

INFORMAL

Vol. 27, No. 2, April-June 2009



Criminalize Torture !

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Formal—Informal

"We are positive about the mandate extension, but there is a caveat. There has to be serious deliberations on questions that have been raised about OHCHR's performance."

Prakash Sharan Mahat, leader, Nepali Congress
Addressing an interaction programme in Kathmandu



"What is the use of extending OHCHR's mandate if it cannot speak when it has to?"

Ishwor Pokhrel, General Secretary, CPN-UML
Addressing an interaction programme in Kathmandu



"It is our understanding that the extension of OHCHR's term sometime ago is only a temporary measure."

Richard Bennett, Chief, OHCHR-Nepal
Talking to media



"OHCHR's jurisdiction should be revised because NHRC is fully capable of carrying out its duties."

Gauri Pradhan, Spokesperson, NHRC
Addressing an interaction programme in Kathmandu



"OHCHR is related to the peace process. And, the process is yet to come to a logical conclusion. So the office is required till the peace process completes."

Subodh Raj Pyakurel, Chairperson, INSEC
Talking to Republica Daily



Initiate Action for Torture Free Society

Eighteen years have been passed since Nepal ratified the UN Convention Against Torture, cruel or inhuman or degrading treatment on 1991, an international instrument for fighting against torture, but the trend of inflicting torture is yet to be stopped. The democratic government formed after the success of Popular Movement of 1990 enacted Torture Compensation Act with the objective of controlling torture in the country. Failure on the part of government authorities to implement the Act fully and lack of strong political will resulted into poor implementation of the national and international instruments formed to combat torture.

With the restoration of multiparty democracy in the country following the success of Popular Movement of 1990 there has been rise in the number of institutions working for the protection and promotion of human rights. The situation of torture exacerbated during the period of Maoist insurgency but incidents of torture have continued even after the formal end of the Maoist insurgency. Not only the state actors, but also the non-state actors like youth wings of political parties and armed groups of Tarai are competing for the act of inflicting torture. Abduction, beating and even murder of a person for the sake of collecting donation are normal phenomenon for such groups. The political parties rather than establishing accountability, are promoting impunity by providing political protection to the criminals. The law enforcing agencies remain mute spectator in these incidents. There are many loopholes in the Torture Compensation Act, which will ultimately discourage victims to initiate efforts for Justice and embolden perpetrators.

Despite some efforts of the government to combat torture in the country, many things remain to be done. The CAT itself is not able to provide justice to individuals if the state is unable or unwilling, so the government needs to ratify the optional protocol of CAT. The government should bring some legislation, which will criminalize torture and provide protection to the victims in line with the international instruments as mere compensation will not give justice to the victims. The government has to make legislation to strictly discourage torture by security agencies and strictly enforce Law and Order situation in the country to discourage the non-state actors from inflicting torture. The government should ratify the Rome Statute of the International Criminal Court to end impunity and establish accountability.

Many non-governmental organizations are working in the sector of torture but they have failed to reach the grass-root level, where torture is rampant. Many people at the rural parts of the country are still unaware about their rights against torture. The goal of torture free New Nepal will not be fulfilled until government show strong will power in this regard and act accordingly. Continued pressure from non-governmental organizations and civil society is must to pressurize the government to abide by the international standards to fight against torture. The lone efforts of non-governmental organization are not sufficient to fight against torture so all should work unitedly and should work for providing justice to the torture survivors while campaigning for torture free society. As the country is going to draft a new constitution, continued pressure from all quarters is a must to pressurize the Constituent Assembly so that it will make the human rights friendly constitution and incorporate necessary measures for uprooting torture in the country. The mandate of the Jana Aandolan II is to make human rights friendly equitable society so rather than just giving rhetoric about torture free New Nepal, political parties have to initiate concrete effort for preparing foundations for torture free society and they cannot have better occasion that International Day against Torture to begin ground work.

Letters to the Editor

Make it interactive

I have gone through your two issues of *Informal*, the October-December 2008 issue that focused on Human Rights and January-March 2009 issue, which focused on women's issues. *INFORMAL* has been able to give in-depth knowledge in both the themes to its readers.

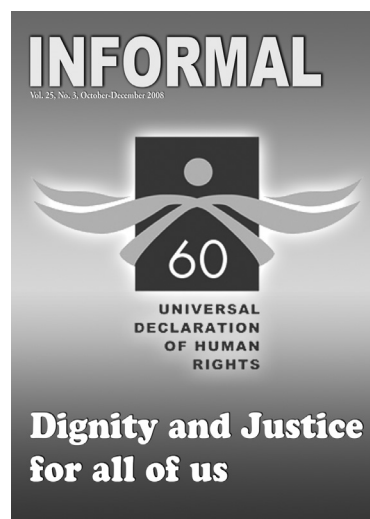
Talking about the latest edition of *INFORMAL*, which has the theme of empowering women, the magazine has been able to deliver the contents to show the ground reality of Nepali women. Only giving rhetoric of empowering women will not yield any result, the political parties must start action for empowering women. In the interview with Nain Kala Thapa, like all the bureaucrats and political leaders, she also said that her office is doing its best to empower women but it is not reflected in the grass-root level. It is a tragedy in Nepali society that all claim that they are doing their best while in power but fail to bring changes in the society. Despite legal and constitutional protection against discrimination

against women, women have to face a number of problems like charge of witchcraft, domestic violence and women are still taken as second grade citizen so all must be united to end such mal-practices and make new Nepal a discrimination free, just and equitable Nepal. The article 'Situation of Domestic Violence in Nepal' by Bajare Chaudhari 'Sushil' presents how horrible the situation is in Nepal.

It would also be better if you get comments from concerned stakeholders in such issues on why they failed to take action against perpetrators and provide justice to victims. Only presenting opinion will not be an effective tool as the bureaucrats of Nepal are not sensitive to listen to people's voices unless they come to street and organize chhaka-jam and start burning tyres. So, it would be better if you present both perspectives in interactive way.

Raju Thapa

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Give grass-root level's perspective

I have an opportunity to read your quarterly publication January-March 2009 issue of *INFORMAL*. The theme is very relevant showing the situation of Nepali women. All the articles of the magazine are very relevant and *INFORMAL* became the eye-opener to all the people who want to have information about the situation of women. Ensuring meaningful representation of women is a must for restoring sustainable peace in the country and *INFORMAL* needs to continuously push the concerned stakeholders for ensuring proportional representation of women in every sector. Though *INFORMAL* has been publishing every issue as special issue concentrating in one topic but it would be more relevant if you inform about the theme of next *INFORMAL* in previous issue and ask feedbacks and write ups from readers so that they can give grass-root level's perspective on the theme.

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Tortured Nepalis



» Subodh Raj Pyakurel «

It is also a form of torture to use force, vandalism and obstruction to people's daily life in the name of bandh, strike and demonstration. Only those people resort to use of force and vandalism on the days of bandh who do not any logical or significant reason to call bandh or who do not have confidence of public support for their cause. To use force is to attack. This is more heinous than waging war.

Torture should not exist in practice among human beings. In the days of hunting and gathering, killing was a necessity for man, otherwise he would starve. Man improved its hunting skills from trick of striking at the sensitive organ of the animals to using light to brutal ways of luring rabbits, capturing calves to force the cows to come near, piercing oxen's nose, striking elephants with hooks as it moved to social and family lifestyle. Thus, we can say that man championed the techniques of torture from such tactics used to domesticate the animals.

The people wishing to capture power and government on the basis of violence and terror use worst forms of torture in public to weaken the people mentally. They have the aim of making the pain of torture widespread and spreading terror among the people so that no one would dare to oppose them. The act of torturing a person well established in society to death falls in this category. The attacks on public places, service centers and religious centers can also be put in the same category.

Authoritarian rulers bestow too much power to the police in the name of maintaining peace and security. They arrest, torture or kill in a fake encounter the opponents label-

ing them as terrorist or being involved in treason. For the authoritarian rulers, the easiest pretext to divert people is advocacy of race, religion or jingoism. Most of the mass murders have been occurred in the world on such pretexts. People are attacked on charge of not belonging to same race, religion or being involved in treason or their supporters. Fear forces people to maintain silence. They remain neutral thinking the other communities are not against them. In such a divided territory, all kinds of authoritarian, brutal regime and individuals gain base to spread arbitrariness. Such state is called the police state.

The identity of an individual is established by his language and script because he disseminates his logics and opinions by uttering words and in writing. If he is free to express, write and form association. Those who can listen to or follow such thoughts or opinion can know and understand the truth. Rulers know this reality. That is why the press freedom is taken as a fundamental right of an individual. Where such right is accepted, there talks, dialogues, logics and legal procedures are used to establish truth and to reach to a logical conclusion. In such a society, all kinds of use of force and violence are

strictly prohibited. In sum, in such society, there is no room for torture because all kinds of torture are banished.

The corporal punishment at schools including beating, scolding and insults are forms of torture. All mental or physical tortures are termed as crimes in the international conventions and in the Nepali Constitution.

It is also a form of torture to use force, vandalism and obstruction to people's daily life in the name of bandh, strike and demonstration. Only those people resort to use of force and vandalism on the days of bandh who do not any logical or significant reason to call bandh or who do not have confidence of public support for their cause. To use force is to attack. This is more heinous than waging war. War is waged at the battle field for self defense. But here, bandh is called at other places or all across the country if there is no agreement with somebody. We all Nepalis are the victims of torture and victims of terrorism at present. Until a government capable of taking immediate action against anyone inflicting direct or indirect torture and until the people rise to express their opinions with sensitiveness while making decisions on political issues, the Nepalis will continue to suffer from torture.



» Bidhya Chapagain «

Criminalize Torture: Way to Fulfill Obligation Under CAT

Background

Nepal successfully held the Constituent Assembly (CA) election in April 10, 2008 and declared itself a Secular, Federal Democratic Republic through the CA on May 28. It is a significant milestone in Nepal's history and reveals the success of democracy and democratic values. While many difficult tasks remain unresolved, one of the most challenging tasks for the government is to deal with the practice of torture by the security forces and the Maoists and political parties' youth wings. Despite the end of the absolute rule after the People's Movement in April 2006 and the end of armed conflict waged by the Maoists, the practice of torture has continued. A total 1,313 cases of torture were documented by an NGO Advocacy Forum during a period of one year up to June 2007.¹

Existing legislation, particularly the Interim Constitution and the Torture Compensation Act, fails to properly criminalize the acts of torture. Though many personnel of the

state security agencies genuinely believe in respecting human rights, the Nepal Army and the Police have not adequately addressed the prevalent use of torture and other degrading treatment. In addition, the political parties have failed to offer their stand to rid the problem of torture. For example, though the Torture Compensation Act is being revised, political parties and the government are reluctant to reform the existing legal measures as per the spirit of the UN Convention against Torture and the directives of the Supreme Court.² Rather the political parties seem engaged in institutionalizing a culture of impunity in order to fulfill their political interests. An example of this is the decision of the Council of Ministers to release persons arrested on different criminal charges.³

Torture is one of the most serious violations of human rights and human dignity. The protection of human rights is generally recognized to be a fundamental aim of modern international law. The proscription of torture is among the non-

derogable, most fundamental norms of international human rights law, recognized as a breach of customary international law by domestic courts and the norm by international tribunals.⁴ The right to be free from torture can never be suspended or overridden, whether by claims of national security or other purported justification.

Torture and ill-treatment in custody are prevalent throughout Nepal, which was practiced with increased brutality during ten years of civil war between the rebels of the then Communist Party of Nepal (Maoist) and the government security forces. During the conflict period the practice of torture by the security forces in Nepal was intrinsically connected to other abuses. Torture victims were invariably killed or disappeared in order to conceal the abuse. Those persons not killed were usually kept in detention until their injuries pass and evidence lost. Those kept in military barracks for extended periods were then sent to the police, to get an arrest on record.⁵ However,

1. Advocacy Forum, "Torture Still Continues – A brief report on the practice of torture in Nepal", June 25th, 2007 (http://www.advocacyforum.org/pdf-coll/26_June_publication.pdf)

2. Rajendra Ghimire vs Government, criminalize torture

3. In October 27, 2008, Cabinet made a decision to withdraw 349 cases of a so-called political nature filed at the district level has added to concerns regarding on-going impunity.

4. "The right to reparations for acts of torture: what right, what remedies?", http://www.ircrt.org/Admin/Public/DWSDownload.aspx?File=%2FFiles%2FFiler%2FTortureJournal%2F17_2_2007%2Fart_04.pdf

5. Torture and zero rule of law in Nepal, Asian Legal Resource Centre, 17 February 2005, <http://www.alrc.net/doc/mainfile.php/61written/279/>

most were not released. The police obtain further detention orders under draconian laws such as the Public Security Act and the Terrorists and Disruptive Activities (Control and Punishment) Ordinance, after which victims may be kept under police custody, sent to prison, or handed back to the army.

Status of Implementation of Anti-Torture Convention

Nepal became party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1991. Article 2 of the Convention clearly outlines each State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. However, even after 18 years, the government has not taken any measures to prevent torture in the country. Nor has it fulfilled its reporting obligations. The government has been proven stubbornly uncooperative in its international torture reporting obligations.

In April 1994, Nepal appeared for the first time before the Committee against Torture, the international body of experts monitoring the implementation of the Convention against Torture. The government's initial (two-page) report of September 1993 on the implementation of the provisions of the Convention against Torture was described by the Committee as "scant

on detail".⁶ It was supplemented at the time of the meeting by a six-page statement and a 10-page background note. The Committee recommended that a supplementary report be submitted within 12 months. No such report was submitted. Although Nepal's second report, was due on June 1996, however, the second, third and fourth combined report was submitted to the Committee on March 2004. Fifth periodic report was due in June 2007, again the state failed to meet the due date. However, instead of sending fifth periodic report, the government submitted its comments on the concluding observation of the committee issued in November 2005.

In 1994, the Committee against Torture noted with concern the failure of Nepal to implement fully the Convention, in particular the lack of legislation incorporating the crime of torture.⁷ In 2005 the Committee commented positively the adoption of the Torture Compensation Act (TCA), 1996 however, it emphasized the implementation of the Convention, and in particular in respect of the enactment or amendment of the legislation.⁸

The Special Rapporteur on Torture has followed up several cases of torture in Nepal and has highlighted the worsening situation in the course of the armed conflict.⁹ It has commented on the inadequacies in the legal framework governing torture in the 1996 TCA.¹⁰ Other UN bod-

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6. Concluding observations of the Committee against Torture: Nepal, 12/06/94. UN document A/49/44, paras. 138-147.

7. CAT/C/SR.180, 26 April 1994, in the course of considering the initial report of Nepal submitted under Article 19 of the Convention (the only one submitted by Nepal at the time of writing), contained in UN Doc. CAT/C/16/Add.3, 16 December 1993.

