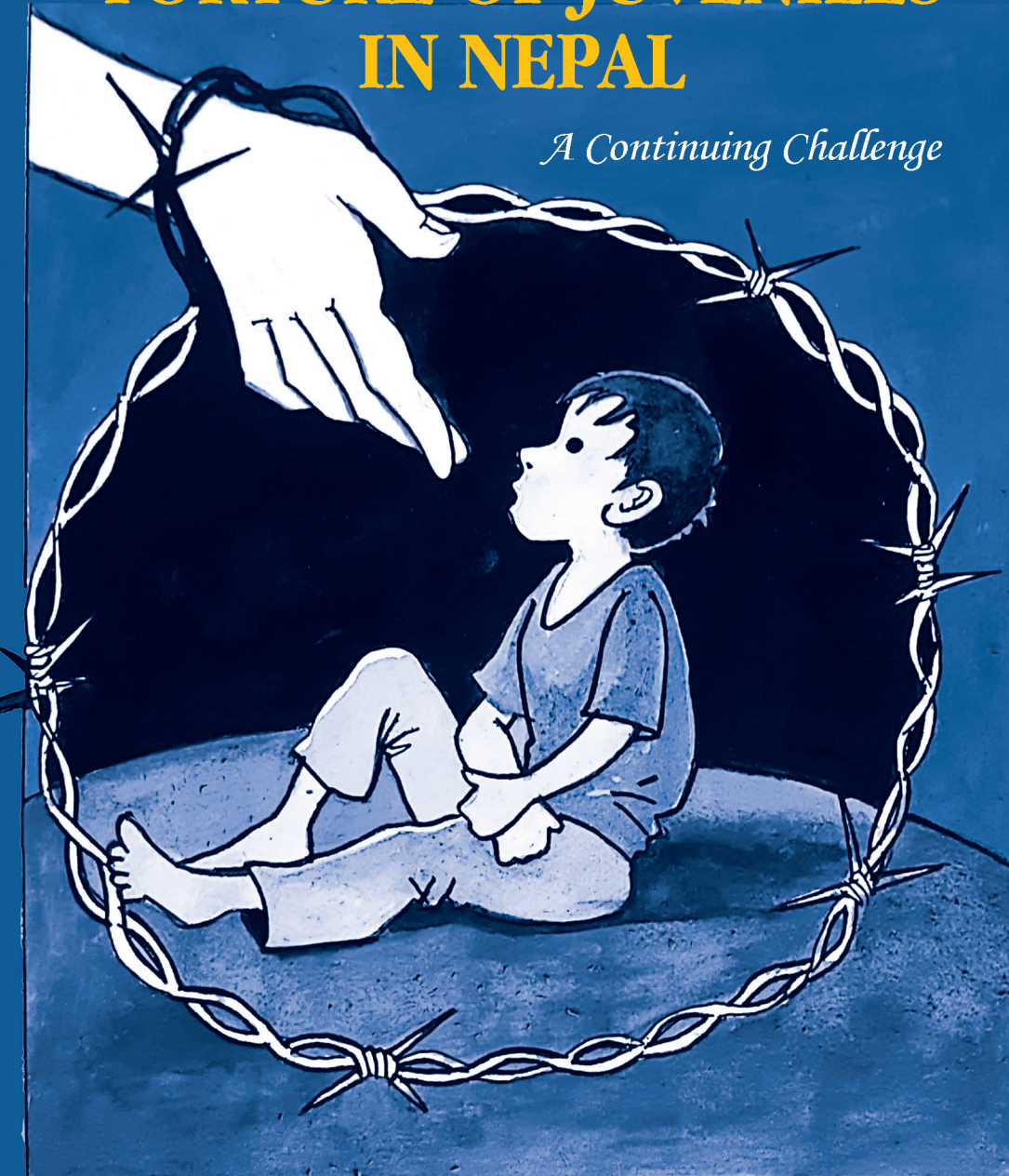


TORTURE OF JUVENILES IN NEPAL

A Continuing Challenge



June 26, 2018

Publication support



DKA Austria
Hilfswerk der Katholischen Jungschar

TORTURE OF JUVENILES IN NEPAL

A Continuing Challenge

June 26, 2018

TORTURE OF JUVENILES IN NEPAL

A Continuing Challenge

June 26, 2018



Torture of Juveniles in Nepal: A Continuing Challenge

First Edition: 2018

Copyright © Advocacy Forum-Nepal

Publisher

Advocacy Forum-Nepal

Lamingtan Marga, Baluwatar-4

Kathmandu, Nepal

P.O. Box: 21798

Tel: # 01- 4425561/4432309; Fax: 01-4432309

info@advocacyforum.org.np,

advocacyforumnepal@gmail.com

Website: [www. advocacyforum.org](http://www.advocacyforum.org)

Layout & Cover design: Kishor Pradhan

Cover Illustration: Sushil Thapa

Printed in Nepal

TABLE OF CONTENTS

Foreword	vii
Executive Summary	1
Introduction	5
Research Methodology	7
Chapter 1	
Trends and Patterns Concerning Torture of Juveniles	9
History of Torture	9
Protection of Juveniles in Practice	10
Analysis of the Current Situation	12
Relevant Case Studies	15
Chapter 2	
International Obligations and Domestic Landscape	
to Protect Juveniles of Nepal	31
UN Convention on the Rights of Children 1989	31
The Children's Act 1992	32
Juvenile Justice Procedural Rules 2006	33
Protection of Children under the Criminal Code 2074 (2017)	34

Chapter 3

Nepal's International Legal Obligations

and Domestic Situation of Torture	37
International Obligation Related to Torture	37
The Domestic Legal Situation Related to Torture	40
The Judiciary and Criminalization of Torture	47
The Terminated Anti-torture Bill 2014	47
Some Cases Related to Torture of Adults	49

Chapter 4

Cases that have Changed the Legal Landscape Related to Torture in Nepal

Maina Sunuwar Case	53
Regina vs. Kumar Lama Case	56
Dev Bahadur Maharjan Case	58
Purna Maya Case	60
Dekendra Raj Thapa Case	62

Conclusions	65
--------------------	----

Recommendations	67
------------------------	----

FOREWORD

Since its establishment in 2001, Advocacy Forum has been at the forefront of adopting integrated intervention measures to reduce the prevailing practice of torture in Nepal by promoting state accountability. AF lawyers visit police detention centers, monitor detainees' legal rights and provide legal support to needy detainees. Every year, the organisation publishes its lawyers' findings in the form of a report. This year, AF focused on child rights and juvenile justice. We regret to report that torture of juveniles is still prevalent in Nepal. In 2014 and 2015, Advocacy Forum had found that 24.1% and 21.7% of juveniles had reported that they were tortured by police respectively. In comparison with the frequency of torture in 2014 and 2015, it is deduced that the level of torture reported by the juveniles visited by AF staff has slightly decreased in the past 3 years. Nevertheless, the figure of 20% in 2017 remains unjustifiably high.

We are publishing this report to mark the United Nations International Day in Support of Victims of Torture, with the sincere hope that it will assist relevant authorities in Nepal to take necessary measures to prevent torture, investigate and prosecute cases of torture, punish those responsible and provide justice to those who suffered torture in police detention centers and rehabilitate and support them.

Advocacy Forum wishes to acknowledge and express sincere thanks to all the individuals who were involved, both directly and indirectly, in the preparation of this report. They are numerous to be named here, but their inputs were vital. In particular, we would like to extend our gratitude

to Ashmita Bhattarai for drafting the report by compiling the relevant documents and Mandira Sharma and Ingrid Massage for their inputs.

Our highest appreciation goes to the detainees and survivors who have shared their experience with us, and above all, we are deeply indebted to the survivors, their families, and the major stakeholders of the criminal justice system in Nepal. We also thank the police officers who have allowed Advocacy Forum lawyers to visit detainees in some of the working districts of AF. We hope that this report will prove beneficial to raise several issues surrounding the discourse of torture and ill-treatment in police custody in Nepal.

Advocacy Forum greatly appreciates the determined lawyers of AF who visit the police detention centers, child correction homes and courts on a regular basis and work tirelessly to collect evidence of injustice, documenting the distresses and pains suffered by the victims. Finally, we would like to thank DKA Austria for providing technical and financial support for the project during which Advocacy Forum collected the data presented in this report and to support the publication of this report.

Om Prakash Sen Thakuri

(Advocate)

Director

Advocacy Forum – Nepal

June 2018

EXECUTIVE SUMMARY

Advocacy Forum (AF) has been visiting police detention centers and child correction home in Bhaktapur for over a decade and a half and documented allegation of torture by security officials and has been providing legal aid to the victims of torture. During visits to police detention centers, AF lawyers have found that most of the children are arrested on petty charges like theft, mobile or mobile charger theft, pick pocketing, quarrel/fighting with friends or in more serious charges like drugs, rape, attempt to rape, murder or attempt to murder etc. However, it was found that they were more vulnerable to torture and ill-treatment in police detention centers. Most of the juveniles interviewed by AF lawyers complained that slapping on cheeks or pulling hair, randomly cutting hair, manhandling are common practices during arrest and detention. However, during interrogation severe types of torture like beating with plastic pipes on the soles of feet, hands and legs, kicking with police boots, keeping in difficult position for a prolonged period of time, interrogation at gun points etc. continue to be practiced.

Nepal has ratified six key international human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Covenant on Civil and Political Rights (ICCPR) and The Convention on the Rights of the Children (CRC). As a party to these treaties, Nepal is obliged to adhere to standards set out by the international human right law in these instruments. Likewise, Nepal has Children's Act – 2048 (1992), The

Children’s Regulation – 2051 (1995), Juvenile Justice Procedural Rules – 2063 (2006) and Criminal Code – 2074 (2017) which will come into force from August 2018. However, proper implementation of these legal instruments is still challenging in Nepal. Complaints of age increase of juveniles to show them adults in police record, detaining juveniles with adult detainees due to lack of separate room for juvenile detainees or treating as adults to the juveniles in the case adults involved, medical professionals not listening complaints of torture and pain in body parts, courts not become more sensitive on juvenile cases, sending them in jail with adult detainees, asking bail amount with juvenile detainees against the law are some common complaints the juveniles complained to AF lawyers.

Over the last few years, Nepal has experienced landmark cases related to Maina Sunuwar, Regina vs. Lama case, Dev Bahadur Maharjan, Purna Maya and Dekendra Raj Thapa that has changed the legal landscape related to torture in Nepal. Maina Sunuwar’s case was heard in Kavre District Court and Kumar Lama’s case was tried in the UK under universal jurisdiction. Nepal has received recommendations from the United Nations Human Rights Committee in cases concerning Mahajran, Purna Maya and other.¹ It is hoped that the Nepali authorities will draw lessons from these cases and will introduce a comprehensive anti-torture bill to prevent the practice of torture in Nepal and provide justice to torture survivors from the past and the future.

RECOMMENDATIONS

Advocacy Forum urges the government of Nepal to take actions to reduce and prevent the practice of torture in Nepal immediately. It recommends the Nepali government to:

- Table the old anti-torture bill in the parliament and ensure it is fully in line with Nepal’s international obligations and takes into account the

¹ For details, please visit: <http://realrightsnow.org/en/>

recommendations of the United Nations Human Rights Committee and civil society.

- Ratify third Optional Protocol to the Convention on the Rights of Child.
- Implement all the recommendations made by member states during the Universal Periodic Review.
- Implement the decision of the courts with regard to compensation under the TCA promptly and form a basket fund to provide compensation to the victims of all forms of human rights violations.
- Make sure that the practice of holding juveniles with adults is prohibited in law and practice.
- Ensure in practice that all detainees have access to a legal representative who should be present during the interrogation and should be able to witness and review a detainee's statement before signing.
- Make sure that medical check-ups are held privately and confidentially and introduce a protocol that allows the doctors to inform the judge confidentially if torture is suspected.
- Establish a prompt and impartial investigation body that is independent from the police to ensure effective investigations into all allegations of torture. Advocacy Forum maintains that it is impossible to make the powerful perpetrators of torture accountable without an independent investigative body.
- Immediately build Child Correction Homes in each province of Nepal.
- Sign and ratify the Optional Protocol to the Convention Against Torture and Introduce an independent National Monitoring Mechanism to monitor the human rights of detainees in all detention facilities in Nepal, including police stations, forestry department facilities and prisons.

