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Article

# Monetary Compensation for Survivors of Torture: Some Lessons from Nepal

Jeevan Raj Sharma and Tobias Kelly\*

## Abstract

The Nepali Compensation Relating to Torture Act (1996) is one of the earliest pieces of specific anti-torture legislation adopted in the global South. Despite a number of important limitations, scores of Nepalis have successfully litigated for monetary compensation under the Act, on a scale relatively rare on the global human rights scene. Using a qualitative case study approach, this article examines the conditions under which survivors of torture are awarded compensation in Nepal, and asks what lessons does this have for broader struggles to win monetary compensation for torture survivors? We end by suggesting that there can be practical tensions between providing individual financial compensation and addressing wider issues of accountability.

**Keywords:** compensation; human rights documentation; Nepal; torture

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## Introduction

The UN Convention against Torture requires that victims of torture are provided with ‘redress and . . . an enforceable right to fair and adequate compensation’ (Article 14). Over the last three decades there has been an attempt to promote domestic legal avenues for redress on behalf of survivors of torture (Malamud-Goti and Grosman 2006; Oette 2012; Scott 2001). Kazakhstan, Bangladesh, the Philippines and Sri Lanka, for example, have made torture a specific offence under their domestic law, and South Africa and Uganda have specific anti-torture legislation (REDRESS and AHRC 2013; REDRESS 2016a). International mechanisms—such as the UN system, and universal jurisdiction cases—can involve barriers of know-how, cost, distance, and language, meaning that they do not present a realistic option for many people. Domestic avenues are therefore of great importance in the search for justice among survivors of torture. In practice, though, seeking redress through domestic

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channels has also raised a number of challenges (Oette 2012; Echeverria 2012; Roht-Arriaza 2004). Immunities, statutes of limitations, insufficient victim protection mechanisms and unresponsive legal systems, for example, have all created particular obstacles.

The Nepali Compensation Relating to Torture Act (1996) (hereafter known as ‘Torture Compensation Act’ or ‘TCA’) was one of the earliest pieces of specific anti-torture legislation adopted in the global South. The TCA sets out the principles and procedures through which survivors of torture can gain monetary compensation, as well as the conditions for administrative action against perpetrators. Nepali human rights NGOs have been at the forefront of the struggle against torture in the country, and had a central role in advocating for the TCA, as well as subsequent anti-torture legislation. They have also played an important part in supporting survivors and bringing cases under the law. The TCA itself, though, has been the subject of considerable criticism, not least from human rights NGOs (Advocacy Forum 2008; also see UN Commission on Human Rights 2006: para. 26). It is argued, for example, that the TCA’s definition of torture is not in line with international law, as the TCA avoids any mention of criminal liability, limits the amount of compensation to the equivalent of around 1,000 US dollars, fails to provide protection to claimants, and places a 35-day limit within which claims have to be made (Advocacy Forum 2015: paras 7, 52; 2014b: paras 69–71). Many victims also never receive the compensation awarded by the court. Such criticisms are well justified. At the same time, it is also important to recognize that scores of Nepalis—from a much larger potential pool—have made successful applications for monetary compensation under the TCA. Successful litigation by individual survivors of torture has taken place on a scale that remains relatively rare on the global human rights scene, and it is therefore important to think about how this is possible. In this sense, the Nepali case can provide lessons for broader struggles.

The relationship between individual monetary compensation and other forms of reparation is much debated (Borneman 2011; de Greiff 2006; Minow 1998; Roht-Arriaza 2004).<sup>1</sup> Money represents only a very limited way of providing redress to survivors, and is usually seen as standing alongside the right to rehabilitation, public apologies, collective reparations, and the improved provision of services, among other things. As Pablo de Greiff has suggested more broadly, there is a need to think about all forms of ‘reparations in relation to a broader political agenda rather than in terms of a narrowly conceived juridical approach’ (2006: 455). However, under the right circumstances, the awarding of monetary compensation can provide practical support for survivors, and also be part of a symbolic recognition of the harm inflicted on individual victims by the state.

The legal provision of financial compensation for survivors of torture raises a number of important questions. For example, how should victims be defined? What is the relationship between compensation and the punishment of particular perpetrators? And what support should survivors be given in order to access redress? These questions have important legal dimensions, but they are also deeply practical. The question of who is a victim, for example, is an issue of what type of person is identified and comes forward at a practical level, as

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1 Article 14(1) of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005; Order Instructing the Trust Fund for Victims to Implement the Draft Implementation Plan, International Criminal Court, Situation in the Democratic Republic of Congo, *Prosecutor v. Thomas Lubanga Dyilo*, 9 February 2016.

well as an issue of legal principle. We should never assume that the passing of laws leads directly to individual legal recognition. Successful human rights litigation is never self-evident. For a claim for compensation to be successful it must go through multiple processes of selection and translation even before it arrives on a judge's desk. As numerous studies have shown, litigation depends on the relative desire and ability of claimants to negotiate political, economic, organizational and cultural barriers (Felstiner et al. 1980; Merry 1990; Yngvesson 1998). For an incident of violence to become a successful legal case a series of social, political and technical relationships have to be mobilized in order to identify and frame an incident in legal terms, to create legally persuasive evidence, and to fill in the required paperwork. At each stage of the process many possible incidents fall by the wayside, and we are left with a small subset of all possible cases. Successful torture compensation cases are therefore made and not born. In many countries, NGOs have played a central role in this process (Jensen et al. 2017). NGOs can act as brokers and translators, connecting human rights law with vulnerable populations (Merry 2005), but they also never do so in an entirely neutral manner. NGO practices inevitably take shape within the context of particular social, political and economic histories, affecting how they approach the struggle for compensation, the types of survivors they support, and the way in which they do so.

