anyone “. This provision is narrower as compared to CAT.

Article 4 of the Convention requires that the offence of torture cover anyone (whether a state official or not) who intentionally and with purpose inflicts severe pain and suffering, in any circumstance where there is a link to state authority as described in article 1.

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similar other discrimination, untouchability or inhuman treatment of any kind is prohibited.”

<sup>16</sup> Section 168(5): “Where a public servant commits an offence under this Section, he or she shall be liable to an additional sentence of imprisonment for a term not exceeding three months.”

<sup>17</sup> Section 169: “A reasonable compensation for the injury or pain caused to the victim shall be ordered to pay by the person who has committed the offence referred to in this Chapter.”

In order to comply with the international standards and principles of State responsibility, this provision should apply to a broader range of actors, i.e., wherever the pain or suffering is inflicted by anyone (whether a public official or not) by or at the instigation of or with the consent or acquiescence of any public official or other person acting in an official capacity. This necessarily extends not only to public officials, but also to any State “agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law.”<sup>18</sup>

***The AF recommends that the phrase “authority who is competent under the laws in force to investigate or prosecute any offence, implement law” should be removed from section 167(1) to incorporate wider range of state officials in line with the CAT.***

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<sup>18</sup> <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalFzYTJnWNYOXxeLRAIVgbwcSm2ZXH%2BcD%2B%2F6IT0pc7BkgqlATQUZPVhi>

## **PROHIBITING TORTURE ONLY IN DETENTION IS PROBLEMATIC**

Section 167 only prohibits torture and ill-treatment during custody or detention, whereas the ICCPR and CAT require to prohibit torture and ill-treatment wherever and in whatever context they occur. For example, Article 1 of the CAT addresses all situations where the pain or suffering in question is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The section 167 of the Penal Code provides that no “person under detention” is subjected to torture. The explanation clause of Section 167 further clarifies that ‘detention’ refers to a state of a person who is arrested, taken into control, and held in custody, detention, imprisonment, or kept under preventative detention or security for the specific purposes.<sup>19</sup> However, this provision is limited not to include a wide range of contexts where torture is inflicted in Nepal. Some other acts also define the term ‘detention’ but with similar and limited way. For example, Section 2(c) of the Prison Act, 2019 (1963) defines the term ‘detainee’ referring to a person held in the custody of a Court, police

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19 The purposes specified under the explanation clause of Section 167 include: (a) to get information on any matter, (b) to extort confession of any offence, (c) to punish for any act, (d) to show fear/intimidation or coercion, or (e) to do any other act in contravention of law.

or other authority for the inquiry and investigation or trial of a crime or a person detained under the Public Security Act, 2046 (1989).<sup>20</sup> Similarly, Section 2(a) of the Compensation Relating to Torture (CRT) Act, 2053 (1996) includes the term ‘detention’ stating that ‘detention’ also refers to a state of a person who is in detention in the course of investigation, inquiry or trial of for any other reason.”

However, many acts of torture and ill-treatment can be committed outside of the custodial setting, including in a variety of public and private spaces. There are reports exposing investigating authorities using private houses as interrogation places where detainees have been subjected to severe torture.<sup>21</sup> The definition of Section 167 on detention, therefore, explicitly excludes ‘pain or suffering’ inflicted to a person who is not in detention. This provision makes no possibility of investigation, prosecution and adjudication

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<sup>20</sup> Section 3(1) and 3(2) of the Public Security Act, 2046 (1989) allow the local authority to keep a person under preventative detention or area confinement if there is a reasonable and adequate ground to prevent a person from acting in any manner prejudicial to the sovereignty, integrity of public peace and order of Nepal and interest of general public or harmonious relations subsisting among various castes, tribes or communities.

<sup>21</sup> Advocacy Forum Nepal, “A Report on Torture of Juveniles in Nepal: A Serious Challenge to Justice System” (June 2010), available at: [http://www.advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal\\_26\\_June\\_2010.pdf](http://www.advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf)



against a perpetrator who commits an act of torture outside of a custodial setting.

*The AF recommends that sections 167 be re-drafted to remove references to “detention” so that torture committed by any public official in any context or spaces can be prosecuted in accordance with international standards.*

### **OBJECTIVES OF TORTURE ENVISIONED IN PENAL CODE IS RESTRICTIVE**

The Penal Code’s list of “objectives” for perpetrating torture is too restrictive. Explanation Chapter of Section 167(1) lists the “objectives” for an act to constitute torture or cruel, brutal, inhuman, degrading treatment or punishment. For example, the Section states, “for the purposes of this Section, intentional inflicting of physical or mental pain or suffering on any person who is arrested, taken into control, held in custody, detention, imprisonment or under preventive detention or security or any other person interested in such person or subjecting such person to cruel, **brutal**, inhuman or degrading treatment or punishment for the following purpose shall be considered to constitute act of torture or cruel, **brutal**, inhuman or degrading treatment or punishment **against/to** such person:

- (a) to get information on any matter,

- (b) to extort confession of any offence,
- (c) to punish for any act,
- (d) to show fear/**intimidation** or coercion, or
- (e) to do any other act in contravention of law.”

