

RIGHT TO FREEDOM FROM TORTURE IN NEPAL

A Dissertation Submitted by

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ABSTRACT

This dissertation examines the right to freedom from torture in Nepal. I will evaluate the local impact of international human rights law, especially the right to freedom from torture, from the viewpoint of established normative frameworks, judicial interventions, and reporting obligations and monitoring by United Nations (UN) mechanisms. My research finds that accession by Nepal to key anti-torture mechanisms has not been enough to counter widespread instances of torture, and that many of the obstacles to the rights to freedom from torture are rooted in State mechanisms and social structures. The key mechanisms are: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), other UN human rights instruments, *Interim Constitution* of Nepal and certain legal provisions, and formal commitments made by the Nepalese government.

Torture is a grave violation of human rights and is prohibited by customary international law and treaty-based international law. The CAT prohibits torture under international law. It also defines standards for the right to freedom from torture and other forms of ill-treatment, and State obligations for protecting and promoting this right. Torture is practised however in many parts of the world, mostly in the course of criminal investigations and to meet political ends. Most notably, after the September 11, 2001 terrorist attacks in the USA, many countries started to use torture to extract confessions from suspected terrorists. The impact of this practice has expanded into many parts of the world. Judicial intervention can play an effective role in protecting people's rights to freedom from torture. Similarly, international pressure can have some positive influence in preventing torture.

As a signatory to the CAT, and other major international human rights treaties, Nepal guarantees the right to freedom from torture and other forms of ill-treatment as a fundamental right. As in other parts of the world, torture is closely associated with the criminal investigation process, so that the implementation in Nepal of legal protections including those found in the CAT is questionable. Research undertaken for this dissertation revealed torture as a systemic problem, used as a means of obtaining confessions and/or information and as a misuse of power by the police and other law enforcement officials. Generally, people have little understanding about their rights and consequently, the rate of acceptance of torture is high in Nepalese society. Poverty, corruption, impunity, inadequate training for police and resource constraints for criminal investigation are linked as factors that are exacerbating the prevalence of torture in Nepal. Poor and marginalised sections of the population are vulnerable to torture and cannot articulate their needs, defend themselves or assert their rights. Other factors which make it challenging for the vulnerable in Nepalese society to access justice include a lack of criminalisation of torture in the statutory law, the absence of independent and prompt investigation of torture, inconsistencies legal provisions, and lengthy, costly and complex court procedures.

Nepal has seen some instances of judicial support for the right to freedom from torture. These include public interest litigation and some torture compensation cases. Nevertheless, conflicting decisions on the non-admissibility of confessions obtained through torture and inadequate analysis of law, precedents and facts in the

decisions of torture compensation cases are also found to have hindered the protection of rights to freedom from torture. The Government has consistently repeated its commitment to fulfil its obligations under international human rights law through periodic reports and participation in constructive dialogue with UN mechanisms and processes in this field. Nevertheless, its implementation of recommendations and history of missing reporting deadlines is sub-optimal. The reporting requirements in CAT (and other UN human rights instruments) require a level of sophistication in bureaucratic systems (including data capture and analysis) that is not yet present in Nepal.

This study recommends a holistic approach for legal reform. Anti-torture measures required in order for the prevention of torture in Nepal to succeed will include effective judicial intervention, strong political will and institutional commitment. More specifically, new legal provisions will be required in order to bring Nepalese law in line with the CAT in forthcoming constitution and anti-torture law. Changes required at a social and cultural level will include: empowering individuals and community members; strengthening the institutional capacity of the police, the judiciary and other concerned officials; and effective monitoring in domestic and at UN contexts.

CERTIFICATION OF DISSERTATION

I certify that the ideas, research works, results, analyses and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has been not previously submitted for any awards.

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ABBREVIATIONS

AF	-	Advocacy Forum
AHRC	-	Asian Human Rights Commission
APF	-	Armed Police Force
CA	-	Constitution Assembly
CAT	-	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CAT/C	-	Committee Against Torture
CCPR/C	-	Human Rights Committee
CDO	-	Chief District Officer
DFID	-	Department of International Development
CeLRRd	-	Centre for Legal Research and Resource Development
CIA	-	Central Intelligence Agency
CIDP/TRCA	-	Commission on Investigation of Disappeared Persons and Truth and Reconciliation Act 2014
CPA	-	Comprehensive Peace Agreement
CPN-M	-	Communist Party of Nepal (Maoist)
CRC	-	Convention on the Rights of the Child 1989
CRTA	-	Compensation Relating to Torture Act 1996
CVICT	-	Centre for Victims of Torture Nepal
DPKO	-	United Nations Department of Peacekeeping Operations
DTA	-	Detainee Treatment Act 2005 (USA)
ECHR	-	European Court of Human Rights
ECtHR	-	European Court of Human Rights
FIR	-	First Information Report
HRC	-	Human Rights Council
HRTMCC	-	Human Rights Treaty Monitoring Coordination Committee
ICC	-	Rome Statute of the International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights 1966
ICJ	-	International Court of Justice
ICRC	-	International Commission of Red Cross
INSEC	-	Informal Sector Service Centre
NPM	-	National Preventive Mechanism
MCA	-	Military Commission Act 2006 (USA)
NGOs	-	Non-government Organizations
NHRC	-	National Human Rights Commission Nepal
NHRCA	-	National Human Rights Commission Act 2012
NHRI	-	National Human Rights Institutions
NJA	-	National Judicial Academy
OHCHR	-	Office of the High Commissioner for Human Rights
OMCT	-	World Organization against Torture
OPCAT	-	Optional Protocol to the Convention Against Torture 2002
OAG	-	Office of Attorney General
OP-ICCPR	-	Optional Protocol to the International Covenant on Civil and Political Rights 1966

PIL	-	Public Interest Litigation
PPR Nepal	-	Forum for Protection of People's Rights Nepal
RNA	-	Royal Nepal Army
SIAC	-	Special Immigration Appeals Commission (UK)
TRC	-	Truth and Reconciliation Commission
UDHR	-	Universal Declaration of Human Rights 1948
UK	-	United Kingdom
UN	-	United Nations
UNDP	-	United Nation Development Programme
UNTS	-	United Nations Treaty Series
UPR	-	Universal Periodic Review
U.S.	-	United States
USA	-	United States of America

CHAPTER-I: INTRODUCTION

1.1 Background of the study

Torture has been accepted as one of the most heinous human rights violations in the world.¹ Professor Rejali defined torture as: “the systematic infliction of physical torment on detained individuals by state officials for police purpose, for confession, information or intimidation”.² Many scholars stated that torture is the intentional infliction of harm on the core of human personality and dignity.³ Therefore, it is widely prohibited by customary international law and treaty-based international laws. The right to freedom from torture has been defined as a peremptory norm which is accepted as a principle of *Jus Cogens*. The principle of the *Jus Cogens* is a fundamental tenet of customary international law which prohibits torture under any circumstances. The Vienna Convention on the Law of the Treaties assures that in circumstances in which the treaty provision conflicts with the peremptory norms, treaty provision becomes void.⁴ Furthermore, the Human Rights Committee (CCPR/C) has clarified that some non-derogable rights including the prohibition of torture and arbitrary deprivation of life cannot be reserved because of their status as peremptory norms.⁵

After World War II, the United Nations Charter declared that the protection of human rights is one of the core purposes of the organisation.⁶ The universal protection of torture was realised mainly from the Universal Declaration of Human Rights (1948) (UDHR);⁷ International Covenant on Civil and Political Rights (1966) (ICCPR) as the first human rights treaty that explicitly covers the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (other forms of ill-treatment).⁸ The

1 See, eg, Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context*, (Oxford University Press, 3rd ed, 2007) 224; Tobias Kelly, ‘The Cause of Human Rights: doubts about torture, law and ethics at the United Nations’ (2011) 17 *Journal of the Royal Anthropological Institute* 728.

2 See Darius Rejali, *Torture and Democracy* (Princeton University Press, 2009) 35.

3 See, eg, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture A Commentary*, (Oxford University Press 2008) 1; Sussman, David, ‘What’s Wrong with Torture?’ (2005) 33 *Philosophy & Public Affairs* 1-33; Winston P. Nagan and Lucie Atkins, ‘The International Law of Torture: From Universal Perspective to Effective Application and Enforcement’ (2001) 14 *Harvard Human Rights Journal* 88.

4 See *Vienna Convention on Law of the Treaties*, open for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53.

5 See Human Rights Committee, *General Comment 24 (52): General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 52nd sess, UN Doc.CCPR/C/21/Rev.1/Add.6 (11 November 1994) para 10. The CCPR/C stated that ‘some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples’.

6 See *Charter of United Nations* arts 1, 3, 55.

7 *Universal Declaration of Human Rights*, GA Res 217 A (III) UN GAOR 3rd sess, 180 plenmtg, UN Doc A /810 (10 December 1948) art 5 (‘UDHR’). The UDHR states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

8 *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 (‘ICCPR’). The ICCPR provides in article 7

provision adds more scope to prohibit medical and scientific experimentation without the consent of the concerned person. Moreover, the ICCPR Article 4 (2) defines right to freedom from torture and other forms of ill-treatment as a non-derogable right. Furthermore, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment in order to condemn torture as an offence to human dignity.⁹ The Declaration is a non-binding instrument; however, it does define torture and has listed measures to abolish torture, which need be adopted by the State.

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT) came into force on 26 June 1987 to protect and promote the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (other forms of ill-treatment). The CAT prohibits torture, more specifically Article 2(2) states that: ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war or internal political instability or any other public emergency, may be invoked as a justification of torture.’¹⁰ This provision elaborates very clearly that there is no any circumstance in which torture is permissible.

The CAT set up a comprehensive arrangement as a form of international law to prohibit torture and other forms of ill-treatment. It sets out a broad range of measures as the obligations of its member states including the definition of torture.

The definition covers the term ‘torture’ as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹

It is an important component to set an international standard and to make it uniform in international level. The definition of torture covers mainly six elements - the act of torture, severity of pain or suffering, involvement of public officials, intention, purpose, and excluding pain or suffering from lawful sanction. In addition, the CAT provides other terms ‘other cruel, inhuman or degrading treatment or punishment’

that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical and scientific experimentation.’

9 *Declaration on the Protection of all Persons from Being Subjected to Torture and other Cruel, inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) art 2.

10 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 2(2) (‘CAT’).

11 CAT art 1.

(other forms of ill-treatment).¹² Professor Nowak stated that the both provisions are equally prohibited.¹³ However, the CAT does not explicitly provide the definition of other forms of ill-treatment (please see for detail in Chapter II).¹⁴

Furthermore the CAT sets out prohibition of torture and other forms of ill-treatment;¹⁵ to establish legislative, administrative and judicial measures in the domestic level for prevention of acts of torture;¹⁶ strong principles of criminal responsibilities including defining universal jurisdiction towards incidents of torture;¹⁷ prompt and impartial investigation and prosecution where torture was inflicted;¹⁸ provide redress to the victims of torture;¹⁹ non-refoulement to the person where he/she would be in danger of being torture;²⁰ anti-torture education;²¹ exclusion of statements obtained through torture;²² and prevention from other forms of ill-treatment.²³ Furthermore, the CAT established the Committee Against Torture (CAT/C), member states' obligations to submit progress report on the implementation of the CAT.²⁴ In addition, Optional Protocol of Convention Against Torture (OPCAT) has been developed as an international mechanism to monitor detention centres at the domestic level.²⁵

Similarly, cruel treatment and torture is prohibited during non-international armed conflict as per the International Humanitarian Law in the Geneva Convention's Common Article' 3.²⁶ The Geneva Convention IV prohibits anyone from obtaining information through coercion during armed conflict.²⁷ In addition, the Additional

12 CAT art 16.

13 Manfred Nowak, 'What Practices Constitute Torture?' US and UN Standard' (2006) 28 *Human Rights Quarterly* 809.

14 Although, there are some differences between the terms 'Torture' and 'Other Cruel, Inhuman or Degrading Treatment or Punishment', the both acts are prohibited by the CAT. In the context of Nepal, the *Compensation Relating to Torture Act 1996* includes the term 'Other Cruel, Inhuman or Degrading Treatment' also part of the term 'Torture'. Thus, the both terms are equally used in this thesis.

15 CAT art 4.

16 Ibid art 2.

17 Ibid art 5.

18 Ibid arts 11, 12.

19 Ibid art 14.

20 Ibid art 3.

21 Ibid art 10.

22 Ibid art 15.

23 Ibid art 16.

24 Ibid arts 17, 24

25 *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Open for signature 4 Feb 2003, 2375 UNTS 57 (entered into force 22 June 2006) art 17 ('OPCAT').

26 *Convention (III) relative to the protection of civilian persons in time of war*, open for signature 12 August 1949, 75 UNTS 135, (entered into force 21 October 1950) art 3. All four Geneva conventions have a common article 3 which prohibits torture and other forms of ill-treatment in the case of armed conflict not of an international character.

27 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) arts 31, 32. The provisions prohibits any physical or moral coercion to obtain information from third party (art 31) and prohibition of torture, corporal punishment and other measures of brutality (art 32).

Protocol to the Geneva Conventions guarantees freedom from torture to the victims of armed conflict.²⁸

The Rome Statute of International Criminal Court (ICC) defines torture as a war crime and a crime against humanity during a period of systematic and widespread violence.²⁹

Regional human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,³⁰ American Convention of Human Rights 1978,³¹ and African Charter on Human Rights and People's Rights 1981³² prohibit any act of torture and other forms of ill-treatment. In addition, many thematic conventions have also contained the right to freedom from torture, such as the Convention on the Rights of the Child 1989 (CRC) requires member States to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.³³ The International Convention on the Protection of the Rights of All Person Migrant Workers and Members of Their Families 1990 provides that member States ensure that 'no migrant worker or member of his or her families shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.³⁴ The International Convention on the Protection of the Rights of Persons with Disabilities 2006 also contains that member States shall guarantee prohibition of torture and other forms of ill-treatment.³⁵

Despite the absolute prohibition of torture and other forms of ill-treatment under the customary and treaty-based international laws, torture and other forms of ill-treatment remain a serious human rights problem in the world. A report stated that Amnesty International received torture and other forms of ill-treatment committed by state officials in 141 countries of the world between 2009 and 2013.³⁶ Similarly, scholars stated that 'its systematic incidence remains significant and widespread, more in authoritarian than liberal regimes, more in developing than developed worlds, but also

28 *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), open for signature 8 June 1977, 1125 UNTS 3 (entered into force 8 December 1978) art 75.

29 *Rome Statute of International Criminal Court* open for signature 17 July 1998, 2187 UNTS 3 (entered into force 01 July 2002) arts 7, 8.

30 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 3. As amended by the protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 27 May 2009 CETS No 204 (entered into force 1 September 2009), art 3.

31 *American Convention on Human Rights*, open for signature 22 November 1969, 1114 UNTS 1243 (entered into force 18 July 1978) art 5(2).

32 *African Charter of Human and People's Rights*, adopted 27 June 1981, 1520 UNCT 217 (entered into force 21 October 1986) art 5.

33 *Convention on the Rights of the Child*, open for signature 20 November 1989, 3 UNTS, (entered into force 2 September 1990) art 37.

34 *International Convention on the Protection of the Rights of All Person Migrant Workers and Members of Their Families*, open for signature 18 December 1990 (entered into force 1 July 2003) UN Doc A/RES/45/158, art 10.

35 *International Convention on the Protection of the Rights of Persons with Disabilities*, open for signature 13 December 2006 (entered into force 3 May 2008) UN Doc. A/61/611, art 15 (1).

36 See Amnesty International, *Torture in 2014, 30 Years of Broken Promises*, (Amnesty International, 2014) 10 <<http://www.amnestyusa.org/sites/default/files/act400042014en.pdf>>.

in developed and democratic countries as well', (see below 1.3 for more).³⁷ The CAT is one of the widely accepted international human rights treaties that came into force from universal consensus³⁸ in the context of the 1980s. The Convention has been in place for almost three decades, therefore the enforcement of the provisions of the convention is a major area of concern for the protection of the right to freedom from torture. This research examines the implementation status of the CAT in general, and in the context of Nepal in particular as a case study for the analysis of the implementation status of the CAT.

1.2 Structure of the thesis

This dissertation is divided into seven chapters. Chapter I begins with the introduction and structure of thesis, including background of the study, current legal and socio-political context of Nepal. The chapter covers statement of the problem with research gaps, objectives and research questions, significance of the study and scope and limitation of the study. Finally the chapter explains the research design and methodology of the study.

Following this introduction, Chapter II examines an overview of the right to freedom from torture and other forms of ill-treatment, historical development of the right to freedom from torture and the CAT. The chapter analyses theoretical debate on implementation of the right to freedom from torture and other forms of ill-treatment at practical level. The chapter analyses the provisions and mechanisms for prevention of torture in current context, especially after the end of the Cold War and emergence of terrorism in the world and the ongoing fight against it.

Chapter III focuses to review existing legal provisions of Nepal in line with the international standards, especially the provisions of the CAT. It highlights some positive initiatives taken by the Government of Nepal, identifies inconsistent provisions in Nepalese law in line with the CAT and other human rights instruments, and identifies gaps in legislative and administrative measures in Nepal.

Chapter IV presents the situation of torture and other forms of ill-treatment in Nepal, which is based on the data from government, court decisions, the National Human Rights Commission (NHRC) and non-governmental organisations. It illustrates trends of torture in the last seven years, causes of torture and other forms of ill-treatment and types of torture in prevalent Nepal.

Next, Chapter V aims to analyse the roles and interventions of the judiciary and other national human rights organisations of Nepal for the protection of the right to freedom from torture of an individual and the implementation of the CAT. The status of cases of public interest litigations, torture compensation cases and court decisions relating

37 See Henery Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (Oxford University Press, 3rd ed, 2007) 224-225.

38 See Maxime E. Tardu, 'The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) *Nordic Journal of International Law* 303.

to criminal cases are critically analysed. Similarly, torture related recommendations of the NHRC and roles of human rights organisations are also examined in the chapter.

Chapter VI reviews and analyses Nepal's reporting obligations towards the Convention Against Torture, especially periodic reports to the CAT/C, the CCPR/C, and report to Human Rights Council under special procedure 'Universal Periodic Review'. Likewise, Nepal's reports and cooperation to thematic mechanisms such as Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Similarly, the chapter examines the effectiveness of monitoring from UN human rights mechanisms towards the situation of right to freedom from torture in Nepal.

Finally, Chapter VII summarises the major findings regarding the implementation of the CAT and provides conclusions and recommendations. The bibliography is included after the conclusion, and finally a list of torture compensation cases is included in the Appendix.

1.3 General situation in Nepal

Nepal is one of the least developed landlocked countries in the world covering an area of 147,181 square kilometres with a total population of nearly 27 million.³⁹ Nepal suffered a decade long violent conflict between the government and Communist Party of Nepal- Maoist (CPM-M), from 1996 to 2006. As consequences of conflict, 13,236 people were killed and 1,006 people disappeared.⁴⁰ The Office of the High-Commissioner for Human Rights (OHCHR) stated that over 2,500 torture cases were recorded during the conflict.⁴¹ Signing of the Comprehensive Peace Agreement (CPA) between the parties in November 2006 ended the decade-long violent conflict. The *Interim Constitution of Nepal 2007* guarantees the right to freedom from torture as the fundamental right and independent judiciary for the protection of human rights.⁴² The Constituent Assembly (CA) election was held successfully in 2008. However, the assembly failed to promulgate a new constitution. The second CA election was held in November 2013, and constitutional-making process is still going on. In addition, Nepal faces many long-term challenges such as poverty, corruption, unemployment and discrimination in the society.

After accession of the CAT and the ICCPR in 1991, the *Interim Constitution* and some laws provide provisions related to the right to freedom from torture in Nepal. Most notably, the *Nepal Treaty Act 1991* stipulates that if any domestic law is found to be inconsistent with a convention to which Nepal is a party, the provision of the

39 The Government of Nepal, National Planning Commission, Central Bureau of Statistics <cba.gov.np>.

40 See Informal Sector Service Centre (INSEC), *Dwanda Pidit Parswa Chitra* [Profile of Conflict Victims] (2010) 4 <www.insec.org.np/victim/>.

41 See Office of High Commissioner of Human Rights (OHCHR), *Nepal Conflict Report* (OHCHR, 2012) 125 <http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf> ('*Nepal Conflict Report*').

42 *Interim Constitution of Nepal 2007* (Nepal) arts 26, 100.

convention prevails over the legal provision of the Act⁴³ and the *Compensation Relating to Torture Act 1996* provides some compensation to the victims and departmental action against the perpetrator⁴⁴ (see details in Chapter III). Despite the legal provisions, many problems and gaps are seen in legislative framework and practical level which are detailed in the following section.

1.4 Statement of the problems

Despite the absolute or unconditional prohibition of torture and other forms of ill-treatment by customary international law and treaty-based international human rights laws, the use of torture and other forms of ill-treatment are widely practised all over the world. As noted above, Amnesty International received torture related reports from 141 countries from 2009 to 2013.⁴⁵ Many countries continue to use torture and other forms of ill-treatment to obtain information from the suspects during criminal investigations, to terrorise people, and to suppress the opposition political parties or groups.⁴⁶ Additionally, after the terrorist attacks in the United States (U.S.) on September 11, 2001, the U.S. government allowed use of torture and other forms of ill-treatment to get confessions and/or information from the terrorist suspected detainees.⁴⁷ The use of torture and other forms of ill-treatment in the process of interrogation of terrorist suspects creates a challenge in the absolute and non-derogable characteristics of the right to freedom from torture and that affects law and legal system in many parts of the world.⁴⁸ As professor Luban stated about the U.S. interrogation on detainees of suspected terrorists in Guantanamo Bay, Afghanistan and Iraq, the aims of torture are: 'victor's pleasure, terror, punishment, extracting confession and intelligence gathering'.⁴⁹ Likewise, a debate has been raised in the academic sector on the issue of absolute prohibition of torture. Most of the academics have continuously argued in favour of absolute prohibition of torture so that torture cannot be used under any circumstances.⁵⁰ However, some academics have argued for giving some room for

43 *Nepal Treaty Act 1991* (Nepal) s 9.

44 *Compensation Relating to Torture Act 1996* (Nepal) s 6.

45 See Amnesty International, *Torture in 2014, 30 Years of Broken Promises*, (Amnesty International, 2014) 10.

46 Henery Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (Oxford University Press, 3rd ed, 2007) 224-225.

47 See, eg, Manfred Nowak, Moritz Birk and Tiphonie Crittin, 'The Obama Administration and Obligation Under the Convention Against Torture' (2011-2012) 20 *Transnational Law and Contemporary Problems* 34; Hajjar, Lisa, 'Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' (2009) 5(1) *Annual Review of Law and Social Science* 312; Geoffrey P.R. Wallace, 'International Law and Public Attitudes toward Torture: An Experimental Study' (2013) 67 *International Organisation* 109.

48 See Paul Amas Fairall, 'Reflection of Necessity of Torture as a Justification of Torture' (2004) 11 *James Cook University Law Review* 35.

49 See David Luban, *Torture, Power and Law*, (Cambridge University Press, 2014) 47-56; David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1429-1440.

50 See, eg, Fatima Kola, 'The Moral Wrongness of Torture' (2008) 14 *UCL Jurisprudence Review* 97; Michael Davis, 'The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment' (2005) 19 *International Journal of Applied Philosophy* 161; Jose E. Alvarez, 'Torturing the Law' (2005-2006) 37 *Case Western Reserve University Journal of International Law* 221-223; David Sussman, 'What's Wrong with Torture?' (2005) 33 *Philosophy and Public Affairs* 1; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture A Commentary*, (Oxford University Press 2008); Nigel S. Rodley with Matt Pollard, *The*

use of torture in extraordinary circumstances such as ticking bomb scenario.⁵¹ In this context, the introduction of use of torture has obviously been raised as an issue in the enforcement of the provisions of the CAT and other human rights instruments.

On the other hand, many least developed and conflict-affected countries have continued using torture in criminal investigations and for meeting political ends. Peter Miller found that multiple regression results show that ‘countries with high per capita income and low domestic repression are less likely to support torture’.⁵² Obviously, the least developed countries might have multiple factors associated for using torture and other forms of ill-treatment. Recently, a research by the University of Sydney found that multiple causes including a culture of impunity, normalisation of violence, societal expectation, problem with dignity, organisational factors, lack of resources, defective criminal justice system and politicisation are linked with the improper use of force in Nepal.⁵³ Another study presented that causes of torture are linked to socio-economic inequality and violence.⁵⁴ In this context, the study deals with the following problems in the research.

First, although, the CAT set out standards of rights and procedure for implementation of the right to freedom from torture, weak implementation of the provisions at the domestic level has been a challenge when it comes to ensuring the right against torture. Many scholars stated that the main challenge of international human rights law is the weak implementation of the provisions of the instruments.⁵⁵ Most particularly in the context of the right to freedom from torture, the provisions of the CAT are not strictly enforced.⁵⁶ For example, Nepal became member of the CAT on 14 May 1991, but torture has not yet been defined as a crime under domestic law. Hathaway stated that

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- Treatment of Prisoners Under International Law*, (Oxford University Press 3rd ed, 2009); Desmond Manderson, ‘Another Modest Proposal’ (2005) 10 *Deakin Law Review* 641; Oona A. Hathaway, Aleen Nowlan and Julia Spiegel, ‘Tortured Reasoning the Intent to Torture Under International and Domestic Law’ (2011-2012) 52 *Virginia Journal of International Law* 791; Henry Shue, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ (2005-2006) 37 *Case Western Reserve Journal of International Law* 131.
- 51 See, eg, Alan M Dershowitz, ‘The Torture Warrant; A Response to Professor Struss’ (2003) 48 *New York Law School Law Review* 277; Mirko Bagaric and Julie Clarke, ‘Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable’ (2004-2005) 39 *University of San Francisco Law Review* 582.
- 52 Peter Miller, ‘Torture Approval in Comparative Perspective’ (2011) 12(4) *Human Rights Review* 441.
- 53 The University of Sydney, *Issue Paper 4, Human Rights in the Nepali Law Enforcement and Security Sector* (University of Sydney, 2014) 1-14.
- 54 Thomas E McCarthy (ed) World Organisation against Torture (OMCT), *Attacking the Root Causes of Torture: Poverty, Inequality and Violence, An Interdisciplinary Study* (OMCT, 2006) 13 < http://www.omct.org/files/interdisciplinary-study/attacking_the_root_causes_of_torture.pdf>.
- 55 See, eg, Julie Cassidy, ‘Watchdog or Paper Tiger: The Enforcement of Human Rights in International Forums’ (2008) 10 *University of Notre Dame Australia Law Review* 42; Joachim Herrmann ‘Implementation of the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany’ (2008) 31 *Hastings International and Comparative Law Review* 437- 459.
- 56 See Joachim Herrmann ‘Implementation of the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany’ (2008) 31 *Hastings International and Comparative Law Review* 459.

the ratification of the treaty itself is a positive step for the prevention of torture. At least an individual or human rights organisations can raise their voices against the prevalence of torture and press for changes in State behaviour.⁵⁷ However, without proper domestication and implementation of the CAT and other human rights instruments, the right to freedom from torture cannot be protected at a practical level. More especially, it could be more difficult in developing countries where many other economic, social and political related challenges are associated with the enforcement of the provisions of the CAT and other instruments. Therefore, comprehensive research in the area of international human rights law focusing on the right to freedom from torture is highly required in least development countries, to find out a proper way to protect the right at the practical level.

Second, despite the *Interim Constitution of Nepal 2007* guaranteeing the right to freedom from torture and other forms of ill-treatment as fundamental rights,⁵⁸ the *Compensation Relating to Torture Act 1996*, and *National Human Rights Commission Act 2012* provide some safeguards to the right to freedom from torture. In addition, although the *Evidence Act 1974* states that the court can exclude evidence obtained through torture,⁵⁹ the acts of torture have not been defined as punishable crime and many existing laws are inconsistent with the CAT and other human rights instruments. Many reports from the Government, the NHRC and human rights organisations have covered torture related records and cases in criminal investigation. For example, a report by the Office of Attorney General (OAG) and Centre for Legal Research and Resource Development (CeLRRd) found that 28.1 per cent detainees were tortured in police detention.⁶⁰ Furthermore, another monitoring report of the OAG accepted that police use various forms of physical torture such as random beating by hand, stick and boot in police custody.⁶¹ The NHRC report found that torture has continued in police custody in the process of criminal investigations.⁶² The Amnesty International report of 2012 covered research findings about torture in Nepal. The report showed that out of 989 prisoners interviewed, 74 per cent were found to have been tortured in police custody.⁶³ Another report showed that of the total 3,783 detainees in 2012 and 3,662 in 2013 interviewed in 57 detention centres across 20 districts, 22.2 and 16.7 per cent respectively claimed that they were tortured while in custody.⁶⁴ Likewise, many

57 See Oona A. Hathaway, 'Why do Countries Commit to Human Rights Treaties?' (2007) 51 *Journal of Conflict Resolution* 593.

58 *Interim Constitution of Nepal 2007* (Nepal) art 26.

59 *Evidence Act 1974* (Nepal) s 9(2).

60 See, eg, Office of Attorney General (OAG) Nepal and Centre for Legal Research and Resource Development (CeLRRd), *Baseline Study of Criminal Justice System in Nepal*, (OAG and CeLRRd 2013) 148 ('*OAG and CeLRRd report 2013*').

61 Office of the Attorney General (OAG), *Mahanyadhi Bakta Ko Karyalaya ko Bulleetion*, 2069 [Bulletin of Government Attorney Office, 2012] Year 2, vol 4. 47. The bulletin covered a report called Monitoring of Situation of Human Rights and Implementation of Court Decision in Detention centres and prisons 2011.

62 See National Human Rights Commission (NHRC), '*Yatana Birudda Ko Adhikar*' [Rights against Torture] (NHRC, 2012) 5 ('*NHRC Torture Report*').

63 See Amnesty International, *Report State of Human Rights* (2012) 251 <http://files.amnesty.org/air12/air_2012_full_en.pdf>.

64 See Advocacy Forum, *Nepal is the Government Unable or Unwilling to Prevent and Investigate Torture?* (Advocacy Forum, 2013) 27; Advocacy Forum, *Promising Development Persistent Problems Trends and Patterns in Torture in Nepal 2013* (Advocacy Forum, 2014) 1.

human rights organisations including the OHCHR, Amnesty International, World Organisation Against Torture (OMCT), Asian Human Rights Commission (AHRC) called for urgent action by the GON on incidents of torture and protection of victims of torture.⁶⁵

Furthermore, in November 2012, the CAT/C published a confidential inquiry report under Article 20 of the CAT mentioning that the CAT/C received reliable information about torture being systematically practised in criminal investigation for the purpose of obtaining confession in many parts of the country.⁶⁶ On October 8, 2012, the OHCHR released its 233-page *Nepal Conflict Report*,⁶⁷ which covers 30,000 cases, including 2,500 torture related cases, of violations of international human rights law and humanitarian laws committed during the conflict period (1996 to 2006).

All these reports and facts showed that torture and other forms of ill-treatment is a serious human rights problem in Nepal. Some legal researchers in Nepal have contributed on criminal justice system, penal system, custody monitoring, women's rights and juvenile justice, such as the CeLRRd conducted researches on baseline study of criminal justice.⁶⁸ Advocacy Forum (AF) conducted researches on fair trial and custody visits and published its monitoring reports,⁶⁹ Centre for Victims of Torture (CVICT) published report on penal reform,⁷⁰ Informal Sector Service Centre (INSEC) published human rights year books and Forum for Protection of People's Rights (PPR Nepal) published research report in Juvenile Justice.⁷¹ Although these reports covered different subject matter, they contributed towards the prevention of torture in Nepal. However, recently, a report was published by a national level network of 66 human rights organisations, namely the Human Rights Treaty Monitoring Coordination Committee (HRTMCC), found that no in-depth research has been done in relation to acts of torture in Nepal.⁷² Therefore, comprehensive research, covering contributing

65 See, eg, Amnesty International <<http://www.amnesty.org>>; World Organisation Against Torture <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal>>; Asian Human Rights Commission <<http://www.humanrights.asia/news/urgent-appeals>>.

66 Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012), para 114 <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm> ('CAT/C Confidential Inquiry report 2011').

67 Nepal Conflict Report, above n 41, 3.

68 See, eg, OAG and CeLRRd report 2013, above n 60, 148; Nepal and Centre for Legal Research and Resource Development (CeLRRd), *Baseline Study of Criminal Justice in Nepal* (CeLRRd, 2002).

69 See, eg, Advocacy Forum-Nepal, *Rights to Fair Trial in Nepal: a Critical Study* (Advocacy Forum, 2012); Advocacy Forum Nepal, *Nepal is the Government Unable or Unwilling to Prevent and Investigate Torture?* (Advocacy Forum, 2013); Advocacy Forum Nepal, *Promising Development Persistent Problems Trends and Patterns in Torture in Nepal 2013* (Advocacy Forum, 2014).

70 Stephen J Keeling and Rabindra Bhattarai (eds) *Penal Reform in Nepal Agenda for Change* (Centre for Victims of Torture (CVICT) 2001).

71 See Hemang Sharma et al, *Rehabilitation and Reintegration Denied; Juvenile Justice System in Nepal* (Forum for Protection of People's Rights, 2007).

72 See Human Rights Treaty Monitoring Coordination Committee (HRTMCC), *Manab Adhikar Sambandhi Thula Mahasandhi ka kehi Prabadhanharu ko Karyanayan ko Abastha- Adyaan*

factors for the prevalence of torture and legislative review in line with the CAT and other international instruments, assessing the effectiveness of judicial intervention and status of reporting obligations to address the above stated problems is required. Furthermore, the Government of Nepal has repeated its commitment and process for the promulgation of anti-torture legislation. Therefore, the findings of the study can help contribute in enhancement of knowledge to policy makers and parliamentarians about the prevalence of torture in Nepal.

Third, torture was recognised as a tool for punishment and obtaining information from the accused in Nepal's history of criminal justice system.⁷³ OAG and CeLRRd report, Advocacy Forum's report and other researches show that torture and other forms of ill treatment is still used to extract confession from suspects in the criminal investigation system of Nepal.⁷⁴ Judicial scrutiny for excluding confession obtained through torture is crucial to prevent torture. Nevertheless, conflicting decisions on the issue of non-admissibility of confession which is obtained by torture create confusion for judicial scrutiny for the protection of the right to freedom from torture. For example, in some cases, the Supreme Court of Nepal excluded confessions as evidence which were claimed to have been extracted through the use of torture.⁷⁵ In contrast, the Court accepted as evidence some confessions which were claimed to have been obtained by torture in police custody.⁷⁶ These conflicting decisions of the Supreme Court of Nepal may hamper the process of ensuring the right to freedom from torture because perpetrators might be encouraged to continue use of force or torture for confession in criminal investigation process. Moreover, many reports commented torture compensation related cases as less or not effective to protect rights.⁷⁷ Comprehensive research is required to review the decisions of the torture compensation cases and its effectiveness.

Four, the reporting to UN mechanisms from member State is vital for self-review and monitoring. Current scenario of reporting to the UN mechanisms does not seem encouraging. For example, the High Commissioner of Human Rights has acknowledged that the treaty body mechanisms have several challenges such as the fact that 84 per cent of member States do not report on time, and hence the backlog of

Pratibedan (2070) [A Study Report on Implementation Status of Some Provisions of Major Human Rights Instruments] (HRTMCC, 2013), 236 ('*HRTMCC report 2013*').

73 See Rewatiraman Khanal, *Nepal Ko KanoonItihas Ko Ruparekha*, [Introduction of History of Nepalese Law], (Srimati Saraswoti Khanal, 2002) 26.

74 See OAG and CeLRRd report 2013, above n 60, 148; Advocacy Forum-Nepal, *Rights to Fair Trial in Nepal: a Critical Study* (Advocacy Forum, 2012), 25; Youbraj Sangroula, *Concepts and Evolution of Human Rights: Nepalese Perspective*, (Kathmandu School of Law, 2005) 300-301.

75 See eg, *Dharma Kumari Sitaula v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 11, 1893 (Supreme Court of Nepal); *Government of Nepal v Suresh Shaha*, Nepal Kanoon Patrika 2064 [Nepal Law Journal 2007] Vol 1, 45(Supreme Court of Nepal).

76 See eg, *Sachin Shrestha v Government of Nepal*, Nepal Kanoon Patrika 2063 [Nepal Law Journal 2006] Vol 2, 183 (Supreme Court of Nepal); *Pasang Sheroa v Government of Nepal*, Nepal Kanoon Patrika 2062 [Nepal Law Journal 2005] Vol 2, 326 (Supreme Court of Nepal); *Phulmaya Tamang v His Majesty Government*, Nepal Kanoon Patrika 2058 [Nepal Law Journal 2001] Vol 3,4, p 216, decision n 6997 (Supreme Court of Nepal).

77 See HRTMCC report, 2013, above n 70, 245-246; Advocacy Forum, *Hope and Frustration, Assessing the Impact of Nepal's Torture Compensation Act -1996* (Advocacy Forum, 2008).

reports in treaty bodies is huge.⁷⁸ A research report showed that 57.09 per cent of countries do not submit their reports to the CAT/C.⁷⁹ The trends reflected in the reporting of Nepal are not satisfactory. For example, the GON submitted two reports in 1993 and 2004 to the CAT/C. During the time, Nepal should have submitted at least six reports. Some research reports were conducted into the issue of the effectiveness of the UN mechanisms.⁸⁰ However, these researches have not sufficiently covered the perspectives of the least developed countries. Therefore, research is needed to assess least developed countries' capacity for fulfilling state obligations to these mechanisms.

The above found facts prove that there is a need of a comprehensive research to examine the overall situation of the right to freedom from torture in Nepal and implementation of the CAT and other human rights instruments. To address the research problems and gaps, this study frames the following research objectives and questions.

1.5 Research objectives and questions

1.5.1 Research objectives

The overall objective of this research is firstly to examine the effectiveness of legislative, judicial, and other institutional measures for the protection of the right to freedom from torture in Nepal, secondly to look at the practical implementation of those measures, and finally to compare them against key provisions of the CAT with a view to formulating recommendations for improving the situation for prevention of torture in Nepal.

The specific objectives of the study are to:

1. Evaluate the existing laws and policies in Nepal in line with the provisions of the CAT and other human rights instruments;
2. Identify and analyse the role of judiciary and national human rights institutions for the prevention of torture and protection of the right to freedom from torture in Nepal;
3. Find out the factors affecting implementation of legal provisions including the CAT at the practical level;
4. Assess the fulfilment of Nepal's reporting obligations towards the CAT and other mechanisms and the monitoring system from UN mechanisms towards implementation of the CAT and other conclusions in Nepal;
5. Examine the provisions of the CAT in current situation, especially in the context of least developed countries;

78 See Navanethem Pillay, *Strengthening the United Nations Treaty Body System, A report by the United Nations High Commissioner for Human Rights* (June 2012), United Nations Human Rights Office of the High Commissioner, 9.

79 See also Lawrence J LeBlanc, Ada Huibregste and Timothy Meister, 'Compliance with Reporting Requirements of Human Rights Conventions' (2010) 14(5) *International Journal of Human Rights*, 799.

80 See, eg, Christof Heyns and Prans Viloen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 508; Michael O'Flaherty 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 *Human Rights Law Review* 321.

6. Make recommendations for improving Nepal's capacity to better implement its obligations to prevent torture.

1.5.2 Research questions

To meet the objectives of the study, following research questions are developed:

Main research question

How effectively does the Government of Nepal protect the right to freedom from torture and other forms of ill-treatment and implement the provisions of the CAT and other human rights instruments in Nepal?

Research sub-questions

1. What is the status of legislative measures for assuring the right to freedom from torture and adoption of the provisions of the CAT in Nepal?
2. How effectively do the judicial and national human rights institutions address needs of victims of torture and protect the right to freedom from torture and other forms of ill-treatment in Nepal?
3. How successfully does the Government of Nepal fulfill its' reporting obligation towards the CAT and monitoring mechanisms and what are the roles of the mechanisms to monitor the situation and implementation of the CAT and recommendations of the decision ?
4. What is the situation of torture and other forms of ill-treatment of Nepal and what are the root causes for the prevalence of torture in Nepal?
5. What are the possibilities and challenges in the implementation of the CAT in current situation in Nepal?

1.6 Significance of the study

The CAT was adopted by the General Assembly in 1984, and was accepted as a rare achievement of universal consensus,⁸¹ despite the Cold War (1947-1991). One hundred and fifty-eight countries have since become parties to the Convention.⁸² Furthermore, the OPCAT has been implemented to monitor the right to freedom from torture at practical level. Side by side, with this the political context has changed in the world, the Cold War has ended and terrorism related challenge has emerged as a more impediment to the elimination of torture. Especially, after the September 11, 2001 attacks in the U.S., torture and other forms of ill-treatment has been introduced as a tool of interrogation used on terrorist suspects.⁸³ A debate in the academic sector on absolute prohibition of torture has been raised – arguing whether torture is absolutely prohibited or it may be used in an extreme emergency case, such as 'ticking bomb'

81 See Maxime E. Tardu, 'The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading treatment or Punishment' (1987) 56 *Nordic International Law Journal* 303; J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988) 106.

82 United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en > .

83 See Manfred Nowak, Moritz Birk and Tiphonie Crittin, 'The Obama Administration and Obligation Under the Convention Against Torture' (2011-2012) 20 *Transnational Law and Contemporary Problems* 34.

scenario. Similarly, least development countries have their own economic, social, political challenges to effectively implement the provisions of the CAT. In this context, the assessment of the implementation status of the CAT, especially in least developed country like Nepal, could be most relevant for the protection and promotion of the right to freedom from torture and other forms of ill-treatment.

In the context of Nepal, torture and other forms of ill-treatment continue to remain as means to obtain confessions from suspects in criminal investigation. UN reports stated that use of torture is widespread and systematic in Nepal.⁸⁴ Legislations regulating the practice of torture are failing to meet the international standards, especially the CAT which calls for criminalising the acts of torture. Therefore, a comprehensive study to assess the implementation of the CAT needs to be conducted. This study reviews and figures out the implementation status of the CAT in Nepal and examines the duties and responsibilities of Nepal as a member State of the United Nations within a broader framework of international human rights law focusing the CAT. The findings of the study will be useful for the Government of Nepal and other concerned in Nepal. Particularly, Nepal is in the process to promulgate a new constitution through the CA and anti-torture legislation.⁸⁵ The findings of the study will directly help CA members and policy makers of Nepal. The NHRC, human rights organisations and victims can use it as a guide for advocacy and to lobby for the prevention of torture in Nepal.

Furthermore, the findings will show the situation of torture in the country and possibilities and challenges of enforcement of the CAT. It is hoped that the CAT/C, the CCPR/C, Special Rapporteur on Torture and other human rights mechanisms will benefit to know the exact situation of the right to freedom from torture and other forms of ill-treatment in Nepal and applicability of the provisions of the CAT and other human rights instruments, which will be helpful in developing further strategies for the protection and promotion of the right to freedom from torture and other forms of ill-treatment. In addition, the research will contribute to increase academic knowledge in the sector of international human rights law especially rights to freedom from torture and other forms of ill-treatment.

1.7 Limitation of the study

The study reviews and analyses the provision of the CAT, the situation of enforcement, some best practices and decisions of various courts around the world related to the right to freedom from torture and other forms of ill-treatment. However, the study takes Nepal as a case study to assess the implementation status of the CAT through analysis of legislative, judicial and institutional measures and by forming a comparison to the practical situation by finding out the causes of prevalence of torture and an examination of the State's reporting obligations. The findings could add to our

84 See, eg, CAT/C Confidential Inquiry report 2011, above n 66; Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006), paras.17, 25, 31; Nepal Conflict Report above n 38, 3.

85 See Anil Giri, 'Govt replaces 'weak' torture law with 'bold' Act' *The Kathmandu Post*, (Kathmandu) 7 April 2012, <<http://www.ekantipur.com/the-kathmandu-post/2012/04/06/nation/govt-replaces-weak-torture-law-with-bold-act/233520.html>>.

knowledge about the implementation status of the CAT in a least developed country under a framework of international human rights law. However, the trends and situation which are analysed in the study covers only Nepal.

In terms of the data, the study collected and analysed court decisions, data from the OAG, the NHRC and reports and case studies from national and international non-governmental organisations. This data covered and cross-checked three sectors - the Government, independent national organisation and non-government organisations, therefore it presents the exact trends of situation of torture and initiatives taken to protect the right to freedom from torture. However, the trends do not cover victims of torture one-by-one.

1.8 Research design and methodology

1.8.1 Research design

Scholars argued that single method cannot cover complete understanding of human rights research and they prefer a mixed method approach in human rights research.⁸⁶ Therefore, this research is a combination of a descriptive and exploratory study in the sector of international human rights law. This study followed a mix-method to review legislative framework, case laws, government policies and action and to examine the trends of torture and other forms of ill-treatment from various data of the government, the NHRC and human rights organisations. Furthermore, Todd Landman found that 'human rights can be measured in principle, in practice and outcomes of government policy'⁸⁷ thus the study used both primary and secondary data to compare the legislative framework, government policies and actions with the international standards. Data was gathered through a review of the laws, court decisions, scholarly articles and reports of various organisations. Furthermore, a data collection field visit to Nepal was conducted to collect government data, court decisions, case studies and reports from human rights organisations. The collected data has been analysed in line with the CAT and other international human rights instruments and jurisprudence. The study has adopted a reform-oriented approach research for the prevention of torture and other forms of ill-treatment.

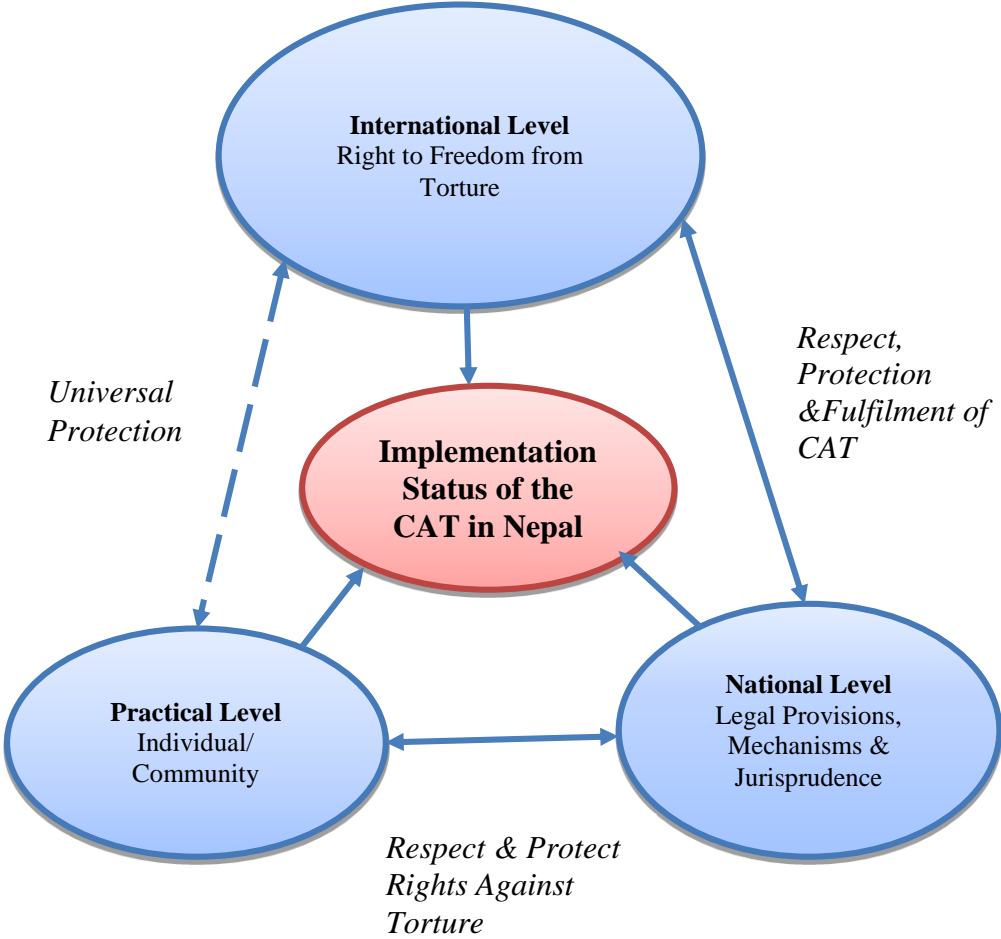
1.8.2 Conceptual framework

86 See Fons Coomans, Fred Crunfeld and Menno T. Kamminga, 'Methods of Human Rights Research: A Primer' (2010)32 *Human Rights Quarterly* 184.

87 See Todd Landman, 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26 *Human Rights Quarterly* 906-931.

The research mainly focused on the implementation status of the CAT in Nepal and the study was carried out at three levels i.e. international, national and individual levels. First, at the international level - the study critically analysed the provisions of the CAT and other human rights instruments, role and responsibilities of treaty-based and thematic mechanisms and the jurisprudences of the CAT/C and CCPR/C. Second, the research analysed the degree of implementation of the CAT in the domestic level legal provisions and mechanisms in Nepal within the last 23 years after accession to the CAT. Third, the study focused on the analysis of the situation of respect, protect and fulfil the right to freedom from torture at the individual and community level. The study also examined in regards to the respect, protection and fulfilment of the right to freedom from torture and universal protection. Individuals/communities are also subject to international human rights law, especially under the CAT and the OPCAT.

All these three components are directly linked to the implementation of the CAT.



1.8.3 Selection of the study site

The study reviewed the effectiveness of the CAT in general which has been in force for more than 27 years. Nepal was selected as a study site for the research. The reasons behind the selection are as detailed below.

After accession to the CAT on 14 May 1991, Nepal has been obliged to respect, protect and fulfill the obligation of the CAT. Constitutional and legislative framework of Nepal provides some safeguard for the protection of the right to freedom from torture. However, violations of the right to freedom from torture have been reported and published by government bodies such as OAG,⁸⁸ NHRC,⁸⁹ UN mechanisms and human rights organisations.⁹⁰ The study envisions examining the effectiveness of the provisions of the CAT through international and domestic legal provisions and mechanisms. Nepal could be a best example to conduct the study from the perspectives of a least developed country. Therefore, Nepal was selected as a sample site for the study.

It is very difficult to obtain data about state-sponsored torture and other forms of ill-treatment because of the involvement of government's police or security officials. In this study, most of the state and governmental organisations such as the judiciary, NHRC, OAG and Prime Minister's Office and human rights organisations agreed to extend their cooperation to the researcher, especially to provide record, decisions, case studies, reports and other relevant data. Likewise, the researcher has working experience in the sector of human rights, especially the right to freedom from torture in Nepal. The commitment and working experience also inspired the researcher to select Nepal as the study site.

1.8.4 Methods of data collection and analysis

Torture generally takes place in an isolated place against a vulnerable person or without independent witnesses; therefore, it is very difficult to present exact statistics of prevalence of torture.⁹¹ Therefore, the study is mainly based on comprehensive desk review on primary and secondary data to meet the objectives of the research. The primary and secondary data are as detailed below.

1.8.4.1 Primary source of literature

The primary sources such are as follows: the *Interim Constitution of Nepal 2007*, legislations (*The Compensation Relating to Torture Act 1996*, *National Human Rights Commission Act 2012*, *Evidence Act 1974*, *Nepal Police Act 1955*, *Prison Act 1963*, *Military Act 1959*, *Public Security Act 1989*, *State Cases Act 1993*, *Civil Rights Act 1955*, *Some Public (Crime and Punishment) Act 1970* etc), the human rights instruments which are ratified by Nepal such as the CAT, ICCPR, decisions of the Supreme Court of Nepal, by laws such as court procedurals, National Human Rights Action Plan, government's data (periodic reports and other special reports to UN mechanisms) and data of the NHRC were collected and analysed. These primary data

88 Office of the Attorney General (OAG), '*Mahanyadhi Bakta Ko Karyalaya ko Bulletin*' (2069) [Bulletin of Government Attorney Office] 2012 Year 2, vol 4. 58.

89 NHRC torture report, above n 62, 16.

90 See, eg, CAT/C Confidential Inquiry report 2011, above n 66; Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006) paras.17, 25, 31; Nepal Conflict Report, above n 41, 3.

91 See Sir Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 3rd ed, 2009)10.

helped to analyse the situation of torture in Nepal and compare them with international standards related to the right to freedom from torture.

1.8.4.2 Secondary source of literature

The CAT/C and CCPR/C's general recommendations, decisions on individual communications and recommendations, reports of Universal Periodic Review (UPR), the OHCHR, and court decisions of other countries, report of other human rights organisations, books, and journal articles were collected and analysed. Likewise, annual and specific reports of Amnesty International, World Organisation Against Torture (OMCT), Human Rights Watch, Asian Human Rights Commission (AHRC), Association of Prevention of Torture (APT), Advocacy Forum (AF), Centre for Victims of Torture (CVICT), Forum for Protection of People's Rights (PPR Nepal), Informal Sector Service Centre (INSEC) were reviewed to find out the situation of Nepal and response from the international level. The decisions of the European Court of Human Rights and courts of some other common law countries such as Australia, the United Kingdom, the United States of America, Canada and India were reviewed and compared with the situation implementation of the CAT in general. Books and journal articles related to the right to freedom from torture were reviewed to identify the theoretical aspects and compare them with the practical situation.

1.8.4.3 Field visit, case selections and analysis

A field visit for data collection was conducted in September-October 2013. In order to address the research questions, data was collected and analysed mainly based on the last seven years (2007/8 to 2013/14 of Nepalese financial calendar year). The reasons behind taking the data of the last seven years were: firstly, the *Interim Constitution of Nepal 2007* was promulgated in 2007 that defined torture as a criminal offence for the first time in Nepal and guaranteed right against torture and other forms of ill-treatment as fundamental right. Secondly, the violent conflict formally ended in 2006, thus the study mainly covers general situation focusing on torture and other forms of ill-treatment during criminal investigation process.

The data related to torture trends are based on the OAG, the NHRC and AF. The OAG and CeLRRd conducted and published a research report called 'Baseline of Criminal Justice System' in 2013. The report covers the situation of criminal justice and fair trial including the right to freedom from torture in Nepal. This research has taken some data from that study. Similarly, the NHRC received a number of torture related complaints and recommends to government for compensation and necessary interventions. The study collected the data from NHRC. Likewise, AF, a national level human rights organisation, conducted and reported custody monitoring in 57 detention centres in 20 districts in Nepal. This study collected and analysed the data as basis of qualitative and quantitative analysis which presents the current trends of torture in Nepal and causes of torture. In addition to that, torture related incidents and case studies documented by national and international human rights organisations were collected and analysed to find out the causes and types of torture and other forms of ill-treatment.

With regard to judicial intervention, various types of court decisions were collected, such as decisions in torture compensation related cases, decisions of criminal cases

linked to using exclusionary rules, and public interest litigation cases related to the issues of the right to freedom of torture and human rights from the Supreme Court and other Courts of Nepal. In the process, a total of 48 torture compensation related decisions of various courts (District, Appellate Courts and Supreme Court) were selected. The decisions were randomly selected covering more than 50 per cent of current running cases and analysed. Furthermore, Nepal's periodic reports, UPR report and other responses to UN human rights mechanisms and conclusions and recommendations of the mechanisms of from 1993 to date were collected and analysed.

1.9 Conclusion

Torture and other forms of ill-treatment are recognised as serious violation of human rights. Customary international law and treaty-based international human rights instruments absolutely prohibit the acts of torture in all circumstances. Nevertheless, torture is widely practised in many parts of the world. Similarly, Nepal as a party to the CAT has an obligation to implement the provisions of the CAT. However, torture is widely practised, particularly during the criminal investigation process and in order to place political pressure on concerned persons in Nepal.

This chapter has provided the background of the right to freedom from torture and the CAT and described the general context within in which torture occurs in Nepal. The problems of the research have been stated, identified and discussed. The research objectives and research questions have been identified in order to address the identified research problems. The significance of the study and limitation of the research were covered, and finally, the methodology of the research has been described.

CHAPTER-II: AN OVERVIEW OF THE RIGHT TO FREEDOM FROM TORTURE

2.1 Introduction

This chapter provides a short historical background of the evolution of the right to freedom from torture, theoretical consideration and possibilities and challenges of the implementation of the Convention Against Torture (CAT) in the past 27 years after it came into force on 26 June 1987. The right to freedom from torture has been developed as reaction to the atrocities of the World War II as an international norm.¹ The CAT has been promulgated to protect and promote the right to freedom from torture and to address many domestic and international conflicts or unrest and suppression against their own citizens. Within the 27 years of the CAT, many changes took place such as the end of the Cold War and terrorism becomes a serious threat for human lives around the world.

The evolution of the right to freedom from torture has emerged as a response against torture or atrocity against individual from State. In another sense, it is a doctrine of conscience and thought against barbarism from government. More specifically before World War II, the Nazi Party legislated the permissibility of torture through so called 'third degree' interrogation² and Stalin also used severe torture against his opposition.³ Immediately after World War II, UN Charter was promulgated which states that the protection of human rights is one of the central objectives of the United Nations.⁴ After that, the Universal Declaration of Human Rights (UDHR) was introduced covering the major human rights foundations including prohibition of torture and other cruel, inhuman or degrading treatment or punishment (other forms of ill-treatment).⁵ The International Covenant on Civil and Political Rights (ICCPR) prohibits torture and other forms of ill-treatment as a hard law of international human rights law.⁶ Then, the CAT has been promulgated as the most comprehensive legal provisions relating to the right to freedom from torture at international level. Likewise, regional human rights instruments such as European Convention of Human Rights,⁷ American Convention

1 See Nigel Sir Rodley with Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 2009) 18-20; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture A Commentary* (Oxford University Press, 2008) 1-3.

2 Rodley with Pollard, above n 1, 9.

3 See Darius Rejali, *Torture and Democracy* (Princeton University Press, 2009) 67.

4 *Charter of the United Nations* arts 1, 3, 55.

5 *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3RD SESS, 180 plen mtg, UN Doc A/810 (entered into force 10 December 1948) art 5 ('UDHR').

6 *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('ICCPR').

7 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 3. As amended by the protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 27 May 2009 CETS No 204 (entered into force 1 September 2009) art 3.

of Human Rights,⁸ the African Charter on Human and People's Rights⁹ prohibit torture and guarantee the right to freedom from torture.

The CAT sets out the prohibition of torture and other forms of ill-treatment, international standards and domestic enforcement process and standards of the right to freedom from torture. General comments and jurisprudence of the CAT/C explains and clarifies more the provisions and State obligations. The CAT is one of the widely accepted human rights instruments around the world, 158 countries have already become party of the Convention.¹⁰ Although the ratification is only a formal commitment to accept the provisions of the CAT, it must be domesticated and implemented in practice to respect and protect individual's right to freedom from torture. The CAT sets out many legal provisions and standards such as definition of torture,¹¹ member States obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture.¹² With respect to the provisions of effective measures, general comment two of the CAT/C further explains that the prohibition of torture is absolute and non-derogable¹³ and the provision attracts the principle of *jus cogens*.¹⁴ Similarly, the CAT defines the term 'torture' and outlines a broad range of measures of the rights to freedom from torture including prohibiting of torture in criminal law,¹⁵ establishing domestic and universal jurisdiction,¹⁶ educating police and law enforcement about the prohibition of torture,¹⁷ ensuring the right to complaint and for prompt and impartial investigation of reported incidents of torture,¹⁸ providing the rehabilitation to the victims,¹⁹ ensuring the non-admissibility of evidence obtained by torture,²⁰ and no extradition of person who may have risk of torture.²¹

In addition, upon ratifying or accessing the CAT, member States are required to submit reports about the implementation of the CAT and a monitoring mechanism known as the Committee Against Torture (CAT/C) has been established.²² If torture is committed in any State, any individual or victim can bring the case to the CAT/C as

8 *American Convention on Human Rights*, open for signature 22 November 1969, 1114 UNTS 1243 (entered into force 18 July 1978) art 5(2).

9 *African Charter of Human and People's Rights*, adopted 27 June 1981, 1520 UNCT 217 (entered into force 21 October 1986) art 5.

10 United Nations Treaty Collection, <
https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en>.

11 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1 ('CAT').

12 *Ibid* art 2.

13 Committee against Torture (CAT/C), *General Comment No 2, Implementation of article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) para 5.

14 *Ibid* para 1.

15 *CAT* art 4.

16 *Ibid* art 5.

17 *Ibid* art 10.

18 *Ibid* arts 12, 13.

19 *Ibid* art 14.

20 *Ibid* art 15.

21 *Ibid* art 3.

22 *Ibid* art 17.

individual communication,²³ and the government of any other country can also communicate incidents of torture to the CAT/C.²⁴ Furthermore, the Optional Protocol of Convention Against Torture (OPCAT) provides implementation mechanisms of the CAT. Similarly, as a thematic mechanism Human Rights Council (HRC) oversees the issue of torture and other form of ill-treatment. In the process, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) works as supplementary role to monitor the right to freedom from torture and Universal Periodic Review (UPR) reviews the rights to freedom from torture and other forms of ill-treatment. Furthermore, Human Rights Committee (CCPR/C) under the ICCPR has also handled the issue of torture and other forms of ill-treatment, which receives individual communication and member State's report periodically (See further detail about the UN mechanisms below sub chapter 2.5).

In spite of the strong prohibition of torture and other forms of ill-treatment, incidents of torture have been widely documented in many parts of the world. Amnesty International reports show that 141 countries used torture in the last five years from 2009-2013.²⁵ After the incident of terrorist attacks in the United States of America (USA) in September 11, 2001, the use of torture and other forms of ill-treatment has been increased in the process of interrogation against suspected terrorists. In response to the incidents, the Central Intelligence Agency (CIA) introduced Enhanced Interrogation Technique which allowed the use of torture and other forms of ill-treatment in the process of the investigation of suspected terrorists.²⁶ Various types of torture and other forms of ill-treatment such as waterboarding, sleep deprivation for long times, humiliation and beating were used.²⁷ A debate has arisen about whether or not torture should be absolutely prohibited, or if it could be justified in exceptional situations, has arisen since the terrorist attacks of September 11, 2001. From all of these developments, many issues and challenges have been raised regarding the provisions of the CAT especially the definition of torture and other forms of ill-treatment and the execution of the provisions of the CAT. Moreover, scholars pointed out the challenges of the implementation in practical field to ensure that the promises contained in the human rights treaties are fulfilled.²⁸ In this context, some issues have been raised: is torture absolutely prohibited or allowed in exceptional situations? Could the provisions of the CAT be addressed in a changed context? What are the major challenges of implementation of the CAT? The chapter deals with the questions

23 Ibid art 22.

24 Ibid art 21.

25 See Amnesty International Report, *Torture in 2014, 30 Years of Broken Promises* (Amnesty International, 2014) 10 ('*Amnesty International Torture Report 2014*').

26 See Senate Select Committee on Intelligence (2014) 2, the report was released on 9 December 2014, As cited the guardian, '*The Senate Intelligence Committee's Report on Torture*', 10 December 2014, < <http://www.theguardian.com/us-news/ng-interactive/2014/dec/09/-sp-torture-report-cia-senate-intelligence-committee>> ('*Senate Select Committee Report, 2014*').

27 See Rebecca Gordon, *Mainstreaming Torture Ethical Approaches in the Post-9/11 United States* (Oxford University Press, 2014) 37-57.

28 See, eg, Chrisof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on Domestic Level' (2001) 23 (3) *Human Rights Quarterly* 484; Julie Cassidy, 'Watchdog or Paper Tiger: The Enforcement of Human Rights in International Forums' (2008) 10 *University Notre Dame Australia International Law Review* 37.

through critically analysing relevant theoretics and practices of many parts of the world.

The chapter is divided into six sub-headings. Following the introduction, second subheading is explained a short description of practices of torture; the evolution of the right to freedom from torture and promulgation of the CAT. Theories and practises of domestication of rights to freedom from torture, current debates on the use of torture, issues and challenges for implementation of the right to freedom from torture are analysed in the third subheading. The fourth sub-heading examines the provisions of the CAT in current situation. The fifth subheading examines status and roles of monitoring mechanisms of the CAT. Finally sixth sub-heading concludes the chapter with some recommendations.

2.2 Evolution of the right to freedom from torture

2.2.1 Short history of the right to freedom from torture

The ancient scriptures of major religions acknowledged humans are gift of God. That means these documents defined human as natural creation. For instance, in Hindu history, Lord Brahma created the world and human beings;²⁹ in Christian history, Bible acknowledged that man is God's special creation.³⁰ However, these scriptures do not contain a codified form of human rights. Contrary to the scriptures, torture was used as a form of punishment and a tool of collecting evidence throughout history in every society. In the West, mostly in Christian society, a systemic use of torture had a long history from the Greek and Roman period to extract the truth in heinous criminal cases.³¹ The early Roman regime applied torture primarily against slaves, foreigners and other persons without full legal personality but later it was gradually expanded to other people.³² The Romans' torture techniques were severe and very painful.³³ The act of torture was continued during the Christian Church's regime. The Church did not protest against torture which was accepted as a practice in Europe.³⁴ The use of torture remained till the mid-thirteenth century, when Pope Innocent IV authorised the use of torture against heretics.³⁵ During twelfth to eighteenth centuries judgements were based on either the testimony of two eye witnesses or confessions obtained through torture. In the absence of real evidence, judges were authorised to obtain confessions through torture.³⁶ Torture was prevalent and regarded as the most secure proof - 'the

29 BB Paliwal, *Message of the Vedas* (Diamond Books (P) Ltd, 2006) 14-15.

30 Holy Bible, 26-27.

31 See Mathew Lippman, 'The Development of Drafting of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments' (1994) 17 *Boston College International and Comparative Law Review* 276; Rodley with Pollard, above n 1, 8; Jordan Bishop, 'Question of Torture' (2007) 159 *Law and Justice and Christian Law Review* 108.

32 See Rodley with Pollard, above n 1, 8; Alfred W. McCoy, 'Cruel Science, CIA Torture and U.S. Foreign Policy' (2005) 19 *New England Journal of Public Policy*, 213; A. Lawrence Lowell, 'The Judicial Use of Torture' (1897) 11(4) *Harvard Law Review* 220.

33 Lippman, above n 31, 277.

34 Leo Eitinger, 'Torture a Perspective of the Past' (1991) 17 *Journal of Medical Ethics* 9-10; Bishop, above n 31, 108.

35 Bishop, above n 31, 108; Lippman, above n 31, 277.

36 Rodley with Pollard, above n 1, 9; 297; Bishop, above n 31, 108.

queen of proofs'.³⁷ During that period, those who defended torture argued that torture was the only possible method of obtaining truth when all other methods failed to find out the truth, especially in serious criminal cases.³⁸

Likewise, in the Eastern Hindu and Buddhist Societies, violent punishments involving severe torture were used in ancient India such as chopping off hands, nose, ears, or feet for offenses against social morality.³⁹ Hodgson explained that if any accused confessed, there was no need to produce evidence. If the accused refused to confess, they were tortured until he confessed.⁴⁰ In China, judicial torture formed an important part of the imperial legal codes from the first Empire Qin dynasty (221 to 204 bc) to the last Empire Qing dynasty (1644-1911).⁴¹

Moreover, in the early twentieth century, many countries used torture as a tool to take control over the people of colonies.⁴²

In Islamic Law, torture is prohibited by law and the Quran does not directly deal the issue.⁴³ However, after the Quran, the use of beating suspected wrongdoers to obtain confessions was permitted.⁴⁴ The use of torture was gradually forbidden in Muslim countries as enshrined in their constitutions and laws.⁴⁵

At the same time, philosophers argued against the use of torture, most notably, John Locke argued that individual rights are granted by nature so that governments cannot supersede the dignity and rights of an individual.⁴⁶ After the mid eighteenth century, moral and logical arguments were accepted which meant that the use of torture decreased as compared to the past, and confessions became less in demand as rules of evidence advanced. Likewise, the death penalty and other types of corporal punishments were increasingly replaced by imprisonment and other types of punishment.⁴⁷ After that, torture was abolished in many countries in Europe.⁴⁸

37 Rodley with Pollard, above n 1, 9; Lippman, above n 31, 297.

38 Rodley with Pollard, above n 1, 9.

39 See Sukla Das, 'Crime and Punishment in Ancient India' (New Delhi: Abhinav, 1977) 55-78; Bhogendra Sharma, Rjesh Gautam and Gopal Guragain, *Indelible Scars A study of Torture in Nepal* (Centre for Victims of Torture, 1994) 68-74.

40 See Brian Houghton Hodgson, 'Miscellaneous Essays relating to Indian Subjects', (London: Trubner and Co. Ludgate Hill, 1880) Vol II 223-224. Mr Hodgson conducted research on law and justice and police administration in Nepal in 1825 to onwards and worked as British ambassador for Nepal. He published many articles and interviews in the matter.

41 J. Shen (1985) Lindai Xingfa Kao [A Study of Criminal Justice Throughout History], As cited in Kong-Pin Chan, Tsung Sheng Tsai and Angela Laung, 'Judicial Torture as Screening Device' (2009) Institute of History and Philosophy, Academia Sinica 1<<http://ssrn.com/abstract/1410518>>.

42 See Marina Lazreg, *Torture and the Twilight of Empire from Algeria to Baghdad* (Princeton University Press 2008) 1-11; Anupama Rao, 'Problems of Violence, States of Terror: Torture in Colonial India' (2010) 3 (2) *Interventions: International Journal of Postcolonial Studies* 199.

43 See Sadiq Reza, 'Torture and Islamic Law' (2007-2008) 8 *Chicago Journal of International Law* 22.

44 Ibid, 21-22.

45 Ibid.

46 John W. Yolton, *Locke an Introduction*, (Basil Blackwell, 1985) 51-72; Thom Brooks (ed.), *Locke and Law*, (Asgate Publishing House, 2007) xi-xv.

47 Rodley with Pollard, above n 1, 9.

48 Lippman, above n 31, 283.

Countries have started to respond to torture relating incidents gradually by introducing anti-torture laws and mechanisms. However, as stated above, some countries resorted to use of torture such as the Nazi Party in Germany which went to legislate the permissibility of so called ‘third degree’ interrogation⁴⁹ and Stalin also used severe torture against the opposition.⁵⁰ Hundreds of people were victimised by torture and other forms of ill-treatment and other severe human rights violations before and during World War II.

As to the reaction of barbaric situation of human rights violations, the UN Charter proclaimed that the protection of human rights is one of the organisation's central purposes.⁵¹ The UDHR provides the foundation of human rights including the provision of the rights to freedom from torture. After the UDHR, the Geneva Conventions also prohibit the act of torture and other forms of ill-treatments during the war.⁵² The Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations Economic and Social Council in 1957, also prohibits all cruel, inhuman or degrading punishments in prison and detention centre. The Standard Minimum Rules for the Treatment of Prisoners has set a minimum standard for prisons and detention centres.⁵³ More significantly, the ICCPR has created a State's obligations to prohibit torture and other cruel, inhuman or degrading treatment or punishment.⁵⁴ The ICCPR guarantees the rights to freedom from torture as a core human rights component which is not to be compromised even during a war or public emergency⁵⁵ and it has established the Human Rights Committee (CCPR/C) as a monitoring mechanism.

Despite this prohibition, the act of torture continued in many parts of the world. In 1954, French forces used torture systematically against Algerian detainees to get information about the strategies and membership of National Liberation Front (Algeria).⁵⁶ Initially, the French Government denied the allegation of torture. However, the act of severe torture was proven by an investigation report and 40 detainees reported that they were subjected to various forms of torture.⁵⁷ The investigator was appointed by the government of France. Likewise, British security force inflicted torture in Northern Ireland against the members of the Irish Republican Army. The European Court of Human Rights (ECtHR) confirmed that the British Force committed human rights violations using mainly five different techniques such as wall-standing; hooding; subjection to noise; deprivation of sleep; and deprivation of food and drink. Specifically, detainees were forced to remain in a spreadeagle

49 Rodley with Pollard, above n 1, 9.

50 Rejali, above n 3, 67.

51 *Charter of the United Nations* arts 1,3,55.

52 *Convention (III) relative to the protection of civilian persons in time of war*, open for signature 12 August 1949, UNTS 75 (entered into force 21 October 1950) art.3. All four Geneva conventions have a common Article 3 which prohibits torture and other forms of ill-treatment.

53 United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955 <<http://www.refworld.org/docid/3ae6b36e8.html>>.

54 *ICCPR* art 7.

55 *Ibid* art 4. .

56 Lippman, above n 31, 290.

57 *Ibid* 291.

position.⁵⁸ The five techniques are defined as the categories of inhuman and degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.⁵⁹

During the Cold War, many countries used torture as a mechanism of political control against the opposition party or group. The use of torture became more sophisticated in the latter period focusing on individual's psychology rather than physical pain to intend the absence of physical scars.⁶⁰ Legal provisions of the Soviet Union permitted prosecuting officials to refer an individual accused of criminal activity to a psychiatric commission.⁶¹ The system was harmful to the opposition group. The political opponents considered of suffering from a psychiatric disorder were sentenced to Special Psychiatric Hospitals, reserved for dangerous offenders. Amnesty International organised a campaign against torture across the world and found that many countries used torture.⁶² In most of the countries, torture was used deliberately by government officials.⁶³ Some governments used severe torture against their own citizens. Most notably, systematic practices of torture in Chile during the Pinochet regime continued to provoke action, and as a response of the situation the United Nations General Assembly expressed serious concern on the practices of torture by the Chilean Government in 1973.⁶⁴ Furthermore, the action supported to develop more specific law for the prevention of torture.

2.2.2 Codes of conducts for professionals

The participants of the Amnesty International's conference in 1973 declared that the use of torture is a violation of freedom of life and dignity. Following the conference, Amnesty International worked towards implementation of the recommendations including preparing a code of conduct for the professionals like medical professionals and law enforcement officials.⁶⁵ Furthermore, World Medical Association released the Tokyo Declaration in 1975 which contained that doctors shall not countenance, condone and participate in the practice of torture.⁶⁶ United Nations Declaration on Principles of Medical Ethics 1983 also prohibits the involvement of doctors in the

58 *Republic of Ireland v United Kingdom* (European Court of Human Rights, Application No 5310/71, 18 January 1978); Lippman, above n 31, 291.

59 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context Law Politics and Morals* (Oxford University Press, 3rd Ed, 2007) 232.

60 Lippman, above n 31, 293.

61 Amnesty International, *Prisoners of Conscience in the USSR: The Treatment and Conditions* (Amnesty International, 1975) 108
<<http://www.amnesty.org/en/library/asset/EUR46/001/1975/en/b6776be8-c230-45f8-ac7e-0e2024c5c87e/eur460011975en.pdf>>.

62 Amnesty International, Annual Report 1973-74 (Amnesty International 2074) 12.

63 Amnesty International, Report on Torture (Amnesty International, 1973) 17
<<http://www.amnesty.org/en/library/asset/ACT40/001/1973/en/d1d865a7-8424-4bd3-a90d-aace85622efe/act400011973eng.pdf>>.

64 Amnesty International, Annual Report 1973-74, above n 62, 36-40; Rodley with Pollard, above n 1, 43.

65 Lippman, above n 31, 296.

66 World Medical Association, *Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment* Tokyo Declaration 1975 art 1.

infliction of torture particularly the physician.⁶⁷ Similarly, in 1980, the UN General Assembly adopted a code of conduct for law enforcement officials. The law enforcement officials may inflict, instigate any act of torture or other cruel, inhuman or degrading treatment or punishment.⁶⁸

2.2.3 Declaration and drafting history of the CAT

The UN General Assembly took into account and declared protection and promotion of the right to freedom from torture through a non-binding nature of international human rights instruments called 'Declaration of the Prohibition of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on December 9, 1975.

After the Declaration in 1975, the General Assembly formally requested to the Commission on Human Rights to prepare a legally binding human rights instrument.⁶⁹ Recognising torture and other forms of ill-treatment as a serious human rights related problem, additional legal provisions were required to protect individuals from torture and other forms of ill-treatment. Following the direction of the General Assembly, the Commission on Human Rights formed a Working Group to Draft Convention related to the right to freedom from torture and other forms of ill-treatment.⁷⁰ At the same time the Government of Sweden prepared a draft text based on the 1975 declaration.⁷¹ The Working Group considered a draft over a period of six years from 1978 to 1984. Representatives of the member states provided inputs and comments based on each article of the draft convention. Despite there was serious latent differences 'Cold War' between U.S. and its alliance and Soviet Unions and its alliance countries in the world and the strong ideological differences between countries, the Working Group was successful in reaching a compromise on many controversial issues including the principle of universal jurisdiction and excluding pain or suffering from lawful sanction as definition of torture.⁷² Finally, the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984 by consensus.⁷³ The CAT was opened for signature on 5 February 1985 and entered into force on 26 June 1987. In the UN General Assembly, many representatives of the member countries proclaimed that the CAT represents a major step towards the protection of human rights and a victory against brutality and violence.⁷⁴

67 United Nations, *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 37/194, UN GAOR, 37th sess. No 51 at 210 UN Doc A/37/727/1983.

68 United Nations, *Code of Conduct of Law Enforcement Officials*, UN Res, 34/169, UN GAOR 34th Sess, Supp No.46 art 5 U.N. Doc A/34/783 (1980).

69 United Nations, GA Res 32/62 (8 December 1977).

70 Commission on Human Rights, *Draft Convention on torture and other cruel, inhuman or degrading treatment or punishment*, 7 March 1978, UN Doc E/CN.4/RES/18 (XXXIV).

71 Nowak and MacArthur, above n 1, 4.

72 Ibid 5.

73 United Nations, GA Res 39/46 (10 December 1984).

74 Lippman, above n 31, 312.

These historical developments show that the right against torture was not developed overnight but it has been developed gradually in many societies, nationally or internationally as a reaction against the barbaric torture and atrocities by the governments against their citizens/people.

2.3 Theoretical consideration on the implementation of the CAT

International human rights discourse is comparatively new in legal philosophy and jurisprudence. It has become a substantive part of international human rights law especially after World War II. The conceptual nature of torture is that it is an inherently oppressive dimension of a State's behaviour towards its citizens or general people. Thus, torture has been taken as a serious human rights violation. The right to freedom from torture is defined as an absolute human right which must be respected by the State without any restriction in normal situations and also during a state of war, internal conflict or public emergency.⁷⁵ As stated, international law prominently prohibits torture. The right to freedom from torture is accepted as peremptory norms (*Jus Cogens*) which is defined by the Vienna Convention on the law of the treaties.⁷⁶ Scholars argue that torture is a direct and deliberate attack on core human personality and dignity.⁷⁷ Fatima stated that torture 'is inherently morally wrong because it seeks to annihilate agency'.⁷⁸ Christoph Burchard posits three reasons why torture impairs human dignity. First, it violates the right to a fair trial especially the principle of right to remain silence (*nemo-tenetur*) which is a core procedure to safeguard human from testifying forcefully. Second, it destroys physical and mental integrity of the victims. Third, torture may violate the social integrity of the victims.⁷⁹

As discussed above, the right to freedom from torture has been gradually developed at the domestic and international level. International law, particularly the CAT, sets out standards for the right to freedom from torture and other forms of ill-treatment. It is obviously a challenge to implement the standards at the domestic level, especially the protection of individual's right against torture.

2.3.1 Domestication of the provisions of the CAT and human rights instruments

Accession to, or ratification of, the CAT and other human rights instrument are a process of domestication of international human rights law including the CAT. It is an important step to accept the provisions of human rights instruments. The CAT is not only important to clarify States' obligations, but it also clarifies the scope of domestic

75 CAT art. 2(2); ICCPR art 4; *Geneva Convention relative to the protection of civilian persons in time of war*, open for signature 12 August 1949, UNTS 75, (entered into force 21 October 1950) art 3.

76 *Vienna Convention on the Law of Treaties*, open for signature on 23 May 1969 1155 UNTS 331 (entered into force 27 January 1980), art. 53.

77 Nowak and MacArthur, above n 1, 1.

78 See Fatima Kola, 'The Moral Wrongness of Torture' (2008) 14 *UCL Jurisprudence Review* 140-141.

79 See Christoph Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals A Critical Assessment' (2008) 6 *Journal of International Criminal Justice* 176.

law prohibiting torture.⁸⁰ It is therefore the domestication process that is crucial for the protection of the right to freedom from torture. Generally, international human rights instruments set standards in a wider level - for example the CAT provides standards and provisions regarding the right to freedom from torture and creates the State's obligation for the implementation of the provisions. Thus, the implementation of the provisions depends on member States' commitment and behaviour. The domestication of recognised international standards of the right to freedom from torture is vital for the enforcement of the provisions of the CAT and protection of the right to freedom from torture at the individual level. The process of domestication of the CAT or any other treaties are accomplished mainly through two ways either directly or indirectly, which is defined as two theories- 'Monism' and 'Dualism'. The debate between the two theories is centered towards the implementation of international human rights law in the domestic level. Nevertheless, the two theories do not have very clear demarcation; both systems have mixed type of practices while domesticating the right to freedom from torture.

2.3.1.1 Monist approach

The monist theory emphasises international and municipal law as one legal system.⁸¹ In the theory, ratified or acceded human rights treaties become a part of national law of the concerned member State. The constitutions and laws of the concerned member States allow or accept direct implementation of the provisions of the human rights convention and courts and National Human Rights Institutions (NHRI) enforce the treaty provisions during decision making. However, there are no any similar practices among the Monist countries. Some countries define treaty provisions as being are higher than the domestic law such as in France and Japan and others define the treaty provisions as being same as municipal laws in Egypt and Georgia.⁸² In accordance with the theory, domestic courts can directly apply the provisions of the CAT in decision making process, however, many judiciaries are less familiar with the international human rights treaties and uncertain about legal nature of the self-executing provisions of treaties.⁸³ It is therefore, incorporation of the provision of the CAT or other treaties in domestic legislations is required even in the Monist countries in order to implement the treaty provisions.

80 See Oona A Hathaway, Aileen Nowlan, and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2011-2012) 52 *Virginia Journal of International Law* 794.

81 See, eg, James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 50; David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement A Comparative Study* (Cambridge University Press 2009) 6; REDRESS, 'Bringing the International Prohibition of Torture Home National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (REDRESS Trust, 2006) 18.

82 REDRESS 2006, above n 81, 18.

83 Ibid 21.

2.3.1.2 Dualist approach

The Dualist theory defines that domestic and international laws are two interdependent legal systems.⁸⁴ The theory of Dualism does not accept the supremacy of provision of the international treaty or convention. It emphasises that all provisions of international treaties or conventions have to be incorporated in the municipal law of the concerned country. The theory accepts the concepts of State sovereignty and constitutional supremacy as State doctrine. With the dualist countries, the countries like Australia, Canada, India and United Kingdom (UK) are defined as more rigid countries having a strong focus on treaty provisions applied through their domestic legal systems. However, courts have started to take treaty provisions as a basis for interpretation of various human rights related issues and related domestic provisions. For example, the British House of Lords comprehensively examined the CAT and domestic provisions in the judgement of *A and others v Secretary of State*.⁸⁵ The decision expressed two aspects for domestication of the provisions of international treaties and some extra focus on the issue of the right to freedom from torture.

Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.⁸⁶

Similarly, the Supreme Court of Canada offered detailed analysis of the CAT in decision of *Suresh v Canada*. The case was related to a contest against deportation certificate based on the allegation of affiliation with a terrorist organisation. The Court quashed the decision related to deportation.⁸⁷ On the other hand, some other decisions by House of Lords and the Canadian Supreme Court followed the doctrine of state sovereignty rather than universal jurisdiction of rights to freedom from torture in the issue of immunity for state officials (see cases detail in sub-heading 2.4.5).⁸⁸

Although there is a debate within the academic sector on Monism and Dualism, many researchers have shown that the practices are mixed i.e. not rigid to one theory while

84 See Sloss, above n 81, 6; Crawford, above n 81, 50; Eileen Denza, 'The Relationship between International and National Law' Malcolm D. Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 417.

85 See, eg, *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* (2005) UKHL 71, (2005).

86 See, eg, *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* (2005) UKHL 71, (2005) [149].

87 See *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR, 3.

88 See, eg, *Jones v Ministry of Interior Al- Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* (2006) UKHL 26; *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62 (10 October 2014) 3 S.C.R.176.

incorporating and adapting international human rights treaties at the domestic level.⁸⁹ In practice, with the growing awareness about the provision of international human rights standards, the judiciaries are increasingly applying international human rights instruments at the domestic level.⁹⁰

2.3.2 Debates on the right to freedom from torture

Despite the fact that the act of torture is unconditionally banned under all customary international law and treaty based law, many countries have used torture and other forms of ill-treatment.⁹¹ Specially, after the notorious terrorist attacks in USA in September 11, 2001, the U.S. Government established secret detention centers to detain for suspected terrorists and introduced a special interrogation system called 'Enhanced Interrogation Techniques'. The U.S. Government authorised to use various forms of torture and other forms of ill-treatment against the suspected terrorists under the interrogation techniques.⁹² Under the 'Enhanced Interrogation Techniques', the government interrogated suspected terrorists, conducted extraordinary rendition and ran secret detention facilities.⁹³ Most specially, two memoranda were prepared by the Attorney General Office that introduced several types of torture and other forms of ill-treatment for interrogation to the suspected terrorists.⁹⁴ The first memorandum (memo) stated two main reasons 'Necessity' and 'Self-Defense' to adopt the techniques which allowed the use of other forms of ill-treatment and torture against suspected terrorists.⁹⁵ The memo defined torture as an extreme act that creates severe pain accompanied by serious physical injury such as organ failure or even death.⁹⁶ The whole development helped to legalise the act of torture and other forms of ill-treatment in the USA.

89 See, eg, Mellisa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 704; Donald R Rothwell, Stuart Kaye, Afshin Akhtarkhvari and Ruth Davis, *International Law Cases and Materials with Australian Perspectives* (Cambridge University Press, 2nd ed, 2014) 204.

90 See Michael Kirby, 'Constitutional and International Law: National Exceptionalism and the Domestic Deficit?' (2010) 98 (2) *The Georgetown Law Journal* 95-122; REDRESS 2006, above n 81, 24.

91 Amnesty International Torture Report 2014, above n 25, 10.

92 See Lisa Hajjar, 'Does Torture Works? A Socio-legal Assessment of the Practice in Historical and Global Perspective' (2009) 5 *Annual Review of Law and Social Science* 312.

93 See Manfred Nowak, Moritz Birk and Tiphonie Crittin, 'The Obama Administration and Obligation Under the Convention Against Torture' (2011-2012) 20 *Transnational Law and Contemporary Problems* 34. (Under the extraordinary rendition, U.S. government agencies transferred foreign nationals suspected of involvement in terrorism to detention and interrogation in countries where in the CIA's view –federal and international legal standards do not apply (for more detail please visit; Fact Sheet: Extraordinary Rendition < <https://www.aclu.org/fact-sheet-extraordinary-rendition?redirect=national-security/fact-sheet-extraordinary-rendition>>).