This article provides a qualitative analysis of litigation under the TCA, focusing particularly on the role of human rights NGOs. It asks how is it possible for survivors of torture to be awarded compensation by the courts in Nepal? And what lessons does this have for broader struggles to win compensation for torture survivors? Our aim is not to do a legal analysis of the TCA. Rather we want to provide a social analysis of the Act, through examining how, why, and in what ways successful litigation is produced. We treat litigation as a process rooted in both political and technical relationships. As such, we follow the process of litigation through from the identification of incidents of violence, and then the processes through which they are named as torture, particular perpetrators are blamed for being responsible for that violence, and legal claims are then launched. These practices require multiple decisions, processes of interpretation, and the forging of relationships, which opens up and closes down possible avenues of redress and accountability.

The central argument of this paper is that for human rights NGOs, supporting legal claims for compensation depends on navigating two key tensions, which both enable successful cases and restrict the types of cases that can be brought. First, an already established and relatively vibrant infrastructure for human rights documentation makes it possible for the specific cases of torture to be brought to court. However, at the same time, this same history of human rights activism has also produced interests and priorities, which limit the cases they seek to prioritize. Second, the relative public profile of the perpetrator can increase the likelihood that the case is taken up by human rights organizations, but at the same time, can increase the pressures on survivors and their representatives to drop the case. As such, litigation under the TCA can be seen as part of a wider set of dilemmas associated with human rights practice (Dudai 2014). Individual litigation can produce real, if sometimes limited, gains for individuals, but also risks either legitimizing the systems that perpetrate the abuse, or simply leaving that system in place (Sfard 2009). Engaging with dominant political structures can increase the likelihood of success, but it can also result in human rights action becoming restrained by the very political factors it wants to challenge.

This article is set out in the following way: after the introduction we explain the methodological approach of the paper. We then describe the wider context of human rights

work in Nepal, before setting out the formal requirements for compensation under the TCA. The next section, by way of illustration, describes a specific case under the TCA, before providing a detailed analysis of the processes through which cases are brought to the courts. We conclude by discussing some of the implications of the TCA for wider attempts to provide monetary compensation for survivors of torture. We suggest that there are possible lessons for NGOs, including the need to expand monitoring networks beyond visits to places of detention, and the importance of prioritizing the protection needs of survivors. More generally, it is suggested that although—from the point of view of justice—monetary compensation might best be thought of in conjunction with other forms of redress (de Greiff 2006), at a practical level, monetary compensation itself can be easier to achieve when divorced from wider political concerns, including broader forms of reparation and accountability.

## Methodology

This article is based on qualitative research examining torture documentation practices in Nepal, conducted between May 2014 and August 2016. The particular research was part of a broader project on the documentation of torture in low-income countries, which we have written about elsewhere (J. R. Sharma and Andersen 2017; Jensen et al. 2017; Kelly et al. 2016). Throughout the research we have addressed the issue of human rights violations from the position of human rights organizations. The perspective of survivors themselves is important, but outside the direct frame of this study. We have taken this approach for ethical as well as analytical reasons. Ethically, survivors may be unwilling or unable to speak to researchers. Analytically, we start with the assumption that the main obstacles to transforming an injury into a claim lie not with the survivor, but in the broader political and social context through which an act is named, responsibility allocated, and a claim processed (Kelly 2012). The research has therefore focused on the processes through which human rights organizations identify, document, and bring cases under the TCA.

The study began by mapping organizations involved in monitoring and documentation of human rights more generally, and torture and ill-treatment specifically. This was done through a series of key informant interviews (15) in Kathmandu through snowballing and the searching of published and web-based resources. A total of 17 organizations were identified who were active in human rights documentation. Having identified the organizations, semi-structured interviews (18) were conducted with key figures in the organizations, including programme officers, lawyers, directors, medical professionals and journalists. Interviews examined the institutional spaces and geographical locations where these organizations focus their documentation, their forms of expertise, how they identify and document experiences of torture and ill-treatment, and the decisions they make on whether or not certain grievances should be transformed into legal cases. Four of the organizations interviewed had a specific focus on the documentation of torture. Forms that were used to document or to screen cases were also collected from the organizations. These forms were designed to collect information on the victim's personal details, the details of the incident, harm and suffering caused as well as details of the accused perpetrator(s). Ten cases of torture and ill-treatment were then reviewed in detail, and interviews were conducted with the documenters or the staff from those organizations regarding the documentation processes followed in those cases.

Two caveats are essential at this stage. Methodologically, such an approach meant that we were not able to access incidents that did not become human rights cases, or never came

to the attention of human rights organizations. Nevertheless, as rights organizations are key actors in the processes through which incidents are turned into cases, we are able to access the processes of identification, interpretation and administration through which the claims are processed. Furthermore, we are not trying to produce a quantitative analysis of trends and patterns from our interviews. Rather we are producing a thicker and contextual analysis of the ways in which human rights organizations understand the processes of bringing a case under the TCA and the challenges they face in doing so.

## The history of torture and human rights in Nepal

While torture has been practised by the ruling government for large periods of Nepal's history, human rights organizations report that torture by the police and armed forces was particularly widespread during the Maoist insurgency ([Advocacy Forum 2006, 2013](#); [Ramakrishnan 2013](#); [UN OHCHR 2012](#); also see [UN Committee against Torture 2012](#); [UN Commission on Human Rights 2006](#)). The human rights organization CVICT (Centre for Victims of Torture), for example, claims that as many as 30,000 people were tortured during this period (interview with programme manager at a human rights NGO, 19 February 2015). After the insurgency, human rights organizations report that the police have continued to inflict torture and ill treatment, particularly as a method to secure 'confessions' (interviews with programme manager at a human rights NGO, 19 February 2015; with lawyer at a human rights NGO, 9 February 2015). It is necessary to note here that although human rights work has often approached the issue of torture in Nepal through the lens of 'transitional justice' and focused on the Maoist insurgency, it is important to take a wider view. Torture took place before and after the insurgency, and the TCA itself was passed just before the major outbreak of Maoist-related violence. We should therefore not assume that responses to torture can be subsumed under the heading of transitional justice.