This provision presents a closed and exhaustive list. It also includes that ‘to do any other act in contravention of law’ as objective to constitute torture, posing risk to dilute the understanding of torture. Not all acts committed by detaining authorities, that contravene existing laws would amount to torture. The plain language of the definition in Article 1 of the CAT makes clear that the list of purposes is to be illustrative rather than exhaustive (by using the phrase “for such purposes as”).

***The AF recommends that section of this penal code should be re-formulated, to indicate that the purposes mentioned are illustrative not exhaustive.***

#### LIMITED DEFINITION OF PROHIBITION ON INHUMAN AND DEGRADING TREATMENT

Section 168(1) prohibits acts of inhuman and degrading treatment. The Section states that “no person shall subject, or cause to be subjected, any one to degrading or inhuman treatment.”<sup>22</sup> However, this provision neither defines

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<sup>22</sup> See, Section 168(1), of the National Penal Code, 2074 (2017).

inhuman and degrading treatment nor explains the acts that lead to them. This section also envisions acts of inhuman and degrading treatment committing also by private individuals.

However, the HRC and the CAT Committee have indicated that many of the obligations and legal consequences pertaining to torture are equally applicable to cruel, inhuman or degrading treatment or punishment.<sup>23</sup> Nevertheless, such separate provision might give space for lesser seriousness in preventing act of inhuman and degrading treatment.

Article 16 of the CAT states that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment [emphasis added] which do not amount torture... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Neither the CAT nor the ICCPR has expressly defined “other cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee, in General Comment 20 pertaining to article 7 of the ICCPR, has noted that the

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<sup>23</sup> CAT Committee, General Comment 2, para. 6; UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2004), para. 8;

UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (10 March 1992), paras. 3-7.

distinctions as between prohibited categories depends on their respective nature, purpose and severity, but also emphasized that the prohibition under article 7 does not relate only to acts of physical pain or suffering but also to acts causing mental suffering.<sup>24</sup>

***AF recommends that Section 168(1) of the Penal Code be amended defining inhuman and degrading treatment in line with international law and standards.***

### *INSUFFICIENT SANCTIONS AND PENALTIES*

Section 167(2) of the Penal Code provides a maximum of five years of imprisonment as a punishment for those involved in torture or a fine up to fifty thousand rupees (Approximately 450 USD) or both, depending on the gravity of the offence.<sup>25</sup> Similarly, Section 168(2) also provides a sentence of imprisonment for a term not exceeding five years, or a fine not exceeding fifty thousand rupees (Approximately

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<sup>24</sup> UN Human Rights Committee, General Comment 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, paras. 4-6.

<sup>25</sup> Section 167(2): “A person who commits an offence under subsection (1) shall be liable to a sentence of imprisonment for term not exceeding five years or a fine not exceeding fifty thousand rupees or the both sentences considering the gravity of the offence.”

450 USD) or both in the cases of inhuman and degrading treatments as well.<sup>26</sup>

The maximum penalty provided for an act of torture, and inhuman and degrading treatments under Section 167(2) and Section 168(2)(5) is insufficient, considering the gravity of the offence and the long-lasting consequences that victims suffer. Although the Penal Code's provision seems to provide a wider discretionary power to the Court in determining the sentence, upper ceiling of 5 years, restricts the judicial discretion. Under the current provision, the penalty could be just for few days or months even in the case of torture. It could just be a fine without any imprisonment.

One of the obligations of the State under the CAT and also the ICCPR is to criminalize all instances of torture and provide appropriate penalties which take into account their grave nature.<sup>27</sup> In General Comment 2, the CAT Committee has highlighted that an important criteria for codifying this crime emphasizes the need for appropriate punishment that

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<sup>26</sup> Section 168(2): "A person who commits an offence under subsection (1) shall be liable to a sentence of imprisonment for a term not exceeding five years and a fine not exceeding fifty thousand rupees."

<sup>27</sup> Article 4(1) of the CAT: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

takes into account “the gravity of the offence” and “strengthen the deterrent effect of the prohibition itself.”<sup>28</sup> In line with this explanation, CAT committee noted in a case of *Kepa Urra Guridi v Spain* that “the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment” and therefore constituted violation under Article 4(2).<sup>29</sup>

The regional Courts have also taken approach in terms of equating the punishment for torture as per the gravity offence. For example, ECtHR in the case of *Paduret vs Moldova* has spelled out that the position of Moldovan government to consider torture as an “average-level crime is absolutely incompatible under Article of 3 of the convention, given the extreme seriousness of the crime of torture.”<sup>30</sup> The Court further mentioned that “the case gives the impression not of preventing any future similar violations, but of being an example of virtually total impunity for ill-treatment by the law-enforcement agencies.”<sup>31</sup>

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<sup>28</sup> Committee against Torture, General Comment 2 (2008), para. 6.

<sup>29</sup> *Kepa Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005 para. 6.7 In this case, the Civil Guards were found guilty of torturing a suspect member of Euskadi Ta Askatasuna (ETA) and were ordered four years of imprisonment. This was later reduced to one year by the Spanish Supreme Court. Then, the civil guards were granted pardons by the Council of Ministers.

<sup>30</sup> *Paduret v. Moldova*, ECtHR judgment of 5 January 2010, para. 77.