8. CAT/C/NPL/CO/2, 13 April 2005, Conclusions and recommendations of the Committee against Torture, Consideration of reports submitted by State parties under Article 19 of the Convention, Committee against Torture, Thirty-fifth session, 7-25 November 2005, para 11

9. Report of the Special Rapporteur on Torture submitted pursuant to Commission on Human Rights resolution 2000/43, UN Doc.E/CN.4/2001/66, 25 January 2001, para.823

10. Report of the Special Rapporteur on Torture, E/CN.4/2002/76/Add.1, para.1104

In 2005 the Special Rapporteur on Torture concluded that torture is practiced systemically in Nepal and highlighted the admissions by the Nepali official to him that "a little bit of torture helps." He also said he even received "repeated and disturbingly frank" admissions from senior police and army officials that torture was acceptable in some instances, and was indeed systematically practiced.

ies such as the Working Group on Arbitrary Detention¹¹, the Special Rapporteur on extra-judicial, summary or arbitrary executions, following a country mission in 2000, expressed his concerns over reports of extra-judicial killings and "disappearances" and the prevailing climate of impunity¹², Torture is not a criminal offence in Nepal and perpetrated rampantly without accountability. In 2005 the Special Rapporteur on Torture concluded that torture is practiced systemically in Nepal¹³ and highlighted the admissions by the Nepali official to him that "a little bit of torture helps."¹⁴ He also said he even received "repeated and disturbingly frank" admissions from senior police and army officials that torture was acceptable in some instances, and was indeed systematically practiced.¹⁵

Besides the UN agencies and victim groups individual states, European Union, domestic and international human rights organizations have expressed their concern over the increase of human rights violations, including torture and the deteriorating security and law and order situation and violations of human rights, including those by security forces in Nepal and urged the government of Nepal to take further immediate action in conformity with its international obligations.¹⁶ In November

2005, the United Nation Committee against Torture recommended to the government of Nepal to adopt domestic legislation "which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the TCA to bring it into compliance with all the elements of the definition of torture provided in the Convention."¹⁷

Despite the constitutional guarantee and ratification or accession of several international human rights treaties including the ICCPR and CAT, torture is rampant in Nepal. As it is evident that torture Nepal is routinely and systemically practiced throughout time and there is no proper documentation and investigation of torture events in the country from government side.¹⁸ Despite the commitments to the rule of law, fair trial, and the right to personal dignity, enshrined with the United Nations Charter, the Universal Declaration of Human Rights and the ICCPR, torture continues to be endemic in Nepal.

National Response to Combact Torture

Nepal is also state party to the International Covenant on Civil and Political Rights (ICCPR), of which

11. See Report of the Working Group on Arbitrary Detention, Addendum, Visit to Nepal, UN Doc. E/CN.4/1997/4/Add.2, 26 November 1996, para.26

12. Report of the Special Rapporteur on extra-judicial, summary or arbitrary executions, supra, para.43

13. Report of Special Rapporteur on torture, E/CN.4/2006/6/Add.5, 9 January 2006

14. UN News Centre, "Torture 'conducted on systematic basis' in Nepal": UN Rapporteur." 2 May 2006, <http://www.un.org/apps/news/story.asp?NewsID=18325&Cr=Nepal&Cr1> (last visited 13 June 2007).

15. Report submitted by Special Rapporteur on Torture to the Commission on Human Rights Sixty-second session, E/CN.4/2006/6/Add.2, 21 March 2006

16. Make Torture a Crime, AI Index: ASA 31/002/2001

17. Concluding Observations by the Committee Against Torture, CAT/C/NPL/CO/2, 13 August 2007

18. Amnesty International Report, 2000, p. 177,188, Amnesty International Report 2001,p 179, Amnesty International Report, 2002, p. 182.

article 7¹⁹ prohibits torture. However, it is difficult to see any substantive evidence of a commitment on the part of the government of Nepal to ending the widespread and systematic torture that exists in the country.

The Interim Constitution, 2007 and Torture Compensation Act are major legal documents that prohibit torture in Nepal. The transition period had significant consequences at the political level including redefinition of the constitutional and legal framework and of domestic legislation. The Special Rapporteur on Torture in his March 2007 report submitted to the UN Human Rights Council welcomed the fact that both the Comprehensive Peace Agreement and the Interim Constitution prohibit arbitrary detention, abduction, disappearances and torture and other forms of ill-treatment as well as requires such offences to be publishable by law.²⁰ However, the Interim Constitution only criminalizes torture that occurs during official detention, whereas the Convention obligates Nepal to criminalize any act of torture that is committed or instigated by an official within territorial jurisdiction of Nepal. Furthermore, the Torture Compensation Act (TCA) is too narrow to meet international standards; it does not even criminalize the practice of torture, which is inconsistent with the Interim Constitution. It appears that the section on human rights entrenched therein raises concerns, as some of its provisions could be deemed inconsistent with Nepal's international obligations.

The TCA which provided that victims of torture or relatives of people who died in custody as a result of torture can seek for compensation at the local district courts. Regrettably

the definition of torture in the law is not in line with the one contained in the Convention against Torture. The law also fails to stipulate specific criminal punishments that can be imposed on the perpetrators as required in the Convention. It merely gives the judge the power to direct the concerned authority to take disciplinary action against the officers involved without even putting a burden upon the government department concerned to report back to the court or any other authority on the action taken. No penal provision under which alleged perpetrators of torture can be brought to justice was included in the Act. Lack of independent monitoring mechanisms to monitor the detention centers and independent inquiry into torture allegations is another major reason for the widespread torture.

The Act is inadequate for the prohibition of torture and the obligations born by the Convention to the state. Furthermore, there are provisions in the draconian laws that increase the torture in Nepal. So, in one hand, the legislative measures to combat torture are insufficient. Furthermore, the legal system does not offer sufficient opportunities for victims of torture to obtain remedies and make perpetrators accountable for their criminal acts. Torturers enjoy almost complete impunity in Nepal. Contrary to the requirement of the Convention, Nepalese law does not comprehensively proscribe torture brought to respond to the problem of torture. In fact, it is almost entirely ineffective for number of reasons:

National legislation: flawed response to address situation of Torture

The definition of torture in the TCA is narrower than that in the

The Interim Constitution

only criminalizes torture that occurs during official detention, whereas the Convention obligates Nepal to criminalize any act of torture that is committed or instigated by an official within territorial jurisdiction of Nepal.

Furthermore, the Torture Compensation Act (TCA) is too narrow to meet international standards; it does not even criminalize the practice of torture, which is inconsistent with the Interim Constitution.

19. No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

20. Report of Special Rapporteur on torture, E/CN.4/2006/6/Add.5, 9 January 2006

Nepal has no other specific law that defines torture as a crime, the only recourse is the "assault" section of the Civil Code of Nepal where physical assault is defined as a crime. However, the Civil Code gives fines/punishment according to the nature of the wound. Even more important is the fact that even this 'assault' section of the Civil Code does not provide any specific provision for assault which has taken place whilst the victim is in custody, that is, when the State is involve.

Convention against Torture, as it relates only to torture inflicted when a person is taken into custody. It only criminalizes torture that occurs during official detention, whereas Articles 1 and 4 of the Convention Against Torture obligates Nepal to criminalize acts of torture that are committed or instigated by an official within Nepal's territorial jurisdiction. Torture is considered a crime against humanity and the Convention has obliged all parties to define the act of torture as a crime however, non criminalization of torture under the domestic law is a major flaw.

The CAT Committee and the SR on Torture repeated their requests "to define the crime of torture as a matter of priority in accordance with Article 1 of the Convention against Torture, with penalties commensurate with the gravity of torture". To date, this provision has not been implemented in legislation. The government in its comments sent to the CAT Committee on the conclusions and recommendations in June 2007 states that the draft Torture Act has been prepared which incorporates the definition of torture in the spirit of the Article 1 of the Torture Convention with broader and wider definition which has been referred to the Ministry of Law, Justice and Parliamentary Affairs for technical approval.²¹ However, no progress has been reported neither any details of the draft have been made available to the public. The government informed the Special Rapporteur that the new bill defines torture in accordance with "the spirit of the Convention and explicitly makes any form of torture and ill-treatment by public officials a criminal offence punishable under the law.

Other legislations also fail to properly implement Nepal's obligation to prevent and criminalize torture. The Evidence Act lacks provisions on witness protection, In listing the duties of the police, the Nepal Police Act does not explicitly state that police personnel must refrain from torture and other forms of cruel, inhumane and degrading treatment. The Police Act and the Armed Force Police Act, in their lengthy sections delineating crimes that a member of the Police or Armed Police may commit and their associated penalties, do not criminalize the practice of torture. The Army Act provides immunity from prosecution for any army personnel conducting any action while discharging duties in good faith. While the Act provides that torture may not be committed in good faith, there is no transparency as to the investigations or prosecutions to be taken.

The Local Administration Act permits the chief district office to empower security agencies to use "whatever means necessary" in order to maintain peace and security. This language permits indiscriminate assaults, including torture against civilians. The Prison Act has conditional regulations on detention standards, such that the standards need to be implemented in possible ways which are not as per the international standards.

Moreover, as Nepal has no other specific law that defines torture as a crime, the only recourse is the "assault" section of the Civil Code of Nepal where physical assault is defined as a crime. However, the Civil Code gives fines/punishment according to the nature of the wound. Even more important is the fact that even

21. CAT/C/NPL/CO/2/Add., Comments by the Government of NEPAL to the conclusions and recommendations of the Committee against Torture (CAT/C/NPL/CO/2), 29 January 2008

this 'assault' section of the Civil Code does not provide any specific provision for assault which has taken place whilst the victim is in custody, that is, when the State is involved. As complaints under the Act are treated as civil cases, whether or not a case is filed is up to the victim. This contravenes the principle enumerated in the Convention that torture is a criminal act, sufficiently serious to attract the sanctions and prosecution of the state. There is also no provision under the Act for protection of the victim and other witnesses, essential for effective redress in torture cases. Besides, torture is defined very narrowly in Nepal, and torture by state officers outside custody appears to be totally an exemption. Consequently, very few lawyers use this clause in court and torture victim is deprived of the rights to seek an effective legal remedy. Torture as crime against humanity, is insufficiently defined with light penalties compared to its criminal gravity under draft Criminal Code which is inadequate to combat ever-growing practice of torture and flourished impunity.

Nepal lacks legislation that criminalizes acts of torture by non-state actors. The existing legislations do not sufficiently implement the international legal obligation to prohibit and criminalize torture which violates its obligation under Article 2 (1) of the Convention. There are several deficiencies in the Nepali criminal justice system that remain to be rectified.

Absence of independent monitoring and enquiry mechanisms

Independent monitoring of

detention facilities is not a concept unknown to the Nepali authorities.²² However, the presence of absolute impunity in the state mechanism is hindering the effective criminal justice system including independent and transparent monitoring mechanisms. CAT Committee has expressed its concern about the prevailing climate of impunity for acts of torture and ill-treatment and the continued allegations of arrests without warrants, extrajudicial killings, death in custody and disappearances. It has also mentioned with concern the lack of an independent body capable of conducting investigations into acts of torture and ill-treatment committed by law enforcing authority.

Mechanism to hear and handle the complaints in case of torture is necessary, therefore, an independent national institution should be established and made functional, established exclusionary rule for confessions, proactive program is essential to address to bring changes addressing various forms of violence. Law should be brought to address them appropriately and specifically on the most serious forms of such violence generated by all types of non-state actors.

The Interim Constitution has upgraded the NHRC to a constitutional body, and entrusted it with additional mandates. The commission is mandated to request governmental action, including provision of compensation, in cases of human rights violations. However, inherent flaws on the Interim Constitution hold back the effectiveness and independence of the Commission and leave it with no options when its recommendations are flouted or not

Mechanism to hear and handle the complaints in case of torture is necessary, therefore, an independent national institution should be established and made functional, established exclusionary rule for confessions, proactive program is essential to address to bring changes addressing various forms of violence.

22. The Prevention of Torture in Nepal, a view from the APT, Association for the Prevention of Torture (APT), 15 June 2007, http://www.apr.ch/region/asiapacific/Nepal_Background.pdf

The judiciary also has the responsibility to monitor the prison. According to the 1991 Judicial Administration Act, these monitoring functions ought to be performed in relation to various categories of detainees, including pre-trial prisoners, detained minors, female or disabled inmates.

implemented.²³ It has not created any mechanisms to bind the government to implement the recommendation of the NHRC.²⁴ In its strategic plan for the period 2008-2010, the NHRC states that it will facilitate to develop national guidelines consisting of standard/checklist for detention centres and support setting minimum national standard for detention center and witness/victim protection. The Interim Constitution does not grant the NHRC the same powers and functions as the NHRC Act 1997. Article 132 of the IC does not explicitly mention the responsibility to "visit, inspect and observe" jails and other types of such facilities under public jurisdiction. In many instances the government has denied the Commission any access to intervene. In addition, perpetrators have consistently threatened victims of torture from taking legal action against them, and the criminal justice system has failed to adequately prosecute perpetrators of human rights violations.

The government should strength the capacity of the NHRC to investigate human rights violations and compel government to take action against the perpetrators. Recently, the OHCHR-Nepal and NHRC have signed the principles to guide collaboration and cooperation between these two institutions to support the capacity building endeavors and taking up the investigations into the cases of the human rights violations which can bring key structural changes in the human rights situation. It is important because it will enable the NHRC to strengthen its capacity in monitoring, investigating,

interviewing, promoting, reporting and human rights analysis. The NHRC should be given permission to carry out regular, independent, unannounced and unrestricted visits to all places of detention, including places where suspects/prisoners are held illegally.

The judiciary also has the responsibility to monitor the prison. According to the 1991 Judicial Administration Act, these monitoring functions ought to be performed in relation to various categories of detainees, including pre-trial prisoners, detained minors, female or disabled inmates. However, judicial officers are increasingly unwilling to accept and record complaints of torture, even where victims brought forward for 'processing' have clear physical injuries caused by abuse while in custody. Although these officers are duty-bound to make enquiries and keep records on such abuses, at every step all basic principles of the rule of law - civilian oversight, judicial review, and constitutional and international norms - are always abandoned.

The OHCHR field office has been monitoring the situation of human rights including investigation and verification as per the 2005 OHCHR-Nepal Government Agreement. The Special Rapporteur on Torture in his report had mentioned that "the OHCHR-Nepal has indeed been facing difficulties in getting access to some places of detention, especially those under the control of the Maoists."²⁵

The UN Human Rights System has created an Optional

23. Chapagain Bidhya, NGO Parallel Report on the Compliance of the Paris Principles of the National Human Rights Commission of Nepal, Asian NGOs Network on National Human Rights Institutions (ANNI), November 2008, p.2

24. Ibid

25. Report of Special Rapporteur on torture, E/CN.4/2006/6/Add.5, 9 January 2006, para.490

Protocol to the Convention against Torture (OPCAT), which provides further channel for independent monitors to investigate the practice of torture. It also creates mechanisms for government security agencies and non-state actors to eliminate torture. Ratification of the OPCAT obligates government to create national inspection mechanism and to host international inspections which offers a mechanism for concrete steps to prevent these violations from occurring within places of detention in Nepal. The government should become party to the Rome Statute of the International Criminal Court (ICC) to open up avenue for international judicial access against genocide, war crimes and crimes against humanity.