94 See Philippe Sands QC, 'Torture Team: The Responsibility of Lawyers for Abusive Interrogation' (2008) 9 *Melbourne Journal of International Law* 368.

95 See Gordon, above n 27, 17; *US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R Gonzales* <<http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>>.

96 Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 *Human Rights Quarterly* 812; Memorandum for Alberto R Gonzales, above n 95.

In the process, the U.S. Government established detention centres including Guantanamo Bay, Abu Ghraib, Bagram Airfield in Afghanistan and many other different locations as secret detention centres where various types of torture and other forms of ill-treatment were used to extract information or confessions from detained suspected terrorists. The interrogators used various types of physical and psychological torture and other forms of ill-treatment such as waterboarding, short shackling, beating, sexual humiliation, sleep deprivation, standing restraints, peroneal strikes.⁹⁷ For example, U.S. soldiers used waterboarding torture techniques 183 times on a detainee of Abu Ghraib prison.⁹⁸ Some detainees have been put in prolonged incommunicado detention in secret places and were tortured.⁹⁹

Being the superpower country of the world, the practices of torture and defective legislative measures in the USA obviously influences many other countries in the world. Scholars stated that the measures directly violate prisoner's rights, erosion of civil liberties, restraining rights of ethnic minorities and manipulation of international law to serve narrowly defined interests.¹⁰⁰ Therefore, the U.S. influence is expanded mainly from two perspectives. First, many countries have introduced anti-terrorism law incorporating some defective legal provisions for the protection of human rights. According to Human Rights Watch, 140 countries have introduced anti-terrorism laws since September 11, 2001.¹⁰¹ In this regard, Maureen Ramsay found that the U.S. policy becomes a dangerous precedent for governments across the world: 'governments from Israel to Uzbekistan, Egypt to Nepal that defy human rights and international humanitarian law in the name of national security and counterterrorism'.¹⁰² Second, the U.S. Government has extradited many detainees under its 'Extraordinary Renditions Program'. The Open Society Institute documented many cases about the illegal transformation. The Central Intelligence Agency (CIA) transferred terrorist suspects to many countries. Under the program 54 countries including Australia and the UK repeatedly participated in the rendition program.¹⁰³ Similarly, the Human Rights Council has covered many cases of secret detention that

97 See Gordon, above n 27, 37-57; Jaykumar A. Menon, 'Suing Torture for Compensation: Mission Possible? Guantanamo Torture Litigation' (2008) 6 *Journal of International Criminal Justice* 223-229.

98 See Gordon, above n 27, 37-57; Peter Miller, 'Torture in Comparative Perspective' (2011) 12 *Human Rights Review* 442; Senate Select Committee, above n 26.

99 See Human Rights Watch, *Getting Away with Torture? Commend Responsibility for the U.S. Abuse of Detainees* (Human Rights Watch, 2005) Vol 17 No 1 (G) 2 <<http://www.hrw.org/sites/default/files/reports/us0405.pdf>>.

100 Julie Mertus and Tazreena Sajjad, 'Human Rights and Human Insecurity: The Contributions of US Counterterrorism' (2008) 7(1) *Journal of Human Rights* 3.

101 See Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide Since September 11* (Human Rights Watch 2012) 3 <<http://www.hrw.org/sites/default/files/reports/global0612ForUploadFinal.pdf>>; REDRESS, *Extraordinary Measures, Predictable Consequences: Security Legislation and Prohibition of Torture* (REDRESS Trust, 2012) 8-34.

102 Maureen Ramsay, 'Can the torture of terrorist suspects be justified?' (2006) 10(2) *The International Journal of Human Rights* 113.

103 See Open Society Institute, 'Globalising Torture: CIA Secret Detention and Extraordinary Rendition', (February 2013); REDRESS, *Torture in the Americas: The Law and Practice, Regional Conference Report* (REDRESS Trust, 2013) 12.

were transferred to many countries in the world.¹⁰⁴ John T Perry pointed out that the rendition policy is against the U.S. Constitution, policies and international commitment.¹⁰⁵ The act of extraordinary rendition not only violates Article 3 of the CAT which prohibits extradition where there may be a risk of torture to detainees, but it is also an expansion of torture practice to other countries which affects their regular criminal interrogation processes. Commentator Naomi Klein stated that ‘the current use of torture goes beyond either punishment or obtaining information not only in particular places but also in the broader community’.¹⁰⁶ The use of torture has been increasingly accepted in legal discourse in the last decade all around the world.¹⁰⁷

As a response of the legal and practical development, arguments among scholars have been divided. The issue has been raised as to whether the right to freedom from torture should be unconditionally banned in any situation or allowed in certain exceptional circumstances. Some scholars who follow the theory of Consequentialism have argued that torture and other forms of ill-treatment could be needed in certain exceptional situations where suspected terrorists might have information about destructive activities or plans. The information from suspects could be useful to save hundreds of lives who might be at risk.¹⁰⁸ On the other hand, many scholars who follow the theory of Deontology have criticised U.S. policies and practices and restated that torture and other forms of ill-treatment is absolutely prohibited legally and morally in any circumstances and there is no room for excuse to use torture or other forms of ill-treatment.¹⁰⁹ Furthermore, many international non-governmental organisations and

104 Human Rights Council, “*Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances,*” UN Doc. A/HRC/13/42, (26 January 2010).

105 See John T Parry, ‘Torture Nation, Torture Law’ (2009) 97 *The Georgetown Law Journal* 1053.

106 Naomi Klein (Canadian writer) published an article in ‘The Nation’ entitled ‘Torture’s Dirty Secret it works’ in 2005, as cited in Jordan Bishop, ‘Questions of Torture’ (2007) 159 *Law & Justice and Christian Law Review* 103.

107 Jens David Ohlin, ‘The Bounds of Necessity’ (2008) 6 *Journal of International Criminal Justice* 289.

108 See, eg, Alan Dershowitz, *Why Terrorism Works-Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) 132-163; Mirko Bagaric and Julie Clarke, ‘Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable’ (2004-2005) 39 *University of San Francisco Law Review* 582; Mirko Bagaric, ‘So What Rights Are Real’ (2008) 4 *Original Law Review* 90; Oren Gross, ‘The Prohibition on Torture and the Limits of the Law’ in Sanford Levinson (ed), *Torture: A Collection*, (Oxford University Press, 2006) 30 <<http://ssrn.com/abstract=485043>>; Fritz Allhoff, ‘Torture Warrants, Self-defence and Necessity’ (2012-2013) 11 *Cardozo Public Law, Policy and Ethics Journal* 425; Cheryn Chang, ‘The Absolute Prohibition on Torture-Extra-Legal and Ex-post Ratification’ (2007) *Supplement UCL Jurisprudential Review* 28; Seumas Miller, ‘Is Torture Ever Morally Justifiable?’ (2005) 19(2) *International Journal of Applied Philosophy* 190.

109 See, eg, Mathew H Kramer, *Torture and Moral Interiority; A Philosophical Enquiry* (Oxford University Press, 2014); Yuval Ginbar, *Why not Torture Terrorists? Moral, Practical and Legal Aspects of the Ticking Bomb Justification for Torture* (Oxford University Press, 2010) 356; Richard Matthews, *The Absolute Violation Why Torture Must be Prohibited* (McGill’s Queen University Press, 2008) 99; Desmond Manderson, ‘Another Modest Proposal’ (2005) 10 *Deakin Law Review* 641; Jose E. Alvarez, ‘Torturing the Law’(2005-2006) 37 *Case Western Reserve University Journal of International Law* 221-223; Nowak, Birk and Crittin, above n 92; Philippe

UN mechanisms have put pressure on the Government to respect the right to freedom from torture and raised serious concerns about the violations of the right to freedom from torture in the USA.¹¹⁰ The CAT/C has recommended that the U.S. Government should define torture at a federal level in line with the CAT and the State should ensure that acts of psychological torture are prohibited as in the CAT.¹¹¹

Scholars take two theories - Deontology and Utilitarianism as a foundation for the debate regarding absolute prohibition and limited permissibility to the use of torture. The theory of Deontology has been taken as the theoretical foundation for absolute prohibition of torture and other forms of ill-treatment; and theory of Utilitarianism for limited permissibility for the betterment of saving hundreds of lives. However, scholars have varied versions in this regard.

2.3.2.1 Consequentialist doctrines for torture

Consequentialists focus on judgements as to whether an act is right or wrong depending upon its consequences. They explain that a good action results in good outcomes and bad act results in bad ones.¹¹² It is difficult to find out what is good and what is bad, so it has been linked to utility for people. Consequentialism is also known as Utilitarianism. The Utilitarian theory began hundreds of years ago most notably with the ideas of philosopher Jeremy Bentham (1748-1842) who systematically developed the principle. His thought focused on social usefulness and pleasure as important for life, so that socially right actions linked to happiness should be maximised. Further, the theory was strengthened by John Stuart Mill (1806-1873) that there has to be a foundation of morals, utility or the greatest happiness principle. The moral values of Utilitarian theory are that pleasure is good and pain is bad, and in moral practice we maximise pleasure and/or minimise pain.¹¹³

The theory has become a moral debate in the current context regarding torture and ticking bombs situations which define a small amount of pain and suffering (torture) against the potential for greater pain and suffering.¹¹⁴ Furthermore, the theory links to

Sands QC, 'Torture Team: The Responsibility of Lawyers for Abusive Interrogation' (2008) 9 *Melbourne Journal of International Law* 365-380; Sirus Kashefi, 'Human Rights: A Relative, Progressive, Regressive, and Controversial Concept' (2011) 7 *International Zeitschrift* 74; Kola, above n 78, 140-141; Jordan J Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2008-2009) 43 *Valparaiso University Law Review* 1535-1536; Nigel S. Rodley, 'The Prohibition of Torture: Absolute Means Absolute' (2006) 34 (1) *Denver Journal of International Law and Policy* 160; David Sussman, 'What's Wrong with Torture?' (2005) 33 *Philosophy & Public Affairs* 1.

110 See Memo from Amnesty Int'l, to the U.S. Attorney Gen., Amnesty International's concerns relating to the post 11 September investigations, AI Index: AMR 51/170/2001, at 16, § 9 (Nov. 1, 2001) (noting these techniques would violate human rights treaties to which the United States is a party), <<http://web.amnesty.org/library/index/ENGAMR511702001>>; Human Rights First, 'End Torture Now' Annual Report 2005/6, 10-11 < <https://www.humanrightsfirst.org/wp-content/uploads/pdf/07221-hrf-ar-05-06.pdf>>.

111 Committee against Torture (CAT/C), *Considering of Reports Submitted by States Parties under Article 19 of the Convention, Conclusion and Recommendations of the Committee Against Torture United States of America*, UN Doc CAT/C/USA/CO/2 (25 July 2006) para 13.

112 See Ginbar, above n 109, 15; Gordon, above n 27, 61.

113 See Matthews, above n 109, 102.

114 See Gindar, above n 109, 16.

morality and the consequences of any act. There are many forms of Utilitarianism. However, two types 'act' and 'rule' Utilitarianism are most popular.¹¹⁵ Among them, Utilitarian act, which was developed by Bentham and Utilitarian rule was developed by JS Mill.¹¹⁶ Professor Bagaric stated that the most influential is hedonistic act utilitarianism, which provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.¹¹⁷ Mathew stated that among the two kinds of Utilitarian theories, the Utilitarian rule theory does not allow the use of torture or cooperation in any situation.¹¹⁸

Some scholars have stated that torture is prohibited in the general situation as a normative form.¹¹⁹ However, they have argued that torture and other forms of ill-treatment could be needed in certain exceptional situations where a suspected terrorist might have information about destructive activities or plans. The information from suspects could be useful to save hundreds of lives that might be at risk.¹²⁰ Alan Dershowitz, Oren Gross, Mirko Bagaric and Julie Clarke, Fritz Allhoff have argued that torture ought to be used in exceptional situations. These scholars stated that Utilitarian theory has provided the basis to use torture for the causes of save hundreds of lives.¹²¹ Nevertheless, the scholars have argued over various proposals and procedures to apply torture and other forms of ill-treatment. The scholars do not have uniform voice whether torture and ill-treatment should be within or outside the legal system. In terms of the procedure to use torture, this can be divided into three broad categories,- i) torture after approval from judicial authority, ii) torture for self-defense, necessity and iii) torture as official disobedience.

Torture warrant from judicial authority

Professor Dershowitz has proposed a formal and systemic proposal to use torture and other forms of ill-treatment against suspects through warrant which is a form of pre-approval (*ex-ante*) from judicial authority.. He has argued that the use of torture through judicial warrant may be useful to obtain immediate information from suspected terrorists in order to prevent serious destruction and to save lives.¹²² Furthermore, he has stated that many countries are routinely practising torture, but they ignore it. There would be less torture with a warrant requirement than without it, because of the activities would be subjected to judicial control and accountability.¹²³

Torture for self-defense and necessity

115 See Matthews, above n 109, 105-107.

116 Ibid

117 See Bagaric, above n 108, 82.

118 See Matthews, above n 109, 105-106.

119 Gross, above n 108, 30. Chang, above n 108, 28.

120 See Dershowitz, *Why Terrorism Works*, above n 108, 132-163; Bagaric and Clarke, above n 108, 582; Bagaric, above n 108, 90; Gross, above n 108, 30; Allhoff, above n 108, 425; Chang, above n 108, 28; Miller, above n 108, 190.

121 See Bagaric and Clarke, above n 108, 616.

122 See Dershowitz, *Why Terrorism Works*, above n 108, 132-163

123 See Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2003-2004) 48 *New York Law School Law Review* 278; *ibid*.

The U.S. Department of Justice's memo posits 'necessity' and 'self-defense' are potential justifications for torture and other forms of ill-treatment against suspected terrorist detainees who might create direct and imminent threat to the U.S. and its citizens.¹²⁴ The memo accepted that U.S. federal laws do not allow necessity as a defense against federal criminal laws; however, the memo argued that current circumstances proved the necessity for defense against risk. Similarly, the memo argued that the doctrine of self-defense permits use of force to prevent harm to another person.¹²⁵ Bagaric and Clark argued that torture is justifiable to gather information to avert a grave risk.¹²⁶ They do not use the words 'self-defense' and 'necessity', however they stated five variables risks - number of lives, immediacy of harm, the availability of other means to acquire information, the level of wrongdoing of the agent and likelihood of knowledge relevant in determining whether torture is permissible and the degree of torture that is appropriate.¹²⁷ All these variables reflect necessity and self-defense in order to protect lives from possible terrorist attacks.

Use of torture as official disobedience

Oren Gross, Seumas Miller, Fritz Allhoff stated that torture should be banned in normal situations and it could not be contained under any system or legalised version. However, in extreme emergency situations, to save lives, torture can be justified.¹²⁸ More specially, Gross has suggested that in a terrible situation, 'the appropriate method of tackling extremely grave national dangers and threats may entail going outside the legal order, at times even violate the otherwise entrenched absolute prohibition on torture'.¹²⁹ He proposes that when catastrophic cases occur, government officials are likely to use preventive interrogation torture, but it should not be authorised as a legal rule.¹³⁰ Likewise Miller stated that 'non-institutionalised acts of torture were performed by state actors in emergency situations'.¹³¹ The proposal proposes for post-recognition (*ex post*) of the torture. Oren Gross has argued that the official disobedience needs to give reasons *ex post*, for example the need to publicly justify the actions. It emphasises accountability of government agents transparently and publicly.¹³²

2.3.2.2 Deontologist doctrines for absolute prohibition of torture

The theory of deontology has been taken as a foundation of ethical values for absolute prohibition of torture and other forms of ill-treatment in any situation. The theory was developed by Immanuel Kant 1724-1804. The theory comes from two Greek words '*Deon*' which means duty and '*logos*' means science or logic. Literally, deontology

124 Memorandum for Alberto R Gonzales, above n 95, 39-42.

125 Ibid.

126 Bagaric and Clarke, above n 108, 616.

127 Ibid 611.

128 Miller, above n 108, 189; Gross, above n 108, 30. Allhoff, above n 108, 425.

129 Gross, above n 108, 30.

130 See, eg, Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience* (April 19, 2004) University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No.04-6, 140-145.

131 Miller, above n 108, 182.

132 Gross, above n 108, 22.

refers to a duty based ethics.¹³³ The Kantian Deontology theory believes in a standard of ethics for good reasons for human values and the theory defines the act of torture as fundamentally wrong.¹³⁴ Kant stated that act should be treated as a way of humanity or action that does not involve coercion.¹³⁵ Furthermore, Ginbar stated three characteristics of Kantian theory that chooses a moral course of action, first - a universal norm or value for all human beings in similar circumstances. Second, the action does not accept any coercion or violation; and third that it becomes a moral value for having their own ends.¹³⁶ David Sussman stated that the Kantian theory argued that ‘what is essentially wrong with torture is the profound disrespect it shows to the humanity or autonomy of its victim’. The victim may strongly object to torture.¹³⁷ Following Deontological theory, many scholars have strongly restated their arguments on absolute prohibition of torture or non-acceptance of torture in any exceptional situation. The argument for absolute prohibition of torture and other forms of ill-treatment explains that torture is legally, morally and practically wrong, as it violates the physical and psychological identity and integrity of a person. It can never be excused or justified in any circumstances. The major arguments for this are detailed below.

Morally wrong

The acts of torture and other forms of ill-treatment are not only defined as illegal, many scholars argued that it is also morally wrong. David Sussmen has contended that torture involves intentional infliction of extreme pain on a person. It has been a broad and confident agreement that torture is exclusively “barbaric” and “inhuman” - the most profound violation affecting the dignity of a human being. Thus, the philosophical and political discussion has taken torture as morally impermissible in any circumstances.¹³⁸ Furthermore, Fatima Kola stated that torture is morally wrong because it damages human dignity. It is an act which directly targets and seeks to annihilate the innermost parts of the individual (their dignity and autonomy), and which intrudes violently upon individual humanity.¹³⁹ These arguments describe the act of torture as being immoral.

Hypothetical situations cannot justify torture and self defense

Consequentialists frequently use hypothetical cases to justify the use of torture in exceptional situations where many people might be under threat from terrorist attack. The scholars who favor Deontology have argued that the hypothetical case cannot

133 See, A video lecture on deontological moral philosophy of Immanuel Kant, ‘The Duty to Act: Kant’s Deontology,’ 7 April 2014 (Mark Thorsby) <<http://www.youtube.com/watch?v=kYAK5UHtecg>>.

134 See, Matthews, above n 109, 12

135 See Immanuel Kant, *The Moral Law: Groundwork for the Metaphysic of Morals*, Translated and analysed by H.J. Paton (Routledge, 2005) 55-78.

136 Gindar, above n 109, 18.

137 Sussman, above n 109, 13-14.

138 Ibid 2.

139 Kola, above n 78, 99-100. 3.

reflect any empirical realities.¹⁴⁰ Richard Mathow stated that the right to freedom from torture has been developed from a long history which is associated with many empirical facts and reality, therefore the hypothetical case does not justify torture and other forms of ill-treatment.¹⁴¹

Torture and other forms of ill-treatment are legally banned

As stated above, the international human rights law, humanitarian law and criminal law prohibit torture and other forms of ill-treatment under any circumstances and this is defined as a non-derogable right. Similarly, the right to freedom from torture and other forms of ill-treatment is defined as a peremptory norm (*Jus Cogens*) and domestic laws ban torture, thus the use of torture and other forms of ill-treatments as being against the law. Professor Rodley stated that the act of torture and other forms of ill-treatment are illegal - not allowed to be used under any circumstances.¹⁴² The arguments which favor allowing torture in exceptional situations are against the law.

Furthermore, Manderson argued in the process of criticising Bagaric and Clarks' arguments relating to use of torture 'due to immediacy of the situation' claimed that no any evidence has been found where information from terrorist suspects about immediate risk to lives were obtained from past interrogations.¹⁴³ A research has shown that there are many false confessions obtained in response to torture.¹⁴⁴ Thus, torture cannot be regarded useful to obtaining information or confessions. With regard to the argument of torture for self-defense, Manderson explained that self-defense is about an individual's action but the act of torture is about the government's action so these two cannot be compared as being the same. Therefore, the subject matter of self-defense cannot be applied in the case of torture.¹⁴⁵

2.3.2.3 Confession or information obtained by torture is ineffective and counter-productive

Recently published, the U.S. Senate Committee report found that 'the use of CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation'.¹⁴⁶ The report found that most of the detainees fabricated information, resulting in faulty intelligence; the use of these tools and techniques were found ineffective.¹⁴⁷ Furthermore, the report stated that as claimed by the CIA's Inspector General and other high level officers, the gathered information was not seen as valuable to save lives to avoid further plots of terrorist attacks. The report reviewed 20 of the most frequent and prominent examples of purported counterterrorism success that attributed to use the techniques and found them to be wrong. There was no relationship with the information extracted from

140 See, Matthews, above n 109, 72; Manderson, above n 109, 645.

141 Matthews, above n 109, 72.

142 Nigel S. Rodley, 'The Prohibition of Torture: Absolute Means Absolute' (2006) 34 (1) *Denver Journal of International Law and Policy* 148-160; Rodley with Pollard, above n 1, 80-81

143 Manderson, above n 109, 643.

144 See, Joel Butler, 'Torture' (2011) 17 (2) *The National Legal Eagle*, article 5, 3.

145 Manderson, above n 109, 649-450.

146 See, Senate Select Committee, above n 20.

147 Ibid.

detainees and the plan.¹⁴⁸ The report reported that the interrogation methods used were worse than their expectation. The use of techniques such as walling, waterboarding and sleep deprivation were found to be harmful.¹⁴⁹ The report also found that CIA officers inflicted coercive interrogation techniques that had not been approved by the Department of Justice.¹⁵⁰ Furthermore, the chairperson of U.S. Senate Committee Ms Dianne Feinstein reported that the CIA's investigators had not found a single case where the information extracted by torture had actually saved lives.¹⁵¹ Similarly, 23 former security officers of national security agencies of the USA including US Army, Central intelligence Agency (CIA), Federal Bureau of Investigation (FBI), the CIA, the Drug Enforcement Agency, the Secret Service, and the Naval Criminal Investigative Service (NCIS) who worked as professionals for interrogation and interviewing the suspected detainees released a statement mentioning that torture and other forms of ill-treatment was illegal, ineffective, counterproductive and immoral.¹⁵² The statement was released based on their intensive experience and study of behavioral science. These reports and statement have given a strong message about torture and/or other forms of ill-treatment cannot be helpful to obtain any useful information or confession from detainees.

As response from the government level, the President Obama stopped the use of torture and other forms of ill-treatment through a Presidential order issued in 2009.¹⁵³ Furthermore, the U.S. Government responded to the Human Rights Council and stated that 'the US is unequivocally committed to the inhuman treatment to all the individuals in detention.'¹⁵⁴ In addition, U.S. delegate acknowledged to the CAT/C that 'in the wake of 9/11 attacks, we regrettably did not always live up to our own values'¹⁵⁵ and committed to implement the CAT.

2.3.3 Jurisprudence for protection of the right to freedom from torture

As noted, torture was an institutionalised practice in legal procedure to establish fact in the common law history. Time and again, with the development of moral sensitivity,

148 Ibid. 3.

149 Ibid 4.

150 Ibid. 12.

151 See, 'Senate Report on CIV torture claims spy agency lied about ineffective program', *News, The guardian*, 10 December 2014.

152 See Statement of National Security, Intelligence, and Interrogation Professional October 1, 2014, Human Rights First <<http://www.humanrightsfirst.org/sites/default/files/Torture-Statement-09-30-14.pdf>>. A statement of retired US army officers, CIA officers and other investigation officer were released on 1st October 2014. The statement has found that torture and other forms of cruel, inhuman, or degrading treatment are illegal, ineffective, counterproductive, and immoral. The officers shared their extensive experience of interrogation through statement.

153 See Executive Order 13491 –Ensuring Lawful Interrogations <https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/>.

154 Human Rights Council, *Report of the Working Group on the Universal Periodic Review United States America* UN Doc A/HRC/16/11 (4 January 2011) para 31.

155 Press TV, 'UN Committee Against Torture grills U.S. again', <<http://www.presstv.ir/detail/2014/11/14/385927/un-antitorture-body-grills-us-again/>>.

judicial enlightenment and rule of law, the method of torture had been changed.¹⁵⁶ Courts have started to exclude evidence obtained through torture and other forms of ill-treatment. In U.S. history, the Supreme Court has prohibited obtaining confessions from suspects through coercion from 1897's *Bram v United States*' case¹⁵⁷ and has excluded involuntary confessions in judicial proceedings.¹⁵⁸ The decision *Miranda v Arizona*,¹⁵⁹ has established a guideline for right to self-incrimination. Similarly, in the case of *Ibrahim v the King*, the House of Lords adopted exclusionary rule of evidence unless the prosecution could show that it was voluntarily made¹⁶⁰ and many other jurisprudences followed the precedent to refuse involuntary confession.¹⁶¹ In Australia, court decisions used exclusionary rules such as in the case of *McDermott v R*, the court explained that 'at common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made'.¹⁶² Similarly, many other decisions also have followed the rules.¹⁶³ All the cases showed that torture and other forms of ill-treatment are unacceptable in common law.

After the introduction of the advanced interrogation techniques used against terrorist suspects in USA, the use of torture and other forms of ill-treatment was made legal. The U.S. Government started secret detention centres i.e. Guantanamo Bay, Iraq and Afghanistan for detainees as the terrorism suspects. The Government took rigid strategies - for example the detainees were denied a trial or respect for basic human rights in the detention centres including *habeas corpus* rights.¹⁶⁴ In this situation, the protection of the rights to freedom from torture had become a serious challenge. Judicial intervention and protection become crucial to the respect and protection of the right to freedom from torture and the maintenance of the rule of law. The legal provisions and practices had failed to protect their rights. Lower level courts quickly rejected claim of detainees based on lack of authority to hear the cases. Later the U.S. Supreme Court protected the rights of the detainees and refused the legal provisions and administrative decisions of U.S. Government.¹⁶⁵ In the process, the U.S. Supreme Court decided crucial decisions for the protection of the detainees' right to *habeas corpus*, fair trial including right to freedom from torture for those who were detained

156 Winston P. Nagam and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001)14 *Harvard Human Rights Journal* 91.

157 *Bram v United States*, 168 U.S. 532, 542 (1897) as cited in the decision of *Dickerson v United States*, 530 U.S. 428 (2000).

158 See, eg, *Brown v Mississippi*, 297 U.S. 278,287 (1936); *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

159 *Miranda v Arizona*, 384 U.S. 436 (1966).

160 *Ibrahim v The King* [1914] AC 599 at 609-610.

161 *R v John* [1970] 2 CCC (2d) 157, 168; *Wong Kam-ming v The Queen* [1980] ACT 247; *R v Harz and Power* [1967] AC 760; *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

162 *McDermott v R* [1948] HCA 23.

163 *R v Lee* [1950] HCA 25; *R v Swaffield* [1998] HCA 1.

164 Nowak, Birk and Crittin, above n 93, 33.

165 See David Luban, *Torture, Power and Law* (Cambridge University Press, 2014) 6-7; Jeffery F. Addicott, 'Into the Stater Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in The War and Terror' (2003-2004) 92 *Kentucky Law Journal* 864-883.

as suspected terrorists charge and held the Guantanamo Bay under the court jurisdiction.

Most notably, a leading case *Shafiq Rasul v Bush, President of the United States*,¹⁶⁶ was decided by the Supreme Court that considered *habeas corpus* and maintaining due process of law for the detainees of Guantanamo Bay. In this case, two British citizens including Rasul, two Australians and twelve Kuwaiti citizens were detained in various places by U.S. military force since late 2001 and transferred to Guantanamo Bay in early 2002.¹⁶⁷ The detainees filed *habeas corpus* writs seeking release from custody, access to counsel and families. The main argument of the petition was that the U.S. Government cannot detain indefinite time without due process of law. Federal District Court dismissed the case based on lack of jurisdiction over foreigners and detained them outside the sovereign territory of USA. The Court of Appeal upheld the decision. The petitioners filed *certiorari* writs in Supreme Court seeking review of the lower courts decisions. In 2004, U.S. Supreme Court granted *certiorari* in these cases. Justice Steven delivered the opinion of court, and reversed the lower court decisions, clarifying that the U.S. has exercised control over the Guantanamo Bay by agreement with Cuba, therefore there was no difference between detainees that was sufficient to guarantee to protect *habeas corpus* rights to aliens. The court expressed that:

.....By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. ...Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority.¹⁶⁸

After the decisions, the U.S. Supreme Court specifically confirmed the territorial jurisdiction in the case which had some confusion in past or previous decisions and the decision to protect the right to fair trial and respect due process of law. According to Professor Hathaway, the Supreme Court decision has permitted foreign citizens to sue the U.S. Government for the first time and refused to allow Guantanamo Bay to be treated as a law free zone.¹⁶⁹ Similarly, after the Supreme Court decision, more than three hundred *habeas corpus* petitions were filed in federal court on behalf of detainees in Guantanamo Bay.¹⁷⁰ Hundreds of lawyers signed up to represent the detainees and collected first-hand information from the detention centres.¹⁷¹

In another case, the U.S. Supreme Court held that a citizen detained as an enemy combatant by the Government is entitled under due process of law and to contest the

166 *Rasul v Bush*, 542 U.S. 466 (2004) 124 S. Ct. 2686.

167 *Ibid*.

168 *Ibid* para 22.

169 Oona A Hathaway, 'Hamdan v Rumsfeld: Domestic Enforcement of International Law' (2007) *International Law Stories, Foundations Press* 13.

170 *Ibid* 14.

171 Lisa Hajjar, 'Rights at Risk Why the Right not to be Tortured is Important to You' (2009) 48 *Studies on Law, Politics, and Society* 98.

facts underlying his/her detention before a court.¹⁷² In this case, Yaser Esam Hamdi, a U.S. citizen was detained as enemy combatant in Afghanistan in 2001 and he was transferred to a naval brig in Norfolk and kept in detention without charge. In 2002, his father filed a *habeas corpus* writ against the illegal detention. In response to the petition, the Government argued that ‘the U.S. President has inherent constitutional authority to detain enemy combatant and the *Non-Detention Act* does not apply to military detention’.¹⁷³ The District Court decided that the evidence against him to prove enemy combatant status was insufficient. The Fourth Circuit Court of Appeal reversed the decision and found that the District Court did not have jurisdiction to question executive decisions. The Supreme Court examined whether the executive (President) possessed power to detain indefinitely U.S. citizens from abroad labelled as ‘enemy combatants’ without a hearing. Finally, the Supreme Court issued orders that the Government did not have the authority to hold U.S. citizen indefinitely without following basic due process of law in the case.¹⁷⁴

Furthermore, in *Salim Ahmed Hamdan v Rumsfeld*, the U.S. Supreme Court ruled that the Geneva Convention 1949 ratified by USA applied to those prisoners who were arrested under the ‘war against terrorism’.¹⁷⁵ Hamdan was arrested in Afghanistan in 2001 and after around six months’ detention, he was transferred to Guantanamo Bay where he was kept as an ‘enemy combatant’. His case was handled by military commission in 2003. Hamdan filed *habeas corpus* and *mandamus* petitions, claiming that the military commission lacked the authority to try him. The District Court granted Hamdan’s petition for *habeas corpus*. However, the Court of Appeal reversed the decision, agreeing with the Government’s argument that a civilian court should not interrupt the process of a military court. Hamdan filed a *certiorari* writ in the Supreme Court. The U.S. Supreme Court granted *certiorari*. During the time, U.S. Congress passed *Detainee Treatment Act in 2005* (DTA). The Government argued that the case was under the new Act which repeals the federal court jurisdiction over detainee *habeas* actions.¹⁷⁶ Justice Stevens and majority of justices granted *certiorari* to him and defined that the DTA did not apply in running cases and the Court refused the administrative argument.

After the Supreme Court decisions on *Rasul v Bush*, *Hamdi v Rumsfeld* and *Hamdan v Rumsfeld*, the U.S. Government had defined the *habeas corpus*-related judicial authority as a legal black hole.¹⁷⁷ The U.S. Congress passed new laws - the DTA and the *Military Commission Act 2006* (MCA) that amended the existing federal statute and removed *habeas corpus* jurisdiction for detainees held in custody defined ‘enemy combatants’ at Guantanamo Bay.¹⁷⁸ The DTA established Combatant Status Review Tribunals to determine the status of enemy combatants. To address the statutory

172 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

173 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

174 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

175 *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).

176 *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).

177 Gerald L Neuman, ‘Constitution after Boumediene v Bush’ (2009) 82 *Southern California Law Review* 560.

178 Amanda McRae, ‘Boumediene v Bush: Another Chapter in the Court’s Jurisprudence on Civil Liberties at Guantanamo Bay’ (2009) 4 *Duke Journal of Constitutional Law & Public Policy Sidebar* 248.

drawback toward *habeas corpus* right and due process of law, the U.S. Supreme Court made another historic decision to recognise the rights of the detainees of the Guantanamo Bay. The Court defined that the right to due process must be followed by government in cases of *Boumediene v Bush*¹⁷⁹ and *Al- Odah v United States*.¹⁸⁰ In the case, Boumediene and six other Algerian citizens were detained from 2001 in Sarajevo and transferred to Guantanamo Bay in 2002. Boumediene and others filed *habeas corpus* in 2004. Al-Odah including three Kuwaiti and twelve Yemeni nationals were detained in Guantanamo Bay commenced cases in 2002. The Court of Appeal of the D.C. Circuit court dismissed the petition defining as lack of jurisdiction in February 20, 2007; and then the Supreme Court also declined to hear the cases on April 20, 2007. In June, the Supreme Court reversed the decision and announced that it would hear the petitions. The Supreme Court granted *certiorari* to challenge by one of the detainees to his trial by military tribunal, and Congress passed the DTA which was amended and provide that “no court, justice, or judge shall have jurisdiction to...consider ...an application for.....*habeas corpus* filed by or on behalf of an alien detained at Guantanamo.”¹⁸¹ Justice Kennedy wrote the opinion of the court for the majority of the justices reversed the previous decision to protect the *habeas corpus* right. The Court ruled that the President could not deal with the detainees at Guantanamo Bay beyond the law. The Detainees of the Guantanamo Bay could challenge under *habeas corpus* rights against their illegal detention under the U.S. Constitution.¹⁸²

The decision has set a norm that the Congress or the President can perform their roles as per due process of law but the right to *habeas corpus* cannot be curtailed in any circumstances. Similarly, the decision reviewed the doctrine of separation of power between Congress, President and Judiciary. These judgements have strengthened judicial oversight to the detention centre where detainees from foreign countries were kept. This was a key aspect for prevention of torture and other forms of ill-treatment in detention centres.

In the Australian context, the most noteworthy case raised in relation to the issue of fighting against terrorism, was when the Federal Court of Australia made a landmark decision affirmed, the right to freedom from torture through the right defined as a peremptory norm of international law, finding that the victims of torture who had torture inflicted by other countries could be entitled to redress in Australia and that the evidence obtained as a result of torture is excluded.¹⁸³ In the case, *Mamdouh Habib* (an Australian citizen) was arrested in October 2001 in Pakistan. He was transferred to Egypt, Afghanistan and Guantanamo Bay in May 2002. After two and half years, he was repatriated to Australia without any charge on January 28, 2005.¹⁸⁴ The applicant charged that ‘the Commonwealth officers committed the torts of misfeasance in public office and international but indirect infliction of harm by aiding, abetting and

179 *Boumediene v. Bush*, 553 U.S. 723 (2008) 128 S.Ct.

180 *Al- Odah v United States*, 553 U.S. 723 (2008) 128 S.Ct.

181 *Boumediene v. Bush*, 553 U.S. 723 (2008) 128 S.Ct.

182 *Boumediene v. Bush*, 553 U.S. 723 (2008) 128 S.Ct.

183 *Habib v Commonwealth of Australia* (2010) FCAFC 12.

184 *Habib v Commonwealth of Australia* (2010) FCAFC 12, 15-16 (Perram J).

counselling his torture and other inhumane treatment by foreign officials'.¹⁸⁵ The Commonwealth argued that the act of state doctrine of the common law compels this result. The Federal Court of Australia ruled several important issues for the protection of the right to freedom from torture. For example, Jagot J concluded that;

The claim is founded on allegations of torture. The prohibition on torture is an absolute requirement of customary international law. The prohibition is codified in the Torture Convention to which each of the states in question is party (other than Pakistan which is a signatory). It is conduct which the Commonwealth Parliament has proscribed by legislation expressed to apply throughout the world and to all persons, consistent with the international consensus that the torturer must have no safe haven. In terms of the "degree of codification or consensus concerning a particular area of international law" (the first Sabbatino factor) the prohibition on torture is an agreed absolute value from which no derogation is permitted for any reason. The prohibition is a clearly established principle of international law in the sense described in *Kuwait Airways No 5* at [139]. The international community has spoken with one voice against torture.¹⁸⁶

Furthermore in the case, the Court defined the Australian statutory provisions and explained the jurisdiction in which the Court can handle such types of cases that happened outside Australia.

Part of the significance of the provisions of the Crimes (Torture) Act, the Geneva Conventions Act and The Criminal Code called up in the impugned paragraphs of the statement of claim is that they provide standards by which Parliament considered that conduct (including conduct of foreign officials outside Australia) may be subject to judicial determination by Australian courts. In so doing the provisions also disclose Parliament's intention that the issues in this area of discourse are capable of judicial determination.¹⁸⁷

The decision examined the Australian *Constitution*, legislation, customary international law, the CAT and Geneva Conventions on prohibition of torture and analysed State doctrine on the issue of prohibition of torture. Some scholars have stated that the decision provides some weight in the issue of torture which might be applied the international law in Australia.¹⁸⁸

Before the decision, the Supreme Court of Victoria made a decision to maintain fair trial, rule of law and non-admissibility of the evidence obtained by torture. The Court refused to accept the confession obtained by torture or forceful means, threat and that lacked legal advice in the case of *R v Thomas*.¹⁸⁹ The case was investigated by Australian Federal Police accompanied by Pakistani officials. The Court ordered a further hearing and the applicant (an Australian citizen) was detained by Pakistani immigration officers at Karachi, Pakistan on January 4, 2003 and remained in custody

185 *Habib v Commonwealth of Australia* (2010) FCAFC 12, 2 (Black CJ).

186 *Habib v Commonwealth of Australia*, (2010) FCAFC 12, 117 (Jagot J).

187 *Habib v Commonwealth of Australia*, (2010) FCAFC 12, 123 (Jagot J).

188 Ben Batros and Philippa Webb, 'National Prosecution of International Crimes: Case and Legislation Accountability and the Limits of the Act of State Doctrine Comments on *Hobib v Commonwealth of Australia*' (2010) 8 *Journal of International Criminal Justice* 1153-1174; Tully, above n 87, 711-721.

189 *R v Thomas* (2006) VSCA 165.

in Pakistan until he was released and returned on June 6, 2003 and he was re-arrested in Melbourne in the charge of receiving funds from terrorist organisations and having a falsified Australian passport on November 18, 2004 mainly based on the evidence of his statements which were taken in the course of an interview by Australian Federal Police in Pakistan.¹⁹⁰ At the beginning of his detention, he was asked questions by U.S and Pakistani investigators but he shared a fabricated story about him. And later, the investigators believed that he was lying and he was blindfolded and kept in a small place like a dog kennel without food and water for three days and asked questions about his involvement by U.S. and Pakistani investigators and after the questions, Australian Federal Police took interviews.¹⁹¹ The court excluded the evidence of particular in the record of the interviews which were obtained through torture or coercion.¹⁹² The Court granted leave for appeal against conviction.

In the United Kingdom (UK), the House of Lords made a decision to exclude the use of evidence obtained by torture.¹⁹³ In the case, following the attacks of September 11, 2001, the Government of UK enacted the *Anti-Terrorism, Crime and Security Act 2001*, under the Act, UK Secretary of State could be allowed to certify as terrorists who were not British citizen and believed to be a risk to national security. Ten appellants who were alleged as suspected terrorists denied their allegations. The House of Lords examined the CAT, European Convention of Human Rights and customary international law and re-stated its absolute prohibition and gave clear indication that the evidence obtained through torture by any persons or authority or anywhere, the House of Lords would reject the evidence.¹⁹⁴ The judgement has given clear indication that any confession extracted by third party or any other party would not be admissible in judicial proceedings.

The court decisions play pivotal roles for the protection of the rights to fair trial, the right to freedom from torture and due process of law. These decisions protect detainees' rights against indefinite detention without charge, the right to freedom from torture and protect the rights related to consult a lawyer and meet family members, seek *habeas corpus* rights and non-admissibility of the evidence obtained through torture.

However, Jenny S. Martinez has analysed the decisions critically and found that the court decisions have dealt with the issue of procedure such as a court's jurisdiction to hear any particular case. The process focused decisions that have significant implications for substantive rights.¹⁹⁵

190 *R v Thomas* (2006) VSCA 165, 1 – 4.

191 *R v Thomas* (2006) VSCA 165, paras 11-14.

192 *R v Thomas* (2006) VSCA 165, para 117.

193 *A (FC) and Other (FC) Applicants v Secretary of State for Home Department* [2005] UKHL 71.

194 *A (FC) and Other (FC) Applicants v Secretary of State for Home Department* [2005] UKHL 71, [16]-[18] (Lord Bingham).

195 Jenny S. Martinez, 'Process and Substance in the 'War on Terror' (2008) 108 (5) *Columbia Law Review* 1013.

2.4 Current context and the Convention Against Torture

2.4.1 Definition of torture

As noted above, the prohibition of torture has been realised for several years, UNDR and ICCPR prohibit torture and other forms of ill-treatment. However, specific definition or scope of the right to freedom from torture was not well formulated. The European Commission on Human Rights stated major elements to the definition of torture included involvement of public officials, the infliction of severe pain or suffering, intention and specific purpose in a Greek Case in 1969.¹⁹⁶ The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 defined the term 'torture' for the first time in any international human rights documents.¹⁹⁷ After that, the CAT defines the term 'torture' most comprehensively in 1984 after long discussion in the Working Group while preparing the Convention from 1979 to 1984. The definition of 'torture' is

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁹⁸

The definition of torture in the CAT is an important component to set an international standard and to make it uniform among international organisations and member countries. The definition of torture covers mainly six elements - the act of torture, severity of pain and suffering, involvement of public officials, intention of torture, purpose of torture, and excluding pain or suffering from lawful sanction. Scholars noted that the definition of torture is a political compromise of various types of interest groups.¹⁹⁹

Despite the widely accepted definition used in the CAT, many questions have been raised regarding the interpretation of the provisions and narrowness of the definition. Many scholars have pointed out that the definition of torture in the CAT narrowly

196 *Greek Case*, (European Court of Human Rights, Application Nos.3321/67,3322/67 and 3344/67, 1969). The case was filed by Denmark, Sweden, Norway and The Netherlands against Military ruler of Greece complaining government used wide range of human rights violation including torture.

197 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) art 1.

198 CAT art 1.

199 Joachim Herrmann, 'Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany' (2008) 31 *Hastings International Law and Comparative Law Review* 441; Nowak and MacArthur, above n 1, 80.

defines many issues with vague terminology.²⁰⁰ The definition of torture is criticised for not covering many issues like nature of the acts of torture, gravity of severe pain or suffering, purpose of torture, intention of torture, involvement of private parties in torture and for not covering the issue of lawful sanction. The terms are elaborated in the following section.

2.4.1.1 Nature of acts of torture and involvement of public officials

The definition of torture requires an act that creates severe pain or suffering whether physical and/or mental to a person is an element of torture. The definition covers the direct act or commission and not mention clearly about ‘omission’ that causes of severe pain or suffering. Some scholars including, Gail H Miller and Maxime E. Tardu stated that the definition excludes ‘omissions’ that cause severe pain or suffering, which makes the definition substantially narrow - for example leaving a prisoner for a long time without food or neglecting food or water would certainly cause severe pain or suffering but it may be considered an omission rather than an act of torture.²⁰¹ However, the Special Rapporteur on Torture has defined the term ‘act’ of the CAT in its definition is not to be understood any way to exclude omissions.²⁰²

The definition further explains that the severe pain or suffering counts as torture, if it is inflicted by ‘government officials or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. So that it is also defined as government sponsored torture which is committed by police, army, prison guards, other government officials and from other parties which with the consent or acquiescence of the government officials. It has accepted that principally human rights are violated by state or government. The definition covers the direct act or commission from government officials such as beating, or the application of electric shocks. Meanwhile, the government sponsor torture and in the impunity of the act exists a serious challenge in the world, especially during the period of drafting. If any torture is inflicted by a private party, the government could interrogate concerned people under domestic criminal law but if State agents committed torture the CAT might apply. Therefore, the CAT stated the involvement of public officials in torture.

200 See, eg, Gail H Miller, *Defining Torture* (Benjamin N. Cardozo School of Law, 2005) 4; Julianne Harper, 'Defining Torture: Bridging the Gap Between Rhetoric and Reality' (2009) 49 *Santa Clara Law Review* 896; David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality: A Journal of Theory and Practice Law and Inequality* 373; Maxime E Tardu, 'The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 *Nordic Journal of International Law* 304; Celso Eduardo Faria Coracini, 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee Against Torture' (2006) 24(2) *Netherlands Quarterly of Human Rights* 305; Elizabeth A. Wilson, 'Essays on In Our Name: A Play of the Torture Years Beyond the Rack: Post-Enlightenment Torture' (2013) 39 *Criminal and Civil Confinement* 41; Rodley with Pollard, above n 1, 86; Nowak and MacArthur, above n 1, 66; Association of the Prevention of Torture and Centre for Justice and International Law *Torture in International Law a Guide of Jurisprudence* (APT and CJIL, 2008) 11; REDRESS 2006, above n 81, 39.

201 Gail H Miller, above n 200, 7; Maxime E Tardu, above n 200,

202 Manfred Nowak, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, UN Doc A/HRC/13/39/Add.5 (5 February 2010) para 31.

2.4.1.2 Gravity of pain or suffering

The CAT states the terms ‘*severe pain or suffering, whether physical or mental*’ as an element of torture. Defining torture this way implies that a severity of pain assessment is made when deciding whether an act is or is not torture.²⁰³ The terms are really vague or difficult to quantify the severity of the harm because the severity should be analysed in the context that directly affects the victims of torture. The CAT does not have any elaboration about the terms. On the other hand, the infliction of severe pain or suffering could be relative or could have different effects on different people. Obviously, the effect of torture would result in the victim to be more vulnerable compared to other people. For example, the Special Rapporteur on Torture has defined that children are particularly vulnerable person to torture and other forms of ill-treatment, requiring higher standard and broader safeguards to protect juveniles deprived of their liberty.²⁰⁴

The European Court of Human Rights defined in a hierarchy of pain or suffering in the *case of Greek* which interpreted torture as being a more serious form of inhuman treatment.²⁰⁵ Likewise, the European Commission and European Court of Human Rights both organisations interpreted the term ‘torture’ in the case of the *Republic of Ireland v. The United Kingdom*, the decision set as torture for the five combined deep interrogation techniques which were used by British security forces against Northern Ireland such as the use of stress positions, hooding, subjected to noise, deprivation of sleep, deprivation of food and water.²⁰⁶

Nigel S Rodley pointed out a question ‘whether the threshold of ‘pain or suffering’ that is necessary for a finding of torture under international law is more than severe or simply severe.’²⁰⁷ Therefore, the given terms ‘severe pain’ and ‘suffering’ in the definition of torture do not provide a clear definition which allows the member states to define these terms differently, especially regarding mental torture.

2.4.1.3 Consent or acquiescence of the government officials and involvement of private party

As discussed, the CAT definition covers government sponsored torture either by police, army, prison guards, or with the consent or acquiescence of the government officials. The definition makes it clear somehow that the other party can commit torture with the consent or acquiescence of the government officials.²⁰⁸ However, the definition does not clearly explain torture being performed by private parties or private entities. During the drafting period of the CAT, there was debate between the states in

203 Elizabeth A Wilson, 'Essays on In Our Name: A Play of the Torture Years Beyond the Rack: Post-Enlightenment Torture ' (2013) 39 *Criminal and Civil Confinement* 50.

204 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015).

205 Rodley with Pollard, above n 1, 91.

206 As cited in Nowak and MacArthur, above n 1, 10, 67; Rodley with Pollard, above n 1, 101.

207 Rodley with Pollard, above n 1, 88.

208 Efrain Staino, ‘Comment: Suing Private Military Contractors for Torture: How to Use the Alien Tort Statute Without Granting Sovereign Immunity-Related Defence’(2010) 50 *Santa Clara Law Review* 1289.

the working group regarding the definition of torture. Finally, the committee accepted as a compromise proposal which extended State responsibilities to include the consent or acquiescence of the public officials.²⁰⁹ The exact meaning of the words ‘consent’ or ‘acquiescence’ may need further interpretation, but the terms ventilate involvement of any other third parties.

While the CAT opened for signature in 1984, the political situation in the world was different compared to current world. Many countries had centralised government regimes. States held most of the power, especially to provide education, health, justice, security. Torture was systematically used against political opposition groups or people and in criminal investigations in Chile, Argentina and the Soviet Union.²¹⁰

Gradually, private schools, hospitals, banks, private security guards are legally recognised as service providers though government has the monitoring authority to those parties. The private parties got involved in the violation of rights for example corporal punishment are practised in the name of maintaining discipline in schools, private security guards using force in the name of security. As a legal entity, they used torture against concerned persons. Though the government has the authority to regulate and monitor it failed to stop the acts of torture from private parties. With regard the issue, UN human rights mechanisms has accepted torture from private party in many instances. For example, in the case of *Elmi v Australia*,²¹¹ the CAT/C decided violation of Article 3 of the CAT and accepted torture from rebel group as under special circumstances. Furthermore, the Human Rights Committee accepted the involvement of private party in torture.²¹² Likewise, the Rome Statute of International Criminal Court (ICC) does not necessarily require governmental official to be involved to qualify as torture.²¹³ It is therefore, to this violations of rights to freedom from torture from private parties have been started to accept as human rights violation.

2.4.1.4 Purpose of torture

The purpose of inflicting torture is the most important aspect in the definition of torture of the CAT. The most common purpose of infliction of torture is to obtain information or a confession from suspect or a third person, punish or intimidate or coerce him/her for an act the person has committed or for any reason based on discrimination of any kind.²¹⁴ It means that the torturer must have some purpose such as extracting information or a confession or punishing the victims through severe pain or suffering, otherwise the acts will not be considered as torture. The provision of the CAT focuses on intentional infliction to create pain or suffering to victim. The definition of torture

209 As cited in the Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention Against Torture A Commentary* (Oxford University Press 2008) 10, 77.

210 Amnesty International Annual Report 1973-74, above n 62.

211 Committee against Torture, *Views: Communication No 120/1998*, 21st sess, UN Doc CAT/C/22/D/120/1998, 22 (*Sadiq Shek Elmi v. Australia*).

212 Human Rights Committee, *General Comment No 20, Article 7 (Prohibition of Torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, 1992, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.1) (10 March 1992) para 2.

213 *Rome Statute of International Criminal Court*, open for signature 17 July 1998, 2187 UNTS 3 (entered into force 01 July 2002) arts 7, 8.

214 CAT art 1.

under the CAT may not include the pain or suffering as a result of negligence. However, the ICC does not include the element of purpose to be defined in torture.²¹⁵ The exclusion of the element of ‘purpose’ from the ICC definition could reflect whether torture might be inflicted by negligence or recklessness or any other types of miss-use of power.

2.4.1.5 Intention of the infliction of torture

Acts must be intentional to fall within the definition of torture. It means if the State official does not intend to inflict severe pain or suffering that it is not defined as an act of torture. Any negligible conduct may not define torture, such as any serious negligence in prisons which might be cause of death or serious illness without any intention.²¹⁶ On the other, evidence is crucial to justify whether the acts were inflicted with intention or without intention. Obviously, the victim cannot justify easily whether the official did the act intentionally or not. The CAT/C has emphasised that the establishing purpose and intent do not involve a ‘subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances’. It is essential to investigate and establish a chain of command and direct perpetrator.²¹⁷ A question has been raised, who will have burden of proof whether the perpetrator intended torture or not. The European Court of Human Rights (ECtHR) clarified that the burden of proof will go to the government in the case of torture. Furthermore, the ECtHR stated that ‘where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused’.²¹⁸

2.4.1.6 Exclude pain or suffering from lawful sanctions

The definition of the CAT provides an exception that the pain or suffering arising only from, inherent or incidental to lawful sanctions is not considered as element of torture.²¹⁹ While the CAT prohibits any acts that arise from pain or suffering, the provision relating to lawful action is an exception which allows the use of harm or suffering as a form of lawful action. This has been a controversial provision from the discussion period of the convention to date.²²⁰ The provision encompasses corporal violence and other violence in accordance with domestic law. Scholars stated that the clause is a product of political compromise between countries. Many countries tried to delete the provisions in the convention, however some countries insisted on the term.²²¹ The definition in 1975 UN Declaration against Torture, allows the term in exception which stated that ‘pain or suffering arising only from, inherent in or

215 Rodley with Pollard, above n 1, 121.

216 Nowak and MacArthur, above n 1, 73; Gail H Miller, above n 202, 13.

217 Committee against Torture, *General Comment No 2, Implementation of article 2 by State parties*, UN Doc CAT/C/GC/2 (24 January 2008).

218 *Selmouni v France* (European Court of Human Rights, Application No 25803/94, 28 July 1999) [87].

219 CAT art 1.

220 Nowak and MacArthur, above n 1, 79.

221 See Joachim Herrmann, 'Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany' (2008) 31 *Hastings International Law and Comparative Law Review* 441; Nowak and MacArthur, above n 1, 80; Coracini, Celso Eduardo Faria 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee Against Torture' (2006) 24(2) *Netherlands Quarterly of Human Rights* 309.

incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.²²² With regard to the provision, Burgers and Danelius stated that the 'exception' relating to lawful sanctions the definition of torture becomes rather vague and open.²²³ It is a challenging task to apply the provisions especially in countries where domestic law imposed violence.²²⁴ In such situations, the provision could be at risk and an excuse against the protection of the right to freedom from torture and implementation of the CAT.

The definition gives a basis for the introduction of torture which obviously is a crucial provision for the prevention of torture. However, as stated above, the definition does not cover all aspects of the right to freedom from torture such as torture from private party and some terms that contradict with other international law. The term 'lawful sanction' is still problematic for the prevention of socio cultural aspect of torture.

2.4.1.7 Other forms of Ill-treatment

The CAT has two provisions; 'torture' and 'other cruel, inhuman or degrading treatment or punishment'. The CAT defines the term 'torture' only and it does not explicitly provide the definition of 'other cruel inhuman or degrading treatment or punishment'. The reason could be, the Convention is more concerned with torture. It is left to the signatory States to prevent in their territories the acts of other cruel, inhuman or degrading treatment or punishment. The Article 16 of the CAT prevents other cruel, inhuman or degrading treatment or punishment. The member States are required to take steps necessary to prohibit torture and other cruel, inhuman or degrading treatment or punishment.²²⁵ The provision further provides that the terms of other forms of ill treatment, do not amount to torture as define in Article 1 and the provision indicates in particular Articles 10,11,12 and 13 as reference where applies the provisions.²²⁶ It indicates the other ill-treatment are less severe than the torture. The provision creates confusion regarding absolute prohibition of other forms of ill-treatment. A question has been raised, whether the provision may not apply for redress and other provisions of the CAT? With regards to distinction between the term 'torture' and 'other cruel, inhuman or degrading treatment', professor Nowak states the both terms are related to personal liberty. He further clarify that if the incident is inflicted outside a situation of detention or similar direct power and control over victim that will be an incident of other cruel, inhuman or degrading treatment.²²⁷

222 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) art 1.

223 As cited, Chris Ingelse, 'Committee against Torture: One step Forward and One step back' (2000) 18 (3) *Netherlands Quarterly of Human Rights* 311.

224 Nowak and MacArthur, above n 1, 81-81; Coracini, Celso Eduardo Faria 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee Against Torture' (2006) 24(2) *Netherlands Quarterly of Human Rights* 317.

225 Joachim Herrmann, 'Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany' (2008) 31 *Hastings International Law and Comparative Law Review* 441.

226 CAT Art 16.

227 Manfred Nowak, 'What Practices Constitute Torture?' US and UN Standard' (2006) 28 *Human Rights Quarterly* 834-835.

In order to clarify the provision, the CAT/C defined that the prohibition and non-derogable rights also applies to confession obtained by other forms of ill-treatment.²²⁸ The ECtHR equally prohibits both torture and other forms of ill-treatment.²²⁹ Professor Nowak also stated that the act of torture and other cruel, inhuman and degrading treatment or punishment, equally applies in terms of absolute prohibition in any situation in accordance to the CAT.²³⁰ However, the terms are still needed more clear interpretation.

2.4.2 Legislative measures, condemnation and criminalisation of torture

The CAT obliges member states to take legislative, administrative and other measures to prevent acts of torture.²³¹ In the process, the State has the responsibility to criminalise the act of torture under its jurisdiction.²³² This is a core provision which links to most other provisions of the CAT and enjoyment of the right to freedom from torture at practical level and its implementation. Ratification or accession of the CAT is a starting point of implementing international human rights instruments including the CAT. Member states require to adopt the provision in domestic level, as stated above either the country follows Monism or Dualism. Furthermore, the CAT/C has consistently recommended many states to criminalise torture in their national law.²³³ As jurisprudence, the CAT/C pointed out the Government of Spain's plan to pardon the perpetrator in a torture case and the Committee concluded that the State Party failed to fulfill its obligations to prevent torture and had violated Articles 2 and 4 of the CAT. Thus, the CAT/C urges the State party to ensure punishment as per its responsibilities.²³⁴ In regard to the criminalisation process, the provisions of the CAT, the conclusion and recommendations of CAT/C, many countries and the jurisprudence have a focus on state's obligation, however, confusion exists; how can member States criminalise torture? For how long the minimum penalty can be applied against the perpetrator?

In practice, member States can either make specific anti-torture legislation or amend existing laws and incorporate the provisions in other laws. At the international level, there is lack of standards on legislative and administrative measures, so how can these provisions be incorporated in domestic law? What are the standard provisions? There are generally two types of trends followed by the member countries while adopting provisions of the CAT. First, provisions are adopted through specific anti-torture law

228 See Committee Against Torture, *General Comment No 2, Implementation of article 2 by States Parties*, UN Doc CAT/C/GC/2 (12 January 2008) paras 3, 6; Committee Against Torture, *Views: Communication No 368/2008*, 47th sess, UN Doc CAT/C/47/D/368/2008, (25 November 2011) para 10.4 ('*Fatou Sonko v Spain*').

229 *Saadi v Italy* (European Court of Human Rights, Application No 37201/06, 28 February 2008) [127].

230 Manfred Nowak, 'What Practices Constitute Torture?' US and UN Standard' (2006) 28 *Human Rights Quarterly* 809.

231 CAT art 2(1).

232 CAT art 4.

233 Nowak and MacArthur, above n 1, 239.

234 Committee against Torture, *Views: Communication No 212/2002*, 35th sess, UN Doc CAT/C/34/D/212/2002, paras 6.2, 6.4 ('*Kepa Urra Guridi v Spain*').

particularly aimed to incorporate the provisions of the CAT. For Example, Sri Lanka *Convention Against Torture Act 1994*, Philippines *Anti-Torture Act 2009*, New Zealand *Crimes of Torture Act 1989*, Australia *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*, Nepal *Compensation Relating to Torture Act 1996*, USA *Torture Victims Protection Act 1991*. These laws focus on the implementation of the provisions of the CAT. However, many laws cannot meet the requirement of the CAT, for example the Nepalese law *Compensation Relating to Torture Act* does not define torture as punishable crime but provisions compensating the victims of torture and departmental action to perpetrator.

Second is incorporating provisions of the CAT in various laws through amendment or repeal of existing laws. Some countries do not have separate legislation to implement the CAT; for example in Canada does not have a separate law, but the *Criminal Code* has some provisions which criminalise the act of torture. It provides that no defense on the charge under the section (torture).²³⁵ The United Kingdom also does not have separate legislation; the *Criminal Justice Act 1988* part 134 deals with the issue of the right to freedom from torture. The law of the UK defines torture as a punishable crime, convicted shall be liable up to life imprisonment.²³⁶ However, the law stipulates the requirement of the attorney general's consent for prosecution.²³⁷ REDRESS found that the provision hinders for prosecution.²³⁸ The provision obviously creates a challenge to get easy access to get justice in case of torture. It is therefore, a clear standard that outlines process and minimum punishment is needed to criminalise acts of torture at the domestic level.

2.4.3 Prohibition of extradition

Extradition of any person where he/she would be in danger of being subjected to torture is prohibited in the CAT and State must ensure this provision in the domestic law.²³⁹ State authorities that extradite any person to any States where there are substantial fears of being subjected to torture is also a violation of absolute prohibition of torture.²⁴⁰ This is another crucial provision to deal with regarding torture at the international level mainly related to asylum seekers and refugees. The CAT/C received the highest number, 80 per cent of total individual complaints relating to extradition.²⁴¹ The CAT/C further defined that the provision and stated that 'the risk of torture must be assessed on grounds of mere theory or suspicious. However, the risk does not have to meet the test of being highly probable'.²⁴² The fact shows that the issue of extradition of persons is a serious challenge across the world. Professor Nowak and MacArthur

235 *Criminal Code* 1985 s 269.1 (Canada).

236 *Criminal Justice Act 1988* s 134 (UK).

237 *Criminal Justice Act 1988* s 135 (UK).

238 REDRESS, *Comments to the United Kingdom's 4th Periodic Report of the Committee Against Torture* (REDRESS Trust, 2004) 9.

239 CAT art 3 (1).

240 Nowak and MacArthur, above n 1, 127.

241 Ibid 159.

242 Committee against Torture (CAT/C), *General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture* (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003) para 6.

pointed out that home countries, host countries and CAT/C must apply subjective and objective tests to assess situations whether or not persons would be at risk of being subjected to torture upon their return. If there does exist a continuing pattern of gross violation and systematic practise of torture in the home country, the government of host country is to provide evidence as to why the person would not be at risk of torture.²⁴³ Further CAT/C has interpreted the provision in many cases and pointed out inconsistently in its jurisprudence that the requirement that the risk of torture must be “foreseeable, real and personal”.²⁴⁴ Moreover, the CAT/C explained these jurisprudence that:

the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.²⁴⁵

The CCPR/C also interpreted the provision under the Article 7 of the ICCPR that ‘State parties must not expose individuals to the danger of torture or other forms of ill-treatment upon the return to another country by the way of their extradition’.²⁴⁶ All these provisions prohibit extradition to any person where he/she would be in danger of subjected to torture and other forms of ill-treatment.

As stated above, more than 80 per cent of individual communications by the CAT/C relate to the extradition and the issue of diplomatic assurances. Likewise, the CCPR/C also made recommendations to many member States on the same issue through communications. For example, two communications (Ahmed Agiza and Mohammed Alzery), claimed that they had been tortured by the Egyptian Government.²⁴⁷ They

243 Ibid 129.

244 See Committee Against Torture, *Views: Communication No 203/2002*, 42nd sess, UN Doc CAT/C/31/D/203/2002 (14 November 2003) para. 7.3 (‘*A.R v the Netherlands*’); Committee Against Torture, *Views: Communication No 285/2006*, 41st sess, UN Doc CAT/C/41/D/285/2006 (21 November 2008) para 7.6, (‘*A.A. et al. v. Switzerland*’) para. 7.6; Committee Against Torture, *Views: Communication No 322/2007*, 44th sess, UN Doc CAT/C/44/D/322/2007 (3 June 2010), para. 9.4 (‘*Njamba v. Sweden*’); Committee Against Torture, *Views: Communication No 374/2009*, 47th sess, UN Doc CAT/C/47/374/2009 (21 November 2011) para 9.5 (‘*S.M., H.M. and A.M. v Sweden*’); Committee Against Torture, *Views: Communication No 381/2009*, 47th sess, UN Doc CAT/C/47/D/381/2009 (21 November 2011) para 9.3, (‘*Abolghasem Farajollah v Switzerland*’).

245 See *S.M., H.M. and A.M. v Sweden*, UN Doc CAT/C/47/D/374/2009, para 9.4; Committee Against Torture, *Views: Communication No 428/2010*, 47th sess, UN Doc CAT/C/47/D/428/2010 para 15.3 (‘*Alexey Kalinichenko v Morocco*’); Committee Against Torture, *Views: Communication No 245/2004*, 35th sess, UN Doc CAT/C/35/D/245/2004 (15 November 2005) para 6.3 (‘*S.S.H. v Switzerland*’); Committee Against Torture, *Views: Communication No 280/2005*, 37th sess, UN Doc CAT/C/37/D/280/2005 (15 November 2006) para 7.3 (‘*Gamal El Rgeig v Switzerland*’); Committee Against Torture, *Views: Communication No. 15/1994*, 13th sess, UN Doc CAT/C/13/D/15/1994, para 12.2 (‘*Khan v Canada*’).

246 Human Rights Committee, *General Comment No 20, Article 7 (Prohibition of Torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, 1992, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.1) (10 March 1992) para 9 (‘*Human Rights Committee, General Comment No 20*’).

247 See Committee against Torture, *Views: Communication No. 233/2003*, 34th sess, UN Doc CAT/C/34/D/233/2003 (20 May 2005) para 2.1–2.4 (‘*Agiza v. Sweden*’); Human Rights

applied for asylum in Sweden but the application were rejected by Swedish government on security grounds in December 2001 and they were transferred to Egypt, where they were tortured.²⁴⁸ Agiza and Alzery each brought a complaint against Sweden before the CAT/C and CCPR/C respectively. In *Agiza v Sweden*, the CAT/C found that, due to Egypt's reputation for using consistent and widespread torture against detainees held for political and security reasons, State party knew or should have known at the time of the applicant's removal that he would be at a real risk of torture in Egypt; thus, Sweden was found to be in breach of Article 3 of the CAT.²⁴⁹ Similarly in *Alzery v Sweden*, the CCPR/C stated that Sweden violated Article 7 of the ICCPR by expelling Alzery to Egypt, as his extradition exposed him to a risk of torture or other forms of ill-treatment. The CCPR/C determined that the diplomatic assurances were not sufficient to eliminate the risk of torture and other forms of ill-treatment.²⁵⁰

At the domestic level, the Canadian Supreme Court and the ECtHR have given many important decisions to refuse extradition. Most notably, the Supreme Court of Canada decided milestone judgement on the case of *Suresh v Canada* relating to non-extradition of a person where there is risk of torture.²⁵¹ In the case, Suresh (a Sri Lankan citizen) stayed in Canada as refugee and applied for immigration status in 1995 and Federal Government arrested and alleged him that he was affiliated to a terrorist organisation as fundraiser and decided to deport him Sri Lanka. The Federal Court, Trial Division upheld the decision for the deportation certificate under s.40.1 of *Immigration Act F.S.C. 1985*. He (the appellant) applied for judicial review. The judicial review was dismissed and upheld the decision in the Federal Appeal Court and the case came in the Supreme Court. The Canadian Supreme Court defined the legal provisions and decided that deportation to torture may deprive a person of the right to liberty, security with protected by s 7 of *Canadian Charter of Rights and Freedom 1982*.²⁵² The Court explained that 'Canadian law and international norms reject deportation to torture, the law views torture as inconsistent with fundamental justice'.²⁵³ In this case the Canadian Supreme Court offered analysis of the CAT and other human rights instruments. The decision further described that

Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the *International Covenant on Civil and Political Rights* and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 33 of the *Convention Relating to the Status of Refugees*, which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to

Committee, views: *Communication No. 1416/2005*, UN Doc. CCPR/C/88/D/1416/2005 (10/11/2006) para 3.2 ('*Alzery v. Sweden*').

248 *Alzery v. Sweden*, para 3.10-3.15; *Agiza v. Sweden*, para 2.5-2.8.

249 *Agiza v. Sweden*, para 13.4.

250 *Alzery v. Sweden*, para 11.5.

251 *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR 3.

252 *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR, 3.

253 *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR, 3 (44).

everyone. International law generally rejects deportation to torture, even where national security interests are at stake.²⁵⁴

The judgement held that torture is prohibited by Canadian Law, the CAT and other international law. The Supreme Court decision found that the provision of the *Immigration Act* can not breach the appellant's constitutional rights and international norms.²⁵⁵

Simialrly, the ECtHR decided many cases relating to non-extradition of person where there may be a risk of torture and other severe human rights violation. In the case *Chahal* was an Indian Citizen, who stayed in England where he was granted indefinite leave to stay in the country. He was involved in separatist activities (political activities) in favour of Sikh rebels against the Indian Government in the UK. The Home Secretary decided to deport him from the UK. He applied for judicial review; leave was granted by High Court and they decided in favour of him on the basis of the analysis of the situation of India where Mr Chahal would be at risk. Again, the Home Secretary decided to deport him. He applied for judicial review; the High Court granted leave for him but affirmed the decision of Home Secretary. The Court of Appeal upheld the decision and refused leave to Appeal to House of Lords and was upheld by House of Lords. Then, Mr Chahal applied to the ECtHR. The judgement explained that if he was deported to India, he might face a real risk of death, or of torture which is contrary to the Article 3 of the European Convention.²⁵⁶ The decision explained that

Article 3 enshrines on of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.²⁵⁷

The ECtHR confirmed judicial competence to review diplomatic assurance against torture and other forms of ill-treatment in the case of *Saadi v Italy*²⁵⁸ in 2008. In this case, the court suggested that the diplomatic assurance has to be done on the basis of case-by-case as to the possible threat of torture and other forms of ill-treatment to the person. Italy wanted to extradite Nassim Saadi to Tunisia. He was sentenced to twenty years imprisonment by the Military Court in Tunisia on allegations of terrorist activities. In terms of his judicial assurance, Tunisia stated that Tunisia ratified the human rights convention and it has a strict commitment to implement national legislation that guarantees the right to a fair trial and that protect prisoners' rights.²⁵⁹ The Court defined that the assurance may be considered as being formally given by foreign ministry, but it appeared to be lacking some substantive information.²⁶⁰

254 *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR, 3.

255 *Suresh v Canada* (Ministry of Citizenship and Immigration) [2002] 1 SCR, 3.

256 *Chahal v United Kingdom* (European Court of Human Rights, Application No 22414/93, 15 November 1996).

257 *Chahal v United Kingdom* (European Court of Human Rights, Application No 22414/93, 15 November 1996) [79].

258 *Saadi v Italy* (European Court of Human Rights, Application No 37201/06, 28 February 2008).

259 *Ibid* paras 54 and 55.

260 *Ibid*.

Furthermore, the Court took Amnesty International and Human Rights Watch's reports of torture and other forms of ill-treatment of terrorist suspects which stated that the situation was a real risk and that Saadi would suffer from torture and other forms of ill-treatment.²⁶¹ Therefore, the Court concluded that despite the assurance, Saadi showed substantial grounds for believing that he was in real risk of torture and other forms of ill-treatment.

In a recent case, the ECtHR decided the deportation of Adu Qatada would be a violation of Article 6 of Convention.²⁶² Mr Adu Qatada (a Jordanian citizen) was granted asylum in the UK in 1993. He was detained from 2002-2005 under *Anti-terrorism, Crime and Security Act 2001*. The Secretary of State had planned to deport him to Jordan. Meanwhile, he was convicted of an offence to carry out a bombing in Jordan. He appealed to the Secretary of State against the decision of deportation, his appeal was dismissed in 2007²⁶³ and the Court of Appeal also upheld the decision; however the decision accepted the applicant's argument that there was a real risk of torture to him. The House of Lords dismissed his appeal.²⁶⁴ The applicant claimed that he was subjected to torture in the process of taking statement. The various reports of UN mechanisms and human rights organisations indicated that torture in Jordan remained in practise, therefore without assurance of Jordanian Government there would be risk of torture and other forms of ill-treatment.

Despite the legal provision, court decisions and recommendations of the committees, many countries violate the provisions, especially after the terrorist attack in USA on September 11, 2001. Many persons (suspected terrorists) are extradited from one State to another - especially the USA has practised 'extraordinary rendition' without assessing the risk of torture in the destination country.²⁶⁵ The practice is against the provision of the CAT. It is obvious that the practice has created/added more challenge in the implementation of absolute prohibition of torture and implementation of the CAT.

2.4.4 Non admissibility of evidence obtained by torture

The CAT provides exclusionary rule in regard to use of evidence obtained by torture in judicial proceedings.²⁶⁶ It is linked with the right to fair trial to protect any accused being compelled to give statement against him/her. The discussion during the

261 Ibid paras 143-48.

262 *Abu Qatada v The United Kingdom* (European Court of Human Rights, Application Nos 8139/09, 9 May 2012).

263 *Abu Qatada v The United Kingdom* (European Court of Human Rights, Application Nos 8139/09, 9 May 2012) [26].

264 *Abu Qatada v The United Kingdom* (European Court of Human Rights, Application Nos 8139/09, 9 May 2012) [51]-[53].

265 See Nowak and MacArthur, above n 1, 129; Open Society Foundations, *Globalizing torture CIA Secret Detention and Extraordinary Rendition* (Open Society Justice Initiative, 2013) 6; Mario Silva, 'Extraordinary Rendition: A Challenge To Canadian and United States Legal Obligations an under the Convention Against Torture' (2008-2009) 39 *California Western International Law Journal* 534; Jeffrey F. Addicott, 'Rightly Dividing The Domestic form the Entry Combatant in the "War against Al-Qaeda"- Why it Matters in Rendition and Targeted Killing' (2012) 45 *Case Western Journal of International Law* 297-300.

266 CAT art 15.

preparation of the CAT, the non-admissibility of the evidence obtained by torture was adopted especially for two reasons; first was as safeguard the fairness of the trial and second was to discourage the use of torture.²⁶⁷ The provision has strengthened the absolute prohibition of torture. The member States of the CAT are obliged to introduce the provision in their domestic legal provision. The provision is relevant to the theory of ‘tainted fruits of the poisonous tree’. Some scholars explain two reasons for the theory. First, statements extracted through torture are often unreliable and would damage the integrity of judicial proceedings, and second, as a result, it fails to prevent torture.²⁶⁸ The CCPR/C states that ‘law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment’.²⁶⁹ The CAT/C clarified that the member State is obliged to ascertain exclusionary norm in evidence obtained by torture in any proceedings.

Similarly, a judiciary can play a vital role for the protection of the right to freedom from torture through refusing to accept confessions as evidence that might have been obtained by torture and other forms of ill-treatment. As stated above, the non-admissibility principle applies to other forms of ill-treatment. The CAT/C clarified that the prohibition and non-derogable rights also applies to confession obtained by other forms of ill-treatment.²⁷⁰ The CAT/C noted that under the provision of Article 15 of the CAT, the State party must ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.²⁷¹

The CCPR/C states that the domestic legal provision must ensure the non-admissibility of confession obtained through torture and other forms of ill-treatment and in that case the burden of proof goes to the State whether the statement given by the accused has been given in a free manner of his or her will.²⁷²

The question of burden of proof is crucial for incidents of torture and other forms of ill-treatment. The CAT does not have clear provision about who is responsible for burden of proof in torture and other forms of ill-treatment related case. Therefore, the interpretation of the CAT/C, other human rights mechanisms and domestic courts are important to clarify the issue and set procedure to avoid admissibility of confession obtained through torture. The CAT/C has clarified that the burden of proof goes to the State/Government. In several cases, the CAT/ stated that ‘each State party has to

267 Kai Ambos, ‘The Transnational Use of Torture Evidence’ (2009) 42 *Israel Law Review* 379.

268 Rodley with Matt Pollard, above n 1, 162; Nowak and MacArthur, above n 1, 530.

269 Human Rights Committee, General Comment 20, above n 259, para 12.

270 See Committee Against Torture, *General Comment No 2, Implementation of article 2 by States Parties*, UN Doc CAT/C/GC/2 (12 January 2008) paras 3, 6; Committee Against Torture, *Views: Communication No 368/2008*, 47th sess, UN Doc CAT/C/47/D/368/2008, (25 November 2011) para 10.4 (*Fatou Sonko v Spain*’).

271 Committee against Torture, *Views: Communication No 453/2011*, 48th sess, UN Doc CAT/C/48/D/453/2011(23 May 2012) para 7.4 (*Oskartz Gallastegi Sodupe and other v Spain*’).

272 See Human Rights Committee, *General Comment No 32, Article 14: Rights to Equality before Courts and Tribunals and to a fair trial* 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) para 41.

ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction have been made as a result of torture'.²⁷³

Common law has a long history of the use of the exclusionary principle for evidence obtained through torture in judicial proceedings. As noted above, the U.S. Supreme Court has prohibited the police from obtaining confessions from suspects through coercion - a precedent established in 1897's *Bram v United States*.²⁷⁴ Following the decision many other decisions used this precedent for the exclusion of involuntary confessions in judicial proceedings.²⁷⁵ In the case of *Miranda v Arizona*, the U.S. Supreme Court established a guideline for the right to self-incrimination.²⁷⁶ Following these precedents, courts have refused involuntary confessions.²⁷⁷ Similarly, Australia, jurisprudence has established a rule that a confession must be refused unless it was voluntary such as in the case of *McDermott v R*, the court explained that 'at common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made'.²⁷⁸ Before this case, the High Court of Australia ruled that confessions must be voluntary.²⁷⁹ Similarly, many other decisions also have followed this rule.²⁸⁰ Therefore the Australian legal system adopted the exclusionary rule for many years.

Likewise, the Supreme Court of Canada has upheld the principle of voluntary confessions for many years; for example in the case of *Prosko v the King*²⁸¹ the Supreme Court clarified that confessions should be voluntary. The *Canadian Charter of Rights and Freedom 1982* provides the provision relating to the exclusion of this kind of evidence in judicial proceedings as a statutory provision.²⁸² In the UK, the House of Lords has excluded evidence obtained through torture and defined the concept of a voluntary confession in the case of *Ibrahim v the King*.²⁸³ Furthermore, the House of Lords has recognised the right to freedom from torture as peremptory

273 See Committee Against Torture, *Views: Communication No 219/2002*, 30th sess, UN Doc CAT/C/30/D/219/2002 (12 May 2003) para 6.10 ('*G.K v Switzerland*'); Committee Against Torture, *Views: Communication No 193/2001*, 29th sess, UN Doc CAT/C/29/D/193/2001 (21 November 2002) para 6.3 ('*P.E v France*'); Committee Against Torture, *Views: Communication No 441/2010*, 51th sess, UN Doc CAT/C/51/D/441/2010 (5 November 2013) para 9.8 ('*Mr. Oleg Evloev v Kazakhstan*').

274 *Bram v United States*, 168 U.S. 532, 542 (1897) as cited in the decision of *Dickerson v United States*, 530 U.S. 428 (2000).

275 *Brown v Mississippi*, 297 U.S. 278, 287 (1936); *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

276 *Miranda v Arizona*, 384 U.S. 436 (1966).

277 *R v John* [1970] 2 CCC (2d) 157, 168; *Wong Kam-ming v The Queen* [1980] ACT 247; *R v Harz and Power* [1967] AC 760; *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

278 *McDermott v R* [1948] HCA 23.

279 *Sinclair v R* [1946] HCA 55.

280 *R v Lee* [1950] HCA 25; *R v Swaffield* [1998] HCA 1.

281 *Prosko v the King*, (1922) 63 S.C.R 226.

282 *Canadian Charter of Rights and Freedom 1982* s 24 (2).

283 *Ibrahim v the King* [1914] AC 599.

norms and defined the various acts of torture as an international crime in common law system as in the case of Pinochet.²⁸⁴

Most recently, the House of Lords within *A and Others v Secretary of State for the Home Department* rejected evidence obtained by torture and other forms of ill-treatment.²⁸⁵ In the case, following the attacks of September 11, 2001, the UK enacted the *Anti-Terrorism, Crime and Security Act 2001*. Under the Act, UK Foreign Secretary could be allowed to certify as terrorists those who were not British Citizens and who were believed to be a risk to national security. The concerned person can appeal to Special Immigration Appeals Commission (SIAC).²⁸⁶ Ten appellants, who were certified by the Foreign Secretary and who appealed to SIAC, had their appeals dismissed in October 2003.²⁸⁷ The Court of Appeal upheld the decision in 2004 by a majority of judges with dissenting opinions. The Court of Appeal rejected the argument of appellants and found that ‘the fact that evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible’.²⁸⁸ But the decision allowed another appeal by the appellants. The House of Lords overruled the Court of Appeal’s decision. The decision excluded the use of evidence obtained by torture and explained that since ‘it’s very earliest days that the common law of England set its face firmly against the use of torture. Rejection of such practice was indeed a distinguishing feature of the common law’.²⁸⁹ Lord Bingham stated that:

It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.²⁹⁰

The decisions further emphasised that the absolute nature of the prohibition against torture required that States take positive steps to prevent torture, such as ensuring that the domestic legal systems outlaw the use of evidence elicited during torture.²⁹¹ These decisions show how the use of the exclusionary rule for confessions obtained through torture is accepted in most of the common law countries.

284 *R v Bow Street Metropolitan Stipendiary Magistrate and Others (No 3)* [2000] 1 AC 147, 197-199.

285 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71.

286 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71, [3]-[5] (Lord Bingham).

287 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71, [8]-[9] (Lord Bingham).

288 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71, [9] (Lord Bingham).

289 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71.

290 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71, [51] (Lord Bingham).

291 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71.

2.4.5 Universal jurisdiction

States are obliged to take necessary legislative measures to establish domestic and universal jurisdiction on the act of torture.²⁹² Theoretically, this provision is linked to the criminalisation of torture at domestic and international level to avoid safe haven for perpetrators, or they can be held legally accountable for their actions if they enter the jurisdiction of any member State of the CAT.²⁹³ The CAT is the first human rights convention that introduced universal jurisdiction in human rights instruments.²⁹⁴ Before the CAT, universal jurisdiction has been practised in international criminal law in areas such as piracy and slave trading.²⁹⁵ The ICC also adopts the provision that applies to core crimes as genocide, war crimes and crimes against humanity, in which torture is defined as crime against humanity. Similarly, the universal jurisdiction was introduced by four Geneva Conventions for the protection of war victims in relation to grave breaches.²⁹⁶

The provision of the CAT allows officials of the member States to be liable to prosecution anywhere in world within the countries of other. Further, M Cherif Bessiouni stated that under the principle of *jus cogens* and obligations *erga omnes*, States should have the responsibility to prosecute perpetrators under the universal jurisdiction.²⁹⁷

The universal jurisdiction is an important, challenging and controversial provision. In recent years, the use of universal jurisdiction in the case of torture has received increasing attention in human rights law, international organisation and academic writing. The CAT/C explained in Habre's case, where the State in whose territory the suspect is present does not prosecute and refuses to extradite the suspect, that these acts are also regarded as a violation of the CAT.²⁹⁸ In regard to the use of universal jurisdiction in torture cases, very few cases were practised and experiences are mixed. In a case relating to Chilean former leader Pinochet, House of Lords denied to give immunity to former head of State on the torture charges against him under universal

292 CAT art 5.

293 Beth A. Simmons, *Mobilizing for Human Rights, International Law in Domestic Politics* (Cambridge University Press, 2009) 263.

294 Cedric Ryngaert, 'Universal Criminal Jurisdiction over Torture: A State of affairs after 20 Years UN Torture Convention' (2005) 23 (4) *Netherlands Quality of Human Rights* 571; Nowak and MacArthur, above n 1, 254.

295 Kenneth C. Randall, 'Universal Jurisdiction under International Law' (1987-1988) 66 *Texas Law Review* 790.

296 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 49; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, open for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 50; *Convention (III) relative to the protection of civilian persons in time of war*, open for signature 12 August 1949, 75 UNTS 135, (entered into force 21 October 1950) art 129; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) art 146.

297 M. Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59 (4) *Law and Contemporary Problems* 65-66.

298 Committee against Torture, *Views: Communication No 181/2001*, 36th sess, UN Doc CAT/C/36/D/181/2001, (19 May 2006) para 3.6, (*Suleymane Guengueng. v. Senegal*).

jurisdiction in 1999.²⁹⁹ The decisions accepted torture as an international crime within the jurisdiction of domestic courts.

Another case relating to Mauritanian Ex-Army Lieutenant Ely Onild Dah was decided by a French Court. The Court accepted the universal jurisdiction as per the provision of the CAT. In the case, the Court sentenced him to ten years imprisonment on allegations of inflicting torture to thousands of black soldiers, junior officers and civil servants.³⁰⁰ These are successful examples regarding the use of universal jurisdiction. However, there are many other examples of unsuccessful application of the universal jurisdiction. For example, the case of Zokirjon Almatov, who was a minister in the Government of Uzbekistan, was alleged to have inflicted torture in many incidents, visited Germany for medical treatment. Special Rapporteur on Torture communicated to the Government of Germany about his involvement in the infliction of torture and drew the attention of the German government to the applicability of universal jurisdiction in this case. The German federal prosecutor decided not to open the case as Uzbekistan was unlikely to support it. Finally Almatov returned to his native country.³⁰¹

Furthermore, the Courts of UK and Canada also refused to use of universal jurisdiction where foreign authorities inflicted torture against their own citizens. In the case of *Jones v Saudi Arabia*, three British citizens were detained on the allegation of their involvement in a bombing campaign in Riyadh, Saudi Arabia in 2001 and 2002. All detainees including Jones were repeatedly tortured in prison in Saudi Arabia and he was released after 67 days detention without any charge. After his return to the UK, Jones brought a civil suit for damages against the state of Saudi Arabia and Lieutenant Colonel Abdul-Aziz in the courts of England and Wales. Mr. Jones' case was conjoined with other cases of Mitchell, Sampson and Walker who also brought a claim for damages against two policemen.³⁰² The cases were dismissed by the High Court on the ground that both the State and the named State officials enjoyed immunity from suit in the courts of England and Wales and the Court of Appeal upheld decisions.³⁰³ The House of Lords also upheld the decision.

In another case, a Canadian citizen Zahra Kazemi, a freelance photographer, visited Iran in 2003, where she was arrested, detained, tortured, and later died as a result of brain injury sustained while in the custody. Her son requested her remains be sent to Canada, but she was buried in Iran. A person was tried and acquitted in the case. The victim's son lodged a case against the Islamic Republic of Iran, the head of State, and other officials. The Quebec Superior Court allowed the motion to dismiss with respect to the estate of victim but denied the motion in respect of the applicant's (son's) claims.

299 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, 38 [1999] I. L.M. 591. Ultimately, Pinochet was not prosecuted in UK because of his weak health condition and he was sent Chile.

300 Nowak and MacArthur, above n 1, 299-301.

301 Ibid 295-297.

302 *Jones v Ministry of Interior Al- Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* (2006) UKHL 26.

303 *Jones v Ministry of Interior Al- Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* (2006) UKHL 26 paras 4 and 5.