There has been a long history of attempts at the legal prohibition of torture in Nepal. Article 14(4) of Nepal's Constitution of 1991 outlawed torture and gave the right of compensation to torture victims. In 1991, Nepal also ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In its attempt to meet its constitutional commitments, as well as its obligations under CAT, and following lobbying by NGOs at the national and international levels, the Nepali government passed the Torture Compensation Act (TCA) in 1996. Following the Maoist insurgency, the TCA has been widely used as a legal instrument to file cases in the Nepalese courts related to this period. However, the challenges facing victims seeking reparation under the TCA became quickly apparent. The TCA does not have a provision for the protection of those filing cases. Complainants and their lawyers repeatedly reported receiving threats and intimidation. In 1998 alone, while 12 victims filed reports of torture inflicted in police custody, six withdrew their complaints, fearing for their safety ([Advocacy Forum 2008: 9](#)).

Besides the TCA, the National Human Rights Commission Act, 2068 (2012), Evidence Act, 2031 (1974), and the National Code, 1963 (Muluki Ain, 2020)<sup>2</sup> also contain provisions against torture. On 20 September 2015 Nepal promulgated a new Constitution, which explicitly prohibits torture and provides the right to compensation for victims.<sup>3</sup>

2 The official Nepali calendar currently differs from the Gregorian calendar by about 56 or 57 years.

3 Article 22 in the new Constitution of 2015 has the following provisions regarding the prohibition against torture: '(1) no person who is arrested or detained shall be subjected to physical or mental

In the absence of a comprehensive system of transitional justice, an ‘interim relief’ scheme provided for compensation to families of victims of disappearances, extrajudicial executions and killing, but interestingly torture survivors were excluded. Since the TCA came into existence, human rights activists, together with their international partners, have also been lobbying for a new law that explicitly treats torture as a crime in Nepal. A new bill (known as the Torture and Cruel, Inhuman or Degrading Treatment [Offence and Punishment] Bill) that sets out criminal liability and increasing levels of compensation has been pending in the Nepalese parliament (M. Sharma 2014). There is also a pending bill on witness protection entitled ‘A Bill Produced to Manage the Protection of Witnesses, 2011’. There is therefore a considerable and broad legal architecture in Nepal that seeks to prohibit torture. However, only the TCA provides specific avenues for limited accountability, and there remains no specific crime of torture under Nepali law.

Nepali human rights organizations have been central to the attempt to bridge the gap between the practice of torture and its legal prohibition. Against the background of the Maoist insurgency in particular, there was a growth in the number of NGOs with a human rights focus across Nepal. These NGOs were often seen as being directly or indirectly linked to different political parties within Nepal. International donors, through bilateral arrangements, UN agencies, international organizations and private foundations, began supporting human rights NGOs in particular (Heaton Shrestha 2002). The Maoist insurgency also led to the development of an infrastructure of documentation, with its organizational structures and professional incentives. As noted above, a mapping of human rights organizations conducted as a part of this study in 2014 showed that four human rights organizations work specifically and explicitly on torture.<sup>4</sup> CVICT, established in 1990, was the first organization to do so. Much of its early work focused on the state violence during pro-democracy protests in 1990. Advocacy Forum was established in 2001, largely as a response to human rights violations related to Nepal’s Maoist insurgency. It works to prevent torture, illegal detention, enforced disappearance, and extrajudicial killings (interview with a human rights activist, 2 September 2014). Established in 2002, PPR-Nepal (Forum for Protection of People’s Rights, Nepal) has been engaged in the documentation of torture and other human rights violations since the Maoist insurgency and the state’s response to it escalated in early 2000. Due to a reported lack of funding, more recently, PPR-Nepal—as with many other human rights groups—has begun to work on other issues such as human trafficking and domestic violence. Finally, Terai Human Rights Defenders Alliance (THRD Alliance) was established informally in 2008 and formally registered in 2011, as a direct response to the political movement in Nepal’s lowland region bordering India. THRD Alliance is engaged in public advocacy as well as filing cases in Nepali courts. It is important to note that only two of these human rights organizations that work explicitly on torture (Advocacy Forum and THRD Alliance) have staff in branch offices outside of Kathmandu.<sup>5</sup>

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torture or to cruel, inhuman or degrading treatment. (2) Any act referred to in clause (1) shall be punishable by law, and any person so treated shall be provided with such compensation as determined by the law.’

- 4 The Nepali National Human Rights Commission have a mandate for monitoring places of detention, but except for one-off visits, have chosen not to do so.
- 5 Established after the Madhesh movement in 2006, an NGO named Madhesh Human Rights Home has its head office in Kapilvastu district of Nepal.



The history of human rights organizations in Nepal is central to the ways in which incidents of violence are transformed into litigation under the TCA. At one level, the social networks of these organizations and their staff or representatives in NGOs, media, government offices, police, lawyers, and health facilities are key to the monitoring, identification and documentation of torture and ill-treatment. Many of these organizations were formed or institutionalized in a period where the political violence of insurgency was seen as the human rights issue of greatest concern. These organizations were also created in the context of international human rights networks, and their sources of funding, shaping their institutional incentives and available resources (Jensen et al. 2017). In a handful of cases, litigating under the TCA has also been a first step towards bringing cases to the UN Human Rights Committee. When domestic avenues for seeking justice have been exhausted, Nepali human rights NGOs, in conjunction with international groups such as REDRESS or Trial, have strategically used international litigation to put pressure on the government (see e.g. UN Human Rights Committee 2008, 2014a, 2014b, 2014c, 2015). An eventually unsuccessful case was also taken in the UK against army officer Kumar Lama, under the principle of universal jurisdiction (see e.g. REDRESS 2016b).