<sup>31</sup> *Ibid.*

ICCPR or CAT has not made specific provision regarding minimum or maximum penalty for perpetrators of torture based upon the gravity of the crime of torture. However, experts by analyzing views expressed by individual committee members suggest that it is appropriate to have custodial sentence between six to twenty years.<sup>32</sup>

The current penalty provision for torture under penal code is insufficient in relation to the potential severity of the crime of torture and other cruel, inhuman and degrading treatments resulting prolonged physical and mental sufferings upon the victims.<sup>33</sup>

***The AF recommends Section 167(2) of the Penal Code to comply with the Convention against Torture, the maximum penalty provided in the Code needs to be increased significantly beyond the present five years imprisonment or the fine.***

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<sup>32</sup> Chris Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, 2001, p. 342.

<sup>33</sup> The sentence up to five years imprisonment or a fine of fifty thousand rupees (Approximately 450 USD) or both is low and is not proportional with the serious crime under the international law and standards.

## *INADEQUATE REPARATIONS PROVISIONS*

Section 169 of the Penal Code states that there will be reasonable compensation for victims of torture and degrading or inhuman treatment.<sup>34</sup> However, it also presents a number of problems. Firstly, it requires a Court's conviction against the perpetrator of the offence of torture and degrading or inhuman treatments for the victims to be eligible for compensation. Secondly, it makes perpetrator to pay compensation, not the State. Thirdly, it does not recognize victim's right to reparation only the compensation. Problems also exist because of lack of clarity on definition of victims, which are discussed below.

## *CONVICTION BASED COMPENSATION*

Section 169 states "A reasonable compensation for the injury or pain caused to the victim shall be ordered to be paid by a person who has committed the offence under this Chapter."<sup>35</sup> It means that only the establishment of an offence of torture and other ill-treatment is not sufficient to receive compensation, it requires conviction from the Court.

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<sup>34</sup> Section 169 of the Penal Code: "A reasonable compensation for the injury or pain caused to the victim shall be ordered to be paid by the person who has committed the offence referred to in this Chapter."

<sup>35</sup> See, Section 169 of the Penal Code, 2074 (2017).



This provision contradicts with both the 2015 Constitution of Nepal and the international law and standards. The Constitution has much broader scope for compensation. It guarantees the right to compensation to the victims of different categories including the victim of crime,<sup>36</sup> victim of torture and ill-treatment<sup>37</sup> and victim of unlawful or detained with mala fide intention<sup>38</sup> as an independent right. In addition, the provisions of the Constitution do not require conviction from Court for the victims to receive compensation.

Similarly, under ICCPR and CAT, and general rules of state responsibility under international law, compensation for a wrongful act is the State's responsibility whether or not any individual responsibility has been or can be established. Article 9 of the ICCPR states, "anyone who has been the victim of unlawful arrest and detention shall have an enforceable right to compensation." Article 14 of the CAT requires state parties to "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,

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<sup>36</sup> Article 21(2): "A victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law."

<sup>37</sup> Article 22(2): "Any act mentioned in clause (1) shall be punishable by law, and any person who is the victim of such treatment shall have the right to obtain compensation in accordance with law."

<sup>38</sup> Article 23(3): "If the authority making preventive detention holds any person under preventive detention contrary to law or in bad faith, the person held under preventive detention shall have the right to obtain compensation in accordance with law."

including the means of for as full rehabilitation as possible.”<sup>39</sup> The CAT Committee has affirmed that this requires States to “promptly initiate a process to ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place.”<sup>40</sup> Also, the Committee has interpreted the relationship between the right to compensation of a victim of torture and ill-treatment and criminal liability. The interpretation is as follows:

“Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim’s claim for reparation should not be dependent on the conclusion of a criminal proceeding. The Committee considers that compensation should not be unduly delayed until criminal liability has been established. Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place.”<sup>41</sup>

Therefore, Section 169 of the Penal Code leaves open the possible outcome that, even where there are reasonable

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<sup>39</sup> See, Article 14 of CAT.

<sup>40</sup> UN Committee Against Torture (CAT Committee), General Comment No. 3, Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3, 13 December 2012, para. 27.

<sup>41</sup> CAT Committee, General Comment No. 3 (2012), para. 26.

grounds to believe that torture has taken place, victims may be denied compensation or other forms of reparation if the State authorities, including Court, do not conduct and conclude a judicial proceeding to determine individual responsibility and make conviction in a case of torture and ill-treatment.

*AF recommends that Section 169 of the Penal Code be reviewed in line with the Constitution of Nepal and the CAT, ensuring that victims of torture and ill-treatment are able to receive compensation when there are reasonable grounds to believe that torture or ill-treatment has taken place.*

## **COMPENSATION BY PERPETRATORS NOT BY THE STATE**

Section 169 of the Penal Code also requires perpetrators to pay compensation to victims, not the State.<sup>42</sup> This provision is problematic, since this requires that crime needs to be established and perpetrator be convicted for any compensation. Furthermore, there may be a danger that victims may be unable to get effective and sufficient

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<sup>42</sup> Section 169: “A reasonable compensation for the injury or pain caused to the victim shall be ordered to be paid by a person who has committed the offence under this Chapter.”

compensation due to the weak economic condition of the perpetrator.

