

The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014

A Briefing Paper

June 2016

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Background

On 21 November 2014, Nepal's Ministry of Home Affairs registered a bill entitled the "Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014" ("the Bill") in Bill Section of the Legislative-Parliament and distributed to the members of the Parliament on 24 November 2014.¹ This Bill criminalizes torture and some forms of cruel, inhuman, or degrading treatment or punishment ("other ill-treatment") under domestic law in Nepal, puts in place "preventive, punitive and promotional measures" to this end, and provides protection and compensation to the victims and survivors of offences under the Bill.²

Nepal's Ministry of Law, Justice and Parliamentary Affairs had previously tabled a bill with similar provisions on 15 October 2014, on the criminal code more generally. However, the Ministry of Home Affairs thereafter brought its a separate draft law on torture and other ill-treatment. Both the Criminal Code Bill and the Torture Bill are currently before the Parliament.

The government's initiative to criminalize torture and other ill-treatment represents a significant step towards bringing Nepal's domestic legislation in line with international law and standards and implementation of Nepal's international legal obligations in this respect. The initiative will also be a step forward in the implementation of constitutional promises reflected in Article 22 of the recently promulgated Constitution of Nepal, and the Supreme Court's 2007 directive to criminalize torture and other ill-treatment.³ However, in their current form, the provisions of the proposed Bills fall short of international standards and meeting Nepal's legal obligations in several key respects.

This briefing paper identifies these deficiencies and details the changes and additions needed to the proposed Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014, in order to ensure that Nepal complies with international law and standards.

¹ Full text of the Bill annexed to this report.

² Preamble, Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014.

³ Rajendra Ghimire and Others v. Office of the Prime Minister and Others (Case No 3219/2062), 17 December 2007.

Applicable International and National Law

International Law

Nepal acceded to the International Covenant on Civil and Political Rights (ICCPR)⁴ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 14 May 1991,⁵ and the Convention on the Rights of the Child (CRC) on 14 September 1990.⁶ These treaties not only unequivocally prohibit torture and other ill-treatment, but also require that States take specific measures to prevent, criminalize and provide redress for these practices.

Torture and other ill-treatment however are still not considered criminal offences under Nepal's domestic law. In order for Nepal to comply with its international legal obligations, it must put in place the requisite legal provisions to prevent, criminalize and redress when necessary, torture and other ill treatment. The legal framework must also adequately address such related legal obligations embodied in the above international treaties to which Nepal is party, as the exclusionary rule, non-refoulement and universal jurisdiction, among others. Moreover, effective implementation of domestic and international legal obligations is essential to ensure accountability for perpetrators of torture and other ill-treatment.

The lack of such implementation, in addition fostering impunity, has also made it difficult for the Nepali judiciary to discharge its duties. Under the Nepal Treaty Act of 1990, the commitments undertaken by the Government of Nepal in relation to international treaties are justiciable in a Nepali court. The Treaty Act holds that where there is a conflict between international and domestic law, international law takes precedence.⁷

Obligation under the ICCPR

Article 7 of the ICCPR provides, in pertinent part:

⁴ *International Covenant on Civil and Political Rights*, 999 UNTS 171, entry into force 23 March 1976, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85, entry into force 26 June 1987, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en.

⁶ *Convention on the Rights of the Child*, 1577 UNTS 3, entry into force 2 Sep 1990, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.

⁷ Section 9(1), Nepal Treaty Act, 2047 (1990).

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

Article 4 of the ICCPR makes clear that the prohibition against torture and CIDT is absolute, as it can never be the subject of derogation, even in situations of emergency.

Article 10 of the ICCPR provides all persons who are deprived of their liberty the right to be treated with humanity and with respect to their inherent dignity.

Article 2(2) of the ICCPR provides for a general obligation "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". Article 2(3) of the ICCPR provides for the right to an effective remedy in case of violation of these rights. The Human Rights Committee, the body charged with supervising the ICCPR and responsible for setting out the authoritative interpretation of its provisions, has expanded on the content of this general obligation under article 2 in its General Comment 31. It has affirmed the "obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies", to criminalize such acts of torture and CIDT to "ensure that those responsible are brought to justice", and to make sure that these obligations are made effective in the domestic legal order.⁸

When the Human Rights Committee examined the Second Periodic Report of Nepal in 2014 to assess compliance with ICCPR obligations, it concluded that Nepal had been deficient in respect of article 7. It indicated that the government "should take appropriate measures to eradicate torture and ill treatment, including by adopting legislation defining and prohibiting torture with

⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 13, 15 and 18. The Human Rights Committee has also elaborated on the reporting requirements of States in demonstrating compliance with the prohibition against torture and other ill-treatment under article 7 of the ICCPR in General Comment 20, requiring States to indicate to the Committee which provisions of the criminal law penalize torture and other ill-treatment, as well as the legislative, administrative, judicial and other measures they have taken to prevent and punish such acts. See Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (1992), paras. 8 and 13.

sanctions and remedies commensurate with the gravity of the crime, in accordance with international standards.”⁹

Obligations under the CAT

Article 2 of the CAT provides, in pertinent part:

(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Article 4 of the CAT provides:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 14 of the CAT provides that Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

The Committee Against Torture has elaborated on the absolute and non-derogable nature of the prohibition against torture and other ill-treatment in its General Comment 2, reminding States that article 2’s prohibition “must be observed in all circumstances”, and that article 4 was “likewise obligatory as applied to both torture and ill-treatment.”¹⁰

In its Concluding Observations on Nepal in 2007, the UN Committee against Torture called on the government of Nepal to “adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and

⁹ Human Rights Committee, Concluding observations on the second periodic report of Nepal, CCPR/C/NPL/CO/2, 15 April 2014, para. 10, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/NPL?CO/2&Lang=En.

¹⁰ Committee Against Torture, General Comment 2: Implementation of article 2 by state parties, UN Doc CAT/C/GC/2, 24 Jan 2008, para. 6.

participation, are criminal offences punishable in a manner proportionate to the gravity of crimes committed.”¹¹

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, on his visit to Nepal in 2005, also called on the government define the crime of torture “as a matter of priority in accordance with article 1 of the Convention against Torture, with penalties commensurate with the gravity of the torture.”¹²

During Nepal’s second Universal Periodic Review at the UN Human Rights Council in 2015, several States further expressed concern that Nepal had yet to enact legislation criminalizing torture and recommended that Nepal promptly do so.¹³ Nepal recognized the need for legislation criminalizing torture and accepted the recommendations on introducing comprehensive legislation to criminalize torture and ensure victims’ right to remedy and reparation.¹⁴

Obligation under the CRC

Article 37(a) of the Convention on the Rights of the Child (CRC) requires State parties to ensure that no child shall be subject to torture or other ill-treatment; that capital punishment or life imprisonment without the possibility of release shall not be imposed on a child below the age of 18; no child shall be unlawfully or arbitrarily deprived of its liberty, and that if it is, the child must be treated with humanity and respect to its inherent dignity; and that every child deprived of its liberty is afforded the right to prompt access to legal assistance and to challenge the legality of its deprivation of liberty before a court or other competent, independent and impartial authority.

¹¹ Conclusions and recommendations of the Committee against Torture: Nepal, CAT/C/NPL/CO/2, 13 April 2007, para. 12, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/NPL/CO/2&Lang=En.

¹² Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf?OpenElement>.

¹³ See Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc. A/HRC/31/9, 23 Dec 2015, paras. 75 (UK expressing concern about the absence of legislation criminalizing torture), 121.3 and 121.4 (Germany and Norway, respectively, recommending that Nepal enact legislation explicitly criminalizing torture, and that such legislation ensure victims’ right to remedy and reparation), available at: http://www.upr-info.org/sites/default/files/document/nepal/session_23_-_november_2015/a_hrc_31_9_e.pdf.