- Introduce an advanced official system of age verification testing and train doctors to ensure it is applied consistently across the country.
- In addition to financial compensation, introduce provisions to ensure victims of torture have access to all forms of reparation, including rehabilitation and medical and psychosocial support from the state.
- Modernize the policing system and provide adequate training, resources and modern equipment for evidence-based investigations.
- Introduce a legal provision of universal jurisdiction that will allow the authorities to prosecute individuals that are accused of torture and ill-treatment regardless of their nationality and place where the crime was committed.

WE ALSO MAKE THE FOLLOWING RECOMMENDATIONS TO THE INTERNATIONAL COMMUNITY:

- Advocate for respect of the constitutional rights of detainees such as access to lawyers in Nepal,
- Advocate for a system of systematic monitoring of places of detention by the NHRC and other organizations,
- Support the Nepal government to modernize the policing system including at the provincial level,
- Consider visa vetting to ensure that police and other security personnel involved in torture are not allowed to travel and benefit from training abroad,
- Initiate cases under the Universal Jurisdiction if any alleged perpetrator from Nepal is found in their territory.

INTRODUCTION

Advocacy Forum had documented a gradual reduction in reported incidents of torture between 2001 to 2015. But since 2016, due to the lack of cooperation from the police authority, Advocacy Forum has been unable to reach an overall assessment of patterns and trends of torture in police detention centers.

After long advocacy and lobby by AF and other human rights organizations for criminalization of torture, the Nepal government tabled a bill on torture in 2014, however, this bill was terminated after the dismissal of the parliament in 2017. This was a positive development, and a step forward in fulfilling its international obligations overdue for more than 20 years after Nepal become a party to the UN Convention Against Torture (CAT) in 1991. The government has to reintroduce the anti-torture bill in the new parliament to pass it as a law. The bill's strengths and weaknesses are analyzed in the third chapter of this report. The chapter will also make a recommendation on how specific issues can be better addressed in the bill.

Replacing the Muluki Ain, the country code, Nepal introduced Civil and Criminal Code 2074 which will come into effect from August 2018. It has criminalized torture; however, it is not in line with the standards set in the CAT. Advocacy Forum hopes that the government will prioritize the re-tabling of the anti-torture bill and will give ample opportunity for the civil society and the parliamentarians to debate its strengths and weaknesses. If this process produces a law in accordance

with international standards, it has the potential to bring an end to the systematic practice of torture in Nepal.

Nepal ratified the Convention on the Rights of the Child (CRC) in 1990 without any reservation. Nepal introduced its first juvenile law, the Children's Act - 1992, incorporating provisions set in the CRC. This, however, did not protect the rights of children from being gravely violated during the period of the internal armed conflict from 1996 to 2006. Sadly, the interviews taken with juvenile detainees show that the incidents of child rights violations continue. Advocacy Forum would like to draw attention of the authorities concerned that despite the widespread nature of abuses against children in police custody, no government official has ever been prosecuted by the government.

This report analyses the current legal provisions and practices in Nepal in relation to torture and protection of juveniles. After the methodology section, the first chapter will present the trends and patterns concerning torture of juveniles. It will discuss about the history of torture and analyze whether the legal provisions set in the international and national legislation are implemented in the current practice. The second chapter will present international obligations and domestic landscape to protect juveniles of Nepal. It will also analyzed the national legislation and failure of the Nepal government to incorporate the standards set in international law. The final chapter will update some emblematic cases such as Maina Sunuwar, Regina vs. Kumar Lama, Maharjan vs. Nepal, Purna Maya vs. Nepal and Dekendra Raj Thapa that have changed the legal landscape of Nepal.

RESEARCH METHODOLOGY

Advocacy Forum regularly visits police detention centers and collects data by interviewing detainees and documents cases of serious human rights violations in police detention. The needy detainees are provided legal, medical and psychosocial support. The findings of detention visits are presented in the form of a yearly report. From January to December 2017, AF lawyers interviewed 250 juveniles. During the meeting with detainees for interview, AF lawyers provided them legal counseling about their legal and constitutional rights. They were asked whether their wish to participate is voluntary and were told that they can refuse to continue with the interview anytime they want. If they were interested they were interviewed and if not, they were only briefed about their rights. At no time did the interviewers offer or promise compensation or other benefits to them.

Advocacy Forum follows best practice while conducting interviews and processing the information obtained. It ensures full confidentiality and seeks formal consent from the juvenile detainees and or their relatives. Consent for the case studies included in this report was sought as part of the questionnaires. All detainees in the case studies provided consent for the use and public release of the details of their cases.

When necessary, the identity of the victim has been anonymized by using pseudonyms and any information that might disclose their identity has been redacted. This step was taken to protect all the participating interviewees from potential damages and harmful consequences.

The interviews with detainees were guided by questionnaires especially prepared with the consultation of national and international experts. In some detention centers, AF lawyers conducted interviews in a separate room. If a confidential room was unavailable, as was the case in several detention centers, they conducted interviews while standing at the gates of detention cells, often in the presence of police officials. In such instances, it is recognized that the detainees would likely not provide full information about the police treatment.

CHAPTER 1

TRENDS AND PATTERNS CONCERNING TORTURE OF JUVENILES

HISTORY OF TORTURE

The practice of torture in Nepal has a very long history. However, it dramatically increased during the decade-long armed conflict between 1996-2006. Both the Maoist rebel forces and the security forces systematically used torture to suppress, intimidate, punish, obtain information and/or confession and control victims. Even after the Comprehensive Peace Agreement (CPA) was signed in 2006 and the introduction of the 2007 Interim Constitution and the new Constitution in 2015, torture is still practiced. Though the government institutions outrightly reject it and often claim to have “zero tolerance” for torture, torture and other ill-treatment continue to be practised by the Nepal Police and the Armed Police Force, especially to extract confessions or information. Other security forces involved in torture include forestry guards and Nepal Army personnel guarding national parks.

Advocacy Forum’s records show that torture and ill-treatment, in general, includes manhandling, slapping on face, kicking with police boots, pulling/cutting hair, beating with sticks on hips, back, calves, feet and other parts of the body; beating with plastic pipes and strips of rubbers from tires; stamping or stepping on different parts of the body; forcing detainees to stand in stressed positions; interrogation on gun points; threats of more torture or filing of fake cases, and use of abusive language.

PROTECTION OF JUVENILES IN PRACTICE

In 2005, the Committee on the Rights of the Child expressed concern that even though the minimum age of criminal responsibility is set as 10 years in the Children's Act, Nepal does not have an official system of age verification in place.¹ The Committee observed that people under 18 in most cases were not separated from adults while in detention due to lack of juvenile detention facilities. The Committee expressed alarm that children are often brought to trial without any proper investigation.²

In 2008, Human Rights Watch issued a press release calling for the Nepal government to take action to stop the abuse of juveniles by police.³ Human Rights Watch had documented more than 200 credible claims of torture or abuse committed by police against juveniles as young as 13.

Over the past years, Advocacy Forum has documented many cases of juveniles who reported that they had been subjected to torture or ill-treatment as defined under the CAT. According to Advocacy Forum's previous findings, juveniles are more likely to be subjected to torture in police custody than adults.⁴

Over the years Advocacy Forum has raised its concerns over the medical-check ups conducted by medical officials. It has been documented that most of the detainees have access to medical check-ups; however, most of them are not taken to a medical practitioner immediately after their arrest.

In its past experience, Advocacy Forum found that in some cases doctors were pressurised and threatened to change the medical report

¹ UN Committee on the Rights of the Child: Concluding Observations, Nepal, 21 September 2005; also see: <http://www.refworld.org/docid/45377ea30>

² UN Committee on the Rights of the Child: Concluding Observations, Nepal, 21 September 2005; also see: <http://www.refworld.org/docid/45377ea30>

³ Human Rights Watch, Nepal: End Torture of Children in Police Custody, 18 November 2008; also see: <https://www.hrw.org/news/2008/11/18/nepal-end-torture-children-police-custody>

⁴ For torture reports published by AF, please visit: <http://advocacyforum.org/publications/torture.php>

that had thoroughly documented injuries caused by torture. In addition, a report published by the Office of Attorney General⁵ in 2013 found out that the doctors fill up medical forms on the basis of the answers to the questions “have you consumed alcohol or not?”⁶ With AF lawyers, most of the detainees complain that doctors do not ask about torture or wounds and do not prescribe medicines even if they dare to complain of pain in their body parts. Several detainees have complained that despite police presence they had dared to complain about pain and wounds in their body parts but most of the doctors did not listen. Some of the detainees complained that they were threatened by police not to tell about torture to the doctor and police presence during medical checkup discouraged them to tell the doctor about torture and their problem. In some positive progress, after hearing the complaints of torture some doctors question to the police why they had inflicted torture on detainees, and had told them that if such incidents continue s/he would write in the medical report. Advocacy Forum would like to stress that questions like this would discourage infliction of torture on detainees.

Advocacy Forum has previously documented and published that judges rarely ask juveniles whether they have been subjected to torture when they were presented to the court. Even when they ask the question, it is in the line of “have you been subjected to torture?” This clearly indicates that the judges do not show interest to know whether the child in question has really been tortured as children often fear to speak about the torture they experience due to fear of re-victimization because at the end of the day, they are returned to police custody. Further, police presence during court proceedings discourages the juveniles to tell the judges about torture and ill-treatment in police custody. Advocacy Forum urges the judges to tell the police to stay out of sight, to check detainees

⁵ Office of the Attorney General (OAG).

⁶ OAG Report (2013); Also see: <http://attorneygeneral.gov.np/document/Bulletin/Bulletin10/final%20Buletine%2010.pdf>

bodies for marks of torture, look at their medical report or order a medical check-up by a forensic doctor if necessary.

Section 55 of the Children's Act mentions that a juvenile should be tried in a juvenile court or by a juvenile bench and the court proceeding must be held privately in a closed hearing considering the best interest of the child. However, there are reports that in some instances juvenile cases are heard in the regular bench by changing some settings.

The Children's Act provides that juveniles arrestees should be transferred to the custody of their guardians or to a Child Correction Home. However, some juvenile detainees complain that police increased their age in their record, despite clearly saying that they are juveniles. As a result, juvenile detainees are detained with adults and thus face a risk of being assaulted or abused by adult detainees as well as detaining authorities. In addition, children also lack access to adequate medical facilities and legal assistance and some face long periods of arbitrary detention too.

Currently, Nepal has three Child Correction Homes operating in Bhaktapur, Kaski and Morang districts. The rehabilitation centers in Kaski and Morang do not admit female juvenile detainees, however, the rehabilitation center in Bhaktapur accepts both girls and boys juvenile detainees. These facilities lack basic infrastructure, enough space and services. In addition, only those juveniles who have been sentenced or are awaiting trial are transferred to these facilities. Those in pre-trial detention are kept in adult facilities until they are legally proved juveniles though often their physicality shows they are juveniles.

ANALYSIS OF THE CURRENT SITUATION

AF lawyers visited to 250 juveniles in the police detention centers of two districts and in the Child Correction Home in Bhaktapur and District Courts of Kathmandu and Banke from January to December 2017 and provided them legal aid and age estimation support as per need. AF suspects that analyzing this small number of interviewed juveniles would

not reflect the torture and fair trial situation of Nepal. So, AF is not doing a detailed analysis of these data. However, it is confident to conclude that around 20% of them had complained of torture and ill-treatment by police officers.

Torture methods used on juveniles to extract information for the purpose of the investigation remain similar to the past. Torture was often inflicted at the place of arrest and in police detention centers. It has been reported that methods of physical torture generally consist of beating with plastic pipes and sticks. Verbal abuse, slapping on face and kicking with police boots are most common methods while random beating on the soles of their feet and other parts of the body with iron inserted plastic pipes are other methods of torture.

Some detainees also reported being restrained, either by lying down or being suspended between objects before being beaten with a stick, punched or kicked. As a result of these torture methods, victims have reported various injuries from cuts and bruising, having difficulty walking for many days.