Although it is important to make perpetrators accountable to pay compensation for any wrongful acts including the torture and ill-treatment he/she has committed under international law the State also has an obligation to provide compensation to the victims.<sup>43</sup> Therefore, Section 169 of the Penal Code fails to appropriately ensure the right to compensation for the victim of torture and ill-treatment.

***AF recommends that Section 169 of the Penal Code be reformed with an appropriate provision that ensures that the duty to provide compensation must lie primarily with the State and not solely with the perpetrator.***

## **NOTION OF REPARATION NOT RECOGNIZED**

Although the Penal Code has limited provision for compensation for victims of torture, it fails to ensure victims' right to reparation that includes right to rehabilitation, restitution, satisfaction and guarantees of non-repetition.

Article 14 of the CAT obligates State Parties to establish national legal system ensuring that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as

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<sup>43</sup> See, Article 2(3) of the ICCPR and Article 14 of the CAT.

full rehabilitation as possible.<sup>44</sup> The CAT Committee, has interpreted the term ‘redress’ enshrined in Article 14 of the CAT as a victim’s right to effective remedy and reparation.<sup>45</sup> The committee has further interpreted that the reparative concept involves restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>46</sup> States parties should also enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims.<sup>47</sup>

International standards such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations also provide that victims are entitled to receive full and effective reparation for the

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<sup>44</sup> Article 14(1) of CAT: “Each State Party shall 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, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

<sup>45</sup> CAT Committee, General Comment No. 3 (2012), para. 2.

<sup>46</sup> *Ibid.*

<sup>47</sup> CAT Committee, General Comment No. 3 (2012), para. 5.

harm suffered.<sup>48</sup> This also includes restitution, compensation, rehabilitation, satisfaction and a guarantee of non-repetition.<sup>49</sup>

It is important to note that the Constitution has recognized the right to social rehabilitation and justice with compensation as a fundamental right of the victims of crime.<sup>50</sup> Arguably, this applies to victims of torture as well as act of torture is a crime. The Crime Victims Protection Act, 2074 (2018) has been adopted by the parliament aiming to ensure the right of crime victims to justice with social rehabilitation and compensation awarded under the Constitution of Nepal. However, it is also limited in its scope as it is not envisioned to provide reparation to victims of human rights violations such as torture but to victims of common crimes.

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<sup>48</sup> 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, March 21, 2006, A/RES/60/147, principle 8; and International Commission of Jurists, *Practitioners' Guide 2, revised edition: The Right to a Remedy and Reparation for Gross Human Rights Violations* (2018), available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

<sup>49</sup> 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 (General Assembly resolution 60/147 of 16 December 2005).

<sup>50</sup> Article 21(2) of the 2015 Constitution of Nepal: "The victim of crime shall have the right to social rehabilitation and justice with compensation as provided by law."

***The AF recommends that the Penal Code is reviewed in line with the 2015 Constitution, international human rights law, and standards in which the right to reparation that includes rehabilitation, restitution, compensation, and a guarantee of non-repetition including the interim relief programs is recognized in sufficient, fair and unconditional manner.***

## **PROVISION RELATED TO INTERIM RELIEF PROBLEMATIC**

Section 48(1) of Chapter 5 of the Penal Code contains a provision to provide medical treatment or compensation or a relief amount to a victim of an offence or a dependent on him/her as an interim relief.<sup>51</sup> Subsection (3) of Section 48 envisages to establish a “Victim Relief Fund” to ensure interim relief to victims and their dependent.<sup>52</sup> However,

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<sup>51</sup> Section 48(1): “Notwithstanding anything contained elsewhere in this Act, where it is necessary to immediately provide medical treatment or compensation or any type of relief amount to a person who has become victim of an offence in consequence of its commission or a person who is dependent on him or her, the Court may order the person accused of such offence to provide medical treatment or pay an interim compensation or relief amount to such person.”

<sup>52</sup> Section 48(3): “Where the accused is unable to provide the compensation or amount pursuant to sub-section (2) in accordance with the order referred to in sub-section (1), the Court shall order that the

Subsection (4) of Section 48 states that the victim should return the interim relief to the perpetrator or the victim relief fund in the case of acquittal of charges by a judgment of Court.<sup>53</sup>

The constitution gives the right to compensation and interim relief to victims of crime as an objective and unconditional right. For example, Article 21(2) of the Constitution provides that “a victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law.”<sup>54</sup> Similarly, Article 22(2) provides “any person who is the victim of physical and mental torture and cruel, inhuman or degrading treatment shall have the right to obtain compensation in accordance with law.”<sup>55</sup>

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compensation or amount be provided to the victim or person dependent on him or her from the victim relief fund established pursuant to the laws in force related to the determination and execution of sentences for criminal offences, and the amount so provided shall be recovered from such accused person and reimbursed into such fund.”

<sup>53</sup> Subsection (4) of Section 48: “Where a person who has paid compensation or relief amount pursuant to this Section is acquitted of the charge by the judgment of the Court, the person who has received such compensation or relief amount shall, within thirty-five days of such acquittal, return such amount to such person or to the victim relief fund referred to in sub-section (3).”

<sup>54</sup> See Article 21(2) of the 2015 Constitution of Nepal.

