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FOHRID HUMAN मानव अधिकार तथा प्रजातान्त्रिक मञ्च RIGHTS AND DEMOCRATIC FORUM

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Nepal: Criminalize torture and end impunity

We are observing June 26, 2012, the UN *International Day in Support of Victims of Torture*. The expression itself reflects sorrow, tears and sufferings of the survivors of torture inflicted to them in political or other reasons of repression. Nepal is facing problems with torture and many of the victims of torture are facing numerous problems attached to their physical and psychological conditions. The major concern that torture victims always take in their minds is impunity granted by the state to the perpetrators. We human rights defenders express our solidarity to them.

FOHRID has already prepared and submitted a draft bill to the Government of Nepal to criminalize torture and prosecute the perpetrators as well as repair the losses borne by the victims. On the occasion of this international day, we would like to remind the government to expedite the process of legislating anti-torture law. We also ask the senior political leaders to come forward to pass the law without any delay with full consideration to our constitutional promise and international obligations in ending practice of torture and ensuring justice to the Victims.

Encl: The Bill Relating to Torture, 2065 (2008), drafted by FOHRID with wider involvement of human rights and civil society and submitted to the Ministry of Home, Government of Nepal as alternative anti-torture bill is enclosed herewith.

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FOHRID is non-governmental, non-partisan and non-profit-making independent organisation. It works for the promotion of peoples rights and genuine democracy include the democratic reform, anti impunity and ICC accession campaign, Peace bulding and reconclaction for sustainable development through training, research, fact-finding, monitoring lobbying, advocacy, mobilizing and capacity bulding NSA, Networking, publishing, empowerment and exchange programs. it has been maintaining working relationship with national, international human rights organisations and human rights bodies of the United Nations.

Bill Relating to Torture, 2065 (2008)

Preamble: Whereas, it is expedient to prescribe punishment by defining torture as criminal offence, to arrange protection of victims and witnesses by making contextual revision of the provisions of torture compensation, and to make legal provisions relating to torture integrated for effective implementation of the United Nations International Convention against Torture

Be it enacted by the Legislative-parliament.

Chapter 1 **Preliminary**

1. **Short title and commencement:** (1) This Act shall be called as "Act Relating to Torture 2008."

(2) This Act shall come into force immediately.

2. **Definitions:** In this Act, unless the subject or the context otherwise requires;

(a) "Torture" shall denote the act or treatment, except suffering felt naturally by a person kept in detention or control as a result of lawful deprivation of liberty, of inflicting physical or mental or both pain or suffering, to a person under any form of control by the public authority or a person working in a public capacity or by any other person with his/her instigation, acquiescence or consent having purpose of obtaining confession or information from him or a third person or punishing him for an offence or a mistake committed or is suspected of having committed by him or by a third person, or intimidating or coercing him or a third person for any other reason based on discrimination. The term includes cruel, inhuman and degrading treatment imposed upon the person.

(b) "Victim" shall denote the person subjected to torture or cruel, inhuman or degrading treatment. In case of death of the person subjected to torture or if s/he is physically disabled, the term includes his/her family members or the dependents.

(c) "Public authority" shall denote authority or official in public service who may exercise authority or has an obligation of fulfilling certain duty or responsibility under Constitution, other laws or decision or order of an agency or authority. The term specifically includes the authority or staff of the Nepal Army, Nepal Police, Armed Police Force, Forest Guards, and authority working for wildlife preservation, etc., incumbent or former if retired.

(d) "Reparation" shall denote rescue, redress and compensation to be provided to the victim by the state; the restitution caused to be provided by the offender to victim in a form of cash, material or service; rehabilitation; satisfaction and guarantees of non-repetition.

(e) "Prescribed or as prescribed" shall denote prescribed or as prescribed in this Act or the Rules framed under this Act.

Chapter 2

Prohibition of torture and record of health check

3. **Torture not to be inflicted to anyone:** (1) No one shall inflict torture, issue order to inflict torture, instigate for inflicting torture or attempt or cause to do so against anyone.

(2) Conduct of any public authority who orders, instigates or agrees to inflict torture, or does not report to the superior authority having knowledge of torture inflicted, or being in a superior position allows torture to occur when it is known to him/her, or does not provide information or hides it knowing the occurrence of torture, shall be regarded as offence of torture and shall be sentenced in accordance with this Act.