Investigation into torture

The legal and procedural mechanisms for investigating and prosecuting torturers are essential, but on their own they are not enough to overcome impunity. The political will to bring in the necessary reforms to laws and institutions, to maintain permanent vigilance, to combat discrimination and to take on each and every case of torture has been imperative. Torture remains a systematically-applied, if secret, part of the regular criminal investigation and prosecution practices of police forces. It continues to be used as a tactic for political intimidation of local people.

Section 20 of the Terrorist and Disruptive Activities (Control and Punishment) Act, 2002 (TADA) grants immunity to investigating authorities for any activity carried out or attempted to be carried out in good faith under TADA. The grant of immunity provides vast potential for the use of torture, contravening the right against torture and inhuman treatment; the right not to be compelled to testify against oneself; the

prohibition against coerced confessions; and the CAT Article 2(2) provision that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Government Cases Act 1992 is defective in terms of effective implementation as its definition of the court is as "Court" denotes the bench of the judge and this term shall also denote the officer with authority delegated to undertake judicial works relating to any case as per the prevailing laws. Article 14 of ICCPR and Article 5 of Basic Principles on Independence of Judiciary require courts to be independent, competent and established by law. Officers with delegated power cannot be considered as court. The competence inclusive of qualification, security of the service tenure, bond of professional secrecy and functional independence with fairness and impartiality ensured by statutory provisions are required for a court with secular morality.

Section 14 (1) and (2) of the Government Cases Act empowers police and individuals to arrest saying to arrest a person if there is appropriate reason to suspect about that person's involvement in the crime, and the person so arrested shall not be detained without giving the notice, also disclosing the grounds for arrest and to arrest witness to a crime can arrest the person committing the crime and hand that person over to the nearby police office. There is no security of the person subjected to such arrest to have informed with the family or legal counsel. No specific rules or guidelines are prepared to avoid the potential torture and inhuman treatments during the travel period while taking into custody is available under existing rules and reg-

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Government should amend the TCA to permit the medical examination of a detainee to be carried out by any doctor registered with the medical council rather than only doctors in government service. As required by Article 13 of the Convention against Torture, steps should be included into the TCA to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of a complaint filed under the Act.

ulations. There are innumerable reports of tortures and misbehaves in the time of arrest.²⁶

Government should amend the TCA to permit the medical examination of a detainee to be carried out by any doctor registered with the medical council rather than only doctors in government service. As required by Article 13 of the Convention against Torture, steps should be included into the TCA to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of a complaint filed under the Act. In addition to the recommendation that the authorities initiate criminal prosecution in a fair trial in all cases of torture, there is a need to amend the provision in the TCA that where disciplinary action against the torturer is recommended by the judge, that the department concerned is obliged to report to the court within a time limit on the nature of the disciplinary action taken.

As required by Article 11 of the Convention against Torture, the TCA should be amended to ensure that interrogation rules, instructions, methods and practices and custody arrangements are kept under review, with a view to prevent any cases of torture. Alternatively, this could be done through amending or passing other legislation.

As there are lapses in systematizing education against torture through professional education and training to law enforcement officials, a sustainable and suitable mechanism should be in place under regular programs of law enforcement. Curriculum of high school level and higher-level education should incorporate specific rules or guidelines to

avoid potential torture and inhuman treatments during the travel period while taking into custody, review of the interrogation rules, instructions, methods and practices as well as arrangement of all incarcerations and treatments and correctional programs should be established and made functional in regular basis to prevent any occurrence of torture.

An independent national institution should be established and made functional to receive complaints, impartially investigate and promptly prosecute the alleged cases of torture before ordinary courts.

Statutory limitation

Another problem is the statutory limit for filing claims established under section 5(1) of the Act. It is scientifically proved that the effects of torture come up even a long time after the actual abuse. For example, to properly diagnose Post Traumatic Stress Disorder means assessing the victim over a period of four to six weeks. The statutory limit is too short, and should be extended on the basis of scientific facts.

In fact, the legal system does not provide effective redress to torture victims. In the TCA, compensation may be awarded to torture victims, but the perpetrators are not punished because, as stated in law, they have not committed a crime. Besides this, the Act also only recognizes claims filed by torture victims within 35 days of the alleged act of torture, or within 35 days of the victim's release from detention. Furthermore, according to the legal system in Nepal, the burden of proof is placed on the complainant (the victim), who is often incapable of providing sufficient evidence to support his claim.

26. CAT Alternative report 2004, Nepal, Human Rights Treaty Monitoring Coordination Committee, Submitted to UN CAT Committee, December 2004

In relation to the current lack of clarity in the law and practice regarding the burden of proof during administrative rulings in criminal cases where it is alleged that a confession was extracted under torture, the government should take the necessary measures to ensure that the burden of proof is laid with the prosecutor as part of the state's obligation not to commit torture and the right of the accused to be presumed innocent until proven guilty. The provision that a government attorney should provide legal services to the accused and not the victim also goes against the principle of criminal law established under the Convention.

The draft Criminal Code prescribes fine without specifying upper and lower limits. Therefore, the acts of torture should be defined as serious criminal offence explicitly the act of torture, attempts to torture and complicity and participation thereon. Adequate penalty for the perpetrator should be laid down and the minimum and maximum limitation (at least five to 10 years) of imprisonment or fine or both depending upon the gravity of the offence, as suggested by the SR on Torture. There should be open clause on time limit for lodging complaint or reporting the case of torture.

The time limit currently set out in the TCA that complaints have to be filed within 35 days after release should be amended so that any person with a complaint that torture has taken place can institute a prompt and impartial investigation. The CAT also does not mention limitation periods for crimes of torture.

Lack of mechanism to compensate victims

The Articles of the CAT and ICCPR provide that acts of torture be made “punishable by law” and that victims be compensated “in accordance with the law”. Currently there is no domestic legislation criminalizing torture, this is incongruous considering that the UN Special Rapporteur concluded “that torture and ill-treatment are systematically practiced in Nepal by the police, the armed police and the Royal Nepalese Army”.²⁷ Given the prevalence of torture and cruel, inhuman and degrading treatment in detention centers and prisons in Nepal, it is essential that the new Constitution establishes that torture is a heinous crime in order to instigate its criminalization and the institution of a more effective and just compensation mechanism.²⁸

Regarding the amount that may be awarded as compensation, Article 14 of the Convention against Torture obliges state parties to provide fair and adequate compensation to allow for full rehabilitation in cases of torture. Article 26 (2) of the Interim Constitution has made the act of torture punishable by law, and has ensured compensation for the person as determined by law.

However, the upper limit on compensation that may be provided under the act is extremely low and inadequate. The Act also does not mention a lower limit for compensation. The Act does not obligate the government to take institutional action against a perpetrator of torture. Instead, perpetrators may be subjected to “departmental action,” such as

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27. Report of Special Rapporteur on torture, E/CN.4/2006/6/Add.5, 9 January 2006, pg. 1

28. Chapagain Bidhya, Do they fit at all? Assessing Incorporation of ICCPR in Nepal's Interim Constitution, INFORMAI, Informal Sector Service Centre (INSEC), January-March 2009,

A provision should be included in the TCA which would reconfirm that it is state responsibility to pay adequate compensation to the victim and allow the state to recover the amount of compensation paid from the perpetrator(s).

demotions, suspensions, and delayed promotions. There is also nothing in place to assess whether or not departmental action was taken against the perpetrators in those cases or whether they were left to carry on with business as usual.²⁹ A provision should be included in the TCA which would reconfirm that it is state responsibility to pay adequate compensation to the victim and allow the state to recover the amount of compensation paid from the perpetrator(s).

The minimum amount of compensation that can be awarded by the court under the TCA should be specified and be commensurate with the gravity of the crime of torture. The current maximum amount of Rs 100,000 (\$1500 approx.) should be removed and replaced by other criminal compensation schemes applied around the world. The provision in the TCA that government attorneys appear on behalf of alleged perpetrators should be removed; alleged perpetrators should be required to retain their own lawyers.

Furthermore, the TCA did not provide for the possibility to prosecute people suspected of having committed acts of torture, but merely opened the door to the possibility for victims of such acts to receive financial compensation. The compensation awarded never exceeded 100 000 rupees (approx., 1500 USD), and was only granted under the most exceptional circumstances. Furthermore under the TCA, if a plaintiff is thought up to 5000 Nepali rupees (80 USD). Because it is difficult to prove incidents of torture in court under the current legal and investigatory regime, and because vic-

tims very often lack substantial financial means, many have decided against taking their cases to court out of fear of being found "guilty" of male fides intention.³⁰

To explain in detail, the maximum punishment for an offence of "general assault" under the Chapter on Assault of the Civil Code is up to six months imprisonment and fine of 2,000 Nepali rupees (about USD 30). The offence of "general assault" means causing pains and wounds on a person's body. For the offence of the "maiming assault", the maximum punishment is up to eight years imprisonment and fine of 10,000 Nepali rupees (about USD 160). However, this offence is very narrowly applicable to gross physical assault, for example, losing a one eyesight or dysfunction of any particular organ of a person's body. Furthermore, the Civil Code does not make any provision for the psychological effects of torture. The government should ensure that the compensation awarded is fair and adequate.

Conclusions

Laws and institutions that regulate torture in Nepal have not been fully implemented to deter perpetrators from committing torture. It has been ratified and incorporated but domestic laws are unfortunately weak and unable to effectively guarantee that its citizens are protected from torture. In Nepal, though there is a compensation law for victims of torture, there exists no definition of torture as a crime. As a result those who are accused of inflicting torture are not charged with committing a crime. Therefore, states must not

29. Ghimire Rajendra, Legal measures for torture prevention in Nepal, <http://www.article2.org/main-file.php/0306/172/>

30. Torture Continues: A Brief Report, Advocacy Forum, 25 June 2007, <http://nepal.ahrchk.net/pdf/AHRC-FP-011-2007-Nepal.pdf>

only pass laws that make torture a crime, but create laws and policies that will effectively stop torture, protect the rule of law and a fair trial and bring due justice to perpetrators of torture. Torture is intrinsically related to rule of law and fair trial and where there is torture it reflects the breakdown of this venerated institution.

Under the present legal setup, torture victims will never have the chance to obtain justice, effective legal redress and rehabilitation. Such rejuvenation is a prerequisite to facilitate a smooth process of transitional justice in Nepal which meets the expectations of the ordinary people who are eager to have a great change for a better life after many long years of suffering. In addition to enacting and implementing legislation that meets international standards, it should ensure that the crime against humanity of torture and the war crimes of torture and related crimes as defined in the Rome Statute of the ICC are made crimes under its national law too.

The role of the civil society within each state is imperative if a state is to take measures in countering the use of torture. The civil society must place pressure on the state by pressing for the implementation of the CAT and ratification of the OPCAT and its incorporation into the domestic level. Civil societies must vigorously fight against torture by reporting all torture violations to the police, NHRC, domestic and international human rights organization and the United Nations Special Rapporteur on Torture. Furthermore, the civil society must support in tangible ways by providing medical, legal, financial, and personal assistance and care. It is only through

these actions that a person's dignity can be protected and the fair trial and the rule of law of the state ensured.

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»Pratibedan Baidya«

Scenario of Torture in Nepal and Challenges for ending it

Suffocating the suspects with the smoke of burning chilies, submerging the head in a tub of water to the point of drowning, beating with sticks, depriving the accused of food and water for over 24 hours, prohibiting them from going toilet for long periods, forcing them to stand continuously, giving electric shocks, and forcing them to stand in electrified water are all the methods of torture used in the police custody since long and most of the torture methods are practiced even today.

The trend of inflicting torture has existed in Nepal since the very beginning of the emergence of the state. In the past, torture was institutionalized as a tool to punish or suppress opponents. Inflicting torture during the trial or investigation of the cases was legal but these days the government has expressed commitment to end torture. Despite the government's attempt to end torture, it remains rampant in Nepal due to the government's inactivity.

Until 1951, the legal system of Nepal was directed by religion, which prescribed extreme physical torture for certain crimes. However various historic changes of the country like fall of Rana oligarchy, Panchyat Regime and even establishment of Republic set-up in the country failed to quell or even decrease the use of torture. Torture in police custody, disappearances and intimidation continue even in the republic Nepal. Similarly, the torture victims are yet to get justice and the perpetrators are yet to be held accountable, which is promoting impunity in the country.

The first Nepali jail was built in Kathmandu in 1894 AD during the reign of Rana Prime Minister Bir Shumsher Jung Bahadur Rana. This hundred years old prison is still in use today as the Central Jail, which shows the government's inaction towards bringing timely reform in the prisons and using prison as reform centres. The trend of inflicting torture in police custody for confession was

rampant in the past. The common form of torture is to beat on soles of the feet with a stick, rubber belt etc., and then make the culprit walk and jump. Suffocating the suspects with the smoke of burning chilies, submerging the head in a tub of water to the point of drowning, beating with sticks, depriving the accused of food and water for over 24 hours, prohibiting them from going toilet for long periods, forcing them to stand continuously, giving electric shocks, and forcing them to stand in electrified water are all the methods of torture used in the police custody since long and most of the torture methods are practiced even today. Centre for Victims of Torture (CVICT), an NGO active in the field of torture prevention, says that it has recorded 40 different kinds of torture methods among the victims in the country.

A three-member commission headed by Janardhan Lal Mallik, the Chief Judge of the Eastern Regional Court, formed in May 23, 1990 was the first commission created by the government to investigate state-sponsored torture to foil the pro-democracy movement of 1990. The Commission was given the responsibility of investigating the loss of life and property during the pro-democracy movement of 1990 and finding the persons responsible. However, the 950-page report submitted by the Commission went unheard. Similarly, reports of the various commissions formed by the government were not

implemented. Inflicting torture in police and army custody was a common feature during the period of Maoist insurgency. The UN Special Rapporteur on Torture Alfred Nowak after his visit to Nepal in 2005 has concluded that torture is systematically practised by the police, armed police and the Army. Excessive use of force was used during the period of 19-day long People's Movement of April 2006 and the government following the success of April 2006 formed a commission led by former Supreme Court Justice Krishna Jung Rayamajhi to investigate the excessive use of force but the report prepared by the Rayamajhi Commission met with the similar fate to that of Mallik Commission. Rather than taking action against the persons involved in the excessive use of force, the government promoted some of them adding to the culture of impunity in the country.