<sup>55</sup> See Article 22(2) of the 2015 Constitution of Nepal.



Article 14 of the CAT obligates State Parties to ensure victims of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In elaborating Article 14 of CAT,<sup>56</sup> the CAT Committee has stated that relevant types of compensation for the purposes of this article should include financial indemnification, rehabilitation and medical and psychological treatment.<sup>57</sup> The provisions of Section 48 and 169, therefore, are contradictory with the constitution and Nepal's international obligations.

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<sup>56</sup> Article 14(1) of CAT : “Each State Party shall 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, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

<sup>57</sup> Concluding Observations on Turkey, (2003) UN doc. CAT/C/CR/30/5, para 123 Concluding Observations on Cuba, (1998) UN doc. A/53/44, § 118; see also Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, para. 26.

*AF recommends that Section 48 of the Penal Code be revised guaranteeing interim relief as the unconditional right of a victim of crime including torture and ill-treatment. It is also recommended that such revision makes State the duty bearer for providing interim relief to such victims.*

## **CLARITY ON DEFINITION OF VICTIMS NEEDED**

Definition of victim is important to give victims entitlement of right to reparation. The Penal Code does not define victims per say but implies the person who suffer directly being the victim entitled to get compensation/ reparation for torture. However, the Crime Victims Protection Act, 2074 (2018), that aims to implement constitutional rights of crime victims defines victims, which could also be used for the purpose or reparation/compensation to victims of torture as well. However, this too remains problematic.

While defining victims, it categorized victims into three categories. Victims of first grade,<sup>58</sup> victim of second grade<sup>59</sup>

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<sup>58</sup> Section 2(h): “Victim of first grade” means a person who has died or has sustained <sup>[[[ ]]</sup> damage as a direct result of an offence that has been committed against the victim, irrespective of whether the perpetrator does not have to bear criminal liability on the ground of his or her age, mental unsoundness, diplomatic immunity or position or whether the identity of the perpetrator remains untraced or whether charge has not been made against the perpetrator or whether the case related to the offence has been withdrawn or whether the sentence imposed on the offender is pardoned or whether the perpetrator has not been convicted of the offence or irrespective of the family relation of the perpetrator with the victim, and this phrase also includes a person who has not been involved in the offence but has died or sustained damage in any of the following circumstances: (1) While preventing the person who is committing the offence from committing it, (2) While extending reasonable support and rescuing with the purpose of saving any person where an offence is being committed against such a person, <sup>[[[ ]]</sup>(3) While trying to arrest the person who is committing or has committed the offence or extending support to the competent authority in the course of arresting the suspect, accused or offender.

<sup>59</sup> Section 2(f): “Victim of second grade” means a person who has not been involved in the offence that has been committed or is being committed against the victim of first grade but who has to bear damage because of being an eyewitness of such offence, and this expression also includes the guardian of the minor victim of first grade who has not been involved in the offence but who has to bear damage because of having information about, or being an eyewitness of, the offence, and any of the following persons who have to bear damage because of having knowledge as to the offence committed against the victim of first grade: (1) Guardian of the victim of first grade, (2) Where the victim of first

and family of victim.<sup>60</sup> Although the Act provides that the Government of Nepal, Provincial Government, and Local Level may, with mutual coordination, conduct necessary plan and program based on the available resources and means for the social rehabilitation of the victim,<sup>61</sup> it puts some restriction as to who could get this compensation/ interim relief. For example, Section 34 of the Act, among others, provides such conditions and limitations where the following victims of crime, among others, have been identified ineligible for the compensation proposed under this Act.

1. “One who makes claims for compensation referred to in this Act in the capacity of the victim of first grade where the offence has been committed against him or her when he or she was involved in any other offence or due to that reason,”<sup>62</sup>
2. “A person who has been convicted of the offence against the State under the prevailing law,”<sup>63</sup>

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grade is a minor, and (3) Where the person who has to bear such damage is not involved in the offence.

<sup>60</sup> Section 2(i): “Family victim” means the victim’s mother, father, husband, wife living in the undivided family of the victim or other member of the undivided family dependent on the victim, who is not involved in the offence against the victim of first grade who has died as a direct result of the offence.

<sup>61</sup> Section 19 of the Crime Victim Protection Act, 2074 (2018).

<sup>62</sup> Section 34(b) of the Crime Victim Protection Act, 2074 (2018).

<sup>63</sup> Section 34(h) of the Crime Victim Protection Act, 2074 (2018).

3. “A person who has been convicted of any organized crime under the prevailing law,”<sup>64</sup>
4. “A person who appears to be unjust for being provided with compensation from the perspective of justice,”<sup>65</sup>
5. “A person who is yet to pay such fine, claimed amount or any other amount as ordered by the Court or such revenue or other amount payable to the Government of Nepal,”<sup>66</sup>

These limitations are discriminatory, unconstitutional, and contradictory to international law and standards including the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

The CAT Committee, further elaborating this Article, has stated, “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term “victim” also includes affected immediate family or dependents of the victim as well as persons who have suffered harm in intervening to assist

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<sup>64</sup> Section 34(i) of the Crime Victim Protection Act, 2074 (2018).

<sup>65</sup> Section 34(m) of the Crime Victim Protection Act, 2074 (2018).