The Quebec Court of Appeal upheld the decision.³⁰⁴ After that, the case was applied in the Canadian Supreme Court. The main point of the interpretation was whether an application of the immunity related to legal provisions for a foreign head of State or other officials with respect right to life, liberty and security of person under the *Canadian Charter of Rights and Freedom 1982* and procedural rights under *Canadian Bills of Rights 1985*. The Supreme Court of Canada dismissed the case on the grounds that Iranian officials who were alleged to have committed torture were immune from the jurisdiction of Canadian Courts by virtue of the *State Immunity Act 1985*, s. 18. The decision took reference from the *State Immunity Act* rather than accepting the rule of customary international law or recognising torture as a violation of peremptory norm and international human rights law. Scholars have lamented that the judgements do not properly examine the impact of the hierarchy norms of immunity and consistently upheld the impunity of perpetrators of torture.³⁰⁵ These cases represent a challenge to implement the provision of universal jurisdiction in the issue of torture.

Before the court decision, International Court of Justice (ICJ) had issued a ruling on February 14, 2002 in the case of *arrest warrant* which the Belgium Government circulated an *arrest warrant* on April 11, 2000 to prosecute the sitting Congolese foreign minister Abdoulaye Yerodia Ndombesi. The Court ruling stated that the Belgium arrest warrant violated the customary international law prohibition on prosecuting sitting heads of state or senior government officials.³⁰⁶ In the *Arrest Warrant* case, Belgium attempted to prosecute the sitting foreign minister for incitement to genocide in Congo. Belgium issued the arrest warrant under the provisions of universal jurisdiction. On 17 October, 2000, Congo lodged application with the ICJ and application challenged Belgium's arrest warrant neglects an official immunity.³⁰⁷ In the case, the Court gave priority to diplomatic immunity to sitting government minister rather than the universal jurisdiction in the case of genocide.

Furthermore, many States have not introduced the provision of universal jurisdiction in domestic legal provision which is an obligation of member State. For example, Nepal does not have the legal provision, practices and experiences to prosecute perpetrators under universal jurisdiction. Thus, another challenge has been raised to prosecute high-level officials who were involved in the formulation of torture policies in the process of fighting against terrorism, especially U.S. officials. Some plaintiffs against the senior U.S. officials were filed in Germany, France and Spain under universal jurisdiction and domestic law of the concerned countries. German courts rejected the complaints based on the fact that there was no special obligation to investigate the case.³⁰⁸ French courts dismissed the complaint based on 'Rumsfeld

304 *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62 (10 October 2014) 3 S.C.R.176.

305 See Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords got it Wrong' (2008) 18(5) *The European Journal of International Law* 955-970; Lorna McGregor, 'Torture and State Immunity: Defecting Impunity, Distorting Sovereignty' (2008) 15 (5) *The European Journal of International Law* 903-919.

306 M. Cherif Bassouni, *International Extradition: United States Law and Practice* (Oxford University Press, 2014) 457.

307 *Ibid.*

308 Katherine Gallagher, 'Universal Jurisdiction in Practice Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture' (2009) 7 *Journal of International Criminal Justice* 1105.

enjoys immunity from prosecution', in an argument to the French Foreign Ministry.³⁰⁹ Spanish courts defined the issues as being a matter of international human rights law; however the Supreme Court later dismissed the case due to the lack of a link with Spain.³¹⁰ These facts reflect the challenges while implementing the provisions especially to prosecute high level officials. In one hand it is a challenge to implement the provision and on the other, the torturer gets immunity in the cases of torture.

Despite these decisions, in a recent case in UK, a senior Nepalese army officer was arrested on January 3, 2013 and charged with torture during the period of conflict in Nepal. The officer went on trial at the Old Bailey accused of torture-related offences. The prosecution of him was done according to the UK's obligations under the CAT.³¹¹ The case has been brought under the *Criminal Justice Act 1988*.³¹² The case is still in process. In this case, UK is following universal jurisdiction under the CAT. On the other hand, in response to the arrest, the Government of Nepal and major political parties condemned the arrest, and demanded the UK Government immediately release the officer based on the principle of State sovereignty.³¹³ Likewise, many practical obstacles have been seen while applying the universal jurisdiction as in the case such as local court of the UK has to follow domestic legal provisions, but the offence of torture is a matter of international law. The incident of torture was committed in Nepal, most of the facts stand in the territory of Nepal. Therefore, it is difficult to collect or hand over facts/evidence of the case from Nepal to the UK without the support from the State authority and clear legal provision. This case reflects many procedural issues of the applications of the provision of universal jurisdiction.

2.4.6 Rights to complaint and investigate against torture

The CAT obliges member states to ensure an individual's right to complain against torture³¹⁴ and establish prompt, impartial and competent investigation mechanisms into incidents of torture.³¹⁵ A prompt and impartial investigation is crucial to providing justice to victims and punishing the perpetrators. It is proper therefore, that the concerned State should assure access to victim and establish a competent and impartial investigation mechanism to investigate the incident promptly. The CAT/C has defined that no formal complaint is required in the incidents of torture, and that the State should take a proactive investigation on such matters.³¹⁶ Jurisprudence of the CAT/C and the

309 Ibid 1110.

310 Ibid 1114.

311 See Owen Bowcott, 'Nepalese colonel faces torture trial in UK', *The Guardian*, 28 February 2015 < <http://www.theguardian.com/law/2015/feb/27/nepalese-colonel-faces-torture-trial-in-uk>>.

312 *Criminal Justice Act 1988* s 134 (UK).

313 See Anil Giri and Phanindra Dahal, 'Govt fumes at NA colonel's UK arrest' *The Kathmandu Post* (Kantipur Publication, 4 January 2013< <http://www.ekantipur.com/the-kathmandu-post/2013/01/04/top-story/govt-fumes-at-na-colonels-uk-arrest/243696.html>>.

314 CAT art 13.

315 CAT art 12.

316 Committee against Torture, *Views: Communication No 6/1990*, 6th sess, UN Doc CAT/C/7/D/6/1990 (12 November 1991) para 10.4 ('*Henri Unai Parrot v Spain*'); Committee Against Torture, *Views: Communication No 59/1996* 20th sess, UN Doc CAT/C/20/D/59/1996 (14 May 1998) para 8.6 ('*Blanco Adad v Spain*'); Committee Against Torture, *Views:*

CCPR/C have given general comments on individual complaints. For example, the CAT/C has interpreted in the provisions and found that ‘promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear’³¹⁷ and the incident should be investigated impartially and promptly.³¹⁸ Similarly, CCPR/C recommended the Sri Lankan government for prompt investigation in the case of torture to provide justice to victim.³¹⁹ The provision is crucial. Nevertheless, it is not clear that what types of organisation would be appropriate to investigate the incident of torture in the CAT provision and jurisprudence.

2.4.7 Reparation for victims of torture

Reparation is one of the major ways in which victims feel that they can get justice. It is also accepted that torture victims have right to reparation in the international law. Article 14 of the CAT is related to compensation and reparation of victims of torture which is the only provision in the Convention that compels State parties to provide compensation and reparation to the victims of torture.³²⁰ The provision requires State parties to provide procedural remedies aimed at recovery adequate reparation. States should not only provide material compensation; but they also need to provide physical, mental and social rehabilitation to the victims.³²¹ The UN has set out a number of components to provide adequate and effective reparation. According to Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious International Humanitarian Law (Principle of Rights to Remedy) the term ‘reparation’ includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³²² Professor Rodley defined the terminologies ‘restitution’ as attempts to restore the victims to their previous condition. Furthermore, he defined that compensation covers economic damage, rehabilitation includes medical, psychological, legal and social support to the victim, satisfaction linked to a public apology, a disclosure of truth and non-repetition ensure not repeating the event in future.³²³ The CAT/C interpreted the term that the CAT recognises not only the right

Communication No 368/2008, 47th sess, Doc CAT/C/47/D/368/2008, (25 November 2011, para 10.6 (*Fatou Sonko v Spain*)).

317 Committee against Torture, *Views: Communication No 59/1996*, 20th sess, UN Doc CAT/C/20/D/59/1996 (14 May 1998) para 8.2 (*Blanco Adad v Spain*’).

318 Committee against Torture, *Views: Communication No 174/2000*, 35th sess, UN Doc CAT/35/174/2000 (24 November 2005) paras 6.5, 6.6 (*Nikolic v. Serbia and Montenegro*’); Committee Against Torture, *Views: Communication No 353/2008*, 47th sess, UN Doc CAT/C/47/D/353/2008 (14 November 2011) para 9.1 (*Dmytro Slyusar v Ukraine*’); Committee Against Torture, *Views: Communication No 368/2008*, 47th sess, UN Doc CAT/C/47/D/368/2008 (25 November 2011) para 10.7 (*Fatou Sonko v Spain*’).

319 Human Rights Committee, *Views: Communication No 1250/2004*, 87th sess, UN Doc CCPR/C/87/D/1250/2004, (14 July 2006) para 9.4 (*Rajapakse v Sri Lanka*’).

320 CAT art. 14.

321 Nowak and MacArthur, above n 1, 464.

322 *Basic Principle and Guidelines on the Rights a Remedy and Reparation for Victims of Gross International Human Rights Law and Serious International Humanitarian Law*, UNGA Res 60/147 of 16 December 2005 paras 15-23.

323 Rodley with Pollard, above n 1, 156.

to fair and adequate compensation, but also requires to ensure redress which covers restitution, compensation, and measures to guarantee non recurrence of the violations in future.³²⁴ International human rights law and jurisprudence of the committee provide encouraging interpretation of a right to reparation.

A report by REDRESS Trust found that several countries have adopted compensation relating statutes which allow torture victim's claim for compensation as a matter of public law and tort law.³²⁵ On the other hand, the procedure of torture compensation cases are challenging in many countries depending upon whether the case follows civil or criminal procedure.³²⁶ The reparation for victim of torture is linked to the criminalisation of torture and, as stated above some countries do not recognised torture as punishable crime. Some countries such as Sri Lanka and the Philippines define torture as a crime. However, victims need strong support to fight against their powerful perpetrators. Even if the legal provisions are favourable, the victims have to wait for long periods without any interim support or compensation. Time and again, the context has been changed because terrorism has become a serious challenge in human security in the world and non-State actors are also involved in human rights violation, and therefore the question of reparation becomes more complex.³²⁷ Other component of reparation includes the assurance of non-repetition, satisfaction and rehabilitation, and these are yet to be practised.

At the domestic level, courts in many countries have refused or do not care to provide redress to victims of torture. For example, as found in the Canadian case *Kazemi v Islamic Republic of Iran*, the issue of rehabilitation under the Article 14 of the CAT was raised. The judgement has acknowledged torture is absolutely prohibited in Canada. Particularly, Abella J wrote dissenting argument found that as a principle of fundamental justice, that Canada is required to ensure redress for victims of torture committed in other jurisdictions. The argument was based on Article 14 of the CAT which Canada is a party and whilst the prohibition against torture, as a *jus cogens* norm.³²⁸ However, the Supreme Court upheld the Court of Appeal's decision.³²⁹ Similarly, in the case of *Jones v Saudi Arabia*, the House of Lords upheld the Court of Appeal's decision to refuse a right to redress of the appellants.³³⁰

324 Committee against Torture, *Views: Communication No 402/2009*, 52nd sess, UN Doc CAT/C/52/D/402/2009 (23 May 2014) para 11.8 ('*Nouar Abdelmalek v Algeria*'); Committee Against Torture, *Views: Communication No433/2010*, 48th sess, UN Doc CAT/C/48/D/433/2010 (24 May 2012) para 12.8 ('*Alexander Gerasimov v Kazakhstan*'); Committee Against Torture, *Views: Communication No 269/2005*, 39th sess, UN Doc CAT/C/39/D/269/2005 (7 November 2007), para. 16.8 ('*Salem v. Tunisia*').

325 REDRESS Trust, *Reparation for Torture, A Survey of Law and Practice in Thirty Selected Countries* (REDRESS Trust, 2003) 47.

326 Ibid 48.

327 Gabriela Echeverria, 'Do Victims of Torture and other serious human rights violations have an independent and enforceable right to reparation?' (2012) 16(5) *the International Journal of Human Rights* 700.

328 *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62 (10 October 2014) 3 S.C.R.176.

329 *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62 (10 October 2014) 3 S.C.R.176.

330 *Jones v Ministry of Interior Al- Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* (2006) UKHL 26.

2.4.8 Capacity building of Police and other concerns personnel

The CAT provides some provisions for prevention of torture and other forms of ill-treatment to build capacity of law enforcement personnel and review existing law in line with international standard. The CAT requires member States to train their law enforcement, medical and other concerned personnel.³³¹ The capacity development activities are ongoing activities so that member States need to make long-term plan to provide anti-torture education of those personnel and widely disseminate the training materials. Nowak and McArthur stated some important aspects of training programs. First, training law enforcement, interrogation, prison and medical staff conveying the message about torture and other forms of ill-treatment are absolutely prohibited under all circumstances. Second, the trainees must understand torture is a serious punishable crime. Third, the concerned police or investigation personnel should inform about torture to judge with the task of carrying out a proper investigation. Fourth, the training give practical guide how to prevent torture and other forms of ill treatment.³³² The UN has adopted many practical guidelines, code of conduct, and principles that included international law and its obligations as basis of capacity development including Standard Minimum Rules for the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, Basic Principles on the use of Force and Firearms by Law Enforcement Officials, Body Principles for the Protection of All Person under Any Forms of Detention of Imprisonment. These documents could be useful for as resource materials.

Likewise, member States of the CAT should keep systematic review interrogation rules, instructions, methods and practices, arrangement of custody and treatment of persons subjected to any form of arrest, detention or imprisonment.³³³ The objective of the provision is to prevent torture and other forms of ill-treatment which is linked to Article 10. Nowak and McArthur stated that systematic review means ‘State parties must continually stay abreast of the actual situation’.³³⁴ Thus, member State requires to take effective legislative, administrative and judicial measure and continues capacity building activities.

2.5 Preventative and monitoring mechanisms

2.5.1 Optional Protocol of CAT and monitoring mechanisms

The OPCAT is a key international instrument for preventing torture and other forms of ill-treatment. It is a new concept of international human rights law which inspects detention centres and prisons directly to protect and promote individual’s rights within its member States. The primary objective of the OPCAT is to prevent torture and other forms of ill-treatment in practical level. The OPCAT establishes a Sub-committee on Prevention of Torture which allows international inspections to the place of detentions and work closely with National Preventive Mechanism (NPM). The Subcommittee on Prevention of Torture can visit detention centres/prisons without restriction to monitor

331 CAT art 10.

332 Nowak and MacArthur, above n 1, 397.

333 CAT art 11.

334 Nowak and MacArthur, above n 1, 410.

the facilities of the detainees and verify international standards related to the rights against torture. Alongside, it also requires domestic preventive mechanism to support the international mechanism.³³⁵ As stated, torture and other forms of ill-treatment is generally committed within isolated places against the vulnerable person. In the situation, it is very difficult to document or monitor the case and collect the evidence of torture in especially in detention centres. The mechanism emphasises the oversight and monitoring to eliminate the prevalence of torture and other forms of ill-treatment in detention centres. The preventive mechanism could play a vital role for monitoring the detention centres and prevention of torture.

Despite the innovative provisions and establishment of preventive mechanisms, the ratification process is very slow; so far only 78 countries have become parties to the OPCAT.³³⁶ With regard to national prevention mechanism, the OPCAT does not specify what types of mechanism and mandate is required. The member States may have the flexibility to establish national prevention mechanism and its mandate. Therefore, there are various models such as single NPM or multiple mechanisms and national human rights institutions or Ombudsmen or other mechanisms working as NPM in many countries. For example, New Zealand has authorised five institutions including NHRC to work as NPM, UK has established a 20 members body coordinated by Her Majesty's Inspectorate for Prisons and some other countries such as Honduras, Nigeria has establish special national prevention mechanisms.³³⁷ Twenty member countries of the OPCAT are yet to be established NPM.³³⁸ The facts show that the implementation of the provisions of OPCAT has been slow.

2.5.2 Monitoring and supervision mechanisms of the CAT and other instruments

Under the UN human rights system, there are many mechanisms established to monitor the implementation of the prohibition of torture and other forms of ill-treatment in practical level. The mechanisms can be divided into two border categories i.e. treaty-based systems that includes the CAT/C and the CCPR/C and Charter-based system like Human Rights Council (HRC), Special Rapporteur on Torture.³³⁹ Among the mechanisms the CAT/C and Special Rapporteur on Torture are fully responsible to monitor the prohibition of torture and other forms of ill-treatment. Other mechanisms including CCPR/C, HRC through UPR monitor the rights to freedom from torture and other forms of ill-treatments partially.

335 *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Open for signature 4 Feb 2003, 2375 UNTS 57 (entered into force 22 June 2006) art 17 ('OPCAT').

336 United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9-b&chapter=4&lang=zh>.

337 OPCAT, Subcommittee on Prevention of Torture, National Preventive Mechanisms, <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>>.

338 Ibid.

339 Steiner, Alston and Goodman, above n 59, 737.

2.5.2.1 Committee Against Torture

The CAT envisages the establishment of a Committee Against Torture (CAT/C) to enforce the compliance of State parties. The CAT/C consists of ten experts with high level moral from member countries.³⁴⁰ The members of the CAT/C are elected from and by States parties. The main functions of the CAT/C are to monitor the implementation of the CAT and make the member States accountable for respecting and protecting right to freedom from torture, through review of periodic reports of the member States which have to be submitted in every four years.³⁴¹ The CAT/C holds two regular sessions every year to review the State's reports and special session can also be called on the committee's decision.

The CAT/C is primarily responsible for monitoring the right to freedom from torture and other forms of ill-treatment and the implementation status of the provisions of the CAT. In this process, the Committee reviews States' reports and provides comments and recommendations. The Committee handles individual communication if any individual was denied justice at the domestic level,³⁴² inter-state communication about the practise of torture³⁴³ and if the Committee gets information about continuous and systematic practises of torture in the territory of any member country, the CAT/C conducts a confidential enquiry.³⁴⁴

The activities of the CAT/C contribute and facilitate member States to review their own situation and status of the implementation of the CAT and prevention of torture. As an example, a research report which was conducted in the European region³⁴⁵ found that the recommendations of the CAT/C are having four different kinds of impacts such as substantial impact in some countries, significant impacts, limited impact and little or no effects in some countries.³⁴⁶ The study found some progress indicators of the countries that have had substantial impact were stated positive record of implementation of the CAT, satisfactory action plan for adoption of the provisions and take appropriate legislative measures and the CAT/C welcomed the consistent initiatives and encouraged further steps. Countries that have had significant impacts have consistently responded and improved according to the conclusions of the CAT/C, few recommendations are yet to be implemented and within the limited impact countries these have not implemented despite some repeated recommendations of the CAT/C. The countries with little impact do not implement these recommendations properly, and continue to use such practices as solitary confinement and detain minors

340 CAT art 17.

341 CAT art 19.

342 CAT art 22.

343 Ibid art 21.

344 Ibid art 20.

345 See Ronagh McQuigg, 'How Effective in the United Nations Committee Against Torture' (2011) 22 (2) *The European Journal Human Rights* 813-828. The research were conducted focusing on eight European Countries namely Norway, the Netherlands, Portugal, Sweden, Denmark, the Czech Republic, Iceland and Luxemburg from 2000- 2008. The finding of the research explained that The CAT/C are having very substantial impact from Norway, the Netherlands and Portugal; significant effect in Sweden, having limited impact in Denmark and Czech Republic and little or no impact in Iceland and Luxemburg.

346 Ronagh McQuigg, 'How Effective in the United Nations Committee Against Torture' (2011) 22 (2) *The European Journal Human Rights* 827.

in adult prisons.³⁴⁷ Overall, this means that the effectiveness of the committee has been mixed.

On the other, scholars have criticised the CAT/C's structure and functions. First, Nowak and McArthur stated that there is no equitable participation in the committee; as there are four from the western group, two each from Eastern European and Latin American group and one each from the Asia and African group.³⁴⁸ Second, many academic writings also routinely describe the monitoring process as being in crisis.³⁴⁹ The Committee has huge workloads and also faces financial crisis - the members of the CAT/C are volunteers and the UN Secretary General provides staff for the committee's secretariat.³⁵⁰ Third, apart from reviewing the State reports, it has to look into individual communications and conduct confidential inquiry. A report shows that majority of the countries or 57.09 per cent are yet to submit their reports to the CAT/C from 1996-2006. Only 6 per cent of reports were submitted on time.³⁵¹ According to annual report of the CAT/C, a total of 169 reports including 26 initial reports were overdue in May 31, 2013 and some countries have submitted their initial and periodic report after extreme delay.³⁵² The facts demonstrate that the CAT/C has serious problems in conducting regular monitoring of the member countries.

2.5.2.2 Human Rights Committee

Human Rights Committee (CCPR/C) is established under the ICCPR as monitoring mechanism,³⁵³ which has 18 members of the Committee. The members of the CCPR/C serve in their personal capacity. The main roles of the CCPR/C is to supervise and monitor the implementation of the ICCPR obligations by State parties. As mentioned above, the ICCPR prohibits torture and other forms of ill-treatment. Thus, the CCPR/C can handle the issue of rights to freedom from torture and other forms of ill-treatment through periodic report in every five years and individual communication from an individual.

2.5.2.3 Special Rapporteur on Torture

The Special Rapporteur on Torture has been established to monitor rights to freedom from torture through regular communication, country visits and also through receive information from other concerned parties by the HRC. The Rapporteur conducts direct monitoring of the right to freedom from torture and plays a vital role in promoting and protecting the right to freedom from torture and other forms of ill-treatment. However,

347 Ibid.

348 Nowak and MacArthur, above n 1, 598.

349 See Tobias Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty' (2009) 31 *Human Rights Quarterly* 785; Winston P. Nagan and Lucia Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001) 14 *Harvard Human Rights Journal* 106.

350 Nowak and MacArthur, above n 1, 605; Rachael Lorna Johnstone, 'Cyclical Savings or Reasonable Reform? Reflection on a Single Unified UN Human Rights Treaty Body' (2007) 71 *Human Rights Law Review* 176-181.

351 Lawrence J LeBlanc, Ada Huijbregste and Timothy Meister, 'Compliance with Reporting Requirements of Human Rights Conventions' (2010) 14 *International Journal of Human Rights* 5, 799.

352 Committee against Torture (CAT/C) *Annual Report 2013*, UN Doc A/68/44, 272-280.

353 ICCPR art 28.

the main weakness of the Special Rapporteur is the absence of an effective follow-up procedure.³⁵⁴ It is also linked to resources constraints, as the Special Rapporteur works on a voluntary basis with limited resources³⁵⁵ which hampers the following up of recommendations. For example in the context of Nepal, the Special Rapporteur on Torture has made recommendations for the prohibition of torture in Nepal after a visit in 2005.³⁵⁶ The Rapporteur prepared and sent four follow-up reports from 2008 to 2012 to the Government of Nepal. The Government responded and updated the situation on the right to freedom from torture in Nepal in 2008.³⁵⁷ After that, the Government is yet to respond to the Special Rapporteur's follow-up reports. In such a situation, the Special Rapporteur could have taken other initiatives to follow-up the recommendations either by conducting follow-up visit or holding a meeting with the representatives of Nepal. However, these actions are yet to be done.

2.5.2.4 Human Rights Council and Other Mechanisms

The Human Rights Council was established by United Nations General Assembly resolution 60/251 in 2006.³⁵⁸ The Council is mandated to promote universal respect for the protection of all human rights and fundamental freedoms. The Council took over the Special Procedure that had been established by the Commission of Human Rights including those relating to rights to freedom from torture and other forms of ill-treatment.³⁵⁹ In addition, the Council established the Universal Periodic Review (UPR) as a peer-review procedures.³⁶⁰ Through the UPR, all States review each other's situation of human rights on a periodic basis (every four years). In this context, right to freedom from torture and other forms of ill-treatment may be examined in the Council.

The Office of the High Commissioner for Human Rights (OHCHR) also covers the rights to freedom from torture and other forms of ill-treatment in reports under its various mandates. (Please see Chapter VI for details of functions of the mechanisms in the context of Nepal)

The success or otherwise of a State in domesticating its policies and practices to make them consistent with its international obligations plays an important role in building a

354 See Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 216.

355 Ibid 217.

356 Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006).

357 Manfred Nowak, *Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Cameroon, Chile, China, Colombia, Georgia, Jordan, Kenya, Mexico, Mongolia, Nepal, Pakistan, Russian Federation, Spain, Turkey, Uzbekistan and Venezuela*, UN Doc A/HRC/C/7/3/Add.2 (18 February 2008) 82.

358 United Nations General Assembly, *resolution 60/251 of 15 March 2006 Human Rights Council*, UN Doc A/RES/60/251 (3 April 2006).

359 Ibid.

360 Human Rights Council, *Resolution 5/1 Institution-building of the United Nations Human Rights Council*, UN Doc A/HRC/5/21 (18 June 2007).

State's reputation.³⁶¹ Thus, regular and effective reporting are the key factors for fulfilment of State obligations, However, these mechanisms have overlapping mandates that might generate some confusion and over-burden the State party for the implementation of the provisions of the CAT. For example, Rachael stated that in recent days that the numbers of human rights instruments have been increased and the human rights regimes have become more complicated and extensive. Therefore, the State party has to prepare many reports for which they need more qualified human resource and other resources to prepare report and fulfil the obligations.³⁶²

International human rights law depends for its effectiveness, on the goodwill of State parties to carry out their treaty obligations. Similarly, the monitoring bodies are not courts; the mechanisms make recommendations or observations, to enable State parties to fulfil the obligations. Therefore, the nature of conclusions or recommendations of international human rights instruments including the CAT/C are non-binding to member States. Thus, the implementation of the legal provisions or recommendation depends on the member State's actions and commitments. The conclusions and recommendations of the mechanisms highlight the shortcomings of implementation of the CAT and other instruments and create international, moral and to some extent legal pressures for the concerned State.

With regard to the pressure from international mechanisms, Risse and Sikkink found that 'countries most sensitive to pressure are not those that are economically weakest, but those that care about their international image'.³⁶³ Therefore, the mechanisms especially the CAT/C can play a proactive role in monitoring the implementation and apply positive pressure for the implementation of the CAT. Similarly, the monitoring is a way to reinforce the concerned State's commitment or agreement for the prohibition of torture. For instance, the CAT/C's confidential inquiry report on Nepal puts pressure to the Government of Nepal. Immediately after releasing the report, the Government responded to the report, repeated its commitment in the report and prepared and tabled an *Anti-torture Bill* and *Penal Code Bill* to criminalise torture in parliament.³⁶⁴

361 D. Zartner and J. Ramos, 'Human Rights as Reputation Builder: Compliance with the Convention Against Torture' (2010) 12(1) *Human Rights Review* 71-92.

362 Rachael Lorna Johnstone, 'Cyclical Savings or Reasonable Reform? Reflection on a Single Unified UN Human Rights Treaty Body' (2007) 71 *Human Rights Law Review* 178-190.

363 See Thomas Risse and Kathryn Sikkink, 'The Socialization of international human rights norms into domestic practice: Introduction', Stephn C. Ropp, Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Chang*, (Cambridge University Press, 1999) 37-38.

364 Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012), part 2 Comments and Observations Submitted by Nepal (8 August 2011) para 127 <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm>.

2.5.3 Socio-economic and political situation and implementation of the CAT

Since the CAT came into force in 1987, many significant movements or initiatives such as ratification complain of the CAT, promulgation of the OPCAT, continuous monitoring from CAT/C and other UN human rights mechanisms, and continuous advocacy and pressure building activities are being conducted by non-governmental organisations. Likewise, many member countries have introduced legislative, administrative and judicial measures for the prevention of torture and other forms of ill-treatment. However, torture and other forms of ill-treatment continued in many parts of the world. It is a serious challenge for the implementation of the provisions of the CAT more specifically in the least developed countries. Many reasons are associated behind the situation such as violent socio-cultural structures, poverty, impunity, lack of resources for investigation and weakness in institutional setting (see detail an example of Nepal Chapter IV). The University of Sydney recently published research reports focusing on Nepal and Sri Lanka which stated that a major weakness of the models of international human rights provision is that it has frequently developed without any attention to the context in which the models are to be applied.³⁶⁵ Furthermore, the research findings show that in the context of Nepal and Sri Lanka, there are many factors including social and economic, poorly developed infrastructure (especially in conflict-affected countries), poverty and discrimination and other cultural violence, political interference are the major factors through the improper use of force.³⁶⁶ Alice Hill found in a study of police reform project in Nigeria that the theories and principles of human rights have been developed from West without addressing socio-cultural and political and other contextual factors, which as a result tended to be superficial or failed to achieve the goals.³⁶⁷ These factors are associated with the proper implementation of the CAT particularly in the least developed countries.

2.6 Conclusion

After the CAT come into effect, many initiatives were attempted at a global level for the prevention of torture and other forms of ill-treatment and for the protection of right to freedom from torture. Major achievements of the last 27 years include the ratification of CAT by 158 countries³⁶⁸ and promulgation of the OPCAT. Seventy-eight countries now allow detention centres to be monitored by international monitoring teams.³⁶⁹ Furthermore, as per State obligations under the CAT, many countries have promulgated laws to prohibit acts of torture in their domestic laws, and not a single country has openly challenged the right to freedom from torture through

365 University of Sydney, *Enhancing Human Rights Protection in the Security Sector on the Asia Pacific* (University of Sydney, 2014) 3.

366 Ibid 6.

367 See Alice Hills, 'Lost in Translation: Why Nigeria's Police don't implement domestic reform' (2012) 88 (4) *International Affairs* 739-755; Alice Hills 'The Dialectic of Police Reform in Nigeria' (2008) 46 (2) *Journal of Modern African Studies* 215-234.

368 United Nations Treaty Collection, < [rg/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en%23EndDec](#)>.

369 United Nations Treaty Collection < [rg/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en](#)>.

its domestic law.³⁷⁰ Furthermore, the CAT/C has reviewed hundreds of State reports and jurisprudence on individual complaints. All these developments are crucial for the prevention of torture and to respect and protect the right to freedom from torture across the world. There is now no question or doubt as to the normative status and binding nature of the prohibition of torture and other forms of ill-treatment in the international legal framework. Rather, the major question in the current situation is the degree to which the implementation of the provisions of the CAT has impacted on the incidence of torture at a domestic level. Torture and other forms of ill-treatment are still practised in many parts of the world. More particularly, in the process of fighting against terrorism, the use of torture and other forms of ill-treatment has increased. While some scholars argue for the limited permissibility of torture in exceptional situation (in order to find out information or obtain confessions). However, most scholars argued that torture and other forms of ill-treatment is illegal, morally wrong and practically inappropriate.

On the other hand, least developed countries have many systemic problems like deep-rooted poverty, discrimination, violent social structure and lack of scientific tools and techniques for criminal investigation, which can be taken as the root causes of torture and other forms of ill-treatment. In such situations, to some extent, the use of torture in fighting against terrorism replicates a negative example not only in the context of developed countries but it also affects the developing world. Therefore, the absolute ban on torture and other forms of ill-treatment are being increasingly challenged as a failure to understand local context and an imposition of Western cultural values.

Despite the challenging situation, positive initiatives have been seen in various sectors. The judiciary in many countries plays an active role in the protection of the right to freedom from torture and other forms of ill-treatment, respecting rights to a fair trial and following the rule of law even during the interrogation process of detainees of terrorist suspects.

Furthermore, Senate Reports of the USA and many experienced interrogating officials of US army, CIA and other agencies have made it clear that the extracting information from terrorist suspects by torture or other forms of ill-treatment are ineffective, immoral and illegal.

All of these developments have helped to strengthen the normative force and hence progress in the implementation of the CAT at the domestic level.

Many provisions of the CAT (such as the definition of torture, the involvement of private parties in torture, the modality and standard of criminalisation of torture at the domestic level, and the prompt and impartial investigation mechanisms on incident of torture), need to be reviewed carefully and made more clear and applicable to the current domestic and international context. A comprehensive study on the effectiveness of the CAT/C and other human rights mechanisms relating to torture is required. New more applicable approaches to enforce the provisions of the CAT and

370 Gross, above n 108, 7; Alex J Bellamy, 'No Pain, No Gain? Torture and Ethics in the War on Terror' (2006) 81 *International Affairs* 1, 126.

recommendations of the mechanisms need to be formulated. In this process, the UN mechanisms including the CAT/C can work in close coordination with non-government organisations working in the sector of the right to freedom from torture and National Human Rights Institutions more significantly to monitor the situation and to enhance the the enforcement of the recommendations. A coordinated work model with NGOs may help with effective monitoring of the implementation of the CAT that might support to decrease workload of the mechanisms. Therefore, the CAT/C and other mechanisms require the development of more effective methods to monitor the right to freedom from torture and the implementation of the CAT.

CHAPTER-III: CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK OF NEPAL

3.1 Introduction

This chapter sets out a comprehensive review of Nepalese constitutional and legal framework and compares it with the provisions of the CAT and other international human rights instruments. According to the Vienna Convention on the Law of Treaties, the State is legally obliged to uphold the terms of the treaty.¹ Hence, as a member State of the CAT, Nepal is obliged to adopt the provisions of the CAT and is bound to fulfil its obligations.

Nepal does not have a long constitutional and legislative history when it comes to guaranteeing the right to freedom from torture. The codification of universally accepted human rights was slowly recognised and grew in the second half of the twentieth century. More significantly, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (other forms of ill-treatment) was introduced in the *Constitution of the Kingdom of Nepal 1990*.² The provision was promulgated as a fundamental right for the first time in the history of Nepalese constitution. After that, Nepal accessed the CAT in March 1991. The *Interim Constitution of Nepal 2007* stipulates the right to freedom from torture as a fundamental right and defines torture and other forms of ill-treatment as crime which is a positive initiation in the implementation of the CAT and for the respect and protection of the right to freedom from torture and other forms of ill-treatment. The *Interim Constitution* assures that no one shall be subjected to physical or psychological torture and other forms of ill-treatment during the process of investigation and trial. If it happens, compensation shall be provided to the victim of torture and punishment to perpetrator as defined by the statutory law.

In the process of the fulfilment of State obligations towards the CAT, *Compensation Relating to Torture Act 1996* (CRTA) was promulgated to ensure the right to freedom from torture. The *National Human Rights Commission Act 2012* (NHRCA) and *Evidence Act 1974* have some provisions which partially include the provisions of the CAT. However, many provisions of the CAT such as criminalisation of torture, investigation of incident of torture, redressing and rehabilitation of victims of torture are not incorporated in domestic provisions. Furthermore, some legal provisions do not comply with the CAT. This chapter compares Nepalese legal provisions and practises with the CAT and other relevant international human rights instruments.

The CAT sets a framework of rights to freedom from torture and other forms of ill-treatment at the international level and obliges member states to protect and promote

1 See *Vienna Convention on Law of the Treaties*, open for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 27; Human Rights Committee (CCPR/C), *General Comment No 31(80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 3 ('*Human Rights Committee, General Comment 31*').

2 *Constitution of the Kingdom of Nepal 1990* (Nepal) art 14.

the right to freedom from torture by ensuring the rights at the domestic level. The CAT provides various rights and State responsibilities within the framework such as defining the act of torture as a crime,³ establishing domestic and universal jurisdiction over torture,⁴ ensuring easy access to rights to complaints against torture and effective investigation,⁵ providing redress and rehabilitation to victims of torture,⁶ developing capacity of law enforcement officials,⁷ ensuring non admissibility of confession made as a result of torture and guaranteeing non-refoulement where the suspect is at high risk of torture.⁸ Likewise, many non-binding international human rights instruments contain the right to freedom from torture and State obligations more explicitly to domesticate the provisions into domestic legal provision and practices. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of the International Humanitarian Law calls on States to ensure domestic law in line with international human rights.⁹ Standard Minimum Rules of Treatment of Prisoners, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Code of Conduct of Law Enforcement Official also outline international standards with more practical explanation.

Similarly, many scholars pointed out the requirement of legislative framework, in the domestic level of member countries for the protection of right to freedom from torture such as the domestication of provisions of the CAT through legislative framework as a major step to respect and protect the rights to freedom from torture and promoting accountability and justice.¹⁰ Victims' rights and accountability for gross human rights violations cannot be fully understood without placing the provisions of international human rights law in the context of domestic legal theory and practice.¹¹ The State can incorporate the provisions of the CAT through constitution and legislative frameworks. With regards to legislative measures, REDRESS Trust suggests that

3 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 4 ('CAT').

4 *Ibid* art 5.

5 *Ibid* art 13.

6 *Ibid* art 14.

7 *Ibid* art 10.

8 *Ibid* art 3.

9 *Basic Principle and Guidelines on the Rights a Remedy and Reparation for Victims of Gross International Human Rights Law and Serious International Humanitarian Law*, UNGA Res 60/147 of 16 December 2005, Principle 2(a) ('*Basic Principles and Guidelines*').

10 See Lutz Oette, 'Implementation the Prohibition of Torture: the Contribution and Limits of National Legislation and Jurisprudence' (2012) 16 (5) *The International Journal of Human Rights* 718; Greg Carne 'Is Near Enough Good Enough? –Implementing Australia's International Human Rights Torture Criminalisation and Prohibition Obligations in the Criminal Code' (CTH) (2012) 33 *Adelaide Law Review* 229-270.

11 See Mykola Sorochinsky, 'Prosecuting Torturer, Protecting Child Molesters toward a Power Balance Model of Criminal Process for International Human Rights Law' (2009) 31 *Michigan Journal of International Law* 178.

member State can incorporate the provisions of the CAT through three different forms;¹²

- Specific anti-torture legislation in particular aimed at implementing the provisions of the CAT in domestic level;
- Amendment to existing legislation including repeal of laws to bring them in line with the provisions of the CAT; or
- A combination of the two which introduces new specific law and amendment of other laws as in line with the CAT.

As a State party, Nepal is bound to fulfil and/or implement the obligations contained in the CAT. For the fulfilment of the obligation, Nepal requires implementation of the provisions of the CAT through its constitution and legislation at the domestic level to prevent acts of torture and other forms of ill-treatment.¹³ Moreover, the CAT/C raised concerns about the widespread use of torture by law enforcement officials and recommended that Nepal should publicly condemn the practice of torture and take effective measures to prevent the acts of torture.¹⁴ Similarly, Nepal has often committed to criminalising torture through its periodic reports and comments of the concluding observation of the Committee.¹⁵ Likewise, the CAT/C consistently has recommended that the Government of Nepal criminalise torture¹⁶ through its concluding observations. The Supreme Court of Nepal has issued a mandamus order to the Government of Nepal to promulgate law which defines torture as a punishable crime in line with the CAT.¹⁷

With regards to the domestication process of these international instruments, Nepal does not have a clear procedure to implement the provisions of the instruments. The *Interim Constitution of Nepal 2007* Article 156 found mainly four types of international conventions which needs to be passed by the two-third majority of the

12 See REDRESS, *Bringing the International Prohibition of Torture home* (REDRESS Trust 2006) 26 ('REDRESS Report').

13 CAT art 2.

14 Committee against Torture (CAT/C), *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and recommendations of the Committee Against Torture* UN Doc. CAT/C/NEP/CO/2 (13 April 2007) para 13.

15 Committee Against Torture (CAT/C), *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Initial Report of State Parties due in 1992: Nepal*, UN Doc CAT/C/16/Add.3, (30 September 1993) para 3 ('Initial Report of Nepal'); CAT/C, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Second Periodic Report of state parties due in 1996: Nepal*, UN Doc CAT/C/33/Add.6 (14 January 2005) para 66 ('Second periodic Report of Nepal'); CAT/C, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention: Comments by the Government of Nepal to the Conclusions and Recommendations of the Committee Against Torture: Nepal*, UN Doc CAT/C/NEP/CO/2Add.1 (29 January 2008) para 1 ('CAT/C Conclusion and Recommendations 2008'); CAT/C, *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012), para 114 <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm> ('CAT/C Confidential Inquiry report 2011').

16 Committee Against Torture (CAT/C), *List of issues to be considered during the examination of the second periodic report on Nepal* UN Doc CAT/C/35/L/NPL (30 June 2005) para 2.

17 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452 (Supreme Court of Nepal).

Legislature Parliament.¹⁸ According to the *Nepal Treaty Act 1990*, the provision of the accessed or ratified treaty shall be implemented as Nepalese Law. If the treaty provision contradicts Nepalese legal provision, the treaty provision supersedes the contradictory parts of the Nepalese law.¹⁹ The provision of the *Nepal Treaty Act 1990* follows the principle of monism. Furthermore, another provision of *Nepal Treaty Act 1991* focuses on enactment of laws for any international provisions' enforcement;

Any treaty which has not been ratified, acceded to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.²⁰

The provisions seem to be close to the dualist approach of domestication of international conventions. Therefore, the domestication process in Nepalese legal system is a mix of the Monist and Dualist approaches.

This chapter is divided into four sub-headings. The first subheading deals with the introduction. Positive initiatives for the implementation of the CAT are presented and discussed in the second subheading which covers the *Constitution*, legal and draft bill provisions. The third subheading analyses contradictory legal provisions in line with the CAT and other relevant human rights documents and inadequacies or gaps in Nepalese legal provision for the implementation of the CAT. The fourth subheading concludes the chapter with some recommendations.

3.2 Initiatives to incorporate the CAT in Nepalese legal framework

After accession to the CAT, Nepal has included some provisions related to rights to freedom from torture and other forms of ill-treatment in the *Constitution* and statutory law. The *Interim Constitution of Nepal 2007* stipulates that the right to freedom from torture are fundamental right and the CRTA has been promulgated to incorporate the provisions of the CAT. The NHRCA and *Evidence Act 1974* also provide for the prevention of torture in Nepal. The major provisions relating to prevention of torture are detailed next.

3.2.1 Constitutional provisions

The *Interim Constitution of Nepal 2007* guarantees the right to freedom from torture as fundamental rights.²¹

(1) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.

18 *Interim Constitution of Nepal 2007* (Nepal) art 156.

19 *Nepal Treaty Act 1990* (Nepal) s 9(1).

20 *Nepal Treaty Act 1990* (Nepal) s 9(2).

21 *Interim Constitution of Nepal 2007* (Nepal) art 26.

(2) Any act referred to in Clause (1) shall be punishable by law, and any person so treated shall be provided with such compensation as may be determined by law

The *Constitution of Nepal* provides significant provisions for the prevention of torture and other forms of ill-treatment in Nepal. The provisions assure that no one shall be subjected to physical or psychological torture and other forms of ill-treatment during the process of investigation and trial; if it happens anywhere, compensation shall be provided to the victim of torture and punishment to perpetrator as defined by the statutory law. More notably, for the first time in the history of Nepal, the *Constitution* has stipulated a positive way to criminalise torture in Nepal. The constitutional provision is a major step to adopt the provisions of the CAT.

Furthermore, the *Constitution* guarantees constitutional remedies for fundamental rights.²² This right can be protected and ensured by the Supreme Court by exercising its extraordinary jurisdiction.²³ Similarly, the *Interim Constitution* has established the National Human Rights Commission (NHRC) as a monitoring body and authorised it to investigate incidents of torture and other types of human rights violation.²⁴ Nevertheless, the constitutional provision refers to law for the implementation of the fundamental rights or prevention of torture. With regards to the implementation of the constitutional provision, the Supreme Court of Nepal defined in a case related to torture compensation that the ‘constitutional provision itself is not sufficient, special law is required to implement fundamental rights’.²⁵

3.2.2 Legislative provisions

3.2.2.1 Compensation Relating to Torture Act 1996

In order to fulfil Nepalese obligations under the CAT, the CRTA has been promulgated. Although the CRTA has been criticised by national and international organisations for its failure to comply with the obligations,²⁶ it is a positive initiative for the implementation of the provisions of the CAT.

The preamble of Act states that the essence of the CRTA is to provide compensation to victims of torture.²⁷ Thus, the Act focus on compensation to victims of torture. The CRTA defines the term "Torture" as ‘physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and

22 *Interim Constitution of Nepal 2007* (Nepal) art 32.

23 *Interim Constitution of Nepal 2007* (Nepal) art 107.

24 *Interim Constitution of Nepal 2007* (Nepal) art 131.

25 *Purna Bahadur Chhantyal v Chief District Officer Dang*, Nepal Law Journal, 1991(Nepal Kanoon Patrika 2048), p 298 (Supreme Court of Nepal). In this case a victim of torture filed a case for compensation as per the fundamental rights of the *Constitution* but the Supreme Court defined the requirement of new law which helps to guarantee the implementation of the fundamental rights.

26 See, eg, Advocacy Forum, *Nepal is government Unable or Unwilling to Prevent and Investigate Torture?* (Advocacy Forum, 2013) 48; Amnesty International (2001) *Nepal Make Torture Crime* (Amnesty International, 2001) 7-9; Bhogendra Sharma and Rajendra Ghimire (2005) *Combating Torture in Nepal Problems and Prospect* (Centre for Victims of Torture (CVICT), 2005) 29-33.

27 *Compensation Relating to Torture Act 1996* (Nepal) Preamble.

includes any cruel, inhuman or degrading treatment given to him/her'.²⁸ The Act accepts the essence of State-sponsored torture such as physical and mental torture inflicted in the process of investigation, inquiry or trial. The act of torture in custody has been defined in the statutory law as a positive step for the protection of the right to freedom from torture in Nepal. Furthermore, the definition of the CRTA includes other cruel, inhuman or degrading treatment as a form of torture which is another proactive and positive provision in the Act.

Furthermore, the Act assures that no person in detention in the course of investigation, inquiry or trial or for any other reason shall be subjected to torture.²⁹ The provision prohibits torture by any government employee. If any employee of the Government of Nepal inflicts torture upon any person, the victim shall be provided compensation.³⁰ For compensation, the victim or family member can file a complaint in the concerned district court; if the contents of the complaint are found to be true or correct, the district court awards a maximum compensation up to NRs 100,000 (approximately 1000 US dollars) for the torture inflicted.³¹ The CRTA does accept torture as a matter for which the victim should be compensated.

Similarly, the CRTA further provides another positive provision relating to the medical examination of detainees during the process of arrest and release.³² The provision contains that physical condition of the detainee shall be examined by government-authorized medical practitioner(s) or if a health practitioner is not available, the concerned officer should examine the health condition of the suspect and the health report should be submitted to the concerned court.³³ The provision grants authority to the district court to monitor torture in police custody or detention centre. Furthermore, if it is suspected that the detainee was tortured in a detention, family members or lawyer of the victim can file a petition in the concerned court for medical examination of the victim. Based on the petition, the court may order to examine the detainee's physical and psychological condition, and if treatment is necessary, medical expenses will be covered by the government.³⁴ The provision allows the torture victim to complain against torture and perpetrator. It is another positive provision to protect right to freedom from torture and other forms of ill-treatment.

Likewise, the court shall order the concerned authority to take departmental action against the government employee who committed torture.³⁵ The execution of compensation related court decision shall be implemented within 35 days after the application date.³⁶

28 *Compensation Relating to Torture Act 1996* (Nepal) s 2(a).

29 *Compensation Relating to Torture Act 1996* (Nepal) s 3.

30 *Compensation Relating to Torture Act 1996* (Nepal) s 4.

31 *Compensation Relating to Torture Act 1996* (Nepal) s 6 (1).

32 *Compensation Relating to Torture Act 1996* (Nepal) s 3 (2).

33 *Compensation Relating to Torture Act 1996* (Nepal) s 3(3).

34 *Compensation Relating to Torture Act 1996* (Nepal) s 5.

35 *Compensation Relating to Torture Act 1996* (Nepal) s 7.

36 *Compensation Relating to Torture Act 1996* (Nepal) s 9.

3.2.2.2 National Human Rights Commission Act 2012

The *Interim Constitution* has established NHRC as an independent and autonomous body. The main responsibility of the NHRC is to ensure respect, protection and promotion of human rights in Nepal.³⁷ The NHRC, however, is only a recommending body.

The *Constitution* and NHRCA grant authority to the NHRC to conduct inquiries into, investigations of, and recommendations for action against the perpetrators on the matters of violation of human rights including torture and other forms of ill-treatment, upon a complaint filed and pro-active initiative of the Commission.³⁸ In the course of action, the NHRC can forward recommendations to the Government of Nepal for compensation up to NRs 300,000 (approximately 3000 US dollars) to victims of human rights violation³⁹ and departmental actions against perpetrators. In this process, the NHRC can conduct inquiry and investigation on incidents of human rights violations including torture and other forms of ill-treatment⁴⁰ and NHRC can issue an order to stop human rights violation based on *prime facie* fact.⁴¹ Similarly, the NHRC also conducts human rights monitoring.⁴²

With regards to procedure matter, the *Constitution* grants authority to the NHRC to exercise the same powers as the court for the purpose of requiring any person to appear before the Commission for recording his/her statement or information and examining them, receiving and examining evidence as well as ordering for the production of any physical proof.⁴³

In addition, the NHRC conducts various types of promotional activities in Nepal such as to carry out research on the issue of human rights, review of existing state of human rights and organise other human rights education program for the protection and promotion of human rights including the rights against torture and other forms of ill-treatment.⁴⁴

These provisions protect the rights of an individual and inclusion of some provisions of the CAT such as investigation on incident of human rights violation related to Article 12 and award compensation to victim related to Article 14 of the CAT. These provisions include all human rights related issues including right to freedom from torture as functions of NHRC.

37 *The Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4.

38 *The Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4

39 *National Human Rights Commission Act 2012* (Nepal) s 16 (3).

40 *National Human Rights Commission Act 2012* (Nepal) s 12.

41 *National Human Rights Commission Act 2012* (Nepal) s 11.

42 *The Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4.

43 *The Interim Constitution of Nepal 2007* (Nepal) art 132 (3) (a).

44 *National Human Rights Commission Act 2012* (Nepal) s 4.

3.2.2.3 Other legal provisions

Some other Acts have stipulated provisions related to rights to freedom from torture in Nepal.

The *Evidence Act 1974* attempts to establish the grounds of admissibility of a confession of accused as evidence. In accordance with the provision, for an expression/confession to be admissible as evidence, it must be made by the accused in a position of consciously;⁴⁵ and the fact was not expressed through putting pressure or torture or threat of torture or putting the accuse in a condition to express the fact against his/her will.⁴⁶ The provision gives positive backing to the independent judiciary to protect right to freedom from torture which relates to Article 15 of the CAT.

The *Nepal Treaty Act 1990* defines that the provision of the accessed or ratified treaty shall be implemented as Nepalese law. If the treaty provision contradicts Nepalese legal provisions, the treaty's provisions will supersede the contradictory part of the law.⁴⁷ This provision is a milestone in the implementation of the provisions of international human rights instruments in Nepal. It can be argued that the provision of the CAT has directly come into enforcement in Nepal. However, many provisions of the CAT refer as state obligations to promulgate laws and mechanisms. For example, the CAT compels a State party to criminalise act of torture but it does not specify the limit of punishment, therefore it is up to the State's discretion.

The *Nepal Army Act 2006* stipulates that any acts such as corruption, theft, torture and disappearance committed by army personnel is defined as an offence that will be a matter for a court martial.⁴⁸ The Act proposes an investigation committee which will be headed by the Deputy Attorney General as appointed by the Government of Nepal.⁴⁹ It is a positive provision and acknowledgement to take torture as an offence in the *Army Act*. However, the Act proposes departmental action as penalties, barring the offenders from salary increment twice or promotion for two years.⁵⁰ The provision does not reflect any punishment of imprisonment.

The *Children Act 1992* prohibits torture and other forms of ill-treatment of children.⁵¹ Likewise, the Illegal Detention chapter of the *National Code 1963* also provides that if any person has to be arrested and detained, the person shall be provided food and water. If, a person is detained otherwise or without providing food and water, it shall be considered to be an offence.⁵² The Code provides fines for such wrongdoers. If the detainee, who is under twelve or above sixty years of age is not provided with food and water for more than seven days, dies, it would be taken as a case of murder and

45 *Evidence Act 1974* (Nepal) s 9 (2) (A) (1).

46 *Evidence Act 1974* (Nepal) s 9 (2) (A) (2).

47 *Nepal Treaty Act 1990* (Nepal) s 9(1).

48 *Nepal Army Act 2006* (Nepal) s 62 (1).

49 *Nepal Army Act 2006* (Nepal) s 62 (2).

50 *Nepal Army Act 2006* (Nepal) s 101 (2) (k).

51 *Children Act 1994* (Nepal) s 7.

52 *National Code 1963* (Nepal) ch 8 no 1.

the offender shall be charged with murder.⁵³ The *Police Act 1955* stipulates that the detainees must be provided necessary food in detention centres.⁵⁴ The *Public Security Act 1989* states that anyone can file a case at district court against preventive detention for compensation and the court may rule compensation to the victim⁵⁵ and departmental action against the perpetrator.⁵⁶ These laws prevent the act of torture in various contexts in detention centres in Nepal. The *State Cases Act 1992* contains a provision which discourages torture. For instance: a statement from a suspect in criminal investigation shall be taken in the presence of the government attorney.⁵⁷ It is believed that presence of the government attorney may discourage the use of torture and other forms of ill-treatment in criminal investigation.

3.2.3 The Penal Code Bill and Anti-Torture Bill

The *Penal Code Bill 2011* was registered into the Legislature Parliament in January 2011. The Code proposes criminalisation of torture in Nepal and defines torture as a punishable crime. The punishment proposes maximum five years imprisonment or NRs 50,000 (approximately 500 US dollars) fine or both for torture related crime to perpetrator.⁵⁸ Furthermore, the Bill states that if a person dies as a result of torture, the torturer shall be punished with life imprisonment -- the same punishment that is handed down to someone when proven guilty in a murder case.⁵⁹

The *Anti-Torture Bill 2011* was registered in the Legislature Parliament in April 2012 by the Government of Nepal. The Bill is a positive step towards criminalising torture and for the enforcement of the entire provisions of the CAT in Nepal. It defines the term torture and other cruel, inhuman or degrading treatment or punishment in line with the CAT.⁶⁰ The Bill provides a descriptive list of types of torture.⁶¹ Most importantly, the Bill defines torture as a punishable crime⁶² and proposes Five Years' imprisonment or NRs 50,000 (approximately 500 US dollars) fine or both as maximum punishment to perpetrator,⁶³ and NRs 500,000 (approximately 5000 US dollars) compensation to victims of torture.⁶⁴ The senior commander in chief of the concerned security office will also be held responsible for torture and subjected to punishment.⁶⁵ Furthermore, the Bill includes the right of non-extradition of any person, if there is risk that he/she will be subjected to torture or other forms of ill-treatment in the concerned state.⁶⁶

53 *National Code 1963* (Nepal) ch 8 no 2.

54 *Police Act 2055* (Nepal) s 15 (h).

55 *Public Security Act 1989* (Nepal) s 12 (a).

56 *Public Security Act 1989* (Nepal) s 13.

57 *State Cases Act 1992* (Nepal) s 9(1).

58 Penal Code Bill 2011 (Nepal) s 169.

59 Penal Code Bill 2011 (Nepal) s 40.

60 Anti-Torture Bill 2011 (Nepal) s 2.

61 Anti-Torture Bill 2011 (Nepal) s 4.

62 Anti-Torture Bill 2011 (Nepal) ss 3, 5.

63 Anti-Torture Bill 2011 (Nepal) s 22.

64 Anti-Torture Bill 2011 (Nepal) s 23.

65 Anti-Torture Bill 2011 (Nepal) s7.

66 Anti-Torture Bill 2011 (Nepal) s 36.

However, the Code and Bill are yet to be passed by the Parliament. Some provisions of the Bill are still inconsistent with the CAT and other human rights instruments. For example, the Bill proposes a six month statute of limitation for registering a torture related complaint that is inconsistent with the notion of human rights.⁶⁷ The CAT/C and the Human Rights Committee (CCPR/C) have expressed concern over these issues and defined that torture should not be subject to any limitation for complaint.⁶⁸ Similarly, the Bill proposes investigation of incidents of torture by higher police officials. In such situation, it would be uncertain if the investigation will be impartial, as both the perpetrator and investigator will be police officials.

3.3 Inconsistent legal provisions and inadequacy and gaps in legal provisions

3.3.1 Inconsistent legal provisions

As noted above, the *Interim Constitution of Nepal 2007* guarantees the right to freedom from torture as the fundamental right and defines a non-derogable right during the period of public emergency.⁶⁹ However, many laws are inconsistent with the provision of the CAT and the *Constitution*.

A broader aim of the CRTA is to integrate the provisions of the CAT in Nepal. Nevertheless, there are many provisions even in the CRTA that contradict and are inconsistent with the CAT. The preamble of the Act clearly mentions that the main objective of the CRTA is to provide compensation,⁷⁰ implying that the Act does not focus on preventing torture. Therefore the Act does not comply with the CAT.⁷¹ The definition of the CRTA mainly covers the incident within the custody or detention whereas the definition of the Convention does not specify the place of detention. For example, in judicial practice, the District Court of Sunsari defined that ‘it is not found that Mr. Yadav (the victim) was beaten in police custody. He was beaten by the police in an open place in front of the public so the action cannot be described as ‘torture’ and the Appellate Court, Biratnagar, upheld the decision.⁷² In another case, the victim claimed that he was beaten in the canteen of a police office. On the basis of the facts,

67 *Basic Principles and Guidelines*, above n 9, principle 6.

68 Human Rights Committee (CCPR/C), General Comment No 31, above n 1, para 18; Committee Against Torture (CAT/C), *Conclusions and recommendations of the Committee Against Torture*, UN Doc. CAT/C/NPL/CO/2 (13 April 2007) para 28.

69 *Interim Constitution of Nepal 2007* (Nepal) art 43 (7).

70 *Compensation Relating to Torture Act 1996* (Nepal) Preamble.

71 CAT open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1. Torture is defined as:

‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

72 *Sitaram Yadav v District Court Sunsari, 1998*, As cited in *Alternative Report to Second, Third and Forth (Combined) State Report of Nepal submitted to Convention Against Torture* (September 2005) 14.

the court concluded that the victim was not taken into custody and there was no reason for him to have been taken into custody, thus the case was not related to torture in accordance to the CRTA.⁷³

The CRTA defines the term “torture” as ‘*physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her*’.⁷⁴ The definition of the CRTA seems broader in terms of the involvement of public officials. However, it does not state that torture should be inflicted by a government official or need his/her encouragement or acquiescence or consent of a public official or other person acting in an official capacity. There are many practices where private individuals are allowed to enter the custody and commit torture.⁷⁵ Furthermore, the definition of the Act omits the purpose of torture, action of pain and suffering to the victims and status of the perpetrators.

Likewise, according to the Section 3 (2) of the CRTA ‘*the concerned officer, at the time of detention and release of any person, shall have that person’s physical condition examined, as far as by a doctor in government service, and when the doctor is not available, by himself, and shall keep and maintain records thereof*’.⁷⁶ The provision is not compatible with the definition of the victims of torture; it ignores mental condition of the victims.

The CAT/C has consistently recommended to the Government of Nepal that it should incorporate an extensive definition in line with Article 1 of the CAT before the promulgation of the CRTA in 1994 as the first concluding observations⁷⁷ and after the promulgation of the CRTA, the Committee recommended the same to the Government of Nepal in 2005.

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.⁷⁸

73 *Dil Kumar Tamang v District Police Office and Others*, Sunsari District Court (decision of 21 August 2009).

74 *Compensation Relating to Torture Act 1996* (Nepal) s 2.

75 Advocacy Forum, INHIRED International, Informal Sector Service Centre (Insec), Centre for Victims of Torture (CVICT) and Forum for Protection of People’s Rights (PPR) *Criminalise Torture*, (Coalition against Torture, 2009) 18 (*‘Criminalise Torture’*).

76 *Compensation Relating to Torture Act 1996*(Nepal) s 3(2).

77 CAT/C, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusion and Recommendation of the Committee Against Torture: Nepal*, UN Doc A/49/94, (21 April 1994) paras 142, 146 (*‘CAT/C Conclusions and Recommendations 1994’*).

78 CAT/C, *Consideration of Reports Submitted by States Parties Under Article 19 of The Convention, Conclusion and recommendation of the Committee Against Torture: Nepal*, UN Doc CAT/C/NPL/CO/2, (13 April 2007), para 12. The CAT/C re-issued conclusion and recommendation for a technical reasons.

The Committee repeated the recommendation to the Government of Nepal in 2012.⁷⁹ The Government of Nepal has several times agreed to broaden the definition of torture in the spirit of the Convention. The Government has drafted anti-torture law which defines torture in line with the CAT; however, it is yet to be promulgated. These facts show that the Government of Nepal has accepted the gaps. Nevertheless, the government does not seem committed to the provisions of the CAT and protection from torture.

The Act provides 35 days limitation from incident of torture and date of release to file a case against perpetrator(s).⁸⁰ This is impractical because the victim who suffered physical or mental torture faces difficulties regarding a decision to file a case due to his/her health condition and fear of re-victimisation or intimidation from the perpetrator. The provision is against the principle of human rights. Similarly, government attorney shall appear in the court on behalf of the employee and defend the perpetrator.⁸¹ The Supreme Court of Nepal accepted the provision and explained that as a government employee, the government attorney can defend on behalf of torturer.⁸² The provision hence maintains the double standards of the State. The State is obligated to protect the right to freedom from torture; in the process if any torture related incident happens anywhere in Nepal, the government attorney is responsible to investigate and prosecute the torturer. On the other hand, the government attorney who is responsible for investigation of crime (torture) will plead or represent on behalf of the suspected torturer in accordance with the provision of CRTA that creates controversy as the State itself supports the perpetrator in torture case. Therefore, the CRTA regards torture as a matter of compensation or a simple civil matter rather than criminal liability of concerned person or authority.

In addition, there are many existing legal provisions which contradict with the CAT and other human rights instruments. These laws allow detention without arrest warrant, detention with out charge, use of force etc. The provisions provoke an incommunicado situation in practice. The Special Rapporteur on Torture reported the case of incommunicado detention in the practical level and recommended the government to make it illegal and release the persons who are in incommucado immediately.⁸³ The CCPR/C explains that the concerned authority should maintain details about suspect with clear record of detention for administrative and judicial proceedings to be kept in registers readily available and accessible to those concerned, including relatives and friends. Detailed record should also be made against incommunicado detention. In regards to this, states parties should ensure that the place of detention is free from any equipment liable to be used for inflicting torture or ill-treatment.⁸⁴ Likewise, the

79 CAT/C Confidential Inquiry report 2011, above n 15, para 109 (b).

80 *Compensation Relating to Torture Act 1996* (Nepal) s 5(1).

81 *Compensation Relating to Torture Act 1996* (Nepal) s 10.

82 *Rabindra Bhattarai v His Majesty Government of Nepal*, Nepal Kanoon Patrika 1998 [Nepal Law Journal, 2055] Vol 11, 615 (Supreme Court of Nepal).

83 See Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, , UN Doc A/HRC/4/33/Aadd.2 (15 March 2007) para 420.

84 See Human Rights Committee, *General Comment No 20, Article 7 (Prohibition of Torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol.1) (10 March 1992) para 11 ('*Human Rights Committee, General Comment 20*').

Human Rights Council (HRC) more clearly defines arrest without warrant, detention in secret places and preventive detention as the preparation of torture. The Council defines;

Prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and the dignity of the person and to ensure that secret places of detention and interrogation are abolished.⁸⁵

Contrary to these provision, the *Nepal Police Act 1955* allows the officer to use force for maintaining discipline on junior staff or in case any subordinate is careless or shows negligence or is incapable of fulfilling his or her task.⁸⁶ The senior officer may dismiss him or her, expel him or her, demote the rank or salary or if he or she so deems necessary, the senior official takes him or her in detention or burdens the person in question with additional ground duty or fatigue as punishment.⁸⁷ The punishment is applied only to junior level police. The provision found the word ‘fatigue’ which reflects a physical hardship to the person. Furthermore, the *Police Act 1955* grants police the power to arrest any person without disclosing any information of arrest based on reasonable suspicion.⁸⁸ The *Prison Act 1963* still gives authority to prison administration to keep convicted prisoners in isolation or separate place.⁸⁹ It is a kind of torture that still exists in the Act or prison system. The provisions contradict the whole essence of the CAT.

The *Armed Police Force Act 2001* stipulates: ‘*An armed police shall not be liable of penalty for a result caused while discharging duty or exercising the power in good faith to be discharged or exercised under this Act or Rules framed hereunder*’.⁹⁰ The provision allows the use of force in the name of internal security or self-defence which might provoke torture and other forms of ill-treatment within the institution. Similarly, *Nepal Army Act 2006* stipulates a provision that ‘*no case may be filed in any court under the jurisdiction of the Act against the person who commits any act in good faith, in the course of discharging his duties, resulting in the death of or loss suffered by any person*’.⁹¹ The provision of the Act gives immunity in the name of good faith if any one commits torture and other forms of ill-treatment to other in the name of maintaining discipline and personal development. These provisions are against the right to freedom from torture. As a member State, Nepal is required to review such types of contradictory provisions according to Article 11 of the CAT and they need to be amended.

85 See Human Rights Council, *Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur*, UN Doc A/HRC/RES/16/23 no 8 (d).

86 *Police Act 1955* (Nepal) s 9(4).

87 *Police Act 1955* (Nepal) s 9(4).

88 *Police Act 1955* (Nepal) s 17.

89 *Prison Act 1963* (Nepal) s 6(2).

90 *Armed Police Force Act 2001* (Nepal) s 26.

91 *Nepal Army Act 2006* (Nepal) s 22.

The *Forest Act 1993* grants power to the forest officer to take possession of any house or land by using necessary force.⁹² The forest officer may use force for the protection of offices⁹³ and to prevent forest action against the alleged person.⁹⁴ The Act does not specify how much power can be used by the concerned officer and what types of power would be included in using force. These legislative provisions contradict the Article 2 of the CAT. *National Park and Wildlife Protection Act 1973* provides authority to concerned officer to arrest any wrongdoer under the Act without warrant. If the wrongdoer protests against the action, the officer may use force against him/her.⁹⁵ Chapter V of the thesis includes examples of the people who were tortured by officer of National park and Wildlife Protection officer (see cases in Chapter – V).

Similarly, many Acts have granted authority to concerned officers to arrest a person under respective wrongdoings such as *Customs Act 2007* which grants customs officer to arrest and detain a person in customs custody.⁹⁶ The officer can use maximum power to arrest a person if that person uses force or tries to escape or go away and cannot be arrested for the time being; the employee deputed for security on the spot may use force including opening fire.⁹⁷ The Act does not specify how much power can be used in this process.

Furthermore, many Acts grant power to arrest a person without warrant. For example, the *Arms and Ammunition Act 2010* grants power to a police officer or the chief district officer or any person assigned by the Chief District Officer (CDO) to arrest without warrant any person carrying arms without licence.⁹⁸ Police can arrest any person who is involved in narcotic drugs and detention can be extended to 90 days with the approval from the CDO under the *Narcotic Drugs (Control) Act 1976*.⁹⁹ Similarly, the *Public Offence Act 1970* grants police the power to arrest any person who is a troublemaker in maintaining peace and order in the society and detention can be extended up to 35 days with the approval from CDO.¹⁰⁰ The *Interim Constitution* guarantees the right to be informed about charge of arrest and the suspect must be produced before judge within 24 hours of arrest. Similarly, ICCPR provides anyone who is arrested shall be informed about the reasons of arrest at the time of arrest.¹⁰¹ Furthermore, the *Public Security Act 1989* grants authority to CDO to take a person into preventive detention ‘if there is reasonable and adequate ground to immediately prevent a person from acting in any manner prejudicial to the sovereignty, integrity or public peace and order in Nepal’.¹⁰² Similarly, the *Local Administration Act 1971* also allows authority to arrest and take any person into preventive detention who is

92 *Forest Act 1993* (Nepal) s 15.

93 *Forest Act 1993* (Nepal) s 55.

94 *Forest Act 1993* (Nepal) s 56.

95 *Public Security Act 1989* (Nepal) s 24.

96 *Custom Act 2007* (Nepal) s 40 (1).

97 *Custom Act 2007* (Nepal) s 44 (1).

98 *Arms and Ammunition Act 1962* (Nepal) s 5 and 6.

99 *Narcotic Drugs (Control) Act 1976* (Nepal) s 22 (c).

100 *Public Offence Act 1970* (Nepal) s 4.

101 *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171(enter into force 23 March 1976) art 9(2) (‘ICCPR’).

102 *Public Security Act 1989* (Nepal) s 5.

involved in violent and destructive acts.¹⁰³ These provisions are against the notion of human rights and support the practise of torture and other forms of ill-treatment. There are many examples which are noticed in case studies, in which many people were arrested and tortured and released without any formal charge. Some examples cases are included in Chapter IV (see detail in Chapter IV).

The *Children Act 1992* stipulates that children shall have the right to freedom from torture and cruel treatment.¹⁰⁴ However, the Act excludes ‘the act of scolding and minor beating to child by father, mother, and member of the family, guardian or teacher for the interests of the child himself/ herself shall not be deemed violation of this Section’. The provision allows minor beating. However, corporal punishments in schools are frequently practised in schools by teachers. Many national newspapers covered news such as ‘teacher’s wrath falls on boy for not doing his homework’.¹⁰⁵ In this case, an eight years old student was severely beaten by the teacher. The CCPR/C defines the prohibition of torture and other forms of ill-treatment under Article 7 of ICCPR, that ‘the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure in particular, children, pupils and patients in teaching and medical institutions’.¹⁰⁶

These contradictory laws and rules have to be reviewed in line with international human rights instruments especially in accordance with Article 11 of the CAT. Nepal has an affirmative obligation to systematically review the rules and conditions of detention with the aim of reducing torture and coercion during interrogation and detention.¹⁰⁷

These provisions stipulated in various Acts still contradict with the CAT as a result of the contradictory provisions contributing to the infliction of torture and other forms of ill-treatment during criminal investigation and maintaining law and order situation in Nepal. In addition to the contradictory provisions, there are many State obligations yet to be fulfilled which are directly related to respect and protection of individual’s right to freedom from torture and other forms of ill-treatment. These gaps are discussed in the next section.

3.3.2 Inadequate legal provisions

As stated, the CRTA primarily focuses on compensation; therefore it is inadequate in complying with several of the provisions of the CAT. For instance, it does not criminalise torture as punishable crime, and there is no investigation and prosecution mechanism and there lacks provisions for protection of victims and witnesses. The Special Rapporteur on Torture noted in his report that the legal framework concerning

103 *Local Administration Act 1971*(Nepal) s 6 (B).

104 *Children Act 1992* (Nepal) s 7.

105 See ‘Teacher’s wrath falls on boy for not doing his Homework’ *News, The Kathmandu Post*, 3 June 2013 < <http://www.ekantipur.com/2013/07/04/top-story/teachers-wrath-falls-on-boy-for-not-doing-his-homework/374276.html>>.

106 See Human Rights Committee, General Comment 20, above n 84, para 5.

107 CAT art 11.

prosecution of serious human rights violations remains inadequate.¹⁰⁸ Mostly the following legal gaps and inadequate laws create a challenge to protect the right to freedom from torture.

3.3.2.1 Lack of criminalisation of torture

The *Interim Constitution of Nepal 2007* guarantees rights against torture and other forms of ill-treatment as fundamental rights and defines torture as a punishable crime as prescribed by the law. However, the acts of torture and other forms of ill-treatment are yet to be criminalised under a statutory law. *National Code (Muluki Ain) 1963* stipulates a provision related to illegal detention, which provides that any detainee should be provided food and water as referred in the Code. However, it does not cover the distinctive nature and gravity of torture and other forms of ill-treatment.¹⁰⁹ Furthermore, the Code provides some other legal provisions related to assault and murder as a general criminal law. These provisions do not cover the acts of torture and other forms of ill-treatment. Thus, there is still a gap in the implementation of the provision of the CAT to criminalise torture in Nepal. The main goal of the CAT is to criminalise the incidents of torture as a punishable crime, which requires state party to ensure that all incidents of torture, attempt to commit torture, complicity and participation of torture are criminal offenses¹¹⁰ and are subjected to appropriate penalties to the perpetrator that take into account the grave nature of their crimes.¹¹¹ This is the heart of the Convention which effects the entire provisions of the CAT and its implementation such as investigation of torture incident, prosecution and reparation to torture victims.

Furthermore, CAT/C, the Special Rapporteur on Torture, the HRC through the Universal Periodic Review have recommended to the Government of Nepal several times to criminalise the acts of torture in Nepal.¹¹² Although the Government of Nepal has promised to promulgate a new law criminalising torture, it is yet to be done.

Under the CAT and the recommendations of various UN mechanisms, Nepal must criminalise the acts of torture and provide appropriate penalties to the perpetrators of torture. However, the CRTA and any other criminal law do not define torture as a criminal offence. The CRTA takes torture as a civil case between a government employee and a civilian where plaintiff must hire a lawyer, produce all evidences of the case, and government lawyer represents on behalf of the alleged torturer., The

108 See Manfred Nowak, Special Rapporteur on Torture and other Cruel Inhuman or Degrading Treatment or Punishment, *Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Cameroon, Chile, China, Colombia, Georgia, Jordan, Kenya, Mexico, Mongolia, Nepal, Pakistan, Russian Federation, Spain, Turkey, Uzbekistan and Venezuela*, UN Doc A/HRC/C/7/3/Add.2 (18 February 2008) para 416.

109 *National Code (Muluki Ain) 1963*, Ch 8.

110 CAT art 4 (1).

111 Ibid art 4(2).

112 See, eg, CAT/C, Second Periodic Report of Nepal, above n 15, para 12; Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006) para 33 (b) ('Manfred Nowak, Report by Special Rapporteur 2006'); Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Nepal* UN Doc A/HRC/17/5 (8 March 2011) para 106.3.

CRTA states ‘the District Court may order the concerned body to take departmental action against the government employee who has inflicted torture, in accordance with the prevailing law’.¹¹³ The provision of the CRTA calls for departmental action as an optional provision by using the word ‘may’ which means district court may order departmental action. The Special Rapporteur on Torture stated that: ‘The disciplinary sanctions and lenient penalties imposed on public officials for their alleged involvement in torture and other forms of ill-treatment contribute to the culture of impunity’.¹¹⁴ A report shows that a total of 208 torture victims filed torture compensation cases in various courts during the first twelve years of the CRTA. Among the 208 cases, the court decided in favour of only 52 victims and only seven victims (13.46%) have thus received compensation. So far, none of the perpetrators has actually been brought to justice.¹¹⁵ Out of forty-four recommendations made by the NHRC regarding departmental action against the perpetrator, not a single perpetrator has received such punishment.¹¹⁶ The situation justifies that even the provision of the CRTA has not been practised.

International communities including various UN Mechanisms are putting pressure continuously on the government to criminalise torture in Nepal. Most recently, Nepal reiterated its commitment to promulgate anti-torture law from Parliament which is in line with the CAT.¹¹⁷ The Committee chairperson and members of the CCPR/C and experts asked about the status of criminalisation of torture in Nepal on March 19, 2014. The government delegate and Secretary of the Office of the Prime Minister repeated government’s commitment to criminalise torture by passing the draft bills.¹¹⁸ Similarly, the CCPR/C has instructed the Government of Nepal to conduct thorough investigation and prosecute and punish the concerned who committed torture, arbitrary detention and incommunicado detention in some cases.¹¹⁹ Nevertheless, the recommendations are yet to be implemented. The consistent commitment from the Government of Nepal is a positive sign to criminalise torture in statutory law. Nevertheless, as stated by a government representative in the meeting of the CCPR/C reiterated that ‘Nepal is in transition following a decade-long violent conflict’. Peace building, constitutional making and addressing other economic and social challenges

113 *Compensation Relating to Torture Act 1996* (Nepal) s 7.

114 See Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/C/19/61/Add.3 (1 March 2012) para 81 (‘Juan E. Mendez, *Special Rapporteur Report 2012*’).

115 See Advocacy Forum, *Hope and Frustration, Assessing the Impact of Nepal’s Torture Compensation Act 1996*, (Advocacy Forum 2008) 1.

116 See National Human Rights Commission (NHRC), *Yatana Birundda Ko Adhikar* [Rights Against Torture], (NHRC, 2012) 11.

117 Human Rights Committee (CCPR/C), *List of issues in relation to the second periodic report of Nepal; Replies of Nepal to the list of issues*, UN Doc CCPR/C/NPL/Q/2/Add.1, (31 March 2014) para 29.

118 See, eg, United Nations Human Rights, Office of High Commissioners, *Human Rights Committee considers report of Nepal* (19 March 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14406&LangID=E>>.

119 Human Rights Committee, *Views: Communication No 1961/2008*, 108th sess, UN Doc. CCPR/C/108/D/1761/2008 (27 April 2011) para 9 (‘*Yubraj Giri v Nepal*’); Human Rights Committee, *Views: Communication No 2018/2010*, 112th sess, UN Doc. CCPR/C/112/D/1761/2018 (8 January 2015) para 13 (‘*Kedar Chaulagain v Nepal*’).

are obvious priorities of the country. Therefore, freedom from torture might be taken as a minor issue compared to other items on the political agenda. This could be a reason why it is taking so long to criminalise torture. However, that cannot be an excusable reason. It clearly shows the lack of political commitment when it comes to criminalising torture in Nepal.

3.3.2.2 Lack of clear jurisdiction

States parties to the CAT undertake to establish domestic¹²⁰ and universal jurisdiction¹²¹ over the crime of torture¹²² as defined in Article 4. The provision of universal jurisdiction is important to avoid safe havens for perpetrators. This is the first time that this has been envisaged in a human rights treaty.¹²³ The principle of universal jurisdiction has been recognised since the 17th century in case of piracy. After that it was recognised in international humanitarian law and international human rights law.¹²⁴ Universal jurisdiction is an important, challenging and controversial provision. Many State parties are extremely reluctant to exercise universal jurisdiction in torture cases.¹²⁵ Therefore, few cases have been brought under the universal jurisdiction in some countries such as the United Kingdom (UK), Belgium, France and Germany. Regarding the universal jurisdiction over torture offence, the CAT/C explained in *Habre's case*, where the state on whose territory the suspect is present does not persecute and refuse to extradite the suspect to this is a violation of the CAT.¹²⁶ The perpetrator should be punished anywhere around the world.

In the context of Nepal, there is no exclusive provision which assures territorial and extra-territorial jurisdiction over the offence of torture, because the act of torture is yet to be criminalised. The CRTA does not clearly include the provisions regarding the jurisdiction. The Act states that the victim of torture may file a complaint in the concerned district court claiming compensation,¹²⁷ which means that the concerned district court has the jurisdiction over the cases of torture within the territory of Nepal. Similarly, the *National Human Rights Commission Act 2012* provides jurisdiction to NHRC to receive complaints over all the issues related to human rights, including torture¹²⁸ and the NHRC conducts investigation on issues related to human rights violation. As mentioned, Nepal does not have legal provision, practices and experiences on prosecuting perpetrator under universal jurisdiction.

120 CAT art 5(1).

121 Ibid art 5 (2).

122 Ibid art 5.

123 Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention Against Torture A Commentary* (Oxford University Press 2008) 254.

124 Mark Chadwick 'Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and Beyond' (2009) 9 *International Criminal Law Review* 361-363.

125 Ibid 356.

126 Committee against Torture, *Views: Communication No 181/2001*, 36th sess, UN Doc CAT/C/36/D/181/2001, para 36 ('*Suleymane Guengueng et al. v. Senegal*').

127 *Compensation Relating to Torture Act 1996* (Nepal) s 5 (1).

128 *National Human Rights Commission Act 2012* (Nepal) s 10.

3.3.2.3 Lack of prompt and impartial investigation and prosecution

Where there is reasonable grounds to believe that an act of torture has been committed, a State party is required to ensure that competent authorities proceed towards a prompt and impartial investigation.¹²⁹ The provision refers to *suo motu* action from the State authorities if there are reasonable grounds to believe that torture has been committed. Similarly, a State party should ensure that any individual who has been subjected to torture has the right to file complaint with the competent authorities, and the authorities are obliged to conduct an investigation into the incident promptly and impartially.¹³⁰ Likewise, every prisoner shall have the opportunity to file a complaint with the concerned authorities. The authorities of investigation shall deal effectively without delay.¹³¹ In a case, CAT/C decided that a fundamental requirement is that the person responsible for torture should be investigated impartially.¹³² The CCPR/C showed concern in general comment 31 that ‘Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies’.¹³³

With regards to the issue of investigation, the European Court of Human Rights stressed the importance of the obligation of effective investigation in a case *Aksoy v Turkey*.¹³⁴ The Court defined that a State must take reasonable steps to secure the evidence concerning the incident of torture. The court further defines that the rights to effective remedy, where an individual has an arguable claim that he has been tortured by agents of the state, in addition to compensation, and an effective investigation. The investigation must be capable of leading to the identification and punishment of those responsible for torture.

The CCPR/C has raised an issue of a Nepalese case. The Committee found the violation of the ICCPR in the case of Mr Yubraj Giri and his family regarding to an effective remedy. The Committee was directed to ensure a thorough and diligent investigation on torture and other forms of ill-treatment suffered by Mr. Giri and prosecute and punish those responsible.¹³⁵ Mr. Giri was arbitrarily arrested and detained, held in incommunicado detention in appalling conditions, tortured repeatedly, and subjected to other forms of ill-treatment from 2004 to 2005 during the conflict period. Despite attempts to file a complaint and bring his case to the attention of the police and court authorities, no investigation was carried out. No person was prosecuted for the abuses Mr. Giri suffered, and no compensation was provided to his family.¹³⁶

129 Ibid art 12.

130 Ibid art 13.

131 *Standard Minimum Rules of Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and Approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, rules. 36 (1), (2), (3).

132 Committee against Torture, Views: Communication No 174/2000, 35th sess, UN Doc CAT/35/174/2000, (24 November 2005) para 6.5 (*Nikolic v. Serbia and Montenegro*).

133 Human Rights Committee, General Comment 31, above n 1, para 15.

134 *Aksoy v Turkey*, 1996 –VI Eur. Ct.H.R. 2260, para 98.

135 *Yubraj Giri v Nepal*, UN Doc. CCPR/C/108/D/1761/2008 (27 April 2011) para 9.

136 *Yubraj Giri v Nepal*, UN Doc CCPR/C/108/D/1761/2008 para 2.1-2.16.

All these provisions and jurisprudence assure that a victim of torture must have the right to complaint against the torture. State must adopt the provision and provide competent complaint mechanism which can investigate torture case promptly and impartially. Especially, when State officials or others associated with the State officials are involved in the infliction of torture, a prompt and impartial investigation is crucial to provide justice to the victim and punish the perpetrators. Without prompt, comprehensive and effective investigation in the torture incident, it is impossible to make the perpetrator accountable and provide justice to the victims.

In the context of Nepal, there is a lack of legal provision empowering or conferring any authority with the specific obligation to thoroughly, promptly and impartially investigate in the cases of allegation of torture and other forms of ill-treatment. According to the *State Cases Act 1992*, Nepal police is responsible to receive first information report¹³⁷ and to investigate the case in coordination with district attorney office in criminal cases found in the schedule 1 of the Act. The Act does not cover torture related offence in schedule 1 so as stated above, torture is not defined as a criminal offence and it is not supposed necessary to conduct prompt, impartial and thorough investigation of such torture incidents. If any victim or their family wants to file a complaint or information about the physical and mental torture or assault, they need to file a complaint in the police office just like a normal case of assault.

If the concerned officer does not accept the first information report, then the victim can go to the Chief District Officer and the CDO will issue an order to the concerned police office to register the case.¹³⁸ This provision creates problems in the impartial and thorough investigation in torture cases. The head of the police retains control of the investigation process, even when it can be his or her staff. The alleged person is not suspended from his or her duty. In such situation, there is a greater possibility that the evidence can be destroyed and the victim gets re-victimised. In this issue, the Special Rapporteur on Torture recommended the Government of Nepal ‘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’.¹³⁹ The right to lodge complaint is the base of prosecution and a step towards providing justice. Therefore, complaint receiving mechanism needs to be made accessible to all.

There is no provision in the CRTA regarding the investigation of incident of torture and prosecution of perpetrator. Under the CRTA, the torture cases are being filed in the respective district courts like other ordinary civil cases and the victim is solely responsible to produce necessary evidence.¹⁴⁰ A research report shows that Advocacy Forum documented 5,349 allegations of torture during eight years, none of the perpetrators accused of torture has been prosecuted before civilian courts.¹⁴¹ Though

137 *State Cases Act 1992* (Nepal) s 3.

138 *State Cases Act 1992* (Nepal) s 3 (5).

139 See Manfred Nowak, Report by Special Rapporteur 2006. para 33 (j).

140 See Alternative Report on Second, Third and Fourth (Combined) State Report of Nepal, (September 2005) Submitted to Committee Against Torture, (Human Rights Treaty Monitoring Collation Committee, 2004) 45 (*Alternative Report*).

141 Criminalise Torture, above n 75, 31.

CRTA provides for departmental action against the perpetrator of torture,¹⁴² this has hardly been practised. The Special Rapporteur on Torture found in the Nepal report, ‘the disciplinary sanctions and lenient penalties imposed on public officials for their alleged involvement in torture and other forms of ill-treatment contribute to the culture of impunity’.¹⁴³

The *Interim Constitution of Nepal 2007*¹⁴⁴ and *National Human Rights Commission Act 2012*,¹⁴⁵ grant authority to the NHRC to investigate into the incident of torture and other forms of ill-treatment from the human rights perspectives. The NHRC conducts investigation on torture related complaints. However, Special Rapporteur’s report raised a question on the capacity of the NHRC in investigating torture-related cases. He stated that ‘the NHRC entrusted with investigating torture allegations and monitoring places of detention. He encourages the Government to strengthen the NHRC’s capacity as the agency entrusted with investigating torture allegations and monitoring places of detention’.¹⁴⁶ In the context, if the NHRC finds incidents of human right violation, it recommends the government for departmental action against the perpetrator, compensation to the victim and prosecution of the perpetrator as per criminal law. The NHRC’s recommendations ultimately refer the government for further investigation and interrogation of cases of torture and other forms of ill-treatment as criminal offence.

3.3.2.4 Inadequate redress and rehabilitation for torture victims

Redress, adequate compensation and rehabilitation are the major elements through which justice can be delivered to victims. Article 14 of the CAT is related to redress, adequate compensation and full rehabilitation to torture victims. State parties are required to ensure legal measures to the victims of torture and for the victim’s family to receive redress and adequate compensation, including as much rehabilitation as possible.¹⁴⁷ Professor Rodley stated that ‘Article 14 of the CAT specially provides that a torture victim must have an enforceable right to compensation that includes the means for as full rehabilitation as possible’.¹⁴⁸ The Basic Principles on The Right to a Remedy and Reparation set out standard of redress and rehabilitation ‘victims must be provided with effective procedural remedies (the ability to have access to justice) as well as substantive reparation, including as appropriate restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’.¹⁴⁹ Likewise, Professor Nowak and Elizabeth MacArthur explained that the Article requires state parties to provide a procedural remedy aimed at recovering adequate reparation. The state should not provide only material compensation; it needs to provide physical, mental and social rehabilitation to the victims.¹⁵⁰ Furthermore, the term reparation not only covers monetary compensation, it needs to restore the victims’ dignity and humanity.¹⁵¹

142 *Compensation Relating to Torture Act 1996* (Nepal) s 7.