Advocacy Forum has also documented that the security officials often force victims to jump up and down after they have been beaten severely on the soles of feet, to avoid blood clotting. This is a practice frequently used in Nepal apparently to get the blood circulating with the intention of lessening the physical evidence of torture.

Psychological torture and threats have also been reported in some cases. Some detainees were threatened with death if they did not confess. In one particular case, a 14-year-old boy was held at gunpoint during interrogation for the investigation concerning a mobile phone theft. Additionally, in another case, victims have reported that they were forced to witness the police torture other detainees. Likewise, some of the detainees complained that they were deprived of sleep for several days and nights.

The Children's Act makes it implicitly clear that while investigating a case concerning a child, the police should wear plain clothes and should

not apply handcuffs on juveniles. However, in practice Advocacy Forum has observed that police officers are dressed in their uniform in most of the cases and handcuff juveniles while taking them for medical check-ups and court. Most of the interviewed juveniles complained that they were taken for a medical check-up at the time of night by making human chains, for example ten detainees in five handcuffs. It is also evidently clear that most of the cases demonstrate that the police do not mention the reason for the arrest before arresting them. Additionally, the police do not inform the children about their constitutional and legal rights at the time of their arrest or detention. They are only informed about the reason for their arrest after they have been detained. This practice contradicts the standards set out in the Children's Act 2048.

Another frequent complaint made by the juvenile detainees is that police force or lure them with a false promise of releasing them early if they lie about their age in the court. This kind of practice is unethical since there is a risk that a child might face harsher sentences due to the alteration of their age.

The majority of victims were discouraged to tell the doctors about torture or other physical pains. In some cases, victims were subjected to torture by police officials for telling the doctor that they were subjected to torture. Another problem is lack of money for treatment. Even when a detainee dares to complaint to the doctor about health problems caused by torture or other reason in the presence of police officers, doctors rarely prescribe medicines or further check-ups. If they prescribe medicines or further medical check-up the detainees have to incur the expenses. Most often medicines are not bought and further medical check-ups are not done as victim do not have money for it, and police don't pay for it.

Most often, during the consultation meetings of stakeholders organized by AF, doctors complain that they do not have sufficient time to check the detainees thoroughly as police bring them in a large group. Due to the presence of other detainees and police, the juvenile detainees hesitate to tell their problems to the doctor. And often time, doctors are

not trained for medico-legal documentation. In some instances, police take detainees to a dental hospital or local clinics for medical check-ups.

The 2015 Constitution provides that anyone has right to access legal assistance at the time of arrest. Advocacy Forum has found that juveniles are normally given access to lawyers only after they are remanded, leaving no time for their lawyers and family members to collect evidence.

The Juvenile Justice Regulations in Nepal require that the investigation into alleged crimes involving juveniles should be conducted in a child-friendly environment in the presence of a parent or guardian during all stages of the investigation. Advocacy Forum has recorded that some were unable to meet their family, while some mentioned that even though they were able to meet their parents they were too scared to talk about the torture they experienced due to the presence of a police officer in the room.

The majority of the juveniles were produced before the court within 24 hours of their arrest, however, some juveniles detainees complained that they were not presented before the court within 24 hours of their arrest.

RELEVANT CASE STUDIES

JUVENILE CASES DOCUMENTED IN 2017

CASE NO: 1

PERSONAL DETAILS

Sisters, 13-year-old Sunaina (changed name), and 14-year-old Sumitra (changed name) were arrested on 14 July 2017 on charge of homicide in Taplejung district.

INCIDENT ALLEGATIONS

STATEMENT OF SUNAINA AND SUMITRA

On 13 July 2017, we discovered the dead body of our sister-in-law (who lives separately in a nearby house) around 90 to 100 meters away from our home. We were shocked and shouted to get attention from our villagers and relatives in the community. The police were informed right after we informed our relatives and villagers. Once the police arrived, they asked us about the incident and we informed them about what we discovered.

TORTURE ALLEGATIONS

At around 6/7 pm on 14 July 2017, 5 of us were arrested by 4-5 male and female police officers in uniform on suspicion of killing our sister-in-law. They took us to the women's cell of the District Police Office, Taplejung where we were subjected to torture during the interrogation by 4-5 police officers. We identified two police officers including police constable Deepa Rai and Police Inspector Homraj Dahal, but the name and rank of rest of the officers were unknown to us.

They beat us on our hands randomly with black plastic pipes and forced us to be on all fours and beat on our back, hips and legs telling either we killed her, or we were hiding the information. We were then taken to the litigation section and handcuffed on the bench and kept there for 9-10 days. We were tortured during those 9-10 days by beating with bamboo sticks and we were not allowed to sleep at night. Sometimes, they ordered us to stand so that they could beat us randomly on our legs, hips and shin. Sometimes they forced us to be on all fours and beat on our hips and legs.

We also witnessed the police torture other adult detainees in the same case (names not disclosed) including a pregnant woman (name not disclosed) who was released after 12 days of illegal detention because she was pregnant.

EFFECTS OF TORTURE

Both of us felt weak as we were deprived of sleep for 9-10 days, we suffered from nausea and lost our appetite. As a result, Sunita was hospitalized for 2-3 hours. Both of us suffered from pain on the soles of our feet, legs and hips for 8-9 days. Due to the severe beating Sunita has sustained a wound below the right knee.

The DySP in the District Police Office of Taplejung did not allow us to meet our family members by saying that the investigation is in progress.

ILLEGAL DETENTION

We were arrested on 14 July 2017 and illegally detained for 12 days and were only remanded on public offence charge on 26 July 2017. The District Administration officials decided to release us on 21 August 2017 after depositing 28,000 Rupees bail amount. Our family deposited the amount on 24 August 2017, but the police rearrested us by arguing that if released, there may be a threat to our lives. We were illegally detained at the District Police Office, Taplejung that very same day and remained incarcerated for 14 days until we were remanded on 7 September 2017 on a charge of homicide. We were finally transferred to Child Correction Home, Bhaktapur on 14 October 2017.

CASE UPDATE:

Sunaina and Sumitra's case is ongoing. They remain at the Child Correction Home, Bhaktapur for trial.

CASE NO: 2

PERSONAL DETAILS

Ram (alias), a 14-year-old boy was arrested in Kathmandu by police on 15 January 2017 on a charge of murder and theft.

INCIDENT DETAILS

STATEMENT OF RAM (CHANGED NAME)

On 12 January 2017, I was heading towards Buddha Park along with my friends Prem (changed name) and Prakash (changed name) at around 8pm under the influence of drugs. On our way to the park, we saw a man carrying a bag and we forcefully tried to take the bag from him. While doing so I kicked the man and my two friends hit him with a stone on his head. Once the man fell on the ground, we stole his mobile phone and money from his bag and fled the crime scene.

TORTURE ALLEGATIONS

On 17 January 2017, I was arrested at Shyachatar, Kathmandu around 6 pm by 4/5 policemen in uniform from Metropolitan Police Circle, Kalimati with handcuffs on my both hands under the offence of murder and theft. I was then taken to the Metropolitan Police Circle in Kalimati where I was interrogated by 2/3 policemen whose name and rank is unknown to me. During the interrogation, the policemen kicked me in the back and slapped me and kept me in custody that day.

The following day i.e. 18 January 2017, around 7 or 8 am, I was handcuffed and a van of Metropolitan Police Circle, Swyambu took me to their police station. After two hours at Swayambu Metropolitan Police Circle, I along with my friends was handcuffed once again and taken to the office of the Deputy Superintendent of Police (DySP), where 4/5 policemen whose names and ranks were unknown were also present. During the interrogation, one of the policemen in the DySP's office, who was known as "Gabbar" asked us how we killed the man. I told him that we only wanted to steal his belongings and we did not attack him with the intention to kill him but the policemen in the room slapped and kicked me. They hit me on the calves muscle and on my back with a stick by pressing my neck downwards.

EFFECTS OF TORTURE

Since my arrest, the police tortured me, again and again, using a stick which left bruises on both of my calves' muscle and back of my knee for 3/4 days. The injury on my calves and muscle hurt a lot and I was in a lot of pain every time I tried standing and sitting. The police did not provide me with any medication for the pain and I was afraid to ask them for medicine, so the wounds and bruises healed by itself.

I could not tell my mother that the police had tortured me in custody since the police sat behind me when I met her. I also feared if I share the brutality, they would torture me again.

Due to poor economic condition, my mother could not afford any lawyer for my case. I came to know about my rights when Advocacy Forum's lawyer informed me about it during the interview.

I was detained in Metropolitan Police Circle, Swayambu with adult detainees for 27 days. I was then detained in the Central Jail with adult detainees for 10 months. Finally, I was transferred to the Child Correction Home on 28 November 2017 after a writ was filed by Advocacy Forum.

CASE UPDATE:

Ram was charged with homicide and convicted. He was sentenced for 10 years' imprisonment on 23 November 2017 as half of the punishment to the adult.

CASE NO: 3

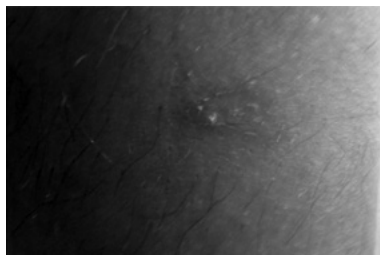
PERSONAL DETAILS

Aaram (changed name), a 14-year-old boy was arrested by Kathmandu police on 24 October 2017 on a charge of some public offence case.

INCIDENT DETAILS

STATEMENT OF AARAM:

During Dashain vacation of 2017, I came to Kathmandu to visit my parents. During my regular visits to Kathmandu, I used to hangout with some friends in the local area but I did not know what they did for a living. They were arrested



for mobile and laptop theft and I had nothing to do with it. The police arrested me because I used to hang out with them often. I have not been involved in any kind of theft nor have the police found any stolen objects in my possession, however, the police remanded me under some public offence cases.

TORTURE ALLEGATIONS

On 24 October 2017, I was arrested at around 7 pm by 4/5 policemen in uniform from Metropolitan Police Circle, Chapagaun. They took me to a room where computers were kept. There were 2/3 civil dressed policemen in the room whose names and ranks were unknown to me. One of the policemen told me to sit with my legs straight and the other policemen tied my knee with a piece of cloth. They then tied my hands behind my back and one of the policemen started to torture me by beating with a stick on the soles of my feet for around 10 minutes and he asked me to jump for few minutes and again resumed inflicting torture on me in the similar manner. They repeatedly asked me about people who were involved in the theft. I started moving my feet when I could not bear the pain but they hit me 5/6 times on my back for disobeying them and moving my feet.

They continued to torture me the same way for the next two days. On the second day, I screamed and moved my feet due to extreme pain during

the torture which resulted in a wound on my right hand. I also witnessed them inflicting torture on two others who were arrested along with me.

EFFECTS OF TORTURE

Due to the severe beating on the soles of my feet, I was unable to stand properly on my own. When an unknown medical personnel while conducting a medical examination asked me if I had any injuries in my body I denied. I lied to the medical personnel because the police standing near to me could hear everything I said and I was scared that they might torture me again. Both my swollen hand and feet healed after a couple of days and I did not get any treatment. I feared to ask for any medicine due to the fear of being tortured by the police again.

When I met my parents, the police stayed close to me to make sure that I would not tell them about the torture perpetrated by the police officers.

When I was arrested, I told the police that I was 14 years old but the police wrote that I was 16 in the police record. My father brought my birth certificate after 6/7 days of my arrest and handed it to the police to prove that I am 14 years old. Even though my father provided them with the proof of my age, I was detained in Metropolitan Police Circle, Chapagaun with adult detainees for 14 days. Only on 7 December 2017 I was transferred to Child Correction home, Bhaktapur.

CASE NO: 4

PERSONAL DETAILS

Suman (changed name), a 15-year-old boy was arrested by police on 30 January 2017 on a charge of theft and drug smuggling.

INCIDENT DETAILS

STATEMENT OF SUMAN

I was arrested with 2 of my friends while visiting Pashupatinath temple. We were arrested on the allegation of theft by CIB (Central Investigation Bureau) policemen in civil dress. Since they were unable to find any illegal things from us, they kept us in the custody on allegation of having 5 grams of brown sugar in our possession.