## Compensation under the Torture Compensation Act

The TCA sets out a number of formal requirements for the granting of compensation to survivors of torture. The Act defines torture as:

physical or mental torture of any person who is *in detention* (emphasis added) in the course of inquiry, investigation or hearing, or for any other reason. The term includes cruel, inhuman, or insulting treatment of such person. (Article 2(a); see also ‘clarification’ under Article 3(a))

The victim, victim’s relative, or a lawyer can file a case in the court within the 35 days from the date of torture or release from detention stipulated for lodging a complaint. The law requires that police facilitate a medical examination of detainees before detaining them and also upon their release. It grants a victim of custodial torture the right to compensation, up to a maximum of 100,000 Nepali rupees (approximately 1,000 US dollars). The TCA also contains a provision for departmental action against employees of the government who inflict torture on others. Section 7 states, ‘the district court shall order the appropriate agency to take departmental action according to the current law against the government employee who has inflicted torture’. The TCA allows officials accused of torture to be defended in the proceedings by the public prosecutor at public expense. The Act’s approach therefore differs from that of the UN Convention against Torture in a number of ways, including the fact that it does not provide for the criminal prosecution of perpetrators, limits incidents to places of detention and places a time limit on when cases can be brought.

To file a case under the TCA, the victim needs to provide information on the reason for detention and the period of time spent in detention, details of torture inflicted while in detention, losses caused by such torture, the amount of compensation claimed, and any other details that help in proving the case. While determining the compensation amount, as per the Act, the court considers (a) the physical or mental pain or hardship caused to the victim, and its gravity; (b) the reduction in income-earning capacity of the victim resulting from physical or mental harm; (c) the age of the victim and their family liabilities in case they have suffered physical or mental damage which cannot be treated; (d) the estimated expenses of treatment following the incident of torture; (e) in case the victim of torture dies,



the number of members of their family dependent on their income, and the minimum amount necessary for their livelihood; (f) other proper and appropriate matters from among those contained in the claim filed by the victim.

In the next section of this paper we will examine how the TCA works in practice, using a particular case by way of illustration. The case has been chosen as it demonstrates many of the wider issues raised in bringing cases under the TCA, and it was brought by one of the historically most influential human rights NGOs in Nepal.

### **A case under the Torture Compensation Act**

In August 2009, an Advocacy Forum (AF) lawyer made a visit to a police station in Kathmandu as part of its regular detention monitoring visits. One of the detainees visited in this way was Bikram Thapa.<sup>6</sup> Police officers from northern Kathmandu had arrested Thapa a few days earlier in connection with a robbery.<sup>7</sup> During the visit, as was usually the case, the AF lawyer did not take a detailed statement from Bikram, as their meeting was likely to be overheard. Instead, the lawyer filled in a standard monitoring form, noting that some signs of ill-treatment were visible on the detainee's body. The AF lawyer then left contact details with Bikram in case he wanted legal counselling or support. The police released Bikram two days later.

After the release, Bikram came to the AF office in Kathmandu. He informed an AF caseworker that the police had beaten him and made threats that they would file a case against him for illegal possession of drugs if he did not provide information on a robbery. In his statement to AF, Bikram identified the name of the detention centre and those involved in his mistreatment. Bikram had a detainee release letter with him that provided written evidence that he was released from a specific detention centre. Through phone calls, the AF caseworker verified the names of the officers involved. Importantly, the accused perpetrator had an influential social relationship—his brother was a powerful politician. An AF employee then took Bikram to the Tribhuvan University Teaching Hospital (TUTH) in order to receive treatment and a medical report from a physician trained in human rights documentation.

After the AF caseworker provided Bikram with legal counselling, including information on how to file a case under the TCA, Bikram decided he wanted to seek compensation for his treatment. AF prepared all the legal documents together with Bikram's testimony, detainee release letter, photographs of his injury, and medical report. The case was filed in the district court of Kathmandu. However, once it was filed, Bikram's case took almost three years to be heard. Lawyers who know of the case commented that this was possibly due to the involvement of the influential police officer, although it is impossible to know for sure (interviews with human rights lawyers at an NGO<sup>10</sup> February 2015). It also emerged that the Nepal Police had sent the accused perpetrator to serve in a UN Peacekeeping Mission in West Africa. When AF informed the UN office in Kathmandu, the police officer was

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6 Bikram Thapa is a pseudonym.

7 Some of the case details are publicly available. Having gone through the publicly available information, one of the authors (Sharma) interviewed a couple of staff at a human rights organization that directly dealt with this case. Questions were asked to the staff who dealt with the case about the documentation processes followed and the decisions made regarding the case.

repatriated by the UN Department of Peacekeeping Operations (DPKO) to Nepal. News on the case also came out in the international press (see Lynch 2011).<sup>8</sup>

When the case finally arrived at court, the police tried to call the evidence into doubt. The evidence was questioned by the police, and AF had to bring the physician who carried out the documentation to the court to give an oral statement. The version of the detainee release letter presented by the police also contained the line: 'detainee was released physically healthy and mentally sound'. Following a request from AF, the court ordered the verification of the handwriting of the detainee release letter. The National Forensic Lab concluded that the phrase was inserted later.

The district court ordered that Bikram's case be settled through mediation, although there is no provision to do so in the TCA. The court's order read, '(t)his case seems as if it can be resolved through compromise. So, the plaintiff and defendant should be called through their agents within 30 days and sent to Court Mediation Center for Reconciliation.'<sup>9</sup> Rejecting the order for mediation, Bikram and AF took the case to the Appellate Court. On 29 March 2012, Patan Appellate Court invalidated the earlier order of the Kathmandu District Court, and ordered the district court to revisit the case. Finally, the district court ruled on 9 July 2012 that the victim should be paid 30,000 Nepali rupees (300 US dollars) as compensation. The district court refrained from ordering administrative action against the perpetrator. No reasons were given.

Not satisfied with the verdict, Bikram filed a further appeal. Eventually, though, the case was settled outside court. The lawyers and human rights workers involved in the case speculated that the victim received financial compensation from the perpetrator in return for agreeing not to take the case forward (interview with a human rights lawyer at an NGO, 10 February 2015). Throughout the case, although the relatively high profile of the alleged perpetrator had brought attention, it had also raised the political stakes, increasing the pressure on Bikram and AF.