¹⁴ See Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc. A/HRC/31/9, 23 Dec 2015, paras. 64 and 121. See also Human Rights Council, Addendum to the Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc. A/HRC/31/9/Add.1, 24 Feb 2016, para. 5, available at: http://www.upr-info.org/sites/default/files/document/nepal/session_23_-_november_2015/a_hrc_31_9_add.1_e.pdf.

Article 19(1) of the CRC further requires States to take all necessary legislative, administrative or other measures to protect the child from all forms of mental or physical violence, injury, abuse, neglect, negligence, maltreatment or exploitation, including sexual abuse.

National Law

Prohibition

The Constitution of Nepal 2015 guarantees the right to be free from torture and cruel, inhuman or degrading treatment when **arrested or detained** as a fundamental right.¹⁵ Article 22 provides that “no person who is arrested or detained shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.”¹⁶

Prior to the introduction of the proposed bill, there was no domestic law that criminalized torture as a distinct offence. Perpetrators could be charged under the unlawful detention/assault provisions of the National Code (*Muluki Ain*).¹⁷ However, very few cases were filed for instances of torture under these provisions.¹⁸

Right to Remedy and Reparation in the Torture Compensation Act 1996

The limited civil and administrative remedies against perpetrators of torture provided for under the Compensation Relating to Torture Act, which has been in force since 1996, is inadequate in meeting Nepal’s obligations under article 14 of the CAT and under article 2(3) of the ICCPR, as well as the UN Basic Principles and Guidelines on Remedy and reparation.¹⁹ Each of these instruments requires that States provide for prompt, accessible and effective remedies for violations, and provide for reparation, including, as appropriate, restitution, compensation,

¹⁵ See Article 22, of the Constitution of Nepal (2015).

¹⁶Article 22, of the Constitution of Nepal (2015).

¹⁷See Chapter 9 Hurt/Battery, National Code (*MulukiAin*), 2020, available at <http://www.lawcommission.gov.np/site/sites/default/files/Documents/muluki-ain-general-code.pdf>

¹⁸See report of the Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006, recording impunity for torture in Nepal and a lack of effective remedies.

¹⁹ See section 7, Compensation Relating to Torture Act, 2053 (1996), for directions on ‘departmental action’ for perpetrators.

rehabilitation, restitution, satisfaction and the right to truth and guarantees of non-repetition.²⁰

Elaborating on this article in General Comment 3, the Committee Against Torture has stated that redress and reparative measures should be tailored to the circumstances of the case and the particular needs of the victim, and that the reparations to the victim should be proportionate to the gravity of the violations committed against them.²¹

The Act wrongly only prohibits torture during detention, whereas the ICCPR and CAT require States to prohibit and redress torture and ill-treatment wherever and in whatever context it occurs. The Act also provides that "[i]f any employee of Government of Nepal is held to have inflicted torture upon any person, the victim shall be provided with compensation as referred to in this Act."²² As mentioned above, reparation is broader than compensation alone. Section 2(a) of the Act defines torture as "physical or mental torture of any person who is in detention in the course of inquiry, investigation or hearing, or for any other reason. The term includes cruel, inhuman, or insulting treatment of such person." The definition of torture in this Act does not comply with the Convention against Torture.²³

The Act also requires the victim to make a claim for compensation before a District Court within 35 days from the date of the alleged torture/ill-treatment or of his/her release from detention.²⁴ This time restriction is arbitrary and discounts the real life situations who for any number of reasons will be unable or unprepared to make a complaint within this constricted time period. If the court found allegations in the complaint to be substantiated, the complainant could be awarded compensation up to Nepali Rupees 100,000 (approx. USD 1000).²⁵ This limitation is arbitrary and will not in all cases be appropriate as reparation for the harm suffered by a victim.

²⁰ UN Basic Principles on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147, 16 Dec 2005; UN Human Rights Committee, General Comment 31, paras. 15-16; Committee Against Torture, General Comment 3, paras. 6-18.

²¹ Committee Against Torture, General Comment 3: Implementation of article 14 by State parties, UN Doc. CAT/C/GC/3, 13 Dec 2012, para. 6.

²² Section 4, Compensation Relating to Torture Act, 2053 (1996).

²³ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006, paras. 13-14.

²⁴ Section 5, Compensation Relating to Torture Act, 2053 (1996).

²⁵ Section 6, Compensation Relating to Torture Act, 2053 (1996).

The definition of torture under the Compensation Relating to Torture Act does not comply with the Convention against Torture,²⁶ and the Act as a whole is not in line with article 14 of the CAT, as elaborated by the Committee Against Torture in General Comment 3, in ensuring the right to redress.

Judicial Pronouncements

In 2007, in the *Rajendra Ghimire* case, the Supreme Court of Nepal ruled that the government must adhere to its obligations under the Convention against Torture and initiate legislation criminalizing torture.²⁷ The Supreme Court on 2 January 2014, in its ruling on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance further emphasized the State's obligation to criminalize torture.²⁸ The court also affirmed that the right to be free from torture was a fundamental right, and that amnesties for grave violations of human rights, including torture, were impermissible under international law.

Analysis of Nepal's Draft Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014 ("the Bill")

Limited Definition and Prohibition Against Torture

The draft Bill's definition of torture is too narrow, leaving many categories and situations of torture and ill-treatment outside its ambit. It does not comply with international law and standards, particularly under the CAT and ICCPR. Section 2(K) of the Bill defines 'torture' as follows:

"Torture" means physical or mental torture by causing serious hurt, pain or suffering whether or not committing any act to a person under detention or any other person by the person holding public office or by any other person under his/her instigation or consent knowingly for any of the following purposes: (1) To take any information on any matter from the victim or any other person; (2) To cause confessed the victim or any other

²⁶ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006, paras. 15-16.

²⁷ *Rajendra Ghimire & Others v. Office of the Prime Minister* (Case No 3219/2062), 17 December 2007.

²⁸ *Advocate Madhav Basnet & Others v. Government of Nepal & Others* (069-WS-0057), 2 January 2014.

person to any offence; (3) To punish the victim or any other person for an act suspected that s/he has committed or is preparing to commit; (4) To force or coercive, or threaten or intimidate the victim or any other person to commit or not to commit any act; (5) To carry out any other act that is based in discrimination and is punishable under current laws.

Section 3 of the Bill states that no person holding public office and no other person under his/her instigation or consent "shall inflict torture on any person under detention or on any other person". Section 3 also criminalizes attempting to torture, instigating anyone to inflict torture; assisting or participating in torture directly or indirectly, and "[h]iding, making plans to abscond or providing shelter knowingly" to anyone involved in committing offences of torture, and shielding them "from being arrested, investigated or punished".

There are many reasons why this definition of torture is problematic and non-compliant.

Article 1 of the CAT defines "torture" as:

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

First, the definition in the draft Bill is qualified by reference to "a person under detention", similar to the formulation in article 22 of the Constitution. Even though the definition in section 2 (k) makes reference to the torture of "any other person", subsequent provisions of the Bill only protect persons who have been tortured while in detention. For example, Section 11 provides for a torture victim to lodge a complaint before the court; however, the provision requires the complaint to present the details of the "period and reason held in detention" (section 11.1.a). Subsequent provisions in Section 12, 13, 14, 15 and 16 are dependent on Section 11. Therefore, there is no mechanism in the Bill for

reporting or filing a complaint against an act of torture committed to a person who is not under detention. And courts can only adjudicate complaints filed as per the procedural provisions contained in the Bill. Therefore, there is no possibility of investigation, prosecution and adjudication against a perpetrator who committed an act of torture to any person who had suffered the torture outside of a custodial setting. Similarly, under section 22, to be compensated, a victim has to establish that he/she has been tortured. And for the reasons mentioned above, it would be difficult to do under the provisions of the Bill if the torture had not happened while 'in detention'.