TORTURE ALLEGATIONS

On the way in police van, they punched us with fists and kicked with police boots on our legs. We were taken to the Metropolitan Police Circle, Boudha. Once we got to the police station in Boudha, they took us to a room and started interrogating us about the theft by slapping on our cheeks and punching with fists on our back and kicked with police boots. They then forced us to sit on the floor and started beating with a black pipe on the soles of our feet. They also interrogated me separately for half an hour with the continuous beating.

From the date of arrest, they kept interrogating and torturing us for 5 days and kept us in the same detention cell for 4 days. At around 8/9 am on 3 February 2017, they took us to a small room near the Litigation Department and informed us that we were arrested on a charge of drug smuggling. They then started interrogating us about drug smuggling under continuous beating. We were kept in the custody of Metropolitan Police Circle, Boudha for 50 days.

EFFECTS OF TORTURE

We were taken to a hospital situated near the Boudha Stupa on 3 February where an unidentified health personnel asked if I was hurt and I told him about the torture I had experienced. The health personnel told the police that they cannot torture me and prescribed me some medicine for the

pain. I did not have any money to buy the medicine and the police did not provide me with the medicine.

The police slapped me once I was brought back to the police station. They yelled at me for telling the medical personnel about the torture I experience in the police station.

Due to the severe beating, I was unable to walk and sit for few days. I did not receive any medical treatment and I was unaware of my legal right to medical treatment.

In the court, I spoke about the torture I experienced in the police detention but the judge did not listen to me. After 50 days of investigation in Boudha, I was sent to prison by the order of the court.

When I was arrested, I told the police that I was 15 years old but the police wrote that I am 18 years old in the police record. I also informed the court that I am 15 years old but I don't know what was written in the legal record because I was sent to the prison with adult detainees. After a medical examination was conducted to determine my age on 29 June 2017, they transferred me to the Child Correction home, Bhaktapur.

N.B. Advocacy Forum provided medical age estimation and legal support to him.

CASE NO: 5

PERSONAL DETAILS

Tika (changed name), a 14-year-old boy was arrested by Kathmandu police on 20 November 2017 on a charge of mobile theft.

INCIDENT DETAILS

STATEMENT OF TIKA

When I was heading towards my home with three of my friends, we saw that a door of a house was open. So we decided to enter the house. I stayed outside the house with one friend while other friends entered the house and stole a phone. We later sold the stolen phone and shared the money among us.

TORTURE ALLEGATIONS

At around 12 in noon on 20 November 2017, I was arrested by 2 civil dressed police officers and brought to Metropolitan Police Circle, Shorakhutte. At around 3.30 pm, I was taken upstairs to the Litigation Department by a police officer known as “Singham” whose ranks and names were unknown to me. He first handcuffed my hands by asking me to keep my hands straight and then started inflicting torture on me by beating with a green pipe on my bottom for 4/5 times.

The following day (21 November 2017), at around 1-2 pm a policeman whose name and rank is unknown to me took me to a corridor, pulled my hair and slapped me twice. He then took me to the custody room where another policeman whose rank and the name is unknown to me started asking me about my other friends by beating me on my hip for about 3/4 times. I was beaten with a stick and my screams were only rewarded with further beatings.

At around 3-4 pm, on the third day, (22 November 2017), they transferred me to the Police Station in Lainchaur. The policemen there, started interrogating me about the stolen mobile phone. They forced me to stand against the wall in an upside down position and started beating me on my hip with a stick. They also pointed a pistol on my chest and threatened to kill me if I did not tell them about the stolen mobile phone. I was detained in detention centers with other adult detainees. I was finally transferred to the Child Correction home on 23 November 2017.

EFFECTS OF TORTURE

Due to the torture of police, I had pain in my hips every time I moved. I was taken for a health check-up at the People's Dental Hospital where medical personnel asked me if there were any wounds or cuts on my body but I lied to him because I was scared of the police who stood beside me during the medical examination.

The remand date was given only after two days of arrest. On my remand date in the court, the judge did not ask me if I was tortured or ill-treated by the police officials but instead, he asked me if I was involved in the theft or not. The police handcuffed me while bringing to the court and taking me back to the Child Correction home.

N.B. Advocacy Forum interviewed two juvenile friends of Tika who were his accomplice in the theft. Similar to Tika, they complained that the police tortured them by pulling their hair, beating with sticks and interrogated them at gunpoint. They were both kept in detention centers with adult detainees and the judge did not ask them if the police used torture to interrogate them. Lastly, similar to Tika, they lied to the medical personnel when asked about injuries because they feared the police officer who stood behind them during the medical examination.

CASE NO: 6

PERSONAL DETAILS

Sudhir (changed name) an 18-year-old man was arrested by police on 27 July 2017 on a charge of motorcycle theft.

STATEMENT OF SUDHIR

I was arrested along with three of my friends on 27 July 2017. One of my friends, Sisir (name changed), came to my place and planned for outings. Two other friends joined us, and we left for a ride in 2 motorcycles. The

police arrested us in Bhaktapur on the way to our destination and took us to Bagikhana, Singhadurbar with our motorcycles.

TORTURE ALLEGATIONS

I was arrested on 27 July 2017 by 6/7 policeman in civil dress and they took us to Bagikhana. On our way to Bagikhana in a police van, we were beaten with sticks and kicked on different parts of our body by the policemen. After they left our motorcycle in Bagikhana, we were eventually taken to Metropolitan Police Circle, Boudha. We were taken to a room by around 4.30 pm by the policemen who arrested us, they forced all of us to lie down on the floor and trampled on our chest and legs, beat with plastic pipes on the soles of feet for almost one hour. They also pulled our hair and slapped on face during interrogation.

EFFECT OF TORTURE

After severe torture, they forced us to walk and jump on the gravel apparently with an intention to lessen the evidence of torture.

They threatened to kill us and to tamper with the evidence in our case if we ever talked about the torture. They took us for a medical check-up that evening, and the doctor asked us if we had any injuries, but we were too scared to talk about the torture we experienced because we feared the policeman standing near us.

JUVENILE CASES DOCUMENTED IN 2018

CASE NO: 1

PERSONAL DETAILS

Bharat (changed name), 12, a 6th grader *dalit* boy from Mugu district was arrested by police in April/May 2018 (He doesn't remember exact date) by 4 policemen in police uniform on charge of theft.

STATEMENT OF BHARAT

My home is in Mugu district. My mother died when I was 8 year old. One day my 13 year old cousin brother gave me a thousand rupees note. Later, I came to know that he had stolen gold and thirty thousand rupees from someone. When police arrested him, they arrested to me also.

ALLEGATION OF TORTURE

We were arrested by four policemen in police uniform and detained in a police station where an unidentified policeman beat me with a bamboo stick on my hands and back and kicked once with police boot on my chest. After keeping us there for two hours, we were transferred to the District Police Office Mugu. In a room at DPO, Mugu an unidentified policeman forced me to lie down on the floor and propped my legs up by catching my legs and another unidentified policeman randomly beat on the soles of my feet with a bamboo stick. Intermittently, they asked me if I was involved in the theft. As I denied my involvement in the theft, the beating and interrogation continued for a long time. When I cried due to pain, they beat me more for making noise. At last they detained me in a detention cell with adult detainees.

Due to police torture, I could not get up. On the third day of my detention one unidentified policeman scolded me for not getting up. He beat me accusing of pretending of illness.

The DySP there also used to pull me up by pulling my temple hair. When I was seriously ill, I was taken to Thini Hospital where I was given pain killer. After 4, 5 days treatment in the hospital I was brought back to DPO Mugu and detained with adult detainees. I and my cousin brother were handcuffed while taking to and bringing back from the court. The police used to take off handcuffs outside of the court and present before the court. DySP had ordered not to put handcuffs on juveniles but when he was out of scene the policemen used to handcuff us.

I don't remember the date but after detaining us at DPO Mugu for around one month the court asked to deposit thirty thousand rupees bail

amount. As my father was not present in the court, I could not deposit the bail amount. Then on 3rd June 2018, I was transferred to Child Correction home, Bhaktapur.

NB: AF lawyers tried to contact his father with the help of DPO Mugu but it came to know that his village is in remote area that needs 2/3 days walk from the district headquarter. So, his guardians could not be contacted. According to him, the economic condition of his family is very poor.

According to the Article 11 (2) of the Children's Act 2048, children aged 10 to 14 should be me punished with monitory liability or asked bail amount. There are several precedents set by the Supreme Court of Nepal too.

CASE NO: 2

PERSONAL DETAILS

Arjun (changed name), a 15-year-old boy was arrested by police on 4 April 2018 on the charge of drug use.

STATEMENT OF ARJUN

I was arrested at around 10 am that day along with my friend Naran (changed name) who was carrying around 60 grams of marijuana in his bag. I was not aware what he had in his bag until we were arrested by an armed policeman whose rank and name is unknown to me. He suspected us and checked his bag.

TORTURE ALLEGATIONS

The armed policeman hit us with a bamboo stick for 8/9 times on our hip and back at the place of arrest when we denied the ownership of the bag containing marijuana. He then handed us over to the Gaushala Metropolitan Police Circle.

Once we were taken to the Gaushala police station, we were taken to the interrogation room where three unidentified policemen in police uniform forced us to sit down on the floor by stretching our legs. One of the policemen stepped on my legs with his police boots and hit on the sole of my feet for about 10/11 times. He scolded us for using marijuana in the tender age and detained us. I was detained with adult detainees for 9 days. I was finally transferred to the Child Correction Home on 13 April 2018.

EFFECTS OF TORTURE

Due to the severe beating, I had pain in hips and soles of feet and I could not walk properly for about 2-3 days. I was taken to Kathmandu Medical College for a medical check-up where an unidentified health worker asked me whether I had consumed alcohol. He did not ask me anything else and I was scared to tell him about the pain caused due to torture because I feared the policeman standing beside me. There were blue marks of torture on my hips for 4-5 days.

The judge did not ask me about the police treatment or torture during the remand hearing.

A policeman had told me that if I tell everyone that I am 17 years old, he would release me in 4/5 days. So, I lied to the court and said I was 17-year-old, but the judge did not believe me and asked for my birth certificate. I informed the court that I did not have a birth certificate, so the judge ordered for medical age estimation. The medical report estimated my age as 15-year-old. The police then transferred me to the Child Correction Home, Bhaktapur.

CHAPTER 2

INTERNATIONAL OBLIGATIONS AND DOMESTIC LANDSCAPE TO PROTECT JUVENILES OF NEPAL

UN CONVENTION ON THE RIGHTS OF CHILDREN (CRC)¹ 1989

Nepal ratified the Convention on the Rights of the Child in 1990. Article 37 and 40 of the CRC protects minors in conflict with the law and sets out their rights relating to the administration of juvenile justice.

Here are some obligations that Nepal is due to follow to protect juveniles in detention under this Convention:

- **Article 19(1)** requires states to “take all necessary legislative, administrative or other measures to protect the child from all forms of mental or physical violence, injury, abuse, neglect, negligence, maltreatment or exploitation, including sexual abuse”;
- **Article 37(a)** states “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”;
- **Article 37(b)** obliges states to ensure that the arrest or detention of a child shall be used only as “a measure of last resort and for the shortest appropriate period of time”;

¹ United Nations Convention on the Rights of Children (CRC) (1989).

- **Article 37(c)** ensures that children are not put in the same detention center or prison with adults and they should be able to keep in contact with their families;
- **Article 37(d)** ensures that children accused of breaking the law have the right to legal assistance;
- **Article 40(2)(b)(iv)** obliges states to ensure that children are “not to be compelled to give testimony or to confess guilt”;
- **Article 40(3)(a)** obliges states to “establish a minimum age below which children are presumed not to have the capacity to infringe the penal law.”