143 Juan E. Mendez Report 2012, above n 114, para 81.

144 *Interim Constitution of Nepal 2007* (Nepal) art 132.

145 *National Human Rights Commission Act 2012* (Nepal) s 4.

146 See Juan E. Mendez Report 2012, above n 114, paras 81.

147 CAT art 14 (1).

148 Nigel S. Rodley, with Matt Pollard, *The Treatment of Prisoners Under International Law*, (Oxford University Press, 3rd ed, 2009), 156.

149 Basic Principles and Guidelines above n 9, principles 15 -23.

150 Nowak and McArthur, above n 123, 464.

151 Ibid 483.

The Basic Principles on the Rights to a Remedy and Reparation outlines a number of principles regarding the remedies and reparations such as judicial remedies,¹⁵² mechanisms to ensure awards,¹⁵³ restoration of liberty and employment.¹⁵⁴ Rehabilitation should include medical, psychological, legal and social services.¹⁵⁵ Likewise, the term “redress”, as defined by the CAT/C, should cover all the harm suffered by the victim, including restitution, compensation and rehabilitation and measures to guarantee that there is no recurrence of violations, while always bearing in mind the circumstances of each case’.¹⁵⁶ These legal provisions and practices have developed a standard about the redress and rehabilitation which the State party should ensure in its territory.

In Nepal, the *Interim Constitution of Nepal 2007* refers to a law to make torture a punishable crime and provides compensation to the victims of torture.¹⁵⁷ The *Constitution* has not used the word ‘redress’ and ‘adequate compensation’ or ‘rehabilitation’, but nevertheless, the provision ventilates access to justice and compensation to torture victims. There is no comprehensive legal provision in Nepal which guarantees the CAT’s provision of ‘fair and adequate compensation, including means for full rehabilitation at the earliest’. The CRTA stipulates that a victim of torture can get maximum NRs 100,000 (approximately 1000 US dollars) compensation¹⁵⁸ as per the court decision. The amount of compensation is extremely low, making it inadequate and victims have to wait for many years to get the compensated amount. A survey report by the Redress Trust found that ‘Conditions in Nepal are worsening, despite the introduction of special, but flawed, legislation to allow torture survivors to claim compensation’.¹⁵⁹ The court process is lengthy in torture compensation related cases. Generally, court takes two to five years to decide a case and when a court awards compensation, the victims have to wait for an even longer period to get compensation. For example, in the case of Ganesh Rai,¹⁶⁰ where the compensation was decided by the court after a lengthy legal struggle: Ganesh Rai, was tortured to death by police in Kathmandu in 1998. His father filed a torture compensation related petition with the Kathmandu District Court the same year. The court took almost five years to decide on the case. The court awarded NRs 100,000 (approximately 1000 US dollars) (the highest amount of the compensation according to the CRTA) to the victim’s family. The family received the amount of compensation after many follow-ups and visits to the Kathmandu District Administration Office. It took the family three years from the date of the decision to get the compensation amount, after the case had run for eight years. During the case hearing, the family of

152 Basic Principles and Guidelines, above n 9, principle 12.

153 Ibid Principle 17.

154 Ibid Principle 19.

155 Ibid Principle 21.

156 Human Rights Committee, *Views: Communication N 291/2006*, 41th sess, UN Doc. CCAT/C/41/D/291/2006, (2008) para 15 (‘Saadia Ali v Tunisia’).

157 *Interim Constitution of Nepal 2007* (Nepal) art 26 (2).

158 *Compensation Relating to Torture Act 1996* (Nepal) s 6(1).

159 REDRESS Trust, *Reparation of Torture; A Survey and Practices in Thirty Selected Countries*, (REDRESS, Trust, 2003), 1.

160 See, eg, Advocacy Forum, *Hope and Frustration, Assessing the Impact of Nepalese Torture Compensation Act 1996* (Advocacy Forum, 2008) 34.

the victim had to come to Kathmandu several times from a remote village of Dhankuta which in itself caused them trouble financially and socially and consumed their time and resources. Therefore, the limited provision of compensation in CRTA also does not provide easy access for victims at the practical level (see Chapter V for details).

3.3.2.5 Insufficient provision to capacitate law enforcement officials

Capacity development of police, prison staff and other law enforcement officials is a vital part of the absolute prohibition of torture. The CAT requires member States to educate law enforcement personnel, police, army, medical personnel and public officials who are involved in keeping suspects in custody or any process of interrogation.¹⁶¹ Furthermore, the United Nations has adopted many guidelines, principles and code of conduct such as Code of Conduct for Law Enforcement Officials, Basic principles of use of force and Firearms by Law Enforcement Officials, Standard Minimum Rules of Treatment of Prisoners and Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These documents outline details about the prohibition of torture in detention centres which is a key matter for educating law enforcement personnel.

In Nepal, torture has been attributed to several factors, i.e. the long practice of using torture and other forms of ill-treatment during the criminal investigations, using violence for political ends, violent culture, corruption, poor training programme (especially human rights related components) and the state of impunity in relation to human rights violations (see details in Chapter IV). Therefore, training and capacity development for police, army, prison staff, medical staff and other law enforcement officials on human rights, especially the right to freedom from torture, is deemed very essential for the prevention of torture and for changing attitudes and behaviour. Similarly, human rights education in school and at college level as part of the core curricula is also important to prevent torture and other forms of ill-treatment.

The CRTA does not have any component relating to the human rights education. The *National Human Rights Commission Act 2012* grants authority to the NHRC for the inclusion of a human rights related component in the curriculum of educational institutions.¹⁶² The NHRC has recommended that the Government of Nepal should include human rights education in school curricula. Based on the recommendation, the Curriculum Development Centre has incorporated some human rights components in the class eight level course curriculum.¹⁶³ However, human rights education is not included at higher levels. Likewise, the NHRC can carry out activities related to human rights promotion.¹⁶⁴ In this process, the NHRC prepared a reading material for security personnel in 2013. The material covers the basic concept of human rights, criminal investigation and human rights and humanitarian law.¹⁶⁵ The reading material is a good initiative on the part of the NHRC in coordination with Nepal Police to provide basic

161 CAT art 10(1).

162 *National Human Rights Commission Act 2012* (Nepal) s 4 (e).

163 National Human Rights Commission, *Six years Report of National Human Rights Commission 2006/7 to 2012/12* (NHRC, 2013) 78.

164 *National Human Rights Commission Act 2012* (Nepal) s 4 (g).

165 See, National Human Rights Commission, *Human Rights Resource Materials for Security Personnel*, (NHRC, 2013).

information about human rights, including right to freedom from torture. Nevertheless, the material is inadequate in providing practical knowledge and skill for investigators and lacks focus, especially on the ways to respect the right to freedom from torture at every step of criminal investigation.

Nepal Police has included a few sessions in their training programmes related to *Constitution* and law including basic concept of human rights designed for senior and junior police personnel.¹⁶⁶ Likewise, Nepal Army has recently included some components of human rights and humanitarian law as a separate training/ orientation package.¹⁶⁷ The OHCHR and some human rights organisations have provided training on human rights for officials of Nepal Police and the Armed Police Force.¹⁶⁸ Nevertheless, the impact of the training programmes is not reflected in practice. The criminal investigations are still based on confession extracting through the use of torture or other forms of ill-treatment rather than via investigations conducted with respect for human rights and dignity.

The *Nepal Police Regulation 1992* (as amended 2010) and *Armed Police Force Regulation 2004* (as amended 2009) focus on martial arts, security, VIP security, crime investigation, police management and physical fitness related components in the training curricula. However, their regulations do not include any training with a focus on human rights, including right to freedom from torture.¹⁶⁹ Both these regulations were promulgated after the accession of the CAT by Nepal. The fact shows that the Government of Nepal has not taken seriously to include the provision of the CAT in the training packages designed for the law enforcement officials.

Regarding human rights education and training, the CAT/C requested that information on the education and information about human rights training be provided for law-enforcement, medical professional and other public officials, including training of non-coercive investigatory techniques and monitoring and evaluation of training programme.¹⁷⁰ In reply, the Government of Nepal reported that some training, workshops, seminars and awareness-raising programmes have been organised by the government and civil society organisations.¹⁷¹ However, incidents of torture are documented by national and international human rights organisations. The reports of

166 Nepal Police, *Main Activities of Nepal Police Human Rights Unit* <www.nepalpolice.gov.np.human-rights.html>.

167 Nepal Army, *Training in Nepal Army* <www.nepalarmy.mil.np/training.php>.

168 See, eg, Human Rights Council, 'Report of the OHCHR on the human rights situation and the activities of her Office, including technical cooperation in Nepal' A/HRC/7/68 (18 February 2008); Kathmandu School of Law and Sydney University provide some training on 'safeguarding Human Rights in Criminal Justice System in Nepal' to the actors of criminal justice system including police, persecutors, Law teacher, and defence lawyer <www.kasl.edu.np/hr_project.asp>; Criminalise Torture, above n 75, 47.

169 See *Nepal Police Regulation 1992* (amended 2010) (Nepal) rule 26, schedule 4; *Armed Police Force Regulation 2004* (Nepal) (Amended 2009) rule 115, schedule 5.

170 CAT/C, *List of issues to be considered during the examination of second periodic report of Nepal*, UN Doc CAT/C/35/L/NPL, (30 June 2005) para 12.

171 CAT/C, *Consideration of Reports Submitted by States Parties Under Article 19 of The Convention, Comments by Government of Nepal to the conclusions and recommendation of the Committee Against torture*, UN Doc CAT/C/NEP/CO/2/Add.1 (29 January 2008), paras 8- 9.

such organisations describe the use of seventy different methods of torture.¹⁷² The reports and incidents show that the Government of Nepal fails to promote education on the right to freedom from torture and awareness as per Article 10 of the CAT.

Despite training and awareness programmes, the behaviour of police and armed police force has not been substantially changed. Many national and international human rights organisations have continuously covered up incidents of torture.¹⁷³ The patterns of torture everywhere in Nepal were found to be similar and for the same causes (see detail in Chapter IV). From the facts and reports, it can be analysed that the training packages designed for security personnel do not include rights to freedom from torture related components.

3.3.2.6 Lack of assurance about extradition

The CAT prohibits expulsion, return or extradition of a person to a State where he/she would be in danger of being subjected to torture.¹⁷⁴ Member States of the CAT are required to make the provision in their national legislation and practice as an obligation. Moreover, the CAT/C explains that:

bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.¹⁷⁵

Similarly, the CCPR/C describes that States parties are required to respect and ensure the provision of, ‘rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm’.¹⁷⁶

In Nepal, the *Interim Constitution of Nepal 2007* contains the stipulation that ‘no citizen shall be exiled’.¹⁷⁷ The constitutional provision clearly states about the rights granted to Nepali Citizen. Similarly, the *Extradition Act 1988* stipulates that no person shall be extradited on political grounds.¹⁷⁸ The provision of the Act might apply to

172 CAT/C Confidential Inquiry report 2011, above n 15, para 58.

173 See, eg, Amnesty International, *Nepal the Search for Justice* (Amnesty International, 2013); Asian Human Rights Commission (AHRC), *Nepal The State of Human Rights 2012* (AHRC, 2012); Advocacy Forum Nepal, *Right to Fair Trial in Nepal: a Critical study* (Advocacy Forum, 2012).

174 CAT art 3 (1).

175 Committee against Torture (CAT/C), *General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture* (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003) para 6.

176 Human Rights Committee General Comment 31, above n 1, para 12.

177 *Interim Constitution of Nepal 2007* (Nepal) art 31.

178 *Extradition Act 1988* (Nepal) s 12.

foreign citizens as well. However, the meaning of political grounds' is not clear. Likewise, the *Immigration Act 1992* states that:

*The Director General, on the basis of the report received from the Immigration Officer after having completed the investigation of the crime pursuant to this Act, may (in the case of a foreigner) and upon regulating the matters required to be regulated as prescribed, and with the approval of Government of Nepal, expel such a foreigner from Nepal, by disqualifying the foreigner from re-entering into Nepal, with or without prescribing the period of time.*¹⁷⁹

The immigration law allows for the extradition of foreigners but fails to clearly mention the assessment of the risk that a person might be subjected to torture in the concerned country. These provisions do not comply with the provisions of the CAT. The CRTA does not provide any provision related to non-expulsion. The Act lacks the provisions to address procedure in determining whether a person being expelled, returned and extradited shall be exposed to danger of being subjected to torture in the country of destination or not.

The practical situation regarding expulsion is inconsistent with the Nepalese obligations under the CAT. There are many cases of expulsion which have been documented, especially the cases of Tibetan refugees or asylum seekers to China,¹⁸⁰ where the deportees are imprisoned and some are forcibly returned to their villages and denied permission to travel outside their districts.

3.3.2.7 Absence of laws to protect victims and witnesses

Protection of victims and witnesses of torture is an important element in proving torture and in providing justice to the victim. As a member State of the CAT Nepal is required to ensure the protection of victims and witnesses of torture and other forms of ill-treatment as a consequence of his/her complaint or any evidence given.¹⁸¹ With regards to the provision, , there are no legal provisions or mechanisms in Nepal. The Government of Nepal has accepted this fact in its State report of the Government of Nepal in 2005.¹⁸² In the absence of victim and witness protection mechanisms, victims frequently find themselves or their families in danger if they lodge a formal complaint under the Act. The threat that the victims face from their perpetrator forces them to suffer quietly rather than to seek legal recourse.¹⁸³

Many torture victims are compelled to withdraw torture compensation related cases due to intimidation from the perpetrator.¹⁸⁴ As a result of the intimidation, many cases are withdrawn by the victims. A survey shows that twelve torture compensation cases were filed in the courts of Nepal in 1998. Among the twelve cases, six were withdrawn before being heard by the district courts owing to intimidation and threats issued to the

179 *Immigration Act 1992* (Nepal) s 9.

180 Alternative Report, above n 140, 32; Criminalise Torture, above n 75, 47.

181 CAT art 13.

182 Second periodic Report of Nepal, above n, 15, para 105.

183 Advocacy Forum, *Hope and Frustration, Assessing the Impact of Nepalese Torture Compensation Act 1996* (Advocacy Forum, 2008) 30.

184 Alternative Report, above n 140, 45.

victims.¹⁸⁵ For example, upon being arrested, Umesh Lama was subjected to severe physical torture while he was detained at the Metropolitan Police Range, Hanumandhoka, Kathmandu. His sister lodged a complaint before the Kathmandu District Court on his behalf, seeking compensation, pursuant to the CRTA. The victim himself and his family members continued to receive threats and intimidation from police officers and consequently withdrew the case three days after it was filed.¹⁸⁶

3.3.2.8 Difficulties in the application of non-admissibility rules

As a member of the CAT, Nepal must ensure the non-admissibility of evidence that is obtained by torture.¹⁸⁷ As stated above, the provision is relevant to the theory of ‘tainted fruits of the poisonous tree’ which includes statements extracted through torture are often unreliable and would damage the integrity of judicial proceedings, and as a result, it fails to prevent torture.¹⁸⁸ The CAT/C clarified that member State is obliged to ascertain exclusionary norm in evidence obtained by torture in any proceedings.¹⁸⁹ The CCPR/C also stated that ‘law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment’.¹⁹⁰

The *Evidence Act 1974* stipulates that if a confession is extracted through torture, threats or by putting a person in a condition to force him or her to state facts against his or her will, the relevant district court can refuse to take the confession into account.¹⁹¹ The provision seems to be positive for the prohibition of torture and to ensure fair trial in the process of criminal investigation. Likewise, the provision gives positive backing to an independent judiciary.

However, the Supreme Court of Nepal, has given conflicting decisions on the issue of non-admissibility of the evidence extracted through torture. In some cases, the Supreme Court of Nepal, has decided to exclude evidence that was obtained through torture or other forceful means. For example, in a case of *Dharma Kumari Sitaula v Government of Nepal*, a drugs related case, the Supreme Court excluded the confession as evidence because there were no supporting documents to justify the confession.¹⁹² On the other hand, the Supreme Court has accepted as evidence confessions that were claimed to have been obtained under torture in police custody. For instance, in another drugs related case: *Sachin Shrestha v Government of Nepal*, the suspect confessed in police custody but in the court, he denied his involvement in the crime and claimed that the confession was extracted through torture in police custody. However, the Supreme Court explained that the suspect had a chance to complain against the torture

185 Ibid 31.

186 Ibid 30.

187 CAT art 15.

188 Rodley with Matt Pollard, above n 148, 162; Nowak and MacArthur, above n 123, 530.

189 Committee against Torture, *Views: Communication No 193/2001*, 29th sess, UN Doc CAT/29/D/193/2001 (21 November, 2002) (*P.E v France*) para 6.3 and 6.6; Committee Against Torture, *Views: Communication No 219/2002*, UN Doc CAT/C/30/D/219/2002 (2003) (*G.K v Switzerland*) para 6.10 and 6.11.

190 Human Rights Committee, General Comment 20, above n 84, para 12.

191 *Evidence Act 1974* s 9(2).

192 *Dharma Kumari Sitaula v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 11, 1893 (Supreme Court of Nepal).

in the court according to the *State Cases Act 1992*. But the suspect had not complained and could not prove that he was tortured in the custody. Based on the facts, the Court allowed an uncorroborated confession to remain as evidence¹⁹³ (see further detail in Chapter V).

The legal provision does not clarify who has the burden of proof in the case of confession that is claimed to be a result of torture. The decisions of the Supreme Court of Nepal illustrate that the suspect should prove whether he was tortured or should complain on time as per the law. In this situation, question has been raised regarding the burden of proof in torture cases. The Special Rapporteur on Torture recommended that burden of proof should be on the State to demonstrate the absence of coercion.¹⁹⁴ The legal provisions of Nepal do not clearly mention the provision.

3.4 Conclusion

As stated, Nepal does not have a long constitutional and legislative history guaranteeing the right to freedom from torture and other forms of ill-treatment. After restoration of multi-party democracy in 1990, the Government of Nepal ratified major international human rights instruments including the CAT and ICCPR. The wider acceptance of human rights, the democratic government had indicated its commitment as a human rights friendly country and human rights are taken as guiding principles.¹⁹⁵ Furthermore, the UN Charter and international law, including international human right law, have been accepted as the basis of Nepalese foreign policies.¹⁹⁶

In that context, Nepal ratified human rights instruments including the CAT. However, the government neither developed any implementation plan nor analysed its existing suite of laws and practices to draw up a baseline against which serious reform attempts could be made and measured. As noted, some laws, policies and practices have been reviewed in line with the CAT. Nepal has therefore been somewhat lacking from the very beginning when it comes to the implementation of the CAT.

Despite repeated commitments to promulgate anti-torture laws, the Government of Nepal has stated that the socio-political situation created particular challenges for preventing torture in Nepal. For example, Nepal suffered from a violent conflict for a decade from 1996 to 2006¹⁹⁷ and after the comprehensive peace agreement, national priorities have shifted to political, social and economic transformation. The

193 *Sachin Shrestha v Government of Nepal*, Nepal Kanoon Patrika 2063 [Nepal Law Journal 2006] Vol 2, 183 (Supreme Court of Nepal).

194 Human Rights Commission, *Civil and Political Rights; including question of torture and detention, Report of the Special Rapporteur: Sir Nigel Radley, submitted pursuant to Commission on Human Rights resolution 1995/37, Visit by the Special Rapporteur to Turkey*, UN Doc E/CN.4/1999/61/Add.1 (27 January 1999) para 113 (e).

195 *Constitution of Kingdom of Nepal 1990* (Nepal) art 25 (4).

196 *Constitution of Kingdom of Nepal 1990* (Nepal) art 26 (15); Official Website of Ministry of Foreigner Affairs, the Government of Nepal < <http://www.mofa.gov.np/en/nepals-foreign-policy-24.html>>.

197 Second periodic Report of Nepal, above n, 15, para 17.

government is therefore sensitive about human rights.¹⁹⁸ To some extent, the government argument is true because the country did face a decade-long violent conflict, and after the peace process, the country is focusing on building peace and writing a new constitution. However, improvements in social stability in the nine years since the peace agreement was signed means that the time to promulgate anti-torture law and introduce practical implementation strategies has without doubt arrived.

Therefore, it seems that there is a serious lack of political will to promulgate anti-torture law and to amend the contradictory or missing legal provisions. Politicians have failed to take any action, and so have senior government officials, and they are unlikely to do so unless there is a perceived requirement and pressure to address this significant problem. Thus, the prevention of torture will depend on engagement by the greater public pressure internally, or as by motivated major political actors, or by international pressure.

To respect, protect and fulfil the obligations required by law and assure right to freedom from torture in Nepal, the Government of Nepal needs to condemn the acts of torture and other forms of ill-treatment in Nepal in accordance with Article 2 of the CAT. Many contradictory laws have to be amended or repealed in line with international standard. Most importantly, the act of torture has to be criminalised with punishment for the perpetrator and adequate compensation for the victims. Similarly, the Government of Nepal should establish an impartial investigation mechanism to prosecute the perpetrators of the past incident and prevent such cases happening in the future and assure justice to the victims, including reparation. Likewise, adoption of domestic and universal jurisdiction is a must and the provision about the terms and condition of extradition also needs to be introduced in the law.

Capacity development of law enforcement officials, especially the police, is also crucial. The Government of Nepal should review the training package of Nepal Police, the Armed Police Force and the Nepal Army and integrate components on the right to freedom from torture in training packages. In this process, the NHRC, security agencies and human rights experts should work together and integrate the right to freedom from torture related components in basic training packages of those agencies. Moreover, the Government should establish a mechanism to protect victims and witnesses of the torture related case. Therefore, the Government of Nepal should take the initiative to pass the *Anti-torture Bill* and *Penal Code Bill* with necessary amendments

198 Human Rights Committee, *Consideration of Reports submitted by States Parties under article 40 of the Covenant, Second Periodic Reports of States Parties Nepal*, UN Doc CCPR/NPL/2 (8 June 2012) para 2; Second periodic Report of Nepal, above n, 15, para 112.

CHAPTER-IV: SITUATION OF TORTURE IN NEPAL

4.1 Introduction

In Chapter III, the existing legislative framework has been analysed in line with the Convention Against Torture (CAT). This chapter examines and compares the legal framework with the practical situation of implementation of the right to freedom from torture and other forms of ill-treatment, and in particular, it attempts to deal with the research question, what is the situation of torture and what factors contribute to the prevalence of torture and other forms of ill-treatment in Nepal.

As stated in Chapter III, Nepal acceded to the CAT on May 14, 1991. The *Interim Constitution of Nepal 2007* guarantees the right to freedom from torture and other forms of ill-treatment as a fundamental right and defines it as a punishable crime. The *Compensation Relating to Torture Act 1996* and the *National Human Rights Commission Act 2012* stipulate some provisions relating to compensation to victims and departmental action for perpetrators of torture. The *Evidence Act 1974* stipulates that courts can reject the evidence which is extracted through torture and other forms of ill-treatment.¹ Furthermore, the Government of Nepal has reiterated its commitment through periodic and other special reports to the Committee Against Torture (CAT/C)² and Universal Periodic Review (UPR)³ to promulgate an anti-torture law which makes torture a criminal offence in Nepal. Nevertheless, the CAT/C pointed out that ‘torture is being systematically practised, and has been for some time, often as a method for criminal investigation and for the purpose of obtaining confessions, in a considerable part of the territory of Nepal’.⁴ Likewise, many national and international human rights organisations regularly publish alarming reports and case studies about the incidence

1 *Evidence Act 1974* (Nepal) s 9.

2 See, eg, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Second periodic reports of States parties due in 1996 Nepal* (5 May 2004) UN Doc CAT/C/33/Add.6. 16 para 66 (‘*Second Periodic Report of Nepal*’); Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012) part 2, para 115. <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm> (‘*CAT/C Confidential Inquiry report 2011*’)

3 See, eg, Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Nepal*, (February 2011) UN Doc A/HRC/WG.6/10/NPL/1, 9. The GON re-stated its commitment to make torture a criminal offence. In the process of the Universal Periodic Report on February 2011, some countries raised the issue related to legislative and institutional reform to criminalise torture and to stop the prevalence of torture in Nepal and as respond, Nepalese representative informed that a draft Anti-torture Bill has been prepared and tabled in parliament.

4 See CAT/C Confidential Inquiry report 2011, above n 2, para 100.

of torture in Nepal.⁵ All these reports show that torture is a serious human rights problem in Nepal. Obviously, the situation raises questions regarding the prevalence of torture in Nepal. Despite legal provisions and government's commitment, why and how does torture exist in practice? What are the current trends of torture in criminal investigation? What are the underlying causes of prevalence of torture and other forms of ill-treatment in Nepal? This chapter primarily deals with these questions.

The chapter examines data from the Office of the Attorney General (OAG) from the government sector, the National Human Rights Commission (NHRC) as an independent state organisation and Advocacy Forum, a national human rights organisation, human rights organisations' reports and coverage from non-governmental sectors and pressure group(s). The data and presented situations will show the exact trend of torture and compare data and trends among the reports. In the process, the chapter analyses various reports such as research report called 'Baseline of Criminal Justice System' which was published by the OAG and Centre for Legal Research and Resource Development (CeLRRd) in 2013. The report covered the overall situation of criminal justice and fair trial including the right to freedom from torture in Nepal. The NHRC's annual and other special reports show trends of torture and other forms of ill-treatment related complaints in Nepal. Likewise, Advocacy Forum's reports are based on custody monitoring in 57 detention centres in 20 districts in Nepal. In addition, torture-related incidents and case studies documented by national and international human rights organisations are also analysed to find out the causes and types of torture and other forms of ill-treatment.

All presented and analysed data cover last seven years' trends from 2007/8 to 2013/14 based on the Nepalese financial calendar year. The reasons behind taking the data of the last seven years are, firstly, the *Interim Constitution of Nepal 2007* was promulgated in 2007 that for the first time defined torture as a criminal offence in Nepal and guaranteed the right to freedom from torture and other forms of ill-treatment as the fundamental right. Therefore, the study examines the implementation of the provisions of the *Constitution* and the CAT at the practical level. Secondly, the decade-long conflict formally ended in 2006, thus the study mainly covers general situation focusing on torture and other forms of ill-treatment in criminal investigation process in the aftermath of the peace deal, rather than in the conflict period.

This chapter is divided into seven subheadings. Following the introduction in the first subheading, the second heading covers the historical situation of use of torture in Nepal. The third subheading presents the current trend of torture based on the OAG, NHRC and Advocacy Forum's reports and case studies. Methods of torture and other forms of ill-treatment and status of perpetrators are discussed under the fourth and fifth subheadings. Various types of direct and underlying causes of torture and other forms

5 See, eg, Advocacy Forum Nepal, *Nepal is Unable or Unwilling to Prevent or Investigate Torture* (Advocacy Forum, 2013) ('*Advocacy Form report 2013*'); Advocacy Forum Nepal, *Right to Fair Trial in Nepal: a Critical study* (Advocacy Forum, 2012) ('*Advocacy Forum, Fair Trial Report*'); Amnesty International, *Nepal the Search for Justice* (Amnesty International, 2013) ('*Search for Justice*'); Asian Human Rights Commission (AHRC), *Nepal The State of Human Rights 2012* (AHRC, 2012) ('*AHRC Report 2012*'); National Human Rights Commission, *Yatana Birundda Ko Adhikar* [Rights Against Torture] (NHRC, 2012) ('*NHRC Torture Report*').

of ill-treatments are analysed under subheading six. Finally, conclusion and recommendation are included under the final subheading of the chapter.

4.2 Historical background of use of torture in Nepal

4.2.1 Ancient period

Torture was recognised as a tool to punish criminals and a method of interrogation to obtain confessions and other information from suspects in Nepalese legal history. In criminal procedure, a prisoner had had a chance to give his/her confession voluntarily. If s/he stayed silent, s/he was first scolded and/or threatened; if these means failed, s/he was beaten with *corah* (by a stick or whip), until a confession was made.⁶ During the Kirat Dynasty (800 BC -300 AD), physical torture in criminal investigation and as a punishment of crime was an integral part of the legal system. For instance, the hands of thieves were immersed into boiling water, and those who took away others' wives were executed and humiliated.⁷ In the Lichhavi period (third to ninth century), physical torture was used as a common form of punishment in various types of crimes such as adultery and robbery, amongst others.⁸

During the Malla period (10th to 18th century), men guilty of adultery within their own clan or with blood relatives had their penises dismembered and, if it was incest, they could have their property confiscated and finally would be executed.⁹ If anyone committed a crime related to theft, men would be punished with humiliation by marking their face with different colours and publicly declaring a thief. They would be killed painfully.¹⁰ The situation of use of torture did not improve in the Shah Period (1769-1846 AD) in spite of King Ram Shah declaring reforms in justice system. If any person, who belonged to Brahmin caste (member of high caste Hindu religion) close relative or Yogi (yoga guru or priest of Hindu Society) committed murder, the person would be exiled with humiliation and had their hair cut in an unusual fashion, indicating their crime their hair would be cut from four sides commonly called *charpata mundne*.¹¹ The regime of King Prithvi Narayan Shah also continued using torture during interrogations. For example, Jagat Pandey (a detainee who faced charges of crime against the State), during his interrogation, was forced to inhale the smoke of burning red chillies.¹²

Torture continued as a tool of interrogation and punishment in the Rana Regime (1846-1950 AD) even after the promulgation of the first written law called 'National

6 Prakash Osti (ed), *Kanoon Sambhandhi Kehi Aitihāsik Avilekha Haru* [Law Related Some Historical Documents] (Kanoon Byabasahi Club, 2006) 182. An article was written in 29 January 1831 AD by Brian H. Hodgson (He conducted a legal and anthropological research in Nepal). The article was published in *Asiatic Research* a publication of Royal Asiatic Research Society, Calcutta in 1996 and re-published in the book.

7 See Rewatiraman Khanal, *Nepal Ko Kanooni Itihas Ko Ruparekha* [Introduction of History of Nepalese Law] (Srimati Saraswoti Khanal, 2002) 26.

8 Ibid 32.

9 See, Bhogendra Sharma, Rjesh Gautam and Gopal Guragain, *Indelible Scars A study of Torture in Nepal* (Centre for Victims of Torture, 1994) 71.

10 See Osti, above n 6, 59.

11 See Khanal, above n 7, 63.

12 Ibid 74.

Code' in 1853 (*Muluki Ain* 1910) in Nepal. The first National Code had some provisions related to torture; if any individual were to be punished as 'Damal' (s/he would be punished with a cut mark on the left cheek mentioning the word 'Damal' and kept in prison for life).¹³ Political prisoners under the Rana period were subjected to severe torture. A political prisoner Khadga Man Singh in his book *Jail ma Bis Barsa* (Twenty Years in Prison) explained that inmates in the 'Golghar' (an inner part of the central jail' where prisoners were kept) was subjected to severe torture and had no access to fresh air).¹⁴

4.2.2 Torture after the first democratic movement (From 1950 to 1996)

Protests against the Rana regime demanding establishment of democratic government ran for many years in Nepal. Many Nepali people lost their lives and suffered torture. Despite hardships and obstacles, Nepali people won out against the Rana regime in 1951. However, the use of torture continued in investigation process of crime and punishment. During the one-party Panchayat regime (1960-1990), torture was frequently used to suppress political activists and supporters of multi-party system¹⁵ and also in crime investigations. After the re-establishment of multi-party democracy in 1990, a commission (the Malik Commission) was formed to investigate human rights violations, including torture during the democratic movement. The Commission prepared a report and recommended to His Majesty's Government of Nepal to punish the perpetrators and compensate the victims of the people's movement. But the report was never implemented in Nepal.

After the People's Movement in 1990, the *Constitution of the Kingdom of Nepal 1990* for the first time in Nepal guaranteed right to freedom from torture as the fundamental rights¹⁶. However, the use of torture in crime investigation process never changed. A report described the detention centre as follows: 'the detention rooms of the police office are suited for torture. The detention rooms have never been reconstructed; they are usually built adjacent to the toilet and are damp, dingy, dark and poorly ventilated'.¹⁷ Police inflict severe torture in detention centres on suspects. The reports documented many cases related to torture in detention centres and prisons in many parts of the country such as in November 1992.

Mr Pratap Biswakarma was arrested and taken into custody. He was slapped on the face and punched several times. He was hit on the ankles with sticks. He was forced to squat, was beaten on his soles and was forced to jump. He received deep wounds on his left sole because of the beating and hence was unable to stand. He was deprived from water. After

13 Ibid 304.

14 Khadga Man Singh, *Jail Ma BisBarsha* (Twenty Years in Jail), as cited, Bhogendra Sharma, Rjesh Gautam and Gopal Guragain, *Indelible Scars A study of Torture in Nepal* (Centre for Victims of Torture, Nepal, 1994) 3.

15 See Centre for Victims of Torture, *Yatana Pidit Haruka Pachya ma BhayakoFaisala*, (A collection of decisions in favour of torture victims) (CVICT, 2005) 5.

16 *Constitution of the Kingdom of Nepal 1990*, (Nepal) art 14.

17 See Sharma, Gautam and Guragain, above n 9, 7.

17 days, he was released but with threats that he would not discuss about the torture meted out to him with anyone, or else he would face arrest again.¹⁸

The case shows the situation of torture after the political change in 1990. Despite the constitutional provisions, Nepalese police continued to inflict torture on suspects whilst they were in custody.

4.2.3 Conflict period (1996-2006)

Nepal suffered from the violent conflict, between the then government and Communist Party of Nepal (CPN-Maoist) from 1996 to 2006. The decade-long conflict left over 13,236 people dead and 1,006 missing.¹⁹ Thousands of people suffered torture. The Office of the High-Commissioner for Human Rights (OHCHR) recorded over 2,500 torture cases during the period.²⁰ With the signing of the Comprehensive Peace Accord (CPA) on November 21, 2006, the conflict finally came to the end.

During the conflict period, torture was extremely used by both conflicting parties.²¹ OHCHR'S Nepal Conflict Report stated that the main objective of security forces to use torture during the conflict period was to extract information about the Maoists from anyone who might have something to reveal. The methods of torture and other forms of ill-treatment were used consistently across the country, and throughout the conflict, those methods generally were intended to inflict pain in increasing measure or over a prolonged period until the victim divulged whatever information they were believed to have been holding.²²

Government forces used various types of torture on rebel groups. The most commonly used forms of torture were random beating, beating on soles (known as *falanga*), electric shocks, blindfolding, rolling a weighted log on the detainees' thighs causing muscle damage, burning with cigarette and forcing the detainee, to stand/sit in awkward and painful postures (eg, making the detainee to squat for long periods of time). Animals, insects and even needles were commonly applied as tools of torture. Likewise, psychological and sexual torture would also be used by the security forces such as death threats, forcing the detainee to witness other people being tortured, depriving the detainee of food and drink and toilet facilities, continuous blindfolding, rape and other sexual abuse to female suspects/detainees.²³ A torture victim wrote a book about his 258 'dark days' whilst in army custody. In the book, he detailed the torture that was inflicted on him by the Royal Nepalese Army in September 2001. He wrote that during the interrogation, the army asked a few questions about Maoist

18 Ibid 12.

19 See The Informal Sector Service Centre (INSEC), *Dwanda Pudit Parswa Chitra* [Profile of Conflict Victims] (INSEC, 2010) 4 <www.insec.org.np/victim/>.

20 See Office of High Commissioner of Human Rights (OHCHR), *Nepal Conflict Report* (OHCHR, 2012)125 ('*Nepal Conflict Report*').

21 Ibid 125. Note: the CAT does not directly define torture and other forms of ill-treatment from rebel group.

22 Ibid 9.

23 See, eg, NHRC Torture Report, above n 5, 4; Informal Sector Service Centre (INSEC) Human Rights Year Book 2004 (INSEC 2004) 17; National Human Rights Commission *Human Rights in Nepal: A Status Report* (NHRC 2003)36.

activities about which he knew nothing. For failing to answer questions, he was subjected to severe torture every day and every night;

.....They (the army) beat me with a stick all over my body. They kicked my body with heavy boots and punched me. In a short span of time, my body was soaked with blood, and I was crying with pain, but they continued beating me in sensitive areas. They submerged my head in a drum filled with water after each question and took it out only after I lost consciousness.....²⁴

Similarly, torture and other forms of ill-treatment were committed by the rebel group (Maoists) during the conflict period. The Maoists inflicted torture in different situations. Local people were subjected to torture for denying donation to the party or for refusing to participate in Maoist activities. People used to be put to torture through so-called 'People's Courts'. In the 'People's Courts', Maoist commanders would inflict torture on people, who they called suspects' even over minor disputes in the name of resolving dispute. Usually, those people who were suspected by Maoists as spies were also subjected to torture for 'sharing information about them with security personnel'. Some forms of torture included random beatings of various parts of the body, dismembering hands, legs and other body parts, life threats, forcing suspects to witness torture and creating threatening situations, taking them into captivity and keeping them in unknown places and forcing them to work as labourers.²⁵ Many cases related to torture have been filed against the Maoists in the NHRC and some of them have already been recommended for compensation and necessary action.²⁶

Many victims of human rights violations are still waiting for justice. A culture of impunity applies for grave human rights violations related cases during the conflict. Many people were found to have been tortured and ill-treated by the state and non-state actors during the armed conflict. But due to intimidation and fear for their lives, people did not file cases against perpetrators. Many of such victims still suffer physical and mental after-effects.²⁷

As agreed among conflicting parties in the CPA 2006, the Government of Nepal in January 2014 formed Truth and Reconciliation Commission and Commission to Investigate Enforced Disappearance. These Commissions are statutory bodies. The main objectives of the Truth and Reconciliation Commission is to find out and publish the incidents of grave human rights violations during the conflict. The Enforced Disappearance Commission's main objective is to investigate actual facts of the issue of disappearance during the conflict. The commissions have just started their work. But the snail-paced development shows that the Government of Nepal has invariably failed to hold to account the perpetrators of human rights violations, including cases of severe torture, which pose a serious challenge when it comes to protecting right to

24 See Jit Man Basnet, *258 Darks Days* (Asian Human Rights Commission- Hong Kong and Advocacy Forum –Nepal, 2008) 14.

25 See Nepal Conflict Report, above n 20, 125.

26 See National Human Rights Commission-Nepal *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon complaints] (NHRC, 2013).

27 Advocacy Forum, *Torture Briefing, Prevention of Torture in Nepal* July to December 2011, 15 <<http://www.advocacyforum.org/publications/torture.php>>.

freedom from torture in Nepal. After the second People's Movement in 2006, the Government of Nepal formed a commission (Rayamajhi Commission) to investigate human rights violations. The commission came up with many recommendations calling for action against the perpetrators and to carry out further investigation into many human rights related incidents. However, the Government of Nepal never implemented the recommendations. Thus, the entire situation helped to increase state of impunity in torture and other severe human rights violation cases in Nepal.

4.3 Current trends of torture in Nepal

Nepal is still in transition. After the CPA and the successful completion of the first Constituent Assembly elections in 2008, the situation of human rights has gradually improved -- at least when it comes to conflict-related human rights violations. However, the first Constituent Assembly failed to promulgate a new constitution and form transitional justice-related mechanisms. The second Constituent Assembly elections were held on 19 November 2013 and the constitutional making and peace building processes are still going on.

Although some improvements have been seen in human rights situation, with substantial decrease in number of conflict related human rights violations, torture and other forms of ill-treatment are still being practised in criminal investigation processes across the country. The NHRC and human rights organisations have regularly published torture related reports and case studies.²⁸ In the absence of government statistics about trends of torture, it is difficult to estimate the overall number of incidents related to torture or the number of torture victims in Nepal. However, the NHRC, the OAG and human rights organisations have documented torture related incidents and case studies. These organisations represent all three sectors - government, independent national organisation and non-governmental organisations of Nepal. The three sectors' reports show a clear trend of prevalence of torture and other forms of ill-treatment. Furthermore, many national and international human rights organisations have documented torture related incidents and case studies regularly. Based on the case studies, some international organisations such as Amnesty International, World Organisation against Torture (OMCT) and Asian Human Rights Commission (AHRC) have called for urgent action/intervention on the issue of torture and other forms of ill-treatment. The study analysed the case studies and urgent action/interventions of the organisation to find out the causes and methods of torture in Nepal. The following data shows the trends and situation of torture in Nepal.

4.3.1 Trend of torture related complaints at NHRC

The NHRC was established in 2000 as an independent national human rights institution. The NHRC is granted the authority to receive complaints about human rights violations and to conduct investigations into and monitoring of rights issues

28 See. eg, National Human Rights Commission, *Annual Report (2069-70)* [2012-13]; NHRC Torture Report, above n 5; Search for Justice, above n 5; AHRC Report 2012, above n 5; Advocacy Forum Fair Trial Report, above n 5; Advocacy Forum Report 2013, above n 5; Informal Sector Research Centre (Insec) *Human Rights Year Book* (INSEC, 2013).

including torture.²⁹ The NHRC publishes its annual reports and special reports regularly. The annual reports should be submitted through the President of Nepal to the Parliament.³⁰ Generally, the annual report covers total number of complaints, investigations, monitoring and promotional activities, conducted by the NHRC within a year. The study has taken complaints related data from seven years' annual reports of NHRC from 2064/56³¹ (2007/8) to 2070/71 (2013/14). The following figure illustrates the number of torture related complaints at NHRC;

Figure: 4.1 Torture related complaints at NRHC from 2064/65 (2007/8) to 2070/71 (2013/14)³²

Year as per Nepalese financial calendar	Total complaints	Torture related complaints
2064/65 (2007/8)	1,137	163
2065/66 (2008/9)	677	114
2066/67 (2009/10)	403	86
2067/68 (2010/11)	345	72
2068/69 (2011/12)	276	45
2069/70 (2012/13)	219	46
2070/71 (2013/14)	240	48
Total	3,297	574

Sources: NHRC Annual Reports of last seven years

As shown in the table, a total of 3,297 complaints related to human rights violations were received at all nine NHRC offices across Nepal in the last seven years. Among them, 574 or 17.40 per cent of complaints were related to torture.³³ In the process of handling the complaints, the NHRC divided a total of 18 themes within three broader frameworks of human rights -- civil and political rights; economic, social and cultural rights and collective rights.³⁴ Torture and other forms of ill-treatment is one of the themes out of the 18. Data shows that the number of torture related complaints is relatively high compared to other complaints registered with the NHRC. The trends

29 *Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4.

30 *Interim Constitution of Nepal 2007* (Nepal) art 133.

31 The data is based on Nepalese Financial Year which starts every year from around July 15.

32 National Human Rights Commission (NHRC), *Annual Report 2064/65 (2007/8)*, 32; NHRC, *Annual Report 2065/66 (2008/9)*, 22; NHRC, *Annual Report 2066/67 (2009/10)*, 23; NHRC, *Annual Report 2067/68 (2010/11)*, 5; NHRC, *Annual Report 2068/69 (2011/12)*, 40; NHRC, *Annual Report 2069/70 (2012/13)*, 11; NHRC, *Annual Report 2070/71 (2013-14)*, 18 .

33 National Human Rights Commission, Nepal has established total nine offices in different locations across Nepal. The location of the offices are in Lalitpur, Biratnagar, Khotang, Janakpur, Butawal, Pokhara, Nepalgunj, Dhangadi and Jumla.

34 National Human Rights Commission, *Annual Report 2069/70 (2012/13)*, 94-95.

of complaints show that the number of torture related complaints was relatively high in the first two years i.e. 2007/8 and 2008/9, which could be the repercussion of the decade-long violent conflict. Later, the number of complaints fell gradually for three years from 2007/8 to 2011/12 that could be a falling ratio of conflict related violations. Data shows that in the first five years after conflict, the number of complaints decreased. Besides, the NHRC has stated some reasons for the decrease in number of complaints related to torture: the end of violent conflict and the signing of the CPA, implying that incidents of torture perpetrated by police on the rebel group or Maoists were in decline. However, the decreasing trend came to a halt in 2012/13 and 2013/14; with the ratio of complaints gradually increasing. Torture in police custody for obtaining confession from suspects in criminal investigation process still continues.³⁵ It is therefore, the increasing ratio of torture complaints at the NHRC shows that police torture in criminal investigation continues to exist.

The number of complaints received at the NHRC offices seems low compared to that of torture in other human rights organisations' reports and data (stated below), because the data is based on complaints received at the NHRC offices. An NHRC report accepted that 'it is very difficult to pinpoint the exact number of torture victims because many incidents of torture go unreported for fear of reprisal'.³⁶ Furthermore, another NHRC report explains that after the end of violent armed conflict, the number of the NHRC recommendations being implemented was low, and people not having access to the NHRC's services are the main reasons for the decreasing ratio of complaints in the NHRC.³⁷ Even so, the number of complaints related to torture cannot be regarded as low.

4.3.2 Torture in criminal investigations

Nepal follows the adversarial system of criminal investigation. As defined by law, separate roles of government agencies are associated with criminal justice system. For example, Nepal Police receives a First Information Report (FIR),³⁸ records witnesses and conducts search and seizure on the suspects and the suspected place,³⁹ carries out investigation of crime and prepares investigation report⁴⁰ and submits it to the OAG. The OAG gives necessary directions to police and prepares a charge sheet and files it in the court.⁴¹ Court then conducts hearing and gives verdict on the case. Coordination and collaboration between these organisations are crucial to stop misuse of power or extra-legal conducts and protection of the right to freedom from torture in criminal investigation. Most of the activities in criminal investigation are conducted by Nepal Police in coordination with the OAG according to the *State Cases Act 1992*. Many reports and data mention that criminal investigations are based on confessions, but the

35 See NHRC Torture Report, above n 5, 4.

36 See especially, National Human Rights Commission *Human Rights in Nepal: A status Report* (NHRC, 2003) 35.

37 NHRC, *Annual Report 2069/70*, 58.

38 *State Case Act 1992* (Nepal) s 3.

39 *State Cases Act 1992* (Nepal) s 4.

40 *State Cases Act 1992* (Nepal) s 17.

41 *State Cases Act 1992* (Nepal) ss 6, 18.

practice is highly criticised for using torture and other forms of ill-treatment as the means of extracting confessions.⁴²

4.3.2.1 Office of the Attorney General has accepted the prevalence of torture

The *Interim Constitution of Nepal 2007* guarantees the right to justice as the fundamental right which includes the right to be informed about the charge of crime,⁴³ the right to be presumed innocent,⁴⁴ the right to access a lawyer⁴⁵ and the rights for family members who are closely associated with the right to freedom from torture. The *International Covenant on Civil and Political Rights 1966* (ICCPR) sets the standard of rights to criminal justice.⁴⁶

The OAG is the main organisation to implement and supervise the right to fair trial and the right to freedom from torture during the criminal investigation process. The OAG is granted the authority to handle complaints related to misuse of power in custody or restriction of enjoyment of other constitutional rights during trial.⁴⁷ Thus, the role of the OAG is vital in protecting the right to freedom from torture in police custody.

The OAG publishes annual reports and special reports. In 2013, the OAG and Centre for Legal Research and Resource Development (CeLRRd)⁴⁸ conducted research and published a report called ‘Baseline of Criminal Justice System’. The report covers the overall situation of criminal justice and situation of fair trial, including the right to freedom from torture. The research reviewed annual reports of the OAG and the Supreme Court and identified issues and conducted research in 15 selected districts out of seventy-five districts in Nepal.⁴⁹ The report has presented various types of quantitative data and trends of criminal justice system. The report states that 28.1 per cent out of 175 interviewed detainees claimed that they were subjected to torture in police custody.⁵⁰ The data demonstrates that the criminal investigation system is still based on confession obtained through torture. Furthermore, the report also found that police do not respect the rights to the presumption of innocence from the very beginning of the investigation process; and often subject suspects to humiliation from

42 See, eg, Office of the Attorney General (OAG) and Centre for Legal Research and Resource Development (CeLRRd) *Baseline Survey of Criminal Justice System* (2013) 141 (‘OAG and CeLRRd 2013’); Advocacy Forum Report 2013, above n 5, 13; Advocacy Forum Fair Trial Report, above n 5, 17; Search for Justice, above n 5, 11; AHRC Report 2012, above n 5, 9-22; Informal Sector Research Centre (Insec) *Human Rights Year Book* (INSEC, 2013) 5; NHRC Torture Report, above n 5, 4; Nepal Conflict Report, above n 20, 125.

43 *Interim Constitution of Nepal 2007* (Nepal) art 24 (1).

44 *Interim Constitution of Nepal 2007* (Nepal) art 24 (5).

45 *Interim Constitution of Nepal 2007* (Nepal) art 24 (2).

46 *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (enter into force 23 March 1976) arts 9, 10, 14 (‘ICCPR’).

47 *Interim Constitution of Nepal 2007* art 135, (3) (c).

48 Centre for Legal Research and Resource Development (CeLRRd) is a national level non-governmental organization of Nepal which conducts research and interventions in the sectors criminal justice system, human rights, anti-corruption, prevention of trafficking of girls and women for sexual exploitation.

49 See OAG and CeLRRd, 2013, above n 42, 10.

50 Ibid 148.

the time of their arrest. For instance, the report shows that 63.45 per cent detainees were not given a warrant sheet before their arrest⁵¹ and 36.04 per cent of detainees were either humiliated or beaten by police.⁵² Similarly, a total of 23 judges were interviewed for the study and out of them, 19 or 86.96 per cent judges accepted that detainees did report about torture in the hearing process.⁵³ Similarly, out of 34 defence lawyers interviewed, 85.3 per cent claimed that police, in general, inflicted torture during interrogation and 73.5 per cent of the defence lawyers said they had dealt with torture related issue.⁵⁴

The data shows that many detainees are victimised by torture in the process of criminal investigation and torture is used as a means to extract confession. The OAG is granted the authority to receive information from any individual who is held in custody and has been mistreated or restricted to meet lawyers and family members. The OAG can give necessary directives in the case.⁵⁵ The OAG has accepted the fact that torture is widely practised in police custody. As a response to the situation, the OAG decided to conduct supervision visits in September 24, 2014.⁵⁶ However, supervision reports are yet to be made public. Supervising detention centres though seems to be a positive move; it should be a regular task of OAG's every office in accordance with the constitution. But the supervision has not been conducted in a regular basis. The OAG is either reluctant to supervise custody and prisons and take action against police or it is not serious about performing its supervisory role for the protection of the right to freedom from torture.

4.3.2.2 Trends of torture in police custody

Torture and other forms of ill-treatment incidents and cases are documented and published by many national and international human rights organisations. Among them, Advocacy Forum (AF),⁵⁷ a national level human rights organisation, has conducted monitoring of detention centres for more than 12 years. Among the activities of the AF in the sector of prevention of torture, monitoring of detention centres has been more consistent and well organised. Therefore, the study analysed the trends of torture from the data of AF reports. AF publishes reports of monitoring of detention centres annually. In the process of monitoring of detention centres, AF lawyers conduct interviews with detainees, record account of torture and other forms of ill-treatment inflicted by the state authorities, and also provide legal support to the

51 Ibid 141.

52 Ibid.

53 Ibid 200.

54 Ibid 181.

55 *Interim Constitution of Nepal 2007* (Nepal) art 135 (3) (c).

56 Office of Attorney General, Nepal (OAG), *Mahanyayadhibakta Karyalayako Barsik Pratibedan 2070/71* [Annual Report of Office of Government Attorney 2013/14] (OAG, 2014) 45-46.

57 Advocacy Forum (AF) is a non-governmental and non-profit making human rights organization based in Nepal. AF works to prevent torture and illegal detention through conducting detention centres monitoring in various parts of Nepal. Lawyers are involved for documentations and provide legal aid to needy torture victim <<http://advocacyforum.org/what-we-do/index.php>>.

victims of torture.⁵⁸ The following data covers last seven years' figures and show the trends of torture in detention centres in Nepal.⁵⁹

Table 4.2 Torture in detention centres from 2007 to 2013

Years	Total number of interviewed detainees	Number of detainees who claimed to have suffered from torture
2007	3,740	1,073
2008	4,085	886
2009	3,874	779
2010	4,198	810
2011	4,187	1,030
2012	3,773	841
2013	3,662	611
Total	27,519	6,030

Source: Advocacy Forum Reports from 2008-2014

The table presents the number of detainees interviewed by lawyers of Advocacy Forum and the number of detainees who claimed that they were subjected to torture by police in detention centres. The data covers trends of torture in detention centres across the country from 2007 to 2013 in 57 detention centres inside police stations in 20 districts.⁶⁰ A total of 27,519 detainees were interviewed in the seven years, and among them 6,030 or 21.91 per cent detainees claimed that they were subjected to torture by police during the pre-trial detention.⁶¹ The trend of torture in last seven years is as follows;

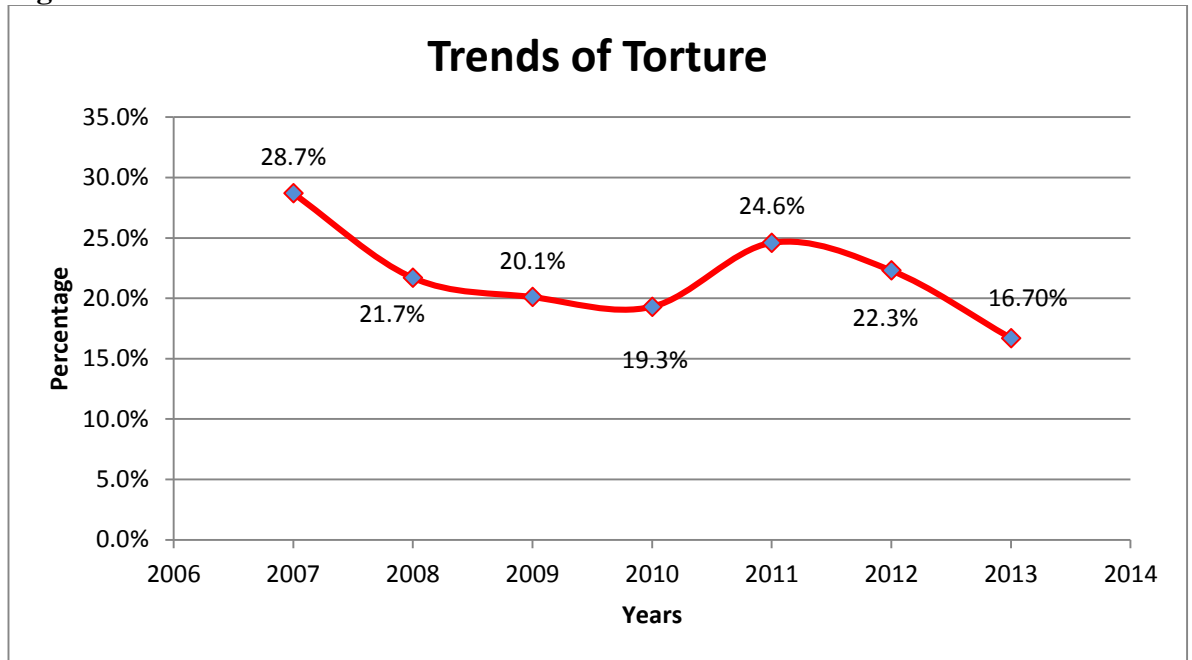
58 Mandira Sharma, Ingrid Massage and Kathryn McDonald 'Lawyers' Intervention at Pretrial Stage Helps to Prevent Torture, Illegal Detention and Other Human Rights Violations: Experiences of Advocacy Forum–Nepal' (2012) 4(2) *Journal of Human Rights Practice* 253-272.

59 See Advocacy Forum Report 2013, above n 5, 27; Advocacy Forum, *Promising Developments Persistent Problem, Trends and Patterns of Torture during Nepal 2013* (Advocacy Forum 2014) 1 ('*Advocacy Forum Report 2014*').

60 See Advocacy Forum Report 2013, above n 5, 19; Advocacy Forum, *Torture of Women: Nepal's Duplicity Continues*, (Advocacy Forum 2012) 1 ('*Advocacy Forum Report 2012*').

61 See Advocacy Forum Report 2013, above no 5, 27; Advocacy Forum Report 2014, above n 59, 1.

Figure 4.3 Trends of torture in detention centres



The presented data shows that the overall victims of torture in detention centres are in a decreasing order in the last seven years. In the beginning, the trend of torture was high i.e. 28.7 per cent detainees were tortured by police in detention in 2007. The graph shows that in the following years, the trend of torture gradually decreased up to 2010. The trend was 21.7 per cent in 2008, 20.1 per cent in 2009 and 19.3 per cent in 2010. Nevertheless, the falling trend stopped in 2011 and number of incidents of torture increased by 5.3 per cent compared to the previous year. In 2012, the trend seemed to fall by 2.3 per cent with 22.3 per cent.⁶² The ratio has significantly decreased by 5.6 per cent⁶³ in 2013. The decreasing ratio of torture in the first four years is positive. However, the percentage of torture was really high. It can be argued that the use of torture was a serious challenge in the time of conflict, so the ratio gradually decreased after the conflict. However, an alarming increase from 2010 to 2011 in the ratio i.e. from 19.3% to 24.6% of use of torture in detention centres illustrates that there is a drawback in the criminal investigation system. After 2011, the practice of torture in detention centres seems to be in decreasing order, with the ratio significantly decreasing from 2012 to 2013. The trend of prevalence of torture in detention centres fluctuated in the last seven years. However, as presented by AF, the ratio is still high and shows that torture and other forms of ill-treatment are being frequently used in the criminal investigation process.

As mentioned, the data of the reports of the OAG and CeLRRd and Advocacy Forum illustrates that hundreds of detainees were subjected to torture during criminal investigation. By comparison with the reports from these organisations, the OAG and CeLRRd report showed a higher percentage of detainees were tortured compared to AF reports. That could be a reason that Advocacy Forum, as a non-governmental

⁶² See Advocacy Forum Report 2013, above n 5, 27.

⁶³ See Advocacy Forum Report 2014, above n 59, 1.

organisation, faces more challenges while accessing and interviewing detainees in a free and fearless environment. The OAG and CeLRRd report brings to the fore the difficult situation when it comes to having access with lawyers. For example, the report stated that only 4.44 per cent of detainees had the opportunity to talk with the lawyer in private.⁶⁴ Therefore, it can be assumed that the number of torture victims in police detention centres could be higher than the data presented in various reports.

4.3.3. Torture of vulnerable groups

Children and women make a more vulnerable group in detention centres. These vulnerable groups are more likely to be at risk – physically and psychologically -- and could even fall victim to sexual abuse by the police.

The *Interim Constitution of Nepal 2007* guarantees children's rights as fundamental rights which guarantees the rights against physical and mental exploitation to child and the acts defines a punishable crime and compensation to victim.⁶⁵ The *Children Act 1992* stipulates 'no child shall be subjected to torture and cruel treatment'.⁶⁶ However, the *Children Act 1992* defines 'child' as a minor who has not completed 16 years of age.⁶⁷ The provision is not compatible with the provision of Convention on the Rights of the Child 1989 (CRC).⁶⁸

In regards to torture, juveniles also are more frequently subjected to torture and other forms of ill-treatment in Nepal. Advocacy Forum's report states that 34.7 per cent out of 930 juveniles were subjected to torture and other forms of ill-treatment in police custody in 2012.⁶⁹ The ratio of torture to juvenile significantly decreased to 22.9 per cent in 2013.⁷⁰ The percentage is remarkably higher than the overall population of detainees who were subjected torture in police custody. The use of torture has been consistently high in the previous years. Similarly, another report shows that an average of 29 per cent of juveniles were subjected to torture from 2007 to 2010.⁷¹ The types of torture used on children are similar to the torture (physical and psychological) inflicted on adults such as random beating, beating on the soles (*falanga*), and hanging.⁷² The following case study, documented by human rights organisation, illustrates infliction of torture on the vulnerable group during criminal investigation

'M', the son of the neighbour of Fahad Khan Usmani, 10, regularly extorted money from him in school. As a result Usmani used to steal money from his house to give it to M. On

64 See OAG and CeLRRd 2013, above n 42, 147.

65 *Interim Constitution of Nepal 2007* (Nepal) art 22(2).

66 *Children Act 1992* (Nepal) s 7.

67 *Children Act 1992* (Nepal) s 2 (a). 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

68 *Convention on the Rights of the Child*, opened for signature 2 September 1990, GA Res 44/25, (entered into force 20 November 1989) art 1.

69 See Advocacy Forum Report 2013, above n 5, 35.

70 See Advocacy Forum Report 2014, above n 59, 13.

71 See Advocacy Forum *Torture of Juveniles in Nepal A Serious Challenge to Justice System* (Advocacy Forum, 2010) 7.

72 See Hemang Sharma et al, *Rehabilitation and Reintegration Denied? A Critical Analysis of Juvenile Justice System in Nepal* (PPR Nepal, 2007) 41.

2 April 2011, Fahad's father, Farrukh Ahemad Musalman came to know that his son had stolen Rs 8,000 from his home and had allegedly given it to M. Then Farrukh went to Area Police Office at Maghgawa and filed a complaint of theft. Later the same day police called both parties to the police station. During the discussion at around 1.45 pm, Sub Inspector Bikram Sahani and Constable Mahendra Yadav took his son Fahad to a room inside the police station for inquiry. SI Sahani then reportedly slapped him to force him to confess that he had spent all the stolen money and had not given it to M. Fahad denied the allegation which angered the policemen. Then, Constable Yadav allegedly tied his legs with a rope, hung him upside down from a ceiling hook and beat him 15 to 20 times on his soles with a bamboo stick. The torture stopped only after another unidentified policeman intervened. When he was brought outside the police station, a crying Fahad informed his father about the torture. The victim's father then requested an explanation from the policemen why they had tortured his son, but the policemen denied the allegation and hurriedly released the victim after making his father sign a statement that 'Fahad had spent the money himself.'⁷³

The case study is an example showing the situation how juveniles are treated in crime interrogation process. The trends and the case study prove that there are rampant violations of the right to freedom from torture and child rights.

Similarly, women also become victim of torture. The ratio of women torture victim is comparatively less than male and juvenile population. Reports show that 9.4 per cent of women were subjected to torture in 2012⁷⁴ whereas in the previous years the ratio was slightly higher -- 15.4 per cent and 10.4 per cent in 2011 and 2010 respectively.⁷⁵ Generally, women are more vulnerable to sexual torture like rape, sexual harassment and other forms of physical and psychological torture.⁷⁶

These facts and figures prove that torture and other forms of ill-treatment are a serious human rights problem in Nepal. Criminal investigation system in Nepal is still based on confession through torture or other forceful means rather than other scientific investigation method. The police and other criminal investigation authorities are not sincere about fundamental rights and other constitutional rights. The right to fair trial, especially the right to the presumption of innocence, the right to get information about the arrest, the right to access a lawyer and family members, are regularly violated.

4.3.4 Obstacles to right to fair trial

The reports and case studies show that the right to fair trial has not been respected in the process of criminal investigation. The right to freedom from torture is directly linked to the right to a fair trial. Without respecting the right to fair trial, it is difficult to respect and protect the right to freedom from torture. Amnesty International fair trial manual stated that;

The criminal justice system itself loses credibility when people are tortured or ill-treated by law enforcement officials, when trials are manifestly unfair and when proceedings are

73 See Asian Human Rights Commission, *The State of Human Rights in Nepal 2011*, (AHRC, 2012) 34. AHRC published the case study of Nepal.

74 See Advocacy Forum Report 2013, above n 5, 34.

75 See Advocacy Forum Report 2012, above n 60, 5.

76 Ibid 13-14.

tainted by discrimination. Unless human rights are upheld during arrest, and in the police station, the interrogation room, the detention centre, the court and the prison cell, the state has failed in its duties and betrayed its responsibilities.⁷⁷

The right to a fair trial is set by international human rights instruments including the ICCPR. The *Interim Constitution of Nepal 2007* guarantees right to justice as the fundamental right⁷⁸ which includes a right to be informed about criminal charge, the right to be presented in front of judge within 24 hours of arrest, right to consult a lawyer, right to have prompt justice from a competent court, right to receive information about a criminal proceedings, right to free legal aid and right against retrospective law and double jeopardy. The OAG and CeLLRd report, Advocacy Forum reports and case studies illustrate embarrassing situation with respect to rights in the process of criminal investigation. A scholar thus put the statement of interrogation: ‘Many police investigators question suspects in narrow and congested rooms, along with their colleagues and subordinates. Interrogations can be long, with none of those arrested being informed of their procedural rights, as is their right, as guaranteed by the Constitution’.⁷⁹ The brief situation still shows the exact context of interrogation in Nepal. The studies have found that the right to fair trial is violated frequently.

The *Interim Constitution of Nepal 2007* contains ‘no person accused of any offence shall be compelled to be a witness against oneself’.⁸⁰ Practically, this right has not been respected. As noted, criminal investigation is focused on confession or forced to say something about the case. Either the interrogator obtains confession or gets other information from the suspect. Therefore, police often violate the right to fair trial and the right to freedom from torture during interrogation. Courts can refuse evidence (confession) obtained through torture in accordance to the *Evidence Act*, nevertheless, the court have given many conflicting decisions in such circumstances (See detail in Chapter V).

Another important aspect of the right to fair trial is ‘right to be informed about arrest’ and it is guaranteed by the *Interim Constitution 2007*. The case studies show that many detainees were arrested without a warrant and without their family being informed. The OAG and CeLLRd report shows 63.54 per cent of detainees were not given any warrant letter before they were arrested.⁸¹ After torture, police released the suspect without any charge. For example,

On 20 July 2012, Mr. Dipen Limbu was arrested without warrant. Without prior notice, police punched on his head and kicked him on his back until he fell on the floor. They then accused him of having extorted money from local shopkeepers. While he was still lying on the floor on his stomach, they kept on kicking him on his head, chest and other parts of his body and used sticks to beat him. Afterwards he was brought back to the Area Police Office

77 See Amnesty International, *Fair Trials Manual* 2nd edition (Amnesty International 2014) xv <<https://www.amnesty.org/en/documents/POL30/002/2014/en/>>.

78 *Interim Constitution of Nepal 2007* (Nepal) art 24.

79 See, eg, Yubraj Sangraula, *Police Investigation: Interrogation methods and their impacts, Policing in Nepal: A collection of Essays* (Saferworld 2007) 44.

80 *Interim Constitution of Nepal 2007* (Nepal) art 24 (7).

81 OAG and CeLLRd Report 2013, above n, 42, 141.

and detained without providing a detention letter or arrest warrant, as is required by the law. He was released on 22 July 2012 at 9 am.⁸²

It is a kind of arbitrary arrest that can create a situation of incommunicado detention and might inflict more torture. Such practices not only violate fundamental rights, but also contradict the ICCPR provisions related to procedural safeguards.⁸³

The above presented case shows a link between arrest without warrant or notice and torture. It can be assumed that, if the police give an arrest information or warrant to the concerned person, at that situation, police would be responsible to prove charge and accountable of torture and other forms of ill-treatment. Thus, police try to avoid the possible risk. As an example, Advocacy Forum report stated that police routinely falsify arrest or fail to keep a detail arrest record appropriately.⁸⁴ Even in many court cases, detainees claimed that they were tortured in police custody before giving any arrest information and after some days, police made new arrest record before submitting to the court for example the case *Tilak Rai v Inspector Rajendra Kumar Thapa, Crime investigation Unit, District Police Office Kathmandu* (please see for detail of case in Chapter V).

Furthermore, the *Interim Constitution of Nepal 2007* guarantees that every person who is arrested shall be produced before the court within a period of 24 hours.⁸⁵ Furthermore, *State Cases Act 1992* re-states the provision. However, at the practical level, case studies and reports show that most of the detainees were not presented before the court within 24 hours of arrest. The OAG and CeLLRd report stated that 65.63 per cent of detainees were not presented before the court within 24 hours of the arrest. The reasons of not presenting suspect before the court within 24 hours could be, either a negligence of the law or being reluctant to present detainee as a person in front of the judge because of the sign of torture. In this regard, the Supreme Court of Nepal states that the provision is crucial to maintain checks and balances to prevent possible torture and other forms of ill-treatment in custody. Further, the court clearly found that in the process of investigation of crime, investigation officers could use torture to obtain evidence and information. Therefore, judges or any authorised person should assess the case and physical condition of suspect. After that, the judge or the authority should decide whether there should be further detention or not.⁸⁶

With regards to a right to prompt legal advice, the *Interim Constitution* guarantees the right as the fundamental right. It is an important provision aligned to the rights to freedom from torture, because, torture most often occurs behind closed doors and its occurrence is difficult to detect. Thus, a lawyers' presence is very important from the beginning or immediately after arrest. A lawyer appointed by the suspect can protect the rights of the detainee and monitor the proper application of law in the criminal

82 See Asian Human Rights Commission, Urgent Appeal (1 August 2012) 'NEPAL: Torture of an 18-year-old student by the police in Jhapa district' <<https://www.ammado.com/nonprofit/108433/articles/64884>>.

83 ICCPR arts 9, 10, 14.

84 Advocay Forum Fair Trial report, above n 5, 8.

85 *Interim Constitution of Nepal 2007* (Nepal) art 24(3).

86 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452 (Supreme Court of Nepal).

investigation process. However, the situation is not encouraging; lawyer's representation on behalf of suspect is really poor. First, many people do not know about the right, as Advocacy Forum's report states that 78.2 per cent of detainees out of 4,328 did not know about their rights.⁸⁷ Another report shows 46.88 per cent detainees did not have a chance to meet with their lawyer whilst in detention.⁸⁸ The data shows huge numbers of detainees are still deprived of their right to access to lawyers, which is an important aspect to decrease torture and protect the right to freedom from torture.

4.4 Methods of torture

Torture is aimed at destroying a victim both physically and psychologically.⁸⁹ Thus, perpetrators use different methods to mete out torture, which creates severe pain and leaves physical scars on victims and, in most cases, victims suffer from mental trauma long afterwards. Any method of torture can affect the physical, psychological and social wellbeing of victims. Physical and psychological torture tends to occur simultaneously.

As stated, the use of torture has a long history in Nepal. However, the tools and techniques of torture have changed with time. Various types of traditional instruments and methods were used from Nepalese early history until the end of Panchayat period in 1990. In Golghar (an isolated place suited for severe torture), the use of Turung (a wooden instrument in which victims' legs are put and locked) may have significantly decreased, but many new tools and techniques have been introduced and practised in Nepal. After the September 11, 2001 terrorist attacks in the United States of America (USA), the U.S. Government introduced various types of torture methods such as walling, cramped confinement, stress positions, sleep deprivation, and water boarding.⁹⁰ Nepalese security forces including the police have started to use similar types of torture methods in Nepal. During the conflict, certain methods of torture were quite often used by the Nepal Army and Nepal Police. For example, random beating, keeping suspects in isolation, sexual violence, sleep deprivation, waterboarding and blind-folding.⁹¹ To some extent, Nepal also has adopted some new types of torture in criminal investigations. Many case studies show the methods of torture in Nepal have become more sophisticated and the perpetrators try to leave fewer marks on the body of the victim, such as waterboarding, and suffocating victims in a dark room. Simultaneously, many forms of physical torture such as beating on the soles of the feet (Falanga), rolling a weighted bamboo stick or any other round object on detainees' thighs (Belana), brutal beatings, and the use of electric shocks are also reported to have been used in criminal investigation system.

87 See Advocacy Forum Fair Trial Report, above n 5, 28.

88 OAG and CeLLRd Report 2013, above n 42, 146.

89 See Metin Basoglu (ed) *Torture and its Consequences, Current Treatment Approval* (Cambridge University Press 1998), 38.

90 See Scharf, Michal P, 'The Torture Lawyers' (2009-2010) 20 *Duke Journal of Comparative & International Law* 399; Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 *Human Rights Quarterly* 812.

91 NHRC Torture Report, above n 5, 3-4.

On 20 February 2011, Mr Sahaj Ram Tharu was arrested by police on the charge of extorting money on behalf of an underground party. He was blindfolded and interrogated and later forced to lie on the floor. The Policemen kicked him on his chest with their boots. When he denied his involvement, the policemen beat him up with sticks on his soles. He fell unconscious. The Policemen then brought him to consciousness by sprinkling water on his face and again made him to jump on the floor for a while and brought him back to the cell. Back in the cell, two policemen held his hands, two others held his legs, two more clutched his head with their hands and the others poured water into his nose and mouth, as they continued interrogation. Each time, water was poured into his nose and mouth for two to three minutes until he became exhausted. As he kept rejecting the allegation, the torture continued.⁹²

The CVICT (a human rights organisation which provides rehabilitation service to victims of torture in Nepal) has defined physical, psychological and sexual torture (three types of torture) in Nepal.⁹³ However, this study has discussed ‘physical’ and ‘psychological’ torture and it has included the sexual torture as a form of both physical and psychological torture.

4.4.1 Physical torture

Physical torture directly harms victims’ body by inflicting pain and discomfort and can leave scars on different parts of the body. The aim of physical torture is not to kill the victims. Perpetrators make sure that the victim does not die during torture, and inflict torture in such a way that scars or marks are not left on body parts for an ordinary examination to detect them.⁹⁴

This study has found that various types of physical torture are practised in Nepal. Among them, random beating (beating all over body parts such as palms, cheeks, arms, back, chest, head, bottom, thighs, legs, hands and mouth by boxing, kicking with boots, and hitting with sticks, rubber pipes, or belts) is the most common form of torture practised in Nepal. Most of the victims – 29 out of 30 cases, or 93.33 per cent -- reported that they were subjected to random beatings. The second most common form of torture is Falanga (beating on the soles of victims’ feet several times with bamboo sticks, iron rods, pipes and rubber belts). Twenty out of 30 victims were subjected to Falanga. The third commonly used form of torture is slapping on the face (cheek, mouth, forehead), seventeen out of thirty victims claimed that they were slapped on their faces during interrogation.

Along with the three most commonly used torture methods, other methods used in torture are Belana (rolling a weighted bamboo stick or any other round object on detainees’ thighs), the use of electric shocks, waterboarding, making victims jump after Falanga, pushing victims off high place, hanging the victim upside down, forcing

92 See World Organisation against Torture (OMCT), *Nepal: Alleged torture and ill-treatment with the purpose of extracting a confession inflicted on Mr. Sahaj Ram Thura*, Urgent Intervention (11 March 2011) <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2011/03/d21181/>>.

93 See, eg, Nirakar Man Shrestha and Bhogendra Sharma, *Torture and Torture Victims: A Manual of Medical Professionals*, (CVICT, 1995) 4.

94 Ibid.

the victim to stand for several hours, banging victims' heads on the wall, forcing the victim to crouch with bent knees, forcing them to lie on the floor, jumping on the victim's stomach, cutting body parts to make victim bleed, forcing victim to perform physical labour and using chilli powder (making the victim inhale smoke from burning chilli). In most cases, two or more types of torture were used during interrogation. The use of torturer seems to be professional because the torturer performs random beatings and Falanga simultaneously. A scholar pointed out that after Falanga, the victim was forced to jump on the same spot as it increases pain and the degree of the squeal.⁹⁵ The physical torture inflicted on victim has long lasting effects. Extreme and excruciating pain, exhaustion, disfiguration, mutilation and permanent disability can be the result of such physical torture. Likewise, more than 20 per cent of victims claimed that they were deprived of food and water whilst in the custody and similar numbers of victims were transferred to many different detention centres.

Sexual torture is often used in Nepal. Advocacy Forum's report shows that the forms of sexual torture inflicted on women victims in Nepal were rape, forced undressing, threats to put stinging nettles into the vaginas of female prisoners, beating women's sensitive parts, pulling hair and using abusive language.⁹⁶ During the time of conflict, sexual torture was a common feature of both parties —the State and the rebels.⁹⁷

4.4.2. Psychological torture

The Compensation Relating to Torture Act 1996 covers both 'physical' and 'psychological' types of torture.⁹⁸ Forms of psychological torture include prolonged isolation, threats, humiliation, and sensory deprivations to name a few, but these are not regarded as serious torture. As per the definition of torture, the 'intention' is a major component; it is evident that psychological torture has always been associated with intention – i.e. to create pain and suffering to the victim. Therefore psychological torture can be defined as torture that is as same as physical torture in terms of the infliction of pain and suffering. Nevertheless, evidence of physical torture is taken into account in the process of assessment for compensation; whereas in most of the cases evidence of psychological torture is ignored in Nepal (see more detail about court decisions regarding torture compensation cases are detailed in Chapter V). Psychological torture generally does not leave scars on victim's body parts. It mainly targets the victim's mind. But since psychological torture affects the mental health of the victim, its effect is more serious and is long lasting.⁹⁹ Research shows that psychological torture damages the victim as badly as physical torture does.¹⁰⁰ The techniques of the psychological torture are divided into five types -- deprivation, coercion, threats, communication and pharmacological techniques.¹⁰¹

95 Basoglu, above n 89, 40.

96 See Advocacy Forum Report 2012, above n 60, 13-14.

97 See Advocacy Forum and International Centre for Transitional Justice, *Across the Lines he Lines he Lines The Impact of Nepal's Conflict on Women* (2010) 7.

98 *Compensation Relating to Torture Act 1996* (Nepal) s 2.

99 See, eg, Sharma, Gautam and Guragain, above n 9, 20.

100 See Metin Basoglu, 'A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture' (2009) 79 (2) *American Journal of Orthopsychiatry* 135-145.

101 See, eg, Shrestha and Sharma, above n 93, 10.

Psychological torture is also commonly used in detention centres. People accept or tolerate torture knowingly or unknowingly. The study found that most of the victims were subjected to psychological torture along with physical torture. One third of the thirty victims were blindfolded immediately after arrest, and during interrogation, similar number of persons had their lives threatened (verbally or at gun point), threatened with pressing charges in cases such as those involving drugs and ammunition, and were verbally abused (using vulgar words). Many victims were kept in solitary confinement and most of the persons were arrested without warrant and kept in illegal detention. Similarly, some sexual torture such as use of abusive or vulgar words is also a common form of torture practised in Nepal.

The effects of physical and psychological torture pose a great challenge when it comes to rehabilitating thousands of torture victims in Nepal. Addressing torture victims' concerns and rehabilitating them is the duty of Government of Nepal under the CAT. Centre for Victims of Torture (CVICT), a national level human rights organisation, which provides rehabilitation services to victims of torture, documented a total of 38,747 torture related cases in a period of 18 years (from 1990 to 2008).¹⁰² A research-based manual of Nepal stated that torture always has effects on the victim – from short-term effects like bruises and haematomas to long-term serious effects such as vision and hearing impairment, mutilation of body parts and Post-traumatic Stress Disorder (PTSD) among others.¹⁰³ The Government of Nepal does not have a rehabilitation package for torture victims, which is a clear indication that the Government of Nepal has failed to implement this provision of the CAT.

4.5 Status of perpetrators

The involvement and identity of perpetrators of torture could be different in various contexts. For example, military, police and rebel groups inflicted severe torture during conflicts, but police routinely committed torture and other forms of ill-treatment in normal circumstances of criminal investigations.

4.5.1 State-sponsored torture

Generally, State-associated personnel inflicting torture and other forms of ill-treatment on individual is called State-sponsored torture. The CAT defines that torture is perpetrated by public official or with the consent or acquiescence of public officials.¹⁰⁴ The Nepal Police, the Armed Police Force, Nepal Army, Forest Guard, Guard of National Park and Wildlife Conservation inflict torture in the process of criminal investigation and while exercising their authorities. Most commonly, it is reported that torture and other forms of ill-treatment are carried out by Nepal police. Nepal police is regulated by *Nepal Police Act 1955* under the Ministry of Home Affairs of

102 Advocacy Forum, INHIRED International, Informal Sector Service Centre (Insec), Centre for Victims of Torture (CVICT) and Forum for Protection of People's Rights (PPR) *Criminalise Torture* (2009) 39.

103 See Shrestha and Sharma, above n 93, 14-21.

104 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1(1).

the Government of Nepal.¹⁰⁵ Similarly, the district level police is under the authority of the CDO.¹⁰⁶ The NHRC, the OAG, and other national and international human rights organisations regularly reported police torture during interrogations as part of the process of crime investigation.¹⁰⁷

Likewise, the Armed Police Force, Forest Guard, and Customs Officer also inflict torture in their jurisdictions.¹⁰⁸ The Armed Police Force (APF) was established in 2001. The force is governed by *Armed Police Force Act 2001*. The Ministry of Home Affairs controls the Armed Police Force. The APF has been deployed in many parts of the country, especially in 27 districts of the Tarai, Eastern Hill and the Kathmandu Valley to maintain peace and security. The personnel of the APF also inflict torture and other forms of ill-treatment.¹⁰⁹

Forest Guard under *Forest Act 1993*¹¹⁰ and Guard of National Park and Wild Life Conservation under *National Park and Wild life Conservation Act 1973*¹¹¹ are also granted authority to arrest and investigate crime that falls under their jurisdiction. Personnel of these offices are also criticised for using torture.¹¹² Nepal Army (previously the Royal Nepal Army) was deployed from November 2001 against the Maoists during the conflict period. Members of then Royal Nepal Army allegedly used torture and other forms of ill-treatment across the country.¹¹³ Currently, Nepal Army is not part of the regular peace and security system.

4.5.2 Non-state actors and private parties

Although international law, especially the CAT, does not directly include the presence of non-state actors or private parties in inflicting torture, many institutions have accepted that there have been violations of the rights to freedom from torture from non-state actors or private parties. For example, the NHRC has received complaints related to human rights violations from rebel groups and private parties such as schools and companies and the rights body conducts investigation into incidents of torture and recommends necessary action to the Government of Nepal.¹¹⁴ Similarly, the OHCHR has also highlighted violations of human rights and humanitarian laws by rebel group

105 *Nepal Police Act 1955* (Nepal) s 4.

106 *Nepal Police Act 1955* (Nepal) s 8

107 See, eg, Advocacy Forum Report 2013, above n 5, 13; Advocacy Forum Fair Trial Report, above n 5, 17; Search for Justice, above n 5, 11; AHRC Report 2012, above n 5, 9-22; Informal Sector Research Centre (Insec) *Human Rights Year Book* (Insec, 2013) 5; NHRC Torture Report, above n 5, 4; OAG and CeLLRd, 2013, above n 42, 141; Nepal Conflict Report, above n 20, 125.

108 See Advocacy Forum and REDRESS, *Held to Account Making the law work to fight impunity in Nepal* (Advocacy Forum and REDRESS, 2011) 90 (*'Advocacy Forum and REDRESS Report'*).

109 See *Search for Justice*, above n 5, 14.

110 *Forest Act 1993* (Nepal) s 55, 56.

111 *National Park and Wild Life Conservation Act 1973* (Nepal) s 24.

112 See Advocacy Forum, Torture Briefing Prevention in Torture in Nepal (2011) 8 <<http://www.advocacyforum.org/publications/torture.php>>.

113 See Bhogendra Sharma and Rajendra Ghimire *Combating Torture in Nepal Problem and Prospects*, (CVICT, 2005) 7.

114 See especially, NHRC 13 Years Report, above n 26, cases serial numbers 386, 401, 517, 706, 707, 708, 709, 711 and 712. (*'NHRC 13 years Report'*)

and made these acts public through its various reports.¹¹⁵ Other national and international human rights organisations have also documented incidents of torture from non-state actors and private parties.¹¹⁶ During the conflict, Maoist activists, especially its affiliated organisation, the People's Liberation Army, committed torture and other grave human rights violations.¹¹⁷ The suspects, especially those assumed to be the spies of the then government and involved in activities against the CPN-Maoist, were subjected to severe torture. Some suspects were even killed through so called "Jana Adalats" (People's Courts). After identifying such rights violations, the NHRC handled such types of torture cases and recommended compensation and necessary action against those Maoist activists who were involved in torture in many cases. However no action has been taken against anyone so far.¹¹⁸

Torture by private entities such as schools, universities, hospitals and private security guards is another challenge in Nepal. For example, corporal punishment is often used against children in school in the name of children's upbringing and to facilitate learning and maintain discipline.¹¹⁹ The acts not only violate child rights but it also violates the right to freedom from torture, which is guaranteed by the *Constitution* and law. Complaints about torture and other forms of ill-treatment of children are also registered with the NHRC. The NHRC has conducted investigations and recommended compensation of NRs 50,000 to victims.¹²⁰ These entities are legally registered organisations, and it is the government's duty to monitor such organisations and ensure that the right to freedom from torture from private entities or non-state actors is upheld.

4.6 Causes of torture and other forms of ill-treatment

There are various causes of torture and other forms of ill-treatment, depending on the situation. For example, as Professor Luban stated in the context of U.S. interrogation of detainees of suspected terrorist in Guantanamo Bay, Afghanistan and Iraq, the objectives of torture were associated with five reasons: 'victor's pleasure, terror, punishment, extracting confessions and intelligence gathering'.¹²¹ Similarly, REDRESS trust has stated, based on various country reports, that certain factors contribute to widespread use of torture, particularly in law enforcement agencies, including the weak rule of law, lack of legal protection and malfunctioning institutions coupled with discrimination and marginalisation.¹²² Another study found that the

115 See Nepal Conflict Report, above n 20, 21.

116 See Search for Justice, above n 5, 8; Sharma and *Ghimire*, above n 113, 7.

117 See Search for Justice, above n 5, 8; Nepal Conflict Report, above n 20, 21.

118 See, eg, NHRC 13 Years Report, above n 26, cases serial numbers 386, 401, 517, 706, 707, 708, 709, 711 and 712.

119 See Mishra N et al 'Corporal Punishment in Nepalese School Children: Facts, Legalities and Implications' (2010) 30(2) *Journal of Nepal Paediatric Society* 98-109.

120 See NHRC 13 years Report, above n 26, case serial numbers 516.

121 David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1429-1440.

122 See REDRESS, *Justice for Torture Worldwide Law, Practice and Agendas for Change* (REDRESS Trust 2013) 19.

causes of torture were linked to socio-economic inequality and violence.¹²³ Therefore, it is difficult to identify the causes of torture and other forms of ill-treatment as circumstances in which torture and other forms of ill-treatment are practised often vary. For example, as Professor Mark stated, violation of human rights itself is a cause of violent conflict and vice-versa.¹²⁴

In the context of Nepal, there are many direct and underlying reasons why torture and other ill forms of treatment are prevalent. As discussed above, torture and other forms of ill-treatment are widely and continuously practised in Nepal, and the use of torture can be associated with direct as well as indirect causes. The Centre for Victims of Torture has stated that the causes of torture are: to obtain confession, to get information, to take revenge, to destroy personality, to control crime, to create threat to society, to harass the victims and to get whatever the perpetrator wants.¹²⁵ The study has found two types of causes of torture and other forms of ill-treatment which are detailed in the following section.

4.6.1 Direct causes/motivations of torture

The study collected and analysed thirty case studies of torture victims, which were documented by many national and international human rights organisations.¹²⁶ Most of the case studies showed that there are multiple causes/motivations that lead to a culture of torture and other forms of ill-treatment in police custody. The following causes were found from the case studies:

Figure 4.4 Causes of torture

Causes/motivations of torture	Total cases	Number of torture victims	Percentage
Obtaining confession	30	24	80.00%
Seeking more information (goods, involvement of others)	30	13	43.33%
Establishing fabricated facts	30	10	33.33%

123 See Thomas E MacCarthy (ed) World Organisation against Torture (OMCT), *Attacking the Root Causes of Torture: Poverty, Inequality and Violence, An Interdisciplinary Study* (OMCT, 2006) 13 < http://www.omct.org/files/interdisciplinary-study/attacking_the_root_causes_of_torture.pdf>.