## Naming, blaming and claiming

Given that only a very small minority of incidents of torture end up in litigation, how had Bikram's particular case ended up at court? His initial experiences in detention had to go through several stages of interpretation and translation before it could become a legal claim under the TCA. As Felstiner et al. (1980) have argued elsewhere, such processes involve forms of what they call 'naming, blaming and claiming'. Naming an incident of violence as an act of torture requires complex processes of interpretation. The Nepali Torture Compensation Act, for example, uses the language of international human rights in order to frame and understand the infliction of state violence in Nepal, which must be translated and vernacularized in order to frame injuries in locally meaningful ways (Merry 2006). However, human rights workers report that only rarely will survivors use the word 'torture' or even the Nepali word *yatana*, to talk about their experience. More often, survivors will use the word *dukha* (meaning suffering or hardship). The use of the word torture (whether in English or Nepali) is largely limited to the human rights community, court proceedings,

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8 The report quoted the UN DPKO spokesperson, 'A Nepalese police officer was repatriated following information that he had a case to answer in the national courts for alleged torture in his home country. The UN acted as soon as it received informal information about this police officer.'

9 Brief information on the verdict is available at Advocacy Forum (2012).

legal and official documents, and occasionally in the media. The everyday language through which violence is understood and explained therefore has to be transformed into the technical legal language of the TCA for it to be *named* as an act of torture.

Next, someone must be *blamed* for inflicting torture. Blaming requires the attribution of responsibility to another party and transforms injurious experience into a grievance. It is possible that the injured person or his/her representative, even after perceiving it as a harmful experience, may not be willing or able to attribute responsibility for injury to others. Criminal prosecutions focus on finding particular individuals culpable. Blaming particular officials raises challenges, as survivors can often be intimidated and gathering evidence on specific perpetrators can be difficult, as torture is often clandestine. In partial contrast, human rights law prioritizes state responsibility. In human rights terms, blaming is also often linked to shaming, where perpetrators are named in the hope that public scrutiny will put pressure on states to improve their human rights practice (Keenan 2004). Among human rights violations, torture is seen as particularly amenable to shaming strategies, as it allows particular perpetrators to be blamed, creating a greater focus for a claim (Roth 2004). There can be tension between blaming a specific perpetrator and holding the state to account. As David Kennedy has argued, to sort and separate the tangle of individual, political and administrative responsibility for acts of torture is not a ‘matter of “getting to the bottom of it” . . . It is a cultural and political project of interpretation’ (2006: 143). Blaming a specific individual can ignore the systemic processes that lead to acts of torture, but focusing on these systems and broader state accountability can also mean that no one is actually held to account (Kelly 2012: 138). Who or what to blame is therefore never self-evident, and has important political implications.

Finally, in order for litigation to commence, someone must decide whether or not to make a *claim* and ask for a remedy. Whether they do so depends on factors such as the relative financial, social, and political costs of such action, as well as the perceived likelihood of success. It requires a certain level of confidence, as well as resources, in order to start a claim that might take years to process and comes with a considerable risk of reprisal. Claims also require the ability to mobilize a legal infrastructure through which they can be made, and mechanisms to support such claims—none of which is equally available to everyone.

At each stage of the naming, blaming and claiming many possible incidents therefore fall by the wayside, and we are left with a small subset of all possible cases (compare, more broadly, Merry 1990, Yngvesson 1998). These processes involve contextually specific interpretations, reliance on existing relationships and the creation of new ones, and decisions on which cases to take, and which direction to pursue. Human rights NGOs play a particularly important role here. But in a world of limited resources, such organizations must decide which cases to focus on, where to take them and why, balancing individual interests against broader advocacy strategies, and narrow legal concerns with wider political ones. In the next three subsections we will therefore examine the processes of naming, blaming and claiming in more detail in relation to bringing cases under the TCA.

### Naming torture

Naming an incident of violence as torture can require, in the first instance, that human rights organizations identify survivors. This is especially important as outside of human rights circles in Nepal, the word torture itself is rarely used. Most survivors are identified

by human rights organizations in relation to places of detention, partly because the TCA definition of torture is restricted to such places. Advocacy Forum has run a detention monitoring scheme as a part of its torture prevention programme in selected districts (see M. Sharma et al. 2012). The visit to Bikram's place of detention was part of this scheme. Lawyers from AF make regular visits to selected detention centres and 'randomly' speak to detainees (interview with a human rights lawyer at an NGO, 9 February 2015). AF also has a long history of interviewing survivors who are not in detention, especially during the insurgency, but the detention monitoring scheme was developed as part of a specific strategy to improve the treatment of detainees in pre-trial detention. However, AF has often faced restrictions in access to pre-trial detention in particular. When visits have been allowed to take place, lawyers give detainees basic legal counselling on the prohibition of torture in detention and their rights as a detainee. They leave their contact details and inform the detainees that they can contact the organization if they are in need of any legal counselling or advice (interview with a human rights lawyer at an NGO, 9 February 2015). Often, once the victim is released, the victim or his/her family may get in touch with AF, who then provide medical support and collect further medical evidence.

Not all human rights NGOs that work on torture have managed to gain access to detention centres and therefore they can find it much more difficult to identify the type of victim that can take a case under the TCA. Other methods for identifying survivors include referral by former survivors who came in contact with the organization or through medical professionals, NGOs, community based organizations, social activists, lawyers, and other civil society representatives (interviews with a human rights lawyer at an NGO, 23 February 2015; with a human rights lawyer at an NGO, 13 February 2015). CVICT uses medical camps as a method of identification of cases of torture and ill-treatment. In addition, human rights NGOs respond to media reports by making a visit or by mobilizing their network to gather further information, and may make field trips to gather facts. Lack of resources can mean that human rights organizations are unable to carry out field missions on their own and have to rely on making phone calls to someone they know (interviews with programme director at a human rights NGO, 5 August 2014; with a human rights lawyer at an NGO, 13 February 2015).