THE CHILDREN’S ACT 1992²

Following the ratification of the Convention on the Rights of the Child in 1990, Nepal adopted its first juvenile law, the Children’s Act of 1992. In summary, here are some key provisions for the protection of children:

- **Section 7** states that “No Child shall be subjected to torture or cruel treatment”;
- **Section 11** states that any child below the age of 10 is presumed to be innocent and shall not be liable to any punishment, while a child between the ages of 10 and 14 years shall be liable to a warning only and if the nature of offense is serious, the child shall be punished with imprisonment limited to six months;
- **Section 15** stipulates that no child “shall be subjected to hand-cuffs, fetters, or solitary confinement” or should be committed to living together in a prison with an adult prisoner;
- **Section 19** states that no case related to a child shall be heard or decided unless “there is a legal practitioner present to defend the

² Government of Nepal (1992), The Children Act 1992.

child” and that the court should make arrangements for the services of a legal practitioner appointed on behalf of the government of Nepal;

- **Section 50** states that juveniles charged with a felony are required to stay in a “Children Rehabilitation Home or in the guardianship of any person or organization” instead of police custody or jail. This mandatory rule is applicable during the investigation process and after sentencing.

According to the Children’s Act, a child is “a minor not having attained the age of 16.” However, the CRC defines a child as anyone less than 18 “unless the majority is attained earlier under national law.”³ As a result, the Children’s Act is inconsistent with the international standards set in the CRC as it fails to incorporate the emerging consensus in international law that a child is anyone under the age of 18.

JUVENILE JUSTICE PROCEDURAL RULES 2006

The Children’s Act 1992 provides the national framework for the juvenile justice system in Nepal. Through the powers conferred by section 58 of the Children’s Act 1991 the Nepal government introduced Juvenile Justice Procedures Rules that provides detailed procedures for the handling of the cases of the child. In summary, here are some key provisions for the protection of children in the juvenile justice system:

- **Section 4(a)** ensures that “police staff shall wear civil dress instead of the police uniform”;
- **Section 4(b)** ensures that the police officer “shall introduce oneself by showing the identity revealing documents and show cause for the arrest while arresting the child”;

³ CRC, Article 1.

- **Section 4(c)** ensure that the police officer “shall inform the child of his/her legal and constitutional rights in the language understood by him/her”;
- **Section 5(1)** ensures that “the investigation and inquiry authority shall arrange for a child friendly environment so as to enable the child to answer the matters asked to him/her”;
- **Section 5(2)** ensures that the interrogation of a juvenile “may be done in the presence of the father, mother, guardian, lawyer or the representative of child welfare home or orphanage if the child has been staying there”;
- **Section 5(4)** ensures that “a child shall not be inquired for a period longer than an hour at once and shall not be inquired at night too”;
- **Article 12(1)** ensure that “the proceeding of the case shall be held in a child friendly environment”;
- **Section 15(d)** ensures that if the juvenile court or bench needs to determine age of a child and the child cannot provide appropriate proof of age, they will determine the age of the child based on the “age certified by the government hospital.”

PROTECTION OF CHILDREN UNDER THE CRIMINAL CODE 2074 (2017)⁴

The Criminal Code Act expected to come into effect from 17 August 2018. The key provision to protect children under this act includes:

- **Section 13 and 25(1)** states that any child below the age of 10 is presumed to be innocent and shall not be liable to any punishment;

⁴ Criminal Code 2074.

- **Section 45(2)** states that any child between the age of 10 and below 14 shall be punished with imprisonment limited to six months or they shall be sent to a Children Rehabilitation Home for up to 1 years;
- **Section 45(3)** states that if the nature of the offence is serious, any child of age 14 or above the age of 14 and below 16 shall be punished with half of the sentence as prescribed for an adult who has committed a crime of similar nature;
- **Section 45(4)** states that if the nature of the offence is serious, any child of age 16 or above the age of 16 and below 18 shall be punished with two third of the sentence as prescribed for an adult who has committed a crime of similar nature.

It is important to acknowledge the fact that the provision under section 45 of the Criminal Code is a positive effort made by the Nepal government to increase the age limit of children (juveniles) from 16 years old in the Children’s Act 1992 to 18 years old which is compatible with the international standard set in the UN Convention on the Rights of Children.⁵

However, Advocacy Forum would like to point out that the protection of children under this Criminal Code still does not meet all the international standards set by the CRC. Section 45(2) states that any child between the age of 10 and below 14 shall be punished with imprisonment limited to six months or they shall be sent to a Child Rehabilitation Home for up to 1 year. However, according to General Comment No. 10 of the CRC, the internationally recognized minimum age for criminal liability is 12-years.⁶

⁵ Article1, CRC (1998).

⁶ Committee on the Rights of the Child, General Comment No.10 (2007), CRC/C/GC/10

In addition, Section 45 of the Criminal Code fails to mention and prohibit the practice of holding juveniles with adults. It also fails to ensure that detained children have right to meet their parents and arrest or detention of a child shall be used as a measure of last resort.

CHAPTER 3

NEPAL'S INTERNATIONAL LEGAL OBLIGATIONS AND DOMESTIC SITUATION OF TORTURE

INTERNATIONAL OBLIGATION RELATED TO TORTURE

Nepal has ratified six key international human rights treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and International Covenant on Civil and Political Rights (ICCPR). As a party to these treaties, Nepal is obliged to adhere to standards set out by the international human rights law.

CONVENTION AGAINST TORTURE (CAT)

Nepal ratified United Nations Convention against Torture (CAT) in April 1991 after the abolishment of the dictatorial and authoritarian rule and the restoration of parliamentary democracy in 1990.

After the ratification of CAT, **Article 2** of CAT has created some crucial obligation to Nepal that is as follows:

1. Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

In addition to CAT, Nepal has also ratified the ICCPR which is the first universal human rights treaty that explicitly includes a prohibition of torture or other cruel, inhuman or degrading treatment in 1991. Under this covenant, Nepal is obliged to adhere to provisions under Article 7 and 10 that are particularly relevant to the prohibition of torture.

- **Article 7** forbids torture in absolute form. It states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”
- **Article 10** complements the prohibition in Article 7 and states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

LEGAL OBLIGATIONS OF NEPAL UNDER INTERNATIONAL HUMAN RIGHTS LAW

➤ **The obligation to Criminalize Torture**

The prohibition against torture is absolute under international human rights law. Article 4 of CAT requires that all acts of torture are treated as criminal offences and individuals responsible for committing acts of torture be punished through appropriate penalties depending on the nature of the crime.

➤ **Duty to Investigate**

International human rights law obliges states to investigate serious human rights violations. The provision set in Article 2 of ICCPR and Article 4, 5 and 7 of the CAT imposes a legal obligation in Nepal to investigate cases related to violations of human rights and

international law and to appropriately punish the perpetrators of the violation reflecting on the severity of torture. In addition, Article 12 and 13 of CAT requires that the relevant authorities must carry out impartial investigations of all cases related to an allegation of torture.

➤ **The obligation to provide compensation for victims**

International human rights law obliges states to provide reparation to victims of serious human rights violation. Article 9 of ICCPR and Article 14 of CAT strongly establishes that states that ratify the treaties must ensure that individuals who are victims of torture have a way to remedy for wrong they have suffered. Nepal is also obliged to provide reparation to victims or their families in cases related to enforced disappearance, unlawful detention and extrajudicial executions.

THE UNIVERSAL PERIODIC REVIEW RECOMMENDATIONS TO NEPAL¹

In 2015, Nepal's human rights record was reviewed for the second time at the twenty third session of United Nations Human Rights Council's Universal Periodic Review. During this session, Nepal received a total of 197 recommendations from 73 member states of the UN. The government of Nepal accepted 148 and noted 18 recommendations. Some of the relevant recommendations that Nepal has accepted include:

- Recommendation to criminalize and impartially investigate acts of torture, and provide victims the right to reparation;
- Recommendation to investigate all allegations of crimes under international law or human rights violations, both past and present;
- Recommendation to explicitly prohibit enforced disappearance as a criminal offence under Nepali law;

¹ NHCR (2015), Suggestions of the National Human Rights Commission Nepal to the Government of Nepal; Also see: <https://www.upr-info.org/en/review/Nepal/Session-23---November-2015>

- Recommendation to prosecute those suspected of committing the crimes before competent, independent and impartial civilian courts, in accordance with international standards;
- Recommendation to intensify efforts to adopt a revised Children’s Act that complies with international standards.

THE DOMESTIC LEGAL SITUATION RELATED TO TORTURE

ARTICLE 22 OF THE 2015 CONSTITUTION²

Despite Nepal’s international legal obligations, Nepal has been very slow to fulfil them through policy changes and institutional reforms. In 2015, Nepal introduced a new constitution for the first time through a constituent assembly. Article 22 of this Constitution constitutes provision regarding rights against torture and includes that the perpetrators of violation of this right will be subject to punishment by law. It assures that “no person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.” If an individual is subjected to torture, they “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.” However, it is important to acknowledge that only a law can criminalize torture and this constitution only outlaw torture, but it does not impose a punishment.

The same provision was recognized by the 2007 interim constitution. However, no separate law on torture is in place yet that would criminalize torture. Till date, complaints of torture are filed under Compensation Relating to Torture Act, 2053 which has not met any of the basic requirements set by CAT. Furthermore, it has not defined torture as a criminal offence and it is solely related to compensation to torture victims rather than prevention of torture. It provides legal safeguards to

² Government of Nepal (2015), Constitution of Nepal.

perpetrators and are not liable to monetary and legal punishment except departmental action against the perpetrators.

Regardless of the 2015 Constitution that outlaws torture, acts of torture and other ill-treatment are continuing systematically practised in criminal investigation for the purpose of obtaining confession and/or information. In addition, Nepal still needs to introduce an inclusive law on prohibition and criminalization of torture. The anti-torture bill proposed to the parliament in September 2014 however was never passed and re-tabled to pass it into law.

In the absence of an inclusive law in line with Article 22 of the 2015 Constitution, the Torture Compensation Act³ remains the only legal recourse for torture victims.

RELEVANT DOMESTIC PROVISIONS IN THE 2015 CONSTITUTION TO PROTECT DETAINEES

- **Right to be informed of charges:** Article 20(1) of the Constitution ensures that “no person shall be detained in custody without informing him or her of the ground for his or her arrest.”
- **Right to prompt legal assistance:** Article 20(2) of the Constitution ensures that “any person who is arrested shall have the right to consult a legal practitioner of his or her choice from the time of such arrest and to be defended by such legal practitioner.”
- **Right to be produced before the court:** Article 20(3) of the Constitution ensures that “any person who is arrested shall be produced before the adjudicating authority within a period of twenty-four hours of such arrest.”

³ Government of Nepal (1996), Compensation relating to Torture Act 1996.

- **Right to self-incrimination:** Article 20(7) of the Constitution ensures that “No person charged with an offence shall be compelled to testify against himself or herself.”
- **Right to information on trial proceeding:** Article 20(8) of the Constitution ensures that “Every person shall have the right to be informed of any proceedings taken against him or her.”

EXISTING TORTURE COMPENSATION ACT, 1996⁴

The 1996 Torture Compensation Act (TCA) defines torture as ‘physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her.’⁵ The TCA was introduced by Nepal as part of its obligations under the CAT.

According to the preamble of the TCA, the main objective of this legislation is to provide compensation, implying that it does not focus on criminalizing and preventing torture.⁶ Additionally, the act refers to an incident of torture that is perpetrated while the victim is in custody, whereas CAT does not specify the place of detention.⁷ Therefore, it is inconsistent with the CAT in this respect.

As the government has not introduced new anti-torture law yet and the existing TCA is not in line with international standard the Criminal

⁴ Compensation relating to Torture Act 1996.

⁵ Section 2(a) Compensation Relating to Torture Act 1996.

⁶ Compensation relating to Torture Act 1996, p. 1.

⁷ Article 1 of CAT states that “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Code that will come into force from August 2018 is only advanced legal instrument to complaint the torture cases. However, as both laws are active, there is confusion under which law torture complaints should be filed.

Under Section 3(2) of the Act, detainees are entitled to receive health check-ups before and after their detention. In addition, the Act provides a 35 days statutory limitation from the date of incident of torture or date of release from police custody to file a case against the perpetrator/s.⁸ This provision is impractical as it fails to consider the fact that a victim who suffered from torture could face difficulties to file a case due to health conditions or fear of intimidation from the perpetrators. However, the criminal code provides 6 month statutory limitation.