124 Susan Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *The Morden Law Review* 61.

125 See Centre for Victims of Torture (CVICT) *Yatana Pidiitka Pachyama Bhayaka Faisalharu* [Collection of decisions in Favour of Torture Victims] (CVICT, 2005)11.

126 The case studies were selected from latest thirty cases from before 2014 June which was documented by many national and international human rights organisations namely Advocacy Form, Centre for Victims of Torture (CVICT), Forum for Protection and People’s Rights (PPR Nepal), Antenna International and published by Asian Human Rights Commission (AHRC) and World Organisations Against Torture (OMCT). These cases were published in the websites of the organisations and many of them are linked to court cases which are explicitly analysed in Chapter V.

Creating threat and force to withdraw case	30	10	33.33%
Torture-corruption nexus (demanding bribe and intervening in civil dispute)	30	8	26.66%

The above table lists multiple responses regarding the causes/motivations of torture and other forms of ill-treatment in the crime investigation system in Nepal. From the analysis of the cases, five different types of direct causes/motivations were found that contributed to the prevalence of torture in Nepal. Two or more causes were linked with a single case in many instances. For example, torture was used to obtain confession in a criminal charge during interrogation, when detainee confessed to the charge, torture was again inflicted to extract more information; to gather intelligence information about the crime or other people's involvement in crime.

4.6.1.1 Obtaining confessions

As shown in the above table, obtaining confessions is the main reason why torture is inflicted on a suspect. The data shows that 24 out of 30 (or 80 per cent) of detainees were subjected to torture to extract confession about crime. Police or investigators are often keen to obtain confession in a quick and less costly manner and they use torture and other forms of ill-treatment to obtain it. The data shows that investigators focused on a confession-based investigation rather than scientific investigation method. This can also be linked to the attitude and behaviour of police. This obviously raises questions about the current police training in Nepal. This means either the training or curriculum does not sufficiently include content about respecting a suspect's right to freedom from torture in the context of criminal investigation; or there is poor implementation of the gained knowledge and skills at the practical level about proper police procedure. Regarding this situation, the Special Rapporteur on Torture noted in his report;

Reportedly, police continue to rely heavily on confessions as the central piece of evidence in most cases. It is alleged that incidents of beatings and ill-treatment during interrogation are widespread and increasing. In addition, it remains very common for detainees to be forced to sign statements without being able to read them.¹²⁷

Further, a report stated that 'most criminal cases are dealt with through extracted confession (with some corroborative evidence) and physical evidence is rarely collected in a thorough or systematic way. Surveillance of suspects in criminal investigations is rare and the number of trained personnel fully devoted to crime investigation is limited'.¹²⁸ A recently published case illustrates that criminal investigation is based on confession obtained by torture. The summary of a case is as follows;

On 12 August 2013, Rabi Shrestha and Dudhraj Tamang were arrested on charge of stealing gold. Police searched Rabi's room but did not find gold. They were then kept in police custody and asked about the gold. They did not answer. Then they were severely and

¹²⁷ Juan E. Mendez, *Report by Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/19/61/Add.3 (2012) 224.

¹²⁸ See Sharma, Gautam and Guragain, above n 9, 14.

repeatedly tortured by police. They were beaten on their face, chest, bottom, thighs, back with police boots and slapped in ears, cheeks, face and eyes. Then the policemen started the interrogation again. As Rabi could not answer those questions, the policemen handcuffed him, forced his knees through his handcuffed hands and inserted a stick through his bent knees. Two policemen lifted the stick and a third policeman kicked on his bottom and back. They lifted him and let him fall down on the floor several times. Rabi lost unconscious repeatedly. The torture continued until one policeman told others to stop for fear that the victim would die. Then he was given some water and some time to rest. But the policemen started to torture him again. Police also tortured Dudharaj in a similar way. The next day police presented them before the District Administration Office under public offence charge. After 10 days, another person Rakesh Lama was arrested in connection with the same case. On 3 September 2013 the CDO office released them on bail. But the police immediately arrested them and issued arrest warrant on abduction charge.¹²⁹

The case study is a representative case which shows the interrogation process – how detainees are questioned in custody. In this case, torture was used as a tool to obtain confessions about crime and to find if other people were also involved. It indicates that obtaining confessions is a reason why police inflict torture on suspects. Furthermore, the case demonstrates the use of arbitrary detention and chronic misuse of power.

4.6.1.2 Seeking more information and the involvement of others in crime

Another direct cause of torture and other forms of ill-treatment is to find out more information about the crime and to seek to infer the involvement of the suspect in any other crime. In the situation, investigators inflict torture immediately after confession or after a few days to extract more information about crime. In the process, investigators ask mainly about the whereabouts of stolen goods and about who else was involved in the crime. The case studies show that a total of 13 suspects out of 30 were subjected to torture and other forms of ill-treatment during the criminal investigation process. The following case shows the suspect repeatedly confessed to crime, but even after that he was beaten severely only to extract more information about the crime.

On 31 October 2010, Mr. Gyan Bahadur Balami was arrested by about six policemen on suspicion of a robbery and drug smuggling. During his arrest, he was allegedly beaten with sticks, punched and kicked. He was then handcuffed and beaten again for 20 minutes before the policemen blindfolded him and took him to a nearby jungle in a jeep. There, he was dragged out of the jeep. The policemen allegedly forced his head into the roots of a fallen tree and put a pistol into his mouth. He was again beaten randomly on his back, legs, hands and feet. The policemen also allegedly drilled a sharp wooden stick into his right sole and bent his fingers with the purpose of obtaining information about alleged stolen items. Mr. Gyan Bahadur Balami reportedly confessed to the crime. The policemen then allegedly forced a pistol into his mouth and said “what is your last desire”. Mr. Gyan Bahadur Balami was later taken back to his house. The police seized some of Mr. Balami's money, boots,

129 See World Organisation against Torture (OMCT), *Nepal: Fear for the safety of Mr. Rabi Shrestha and Mr. Dudhraj Tamang, victims of torture* Urgent Intervention (16 September 2013) <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2013/09/d22369/L>>.

and jackets. The police also arrested his wife, who was taken to Makawanpur District Police Office (DPO). Once at the police station, they were detained in separate detention cells...¹³⁰

The case indicates another situation where torture was used as tool to find out more detail about the crime, goods etc. Here is another example:

On 17 May 2011, 'Mr. Kedar K.C. was informed that he was charged with seven cases. He was also asked to identify his alleged accomplices at the central jail and from pictures. When he said he could not identify them, he was reportedly kicked and beaten with a plastic pipe and a stick all over his body. He was also forced to jump on the floor for about 10 -15 minutes.¹³¹

The cases indicate that the criminal investigation system in Nepal still depends on information extracted from suspects through forceful coercions rather than scientific methods.

4.6.1.3 Establishing fabricated facts

The study identified that 10 out of 30 persons claimed that they were subjected to torture to either thumb print or sign a prepared statement and establish fabricated facts. Obtaining confessions and forcing suspects to give thumb prints or sign prepared statements or documents are two different aspects. Generally, a detainee knows the issue or charge against him/her and police asks question in relation to the charge in the process of obtaining confession, but detainees are not informed about the statement. For example: '... The beating cut Mr Chaudary's left eyebrow and he fell unconscious. When he woke up, he found his face covered with blood. Police officer Yadav brought him to a tap and ordered him to wash his face and then asked him to sign a paper without letting him see what was written on it'.¹³²

The case shows that investigators tried to establish a fabricated story of crime through severe torture. The investigator was either in a face-saving bid in the wake of public pressure or was reluctant to follow other scientific or effective techniques in the criminal investigation system.

Furthermore, as a result of the situation, if any evidence could not be extracted from torture, police might charge fabricated criminal case such as drug case under the *Narcotic Drugs (Control) Act 1976* and Public Offence under the *Public Security Act*

130 See World Organisation against Torture (OMCT) released two urgent interventions about the cases which titled were *Nepal: Alleged torture and ill-treatment in police custody including sexual abuse, with the purpose of extracting a confession* and *Nepal: Follow-up_Mr. Gyan Bahadur Balami, Ms. Lama and Mr. Iman continue to be threatened and have still not been provided with adequate medical care_OMCT fears for their safety*, Urgent Campaign (2010) <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2010/12/d21010/>>.

131 See World Organisation against Torture (OMCT) released an urgent intervention to Nepal. The title was *Nepal: Torture and ill-treatment in custody of Mr. Kedar K.C. to extract a confession Fear for his safety* Urgent Campaign (2011) <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2011/06/d21309/>>.

132 See Asian Human Rights Commission (AHRC) *NEPAL: A torture victim remains in the custody of his torturers* Urgent Appeal (9 March 2013) <<http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-059-2013>>.

1989 which are handled by the CDO. The detainees charged under these Acts can be detained, without trial, for up to three months.¹³³ Here is an example: A 15-year-old domestic helper, employed by an army officer in Kathmandu, was accused of stealing gold. He was charged with public offence rather than theft related charge.¹³⁴ The question obviously arises as to why the victim was charged under public offence when his crime is said to be stealing. Behind the situation, it might have a reason that the case pits the victim against a powerful person and whose influence in state mechanism. Likewise, if the general public, human rights activists and media raised the issue seriously, at that situation the police might try to justify their actions. This creates a situation in which protecting rights to freedom from torture and stopping arbitrary arrests of vulnerable people become a challenge.

4.6.1.4 Creating threats and forcing the withdrawal of torture compensation cases

In some cases, the objectives of torture are to create threats to suspects even after the confession has been extracted. Furthermore, the purpose of torture and other forms of ill-treatment is to create threats or force the suspect to withdraw torture compensation cases. In 10 out of 30 cases, suspects were subjected to torture with these motives. In accordance with the *Compensation Relating to Torture Act 1996*, torture victims can file a petition in court for physical and mental check-ups¹³⁵ and get compensation and take necessary action against the perpetrator.¹³⁶ Likewise, victims and family members can also file a complaint in the NHRC.¹³⁷ In many cases, the complaint against torture becomes the cause of the person being re-victimised. Due to the absence of ‘victims and witnesses protection law’, the victims of torture are reluctant to file cases against their perpetrators. For example:

On 25 June 2012, Chandra Prasad Bhattarai was arrested on charge of forgery. He was tortured by police. He filed a petition for his health check-up in the district court. The Court ordered for his health check-up. Meanwhile, one of the inspectors continuously threatened the victim to withdraw his application for medical examination, saying that he would be charged with drug-related offence if he failed to do so. Suspects charged under the Narcotic Drugs (Control) Act 1976 can be detained, without trial, for up to three months, with the permission of the court.¹³⁸

This case shows a situation where victims get threats from their torturer, and this situation indeed is critical in Nepal. In this situation, victims get re-victimised or they can be charged with another fabricated case. In the absence of protection of ‘victims and witnesses protection law’ (which is discussed in Chapter III), torture victims are deprived of justice.

133 *Public Security Act 1989* (Nepal) s 6 (2).

134 See Asian Human Rights Commission *NEPAL: A minor is tortured & illegally detained, alongside adults, & refused access to a lawyer*, Urgent Appeal (19 September 2012) <<http://203.86.237.28/web28/web/support.php?ua=AHRC-UAC-172-2012>>.

135 *Compensation Relating to Torture Act 1996* (Nepal) s 5.

136 *Compensation Relating to Torture Act 1996* (Nepal) s 7.

137 *National Human Rights Commission Act 2012* (Nepal) s 10.

138 See Asian Human Rights Commission (AHRC) *‘NEPAL: A man is tortured by the Central Investigation Bureau and threatened that false charges would be brought against him*, Urgent Appeal, (June 2012) <<https://www.nepalmonitor.org/index.php/reports/view/937>>.

4.6.1.5 Torture for inability to pay bribes and for no reason

The study found that in some cases people were taken into custody in civil disputes and for their inability to pay bribes. Similarly, some persons were arrested without any reason at all. For example, if someone gets involved in a spat with a policeman or any other influential person, police arrest him/her and inflicts torture. Eight out of 30 persons were subjected to torture and other forms of ill-treatment in civil disputes, for being unable to pay bribes and/or without any reasons. For instance:

On 9 February 2011, Mr. Ang Dorje Sherpa and his wife Mrs. Jangbu Sherpa were arrested on charges of not being able to pay money to police. It is a common practice for police officers to forcibly collect money regularly from shop owners of the Kathmandu Valley. As there was no legal reason for the policemen to ask for money from the victims, and as the victims were from a poor socio-economic background, they refused. Inspector Khanal reportedly grabbed Ang Dorje Sherpa by the neck and hair and started to beat him randomly all over his body. The policemen reportedly kicked him and punched him. Mrs. Jangbu Sherpa's right breast and back were hit with the butt of the rifle and the policemen slapped her several times.¹³⁹

As mentioned, police make arbitrary arrests and keep people in detention without reason or charge and detainees are tortured. Some police do this either to show their power, or in other words misuse the power, or to demand bribes or receive money from other party. Case studies illustrate that some people were arbitrarily detained by police for some days, tortured and released after some days without any charges. For example,

On 23 June 2013, Padam Bahadur Shahi, a 42-year-old male, was arrested by three policemen after a minor dispute with bus staff. Immediately, one of policemen punched Shahi's left cheek for not paying the bus fare. Another policeman also punched him four to five times. Then he was taken in police custody. After a while, Sub-Inspector Narpati Bhatt entered the cell and punched on Shahi's neck, face and chest four to five times. The police officer also kicked Shahi's knees and legs three to four times. He punched him hard on his right cheek. At the same time a detention guard, Head Constable with the surname Chaudhary, punched Shahi's left armpit three times, punched his neck and head five to six times and kicked with his boots on victim's knees nine to ten times. The police then brought him out of the police station, still handcuffed. They accused the victim of having broken a fan outside the detention room and asked him to pay NRs. 2800.00 as compensation. Despite the victim refusing, the police forced him to pay NRs. 1400.00. He was released later that day.¹⁴⁰

The cases illustrate that torture and other forms of ill-treatment have been used for taking bribes and revenge. The situation also shows the corruption prevalent in the police system and tendency among police officials to inflict torture and take revenge.

139 See Asian Human Rights Commission (AHRC) *NEPAL: Police ask for bribes and beat a couple in Kathmandu*, Urgent Appeal (11 February 2011) <<https://www.ammado.com/nonprofit/108433/articles/21050>>.

140 See World Organisation against Torture (OMCT) *Nepal: Alleged torture and ill-treatment in police custody of Mr. Padam Bahadur Shahi_Fear for his safety*, Urgent Intervention (8 July 2013) <<http://www.omct.org/urgent-campaigns/urgent-interventions/nepal/2013/07/d22306/>>.

4.6.2 Underlying causes of torture and other forms of ill-treatment in Nepal

Understanding the causes of torture and other forms of ill-treatment is crucial to adopting strategies to prevent torture and other forms of ill-treatment, to provide justice to torture victims and to punish the perpetrators. There are many factors that give rise to and nourish the culture of torture and other forms of ill-treatment. A report has identified that situational factors are the root causes of human rights violation, including torture.¹⁴¹ The report covers six components within the situational factors such as lack of accountability, dehumanisation, ineffective interrogators, frustration and stress amongst personnel, pressure from the public for quick solutions of crime, breakdown of command responsibility, security personnel normalised to violence and disrespect.¹⁴² A scholar pointed out that effective measures against torture require a scientific analysis of the factors that generate and sustain the problem. Social, political and behavioural science can contribute to understanding the situation of torture in various parts of the world.¹⁴³ In a broader sense, in Nepalese context, following are the root causes that are associated to torture and other forms of ill-treatment:

4.6.2.1 Inadequate legal frameworks and culture of impunity

As analysed in Chapter III, a gap or inadequacy in law is found in Nepalese law in protecting the right to freedom from torture and other forms of ill-treatment. For example, the lack of an anti-torture law which defines torture as a punishable crime, as well as a lack of legislation protecting the rights of victims and witnesses; as well as the lack of impartial investigation mechanisms fail to protect vulnerable people. Similarly many inconsistent laws are yet to be amended in line with the CAT and other human rights instruments. The political system is obviously considered pivotal to promulgate laws and end the culture of impunity. However, inactivity on criminalising torture and ending impunity shows the weakness of the Government of Nepal and political leaders in these matters. For example, the Government of Nepal has shown its commitment to criminalise torture through CAT/C and UPR process¹⁴⁴ repeatedly. Nevertheless, the government has never implemented this commitment. Failure to criminalise torture and to punish the perpetrators results in a situation that encourages the use of torture.

Impunity in the case of torture by police, military and armed groups remains a norm,¹⁴⁵ which is a longstanding challenge in Nepal. For example, after the 1990's movement

141 See The Sydney University, Colombo University and Kathmandu School of Law *'Enhancing Human Rights Protections in the Context of Law Enforcement and Security in Nepal and Sri Lanka'* (2013) 4 ('Sydney University, Colombo University and Kathmandu School of Law 2013').

142 Ibid.

143 Basoglu above n 89, 3.

144 CAT/C Confidential Inquiry report 2011, above n 2, para 115; Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Nepal*, (February 2011) UN Doc A/HRC/WG.6/10/NPL/1, 9.

145 See, eg, Advocacy Forum and REDRESS Report, above n 108, 1.

for democracy, the Interim Government formed a high level commission called 'Mallik Commission' which was given the authority to investigate into human rights violations. The Commission recommended prosecution of human rights violators. However, the Government never implemented the recommendations.¹⁴⁶ Similarly, the 'Rayamajhi Commission' was formed by the Government in 2006 to investigate into human rights violations during the second people's movement in 2003. The Commission recommended to take necessary action against 202 persons for their involvement in human rights violations. The Government of Nepal did make public the report after eight months but never implemented the recommendations.¹⁴⁷ Furthermore, not even a single perpetrator of torture and other forms of ill-treatment has been punished or made to face action based on the 59 torture-related NHRC recommendations in the last 12 years.¹⁴⁸ These facts and trends show that impunity is rampant when it comes to torture and other forms of ill-treatment in Nepal. Inadequate legal frameworks and rampant impunity create a climate that encourages perpetrators to use torture and other forms of ill-treatment in criminal investigations, and these are the root causes of the prevalence of torture.

At the administrative level, Nepal Police has established Human Rights Cell to monitor human rights violation within the institution. Nepal Police's website has kept some data related to departmental actions against violators of human rights. In the fiscal year 2067/068 (2010/11), departmental actions were taken against 20 police personnel for violating human rights. Among them three were senior officers and 17 were of lower ranks. As many as 586 police personnel faced departmental actions on charges of violating human rights from 2003 to till date.¹⁴⁹ However, the data does not cover what types of human rights violations were committed and what types of actions were taken against the police personnel. In some conflict-related torture and other human rights violation cases, many victims went to register First Information Reports (FIRs) against the police or security personnel on the grounds of torture and other misconduct. Police in these cases refused to register the FIR. In accordance with the *State Cases Act 1992*, an applicant can inform the CDO about the police's refusal to register an FIR.¹⁵⁰ But the CDO also refused to register the case. In some cases, police refused to register an FIR even after a court order.¹⁵¹ Nevertheless, the refusal to register FIR is not defined as a matter of action. The major consequence of such a state of impunity is that perpetrators are encouraged to continue torture and other forms of ill-treatment without fear. The rampant impunity not only deprives the victims of their rights against torture but it also has a direct and adverse effect on the criminal justice system. This state of impunity ultimately helps in fuelling distrust among general public for the police and other systems.

146 See, eg, International Commission of Jurists (ICJ), *Authority without Accountability: The Struggle for Justice in Nepal* (ICJ, 2013) 109; Sharma, Gautam and Guragain, above n 9, 42-48.

147 'Rayamajhi's findings gather dust', *News, The Kathmandu Post*, 24 April 2010 <<http://www.ekantipur.com/the-kathmandu-post/2010/04/24/Nation/Rayamajhis-findings-gather-dust/207562/>>.

148 See NHRC 13 years Report, above n 26, 2.

149 Nepal Police, *Human Right Cell* <<http://www.nepalpolice.gov.np/human-rights.html>>.

150 *State Cases Act 1992* (Nepal) s 3.

151 See Nepal Conflict Report, above n 20, 194-195.

4.6.2.2 Poverty, discrimination and marginalisation in society

The issue of torture is linked to economic, social and cultural issues. Nepal is a heterogeneous country with different castes, ethnicities and languages and a diverge geography. Discrimination is rife in various forms -- based on class, gender and castes. According to the Central Bureau of Statistics (CBS) 2010-2011, 25.16 per cent of Nepalese are living below poverty line.¹⁵² Poverty and a high level of unemployment are yet another challenge in Nepal, leading to the denial of economic, social and cultural rights. The poor and the marginalised are more likely to be mistreated or tortured in custody or detention centres.

Professor Sangroula stated about perception about Nepal Police:

Police generally believe that offenders come from shanty towns and are low-income people, bartered or deserted women, street children and migrant workers. Hence, police are always chasing these categories of people as problems of the society. Police work with the deep-rooted concept that places inhabited by poor people are the source of crimes. Therefore, the vulnerability of the human rights of these categories of people is always serious and widespread in a society like that of Nepal.¹⁵³

A report explained a situation that ‘most of the victims of torture are poor, uneducated and come from the rural community of Nepal’.¹⁵⁴ This could be seen as a result of a broader cultural influence in which the powerful abuse the powerless in the society. Another report found that poor people have little or no access to justice due to high costs of seeking justice and a perception that justice is reserved for the rich and powerful people.¹⁵⁵ Hence, the difference between the rich and the poor is apparent, as a matter of fact, when it comes to access to justice. It is obvious, in many instance, that the rich and/or powerful either can pay more expenses including bribes to concerned persons or put pressure/influence on the concerned personnel, which helps to secure them from torture and other forms of ill-treatment. On the other hand, as stated in the above case studies, poor and vulnerable people cannot pay bribes and they might be unaware about their human rights. In that situation, poor and marginalised people would be more victimised. Therefore, in many cases, the situation pushes those poor and marginalised people (various interest groups) to organise protests, which mainly demand better outcomes for economic and social wellbeing. In response to that situation, the State adopts violence, including torture, and creates a cycle of repression. For example, a protest was organised by *Kamlaris* (bonded labour women) in June 2013 in Kathmandu and Dang, demanding an investigation into the mysterious deaths

152 Ashok Thapa, ‘Third Nepal Living Standards Survey: 25.16 percent Nepalese below poverty line’, *The Kathmandu Post*, (Kathmandu) 21 October 2011, < <http://www.ekantipur.com/the-kathmandu-post/2011/10/20/money/third-nepal-living-standards-survey-25.16-percent-nepalis-below-poverty-line/227426.html>>.

153 See, eg. Yobaraj Sangroula, *Nepalese Legal System: Human Rights Perspective* (Kathmandu School of law, 2005) 47.

154 See Asian Human Rights Commission *Fact sheet on torture in Nepal* (26 June 2011) <<http://www.humanrights.asia/news/forwarded-news/AHRC-FPR-034-2011>>. The fact is based on a research conducted by Centre for Victims of Torture (CVICT) Nepal.

155 See Antenna Foundation Nepal, Equal Access Nepal, Forum for Women, Law and Development, Institute of Human Rights and Communication Nepal, International Alret and Saferworld, *Security and Justice in Nepal District Assessment Finding*, (2010) ii.

of *Kamlaris* in the past years. They were beaten brutally by police and many *Kamlaris* had to be taken to the hospital.¹⁵⁶

On the other hand, the higher class, particularly rich people, political leaders/activists, government officials and other social elites, have close ties with police and high-level government officials, and they put pressure on the system. The pressure, or social perception, encourages the use of torture to obtain confessions or information or as a kind of punishment. Poor or socially vulnerable people who do not have access to the power might be victimised from the events. Therefore, the prevalence of poverty and marginalisation and police perception towards the situation is a major source of torture and other misuse of power by police in Nepal.

4.6.2.3 Violent socio-cultural practices and lack of awareness

Existence of violence in various sectors of the societies is deeply rooted in Nepalese society. For example, school violence such as corporal punishment is used as a means of maintaining discipline in school,¹⁵⁷ and sexual violence against women such as rape, trafficking, domestic violence and cultural violence like witchcraft are widely practised.¹⁵⁸ Furthermore, in recent history, Nepalese society has regarded violence as a normal phenomenon. Even after conflict, violence has been committed by organised criminal groups and politically affiliated groups and increased incidents of extortion and various robberies in city areas have been reported.¹⁵⁹ Hence, the fragile nature of safety and security of people, frequent serious crimes, weak rule of law and slow and corrupt criminal justice system also increase the overall levels of frustration among the general public. Many people want prompt responses from police on crime or control on criminal activities in the society. In many instances, police were criticised for their ineffectiveness to investigate crimes or to arrest criminals as they did not use strong or coercive methods against those criminals. A recent study also found that the pressure from the public to the police for quick solutions is also another root cause of torture.¹⁶⁰ As a result of these circumstances, the general public accepts torture and may also try to take law into their own hands by mobbing or killing suspected criminals. For example, on 12 February 2010, three persons were arrested in Panchthar on charge of theft, and police tortured the suspects severely. After confessing to the theft, the villagers also beat them while they were in police custody. Unfortunately, two of the suspects died as a result of the torture.

156 'Pachas Bhandas Badi Kamlaris Pakrau' [Over 50 Kamlaris arrested], *News, Kantipur National Daily*, 3 June 2013 <<http://www.ekantipur.com/np/2070/2/20/full-story/369343.html>>.

157 See Mishra N and et al 'Corporal Punishment in Nepalese School Children: Facts, Legalities and Implications' (2010) 30(2) *Journal of Nepal Paediatric Society* 98-109; United Nations Children Funds (UNICEF) and Centre for Victims of Torture (CVICT). *Violence Against Children in Nepal Series 2, A Study of the System of School Discipline in Nepal* (UNICEF and CVICT, 2004) <http://www.unicef.org/nepal/Voilence_Against_Children_series_2.pdf. Published 2004>.

158 See Sarah Howkes et al, *Tracking Cases of Gender-Based Violence in Nepal, Individual, Institutional, Legal and Policy Analysis*, (Credha and UCL, 2013) 6-8.

159 See Jaideep Gupta and Subindra Bogati, *Key Challenges of Security Provision of Rapidly Urbanising Contexts: Evidence from Kathmandu Valley and Tarai Regions of Nepal* (Institute of Development Studies 2014) 8.

160 See Sydney University, Colombo University and Kathmandu School of Law 2013, above n 141, 4.

....During the interrogation, they were allegedly beaten with a regular stick, a bamboo stick and a plastic pipe all over their bodies for about three hours. In order to stop further torture, they reportedly confessed to the crime. After that, at around 2:00 pm., they were taken outside where the local villagers were waiting. They admitted to the crime. Shortly afterwards, the villagers reportedly blamed all alleged for their involvement in another case of robbery and started beating them in the presence of the police.¹⁶¹

On the other hand, 34.1 per cent of the people are not literate,¹⁶² therefore they are not aware of their rights; especially vulnerable community members who neither know about their rights nor about the functions of government institutions that are meant to protect them. Therefore, most of the general population simply accept torture and the misuse of power as a general phenomenon of police or a government institution. In general trends, law or rules are promulgated at the central level in close discussion in the parliament and within concerned ministries of the government, but there are no mechanisms and practices to make the general population aware of their rights or legal protections. Furthermore, no specific programmes or courses about human rights with a special focus on the right to freedom from torture have been included in school and college curricula, except in some higher level law education. Therefore, violence, socio-cultural practices and lack of awareness about the right to freedom from torture among general people also result in the widespread use of torture.

4.6.2.4 Inadequate knowledge about the right to freedom from torture

In accordance with the *State Cases Act 1993*, Nepal Police is responsible for conducting criminal investigations in many parts of the country. For the purpose of investigation, police should have adequate skills and knowledge, along with sufficient resources. Police training plays a significant role in producing skilful staff members who can conduct investigation without violating human rights. Research shows that the coverage of human rights issues that is included in the basic training package provided to new recruits is not sufficient.¹⁶³

As discussed above, one of the main factors for the existence of torture in Nepal is a seemingly institutionalised practice within the police force, where violence amounting to torture is used as a means to extract confession and information. The methods of torture seem similar in every case. These cases are rife across Nepal i.e. various geographical locations, gender representations, and juvenile victims. Therefore, the use of torture is a common practice, and schooling of the perpetrators seems similar. The fact shows that police are using torture in similar patterns, methods and for similar causes. Therefore it can be concluded that the training of police is considered to be

161 See World Organisation against Torture (OMCT), *Nepal: Death and allegation of torture and other forms of ill-treatment in police custody, including of two minors fear of impunity* Urgent Intervention (12 March 2010) <www.omct.org/urgent-campaigns/urgent-interventions/nepal/2010/03/d20603/>.

162 See The Government of Nepal, Central Bureau of Statistics (CBS), *National Population and Housing Census, National Report 2011* (CBS, 2012) 4 <<http://cbs.gov.np/wp-content/uploads/2012/11/National%20Report.pdf>>.

163 See Ben Saul, David Kinley and Yubraj Sangroula, *Review of Human Rights Education in the Criminal Justice System in Nepal: Curriculum Report* (Sydney University and Kathmandu School of Law, 2009) 6, <<http://sydney.edu.au/law/scil/documents/2009/NepalHumanRightsCurriculumReview.pdf>>.

defective, as it seems to condone the use of torture in criminal investigations. It can be assumed that police have failed to change their attitudes or behaviour and continue to use torture and misuse power in criminal investigation.

4.6.2.5 Insufficient resources for criminal investigations

Resource constraints on criminal investigations and overall management of detention centres are other challenges in Nepal which could be an underlying cause of torture and other forms of ill-treatment. Many research reports have cited resource constraints in police offices.¹⁶⁴ Research carried out by Sydney University found that the lack of resources to conduct effective investigations, stress and job dissatisfaction, political interference and inadequacies in the justice system are institutional factors that continue to contribute to the prevalence of torture in the Nepalese society.¹⁶⁵ For example, the research pointed out that Nepal police have resource constraints to use fingerprinting powder which is essential for evidence collection. In the beginning, British Government encouraged to police to use the powder. After completion of the support, the Government of Nepal does not allocate sufficient funds to purchase the powder.¹⁶⁶ Similarly, the OAG and CeLRRd report found the poor standards of police infrastructure. The report found that 73 per cent of detention centres are old, narrow and inappropriate for detainees. Among them, 80 per cent of centres for police custody do not have separate rooms for juvenile delinquents and 13.33 per cent of custody facilities do not have a separate section for women detainees.¹⁶⁷ Another report presented a situation of custody of Kathmandu.

The police detention centres are particularly suited for torture. The stench of urine and excrement pervades these squalid cells, usually built adjacent to the toilets and they are damp, dark and poorly ventilated. Detention chambers have never been reconstructed or refurbished for healthier human habitation as they are regarded as the ideal place for confining and torturing the accused.¹⁶⁸

In this context, due to the resource constraint and inadequate knowledge and skill to use scientific tools and techniques, investigators use torture and other forms of ill-treatment as a quick and less costly method in crime investigation.

4.6.2.6 Corruption nexus torture

As discussed above, inability to pay bribes is a direct cause of torture because some police investigators demand bribes. If a suspect refuses or cannot pay bribe, he/she is subjected to torture and other forms of ill-treatment. Beside the direct causes, there are

164 See, eg, Sydney University, Kathmandu School of Law and University of Colombo, , *Issue Paper 4: Human Rights in the Nepali Law Enforcement and Security Sectors*, (Enhancing Human Rights Protections in Security Sector in the Asia Pacific, 2014) 7-8; OAG and CeLRRd 2013, above n 42, 151; Antenna Foundation Nepal, Equal Access Nepal, Forum for Women, Law and Development, Institute of Human Rights and Communication Nepal, International Alret and Saferworld, *Security and Justice in Nepal District Assessment Finding*, (2010) ii; Karon Cochran-Budhathoki, *Calling for Security and Justice in Nepal: Citizens' Perspective on the Rule of Law and Role of the Nepal Police* (United States Institute of Peace, 2011) 123.

165 Sydney University, Colombo University and Kathmandu School of Law 2013, above n 141, 4.

166 Sydney University Issue Paper 4, above n 164, 7-8.

167 See OAG and CeLRRd 2013, above n 42, 151.

168 See Sharma, Gautam and Guragain, above n 9, 7.

some underlying causes. The police organisation is highly politicised in Nepal. This is a result of the political transition -- Nepal police have changed from being an agent of the monarchy to the State.¹⁶⁹ The police force has gradually evolved to serve the interests of those in political power. Major political parties seek favour from the police and use the police to commit various types of malpractices including corruption.¹⁷⁰ A report shows that police corruption begins from the earliest days of the appointment of a police officer, as recruitment officials demand huge amount of money from candidates to ensure their entry into police force,¹⁷¹ and transfers and opportunities to travel after they join the force.¹⁷² Furthermore, another report shows that 32 per cent of Nepali people do not trust the investigations of Nepal police because of rampant corruption.¹⁷³ Reports show that corruption has become an institutional challenge.

Shika K. Dhungana stated some examples of the nexus between police corruption and torture, misuse of power through ‘arresting innocent people and torturing them for money or other belongings’, and ‘protecting some serious criminals through illegal activities to help them escape conviction in court through faulty investigations or by accusing innocent people, and falsifying evidence against them’¹⁷⁴ For example, the Asian Human Rights Commission published an urgent action in August 2014 and found that ‘some police personnel demanded a bribe of NRs 15,000 (approximately 150 US dollars) from a villager in an allegation of killing an ox. The villager refused to pay the money and the police, after the use of threats and torture’.¹⁷⁵

This case shows that police tend to inflict torture and other forms of ill-treatment as a result of a victim’s failure to pay a bribe. Therefore, the institutional weakness and corruption are also another reason of torture and other forms of ill-treatment.

4.7 Conclusion

Despite the prevalence of torture, the declining trends of incidents of torture and other forms of ill-treatment seem to be a positive development in criminal investigation system in Nepal. However, torture and other forms of ill-treatment are still widely practised. The OAG itself has accepted that 28.1 per cent detainees were subjected to torture in the process of criminal investigation.¹⁷⁶ The NHRC and human rights

169 See Department of International Development (DFID), United Nations and Danida HUGOU, *Assess to Security Justice and Rule of Law in Nepal An Assessment Report*, (DFID, UN and DanidaHUGOU , 2012) 29 < http://www.un.org.np/sites/default/files/2012-10-5-Access%20to%20Security_Justice_RoL_Nepal.pdf>.

170 See, eg, Sangroula, above n 153, 44.

171 See Shiva K. Dhungana, ‘Addressing Corruption in Police Reform’ in *Policing in Nepal: A collection of Essays* (Saferworld, 2007) 36.

172 See Sapana Malla Pradhan, ‘Rule of Law and Policing in Nepal’ in *Policing in Nepal: A collection of Essays* (Saferworld, 2007) 31.

173 See Saferworld, *Public Safety and Policing in Nepal: An analysis of Public attitudes towards community safety and policing across Nepal* (Saferworld, 2008) iii.

174 See, Dhungana, above n 171, 37.

175 See Asian Human Rights Commission, ‘*Drunken Police Demand Bribe and Shoot Tamang Died*’, (August 2014) <<http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-118-2014>>.

¹⁷⁶ See OAG and CeLRRd, 2013, above n 42, 148.

organisations also show significant numbers of suspects being tortured in criminal investigations. Therefore, torture is a serious human rights problem in Nepal. Norms and principles such as the right to fair trial are violated in a similar pattern. Thus, the institutions of criminal justice lose the trust of the general population.

There are a number of interlinking factors as to why torture and other forms of ill-treatment are prevalent in Nepal. This study has identified that the deep-rooted underlying causes of torture in Nepal include: inadequate legal frameworks, impunity against prosecution for agents of torture, poverty, discrimination, marginalisation, violent socio-cultural structure, lack of general awareness, the corruption-torture nexus, resource constraints in criminal investigation resulting in inadequate training of police and other officials.

The Nepalese situation has proved that the constitutional provision, accession to the CAT and ICCPR and State commitments are not sufficient to protect and promote the right to freedom from torture in the country where a number of factors are aligned with the problem. Therefore, a holistic approach of intervention is required. This would include: formulation of law and policies such as anti-torture legislation; proper implementation of laws and policies; and strengthening mechanisms of criminal justice. It would also include empowering members of the community to raise awareness among the general public about the right to freedom from torture, as well as the negative consequences of physical and psychological torture on individuals and society as a whole.

Furthermore, improvement in existing confession-based criminal investigation practices is a must. Implementation of scientific and human rights-friendly methods is crucial to the respect and protection of the right to freedom from torture. Hence, the current police training regime has to be modified to introduce a more behavioural approach for police to follow scientific investigation methods that respect the right to fair trial and the right to freedom from torture at every step of a criminal investigation. Therefore, police personnel need to be provided with capacity-building activities to maintain their intrinsic motivation and to encourage them to follow the rule of law and respect the rights to freedom from torture.

CHAPTER-V: JUDICIAL AND ADMINISTRATIVE INTERVENTIONS

5.1 Introduction

This chapter examines how the judiciary of Nepal protects people's right to freedom from torture as well as the roles of the National Human Rights Commission (NHRC) and non-governmental organisations (NGOs) in protecting and promoting the right to freedom from torture in Nepal. This chapter examines court decisions related to protecting the right to freedom from torture, especially in the form of writ petitions for the protection of fundamental rights through Judicial intervention and public interest litigations, various court practices on torture compensation cases and situation of use of rule of non-admissibility evidence that may have been obtained through torture in various types of criminal cases. Furthermore, the chapter appraises briefly the right to freedom from torture related recommendations of the NHRC. This chapter is based on the Supreme Court publications such as *Nepal Law Journal*,¹ *Bulletin*² and subject-specific precedents collections. Regarding torture compensation related cases, a total of 48 decisions of various courts (District, Appellate and the Supreme Courts) decisions were randomly selected covering more than fifty per cent of current running cases and were analysed. Moreover, this study has reviewed all 59 torture and 10 custodial death related recommendations of the NHRC Nepal.

As stated in previous chapters, the right to freedom from torture is an absolute and non-derogable right. By ratifying the CAT, State parties have agreed to implement and be accountable for the prevention of torture and protection of the right to freedom from torture. In accordance with the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), member States should enforce the provisions through judicial and administrative measures to promote these rights.³ When the government violates the right to freedom from torture of an individual or group or breaches the fundamental rights or the State's commitment towards the CAT, a strong judiciary should play an effective role in protecting the right to redress of an individual or a group and in putting a limit on State behaviour.⁴

As discussed in Chapter II in terms of the enforcement of human rights treaties through domestic courts, there are some variations between legal systems that follow Monism

¹ Nepal Kanoon Patrika [Nepal Law Journal] a monthly journal published by Supreme Court of Nepal. It is an authentic document to cite as precedent of the Supreme Court Decisions.

² Bulletin is another Supreme Court Publication which publishes two issues a month covers summary of case decisions and other major activities of Supreme Court of Nepal.

³ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2 (1) ('CAT'); *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3) ('ICCPR').

⁴ Emilia Justyna Powell and Jefferey K. Staton, 'Domestic Judicial Institution and Human Rights Treaty Violation' (2009) 53 *International Studies Quarterly* 167.

or Dualism.⁵ However, human rights related treaties codify an agreed understanding about the subject matters of the universal norms which express collective moral judgements of people, thus domestic courts implement these norms.⁶ Scholars pointed out that an effective judicial system could help in the protection of individual rights and influence the concerned State to deal with the challenges related to torture.⁷ Research has identified that judicial independence directly affects the improvement of human rights performance in accordance with the constitutional and international treaties' status in practice.⁸ Furthermore, the United Nations General Assembly sets preconditions relating to basic principles on independence of the judiciary such as that the judiciary shall be guaranteed to be enshrined in the *Constitution* or law of the country, the judiciary shall decide matters before them impartially, without any restrictions, improper influences, inducements, pressure and threats, and there shall not be any inappropriate interference in the judicial process, everyone shall be guaranteed the right to access of ordinary court, and be provided with adequate resources and capacity development.⁹ In addition to that, the basic principles outline that member States shall take into account the appointment and existence of professional judges in domestic legislation.¹⁰

A National Human Rights Institution (NHRI) is established for the protection and promotion of human rights which monitors the international human rights treaties and its implementation at the practical field.¹¹ The establishment of NHRI is a comparatively new mechanism which has been started after the declaration of the Paris Principles 1991¹² that works as a quasi-judicial body to handle human rights violations-related complaints including torture¹³ and to investigate torture-related incidents and recommend necessary action against perpetrators and compensation for the victims. After the promulgation of Optional Protocol of the Convention Against Torture (OPCAT), the role of NHRI has been broadened, and it may work as a national

5 See David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement A Comparative Study* (Cambridge University Press , 2009) 6; REDRESS, *Bringing the International Prohibition of Torture Home National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (REDRESS Trust, 2006) 22.

6 Sloss, above n 5, 5.

7 Powell and Staton, above n 4, 167.

8 Wayne Sandholtz, 'Treaties, Constitutions, Courts, and Human Rights' (2012) 11 *Journal of Human Rights* 28.

9 See Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> ('*Basic principles of the Independence of Judiciary*').

10 Ibid.

11 Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International law' (2010) 10 *Human Rights Law Review* 5.

12 Principle relating to the status and functioning of national institution for protection and promotion of human rights (endorsed by UN Commission for Human Rights Res 1992/54.3 March 1992, annexed to GA Res. A/RES/48/134, 20 December 1993, A/RES/48/134>.

13 Carver, above n 11, 4.

preventive mechanism¹⁴ and also in coordination with international preventive mechanisms.

In the context of Nepal, since 1990, the Government of Nepal has committed to protecting the right to freedom from torture through a competent and impartial justice system by promulgating the *Constitution* and by ratifying the most important human rights treaties. The concept of human rights, rule of law and independent judiciary has been included in 1990's Constitution¹⁵ which guaranteed the right to freedom from torture as the fundamental right for the first time in Nepalese constitutional history.¹⁶ Furthermore, Nepal expresses its commitment to human rights, rule of law and judicial independence through the *Interim Constitution of Nepal 2007*¹⁷ and these components are defined as State obligations.¹⁸ Fundamental rights including the right to freedom from torture and the rights for justice are guaranteed by the *Interim Constitution* which is enforced by the Supreme Court of Nepal.¹⁹ Similarly, the courts handle torture compensation cases and criminal cases under general jurisdiction. By and large, judicial intervention is mixed in terms of the protection of the right to freedom from torture. The Supreme Court of Nepal has issued some positive decisions. For example, it has issued a mandamus order to criminalise torture and introduced a vetting system about involvement of human rights violation including torture. However, non-implementation of the court decisions and NHRC recommendations represent a serious challenge. In the meantime, the Court has given conflicting decisions on the issue of non-admissibility of evidence obtained by torture and uniformity in the judgements on torture compensation cases is lacking; this affects justice to victims of torture.

This chapter is organised in eight sub-headings. Following the introduction, the second sub-heading includes analysis of some theoretical parts of judicial intervention and the domestication of the CAT in many countries. The third sub-heading gives a brief overview of judicial structure and independence of judiciary in Nepal. The roles of Nepalese judiciary, focussing on judicial review and public interest litigation, regular cases related to torture compensation and criminal cases where courts either accept or reject evidence which claimed to obtain by torture are critically reviewed under fourth sub-heading. Content under the fifth, sixth and seventh sub-headings examine the roles of NHRC, government institutions and human rights related NGOs respectively. Finally, the conclusion has been drawn under the last sub-heading.

14 *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 4 Feb 2003, 2375 UNTS 57 (entered into force 22 June 2006) art 17 ('*OPCAT*').

15 *Constitution of Kingdom of Nepal 1990* (Nepal) Preamble, art 88.

16 *Constitution of Kingdom of Nepal 1990* (Nepal) art 14.

17 *Interim Constitution of Nepal 2007* (Nepal) Preamble.

18 *Interim Constitution of Nepal 2007* (Nepal) art 33 (c).

19 *Interim Constitution of Nepal 2007* (Nepal) art 107 (2).

5.2 Judicial interventions and the domestication of the CAT

As stated, judicial intervention is crucial for the protection of the right to freedom from torture. In the process of judicial intervention, the judiciary may adopt provisions of the CAT or other international human rights instruments. The adaptation is guided by two different theoretical perspectives: the Monist and the Dualist.

Conceptually, judiciaries in Monist countries directly adopt/interpret the provisions of the ratified international treaties and convention as though they were domestic law. On the contrary, the judiciary of the Dualist countries do not directly adopt the international provisions.²⁰ Despite the variation in the approach of the two theories: many scholars like Hathaway, McElroy and Solow argue that the provisions of international human rights instruments have been enforced in many Dualist countries and many court decisions in the United States of America (USA) enforced the treaty provisions even though there is no private right of action.²¹ Similarly, Ramachran stated that the international human rights norms relating to principle of *jus cogens* should be directly implemented by domestic courts as part of customary international law.²² In practice, with a growing awareness about international human rights laws, courts have started to enforce these laws directly and use international human rights instruments as means of interpretation, especially after the Bangalore Principles in 1988 which was an outcome of a high level judicial colloquium mainly among the Commonwealth countries and others including the United States. The principles urge the judiciary to perform a more dynamic role in applying the provisions of international human rights law in domestic courts.²³ For example, the House of Lords recognised the right to freedom from torture as peremptory norms and defined the acts of torture as an international crime in common law system in the case of Pinochet.²⁴ The Supreme Court of India decided many cases using international human rights instruments in the process of interpretation of constitutional provisions as in the case of *D.K Basu v State of West Bengal*.²⁵ In this case the Court referred to the provision of the ICCPR and developed interrogation guidelines to protect the right to freedom from torture while in custody. Similarly, in the issue of the exclusionary rule, the CAT has been designed to prevent torture through judicial proceedings.²⁶ In common law, courts have adopted various rationales -- such as the rule of voluntariness, ensuring reliability, respect to right of self-determination of suspects and admission of justice - - to exclude confessions obtained by torture and other forms of ill-treatment. Many

20 Sloss, above n 5, 6.

21 See Oona A Hathaway, Sabrina McElroy and Sara Aronchick Solow, 'International Law at Home: Enforcing Treaties in U.S. Courts' (2012) 37 *Yale Journal of International Law* 76; Oona A Hathaway, Aileen Nowlan and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2011-2012) 52 *Virginia Journal of International Law* 836.

22 Bertand Ramcharan, 'National Responsibility of Human Rights' (2009) 39 *Hong Kong Law Journal* 366.

23 REDRESS 2006, above n 5, 25.

24 *R v Bow Street Metropolitan Stipendiary Magistrate and Others* [1999] 38 I. L.M. 591 (the House of Lords).

25 *D.K. Basu v State of Bengal*, Indian Supreme Court, AIR 1997 SC 610.

26 CAT art 15.

other court decisions have followed the principles which are discussed below in the section related to the exclusionary rules.

Despite the absolute prohibition of torture in international human rights law and humanitarian law, a few scholars have argued that torture could be used in the process of information gathering in exceptional circumstances from individuals where there are large numbers of people at risk.²⁷ The argument has been raised mainly after the terrorist attacks in the USA in September 2001. However, many academics strongly defend the absolute prohibition of torture and other forms of ill-treatment as being morally wrong, whatever the situation²⁸ (see details in Chapter II). To deal with the issue, many domestic and regional courts have decided many decisions in favour of the absolute prohibition of torture.

A few district and appellate courts dismissed *habeas corpus* writs relating to illegal detention on the ground that the writs did not apply to non-U.S. citizens who were in Guantanamo Bay.²⁹ However, the U.S. Supreme Court often emphasised the right to freedom from torture, and found against illegal detention. In the case of *Rasul v Bush*, the U.S. Supreme Court granted *certiorari* to release the detainees of foreign nationals who were in illegal detention in Guantanamo Bay without hearing for a long time.³⁰ Similarly, the Supreme Court played a significant role to stop torture and other forms of ill-treatment related to interrogation in Guantanamo Bay, finding that the interrogation procedures are against the Geneva Conventions, especially common Article 3 and U.S. Uniform Code of Military Justice.³¹ In another case, the Supreme Court decided that every U.S. citizen must have the right to due process, thus the

27 See, eg, Mirko Bagaric and Julie Clarke, 'No Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2004-2005) 39 *University of San Francisco Law Review* 616; A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) 158-63; Further Dershowitz described on 'Torture Reasoning' as a clarifying version of the term 'Legal Warrant'; Oren Gross, 'The Prohibition on Torture and the Limits of the Law' in Sanford Levinson (ed), *Torture: A Collection*, (Oxford University Press, 2006) 30.

28 See, eg, Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention Against Torture a Commentary*, (Oxford University Press, 2008) 536; Yuval Ginbar, *Why not Torture Terrorists? Moral, Practical and Legal Aspects of the Ticking Bomb Justification for Torture* (Oxford University Press, 2010) 356; Desmond Manderson, 'Another Modest Proposal' (2005) 10 *Deakin Law Review* 641; Philippe Sands QC, 'Torture Team: The Responsibility of Lawyers for Abusive Interrogation' (2008) 9 *Melbourne Journal of International Law* 365-380; Sirius Kashefi, 'Human Rights: A Relative, Progressive, Regressive, and Controversial Concept' (2011) 7 *International Zeitschrift* 74; Fatima Kola, 'The Moral Wrongness of Torture' (2008) 14 *UCL Jurisprudence Review* 140-141; Jordan J Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2008-2009) 43 *Valparaiso University Law Review* 1535-1536; Nigel S. Rodley, 'The Prohibition of Torture: Absolute Means Absolute' (2006) 34 (1) *Denver Journal of International Law and Policy* 160.

29 See Centre for Constitutional Rights, *Rasul v Bush* < <http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states>>. The centre shared its experiences for litigations against Presidential Executive Order 13, 2001. The Centre filed many write petitions on behalf of detainees of Guantanamo Bay. Soon after the September 11's terrorist attacked in USA, courts dismissed petitions relating to Habeas Corpus writ such as *Habib v Bush*, *Rasul v Bush* were dismissed in district court level. However, Supreme Court of US issued the writ on protected right against illegal detention and torture and ill-treatment.

30 *Rasul v Bush*, 542 U.S. 466 (2004) 124 S. Ct. 2686.

31 *Hamdan v Rumsfeld*, 548 U.S. 557 (2006) 126 S. Ct. 2749.

government should follow due process of law.³² There Hamdi was arrested in Afghanistan in 2001 and kept in detention for a long-time without charge. His father filed a *habeas corpus* petition, the majority of the judges of the U.S. Supreme Court found that the government cannot hold a U.S. citizen in custody indefinitely without following the basic due process of law.³³ As the consequence of the decisions, the U.S. Supreme Court released many detainees from Guantanamo bay.³⁴ In the case of *Boumediene v Bush*, the U.S. Supreme Court decided that the detainees of Guantanamo Detainees Centre have the right to file a petition. The *Habeas Corpus* in accordance with the U.S. Constitution³⁵ (See details in Chapter II).

In the context of Nepal, as noted in Chapter III, the *Nepal Treaty Act 1991* is influenced by the theory of Monism. The Supreme Court of Nepal has adopted the provisions of the CAT and other major human rights instruments as forms of *ratio decidendi* and *obiter dicta* in many decisions. Recently, a special bench of the Supreme Court has explained that Nepal is a party to major human rights instruments including the CAT, in accordance with the *Nepal Treaty Act 1991*; it is a duty of Nepal to enforce the provisions of human rights instruments to conduct investigation, prosecute and ensure reparations to victims on heinous human rights violation related incidents.³⁶ Similarly, in another case, the Court defined that as per the provision on the *Treaty Act*, Nepal should enforce the provisions of ratified human rights treaties.³⁷ Furthermore, the Court has used the international human rights instruments in many cases while making decisions,³⁸ and issued directives to form a committee in the leadership of secretary of National Human Rights Commission and representatives of other ministries and experts to consider inconsistencies with treaties.³⁹ Nevertheless, in some cases, the Supreme Court decided contrary versions as well. For instance, the Supreme Court had interpreted that the treaty provisions are required to be included in domestic law for their implementation.⁴⁰ In other two cases, the Court did not check the compatibility of the national law with the provision of human rights treaties.⁴¹ There was some confusion in court practices, notwithstanding the situation.

32 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) 124 S. CT.

33 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) 124 S. CT.

34 Centre for Constitutional Rights, *Boumediene v Bush/Al Odah v United States* <<http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states>>.

35 *Boumediene v. Bush*, 553 U.S. 723 (2008) 128 S. CT.

36 *Suman Adhikari and others v Office of Prime Minister and Council of Ministry and others*, Mandamus, case No 070-WS-0050 decision date 2071-11-14 [26 February 2015] (Supreme Court of Nepal).

37 *Narayan Bahadur Khadka v Ministry of Home and Others*, Nepal Kanoon Patrika 2061 [Nepal Law Journal 2004] Vol 6 748 (Supreme Court of Nepal).

38 *Madhav Kumar Basnet v Secretariat of council of ministries and others*, decision date 2070/9/11, case no 069 WS 0058 (Supreme Court of Nepal); *Govinda Prasad Bandhi v Mukti Narayan Pradhan, Attorney General of Nepal and others*, decision date 2070/12/19, case no 69-WO-0740 (Supreme Court of Nepal).

39 *Sapana Pradhan Malla v Secretariat of council of ministries and others*, Nepal Kanoon Patrika 2061 [Nepal Law Journal 2004] Vol 4, 378 (Supreme Court of Nepal).

40 *Rajaram Dhakal v Prime Minister Office and others*, Nepal Kanoon Patrika 2060 [Nepal Law Journal 2003], Vol 9 and 10, 781 (Supreme Court of Nepal).

41 *Rama Panta v Council of Ministries and others*, Nepal Kanoon Patrika 2065 [Nepal Law Journal 2008] Vol 4, 398 (Supreme Court of Nepal); *Dinesh Kumar Sharma v Council of Ministries and*

However, the latest decision by a special bench of the Supreme Court has given clear instruction to use international human rights instruments in the same way that they would a Nepalese law.

5.3 Judicial Independence and Structure in Nepal

5.3.1 Brief history of the development of Nepalese judicial system

Nepal inherited many of its legal traditions from Hindu law and scriptures from the beginning of written history.⁴² A comprehensive code called Manab Nyaya Shastra (Legal Rules for Human Justice) was promulgated in the 14th century which covered mainly some religious conducts and practical legal provisions based on Hindu religious scriptures.⁴³ After a long time, another comprehensive law, *Muluki Ain* (National Code) was promulgated in 1953.

The Code had many provisions related to civil, criminal and religious matters. The *National Code* was influenced by the French Model of codification.⁴⁴ The code stopped some extremely coercive types of punishment such as mutilation of body parts. However, many forms of torture such as random beating and humiliation remained in the *National Code*.⁴⁵ Furthermore, these laws and practices established and run various administrative and judicial mechanisms to settle civil, criminal, religious and customary issues in different regimes. The King was the head of the executive and judicial power before the Rana regime (1845-1950). During the initial period of the Rana regime, four courts of Justice were established; Bhardari Shabh (Council of State), Kot Lingh (handled civil disputes), Ita Chapali (handled criminal cases), Taksar and Dhansar (these two were originated for initial courts).⁴⁶ Goswara Court (Apex Court) was also established at the central level. These court systems were reformed many times during the Rana regime. In this process, many courts were abolished and different types of courts were established.⁴⁷ However, the judges were appointed generally either from Rana family or high-class families. Therefore, the judges had very little scope to decide against the Rana regime.⁴⁸

After 1930, Rana Prime-Minister Juddha Shamsheer was inspired by the principle of separation of power and introduced a separate judiciary from the executive. He issued

Others Nepal Kanoon Patrika 2063 [Nepal Law Journal 2006] Vol 9 1136, (Supreme Court of Nepal).

42 Rewatiraman Khanal, *Nepal Ko Kanooni Itihas Ko Ruparekha*, [Introduction of History of Nepalese Law], (Srimati Saraswoti Khanal 2002) 33.

43 Prakash Osti (ed) *Kanoon Sambhandhi Kehi Aitihāsik Avilekha Haru* [Law Related Some Historical Documents] (Kanoon Byabasahi Club, 2007) 1.

44 Khanal, above n 42, 296.

45 Ibid 305.

46 Osti, above n 43, page 168-170.

47 Khanal, above n 42, 358-443.

48 Ibid; Centre for Legal Research and Resource Development (CeLRRd), *Baseline Study of Criminal Justice System in Nepal* (CeLRRd, 2003) 21 ('*CeLRRd Baseline Study 2003*').

two laws (Sanad) to establish a Pradhan Nyayalaya (Apex Court) and nine appellate courts.⁴⁹

The Sanad (Law) had granted final authority to decide cases.⁵⁰ After the first historic people's movement in 1950, a separate judicial structure was established by *Nepal Pradhan Nyayalaya Ain 2008* (Apex Court Act 1954). Nevertheless, the executive intervened in its process. For example, the first chief justice was appointed by then incumbent Home Minister.⁵¹ After the popular movement in 1950, the Nepalese judiciary and the justice system was influenced by Indian Justice System which in turn was influenced by the British System. Many high level officials including the Chief Justice were invited from India for judicial and administrative reform.⁵² The legal system adopted the adversarial approach rather than the inquisitorial approach. The *Constitution of the Kingdom of Nepal 1959* further enhanced the development of the adversarial approach in justice system and the *State Cases Act and Rules 1961* and *Constitution of Nepal 1962* took a remarkable step in widening the scope of adversarial system in Nepal.⁵³ The *Constitution of the Kingdom of Nepal 1990* had adopted the concept of independent and competent judiciary, human rights and rule of law as unamendable parts of the *Constitution*.⁵⁴

The *Interim Constitution of Nepal 2007* enshrines civil liberties, fundamental rights, human rights, and the independence of judiciary and the concept of the rule of law as the basic features which also are the state's commitment.⁵⁵ In accordance with the *Interim Constitution of Nepal 2007*, the power related to justice shall be exercised by the courts and judicial institutions.⁵⁶ The *Constitution* defines three tiers of courts -- the Supreme Court, Appellate Court and District Court. In addition, judicial bodies or tribunals can be established as judicial institutions.⁵⁷ Among the court, the Supreme Court of Nepal has the heightened authority of the judiciary which is considered a court of record and may impose penalties for contempt of court,⁵⁸ and final authority for interpreting the constitutional and other legal provisions.⁵⁹ The Supreme Court has extraordinary power to declare any law or its part void on the grounds of the fundamental rights which are guaranteed by the *Interim Constitution of Nepal 2007*.⁶⁰ The *Constitution* grants authority to the Supreme Court to issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto*⁶¹ for the protection of the fundamental rights that are deliberated by the *Interim Constitution of Nepal 2007*. In addition, the Supreme Court hears original and

49 Osti, above n 43, 348; Khanal, above n 42, 504-506.

50 Khanal, above n 42, 503.

51 Ibid 443.

52 Ibid 537-544.

53 CeLRRd Baseline Study 2003, above n 48, 23.

54 *Constitution of Kingdom of Nepal 1990* (Nepal) preamble, art 116.

55 *Interim Constitution of Nepal 2007* (Nepal) preamble.

56 *Interim Constitution of Nepal 2007* (Nepal) art 100 (1)

57 *Interim Constitution of Nepal 2007* (Nepal) art 101.

58 *Interim Constitution of Nepal 2007* (Nepal) art 102 (1), (3).

59 *Interim Constitution of Nepal 2007* (Nepal) art 102 (4).

60 *Interim Constitution of Nepal 2007* (Nepal) art 101 (1).

61 *Interim Constitution of Nepal 2007* (Nepal) art 107 (2).

appellate cases. Sixteen appellate courts and seventy five district courts are established as trial courts and hear appeal as well as writs jurisdictions. In addition, some special courts are also constituted such as Labour Court, Administrative Court and Special Court to hear corruption cases.

5.3.2 Independence of judiciary, separation of power and rule of law in Nepal

The independence of judiciary is recognised as a precondition of fair and public hearing and ensuring fair trial by major international human rights instruments,⁶² International humanitarian law⁶³ and Rome Statute of the International Criminal Court.⁶⁴ Nevertheless, a research report of REDRESS stated that judges in many countries have repeatedly failed to address torture related issues due to structural shortcomings in the administration of justice, particularly, where the judiciary is weak; and where there is a scarcity of resources, lack of independence and rule of law is compromised.⁶⁵ By the nature of violations of the right to freedom from torture, a person must fight State institutions. Therefore, a strong, competent and independent judiciary is required to protect the right to freedom from torture. In terms of dealing with the issue of torture, the European Court of Human Rights (ECtHR) expressed that an independent judiciary and impartial investigations of incidents of torture are required.⁶⁶

The Basic Principles on the Independence of Judiciary 1985 sets the standard for the preconditions of the independence of the judiciaries of the UN member States (including Nepal). These basic principles express that the independence of judiciary must be guaranteed by the *Constitution* and law of the State and judiciary should be free from any type of influence and intervention from other State organs.⁶⁷

The concept of the rule of law is directly related to the independence of judiciary which has a number of factors associated with it, including accountability of government decisions, proper use of discretionary power, and the protection of human rights.⁶⁸ In 1997, the sixth conference of chief justices of the Asia and Pacific region declared the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia region*. The Beijing Statement outlines the preconditions of independence of judiciary. The Statement posited that an independent judiciary should decide matters before it in accordance with its impartial assessment of the facts and understanding of the law

62 *Universal Declaration of Human Rights*, GA Res 217 A (III) UN GAOR 3rd sess, 180 plenmtg, UN Doc A 810 (10 December 1948) art 10; *ICCPR* art 14 (1).

63 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, open for signature 8 June 1977 UNTS 1125 (entered into force 8 December 1978) art 75(4).

64 *Rome Statute of International Criminal Court* open for signature 17 July 1998, 2187 UNTS 3 (entered into force 01 July 2002) 40(1).

65 REDRESS, *Justice for Torture Worldwide Law, Practice and Agendas for Change* (REDRESS Trust 2013) 84.

66 *Abu Qatada v The United Kingdom* (European Court of Human Rights, Application Nos 8139/09, 9 May 2012) [276].

67 Basic Principles on the Independence of the Judiciary, above n 9.

68 William C Whitford, 'The Rule of Law' (2000) *Wisconsin Law Review* 741-742.

without improper influences directly or indirectly;⁶⁹ judges should be chosen on the basis of proven competence, integrity and independence;⁷⁰ judges must have security of tenure;⁷¹ judges must receive adequate remuneration with appropriate terms and condition;⁷² the judiciary must have jurisdiction over issues of all justiciable nature and exclusive authority to give its decisions⁷³ and judges must be provided with necessary resources to perform their functions.⁷⁴ The preamble of the statement mentions its commitment to promote and encourage respect for human rights and fundamental freedom without discrimination.⁷⁵ Furthermore, the Universal Charter of the Judge found that the selection of a judge must be carried out by an independent body that includes substantial judicial representation in a transparent criteria based on proper professional qualifications,⁷⁶ and administration of judiciary and disciplinary action should be carried out by the independent body.⁷⁷

In Nepal, the judiciary is recognised as the major state organ for ensuring human rights and the rule of law. As stated above, the *Interim Constitution of Nepal 2007* expresses its commitment to an independent judiciary, human rights and the rule of law in Nepal.⁷⁸ Furthermore, the *Constitution* stipulates the structure of judiciary and accepts pre-conditions of independence of judiciary by guaranteeing the independence of the judiciary,⁷⁹ appointment of the Chief Justice by the President as recommended by the Constitutional Council,⁸⁰ and the judges of Supreme Court and other courts are appointed based as the recommendation of Judicial Council which is considered as independent body headed by Chief Justice, senior judge of the Supreme Court, two legal experts and law minister.⁸¹ The remuneration and other facilities for judges are

69 Basic Principles on the Independence of the Judiciary, above n 9, 2.

70 Ibid 11.

71 Ibid 18.

72 Ibid 31.

73 Ibid 33.

74 Ibid 41.

75 Basic Principles of the Independence of Judiciary; Beijing Statement of Principles of Independence of the Judiciary in the Asia Pacific Region, adopted by chief justice of the region in 1995, Preamble <<http://lawasia.asn.au/objectlibrary/26?filename=Beijing%20Statement.pdf>>.

76 Universal Charter of the Judge, (1999) art 9 <<http://www2.fjc.gov/sites/default/files/2015/Universal%20Charter%20of%20the%20Judge.pdf>>. The Charter is not a hard law, however it has established some benchmarks of independence of judiciary. The Charter has been approved by the member associations of the International Association of Judges. Total 41 countries including UK and USA were participated in the conference which was organised on November 17, 1999 in Taipei (Taiwan).

77 Ibid art 11.

78 *Interim Constitution of Nepal 2007* (Nepal) preamble, art 33(c).

79 *Interim Constitution of Nepal 2007* (Nepal) art 100.

80 *Interim Constitution of Nepal 2007* (Nepal) art 103 (1). The Constitutional Council is a body which is headed by Prime Minister, chief justice, speaker of parliament, three ministers represent from political parties and leader of opposition party in parliament are the members. Main task of the Council is to make recommendations for appointment of officials of Constitutional bodies including Chief Justice. While making recommendation of chief justice, Minister of Law and Justice will be included. (Article 149).

81 *Interim Constitution of Nepal 2007* (Nepal) art 113.

defined by the law and the judges are provided allowances and pension as per the law.⁸² The facilities of chief justice and other judges shall not be altered to their disadvantage⁸³ and the salaries and other benefits of judges are directly allocated from consolidated fund of Nepal which is guaranteed by the *Interim Constitution*.⁸⁴ Similarly, the tenure of judges is fixed in such a way that a judge will retire from work at the age of 65 in the Supreme Court⁸⁵ and at 63 in Appellate and District Courts.⁸⁶ Furthermore, the *Constitution* sets conditions as well as processes for removal of judges i.e. Chief Justice or Judges of the Supreme Court can be removal through a motion of impeachment against them by a two-third majority of parliament on the ground of incompetence, misbehaviour or failure to discharge the given duties, and the alleged judge will be provided with an opportunity to defend himself or herself.⁸⁷ The Judicial Council can remove judges of appellate and district courts on the basis of incompetence, misbehaviour or failure to discharge the given duties, and the judge in question will have a chance to defend the allegation.⁸⁸ The *Constitution* guarantees that no Supreme Court judge shall be engaged in or deputed to any assignment, and judges from no other courts shall be transferred to any other office other than of the judges.⁸⁹ To some extent, all these provisions align with and meet the pre-conditions of the set standard of independent judiciary.

Nepal expresses its full commitment to the rule of law through the *Interim Constitution of Nepal 2007*. With regards to the concept of the rule of law, it guides all forms -- both law making and law enforcement. In particular, suggests that a legal certainty and procedural protection are the fundamental requirement of democratic constitutionalism. It encourages accountability, efficiency, fairness, and respect for human dignity'.⁹⁰ It is obvious that the concept of rule of law has encouraged fairness, accountability and respect for human rights. The *Interim Constitution of Nepal 2007* incorporates many provisions that call for fulfilling the rule of law and stopping misuse of power.

The *Constitution* is the fundamental law of the land and all laws inconsistent with it are null and void to the extent of inconsistency.⁹¹ Likewise, the *Constitution* guarantees the rights to equality, which explains that 'all citizens shall be equal before the law. No person shall be denied the equal protection of the laws'⁹² and the right to freedom and liberty is guaranteed by the *Constitution*.⁹³

82 *Interim Constitution of Nepal 2007* (Nepal) arts 104 (3), 109(7).

83 *Interim Constitution of Nepal 2007* (Nepal) arts 104 (4), 109(8)

84 *Interim Constitution of Nepal 2007* (Nepal) art 92.

85 *Interim Constitution of Nepal 2007* (Nepal) art 105.

86 *Interim Constitution of Nepal 2007* (Nepal) art 109 (10); *Judicial Council Act 2091* (Nepal) ss 5-8.

87 *Interim Constitution of Nepal 2007* (Nepal) art 104 (2).

88 *Interim Constitution of Nepal 2007* (Nepal) art 109 (10).

89 *Interim Constitution of Nepal 2007* (Nepal) arts 106 (1), 110(1).

90 Feffery Jowell, 'The Rule of Law and its Underlying Values' in Jeffery Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2011) 24.

91 *Interim Constitution of Nepal 2007* (Nepal) art 1.

92 *Interim Constitution of Nepal 2007*(Nepal) art 13.

93 *Interim Constitution of Nepal 2007*(Nepal) art 12.

The *Constitution* has adopted the doctrines of separation of power and checks and balances. The doctrine of separation of power requires that functions of state organs should be kept separate or should not intervene in each other's functioning. Justice Mason stated that 'the lesson from history is that separation of power doctrine serves as a valuable purpose in safeguarding the judiciary from the emergence of arbitrary or totalitarian power'.⁹⁴ Obviously, the doctrine of separation of power is important in a democratic country and to respect human rights. The *Interim Constitution of Nepal* has authorised separate roles i.e. the legislature is responsible to make law; the executive exercises the authority to enforce the law and the judiciary interprets the law in a broader sense.

Furthermore, the *Constitution* has adopted the theory of checks and balances to some extent. For example, judges of the Supreme Court, including the Chief Justice, have been appointed through a parliamentary hearing and if they need to be fired, it has to be done through impeachment, which needs a two-third majority for the same in the parliament.⁹⁵ Moreover, the doctrine of separation of power among state organs and their mutual checks and balances have been placed as the foundation of judicial review in the *Interim Constitution of Nepal*.⁹⁶ The *Constitution* provides authority to the Supreme Court to handle cases related to the principle of constitutional supremacy; if any legal provision is in contradiction with the provision of the *Interim Constitution* or the legal provision and imposes an unreasonable restriction on the enjoyment of the fundamental rights, the Supreme Court has extra-judicial authority to declare the legal provision in question void.⁹⁷ The provision allows broader *locus standi* to general people to protect the public interest through public interest litigation, a modern jurisprudence.

Based on these provisions, the Supreme Court of Nepal has made some remarkable decisions related to human rights, in which it had declared some government decisions void. For example, the Supreme Court recently declared some provisions of the *National Human Rights Commission Act 2012* (NHRCA)⁹⁸ and *The Commission on Investigation of Disappeared Persons and Truth and Reconciliation Act 2014* (CIDP/TRCA) void(see for detail below).⁹⁹ The Supreme Court has therefore exhibited some real independence in its decisions.

In spite of the constitutional provisions about independence of judiciary, the appointment of judges in the Supreme Court and Appellate Courts have been often criticised by former chief justices, legal professionals, Nepal Bar Association and the

94 Anthony Mason, 'A perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 2.

95 *Interim Constitution of Nepal 2007*(Nepal) art 105.

96 *Interim Constitution of Nepal 2007*(Nepal) art 107 (1).

97 *Interim Constitution of Nepal 2007* (Nepal) art 107.

98 *Om Prakash Aryal and Others v National Human Rights Commission, Hariharbhawan and Others*, Nepal Kanoon Patrika 2070 [Nepal Law Journal 2013] Vol 7, 843 (Supreme Court of Nepal).

99 *Suman Adhikari and others v Office of Prime Minister and Council of Ministry and Others*, Decision date 2071 Falun 14 [26 February 2015] case n 070-ws-0050 (Supreme Court of Nepal).

media. The appointment of eight judges in the Supreme Court and 169 judges in Appellate and District Courts last year were highly controversial and raised serious concern among the legal professional and organisations, as they questioned the future of independence of judiciary.¹⁰⁰ The national media and professionals questioned the Judicial Council's recommendations, saying that the appointments were not transparent and that they were made based on the political affiliation (political influence) of the appointed judges and nepotism. They even raised the issue of corruption in the process of their appointments.¹⁰¹ Regarding the political influence in the Judiciary, the then Chief Justice (who also chairs the Judicial Council) admitted political pressure in the process of judges' appointment.¹⁰²

Furthermore, with regards to the competence of judges, two internal supervision reports of the Supreme Court of Nepal pointed that some judges of the Appellate Court Patan and the Special Court, Kathmandu ignored precedents, took unnecessary orders while hearing cases, made inadequate analysis of law and deferred court hearings more than 20 times, whereas the law says it can be done only twice. The reports also explained that these types of malpractices support corruption and the misuse of power.¹⁰³ These reports and news have raised an issue of incompetence among judges, judicial corruption and political intervention, which, as a result, affect the independence of judiciary and rule of law in Nepal. A lawyer stated in his book that corruption and delay in justice dispensation are major challenges in current justice system.¹⁰⁴ Furthermore, there was a direct violation of the principle of the independence of the judiciary and the theory of separation of powers when then sitting chief justice was appointed as the Chairperson of the Interim Electoral Government of

100 See, eg, Binita Dahal, 'Justifying the Justices', *Nepali Times*, (Kathmandu) April 29, 2012 <<http://nepalitimes.com/article/nation/justifying-the-justices,1320>>; Gyan Basnet, 'Judicial Independence, Judges and Political 'Bhagbanda'', *Nepalnews.com* (Kathmandu) <http://www.nepalnews.com/archive/2013/others/guestcolumn/jul/guest_columns_02.php>; Nabin Khatiwada, 'JC recommendations SC Justices Court Controversy, Justice Sah writes note of dissent, BAR voices dissatisfaction', *Republica* (Kathmandu) April 23, 2014 <http://myrepublica.com/portal/index.php?action=news_details&news_id=73352>; Ghanashyam Khadka, 'Nyayadhis Sifaris Samsadle Ultaunu Parchha' [the recommendation for appointment of judges must be reversed by parliament], *Kantipur National Daily*, (Kathmandu) April 27, 2014 <<http://epaper.ekantipur.com/kantipur/epaperhome.aspx?issue=2742014>>; 'Minbahadur Rayamajhi former chief justice of Supreme Court of Nepal told that the recommended persons are incompetent and controversial which will affect negatively in Judiciary'.

101 See, eg, Nabin Khatiwada, 'JC recommendations SC Justices Court Controversy, Justice Sah writes note of dissent, BAR voices dissatisfaction', *Republica* (Kathmandu) April 23, 2014 <http://myrepublica.com/portal/index.php?action=news_details&news_id=73352>; Ghanashyam Khadka, 'Nyayadhis Sifaris Samsadle Ultaunu Parchha' [the recommendation for appointment of judges must be reversed by parliament], *Kantipur National Daily*, (Kathmandu) 27 April 2014 <<http://epaper.ekantipur.com/kantipur/epaperhome.aspx?issue=2742014>>.

102 See also 'CJ Sharma admits political pressure in judges' appointments' *News, Republica*, (Kathmandu) 11 June 2014 <<http://www.myrepublica.com>>.

103 See also Kiran Chapagain, 'SC questions verdicts at Patan Appellate, Special Court' *Republica*, (Kathmandu) May 13, 2009 <http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=4965>. A senior judge of the Supreme Court of Nepal supervised to two courts namely Appellate Court Patan and Special Court Kathmandu and prepared reports in 2009.

104 See also Ananta Raj Luitel, *Parda Pachadi ko Naya* [Unseen Matter behind the Justice] (Pairabi Prakasan M House and Budha Academy, 2013) 168.

Nepal in March 2013. The chief justice-headed government conducted an election to the second Constituent Assembly in November 2013, handed over power to political parties in February 2014 and then stepping down as the chief justice. These developments and political interventions show that the judiciary faces challenges. They indicate the lack of *de facto* judicial independence in Nepal.

On the other hand, for the common people in Nepal, especially the poor and marginalised section of the society, the judicial process and justice are not accessible. The lengthy, complex, and expensive court procedure, geographical un-reach and non-implementation of court decisions are major obstacles to justice dispensation. The Strategic Plan of the Supreme Court has accepted the fact;

Justice is not only slow and cumbersome, it is also expensive. The court has failed to earn public trust and easy access to justice for the general public has not been maintained. Public cannot experience reform through the reforms being made on the physical aspect of the courts. It is imperative that reforms should immediately be made from the initial stage of registration of case to the execution of judgements.¹⁰⁵

Moreover, the torture victims face more problems while seeking justice. It is common that the victims of torture have less confidence to fight against powerful State institutions. Simultaneously, the perpetrators threaten the victims and their families. Thus, the role of an independent judiciary and the rule of law is vital for providing justice to the victims of torture and control discretion and misuse of power of the government institutions.

5.4 Judicial protection of the right to freedom from torture

5.4.1 Judicial review and public interest litigation

Judicial protection is performed through judicial review and Public Interest Litigation (PIL). Judicial review is a tool to review the constitutionality of law and decisions. It is judicial power on demand for judicial protection of fundamental rights.¹⁰⁶ Furthermore, it is a power of court to review actions taken by the legislative and executive and decide whether the actions are under the constitution. . In USA, *Marbury v Madison* is a historical case to establish judicial review through defining constitutional supremacy against contradictory provision of law.¹⁰⁷

Public Interest Litigation (PIL) is crucial for democratic practice and protection of the rights of people. PIL offers a ladder of justice to disadvantaged groups of people in the society, provide as avenue enforced collective rights, awareness about human rights

105 Supreme Court of Nepal, *Second Strategic Plan 2009/10-13/14*) 64.

106 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) 11.

107 *Marbury v Madison*, 5 U.S. 137 (1806).

and to participate government decision making.¹⁰⁸ In a simple language, PIL is defined as the use of litigation that seeks protection of vulnerable or disadvantage groups or individuals which raises issues as wider public concern. ‘PIL focuses on providing justice to the public rather than the issue having private interest. Most notably, the Indian Supreme Court started using PIL with an objective to provide justice to the people who were either ignorant of their rights or too far from accessing justice.¹⁰⁹ Courts can play a proactive role in providing justice and protect public interest to the needy people to take into account the notice from telephone conversations, newspapers and other mediums of information. For example, the Indian Supreme Court has dropped the requirement for formal petitions; courts can now take action on the basis of a written letter, newspapers or telephone conversations.¹¹⁰ Despite a few criticisms; such as that the policy formulation by the courts might affect the regular work or administration of justice and might affect the notion of separation of power,¹¹¹ PIL plays a significant role in the protection of the right to freedom from torture.

In the Indian experience, the Supreme Court has emphasised the prevention of torture and other forms of ill-treatment in *D.K. Basu v State of West Bengal*. The court sets guidelines for the safeguard of investigations, mainly to prevent custodial torture.¹¹² The Supreme Court of Bangladesh has given similar decisions and outlined arrest and remand cases.¹¹³ The House of Lords reinforced the duty of effective investigation on alleged human rights breaches, finding it is not just a secondary obligation, but it is an essential of these rights.¹¹⁴ Furthermore, the European Court of Human Rights, referring to a Russian case, explained that the State failed to investigate as an independent body and provide adequate, prompt and transparent service involving the victims.¹¹⁵

In Nepal, the *Constitution of the Kingdom of Nepal 1990* granted authority to the Supreme Court of Nepal for judicial review to check the constitutionality of existing laws the first time of constitutional history. Similarly, the *Interim Constitution of Nepal 2007* also grants power to the judiciary for the protection of fundamental rights and for the enforcement of legal rights, which have no other legal remedy or are inadequate or ineffective. The *Constitution* has established the judiciary as an independent organ, which separates the power from other state organs, and is aligned to the doctrine of separation of powers and mutually introduces doctrine of checks and balances too through granted power of judicial review of law promulgated by the legislature and administrative decisions made by the executive. In such situation, the

108 Surya Deva, ‘Public Interest Litigation in India: A Critical Review’ (2009) 28 *Civil Justice Quarterly* 19.

109 Ibid, 24.

110 Nihal Jayawickrama, ‘India’, David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement A Comparative Study* (Cambridge University Press, 2009) 270.

111 Varun Gauri, *Public Interest Litigation in India Overreaching or Underachieving?* (The World Bank Development Research Group, human Development and Public Service Team 2009) 4.

112 *D.K. Basu v State of Bangal*, Indian Supreme Court, AIR 1997 SC 610.

113 *Blast v Bangladesh*, Writ No 3806 of 1998, 55 DLR (2003) 383 (Supreme Court of Bangladesh).

114 *R v Secretary of State for Justice* [2008] UKHL 68 [26].

115 *Menesheva v Russia* (European Court of Human Rights, Application No 59261/00, 9 March 2006).

Supreme Court can issue order or writ for the protection of rights and remedy.¹¹⁶ The Court has made significant contributions to protecting the right to freedom from torture through PIL and judicial review. Most remarkably, the Supreme Court has given directive orders to the Government of Nepal to define torture as a punishable crime in accordance with the *Interim Constitution 2007* and the CAT.¹¹⁷ The major PIL and judicial reviews relating to the right to freedom from torture related decisions are analysed in the following section.

5.4.1.1 Mandamus order issued for the criminalisation of torture

A writ petition of mandamus was filed by two advocates (Rajendra Ghimire and Kedar Prasad Dahal) in March, 2006 on behalf of a human rights organisation at the Supreme Court of Nepal demanding a mandamus order to promulgate a new anti-torture law or amend the existing law to define torture as a punishable crime in line with the CAT. The petitioners argued that Article 14 (4) of the *Constitution of Kingdom of Nepal 1990* recognised the right to freedom from torture as a fundamental right. The petitioners claimed that it is a State obligation of Nepal in Articles 2 and 4 of the CAT to promulgate anti-torture laws. The writ was filed before the promulgation of current interim Constitution. Later, in the decision making process, the Supreme Court took into account of new provision of the *Interim Constitution of Nepal 2007* that also stipulates the right to freedom from torture and other forms of ill-treatment as fundamental right and defines as crime as determined by the law. The Court accepted that the new provision is more detailed and progressive to guarantee the right to freedom from torture. The Court found that the act of torture is against the rule of law and in violation of fundamental rights. Therefore, it is the duty of the State to implement fundamental rights and provide justice to victims, which is also a legal obligation of a member State towards the CAT. Furthermore, the Court noted that Nepal was yet to promulgate an anti-torture law even after a long-time of the accession of the CAT. Therefore, the Court issued a mandamus order in the name of the government to make torture as a punishable crime and compensate victims of torture.¹¹⁸ Moreover in another case, the Supreme Court of Nepal stated that the acts of torture and disappearances are criminal offences. Therefore, these offences have to be investigated separately and are not matters to be withdrawn from criminal charge.¹¹⁹

The Supreme Court verdicts are considered as positive decisions in relation to respecting the right to freedom from torture and punishment to the perpetrators. It regards the issue of torture as a serious human rights violation and has given clear instructions to the Government of Nepal. However, the decision is yet to be implemented. As per the report of the Council of Ministers on the implementation of the court decisions, a draft *Anti-Torture Bill*, which defines torture as a criminal

116 *Interim Constitution of Nepal 2007* (Nepal) art 107 (2).

117 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452 (Supreme Court of Nepal).

118 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452, decision n 8101 (Supreme Court of Nepal).

119 *Madhav Kumar Basnet and others v Prime Minister and Ministry of Council Office and others*, Supreme Court Bulletin 2070 Paus -2 [January 2014] decision date 2070/11/18 [January 2, 2014], no 069-WS-0057 (Supreme Court of Nepal).

offence, has been prepared and in the process of being tabled in the Parliament (see for more detail in Chapter III).¹²⁰

The government report does not reflect any significant progress in the last seven years regarding the implementation of the decision. The report does not explain the delay. There could have been some reasons behind the non-implementation of the decisions that are also directly linked to the enforcement of the CAT.

The overall implementation of the PIL related cases is very low. The Supreme Court annual report 2012/13 shows that only 7.4 per cent of PIL related cases have been implemented.¹²¹ Perhaps, either the court decisions are taken lightly or the country's transitional phase for peace building and constitutional making process for the last seven years is forcing the government to place the issue as a lower priority because of the existence of several socio-political and economic challenges such as poverty, backwardness and unemployment. With regards to penalty, courts can charge contempt of court for those individuals, however it is not frequent practice.

6.4.1.2 Protection of the right to fair trial

As noted in Chapter IV, many quasi-judicial bodies inflict torture and other forms of ill-treatment in the process of interrogation, and many laws grant authorities to administrative or quasi-judicial organisations to receive a case, arrest people, conduct investigations and give decision on the relevant matter. The Supreme Court decided to raise the role of the Chief District Officer (CDO) in a case *Amar Raut v Ministry of Home Affairs*. The petitioner claimed that the *Interim Constitution of Nepal 2007* Article 100 (1) defines that the three tiers of courts and special court are granted to handle various types cases and the *Constitution* guarantees fair trial rights as fundamental rights. However, many laws including *Local Administration Act 1971* and *Arms and Ammunition Act 1962* grant authority the CDO to arrest people, conduct investigation, prosecution and gives decisions on the issues. The punishments include imprisonment for up to seven years and fines. The CDO is established as administrative body under the Ministry of Home Affairs which is responsible for day-to-day administrative and other social activities in district. Therefore, the power of CDO breaches separation of powers and constitutional provision. The petitioner demanded that such laws be declared null and void and that the current cases in CDO office be transferred to the relevant district courts.¹²²

The Supreme Court of Nepal issued a directive order to the government to form a special committee comprising legal and administrative experts to review the existing provisions and recommend necessary changes within six months. Furthermore, the Court said that competence, independence and impartiality are the pillars of justice system. If justice dispensation mechanisms follow these three pillars, it can gain the trust of the people. Therefore, the authoritative person should have knowledge and

120 Government of Nepal, Office of Prime-Minister and Council of Ministries, Law and Human Rights Promotion Department, *Progress Report on the Implementation of Public Interest Litigations related Supreme Court Decisions* (2070 Falgun) [March-April 2014] 166-167.

121 Supreme Court of Nepal, *Barsik Pratibedan 2069/70* [Annual Report 2012/13] 37.

122 *Amar Raut v Ministry of Home Affairs*, Nepal Government and Others, Nepal Kanoon Patrika 2068 [Nepal Law Journal 2011] Vol 7, 1083, Decision No 8642 (Supreme Court of Nepal).

skill about contents and procedures and the body must be independent and free from any influence from the executive. The CDO is a unit of the government, so it is assumed that the CDO will not go against the government policies and directives, giving rise to the possibility of violation of the rights of the people.¹²³

It is an encouraging decision to respect right to fair trial, which is obviously linked to the right to freedom from torture. The decision also respects the doctrine of the separation of powers. For the implementation of the decision, the Government of Nepal formed a committee to review the legal provisions and the committee submitted its report about one and a half years ago.¹²⁴ As things stand, no further improvements have been observed in this regard.

5.4.1.3 Directive to introduce vetting system for security personnel

A writ was filed by human rights lawyers demanding an interim order to stop promotion of a senior police officer, who was allegedly involved in torture, disappearance and death of five students in 2003. The petitioners argued that the person was identified as human rights violator by the NHRC.¹²⁵ In this case, the Supreme Court of Nepal did not issue an interim order to stop the process. However, the Court ordered the Office of the Prime Minister and Council of Ministers to make necessary laws or set criteria for vetting system to identify the involvement of security personnel in human rights violations, and to strictly regulate the norms in the process of appointment and promotion of individuals.¹²⁶ For the enforcement of the decision, the Government of Nepal introduced vetting system in the new *Army Service Regulation 2013*, which states that army personnel convicted of violation of human rights and international humanitarian law will not be eligible for promotions.¹²⁷ However, the vetting process is yet to be introduced by the Nepal police service. Finally, the alleged person was promoted by the Government of Nepal.