(3) Any situation including war or threat of war or situation of terror or internal political instability or armed conflict, riot or any other type of public emergencies or order of superior authority may not be admitted as a defense of torture.

4. **Record of health check up should be maintained:** (1) Notwithstanding anything mentioned elsewhere in Nepal laws, while taking someone under control or keeping in custody after arrest or releasing according to law, physical and mental health check up, if possible, by a public physician and, if such physician is not available, by other certified physician should be carried out and the report should be closed and sealed by the physician and preserved.

(2) After the person is brought for health check up according to sub-Section (1), the concerned physician should maintain clear record of the physical and mental health. And, one copy of the record should be preserved in the office in a confidential manner and should be produced promptly whenever required by the court.

(3) When a suspect is produced to the court requesting for his remand after lawful arrest, the court should receive and preserve the sealed envelop of health report according to sub-Section (2) and it should be attached to the dossier of the case after the charge-sheet is lodged. If such health check up of the person, requested for remand, is not performed, the person should be immediately sent for health check up and a report should be received and attached to the dossier.

(4) If it is suspected that torture is inflicted to the person in custody, the family member or his/her lawyer may submit petition to the concerned district court for health check up. If such petition is submitted, the court may order immediate health check up of the person in custody. While giving such order, the physician should be instructed to carry out health check up without being influenced by the security personnel and submit report to the court and dispatch a copy to the National Human Rights Commission.

(5) In case of reasonable ground to believe that the physician carrying out health check up according to this Section has conducted it under coercion, or allured or with bad intention to make evidence and impact of torture unclear or hidden, the Investigation Officer or the person protecting right of the victim can apply in the court. In case such application is submitted, the court may order for a second health check up if the situation is suspicious.

Clarification: For the purpose of this Section, physician means a physician certified by Nepal Medical Council or medical practitioner certified by Health Professionals' Council. Health check up means check up of physical and mental health.

(6) If a person under control or kept in custody suffers death or mutilation or physical injury or problem in mental health, the authority or personnel managing such control or custody shall justify with proof that it was not caused due to torture.

Chapter 3

Investigation, prosecution and punishment

5. **Anyone, knowing torture shall inform:** Any person who knows about torture inflicted to someone by public authority should inform, by mentioning facts whatever known, to the office of the district government attorney.
6. **Provisions on investigation and prosecution:** (1) District government attorney shall carry out investigation of the offence of torture.

But, the district government attorney shall immediately report to the Attorney General, if it is informed on behalf of the victim that it is not appropriate to carry out investigation from him/her because the alleged case of torture has occurred during criminal investigation or prosecution conducted by him/her. If such report is received, the Attorney General shall immediately designate another Investigation Officer and the designated Investigation Officer shall carry out investigation of torture.

(2) While conducting investigation and prosecution of torture, the district government attorney may obtain necessary and proper information from, among others, the victim, any other person who knows about the incident, National Human Rights Commission, other organizations working in the field of human rights and justice.

(3) The district government attorney may take assistance from experts for investigation and prosecution as required. Conditions for such assistance from the experts shall be as designated.

(4) For the purpose of investigation, the government attorney or Investigation Officer shall enjoy all the rights similar to that of a police as set forth in Nepal law.

(5) After completion of investigation, the district government attorney shall prepare charge sheet and file public criminal case on behalf of Nepal government as plaintiff in the court and also defend it.

But, after completion of investigation by Investigation Officer, if the Attorney General decides that the case cannot be prosecuted as a public case according to this Act or other Nepal law, the government attorney shall, within 5 days, inform this to the informant or victim or his/her relative or family member or guardian or lawyer.

(6) In case the government attorney informs, according to the proviso of sub-Section 5 that the case cannot be filed as a public case, the victim or for him/her the informant or relative or family member or guardian or lawyer can file a case as plaintiff on behalf of the victim in the district court.

(7) If a case is filed according to sub-Section 6, the district court shall designate the person who files the case as plaintiff and prosecute and finalize the case as private plaintiff criminal case.

(8) Conversion of the case as private plaintiff criminal case according to sub-Section 7 shall not affect other legal procedure of the case and its result.