This Act provides that victims could get maximum compensation up to 100,000 Rupees and get an order from the court for disciplinary action to be taken against those responsible.⁹ However, a maximum of 100,000 Rupees as compensation is inadequate and extremely low for the further treatment of mental and physical harms, legal assistance, and reimbursement for their lost opportunities. Furthermore, non-compliance of court order is another big challenge the torture survivors are facing. In addition, aside from compensation, almost all victims do not have access to any reparation and rehabilitation, particularly in relation to medical, social and psychological support from the government.

In the present context, the TCA is of little relevance in practice. According to Section 9(2), it should only take a maximum of 35 days to receive compensation as per court order after an application is submitted. Advocacy Forum has observed that few of the victims who were granted compensation after they won the case against their perpetrators have

⁸ Article 5(1), Compensation Relating to Torture Act 1996.

⁹ Article 6, Compensation Relating to Torture Act 1996.

received the compensation within 35 days. Instead, some individuals have been waiting for more than 9 to 10 years.¹⁰

THE CRIMINAL CODE 2074 (2017) AND CRIMINALIZATION OF TORTURE

After many years of the Supreme Court's ruling on Rajendra Ghimire vs. Nepal in 2007, the constitutional promises of the Article 22 and Nepal government's obligations under the CAT¹¹, the Criminal Code Bill was tabled in the parliament on 8 August 2014 and signed into law by the President Bidhya Devi Bhandari on 16 October 2017. This act that criminalizes torture, enforced disappearance, rape and other forms of sexual violence will come into effect from 17 August 2018.

The provision related to torture falls under Chapter 10 Section 167 of the Criminal Code. As the provision related to torture is confined to only few sections, there are not much legal safeguards provided to the torture survivors. Section 167(1) under the title "Torture should not be inflicted provides: Officers authorized to investigate crime, prosecute, enforce law or take under control, detention or custody as per law, should not inflict physical and mental torture on someone or order for it or should not commissioned or order for cruel, inhuman or degrading treatment."¹²

Clarification: For the purpose of this section arrested, taken in control, detention, jail or incommunicado detention or someone taken in custody or due to such person knowingly inflicted physical and mental pain or trouble or cruel, inhuman or degrading treatment or punishment to some other person for the following purpose, it is considered torture or cruel, inhuman or degrading treatment on such person:

¹⁰ AF is waiting full text of the Supreme Court order in the writ filed by AF on behalf of torture survivors demanding a basket fund including others to provide support or compensation immediately.

¹¹ Rajendra Ghimire and Others vs. Office of the Prime Minister and Others (Case No 3219/2062), 17 December 2007.

¹² Unofficial translation done by AF.

- a) To gain information on something,
- b) To get confession on crime,
- c) To punish for something,
- d) Coercion or threat, or
- e) Act against the law.

As this code doesn't define torture and TCA lacks the international stands on definition of torture, there is immediate need of a separate law on torture.

Sub-section 2 provides, "The person who commissioned acts under sub-section (1) shall be punished for five years jail or fifty thousand rupees punishment or both as per the gravity of the crime."

Advocacy Forum would like to point out that the maximum penalty provided for an act of torture under the Criminal Code is inadequate in many cases considering the gravity of torture and the long-lasting physical damages and mental integrity suffered by the victims. It does not mention any additional provisions concerning compensation, reparation and rehabilitation for the victims of torture. So, the victim could be entitled to only fifty thousand rupees compensation which is too low in comparison to the gravity of severe forms of torture.

Sub-section 3 provides, "The person who commits crime or the person who helps to commit the crimes provided under sub-section (1) shall be punished as to the main culprit."

However, this Criminal Code doesn't specify about the command responsibility of the officer in commanding if his/her junior commits such crime. Likewise, it doesn't talk if the junior staffs take responsibility or are forced to take all the responsibility by the commanding officer, they will have immunity from individual liability.

Sub-section 4 mentions, “The person who commits crime mentioned under sub-section (1) cannot claim that he/she followed the superior’s order and he/she will not get immunity for the punishment for such crimes.”

There are practices that the superiors, without mentioning torture or ill-treatment, pressurize the junior staffs to bring the result or find out the truth or solve the case as soon as possible. In such condition, the junior staffs could use every option including torture and ill-treatment. So, making more responsible to the junior staffs only is not the solution for prevention of torture and ill-treatment on detainees/suspects.

Section 169 provides, “The victims under this Chapter should be provided appropriate compensation as per loss and pain suffered by the victim from the perpetrator/s.”

It’s good that the perpetrators will be personally liable to provide compensation to the victims. However, it does not specify how much is appropriate compensation and who will provide compensation if the perpetrator is unable to pay or doesn’t have enough property to pay compensation.

Section 170(2) provides, “For the crime under section 167, the complaint would not be accepted after six months of the incident date or release of such person from arrest, control, detention, custody, jail or incommunicado detention.”

Often a victim who suffered torture faces difficulties to file a case immediately due to health conditions or fear of intimidation from the perpetrators. Advocacy Forum demands the Nepal government to amend this provision by removing the statute of limitation to report incidents concerning torture. By doing so it will encourage the victims to report the crime of torture perpetrated against them once they are physically or emotionally ready to seek justice.

Advocacy Forum urges the Nepal government, instead of providing scattered provisions on torture in different laws, to formulate a comprehensive law in the form of an anti-torture law. So, AF urges the

government to reintroduce the past bill on torture for wider discussion with civil society and pass it into law.

THE JUDICIARY AND CRIMINALIZATION OF TORTURE

In December 2007, the Supreme Court gave a directive order to the government of Nepal to criminalize torture and to provide appropriate reparation to victims of torture.¹³ The order was issued by the joint bench of Justices Baram KC and Tahir Ali Ansari. The court concluded that “torture is practised especially by security personnel. Although there are legal arrangements for compensating torture victims, there is so far no arrangement recognizing torture as a crime and laying down the punishment for it.”¹⁴

This was a landmark case for Nepal since the courts affirmed that Nepal has an obligation to fulfil its international commitment to criminalize torture. The court affirmed that Nepal needs to pass a law that incorporates international standards set in Article 2 and 4 of the CAT and establishes provisions to punish the perpetrators of torture.

In September 2014, a bill to criminalize torture was tabled in parliament which could have paved the way for the government to finally implement the Supreme Court decision and deliver on its obligations under CAT. Unfortunately, the bill was not tabled for debate before the parliament was dissolved ahead of the parliamentary elections in 2017. Advocacy Forum understands that the bill would have to be tabled afresh, and has not been able to establish whether the government has any plans to do so.

THE TERMINATED ANTI-TORTURE BILL 2014

Nearly after two and half decade of ratification of CAT, Nepal drafted “**Torture or Cruel, Inhuman or Degrading Treatment (Control) Act**

¹³ Rajendra Ghimire and Others vs. Office of the Prime Minister and Others (Case No 3219/2062), 17 December 2007

¹⁴ Also see: <http://www.loc.gov/law/foreign-news/article/nepal-supreme-court-orders-formulation-of-law-against-torture/>

2071 (2014), a bill to criminalize torture. This bill came into existence after arrest of Nepal Army Colonel Kumar Lama in 2013 in London as an attempt to extradite him to Nepal. The bill was tabled before the parliament in September 2014. However, the bill was terminated after the dissolution of the old parliament and introduction of the new parliament in 2017.

The bill has defined torture as any form of physical and mental abuse perpetrated by security forces on any person in their custody during remand or criminal investigation. It criminalizes torture in custody and stipulates a maximum of five-year imprisonment term for the perpetrators, including the officials who order the torture. The bill also proposes compensations to the victims from the perpetrators.¹⁵

Discussion on the anti-torture bill (2014), however, failed to start after the draft was tabled in the parliament. The parliamentary committee mentioned that the delay to start discussions regarding this bill was because the parliament had other equally important bills to discuss.¹⁶ This can be interpreted as a sign of the government's lack of commitment towards the provisions of the CAT and protection from torture.

Advocacy Forum urges the government to initiate a public discussion to get feedback from different stakeholders in the anti-torture bill and introduce to the parliament to pass into law as soon possible.

¹⁵ Analysis of bill in Nepali version is available at: <http://advocacyforum.org/leaflet23June2015PDF.pdf>

¹⁶ Also see: <http://kathmandupost.ekantipur.com/news/2016-10-26/anti-torture-bill-gathers-dust-in-house-panel.html>

SOME CASES RELATED TO TORTURE OF ADULTS

CASE NO: 1

PERSONAL DETAILS

Shyam (changed name), a 22-year-old man was arrested by police on 29 May 2017 on a charge of theft.

STATEMENT OF SHYAM

I occasionally spent time with Samrat (name changed) and Mohit (name changed). I was not aware that one day they had stolen LED TV, money, gold and silver. I was with them when they were arrested and the police arrested me too.

TORTURE ALLEGATIONS

I was arrested at around 4 pm on 29 May 2017 by 1 unidentified policeman in uniform and was taken to Metropolitan Police Circle, Gaushala. Once I was taken to the police station, 6/7 policemen whose identity and rank is unknown, took me to a room where I was subjected to torture. They handcuffed both of my hands and forced me to put my knees in between hands. They then inserted a baton between my elbow and back of my knees and suspended me between two tables. Then 2/3 unidentified policemen started interrogating me while beating on the soles of my feet with batons. The interrogation and torture continued for almost an hour.

I was later told by other inmates that the policemen who arrested and tortured me were from the Criminal Investigations Department.

On 30 May 2017, they remanded me for seven more days for further investigation.

EFFECTS OF TORTURE

I was taken to Kathmandu Medical College for a medical check-up where an unidentified health worker asked me whether I had consumed alcohol.

Due to the severe torture, I was having difficulty to walk for 2/3 days. I did not receive any medical treatment, nor was I made aware of my right to medical treatment.

When I met a lawyer from Advocacy Forum, I was scared to reveal that I had been tortured. I later told her about the torture when I met her in the court.

CASE NO: 2

PERSONAL DETAILS

Rohan (name changed), 27, a hotel owner in Kathmandu was arrested by police on 4 January 2018 [2074/09/20] by 4 policemen from Metropolitan Police Circle Bauddha on charge of swindling/cheating. According to him, after arrest he was taken to Metropolitan Police Circle Gausala, Kathmandu.

CASE DETAILS

I run a hotel in Kathmandu. Few days before my arrest one customer had to pay me Rs 6000 but he said he didn't have money. Then I asked him to leave his belonging as a guarantee and take it back after paying the bill. He said he has a gold ring which he can leave as guarantee. He left the gold ring and went out to bring money but he didn't come back. After few days, my wife and I had a quarrel over the issue. She filed a complaint at police and police arrested me. Now she is apologizing to me that she had made mistake.

TORTURE ALLEGATION:

I was arrested from Chabahil Chowk on and was taken to Gausala Police Circle. I don't know in which room I was taken but there were some police with masks on their faces. They blindfolded my eyes with black cloth and forced me to lie down on the floor face down. Then they beat me with plastic pipes and kicked with their boots. They tortured from

2pm to 8pm that day and threatened to kill me there. They didn't provide me food to eat that night. The following day, I was brought to Bauddha Police Station and police took me to the court for remand hearing. I was not beaten after I was brought to Bauddha Police Station. It was difficult to look at the wounds in front of police but there were blue marks on my feet and there was blood clotting in left toe due to torture.

CASE NO: 3

PERSONAL DETAILS:

Dharmendra (changed name), 24, a resident of Banke district from Madhesi community, was arrested by police on 2 February 2018 on charge of drug smuggling.

CASE DETAILS:

On 2 February 2018 [2074/10/19] around 10/12 policemen in civilian clothes arrested me from near a lake in my locality. They seized 6 grams of brown sugar from me. When I denied its ownership, one of the policemen grabbed me by my head and pushed me into the water of the lake and forced me to confess that it was mine.

TORTURE ALLEGATION:

During arrest those 10/12 civil dress policemen beat and kicked me in turn on my back, hip, legs and other parts of my body. Due to that beating my right shin was swollen and sustained bruises on different parts of body. There was also a wound on my left thumbnail. Due to the beating, it was difficult for me to walk. Then I was taken and detained at District Police Office, Banke.