Clearly many acts of torture and ill-treatment can be and frequently are committed outside of the custodial setting, including in a variety of public and private spaces. AS the CAT has pointed, the Convention requires States to "prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm." The omission of such situations is arbitrary and unjustifiable, and stands to leave perpetrators enjoying impunity and victims without access to justice.²⁹

The definition of torture under the Bill is thus narrower in scope and application than the definition under the CAT and the ICCPR article 7; which similarly applies to all person subject to torture or ill-treatment, whether or not inside detention.

The ICJ recommends that sections 2 (a), 4, and 11 be re-drafted to remove references to "detention" so that torture committed by any public official in any context can be prosecuted under this Bill, in accordance with international standards.

Second, the Bill's definition of a "person holding public office" is too narrow and does not conform to the language of CAT. Section 2 (j) of the Bill defines a "person holding public office" as follows:

An officer responsible for taking a person to control, arrest, investigate or prosecute for an offence, provide security or implement the punishment or a person receives remuneration or other facility from government fund

²⁹ Committee Against Torture, General Comment 2, para. 15.

being appointed, elected or nominated for performing public duty and the term also denotes any other person working in the capacity of such person.

Article 1 of the Convention against Torture addresses all situations where the pain or suffering in question is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 4 of the Convention requires that the offence of torture cover anyone (whether a state official or not) who intentionally and with purpose inflicts severe pain and suffering, in any circumstance where there is a link to state authority as described in article 1.

While section 1 (2) (j) of the Bill includes the phrase “any other person working in the capacity of such person”, it is still framed in terms of officials involved in law enforcement or those being paid to perform a ‘public duty’. In order to comply with international standards and principles of State responsibility, this provision should apply to a broader range of actors, i.e., wherever the pain of suffering is inflicted by anyone (whether a public official or not) by or at the instigation of or with the consent or acquiescence of any public official or other person acting in an official capacity. This necessarily extends not only to public officials, but also to any State “agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.”³⁰

The ICJ recommends that the phrase “An officer responsible for taking a person to control, arrest, investigate or prosecute for an offence, provide security or implement the punishment” be deleted from section (1)2 (j), and the formulation in the CAT instead be followed.

Third, the Bill’s definition of the “objectives” for perpetrating torture is too restrictive. Section 2 (k) of the Bill lists the “objectives” or purposes in order for an act to constitute torture. The Bill presents this as a closed and exhaustive list. The plain language of the definition in article 1 of CAT makes clear that the list of purposes is to be illustrative rather than exhaustive (by using the phrase “for such purposes as”).

³⁰ Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fGC%2fGC%2f2&Lang=en.

The ICJ recommends that section 2 (k) be re-formulated, to indicate that the purposes mentioned are illustrative not exhaustive.

Limited Definition and Prohibition Against Other Ill-Treatment

Both the Human Rights Committee and the Committee Against Torture have indicated that many of the obligations and legal consequences pertaining to torture are equally applicable to cruel, inhuman or degrading treatment or punishment.³¹

The draft Bill's definition of "cruel, inhuman or degrading treatment" (CIDT) is too restrictive and does not conform to international legal standards. Section 2(f) of the Bill defines "Cruel, inhuman or degrading treatment" and section 4 lays down the prohibition against the same. Section 4 states that no person in public office shall impose cruel, inhuman or degrading treatment on "any person under detention or on any other person". By framing the prohibition in the context of persons in detention, this formulation presents the same concerns as those described in the case of torture above. Indeed, the prohibition against CIDT under the CAT and the ICCPR is not only absolute, but does not contain any "purpose" element in its definition, and is clearly not meant to be limited to only certain contexts.

Section 2 (f) of the Bill defines cruel, inhuman or degrading treatment as: "any act or treatment other than an act of torture to any other person that is against his human dignity, reputation and dignity knowingly inflicted by a person holding a public office or by any other person under his instigation or consent". This definition is vague and can lend itself to multiple interpretations, and failing to provide precise guidance to a range of officials in meeting their duties under the law.

Article 16 of the CAT states that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment **or punishment** [emphasis added] which do not amount to torture...when such acts are committed by or at the instigation of or with the

³¹ See Committee Against Torture, General Comment 2, para. 6; Human Rights Committee, General Comment 31, para. 8; Human Rights Committee, General Comment 20, paras. 3-7.

consent or acquiescence of a public official or other person acting in an official capacity”.

Neither the CAT nor the ICCPR has expressly defined “other cruel, inhuman or degrading treatment or punishment”. The Human Rights Committee, in General Comment 20 pertaining to article 7 of the ICCPR, has noted that the distinctions as between prohibited categories depends on their respective nature, purpose and severity, but also emphasized that the prohibition under article 7 does not relate only to acts of physical pain or suffering but also to acts causing mental suffering.³²

In order to ensure the obligation to prevent cruel, inhuman or degrading treatment or punishment complies with international standards, the government must, in addition to criminalizing other ill-treatment, provide a non-exhaustive list of illustrative examples to demonstrate the acts that constitute ill treatment and are therefore prohibited.

The ICJ recommends that the definition and prohibition under 2(f) and 4 of the Bill be drafted consistent with the prohibition under article 16 of the CAT, and that phrase “or punishment” be added to sections 2 (f) and 4.

Limited Responsibility of the “Charge of Office”

The draft Bill’s imposition of responsibility on public officials is drafted too narrowly and does not comply with international law and standards. Section 6 of the Bill states

It shall be the duty of the in charge of the relevant office to stop inflicting torture or imposing cruel, inhuman or degrading treatment, if s/he is noticed or if there is reasonable reason to be noticed that if anyone is to inflict torture or to impose cruel, inhuman or degrading treatment to any person held under detention.

According to the Bill, if this official does not perform this duty, it is unclear whether he or she may be subject only to departmental action and not criminal sanction, as is required by Nepal’s international legal obligation.

³² See UN Human Rights Committee, CCPR General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, paras. 4-6.

In addition, Section 6 is limited to the risk of torture posed to people in detention. However, as discussed above, this custodial limitation is arbitrary.

Article 4 of CAT extends criminal responsibility not only to persons directly carrying out torture, but also to conduct of any person that constitutes “participation or complicity” in torture. This includes, for examples, persons in positions of superior or command responsibility. Such persons need not have necessarily have ordered the torture to be held responsibility; they may have acquiesced or failed to exercise their protective responsibilities in accordance with minimal standards of due diligence. The UN Committee against Torture has explained:

[W]here State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill- treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non- State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.³³

The Committee has often used this principle to hold officials responsible for preventing and protecting victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.³⁴

Furthermore, the penalty for not exercising a due diligence obligation and preventing torture must not merely consist of departmental disciplinary action. As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment said, in his report on Nepal, “the sanction of ‘departmental action’ against perpetrators provided for in Nepali legislation such

³³ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para. 18.

³⁴ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para. 18.

as demotions, suspensions, fines, delayed promotions, etc. is so grossly inadequate that any preventive or deterrent effect that may have been envisaged is meaningless in practice.”³⁵

The Bill must therefore ensure that officials in a position of superior or command, or similar supervisory responsibility, who are acquiescent or otherwise fail to exercise a due diligence obligation to prevent torture must be subject to comparable criminal responsibility as public officials who directly commit acts of torture.

The ICJ recommends that section 6 be broadened to include the duty to prevent torture and CIDT in all circumstances, including outside detention. Criminal responsibility for torture and CIDT officials in a command, superior or supervisory authority who are complicit, acquiesce or other fail to exercise due diligence to prevent and stop such conduct, with sanctions that reflect the gravity of their crime (see below).