According to a study conducted by Advocacy Forum Nepal even in its limited capacity to provide torture victims with the chance to receive compensation, the Torture Compensation Act (TCA) has resulted in extremely few actual awards of compensation. A study by Advocacy Forum found that of the 208 cases filed for torture compensation in the 12-year history of the TCA, only 52 victims have been awarded compensation. Similarly, a recent study has revealed that interrogation of suspects in Nepal results in an implausibly high number of confessions. The 2002 study by the Centre for Legal Research and Resource Development found that 59.6% of accused persons made confessions while in police custody in Nepal. When it came to the trial stage, however, 76.6% pleaded innocent in court directly contrary to their own confession.¹ This indicates

that it is very likely that torture methods were employed to extract those confessions as only the cruel and base interrogation method of inflicting unbearable suffering on a suspect is capable of producing such absurd results.

The governments formed after the success of April Uprising of 2006 paid little attention towards combating torture. For example, a report of the UN Office of the High Commissioner for Human Rights (OHCHR) released on May 2006² said that the arbitrary detention, torture and disappearances between 2003 and 2004 were reported in two army battalions, the Bhairabnath and Yuddha Bhairab. The report further said that torture and ill-treatment of detainees during interrogation at Maharajgunj barracks was routine and systematic, with a special team carrying out the tasks. The OHCHR report further said that "OHCHR finds that the RNA's 10th Brigade systematically arrested, held in secret detention, and tortured suspected CPN-M members at its Maharajgunj barracks in 2003"³. However the governments formed after the April Movement neither investigated these incidents nor took any action against the chiefs of these organizations. Even though, most of the victims were Maoist supporters, the Maoist-led government also did not initiate any effort in this regard.

Though some legal mechanisms have been made in the span of time but there has not been any significant improvement in this sector. The government ratified the Convention Against Torture but it is yet to amend existing domestic legislations or form new laws as per its obligation. Many domestic legal provisions are in conflict with the spirit of CAT but the government does not

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1. Centre for Legal Research and Resource Development – 'Analysis and Reforms of Criminal Justice System in Nepal' (2002).

2. http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/Pages%20from%202006_05_26_OHCHR-

Nepal.Report%20on%20Disappearances%20linked%20to%20Maharajgunj%20Barracks_Eng.pdf
ibid

The government has made half-hearted attempt to combat torture in the country. The state should take some bold steps to end the trend of torture in the country. Firstly, the state should incorporate torture, act of torture, under criminal offence and make the provision of punishment to perpetrators and accomplices to torture in line with the gravity of the act. It should amend the TCA 1996 and form necessary laws to combat torture in line with the CAT.

find time to amend these legislations in line with the obligation of the convention. Article 2 of the CAT mentions that, 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture' however there are many municipal laws that are against the spirit of the provision. For example Clause 22 of the Army Act 2063 BS has the provision that if any person died or some persons faced loss from the act conducted with good intention by any person which falls under the jurisdiction of the Army Act, case shall not be filed at the Court against such person. Similarly, Clause 26 of the Armed Police Force Act says that Armed Police shall not be liable for punishment while using their authority with good intention while conducting their duty. Similarly, clause 9 (4) (B) of the Police Act 2012 BS has the provision allowing senior police officials to detain lower ranking police official upto 15 days.

Similarly, Article 12 of the CAT states that each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. However, Clause 9 of Torture Compensation Act states that in the context that the state has not taken torture as criminal offense there is no provision of investigation by competent authority even if there is a ground to believe that torture was inflicted in line with the provision of the Convention. Even if the application regarding torture is filed, the alleged perpetrator is protected by the state which provides government

attorney for pleading and pays the compensation from state treasury.

Similarly Article 14 of the CAT states that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. However, Clause 6 (1) of the Torture Compensation Act 1996 has the provision to have compensation in maximum of Rs 100,000 regardless of the gravity of the torture. Similarly, the government will pay the compensation, not the perpetrator, which fails to make the perpetrator accountable for the acts of torture.

The government has made half-hearted attempt to combat torture in the country. The state should take some bold steps to end the trend of torture in the country. Firstly, the state should incorporate torture, act of torture, under criminal offence and make the provision of punishment to perpetrators and accomplices to torture in line with the gravity of the act. It should amend the TCA 1996 and form necessary laws to combat torture in line with the CAT.

In the case when torture is inflicted by the government employee, if the government attorney is pleading on behalf of the defendant then it can be said that both the government and the perpetrator are acting against victim. Similarly, if it is proved that the government employee is involved in inflicting torture, the government, which is pleading on his/her behalf, provides compensation. In this way due to procedural mistake, most of the victims cannot get justice. Legal reforms should be made to avoid these sorts of weaknesses. Law should be formulated to manage independent and impartial authorities for investigation and interrogation of torture-related cases.

Reparation of Torture Survivors and Their Families



» Dr Bhushan Guragain «

It is unfortunate that Nepal has enacted Torture Compensation Act in 1996 and it has been one decade but very few cases have been registered from all over the country in comparison to the number of torture survivors. About 210 cases were registered throughout the country out of which 113 cases have been decided by the court till now.

Torture is internationally recognized as a crime against humanity. It is not justifiable under any circumstances whatsoever, whether a state at war or a threat of war, internal political instability or any other public emergency. Act of torture violates fundamental human rights and life of dignity. It has been prohibited by international human rights treaties, that Nepal is a state party to. Article 7 of International Covenant on Civil and Political Rights and Convention against Torture has imposed obligation to the state to prohibit the use of torture. However, in practice there is systematic use of torture prevailing in Nepal. During the decade long armed conflict between the state and the Maoists, use of torture was extensive. But it is also true that the use of torture existed in the country before the armed struggle started and is continuing even after the beginning of peace process.

Nepal has enacted Torture Compensation Act in 1996, which has many loopholes to be fulfilled. Similarly Interim Constitution 2006 stated that torture should be pun-

ished by law. The Committee against Torture has recommended several recommendations to be followed for the revision of the Torture Compensation Act. Nepal has not amended law to classify torture as a crime though it is mentioned so in the Interim Constitution. The Special Rapporteur on Torture after his visit to Nepal in 2005 concluded that torture was systematically practiced by the police, Armed Police and the then Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the unsaid rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation and rehabilitation. Thus, he recommended ratifying the Optional Protocol to the Convention against Torture which allows inspection of police stations, prisons and other detention centre without prior notice.

It is unfortunate that Nepal has enacted Torture Compensation Act in 1996 and it has been one decade but very few cases have been registered from all over the country in

comparison to the number of torture survivors. About 210 cases were registered throughout the country out of which 113 cases have been decided by the court till now. Among them, 66 cases have been quashed on the ground that the petitioner's claim is not proved. Only 47 cases have been awarded with the compensation and only eight victims could get the compensation amount in hand. Only a few cases could be filed at the court due to lack of security for victims, fear of re-victimization and lengthy trial process. The trial process could take upto five years though the law states that cases must be decided within 90 days of filing. Lack of appropriate legal provisions to take prompt actions has led to many survivors being left without any compensation or mental peace of getting justice. Even if the case is decided in favor of the victim, the implementation procedure is arduous. It is a failure of our legal system that no perpetrator has been punished till date.

The Torture Compensation Act of Nepal provides that if anyone is tortured, he himself or on behalf of him a lawyer or family member can

Empower state organs for minimizing torture

The World is celebrating International Day against Torture on June 26. The day is celebrated to commemorate the enforcement of the Convention against Torture. Amid reports that Torture is rampantly practiced in Nepal, INFORMAL asked people of different fields about how they observe the present situation of torture and what should be done to end torture in the country. Excerpts:

Indra Kharel, Chairperson, Supreme Court Bar Association

The situation of torture could be worse if the civil society had not taken any initiative to prevent it. The civil society should be active for ending torture as the state is not serious in this regard. Umanath Hamal of Kalikot and Nirmal Pant and Puskar Dangol of Kalanki, Kathmandu were killed by Maoist-affiliated Young Communist League. In the past, police used to inflict torture but these days Maoists are taking the lead. The definition of torture is narrow in Nepal. People fail to reach to their destinations on time due to bandh and strikes, whether we call it mental torture or not. These types of incidents should be taken as mental torture.

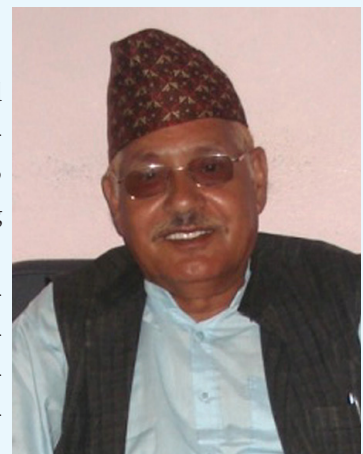
There has been rise in the incidents of torture as the perpetrators, who brutally murdered person after inflicting torture, are getting impunity when the political party they are affiliated with say it will take action after investigation. It is the responsibility of the state to investigate incidents of torture, not the political parties. It is essential to make constitutional provision disqualifying those involved in inflicting torture to contest the election. The person involved in inflicting torture should be held accountable. There is a need of empowering the state organs rather than the political parties for minimizing torture.



Muktinath Sharma, Torture Victim, Deuda VDC-2, Doti

Torture is a cruel and inhuman treatment. Torture could be inflicted through beating, cutting different parts of body and other inhuman treatment. A group of nearly 15 Maoist cadres abducted me on September 4, 2003 and took me to Prabhat Higher Secondary School Dehimandu. My right leg does not work due to the torture inflicted by Maoist cadres at that time.

The trend of inflicting torture will continue till the trend of impunity exists on various excuses and till the political parties do not abide by commitments made in the past. Discipline should be maintained for ending torture. The trend of impunity must end and commitments should be translated.



ed into reality. So, in conclusion, the trend of inflicting torture will continue till the commitments are translated into reality.

Rishiram Niraula, Court assistant, District Court Patan

There has been some improvement in the situation of torture as compared to the past. In recent days, there were no complaints regarding torture inflicted in police custody for the purpose of confession. There are some incidents in which people take back their complaints claiming that they had reached into an agreement regarding the dispute. A case against torture was filed while I was working in Sunsari and the Morang District Court gave the verdict in favor of victim. Torture exists in the society due to old concept that the detainee will not give right statement unless torture is inflicted to him/her and due to traditional method of interrogation. I could not see any relevancy of inflicting torture for confession as the court does not take it as a proof. There is decline in the incidents of torture in custody as such confessions are not taken as main evidence as per the criminal justice system.



First of all, people should be made aware about torture. As the Interim Constitution has guaranteed right against torture as fundamental rights, the victim should knock the door of judiciary for Justice. Judiciary cannot initiate the investigation process before receiving complaint. The police department also has the Human rights cell, which can also work in the field of torture and contribute for reducing torture.

Rajendra Ghimire, Chairperson, PPR

Reports of different organizations show that torture remains as a problem in Nepal. It was believed that torture would end following the restoration of democracy but it did not happen so. It was found that torture was inflicted not only in police custody but different armed groups have also been inflicting torture. Before ten year period torture could be inflicted only by the state but these days we find many examples of torture inflicted by organized groups.

Only a few activities are not sufficient to combat torture. Strong political willpower is a must for it. The leaders, who were tortured in the past, are ruling the country but they have failed to make strong commitment for ending torture. Similarly, the trend of torture will decline only if various treaties and conventions especially Convention Against Torture, is implemented effectively. Many other countries have criminalized torture but Nepal has so far failed to imulate that step.

Nepal should define torture as criminal offense. There is a need of forming a powerful mechanism to deal with the cases of torture. Legal provision should be made for protection of torture victim and witness. There is also a need of raising awareness about torture and providing training to police about the skills of collecting evidences using different method rather than through torturing arrestees.



(Compiled by Gopi Krishna Bhattarai)

Since most torture victims are poor, it leads to myriads of psychosocial problems ultimately affecting their economic health resulting in poor becoming poorer, and aggravation of their psychosocial health. So, when torture survivors are treated with medical therapy, psychosocial interventions and various other therapies, they can revert to a normal life ultimately improving their economic condition.

file an application for the physical and mental check up in the concerned district court. The court can order to provide the physical and mental check up within three days. But in practice when a torture survivor has to get medical treatment either he/she has to pay the medical expenses or they need an organization to support him/her. There is no any separate unit or doctors to provide medical treatment to the torture survivors in the governmental hospital and the torture compensation act has also failed to incorporate this issue.

Centre for Victims of Torture Nepal (CVICT-Nepal), which provides comprehensive care and support to torture victims since 1990, has, so far, provided services to 38,747 torture victims. Bearing in mind the importance of preventative action against torture, CVICT exercises a holistic approach towards rehabilitation of torture victims. Torture severely affects human dignity of the affected. Immediate effects of torture are mostly physical which may or may not be treatable (many cases of mental torture is on a rise nowadays). When such physical problems are treated, the psychological problems start appearing in the form of post-traumatic stress symptoms. Since most torture victims are poor, it leads to myriads of psychosocial problems ultimately affecting their economic health resulting in poor becoming poorer, and aggravation of their psychosocial health. So, when torture survivors are treated with medical therapy, psychosocial interventions and various other therapies, they can revert to a normal life ultimately improving their economic condition.

Prevention is an important part of fight against torture but looking only at the preventative campaign is an injustice to victims who are in extreme pain, mental and physical. A gesture of compassion and goodwill to such traumatized victims is not

enough. Preventative work may seem more sustainable but if the torture survivors don't receive any services then what good are we doing to help the one who's been through such trauma. Likewise, working at only the rehabilitative part will be doing injustice to the ones who might be tortured. Both rehabilitative and preventative actions should go hand in hand. Rehabilitative work will explore to the root cause of the problem indirectly helping out in preventative work.

Lack of scientific methods in crime investigation sector, lack of awareness to the community for the right against torture and legal safeguard to the state of impunity are the major contributing factors for its continuance. Detainees have no knowledge of right against torture. A survey conducted by CVICT in 11 prisons of Nepal shows that 79% of detainees were tortured in the pre-trial detention mainly for the confession. We suspect that the use of torture is in higher range than reported. The cause behind that is the lack of knowledge and enthusiasm to report against torture.

Prevention of torture is not possible without strong political willpower, so, political leaders should be sensitized on why torture is continuing in Nepal, on the legal ambiguity, why the facility in detention center is not improving and why the police department is used to satisfy the vested political interest. If they are talking of a new Nepal, there should be a violence free society. For that, the politicians have to turn their mind on these issues rather than focusing on getting hold of ministries and reaping benefits for themselves. Civil society should work together and our government should also take responsibility for reparation of the torture survivors and families, first and foremost by redressing the failures of our old constitution on torture.

Torture as a Criminal Offence: - Legal Provisions and Practices in Nepal



»Kopila Adhikari«

Situation

"We think that most people know or can easily imagine that torture makes you ill. Torture is the only illness that is "intentional" all other illnesses are caused by bacteria, viruses, cancer and so on. Torture is inflicted by another human being, and this absurdity makes the after-effects even more unbearable." Torture is a crime an article written by Inge Genefke and Bent Sorensen.