<sup>66</sup> Section 34(o) of the Crime Victim Protection Act, 2074 (2018).

victims or to prevent victimization. The term “survivors” may, in some cases, be preferred by persons who have suffered harm. The Committee uses the legal term “victims” without prejudice to other terms which may be preferable in specific contexts.”<sup>67</sup>

***AF recommends including definition of victims more in line with international standards, to cover both those who suffer harm directly and indirectly.***

### *SHORT LIMITATION PERIODS*

Section 170(2) imposes unduly short limitation period for victim’s to file complaints for torture and other inhuman treatment. Under this provision, “no complaints shall lie after the expiry of six months from the date of the offence or from the date of release of the concerned person from arrest, control, custody, detention, imprisonment or preventive detention and from the date of knowledge of the commission of any of the other offences.”

Such six-month limitation or prescription is unacceptable under international standards, and the directions of the Supreme Court of Nepal. Further, CAT committee has mentioned “On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable

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<sup>67</sup> CAT Committee, General Comment No. 3 (2012), para. 3.

as these deprive victims of the redress, compensation, and rehabilitation due to them.”<sup>68</sup> Similarly, the jurisprudence laid down by the regional mechanisms have also maintained that there should not be statute of limitation for crime of torture.<sup>69</sup>

Principle 4 of the UN Basic Principles and Guidelines on the Right to Remedy and Reparations states that a “statute of limitations shall not apply to gross violations of international human rights law ... constituting crimes under international law [such as torture].”<sup>70</sup>

The CAT has further said that limitation periods for acts of torture are incompatible with the Convention against Torture.<sup>71</sup> Moreover, in its concluding observations on Nepal,

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<sup>68</sup> CAT Committee, General Comment No. 3 (2012), para. 40.

<sup>69</sup> *Moiwana Community v Suriname*, IACrTHR (Series C) No. 124, Judgement (15 June 2005) para. 211.

<sup>70</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by GA resolution 60/147, on 16 Dec 2005, UN Doc. A/Res/60/147, 21 Mar 2006.

<sup>71</sup> Nigel Rodley and Matt Pollard, ‘Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, (2006) 2, *European Human Rights Law Review* pp. 127-128. Regional human rights bodies have echoed this view. For instance, the Inter-American Court of Human Rights has stated that “it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such

Committee has further noted that there should be no statute of limitations for the registering of complaints regarding torture.<sup>72</sup>

Additionally, the Nepali Supreme Court on 2 January 2014 held that a “statute of limitations may not be made with regard to the offences of grave violations of international human rights.”<sup>73</sup> The Supreme Court ruling interpreted torture as a grave violation of international human rights.<sup>74</sup>

***The AF recommends that the stipulation of a time period be removed from section 170(2) and amended to categorically affirm that there is no limitation or prescription period for the filing of complaints or cases of torture or other ill-treatment.***

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as torture[.]” *Barrios Altos (Chumbipuma Aguirre and others v Peru)*, IACrHR, Judgment 14 March 2001, para. 4.

<sup>72</sup> UN Committee Against Torture (CAT), *Conclusions and recommendations of the Committee against Torture: Nepal*, 15 December 2005, CAT/C/NPL/CO/2, para. 28.

<sup>73</sup> *Basnet and Pokharel v. Government of Nepal & Others*, 2 January 2014 (069-WS-0057).

<sup>74</sup> *Basnet and Pokharel v. Government of Nepal & Others*, 2 January 2014 (069-WS-0057).



## PROVISION ON ATTEMPT

Article 4(2) of the CAT provides that all acts of torture, as well as attempt, complicity and participation, must be “punishable by appropriate penalties which take into account their grave nature.” In its Concluding Observations on Nepal in 2007, the UN Committee against Torture called on the Government of Nepal to adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of crimes committed.”<sup>75</sup> The penal code does not have any provision for someone who attempts to commit torture and other inhuman and degrading treatment.

***The AF recommends that the attempt to inflict torture and other inhuman and degrading treatment should be criminalized and penalized in accordance of CAT.***

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<sup>75</sup> UN Committee Against Torture (CAT), *Conclusions and recommendations of the Committee against Torture: Nepal*, CAT/C/NPL/CO/2, 13 April 2007, para. 12, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/NPL/CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/NPL/CO/2&Lang=En)

## UNIVERSAL JURISDICTION

The application of the principle of universal jurisdiction is crucial to ensuring accountability for acts of torture globally. Pursuant to the CAT, Nepal must prosecute or extradite to another country for prosecution any torture suspect, irrespective of where in the world the torture took place.

Article 5(2) of the CAT states: “Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.”

The Special Rapporteur on Torture has stated that “[i]n countries where the law does not give the authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator or victim (universal jurisdiction), the enactment of such legislation should be made a priority.”<sup>76</sup> Similarly, “States should establish universal criminal jurisdiction over extraterritorial acts of torture. Under the principle of *aut dedere aut judicare*, States are required to prosecute alleged perpetrators of torture under their jurisdiction or to ensure

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<sup>76</sup> Economic and Social Council, “Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38”, (17 December 2002) E/CN.4/2003/68, para. 26.

their presence at criminal or extradition proceedings.”<sup>77</sup> And therefore the rapporteur called upon States “to exercise jurisdiction over acts of torture and ill-treatment, regardless of the locus where wrongfulness took place.”