Insufficient Sanctions and Penalties

Section 20 of the Bill provides a maximum punishment of five years imprisonment, or a fine up to Rs 50,000 (approximately \$500 USD) or both. Section 20 (3) provides for a 10 percent enhancement of punishment in certain cases, including where the victim is a minor, pregnant, elderly person, mentally or physically disabled, or where the torture or ill treatment has resulted in: mutilation, mental abnormality, disfigurement, inability to perform employment tasks, or HIV+ infection.

The Bill provided that if the act in question also amounts to an offence under other laws in force, the penalty under the other law shall be imposed in addition to the penalties under the Bill. Section 20 (5) of the Bill also states that if “someone dies due to torture, it shall be punishable only under current law related to homicide”.

The maximum penalty provided for an act of torture under the Bill is grossly inadequate in many cases of torture, considering the gravity of the offence and the long-lasting damage suffered by the victims.

³⁵ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006.

Article 4(2) of the CAT provides that all acts of torture, as well as attempt, complicity and participation, must be “punishable by appropriate penalties which take into account their grave nature”. The CAT does not specify a minimum or maximum sentence or punishment for perpetrators of torture, and cases must be individual assessed in accordance with various factors including the severity of the ill-treatment.

The ICJ recommends that for section 20(3)(e) of the Bill to comply with the Convention against Torture, the maximum penalty provided in the Bill needs to be increased significantly beyond the present five years (or five plus 10 percent in certain cases), and left to the discretion of the court in the interests of justice in each case.

Under Section 20 (3) (e) of the Bill, enhanced punishment shall be imposed if the act of torture results in HIV infection. The use of criminal law to regulate HIV transmission is inappropriate because of the impact of such interventions on public health and human rights, including the right to health, which Nepal is legally bound to protect.³⁶ The Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Office of the High Commissioner for Human Rights (OHCHR) have promulgated guidelines on HIV/AIDS and human rights, stating:

Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.³⁷

On the question of when HIV transmission should lead to enhanced penalties, UNAIDS has said that “[w]here a violent offence (e.g., rape, other sexual assault or defilement) has also resulted in the transmission of HIV or created a significant risk of transmission, the HIV-positive status of the offender may

³⁶ See, for example, UNAIDS Policy Brief “Criminalization of HIV Transmission” available at http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf; and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 27 April 2010, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/131/18/PDF/G1013118.pdf?OpenElement>.

³⁷ Guideline 4, International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version, para. 12, available at <http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf>.

legitimately be considered an aggravating factor in sentencing only if the person knew he or she was HIV positive at the time of committing the offence".³⁸

The present Bill makes no provision for foreseeability or intent while providing for an aggravated sentence, that is, factors such as whether the perpetrator knew of a person's HIV status, whether the perpetrator had taken precautions to prevent transmission, and whether she or he had intended to transmit the virus to the victim.

The ICJ recommends that section 20 (3) (e) of the Bill be removed from the Bill.

Short Limitation Periods

The draft Bill imposes unduly short limitation period for victim's to file complaints of torture and ill treatment. Under Section (3)(11) of the Bill, complainants – that is, the victim or the victim's representative – must file the complaint within 90 days of when the torture or other ill-treatment had been inflicted or when they were released from detention. Once a complaint is filed, law enforcement officials are responsible for the investigation, and for filing a case where facts support it. Under Section 17, a case must be lodged within a year of when the offence was alleged to have been committed.

These provisions, constituting statutes of limitations or prescriptions, are unacceptable under international standards, and the directions of the Supreme Court of Nepal. Principle 4 of the UN Basic Principles and Guidelines on the Right to Remedy and Reparations states that a "statute of limitations shall not apply to gross violations of international human rights law ... constituting crimes under international law [such as torture]".³⁹ Principle 23 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states:

Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply

³⁸ UNAIDS Policy Brief, Criminalization of HIV Transmission, pg.2, available at http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

³⁹ See UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by GA resolution 60/147, on 16 Dec 2005, UN Doc. A/Res/60/147, 21 Mar 2006.

to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.⁴⁰

The UN Committee against Torture has said that limitation periods for acts of torture are incompatible with the Convention against Torture.⁴¹

The Nepali Supreme Court on 2 January 2014 held that a "statute of limitations may not be made with regard to the offences of grave violations of international human rights."⁴² The Supreme Court ruling interpreted torture as a grave violation of international human rights.⁴³

The ICJ recommends that the stipulation of a time period be removed from section 11, and that section 17 of the Bill be removed as well. Instead, the Bill should contain a provision categorically affirming that there is no limitation or prescription period for the filing of complaints or cases of torture or other ill-treatment.

Inadequate Reparations Provisions

The draft Bill's suggested compensation rates for victims of torture or ill treatment are too low compared with the gravity of the crime. Section 2 (g) of the Bill defines 'reparation' as follows:

"Reparation" means the remedy, compensation or any other services that may be provided to the victims under present act or the rules formulated under it.

This Bill currently before the Parliament is intended to replace and supersede the Torture Compensation Act 1996. Section 22 enables courts to order up to 500,000 rupees (approximately \$5000 USD) in compensation for the victim

⁴⁰ Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, recommended by UN Human Rights Commission resolution 2005/81, 8 Feb 2005, principle 23.

⁴¹Rodley and Pollard, "Criminalisation of Torture" (2006), pp. 127-128. Regional human rights bodies have echoed this view. For instance, the Inter-American Court of Human Rights has stated that "it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture[.]" See Case of Barrios Altos (Chumbipuma Aguirre and others v Peru), Inter-Am Ct.H.R., Judgment 14 March 2001, para 4.

⁴²Basnet and Pokharel v. Government of Nepal & Others, 2 January 2014 (069-WS-0057).

⁴³Basnet and Pokharel v. Government of Nepal & Others, 2 January 2014 (069-WS-0057).

from the offender, “where it is established anyone has tortured or treated with cruel, inhuman or degrading treatment pursuant to present Act”. Under 22(3), if the offender is unable to pay the compensation, “the court may order to make compensated such amount of compensation from Government of Nepal”.

As noted above, the right to and effective remedy and reparation for human rights violations is a general international law obligation, and required specifically for torture under ICCPR article 7 together with article 2(3); and CAT article 10. General Principles regarding UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which was adopted by a consensus resolution of all States at the UN General Assembly. The Human Rights Committee and the Committee of torture have elaborated at length on the scope of the principle as applied to the ICCPR and CAT respectively.⁴⁴

The Bill’s provisions on reparation fall short of international law and standards in a number of respects:

First, the definitions of reparation and compensation here are wholly inadequate. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law state, ICCPR article 2(3) and 7, and CAT article 14 all require that all forms of reparations, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, must be available in accordance with the requirements of justice in any particular case and taking into account the needs and wishes of the victim.⁴⁵ The definition of these terms have been

⁴⁴ Human Rights Committee, General Comment 31, paras. 15-16; Committee Against Torture, General Comment 3.

⁴⁵ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 on 16 December 2005, UN Doc. A/Res/60/147, 21 Mar 2006; arts. 2(3) and 7, ICCPR; art. 14, CAT; see also ICJ, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners’ Guide, Practitioners’ Guide No. 2 (2006).

elaborated in the Basic Principles as well as the Committee Against Torture's General Comment 3 in the context of torture.⁴⁶

The ICJ recommends that section 2 (g) of the Bill be broadened to ensure restitution, rehabilitation, satisfaction and guarantees of non-repetition, as needed, in accordance with interests and wishes of the victims. The Government should be directed to provide for administrative rules implementing this obligation, but where complaints come before the court it is for the judiciary to have the final determination as to the reparations ordered.