Despite the claims that the New Nepal is the outcome of new idea, vision and changing situation of the day, it has been centered in the power, position, and dividends of government coffer. In the New Nepal illegal activities, collisions, extortions and violence are increasing day by day. Furthermore, the sister organizations of political parties are aggravating the woes and cries of Nepalese people.

On the one hand, the political leaders are not tired of making promises of sustainability, peace, development and end of impunity. On the other hand, they encourage their followers to breach the law and inflict torture on the hoi polloi.

The state's failure to restrain the criminal activities of the apparently intractable YCL and Youth Force, continuing violations and

abuses by the Tarai armed groups have cast a shadow over the people's aspirations of violence free new Nepal. Therefore, it's time for the political leaders to disentangle themselves from the mire of petty polemics and concentrate on the fulfilment of popular mandate of peace, democracy and rule of law as envisaged by the *Jana Aandolan-II* and deliver a new constitution.

Trends/ Practices

Many people are under the illusion that torture has only been practiced in Nepal since the start of the armed conflict. However, torture was systematically practiced before the Maoist insurgency started in Nepal and continues to be systematically practiced today too, even after the restoration of democracy. Nevertheless, it is true that torture became widespread because of the conflict. During the last 10 years, both the State and the Maoists have routinely and systematically used torture to silence people, make them confess and to punish them. This has completely ruined the lives of the victims and their families. Many have lost their self-esteem and personality, many are still struggling for their lives and many have already died due to torture.

However, torture in police detention continues to be common-

place of Nepal. Instead the investigation system that completes through torture is the primary and practical investigative system in Nepal. The CAT provisions that torture should not be inflicted upon anyone, torture is a criminal act and that the perpetrators should be held accountable, are limited to the documents only. In practicality the state or non-state actors use the torture as a method of investigation, revenge or to mitigate their political motif. Thousands of torture victims are compelled to live a degrading life but neither have they got justice nor their right for life guaranteed. The power lust among the political leaders and lack of accountability towards Nepalese people are responsible for impunity and injustice to the torture victims.

In 2008, the Advocacy Forum reached out to 4,281 detainees in various detention facilities in AF working districts, out of them total 915 (21.4 %) claimed that they were subjected to torture.

Provisions/Legislations

In 1991, Nepal government ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). All those human rights treaties prevail in Nepal as national laws as per the provision of Nepal's Treaty Act. However, in prac-

Most of the torture victims are from poor, illiterate and down trodden communities. In the absence of state's proper attention neither any special mechanism is working diligently in this field nor has a strong law been come out till now.

The Interim Constitution of Nepal criminalized torture in detention for the first time in Nepal's legal history but that constitutional provision is yet to come into practice.

Total number of detainees interviewed by Advocacy Forum from Jan – Dec 2008	4281
% not taken to court within 24hrs	50.6 %
% physically tortured whilst in detention	21.4%
% not asked in court if they had been tortured	93.3 %
% not made aware of their legal rights	79.7%
% not provided with written statements	95.6%
% not provided statements of free will	4.5 %
% did not receive food or any money to buy food	8.2 %

Data Source: Annual Report 2008 of Advocacy Forum

tice, the State has been practicing, sponsoring and tolerating torture in Nepal. It is systematically and routinely practiced mostly in detention centres. Impunity of the perpetrators is the major contributing factor in the continuing practice of torture in Nepal. Since 1996 the UN Committee against Torture has been asking the Government of Nepal to criminalize the act of torture, but the State has failed to do so. Furthermore, the existing Torture Compensation Act does not comply with Nepal's international obligations.

However, the existing system forces the victims of torture to remain silent. What happens in practice is that if a person is arrested, generally that person will be detained for some days without any custody record, the authority does not even acknowledge the detention of that person, and there is no mechanism that allows inspection or scrutiny of the detention records of the police. How the victims who can't even say that they were tortured, fight for justice? Most of the torture victims are from poor, illiterate and down trodden communities. In the absence of state's proper attention neither any special mechanism is working diligently in this field nor has a strong law been come out till now.

The Interim Constitution of Nepal criminalized torture in deten-

tion for the first time in Nepal's legal history but that constitutional provision is yet to come into practice. At present, the torture victims have become aware to some extent. Some of them are aware of legal remedies of torture whereas some of them are interested to know about it. Some human rights organizations working in the field of torture are organizing awareness raising programs for the torture victims. As a result, some of the torture cases are registered in the courts under the Torture Compensation Act because no other way of taking legal action is provided by the State. So, many victims are still rubbing soles for justice as per the Act. However, many cases registered by the victims under the Torture Compensation Act couldn't conclude in providing justice to victims because they were dismissed by the courts in absence of enough evidences. How the victims who even cannot claim that they were tortured can provide evidences?

Commitment vs Reality

"The Article 5 of the Convention against Torture aim to counteract impunity, alleged perpetrator is to be brought before a court, irrespective of the nationality of the perpetrator or the victim, or of the place where the crime took place. If the perpetrator is found guilty, he or

she must receive a penalty which takes into account the grave nature of the crime. In addition to the perpetrator, there is also a victim, perhaps several. This is dealt with in Article 14. The state is obliged to offer the victim of torture a 'fair and adequate compensation, including the means for as full rehabilitation as possible,' and this means medical rehabilitation. It is the state that has the duty to offer this".

It has been the established system in Nepal that the government doesn't pay heed to any public demand without intense pressure through bandhs, rallies, strikes and sit-ins. But there is another simple and easy way to pressurize the government through legal procedures. The authorities concerned should know that the New Nepal is not possible without the rule of law and proper implementation of law. So, to put an end to torture Nepal needs strong law against torture that will assimilate the provisions of international conventions and Nepal's Interim Constitution.

After the ratification of the Convention against Torture, the state party is obliged to curb the torture practices, develop an effective legislation and create an environment to implement the legislation properly. Further, the state should comply with the mandates given by the treaty but Nepal government has not complied with the international obligations as per the international treaty. Neither the Nepal government has acknowledged the recommendations given by the Committee Against Torture.

During the visit to Nepal in 2005 the Special Rapporteur on Torture had given some recommendations to the Nepal government but the government is yet to implement them. However, since the new Interim Constitution of Nepal tried to make torture a criminal offence after the visit of the special Rapporteur of Torture, it can be hoped that the government will be serious to deter

torture in days to come by drafting a new legislation against Torture. The Committee Against Torture also gave a number of recommendations to the Nepal government to fight against torture but most of the recommendations are not implemented so far.

Some of the Recommendations of CAT Committee are as follows:

1. The State party should adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the Convention. The State party should provide information to the Committee on domestic jurisprudence referring to the definition of torture as per article 1 of the Convention.
2. The State party should publicly condemn the practice of torture and take effective measures to prevent acts of torture in any territory under its jurisdiction. The State party should also take all measures, as appropriate, to protect all members of society from acts of torture.
3. The State party should bring the practice of pre-trial detention into line with international human rights norms and ensure that the fundamental rights of persons deprived of liberty are guaranteed, including the right to habeas corpus, the right to inform a relative, and the right of access to a lawyer and a doctor of one's choice. The State party should ensure that any measure taken to combat terrorism is in accordance with Security Council resolutions 1373 (2001) and 1566 (2004),

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which require that anti-terrorist measures be carried out with full respect for, *inter alia*, international human rights law, including the Convention. The State party should provide to the Committee information on the number of people still in pre-trial detention.

4. The State party should take the necessary measures to support the work of the National Human Rights Commission, ensuring its recommendations are fully implemented.
5. The State party should make every effort to guarantee the independence of the judiciary, including ensuring that security forces comply with court orders. The State party should provide to the Committee information on the composition, mandate, methods of work and investigations of the Royal Commission for Corruption Control, including whether it exercises jurisdiction over constitutional matters in full conformity with the requirements of the Convention and whether its rulings are subject to judicial review. The State party is requested to provide the same information concerning the Justice Sector Coordination Committees.
6. The Committee recommends that the State party consider acceding to the Convention relating to the Status of Refugees and other related international legal instruments. In addition, the Committee recommends that the State party enact legislation aimed at prohibiting refoulement of persons without an appropriate legal procedure. The State party should provide to the Committee information on the number of cases of extradition, removal, deportation, forced return and expulsion that have occurred since 1994, as well as information

on cases in which deportation was not effected for fear of torture.

7. The State party should take the necessary measures to ensure that acts of torture are made subject to universal jurisdiction under the draft Criminal Code, in accordance with article 5 of the Convention. The State party should also make every effort to ensure compliance with articles 6 to 9 of the Convention.
8. The State party should intensify its education and training efforts relating to the prohibition against torture, and introduce evaluation and monitoring mechanisms to assess their impact.
9. The State party must ensure that no recourse is made, under any circumstances, by law enforcement personnel to interrogation methods prohibited by the Convention. In addition, the State party should provide to the Committee information, including examples, on measures adopted to review interrogation rules, instructions, methods and practices applicable to law enforcement officials.
10. The state party should:
 - (a) Adopt the necessary measures to reduce pretrial detention wherever possible;
 - (b) Immediately transfer all detainees to legally designated places of detention that conform to international minimum standards;
 - (c) Take immediate steps to ensure that all arrests and detentions are systematically documented, in particular of juveniles. The State party should consider creating a central register for persons deprived of liberty, to be made accessible to national and international monitors;
 - (d) The State party should consider amending the relevant section of the Compensation Relating to Torture Act of 1996, to ensure

that all detainees have access to a proper medical examination at the time of arrest and upon release;

- (e) Prohibit the use of incommunicado detention. The Committee recommends that persons held incommunicado should be released, or charged and tried under due process. The State party should provide to the Committee information on the exact number and location of detention places and other detention facilities used by the Royal Nepalese Army, the Armed Police Force and the Police, and the number of persons deprived of liberty;
- (f) The State party should take measures to ensure compliance by security forces of all orders of the courts, including habeas corpus;
- (g) The State party should take the necessary steps to protect juveniles from breaches of the Convention, and ensure proper functioning of a juvenile justice system in compliance with international standards, differentiating treatment according to age.
11. The State party should consider setting up a national system to review all places of detention, and react to findings of the systematic review.
12. The Committee recommends that the State party consider amending the Code of Conduct for Non-Governmental Organizations so that it is in line with international human rights standards on the protection of human rights defenders. The State party should ensure that national and international monitors are granted permission to carry out regular, independent, unannounced and unrestricted visits to all places of detention. The State party should facilitate visits by, for example, the International Committee of the

Red Cross, OHCHR, the National Human Rights Commission, and national and international NGOs.

13. The State party should send a clear and unambiguous message condemning torture and ill treatment to all persons and groups under its jurisdiction. The State party should take effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and the perpetrators punished. In connection with *prima facie* cases of torture, the accused should be subject to suspension or reassignment during the investigation.
14. The State party should establish an independent body to investigate acts of torture and ill-treatment committed by law enforcement personnel. The State party should provide to the Committee information on the mandate, role, composition and jurisprudence of the special police courts.
15. The Committee reaffirms that it is the duty of the State party to protect all members of society, in particular citizens belonging to marginalized and disadvantaged groups or castes, such as the Dalits. The State party should take specific steps to safeguard their physical integrity, ensure that accountability mechanisms are in place guaranteeing that caste is not used as a basis for abuses, unlawful detention and torture, and take steps to ensure more diverse caste and ethnic representation in its police and security forces. The State party should include information on caste discrimination in its next periodic report.

16. The State party should ensure that procedures are in place to monitor the behaviour of law enforcement officials, and should promptly and impartially investigate all allegations of torture and ill-treatment, including sexual violence, with a view to prosecuting those responsible. The State party should provide to the Committee a list of cases of gender-based violence and abuse against women and children in custody that have been investigated and prosecuted, and the perpetrators punished.

17. The State party should:

- (a) Make available to victims of torture the conclusions of any independent inquiry in order to assist them in pursuing compensation claims. The State party should amend its current and planned legislation so that there is no statute of limitation for registering complaints against acts of torture and that actions for compensation can be brought within two years from the date that the conclusions of inquiries become available;
 - (b) Consider adopting legislative and administrative measures for witness protection, ensuring that all persons who report acts of torture or ill-treatment are adequately protected.
18. The State party should ensure that compensation awarded by the courts or decided upon by the National Human Rights Commission is paid in a timely manner. The State party should provide to the Committee information on the total amount paid in compensations to victims of torture.

19. The State party should provide to the Committee information on both legislation and jurisprudence that exclude statements obtained as a result of torture

being admitted as evidence.

1. 20 The Committee recommends that the State party take all necessary measures to improve conditions of detention.
2. 21. The State party should reinforce international cooperation mechanisms to fight trafficking in persons, prosecute perpetrators, and provide protection and redress to all victims.
3. 22. The State party should take effective measures to prevent security forces using children as spies and messengers. The State party should also take the necessary steps, as a matter of urgency and in a comprehensive manner, to prevent the abduction of children by CPN-Maoist and to facilitate the reintegration of former child soldiers into society. The State party should also consider ratifying the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Conclusion/Recommendations

The state must investigate each and every allegation of torture and compensate the victims. Without creating an environment where each case of torture is impartially investigated, the victims are adequately compensated and the perpetrators are brought to justice, the deep rooted culture of impunity cannot be contested. Without contesting such culture of impunity, it is hard to believe that the protection of rule of law and human rights will be possible in Nepal. So, it is imperative that all allegations of torture are independently investigated and the perpetrators brought to justice. The new anti-Torture legislation should come out soon and be implemented thoroughly. The new legislation should be in favor of the victims and that should guarantee the victims an easy access to justice and reparation.



►►Deirdre Flanigan◄◄

Torture and Excessive Use of Force by The State Security Forces

The CPN (Maoist)'s People's War against the State has resulted in the overthrow of the Monarchy and the genesis of a New Nepal. Nepal is now a post-conflict society and a new federal democratic republic. The peace process has been internationally acclaimed and the elections deemed a relative success. Despite this an unacceptably high level of human rights abuses continue to be reported throughout the country, a culture of impunity prevails and, in some Tarai areas, the violence appears to be worsening.¹

This article will focus on the issue of the continuing incidences of torture in Nepal and the continuing impunity for violators of the prohibition on torture. The related issue of excessive use of force by the Nepal Police, Armed Police Force (APF) and Nepal Army (formerly the Royal Nepal Army) shall also be discussed. It is apparent that these issues have not been taken seriously in the Nepali context and it is exactly this type of indifference that perpetuates a violent and reactionary culture in post-conflict Nepal. The continuing incidences of torture and excessive use of force are indicative of the legal vacuum in which the State security forces,

and paramilitary groups, currently operate in. Furthermore, such extra-judicial acts of revenge or punishment have the direct effect of igniting further tensions and inevitably causing more violence and suffering. The law must intervene to end the cycle of violence and end the dangerous culture of impunity for human rights violators.