However, there are no provisions establishing UJ for the investigation and prosecution of perpetrators of torture and ill-treatment in the Penal Code.

***The AF recommends the Penal Code be amended to include a section recognizing universal jurisdiction to ensure that an alleged perpetrator of torture be prosecuted or extradited, irrespective of the countries where such a crime was committed.***

#### *NON-REFOULEMENT*

The Penal Code also does not contain provision on non-refoulement. “Non-refoulement” means the prohibition on sending a person to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is defined to be absolute.<sup>78</sup>

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<sup>77</sup> UN General Assembly, “Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment” UN Doc A/70/303, 07 August 2015, para. 70.

<sup>78</sup> UN Committee Against Torture (CAT Committee), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, (9 February 2018) para. 9.

Article 3(1) of the CAT imposes a mandatory obligation on States, stating, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”

The principle of non-refoulement is absolute and non-derogable.<sup>79</sup> It is a basic component of the prohibition of torture and must be included in the implementing legislation. It is imperative that a person who faces a risk of torture or ill-treatment in a third country not be forcibly transferred there

***The AF recommends that the Penal Code be amended to expressly include the principle of non-refoulement.***

#### **RESPONSIBILITY TO PREVENT TORTURE AND OTHER ILL-TREATMENT**

In addition to ensuring accountability for torture, the Convention against Torture also places obligations on State parties to prevent torture and ill-treatment. Article 2 of the CAT states, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 16

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<sup>79</sup> CAT Committee, Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

provides for a similar obligation to prevent cruel, inhuman or degrading treatment or punishment.

The CAT Committee views preventive measures as paramount, transcending the items enumerated specifically in the Convention or the demands of its General Comment.<sup>80</sup>

Article 10 and 11 impose specific obligations on State parties to prevent torture by enacting provisions to promote education and training as well as a systematic review of interrogation rules, instructions, methods and practices relating to custody and treatment of persons in custody. Other preventive mechanisms include: (1) signing and ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); (2) Signing and ratifying the International Convention for the Protection of All Persons from Enforced Disappearance; (3) furthering training or education of trained staff involved in custody; (4) ensuring that persons who report allegations of torture are not punished; (5) ensuring that persons who are convicted of torture are prevented from working in custody, interrogation or imprisonment or anything else relating to the deprivation of liberty; (6) ensuring that persons are brought before a judge or other independent judicial officer regularly and allowed visits from family; and (7) providing for an effective monitoring

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<sup>80</sup> CAT Committee, General Comment No. 2 (2008), para. 25.

mechanism, if not the OPCAT then a National Human Rights Institution.<sup>81</sup>

While commenting on Nepal's compliance with its international obligations, various UN mechanisms have commented on the need for preventive and monitoring mechanisms in the context of torture. For example, in its Concluding Observations of Nepal in 2014, the UN Human Rights Committee stated that Nepal "should also ensure that law enforcement personnel receive training on the prevention and investigation of torture and ill-treatment by integrating the Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)."<sup>82</sup> Similarly, in its 2007 Concluding Observations, the Committee against Torture recommended that "[t]he State party should intensify its education and training efforts relating to the prohibition against torture, and introduce evaluation and monitoring mechanisms to assess their impact."<sup>83</sup> However, the Penal Code provides no specific preventive measures.

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<sup>81</sup> UN General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment," Resolution 65/205 adopted by the General Assembly on 21 December 2010, A/RES/65/205, available at: <https://undocs.org/en/A/RES/65/205>

<sup>82</sup> Para. 10, "Conclusions and recommendations of the Committee against Torture: Nepal" CAT/C/NPL/CO/2, 13 April 2007.

<sup>83</sup> Para. 19, "Conclusions and recommendations of the Committee against Torture: Nepal" CAT/C/NPL/CO/2, 13 April 2007.

*The AF recommends that legal provisions criminalizing torture should also place obligations on specific State institutions to establish preventive programs with trainings for police, legal professionals including judges and prosecutors, and medical professionals on Istanbul Protocol, among others, for torture and monitor their implementation. It should provide for the establishment and designation of a national preventative mechanism, in line with that set out in the OPCAT.*

## IMPARTIALITY AND EFFECTIVE INVESTIGATION

As discussed in previous sections, torture and ill-treatment could lead to the violations of many substantive rights enshrined in the ICCPR. The HRC has found a violation of article 2 (duty to provide effective remedy) together with right to life (article 6), right against torture (article 7) and rights to individual liberty to name some.<sup>84</sup> When crimes of

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<sup>84</sup> *Dev Bahadur Maharjan v Nepal* Communication No 1863/2009, UN Doc CCPR/C/105/D/1863/2009 (HRC, 12 September 2012); *Giri v Nepal* Communication No 1761/2008, UN Doc CCPR/C/101/D/1761/2008 (HRC, 24 March 2011); *Sharma v Nepal* Communication No 1469/2006, UN Doc CCPR/C/94/D/1469/2006 (HRC, 28 October 2008); *Herrera* [11-12].