It is important to recognize that access to places of detention is a source of constant struggle for human rights practitioners. Even once inside a place of detention, identifying a survivor of torture poses challenges. Not all detainees, for example, feel comfortable or confident speaking with human rights lawyers inside the detention centre as they offer very little privacy. One human rights lawyer, associated with AF, reported that she feels that those who are accused of trafficking, drug theft and murder are more likely to be tortured for confession (interview with a human rights lawyer at an NGO, 9 February 2015). Accordingly, when she visits detention centres, she actively looks for detainees with these characteristics. Given that private conversations can be hard to come by, seeing physical marks, such as those noted by the AF lawyer in Bikram's case, is a crucial form of identification. Human rights workers report though that they also suspect that verbal abuse and threats are very common, and in particular threatening the victims with false allegations involving 'weapons, drugs or trafficking' (interview with a human rights lawyer at an NGO, 9 February 2015). A human rights lawyer for example, reported to us that the 'police have become smarter; if they physically torture someone, then it is possible to identify the abuse, but if it is mental or psychological torture, then it is likely that there is no evidence left, and human rights organizations have limited expertise available to collect psychological

evidence' (informal conversation at a meeting in Advocacy Forum Office on 15 July 2015; interview with a human rights lawyer at an NGO, 13 February 2015). As such, it is very difficult to for human rights workers to identify survivors of psychological mistreatment (interviews with a human rights lawyer at an NGO, 13 February 2015; with a human rights lawyer at an NGO, 23 February 2015; with a human rights lawyer at an NGO, 9 February 2015).

There are therefore several obstacles to naming an incident of violence as an act of torture. The first step is that survivors need to come into contact with human rights organizations. The emphasis on detention in the TCA and wider human rights practice means that survivors who have not been through detention are more complicated to name as such. Even when in detention, identifying survivors can be difficult, as access is often limited, and survivors without physical marks can be harder to recognize.

### Blaming a perpetrator

Once an incident has been named as torture, a perpetrator has to be blamed. Interestingly, though, the TCA does not mention the need for a particular identified perpetrator as being necessary for the award of compensation. As long there is evidence of a state actor's role in inflicting torture, the survivor is deemed eligible for compensation. Furthermore, in line with general human rights principles, it is the state, rather than specific perpetrators, who must pay the money. Case documents will usually include the details of specific perpetrator(s) as this is necessary for any administrative action against a particular identified perpetrator that the court may recommend. However, in practice, compensation is often not directly tied to such action.

In Bikram's example, as in many other cases, the process of allocating blame to a specific individual perpetrator raised particular problems. From the perspective of Bikram and his lawyer, it was not sufficient to attribute responsibility to an abstract state actor and they sought to identify the particular individuals involved. It is then arguable that his case then gained wider media attention because it involved a relative high profile police officer. However, at the same time this police officer was in a position to exercise direct and indirect pressure on Bikram, AF, and the Nepali court system. More broadly, blaming specific state officials for torture is a high risk for many survivors and their representatives. Threats are common against those who make accusations, and survivors and their lawyers are often intimidated. If a police officer has tortured them once before, there is no necessary reason why they will not resort to violence again. As we have written about elsewhere, in the absence of adequate protection mechanisms, torture survivors or their families and friends risk being intimidated (Kelly et al. 2016; Jensen et al. 2017). Often, the priority is to look for protection, avoid any confrontation and focus on carrying on with everyday life quietly. The head of documentation at one Nepali human rights NGO reported several cases where survivors had been tortured again following allegations, resulting in a loss of trust in the legal process among survivors (interview with head of documentation, national human rights NGO, 11 June 2014). In such contexts, our interviewees reported that survivors are often extremely reluctant to seek justice through formal mechanisms (interviews with head of documentation, national human rights NGO, 13 February 2015; with medical professional and director of national human rights NGO, 5 August 2014; Nepal Stakeholder Workshop, 4 September 2014). It is therefore not just survivors that can be intimidated, but also those involved more broadly in bringing the case, such as lawyers and caseworkers.

One of the reasons for the difficulty in obtaining high quality medico-legal reports, for example, is that many clinicians are directly employed by government-funded hospitals, and therefore fear losing their jobs if they are critical of the state. A Nepali human rights activist, for example, reported that medical personnel are under pressure from the police and 'don't want to take active steps' (interview with director, national human rights NGO, 7 August 2014). It is also worth noting that very few cases have been brought against the army, even though they were heavily involved in torture during the Maoist insurgency. We might infer that the lack of cases is due to political influence of the military and the continued fear that they can evoke. In the context of a ubiquitous threat of intimidation, the priority is often survival.

Blaming a specific perpetrator therefore carries risks that can discourage survivors and NGOs from bringing a case under the TCA. These risks can increase the more high profile the perpetrator. However, as we shall show in the next section, high profile perpetrators can have their own attractions for NGOs, if not for survivors.

### Making a legal claim

Once Bikram's treatment by the police had been named as torture, and a perpetrator had been blamed, the next step was to make a claim. Even before a case gets to court, there are important procedural obstacles under the TCA. Not the least, the 35-day limit on filing a case is a major constraint. This is a very short period of time for a survivor to name and blame, to make contact with a human rights organization and to mobilize the necessary resources. There is no available data on how many cases fail for this reason. The general perception among the human rights workers is that educated, politically informed survivors, who are not from economically struggling backgrounds, are more likely to come forward (interviews with a human rights lawyer at an NGO, 9 February 2015; with a human rights lawyer at an NGO, 8 August 2014). It is also important to note that almost all claimants are men, speaking to the social stigma associated with female survivors and the wider difficulties women can face in making public claims. Furthermore, litigation is expensive, although legal aid is sometimes provided by the organization for those who cannot pay, and human rights organizations in Nepal often fund these cases from donor-funded projects. While some human rights organizations have one or two human rights lawyers on payroll who file cases in the court, others hire lawyers on a case-by-case basis. When victims are unable to afford legal costs, human rights organizations refer cases to the limited free legal aid that is available from the Nepal Bar Association or other NGOs.