Over two years have passed since the Comprehensive Peace Agreement (CPA) was signed by the Seven Party Alliance and the Maoists. The fact that the agents of the State continue to demonstrate such indifference towards the inviolability of human rights is wholly unacceptable. The ten year long civil war was characterized by widespread disappearances, extra-judicial killings and torture, it is of grave concern that the peace process continues to be dogged by continuing incidences of this nature and by a lack of real consequence for the perpetrators of these heinous acts. The vicious and highly publicized torture and subsequent disappearance of the 15 year old girl Maina Sunuwar by the then Royal Nepalese Army exemplifies the authorities' indifference towards ending impunity for torturers. The UN

Office of the High Commissioner for Human Rights (OHCHR) reported last year that the Nepal Army and police were not co-operative in assisting an exhumation of a body found believed to be hers.² Hundreds of cases like Maina's remain unsolved and the perpetrators remain free from consequence. Meanwhile the culture of violence, torture and ill-treatment perpetuates relentlessly through barracks, detention centers and police stations.

The international prohibition on torture and other cruel, inhuman or degrading treatment covers a wide range of behavior by state actors. The moral and legal prohibition on mistreating civilians serves to protect the dignity of all human beings, even those who the authorities suspect have themselves committed egregious offences against their fellow citizens. The moral imperative to treat suspects in a dignified manner is furthered in the Nepali context by the recognition that mis-treatment of 'enemy-combatants' will endanger the peace process by exacerbating the contentions that were the root causes of the decade long conflict.

1. See generally INSEC Yearbooks 2008 and 2009.

2. Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General, Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal. A/HRC/7/68, 18 February 2008, pg. 17.

The Prevalence of Torture and Excessive Use of Force

1. Torture

Torturers continue to be protected by the culture of impunity and torture and cruel, inhuman and degrading treatment remains commonplace. In 2008 INSEC has recorded many incidences of torture and other prohibited treatment. In very few of the cases did the perpetrators receive any punishment. Similarly, the National Human Rights Commission reported that they had received 75 complaints of torture by the security forces.³ Only a small percentage of torture victims actually complain to a public body and so it is reasonable to assume that the actual number of persons who received torture and ill-treatment at the hands of the State is actually much higher.

The government remains indifferent towards the prevalence of torture and cruel, inhuman and degrading treatment by the authorities in Nepal. The Office of the High Commissioner for Human Rights (OHCHR), in its comprehensive January 2008 report on the human rights situation in Nepal, detailed its concerns regarding the continuing use of torture and excessive use of force. Instead of expressing concern at the fact that such heinous violations continued to be committed during the peace process, the government demonstrated its lack of concern towards this issue by describing OHCHR's concerns as being 'baseless'.⁴

2. Excessive Use of Force

Protests, demonstrations and

rallies are common in Nepal and the majority of them take place peacefully and without violence. The protection of freedom of assembly and expression are necessary in a just and democratic society. The international standard, as espoused in the International Covenant of Civil and Political Rights, requires that any restrictions on these rights must be necessary in the "interests of national security or public safety, public order, the protection of public health or morals..."

The *Jana Andolan II* was a mass wave of protests organized by the Seven Party Alliance and civil society, with the support of the CPN (Maoist), the protests lasted for 19 days and culminated in the King's restoration of the House of Representatives. There were, however, many protests which became violent and dangerous and to which the security forces policing the protests responded with excessive and, occasionally, lethal force. Security forces often responded by hitting protestors with *lathis* and even fired live ammunition indiscriminately into crowds causing arbitrary loss of life. The disproportionate response of the security forces led the UN High Commissioner for Human Rights to state that she was 'shocked' at their behavior and urged the police to exercise restraint even when demonstrators were throwing stones and other missiles.⁵ The Nepali Red Cross confirmed that 4,300 people had been treated for injuries sustained during this protest, the numbers of injuries are likely to be much higher than this as not everyone could get to a hospital to receive treatment.

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3. INSEC Yearbook, Opinion of the National Human Rights Commission, pg. 428.

4. Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/HRC/7/68, 18 February 2008, para. 14.

5. Press Release: OHCHR, 'High Commissioner for Human Rights Shocked by Excessive Use of Force in Nepal', 13 April 2006.

Since 1991 Nepal has been a party to the United Nations Convention against Torture and Other, Cruel, Inhuman and Degrading Treatment (UNCAT). It is also a signatory to the International Covenant for Civil and Political Rights, the Convention for the Rights of the Child and the Geneva Conventions which all prohibit the use of torture in all circumstances. The most relevant of these is the UNCAT as it solely deals with the issue of torture, the other treaties are relevant in that they demonstrate that Nepal has repeatedly confirmed its international obligations with regard to the prohibition of torture and cruel, inhuman and degrading treatment.

The Tarai protests of February 2008 represented an opportunity for the state security forces to demonstrate a new, democratic approach towards dealing with protests in the new, democratic Nepal. Unfortunately the APF and Nepal Police were found again to display a systematic pattern of excessive use of force. OHCHR found that although there were many occasions when police showed considerable restraint in dealing with violent and provocative protestors they were not, on the whole, respectful of international human rights standards. Live bullets were fired into crowds in circumstances where other crowd control options were possible and protestors were not given sufficient warning.

The Law and Its Weakness

The UN Convention against Torture

Nepal's obligations under international law are quite clear. The domestic Nepal Treaty Act 1991 explicitly provides that in the case that any domestic law is inconsistent with a provision in an international convention then the convention will prevail. The supremacy of international treaty law is therefore without doubt. Since 1991 Nepal has been a party to the United Nations Convention against Torture and Other, Cruel, Inhuman and Degrading Treatment (UNCAT). It is also a signatory to the International Covenant for Civil and Political Rights, the Convention for the Rights of the Child and the Geneva Conventions which all prohibit the use of torture in all circumstances. The most relevant of these is the UNCAT as it solely deals with the issue of torture, the other treaties are relevant in that they demonstrate that Nepal has repeatedly confirmed its international obligations with regard to the prohibition of torture and

cruel, inhuman and degrading treatment.

Nepal has not signed the Optional Protocol to the UNCAT which would allow the UN Subcommittee for the Prevention of Torture to make investigatory visits to Nepal's detention centers and prisons in order to assess compliance with UNCAT. Also Nepal has not taken the opportunity to make a declaration under Article 22 to allow individuals within its jurisdiction to make individual petitions to the Committee Against Torture. It has, however, recognized the Human Rights Committee's competence under the ICCPR's individual complaint mechanism, as torture is prohibited by article ENTER then a torture victim could appeal to an international adjudicatory body this way.

The Interim Constitution

The 2007 Interim Constitution prohibits torture and cruel, inhuman and degrading treatment. Article 26 provides that:

- (1) No person who is detained during investigation, or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment.
- (2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by law.

The Interim Constitution's provision that torture "shall be punishable by law" is a positive development, however, so far there have been no practical legislative steps taken to bridge the gap between the aspirations of the Interim Constitution and the actual law with regard to punishing torturers. Currently there is no legislation criminalizing torture and those found guilty are merely subject

to 'departmental action'. In January 2008 the Government reported to the UN Committee Against Torture that a draft Torture Act has been prepared which incorporates the definition of torture in the spirit of the Article 1 of the Torture Convention. The draft has been referred to the Ministry of Law, Justice and Parliamentary Affairs for technical approval. The draft Act broadens and widens the definition of torture in the spirit of the torture convention.⁶ Over a year later this bill has not been passed and Nepal remains in contravention with its obligation under UNCAT to criminalize torture. Like the UN Committee the Supreme Court has also directed the legislature to criminalize torture by enacting new legislation.⁷

The Torture Compensation Act 1996

The 1996 Torture Compensation Act represents a half-hearted attempt to combat the widespread and systematic use of torture in Nepal. A close look at the act's definition of torture reveals that it is not compatible with the UNCAT definition. The Compensation Act fails to outline the 'purpose' of the treatment and merely refers to mal-treatment that occurs during "detention for investigation, awaiting trial or for any other reason". As a result it only applies to torture committed during actual police custody, clearly the UNCAT demands a much wider definition to cover torture whenever the victim is in the control of the state whether officially or unofficially. Similarly it fails to link torture with its official character that is treatment

which is committed by a state actor or with his/her acquiescence.

More crucial to the issue of impunity is that it fails to make torture a criminal offence. The absence of any provision deeming participation in torture a criminal offence in the criminal justice system means that Nepal is in direct violation of international law. As has been mentioned the UNCAT explicitly obliges signatory states to enact domestic legislation to this end. The Torture Compensation Act merely authorizes 'departmental action' to be taken against perpetrators, it is axiomatic that the lack of an independent adjudicator to punish such perpetrators is an unsatisfactory outcome for victims of this heinous crime. Moreover, it is reasonable to assume that such departmental action is unlikely to result in a proportionate punishment commensurate with the crime, thereby failing to deter future perpetrators. The failure to legislate torture as a criminal act, therefore, perpetuates the cycle of impunity by continuing the institutionalization of torture in the conduct of state actors. In theory, victims can achieve compensation but perpetrators will not be held properly accountable. A study by Advocacy Forum found that of the 208 cases filed for torture compensation in the 12-year history of the TCA, only 52 victims have been awarded compensation.

The menacing inclusion of a provision prescribing a fine for those who register a false claim under the Act also prevents many legitimate victims from coming forward for fear that they will be unable to prove that

they were tortured and may find themselves being further punished. Another cause for concern is the provision which provides that a police officer may conduct medical examination of a suspect in cases where a doctor is not available. The provisions of the Torture Compensation Act actively discourage victims from applying for compensation. The stringent and impractical 35 day time limit, for filing a torture case, serves only to protect torturers as it results in only a tiny minority of cases actually being reported. It is of crucial importance that the legislature demonstrates its commitment to human rights and security by removing or at least extending, the time limit.

Domestic laws relating to detention and evidence

The former UN High Commissioner for Human Rights Louise Arbour has emphasized the need for "a well-functioning law enforcement and criminal justice system as an essential means of strengthening human rights protection".⁸

This statement is of utmost prevalence with regards to strengthening the prohibition on torture; whenever the essential protections of a democratic and fair criminal justice system are weak and corrupt it is axiomatic that incidences of torture will be rife.

The domestic law governing police powers of arrest, interrogation and admissible evidence for suspects' trials can be found in the Interim Constitution, the State Cases Act and the Evidence Act. Ostensibly these

6. Comments by the Government of Nepal to the Committee Against Torture CAT/C/NPL/CO/2 (29 January 2008). [org/pdfcoll/26_June_publication.pdf](http://npl.co/26_June_publication.pdf).

7. See INSEC Yearbook 2008, pg. 74.

8. Truth and justice mechanisms: Ensuring accountability and sustainable peace and democracy in Nepal, Louise Arbour, United Nations High Commissioner for Human Rights, Kathmandu, Monday 22 January, 2007, available at: http://nepal.ohchr.org/en/resources/Documents/English/statements/HC/Year2007/2007_01_22_HC%20Transitional%20Justice_E.pdf

acts do not evince an overwhelmingly weak protection of human rights and they are commensurate with the minimum international human rights standards. Some lacunae are evident, however, within the framework of the law and its application which provides some indication of why the prohibition of torture is so widely disregarded in Nepal. Many of the rights guaranteed in the Interim Constitution are compromised by the current domestic legislation.

The State Cases Act governs the rules of police investigation and the prosecution of criminals. The right to not incriminate oneself, which ensures that an accused person cannot be compelled to be a witness against themselves, is present in the Interim Constitution and also dates back to the 1990 Constitution.⁹ Such protection is diluted by section 9(1) and (2) of the State Cases Act. Section 9(1) vests all authority in the police and hands over wide powers of interrogation and grants to the interrogators the sole responsibility for taking witness statements in the context of an investigation. Such a broad range of powers and the complete lack of any independent supervision or requirement to report to any third party create an atmosphere conducive for the abuse of the prohibition on torture. Section 9(2) provides police with the power to stop and arrest anyone they consider to be involved in the commission of the crime and they are empowered to record statements in writing. Obviously it is the role of the police force to make arrests and collect statements in a criminal investigation however the lack of inde-

pendent oversight leaves the system open to widespread abuse.

The Evidence Act governs what evidence is admissible in a criminal trial in order to convict the accused. Although a confession will only be admissible in court if it has been made voluntarily and without duress¹⁰ the burden of proof is placed firmly on the accused to prove that his/her statement was not given voluntarily.¹¹ Effective torture methods are continually being developed that leave little or no physical marks on the victim, in such cases it would be nearly impossible to prove that the accused had been tortured at all. Furthermore one Supreme Court admissibility decision held that a disputed confession was admissible as there were no visible signs that indicated a forced confession.¹² Given the Nepali common law's use of judicial precedent such a skewed interpretation of the rules of evidence is of grave concern.

A recent study has revealed that interrogation of suspects in Nepal results in an implausibly high number of confessions. The 2002 study by the Centre for Legal Research and Resource Development found that 59.6% of accused persons made confessions while in police custody in Nepal. When it came to the trial stage, however, 76.6% pleaded innocent in court directly contrary to their own confession.¹³ This indicates that it is very likely that torture methods were employed to get those confessions as only the cruel and base interrogation method of inflicting unbearable suffering on a suspect is capable of producing such absurd

results. A tortured suspect holed up in an interrogation room surrounded only by corrupt police officers will admit to anything in order for the pain and suffering to stop, it is only at the trial stage that he can publicly protest his innocence.

Laws relating to preventative detention

The Public Security Act of 1989 provides the police with the power to detain someone without formal charge for 90 days. The Terrorist and Disruptive Activities Ordinance of 2004 was enacted with the express purpose of assisting the police and army in the Maoist counter-insurgency and allows them to detain suspected 'terrorists' for up to 12 months. Both acts evince contempt for due process rights and as such have handed over immense powers of control to the state security forces in order to extract confessions and gain intelligence. In other words they have created an environment of interrogation and detention which is conducive to the widespread use of torture with impunity. The Committee Against Torture expressed concern over these powers and their obvious link to the prevalence of torture in Nepal.

The Public Security Act must also be reviewed and the excessive 90-day without charge provision must be changed in order to give those under the control of the state authorities the essential fair trial rights that help protect detainees from suffering torture and cruel, inhuman or degrading treatment.

9. Article 24(7) Interim Constitution and article 14(3) 1990 Constitution of Nepal.

10. Section 9(2), Evidence Act.

11. Section 26, Evidence Act.

12. Tara Prasad Sapkota v. HMG (1978) in "Police Investigation" by Yabera Sangraula, 'Policing in Nepal: A Collection of Essays' (Saferworld: 2007).

13. Centre for Legal Research and Resource Development – 'Analysis and Reforms of Criminal Justice System in Nepal' (2002).