During the remand hearing on 4 February 2018, one policeman told me not to tell the judge about torture. On 13 February 2018 [2074/11/01], due to torture my both legs stopped working so they took me to Bheri Zonal Hospital where one of the policemen told me not to tell about the

torture to the doctor. I was admitted at Bheri Zonal Hospital from 13 to 15 February 2018. After treatment, I was brought back to District Police Office, Banke. Even after treatment I was not able to stand on my feet so, I was taken to the Bheri Zonal Hospital again where they injected a painkiller and brought me back to DPO, Banke.

CHAPTER 4

CASES THAT HAVE CHANGED THE LEGAL LANDSCAPE RELATED TO TORTURE IN NEPAL

MAINA SUNUWAR CASE

In April 2017, the Kavre District court sentenced three Army officers (Babi Khatri, Amit Pun and Sunil Prasad Adhikari) to life imprisonment (20 years) for the murder of Maina Sunuwar in 2004 during the armed conflict. The court acquitted the fourth accused, Major Niranjan Basnet, who is still serving in the Nepali army stating that he was merely following his superior's order to arrest Maina but he was not involved in her killing. The trial before the district court took place in absentia of all four accused, despite repeated court summons, including arrest warrant to notify them of the charges and to compel them to appear in court.

After 13 years of legal battle, the verdict in Maina Sunuwar case is a critical development where Nepali Army personnel have been convicted and held accountable for the first time for their wrong doings during the armed conflict in a civilian court. This is the second case where the court has convicted anyone for crimes during the armed conflict between 1996-2006. In 2014, five former Maoist rebels were sentenced to imprisonment for two years for torture and killing of journalist Dekendra Raj Thapa. This decision made in 2014 was criticized for being lenient for the crimes committed by the former rebels.

The Maina Sunuwar case symbolizes the horror of wartime abuse where 15-year-old school girl Maina was arrested from her home in Kavre in 2004 and brought to the army base in Panchkhal where she was subjected to torture involving drowning and electrocution during

interrogation. She died and disappeared the same day in captivity inside the army barracks after severe torture perpetrated by Nepal Army personnel. At first, the Nepal Army tried to cover up their mistake by denying arresting her and later claiming that Maina was shot whilst trying to escape from custody. After intensive national and international pressure, the army initiated an internal inquiry and brought three soldiers (Babi Khatri, Sunil Prasad Adhikari and Amit Pun) before a Court Martial.

Despite being presented to the Court Martial, none of the soldiers were convicted for the disappearance, torture and killing of Maina. The death caused by torture was described as “accidental” and put down as “carelessness” and a failure to follow procedures. The three accused perpetrators were convicted of procedural offences and sentenced to six-month imprisonment, temporary suspensions of promotions and a nominal monetary fine as compensation to Maina’s family. The guilty officers, however, did not serve their prison term because the court held that their time in confinement during the proceedings of the Court Martial was equivalent to the time demanded by the verdict of the case.

The perpetrators of this crime remained unpunished for over a decade which reflects Nepal’s structural inadequacies in prosecuting torture. Outraged by the decision of the military court, Maina’s mother lodged a complaint at the District Police Office Kavre in 2005 against the four alleged perpetrators. No actions were taken by the District Police Office for months after the complaint was lodged. This eventually forced Maina’s mother to take her case to the Supreme Court.

The Supreme Court in September 2007 ordered the police officers to carry out and complete the investigation within three months. Consequently, a charge sheet was filed in Kavre District Court by the public prosecutor in January 2008. On February 2008, the district court issued a warrant against the four perpetrators. However, the arrest warrant was never enforced and the police told the court that they were unable to trace their whereabouts.

Since 2005, Maina Sunuwar's case has faced numerous political and procedural hurdles and lack of cooperation by the military seeking to protect its officers. After many unsuccessful attempts to seek justice, the outcome of Maina Sunuwar case is the first conviction for wartime abuse in Nepal. The decision of the district court reaffirms the independence of the judiciary from political and military pressure by holding perpetrators of crimes committed during the armed conflict. It is a significant step taken by the civilian court and sets a good precedent which could kindle hope to get justice for conflict victims.

Nevertheless, it is important to note that till date, the three convicted officials have not been arrested and the police have not made any effort to look for their whereabouts. By doing so the relevant authorities have shown their lack of commitment to respect the court's decision. Advocacy Forum demands the relevant authorities to implement the ruling of the court by searching all three convicted officials.

Maina's mother was not convinced about the grounds on which Major Niranjan Basnet has been acquitted and Attorney General's decision not to appeal at high court, she had filed a separate petition to challenge this decision in the High Court. However, the High Court has dismissed the appeal and ruled in favor of Major Basnet. The Attorney General's decision to not appeal against the acquittal of Major Niranjan Basnet dampened the enthusiasm of many victims. This is because Major Basnet was part of the team and was present during the interrogation. The district court's decision to acquit him based on the argument that he was merely following the orders of his superior's contrasts with the international law that explicitly prohibits invoking this justification for committing serious human rights abuse.

In September 2017, the Nepali Army has filed a writ in the Supreme Court against 1. the Office of the Prime Minister and Council of Ministers; 2. Ministry of Peace and Reconstruction; 3. Attorney General of Nepal; 4. High Court, Harihar Bhawan, Lalitpur; 5. Kavre District Court; 6. Truth and Reconciliation Commission; 7. Office of the District Government

Attorney; 8. District Police Office, Dhulikhel and Maina's mother Devi Sunuwar, seeking a review of the verdict of Kavre District court by arguing that the decision made by the district court is wrong. Till date the writ is under sub-judice at the Supreme Court.

REGINA VS. KUMAR LAMA CASE

Nepal Army Colonel Kumar Lama was claimed to be responsible for ordering two incidents of torture allegedly committed in 2005 by military personnel on two detainees, Karam Hussain and Janak Bahadur Raut who were suspected Maoist supporters. Both men allege that they were severely beaten on Col. Lama's orders and threatened with death if they did not confess. Raut claimed that he was suspended upside down while hot water was poured down his nose and that a parrot was allowed to peck him until he bled. While Hussain claimed that officers used cigarette butt to burn his hands. They were severely tortured for several months.

As a consequence of these allegations, Lama was arrested in January 2013 in East Sussex (UK) for intentionally inflicting pain and suffering while exercising his function as a public officer in Nepal. This arrest was possible under section 134 of the UK Criminal Justice Act 1988 that provides for universal jurisdiction over the offence of torture and permits the UK to arrest and prosecute individuals who are accused of human rights violations irrespective of the offender's nationality and wherever the crime was committed.

After numerous delays and a legal battle for 3 years, the trial of Col. Lama on two counts of torture commenced from 6 June 2016 in the Central Criminal Court (Old Bailey) of London. On 1 August 2016, the jury acquitted him on one charge but could not reach to any decision on the second charge after eight weeks of evidence and argument presented to the court. The UK Crown Prosecution Service on 5 September 2016 decided against the retrial of Mr Lama on the second case. Since then Lama has been cleared of all charges against him and has returned to Nepal.

The outcome of this case is a disappointment not only to the victims in the case who had provided evidence on the torture they endured but also for many torture victims who are seeking justice and organizations that are defending them. Advocacy Forum wants to make it clear that undoubtedly both appellants were subjected to torture at Goringhe army barracks. If there were any doubts regarding the prevalence of torture, Mr Lama would not have been arrested and certainly not tried.

The chance of Col. Lama's acquittal, in this case, was high, considering the Nepali authorities' reluctance to provide any assistance to the UK police investigation. Nepal did not permit them entry to Nepal to conduct their own independent investigation in Nepal, nor did they provide the evidence and documents requested by the UK police whereas Col. Lama's lawyers did not face any restrictions and received the cooperation of the relevant authorities to visit Nepal and collect evidence to defend the accused.

Col. Lama is the first person to be tried outside Nepal for crimes committed by any individual during the armed conflict in Nepal. Additionally, it was the first case where a serving officer of Nepal was arrested in a foreign land under the principle of universal jurisdiction for a human rights violation. Despite, the acquittal of Col. Lama, the fact that Lama was arrested and prosecuted in a third country is a significant step. It has set a precedent of universal jurisdiction for the victims of torture and other violation that is open in the UK and beyond.

Col. Lama's trial was the third universal jurisdiction trial in the UK history.¹ There were problems of interpretation during the proceedings. The case was difficult since it concerned a crime committed more than

¹ In April 1999, Anthony Sawoniuk was convicted under the War Crimes Act 1991 of two counts of murder which occurred in 1942 in Nazi-occupied territories. In 2005 Faryadi Zardad, an Afghan warlord was convicted under section 134 of the UK Criminal Justice Act 1988 and sentenced to 20 years in prison in relation to conspiracy to torture in Afghanistan in the 1990s.

10 years ago in another country that is a thousand miles away. Advocacy Forum played a key role in gathering evidence for this prosecution.

Advocacy Forum demands that the Nepal government ends impunity on international crimes. Additionally, the reason why Col. Lama was prosecuted in the UK was because Nepal does not have a legal framework to prosecute such crimes in the country. Advocacy Forum hopes that the Nepal government will draw lessons from this case and will take necessary steps to criminalize torture with a comprehensive law that meets the international standards to investigate cases of torture in Nepal.

DEV BAHADUR MAHARJAN CASE

Dev Bahadur Maharjan was arrested from his home on 26 November 2003 by members of the Nepal Army. He was illegally detained at the Chhauni military barracks from the time of his arrest until 17 September 2004, when he was transferred to an official detention facility in Sundarijal.

For most of the ten months that Mr Maharjan was held at the military barracks, he was blindfolded or made to wear a hood which allowed him to look downwards only. Moreover, he was not able to contact his family, friends, or consult with a lawyer during this time. During visits by delegates of the International Committee of the Red Cross (ICRC), he was hidden in a different room and was therefore not able to speak to them.

While he was detained in the barracks, soldiers severely tortured him for four consecutive nights and randomly beat him and other detainees throughout his detention. He was beaten on his back, his legs, the sole of his feet and shins, kicked in his chest and face, he was asphyxiated, and cold water was spilled over him. Mr Maharjan suffered injuries from this torture but was not provided with medical treatment. Moreover, Mr Maharjan was also forced to watch the execution of an inmate and subjected to horrific conditions of detention.

Mr Maharjan was finally released from detention on 7 January 2005, after his sister filed a successful petition for a writ of *habeas corpus* at the Supreme Court with the support of AF. The Supreme Court held that

Mr Maharjan had been detained without sufficient ground and reason and without complying with the appropriate legal procedure. He was never charged with any offence. Since his release, there has been no investigation by the state into Mr Maharjan's enforced disappearance and torture, and Mr Maharjan has not been given any compensation for his illegal arrest and detention.

Mr Maharjan was unable to file a complaint of torture or enforced disappearance in Nepal, as they were not considered as crimes under Nepali Law. He made a complaint to the NHRC of Nepal, but no investigation was undertaken. In 2008, Mr Maharjan took his case to the United Nations Human Rights Committee, represented by Advocacy Forum. The Human Rights Committee reached a decision in July 2012. It found that Mr Maharjan was a victim of illegal detention, enforced disappearance and torture at the hands of the then Royal Nepal Army. In addition, it found that the anguish and distress caused to his family by the disappearance also violated the prohibition of torture and other ill-treatment.

The Human Rights Committee recommended Nepal to carry out a thorough and diligent investigation and prosecute and punish those responsible. It also recommended Nepal to provide Mr Maharjan and his family with adequate compensation. In addition, it called on the Nepal government to criminalize torture and to repeal all laws granting impunity to those allegedly responsible for torture and enforced disappearance.

Since the recommendation of the Human Rights Committee, no criminal investigation has been carried out to investigate Mr Maharjan's case and no person has been prosecuted in relation to the crime. The government has only provided Mr Maharjan with a small payment of 175,000 rupees as "interim relief," which does not commensurate with the gravity of the violation. He is under regular medication.