(9) For the purpose of investigation and prosecution of the torture related offence according to this Act, the Investigation Officer, members of investigation team, government attorney, victim's lawyer and officer or staff having court order shall have the authority to inspect or monitor any prison or custody throughout Nepal. Consent from the higher authority of security agency is not necessary for such inspection or monitoring and public officer or public servants must assist investigation.

(10) Other arrangements relating to investigation, prosecution and proceedings of the case shall be as designated.

7. **Penalties:** (1) Public authority issuing order to inflict torture or inflicting torture shall be sentenced as follows:

- (a) Punishment according to National Code (Muluki Ain) Chapter "Of life" and 5 years additional imprisonment will be sentenced if any person has died due to torture.
- (b) Punishment according to Nepal law and upto 3 years additional imprisonment will be sentenced if the victim has been mutilated due to torture.
- (c) The person inflicting torture shall be sentenced upto 5 years imprisonment if the victim has received physical, mental or psycho-physical health problem requiring long term treatment due to torture.
- (d) From 2 to 3 years imprisonment or from Rs. 50,000 to Rs. 300,000 fine if the victim has developed physical or mental health problem due to torture in which immediate treatment is enough or in case of torture inflicted except that mentioned in paragraphs (a), (b) or (c).
- (e) If the public authority knowing the incident of torture denies providing information or hides, s/he shall be sentenced upto 1 year imprisonment or Rs. 100,000 fine.
- (f) Upto 1 month imprisonment or upto Rs. 10,000 fine to the person creating obstacle in the investigation or proceedings according to Section 6, sub-Section 9.

(2) Sentence according to sub-Section (1) if encouraged torture, half of sub-Section (1) if agreed or solicited in inflicting torture and one forth of sub-Section (1) if effort of torture is made.

(3) Half of the punishment shall be sentenced, if a person other than public authority is involved in the offence to be sentenced according to this Act.

Chapter 4

Reparation and protection of victims

8. **Provisions of rescue, treatment, compensation and rehabilitation:** (1) The victim inflicted by torture from public authority shall receive rescue, treatment, compensation and rehabilitation as set forth in this Act.

(2) If diagnosis or treatment of physical or mental health is required due to torture, treatment shall be provided at the expenses of Nepal government. Financial assistance shall also be provided to the dependents or family members if immediate relief is required due to treatment of the victim.

(3) A person determined as victim according to this Act shall receive compensation as determined by the court. The amount of compensation to be determined in such a way shall not be less than Rs. 100,000 at any circumstances.

(4) A rehabilitation centre with necessary medical and care facility shall be established to take care of those who are mutilated or have sustained physical or mental problem requiring long term treatment and care and Nepal government shall bear the cost of its operation.

(5) Other arrangements of reparations including rescue, treatment, rehabilitation and guarantees of non-repetition shall be as prescribed.

9. **Procedures to apply for reparation:** (1) The victim of torture, after sustaining torture or being free from control, may apply with details of torture or cruel, inhuman or degrading treatment or punishment

demanding reparation including compensation to the District Court of the district where torture was inflicted or s/he was kept under control.

(2) Whatsoever written in sub-Section (1), in case of victim's death or inability to apply himself or herself, his/her relative or family member or guardian or lawyer may apply to the District Court demanding reparation including compensation.

(3) Other procedures relating to reparation including compensation shall be as designated.

10. Compensation Fund: (1) There shall be a Compensation Fund for the purpose of providing compensation to the victims according to this Act.

(2) A Compensation Fund Management Committee comprised of the following shall be formed to manage the Compensation Fund:

(a) Law Secretary - Convener

(b) Assistant Registrar designated by Registrar of the Supreme Court - Member

(c) Assistant Secretary designated by Secretary of the Finance Ministry - Member

(3) Annual allocation by the government, donation amount from the national and international donor agencies or individuals, and the amount fined under this Act shall be collected in the Fund.

(4) All the expenses to be incurred according to Section 8 and the compensation to the victim of torture will be written expenses under the Fund.

(5) Other provisions regarding Compensation Fund will be as designated.

11. Determination of reparation including compensation: (1) The Investigation Officer should immediately consider situation of the victim, determine amount of assistance relating to rescue and recommend to the Chief District Officer of the district of victim to provide the amount.

(2) The Chief District Officer should provide the relief amount to the victim or his/her guardian after receiving letter according to sub-Section (1).