5.4.1.4 Contradictory provisions declared void and prosecution of human rights violators

123 *Amar Raut v Ministry of Home Affairs, Nepal Government and Others*, Nepal Kanoon Patrika 2068 [Nepal Law Journal 2011] Vol 7, 1083, Decision No 8642 (Supreme Court of Nepal).

124 Government of Nepal, Office of Prime-Minister and Council of Ministries, Law and Human Rights Promotion Department, *Progress Report on the Implementation of Public Interest Litigations related Supreme Court Decisions* (2070 Falgun) [March-April 2014] 86-87.

125 National Human Rights Commission-Nepal *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057 -2070* [Thirteen Years of NHRC, the Situation of the implementation of the NHRC's recommendations] (NHRC, 2013).159-160.

126 *Ranjan Jha and Deependra Jha v Prime Minister and Minister of Council Office*, No 067-WO-1198, Decision date 2059-4-28 [August 12, 2012] (Supreme Court of Nepal).

127 Phanindra Dahal, 'New Regulation Change Nepal Army Promotion Criteria' *The Kathmandu Post* (Kathmandu) 14 February 2014, < <http://www.ekantipur.com/the-kathmandu-post/2013/02/14/top-story/new-regulations-change-nepal-army-promotion-criteria/245301.html>>.

As stated above, many legal provisions of laws have been declared void by the Supreme Court of Nepal through judicial review. The Supreme Court recently declared some provisions of the NHRCA, *Truth and Reconciliation Commission Bill* (TRC Bill) and CIDP/TRCA¹²⁸ void in three cases related to human rights.

A writ petition was filed by a group of lawyers and human rights activists in the Supreme Court of Nepal. The petition claimed that some provisions of the NHRCA contradicted the provision of the *Interim Constitution of Nepal 2007* and Paris Principles governing National Human Rights Institutions (NHRIs) 1991. The petitioners argued that the provision of section 10(5), complaints regarding the incidents of human rights violation had to be lodged within six months from the date of incident of human rights violation or the date on which a person has been released from detention, contradicts the *Interim Constitution's* provision related to the role and function of the NHRC. The petitioners claimed that the provision of the NHRCA restricts and discourages to enjoy fundamental rights and provisions of international human rights instruments. Similarly, there is another provision of NHRCA section 17(10) with regard to the initiatives to prosecute case based on NHRC recommendations: ‘... if the Attorney General decides that the case cannot be initiated pursuant to prevailing laws, the Attorney General shall inform the NHRC’. The petitioners argued that the provision contradicts the *Constitution* and the Paris Principles because the NHRC is an independent, impartial and competent organisation, which has the absolute authority to investigate human rights violations and recommend prosecution against human rights violator. The provision of the NHRCA defines an optional role of the Attorney General. Therefore, the provision contradicts the *Constitution* and the petitioners demanded that the provisions be declared void.

The Supreme Court declared the provisions relating to section 10 (5) and 17 (10) of the NHRC's Act void from judicial review. The Court interpreted that the NHRC act with the statute of limitation of six months for lodging a complaint of human rights violation could control and limit the functions of NHRC, which contradicts the *Interim Constitution's* Article 132 which is related to the duties and rights of the NHRC. Similarly, the court interpreted that the Attorney General cannot reject NHRC's recommendations like in other criminal case because NHRC recommendations for prosecution are based on the prevailing law.¹²⁹ It is another positive decision of the Supreme Court of Nepal which declared the provisions of NHRCA void and sought to clarify Attorney General's role to prosecute human rights violators as per NHRC recommendations. These could be instrumental in implementing some NHRC recommendations to prosecute perpetrators, which could help decrease impunity in torture related cases. However, implementation is still problematic in this case,

128 *Commission on Investigation of Disappeared Persons and Truth and Reconciliation Act 2014* (Nepal). After long discussion in parliament and outside parliament, the Act has been promulgated by Legislative Parliament in 2014.

129 *Om Prakash Aryal and Others v National Human Rights Commission, Hariharbawan and Others*, Nepal Kanoon Patrika 2070 [Nepal Law Journal 2013] Vol 7, 843 (Supreme Court of Nepal). In the case the petitioners claimed sections 10 (5), 16 (4), 17 (10), 20 (3), 25 and 28 contradict with the *Constitution*, however the court decided to void the section 10(5) and 17 (10) only.

because there are no guidelines or practices that have been developed among the NHRC and OAG governing implementation.

Similarly, a number of victims' groups lodged writs in the Supreme Court demanding that some provisions of CIDP/TRCA be declared void in accordance with constitutional provisions and international human rights instruments. The petitioners argued that the key provisions, mainly the Commissions mandate to allow mediation to reconcile victims and perpetrators even in the issue of serious human rights violations (Section 22(1)), prohibition of any legal action in mediated case (section 25 (3 and 4)), the Truth and Reconciliation Commission's mandate to recommend amnesties even gross human rights violations (section 26 (1, 2, 5)) and some other, contradict the *Interim Constitution*, international human rights and humanitarian law and the Supreme Court precedents.¹³⁰ The petitioners argued that reconciliation without the participation or consent of victims of murder, torture and other gross violation of human rights is against the international human right law and standard. The Supreme Court of Nepal ruled that amnesties for gross violations of human rights were impermissible and that the Truth and Reconciliation Commission should not encourage forced reconciliation between victims and perpetrators. The court declared sections 26(2) and 29(2) void for they were in contradiction with the *Interim Constitution*.¹³¹ Before the decision, the Supreme Court of Nepal had directed the Government of Nepal to amend some provisions of two proposed ordinances of Commission on Investigation of Disappeared Persons and Truth and Reconciliation Commission, which was related to amnesties and reconciliation of gross human rights violation cases.¹³²

The judicial review from the Supreme Court of Nepal seems instrumental in protecting human rights, including the right to freedom from torture, and to make the GON sensitive to providing justice to victims of human rights violations. Nevertheless, some court decisions might cross the jurisdiction. For example, in the decisions related to judicial review on the case of *Commission on Investigation of Disappeared Persons and Commission of Truth and Reconciliation Bills*, the Supreme Court declared some proposed provisions to be inconsistent with the *Constitution* and directed the Government of Nepal to amend or reform the provision.¹³³ To some extent, the decision could be pro-active for pointing out inconsistent provisions in the proposed Bills. However, the decision has raised some questions such as whether the Supreme

130 *Suman Adhikari and others v Office of Prime Minister and Council of Ministry and Others*, Decision date 2071 Falun 14 [26 February 2015] case n 070-ws-0050 (Supreme Court of Nepal). Nearly two hundred fifty victims of conflict, lawyers and activists lodged the case. The petitioners demanded many provisions sections 10,11,12, 13(1,2), 22(1),25(3, 4), 26(1,2,3),29(1) and 44 to declare void.

131 *Suman Adhikari and others v Office of Prime Minister and Council of Ministry and Others*, Decision date 2071 Falun 14 [26 February 2015] case n 070-ws-0050 (Supreme Court of Nepal).

132 *Madhav Kumar Basnet and Bishnu Prasad Pokharel v President of Nepal Government, Interim Election Government, Prime Minister Officer and Others*, decision date 2070 Paush 18 [4 January 2014] case n 069-WS-0059 (Supreme Court of Nepal).

133 *Madhav Kumar Basnet and Bishnu Prasad Pokharel v President of Nepal Government, Interim Election Government, Prime Minister Officer and Others*, decision date 2070 Paush 18 [4 January 2014] case n 069-WS-0059 (Supreme Court of Nepal).

Court can review a proposed bill, which has not even become a law? Is not it an intervention in the power of legislature? It seems against the doctrine of separation of powers. It is obvious that the judicial review or PIL could protect the broader public interest and their rights without crossing a limitation.

5.4.1.5 Protection of children from torture and other forms of ill-treatment

Two writ petitions were lodged in the Supreme Court demanding that the contradictory provisions of *Children Act 1991* and *Muluki Ain 2020* (National Code 1963) be declared void. The petitioners argued that the provisions gave immunity if any coercion or torture that was inflicted in the name of providing protection or education is not defined as a crime.¹³⁴ The Supreme Court declared the provisions of the *Children Act* and *National Code* void. The Court issued an order to the government to stop such types of torture or violence against children and to establish mechanisms to monitor such activities. The decisions recognised torture from schools or private parties illegal and emphasised the ultimate responsibility of the government to protect the rights of the children.

Despite some positive decisions, the Supreme Court has quashed many cases related to rights to freedom from torture. For example, a writ petition was lodged demanding that the contradictory provision of *Compensation Relating to Torture Act 1996*, which states that the government attorney shall represent on behalf of the alleged torturer, be declared void. The petitioner argued that the provision contradicts the *Constitution of the Kingdom of Nepal 1990* and the CAT. However, the Supreme Court rejected the plea on the basis that an accused is innocent until proven guilty, and nothing in the CAT prevented a torture case from being defended by a government lawyer (See further detail in Chapter III).¹³⁵ In another case, a petition was filed demanding that the provision of the *Police Act 1955*, which is related to physical punishment using ‘fatigue’ or detention of junior police personnel up to 15 days without maintaining proper records as disciplinary actions, be made void. The court found that the provision did not contradict the *Constitution* and the CAT. The court interpreted the provision as necessary to maintaining discipline within the police force.¹³⁶ Likewise, another writ petition was filed in the Supreme Court claiming that compensation to a torture victim amounting to Rs 100,000 (approximately 1000 US dollars) is not enough and is against the provision of *Constitution* of Nepal and notion of the CAT. The court rejected the plea and upheld that the amount can be decided by the Parliament and that it is not the duty of the court to increase the amount.¹³⁷ In this case, the court respected the doctrine of separation of power. Nevertheless, these court decisions did not

134 *Raju Prasad Chapagain and others v Prime Minister and Council of Ministers and others*, Nepal Kanoon Patrika 2065 [Nepal Law Journal 2009] Vol 10, 1180 (Supreme Court of Nepal); *Devendra Ale and others v Council of Ministries and others*, Nepal Law Journal 2061, Vol 9, 1156 (Supreme Court of Nepal).

135 *Rabindra Bhattarai v His Majesty Government of Nepal*, Nepal Kanoon Patrika 1998 [Nepal Law Journal, 2055] Vol 11, 615 (Supreme Court of Nepal).

136 *Rabindra Bhattarai v His Majesty's Government, and Others*, Decided by Supreme Court (30 Aug 2001).

137 *Madhav Kumar Basnet and Other v His Majesty Government and Other*, decision date 10 September 2003, decided by Supreme Court of Nepal.

adequately analyse the legal provisions and notion of the CAT to protect right to freedom from torture.

5.4.2 Torture compensation cases

As stated in Chapter III, Nepal has promulgated *Compensation Relating to Torture Act 1996* (CRTA) to incorporate the provisions of the CAT. Although the Act does not meet the provisions of the CAT and the notion of the constitutional provisions; it stipulates that torture victims be provided with some amount of compensation and departmental action against the perpetrator. The Act has been in judicial practice for more than 18 years. Despite the fact that the Supreme Court's annual report has started to list torture compensation cases since 2011/12, the District, Appellate and Supreme Courts have handled many torture compensations cases across the country. For the protection of the right to freedom from torture and other forms of ill-treatment and enforcement of the CRTA, human rights NGOs play a vital role from the documentation of cases to boosting the morale of torture victims to the preparation of cases to pleading in the court and other legal support such as filling torture compensation cases and to implementing court decisions. For example, many reports of human rights organisations have recorded the trends and practices of torture compensation cases (from 2001 to 2014).

A report of Amnesty International covered that a total of approximately 35 cases were registered in various courts from 1996 to 2001. Among them, two (approximately 6 per cent) victims were awarded compensation.¹³⁸ In 2005, another report published by the Centre for Victims of Torture (CVICT) illustrated that a total of 175 cases were registered in the district and appellate courts within nine years. Among them, the courts gave verdicts on 85 cases, in which 35 cases were decided in favour of the victims.¹³⁹ Likewise, another report stated that a total of 208 torture victims lodged compensation cases within 12 years (from 1996-2008). Out of the 208 cases, only 52 cases, or 25 per cent, were decided in favour of the victims.¹⁴⁰ In 2014, a report stated that 31 per cent of the victims were granted compensation by the courts.¹⁴¹ Human rights organisations' reports show that in less than one third of torture compensation cases, compensation has been granted to the victims. All the reports show few numbers of cases filed in all level of courts. The annual reports of the Supreme Court have started to cover torture compensation cases related records from 2010/11. Before that, the judiciary did not count the cases as a significant number. Annual reports of the last

138 Amnesty International, *Nepal Make Torture a Crime* (Amnesty International, 2001) 7.

139 Centre for Victims of Torture (CVICT), *Yatanapidit ka Pachyama Bhayaka Faisalharu ko Sangalo* [Collection of decisions in favour of victims of torture] (CVICT Nepal 2005) 10 ('*CVICT Collection of Decisions*').

140 Advocacy Forum, *Hope and Frustration of Assessment of the Impact of Nepal's Torture Compensation Act -1996* (Advocacy Forum Nepal, 2008) 1 ('*Advocacy Forum, Hope and Frustration*').

141 Advocacy Forum, *Promising Developments Persistent Problems, trends and Patterns in Torture in Nepal During 2013* (Advocacy Forum, Nepal 2014) 85 ('*Advocacy Forum report 2014*').

two years of the Supreme Court show that a total of 56 and 48 new cases related to torture compensation were lodged in district and appellate courts respectively.¹⁴²

There are a number of reasons why most of the cases related to torture compensations have not been lodged in courts. First, in general people do not have an easy access to justice because of the geographical remoteness, complex court procedure and costly and delayed justice.¹⁴³ It is obvious that torture victims are more vulnerable and always face challenges to file case against the State system. Second, more specifically in torture cases, the absence of laws defining torture as a criminal offence with penalties to perpetrators, establishment of prompt, transparent, competent and impartial investigation mechanisms and lack of victims/witness protection law affect the torture victims' access to justice. Third, most of the victims are reluctant to file a case against the police and security agencies, which inflict torture, due to threats or intimidation from perpetrators. As a result, the majority of torture cases do not make any complaint against the perpetrator due to the fear of being re-victimised.¹⁴⁴ For example, recently, a lawyer who has provided legal support on behalf of a torture victim got threat calls from the police in Kathmandu.¹⁴⁵ Fourth, the burden of proof goes to the victim that means victims should prepare cases, collect evidences, including medical evidences, and hire lawyers and make other necessary arrangements to proceed with the case in the court. Therefore, torture victims do not want to take further challenge against perpetrators.

The CAT/C has recommended that where a detainee alleges that a confession was extracted under torture, the prosecution should carry the burden of proof that confession was made freely.¹⁴⁶ Even after the filing of torture compensation case in the court, torture victims and family members are either offered money as a benefit to reconcile or are put under pressure, threat or intimidation by perpetrators to withdraw the case. Pressure from police can force the victims to withdraw the case of torture compensation even before the court's decision.¹⁴⁷ Therefore, torture victims do not have easy access to justice in the current legal framework/mechanisms. Despite these challenges, many victims still lodged cases in the courts.

The study has selected 48 torture compensation cases which were decided in several courts, appellate courts and the Supreme Court of Nepal over the last seven years. Out

142 Supreme Court *Annual Report* 2010/11, 3; Supreme Court *Annual Report* 2012/13, pages 88,107, 156; Supreme Court *Annual Report* 2012/13, pages 79, 95, 144.

143 Supreme Court of Nepal, *Second Strategic Plan* 2009/10-13/14) 64.

144 Yubraj Sangroula, *Concept and Evolution of Human Rights Nepalese Perspective* (Kathmandu School of Law, 2005) 304.

145 See Asian Human Rights Commission *NEPAL: Lawyer threatened for raising the issue of police torture* Urgent Appeal (24 March 2014) < <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-042-2014>>.

146 Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012), part 2 Comments and Observations Submitted by Nepal (8 August 2011) para 110(g), <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm>('CAT/C Confidential Inquiry Report 2011').

147 Advocacy Forum Report 2014, above n 141, 27.

of a total of 48 cases, 22 cases were decided in favour of the victims and 21 cases against the victims and five cases were dismissed and taken for analysis (see the list of cases in annex). These selected cases cover more than 50 per cent of the currently running cases in all tiers of courts. The study has reviewed and analysed the courts' decisions with a focus on facts, law, evidences, use of human rights instruments and procedure followed while giving the verdict. The analysis identified the strength in the decision and also the shortcomings of the decisions.

5.4.2.1 Positive trends in torture compensation cases

Despite a lack of laws to criminalise torture, investigation mechanisms and access to justice issues, Nepalese courts have granted some compensation to torture victims and ordered departmental actions against perpetrators in some cases and together these actions can be considered as positive signs from the judiciary on progress towards providing justice to victims of torture. The courts have granted a minimum of Rs 5,000 to 60,000 (approximately 50 to 600 US dollars) as compensations to the victims of torture in 22 cases and ordered departmental actions in eight out of 22 successful cases.

The courts have taken medical reports, scars or signs of body parts and eyewitnesses as evidence to provide compensation. Medical reports were taken as major evidence to award compensation in 15 out of 22 positive decisions. Physical appearance such as scars and signs or marks on victims' body were taken as being the second most important form of evidence in awarding the compensation. The decisions show that the courts consider medical reports and scars on the body as the determining factors to award compensation. In some cases, the courts have started to review the provision of international human rights instruments including the CAT while giving decisions.¹⁴⁸ However, many shortcomings in court decisions are found, including inconsistent decisions, inadequate (sometimes incorrect) analysis of facts, laws and human rights principles and few directives for departmental action against perpetrators.

5.4.2.2 Shortcomings in torture compensation cases

As stated above, the courts have awarded some amount as compensation in accordance with the CRTA. However, the trends for granting compensation and departmental action against perpetrators are not encouraging. Many reports (from 2001 to 2014) show that low numbers of cases have been lodged in the courts. Among them, less than 30 per cent victims were granted compensation. Most of the victims are awarded. An average of Rs 10,000 is ordered,¹⁴⁹ which is considered to be very low. The Nepalese courts are rigid when it comes to providing compensation as compared to the courts of other countries. For example in India, the High Court of Punjab and Haryana ruled that 'appellants were tortured physically in police stations, mentally harassed and were boycotted socially' and decided to award Indian Rs. 20 lakhs (approximately 33,000 UD dollars) each to five victims in a recent case for compensation for false

148 *Arjun Gurung v Basnta Bahadur Kunwar, Deputy Special Police, Metropolitan Police Brit Balaju, Kathmandu*, decided by Kathmandu District Court decision date 2069/3/25 (12/07/2012); *Shivadhan Rai v Ganesh KC, Police Superintendence. Metropolitan Police Brit and others*, decided by Kathmandu District Court, decision date 2069/3/25 (12/07/2012).

149 Advocacy Forum Report 2014, above n 141, 26.

prosecution, torture and illegal detention.¹⁵⁰ A report published an experience about providing legal support for torture compensation cases stating that even the highest amount of compensation of Rs 100,000 (approximately 1000 US dollars) is accepted as a nominal amount when compared to court expenses and other costs, including travel expenses.¹⁵¹ Furthermore, the courts rarely order departmental action against perpetrators.¹⁵² In this situation, the study finds the following shortcomings by analysing 48 torture compensation related decisions of various courts of Nepal.

Seeking loopholes and technical reasons to avoid departmental action against torturer

As mentioned, many obstacles hamper the lodging of torture compensation cases. It is obvious that a victim who lodges a torture compensation case is taking a huge risk and he/she must collect evidence/documents, prepare all court documents, hire lawyers, pay other expenses and submit the witness to the court. The victims of torture may face threats from perpetrators during the whole process. Even in such situations, some victims take the risk and lodge cases in court against their perpetrators. As stated above, some victims have been successful in receiving some compensation and ensuring departmental action against perpetrators. However, many cases are quashed or dismissed for technical reasons. As noted in Chapter IV, many people have been arrested without a warrant and not presented before the court within 24 hours. A report stated the situation of Nepal that police complete all interrogation process and then start legal formalities such as providing warrant or detention letter, maintain detainees' register, arranging medical check-up for victims and submitting a remand application to the court. The report found that the practice of falsifying detainees' records is widespread.¹⁵³

Reports of the Office of the Attorney General (OAG) and Centre for Legal Research and Resource Development (CeLRRd) illustrated that 65.63 per cent of detainees have not been presented before the judge within 24 hours of arrest.¹⁵⁴ Similarly, another report found that fabricated dates of arrest have widely been used in many cases during the pre-trial process.¹⁵⁵ The data shows that in most of the cases the police do not inform the detainees, which means that around two third per cent of detainees have been detained illegally and later new fake arrest dates are documented.

150 *Nachhattar Singh alias Khanda and others v State of Punjab*, High Court of Punjab and Haryana, India decided on 23 September 2009.

151 *Advocacy Forum Nepal is government Unable or Unwilling to Prevent and Investigate Torture?* (Advocacy Forum, 2013) 97 ('*Advocacy Forum Report 2013*').

152 Amnesty International, *Nepal Make Torture a Crime* (Amnesty International, 2001) 7; CVICT Collection of Decisions, above n 139, 10; Advocacy Forum Hope and Frustration, above n 140, 1.

153 Advocacy Forum Report 2013, above n 151, 59 and 66.

154 Office of Attorney General (OAG) and Centre for Legal Research and Resource Development (CeLRRd), *Nepal ko Faujdari Nyayapradali ko Aadharbhut Sarbechad 2069* [Baseline Study of Criminal Justice System in Nepal] (OAG and CeLRRd, Kathmandu 2013), 144. ('*OAG and CeLRRd 2013*')

155 Advocacy Forum, *The Rights to Fair Trial in Nepal: A Critical Study* (Advocacy Forum Nepal, 2012) 7.

Despite the critical situation, courts define the police record as a formal record. For instance, four torture compensation cases were quashed and compensation to victims and departmental action against perpetrators were denied by the District Court of Kathmandu, and these decisions were upheld by the Appellate Court, because torture victims failed to prove that they were in police custody when the applicants claimed that they were tortured.¹⁵⁶ In these four cases the victims claimed that they were arrested on 2061/07/25 (10/11/2004) by District Police Office, Kathmandu, and were kept in illegal detention for five days and severely tortured. However, the police submitted a report that they were arrested on 2061/08/01 (16/11/2004) on the charge of robbery. The Court simply stated that the minor scars were seen on their body part might have been there before they were arrested and that the court could not accept that torture was inflicted at the time of illegal detention, or the applicants could not prove that they were arrested on that particular date. The court process is mechanical in terms of analysing the coherence of facts and story in these cases, because all four victims had scars and bruises on their bodies and they were arrested in the same case.

On the other hand, the fact also raises question over the court's level of scrutiny, as the suspect must be presented before the concerned court within 24 hours of arrest, excluding travel time. With regards to the provision, the Supreme Court of Nepal expressed that the court has a major responsibility to protect human rights so that the court must seriously scrutinise all circumstances related to the case, nature of crime and situation of suspect in the process of extending the time for investigation.¹⁵⁷ In these cases, the fact and documents show that the court did not scrutinise the evidence, especially the situation of victims and other relevant documents in the process of extending the detention period.

Likewise, the CRTA provides 35 days' limitation to file torture compensation cases from the date of the incident or after their release from detention in the concerned courts.¹⁵⁸ This is not practical, because the victim who suffered physical or mental torture finds it difficult to decide whether or not to file the case for the fear of re-victimisation or intimidation from the perpetrator. On the other hand, many detainees do not have access to lawyer during the detention period; generally the detention period is 25 days from the day of arrest in accordance with the *State Cases Act 1992*.

156 *Tilak Rai v Inspector Rajendra Kumar Thapa*, Crime investigation Unit and District Police Office, Kathmandu decided by Kathmandu District Court on 2064/5/6 (23/08/2007); *Jeeven Thapa v Inspector Rajendra Kumar Thapa*, Crime investigation Unit and District Police Office, Kathmandu, decided by Kathmandu District Court on 2064/5/6 (23/08/2007); *Shyam Krishana Maharjan v Inspector Rajendra Kumar Thapa*, Crime investigation Unit and District Police Office, Kathmandu, decided by Kathmandu District Court on 2064/5/6 (23/08/2007); *Bigendra Jonche v Inspector Rajendra Kumar Thapa*, Crime investigation Unit and District Police Office, Kathmandu, decided by Kathmandu District Court on 2064/5/6 (23/08/2007). The four applicants lodged torture compensation cases in Kathmandu District Court separately describing their torture and other forms of ill-treatment in the police custody and the Court decided these cases separately. The Appellate Court Patan also upheld the decision.

157 *Baidhyanath Karna and others v Metropolitan Police Brit and others*, Nepal Law Journal 2069 [2013] vol 8, 1295 Supreme Court of Nepal.

158 *Compensation Relating to Torture Act 1996*, s 5(1).

A report shows that 46.88 percent suspects did not get access to lawyers when they were in police custody.¹⁵⁹ Due to strict timeframes and inability to meet lawyers, torture victims fail to lodge torture cases within the given time frame. Advocacy Forum report found that the victims failed to file torture compensation cases within the time limit.¹⁶⁰ Courts quashed some torture compensation cases on the grounds of this statute of limitation. For example, the suspect was arrested in 2066/3/20 (04/07/2009). He stated in his plaintiff paper that he was tortured on 2066/3/24-25 (08-9/07/2009). He was sent in judicial detention in prison by the decision of the District Court of Dolakha on 2066/4/15 (30/07/2009). He filed the torture compensation case in district court only on 2066/6/18 (04/10/2009). In this case, court defined that the case was not lodged within the limitation in accordance with the CRTA.¹⁶¹ In this case, the court followed rigid interpretation of the word ‘detention’ that means police custody. It excluded judicial detention or prison as detention for the suspect.

Contrary to the decision, the Appellate Court Baglung stated that ‘the plaintiff is still in the prison, which is a continuity of the detention from the custody. Therefore, the period of prison is considered as detention in prison as well in accordance with the CRTA’.¹⁶² Before that, the case was quashed by the District Court Baglung because it was not in line with the statute of limitation according to the CRTA. These cases show that courts are not consistent while interpreting the provision of limitation. In these decisions the victims were deprived of access to justice and enjoy the fundamental rights related to the right to freedom from torture.

Few torture compensation cases were lodged against prison management related to infliction of torture whilst in prison. In accordance with the *Prison Rules 1964*, the Jailer appoints Chaukidar (Guard), Naike (Leader) and Bhai Naike (Assistant to the Leader) from among the prisoners to maintain internal management of a prison.¹⁶³ The Guard and the Leader inflicted torture on other prisoners. In the cases of Chiranjibi Lamichane, Bal Bahadur Singh Thakuri, Shambhu Sharma (Bastola), (the applicants) claimed that they were tortured by the Guard, Leader and Assistant to the Leader. The courts quashed the cases on the basis that the CRTA does not consider the Guard, Leader and Assistant to the Leader as government officials.¹⁶⁴ In this situation, the

159 OAG and CeLRRd 2013, above n 154, 146.

160 Advocacy Forum Report 2013, above n 151, 92.

161 *Ram Chandra Khati v Inspector Tirtharaj Sigdel*, District Police Office, Dolakha, the case decided by District Court Dolakha on 2067/3/28 (12/07/2010); *Dev Raj Baral v Inspector Tirtharaj Sigdel*, District Police Office, Dolakha, the case decided by District Court Dolakha on 2067/3/28 (12/07/2010).

162 *Rajendra Bahadur KC v District Police Office Baglung and others*, the case was decided by the Appellate Court Baglung on 2065/5/30(15/09/2008).

163 *Prison Rules 1964* (Nepal) s 24 (a).

164 *Chiranjibi Lamichane v Narendra Prasad Dahal Chief District Officer Morang* Currently working in Mid-regional Administration Office and Others the case decided by Morang District Court on 2066/5/10 (26/08/2009); *Bal Bahadur Singh Thakuri v Narendra Prasad Dahal Chief District Officer Morang* Currently working in Mid-regional Administration Office and Others the case decided by Morang District Court on 2066/5/16 (01/09/2009); *Shambhu Sharma (Bastola) v Narendra Prasad Dahal Chief District Officer Morang* Currently working in Mid-

court did not accept the definition of the CAT which states that ‘... pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...’ The Guard, Leader and Assistant to the Leader are appointed by the Jailer as per the law. These appointees have some legitimate power, thus the court interpretation does not meet the notion of the definition of the CAT.

Inadequate address to demands of plaintiffs and less departmental actions

Generally, the plaintiffs of torture compensation cases demand compensation and coverage of their expenses of medical treatment and take action against their torturer under the CRTA. However, usually, courts do not deal with the departmental action and medical treatment demands of the plaintiff. Courts only deal with the issue of compensation and the issue of action against perpetrators and medical treatment of torture victims is not addressed. For instance, courts have issued departmental actions against perpetrators in only eight out of the 48 cases; and in 14 out of the 22 cases, compensation was awarded, but no action was taken against the torturers even though the courts accepted that torture was inflicted. The courts gave some reasons why compensation should be awarded or not to the victims. Nevertheless, no reason is given as whether departmental action against the suspected torturer should be taken, which is the major demand of the plaintiffs.¹⁶⁵ Similarly, most of the decisions do not address the claim related to medical treatment to be provided by the Government under CRTA. Some plaintiff demanded expenses for their medical treatment but generally, courts do not mention the amount of treatment cost in the decisions.¹⁶⁶

As noted, the Nepalese justice system follows the adversarial system. In this system both disputing parties lead the case, lawyers of the parties represent the disputing parties and the judge plays a role as an impartial third party to analyse law, fact and evidence and decide the conflicting issues of the parties.¹⁶⁷ Judges need to address the disputing issues of the parties under the system. However, the role of court, in terms of dealing with the claims and evidence testimonies is inadequate in torture compensation cases. Failure to address the claim results in the benefit for the opponent party of the case. Hence it could negatively affect equal justice to the disputing parties.

regional Administration Office and Others the case decided by Morang District Court on 2066/5/10 (26/08/2009).

165 *Narayan Thapa v Police Constable Harka Bahadur Thapa*, the case decided by Morang District Court on 2067/11/11 (23/02/2011); *Purna Bahadur Gurung v Police Inspector Krishana Rana, District Police Office Kaski and Others*, the case decided by District Court Kaski on 2067/11/29 (13/03/2011); *Kamala Gahatraj v Ministry of Home Affair and Others*, the case was decided by Kathmandu District Court on 2067/3/17 (01/07/2010).

166 *Bimala Paudel v Police Inspector Bir Bahadur Buda Magar and others*, decided by Kathmandu District Court on 2067/5/19 (04/09/2010); *Maria Sudirana Rodrigeg (Bikky Serpa) v District Administration Office and other*, decided by Kathmandu District Court on 2067/5/19 (04/09/2010).

167 Ellen E. Sward, ‘Values, Ideology, and the Evolution of the Adversarial System’ (1988-1989) 64 *Indiana Law Journal* 302; Martin Marcus, ‘Above the Fray or into the Breach the Judge’s Role in New York’s Adversarial System of Criminal Justice’ (1991-1992) 57 *Brooklyn Law Review* 1193.

Many other reasons explain why actions have not been taken against the commander or head, who is responsible for the concerned police office and the person who inflicted the torture. Thus, torture victims file cases against the office itself and the chief of the concerned office. In this situation, courts often do not accept the involvement of head of the office in torture and decline to order departmental action against perpetrators. In the case of *Mahima Kusule*, the victim was arrested on suspicion of theft and was severely beaten in police custody to extract confession. But she refused to confess. She was released without any charges. After her release, she filed a torture compensation case. The District Court of Dolakha accepted that she was tortured by police and decided to award Rs 15,000 as compensation, but the court did not issue any order for departmental action against the perpetrator. The court found that ‘the police in-charge has the overall duty of the office and he was not involved in the infliction of torture. An investigation team within the police force was appointed to investigate the case, and they concluded that there was no reasonable ground for his involvement in torture and neither did he order the victim to be tortured.’¹⁶⁸ Likewise, similar reasons were given in the cases of *Pema Dorje Tamang* and *Arjun Gurung*.¹⁶⁹ Questions have been raised from these cases such as who is responsible for torture? As per the legal provision, does the government attorney present in the interrogation process? And does the concerned court review the case or situation of victim in the process of extend to the detention period of the case? These cases suggest that the criminal justice related mechanisms do not perform their role and responsibilities properly.

Burden of proof in torture compensation cases

The CRTA does not define the issue of burden of proof in the case of torture compensation. The *Evidence Act 1974* stipulates that ‘the burden of proof of proving that the accused has committed the offence in a criminal case shall lie on the plaintiff’.¹⁷⁰ It is a general rule in Nepal, which applies in the cases of torture compensation. Therefore, the torture victims or plaintiffs should prove the allegation of torture related facts and must submit medical and other evidence to the court in torture compensation cases. Regarding the burden of proof, the jurisprudence of the CAT/C has expressed that ‘any State party to verify the statements in a proceeding under its jurisdiction were not made under torture’.¹⁷¹ The jurisprudence indicated the burden of proof goes to state in torture case. Furthermore, the CRTA provides if the complaint was found *mala fide* than the applicant may be fined Rs. 5,000.¹⁷² It means the applicant should prove the charge or he/she will have the risk to pay the fine. Many victims are discouraged from filing cases under the CRTA because of the provision.¹⁷³ Similarly, the CAT/C recommended to Nepal that in torture related allegations where

168 *Mahima Kusule v Deputy Superintendent of Police (DSP) Dhiraj Pratab Singh*, District Police Office Dolakha and others, the case decided by District Court Dolakha on 2068/2/8 (11/05/2011).

169 *Arjun Gurung v Basanta Bahadur Kunwer, Metropolitan Police Brit and Policemen Giriraj Aryal*, the case decided by Kathmandu District Court on 2069/3/25 (09/07/2011); *Pema Dorje Tamang v Deputy Superintendent of Police (DSP) Dhiraj Pratab Singh, District Police Office Dolakha and others*, the case decided by District Court Dolakha on 2068/2/8 (11/05/2011).

170 *Evidence Act 1974* (Nepal) s 25.

171 Committee against Torture, *Views: Communication No 514/2012*, 53rd sess, UN Doc CAT/C/53/D/514/2012 (13 January 2015) para 8.7 (‘*Deogratias Niyonzima v Burundi*’).

172 *Compensation Relating to Torture Act 1996* (Nepal) s 6 (2).

173 Advocacy Forum Report 2013, above n 151, 95-96.

a confession has been obtained, the prosecution should have the burden of proof that the confession was obtained freely.¹⁷⁴ By nature itself, torture takes place in an isolated place where there are no independent witnesses.¹⁷⁵ Therefore, it is very difficult to collect evidence of torture while the victim is in custody. As a result, courts decline to award compensation and departmental action against wrongdoers such as in the case of *Bigyendra Jyonche*.

The court decision stated:

Health report found that 'headache verging four days and bruises over thigh'. However, no any eyewitness was presented to prove the scars were because of torture while he was in the custody. These kinds of ordinary scars or marks could have been due to some other reasons rather than infliction of torture. And also no statement was given by medical expert in the court. Therefore, the plaintiff could not prove his claim.¹⁷⁶

The court defined that the burden of proof rests with the plaintiff. Similarly, in some other cases, courts accepted the applicants were tortured in police custody and granted compensation, but nevertheless the courts did not order departmental action because the victims could not identify who was actually involved in inflicting the torture.¹⁷⁷ In these cases, courts explained that the plaintiffs could not identify the perpetrators involved in the infliction of torture while in custody and quashed the departmental action related claims.

Inadequate analysis of the legal provisions in decisions

The court decisions provide some amount of compensation to victims of torture in accordance with the CRTA. The decisions have been used as discretionary power or common understanding while fixing the compensation amount. However, the decisions have not analysed legal provisions. For example, in the case of *Saroj Kumar Chaudhari*, the court analysed some facts, procedures and explained that the opponent party could not present any evidence except rejecting the opponent's claim, so the court concluded that the opponent (army) inflicted torture on the plaintiff and awarded

174 CAT/C Confidential Inquiry report 2011, above no 146.

175 Nigel S. Rodley, with Matt Pollard, *The Treatment of Prisoners Under International Law*, (Oxford University Press 3rd ed, 2009), 10-11.

176 *Bigendra Jonche v Police Inspector Rajendra Kumar Thapa*, Valley Crime Investigation Branch, District Police Office Kathmandu, decided by Appellate Court, Patan on 2067/5/28 (13/09/2010).

177 *Manoj Shresta v Police Inspector Santa Bahadur Tamang*, Regional Police Office Rani, Morang, decided by District Court Morang on 2065/3/16 (30/06/2008); *Bablu Tamang v Bhairabnath Army Battalion, Kathmandu and Others*, decided by Kathmandu District Court on 2065/3/5 (19/06/2008); *Sabita Lama v Police Inspector Shishir Kumar Karmacharya*, Ward Police Office Baudha and District Police Office, Decided by Kathmandu District Court on 2063/11/20 (04/03/2007); *Arjun Gurung v DSP Basanta Bahadur Kunwar*, Metropolitan Police Brit and Policeman Giriraj Aryal, decided by Kathmandu District Court on 2069/3/25 (09/07/2011).

RS 25,000 compensation to the plaintiff from the account of the Government of Nepal in accordance with the CRTA.¹⁷⁸

Nevertheless, the court did not explain any rationale as to how or why the Rs 25,000 compensation was fixed. The CRTA stipulates the following rational for fixation of the compensation amount:¹⁷⁹

- *Gravity of the physical or mental pain or suffering;*
- *Depreciation occurred in earning capacity of the victims as a consequence of physical or mental injury;*
- *Incurable nature of injury, age of the victim and his/her family's obligations;*
- *In the case of incurable nature, estimated expenditure for its treatment;*
- *In the case of death as a result of torture, the number of dependent and his/her income and minimum expenditure required for livelihood; and*
- *Other just and proper claims by the victim*

The court did not apply these factors. Furthermore, Article 14 of the CAT provides the right to compensation in terms of 'adequate compensation' and 'full rehabilitation'. The decision neither reflected any analysis about the physical and psychological conditions of the victims nor the effect of torture according to the CRTA and the CAT. Generally, courts do not sufficiently analyse the gravity of torture and evidence based on the legal provision. For instance, in various types of severe torture cases, the amount awarded as compensation ranged from Rs 5,000 at the lowest¹⁸⁰ to Rs 60,000 at the highest.¹⁸¹ However, the amount of compensation is significantly different. No legal and precedential analysis in relation to the rationale for fixing the compensation amounts were seen in the 22 cases.

Insufficient analysis of medical evidence

Courts should decide cases based on the analysis of evidence and facts. In torture compensation cases, it is very difficult to collect evidence and witnesses because torture is usually inflicted in isolation and by a powerful State organ against a vulnerable person. Likewise, the victims of torture are not allowed access to medical doctors on time, and on the other hand, scarcity of medical doctors in many remote districts, where doctors usually do not give priority because of less opportunities may create challenges when it comes to medical documentation. Furthermore, in many torture cases, forensic reports are needed. However, forensic experts are only available in the capital city, hence most of the reports are prepared on an ad hoc basis by general practitioners. The medical or forensic evidence could be vital to prove torture and be relied upon to decide about the provision of compensation to the victims of torture. The CRTA stipulates that the detainees are entitled to a medical check-up of their physical condition during the time of arrest as well as at the time of release, and a copy of the report should be submitted to the concerned district court. Medical examination

178 *Saroj Kumar Chudhari v Jaya Pratap Lama*, Joint Security Force Camp Saptari and Chief of the Army Camp, Decided by Saptari District Court on 2067/3/21(05/06/2010).

179 *Compensation Relating to Torture Act 1996* (Nepal) s 8.

180 *Purna Bahadur Gurung v Police Inspector Krishana Rana*, District Police office, Kaski and Others, Decision from Kaski District Court decision on 2067/11/29 (13/03/2011).

181 *Kalpana Bhandari v Inspector Jayaram Sapkota*, Metropolitan Police Brit and others decision by Kathmandu District Court on 2065/3/1 (15/06/2008).

should be conducted as far as possible by medical doctors or medical personnel, and if a doctor is not available, the officer should maintain the record himself.¹⁸² Under the provision, district court could check or cross-check health conditions of the complainant. However, the courts generally do not refer the medical report which is prepared in police custody and do not cross-check it with the victim health report in the decision-making process. Among the 44 decisions, none of the cases were analysed focusing on health check-up report prepared at the time of arrest and release of detainees.

The courts have taken medical evidence as the key determining factor to prove the allegation of torture. In some cases, courts award compensation mainly based on medical evidence. However, in many other decisions, courts have concluded that the scars which were shown in the medical report are not serious. Lack of medical check-up, delay in medical-check and lack of signs in the body are often used to decline the award compensation to the victims. An example of district court's decision to decline award compensation to the torture victims:

The applicant claimed that he was severely beaten by a bamboo stick all over his body. However, the medical report illustrates that he has three simple scars on his body. If he had indeed been beaten severely, he would have shown more severe scars and bruises on many parts of his body, thus the description of torture which is written in the plaintiff sheet does not match with the medical report.¹⁸³

In this case, the court examined three simple scars on his body, and did not consider it as a result of severe torture whilst giving its decision. Likewise, in another case related to a school boy who was arrested after the school management report to the police. The decision stated that ‘an eyewitness confirmed that he had been tortured’ and medical report also stated that there was a ‘blunt Injury on the chest (no external injury and bruises were observed)’. In this case the court has taken the component of ‘no external injury and bruises were observed’ and interpreted that there was no mark/sign on his body as per his claim that he was beaten by police with stick. The court found chest pain could be caused by other things; for example he might have been beaten by his teachers in school and therefore declined to award any compensation and did not recommend departmental action against the perpetrator.¹⁸⁴ In some other cases, courts regarded delayed medical check-up of the applicants as a reason to decline compensation. The court found that alleged torture victims should not wait ‘too long’ before reporting it, and used the fact the victim had not reported alleged torture for 25 days as evidence that it had not, in fact, occurred.¹⁸⁵ Similarly, they used the fact that

182 *Compensation Relating to Torture Act 1996* (Nepal) s 3.

183 *Bhim Bahadur Pun v Binod Sharma, Inspector, District Police Office Kaski and others*, decision date 2066/02/03 (17/05/2009) decided by Kaski District Court.

184 *Sher Bahadur Karki v Assistant Sub Inspector, Tanka Karki, Ilaka Police Office Jaljale, Udayapur and other*, Decided by district court Udayapur on 2064/02/30 (17/06/2007); The Appellate Court Rajbiraj also upheld the decision on 2065/02/01 (14/05/2008).

185 *Lal Bahadur Basnet v Keshab Kumar Shah, Ilaka Police Office, Jiri Dolakha and others*, decided by District Court Dolakha on 2069/8/27 (12/12/2012); *Indra Bahadur Basnet v Keshab Kumar Shah, Ilaka Police Office, Jiri Dolakha and others*, decided by District Court Dolakha on

the victim did not obtain medical treatment for a long time after the abuse against victim.

These decisions have some predetermined assumption about the facts of the victim's health and analysis of medical evidence that every torture victims should have severe scars or bruises on the body, which indicate that he/she was tortured. The assumption ignores the facts that some kind of torture may not leave scars or bruises on victim's body, but could certainly create severe pain and long-term effects. For example, Falanga and psychological torture, which affect the victims for a long period of time.¹⁸⁶ There are some serious consequences for medical check-ups. Generally, police make arrangements for victims to undergo medical check-ups immediately after the arrest. However, the health report is made in a superficial way, and the suspects are kept in detention for a longer period of time. This means detainees may not have the chance to complain against the torture. When they are presented at the court, the external injuries/scars might have been healed and the physical evidence might not exist.¹⁸⁷ In such situations, the decisions not only refuse to analyse the health reports, but also accept the practices of torture which only leaves simple scars or marks on the suspect's body.

Application of international human rights instruments in the court's decisions

An Independent judiciary is the guardian for the protection of human rights. The *Interim Constitution* grants jurisdiction to the judiciary to safeguard the fundamental rights.¹⁸⁸ Furthermore, the *Constitution* stipulates protection and promotion of human rights as the directive principle of the state.¹⁸⁹ The *Nepal Treaty Act 1991* accepts the provisions of ratified conventions as Nepalese law. In this context, courts could play a pro-active role in protecting the right to freedom from torture and define the international human rights standards in domestic and practical level. The courts' practice in torture compensation cases is found to be of a mixed nature in the 48 cases. In 11 decisions out of 48 torture compensation cases, international human rights instruments such as the CAT, ICCPR and UDHR have been cited or used by courts while giving decision as a form of *obiter dicta*. Courts have not cited provisions of the CAT in more than 75 per cent of the cases. In some of the cases, the courts gave decision against the notion of human rights.

For instance, in Arjun Gurung's case, Mr. Lama lodged a torture compensation case in the Kathmandu District Court on 18 September 2009. Medical reports and

2069/8/27 (12/12/2012); *Tej Bahadur Basnet v Keshab Kumar Shah, Ilaka Police Office, Jiri Dolakha and others*, decided by District Court Dolakha on 2069/8/27 (12/12/2012).

186 See Office of High Commissioners for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Istanbul Protocol*, Professional Training Series 8/Rev 1, paras 234-262 <<http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>>; Hernan Reyes, 'The Worst scars are in the mind: Psychological Torture' (2007) 89 *International Review of Red Cross* 867, 591; Nirakar Man Shrestha and Bhogendra Sharma, *Torture and Torture Victims, A Manual for Medical Professional* (Centre for Victims of Torture Nepal, 1995) 5.

187 Advocacy Forum, *Rights to Fair Trial in Nepal, A critical Study*, (Advocacy Forum 2012) 18-19.

188 *Interim Constitution of Nepal 2007* (Nepal) art 100 (2).

189 *Interim Constitution of Nepal 2007* (Nepal) art 34 (2).

photographs were also submitted. During the case hearing, the victim and his lawyer were threatened and pressurised by the perpetrator and forced to withdraw the case. The court referred the parties to mediation.¹⁹⁰ The victim was not satisfied with the decision and filed a petition against the District Court's decision to Appellate Court. The Appellate Court overturned the district court's decision, finding that mediation was not the appropriate option to handle the case.¹⁹¹ Finally, the District Court awarded the victim Rs. 30,000 as compensation. However, the decision excluded any kind of departmental action against perpetrator.¹⁹²

In another case, the Appellate Court of Mahendranagar dismissed a torture compensation case because the plaintiff had been absolved in another public offence case, in which he had claimed that he was subjected to torture.¹⁹³ In this case, the court did not treat the issue of torture as a severe human rights violation. The case could have been dismissed only if it did not find any torture related facts and evidence, but in this case, the court seems to have ignored the investigation and testimony of the torture related evidence.

Delayed court procedure

The concerned court must dispose/decide torture compensation cases within 90 days of receiving the response from the defendant according to the *Summary Procedure Act 1972*.¹⁹⁴ The parties of the case can postpone the hearing once for 15 days.¹⁹⁵ This means the torture compensation case should be decided within four months after the defendant's response. However, the district courts repeatedly exceed the time limit. Courts often took two-five years or more to decide torture compensation cases.¹⁹⁶ On average, district courts took one and a half years to decide 48 torture compensation cases. This is relatively less time taken by the courts to decide the cases compared to previous years. However, it is still four times the delay compared to the existing legal provisions, which might affect torture victims.

Dismissal of torture cases and its consequences

Courts dismissed many decisions on the grounds that the applicants left the given due date without prior notice. Five out of 48 cases i.e. around 10 per cent of the cases were dismissed because the person did not attend the court.¹⁹⁷ Similarly, a report illustrated

190 Advocacy Forum Report 2013, above n 151, 98.

191 Ibid.

192 *Arjun Gurung v Basanta Bahadur Kunwer, Metropolitan Police Brit and Policemen Giriraj Aryal*, the case decided by Kathmandu District Court on 2069/3/25 (29/05/ 2012).

193 *Tekraj Bhatta v District Police Office, Kanchanpur and others*, the case decided by Appellate Court Kanchanpur on 2065/03/08 (22/06/2008).

194 *Compensation Relating to Torture Act 1996* (Nepal) s 6.

195 *Summary Procedure Act 1972* (Nepal) s 8.

196 Human Rights Treaty Monitoring Coordination Committee (HRTMCC), Alternative Report on Second, Third and Fourth (Combined) State Report of Nepal, (September 2005) Submitted to Committee Against Torture, (HRTMCC, 2004) 29; Advocacy Forum Hope and Frustration, above n 140, 34.

197 *Noorjan Khatun v District Police Office Morang and others*, the case decided by District Court Morang on 2065/11/01(12/02/2009); *Sindha Ram Gachhadar v District Police Office Morang*

that in 2013, six cases were withdrawn before the decision of concerned district courts.¹⁹⁸ The scenario obviously raises questions as to why the applicants or the victims let the due court date expire or withdrew their cases. In the case of Noorjan Khatun,¹⁹⁹ a human rights organisation (which provided legal support to her) published that due to her health problems, a request was made to the concerned court administration, which at first agreed to extend the time limit for 13 days as per the request of the victim considering her illness. However, later the judge denied her application and dismissed the case and ordered a fine for ‘filing a false complaint’. She could not file an appeal because of threats she received from local police.²⁰⁰ Many reports found that the threat or intimidation and the luring of victims by perpetrators were major causes for the withdrawal of the cases.²⁰¹ In the absence of victims and witness protection laws, applicants cannot wait long periods of time for the court’s decisions.²⁰² Another reason of dismissal or out-of-court settlements can be linked with the vetting system because if the case is decided by the court, there is high possibility that perpetrators’ involvement in human rights violation cases would be subjected of departmental action, which may bar him/her from joining a UN peacekeeping job.²⁰³

Although some victims of torture have been awarded compensation, the overall trend of court decisions on torture compensation cases has failed to set a regular court procedure in Nepal, which is not very encouraging in terms of the protection of the right to freedom from torture. The court scrutiny in the process of extension of detention date of suspect and check and cross-check of medical reports have been found to be weak in torture related issues. In many cases, courts proved torture and granted compensation but did not order departmental action against perpetrators, which may mean that either courts are reluctant to practise the provision or they are influenced by the concerned persons or the government.

5.4.3 Non-admissibility of evidence obtained by torture

and others, the case decided by Moran District Court on 2066/3/26 (10/06/2009); *Sumitra Khawas v Ilaka* the case decided by Morang District Court on 2066/9/23 (07/01/2010); *Mohamad Kalam Miya v District Police Office Morang and Others* the case decided by Morang District Court on 2065/5/5 (21/08/2008); *Mun Bahadur Raule v District Administration Office, Surkhet and others* the case decided by Surkhe District Court on 2065/9/27 (11/01/2009).

198 Advocacy Forum Report 2014, above n 141, 26.

199 *Noorjan Khatun v District Police Office Morang and others*, the case was dismissed by Morang District Court on 2065/11/1 (12/02/2009).

200 Advocacy Forum, *Torture of Women Nepal’s Duplicity Continues*, (Advocacy Forum Nepal 2012) 43.

201 Advocacy Forum Report 2014, above n 141, 26; Advocacy Forum Hope and Frustration, above n 140, 30.

202 Human Rights Treaty Monitoring Coordination Committee (HRTMCC), *Manab Adhikar Sambandhi Thula Mahasandhi ka kehi Prabadhanharu ko Karyanayan ko Abastha- Adyaan Pratibedan*, [A Study Report on Implementation Status of Some Provisions of Major Human Rights Instruments] (HRTMCC, 2013), 246.

203 Advocay Form, *Vetting in Nepal: Challenges and Issues*, (Advocay Forum, 2014) 62.

As stated, torture and other forms of ill-treatment is absolutely prohibited by international law.²⁰⁴ The CAT prohibits torture and provides the exclusionary rule in judicial proceedings for ruling out evidence obtained by torture.²⁰⁵ The Rome Statute of International Criminal Court (ICC) provides that the evidence obtained by torture shall not be admissible if the violation casts substantial doubt on the reliability of the evidence or seriously damage integrity in the proceedings.²⁰⁶ Thus, the evidence obtained by torture is always inadmissible. The jurisprudence of the CAT/C also covered the issue in many individual communications. The CAT/C confirmed and re-stated that each State party requires to establish the absolute prohibition of torture, and the total inadmissibility of evidence has been elicited as a result of torture from any proceedings.²⁰⁷

As stated above, the principle of non-admissibility of evidence extracted by torture is aligned with many other rules and principles like the rule of voluntariness, ensuring the reliability of confessions, and respecting the right to self-incrimination. The common law has a long history of applying the exclusionary rule - the first American court decision to exclude an involuntary confession was in the case of *Commonwealth v Chabcock* in 1804.²⁰⁸ Furthermore the U.S. Supreme Court has emphasised that the evidence of confessions which are involuntary i.e. the product of torture or coercion

204 See CAT art 2; ICCPR art 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 3. As amended by the protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 27 May 2009 CETS No 204 (entered into force 1 September 2009), art 3; *American Convention on Human Rights*, open for signature 22 November 1969, 1114 UNTS 1243 (entered into force 18 July 1978) art 5(2); *African Charter of Human and People's Rights*, adopted 27 June 1981, 1520 UNCT 217 (entered into force 21 October 1986) art 5; *Convention (III) relative to the protection of civilian persons in time of war*, open for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art.3. All four Geneva conventions have a common article 3 which prohibits torture and other forms of ill-treatment; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) arts 31, 32; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 8 December 1978) art 75; *Protocol Additional to the Geneva Conventions of 12 August 1994, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)*, open for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 4 (2).

205 CAT art.15.

206 *Rome Statute of International Criminal Court* open for signature 17 July 1998, 2187 UNTS 3 (entered into force 01 July 2002) art 69 (7).

207 See Committee Against Torture (CAT/C) *Views: Communication No 441/2010*, 51st sess, UN Doc CAT/C/51/D/441/2010 (5 November 2013) para 9.8 ('*Oleg Evloev v Kazakhstan*'); Committee Against Torture (CAT/C) *Views: Communication No 430/2010*, 50th sess, UN Doc CAT/C/50/D/430/2010 (16 July 2013) Para 11.5, ('*Abichou v Germany*'); Committee Against Torture (CAT/C), *Views: Communication No 219/2002*, 30th sess, UN Doc CAT/C/30/D/219/2002 (15 May 2003) paras 6.10, 6.11 ('*G.K. v Switzerland*'); CAT/C, *Views: Communication No 193/2001*, 29th sess, UN Doc CAT/C/29/D/193/2001(21 November 2002) paras 6.3, 6.6 ('*P.E. v France*').

208 *Commonwealth v Chabcock*, as cited Steven Penny, 'Theories of Confession Admissibility: A Historical Perspective' (1998) 25 *American Journal of Criminal Law* 321.

must be refused. It is not because of the unreliability of the evidence, but because of the method used to extract it.²⁰⁹ In the *Miranda case*, the U.S. Supreme Court established basic procedural guidelines for custodial interrogation through respect to right to the remain silent and right to counsel in the case²¹⁰ and the court held that confessions would be prohibited to protect plaintiffs from self-incrimination.²¹¹

In the United Kingdom (UK), the voluntariness aspects of the rules of evidence were defined around 100 years ago in the case of *Ibrahim v the King*. The Court held that the confession must be voluntary statement that had not been extracted by ‘fear of prejudice or hope of advantage’.²¹² Following the decision, in 1973, in a leading case of UK, *Rex v Warickshall*, the Court refused the confession in a theft case in which the suspect made a full confession after the police made “promises of favour”. The court held that promises rendered the confession involuntary, and therefore the evidence would not be admissible.²¹³

Furthermore, the House of Lords excluded the use of evidence obtained by torture and found that ‘its very earliest days the common law of England set its face firmly against the use of torture. Rejection of such practice was indeed a distinguishing feature of the common law’.²¹⁴ In the case, *A and others v Secretary of State for Home Department*, British Security of State issued arrest letters under *Anti-Terrorism, Crime and Security Act 2001* to some persons as suspected terrorists. The detainees appealed to the Special Immigration Appeals Commission on the basis that the confession or information was obtained by torture by a third party. The Appellate Court accepted the evidence even though it was extracted by torture. Then the appellants appealed to the House of Lords. Lord Bingham for the majority that ‘the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile an English court whatever the nationality of the torturer.’²¹⁵ He noted that ‘torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose the former can never be admissible in the latter.’²¹⁶ The decision seems a progressive decision to apply the exclusionary rule to confessions obtained by torture and other forms of ill-treatment, no matter who commits it or where.

In Australia, the High Court of Australia expressed the requirement of voluntariness is well-established, and the court has no discretion in this matter. The decision found that ‘the essential question is whether the confession has been made in the exercise of

209 *Rogers v Richmond*, 365 U.S. 534 (1961).

210 *Miranda v Arizona*, 384 U.S. 436,444, (1966).

211 William T. Pizzi and Morris B. Hoffman, ‘Taking Miranda’s Pulse’ (2005) 58 *Vanderbilt Law Review* 815.

212 *Ibrahim v the King*, [1914] A.C. 599 (PC)

213 *Rex v Warickshall*, 168 Eng. 234 (1783); as cited in Mark A Godsey, ‘Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination’ (2005) 93 (2) *California Law Review* 482-483.

214 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71.

215 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71 [91].

216 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71 [35].

a free choice on the part of the accused'. Similarly, the decision also gave emphasis of the reliability of the confession 'why an involuntary confession should not be received in evidence'.²¹⁷ Furthermore, the Victorian Court of Appeal refused to accept a conviction that was obtained by forceful means, through threats and lack of legal advice. The case was investigated by Australian Federal Police accompanied by Pakistani Officials. The Court ordered further hearings in this case.²¹⁸

Similarly following the decision, the Canadian Supreme Court set some factors for determination of rule of voluntariness of confession statements in the process of criminal investigations. The court stated mainly four factors which affected the rule of voluntariness of suspects such as not using threats or promises, conducting interrogation in an 'atmosphere of oppression', suggesting a suspect's 'operative mind' might be compromised to give statements or by and obtaining confessions by 'police trickery' that may violate a suspect's right to silence.²¹⁹

The European Court of Human Rights (ECHR) explained that the exclusionary rule applies to statements made under compulsion and is contrary to the right against self-incrimination which is a key component of the right to a fair trial.²²⁰ Furthermore, the ECHR confirmed that the statement obtained through torture had an impact on the outcomes of applicant's criminal proceedings, which was wholly unfair.²²¹

In the context of Nepal, as stated in chapter –III, The *Evidence Act 1974* attempts to establish the grounds of admissibility of a confession as evidence. In accordance with the provision, for an expression/confession to be admissible as evidence, it must be made by accused in a position of consciously;²²² and the fact was not expressed through putting pressure or torture or threat of torture or putting the accused in a condition to express the fact against his/her will.²²³ To some extent the provisions adopt the voluntary rule of evidence. The provision of the Act contains a safeguard against the legislature which fails to criminalise torture. The provision gives positive backing to protecting the independence of the judiciary. Based on this provision, courts can play a vital role in discouraging the use of torture to obtain evidence during criminal investigation.

However, the Supreme Court of Nepal has given conflicting decisions on the issue. The CAT/C noted the situation in a confidential inquiry report that despite the legal provision for non-admissibility evidence obtained by torture, 'torture is practised to coerce confessions and judges do not generally restrict the admissibility of the evidence during interrogation process and confessions remain the central piece of

217 *R v Swaffield* (1998) HCA 1.

218 *R v Thomas* (2006) VSCA 165.

219 *Rex v Richard Oickle* (2000) SCC 38, 384.

220 *Saunders v United Kingdom* (European Court of Human Rights, Application No 19187/91, 17 December 1996).

221 *Harutyunyan v Armenia* (European Court of Human Rights, Application No 36549 /03, 28 June 2007).

222 *Evidence Act 1974* (Nepal) s 9 (2) (A) (1).

223 *Evidence Act 1974* (Nepal) s 9(2).

evidence'.²²⁴ Similarly, Professor Sangroula stated that police and prosecutors depend on confessions and courts entertain such evidence without giving due care to constitutional and legal provisions.²²⁵ The application of the non-admissibility principle is detailed below.

5.4.3.1 Conflicting decisions on the non-admissibility principle

In some cases, the Supreme Court of Nepal has excluded evidence obtained by torture. For instance, in a drug case *Dharma Kumari Sitaula v Government of Nepal*, whilst in custody, a suspect confessed to committing the crime, but when the case was presented before the court, she claimed that she was subjected to torture during police interrogation and the confession was prepared by the police under torture. In decision, the Court excluded the confession as evidence. As a rationale for the decision, the court explained that the confession whilst in police custody could not justify the allegation without other sequential and supporting independent evidence.²²⁶ Similarly, in some other cases related to murder, suspects confessed in police custody and later in courts they denied the charges and claimed that they were tortured and forced to sign prepared documents. The Court refused these confessions as evidence and on the basis that the confession in police custody cannot be justified as sufficient evidence to prove a crime in the absence of other corroborating and/or independent evidence.²²⁷ The Supreme Court of Nepal explained the issue in a murder case *Government of Nepal v Midhan Bahadur Raske*, which excluded the evidence and explained its consequences in criminal justice system.

Despite confession itself being important evidence, it is not justifiable to prove someone guilty on the basis of confession obtained in police custody without any other corroborating or sequential evidences in this case. If the court takes this confession as a basis of the decision which has been extracted in the police custody, the decision would be more complex in criminal justice system in Nepal which would encourage the trend of obtaining confession forcefully rather than collecting and analysing other evidence in criminal cases. This would create a situation where the possibility of real criminal getting scot-free and innocent getting punished would be higher.²²⁸

In these cases, the Supreme Court not only excluded the evidence obtained by torture but also raised caution, saying if such types of evidences were accepted, it could encourage the use of torture or forceful means, rather than collection of genuine evidence, in criminal investigations. The decisions are crucial to discouraging the use of torture in criminal investigations.

224 Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, Forty-Seventh Session (21 October to 25 November 2011), Forty-Eight Session (7 May to 1 June 2012), (A/76/44) para 51.

225 Yubraj Sangroula, *Nepalese Legal System: Human Rights Perspective* (Kathmandu School of Law, 2005) 149.

226 *Dharma Kumari Sitaula v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 11, 1893 (Supreme Court of Nepal).

227 *Netra Bahadur Karki v His Majesty's Government*, Nepal Kanoon Patrika 2062 [Nepal Law Journal 2006] Vol 6, 742 (Supreme Court of Nepal); *Jageshower Kamait v Government of Nepal*, Nepal Kanoon Patrika 2067 [Nepal Law Journal 2011] Vol 12, 2101 (Supreme Court of Nepal).

228 *Government of Nepal v Midhan Bahadur Raske*, Nepal Kanoon Patrika 2070 [Nepal Law Journal 2013] Vol 1, 75 (Supreme Court of Nepal).

Despite the exclusion of forced confessions in judicial proceeding, the decisions have not clearly explained the rationale of the exclusion of the confession obtained by torture from the theoretical and human rights perspectives. For example, the decisions found that in the absence of other independent or sequential evidences to support the confession (which was claimed as result of torture), the alleged crimes could not be justified; and that means the decision against the plaintiffs were made only based on a lack of sequential evidence rather than the consequences of torture. Therefore, court decisions have given less priority on the right to freedom from torture and absolute fundamental rights, and rule of voluntariness, reliability and right to self-determination in the process of extracting confessions.

Furthermore, the Supreme Court has accepted many confessions as evidence that were claimed to have been obtained under torture in police custody. In a drug case, the Supreme Court explained the rationale of acceptance of the confession as evidence that the suspect had an opportunity to complaint about torture while he was presented in the court in according with the *State Cases Act 1992*, but he did not complain and could not prove that he was tortured in the custody. The Court allowed an uncorroborated confession to remain as evidence.²²⁹ The Supreme Court has accepted confessions obtained by torture or forceful means in many criminal cases.²³⁰ In the cases, courts explained more rationales for the acceptance and found that confessions given in police custody cannot be defined as valueless documents, and the courts consider whether or not other evidence proved the confession that can be accepted as evidence.

5.4.3.2 Acceptance of evidence obtained by quasi-judicial bodies

As discussed in Chapter III, forest officers and officer of Nationals Park and Wildlife Conservation are granted authority by the *Forest Act 1993* and the *National Park and Wildlife Protection Act 1773*. The concerned officers receive first information of crimes, conduct proactive action against the criminal activities, investigate the cases and also give decisions. The Acts have granted sole authority to the concerned officer on crimes related to forestry or wildlife matters. After the concerned officers' decision, the detainees can appeal against the decision in Appellate Court. Generally, appellants claimed that while he/she was in detention or the concerned officer inflicted torture in the process of taking statement. Here, courts often reject his/her plea and accept confessions as evidence. For instance, in three recently-decided cases, the Supreme Court accepted evidence obtained by National Parks and Wildlife Officers in rhino poaching cases. The facts of the three cases (detailing the involvement of seven

229 *Sachin Shrestha v Government of Nepal*, Nepal Kanoon Patrika 2063 [Nepal Law Journal 2006] Vol 2, 183 (Supreme Court of Nepal).

230 *The Government of Nepal v Asbin Kumar Napit and Others*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 2, 185 (Supreme Court of Nepal); *Shekh Rahim Aalam v Government of Nepal*, Nepal Kanoon Patrika 2067 [Nepal Law Journal 2010] Vol 2, 285 (Supreme Court of Nepal); *Pasang Sheroa v Government of Nepal*, Nepal Kanoon Patrika 2062 [Nepal Law Journal 2005] Vol 2, 326 (Supreme Court of Nepal); *Phulmaya Tamang v His Majesty's Government*, Nepal Kanoon Patrika 2058 [Nepal Law Journal 2001] Vol 3,4, p 216, decision n 6997 (Supreme Court of Nepal).

persons) were the similar but the dates and incidents were different. The alleged persons were charged with rhino poaching. They were arrested and interrogated by Chitwan National Park and Wildlife officers. The alleged persons were sentenced for 15 years imprisonment and Rs. 100,000 (approximately 955 US dollars) fine by the Chitwan National Park and Wildlife officers. After the decisions, the detainees filed appeals to the Appellate Court Hetauda. In the appeal, the detainees claimed that they were subjected to severe torture during interrogation to obtain confessions.²³¹ The Appellate Court did not hear their plea that they had been tortured and upheld the decisions.

The Supreme Court accepted the confessions as evidence extracted by National Park Officers which were claimed to obtain by torture. The judges of the Supreme Court have given different reasons for accepting the confessions in the same nature of different cases. In one case, the Court interpreted that ‘the concerned officers are granted authority by law to handle the case. In accordance with section 2 of the *Evidence Act 1974*, the definition of term ‘Court’ also includes any other authorities that are granted authority to hear a case by law. Therefore, it cannot be assumed that the court uses torture in the process of taking statement during interrogating’.²³² The decision indicates that the National Parks and Wildlife Officer was fair and had the same authority as the judge of court. The precedent was followed another case.²³³ In another case, the same judge gave another reason: ‘the suspect did not file any complaint while he was in custody and prison therefore, the complaint related to torture in the appellate court could not be justified’.²³⁴

The Supreme Court decisions not only accepted confessions obtained through torture and other forms of ill-treatment, but also the decisions contradict the precedent which interpreted that competence and independence of the organisation are major characteristics of the decision makers and ordered the government to review and amend the laws that granted legal authority to the administrative organs.²³⁵ The acceptance of evidence obtained through torture by administrative bodies or quasi-judicial bodies might raise challenge on the respect of absolute prohibition of torture.

231 *Bam Babadur Praja v Government of Nepal and Bed Bahadu Bote v Government of Nepal*, Nepal Kanoon Patrika 2067[Nepal Law Journal 2011], Vol 11, 1869 (Supreme Court of Nepal); *Ram Chandra Praja v Government of Nepal and Til Bahadur Gurung v Government of Nepal*, Supreme Court Bulletin 2069 [2011] Falgun case no 067-CR-0557 and 0313(Supreme Court of Nepal); *Surya Bahadur Pun v Government of Nepal, Yam bahadur Pun v Government of Nepal and Bam Bahadur Praja v Government of Nepal*, Nepal Kanoon Patrika 2069 [Nepal Law Journal 2012], Vol 3, 404 (Supreme Court of Nepal).

232 *Bam Babadur Praja v Government of Nepal and Bed Bahadu Bote v Government of Nepal*, Nepal Kanoon Patrika 2067[Nepal Law Journal 2011], Vol 11, 1869, decision n 8503 (Supreme Court of Nepal).

233 *Ram Chandra Praja v Government of Nepal and Til Bahadur Gurung v Government of Nepal*, Supreme Court Bulletin 2069 [2011] Falgun case no 067-CR-0557 and 0313 (Supreme Court of Nepal).

234 *Surya Bahadur Pun v Government of Nepal, Yam bahadur Pun v Government of Nepal and Bam Bahadur Praja v Government of Nepal*, Nepal Kanoon Patrika 2069 [Nepal Law Journal 2012], Vol 3, 404 (Supreme Court of Nepal).

235 *Amar Raut v Ministry of Home Affairs, Nepal Government and Others*, Nepal Kanoon Patrika 2068 [Nepal Law Journal 2011] Vol 7, 1083, Decision No 8642 (Supreme Court of Nepal).

5.4.3.3 Burden of proof

As noted above, the *Evidence Act 1974* provides that ‘the burden of proof of proving that the accused has committed the offence in a criminal case shall lie on the plaintiff’.²³⁶ With regards to complaint against torture and other forms of ill-treatment during interrogation, the law does not specify about burden of proof. However, in practice, the Supreme Court has stated ‘the defendants could not prove torture and sequential evidences support to the confessions’ in many cases.²³⁷ It means that the burden of proof is on the victims. Thus, the situation raised some questions: is the general principle of burden of proof applied in the case of torture? How and who carries the burden of proof? Obviously, it is hard to prove torture and other forms of ill-treatment during interrogation. In the decision of *A and others v Secretary of State for Home Department*, Lord Bingham and Lord Hope accepted the obstacles to prove torture and stated that the conventional approach to the burden of proof is inappropriate in the context of torture.²³⁸ Furthermore, the decision found that on the issue of torture, individuals face challenges to prove the facts of the case, so that the burden of proof is normally on the State.²³⁹ The CAT/C recommended to Nepal that in torture related allegations where confession has been obtained; the prosecution should have the burden of proof that the confession was obtained freely.²⁴⁰ However, the Supreme Court of Nepal has yet to adopt the issue of burden of proof in decision making process on the torture related complaint during the hearing process of the criminal case.

As stated above, Courts of many countries including the UK, Australia, Canada and the USA exclude any confessions obtained by torture. The judiciaries of these countries have developed some rationales and rules to reject such evidence such as the voluntariness rule, the reliability test and respect for the right to be silent. For example, Australian and Canadian Courts have recognised that the voluntariness requires ensuring reliability and fairness.²⁴¹ In comparison to other common law countries, the decisions of Supreme Court of Nepal seem still confusing for using non-admissibility principle for excluding confessions obtained through torture. Generally, judges use discretionary power to accept or reject confessions obtained through torture. Some decisions reflect that the Court is sensitive about the prevalence of torture and other forms of ill-treatment in criminal investigations. Nevertheless, the decisions, which have rejected the confessions, are based on a lack of other independent sequential evidence to support the confession. Therefore, the decisions based on rulings which

236 *Evidence Act 1974*, (Nepal) s 25.

237 *Bam Babadur Praja v Government of Nepal and Bed Bahadu Bote v Government of Nepal*, Nepal Kanoon Patrika 2067 [Nepal Law Journal 2011] Vol 11, 1869 (Supreme Court of Nepal); *Ram Chandra Praja v Government of Nepal and Til Bahadur Gurung v Government of Nepal*, Supreme Court Bulletin 2069 [2011] Falgun case no 067-CR-0557 and 0313 (Supreme Court of Nepal); *Surya Bahadur Pun v Government of Nepal, Yam bahadur Pun v Government of Nepal and Bam Bahadur Praja v Government of Nepal*, Nepal Kanoon Patrika 2069 [Nepal Law Journal 2012] Vol 3, 404 (Supreme Court of Nepal).

238 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71 [55] (Lord Bingham), [116] (Lord Hope).

239 *A (FC) and Other (FC) Applicant v Secretary of State for Home Department* [2005] UKHL 71 [56] (Lord Bingham), [98] (Lord Hoffmann).

240 CAT/C Confidential Inquiry Report 2011, above n 148.

241 *R v Swaffield* (1998) HCA 1; *Rex v Richard Oickle* (2000) SCC 38, 384.

refused to accept confessions obtained by torture that analysed only the corroboration of the confession to other evidence. These decisions did not sufficiently analyse the principles of voluntariness and reliability.

Most criminal trials are confession-based. Generally, courts accept the confession as *prima facie* evidence on the basis of which a person is detained. The courts assume all statements or confessions taken by the police are not extracted through the use of torture unless proven otherwise. Based on the *Evidence Act 1974*, courts could potentially play a vital role in discouraging the use of torture to obtain confessions in criminal investigations. However, the contradictory decisions of the Supreme Court can encourage the continued use of force or torture for extracting confessions in criminal investigations.

5.5 The Role of National Human Rights Commission

As stated in Chapter III, the NHRC can investigate and monitor human rights violations including torture and recommend compensation and necessary action to be taken against the perpetrator(s).²⁴² The NHRC has authority like a court to issue summonses, to take statements, examine the evidence, search without notice in particular places and recommend compensation for victims and take necessary action against perpetrators.²⁴³ The NHRC, however, is only a recommending body; it does not have enforcement authority. As reported by the NHRC, a total of 873 torture-related complaints from victims and their families were registered in all the nine NHRC offices between 2000 and 2012.²⁴⁴ The total number of complaints is far lower than the record shown by NGOs. For example, The Advocacy Forum documented 941 detainees who claimed that they were subjected to torture in 57 detention centres in 20 of 75 districts in 2012. It can be assumed that still many needy people do not have access to the NHRC's services.

The NHRC decided 59 complaints out of 873 in 13 years, recommending compensation to victims and necessary action to torturers. Of 59 recommendations, 34 related to compensation to the victims and necessary action against the perpetrators. Twenty recommendations were related to compensations to the victims without any action against perpetrators and five recommendations were related to warning/notice to the concerned parties. In terms of implementation of the recommendations, a total of 11 related to compensation were fully implemented, 13 were partially implemented and 34 have not been implemented yet.²⁴⁵ None of the perpetrators were punished as spelled out in the recommendations of the NHRC.²⁴⁶ Furthermore, the NHRC recommended compensation in 11 custodial death caused by torture. The

242 *Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4.

243 *Interim Constitution of Nepal 2007* (Nepal) art 132; *National Human Rights Commission Act 2012* (Nepal) s 4.

244 National Human Rights Commission, *Yatana Birodha ko Haq* [Rights against Torture] (NHRC Nepal 2012) 11 ('*NHRC Torture Report*').

245 National Human Rights Commission-Nepal *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon complaints] (NHRC, 2013), ('*NHRC 13 years Report*').

246 Ibid.

implementation of these recommendations is extremely low as 10 recommendations out of 11 are yet to be implemented.²⁴⁷ The NHRC could play a more effective role to pressurise the government agencies through implementing a function of the NHRC. If the concerned agencies do not implement or respond to the NHRC's recommendations, the NHRC could make the name public or make a list of those persons or officials who do not knowingly implement the NHRC recommendations.²⁴⁸ That could be helpful in implementing the NHRC recommendations. However, this function is yet to be implemented. On the other hand, a total of 814 out of 873 torture and other forms of ill-treatment related complaints (more than 90 per cent) are either closed or repelled or kept pending or backlogged.²⁴⁹ Obviously, torture-related incidents are sensitive and victims need immediate relief and support and proper information about their rights and remedies. For investigation purposes, collection of evidence should be conducted as soon as possible. Time and again, the bruises or scars on the victims' body will heal, mental situation of victims could be changed, and/or the context could be changed or suspected torturer might be transferred from one place to another. The chances of effective investigation in the incident of torture are reduced. Similarly, more expertise or skill might be needed to find out the correct information.

5.5.1 Inadequate investigation of torture-related incidents

NHRC recommendations for compensation and action against perpetrators of torture are incomplete. For example, in 20 out of 34 recommendations in which victims were to get compensation and the perpetrator to face action, the perpetrators are yet to be identified.²⁵⁰ The recommendations have simply found that the concerned person who inflicted torture needs to be identified. This means that the NHRC's recommendations suggest for another investigation to find out the perpetrators of torture. As stated in Chapter III, in the absence of any other impartial organisation to conduct an investigation, one wonders how successful further investigation can be in recognising/identifying the concerned persons.

5.5.2 Inconsistent decisions and inadequate analysis of torture

The NHRC can recommend filing criminal charges against any person who is involved in human rights violations.²⁵¹ Likewise, NHRC can grant a maximum of Rs 300,000 (approximately 3000 US dollars) compensation to victim of human rights violation.²⁵² In accordance with these provisions, NHRC has awarded NRs 10,000 to Rs 100,000 (approximately 100 to 1000 US dollars) compensations to victims of torture in 54 torture related complaints and recommended departmental or necessary action in 34 recommendations.²⁵³ However, in many cases, NHRC's recommendations are inconsistent in terms of recommending necessary action against the perpetrators and

247 Ibid.

248 *National Human Rights Commission Act 2012* (Nepal) s 7.

249 National Human Rights Commission, *Annual Reports 2065/66-69/70* [2007/8-2013/14].

250 NHRC 13 years Report, above n 245.

251 *Interim Constitution of Nepal 2007* (Nepal) art 132 c.

252 *National Human Rights Commission Act 2012* (Nepal) s 16.

253 NHRC 13 years Report, above n 245.

granting compensation to the victims. For example, Madhab Prasad Neupane, Sarita Devi Sharma and Krishana KC (three separate complaints) were arrested by Army during the period of conflict. They were severely tortured. The NHRC recommended two different recommendations relating to action against the perpetrators. In Madhav and Sarita's complaints, the NHRC recommended necessary action against the perpetrators²⁵⁴ whereas in Krishna KC's case, the facts were similar, but the NHRC did not recommend any action against perpetrators.²⁵⁵ Similarly, the NHRC recommendations have not given clear rationale to grant the amount for compensations to torture victims. For instance, Amarika was tortured in police custody in the process of obtaining his confession. He was beaten with bamboo stick, and a plastic pipe, punched and kicked with boots all over his body. Based on this description, he was granted Rs 10,000 (approximately 100 US dollars) compensations.²⁵⁶ In the case of Pitambar Lamichhane, it was found in his complaint that he was tortured in police custody. He was also beaten with bamboo stick all over his body. The NHRC awarded Rs 50,000 (approximately 500 US dollars) in compensation.²⁵⁷ The nature of torture seems similar in the two recommendations; however the compensation amounts are significantly different. Therefore, it can be assumed that the decisions have been made without a clear rationale or an assessment of the victims' physical and psychological condition.

5.5.3 Inadequate custody monitoring

The NHRC has developed and implemented Prison and Detention Centres Monitoring Guidelines, which is a good initiative to make the monitoring effective and comprehensive. The guidelines cover various aspects of monitoring of detention centres and prisons such as its administration and management, disciplinary activities, education, health, physical condition of the detention centres/prisons, behaviours with detainees and legal documentation.²⁵⁸ Although the NHRC prepared and implemented the guidelines, the frequency of monitoring/visits in custody and in prisons has decreased in the last three years. The number of visits dropped from 54 visits in

254 *Complainer Saritadevi Sharma v Royal Nepalese Army*, s.n 704, recommendation date 2069/4/32 [August 16, 2012], National Human Rights Commission-Nepal, *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon complaints] (NHRC, 2013); Complainer *Madhav Prasad Neupane v Royal Nepalese Army*, s.n 705, recommendation date 2069/4/32 [August 16, 2012] National Human Rights Commission-Nepal, *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon complaints] (NHRC, 2013).

255 *Complainer Krishna KC v Royal Nepalese Army*, s.n. 34, recommendation date 2067/4/2 [July 18, 2010], National Human Rights Commission-Nepal, *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057 -2070* [Thirteen Years of NHRC, the Situation of the implementation of the NHRC's recommendations] (NHRC, 2013).

256 *Complainer Amarika Prasad Yadav v Nepal Police*, s n 636, recommendation date 2069/2/1 [May 15, 2012], National Human Rights Commission-Nepal, *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon Complaints] (NHRC, 2013).

257 *Complainer Pitambar Lamichane v Nepal Police*, s.n 630, recommendation date 2069/3/27 [July 11, 2012], National Human Rights Commission-Nepal *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, Recommendations upon complaints] (NHRC, 2013).

258 See detail for National Human Rights Commission, Prison and Detention Centre Monitoring Guidelines, (NHRC, 2010).

2067/68 (2011-12), to 20 visits in 2068/69 (2012-13) and down to 15 visits in 2069/70 (2013-14).²⁵⁹ It seems that either the NHRC gave less priority to the monitoring of detention centres or, as defined, the situation of the detention centres/prisons has improved. However, the NHRC's reports also accepted that torture in police custody is continuously practised during criminal investigation, especially to obtain confessions.²⁶⁰ Furthermore, the NHRC has been criticised for its role for custody monitoring and investigation of torture-related cases. For example, the Special Rapporteur on Torture commented that 'NHRC entrusted with investigating torture allegations and monitoring places of detention, may have not been in a position to carry out systematic visits and give priority to investigate cases related to torture allegations'.²⁶¹

The NHRC could play an effective role in decreasing the practice of torture in detention centres and change the policy through monitoring of detention centres; therefore, frequent and quality monitoring from NHRC is required to ensure that the right to freedom from torture in Nepal is upheld.

Furthermore, the NHRC has been granted the authority to recommend to the Government of Nepal for necessary improvements in the human rights situations of the country and implement the ratified human rights treaties at the practical level.²⁶² The NHRC, along with other National Human Rights Institutions, has recommended that the Government should ratify the OPCAT.²⁶³ In this context, the NHRC could play a more meaningful role by conducting an assessment of the relevant legislation and the current situation of torture in the country; showing the necessity of ratifying OPCAT, like the Australian Human Rights Commission conducted an assessment on pros and cons about implementing the OPCAT in Australia.²⁶⁴

5.6 Role of Government Attorney and Administrative Institutions

In accordance with the *Interim Constitution of Nepal 2007*, the OAG is a constitutional body which works as the chief legal advisor of the Government of Nepal.²⁶⁵ The *State Cases Act 1992* stipulates that the Government Attorney should be present in the

259 National Human Rights Commission, *Chha Barse Samasthigat Pratibedan 2064-2070* [Comprehensive Report of Six Year 2007/8-2013/14] 42.

260 Ibid; NHRC Torture Report, above n 244, 4.

261 Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/C/19/61/Add.3 (1 March 2012) para 81.

262 *Interim Constitution of Nepal 2007* (Nepal) art 132 (g), (f); *National Human Rights Commission Act 2012* (Nepal) s 4.

263 National Human Rights Commission, National Women Commission and National Dalit Commission, *Report of the NHRI Nepal on the UPR Process* (NHRC, 2010) 10, para 72.

264 Australian Human Rights Commission, 'Implementing the Optional Protocol to the Convention Against Torture: Options for Australia' <<https://www.humanrights.gov.au/publications/implementing-optional-protocol-convention-against-torture-options-australia>>.

265 *Interim Constitution of Nepal 2007* (Nepal) art 135.

process of taking statements with suspect.²⁶⁶ However, in exceptional situations, an investigating officer could take statements from suspects without the presence of a government attorney.²⁶⁷ Government attorneys should supervise the behaviour of the police during interrogation, especially while statements are being taken. This ensures that the presence of the government attorney is regarded as that of a civilian to supervise the behaviour of the police, especially ensuring the right to freedom from torture and other forms of ill-treatment and also monitoring to ensure that due processes of law during criminal investigations are followed.

The role of government attorneys requires ensuring that any information or confession was taken freely.²⁶⁸ However, torture is often used in the process of criminal interrogation. The OAG itself has published a figure that 28.1 per cent of detainees were subjected to torture whilst in police custody.²⁶⁹ It is a positive sign that at least the government attorney's office acknowledged the problem in its report. However, the role that the government attorney plays in protecting the right to freedom from torture and follow the rule of law has become questionable.

There are various reasons for this. First, the police takes statements without the presence of government attorneys but state falsely in the statement that the government attorney was present. Second, there might be challenges in relations between the police and the government attorneys especially when collaborating on the criminal investigation process - either the police do not accept government attorney office as a supervisory body or the government attorney is not active in monitoring the process and protecting human rights. Third, the police and the government attorney might have a very close relationship especially regarding malpractice such as corruption. In terms of Nepal police and attorney's role, police and government attorneys believe that confessions are decisive evidence for conviction.²⁷⁰ Furthermore, the OAG has the responsibility to prosecute the human rights violators as per the NHRC recommendations.²⁷¹ The Supreme Court further interpreted the provisions and stated that the government attorney should prosecute against the perpetrators as per the NHRC recommendation.²⁷² However, the OAG has not taken any initiative to prosecute human rights violators as per the NHRC recommendations.

As administrative initiatives, the Government of Nepal has formed the 'Law and Human Rights Promotion Department under the Office of the Prime Minister and Council of Ministers for the coordination of human rights activities and policy

266 *State Cases Act 1992* (Nepal) s 9 (1).

267 *State Cases Act 1992* (Nepal) s 9(2).

268 Conor Foley, *Combating Torture, A Manual for Judges and Prosecutors* (Human Rights Centre, University of Essex, 2003) 44.

269 OAG and CeLRRd 2013, above n 154.

270 See Yubraj Sangroula, *Nepalese Legal System: Human Rights Perspective* (Kathmandu School of Law, 2005) 149.

271 *Interim Constitution of Nepal 2007* (Nepal) art 132 (2) (d); *National Human Rights Commission Act 2012* (Nepal) s 12 (10).

272 *Om Prakash Aryal and Others v National Human Rights Commission, Hariharbhanan and Others*, Nepal Kanoon Patrika 2070 [Nepal Law Journal 2013] Vol 7, 843 (Supreme Court of Nepal).

reform.²⁷³ The Department also works as a liaison to NHRC.²⁷⁴ The Department completed a three-year National Human Rights Action Plan from 2011/12-2013/14 which includes activities for the protection of the right to freedom from torture such as establishing a compensation fund for torture victims and human rights training for police.²⁷⁵ Recently a five years plan from 2014/15-2018/19 has been prepared and implemented.²⁷⁶ However, the plan does not include concrete activities with a definite timeframe. Similarly, the Ministry of Home Affairs established Human Rights Units under Nepal Police and Armed Police Force (APF) in order to monitor and investigate human rights violations in their respective organisations/forces.²⁷⁷ Human Rights Unit of the Armed Police Force has not found any activity and progress. According to the update from the Nepal Police, 522 police personnel and 56 armed police personnel faced departmental action for violation of human rights.²⁷⁸ However, the police data does not specify what type of violations occurred, nor does it say what types of actions were taken. Furthermore, some major human rights organisations, including the Special Rapporteur, have criticised the effectiveness and impartiality of the working of these cells. The Rapporteur highlighted that lack of independence from the Human Rights Unit and Attorney-General's Office to investigate incident of human rights violations.²⁷⁹ A report found that many victims filed complaints in the unit; however, no substantial information has been received by the victims as yet.²⁸⁰ Thus, it can be said that the units are not transparent in articulating their roles, powers and progress.