It is important to note that torture and enforced disappearance will be criminalized under the Criminal Code 2074 and that this will come into force from August 2018. This is a positive step taken by the Nepal

Government to prevent and criminalize offence related to torture and other ill-treatment, illegal detention and enforced disappearance. However, the Criminal Code does not allow a retroactive application. Therefore, none of the cases of torture during the conflict will be able to be prosecuted under this provision. Advocacy Forum urges the Nepal government to adopt a comprehensive legislation to criminalize torture and enforced disappearance in line with international standards. Additionally, Advocacy Forum recommends that Nepal ratifies the Convention on the Protection of All Persons from Enforced Disappearance.

PURNA MAYA CASE

After having been subjected to a series of threats from soldiers who were looking for her estranged husband, Purna Maya (alias) was dragged out of bed by soldiers and taken into custody in 2004. During this time, she was blindfolded, interrogated about her husband's activities, punched and kicked, told to drink urine, bitten, and repeatedly raped by four soldiers, before being dumped on the street.

She suffered grave injuries, including a severe haemorrhage that required her to undergo surgery to have her uterus removed. She also suffered from severe depression and post-traumatic stress disorder. After the attack, she and her daughter were displaced. She lost her small tea business and property. She is also rejected by part of the society because she is a rape victim and faces financial constraints as her husband has stopped providing the food allowances for her and their daughter because of the rape.

Despite notifying officials about the crime and identifying one of the alleged perpetrators in 2006, investigation has never been opened into her case. In 2011, her lawyers from Advocacy Forum and several Nepali women's rights organizations were barred from lodging a complaint with the police. Police refused to file the complaint because Nepali law at that time provided that complaints in rape cases must be brought to the police

within 35 days of the incident. An appeal to the Supreme Court calling for the registration of the case was failed.

Since Purna Maya failed to obtain justice in Nepal, her lawyers from Advocacy Forum and REDRESS brought a complaint before the United Nations Human Rights Committee alleging that Nepal was responsible for serious violations of Purna Maya's human rights. Advocacy Forum and REDRESS argued that Purna Maya was a victim of torture, arbitrary detention, inhuman treatment and discrimination, contrary to the ICCPR, which Nepal ratified in 1991. The complaint examined the nature of rape as a form of torture and the obligation that states have to respond to it and argued that the limitation period for filing rape complaints was discriminatory and contrary to Nepal's obligations under the Covenant.

In 2017, the Committee concluded that Purna Maya was subjected to torture, arbitrary detention, inhuman treatment and discrimination. It urged Nepal to investigate the facts; to prosecute, try and punish those responsible, and to provide her with full reparation, including reimbursement for medical expenses incurred. The Committee also urged Nepal to adopt legislation to make torture a crime in its domestic law and to remove other barriers to justice for rape victims. The Committee urged Nepal to take some concrete measures, among others, ensuring the confidentiality and protection of victims during the filing of a complaint, the investigation and the proceedings and to provide training and conduct awareness-raising campaigns on violence against women and provide adequate protection to victims.

In November 2015, following several Supreme Court decisions, the statute of limitations on reporting of rape cases was extended from 35 to 180 days in Nepal. However, victims can still not file first information reports about cases that occurred during the armed conflict. The Committee noted in its decision that the previous 35-day limitation period for filing complaints of rape was "unreasonably short" and "flagrantly inconsistent with the gravity and nature of the crime and that it has a

disproportionately negative effect on women, who are predominantly the victims of rape.”²

Since the recommendation of the Human Rights Committee, no criminal investigation has been carried out to investigate Purna Maya’s case and no person has been prosecuted in relation to the crime. The government has not provided Purna Maya with any compensation and reparation commensurate with the gravity of the violation.

Advocacy Forum urges the Nepal government to immediately implement the decision of the Human Rights Committee by investigating the facts and prosecuting and punishing the perpetrators. It also demands that the government provide effective and full reparation to the victim and ensure that the victim has access to all the necessary rehabilitation and medical treatment. In addition, Advocacy Forum urges the Nepal government to lift any time limitation on prosecution for rape and take all the necessary steps identified and recommended by the Committee to prevent further violations. It also stresses that the Government needs to adopt a comprehensive legislation to criminalize torture that meets international standards and permits investigation and prosecution of conflict-era crimes.

DEKENDRA RAJ THAPA CASE

Dekendra Raj Thapa, a journalist, was abducted on 26 June 2004 by the then Maoist cadres from his home. He was then severely torture and buried alive. On 16 August 2004, a maoist commander had announced that Thapa was “eliminated.”

On 26 June 2008, Dekendra’s dead body was exhumed with the technical assistance provided by National Human Rights Commission (NHRC).

For four years, the police failed to make any progress in the investigation. Even after the registration of the FIR pinpointing the

² The Decision of the Human Rights Committee Available at: <http://www.redress.org/downloads/hrc-views-17-march-2017.pdf>

perpetrators, police did not appoint any investigating officer and the public prosecutor office remained indifferent to the case. Then, on 12 December 2012, his wife Laxmi Thapa requested the Appellate Court in Surkhet to issue a mandamus order to the police for prompt investigation and prosecution of the case.

On 5 January 2013, the Dailekh district police arrested five cadres of (the then) UCPN-M and CPN-M on suspicion of abducting and killing Dekendra Raj Thapa. Despite a reported confession of one of the alleged perpetrators, police investigations were temporarily halted for a few days following orders of the Government of Nepal. The Attorney General pressurized the Dailekh District Attorney's Office and District Police Office to stop recording statements of the accused. The Government claimed that these cases would be dealt with by the Truth and Reconciliation Commission and that the proceedings were threatening to peace process. The UCPN-Maoist led coalition government on 9 January 2013 directed the police and prosecutor to immediately halt all investigations into the case.

On 15 January 2013, responding to a writ petition filed by Laxmi with the assistance of Advocacy Forum, against the Prime Minister and the Attorney General, the Supreme Court ordered the police and District Attorney's Office to continue investigations and summoned the Prime Minister and Attorney General for contempt of court.

Lakshiram Gharti Magar, one of those arrested, provided his statement to the police and the public prosecutor that he and others had buried Dekendra alive after severely torturing him as per party's instruction. He added that he was eager to tell the truth to the authorities regarding the murder. He also said that he was ready to face any punishments so that Dekendra's soul would rest in peace.

On 7 December 2014, the District Court, Dailekh, delivered the final verdict after hearing the arguments of both the plaintiff and the defendants, keeping open the provision to grant amnesty to the perpetrators and provide reparation to the victims. The Court sentenced Nirak Gharti

Magar, Harilal Pun and Jaya Bahadur Shahi to two years' imprisonment. Lakshiram Gharti Magar and Bir Bahadur KC were sentenced to one and a half years and one year of incarceration respectively. The court also ordered the District Prison to release Bir Bahadur and Lakshiram, stating that they had served their terms by the time. The court has also decided to keep on hold the cases of four other accused who are at large.

Though this verdict is not encouraging in terms of the sentence imposed for such a serious crime, it however, has ended the debate that has been hovering around Nepalese transition that the existing criminal justice system is not empowered to hear the conflict-era cases and that these cases only can be dealt under TRC Law. Also, the case has proven that seeking justice for victims of conflict in Nepal is very challenging.

CONCLUSIONS

The prevalence of torture among juveniles suggests that the Nepal government has failed to fulfill its obligations both under the CAT and CRC. In the light of the findings in this report, Advocacy Forum calls on all the relevant governmental institutions to ensure that the juvenile justice laws are in line with the international standards, ensure an end to the practice of torture on juveniles, abide by the rulings of the Supreme Court and implement all the recommendations made by the relevant bodies, such as the UPR, CRC Committee and Human Rights Committee.

Advocacy Forum further calls on all NGOs and INGOs working with juveniles in detention to step up their monitoring and increase the pressure on governmental institutions and the stakeholders of the criminal justice system to allow access to detainees in pre-trial detention.

The case studies presented in this report indicates that the provisions set under the Children's Act are not held up in practice. There has been evidence that children are detained with adults, are not informed about the reason for their arrest before they are detained and are handcuffed during their arrest or on the way to the court. Advocacy Forum urges the Nepal government and relevant authorities to protect the innocence of children and ensure that treatment of detained juvenile is practised in accordance with the law.

Cases of Maina Sunuwar, Kumar Lama, Dev Bahadur Maharjan, Dekendra Raj Thap and Purna Maya show that impunity is still present in Nepal. Advocacy Forum urges the Nepal government to uphold and

enforce the rulings of the District Court in Maina Sunuwar's case and make efforts to find the convicted officers and take them into prison. In addition, it urges the Nepal government to take steps to provide justice to Dev Bahadur Maharjan and Purna Maya following the recommendation made by the UN Human Rights Committee to investigate the facts and prosecute the perpetrators. It also demands the government provide effective and full reparation to the victims and ensure that the victims have access to all the necessary rehabilitation and medical treatment.

Even though the Nepali government has criminalized torture and enforced disappearance for the first time in its history, still laws on torture and enforced disappearance are lacking. In addition, the provisions under the Children's Act and Protection of Children in the Criminal Code are not in line with the standards set in the CRC. Advocacy Forum stresses that there is an urgent need for the Nepal government to introduce a comprehensive law that criminalizes torture and a new law that protects the children in line with the international standards.

RECOMMENDATIONS

Advocacy Forum urges the government of Nepal to take actions to reduce and prevent the practice of torture in Nepal immediately. It recommends the Nepali government to:

- Table the old anti-torture bill that criminalizes torture in the parliament and ensure it is fully in line with Nepal's international obligations and takes into account the recommendations of the United Nations Human Rights Committee and civil society.
- Ratify third Optional Protocol to the Convention on the Rights of Child. Implement all the recommendations made by member states during the Universal Periodic Review.
- Implement the decision of the courts with regard to compensation under the TCA promptly and form a basket fund to provide compensation to the victims of all forms of human rights violations.
- Make sure that the practice of holding juveniles with adults is prohibited in law and practice.
- Ensure in practice that all detainees have access to a legal representative who should be present during the interrogation and should be able to witness and review a detainee's statement before signing.

- Make sure that medical check-ups are held privately and confidentially and introduce a protocol that allows the doctors to inform the judge confidentially if torture is suspected.
- Establish a prompt and impartial investigation body that is independent from the police to ensure effective investigations into all allegations of torture. Advocacy Forum maintains that it is impossible to make the powerful perpetrators of torture accountable without an independent investigative body.
- Immediately build Child Rehabilitation Homes in each province of Nepal.
- Sign and ratify the Optional Protocol to the Convention Against Torture and Introduce an independent National Monitoring Mechanism to monitor the human rights of detainees in all detention facilities in Nepal, including police stations, forestry department facilities and prisons.
- Introduce an advanced official system of medical age estimation and train doctors to ensure it is applied consistently across the country.
- In addition to financial compensation, introduce provisions to ensure victims of torture have access to all forms of reparation, including rehabilitation and medical and psychosocial support from the state.
- Modernize the policing system and provide adequate training, resources and modern equipment for evidence-based investigations.
- Introduce a legal provision of universal jurisdiction that will allow the authorities to prosecute individuals that are accused of torture and ill-treatment regardless of their nationality and place where the crime was committed.

**WE ALSO MAKE THE FOLLOWING RECOMMENDATIONS
TO THE INTERNATIONAL COMMUNITY:**

- Advocate for respect of the constitutional rights of detainees such as access to lawyers in practice,
- Advocate for a system of systematic monitoring of places of detention by the NHRC and human rights organizations,
- Support the Nepal government to modernize the policing system, including at the provincial level,
- Consider visa vetting to ensure that police and other security personnel involved in torture are not allowed to travel and benefit from training abroad,
- Initiate cases under the Universal Jurisdiction if any alleged perpetrator from Nepal is found in their territory.

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)

AF's mission is to combat the culture of impunity by promoting the rule of law. AF seeks to achieve this mission through a number of activities, including capacity development of the victims themselves, legal aid and high level policy advocacy aimed to create effective institutions and legal and policy frameworks necessary for fair and effective delivery of justice. The objectives of AF are to provide legal aid to the victims of human rights violations, including children and women suffering from impacts of armed conflict, and juveniles in detention center; to undertake systematic monitoring and documentation of human rights violations; to promote comprehensive transitional justice mechanisms; to advocate for the reforms of legislations; to combat impunity and to work to prevent torture.

June 26, 2018



DKA Austria
Hilfswerk der Katholischen Jungschar

Publication support