torture and ill-treatment are concerned, States are required to have judicial investigation that entails different constituent elements. For example, investigation has to be *prompt*.<sup>85</sup> Prompt investigation is found to be important not only to protect life, prevent torture and enforced disappearances but also to maintain public confidence in the authorities and adherence to the rule of law.<sup>86</sup> It is also important to prevent any collusion in, or tolerance of, unlawful acts.<sup>87</sup>

Investigation has to be ‘*thorough*’ and ‘*exhaustive*’ as well. Thorough investigation also entails an analysis of facts, evidence and scrutiny of all material circumstances to establish the crime.<sup>88</sup> Thorough and exhaustive investigation also includes States making efforts to investigate and clarify

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<sup>85</sup> *Contreras et al v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 232 (31 August 2011) para. 128; IAHR, ‘Case 10.480. Report No 1/99. *Lucio Parada Cea and others v El Salvador*, Case 10.473, Report No 1/94, IACHR, OEA/Ser.L/V/II.95 Doc 7 rev (27 January 1999), para. 148; *Orgur v Turkey* App no 21954/93 (ECtHR, 1 November 1999) paras. 91-92; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 September 2009); OHCHR, HRC, ‘General Comment No 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (Replaces general comment No. 7)’ (10 March 1992) 44th session UN Doc HRI/Gen/1/Rev.9 (Vol 1), para. 14.

<sup>86</sup> *Ramsahai and Others v The Netherlands* App no 52391/99 (ECtHR, 15 May 2007) para. 326.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Nachova and Others v Bulgaria* App no 43577/98 and 43579/98 (ECtHR, 6 July 2005) para. 114; *Zelilof v Greece* App no 17060/03 (ECtHR, 24 August 2007) para. 56.



patterns of violations, the operational structures that allowed violations, reasons for them, causes, consequences and beneficiaries so the applicable punishment can be imposed.<sup>89</sup>

Torture, which is crime under the Penal Code, is criminal offence listed under Schedule-1. This means, Nepal Police are primarily obligated to investigate allegation of torture. The Criminal Procedure Code requires that a FIR (First Information Report), written, oral, or through electronic means, need to be filed at the nearest police station. In the FIR, the complainant should provide evidence (to the extent possible) that the alleged incident happened.<sup>90</sup> Once the FIR gets registered or the police are informed about the incident, the concerned police office, as soon as possible, has to designate an investigating officer to investigate the incident and collect evidence.<sup>91</sup> The investigating officer is endowed

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<sup>89</sup> *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 213 (26 May 2010) paras. 118-119

<sup>90</sup> Section 4 (1) of the National Criminal Procedure Code, 2074 (2017) : “(1) A person who knows that any offence set forth in Schedule-1 has been committed or is being committed or is likely to be committed shall, as soon as possible, make a first information report in writing or give information verbally or through electronic means, on such offence, along with whatever proof or evidence which is in his or her possession or which he or she has seen or known, to the nearby police office in the form set forth in Schedule-5.”

<sup>91</sup> Section 8 of the National Criminal Procedure Code, 2074 (2017).

with the power to arrest the perpetrator with the permission from the judicial authority.<sup>92</sup>

However, the AF has documented several cases where police refusing to register FIR and to initiate investigation. The police have rarely implemented the legal provisions when they come to investigate a case of human rights violation particularly, the case of torture and ill-treatment, where police are often alleged to have been committing such crimes.

An impartial, independent and effective investigation includes several components such as the assurance that there is no influence of any alleged perpetrators in the investigation;<sup>93</sup> investigators have no records of being involved in violations etc.<sup>94</sup>

The Supreme Court of Nepal has also recognized this lack of investigation by police in cases where they are alleged perpetrators. Supreme Court on 6 January 2020, responding a writ petition, stated the need to have independent investigative

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<sup>92</sup> Section 9 of the National Criminal Procedure Code, 2074 (2017).

<sup>93</sup> Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law Approaches of Regional and International Systems. Approaches of Regional and International Systems* (Brill-Nijhoff 2017) 38.

<sup>94</sup> *Güleç v Turkey* App no 54/1997/838/1044 (ECtHR, 27 July 1998) paras. 81-82.

mechanisms. In this decision, the Court has interpreted, “the investigation, in order to be considered independent, requires that the investigating body and investigators have no subordination, hierarchy or functional dependency with the alleged or the body the alleged are involved.”<sup>95</sup> The Court has also ruled the authorities including the Government of Nepal to constitute an independent investigation mechanism for a fair, impartial and effective investigation of EJKs committed by security officials.

***The AF recommends that the Penal Code be amended with the provisions of independent investigative body for a fair, impartial, and effective investigation in the cases of human rights violations including torture and ill-treatment.***

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<sup>95</sup> Sunil Ranjan Singh *and Others v. Government of Nepal & Others*, 6 January 2020 (067-WO-1043).

Advocacy Forum (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold international human rights standards in Nepal. Since its establishment in 2001, AF has been at the forefront of human rights advocacy and actively confronting the deeply entrenched culture of impunity in Nepal.

AF's contribution in the human rights advocacy in Nepal has been recognized by Human Rights Watch (HRW) in terms of "One of Asia's most respected and effective human Rights Organization". AF is a recipient of a number of awards including "Women In Leadership Award" (conferred by Swiss Agency for Development and Cooperation).



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