Second, under section 22 of the Bill, compensation can only be ordered "where it is established anyone has tortured or treated with cruel, inhuman or degrading treatment pursuant to present Act". This implies that compensation may be awarded only where judicial proceedings for torture have been concluded, and someone has been found responsible.

The logic behind this provision is an incorrect conflation of the State responsibility and individual criminal responsibility. Under both the ICCPR and the CAT, and general rules of state responsibility under international law, it is the State itself that is responsible for a wrongful act, irrespective of whether any individual responsibility has been or can be established.

Thus, Article 14 of the CAT requires state parties to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." The UN Committee against Torture has affirmed that this requires States to "promptly initiate a process to ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place."⁴⁷ According to the Committee,

Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. The

⁴⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 on 16 December 2005, UN Doc. A/Res/60/147, 21 Mar 2006; Committee Against Torture, General comment No. 3 (2012): Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012; ICJ, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide, Practitioners' Guide No. 2 (2006).

⁴⁷ Committee Against Torture, General Comment No. 3 (2012): Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012, para. 27.

Committee considers that compensation should not be unduly delayed until criminal liability has been established. Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place.⁴⁸

Section 22 of the Bill therefore leaves open the possible outcome that, even where there are reasonable grounds to believe that torture has taken place, victims may be denied any redress, whether compensation or other forms of reparation, if the State authorities do not conduct and conclude a judicial proceeding to determine individual responsibility.⁴⁹

Furthermore, article 22(3) makes the duty to compensate fall primarily on the perpetrator, and the government is only obliged to step in if the perpetrator is unable to pay. But under international law the State remains responsible for the wrongful acts of its officials, and the State has an obligation to put in place appropriate procedures to ensure that victims are able to access to effective remedy and reparation from the State – while not precluding also pursuing the perpetrator - in a prompt and timely manner.

The ICJ recommends that the phrase “where it is established anyone has tortured or treated with cruel, inhuman or degrading treatment pursuant to present Act” be deleted from section 22, and that victims be granted the right to all forms of reparation, including but only compensation, when there are reasonable grounds to believe that torture or ill-treatment has taken place, independent of the existence or outcome of a judicial proceeding. Furthermore, the duty to provide reparation must lie primarily with the State and not solely with the perpetrator.

Improper Penalties for 'Fake' Complaints

Section 11 of the Bill makes a provision for the victim - or if she or he cannot file a complaint themselves, then for someone on their behalf - to file a complaint

⁴⁸ Committee Against Torture, General comment No. 3 (2012): Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3, 13 December 2012, para. 26.

⁴⁹ See, e.g., the ICJ's prior submissions to the UN Human Rights Council and other public comments detailing Nepal's history of impunity for torture and other ill-treatment: <http://www.icj.org/icj-submission-on-nepal-to-the-un-human-rights-committee/>; <http://www.icj.org/nepal-government-fails-to-meet-its-commitment-to-combat-impunity/>; <http://www.icj.org/government-obstruction-of-justice-and-defiance-of-judicial-authority/>.

before the court alleging that they have been subject to torture or ill-treatment. However, section 31 provides that:

If it is found that anyone made a fake complaint alleging committal of offence under present Act, court may fine such person lodging such complaint up to ten thousand rupees.

Section 31 raises serious concerns as to the effectiveness of the Bill in its stated purpose of criminalizing and preventing torture. First, section 31 has the significant potential to scare victims and their representatives, and deter the reporting of torture instead of facilitating it. This is particularly true in situations such as Nepal, where relatively powerless victims from poor and disadvantaged communities have to file cases against relatively powerful public officials. Furthermore, section 31 only speaks of a 'fake' complaint, and makes no reference to intent or malice. It is possible that even though the victim files a complaint against the perpetrator, lack of evidence or procedural causes result in a verdict of non-guilty. The Bill does not define a "fake" complaint, and therefore opens itself up for abuse and perpetuating impunity by labeling all dismissed complaints as "fake" and punishing the complainants in those cases. This in turn would have a chilling effect in preventing other victims from coming forward: the exact opposite effect of the stated purpose of the Bill. Thus, the manner in which section 31 is drafted means it can be used against the victim, resulting in further injustice.

The ICJ recommends that section 31 of the Bill be removed in its entirety.
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Responsibility to Prevent Torture and Other Ill-Treatment

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

The international framework for prevention is set out in the Optional Protocol to the CAT, to which the ICJ, in addition to a number of States at Nepal's UPR,

have called upon Nepal to accede. Until such time as it does, Nepal should move to implement its key provisions, particularly the establishment or designation of a national preventative mechanisms tasked, among another things, with carrying a programme of preventative visits to places of detention around the country.

While commenting on Nepal's compliance with its international obligations, various international authorities have commented on the need for preventive and monitoring mechanisms in the context of torture. For example, in its Concluding Observations of Nepal in 2014, the UN Human Rights Committee stated that Nepal "should also ensure that law enforcement personnel receive training on the prevention and investigation of torture and ill-treatment by integrating the Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)".⁵⁰ Similarly, in its 2007 Concluding Observations, the Committee against Torture recommended that "[t]he State party should intensify its education and training efforts relating to the prohibition against torture, and introduce evaluation and monitoring mechanisms to assess their impact".⁵¹

The ICJ recommends that the proposed Bill also place obligations on specific State institutions to establish preventive programs for torture and monitor their implementation. It should provide for the establishment and designation of a national preventative mechanism, in line with that set out in the OPCAT.

Universal Jurisdiction

Pursuant to the CAT, Nepal must prosecute or extradite to another country for prosecution any torture suspect, irrespective of where in the world the torture took place. Article 5 (2) of the CAT requires, "Each State Party shall take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction

⁵⁰ Para 10, "Conclusions and recommendations of the Committee against Torture: Nepal" CAT/C/NPL/CO/2, 13 April 2007.

⁵¹ Para 19, "Conclusions and recommendations of the Committee against Torture: Nepal" CAT/C/NPL/CO/2, 13 April 2007.

and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article”.

The Committee Against Torture has made clear that this obligation to prosecute must be discharged whether or not another state has made an extradition request.⁵²

The application of the principle of universal jurisdiction is crucial to ensuring accountability for acts of torture globally. The Special Rapporteur on torture has stated that “[i]n countries where the law does not give the authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator or victim (universal jurisdiction), the enactment of such legislation should be made a priority.”⁵³ Any legislation that aims to prevent and protect people against torture must enable authorities to prosecute people accused of torture in their territory, irrespective of where the crime has been committed and the nationality of the perpetrator.

The ICJ recommends that the Bill include a provision requiring authorities in Nepal to prosecute all individuals accused of torture, or else extradite the person to another State for prosecution, in line with CAT article 5, irrespective of their nationality and where the crime was committed.

Exclusionary Rule

Section 28(1) of the Bill makes “any confession, admission or statement taken from any person on whom torture has been inflicted inadmissible in any proceeding.”

The provision should be other ill-treatment, and not just torture, in the exclusion, in line with the CAT and General Comment 2 of the Committee Against Torture.

The ICJ recommends that Section 28(1) of the Bill be amended to exclude statements made by the person on whom the torture or other ill-treatment was inflicted, and that Section 28 expressly include other ill-treatment in the exclusion.

⁵² See *Guengueng and others v. Senegal*, CAT Communication No. 181/2991, para. 9.7.

⁵³ UN Doc. E/CN.4/2003/68, para. 26.

Non-Refoulement

Section 33 of the Bill states that, if any foreign citizen living in Nepal is to be exiled from Nepal or deported to his State of nationality and if there is ground to believe that s/he would be subjected to torture by such expatriation, concerned authority may restrict the process of expatriating or deporting him/her.