If a survivor wants to take a case forward, human rights organizations themselves need to decide whether they want to invest time and resources in litigating under the TCA. At this stage, human rights organizations are confronted with several decisions and dilemmas. For a case to have a chance of success, human rights organizations need to produce legally persuasive evidence about a particular incident. This can be very resource intensive. Time needs to be spent with the survivor as well as witnesses to take statements, and the latter could mean visiting the same detention centre where the victim was tortured. Official documents, such as arrest papers, release note from the detention, or medical reports, are also collated. Photographs need to be taken. Medical evidence is particularly resource intensive, although this can be very persuasive before the Nepali courts (interviews with a human rights lawyer at an NGO, 4 September 2014; with programme manager at a human rights NGO, 10 February 2015; with a human rights lawyer at an NGO, 13 February

2015; with forensic expert, 15 November 2015; also see [M. Sharma 2014](#)). There is however a shortage of trained medical professionals who are willing and qualified to produce medico-legal reports for human rights organizations. Medical evidence produced by police-appointed doctors from government hospitals is of relatively poor quality, and high quality independent reports can be difficult to obtain and resource intensive (interviews with a human rights lawyer at an NGO, 13 February 2015; with programme manager at a human rights NGO, 23 July 2015; with the director of a human rights NGO, 15 July 2015). Human rights activists also report that it is very difficult to produce evidence on psychological torture. While there has been some training on the use of the Istanbul Protocol ([UN OHCHR 2004](#)) in Nepal, its use is limited due to lack of capacity ([Kelly et al. 2016](#)). Given all the resources that need to be mobilized, some Nepali human rights organizations make the survivors sign a consent form saying that they will not drop out of a case if it is taken forward (interview with a human rights lawyer at an NGO, 8 August 2014).

In this context, we can begin to appreciate how and why Bikram's case was taken forward in the way that it was. Bikram was willing to take the case to the court, once supported by the legal aid provided through AF. Not only was there physical evidence of torture, but they were also able to identify a perpetrator. Probably most importantly, against the background of the relatively high profile of the perpetrator, AF was also able and willing to invest resources into the case. As elsewhere in the world, most of the identified incidents of torture in Nepal sit in the shelves of human rights organizations as 'passive' cases. Excerpts of these cases may be used for writing annual reports or while submitting UN Universal Periodic Review reports, or for general advocacy. Only selected cases remain 'active' and proceed to litigation under the TCA. Human rights organizations report that some of the key criteria for taking a case forward include the seriousness of the case in terms of severity of injury, threat of further torture or ill-treatment, potential political or media interest or its suitability as a 'good case' for advocacy campaigns to pressure the government (interviews with a human rights lawyer at an NGO, 4 September 2014; with a human rights lawyer at an NGO, 8 August 2014). Cases under the TCA therefore do not simply stand on their own merits, but can be taken forward as part of wider human rights strategies. More specifically, there is a sense among some human rights workers that cases are only taken forward when they meet the wider goals of particular human rights organizations (interviews with a human rights lawyer at an NGO, 4 September 2014; with a human rights lawyer at an NGO, 8 August 2014). There are also claims, for example, that human rights organizations ignore, in practice, incidents of torture when they occur in the southern lowland area of the country known as the Terai. Part of this is a legacy of the Maoist insurgency's focus in the hill country, meaning that human rights organizations have a relatively stronger presence in upland areas. But there is also a widespread perception amongst Madhesi activists in particular that the Kathmandu-based human rights organizations have a political prejudice against the Terai reflecting the dominant strains in Nepali nationalism (interview with a human rights lawyer at an NGO, 8 August 2014).<sup>10</sup>

Persuading a human rights organization to take a case though is not the final hurdle. Once a case reaches the courts, judges can often be relatively antipathetic to claims of

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10 Madhesi activists fight for the rights of those who live in the Terai. While there is a long history of the Madhesi movement in Nepal, it has occupied a key place in Nepali politics since the Madhesh movement of 2006.



torture. Delays are also common meaning that, as in Bikram's case, those cases that do make it to court can take years to do so. Systematic data is not available on cases in the Nepali courts under the TCA. However, we can begin to pull together a broader view from the information that does exist, and it can be inferred that successful cases represent only a very small minority of all possible cases. In 2013/14, there were 91 active cases in Nepali courts under the TCA ([Supreme Court of Nepal 2014](#)). In 2006 CVICT reported that out of a total of 109 cases filed by them, 21 cases were decided in favour of the survivor ([CVICT 2006](#)). Advocacy Forum reported in 2008 that 'in the 12-year history of the TCA, only 208 cases of torture compensation have been filed, only 52 victims have been awarded compensation under the TCA, and of those awarded compensation, only seven victims (13.46 per cent) have thus far actually received their money ([Advocacy Forum 2008: viii](#)). A 2014 publication from AF reported that they had filed a total of 146 cases under the TCA since 2003, with the following outcomes: 31 cases (21 per cent) were granted compensation, 48 cases (32.9 per cent) were dismissed, 61 cases (41.8 per cent) were awaiting decision, and six cases (4.1 per cent) were withdrawn ([Advocacy Forum 2014a](#)). In general therefore only a minority of cases that reach the courts end in a positive verdict for survivors of torture.

When compensation is awarded to survivors, human rights organizations report that it can take many months to be processed, if at all (interviews with programme manager at a human rights NGO, 23 July 2015; with a human rights lawyer at an NGO, 8 August 2014; with a human rights lawyer at an NGO, 9 February 2015). There are no clear or detailed guidelines on how to calculate the amount of compensation to particular claimants. In Bikram's case, it is not clear how the amount of compensation was calculated by the district court judges, and there seems to be no systematic way in which such decisions are reached. According to the 2006 report published by CVICT, the amount awarded by the courts has ranged from 1,000 to 50,000 Nepali rupees with only one instance where the court awarded 100,000. However, in the first 12 years of the TCA (between 1996 and 2008), only seven victims (13.46 per cent) actually received money ([Advocacy Forum 2008: 1](#)). Although the TCA also gives courts the power to order administrative action against individual perpetrators, according to the 2006 CVICT report, such action was recommended in only just over half of successful cases. Human rights workers interviewed said that this has not changed in recent years and administrative action is recommended in only a handful of cases (interview with a human rights lawyer at an NGO, 4 September 2014). However, several individual government officers have been prevented from being selected for overseas training or lucrative UN peacekeeping positions mainly due to advocacy strategies adopted by human rights organizations (interview with a human rights lawyer at an NGO, 4 September 2014).