Law and procedure relating to use of force

No international convention on the use of force exists however there are international standards to which Nepal is certainly under a moral obligation to comply with. It is arguable also that these standards are rules of customary international law which would confer a legal obligation on Nepal to comply with the standards. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials provide that officials should only use force against civilians when it is absolutely necessary to do so, moreover the use of force should be a proportionate response to the actual threat presented by a civilian. In particular, the use of firearms to disperse violent protests or to prevent violations of curfew should be restricted only to situations of necessity when there is no other alternative. The principles provide three paradigm situations when the necessity requirement will be typically fulfilled; (i) in self-defense or in defense of other people against imminent threat of death or serious injury; (ii) to prevent a particularly serious crime involving a grave threat to life; or (iii) to arrest a person posing this kind of threat and who is resisting efforts to stop the threat or to prevent their escape.

Moreover the ICCPR includes the right of freedom of assembly and freedom of movement. The state must protect those exercising this right and are only allowed to intervene 'in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'¹⁴ The domestic law is not commensurate

with these standards and it is evident that the APE, Nepal Police and Army are not adequately trained to deal with non-violent and violent protests according to the international standards. The relevant domestic law can be found in the Local Administration Act 1971 (LAA) and the Essential Installation Protection Act 1955 (EIA). The LAA empowers police to use force to restore public order and requires that they take a graduated response in responded with force. It is apparent that this standard is lower than those found in the UN Basic Principles and the Code of Conduct which requires the use of force to be guided by the principles of necessity and proportionality. The LAA permits police officers to use batons, rubber bullets, firing in the air, tear-gas and water cannon to preemptively restore public order. This clearly prescribes for situations where non-violent assemblies can be broken up by police using unnecessary and disproportionate use of force. The graduated response means that if the protests continue despite the use of the aforementioned weapons then use of firearms can be permissible. Authorization of the use of firearms is achieved by a written order of the Chief District Officer or if there is no time a verbal order will suffice and a written one presented within 24 hours, presumably after the event has taken place. Shots should be fired below the knee so as to disable the victim but without killing him/her. The law fails to ensure that firearms are used only in the most extraordinary of circumstances and the doctrinal requirements of necessity and proportionality have not been considered.

The EIA grants very wide powers to senior police officers to fire

The LAA empowers police to use force to restore public order and requires that they take a graduated response in responded with force. It is apparent that this standard is lower than those found in the UN Basic Principles and the Code of Conduct which requires the use of force to be guided by the principles of necessity and proportionality.

The LAA permits police officers to use batons, rubber bullets, firing in the air, teargas and water cannon to preemptively restore public order.

14. Article 21, ICCPR.

at persons below the knee in order protect petrol stations and highways from persons destroying or attempting to destroy them. The international standards clearly only authorize this type of response when there is a threat to life of the officers themselves or to other civilians. The OHCHR in Nepal has repeatedly sought to remind the security forces that the use of live fire is only appropriate in the limited cases where a suspected offender offers armed resistance or jeopardizes the lives of others.¹⁵

The domestic legal framework does not incorporate the principles of necessity and proportionality and does not encourage police officers to act with restraint and caution. The spirit of the UN Basic Principles is that force should be used as a method of last resort when no other peaceful alternatives are possible. The LAA and the EIA confer wide discretionary powers onto police officers in regulating their use of force. Their aim is clearly to give police the power to quell protests and enforce curfews to protect public property and maintain public order. This aim is legitimate and such powers are often necessary in a democratic state, however, it should be balanced with a proper respect for human rights principles. Freedom of assembly and freedom of movement are important human rights and police are prohibited under international law from preventing individuals from exercising their right to peacefully protest and to move around as they see fit.

Attitudes

It is apparent that there is not an explicit culture of respect for human rights within the Nepal Police, the Armed Police Force or the Nepal Army. During the autocratic rule of the *Panchayat* era the security forces existed primarily to protect the ruling elite and keep law and order at all costs. When democracy was instituted in 1990 there was hope that these institutions would come to be perceived as public servants capable of promoting human rights and maintaining law and order. According to national and international opinion the police failed to live up to these expectations in the early days of a democratic Nepal.¹⁶ The instigation of the People's War in 1996 and the subsequent atrocities committed by the State security forces in their counter-insurgency has ensured that people remain distrustful and fearful of their power.

INGOs and NGOs have recently been making great efforts to educate police and army personnel about concepts of human rights and international humanitarian law. It is apparent that such personnel, particularly low-level troops, do not have sufficient knowledge of rights based approaches to policing and maintaining law and order. The Special Rapporteur on Torture reported in 2005 how he had interviewed fairly senior personnel who did not believe that interrogation was possible without the use of torture. Such atavistic attitudes must be changed and a culture of respect for human rights of all persons regardless of their criminality must be fostered. Encouragingly

human rights cells have been running in the police, APF and army since the early 2000s. It is not clear how effective these cells have been in strengthening human rights protection within each of the institutions.

Conclusion

The success of the peace process is dependent upon the preservation of the rule of law and the maintenance of public order. These aspirations can only be achieved if the people of Nepal have confidence in their public servants and the legal process. The salience of incidences of torture and excessive use of force by the security forces have led to a crisis of trust within the state, this has been further compounded by the ongoing impunity for human rights violators. It is essential that this issue is taken seriously by the government, the security forces, the judiciary and civil society so that this trend does not continue in the new Nepal. A human rights based approach which recognizes the non-derogability of the prohibition on torture and respects the right to peaceful assembly and freedom of movement must be adhered to at all levels. Past perpetrators must be prosecuted and laws and attitudes must be reformed to prevent such incidences in the future. Only by reforming the state security forces and promoting a human rights agenda within the legislature and the judiciary can the new government of Nepal fully demonstrate its commitment to the peace process and human rights.

15. See Press Release: OHCHR-'Nepal renews appeal for non-violence by demonstrators and avoidance of excessive use of force by security personnel', 24 April 2006.

16. See Proposal submitted to the Enabling State Program, supported by the UK Dept. for International Development, for police reform to the Police HQ in Kathmandu, 2003.

Forthcoming Constitution of Nepal: How should It Treat Torture?



» Rabindra Bhattarai «

The Context

The first meeting of the Constituent Assembly, held in May 2008, declared Nepal as a republic and decided to go for federal system through re-structuring of the state. As result, at present the state system of Nepal is at a crossroad between abandonment of old system and establishment of a new one. State system is in transition where all the state machineries are running as they ran before but with constitutional promises of inclusive reframing. In the context of this shift of governance pattern, the issues of human rights and justice are, and should be, of prime importance. It is important at this stage that the bad tradition of impunity, and evil practice of torture, which are formally condemned by state itself, should not continue and it is more important to ensure that the human rights violations and atrocity will never reoccur in the future.

The Background

Torture is regarded as an old evil sustained throughout the civilizations as the mother of all human rights violations. It is one of the major concerns of human rights. Nepal has formally condemned torture and other forms of cruel, inhuman and degrading treatment or punishment. The formal condemnations are to be found in the constitutional provision, in the depository of UN in account of accession to the Convention against

Torture and Cruel, Inhuman or Degrading Treatment or Punishment, in a statutory promise in the name of Torture Compensation Act. However, torture, the evil practice of human capacity against fellow human beings, exists in practice in Nepal within the state's framework of these virtuous condemnations.

The Problem

The practice of torture in Nepal extends from army, police, armed rebel groups, and school teachers. However, custodial torture is the core one and it is in practice due to a state framework which condemns torture by one arm and allows and encourages it by the other.

In the past, both the Maoists and the security forces were engaged in regular intimidation and extortion leading to a climate of intense fear in Nepal. The government forces resorted to large-scale arbitrary arrests, detentions, "disappearances", extra judicial executions and torture including rape. Human rights defenders including lawyers, journalists and members of NGO's were arrested, tortured, killed or "disappeared". Nepal held the notorious distinction for the highest number of "disappearances" in any country in 2003 and 2004. The Maoists also resorted to torture and deliberate and unlawful killings. According to INSEC, a human rights organisation, nearly 3,000 people were killed and

In the past, both the Maoists and the security forces were engaged in regular intimidation and extortion leading to a climate of intense fear in Nepal. The government forces resorted to large-scale arbitrary arrests, detentions, "disappearances", extra judicial executions and torture including rape. Human rights defenders including lawyers, journalists and members of NGO's were arrested, tortured, killed or "disappeared".

Immediately after enforcement of the Interim Constitution, it was required to introduce a new torture related law complying with the constitution. This is still left untouched, as the leaders focused on their own vested interests. At present there is legislative structure in place for formulation of new constitution and law, therefore, the government and Constituent Assembly should be able to ensure mechanism against torture and impunity and should be determined to functionalize state's commitments.

about 26,000 people were abducted in 2004 in Nepal. The Maoists abducted civilians, including teachers and schoolchildren for the purpose of 'political indoctrination'.

More than 70% of Nepalese prisoners claim to have been tortured while in custody. CVICT Nepal, an NGO based in Kathmandu claims that some 16,000 people are subject to torture in Nepal every year, affecting an estimated 100,000 people including family members. According to data compiled by CVICT, at the beginning of the Maoist insurgency 80 percent of the victims were subjected to torture from the state and the remainder by the Maoist rebels. However, a study in the mid-western district of Jajarkot showed that the number subjected to torture by Maoists had doubled and reached 40 percent. The long-term repercussions of torture on health and psychological well-being were considered devastating. Political situation has changed in the country and Nepal is declared as a republic; however the situation of human rights has not improved significantly.

The Need

Torture Compensation Act 2053 could not address the need of the hour. It could not criminalize torture or discourage tortures. Consequently, torture continued in Nepal. The People's Movement 2006, therefore, mandated to term torture as a punishable offence. As a result, the Interim Constitution of Nepal 2007 has made constitutional provision of making torture a punishable offence. Torture Compensation Act 2053 is obviously insufficient as it cannot address the obligations of state party to the CAT and need of state mechanism to implement Interim Constitution.

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ture related law complying with the constitution. This is still left untouched, as the leaders focused on their own vested interests. At present there is legislative structure in place for formulation of new constitution and law, therefore, the government and Constituent Assembly should be able to ensure mechanism against torture and impunity and should be determined to functionalize state's commitments.

What to be done then?

For the journey to this direction, the government should listen to the civil society and go hand in hand with them and forward campaign against torture and impunity with a long term strategy. We need to adopt international system of criminalizing torture and impunity in the Nepalese legal system to ensure that no one faces torture in the Nepalese territory in future and to prevent such acts. To ensure non-recurrence of human rights violation in the future, we have to expressly determine that human rights violation is a criminal offence. We can discourage human rights violation with the burden of proof on the perpetrator. Hence, the government should prioritize formulation of law for the future with clear, effective and certainty of implementation.

Article 25 of the Interim Constitution states "No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner. Any such an act pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner determined by law." However, no law has been legislated yet. For constitutional safeguard this provision seems sufficient with minor changes. Major part of the changes in it should make it clear that constitution prohibits torture in all spheres

not only the torture that takes place in custodial settings.

The provision limits the scope of the torture within detention of any form. Torture inflicted during detention may be taken seriously than torture happened in other places and that should be punished by law proportionally, however, the constitution should not limit it only within detention. The phrase "who detained during investigation or for trial or for any other reason" is not necessary. Therefore, Constituent Assembly is recommended to provide the following provision in new Constitution:

- "(1) No person shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.*
- (2) Act of torture or cruel, inhuman or degrading treatment shall be punishable by law*
- (3) Person, subjected to or victim of, torture shall be entitled to reparation and shall be compensated in a manner determined by law."*

Present constitutional and legal provisions have made the right to compensation as a civil claim. Right to compensation, rescue and reparation of the victims have been ignored. There is almost no provision for protection of victims and witnesses. Hence, we have to make necessary arrangements so that the victims can feel justice.

Having above changes in the existing provision will lead to broader coverage against torture and protection to the victims as well. Keeping a progressive provision in the Constitution is not sufficient. Such progressive provisions should be expanded through specific legislation. Law to prescribe punishment for the act of torture has been expected since the promulgation of the Interim Constitution; however, the government has not been able or willing to bring that law.

Civil society has been pushing much to bring new law that prescribes punishment for act or torture and updates the provisions for the justice to victim including effective compensation schemes. The voice of the people is unheard. A draft bill prepared by civil society initiative has already been presented to Ministry of Law, Justice and Constituent Assembly and to Ministry of Home. More recently, Supreme Court has issued a stricture to the government to prescribe punishment against torturers. Therefore, Constituent Assembly should be serious in this matter. It should pass the bill by asking the government to table it immediately. The law should be supplementary to the constitutional provision as every detail could not be incorporated in the constitution.

If law are in place, plan of action for its implementation should be also in place and necessary resources should also be ensured. The Assembly should also instruct the government to these aspects. The agencies responsible for security arrangements should develop human resources well-equipped with scientific technology, instruments, resources and means for crime investigation to guarantee protection against torture. Crime investigation should be developed through the aspect of forensic science. Crime investigation should be specialized. We have to end the trend to initiate case on the basis of the statement of suspect. Crime investigation and custody and detention management should be conducted by the human resource that has developed mentality to conduct crime investigation without torture. Regular inspection and supervision should be arranged. For this, the government has to prepare and implement clear action plan against torture with allocation of necessary resources and means.

Keeping a progressive provision in the Constitution is not sufficient. Such progressive provisions should be expanded through specific legislation.

Law to prescribe punishment for the act of torture has been expected since the promulgation of the Interim Constitution; however, the government has not been able or willing to bring that law.



Interview

There is not a Competitive Market in Human Rights as There is in Other Endeavours: Bennett

The Office of the High Commissioner for Human Rights (OHCHR) in Nepal was established as per an agreement between the United Nations High Commissioner for Human Rights and Government of Nepal on April 2005, during the direct rule of former King Gyanendra. The decade long armed conflict was on the peak during the period of its establishment. The Office played important role for protection of people's rights during the April uprising and tarai movement of the country.

Richard Bennett has been appointed as Nepal Representative of UN High Commissioner for Human Rights in July 2007. Prior to Nepal, Bennett has served as the Representative of the High Commissioner for Human Rights in Afghanistan and Chief Human Rights Officer in the United Nations Mission in Afghanistan. As the country is celebrating UN Day against Torture Bennett gave written interview to INFORMAL about the situation of torture and role of his office in ending torture. Excerpts:

1. How do you assess the situation of torture in the country?

Torture and other forms of cruel, inhuman and degrading treatment have been and remain serious problems in Nepal. During the conflict, both parties to the conflict used torture. OHCHR-Nepal has documented and published reports on many of these cases, by both the Maoist Army and the Nepal Army (NA) including reports documenting torture by the then Royal Nepal Army at the Bhairabnath Battalion in Maharajgunj and the Chisapani Barracks in Bardiya, and on abuses by cadres of the Young Communist League (YCL), including serious allegations of ill-treatment of individuals taken under their control. Cadres of various political parties continue to use intimidation and violence, which often includes the use of beatings and serious ill-treatment.