This provision is inconsistent with international law, as embodied in article 3 of the CAT, and articles 2 and 7 of the ICCPR as interpreted by the Human Rights Committee in its General Comment 31.

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

The Human Rights Committee has reinforced this principle of non-refoulement in the context of articles 2 and 7 of the ICCPR in General Comment 31, stating in pertinent part:

[T]he article 2 obligation requiring that State Parties respect and ensure Covenant 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, such as that contemplated by articles 6 [right to life] and 7 [torture and ill-treatment] of the Covenant[.]⁵⁴

Under the Nepali Bill, on the other hand, Nepali authorities are *permitted, but not required*, to avoid deportation or expatriation. Likewise, the duty under the Nepali Bill to "restrict" extradition or deportation is inadequate and inconsistent with the absolute prohibition imposed under international law.

Article 3(2) of the CAT elaborates on the scope of the determination of whether there are grounds to believe that a person would be in danger of torture if repatriated, stating:

[T]he competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State

⁵⁴ Human Rights Committee, General Comment 31, para. 12.

concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Nepali Bill does not expressly define the broad scope of the determination, in accordance with article 3 of the CAT.

The ICJ recommends that Section 33 of the Bill be amended in line with article 3 of the CAT, in order to be fully consistent with the international principle of non-refoulement, by explicitly imposing a mandatory and absolute prohibition on extradition, deportation, return or removal if there are substantial grounds to believe that a person may be in danger of being subjected to torture or ill-treatment, and that determination be based broadly on all relevant considerations including the existence of a consistent pattern of human rights violations in the State concerned.

Conclusions and Recommendations

The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014 is a timely and welcome proposal, necessary to bring Nepal's laws in line with its international legal obligations. However, the Bill as presently drafted fails to comply with Nepal's international human rights treaty obligations in a number of important respects. This briefing has analyzed provisions of the Bill against relevant international law, comparative legal standards, and the requirements of Nepal's historic and socio-political context, to highlight these various shortcomings with respect to international law.

To this end, the ICJ recommends the following changes to the draft of the Torture and Cruel, Inhuman or Degrading Treatment (Control) Act 2014 as it is currently framed:

1. Sections 2 (k), 4, and 11 be re-drafted to remove references to "detention", so that torture committed by any public official in any situation or context, including non-custodial situations, can be prosecuted under the Act.
2. The phrase "An officer responsible for taking a person to control, arrest, investigate or prosecute for an offence, provide security or implement the punishment" be deleted from section 2 (j), and the equivalent formulation under CAT article 1 be followed.

3. Section 2(k) be re-formulated, to indicate that the purposes mentioned are illustrative not exhaustive.
4. The phrase "or punishment" be added to sections 2 (f) and 4.
5. Section 6 be broadened to include the duty to prevent torture in all circumstances, and that officials who violate section 6 be subject to penalties that reflect the gravity of their crime.
6. The maximum penalty provided in the Bill in Section 20(3)(e) be revised and increased significantly to comply with the Convention against Torture.
7. Section 20 (3) (e) of the Bill be deleted.
8. Provide for enhanced punishment for the commanding officer when he or she has ordered torture.
9. The stipulation of a statute of limitations time period be deleted from section 11, and that section 17 of the Bill be deleted as well. Instead, the Bill should contain a provision stating that there is no limitation period for the filing of complaints or cases of torture or other ill-treatment.
10. Section 2 (g) of the Bill be broadened to include reference to include all forms of reparation, including restitution, rehabilitation, satisfaction and the right to truth, and guarantees of non-repetition, and that the government be empowered to make rules to implement this obligation.
11. The phrase "where it is established anyone has tortured or treated with cruel, inhuman or degrading treatment pursuant to present Act" be deleted from section 22, and recognize the right of victims to reparation when there are reasonable grounds to believe that torture or ill-treatment has taken place, independent of the existence or outcome of a criminal case. Furthermore, the primary duty to provide this reparation should lie with the government and not with the perpetrator.
12. Section 31 of the Bill, providing for penalties for fake complaints, be deleted in its entirety.
13. The Bill should also place obligations on specific State institutions to establish preventive programs for torture and monitor their implementation.

14. The Bill should include a provision enabling authorities in Nepal to prosecute all individuals accused of torture and ill-treatment , irrespective of their nationality and where the crime was committed.
15. Section 28(1) of the Bill should be amended in line with article 15 of the CAT, to exclude statements made by the person on whom the torture or other ill-treatment was inflicted, and that Section 28 expressly include other ill-treatment in the exclusion.
16. Section 33 of the Bill should be amended in line with article 3 of the CAT, in order to be fully consistent with the international principle of non-refoulement, by explicitly imposing a mandatory and absolute prohibition on extradition, deportation, return or removal if there are substantial grounds to believe that a person may be in danger of being subjected to torture or ill-treatment, and that determination be based broadly on all relevant considerations including the existence of a consistent pattern of human rights violations in the State concerned.

ANNEX: Full Text of Bill (English Translation)

Bill on Controlling Acts of Inflicting Torture and Cruel, Inhuman and Degrading Treatment

Preamble:

Whereas it is expedient to control acts of torture and cruel, inhuman or degrading treatments considering them as criminal offence having protected the right of person to live with dignity and having adopted including preventive, punitive and promotional measures; and to provide for necessary provisions having reformed the current legal provision on protection and granting compensation to the victim suffered by such acts; The Constituent Assembly, in its capacity of Legislature-Parliament, has promulgated this Act pursuant to Article 83 of the Interim Constitution of Nepal 2007.

Chapter 1

Preliminary

1 Short Title and Commencement

(1) The name of present Act is "Torture and Cruel, Inhuman or Degrading Treatment (Control) Act 2014".

(2) Present act shall come into force on the 91th day of its official recognition.

2 Definitions

Unless the subject or contexts requires otherwise, in present Act:

a. "Court" means the relevant District Court.

b. "Investigation Officer" means the officer authorised under current act to investigate the offence.

c. "Offence" means offence under the present Act.

d. "Prescribed" or "as prescribed" means prescribed or as prescribed in the rules and regulations under the present Act.

e. "Under detention" means a condition that a person is arrested and held under control, custody, imprisonment or confinement pursuant current laws.

f. "Cruel, inhuman or degrading treatment" means any act or treatment other than an act of torture to any other person that is against his human dignity, reputation and dignity knowingly inflicted by a person holding a public office or by any other person under his instigation or consent.

g. "Reparation" means the remedy, compensation or any other services that may be provided under present act or the rules formulated under it. to acts of making persons disappeared in course of armed conflict. The term also denotes the person giving order or instructions, soliciting or conspiring, abetting, or aiding to absconding, hiding or sheltering a perpetrator to make him protected.

h. "Victim" means the person suffered by the offence under present Act.

i. "Government Doctor" means a Doctor, Kaviraj or a Health Assistant in government service.

j. "Person holding Public Office" means an officer responsible for taking a person

to control, arrest, investigate or prosecute for an offence, provide security or implement the punishment or a person receives remuneration or other facility from government fund being appointed, elected or nominated for performing public duty and the term also denotes any other person working in the capacity of such person.

k. "Torture" means physical or mental torture by causing serious hurt, pain or suffering whether or not committing any act to a person under detention or any other person by the person holding public office or by any other person under his/her instigation or consent knowingly for any of the following purposes:

1. To take any information on any subject from the victim or any other person;
2. To cause confessed the victim or any other person to any offence;
3. To punish the victim or any other person for an act suspected that s/he has committed or is preparing to commit;
4. To force or coercive, or threaten or intimidate the victim or any other person to commit or not to commit any act;
5. To carry out any other act that is based in discrimination and is punishable under current laws.