## Conclusion

What lessons might we take from the experience of Nepali NGOs trying to support cases under the Torture Compensation Act? The TCA highlights the challenges and potentials for human rights NGOs when trying to support individual claims for monetary compensation as a response to acts of torture.

At a formal legal level, the Act is highly restrictive. It sets out a 35-day limit for making claims, requires that torture occurs in a place of detention, requires that government employees be involved, limits the amount of compensation that can be granted, and only indirectly links compensation for victims to punishment of perpetrators.

Practically speaking, there are also significant obstacles before incidents can be named, blamed and claimed as torture. As we have shown above, human rights organizations play a crucially important role in the naming of incidents of violence as acts of torture. But those survivors in forms of detention that human rights organizations find hard to reach, too scared to come forward, or without visible injuries, can be particularly hard to identify. Once survivors have been identified, and their experiences named as torture, blaming perpetrators carries particular risks. Expensive and resource intensive evidence—most especially medical reports—then need to be collected in order to make a claim. A survivor must then be willing to stay with a case through the years that it can take to process, and human rights organizations must decide that it meets their strategic objectives. Only then does a case even enter the court.

And from a political and historical perspective, the TCA has important limitations. Its case-by-case focus might create opportunities for individuals seeking compensation, but also produces unequal forms of access to the courts. In the absence of a more widespread transitional justice mechanism, the TCA also does not address wider political concerns. If one of the goals in human rights litigation—alongside compensation for individuals—is the partial shaming and subsequently reform of the state, it is not clear what, if anything, is being shamed here. Individual perpetrators do not have to pay costs—especially in the widespread absence of administrative action—but the Nepali state can write torture off as the action of isolated individuals. If there is any shame to go around, it seems to slip between the individual perpetrator and the state.

However, despite these important limitations, scores of survivors have been granted compensation since the Act came into force. Although the successful cases are just a small subset of all possible cases, and the amounts of money awarded are relatively small, successful claims still exist at a rate that is rare on a global scale. Those cases that are successful might be exceptional, but if the number of survivors being awarded compensation is ever to be increased it is important to reflect on how they might be made relatively less so, and the wider implications that this might have for human rights struggles.

What would it take to expand the reach of human rights organizations to make contact with survivors, and increase the number of successful cases? This list is necessarily speculative and incomplete, but from the above analysis, we can begin to identify several possible lessons. Many of them are straightforward, but are nevertheless important to reiterate. The larger, wider and more inclusive the networks of human rights organizations, the more survivors they will come into contact with. Given the necessarily limited resources of human rights organizations, this suggests that they need to make alliances with other organizations—such as community health workers—that do have a larger on the ground presence.

Human rights campaigners have been lobbying for a new anti-torture law that would increase the amount of compensation available and also make torture a specific criminal offence. Such moves can only be a good thing, but in light of the arguments presented here about successful compensation cases, it is also worth examining some possible implications. In part, successful compensation cases under the TCA depend on a careful balancing of political pressures. If survivors are afraid of repercussions cases are not able to go forward, but if cases have a higher political profile they are more likely to resonate with the strategic goals of human rights organizations. In this context, the relative lack of punishment under the current TCA can therefore decrease the stakes for perpetrators, and also decrease the likelihood of political intimidation. If the stakes were higher, and punishment was more directly linked to compensation, the incentives for non-cooperation and interference would be even higher. The relative absence of both blame and shame can therefore make litigation easier.

Some comparative illustrations are instructive here. The Torture and Custodial Death (Prevention) Act 2013 in Bangladesh criminalizes torture and requires that a police officer is suspended while an investigation is carried out. In the absence of functioning victim protection mechanisms, however, the result is not higher levels of criminal accountability. Rather it is higher levels of intimidation, as police officers pressure survivors to withdraw cases (J. R. Sharma and Andersen 2017). Similarly, in Sri Lanka, torture is criminalized under the Convention Against Torture (CAT) Act No. 22 of 1994. However, prosecutions are extremely rare, despite large numbers of documented cases. In practice, the only available civil remedy is filing a case at the Supreme Court for a breach of ‘fundamental rights’. Such cases though are costly, time consuming and technical, and therefore out of the reach of most survivors (UN Human Rights Council 2016). No adequate protection mechanisms exist, and many survivors remain deeply afraid of launching cases against the police. Naming and claiming is therefore relatively easier for individual victims when perpetrators are not directly blamed.

More generally, human rights practitioners are rightly weary of separating monetary compensation from other forms of reparations. John Borneman has argued, for example, that financial compensation can only work as an adequate form of redress when it is supplemented by other forms of redress, including punishment of perpetrators (2011: 11). Human rights jurisprudence also stresses the indivisibility of reparations, and that compensation on its own is widely seen as insufficient (Borneman 2011; de Greiff 2006; Minow 1998; Roht-Arriaza 2004).<sup>11</sup> However, at a practical level, different forms of reparations do not necessarily line up easily alongside one another, and their implementation might even be in tension. The political contexts within which redress plays out can mean that it is far from straightforward to demand both criminal prosecutions and financial compensation at the same time. More specifically, it might well be that monetary compensation is easier without wider forms of reparation. This suggestion is necessarily speculative, and requires further research. It is not to say that accountability is not an important goal, but that there are potential practical choices to be made between (limited) compensation for individuals and a broader struggle to end impunity. If compensation is only meaningful in the context of a wider accountability, this very accountability might make individual compensation more problematic. In order for this circle to be squared, it is therefore of crucial importance that attention is paid to the ways in which survivors of torture can be provided protection. Witness and Victim Protection laws, such as the pending draft bill circulated for comments in June 2011 by the National Law Commission of Nepal, are a crucial part of this process. But it is also important to make sure that they are not simply restricted to relatively high profile cases and that protection is provided by organizations that survivors trust. If protection is simply provided by the police—the body that is after all often responsible for acts of torture—the cycle of fear will only be perpetuated.

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11 Article 14(1) of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005.

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