(3) While determining the amount of compensation to the victim according to this Act, the court should, among other, consider following things:

a. Scale and gravity of physical or mental suffering borne by the victim;

b. Decrease in the humanitarian capacity of the victim and its potential impact in income generation and livelihood;

c. Age, family responsibility and condition of dependents of the victim;

d. Expenses made or likely to be made in treatment; and

e. Duration and necessary means and resources for the rehabilitation of the victim.

(4) Determination of rehabilitation of the victim shall be as designated.

12. Method of providing amount of compensation: (1) An application demanding compensation should be submitted to the district court after decision that the victim shall receive compensation.

(2) After submission of application according to sub-Section (1), a letter alongwith a copy of case verdict should be sent to the Compensation Fund Management Committee and the Fund shall release compensation amount accordingly within 15 days.

(3) After receipt of released amount according to sub-Section (2), the district court shall inform the victim to receive the amount. After receiving information, the victim shall receive amount of compensation from the court.

13. Additional provisions relating to restitutions: (1) If the court, having considered the effect on victim and severity of torture, decides that it is expedient to provide restitution to the victim from the personal property of the convicted person, it may order in writing the concerned Land Revenue Office, bank or property security or registration authority to transfer the ownership by maintaining records to victim upto half of the total property of the convict.

(2) Notwithstanding anything written elsewhere in Nepal law, in case of decision of the court according to sub-Section (1), the concerned authority should maintain the ownership and possession of the decided part of property of the convicted person in the name of the victim and provide a proof thereto for its use.

Clarification: For the purpose of this Section "property" shall denote all types of movable and immovable property possessed by or in possession of the individual according to law.

14. **Proceedings to determine offence shall not affect compensation:** Decision of the initial jurisdiction court shall be final in the context of compensation in a case under this Act except appealed by the victim against the decision due to his/her dissatisfaction on the determined amount of compensation; and appeal by the plaintiff or defendant relating to offence of torture and non finalization of proceedings of such a case shall not affect providing compensation to the victim.

Chapter 5

Miscellaneous

15. **Nepal government to be the plaintiff:** (1) Unless the case proceeds as private plaintiff criminal case according to Section 6, sub-Section (6) and (7), Nepal government shall be the plaintiff of the torture related case lodged under this Act.
- (2) For effective justice, victim of torture or his/her guardian himself/herself or through a lawyer can handle trial of the case as plaintiff at any stage of the case.
16. **Protection of the witness:** (1) The victim shall be termed as witness of the plaintiff in the proceedings of the cases of offence under this Act.
- (2) Victims and the witnesses related to the offence shall be protected as prescribed.
17. **Automatic suspension:** Any sitting public authority shall be automatically suspended from his/her position, after commencement of investigation in the accusation of offence under this Act till the final proceedings of the case.
18. **Prohibition of torture to be incorporated in the curriculum:** (1) Prohibition of torture shall be incorporated in all the curriculum and relevant text books of competitive examinations and training for entry into public service.
- (2) The manpower working in the agencies related to criminal law shall be trained on the basis of common curriculum prohibiting torture.
- (3) Nepal government shall make proper arrangements to incorporate this subject in the school and university level curriculum.
19. **No extradition, repatriation or expulsion in case of possibility of torture:** Whatsoever written elsewhere in Nepal law, Nepal government shall not extradite, repatriate or expel any foreign citizen residing in Nepal if there is ample ground to believe that the person may be inflicted torture in other country.
20. **Consent of victim necessary to pardon punishment:** Whatsoever written elsewhere in Nepal law, the punishment imposed under this Act shall not be reduced or pardoned without obtaining consent from the victim.
21. **Limitation:** Limitation for prosecution of case in the offence under this Act will be 3 years from the date of torture or release from control or, if treated in hospital, after release from the hospital or the date of decision according to the proviso of Section 6(5).
- But, there shall be no limitation to file complaint demanding compensation and treatment; if the physician or expert, conducting health check up, diagnoses that the symptoms of the health problem on victim are of the nature that appears only long time after infliction of torture.
22. **Framing of Rules:** Nepal Government shall frame necessary Rules for implementation of this Act.
23. **Repeal:** (1) Torture Compensation Act 2053 has been repealed.
- (2) The proceedings performed according to the Torture Compensation Act, 2053 shall be regarded performed according to this Act and the cases being prosecuted under that Act shall proceed as the cases under Section 6 (7) of this Act.

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