Chapter 2

Provision Related to Offence

3 Torture Not to be Inflicted

(1) Person holding public office or by any other person under his/her instigation or consent shall not inflict torture on any person under detention or on any other person.

(2) For the purpose of Subsection (1), if any of the following acts are carried out, it shall be deemed the offence related to torture under present Act is committed:

- a. Inflicting torture;
- b. Causing or ordering to inflict torture;
- c. Instigating anyone to inflict torture;
- d. Attempting to inflict torture;
- e. Assisting or participating directly or indirectly to torture;
- f. Hiding, making abscond or proving shelter knowingly, any person involved in any acts under Clause (a) to Clause (e), to shield from being arrested, investigated or punished.

4 Not to be treated with Cruel, Inhuman or Degrading Treatment

(1) Person holding public office or by any other person under his/her instigation or consent shall not impose cruel, inhuman or degrading treatment on any person under detention or on any other person by the.

(2) For the purpose of Subsection (1), if any of the following acts are carried out, it shall be deemed the offence related to torture under present Act is committed:

- g. Imposing such treatment;
- h. Causing or ordering to impose such treatment;
- i. Instigating anyone to impose such treatment;
- j. Attempting to impose such treatment;
- k. Assisting or participating directly or indirectly in imposing such treatment;
- l. Hiding, making abscond or proving shelter knowingly, any person involved in

any acts under Clause (a) to Clause (e), to shield from being arrested, investigated or punished.

5 To be Deemed Committed the Offence Within Nepal

Notwithstanding anything contained in current laws elsewhere, the offence happen in the following situations shall be deemed have been committed in Nepal:

- a. If the offence is committed in aircraft or a ship registered in Nepal;
- b. If the offence is committed in Nepalese embassy or diplomatic mission located in abroad;
- c. If the person involved in the offence or the victim person of the offence is Nepali citizen when the offence is committed outside Nepal; or
- d. If a foreigner citizen involved in the offence is found in Nepal where the offence is committed outside Nepal and the case is to be lodged in Nepal as such person could not be extradited in accordance with current law.

6 In Charge of Office Shall be Liable

(1) It shall be the duty of the in charge of the relevant office to stop inflicting torture or imposing cruel, inhuman or degrading treatment, if s/he is noticed or if there is reasonable reason to be noticed that if anyone is to inflict torture or to impose cruel, inhuman or degrading treatment to any person held under detention.

(2) In charge of the office that does not fulfill the liability pursuant to Subsection 1 may be subjected to departmental action in accordance with the law to his service condition.

7 Information or Notice is to be Given

Any person, having notice of situation where anyone is in position to inflict torture or impose cruel, inhuman or degrading treatment to person under detention, shall inform or notify the matter to the in charge of the office that person detained. But in a situation where the relevant office in charge himself/herself is involved in such acts, such information or notice is to be given to the superior officer.

8 No Impunity from Action or Sanction

(1) No person shall be granted impunity or be exempted from the action or sanction attributable under present Act on the ground that torture was inflicted or cruel, inhuman or degrading treatment was imposed to obey an order of the superior officer or body.

(2) If any officer in the inferior position inflict torture or imposes cruel, inhuman or degrading treatment to any person by the reason that s/he was ordered by the officer of superior position to inflict torture or to impose cruel, inhuman or degrading treatment, order giver and the obeying both officers shall be punished under present Act assumed as principle offender.

9 May Not Be Considered Appropriate

It shall not be considered just the acts of torture or cruel, inhuman or degrading treatment inflicted upon any one showing the reason of war, threat of war, internal armed conflict or a situation of emergency.

10 Not be deemed Torture

Notwithstanding anything contained elsewhere in the present Act, the pain or

suffering inherent as a result of the taken into the control, arrest, detention, custody, confinement or imprisonment or enforcement of punishment carried out on any person by the person holding public office in accordance with current laws shall not be deemed torture for the purpose of present Act.

Chapter 3

Complaint and Proceedings

11 May File Complaint

(1) Victimized person may file a complaint before the court within 90 day of the date of torture inflicted or cruel, inhuman or degrading treatment imposed or the date of release from the detention detailing following as for as possible:

- a. The period and reason held in detention;
- b. Details of the offence;
- c. Name address and other issues of the offender;
- d. Loss or damaged caused by the offence;
- e. Amount of compensation claimed;
- f. Other necessary matters to prove the claim.

(2) Notwithstanding the provisions contained in Subsection (1), in case the victimized person died or for any other reason cannot file a complaint himself/herself or if noticed that person under detention is tortured or suffered with cruel, inhuman or degrading treatment, any other person on behalf of the victim may file a complaint pursuant to the timeframe mentioned in Subsection (1).

12 Proceedings on Complaint

(1) Where complaint is filed pursuant to Section 11, the court, may issue an order to in charge of the office of the detention if the victim is still under detention and to in charge of the concerned District Police Office if released from the detention for a medical examination of a victimized person.

(2) If it is deemed necessary to provide medical treatment to the victim while carrying out the medical examination, the court may order to the officer mentioned in Subsection (1) to provide medical treatment immediately.

(3) Where an order is made in accordance with Subsection (1) for medical examination and in accordance with Subsection (2) for medication medical examination and medication of the victim are to be caused by a government doctor where is possible, and if such doctor is not available, by the doctor registered under current law.

(4) The expenses for the medical examination under Subsection (1) and medication under Subsection (2) shall be borne by Government of Nepal.

(5) Having carried out the medical examination in accordance with Subsection (1), relevant doctor shall provide a report in a closed envelop and confidential without delay to the officer mentioned in Subsection 1.

(6) Having received the report under Subsection 5, relevant officer shall submit the closed confidential envelop of the report to the court immediately.

13 Investigation May Be Ordered

If it is seen by the Complaint under Section 11, the report submitted under Subsection 6 of Section 12 or any evidence received immediately that the victim has been subjected to torture or cruel, inhuman or degrading treatment; the court may order relevant District Police Office to investigate the case. But, the

court may order appropriately for the investigation by the superior officer where the complaint is filed against the in charge of the relevant District Police Office.

14 Powers of Investigating Officer

The investigation officer may exercise powers rendered to the investigating officer under the current law of government cases, where investigation is to be carried out by the order of the court pursuant to Section 13, where needed to arrest any person, collect proofs, protect evidence from being lapsed or damaged, to take immediate any action or any other actions to be performed.

15 Investigation Report is to be Forwarded

(1) Having completed the investigation on the offence under present Act, investigation officer shall prepare a report and forward the report along with the original dossier, evidence and own opinion to the relevant Government Attorney Office.

(2) A copy of the under Subsection 1 is to be forwarded to court as well.

16 Case to be Filed

(1) Having received the investigation report under Section 15, if it is deemed the case to be filed by the completion of the legal process under the current law on government case, relevant government attorney shall lodge the case before court having framed charge sheet.

(2) If, by the completion of proceeding under Subsection 1, it is found that the case would not be filed, notification of the same is to be given to the court and the victim.

17 Law of Limitation

The case is to be lodged within one year of the offence occurred for the offences under present Act.

18 Investigation and Lodging of the Case if Offence Committed Outside Nepal Notwithstanding anything contained in this Chapter and current laws, in charge of the District Police Office of Kathmandu shall have the powers to investigate and Kathmandu District Court shall have powers to proceed and conclude the case of the offences under present Act committed outside Nepal.

19 Law Practitioner May Be Appointed

Victim may hire or appoint law practitioner (lawyer) for the proceeding of the cases related to the offence under present Act.