5.7 Roles of Non-Governmental Organisations

The government must be solely responsible for the prevention of torture and protect the right to freedom from torture. In this process, if the government does not play an active role in the protection and promotion of the right to freedom from torture, human rights NGOs can play a proactive role to create pressure on the government for the protection of right to the freedom from torture and other forms of ill-treatment.

273 The Prime Minister and the Council of Ministries had formed a Human Rights Promotion Centre during the period of conflict. The Government of Nepal has developed as a separate Department after the re-stated democratic system in 2006.

274 Nepal Government, Office of the Prime minister and Council of Ministries (July 2012) *Universal Periodic Review*, 12.

275 Nepal Government, Law and Human Rights Promotion Department, Office of the Prime Minister and Council of Ministries, *National Human Rights Action Plan 2014*, 53-54, 68-70.

276 The Government of Nepal, Office of the Prime Minister and Council of Ministers, *Forurth National Plan of Actions on Human Rights*, (Fiscal Year 2014/15-2018/19).

277 Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Second Periodic Report of Nepal*, UN Doc CCPR/C/NPL/2(8 June 2012) para 28.

278 Nepal Government, Law and Human Rights Promotion Department under the Office of the Prime Minister and Council of Ministers, *National Human Rights Action Plan 2014*, 11.

279 Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/C/19/61/Add.3 (1 March 2012) para 107.

280 Advocacy Forum, INHIRED International, Informal Sector Service Centre (Insec), Centre for Victims of Torture (CVICT) and Forum for Protection of People's Rights (PPR), *Criminalise Torture* (Kathmandu: Coalition against Torture, 2009) 11.

With regards to the role of NGOs, the United Nations Charter provides a consultative status within the competence of the Economic and Social Council.²⁸¹ At the international level, NGOs have played a significant role in the process of setting up international norms.²⁸² For example on the issue of the right to freedom from torture, Amnesty International's one-year campaign for abolition of torture in December 1972 with the support of many NGOs created an impact on the media, public opinion and sensibility of governments that contributed to lay the ground for UN Declaration against Torture 1975. Further, many human rights NGOs such as Amnesty International and the International Commission of Jurists (ICJ) have played a proactive role in the drafting process of the CAT.²⁸³ Time and again, the role of NGOs has broadened; NGOs do not only participate as legal representatives of a party but also provided crucial information and recourse, as well as advocate for autonomy of international and regional courts and give support to implement such courts' decisions.²⁸⁴ Currently, human rights NGOs have played a pro-active role to document torture related incidents and provide major information to the UN human rights mechanisms. For instance, Nepalese NGO Advocacy Forum represented on behalf of the torture victim and communicated to the Human Rights Committee.²⁸⁵ Similarly, many NGOs and INGOs have submitted their alternative report to the Human Rights Council in the UPR process in 2011 and Periodic Review Process of CCPR/C in 2014.

In Nepal, human rights NGOs have played an important role in the protection and promotion of human rights since 1990. Since then, thousands of NGOs have been registered; however only a few have been actively working in the field of human rights. The NGOs working in the field of the right to freedom from torture have played a significant role, mainly in five sectors:

(I) These NGOs document cases of human rights violations including torture related incidents across the country even during the violent conflict period. In the absence of the government, human rights activists reached to the grassroots level to monitor the human rights situation of the country. For example, Informal Sector Service Centre (INSEC) has been continuously documenting human rights violations related documents including torture and extrajudicial killings for the last 14 years.²⁸⁶

281 *Charter of the United Nations* art 71.

282 Theo van Boven, 'The Role of Non-Governmental Organisations in International Human Rights Setting: Human Rights Standard-Setting: A Prerequisite of Democracy' (1989-1990) 20 *California Western International Journal* 213.

283 *Ibid* 213-214.

284 Heidi Nichols Hadded, 'Judicial Institutional Builders: NGOs and International Human Rights Courts' (2012) 11 *Journal of Human Rights* 143-144.

285 Human Rights Committee, *Views: Communication no 1469/2006*, 94th sess, UN Doc CCPR/C/94/D/1469/2006 (8 November 2008) ('*Yasodha Sharma v Nepal*').

286 Internal Sector Service Centre (INSEC), *Human Rights Year Book*. Insec has started to document human rights violations related incidents across Nepal from 1996 to till date. Human Rights Year Book covers all types of human rights violation including torture and publishes every year.

(II) NGOs have started custody monitoring and documenting cases of torture and other human rights violations in police custody. For example, Advocacy Forum continuously conducts the monitoring of detention centres and publishes reports.²⁸⁷

(III) NGOs provide a moral boost to the victims of torture while documenting cases, providing advice (social, legal and psychosocial), prepare cases and provide legal support to the courts. The record of court decisions show that most of the torture compensation related cases have been filed with the support from NGOs mainly from the Centre for Victims of Torture, Advocacy Forum and PPR Nepal. In the absence of government support for the rehabilitation of torture victims, NGOs mainly CVICT provided rehabilitation support to victims of torture for several years.²⁸⁸ In addition, Advocacy Forum provides legal and other social support for direct communication with the UN Human Rights Committee on behalf of the victim and the CCPR/C communicated for further investigation and compensation to victims of torture in four individual cases.²⁸⁹

(IV) Human Rights NGOs have been facilitating and pressurising the government for policy reform or promulgation of anti-torture law and policies. For instance, many national and international NGOs played an important role in the process of promulgating the current CRTA.²⁹⁰ After promulgation of the CRTA in 1996, many NGOs have reviewed the provisions and the practice of torture and recommended to the government that it can make new anti-torture laws in Nepal.²⁹¹

(V) In terms of the communication to the UN Human Rights mechanisms such as CAT/C, CCPR/C and Human Rights Council, NGOs have submitted regular reports and communication on torture. Most significantly, the CAT/C and the Special

287 Mandira Sharma, Ingrid Massage and Kathryn McDonald 'Lawyers' Intervention at Pretrial Stage Helps to Prevent Torture, Illegal Detention and Other Human Rights Violations: Experiences of Advocacy Forum–Nepal' (2012) 4(2) *Journal of Human Rights Practice* 253-272.

288 Advocacy Forum, INHIREC International, Informal Sector Service Centre (Insec), Centre for Victims of Torture (CVICT) and Forum for Protection of People's Rights (PPR) (2009) *Criminalise Torture*, 39.

289 Human Rights Committee, *Views: Communication No 1863/2009*, 105th sess, UN Doc CCPR/C/105/D/1863/2009 (2 August 2012) ('*Dev Bahadur Maharjan v Nepal*'); Human Rights Committee, *Views: Communication No 1961/2008*, 108th sess, UN Doc. CCPR/C/108/D/1761/2008 (27 April 2011) ('*Yubraj Giri v Nepal*'); Human Rights Committee, *Views: Communication No 1865/2009*, 108th sess, UN Doc CCPR/C/108/D/1865/2009 (28 October 2013) ('*Santa Sedhai v Nepal*'); Human Rights Committee, *Views: Communication No 1469/2006*, 94th sess, UN Doc CCPR/C/94/D/1469/2006 (6 November 2008) ('*Yasodha Sharma v Nepal*').

290 Rabindra Bhattarai, *Faujdari Nyaya ma Yatana Birudha ko Hoc* [Right against Torture in Criminal Justice System] (Centre for Victims of Torture Nepal, 1997) 52.

291 Amnesty International, *Make Torture a Crime* (Amnesty International 2001) 7-16; Bhogendra Sharma and Rajendra Ghimire, *Combating Torture in Nepal Problem and Prospect*, (Centre for Victims of Torture Nepal 2006) 30-32; Advocacy Forum Hope and Frustration, above n 140, 1-58; Advocacy Forum, *Torture of Women Nepal's Duplicity Continues* (Advocacy Forum 2011) 52-60.

Rapporteur on Torture have acknowledged the reports and communication from the human rights NGOs.²⁹²

Human rights NGOs are energetic in raising the issue of torture and pressuring the Government of Nepal to support torture victims to access justice. However, the government does not give priority to the issues that are raised by the NGOs. The Government of Nepal report as a reply of the CAT/C's confidential inquiry stated that 'some reports which were a campaign against Nepal and beyond agenda should not be taken for a credible confidential procedure of the CAT/C'.²⁹³ Even though the report does not mention the name of the report or the publishers' name, the government cautioned the CAT/C about the impartiality and credibility of such reports.

5.8 Conclusion

Constitutional backing for the independence of the judiciary, human rights and the rule of law provides an important precondition for a strong and effective Nepalese judiciary. As per its mandate, the Supreme Court of Nepal has issued many orders for the protection and promotion of the right to freedom from torture such as the use of a writ of mandamus ordering the Government of Nepal to designate the act of torture as a criminal offence.²⁹⁴ In terms of judicial scrutiny towards criminal investigation processes and the protection of the right to freedom from torture, the jurisprudence has been mixed. Likewise, courts have awarded compensation to victims of torture and departmental action against the perpetrators in some torture compensation cases. Further, with growing awareness about the provisions of international human rights instruments including the CAT, Nepalese courts have started to use the provisions in decision-making processes in PIL and torture compensation cases. Support from human rights organisations for documentation and advocacy for victims has been encouraging.

Despite the basic constitutional protections and some positive decisions, the implementation rate for court decisions is very low. Political influence, corruption and lengthy court procedures have made the judiciary weak. Conflicting decisions on the non-admissibility of confessions obtained by torture has made judicial scrutiny weak with regards to the protection of the right to freedom from torture that ultimately supports the continuation of confession-based criminal investigation system. The role that is being played by the judiciary in torture compensation cases seems less encouraging. In a few cases, departmental actions against perpetrator have been ordered. Furthermore, there have been many shortcomings in judicial decisions. These shortcomings include inadequate analysis of facts, laws and provisions relating to the right to freedom from torture. Courts exclude core issues and focus on peripheral issues in many torture compensation cases. This itself has raised the issue of judicial competency and independence. Likewise, the implementation of the NHRC's

292 CAT/C Confidential Inquiry Report 2011, above no 148, paras 8, 12: Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/C/19/61/Add.3 (1 March 2012) 209-238.

293 CAT/C Confidential Inquiry Report, above no 146, para 113.

294 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452 (Supreme Court of Nepal).

recommendations has always been a challenge. The OAG fails to prosecute as per the NHRC's recommendations.

Formal protections against torture need to be complemented by judges and court officials with honesty and sincerity to implement the mandate of the judiciary. For example, the *Interim Constitution* and *State Cases Act* stipulate that when a suspect is brought before court within 24 hours of arrest, the court may check the condition of the suspect. This scrutiny can be repeated every time detention period is extended. Likewise, the courts could enforce the existing legal provisions related to health-checks for detainees at the time of their arrest and release. This would allow them to check and cross-check the health condition of detainee and provide judicial oversight of the treatment of people coming into contact with the criminal justice system.

Therefore, judicial scrutiny in criminal cases is very important to discourage the prevalence of torture. Likewise, the Government should act on its commitment to the right to freedom from torture by fully implementing the judicial decisions and NHRC recommendations. Furthermore, this study has identified many shortcomings in the decision-making processes of court such as inadequate analysis of fact, law, precedent and application of fundamental rights. It is therefore essential that there should be capacity-development measures for judges, lawyers and NHRC officials.

CHAPTER-VI: REPORTING OBLIGATIONS AND MONITORING MECHANISMS

6.1 Introduction

Previous chapters covered the legislative framework, practical situation and judicial and other institutional interventions for the prevention of torture and the protection of the right to freedom from torture in Nepal. Those chapters noted many issues and challenges that have been pointed out by the human rights mechanisms of United Nations (UN). In this chapter, the status of Nepalese reporting to the Committee Against Torture (CAT/C) and other mechanisms and situations of monitoring are examined in terms of fulfilment of the State's responsibilities to implement the provisions of the Convention Against Torture (CAT). The chapter deals with another research objective related to the status for the fulfilment of reporting obligations towards the CAT and monitoring from the UN mechanisms. In the process of this analysis, a number of State reports, comments and observations about Nepal, shadow reports, list of issues, concluding observations and recommendations of concerned committees or mechanisms of all documents from 1993 to 2014 are critically reviewed and analysed in this chapter.

The reporting mechanisms under the UN are divided into two broad categories i.e. treaty-based mechanisms and charter-based mechanisms.¹ In terms of the right to freedom from torture, the CAT and the International Covenant on Civil and Political Rights (ICCPR) have laid down the right to freedom from torture and other forms of ill-treatment to individuals and groups. These international human rights instruments also set out the duties of State parties to ensure the rights of people and report to the concerned mechanisms. The CAT and the ICCPR contains provisions that the treaty-based mechanisms that assist member States to fulfil the State's obligations towards the concerned treaty. The CAT/C under the CAT and Human Rights Committee (CCPR/C) under the ICCPR are established as treaty-based mechanisms. The CAT/C and CCPR/C are composed of independent experts nominated by the State parties. These treaty bodies have issued guidelines to facilitate reporting by the member states on their implementation of the CAT and ICCPR.² These guidelines set procedural and substantive criteria for reporting such as reporting time, contents and structure of the

1 See Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (Oxford University Press 3rd ed, 2007) 737; Office of the High Commissioner for Human Rights (OHCHR), United Nations Human Rights, <<http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>> . The Charter-based organs are included either the bodies is created and/or mandated by the UN Charter, such as General Assembly, Human Rights Council or any other mechanics which have been authorised by one of those bodies such as Special Rapporteur on Torture and other forms of ill-treatment. Treaty-based are formed under the nine core human rights treaties, such as the CAT/C formed under the CAT, CCPR/C formed under the ICCPR.

2 International Human Rights Instruments, '*Compilation of Guidelines on the Form and Content of Reports to be Submitted by State Parties to the International Human Rights Treaties, Report of Security General*, UN Doc HRI/GEN/2/Rev.5 (2 May 2008).

report. Reporting to these mechanisms is a process to enable the implementation of the provisions of the CAT.

Similarly, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) has a mandate to monitor the right to freedom from torture and report to Human Rights Council (HRC). The Universal Periodic Review (UPR) is also established by HRC as a special procedure. Under the UPR process, State parties should review human rights situations including rights to freedom from torture and other forms of ill-treatment every four years. Furthermore, Office of the High Commissioner for Human Rights (OHCHR) has been established by General Assembly. The OHCHR handles the issue of torture along with other human rights violation from its headquarters in Geneva or field offices with regards to HRC and UN General Assembly. The HRC which is a body of the UN General Assembly oversees the issue through these charter-based mechanisms.

The mechanisms make conclusions and recommendations to State parties such as to modify legislation to make it consistent with the CAT and to take practical measures for the prevention and protection of the right to freedom from torture. However, the conclusions and recommendations are not considered binding on States.³ Many scholars stated that States may accept or reject any of these recommendations despite the fact that if any country ratifies or becomes a party of the instruments, the concerned State must fulfil the treaty obligations and monitoring mechanisms. It is a part of confirming international human rights standards and accepting international supervision.⁴

In the context of Nepal, after 30 years of a tyrannical single party system, a multi-party democratic government was formed in 1990. The democratic government acceded to the core human rights treaties including the CAT, ICCPR and its First Optional Protocol on 14 May 1991. As a member state, Nepal is obliged to submit initial, periodic and other special reports to the concerned mechanisms including the CAT/C,⁵ and CCPR/C.⁶ Under this obligation, Nepal has submitted an initial report under each of these instruments, and one periodic report in the last 23 years. The reporting trend, however, has not been satisfactory. The reports from Nepal have either not been

3 See, eg, Michael O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 *Human Rights Law Review* 33; Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press, 2012) 4; Jay Goodliffe and Darren G. Hawkins, ‘Explaining Commitment State and The Convention Against Torture’ (2006) 68 (2) *The Journal of Politics* 359; Tabias Kelly, ‘The UN Committee Against Torture Human Rights Monitoring and the Legal Recognition of Cruelty’ (2009) 31 *Human Rights Quarterly* 784; Jack Donnelly, *Universal Human Rights: In Theory and Practice* (Cornell University Press, 3rd ed, 2013) 163-169.

4 See Christof Heyns and Frans Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 *Human Rights Quarterly* 491.

5 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 29 (‘CAT’).

6 *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 40 (‘ICCPR’).

submitted to the treaty bodies or were submitted after extensive delays. Content-wise, most of the reports highlighted constitutional, some positive legal provisions and court decisions which have been positive for the prevention of torture and other forms of ill-treatment.⁷ Nepal is yet to adopt the provisions regarding individual communication regarding torture in accordance to Article 22 of the CAT and is yet to ratify the Optional Protocol on Convention Against Torture (OPCAT). A number of individual communications against torture have been considered by the CCPR/C under the Optional Protocol to ICCPR.

This chapter is organised under five subheadings. Following the introduction, the second subheading covers a brief overview of Nepalese reporting obligations, covers the reporting status of Nepal towards treaty-based mechanisms and thematic mechanisms and critically reviews the substantive and procedural parts of reporting. Content under the third subheading analyses the issues and challenges of fulfilment of the reporting obligations in Nepal. Under the fourth subheading are the analysis of the status of monitoring and follow-up from the CAT/C and other mechanisms in the context of Nepal. Finally, a conclusion is drawn with some recommendations for further improvement.

6.2 Overview of Nepalese Reporting Obligations

As stated above, as a party to the CAT, the ICCPR and other human rights instruments, Nepal must submit its initial, periodic and other special reports to the concerned treaty body mechanisms such as CAT/C and CCPR/C. Similarly, a periodic human rights report must be submitted under the UPR to Human Rights Council and Nepal must cooperate with the Special Rapporteur on Torture during the monitoring process on the situation of torture and other forms of ill-treatment in the country. For reporting purposes, the UN International Human Rights Instruments developed a set of common guidelines for its member States. Under the guidelines, the report has to be divided into three parts - general information, human rights framework and other relevant information.⁸ The reporting is an opportunity for the Government of Nepal to show its commitment to respect and protect the right to freedom from torture, get constructive

7 See, eg, Human Rights Committee (CCPR/C), *Consideration of Report Submitted by State Parties Under Article 40 of the Covenant, Second Periodic Reports of State Parties Nepal* (8 June 2012) UN Doc CCPR/C/NPL/2 para 118-119 ('*CCPR/C Second Periodic Report 2012*'); Committee Against Torture (CAT/C), *Report of Committee Against Torture, Annex III, Report on Nepal adopted by the Committee Against Torture under article 20 of the Convention and comments and observations by the State party*, 47th sess, (21 October to 25 November 2011), 48th sess, UN Doc A/76/44 (7 May to 1 June 2012), para 114 <http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm> ('*CAT/C Confidential Inquiry report 2011*'); Committee Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Second Periodic Report of state parties due in 1996: Nepal*, UN Doc CAT/C/33/Add.6 (14 January 2005) para 23-24 ('*CAT/C Second Periodic Report of Nepal 2004*'); Committee Against Torture (CAT/C), Committee Against Torture (CAT/C), *Initial Report of State Party Nepal* (19 December 1993) UN Doc CAT/C/16/Add.3 para 1. ('*CAT/C Initial Report of Nepal 1993*')

8 United Nations International Human Rights Instruments, *Harmonized Guidelines on the Reporting under the International Human Rights Treaties, Including Guideline on a Core Document and Treaty-Specific Documents*, UN Doc HRI/MC/2006/3 (10 May 2006) para 32-59.

comments from the assessment of the reports and show seriousness about the prevention of torture. As noted in the conclusions and recommendations of the CAT/C and concluding observations of the second periodic report of Nepal under the ICCPR, the reporting procedure will support constructive dialogue between the Government of Nepal and the treaty body mechanisms.⁹

This is an important objective of the Committees to play a supportive role in the prevention of torture in Nepal. However, no special department or unit under the Government of Nepal has been established to oversee the implementation status of the human rights treaties, the preparation of reports and the development of a constructive dialogue/communication with the CAT/C and other UN mechanisms. A Human Rights Centre under the Prime Minister's Office has been established. The Centre has prepared a human rights action plan. It has also prepared and submitted Nepalese UPR report. Nevertheless, there is no specific body to report under the CAT and the ICCPR. For example, the initial report under the CAT was prepared and submitted by the Ministry of Foreign Affairs in 1993 and the second periodic report was prepared by a committee under the Ministry of Home Affairs. Thus, the continuity of the reporting and institutional memories are lacking in Nepal. The status of reporting obligations of Nepal to the mechanisms are detailed in the next section.

6.2.1 Reporting compliance to the Committee Against Torture

The CAT/C consisting of 10 international experts elected by member States¹⁰ is responsible for monitoring the implementation of the CAT. The major functions of the CAT/C are to monitor the implementation of the CAT provisions, create a constructive dialogue between the State and the CAT/C and make member States accountable to prevent acts of torture and other forms of ill-treatment. State parties are obliged to submit initial reports within a year after the CAT comes into force¹¹ and a periodic report in every four years,¹² and the CAT/C can request any additional or specific report on torture from the member State.¹³ Periodic and other reports to the CAT/C are a major means of monitoring of the implementation of the right to freedom from torture in practice.

The CAT also receives data and information from Non-Governmental Organisations (NGOs) which in itself is the first time for a treaty body.¹⁴ The CAT/C holds two

9 See, eg, Committee Against Torture (CAT/C), *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture*, 35th sess, UN Doc CAT/C/NPL/CO/2 (13 April 2007) para 2 ('CAT/C Conclusion and Recommendations 2007'); Human Rights Committee (CCPR/C), *Consideration of Reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Second Periodic Report of Nepal* (15 April 2014) UN Doc CCPR/C/NPL/Q/2/Add.1 para 2 ('CCPR/C Concluding observations 2014').

10 CAT art 17.

11 Ibid art 19.

12 Ibid.

13 Ibid.

14 Manfred Nowak and Elizabeth McArthur, *the United Nations Convention Against Torture A Commentary* (Oxford University Press, 2008) 614.

regular sessions every year to review the State's report and special sessions can also be called on the committee's decision. After the interactive discussion between the CAT/C members and representatives of the member State, the CAT/C releases conclusions and recommendations on the State party's report. Furthermore, if the CAT/C receives reliable information about torture being systematically practised in the territory of any member State then the CAT/C will make confidential inquiries into the concerned member State¹⁵ and the CAT/C receives individual communication and handles the issue of torture at the individual level¹⁶ and inter-State communication against the acts of torture.¹⁷ Nepal submitted its initial report, a periodic report and two comments and observations to the Committee.

6.2.1.1 Initial reports, periodic reports and additional reports

As a State party to the CAT, Nepal must submit initial reports within a year after the CAT came into force, which is 30 days of the accession.¹⁸ The due date for Nepalese initial report was on June 15, 1992, and after that the periodic report has to be submitted in every four years. The reporting trends of Nepal do not meet the requirements of the CAT. Nepal submitted a two-page initial report in 1993, after a delay of around one year. The report did not follow the set guidelines. The report stated that after restoration of democracy in 1990, the *Constitution* guarantees the rights to criminal justice as a fundamental right which includes the right to freedom from torture and that *Compensation Relating to Torture Bill* has been tabled and the police have been trained about right to freedom from torture.¹⁹ The CAT/C made conclusions and recommendations in 1994 and requested additional report from Nepal²⁰ as per the Rules and Procedures of the CAT.²¹ However, the additional report has never been submitted by the Government of Nepal as per the recommendation. A general report from the Government of Nepal was submitted in 1994 which covered the general context, political situation, constitutional issues and State institutions.²²

In May 2004, second periodic report of Nepal was submitted after a delay of more than 10 years and was a combined version of the second, third and fourth periodic reports. The combined report had three parts - general information, article-specific information and conclusion. It covers more detailed information about the situation of the right to freedom from torture and has article-wise coverage and discussion, which was a positive aspect of reporting on its obligations towards the CAT. The report mainly stated that the 1990's *Constitution* prohibits torture and other forms of ill-treatment; *Nepal Treaty Act 1991*, *Compensation Relating to Torture Act 1996* (CRTA) and *National Human*

15 CAT art 20.

16 Ibid art 22.

17 Ibid art 21.

18 Ibid art 27.

19 CAT/C initial report 1993 of Nepal, above n 7.

20 See Committee Against Torture (CAT/C) Considering of Reports Submitted by State Parties under Article 19 of the Convention, *Conclusions and Recommendations of the Committee against Torture: Nepal*, UN Doc A/49/44(12 June 1994) para 145 ('CAT/C Conclusions and Recommendations 1994').

21 Committee against Torture (CAT/C), *Rule and Procedure of Convention Against Torture*, U.N. Doc. CAT/C/3/Rev.3 (1998) rule 67.

22 *General Core Document forming part of the reports of State Party Nepal*, UN Doc HRI/CORE/1/Add.42 (14 June 1994).

Rights Commission Act 1997 are promulgated to address the issue of torture in Nepal. Furthermore, the Government established National Human Rights Commission, Human Rights Promotion Centre under Prime Minister Office and Human Rights Cells under army and police to protect these rights. The report found some actions against police and army personnel involving human rights violations; the Government is in the process of reviewing interrogation rules, instruments, methods practices and legal provisions; sufficient laws to educate law enforcement officials are enacted and many organisations such as Amnesty International, International Commission of Red Cross (ICRC) and other human rights organisations provide training.

Furthermore, the report accepted the difficulty in preventing torture during the conflict and the CRTA does not meet the definition of the CAT and draft *Criminal Code* will cover the torture as a punishable crime; and Increasing torture from Maoists (as non-State actors) and to counter the insurgency, the Government declared a state of public emergency and introduced the *Terrorist and Destructive (Prevention and Punishment) Act 2002*.

The CAT/C considered the report in 2005 and released conclusions and recommendations on the report in 2007. The Government of Nepal commented on the concerns and recommendations in 2007. After the fourth periodic report, the CAT/C gave a due date for the fifth periodic report before June 2008. However, the Government of Nepal is yet to submit the fifth periodic report. The Government of Nepal is not giving priority to reporting obligations, or takes it as a formality and does not consider it as an opportunity for self-assessment of the situation of prevention of torture and implementation of the provisions of the CAT.

6.2.1.2 Confidential Inquiry

The CAT/C can play a proactive role through confidential inquiry if the Committee receives reliable evidence that indicates that torture is being systematically practised in the territory of a member State.²³ The procedure is not used to address individual cases of torture.²⁴ It is a really crucial action of the CAT/C to oblige member States to combat torture.²⁵ According to the Rules of Procedure of the CAT/C, the procedure sets many steps to conduct confidential inquiries. In the process, the Committee evaluates the information of the State and brings the attention of the UN Secretary General to bear and decide whether or not to undertake the inquiry. The Committee examines information and conducts the inquiry and finally it adopts and transmits the findings of the inquiry.²⁶ Following the procedure, the CAT/C conducted confidential inquiries about Nepal and released a report in 2011 with recommendations.

During the inquiry process, generally the CAT/C receives information on torture from various UN organs and non-governmental organisations and conducts visit to a

23 *CAT* art 20.

24 See Oona A. Hathaway, Aileen Nowlan and Julia Spiegel 'Torture Reasoning' (2011-2012) 52 *Virginia Journal of International Law* 827; Nowak and McArthur above n 14, 673.

25 See Chris Ingelse 'The Committee Against Torture One Step Forward, One Step Back' (2000) 18 (3) *Netherlands Quarterly of Human Rights* 315.

26 Committee against Torture, *Rule and Procedure*, CAT/C, UN Doc CAT/C/3/Rev.5 (21 February 2011), rules 75-90.

particular country. In the past, CAT/C members visited Egypt and Turkey while preparing their inquiry reports.²⁷ The report stated that the Committee received reliable information about torture being systematically practised in Nepal²⁸ and the CAT/C requested the Government of Nepal to make necessary arrangements for the Committee members' visit on 30 November 2009. However, the Government of Nepal informed the committee that the country's focus was on the peace process and the promulgation of the new constitution so the concerned authority was not in a position to provide the time to the committee members. Nepal recommended that the CAT/C contact Nepalese permanent mission in Geneva for the process.²⁹ During the inquiry process, the CAT/C considered the information related to torture reported by the Special Rapporteur, by the OHCHR Nepal office, and in reports of the National Human Rights Commission (NHRC), and national and international human rights organisations.³⁰ Based on the information, the Committee came to a conclusion that 'torture is being systematically practised in the territory of Nepal, according to its longstanding definition, mainly in police custody³¹ and recommended agendas for reform.³²

Nepal responded to the report of confidential inquiry promptly through comments and observations in August 2011.³³ The prompt response itself gives a positive message to respond the concerns and recommendations of the CAT/C. The Government of Nepal has defined the report as being 'baseless' and denied the allegations of continuous and systematic torture practised in police custody.³⁴ The Government of Nepal found that 'the report seems to have been based on some reports that were published by a campaign group against Nepal going beyond the agenda of protection and promotion of human rights. Thus, the report should not be a part of credible procedure of treaty bodies'.³⁵ However, the Government of Nepal could not produce a strong rationale and evidence about the reasons of the rejection of the statement of the report, date and the information of the UN, international, national human rights organisation, which was considered by the CAT/C. The Government only reported the country's situation: that Nepal is in the process of socio-economic and political transformation and in bid to conclude peace process and draw up a constitution³⁶ and that the Government of Nepal has prepared a draft *Anti-torture Bill*, *Penal Code* and *Criminal Procedure Code* which will criminalise the acts of torture.³⁷ The comments also found some legislative reforms such as constitutional provisions and the amendment of the *Nepal Army Act*, which are positive developments in relation to the prohibition of torture. Despite the Government of Nepal rejecting the confidential inquiry report, mainly allegations of continuation of systematic torture in Nepal, and the report puts positive pressure on the policymakers.

27 See Nowak and McArthur, above n 14, 680.

28 CAT/C Confidential Inquiry Report 2011 above n 7, para 100.

29 CAT/C Confidential Inquiry Report 2011, above n 7, para 11.

30 Ibid para 17.

31 Ibid para 108.

32 Ibid para 109.

33 CAT/C Confidential Inquiry Report 2011 above n 7.

34 Ibid para, 111.

35 Ibid para, 113.

36 Ibid para 112

37 Ibid para 115.

6.2.1.3 Individual and Inter-State Communication and Optional Protocol of Convention Against Torture

An individual can lodge a complaint against torture and other forms of ill-treatment to the CAT/C for remedy of torture and other forms of ill-treatment, if he/she does not get justice or effective remedy from domestic mechanisms.³⁸

It is an important provision of the CAT/C, which is directly linked to the protection and promotion of the right to freedom from torture at an individual level. However, there is a condition in the CAT that makes the provision enforceable i.e. the individual complaint has to be recognised by the committee's competence by a member State within the State's territory under Article 22. As a State party, Nepal must make the declaration required to recognise the competence of the Committee towards individual communication³⁹ and communications from other States regarding torture or inter-state communication.⁴⁰ Therefore, these provisions of the CAT are yet to be implemented in Nepal.

Optional Protocol of Convention Against Torture (OPCAT) is a pivotal instrument for the prevention of torture and other forms of ill-treatment. Nepal is yet to ratify the OPCAT which envisages the establishment of an independent national mechanism⁴¹ and working in close coordination with Sub Committee on Prevention of Torture that conducts monitoring in the detention centres including prisons regularly for the purpose of prevention of torture.⁴² The ratification of the OPCAT would enhance the accountability of the State that supports the prevention of torture and other forms of ill-treatment. The Government of Nepal does not have a consistent voice in regard to the ratification of the OPCAT. In 2008, the Government of Nepal stated that Nepal is considering accession to the OPCAT in the response to the Special Rapporteur's Report.⁴³ However, in the UPR process in 2011, the Government of Nepal informed that the prevention mechanism already existed in Nepal since OHCHR used to monitor the detention centres and prisons therefore the OPCAT does not need to be ratified in the context of Nepal.⁴⁴ The situation has not changed; nevertheless the Government of Nepal has changed its voice for the ratification of the OPCAT. Furthermore, with regard to accepting the competence of individual communications and ratification of

38 CAT art 22.

39 Ibid art 22.

40 Ibid art 21.

41 *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 4 Feb 2003, 2375 UNTS 57 (entered into force 22 June 2006) art 17 ('OPCAT').

42 Ibid art 11.

43 See Manfred Nowak, Special Rapporteur on Torture and other Cruel Inhuman or Degrading Treatment or Punishment, *Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Cameroon, Chile, China, Colombia, Georgia, Jordan, Kenya, Mexico, Mongolia, Nepal, Pakistan, Russian Federation, Spain, Turkey, Uzbekistan and Venezuela*, UN Doc A/HRC/C/7/3/Add.2 (18 February 2008) 93 para 479 ('Manfred Nowak, *Special Rapporteur on Torture Follow-up Report 2008*').

44 UPR Promoting and strengthening the Universal Periodic Review, *Nepal Mid-term Implementation assessment* (November 2013) 63 <www.upr-info.org>.

the OPCAT, the Government of Nepal, in its response to the confidential inquiry report of the CAT/C plainly found that Nepal does not intend to be a party to the OPCAT and does not accept the competence of the CAT/C in the individual communication at the moment.⁴⁵ All these views of the Government of Nepal show that Nepal wants to avoid international scrutiny of the right to freedom from torture and other forms of ill-treatment.

6.2.2 Issues and challenges of reporting and implementation

As noted above, the reporting trends and patterns show that Nepalese conduct is far from satisfactory in the fulfilment of its obligations under the CAT/C. As a reason for the delay or non-reporting to the Committee, Nepal has reported socio-political transformation and peace and constitutional making process as a cause in failing to fulfil the provisions of the CAT.⁴⁶ However, Nepal cannot be regarded as being excused from the protection of the right to freedom from torture in any circumstances and from its reporting commitments. The facts reflect negatively on the government's commitment to fulfil its obligations because more than twenty-three years have passed since Nepal became a State party to CAT.

The reasons for not fulfilling its ongoing reporting obligations could not always be the political transition in the country – this could not be used as a perpetual excuse. Even in the peaceful and stable period from 1991 to 1996 and after 2006 to till date, the Government of Nepal has not taken significant initiatives to fulfil its reporting obligations. There are many gaps in the procedural and substantive aspects of the reporting to the CAT/C. They may be summarised as detailed below.

6.2.2.1 Procedural aspects of State reporting

Reporting to the CAT/C and other mechanisms is a regular task, thus, institutional memories, regular communication and professionalism are required to provide effective reporting to the UN organs. In the report preparation process, it is better to incorporate information from various organisations of the Government of Nepal and NGOs in the report. Notwithstanding, the Government does not have the practice of organising meetings. The NHRC also was not consulted in the reporting process on confidential inquiry report 2011. Thus, the periodic reports did not cover comprehensive information and data about the situation of torture and protection of the right to freedom from torture. Likewise, the reports (initial and second) to the CAT/C were presented by the permanent representatives of Nepal to the UN.⁴⁷ Generally, the permanent representative of Nepal to UN does not take part in the report preparation phase therefore does not have experience due and so s/he could not cover the exact situation of the country and commit on behalf of the Government of Nepal.

45 CAT/C Confidential Inquiry Report 2011, above n 7, para 128 (f).

46 Ibid para 11.

47 Committee against Torture (CAT/C), 35th sess, Summary Record of the 669th Meeting on Second Periodic Report of Nepal (16 November 2005) UN Doc CAT/C/SR.669; Committee Against Torture, 12th sess, Summary Record of the Public Part of the 180th Meeting UN Doc CAT/C/SR(26 April 1994),180.

The reports/recommendations of the CAT/C and other mechanisms to Nepal have not been published by the Government of Nepal. For example, the issue of recommendations was never discussed in parliament or parliamentary committee. The conclusions and recommendations of the CAT/C in the confidential inquiry have raised many serious issues regarding the practices of torture in Nepal. A parliamentary committee called Human Rights and Foreign Affairs Committee existed at that time, nevertheless the Committee did not discuss the issue. Thus, the report preparation process and the dissemination of the recommendations of the CAT/C are yet to be done on a regular basis, and this affects negatively reporting on these issues and meeting deadlines.

6.2.2.2 Implementation status of the substantive aspect of the CAT/C

The CAT/C has raised many substantive issues and concerns on the reports of Nepal through conclusions and recommendations from 1994 to 2011. Some concerns and recommendations are attributed to the fundamental changes of political circumstances of the country i.e. from monarchy to a republic setup up; the CAT/C pointed out prolonged detention without trial under the *Terrorist and Disruptive (Control and Punishment) Act* and *Public Security Act*. The Act was repealed and other laws have been amended along with the political change. These are positive changes which protect rights to freedom from torture in Nepal. However, most of the crucial concerns and recommendations of the CAT/C are yet to be implemented.

Defining torture as a punishable crime

After accession of the CAT, the CAT/C recommended that Nepal should define torture as a criminal offence in domestic legal provisions during the review process of initial reports in 1994.⁴⁸ It repeated the same recommendation in 2007 as a concluding observation in the second periodic report⁴⁹ and in 2011, the same recommendations was found once again in the list of issues sent to Nepal.⁵⁰ Again, the same recommendations were reiterated in the Confidential Inquiry Report in 2011.⁵¹ The issue of criminalising torture in Nepal has been raised constantly by the CAT/C. In response to the recommendations, the Government of Nepal accepted that the act of torture is not defined as criminal offence in Nepal⁵² and has continuously found its commitment to criminalise torture i.e. in the initial report in 1993,⁵³ second report in 2004,⁵⁴ comments on Committee's concluding observation in 2007 and response to the confidential inquiry report 2011.⁵⁵ Nepal has always found that it plans to adopt an *Anti-torture Act* and a *Penal Code* or *Criminal Code* that will criminalise the act of torture as punishable crime in full compliance with CAT. In this context, Nepal not

48 CAT/C Concluding Observation 1994, above n 20, para 2.

49 CAT/C Conclusion and Recommendations 2007, above n 9, para 12.

50 Committee Against Torture (CAT/C) *List of issues prior to the submission of the Third, Fourth and Fifth Periodic Report of Nepal* (17 January 2011) UN Doc CAT/C/NPL/Q/3-5, para 1. ('CAT/C list of issues 2011').

51 CAT/C Confidential Inquiry Report 2011, above no 7, para 109 (b).

52 CAT/C Second Periodic Report of Nepal 2004, above n 7, para 66.

53 CAT/C Initial Report of Nepal 1993, above n 7, para 1.

54 CAT/C Second Periodic Report of Nepal 2004, above n 7, para 66.

55 CAT/C Confidential Inquiry Report 2011, above n 7, para 115.

only fails to fulfil the obligations towards the CAT and recommendations of the CAT/C but it also raises questions about Nepalese continuous commitment to criminalise torture (see detail in Chapter III).

Various reports and comments of Nepal create contradictory impressions regarding the progress made to criminalise torture. For example, the 2007 report stated that a draft Torture Act was prepared and submitted by the Ministry of Law and Justice and Parliamentary Affairs for technical approval (a final process to submit draft bill) to the parliament.⁵⁶ In 2011, the responses and comments of the government on confidential inquiry report stated that the Ministry of Home Affairs had finalised draft legislation to fully comply with the CAT and forwarded it to the Ministry of Law and Justice for the finalisation of the draft bill.⁵⁷ These versions showed no progress from 2007 to 2011 in the proposed draft bill.

Condemnation of the practice of torture and impunity

The CAT/C had a serious concern about the widespread use of torture and recommended that Nepal should send a clear and unambiguous message condemning torture and other forms of ill-treatment.⁵⁸ The country reports referring to the constitutional provisions stated that Nepal prohibits torture and other forms of ill-treatment and reported that there is no widespread practice of torture in Nepal and if anyone was found to be involved in such an act, the Government of Nepal would not spare any individual if found guilty. The reports accepted torture at the individual level as being isolated and sporadic incidents, but denied widespread practice of torture in their reports.⁵⁹

The CAT/C has further raised the issue of impunity in torture cases and implementation of recommendations of the NHRC.⁶⁰ The comments of the Government of Nepal reported that a total of around Rs. 1,450,000 compensation was provided to the victims of torture as per the recommendations.⁶¹ However, as stated in chapter V, none of the recommendations related to the punishment of the perpetrators have been implemented by the Government of Nepal.⁶²

56 Committee against Torture (CAT/C), *Consideration of Reports Submitted by States Parties Under Article 19 of The Convention, Comment by the Government of Nepal to the conclusions and recommendations of the Committee Against Torture*, UN Doc CAT/C/NPL/CO/2Add.1 (29 January 2008) para 1. (*Nepal's Comment to CAT/C 2008*).

57 CAT/C Confidential Inquiry Report 2011, above n 7, para 115.

58 CAT/C Conclusion and Recommendations 2007, above n 9, para 13; CAT/C Confidential Inquiry Report 2011, above n 7, para 109 (a),(c).

59 See Nepal's Comment to CAT/C 2008, above n 56, para 2; CAT/C Confidential Inquiry Report 2011, above n 7, paras 117, 130.

60 CAT/C Conclusion and Recommendations 2007, above n 9, paras 15, 24; CAT/C list of issues 2011, above n 50, para 29; CAT/C Confidential Inquiry Report 2011, above n 7, para 105.

61 CAT/C Confidential Inquiry Report 2011, above n 7, para 121.

62 See National Human Rights Commission-Nepal *Aayog Ka Terabarsa Ujuri Upar Aayog Ka Sifaris 2057-2070* [Thirteen Years of NHRC, the Situation of the implementation of the NHRC's recommendations] (NHRC, 2013) (*NHRC 13 years Report*).

Investigation of torture and other forms of ill-treatment

The CAT/C has recommended several times to Nepal that it should establish prompt and impartial investigation mechanisms on the issue of torture and other forms of ill-treatment.⁶³ Nepalese response was that ‘if police personnel are involved in torture, the case is immediately investigated and the perpetrators are punished in accordance with the law’.⁶⁴ Furthermore, article 135 of the *Interim Constitution of Nepal 2007* authorises the Office of the Attorney General (OAG) to investigate torture and other ill forms of treatment-related cases.⁶⁵ Recently, the Supreme Court of Nepal decided that the OAG does not have discretionary power to file human rights-related violations recommended by the NHRC. The Attorney General should take into account violations of the right to freedom from torture.⁶⁶ However, no mechanism has been established to conduct prompt and impartial investigations of torture (see details in Chapter VI and III). The OAG never handles the issue related to torture and other forms of ill-treatment because the Government Attorney pleads on behalf of the alleged police officer in the case hearing process. On the other hand, the *State Cases Act 1993* does not include torture and other forms of ill-treatment-related cases in the schedule 1, which include lists of State party criminal cases.

Review of interrogation and detention norms and practises

The CAT/C recommended Nepal adopts various types of interrogation and detention related norms and practices. It recommended that Nepal should adopt necessary pre-trial detention, immediate transfer of the detainees to legally designated places and the prohibition of incommunicado detention and access to medical treatment.⁶⁷ Likewise, the detainee should be presented before the judge within 24 hours of arrest.⁶⁸ Nepal has not responded to this issue in its periodic report and comments of the CAT/C’s conclusions and recommendations.

Regarding the monitoring of detention centres, the CAT/C recommended that the Government of Nepal systematically monitors the custody or detention centres with special focus on preventing torture, monitor the registration system of detainees and protect the rights of juvenile delinquents.⁶⁹ The monitoring should be conducted with the involvement of forensic doctors trained in detecting signs of torture.⁷⁰ The Government of Nepal responded that the District and Appellate Court can monitor custody reports at any time and the NHRC, OHCHR and International Committee of

63 CAT/C Confidential Inquiry Report 2011, above n 7, para 110 (b); CAT/C list of issues 2011, above n 50, para 28; CAT/C Conclusion and Recommendations 2007, above n 9, para 27.

64 CAT/C Confidential Inquiry Report 2011, above n 9, para 120.

65 Ibid, para 121.

66 *Om Prakash Aryal and Others v National Human Rights Commission, Hariharbhawan and Others*, Nepal Kanoon Patrika 2070 [Nepal Law Journal 2013] Vol 7, 843 (Supreme Court of Nepal).

67 CAT/C Conclusion and Recommendations 2007, above n 9, paras 21 (a), (b), (c), (d), (e).

68 CAT/C Confidential Inquiry Report 2011, above no 7, para 109 (k).

69 CAT/C list of issues 2011, above n 50, para 22-25; CAT/C Conclusion and Recommendations 2007, above n 9, paras 20-21; CAT/C Confidential Inquiry Report, above n 7, para 108 (e).

70 CAT/C Confidential Inquiry Report 2011, above no 7, para 108 (e).

Red Cross (ICRC) are also allowed to monitor detention centres and prisons.⁷¹ However, the reports show that these agencies do not monitor the situation regularly and torture is continuously practised in police custody.⁷²

Capacity enhancement of police and law enforcement officials

The CAT/C recommended vigorous programmes for educating/training police, other law enforcement officials and medical personnel continuously from 1994, 2007 and 2011.⁷³ The Government of Nepal has reported that the training/education, information and guidelines are included in the training packages for the police and law enforcement officials in the 1993 initial report.⁷⁴ The second periodic report of Nepal has stated that ‘there is sufficient legislation to educate the law enforcement officials’ and the training for medical professionals and training for army, police and prison staff were conducted jointly by the Police Academy, NHRC and Non-Governmental Organisations (NGOs).⁷⁵ In addition, the Nepalese comments on confidential inquiry report of CAT/C, explained training on human rights and humanitarian law conducted by UN agencies.⁷⁶

Although Nepalese reports included education and training package to police, army and other law enforcement officials, the reports from 1993 to 2011 have stated that the data and information have been inconsistent. The initial report found that ‘Nepal ensures the education, information and guidelines regarding prohibition of torture are included in the training package for law enforcement officials’. After 11 years, the report stated that its code of conduct for Nepal Police included a human rights component and some security related training centres, and Human Rights Organisations organised human rights related training programmes for law enforcement officials. Reports of 2008 and 2011 described training on human rights law and humanitarian law conducted by Government and civil society organisations. These reports showed that training packages and education programmes related to the right to freedom from torture have gradually decreased, which means either the submitted government report was factually wrong or the government had failed to take the issues of capacity building seriously for law enforcement officials for the prevention of torture.

6.2.3 Status of compliance to the Human Rights Committee

71 CAT/C Confidential Inquiry Report 2011, above no 7, para 121; CAT/C Second Periodic Report of Nepal 2004, above no 7, para 92-94.

72 Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/C/19/61/Add.3 (1 March 2012) 109-138 (‘Juan E. Mendez, *Special Rapporteur Report 2012*’); Asian Human Rights Commission, *Nepal The State of Human Rights 2013*(AHRC, 2013) 13-17, <<http://www.humanrights.asia/resources/hrreport/2013/AHRC-SPR-004-2013.pdf/view>> (‘Juan E. Mendez *Special Rapporteur on Torture, Report 2012*’).

73 CAT/C Concluding Observation 1994, above n 20 para 147; CAT/C Conclusion and Recommendations 2007, above n 9, para 12; CAT/C list of issues 2011, above n 50, para 21-22.

74 CAT/C, Initial Report of State party, Nepal above n 7, para 7.

75 CAT/C Second Periodic Report of Nepal 2004, above no 7, para 77-87; Nepal’s Comment to CAT/C 2008, above n 56, para 8.

76 CAT/C Confidential Inquiry Report 2011, above n 7, para 118.

The ICCPR prohibits torture and other forms of ill-treatment and establishes CCPR/C as a monitoring mechanism.⁷⁷ Furthermore, first Optional Protocol to the International Covenant on Civil and Political Rights 1966 (OP-ICCPR) assures that the procedure of the mechanism including individual communication against human rights violations in concerned countries.⁷⁸ The Committee supervises and monitors the implementation of the provisions of the Covenant through receiving and examining the States' reports and gives general comments on the reports. The Committee considers individuals who claim to have their rights violated under the OP-ICCPR⁷⁹ and recommends that the concerned member State investigate the individual complaints.

Nepal accepted the jurisdiction of CCPR/C with the accession of the ICCPR and OP-ICCPR on May 14, 1991 and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death penalty on March 4, 1988. As a State obligation, Nepal should submit its initial report within one year of after the one year and three months of the accession of the Covenant⁸⁰ and periodic report in every five years to the CCPR/C. The CCPR/C has developed guidelines for initial and periodic reporting.⁸¹ The report should cover the positive development of the implementation of the ICCPR and challenges faced in the pursuit of that goal.

Similarly, a list of issues of the CCPR/C also needs to be included in the report. The initial report was scheduled for submission on August 15, 1992. Nepal failed to meet its obligation to submit its initial report on time. The second periodic report was also submitted in long delay. Many procedural and substantive challenges were found in the Nepalese reporting procedures.

6.2.3.1 Procedural aspects of reporting to the CCPR/C

The report preparation process, the participation of the concerned organisations, meeting reporting deadlines and implementation of the conclusions and recommendations are major procedural aspects required to fulfil the reporting obligations of the CCPR/C.

With regards to the reporting under the CCPR/C, the Nepalese record is not encouraging. For example, the initial report was submitted around one and half years later i.e. in March 1994 and the Committee stated that 'the Committee regrets, however, that the information provided in the report was in many respects incomplete

77 *ICCPR* art 28.

78 *Optional Protocol to the International Covenant on Civil and Political Rights* open for signature 16 December 1966 UNTS vol. 999 p171 (entered into the force 23 March 1976) art 2 ('*OP-ICCPR*').

79 *Ibid.*

80 *ICCPR* arts 40, 49.

81 Human Rights Committee (CCPR/C), *General Comment No 2, Reporting Guideline* 80th sess, UN Doc CCPR/C/66/GUI (29 September 1999).

and did not follow the Committee's guidelines for the initial report'.⁸² No consultations were undertaken in the process of report preparation.

The second periodic report was submitted after a long delay in 2012 as a combined report of the second, third and fourth periodic reports after more than 15 years from the submission of the initial report. The report covered the period from 1995 to 2010 and did not follow the schedule of the CCPR/C's reporting criteria. Despite the delay in the reporting, the second periodic report seems to be more detailed compared to the initial report. Comments and suggestions of the NHRC and civil society organisations were also considered while preparing the report.⁸³ Moreover, 21 shadow reports from different organisations were submitted to the CCPR/C.

6.2.3.2 Implementation of conclusions and recommendations of the CCPR/C

In relation to the right to freedom from torture, the CCPR/C made lists of issues and concluding observations on Nepalese reports and in reports presented to the Committee. The CCPR/C also recommended that Nepal should take necessary measures to criminalise torture and other forms of ill-treatment in the domestic level provisions in line with the CAT and other human rights instruments.⁸⁴ However, torture and other forms of ill-treatment has been neither included as criminal act as provisioned in the *State Cases Act 1993* schedule 1 nor promulgated new specific anti-torture laws. As noted above, the Government of Nepal has not implemented the recommendations.

6.2.4 Individual complaints

As stated above, Nepal has yet to make the requisite declarations in relation to accepting the individual communication as the application of Article 22 of the CAT and yet to ratify the OPCAT. In the absence of the competence of the OPCAT and the competence of individual communication of the CAT, many torture victims have taken communicated to the CCPR/C under the OP-ICCPR.⁸⁵ Torture victims can communicate about their complaints related to the violation of Article 7 of the ICCPR to the CCPR/C. The procedure for individual complaint is similar to the CAT/C that is directly related to an individual's right to freedom from torture.

Although the recommendations of the treaty bodies are not legally binding on the State parties, the CCPR/C defined 'views of the CCPR/C under the Optional Protocol that

82 Human Rights Committee (CCPR/C) *Comments of the Human Rights Committee*, UN Doc CCPR/C/79/Add.42 (10 November 1994) para 2 ('*CCPR/C Comments 1994*').

83 CCPR/C Second Periodic Report of Nepal 2012, above n 7, para 5.

84 Human Rights Committee (CCPR/C), *Consideration of Reports submitted by States Parties under article 40, Committee's suggestions and recommendation*, UN Doc CCPR/C/74/Add.2 (18 May 1994) para 75, ('*CCPR/C Suggestions and Recommendations 1994*'); Human Rights Committee (CCPR/C), *List of issue in relation to the second periodic report of Nepal*, UN Doc CCPR/C/NPL (21 August 2013) para 10, ('*CCPR/C List of Issues 2013*'); CCPR/C Concluding Observations 2014, above n 9, para 10.

85 *OP-ICCPR* art 1.

exhibits some important characteristics of a judicial decision'.⁸⁶ Furthermore, many scholars have argued that the individual complaints-related decisions from the treaty bodies are enforceable or binding for State parties. For example, Joseph and Castan stated that the CCPR/C is an authority for the interpretation of the provision of the ICCPR which itself is legally binding, and if the member State rejects the decision, then that is a good example of a State's negative attitude towards its obligations.⁸⁷ Scheinin and Langford explained that the CCPR/C has been handling civil and political rights related cases for the last three decades under an adversarial complaint mechanism attached to a judicial and quasi-judicial approach making it a live instrument to assist governments, courts and NGOs in understanding the interpretation of the ICCPR.⁸⁸

Nepal does not have any domestic legal provision and set practice that deals with the issue of the decisions of individual complaints. In 2013, the CCPR/C raised the questions regarding the implementation of eight individual communications-related decisions.⁸⁹ In its response, the Government of Nepal put forward a policy related to interim relief to be provided to the victims of conflict and their families.⁹⁰ However, the response did not mention the implementation status of the decisions. Among the eight individuals who brought their communications related to torture, disappearance and arbitrary detention to the Committee. The CCPR/C found violations of human rights including the right to freedom from torture (Article 7 of the ICCPR) in all eight communications and recommended the Nepal Government to take necessary action.⁹¹ Among them, five individual communications are directly related to torture.

Mr Dev Bahadur Maharjan took his case to the Human Rights Committee in 2008. He was arrested by members of Nepal Army in 2003 on the charge that he was involved in Maoist activities. He was severely tortured and kept blindfolded throughout his detention. Mr Maharjan was asked about Maoist's activities and a list of people for four consecutive nights. He was beaten on his back, legs, the soles of his feet, and

86 Human Rights Committee (CCPR/C), *General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94th sess, UN Doc CCPR/C/GC/33 (25 June 2009) para 11.

87 See Saraha Joseph and Melisaa Castan, *International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 22.

88 See Martin Scheinin and Malcolm Langford, 'Evolution or Revolution?-Extrapolating from the Experience of the Human Rights Committee' (2009) 27 (1) *Nordisk Tidsskrift for Menneskerettigheter* 112.

89 CCPR/C List of Issues 2013, above n 84, para 2.

90 Human Rights Committee (CCPR/C), *Replies of Nepal to the list of issues*, UN Doc CCPR/NPL/Q/2/Add.1(31 March 2014) para 7 (a).

91 Human Rights Committee, *Views: Communication No 1863/2009*, 105th sess, UN Doc CCPR/C/105/D/1863/2009 (2 August 2012) ('*Dev Bahadur Maharjan v Nepal*'); Human Rights Committee, *Views: Communication No 1961/2008*, 108th sess, UN Doc. CCPR/C/108/D/1761/2008 (27 April 2011) ('*Yubraj Giri v Nepal*'); Human Rights Committee, *Views: Communication No 1865/2009*, 108th sess, UN Doc CCPR/C/108/D/1865/2009 (28 October 2013) ('*Santa Sedhai v Nepal*'); Human Rights Committee, *Views: Communication No 1469/2006*, 94th sess, UN Doc CCPR/C/94/D/1469/2006 (6 November 2008) (*Yasodha Sharma v Nepal*); Human Rights Committee, *Views: Communication No 1870/2009*, 99th sess, UN Doc CCPR/C/99/1870/2009 (27 July 2010) ('*Charles Gurmurkh Sobhraj v Nepal*').

kicked on his face and chest.⁹² He was released in January 2005 by a Supreme Court's order on a *habeas corpus* writ filed by his sister. He was never charged with any offence. After his release, he was continuously threatened with re-arrest and torture for a long time. He tried to look for a remedy at the national level but could not get proper and timely remedy. The Government of Nepal denied his allegations that he was tortured, in custody. After that he communicated with the CCPR/C.

The CCPR/C concluded that in the case of Mr Maharjan, the State had violated Article 7 of the ICCPR.⁹³ The CCPR/C recommended that Nepal ensures thorough and diligent investigation in the cases of torture and other forms of ill-treatment, prosecute the case and punish those responsible, provide adequate compensation to the victims and his family, amend legislation in line with the Convention. Following the recommendation of the CCPR/C, he was provided Rs 25,000 (approximately 250 US dollars) as an interim relief.⁹⁴ Recently, the Government of Nepal decided to award him Rs 150,000 (approximately 1500 US dollars) as compensation as recommended by the CCPR/C.⁹⁵ These are positive steps by the government in response to the CCPR/C's recommendation. However, it seems that the decisions were taken on an ad hoc basis, without any policy and plan. Furthermore, no other initiatives have been taken for impartial investigation on the issue of torture.

Similarly, another torture related complaint was also communicated to the CCPR/C by Mr Yubraj Giri in 2008. He reported in his complaint that he was arrested, held in incommunicado detention and severely tortured alleging that he was involved in Maoist activities. Nepal Army officers tried to seek a confession from him. During his detention he was denied medical treatment. As a result of the torture, he suffered from multiple health-related problems such as constant headaches and dizziness, pain in the jaw, head, shoulders, back, hips and legs.⁹⁶ Despite bringing the case to the attention of the court and police, no investigation was carried out. He was not given any compensation and no person was prosecuted.⁹⁷ The Government of Nepal sent for an observation in his case and concluded that he did not exhaust all domestic remedies through the Court under the *Compensation Relating to Torture Act* and National Human Rights Commission. The Government of Nepal further argued that he was treated as 'fairly human'.⁹⁸

In the case, the CCPR/C found the existence of the violation of the right to freedom from torture in accordance with Article 7 of the ICCPR⁹⁹ and that Nepal had failed to investigate the allegation of human rights violations. The Committee reiterated the

92 *Dev Bahadur Maharjan v Nepal*, UN Doc CCPR/C/105/D/1863/2009 para 2.4.

93 Ibid para 8.4-8.5.

94 Advocacy Forum and REDRESS, *Nepal Failure to Implement views in Individual Communications 2014*, 3 <http://www.ccprcentre.org/doc/2014/03/INT_CCPR_CSS_NPL_16465_E.pdf> ('Advocacy Forum and REDRESS views in Individual Communications 2014').

95 Arjun Subedi, 'Karmachari Kastai Sarkar' [Government rigid towards civil servant] *News, Nagarik News Daily*, (Kathmandu) 4 April 2014 <<http://nagariknews.com/index.php>>.

96 *Yubraj Giri v Nepal*, UN Doc. CCPR/C/108/D/1761/2008 para 2.6.

97 Ibid paras 2.12-2.15.

98 Ibid paras 4.1-4.4.

99 Ibid paras 7.6-7.7.

importance which it attaches to establishing appropriate judicial and administrative mechanisms to address the violation of rights.¹⁰⁰ The CCPR/C recommended that the Government of Nepal ensure a thorough and diligent investigation of torture and other forms of ill-treatment, prosecution and punishment of those responsible, to ensure compensation to victims and to prevent similar violations in future. In regard to the implementation of the recommendation of the CCPR/C, the Government of Nepal provided some financial compensation to the victim as an 'interim relief'. The relief might be related to the government's regular package for victims of conflict. Furthermore, the Council of Ministers agreed that the Ministry of Home Affairs and the Ministry of Defence would develop a mechanism to prevent the recurrence of such incidents.¹⁰¹ However, the Government of Nepal has not yet initiated a process for effective investigation.

Recently, the CCPR/C decided three torture and enforced disappearance-related violations of human rights on three different individual communications from Nepalese victims. In these communications, the victims claimed they or their relatives were forcibly arrested, tortured and disappeared by security force during the period of conflict in Nepal. The CCPR/C recommended that the Government of Nepal should provide an effective remedy, including effective investigation and adequate compensation to the victims and their families, and ensure necessary rehabilitation and satisfaction to the victims.¹⁰²

The CCPR/C raised an issue regarding the implementation procedures of the individual communications in the list of issues in the second periodic report of Nepal.¹⁰³ However, the second periodic report of Nepal did not include any wording regarding the implementation procedure of the communications. It can be assumed that there is no implementing procedure developed by the Government of Nepal to address the recommendations of the CCPR/C regarding individual communications. A report states that Nepal does not implement the recommendations regarding the communications apart from providing some amount as interim relief.¹⁰⁴ The interim relief was established for victims of conflict by the Comprehensive Peace Accord (CPA).¹⁰⁵ Therefore, the relief package, being of an ad hoc nature, cannot be considered as an institutionalised process of the implementation of the CCPR/C communications. On the other hand, individual communication related to torture presumably creates an urgent situation which requires immediate action to protect the rights of the concerned persons. Nevertheless, the CCPR/C took more than three years

100 Ibid para 7.10.

101 Advocacy Forum and REDRESS views in Individual Communications 2014, above n 94, 3.

102 Human Rights Committee, *Views: Communication No 2051/2011*, 112th sess, UN Doc CCPR/C/112/D/2051/2011 (11 November 2014) ('*Jit Man Basnet and Top Bahadur Basnet v Nepal*'); Human Rights Committee, *Views: Communication No 2111/2011*, 112th sess, UN Doc CCPR/C/112/D/2111/2011 (10 November 2014) ('*Gyanendra Tripathi v Nepal*'); Human Rights Committee, *Views: Communication No 2031/2011*, 112th sess, UN Doc CCPR/C/112/D/2051/2011 (10 November 2014) ('*Tej Bahadur Bhandari v Nepal*').

103 CCPR/C List of Issues 2013, above n 84, para 2.

104 See Advocacy Forum and REDRESS views in Individual Communications 2014, above n 94, 1.

105 Comprehensive Peace Accord, between, Government of Nepal and The Communist Party of Nepal (Maoist) (21 November 2006) art 5.2.4.

to develop recommendations on individual communications in these torture-related cases.

6.2.5 Status of implementation of Special Rapporteur's recommendations

The Special Rapporteur on Torture has played an important role in promoting and protecting rights to freedom from torture in most at risk countries.¹⁰⁶ The mandate of the Special Rapporteur on Torture is to seek, receive and examine information about torture, release urgent appeals, conduct country visits, recommend appropriate measures, cooperate with other mechanisms such as the CAT/C, Sub-Committee under OPCAT, and the Human Rights Council.¹⁰⁷ The Special Rapporteur on Torture has the authority to monitor the implementation of the right to freedom from torture at the domestic level.

The UN Special Rapporteur on Torture (Mr. Manfred Nowak) visited Nepal in September 2005. He conducted interviews with current and former detainees, security officers, government officers, representatives of human rights communities and lawyers and also visited prisons and detention centres.¹⁰⁸ The Rapporteur concluded that torture was systematically practised by Nepal Police, Armed Police Force and then Royal Nepalese Army. Legal safeguards were ignored and impunity existed in cases of torture.¹⁰⁹ After the visit, the Rapporteur followed up in 2007, 2008, 2010 and 2012. The report put forward concerns and made recommendations for the protection and promotion of rights to freedom from torture in Nepal and consistently followed up to verify if progress was made regarding the recommendations. Although the Government of Nepal has objected to the conclusions of the report,¹¹⁰ Nepal committed to prohibiting torture and stated that 'Government of Nepal does not tolerate, condone or permit torture, does not allow impunity and conducts investigations and takes action against offenders'.¹¹¹ In terms of the response and implementation of the recommendations of the Special Rapporteur, the Government of Nepal responded with an update on the implementation of the recommendation in 2008.¹¹² After that, no reports and responses have been submitted by the Government of Nepal to date. For example, follow-up reports 2010 and 2012 stated that the Special Rapporteur sent the follow-up charts/table which found recommendations and communications from NGOs, but the Government of Nepal did not provide any information related to torture and other forms of ill-treatment to the Special

106 Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 202.

107 Human Rights Council, *Torture and Other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur*, UN Doc A/CCPR/C/RES/16/23, 2; Manfred Nowak, 'Torture: Perspective from UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment' (2012) 7 (2) *National Taiwan University Law Review* 474.

108 See Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006) para 32 ('Manfred Nowak, *Report by Special Rapporteur 2006*').

109 Ibid para 31.

110 Ibid para 32.

111 Ibid.

112 Manfred Nowak, *Special Rapporteur on Torture Follow-up Report 2008*, above n 43.

Rapporteur.¹¹³ This implied that there might be some reasons for the Government of Nepal for not cooperating with the Special Rapporteur -- either it was neglecting the matter or it had failed to make significant progress on the recommendation of the Special Rapporteur's report.

The initiative of the Government of Nepal does not reflect encouraging progress in relation to the implementation of the substance of the recommendations. The report recommended that the Government of Nepal should end impunity, criminalise torture, investigate torture-related incidents, suspend and punish the perpetrators, rehabilitate the victims of torture and respect free and fair trials by putting an end to incommunicado detention, ensuring access to a lawyer, maintaining custody records, closing undisclosed detention centres, presenting the detainees before the court close to the time of their arrest and allowing the judicial process to run its course. As stated above, the Government of Nepal repeated its promises to respect and protect the right to freedom from torture, especially to end impunity, criminalise torture and investigate torture incidents.¹¹⁴ Nevertheless, the commitment is not reflected in action. For example, in relation to respecting the right to a fair trial, the situation has not improved. A report shows that the police still maintain two different registration books to record arrest information, and lawyers and public do not have access to those registers and police records are misleading.¹¹⁵ Overall, the Special Rapporteur's comments and recommendations raised a level of awareness among concerned persons, including the Government of Nepal, to some extent but the recommendations and requirements prescribed in the reports have not been implemented.

6.2.6 Universal Periodic Review and Nepal

Universal Periodic Review (UPR) is a special procedure which reviews human rights situations periodically. It was established under the Human Rights Council (HRC) on 15 March 2006 by a UN General Assembly resolution after two years of negotiations.¹¹⁶ The UPR has been considered a peer review of the human rights situations, including the right to freedom from torture, of every member State, by the

113 See Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/13/39/Add.6 (26 February 2010) para 53; Juan E. Mendez, Special Rapporteur Report 2012, above n 72, para 77.

114 Juan E. Mendez, Special Rapporteur Report 2012, above n 72, para 77-81. Many issues such as to end culture of impunity in the case of torture, criminalise torture, investigation and prosecution of the incident of torture, rehabilitation of the victims of torture and respect fair trial related rights such as access lawyer, stop incommunicado detention and separate place of detention have been raised by the Special Rapporteur on torture from 2006 in his field visit report and follow-up reports in 2007, 2008, 2010 and 2012 .

115 See Advocacy Forum, REDRESS and APT, *Review of the Implementation of Recommendations made by the Special Rapporteur on Torture*, Manfred Nowak, after his mission to Nepal 2005, 2009, 19. ('*Advocacy Forum, REDRESS and APT, Review of Special Rapporteur on Torture Report 2009*') The document was submitted in 10th session of Human Rights Council in 2009, 12.

116 General Assembly, *Reaffirming the relevant provisions, related to the universal periodic review*, of General Assembly resolution 60/251 of 15 March 2006 and of Human Rights Council resolution 5/1 of 18 June 2007 containing the institution-building package, the Council adopts the following General Guidelines.

HRC. The procedure under Council resolution 5/I envisaged a four-year cycle for all states to be reviewed. The first cycle was completed in 2011. The second started in 2012.

The HRC conducts three sessions each year in which 14 States are reviewed at each session. The review consists of two phases: the Working Group Phase, ('interactive dialogue') where all member States are present and have the right to make recommendations to the State under review. The working group reports to the Council, which then adopts the outcome of the interactive dialogue. It is a peer review which is assisted by a group of three States referred to as the 'Troika' which prepares the outcome of the Working Group to the Council.¹¹⁷ All member States can provide comments and recommendations. The reviews are based on three documents. A national report from the government, a compilation prepared by the OHCHR of the information contained of the reports of treaty bodies, special procedures and a credible and reliable information provided by other stakeholders to UPR process are circulated by Working Group under UPR process.¹¹⁸ All aspects of timing to submit reports, and limitation of length (pages) of every reports are strictly controlled. An interactive discussion between the State and other UN member States is organised where UN member countries put questions and recommendations to the State in the three-hour review meeting. The Troika then prepare an outcome report.

The Government of Nepal submitted its human rights report under UPR in November 2010, and Nepalese report was reviewed for the first time under the UPR on 25 January 2011. The report covered the overall human rights situation of Nepal including a component of the right to freedom from torture in Nepal. The Government repeated its commitment to criminalise torture through special legislation.¹¹⁹ Furthermore, the report stated that the Government of Nepal takes torture-related incidents seriously and will investigate the allegations of torture and that the Government of Nepal is seriously considering the recommendations made by the Special Rapporteur regarding necessary legal reforms to stop torture.¹²⁰ Nevertheless, many reports from National Human Rights Institutions (NHRI) and NGOs reported that torture is a serious human rights challenge in Nepal and many facts and incidents relating to torture were included in their reports. The NHRI found that 'the practice of torture during detention is frequent. Many of the accused are at a risk of torture and other forms of ill-treatment.'¹²¹ In addition, 20 reports from many coalitions and organisations were submitted for the UPR process.¹²² The reports stated that torture was systematically practised by police during criminal investigation and lacked investigation against torture and effective redress to the victims of torture.¹²³

117 See Human Rights Council, *Fact Sheet, Universal Periodic Review*, 2008 <<http://www.ohchr.org/EN/HRBodies/UPR/Documents/UPRFactSheetFinal.pdf>>.

118 Ibid.

119 *Universal Periodic Report Nepal Report* UN Doc A/CCPR/C/WG.6/10/NPL/1, 9, para 46.

120 Ibid para 47.

121 National Human Rights Commission, *Nepal ko Biswobyapi Aabadhik Samichya ko Madyabadi Samikya 2070* [Mid-Term Review of Universal Periodic Review 2013] (NHRC 2013) 3<www.nhrc.org> ('NHRC UPR Mid-term Review').

122 OHCHR <<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/NPSession10>>.

123 Human Rights Council, *Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c)*

Many member countries raised concerns about human rights issues in Nepal during the review process and framed many recommendations for the improvement of the human rights situation. The recommendations included various human rights related themes including prevention of torture and other forms of ill-treatment. Fifty-two countries commented and a total of 135 recommendations were made in regards to improving human rights situation in Nepal. Most of the recommendations were accepted by the Government of Nepal.¹²⁴ A total of 18 recommendations were made in relation to the right to freedom from torture, among which four recommendations were accepted relating to criminalising torture. Likewise, the Government of Nepal accepted that the investigation and punishment to the perpetrator based on five recommendations. Similarly, four recommendations, related to establishing independent complaint mechanism against abuse or misuse of power against police behaviour, were considered. Five recommendations asking for the ratification of the OPCAT were rejected by Nepal.

The Government of Nepal voluntarily agreed to accept and support the implementation of the UPR recommendations. After finalisation of the recommendations, the Government of Nepal has prepared an implementation plan of UPR recommendations. The acceptance of most of the recommendations and the planning are a positive start on the part of Nepal, and a way towards accepting the jurisdiction of the newly-established human rights mechanism. In addition, the Government of Nepal stated that Nepal has been strongly upholding the rights set by UN human rights instruments and committed to making the HRC a strong and effective body.¹²⁵ The plan of action for the implementation of the UPR recommendations has identified activities and the responsible/assisting bodies for the implementation of the recommendations. Most notably, for the criminalisation of torture in the statutory law, the Ministry of Home Affairs and Ministry of Federal Affairs and the Constitutional Assembly will be responsible for facilitating the process of formulating and enacting legislation that criminalises torture.¹²⁶ According to the plan of action, the Ministry of Home Affairs and the Ministry of Defence are responsible to continue the mechanisms to conduct thorough and impartial investigations in the cases of torture¹²⁷ and the Ministry of Home Affairs and the OAG are responsible for ending impunity in the issue of torture. The place of action also proposed to revamp, reinforce and review the existing measures, and adopt, as appropriate, further measures to end torture and impunity.¹²⁸

of the annex to Human Rights Council resolution 5/1 UN Doc A/HRC/WG.6/10/NPL/2 (13 October 2010) para 28.

124 Human Rights Council, *Report of Working Group, Universal Periodic Review Nepal*, UN Doc A/HRC/C/17/5 (8 March 2011).

125 Government of Nepal, Office of the Prime Minister and Council of Ministries, (July 2012) *Universal Periodic Review Report: Its Recommendations, Action Plan and Implementation Status*, 13 ('*Government of Nepal UPR Action Plan 2012*').

126 Ibid 84.

127 Ibid 102.

128 Ibid 98.

The action plan itself seems a positive initiative for the implementation of the UPR recommendations in Nepal. However, the planned activities and division of roles to address the recommendations are vague and lack a specific timeframe. As scheduled, the Government of Nepal should submit the second UPR report in 2015, therefore the progress of the UPR recommendations will also be reviewed during the second review process. The Government of Nepal action plan uses two terms ‘on-going’ and ‘due course of time’, but it does not mention any timeframe for the completion of the activities or recommendation, which obviously raise question about their seriousness in implementing the recommendations.

Recently published ‘Nepalese Mid-term Implementation Assessment’ stated that eight out of nine right to freedom from torture related recommendations had not been implemented by the Government of Nepal by the end of 2013.¹²⁹ A recommendation relating to the criminalisation of torture is being partially implemented through prepared drafts of an *Anti-Torture Bill*, *Penal Code* and *Criminal Procedure Code Bill*.¹³⁰ The report was prepared based on inputs from the NHRC and national and international human rights organisations of Nepal. The NHRC has reviewed the implementation status of the UPR recommendations and pointed out that the right to freedom from torture-related recommendations have not been implemented by the government of Nepal. For example, as promised by the Government of Nepal, the mechanism to conduct investigation into torture related cases is yet to be established.¹³¹ These reports indicate that the implementation of the recommendations of UPR is not satisfactory. In March 2014, the HRC showed concerns about the non-implementation of the UPR recommendations as agreed by the Government of Nepal.¹³²

6.2.7 Role of the Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) plays a significant role in substantive issues for the protection and promotion of human rights and provides secretarial services to all UN human rights mechanisms. The OHCHR conducts human rights related activities all over the world through its central office and field offices. In the process, OHCHR field office in Nepal was established in 2005 after an agreement between then Government of the Kingdom of Nepal and the High Commissioner for Human Rights.¹³³

The OHCHR Nepal has conducted human rights monitoring and investigation into violations of human rights, including torture, since its establishment till the end of

129 UPR info, Promoting and Strengthening the Universal Periodic Review, *Nepal Mid-Term Implementation Assessment* (November 2013), <www.upr-info.org> (‘UPR Info, Nepal Mid-term Implementation assessment 2013’).

130 Ibid.

131 NHRC UPR Mid-term Review, above n 121, 17.

132 ‘UN CCPR/C doubts Nepal’s compliance’ *News, The Kathmandu Post*, (Kathmandu) 23 March 2014, <<http://epaper.ekantipur.com/kathmandupost/epaperhome.aspx?issue=2332014>>.

133 United Nations General Assembly, *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* UN Doc A/60/359(16 September 2005) para 1.

2011. The OHCHR Nepal office produced many reports which also dealt with torture and other forms of ill-treatment related cases and recommended the Government of Nepal further investigation and action against perpetrators. The OHCHR published a comprehensive report ‘Nepal Conflict Report’ in 2012. The report covered over 2,500 torture and other forms of ill-treatment related cases during the period of conflict.¹³⁴ The report documented torture and other forms of ill-treatment inflicted by the security forces and the Communist Party of Nepal- Maoist.

Most notably, in 2006, OHCHR Nepal conducted two investigative missions to find out about arbitrary detention, torture, extrajudicial killing and disappearances in the army barracks of Maharajgunj in Kathmandu and Kavre. The investigation found that hundreds of persons were arbitrarily arrested and routinely, severely and systematically tortured during interrogation by army personnel in the Bhairabnath Battalion, Maharajgunj, Kathmandu in 2003.¹³⁵ Medical personnel were also used to inflict torture on the victims.¹³⁶ The OHCHR found secret detention rooms where victims were severely tortured. In the report, the OHCHR recommended conducting a credible, competent, impartial and fully independent investigation to identify the facts about the arrest, detention, torture, and disappearance and finding out involvement of medical personnel on inflicting torture. Furthermore, the report recommended that those potentially implicated directly or through command should be suspended from official duties pending the investigation, and should not be proposed for UN Peacekeeping Missions.¹³⁷

In 2004, the OHCHR also conducted investigation into another incident in Kavre, where a 15- year-old girl was allegedly tortured by the army. The girl later died. The the investigation found out serious human rights violations and recommended that the Nepal Army should cooperate in the investigation and Nepal Police should carry out investigation into torture and death.¹³⁸ As recommended in the reports, the Government of Nepal is yet to implement any of the recommendations.

It seems that there is a lack of political will to investigate incidents of torture and punish the perpetrators. The non-implementation was attributed to the transitional period, saying that the to-be-formed Truth and Reconciliation Commission (TRC) would deal with the issue. The TRC, which was formed years later, is yet to start its work in a fully-fledged manner.

134 See Office of the High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report 2012*, 20 <http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf>.

135 See United Nations Office of High Commissioner for Human Rights (OHCHR) Nepal, *Report of Investigation into Arbitrary Detention, Torture and Disappearances at Maharajgunj RNA Barracks, Kathmandu, in 2003–2004* (May 2006) 45 <[www. http://nepal.ohchr.org/en/Reports.html](http://nepal.ohchr.org/en/Reports.html)> .

136 Ibid 56.

137 Ibid 67.

138 See United Nations Office of High Commissioner for Human Rights (OHCHR) Nepal, *The Torture and Death in Custody of Maina Sunuwar Summary of Concerns* (December 2006) 8 <[www. http://nepal.ohchr.org/en/Reports.html](http://nepal.ohchr.org/en/Reports.html)> .

6.2.8 Vetting systems for security personnel

Vetting systems for police and other security personnel of their involvement in torture or other serious human rights violations is a newly-developed policy in the UN system.¹³⁹ The UN excludes those found guilty of human rights violations from UN peacekeeping missions. The vetting system helps to make the State, security agencies and security personnel accountable and calls on them to respect and protect human rights and establish fair procedures to ensure non-participation of human rights violators in peacekeeping missions.

In the context of Nepal, issues relating to the vetting of security personnel in regards to their involvement in human rights violations started from 2005, when the conflict was at its peak. Nepal Army and Nepal Police were criticised by many national and international human rights organisations for torture, extra-judicial killings, rape and other human rights violations. Initially, Amnesty International had sent a letter to the Secretary General of the UN in March 2005, calling for the vetting of Nepal Army personnel who had considered joining UN Peacekeeping missions. In response to the letter, the UN Department of Peacekeeping Operations (DPKO) wrote to Nepalese authorities.¹⁴⁰ The OHCHR Nepal office and Special Rapporteur on Torture made recommendations that the security forces should be vetted for their suitability for participation in United Nations peacekeeping operations.¹⁴¹

Nepal has been a major contributor of troops to the UN peacekeeping missions in various countries. Currently, Nepal Army's participation in the UN peacekeeping missions totals 3,856 persons.¹⁴² In addition, hundreds of police personnel are also sent to UN missions. Serving with the UN peacekeeping forces is considered to be a good opportunity and a motivating factor for the army and police personnel. After the recommendations and pressures from human rights organisations, including OHCHR, Nepal Army has implemented the policy of vetting system. Those found guilty of human rights violations are disqualified from the UN peacekeeping missions. The Government of Nepal reiterated the need to apply vetting of security personnel through its periodic report.¹⁴³ However, in the absence of any effective law and guidelines for the vetting of security personnel about their involvement in torture or any other human rights violation, and the existence of impunity in cases of torture, the vetting process has not been effective.

139 Opening Statement by Ms Navi Pillay, United National of High Commissioner for Human Rights <www.ohchr.org/EN/NewsEvents>. The statement was found that UN Office has applied to ensure that alleged human rights violators especially at the senior level do not serve in the United Nations.

140 Amnesty International (2005) *Nepal Military assistance contributing to grave human rights violations*, 23 <<http://www.amnesty.org/en/library/asset/ASA31/047/2005>> .

141 Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal* (16 February 2006) E/CN.4/2006/107 para 99; Manfred Nowak, Report by Special Rapporteur 2006, above n 111, para 33 (r).

142 Nepalese Army Website, *Participation of Nepalese Army in UN Missions*, <http://www.nepalarmy.mil.np/na_un.php>.

143 CAT/C Confidential Inquiry: Comments and Observations by Nepal, above n 7, para 126; CCPR/C Second Periodic Report of Nepal 2012, above n 10, para 29.

The Government of Nepal has failed to take accountability to vet the security personnel who committed torture and other serious human rights violations. It might be because of the fear that many security personnel would be identified as violators of right to freedom from torture or any other human rights. Some higher level police and army officials were deported from their duty by the UN missions after they were found involved in the incidents of human rights violations. A senior army officer was repatriated from his UN peacekeeping duties in the Central African Republic in December 2009. He was accused of inflicting torture on a 15-year-old girl who was raped and murdered in 2004.¹⁴⁴ Likewise, a deputy superintendent of police was repatriated from UN peacekeeping duty in Liberia in 2011 after the UN received information about his involvement in a case related to torture during a criminal investigation in Kathmandu in 2009.¹⁴⁵ Most notably, another senior army officer was arrested in the UK on charge of two counts of torture. He was arrested by the UK police under the universal jurisdiction in accordance with the *Criminal Justice Code 1988*.¹⁴⁶ At the time of his arrest, he was on leave from the UN peacekeeping duty in South Sudan and was holidaying in London with his family.

After these incidents, the vetting system for security personnel of their prior records of human rights violations has been criticised by UN and human rights organisations. The DPKO expressed concerns to the Government of Nepal about the vetting system of security personnel.¹⁴⁷ Human rights organisations have raised their voices against the weaknesses of the vetting system of the Government of Nepal and pressurised it to establish an effective vetting system.¹⁴⁸ Regarding the vetting of security personnel, the Supreme Court of Nepal has issued a directive order to the Government of Nepal to introduce an appropriate and comprehensive vetting system as part of the

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- 144 See Amnesty International (2009) *Nepal: Bar human rights violators from UN peacekeeping missions* < www.amnesty.org/en/news-and-updates/nepal-must-bar-human-rights-violators-un-peacekeeping-missions-20091218>; Mandira Sharma, *Strengthening the rule of Law through the United Nations Security Council*, Working Paper, 8-9 December 2011, Australian Government's Australian Civil-Military Centre and Australian National University, Centre for International Governance and Justice, 7 ('Sharma, *Strengthening the Rule of Law through UN Security Council 2011*').
- 145 Sharma, *Strengthening the Rule of Law through UN Security Council 2011*, above n 144, 7.
- 146 'Nepalese Torture Suspected Held by Metropolitan Police', *News, BBC World News*, (London) 3 January 2013, <<http://www.bbc.co.uk/news/world-20900289>>; The Guardian, 'UK defends decision to prosecute Nepalese colonel accused of torture' Robert Booth, Monday 7 January 2013 < <http://www.theguardian.com/law/2013/jan/06/uk-defends-prosecute-nepalese-colonel>>.
- 147 Phanindra Dahal, 'Col Lama's Detention in UK: UN to Question Nepal Peacekeepers' Vetting Basis', *The Kathmandu Post*, (Kathmandu) 5 January 2013, <<http://www.ekantipur.com/the-kathmandu-post/2013/01/05/top-story/col-lamas-detention-in-uk--un-to-question-nepal-peacekeepers-vetting-basis/243734.html>>.
- 148 Trial, 'concerned over Nepal reaction to UK torture arrest' (10 January 2013) www.trial-ch.org; Advocacy Forum, REDRESS, Association of Prevention of Torture, *Submission to the Human Rights Committee ahead of its examination of Nepal's second Periodic Report under the International Covenant on Civil and Political Rights*, (February 2014) 13. International Commission of Jurist (February 2014) *Alternative Report of the International Commission of Jurist to the UN Human Rights Committee on the Combined Second, Third and Fourth Periodic Reports of Nepal Under International Covenant on Civil and Political Rights*, 10.

transitional justice.¹⁴⁹ As stated, the Government of Nepal also repeated its commitment to establish the vetting system.¹⁵⁰ Nevertheless, the fact about the repatriated officials from UN peacekeeping missions shows that either there is no effective vetting system or there is a serious negligence in the vetting process in Nepal. A report of International Commission of Jurist stated that ‘to date, neither the Nepalese Army nor the Nepalese Police has introduced a system of vetting consistent with the international principles’.¹⁵¹

Although the criticism, the vetting system seems to be an effective tool to prevent torture and other forms of human rights violations in Nepal. It creates high levels of awareness and a kind of fear among the security personnel, as it is linked with individual’s personal career and wellbeing. Furthermore, the system helps to strengthen the rule of law and protect rights to freedom from torture. The system also enhances the good image of the security agencies at the domestic and international level. Obviously, there are many police and army personnel who respect human rights and follow the rule of law. The system thus supports such personnel and serves as morale boosting factor. Therefore a clear and accountable vetting system is required which should be prepared after wider consultation with human rights experts and civil society organisations.

6.3 Reasons for drawbacks in the fulfilment of obligations

The Government of Nepal has demonstrated its commitment to the protection and promotion of the right to freedom from torture through accessing the CAT and ICCPR without reservation and through reporting to the UN. However, the Government of Nepal has been less enthusiastic about fulfilling reporting obligations towards the UN human rights mechanisms. The absence of international monitoring mechanisms for torture and other forms of ill-treatment, or delays in reporting to the mechanisms creates challenges to monitoring of the implementation of the CAT and other instruments in Nepal. The reasons for the non-reporting, delays in reporting and complex reporting could be a result of various factors such as a lack of political will to respect human rights treaty obligations, other urgent priorities and a lack of resources and coordination among concerned administrative organisations. Obviously, it raises reasonable assumptions that either the Government of Nepal neglects the matter or it has failed to make significant progress regarding the implementation of the provisions of the CAT or any other provisions to report to the mechanisms. The major drawbacks are detailed in the next section.

149 *Ranjan Singh and Dipendra Jha v Prime Minister Office and Others* (2012) Supreme Court of Nepal, Case Number 067-W0-1198, decision date 2069 Shrawan 28 [August 12, 2012].

150 CCPR/C Second Periodic Report of Nepal 2012, above n 7, para 29.

151 See International Commission of Jurist (February 2014) *Alternative Report of the International Commission of Jurist to the UN Human Rights Committee on the Combined Second, Third and Fourth Periodic Reports of Nepal Under International Covenant on Civil and Political Rights*, 10-11.