Since the end of the conflict,

there has been a significant improvement in Nepal's record on torture. OHCHR no longer receives new reports of torture by the NA. However, OHCHR continues to receive reports of the use of torture and cruel, inhuman or degrading treatment in places of detention, and has documented many instances of serious beatings and other forms of ill-treatment by police during interrogations. OHCHR has tried to identify ways to both prevent these violations and to improve accountability when they happen. For instance, detainees in police custody, including those who have been abused, often go without medical care, and health examinations are poorly documented. The failure of police and health officials to properly document the health of detainees after arrest makes it more difficult to identify abuse in custody when it happens, and more difficult to defend against baseless

allegations.

Another problem frequently encountered by OHCHR monitoring teams is a lack of compliance with the rule that detainees must be presented before judicial authorities within 24 hours of arrest. The lack of proper registration and production before a court has resulted in persons being kept in illegal detention for periods from several days up to several weeks. This still remains a common practice. Those who detained illegally are particularly vulnerable to abuse.

There have been some positive developments. The language of the Interim Constitution suggests that the state is under an obligation to adopt laws criminalising torture. That provision of the Constitution has yet to be fully enacted in anti-torture legislation. We understand that a draft bill criminalising torture has been prepared, but it has yet to be made public or tabled before the

In addition to the passage of strong anti-torture legislation, we believe that instances of torture can be reduced if the current laws and regulations giving due process rights to detainees are more closely followed – for instance, laws requiring timely access to a lawyer, bringing suspects before a judge within 24 hours of arrests, and providing thorough medical examinations upon arrest or transfer into and out of police custody.

Parliament. While the Torture Compensation Act has proved to be a valuable tool for victims of torture to obtain some relief, its provisions have not been fully implemented, and the Act itself could also be improved in many ways. For instance, its short 35-day statute of limitations has prevented many victims from seeking compensation pursuant to the Act.

In addition to the passage of strong anti-torture legislation, we believe that instances of torture can be reduced if the current laws and regulations giving due process rights to detainees are more closely followed – for instance, laws requiring timely access to a lawyer, bringing suspects before a judge within 24 hours of arrests, and providing thorough medical examinations upon arrest or transfer into and out of police custody.

2. How is your office collaborating with other national organisations to combat torture and impunity in Nepal?

OHCHR is collaborating very closely with both government and non-government institutions to combat impunity for torture in Nepal. Our teams monitor incidences of torture through regular visits to police custody facilities throughout the country. We then use the information gathered during this monitoring to develop targeted technical advice and training programmes for

the police. For instance, OHCHR – in collaboration with the Nepal Police, National Human Rights Commission (NHRC) and Advocacy Forum – has developed a series of programmes targeted at providing better health examinations to detainees in police custody. We hope that the provision of thorough and well-documented health exams will act as a deterrent to the abuse of detainees in police custody. In addition to these workshops, OHCHR worked with the police to develop its human rights curriculum, which includes issues of torture and ill-treatment. In addition to its work directly with the police, OHCHR has also participated in organising workshops with the NHRC and civil society organizations on establishing effective national mechanisms in accordance with the Optional Protocol to the Convention Against Torture (CAT), which Nepal ratified in 1991.

3. What measures needs to be taken to make torture a history in Nepal?

Above all, the political will needs to be built to take steps to prevent the occurrence of serious human rights violations, including torture – and to end ongoing impunity for such acts of violence. The problem of torture has to be addressed at many levels – at the level of national legislation and at the level of police procedures and practices. OHCHR has found that there is an over-emphasis

among police on eliciting a confession from criminal suspects, rather than a focus on a broader criminal investigation. This leads many police to use coercive tactics during interrogation. Increased training and resources for criminal investigation, and a clear message from the police command and civilian authorities that coercive interrogation techniques will not be tolerated, will have a positive impact on reducing torture and ill-treatment.

There are also certain legislative initiatives that can help make torture a thing of the past. Incorporating the provisions of the CAT into domestic law, defining torture as a crime in national criminal law, making appropriate revisions of the Torture Compensation Act and ratifying the Optional Protocol would all be positive steps. Ensuring that past cases of torture are properly investigated and, where appropriate, prosecuted is also crucial. We remain concerned, for instance, that those responsible for the torture and death of Maina Sunuwar have yet to be brought to justice.

4. The government has been facing criticism for not implementing the recommendations of UN Special Rapporteur on Torture Manfred Nowak. Your office has been monitoring the implementation of the SR's recommendations what is the situation of implementation of

there recommendations?

The key recommendations of the Special Rapporteur included: the need to define torture in accordance with the CAT, the criminalisation of in-communicado detention, establishing an independent authority to investigate cases of torture and developing a broader approach to compensation for victims of torture, including not just financial compensation but also medical treatment and rehabilitation. OHCHR has been monitoring the implementation of these recommendations. There have been some developments in the recent past, though many of the Special Rapporteur's recommendations are yet to be implemented.

But the Government of Nepal need not look only to the international community for guidance on this. Its own institutions have spoken loudly against torture. Many of the NHRC's recommendations relating to torture have yet to be implemented, and the Nepal Supreme Court issued a December 2007 decision requiring the government to pass legislation criminalising torture in accordance with the Interim Constitution and Nepal's international treaty obligations.

5. Do you think existing Nepali laws are sufficient for combating torture or there is still the need of new legislation?

The main laws regulating the prohibition against torture in Nepal are the Interim Constitution and the Torture Compensation Act. As mentioned before, the Interim Constitution, promulgated in 2007, states that torture "shall be punishable by law", but the government has yet to pass legislation criminalising torture, and OHCHR-Nepal urges it to do so promptly.

The Torture Compensation Act also provides an opportunity for victims to seek compensation, but it

is limited by focusing solely on financial compensation. It also does very little to combat impunity because the actual perpetrators are not responsible to pay compensation – which is paid by the government. The Act also does not obligate the government to take institutional action against a perpetrator of torture. Instead, perpetrators are subject only to "departmental action," such as demotions and suspensions. The Act should be amended to ensure that the perpetrators themselves suffer some consequences as a result of their actions. The authorities should take action whenever there is an allegation of torture, and these acts certainly should have formal consequences where a case of torture is substantiated under the Torture Compensation Act. OHCHR has so far not heard of any cases of torture substantiated under the TCA in which the police officers had faced any action.

6. As the country is drafting a new constitution, what provisions should be incorporated in it for the protection of human rights and combating torture?

Ultimately, it is up to the Constituent Assembly and the people of Nepal to decide precisely how the new Constitution will protect victims of torture and ensure that perpetrators are properly punished. Some options include constitutional provisions allowing for retrospective criminal prosecution of international crimes, prohibiting amnesties for torture, providing for the non-admissibility of evidence gathered through the use of torture and ensuring that torture by state actors such as police and Army officials fall within the jurisdiction of civilian courts. The new Constitution could take a progressive approach toward international law by directly incorporating Nepal's treaty obligations under international human rights instru-

ments such as the CAT. OHCHR stands ready to advise and assist the Constituent Assembly, the Government and other stakeholders in these matters.

7. What role has your office been playing to make the future constitution human rights friendly constitution?

Our main role has been to respond to requests for advice concerning the international human rights provisions to be included in the new Constitution. We have also been working to ensure participation of all Nepalis in the constitution-making process, primarily by providing training on that process to journalists.

8. Do you have any words for the readers of INFORMAL?

I would like to say a few words about the extension of OHCHR-Nepal's agreement with the Government. First, I very much appreciate the support that OHCHR has received from civil society about the extension: we all remember the role you played to bring OHCHR to Nepal. As you know, the agreement has been extended until 9 September as an interim measure; however government officials have assured us that once the new cabinet is formed, discussions will be held urgently about the longer extension requested by the High Commissioner.

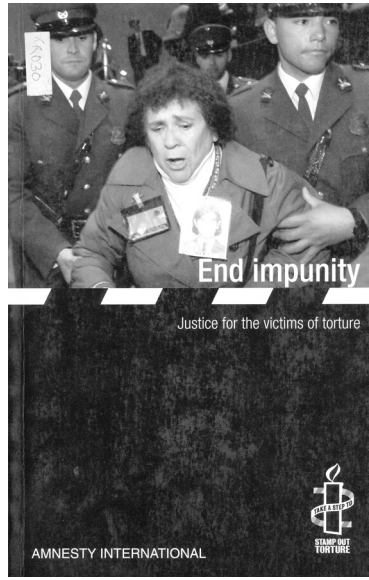
OHCHR believes that there is ample space for all of us to work for the protection and promotion of human rights in Nepal, including civil society, the NHRC and other national institutions, and the Government. There is not a competitive market in human rights as there is in other endeavours. Rather it is an area in which our efforts, whether in monitoring, investigating, reporting or building capacity, should be mutually reinforcing.

End Impunity: Justice for The Victims of Torture

'End Impunity: Justice for the victims of torture' highlights the fact that most of those who torture, order torture or fail to intervene in torture escape without ever being investigated, prosecuted, tried or punished. The book published by Amnesty International in 2001 in the form of a report demonstrates the widespread failure to give victims of torture the rehabilitation, compensation and other forms of reparation they need and deserve. The book analyses the prohibition of torture in international law and the rights of torture victims to reparation. It explores the barrier to justice in national laws and practices, and stresses that the struggle against impunity must be waged primarily at the local and national level.

The book records the welcome developments in the quest for justice internationally, and concludes with a series of recommendations aimed at governments to promote the fair and effective prosecution of those alleged to be responsible for a crime of torture or a related crime.

In its introduction, the book talks about progress being made in the effort to overcome impunity. "Public awareness of the issue is greater than ever before, and ground breaking measures have been taken to ensure that alleged torturers who escape justice in their own country can be held to account internationally." The book presses for bringing the culprits to justice not only to deter them from repeating their crimes, but also to make clear to others that torture and



End Impunity: Justice for The Victims of Torture

Publisher: Amnesty International

Edition: 2001

ill-treatment will not be tolerated.

The book is divided into six chapters. The first chapter 'No lasting reconciliation without justice' chronicles the impunity enjoyed by those involved in torture in Turkey, Brazil, Mexico, Sierra Leone, Chechnya, China, Bangladesh and Egypt during the period 1990-2001. Hailing the international community's vote to establish International Criminal Court with jurisdiction over perpetrators of torture, the chapter concludes that the goal of overcoming impunity is a step closer with every successful prosecu-

tion. The second chapter 'The crime of torture and related crimes under international law' analyses the provisions against torture enshrined in international laws – mainly in the Convention against Torture and the Rome Statute of the ICC. Victims' right to reparations, the third chapter urges the government to award appropriate reparations to the victims of torture, including compensation, rehabilitation, restitution (restoring the victim to the previous situation), satisfaction (such as restoration of reputation and public acknowledgement of the harm suffered) and measures to ensure non-repetition.

Chapter four 'Injustice at home' analyses the flaws in the legal framework for torture of certain countries. Giving examples of Special Court in Sierra Leone, 'mixed tribunal' in Cambodia and the Rome Statute of ICC, the fifth chapter 'Justice Abroad' asserts that the exercise of universal jurisdiction has proved to be one way of achieving effective prosecution. In the last chapter, the book has made 19 recommendations on criminalizing torture, ensuring rights of victims and ensuring that torture is made subject to universal jurisdiction.

The case studies of different countries presented in the chapters have added more meaning to the chapters. The book only concentrates on impunity for torture by agents of state or by armed political groups. If cases of torture committed by individuals were also included, the book would have succeeded in portraying all forms of torture.
(Nir Lama)

Ensure Accountability for Building Torture Free Society

"Soni Kuresi, 19, Moni Kuresi, 13, and Gudiya Kuresi, 14, of Surkhet Municipality-6 were tortured in custody by DSP Govinda Sah and ASI Gyanumaya Thapa of District Police Office in 14 May 2008. The victims were inflicted electric shocks, beaten with a pipe and a pin was driven into their fingers. Of the three, the most seriously injured Soni underwent treatment in Kathmandu, while Moni and Gudiya underwent treatment in Surkhet. Though a panel led by SP of Regional Police Office Bir Bahadur Rana was formed to probe the incident, the victims did not receive justice by the end of the year",

This is a case which reflects the trend of torture in our country. This is only a representative case, many people who faced torture during the period of Maoist insurgency did not receive any compensation neither they were given justice.

Though the government had expressed its commitment to combat torture, it is yet to exhibit its will to translate its commitment into reality. CVICT, a NGO working in the field of torture, informed that it has provided assistance to over 35,000 torture victims since its inception in 1990. As per the international standard, the family members of the torture victims are also considered as the torture victims, so there are hundreds of thousands torture victims in the country. The trend of torturing suspects during the process of trial for the purpose of extraction of confession is still rampant in the country despite efforts from various organizations to make security personnel aware about the national and interna-

tional legal provisions against torture.

The statistics released by Advocacy Forum reveal that of the 208 cases filed for torture compensation in the 12-year history of the Torture Compensation Act (TCA) only 52 victims have been awarded compensation. The TCA has the provision that the government will pay the compensation on the case of torture and the government attorney will plead on behalf of the perpetrators in case of torture-promoted impunity. The trend of inflicting torture in jail for the purpose of confession still exists, which is a great challenge for modern investigation system. Though the country has signed various national and international treaties and conventions related to human rights and the interim constitution of the country also ensures constitutional guarantee against torture, the trend of inflicting torture goes on unabated.

The country expressed its commitment for ending torture by guarantying rights against torture as fundamental rights but it has failed to criminalize torture. Nepal also has failed to amend domestic legislation in line with International standard and also to ratify the optional protocol of CAT, which give impression that the government's commitments against torture are quite hollow. New Nepal should be torture free Nepal for restoration of sustainable peace in the country. As the CA members are busy drafting a new constitution, they should make sure that it frames all necessary instruments for combatting torture.

The government forces resorted to large-scale of arbitrary

arrests, detentions, disappearances, extra judicial executions and torture including rape during the period of Maoist insurgency but none of the perpetrators were held accountable so far. The trend of inflicting torture will continue till the government exhibits strong commitment of initiating action against persons involved in inflicting torture.

All the governments formed after the success of April Uprising of 2006 made an excuse of transitional period to cover up their inability to combat torture, among other violations, in the country. As we are going to make a new Nepal by institutionalizing the Federal Democratic Republic there should not be any room for torture. To eliminate torture from the country and to realize 'New Nepal: Torture Free Nepal', all allegations of torture and ill-treatment ought to be promptly and thoroughly investigated by an independent authority. The NHRC might be entrusted with this task after enhancing its the skill, as at present the NHRC has become only a show piece due to lack of necessary resources. Similarly, any public official indicted for abuse or torture, including prosecutors and judges implicated in colluding in torture or ignoring evidence, be immediately suspended from duty pending trial, and prosecuted. Victims of torture and ill-treatment should receive substantial compensation proportionate to the gravity of the physical and mental harm suffered, and adequate medical treatment and rehabilitation.

Pratibedan Baidya

(*See Nepal Human Rights Yearbook 2009 of INSEC, pg. 339)

Livelihood at Risk

Findings from Mid-western Nepal



Land Holding Pattern in Mid-western Nepal



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