Chapter 4

Punishment and Compensation

20 Punishment

(1) In the cases of the offence under Subsection 2 of Section 3, with consideration to seriousness of the offence, punishment shall be as follows:

a. Imprisonment up to five years or fine up to fifty thousand rupees or both for the offences under Clause a and b;

b. Imprisonment up to three years or fine up to thirty thousand rupees or both for the offences under Clause c, d and e;

c. Imprisonment up to four years or fine up to forty thousand rupees or both for

the offences under Clause f.

(2) In the cases of the offence under Subsection 2 of Section 4, with consideration to seriousness of the offence, punishment shall be as follows:

- a. Imprisonment up to four years or fine up to forty thousand rupees or both for the offences under Clause a and b;
- b. Imprisonment up to two years or fine up to twenty thousand rupees or both for the offences under Clause c, d and e;
- c. Imprisonment up to three years or fine up to thirty thousand rupees or both for the offences under Clause f.

(3) Notwithstanding anything contained in Subsection 1, if the offence is committed against a minor, a pregnant, a senior citizen who have attained the age of 65 years, or mentally or physically disabled person or the victim reached to the following conditions as a result of torture, ten percent of the punishment of the present section shall be imposed as addition:

- a. If mutilated any organ;
- b. If became mentally abnormal or sick;
- c. If disfigured;
- d. If became unable to perform the task of profession or employment; or
- e. If infected by HIV Positive.

(4) If the act deemed as offence under the present Act is also an offence under current law, in relation to such offence, the punishment pursuant to present Act shall be levied additionally.

(5) Notwithstanding anything mentioned in Subsection 4, if someone dies due to torture, it shall be punishable only under current law related to life.

21 May Order for Departmental Action

(1) Court may order concerned authority to take departmental action in accordance with current law against the in charge of the office failed to fulfill the liability under Section 6.

(2) Where an order is issued by the court under Subsection 1, concerned authority shall inform it having taken the departmental action.

22 Causing Compensation

(1) Court may issue an order causing the victim compensated with an amount of up to the five hundred thousand rupees from the offender where it is established anyone has tortured or treated with cruel, inhuman or degrading treatment pursuant to present Act.

(2) If the person who has to compensate the victim is a ruminator or pension recipient of any entity, court may cause compensation that could be deducted from such amount.

(3) Notwithstanding anything mentioned in Subsection 1, if the offender has no immovable or movable property to compensate the victim, the court may order to make compensated such amount of compensation from Government of Nepal.

(4) If the victim eligible to get compensation under Subsection 1, 2 and 3 has been died, the court may order that the heir of the victim under law receives the compensation.

(5) For the purpose of present Section, court shall take the following matters into the account while determining the amount of compensation:

- a. The physical and mental pain or suffering caused to victims and its seriousness;
- b. Decline in income earning capacity of the victim as a result of physical or mental torture;

- c. In case the physical or mental damage caused cannot be treated, victim's age and his/her family responsibilities;
- d. The estimated expenses required for treatment if physical or mental damage is treatable;
- e. In case of death due to torture, the number of the family members depended upon his/her income and minimum expenses necessary for their livelihood;
- f. Matters deemed reasonable and appropriate among from the matters claimed by the victim.

Chapter 5

Miscellaneous

23 Enforcement of the Decision

- (1) As the final decision is taken in relation to the compensation to be granted by the Government of Nepal to the victimized person pursuant to Subsection 3 of Section 22, the victim or in case of his/her death the inheritor in accordance with law shall submit an application along with the copy of the decision made by the court in relation to granting compensation before the Chief District Officer of relevant district within one year of the receipt of notice of such decision for the compensation amount.
- (2) Chief District Officer shall make available the amount of the compensation to the applicant within 90 day of the receipt of the application in accordance with Subsection 1.
- (3) The punishment imposed for an offence under present Act shall be executed in accordance with current law.

24 Health is to be Examined

- (1) At the time of keeping in and making release of any person from detention, custody, imprisonment or internment, his/her physical and mental status shall be caused examined by a government doctor as far as possible and by a registered doctor under current law in a situation such doctor is unavailable and records thereof shall be kept and maintained.
- (2) Relevant doctor shall submit a confidential report of the medical examination under Subsection 1 having it enclosed in closed envelop to the authority where the victimised person is held.
- (3) If court demanded the medical examination report submitted under Subsection 2, concerned authority shall make it available.

25 Matters to be Mentioned in the Medical Examination Report

The matters to be mentioned in the medical examination report in accordance with present Act shall be as prescribed.

26 Provision Related to Reparation

Other provisions on the reparation other than mentioned in present Act shall be as prescribed.

27 Order May Be Issued to Protect Witness

- (1) Any witness of the case related to offence under present Act may submit an application to the court for providing security mentioning reasons if s/he felt that there is security threat to him/her or to a member of his family in terms of appearing the court or after the statement is given to court.

(2) If a request is made pursuant to Subsection 1, court may order relevant authority to manage the security of such witness.

(3) If the court orders pursuant to Subsection 1, it shall be duty of the concerned authority to provide such security.

(4) No question may be raised in any court in relation to security provision managed under the order of the court in course of protecting witness under present Section.

28 Inadmissible as Evidence

(1) Confession, admission or statement taken from any person on whom torture is inflicted shall not be admissible as evidence in any proceeding.

(2) Notwithstanding anything mentioned in Subsection 1, the matter may be taken as evidence in the case brought against the person involved in the act of inflicting torture.

29 Nepal Government Shall Be Claimant

Government of Nepal shall be claimant/plaintiff in the case under present Act and such case shall be deemed included in the Schedule 1 of Government Cases Act 2049 B.S.

But, in the matters of lodging complaints and mentioned in present Act, it shall be in accordance present Act.

30 Witness May Be Examined at Abroad

Notwithstanding anything mentioned in the current laws, in case of offence under present Act, any witness or evidence staying or remaining outside Nepal in accordance with current law may be examined and witness or evidence examined such may be taken as evidence assuming as collected and examined in Nepal.

31 Punishment of Fake Complainant

If it is found that anyone made a fake complaint alleging committal of offence under present Act, court may fine such person lodging such complaint up to ten thousand rupees.

32 Not to be Deemed Adversely Affected

It shall not be deemed that anything mentioned in present Act may have a adverse effect to lodge a complaint to the National Human Rights Commission under current law and furthered the proceeding by the Commission on the subject of torture or cruel, inhuman or degrading treatment subjected to any person.

33 Process of Expatriating May Be Restricted

If any foreign citizen living in Nepal is to be exiled from Nepal or deported to his State of nationality and if there is ground to believe that s/he would be subjected to torture by such expatriation, concerned authority may restrict the process of expatriating or deporting him/her.

34 No Barrier to Punish in Accordance with Current Law

It shall not be deemed that present Act to bar institution of separate action on a matter deemed to be an offence pursuant to current law and to impose punishment. But no more than once, it shall be charged and punished for the same offence.

35 Preventive and Promotional Measures May Be Adopted

Government of Nepal may adopt necessary preventive and promotional measures such as development of effective practice and process, institutional reform, internal control system, training and awareness raising programmes to control torture and cruel, inhuman or degrading treatment.

36 Powers to Formulate Rule

Government of Nepal may formulate necessary rules and regulations to implement present Act.

37 Directives and Code of Conducts May Be Devised and Enforced

(1) Government of Nepal may adopt and enforce necessary directives subject to present Act and the rules and regulations formulated under present Act.

(2) Government of Nepal may prepare and enforce Code of Conducts for Law Enforcing Officials.

38 Retraction and Save

(1) Torture Compensation Act 1996 (2053 BS) is repealed.

(2) The tasks and proceedings carried out under Torture Compensation Act 1996 shall be deemed to be carried out under present Act.

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