6.3.1 Political context and unwillingness to fulfil reporting obligations

The GON has several times cited the political situation of Nepal as a direct or indirect cause or challenge for the non-implementation of the provision of the right to freedom from torture and fulfilment of the reporting obligations. For example, the second periodic report stated that ‘the violent conflict damaged infrastructure, around 1,100 people were killed and more than 2,000 were tortured. To address the situation, the government took measures like so-called anti-terrorism related laws’.¹⁵² The report indirectly accepted the necessity of draconian laws. Likewise, another report noted that the country has been in the process of a profound socio-economic and political transformation through the promulgation of a new democratic constitution, which it said was the main focus of the country.¹⁵³ The report reflects that the national priority is far from implementing the provisions of the right to freedom from torture and fulfilling the reporting obligations.

As stated in the reports submitted by the Government of Nepal, Nepal has been in transition for many years, after the People’s Movement in 1990. The newly-established democratic government has become a party to the CAT, and the government was busy developing democratic values and principles such as holding parliamentary and local elections. The initial report stated that after the political change, the Government of Nepal showed its commitment to introduce new laws to prohibit torture and provide compensation to the victims.¹⁵⁴ Incomplete legislation, the *Compensation Relating to Torture Act 1996*, was promulgated before the violent conflict in Nepal. During this period of conflict, the Government introduced the tyrannical law *Terrorist and Destructive (Control and Punishment) Act, 2004*. The Act allowed preventive detention for periods of up to one year.¹⁵⁵ The Government of Nepal stated that as a response to the destructive activities of the Maoists, the government took such a measure.¹⁵⁶ A CPA was later signed in 2006 that showed the commitment to stop torture and end impunity. The first Constitutional Assembly (CA) election was held in 2008. The CA, primarily elected for two years, failed to promulgate a new constitution and its tenure, after repeated term extensions, finally ended. A second CA election was successfully conducted in November 2013. The constitution-making and peace processes are yet to be completed. To some extent, it is true that the political situation for the last one decade has not favoured Nepal to focus on other agenda as it has been struggling to draw up a new constitution making and conclude the peace process. Likewise, sometimes it is ascribed as the process of socio-political transformation which affects legal reforms and takes time to get noticed and can be presented in the report. Nevertheless, the political situation should not be an excuse for failure of the

152 CAT/C Second Periodic Report of Nepal 2004, above n 7, para 17-21.

153 CAT/C Confidential Inquiry Report 2011, above n 7, para 112.

154 CAT/C Initial Report of Nepal 1993, above n 7, para 1.

155 *Terrorist and Disruptive (Prevention and Punishment) Act 2002*. After the success of the people’s movement 2006, newly formed the Government of Nepal repealed the Act. The Act was promulgated during the period of conflict to suppress Maoist activities. The law allowed preventive detention up to twelve months.

156 CAT/C Second Periodic Report of Nepal 2004, above n 7, para 21.

Government of Nepal to fulfil the state's reporting obligations and protect the right to freedom from torture.

Former High Commissioner for Human Rights, Ms. Louise Arbour stated that the Government of Nepal accepts human rights treaties formally but fails to implement them either due to the lack of capacity or the lack of political will.¹⁵⁷ Research conducted in 20 countries including Australia and India found that one reason for non-submission and late submission of reports is the lack of political will.¹⁵⁸ It is clear that there is a lack of will by political and senior level officials to fulfil the commitment in Nepal. The main reasons for delay in reporting or in non-submission of reports could be either the Government of Nepal's reluctance to share non-progress of the implementation of the provisions, the conclusions and recommendations of the committees; or its negligence to fulfil the reporting obligations, or both.

6.3.2 Content of the reports

The CCPR/C has explained that the State report should not focus only on relevant laws and norms but it should also include court decisions, facts and actual implementation and enjoyment of the rights.¹⁵⁹ On the contrary, most of the reports have highlighted the constitutional and positive legal provisions that guarantee the right to freedom from torture and other forms of ill-treatment.¹⁶⁰ Provisions of *Constitution* and legal statutes are ideal but the reports have not covered any practical level information regarding torture and other forms of ill-treatment, especially in police custody during criminal investigation. Similarly, reports have found some positive decisions of the court regarding Public Interest Litigation and Torture Compensation. Nevertheless, the reports do not cover the implementation status of the court decisions and other controversial decisions such as the acceptance of confessions obtained under torture. The report or response simply replied or denied the concerned allegation or fact without any factual evidence or data.

6.3.3 Capacities and recourse for reporting processes

The Government of Nepal does not have any administrative department or focal unit to deal with reporting obligations. The administrative unit or focal person is a key for the report preparation, communication, follow-up and other necessary arrangement for the reporting process. The Government of Nepal is yet to establish a department or a unit and no organisation has been designated to deal with the reporting related issues and the implementation of the conclusions and recommendations of the CAT/C. Therefore different organisations prepared and submitted the CAT/C reports. The international law department of the Ministry of Law and Justice is responsible for

157 Michael O'Flaherty 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 *Human Rights Law Review* 321.

158 Christof Heyns and Prans Viloen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 508.

159 Human Rights Committee, *General Comment No 2, Reporting Guideline* 80th sess, UN Doc CCPR/C/66/GUI (29 September 1999) para 3.

160 CCPR/C Second Periodic Report of Nepal 2012, above n 7, paras 118-119; CAT/C Confidential Inquiry Report 2011, above n 7, para 114; CAT/C Second Periodic Report of Nepal 2004, above n 7, paras 23-24; CAT/C Initial Report of Nepal 1993, above n 7, para 1.

providing opinions to the Government of Nepal regarding the ratification of and accession to the treaties and the monitoring of obligations under international treaties.¹⁶¹ However, the initial report was prepared and submitted by the Ministry of Foreign Affairs on behalf of the Council of Ministers. The second periodic report was prepared by a committee under the leadership of Ministry of Home Affairs. The Committee was formed on a temporary basis to prepare the second periodic report. After the completion of the task, the committee was dissolved. In the absence of a reporting unit and resources, the reporting process fails to meet the reporting timeframe and follow the required format or guidance. For example, the initial and periodic reports did not follow the given reporting guidelines, were not prepared with wider consultation with the concerned persons and organisations and were not submitted on time. The CAT/C also pointed out about the capacity of data collection for reporting purpose¹⁶² and the Government of Nepal's failure to follow the reporting guidelines.¹⁶³ The High Commissioner for Human Rights noted that when States depend on ad hoc or temporary types of report preparation committee, the capacity gaps will be exacerbated.¹⁶⁴ There is lack of data to monitor the implementation of the CAT, and its conclusions and recommendations in Nepal. Reporting is a collaborative effort of various governmental agencies such as the Nepal Police, Nepal Army, ministries, judiciary, parliament and other concerned agencies. The coordination is lacking among the concerned governmental agencies while preparing the reports. Scarcity of resources could be another issue. Since the government should conduct consultations and get inputs from wider-level stakeholders, resources are required, and generally the government does not allocate the necessary resources to enable such a consultation process.

In the process of UPR reporting, the Prime Minister's Office took responsibility for reporting, representing and implementing the plan. As per the UPR implementation plan of action, the Government of Nepal has identified the Ministry of Home Affairs as a major responsible body to implement torture related recommendations.¹⁶⁵ However, the ministry has not been authorised formally to prepare a report and submit it to the UN mechanisms.

6.3.4 Reporting deadlines

Reporting to the CAT/C and other mechanisms is a tool for monitoring the situation of the right to freedom from torture and timely reporting is an important aspect to monitor trends of torture and bring about reforms for the prohibition of torture. Generally, the Government of Nepal crosses the due date except for the UPR report. The UPR report was submitted on time and representation of a high level delegation

161 Government of Nepal UPR Action Plan 2012, above n 125, 13.

162 CAT/C Concluding Observation 1994, above n 20, para 143.

163 CAT/C Concluding Observation 1994, above n 20, para 139; CAT/C Conclusion and Observations, above n 9, para 2.

164 See Navanethem Pillay, *Strengthening the United Nations Treaty Body System, A report by the United Nations High Commissioner for Human Rights* (June 2012), United Nations Human Rights Office of the High Commissioner 25 (*'Pillay, Report for Strengthening Treaty Body System 2012'*).

165 Government of Nepal UPR Action Plan 2012, above n 125, 101-103.

from Nepal was a positive sign for respecting human rights obligations under the UN human rights monitoring mechanisms.

Nevertheless, remaining reports under the CAT and the ICCPR have not been submitted on time. Under the CAT, Nepal failed to meet its two due dates in 2008 and 2012. The new procedure of the CAT/C to release a lists of issues a year before the submission due date is based on the belief that it could help State parties to focus on preparing reports and strengthening the capacity of reporting obligations in a timely and effective manner. In this context, the CAT/C released a list of issues on 17 February 2011. Again, the Government of Nepal failed to meet the due date in 2012. The new due date for the fifth report has been given for 2016.

Nepal submitted its second periodic report as a combined report of second, third and fourth reports after much delay in 2012 under the ICCPR. The report has not explained the reasons for the delay. The reasons could be either that the Government of Nepal gave less priority to the report or there was some lack of knowledge and coordination among government agencies to collect necessary information for preparing the report.

6.3.5 Inputs from NHRC and other concerned organisations

In the process of preparing reports, generally the concerned ministry of the Government of Nepal prepares a draft report. In very few instances, representatives of the human rights community, lawyers and other civil society groups are invited to provide inputs on the draft report. The NHRC also provides inputs on the draft report if the government makes a request for the same. However, many periodic reports and other reports have been submitted to the mechanisms without consulting and seeking comments and suggestions from the NHRC.¹⁶⁶ On the other hand, there is a gap between human rights NGOs and the Government of Nepal. In the second periodic report of the ICCPR, NGOs provided inputs on the draft report but the suggestions or inputs were not included in the State report. The reason might be either that the Government of Nepal refused to incorporate the feedback in the report or the NGOs failed to provide useful inputs. NGOs provide information directly to the CAT/C, CCPR/C and other mechanisms. The reporting trends show that there have been some differences between the Government of Nepal and NGO communities – the government always found positive initiatives or tried to bypass negative facts and figures, whereas NGOs were guided by the facts and figures of violations rather than positive initiatives.

6.3.6 Lack of awareness and weak internal monitoring systems

Very few people, human rights activists, lawyers, judges and government officials and officials of the Ministry of Law and Justice who deal with the CAT or human rights treaties are familiar with the treaty obligation and State's responsibilities. Most of the political leaders, governmental officials, security personnel, even lawyers and judges

166 CCPR/C Second Periodic Report of Nepal 2012, above n 7, para 5. The Report Preparation Committee organised some consultation meetings with human rights activists and civil society organisation on draft report and got inputs from NHRC on the draft report to CCPR/C. However, the Government of Nepal did not get any inputs from NHRC in the Comments and response on the Confidential Inquiry Report of the CAT/C.

are not familiar with the State's obligations. Similarly, journalists pay very little attention to treaty obligations and implementation of the treaty provisions and conclusion and recommendations of the mechanisms. Media covers news only if a concerned organisation or a person who is involved in human rights advocacy and reporting organises a press conference. The dissemination of the conclusions and recommendations of the CAT/C, CCPR/C, UPR outcomes and the Special Rapporteur is poor. The dissemination should reach the parliamentary members through HR committee and other ministries, but such practices have hardly been seen in Nepal.

6.4 Monitoring and follow-up from UN mechanisms

The success of the human rights treaty bodies and thematic mechanisms depends largely on the implementation of the treaty provisions and conclusions and recommendations at the domestic level. The conclusions and recommendations are drawn on the basis of assessment and review of the State reports, reports from NGOs and individuals, visits and consultations with concerned persons and institutions by the treaty bodies and thematic mechanisms, which are also linked to the monitoring and supervision of the UN human rights mechanisms.

Dynamic reporting and follow-up processes ensure a positive impact on the State for the enjoyment of the rights to freedom from torture. Nevertheless, the treaty body mechanisms have several challenges - such as 84 per cent of member States do not report on time and the backlog of reports in treaty bodies is huge.¹⁶⁷ As noted above, the CAT/C are part-time volunteer and overloaded; overlapping mandate of mechanisms; The members of the committee, who work as part-time volunteers are overloaded in the CAT/C.¹⁶⁸ The treaty bodies may have overlap with the provisions and duplication of work.¹⁶⁹ Another issue that has also been raised is that a member State that ratifies many human rights treaties has the pressure to report to many committees or mechanisms.¹⁷⁰ Furthermore, the CAT/C is more diverse - experts come from different backgrounds such as medicine, psychology, political science and journalism.¹⁷¹ Common complaints include that the committee members do not have the necessary levels of expertise to grasp complicated legal issues.¹⁷² There is no equitable participation in the committee, four from the Western group, and two each from Eastern European and Latin American groups and one each from the Asian and African groups.¹⁷³ The UN Secretary General provides staff from its secretariat for the committee.¹⁷⁴

167 See Pillay, Report for Strengthening Treaty Body System 2012, above n 164, 9.

168 See Michael O'Flaherty and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A critique of the Concept Paper on the High Commissioner's Proposal for Unified Standing Treaty Body' (2007) 7 *Human Rights Law Review* 143.

169 See Michael O'Flaherty, 'Reform of the UN Human Rights System: Locating and Dublin Statement' (2010) 10 *Human Rights Law Review* 321.

170 See Walter Kalin, 'Examination of State Report' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press, 2012) 18.

171 See Nowak and MacArthur, above n 14, 597.

172 See Tobias Kelly, 'The UN Committee Against Torture, above n 3, 31.

173 See Nowak and MacArthur, above n 14, 598.

174 *Ibid*, 605.

Research shows that 57.09 per cent countries do not submit their report to the CAT/C. Out of 269 reports, 169 reports were not submitted to the CAT/C from 1996-2006. Only 6 per cent of reports were submitted on time.¹⁷⁵ According to the annual report of the CAT/C, a total of 169 reports, including 26 initial reports, were overdue on 31 May 2013 and some had submitted their initial and periodic report after quite a delay.¹⁷⁶ Likewise, the Special Rapporteur on Torture conducts direct monitoring of the right to freedom from torture and plays a vital role in promoting and protecting the right to freedom from torture and other forms of ill-treatment. However, the main weakness in the mechanism of the Special Rapporteur is the absence of effective follow-up procedure to submit report and communications.¹⁷⁷ This shows that the UN human rights mechanisms have many weakness and challenges in relation to monitoring and supervising the member countries.

Although these above noted problems exist in the mechanisms, State parties should not be excused for failing to fulfil their commitments. Moreover, it is a duty of a member State to strengthen the capacity and efficiency of the mechanisms for the betterment of the protection of the right to freedom from torture and other forms of ill-treatment.

As stated above, despite the rejection of the confidential inquiry report of the CAT/C, the report put pressure on the Government of Nepal to respond to the allegations of continuous and systematic practice of torture in Nepal; vetting of the human rights track record of security personnel seems an effective tool to make the concerned persons and institutions more sensitive towards protecting and promoting rights to freedom from torture; the UPR report has been taken into account immediately in Nepal; and another positive initiative is that the government has decided to provide compensation to the victims following the decision of the CCPR/C on individual communication.

Nevertheless, many issues and challenges of the CAT/C and other human rights mechanisms are seen in relation to the monitoring and supervision of the right to freedom from torture and other forms of ill-treatment.

6.4.1 Monitoring and follow-up in the context of Nepal

The CAT/C has developed follow-up mechanisms under the reporting procedure. Every session of the committee discusses the reporting status of member States and through sending reminder letters to the concerned State for the submission of the periodic report.¹⁷⁸ For the implementation of the CAT/C's conclusion and recommendations, at least one Rapporteur will be appointed for the State party,¹⁷⁹ the

175 See Lawrence J LeBlanc, Ada Huibregste and Timothy Meister, 'Compliance with Reporting Requirements of Human Rights Conventions' (2010) 14 *International Journal of Human Rights* 5, 799.

176 Committee against Torture (CAT/C) *Annual Report 2013*, UN Doc A/68/44, 272-280.

177 See Subedi, Protection of Human rights through Special Rapporteur 2011, above n 106, 216.

178 Committee against Torture (CAT/C), Rules of Procedural UN Doc CAT/C/3/Rev.6 (13 August 2013) rule 67 (1).

179 Ibid rule 72 (1).

follow-up Rapporteur assess the information with the country representatives and discusses it in the upcoming session.¹⁸⁰ Despite the initiatives taken by the committee, as noted above, CAT/C has many internal problems that directly affect the follow-up of the periodic report, assessment of the reports on time, and following up on the conclusions and recommendations. Therefore, the issue of reforming the treaty body mechanisms has been raised. The inter-committee meeting of the treaty bodies has acknowledged the problem in follow-up for treaty body recommendations and agreed to establish a dedicated unit on the follow-up under the OHCHR. The treaty bodies agreed to conduct a study to identify the problems of the implementation and develop indicators for monitoring.¹⁸¹

In the context of Nepal, the monitoring of the implementation of the CAT's provisions and follow-up of the implementation of conclusions and recommendations and reporting time under the CAT/C is not encouraging. For example, in 1994, after examining the initial report, the CAT/C recommended an additional report within a year covering full information and follow-up guidelines. However, the Government of Nepal never submitted any additional report based on those recommendations. In 1994, the Government of Nepal submitted a general report called 'Core Document forming parts of State Parties Nepal'.¹⁸² The report covered general, political and State mechanisms. It did not cover full information based on the CAT as requested in the additional report from the Committee. The CAT/C also did not follow-up on the additional report required from Nepal. Likewise, Nepal has submitted two periodic reports including an initial report to the CAT/C and CCPR/C respectively in 1993, 2004, 1994 and 2012.

As per the treaty obligations, at least six reports including an initial report should have been submitted in the 23 years following accession to the instruments. As noted, Nepal failed to fulfil the treaty obligations which can also be considered as the reason for the weakness in the monitoring. Most of the substantive issues of the conclusions and recommendations of the CAT/C, Special Rapporteur and the CCPR/C are yet to be implemented in Nepal.

The CAT/C sent two follow-up letters to Nepal on April 13, 2007, mentioning the conclusions and recommendations of second, third and fourth periodic reports. In response to the letter, the Government of Nepal replied with clarification on June 1, 2008. The CAT/C again sent another letter to the Government of Nepal reminding to address the remaining issues on May 15, 2008. However, the Government of Nepal is yet to respond to the letter.

Following up of the reporting by the concerned State is another important aspect. The CAT/C and CCPR/C have introduced a procedure in which specific issues are raised before submission of the periodic report. It provides some issues for reporting

180 Ibid rule 72 (2).

181 See Suzanne Egan, 'Strengthening the United Nations Human Rights Treaty Body System' (2013) 13 (2) *Human Rights Law Review* 209-243.

182 General, *Core Document forming part of the reports of State Party Nepal*, UN Doc HRI/CORE/1/Add.42 (14 June 1994).

that could be easier to report from the concerned country, which can be taken another follow-up procedure for periodic report. The CAT/C sent a list of issues to Nepal in February 2011.¹⁸³ However, the Government of Nepal is yet to submit the periodic report to the CAT/C addressing these concerns.

The Special Rapporteur also has internal problems. Former Special Rapporteur stated that one of the major weaknesses of the Special Rapporteur is the absence of effective follow-up procedure for submitted reports.¹⁸⁴ It is also linked to the resources of the mechanism; Special Rapporteur works on voluntary basis with limited resources,¹⁸⁵ which hampers the follow-up process.

The Special Rapporteur on torture has enlisted recommendations for the prohibition of torture in Nepal based after a visit in 2005.¹⁸⁶ The Rapporteur prepared four follow-up reports sent to Nepal for response and feedback in the updated report from 2008 to 2012. The Government of Nepal responded and updated the situation on the right to freedom from torture in Nepal in 2008.¹⁸⁷ Following this, the Government of Nepal is yet to respond to the Special Rapporteur's follow-up reports. In this situation, the Special Rapporteur could take other initiatives to follow-up the recommendation such as conducting a follow-up visit or holding a meeting with the representative of Nepal. However, this has not yet occurred.

6.4.2 Vague terms and deviation from the main issues

The conclusions and recommendations of the treaty body mechanisms are of mixed nature. Some of the recommendations are useful but some of them are too general in nature.¹⁸⁸ Therefore, the High Commissioner for Human Rights recommends more focus on concluding observations of the treaty bodies, containing concrete and achievable recommendations.¹⁸⁹ Some conclusions and recommendations of the CAT/C seem too general with vague terms on Nepalese reports. For example, the CAT/C expressed concern and made recommendation to condemn the practice of torture and called for taking effective measures to prevent acts of torture in any territory under its jurisdiction and take all measures, as appropriate, to protect all members of society from the acts of torture.¹⁹⁰ The recommendation seems vague. It does not have clear instruction and process. What is the process of condemnation of the practice of torture? The *Interim Constitution of Nepal* prohibits torture, but is the provision sufficient or not? The Government of Nepal condemns the practice of torture in its periodic and other reports, but is that sufficient? As a response to the recommendation, the Government of Nepal replied that the democratic government does not condone torture of any kind and that the law of the land and policy of the State completely bans the act of torture in Nepal.¹⁹¹

183 CAT/C list of issues 2011, above n 50.

184 See Subedi, Protection of Human rights through Special Rapporteur 2011, above n 106, 216.

185 Ibid 217.

186 Manfred Nowak, Special Rapporteur Report 2006, above n 108.

187 Manfred Nowak, Special Rapporteur on Torture Follow-up Report 2008, above n 43.

188 See Kalin, Examination of State Report, above n 170, 63.

189 See Pillay, Report for Strengthening Treaty Body System 2012, above n 164, 60.

190 CAT/C Conclusion and Recommendations 2007, above n 9, para 13.

191 See, Nepal's Comment to CAT/C 2008, above n 56, para 2.

Moreover, many concerns and recommendations are not related to the hard core issues of the right to freedom from torture or the prevention of torture. For example, CAT/C recommended that the Government of Nepal as response of second periodic report of Nepal in 2007 consider Code of Conduct for NGOs in line with international human rights law.¹⁹² Similarly, it recommended that the State party should reinforce international cooperation mechanisms to fight against trafficking.¹⁹³ These types of recommendations could be covered by the CCPR/C or any other mechanism, which is related to the subject matter and/or relevant to the CAT.

6.4.3 Overlapping mandate of the mechanisms and repetition

Overlapping of mandate among different mechanisms is another problem which might create confusion to the State party from the implementation point of view. The mechanisms, especially CAT/C, Special Rapporteur, CCPR/C and UPR, simultaneously deal with issues of torture and other forms of ill-treatment from the point of view of their own working style and procedures. These mechanisms raise similar issues, such as in recommendations related to criminalising torture and investigation.¹⁹⁴

6.4.4 Main source from NGOs and issue of verification

The source of information is vital to making the report more credible and impartial. Receiving information from government or any non-governmental sector will be valuable for finding out the situation, but it needs to be verified from other various parties/aspects. It is good to receive information where NGOs are active to report the situation, but if any country does not have active NGOs, information gathering may be difficult.¹⁹⁵ The CAT/C, CCPR/C, Special Rapporteur and other mechanisms mainly receive information or communication about Nepal through national and international human rights NGOs. It is important first to get information about the situation of torture and other forms of ill-treatment; however, the information needs to be crosschecked with the government or any other sources. It is one of the toughest tasks of the committees or mechanisms. The Government of Nepal has raised questions regarding the credibility of the sources of some reports of the confidential inquiry reports the CAT/C and stated that the reports which are taken into consideration should not constitute part of any credible procedure in order to maintain independence.¹⁹⁶ To address the response from Nepal, the CAT/C requires verification of the information and reliability with more sources. Generally, the CAT/C and Special Rapporteur send reports to request information from the Government of Nepal. However, the

192 See CAT/C Conclusion and Recommendations 2007, above n 9, para 23.

193 Ibid para 32.

194 See, eg, CAT/C Conclusion and Recommendations 2007, above n 9, para 12; CCPR/C Concluding Observations of the second periodic report of Nepal 2014' above n 10, para 5 (a); Juan E. Mendez, Special Rapporteur Report 2012, above n 72, 211; Human Rights Council, *Report of the Working Group on the Universal Periodic Review Nepal*, UN Doc A/HRC/C/17/5 (8 March 2011) para 106.3.

195 See Kalin, Examination of State Report, above n 170, 62.

196 See CAT/C Confidential Inquiry Report 2011, above n 7, para 113.

Government of Nepal rarely responds to these requests. Verification measures are needed.

6.4.5 Focus on high level political issues in UPR

The new peer review mechanism of the HRC seems effective in the context of Nepal. The Government of Nepal has given priority to report preparations and implementation strategies of the UPR recommendations. It is still early to evaluate the effectiveness of the UPR recommendation. The process of monitoring the implementation of Nepalese commitment to the UPR will be evaluated from the second UPR report in 2015. However, the UPR recommendations seem to be high level political and constitutional issues rather than practical issues and/or interpretation of any particular treaty or convention. The UPR process does not have standard conclusions and recommendations as in the outcome document.¹⁹⁷ Nepalese UPR outcome document is not specific in its conclusions.

A report covering mid-term review of the implementation status of UPR recommendations in Nepal stated that only one recommendation had been partially implemented out of 18 recommendations related to the right to freedom from torture in Nepal.¹⁹⁸ Follow-up or monitoring of the UPR recommendations is essential.

6.5 Conclusion

Under the CAT/C and CCPR/C, Nepal has reporting obligations. Nepal has submitted its initial reports, one periodic report each to the CAT/C, CCPR/C and UPR and facilitated the visit of Special Rapporteur on Torture in Nepal during the 23 years since its accession to the CAT and the ICCPR. In this process, preparation and submission of periodic reports, assessment of the reports under the CAT/C and other mechanisms, providing conclusions and recommendations and implementation of the recommendations are the key procedural aspects for the implementation of the provisions of the CAT and other human rights instruments. Nepal has gone through this process and been involved in a constructive dialogue with treaty bodies and thematic mechanisms. On the basis of the reports, the CAT/C and other mechanisms have pointed out some issues and recommended legislative, administrative and other practical reforms for the protection and promotion of the right to freedom from torture in Nepal. The reporting process has helped Nepal to assess itself in terms of the commitments and situation of the right to freedom from torture and other forms of ill-treatment. However, the current reporting status is not encouraging. The periodic reports have either not been submitted or are submitted after extensive delays. The GON approaches the reporting obligations as a mere formality. Many issues raised by CAT/C, the Special Rapporteur and other mechanisms have not been responded to or implemented. Most of the reports do not follow the reporting guidelines of the CAT/C and CCPR/C. The information in the reports mainly covers the legislative framework rather than the practical aspects or factual events.

197 See Nigel S. Rodley, 'UN Treaty Bodies and Human Rights Council' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press, 2012) 328.

198 See UPR Info, Nepal Mid-term Implementation assessment 2013, above n 121.

Although, the recommendations relating to vetting system of security personnel has created some positive impacts on the incidence of torture in the criminal justice system. There are also some shortcomings in the UN oversight mechanisms; in particular, the follow-up of the implementation of conclusions and recommendations and fulfilling the obligations. The UN monitoring is less effective in influencing the implementation of and follow-up to the reporting process. Therefore, key commentators have emphasised the heavy work load on State parties in fulfilling the reporting obligations to the UN treaty mechanisms, while doubting that reporting alone is enough to impact on the domestic incidence of torture. These commentators have proposed reforms to adopt a coordinated approach to reporting and monitoring process and to strengthen the treaty body system.¹⁹⁹

Nepalese situation shows that in most of the issues, the Government of Nepal is positive about implementing the provisions of the CAT and conclusions and recommendations of the UN mechanisms. The *Constitution* guarantees these rights as fundamental rights and defines torture as a punishable crime, and the Government of Nepal has repeated its commitment to criminalise it. However, torture is prevalent in many sectors including criminal investigation. As discussed in chapter IV, social, economic, cultural, traditional mind set, corruption, and other institutional factors are also linked to the prevalence of torture and other forms of ill-treatment. Therefore, the UN mechanisms should consider about preventing torture holistically, and consider such approaches as capacity building for Nepalese agencies in relation to the implementation of CAT. Similarly, Nepal should accept the individual complaint mechanisms and ratify the OPCAT in order to respect and protect individual rights.

At present, it is hard to identify exactly which area or unit in the Nepalese government is responsible at an official level for gathering, co-ordinating and transmitting human rights reporting to the UN, including under the CAT. An identified unit with a clear mandate for fulfilling reporting requirements under the CAT is the precondition for the fulfilment of the treaty obligations in Nepal. The unit would maintain reporting timelines, communicate with the CAT/C, CCPR/C and other mechanisms and coordinate with other government agencies and NGOs. Therefore, an official unit tasked with treaty reporting including the CAT should be established. Furthermore, the Government of Nepal does not have any central data base tracking implementation of the right to freedom from torture at a practical level. Thus, a central data base system regarding the right to freedom from torture needs to be established that will ease the process of preparing periodic reports and make it more systematic so that they could

199 See, eg, Pillay, Report for Strengthening Treaty Body System 2012, above n 164, 10; John Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) LVIII *Netherlands International Law Review* 331. Chris Ingelse, 'The Committee Against Torture: One Step Forward One Step Back' (2000) 18 *Netherlands Quarterly of Human Rights* 3, 325; Suzanne Egan, 'Strengthening the United Nations Treaty Body System, (2013) 13 (2) *Human Rights Law Review* 242; Françoise J. Hamson, An Overview of Reform of the UN Human Rights Machinery (2007) 7 (1) *Human Rights Law Review* 7-27. Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 522-525.

be submitted on time. The unit would be obliged to gather CAT-related data from all Nepalese government agencies and NGOs per the timeframes and standards. That data will include reporting on the progress against conclusions and recommendations of the CAT/C and other mechanisms. The unit would also communicate with the executive arm of the government.

CHAPTER-VII: SUMMARY, CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This study attempts to address the main research question - how effectively does the Government of Nepal protect the right to freedom from torture and other forms of ill-treatment and implementation of the CAT in the context of Nepal. It does so through examining legislative measures, the situation of torture and other forms of ill-treatment, judicial and institutional initiatives and the State's reporting obligations towards the CAT. When compared to any other studies in the field of international human rights law, this study is more comprehensive because it covers major dimensions of the CAT and its implications at the individual, national and international levels, focusing particularly on Nepal, a least developed country. In addition, the study analysed the State's reporting obligations and monitoring status from concerned UN mechanisms along with the critical review of the CAT during 27 years of its implementation. This study identified the gaps in the laws, judicial practices, State reporting obligations and underlying causes of the prevalence of torture in Nepal. It recommends a practical agenda for the prevention of torture and the protection of the right to freedom from torture for policy makers, parliamentarians, members of the judiciary, government officials, concerned persons of the UN human rights mechanisms and human rights activists for further intervention in Nepal.

This chapter is divided into four sub-headings. Following the introduction, the summary of the major findings of the study is included in the second subheading. This study's research contribution is included under the third and the final sub-heading recommends for law and policy level change and interventions for the prevention of torture and other forms of ill-treatment; and areas of further research are noted.

7.2 Summary of Major Findings

The overall objective of the study was to examine the legislative measures and effectiveness of judicial and other institutional measures for the implementation status of the right to freedom from torture especially the situation of the respect, protection and fulfilment of the State's obligations under the CAT. The legislative review was addressed through a comprehensive review of Nepalese legal provisions in line with the CAT and other international human rights instruments in chapter III, which covered the strength of Nepalese legal provisions, contradictory provisions and gaps in legislative measures. Judicial and administrative interventions were critically reviewed and analysed in chapter V. In that chapter, the study examined trends of jurisprudence of Nepal for the protection of the right to freedom from torture focused on torture compensation cases, Judicial intervention, and the use of the exclusionary norm of confessions obtained through torture in Nepal. Chapter VI met another objective relating to Nepalese reporting obligations towards the CAT/C and other human rights mechanisms; and further, the role of those monitoring mechanisms was reviewed. In addition, chapter II covered an overview of the rights to freedom from

torture focusing on the period after the CAT entered into force in 1987. The study analysed challenges for the implementation of the CAT in practice, especially in the context of fighting against terrorism, addressing other issues mainly in global south and the changed political context that emerged after the end of the Cold War. The overall situation of torture and other forms of ill-treatment in Nepal was analysed in chapter IV. Presentations, discussions and analyses of the chapters meet the expected objectives of the study. Here, a brief description of the major findings of the study that lay out the strategic and long term consequences for the promulgation of laws and policies for practical interventions in Nepal, as well as for monitoring mechanisms at the international level.

7.2.1 Inadequate and incompatible Laws

The *Interim Constitution of Nepal 2007* adopts the principles of the CAT and guarantees the right to freedom from torture and other forms of ill-treatment as a fundamental right. The *Nepal Treaty Act 1990* defines the provision of the treaties to which Nepal is a party are being the same as under Nepalese law.¹ The *Compensation Relating to Torture Act 1996* (CRTA) and the *National Human Rights Commission Act 2012* have adopted some of the essence of the CAT especially in providing compensation and departmental actions against the perpetrators. The *Evidence Act 1974* stipulates provisions that confirm non-admissibility of confessions extracted through torture or other forms of ill-treatment. However, the provision of the *Constitution* is referred to the statutory law. The Acts do not meet the key aspects of the State obligations towards the CAT. The CRTA fails to comply with the provisions of the CAT, particularly as torture is not defined as a punishable crime; no mechanism to conduct prompt and impartial investigation on incident of torture; the provisions relating to limitation of 35 days to lodge a complaint from incident of torture or date of release, is contrary to the notion of human rights and against the recommendations of the CAT/C;² and the State protects perpetrators of torture by providing support as legal representation by the government attorney in favour of the perpetrators.

Furthermore, some provisions of the *Nepal police Act 1963*, *Nepal Armed Police Act 2001*, *Forest Act 1993*, *National Park and Wildlife Protection Act 1973* contradict the provision of the CAT and other human rights instruments. Likewise, many provisions of the CAT are not yet adopted in statutory laws such as defining torture as crime, ensuring easy access right to complaints against torture and effective investigation of torture related incidents and the protection of victims and witnesses of torture compensation cases, establishing domestic and universal jurisdiction and providing reparation for torture victims. The absence of law and contradictory provisions are due to a lack of political commitment and a lower priority being given to protecting the right to freedom from torture and implementation of the CAT in Nepal. Furthermore, the CRTA does not ventilate any provisions about training or capacity building for the police and other security personnel. The *Police Regulations* stipulate that the training components include martial arts, security, crime investigation, management, physical

1 *Nepal Treaty Act 1990* (Nepal) s 9(2).

2 See Committee Against Torture (CAT/C), *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusion and Recommendation of the Committee Against Torture* (13 April 2007) UN Doc CAT/C/NPL/CO/2, para 28.

fitness and others; it gives less focus on human rights. Some reports reported that police and other security agencies are provided some training sessions on human rights and the law.³ Similarly, NHRC prepared a training and resource materials for police and security officials.⁴ However, the impact of the training programs has hardly been reflected at the practical level.

7.2.2 Prevalence of torture and its root causes

The research analysed the data published over the last seven years by the OAG, NHRC and human rights NGOs. The reports show positive trends as expressed as decreasing ratios of torture and other forms of ill-treatment compared to those observed during the period of conflict. However, the trend of torture and other forms of ill-treatment is still high, which is a serious challenge for the prevention of torture in Nepal. In accordance with the OAG and CeLRRd's report 2013, 28.1 per cent of detainees claimed that they were subjected to torture during criminal investigations.⁵ Similarly, NHRC reports show that a total of 574 complaints were registered in the NHRC offices in the last seven years which reflects an average of seven torture related complaints registered each month. Likewise, the reports in the last seven years of Advocacy Forum show that an average of 21.91% detainees claimed that they were tortured in police custody (see details in chapter IV). The data demonstrates the continued prevalence of torture and other forms of ill-treatment.

The study revealed that torture is a systemic problem and is used as a means of obtaining confessions, misuse of power and is practised as a form of political repression by police and other law enforcement officials. Some direct and indirect reasons are cited to explain the prevalence of torture in Nepal. The study found that torture is directly linked with the practice of obtaining confessions and/or information, to establish fabricated facts, corruption, and threaten the suspect or his/her family members. The indirect or underlying causes behind the prevalence of torture and other forms of ill-treatment during criminal investigations include to inadequate legal provisions and impunity, poverty, violent social structures, corruption, traditional mindsets, lack of training for police, and little awareness within the general population of their rights. For example, as noted in chapter IV, a large section of people criticised the ineffectiveness of police in investigating crime and their failure to arrest criminals or persons suspected of committing crimes because they do not use strong or coercive

3 See, eg, Human Rights Council, *Report of the OHCHR on the human rights situation and the activities of her Office, including technical cooperation in Nepal* (18 February 2008) A/HRC/7/68; Kathmandu School of Law and Sydney University provide some training on *'safeguarding Human Rights in Criminal Justice System in Nepal'* to the actors of criminal justice system including police, persecutors, Law teacher, and defence lawyer <www.kasl.edu.np/hr_project.asp>; Advocacy Forum, INHIRED International, Informal Sector Service Centre (Insec), Centre for Victims of Torture (CVICT) and Forum for Protection of People's Rights (PPR) (2009) *Criminalise Torture*, 47.

4 National Human Rights Commission, *Human Rights Resource Materials for Security Personnel* (NHRC 2013).

5 Office of the Attorney General (OAG) and Centre for Legal Research and Resource Development (CeLRRd) *Baseline Survey of Criminal Justice System* (OAG and CeLRRd 2013) 148 (*'OAG and CeLRRd'*).

methods against those criminals or anti-social persons. Thus, the police are forced to use torture or any other coercive method directly or indirectly against such criminals/suspects. Furthermore, people from the upper class including political leaders/activists, government officials and other social elites having close ties with the police and high level government officials to put pressure on the system. The unfair pressure also encourages the use of torture to obtain confessions or information or as a kind of punishment against the accused. Obviously, poor or socially vulnerable people who do not have access to power might be victimised by the events.

7.2.3 Judicial and other institutional intervention

The use of torture as a form of punishment and a tool of criminal investigation was a general phenomenon throughout the history of the Nepalese criminal justice system. The legal system was based on an inquisitorial system that dates back to before the 1950s democratic movement.⁶ Modification gradually took place and Nepal gradually adopted an adversarial system. The independence of the judiciary was established in Nepal after the promulgation of the *Constitution of the Kingdom of Nepal 1990*. One of the strongest and most positive features of the Nepalese judiciary has been the constitutional backing for the independence of judiciary, human rights and the rule of law. After the ratification of the CAT and other human rights instruments and with a growing awareness about the provisions of international human rights instruments, courts have started to use the provisions of international human rights law in decision making processes, in public interest litigation, torture compensation cases and other regular criminal cases. These court decisions have played a vital role in providing justice to torture victims and for the protection of their rights.

The Supreme Court of Nepal has issued many orders for the protection and promotion of rights against torture such as mandamus orders to the Government of Nepal to make the act of torture a criminal offence,⁷ to review the judicial roles of the Chief District Officer as a quasi-judicial body⁸ and to establish a vetting system of security personnel of their past records.⁹ However, the study revealed that there is much lacking in the implementation of those court decisions. For example, as noted in chapter V, only 7.40 per cent and 10 per cent of public interest litigations and judicial review related Supreme Court's decisions were implemented respectively in 2012/13 and 2013/14.¹⁰

Furthermore, regarding the torture compensation cases, the study found that small numbers of cases have been filed in the courts - total 56 and 48 new cases were registered in 2011/12 and 2012/13 (two years) respectively in the courts. While

6 Centre for Legal Research and Resource Development (CeLRRd), *Baseline Study of Criminal Justice System in Nepal* (CeLRRd, 2003) 23.

7 *Rajendra Ghimire and Kedar Pd. Dahal v Government of Nepal*, Nepal Kanoon Patrika 2066 [Nepal Law Journal 2009] Vol 3, 452 (Supreme Court of Nepal).

8 *Amar Raut v Ministry of Home Affairs*, Nepal Government and Others, Nepal Kanoon Patrika 2068 [Nepal Law Journal 2011] Vol 7, 1083, Decision No 8642 (Supreme Court of Nepal).

9 *Ranjan Jha and Deependra Jha v Prime Minister and Minister of Council Office*, No 067-WO-1198, decision date 2059-4-28 [August 12, 2012] (Supreme Court of Nepal)

10 Supreme Court of Nepal, *Barsik Pratibedan 2069/70* [Annual Report 2012/13] 37; Supreme Court of Nepal, *Barsik Pratibedan 2068/69* [Annual Report 2011/12] (Supreme Court of Nepal) 47.

analysing the facts and trends of the cases, the study found some reasons that explain the situation. First, many victims do not have access to justice due to lack of sufficient laws, awareness, geographical remoteness, and complex court procedures. Second, victims get threatened by their torturers not to take action. Third, the lack of proper investigation mechanisms in torture cases by State mechanisms and the burden of proof on torture cases is always with the victim, not the perpetrator(s). Generally, incidents of torture take place in isolated places (often in the torturer's premises) and it is difficult to document and collect the evidence, and so the victim(s) always face challenges in collecting facts and material evidence.

Among the total registered cases, courts have decided to award compensation to the victims and taken departmental actions against the perpetrators in few cases. For example, reports by Advocacy Forum (2008 and 2014) show that a total of 25 per cent and 31 per cent of torture victims got compensation respectively in various courts.¹¹ This means around 70 per cent of the torture related cases failed. The research identified some shortcomings of courts decisions i.e. inadequate addressing of the claims of plaintiff(s), inadequate analysis of law, precedents and evidence, and the seeking out of technicalities to avoid departmental action against the torturer. On the other hand, challenges to implementing court decisions, the undue exercise of political influence, corruption, lengthy and complex court procedures have made the judiciary weak. Therefore, it is often challenging for victims of torture to get justice in Nepal.

In regards to the judicial scrutiny towards the protection of the right to freedom from torture, there has been some progress. In some decisions, courts have rejected evidence obtained by torture. In those cases, the courts explained the possibility of challenges if it accepts such types of evidence and that doing so may affect its ability to protect the right to freedom from torture and fair trial. In contrast, some confessions which were claimed to have been obtained as a result of torture have been accepted as evidence by the Supreme Court. In general, judges have used their discretionary powers to accept or reject confessions obtained through torture. Conflicting decisions relating to non-admissibility of evidence obtained as a result of torture makes the judicial scrutiny weak in regards to the protection of rights against torture, especially during criminal investigations which ultimately supports the continuation of the admissibility of confessions obtained by torture in criminal investigations.

The NHRC must investigate and monitor detention centres and the overall situation of human rights in the country. The NHRC received 873 torture-related complaints during the twelve years in which the NHRC recommended 59 cases in favour of victims. Nevertheless the study found that some of the NHRC's recommendations sought further investigations to identify perpetrators of torture. Similarly, inadequate analysis of the facts, law and inconsistencies in the recommendations were found as being shortcomings. Furthermore, the NHRC is not effective to prevent torture;

11 Advocacy Forum (2008) *Hope and Frustration of Assessment of the Impact of Nepal's Torture Compensation Act -1996* (Advocacy Forum Nepal, 2008) 1; Advocacy Forum (2014) *Promising Developments Persistent Problems, trends and Patterns in Torture in Nepal During 2013*, (Advocacy Forum, Nepal 2014) 85.

especially in monitoring detention centres. On the other hand, the implementation of the NHRC's recommendations has always been challenged, especially as per the Constitutional provisions; and the Office of Attorney of the Government fails to prosecute any torturers despite the NHRC's recommendations.

7.2.4 Reform in the socio-political, economic and cultural context

The CAT is a widely accepted international human rights convention. As per the State obligations towards the CAT, countries should prohibit the act of torture in their domestic law. CAT/C, Sub-Committee under OPCAT, Special Rapporteur on Torture and other UN human rights mechanisms can monitor the implementation status of the CAT and situation of torture and other forms of ill-treatment. All of these developments are crucial for the prevention of torture and to uphold respect for and protect the right to freedom from torture as set in the standards at the international level. However, many countries including Nepal continue practicing torture and other forms of ill-treatment during criminal investigations. Many training and education programs for police and security personnel have been conducted. Nevertheless, there has been little impact at the practical level. This could be due to multiple challenges such as deep rooted poverty, lack of awareness about the rights among the general population, violent social structures, traditional mind sets on criminal investigations, impunity, corruption and lack of scientific tools and techniques in criminal investigation are associated with the problem. In this context, it is obvious that the effectiveness of the CAT and other international human rights is sub-optimal.

7.2.5 Fulfilment of State's obligations

Nepal must submit initial reports, periodic reports and additional reports to the CAT/C and other mechanisms. During the last 23 years or after the accession of the CAT and the ICCPR, Nepal has submitted its initial reports, one periodic report each to the CAT/C, CCPR/C and UPR, and facilitated a visit by the Special Rapporteur on Torture in Nepal. Responses to the Nepalese reports on the UN mechanisms have provided many conclusions and recommendations, list of issues and some follow-up recommendations to the Government of Nepal. From all of these experiences and practices, Nepal has followed the reporting process and participated in a constructive dialogue with treaty bodies and thematic mechanisms. The most remarkable aspects of the Nepalese reports and responses have been the consistent and repeated commitment to respect and protect rights to freedom from torture and to fulfilling State obligations towards the CAT and other human rights instruments such as the condemnation of torture and criminalisation of torture. From the perspective of cooperation with CAT/C and other mechanisms, and acceptance of recommendations, in overall, the Nepalese reports seem to be cooperative or supportive of the implementation of the provisions of the CAT and other human rights instruments, except the ratification of OPCAT and the individual complaints related provisions like Article 22 of the CAT, which Nepal refuses to accept the mechanisms.

Many recommendations made by and issues raised by the CAT/C, Special Rapporteur and the CCPR/C are not yet addressed. Similarly, most of the reports have not followed the reporting guidelines. The reports mainly covered legislative frameworks rather

than practical aspects or factual events. The CCPR/C received some torture-related individual complaints from the victims of torture, the committee found violation of rights to freedom from torture in accordance to Article 7 of the ICCPR and recommended that Nepal ensures thorough and diligent investigation of cases of torture and other forms of ill-treatment, prosecute those cases and punish those responsible, as well as providing adequate compensation to the victims and his/her family and amend legislation in line with the Convention. As a response, the Government of Nepal provided little compensations in two complaints. However, investigation, prosecution and rehabilitation of victims of torture is piecemeal.

Although Nepal has experienced a constructive dialogue process with the CAT/C and other UN mechanisms, the study found that their reporting status is not encouraging. The periodic reports have either not been submitted or submitted after extensive delays. This is not just a matter of political will. The reporting requirements in CAT (and other UN human rights instruments) require a level of sophistication in bureaucratic systems (including data capture and analysis) that is not yet present in Nepal. The high levels of bureaucratic competence required to participate in UN reporting rounds which affects Nepalese reporting practices.

7.2.6 Effective monitoring and facilitation for implementation

The CAT/C, CCPR/C, Special Rapporteur and Human Rights Council have conducted a constructive dialogue through the review of various reports and organising face to face meetings with concerned Nepalese officials. Even as a non-binding nature of the recommendations and/or concluding remarks of the mechanisms, these recommendations have had positive effects in the context of Nepal, especially the confidential inquiry report of the CAT/C put pressure on the Government of Nepal to do better. The Government of Nepal responded immediately with an explanation about national priorities, initiations for prevention of torture and the reasons for delayed proceedings. Many non-governmental organisations consider the report as effective advocacy material. Similarly, UN mechanisms and international human rights organisations raised the issue of vetting (individuals past involvement in cases of human rights violation) and the mechanisms resulted in the return of some higher ranking army and police officers from different UN peace keeping missions because of their involvement in torture and other human rights violation cases. The incidents have had a positive effect in Nepal. The government has introduced rules for a vetting system for the selection of troops for UN missions.

In spite of these some positive effects, obstacles to effective monitoring from the CAT/C and other mechanisms exist in the context of Nepal, especially the weak follow-up of conclusions and recommendations by the mechanisms. The UN mechanisms often refer to the reports or information of NGOs relating to incidents of torture and other human rights violations. To some extent, it is good to get preliminary information; however it could be a matter of verification with other concerned parties. Thus, the Government of Nepal's response to confidential inquiry reports raised the issue of the credibility of data or finding sources of information. Likewise, the recommendations or concluding remarks used vague terms and deviated from major

issues, which is another challenge to the implementation in practice. In addition, overlapping mandates among the mechanisms also create some problems for reporting in a timely and proper way.

Furthermore, Nepal does not have a separate department or unit to prepare periodic and other special reports and regular communication with the mechanisms. The lack of special unit obstructs institutional memory and timely and effective reporting to the concerned mechanisms.

7.2.7 Changing context affects the prohibition of torture

As stated above, the concept of the right to freedom from torture has been evolved in a long period of time. More specifically, the right has been developed after bitter lessons learned from serious human rights violations including World War II.¹² After that, the provisions relating to protection and promotion of human rights have been stipulated as a central objective of UN Charter.¹³ Furthermore, many countries used severe torture against their citizens in the 1960s and 1970s. In this context, many initiatives were taken by NGOs to pressurise to UN. The initiatives helped to sensitise the issue in the UN and other human rights organisations about the seriousness of torture by governments against their own citizens. That created significant pressure to develop declarations against torture and the CAT.

Likewise, during the era of the Nepali people's movement for democracy, human rights and rule of law have contributed to establishing rights to freedom from torture as constitutional provisions. For example, after the success of the 1990's people's movement against the single-party Panchayat system that ruled for 30 years, the *Constitution of Kingdom of Nepal* specified a right to freedom from torture as a fundamental right for the first time in Nepalese constitutional history and Nepal accessed the CAT. Similarly, after the 2003 people's movement, the *Interim Constitution of Nepal* not only guarantees rights to freedom from torture as fundamental rights but also defines torture as a punishable crime.

After the terrorist attacks in the USA in September 11, 2001, the U.S. Government introduced torture and other forms of ill-treatment as a possible tool for obtaining information from detained terrorist suspects and many other States followed this practice.¹⁴ Some scholars, lawyers and politicians have argued that torture or other forms of ill-treatment can be used in exceptional situations to obtain information from terrorist suspects.¹⁵ However, many other scholars strongly oppose this argument and

12 Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 2009) 18-20; Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention Against Torture A Commentary*, (Oxford University Press, 2008) 1-3.

13 *United Nations Charter* arts 1, 3, 55.

14 Human Rights Watch, 'In the Name of Security: Counterterrorism Laws Worldwide Since September 11' (Human Rights Watch 2012) 3 <<http://www.hrw.org/sites/default/files/reports/global0612ForUploadFinal.pdf>>; REDRESS Trust, *Extraordinary Measures, Predictable Consequences: Security Legislation and Prohibition of Torture* (REDRESS Trust, 2012) 8-34.

15 Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) 132-163; Mirko Bagaric and Julie Clarke,

mention that the right against torture has developed as an empirical fact and focus for absolute prohibition of torture.¹⁶ Judiciaries of many countries have emphasised the right to freedom from torture, fair trial and the rule of law. Furthermore, U.S. Senate Special Committee report found that ‘enhanced interrogation techniques were not effective means of obtaining accurate information or gaining detainee cooperation’.¹⁷ The report found that most of the detainees fabricated information, resulting in faulty intelligence.

Likewise, some experienced U.S. army, CIA and other officials clarified that torture is ineffective, illegal, immoral and counterproductive.¹⁸ All these developments support the strengthening of the prohibition of torture across the world. The facts and development show that there is no question about the prohibition of torture and other forms of ill-treatment. The main question in the current situation is about the implementation of the provisions of the CAT at a practical level in many parts of world.

7.2.8 Provisions of the CAT requiring more interpretation or update

The CAT is a progressive step towards outlining state obligations, to defining torture as criminal offence and establishing universal jurisdiction to remove safe havens for perpetrators, which would be a first for human rights treaties. The CAT establishes monitoring mechanisms for the protection and promotion of the right to freedom from torture. Most importantly, the CAT focuses on protecting individuals who suffer as a result of the acts of the police and other State officials. Nevertheless, some provisions of the CAT require more interpretation or clarification as per the notion of the convention. For example, in the context of Nepal, the CAT/C raised issue relating to condemnation of torture and recommended that the State should condemn acts of torture. In Nepal the *Interim Constitution of Nepal 2007* guarantees the rights to freedom from torture, the government has repeatedly voiced its commitment through periodic reports and responses.

The provision and repeated commitment is sufficient for condemnation or what is the process condemnation? How can it be verified for its implementation? In terms of

‘Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable’ (2004-2005) 39 *University of San Francisco Law Review* 582.

16 Nigel S. Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’ (2006) 34 (1) *Denver Journal of International Law and Policy* 148-160; Richard Matthews, *The Absolute Violation Why Torture Must be Prohibited* (McGill-Queen’s University Press 2008) 72; Manderson, Desmond ‘Another Modest Proposal’ (2005) 10 *Deakin Law Review* 643.

17 Senate Select Committee on Intelligence, (Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, 2014) 2, the report was released on 9 December 2014, As cited the guardian, ‘*The Senate Intelligence Committee’s Report on Torture*’, 10 December 2014, < <http://www.theguardian.com/us-news/ng-interactive/2014/dec/09/-sp-torture-report-cia-senate-intelligence-committee>>.

18 ‘Statement of National Security, Intelligence, and Interrogation Professional’, October 1, 2014, Human Rights First< <http://www.humanrightsfirst.org/sites/default/files/Torture-Statement-09-30-14.pdf>>.

criminalising the act of torture, does it need special statutory laws or does it need to include the provisions of any other law? What is the range of punishment at the minimum level required against the perpetrator? Likewise, propose to investigation on torture, CAT found prompt and impartial investigation from competent organisation, what type of organisations could be considered as being competent, impartial and prompt? Furthermore, regarding the omission of torture that includes the participation of private parties, to some extent, CAT/C and other mechanisms have defined the omission in the involvement of private parties. However, this remains controversial. The changed context of private security organisations have been established in many parts of the world, what will be the status if any security guard associated with that agency were to inflict torture? On this issue, the CAT is silent. These many subject matters need to be clarified in the changed context.

7.3 Research contributions

The strength of this study is its comprehensiveness as it has considered all of the major dimensions of implementation of the CAT and other human rights instruments at the domestic level of Nepal and in its comparison with many other countries in the issues. In this process, the study reviewed legislative measures, judicial and other institutional interventions, State reporting obligations and monitoring from CAT/C and other mechanisms and cross-checked at the practical level. The study would be interesting to human rights professionals, policymakers of Nepal, judges and judicial staff, human rights lawyers and members or associates of the UN human rights mechanisms.

The study found out legislative gaps, inconsistent provisions in Nepalese laws with the CAT and other international human rights instruments, judicial trends and obstacles to protect the right to freedom from torture, and suggested legislative reform. It is believed that the research will be useful to understand multiple factors of prevalence of torture and other forms of ill-treatment in Nepal and which might support to develop proper plan and further strategies for prevention of torture and other forms of ill-treatment. The constitution-making process is yet to be completed in Nepal. The Constitutional Assembly is drafting a new Constitution with series of discussions on many subject matters including fundamental rights, directive principles, judiciary and other mechanisms. In addition, the Government of Nepal has repeated its commitment to formulate anti-torture law. Two draft bills called *Anti-torture Bill* and *Penal Code Bill* have been drafted and presented to the legislative parliament in 2011 and 2012. However, the parliament was dissolved before the discussion started on the Bills. The Government of Nepal is yet to present the Bills to the current legislative parliament. Therefore, the findings of the study will help the parliamentarians and policy makers for the formulation of new Constitution and anti-torture law in Nepal.

This study has demonstrated how the provisions of the CAT and other international human rights instruments can be implemented at the practical level. It covers three levels- international, State and individual levels simultaneously. At the international level, the study reviewed and analysed the Nepalese reporting and monitoring status of the CAT/C or other mechanisms. At the State level, it reviewed existing legislations and judicial and other interventions. The study analysed the situation of the enjoyment of the right against torture at the individual level and cross checked this against the

practical situation. The study conducted extensive reviews of legislations, court case materials, government reports, reports of NHRC, reports of NGOs, international human rights instruments, monitoring reports of human rights mechanism's and jurisprudence and media coverage. This data and analysis helped to prove the prevalence of torture and other forms of ill-treatment and situation to respect and protect rights to freedom from torture. The research methodology of the study covers most of the aspects of international human rights law and its enforcement in domestic level. It could be replicated in other similar contexts.

The study found that the State reporting and monitoring by the UN human rights mechanisms' are crucial for the implementation of the provision of the CAT. The study identified many strengths and obstacles for the fulfilment of the State obligations and monitoring mechanisms. Some of the monitoring tools seemed effective. For example, even though the UN system does not have well structured standard about the vetting system, the recommendations relating to the screening of human rights violation reports on security personnel seem effective in Nepal. The Government of Nepal has taken the screening issue seriously and has introduced a vetting system in the Nepalese Army. It could be useful learning for UN mechanisms to develop further standards for screening individual troops.

7.4 Recommendations

The study recommends further actions for the prevention of torture in Nepal.

7.4.1 Legislative reform

As mentioned, the *Interim Constitution of Nepal* refers to a statutory law to criminalise torture and for the protection of rights to freedom from torture. Furthermore, during the research period in early July 2015, the Constitution Assembly has passed a draft constitution for the public comments which also proposes the similar provisions.¹⁹ However, the current statutory laws do not define torture as a punishable crime and fail to meet the requirements of the CAT. Adequate legislation is a precondition and is essential for the prevention of torture and other forms of ill-treatment. The study pointed out some inconsistent provisions in the current laws and proposed bills. Therefore, a comprehensive anti-torture law incorporating the provisions of the CAT, mainly to cover a clear definition of torture, criminalising the act of torture as a punishable crime, introducing a complaint handling mechanism for prompt and impartial investigation, establishing domestic and universal jurisdiction and providing reparation to victims of torture must be promulgated and enacted. The study recommends that the Government of Nepal should re-table the *Anti-torture Bill* and *Penal Code Bill* in the parliament to promulgate the anti-torture laws.

In addition, the study has identified some provisions of 14 different legislations contradict with international human rights instruments including the CAT. Some of these contradictory provisions provide monopoly power concerned officials against

¹⁹ Draft New Constitution of Nepal 2015, art 27 < <http://www.can.gov.np/en/ncd.html>>.

the detainees/suspects who potentially encourage torture and other forms of ill-treatment. Thus, the contradictory laws need to be amended or repealed in line with the *Interim Constitution* and the CAT.

7.4.2 Reformed training packages and increased levels of awareness

The study has pointed out from the case studies and the court cases that the police use similar types of torture and other forms of ill-treatment methods. Confessions obtained through torture are often used in the Nepalese criminal investigation system. The police training program does not sufficiently cover human rights components, especially the right to freedom from torture. It can be assumed that the training program focuses on how to use force rather than how to respect human rights is defective. Accordingly, the training of police and other security organisations require a thorough review and should be made human rights friendly, especially focusing on the application of the right to freedom from torture in the context of criminal investigations as an integral part of their basic training package. The study recommends that the existing police training regime must be modified and updated to introduce a more behavioural approach for police to follow scientific investigation methods that respect the right to fair trial and the right to freedom from torture at every step of a criminal investigation. Furthermore, police personnel must be provided with capacity-building activities to maintain their intrinsic motivation and to encourage them to follow the rule of law and respect the rights to freedom from torture.

In addition, the study found that the lack of sufficient resources to conduct criminal investigations presented a difficulty for the prevention of torture. Therefore, the adoption of resources and new technology for criminal investigations must be increased and started such as the use of audio/video recordings as part of the process of taking statements from suspects in police custody.

As noted, the prevalence of torture and other forms of ill-treatment is rooted in a lack of awareness among many people in society about their rights, especially vulnerable people. Given the devastating effect of torture and other forms of ill-treatment on access to justice or other services for victims of torture, awareness for detainees and community members about the right to freedom from torture, fair trial and due process of law is essential to addressing the root causes of torture. Furthermore, as stated, the victims of torture always become vulnerable, and therefore he/she needs moral support, legal and social assistance in order to lodge a case against their perpetrator(s). Thus, community awareness and victim empowerment activities including legal aid should be provided regularly to enhance access to justice to the victim of torture and to prevent torture in the society.

7.4.3 Increased judicial scrutiny

The *Interim Constitution of Nepal* and other laws grant absolute authority to the Supreme Court of Nepal to interpret and to enforce the provision of fundamental rights and the CAT for the protection and promotion of the right to freedom from torture. The provisions need to be implemented in practice. Thus, ensuring the honesty and sincerity of the concerned judges and courts officials to implement the mandate of the

judiciary and ensuring the protection of the fundamental right to freedom from torture would be an initial point to reform the organisation and to protect the right to freedom from torture. Likewise, the Government should ensure that it fully implements the courts' decisions and NHRC's recommendations. The *Interim Constitution* and *State Cases Act* stipulate that the provisions relating to the judicial scrutiny in criminal cases (such as bringing suspects before the court within 24 hours of arrest). Judges could inspect the physical situation of the suspect and the nature of cases during the extension of detention.

The conflicting decisions from the Supreme Court on an application of the principle of non-admissibility apparently created confusion about the acceptance or rejection of evidence obtained through torture and other forms of ill-treatment. These practices not only affected the right to remain silent and other criminal justice relating rights but also encouraged the use of torture and other forms of ill-treatment. Therefore, evidence obtained by torture should be rejected absolutely.

The study identified many shortcomings in the court decisions. Thus, strengthening the capacity of judges, lawyers and judicial officials is vital to reform the justice system. Currently, National Judicial Academy of Nepal conducts some training or capacity development activities, but it is not enough to address the problem. Therefore, comprehensive capacity development activities for judges, lawyers and court officials must to be conducted.

The study pointed out that the monitoring of detention centres is crucial for the protection of rights to freedom from torture and other forms of ill-treatment. Therefore, the NHRC should conduct more effective and regular monitoring of detention centres in various parts of the country as per its mandates. As some human rights NGOs have been already involved in monitoring detention centres, thus NHRC should coordinate with them and continue this monitoring.

Furthermore, the preventive approach of torture and other forms of ill-treatment in detention centres could be effective in protecting the right to freedom from torture. Thus, the preventive mechanisms or correctional oversight mechanism from the Sub-Committee on the Prevention of Torture under OPCAT would be essential. The study recommends to the Government of Nepal to ratify the OPCAT and accept the individual complaint mechanisms in order to respect and protect individual rights.

7.4.4 Fulfilment of the State's commitment

The study has found that the fulfilment of Nepalese reporting obligations has not been encouraging. Mainly, periodic reports have either not been submitted or been submitted after a long delay. Most of the reports covered legislative information rather than practical situations and do not meet the reporting guidelines of the CAT/C and other mechanisms. Failing to meet the reporting deadlines and failure to follow set guidelines, and a lack of institutional memories and technical expertise used in the preparation of the periodic and special reports are other shortcomings of the Government of Nepal. Therefore, the study recommends the Government of Nepal to

establish a dedicated separate unit that provides a clear mandate for fulfilling government reporting obligations and then disseminating the conclusions and recommendations.

7.4.5 Proactive monitoring

The implementation of the recommendations of the CAT/C and other mechanisms is a challenge and follow-up of these agencies is less effective in Nepal. The recommendations and concerns are merely formalities. The CAT/C and other UN agencies should monitor the implementation of their recommendations and concerns in Nepal by sending regular reminders, making special and planned visits by concerned officials, creating international pressure for the implementation of the recommendations and taking appropriate steps such as establishing vetting systems to recruit troops for the UN jobs and other international purposes. Furthermore, the study recommends that the mechanisms should prepare international standards of screening system of troops about their involvement in the human rights violations.

The study has pointed out the work-load of the mechanisms and overlapping responsibilities of the country. To address the issue, as noted above, the UN High Commissioner for Human Rights' recommendation to adopt coordinated approaches for reporting and monitoring within the UN system should be implemented. The approach could be useful for monitoring and follow-up. In addition, the study recommends that the CAT/C and other mechanisms should provide effective capacity development activities to the concerned government officials especially those who are responsible for preparing reports, coverage, and fulfilling the reporting obligations more effectively in the context of Nepal.

7.5 Suggestion for further research

This study has captured the status of legislative, administrative, judicial interventions for prevention of torture and other forms of ill-treatment and the practical situation of the protection of the right to freedom from torture and other forms of ill-treatment. In so doing, gaps in legislative, administrative and judicial intervention have been identified. Furthermore, deep rooted poverty, lack of awareness, violent social structure, traditional mind-set on criminal investigations, impunity, lack of resources for criminal investigation and corruption are found as the root-causes of prevalence of torture. Given the limited resources and time this study is focused on the situation in Nepal. The replications of similar study in other countries contributes to the UN mechanisms and other international actors to formulate laws and policies in the sector of international human rights law.

From overall discussions and analysis, it is noted that the CAT is a progressive human rights convention for the prevention of torture and protection of the right to freedom from torture. In acceding to the CAT, States undertake a number of obligations. The strength of the Convention depends on their commitment in carrying out these obligations. This study found that Nepal reflects its commitment to the prevention of torture through the accession to the CAT without reservations and guaranteed the rights to freedom from torture and other forms of ill-treatment as fundamental rights. However, the study found many deficiencies in the economic, social, cultural and

political situation that affect both the prevention of torture and other forms of ill-treatment at a practical level and the fulfilment of reporting obligations. Similarly, this study also found that the lack of regular and effective monitoring and follow up are another challenge for proper implementation of the CAT. Thus, a comprehensive study needs to be conducted focusing on how to overcome these deep-rooted problems and to define appropriate human rights monitoring techniques especially for the developing world

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ANNEX

Torture Compensation related Cases

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
1	Saroj Kumar Chaudhari V Jaya Pratap Lama, head Joint security force, base camp and others	Random beating with boots, stick and falanga became unconscious	2063/4 Saptari District Court Claimed for compensation and action against the torturers in accordance to CRTA	District Court decided to award Rs 25,000 compensation and referred for departmental action on 2067/3/21	No reasons given for compensating the victim; Health report and eye witness was taken as evidences The opponent accepted the arrest by joint security force and kept at Army Camp. Eye witness stated the incident of torture and army could not present any evidence about their non involvement in torture
2	Manoj Shrestha V Regional Police Office, Inspector Santa Bd Tamang	Random beating and threaten to kill with sharp arms such as muzzle (Kunda) of gun	2063/1/14 Morang District Court Claimed compensation and action against the torturers in accordance to CRTA	On 2065/3/16 District Court decided to award Rs 10,000 compensation but no departmental action against the torturers Appellate court also upheld the decision on 2066/5/4	Health report was taken as an evidence for compensation, No departmental action recommended because the victim could not identify the perpetrator. In such cases if the court issue order for departmental action, there might be chances of not implementing the decision.

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
3	Raj Narayan Chaudhari V Armed police Inspector Pramod Raya and S.A.I Raj Kumar Subba	Random beating and severe torture in Police Office	2065/12 Morang District Court	On 2066/12/16 District Court decided to award Rs 15000 compensation and departmental action. The Appellate Court Biratnagar upheld the compensation amount and repealed the departmental action	No any specific reasons given in the district court, The Appellate Court reasoned that the applicant and opponent did not have personnel dispute or enmity. He was arrested during the police patrol (as per his duty) so that the departmental action is not needed in this case.
4	Purna Bd Gurung V District Police Office Kaski, Police Inspector Krishna Rana	Blindfolded, Falanga, random beating with boots and stick	On 2065/8/23 Kaski District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2067/11/29 District Court decided to award Rs 5000 as compensation and no departmental action	The health report showed deep scars on his body. Witness also explained about the torture in Police Custody. No reasons given for not taking departmental action against the perpetrator.
5	Bablu Tamang v Bhairabnath Army Battalion Kathmandu and others	Blind folded, random beating with boot, sharp weapons such as muzzal of gun (kunda), Waterboarding Electrical torture	On 2062/12 Kathmandu District Court Claimed compensation and actions against the	On 2065/3/5 District Court decided to award Rs 50,000 as compensation but no departmental action	Medical reports (several) taken as evidence for compensation, No identification of real perpetrator due to which the action against the perpetrator could not be justified

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
		Became unconscious	torturers in accordance to CRTA		
6	Sabita Lama v Police Inspector Shishir Kumar Karmacharya, ward police office Baudha and District Police Office	Forced to stand for a long time hands up, beaten on back and Falanga with stick	On 2061/2/4 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	District Court decided to award Rs 10,000 compensation and no departmental action on 2063/11/20. Health report shows her right hand broken	The court had taken the health report as evidence, which shows that her right hand was broken. Failed to identify the person who inflicted torture
7	Shivadhan Rai V Police Superintend Ganesh KC, Metropolitan Police Brit SSP Rana Bahadur Chanda and Inspector Lal Bahadur Dhama, Naxal	Beaten with boots Falanga, random beating with hands tied behind,	Kathmandu District Court Petitioned for physical and mental check up on 2066/11/10 and plaintiff filed complaint on 2066/11 Claimed compensation and actions against the torturers in accordance to CRTA	On 2069/3/25 District Court Kathmandu decided to award Rs 10,000 compensation and no departmental action	The Court accepted torture was inflicted and also accepted evidence including his health condition. Regarding the departmental action, court argued that the police did not have personnel or fixed interest with the person and the claim paper also doesn't justify the issue. Victim got compensation.
8	Mahima Kusule v	Slapped on the cheeks, beaten on both the hands,	2067/4 Dolakha District Court	On 2068/2/8 District Court decided to award Rs 15,000 as	Scars on the victim's body, forensic report was taken as evidence

S.N.	Name of parties	Torture and claim	Case register date/ districts	Decision outcomes/date	Main reasons
	SP Dhiraj Pratap Singh, District Police Office Dolakha and others	thighs, hanged on bamboo stick and beaten on the legs, random beating, forced to stand and do ups and downs and also threatened to electric shocks	Claimed compensation and actions against the torturers in accordance to CRTA	compensation but no departmental action was ordered	The court has decided to send a warning letter to the district police office Dolakha for not to repeat such acts in the future.
9	Pema Dorje Tamang V SP Dhiraj Pratap Singh, District Police Office Dolakha and others	Slapped on the cheeks, random beating with polythene pipe, Falange, Hanged in a wall (upside down) for long hours	2067/4 Dolakha District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2068/2/8 District Court decided to award Rs 15.000 as compensation but no departmental action	Scars on the victim's body, forensic report was taken as evidence The court has decided to send a warning letter to the district police office Dolakha for not to repeat such acts in the future.
10	Narayan Thapa V Police Constable Harka Bd Rai and others	Falanga, beaten on the back Became Unconscious, Forced labour such as cleaning the Police office	2065/10 Morang District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2067/11/11 District Court decided to award Rs 15,000 as compensation but no departmental actions	Scars in the victim's body was taken as evidence as the opponent was unable to justify the evidence was not because of torture Departmental action to the perpetrator was not mentioned

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
11	Bimala Paudel v Police Inspector Bir Bahadur Budha Magar and others	Random beating with boots, stick, and punched	2066/6/27 Kathmandu District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2067/5/19 Court decided to award Rs 50,000 as compensation and departmental action for two police officers	Medical Report was taken as evidence
12	Maria, Subirana Rodrigeg alias Bikky Sherpa v District Administrative Office Kathmandu and Others	Random beating with boots, stick, punched	2066/6/27 Kathmandu District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2067/5/19 District Court decided to award Rs 50,000 compensation and departmental action to two police officers	Medical Report was taken as evidence
13	Kamala Gahatraj v Home Ministry and others	Random beating, became unconscious	2065/5/23 Kathmandu District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2067/3/17 District Court decided to award Rs 25,000 but no departmental action	Photograph was taken as evidence Not explained about the claim regarding departmental action
14	Arjun Gurung v	Beaten with boot on the legs,	2066/6	On 2069/3/25 District Court decided to	Medical reports, doctor's interview were taken as evidence

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
	Basanta Bahadur Kuwar, Metropolitan Police Circle and Police men Giriraj Aryal	random beating by polythene pipe	Kathmandu District Court Claimed compensation and actions against the torturers in accordance to CRTA	award Rs 30,000 as compensation but no departmental action	In the application, many personnel were found as torturer, due to lack of identifying the real perpetrator the departmental action could not be justified
15	Atiraj Tamang v Bikram Bd Chanda, DSP, Police Head Quarter, Naxal and others	Random beating, Falanga, Suffocation by placing the boot on the mouth	2059/12 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	On 2061/7/16 District Court decided to award Rs 10,000 as compensation and departmental action to the police personnel Appellate Court Patan also upheld the district court's decision on 2066/3/18	Medical report was taken as evidence for compensation and departmental action
16	Chandra Bahadur Thapa v Bikram Bd Chanda, DSP, Police Head Quarter, Naxal and others	Random beating, Falanga, Suffocation by placing the boot on the mouth	2059/12 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	On 2061/7/16 District Court decided to award Rs 10,000 as compensation and departmental action against the police personnel Appellate Court Patan also upheld the district	Medical report was taken as evidence

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
				court's decision on 2066/3/18	
17	Shiva Chauhan v Bikram Bd Chanda, DSP, Police Head Quarter, Naxal and others	Random beating, Falanga, Suffocation by placing the boot on the mouth	2059/12 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	District Court decided to award Rs 10,000 as compensation and departmental action for the police personnel On 2061/7/16 Appellate Court Patan also upheld the district court's decision on 2066/3/18	Medical report was taken as evidence

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
18	Hom Bd Tamang v Bikram Bd Chanda, DSP, Police Head Quarter, Nakxal and others	Random beating, Falanga, Suffocation by placing the boot on the mouth	2059/12 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	District Court decided to award Rs 10,000 compensation and departmental action against the police personnel on 2061/7/16 Appellate Court Patan also upheld the district court's decision on 2066/3/18	Medical report was taken as evidence
19	Jit Man Rai V Bikram Bd Chanda, DSP, Police Head Quarter, Nakxal and others	Random beating, Falanga, Suffocation by placing the boot on the mouth	2059/12 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	District Court decided to award Rs 10,000 as compensation and departmental action against the police personnel on 2061/7/16 Appellate Court Patan also upheld the district court's decision on 2066/3/18	Medical report was taken as evidence
20	Kalpna Bhandari V	Random beating	2064/2/28 Kathmandu District Court	District Court decided to award Rs 60,000 as	Heath reports were taken as evidence

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
	Inspector Jayaram Sapkota, Metropolitan Police Circle and others		Claimed compensation and action against the torturers in accordance to CRTA	compensation but no departmental action	Not found about departmental action
21	Pradesh Bd Bista V Bhairabnatha Army Battalion, Kathmandu and others	Blindfolded, various types of severe torture. As an impact of torture, he has multiple pain all over his body	2062/11 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	On 2065/10/23 District Court decided to award Rs 25,000 as compensation but no departmental action	Court took victim's health condition as evidence Plaintiff could not identify person who inflicted torture therefore the court not able to issue order for departmental action
22	Karabir Singh Sahu v Tikaram Adhikari, District Forest Office and Others	Random beating	Supreme Court	On 2069/8/12 the Supreme Court gave a verdict The Court upheld the compensation amount Rs 50,000, however Supreme Court rejected some components of the appellate court decision	The Supreme Court gave a verdict that the torturer is individually responsible for violation of law or for the misuse of law. The evidence did not prove the involvement of the department's head in the infliction of torture. Thus, the supreme court repealed the component of the appellate court decision, Similarly, the Appellate Court decision awarded compensation of Rs. 10,000 each from the

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
					opponents (as fine), but the Supreme Court defined that compensation should be provided from government's fund not from the person according to the CRTA. Did not mention about departmental action against perpetrator
23	Indra Bahadur Basnet V Keshab Kumar Shah, Area Police Office, Jiri Dolakha and others	Random beating with stick, use of abusive language	2068/11 Dolakha District Court Claimed compensation and actions against the torturers in accordance to CRTA	On 2069/8/27 the district court gave a verdict with no compensation and no departmental action	District court took two main reasons of its verdict 1) the plaintiff had medical check-up only after 27 days of the incident which it regarded as unbelievable, 2) As stated by the police it organised a discussion in the police office where the victim was present but he was not taken in custody. This does not comply with CRTA

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
24	Prem Bd Basnet V Keshab Kumar Shah, Area Police Office, Jiri Dolakha and others	Random beating with stick, use of abusive language	2068/11 Dolakha District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2069/8/27	District court took two main reasons of its verdict 1) the plaintiff had medical check-up only after 27 days of the incident which it regarded as unbelievable, 2) As stated by the police it organised a discussion in the police office where the victim was present but he was not taken in custody. This does not comply with CRTA
25	Tej Bahadur Basnet V Keshab Kumar Shah, Area Police Office, Jiri Dolakha and others	Random beating with stick, use abusive language	2068/11 Dolakha District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2069/8/27	District court has two main reasons of its verdict 1) the plaintiff had medical check-up only after 27 days of the incident which it regarded as unbelievable, 2) As stated by the police it organised a discussion in the police office where the victim was present but he was not taken in custody. This does not comply with CRTA

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
26	Dhan Bd Basnet V Keshab Kumar Shah, Area Police Office, Jiri Dolakha and others	Random beating with stick, abusive language	2068/11 Dolakha District Court Claimed compensation and actions against the torturers in accordance to CRTA	No compensation and no any departmental action 2069/8/27	District court took two main reasons of its verdict 1) the plaintiff had medical check-up only after 27 days of the incident which it regarded as unbelievable, 2) As stated by the police it organised a discussion in the police office where the victim was present but he was not taken in custody. This does not comply with CRTA
27	Lal Bd Basnet V Keshab Kumar Shah, Area Police Office, Jiri Dolakha and others	Random beating with stick, abusive language	2068/11 Dolakha District Court Claimed compensation and actions against the torturers in accordance to CRTA	No compensation and no any departmental action 2069/8/27	District court took two main reasons of its verdict 1) the plaintiff had medical check-up only after 27 days of the incident which it regarded as unbelievable, 2) As stated by the police it organised a discussion in the police office where the victim was present but he was not taken in custody. This does not comply with CRTA

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
					The court also interpreted that his place of residence (he is originally from Ramechhap district) is other than Area Police Office, Dolakha
28	Rajendra Bahadur KC v District Police Office Baglung and Others	Hands and legs tied with rope, beaten on the soles of feet (Falanga), Beaten on the head,	2063/7/21 Baglung District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2064/9/22 The appellate Court Baglung, reversed the District Court's decision and defined the plaintiff is in prison so it cannot be defined that he is free from detention.	The Court took reason that the limitation to lodge torture compensation case has crossed (35 days after freed from custody). The Court describe that he was released from custody as per the court's order on 2063/6/3. After the judicial detention, he had to file case but he missed the limitation as per the CRTA sec 5.
29	Dil Kumar Tamang (14 years) v District Police Office, Sunsari and others	Random beating by leather belt, boot, water boarding,	2064/6/20 Sunsari District Court	No compensation and no any departmental action 2066/5/15	For some time the plaintiff was kept in Canteen of Police station and he could not prove the reasons for torture. The police also denied inflicting torture.
30	Sher Bd. Karki V	Random beating after he was hanged,	2063/8 Udyayapur District Court	No compensation and no any departmental action	The court stated that eye witness confirmed his torture and health report shows that Blunt Injury on

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
	ASI, Tanka Karki, Ilaka Police Office Janljale, Udyayapur and others	and was forced to roll over 100 times	Claimed compensation and action against the torturers in accordance to CRTA	2064/2/30 Appellate Court Rajbiraj also upheld the decision on 2065/2/1	the chest (No External injury and bruise were observed) The Court gave a verdict that 'no external injury' seen and defined that there is no sign of beatings with stick, most probably, the scars on his chest was probably because of the beating by teacher not by police.
31	Tekraj Bhatta v District Police Office Kanchanpur	Random beating	2062/8 Kanchanpur District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2064/3/21 Due to lack of proof of mental torture. Appellate Court upheld the decision on 2065/3/8	The Appellate Court gave reason that the case was raised from a public offence, which was based on a relationship of between a boy (applicant) and a girl. The applicant did not raise the issue of torture in the public offence case. The same court decided in favour of him or free from the charge. The root of the torture case was the public offence case. So that, the torture related case has become out of context.
32	Ram Chandra Khati V Inspector Tirtharaj Sigdel,	Random beating by polythene pipe, Falanga, Became unconscious	2066/5 Dolakha District Court Claimed compensation and action against the	No compensation and no any departmental action 2067/3/28	The Court took reason that it has crossed time limitation to file case which is within 35 days after he was freed from custody. On 2063/4/14 the plaintiff was transferred to prison from custody

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
	District Police Office Dolakha		torturers in accordance to CRTA		for judicial detention. He had to file case within 35 days but he missed limitation of the CRTA section 5.
33	Dev Raj Baral (different case but same decision) v Inspector Tirtharaj Sigdel, District Police Office Dolakha	Random beating by polythene pipe, Falanga, Became unconscious	2066/5 Dolakha District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2067/3/28	The Court took reason that it has crossed time limitation to file case which is within 35 days after he was freed from custody. On 2063/4/14 the plaintiff was transferred to prison from custody for judicial detention. He had to file case within 35 days but he missed limitation of the CRTA section 5.
34	Prem Bd Singh V Inspector Dipendra GC, ward no.32, Metropolitan Police Brit and others	4/5 days torture, random beating, falanga	2064/10 Bhaktapur District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action 2065/3/29, Appellate Court upheld the decision on 2066/5/29	The court found that there is no evidence to prove that the scars seen on the face and other body parts existed before or after the police arrest.
35	Resh Bd Chokhyal V District police office Baglung and others	Beaten on the cheeks and back, falanga, random beating, become unconscious	2065/7 Baglung District Court Claimed compensation and	No compensation and no departmental action 2067/2/21	The Court took the medical report prepared by police as evidence and assumed that the scars were already on his face before the arrest.

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
			action against the torturers in accordance to CRTA		
36	Bigendra Jonchhe V Inspector Rajendra Kumar Thapa, District Police office Kathmandu, Crime Investigation Unit and District Police Office	Random beating by bamboo stick, boots, falanga in hanging position	2061/9 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no departmental action 2064/5/6 Appellate Court also upheld the district court decision on 2067/5/28	The Court took the time frame to decide against the victims. The plaintiff claimed that he was tortured after arrest from 25 to 30 Kartik 2061 but the police record showed that he was arrested on 2061/08/. Therefore, the claim could not be proved. He did not apply for his health check-up in the process of court hearing
37	Jeeven Thapa V Inspector Rajendra Kumar Thapa, District Police office Kathmandu, Crime Investigation Unit and District Police Office	Random beating by bamboo stick, boot, falanga in hanging position	2061/9 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no departmental action 2064/5/6	The Court took the time frame to decide against the victims. The plaintiff claimed that he was tortured after arrest from 25 to 30 Kartik 2061 but the police record showed that he was arrested on 2061/08/. Therefore, the claim could not be proved. He did not apply for his health check-up in the process of court hearing

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
38	Shyam Krishna Maharjan v Inspector Rajendra Kumar Thapa, District Police office Kathmandu, Crime Investigation Unit and District Police Office	Tied hands behind and random beating, hang and falanga in the position	2061/9 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no departmental action 2064/5/6	The Court took the time frame to decide against the victims. The plaintiff claimed that he was tortured after arrest from 25 to 30 Kartik 2061 but the police record showed that he was arrested on 2061/08/. Therefore, the claim could not be proved. He did not apply for his health check-up in the process of court hearing
39	Tilak Rai V Inspector Rajendra Kumar Thapa, District Police office Kathmandu, Crime Investigation Unit and District Police Office	Deprivation from food, beaten by stick and boot on his hack side around twenty minutes,	2061/9 Kathmandu District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no departmental action 2064/5/6	The Court took the time frame to decide against the victims. The plaintiff claimed that he was tortured after arrest from 25 to 30 Kartik 2061 but the police record showed that he was arrested on 2061/08/. Therefore, the claim could not be proved. He did not apply for his health check-up in the process of court hearing
40	Bhim Bd Pun v Inspector Binod Sharma, District	Hands and legs tied with rope, random beating with stick,	2064/5 Kaski District Court Claimed compensation and	No compensation and no action against police	The main reasons were taken by court that the applicant claimed severe torture and random beating but the health check-up report showed three simple scars on his

S.N.	Name of parties	Torture and claim	Case register date/ districts	Decision outcomes/date	Main reasons
	Police Office, Kaski and Others		action against the torturers in accordance to CRTA		body which did not match with his explanation
41	Shambhu Sharma V Narendra Dahal, Chief District Officer Morang, currently, Joint Regional Administrator, Hetauda and others	Beaten by iron rod, and wooden stick on different parts of the body	2063/3 Morang District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action	The court interpreted that as the victim was beaten by Naike (leader), Bhainaike (Assessment to Leader), Chaukidar (Guard) and others who are not government employees. Therefore the CRTA does not apply in the case.
42	Bal Bahadur Singh Thakuri v Narendra Dahal, Chief District Officer Morang, currently, Joint Regional Administrator, Hetauda and others	Beaten by iron rod, and wooden stick on different parts of the body	2063/3 Morang District Court Claimed compensation and action against the torturers in accordance to CRTA	No compensation and no any departmental action	The court interpreted that as the victim was beaten by Naike (leader), Bhainaike (Assessment to Leader), Chaukidar (Guard) and others who are not government employees. Therefore the CRTA does not apply in the case.
43	Chiranjibi Lamichane V	Beaten by iron rod, and wooden	2063/3 Morang District Court	No compensation and no any departmental action	The court interpreted that as the victim was beaten by Naike (leader), Bhainaike (Assessment

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
	Narendra Dahal, Chief District Officer Morang, currently, Joint Regional Administrator, Hetauda and others	stick on different parts of the body	Claimed compensation and action against the torturers in accordance to CRTA		to Leader), Chaukidar (Guard) and others who are not government employees. Therefore the CRTA does not apply in the case.
44	Mun Bahadur Raule V District Administration Office, Surkhet and Others	Not found in the decision	Surkhet District Court Torture Compensation	Dismissal the case on 2065/9/27 Fined Rs. 1000 and use discretionary power and decreased the amount to Rs. 100	The plaintiff missed the court's due date without any written notice and crossed other given court due date too.
45	Mohamad Kalam Miya V District Police Office Morang and Others	Not found in the decision	Morang District Court Torture Compensation	Dismissal of the case on 2065/5/5 Fined Rs. 500 and use discretionary power and decreased the amount to Rs. 12 and 50 Paisa	The plaintiff missed the court's due date without any written notice and crossed other given court due date too.
46	Sumitra Khawas v Ilaka Police Office, Belbari Morang and Others	Not found in the decision	Morang District Court Torture Compensation	Dismissal of the case on 2066/9/23 Fined Rs. 5000 and use discretionary power and decreased the amount to Rs. 50	The plaintiff missed the court's due date without any written notice and crossed other given court due date too.

S.N.	Name of parties	Torture and claim	Case register date/districts	Decision outcomes/date	Main reasons
47	Sindha Ram Gachhadar V District Police Office Morang and Others	Not found in the decision	Morang District Court Torture Compensation	Dismissal of the case on 2066/3/26 Fined Rs. 500 and use discretionary power and decreased the amount to Rs 250	The plaintiff missed the court's due date without any written notice and crossed other given court due date too.
48	Noorjan Khatun v District Police Office Morang and Others	Not found in the decision	Morang District Court Torture Compensation	Dismissal of the case on 2065/11/1 Fined Rs. 2000 and use discretionary power and decreased the amount to Rs. 200	The plaintiff missed the court's due date without any written notice and crossed other given court due date too.