

Nepal's Failure to Address Torture: The Relevance of the UN Torture Convention

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Introduction

This paper compares and contrasts Nepal's record on compliance with the UN Convention Against Torture (CAT) with global patterns of compliance and recommends application of some of the lessons learned globally to Nepal. The paper is divided into three sections, section one examines the extent and nature of torture in Nepal; section two compares the Nepali reality with global patterns of CAT compliance and a brief discussion of this larger pattern; section three applies some of these global lessons to the case of Nepal.

1. The practice of torture in Nepal

1.1 Historical Perspective

Torture has been used as a tool of social control through much of Nepal's history. Even after a democratic regime was introduced with a new Constitution in 1990, the security forces continued

to use excessive force as well as torture and ill treatment of people held in custody.¹ Amnesty International, in a report on Torture in Nepal states that:

Nepal has a historical tradition of torture and humiliation of criminals by police and local authorities... Despite the process of political change over the last ten years and the prohibition of torture in the 1990 Constitution, torture as a punishment is still widely perceived as acceptable. Sometimes very gruesome forms of torture are reported. They include falanga (beatings on the soles of the feet) with bamboo sticks, iron or PVC pipes; belana (rolling a weighted bamboo stick or other round object along the prisoner's thighs, resulting in muscle damage); telephono (simultaneous boxing on the ears), rape, electric shock and beatings with sisnu (a plant which causes painful swellings on the skin). The latter method of torture is often inflicted on women, more particularly on their private parts.²

The occurrence of torture increased dramatically during the decade of internal armed conflict (1996 to 2006) as both the security forces and the Maoist rebel forces systematically used torture to intimidate, suppress, control and punish victims.³

In his 2006 report, a UN Special Rapporteur concludes unequivocally that:

Torture and ill-treatment are systematically practiced in Nepal by the police, armed police and the RNA primarily to extract confessions and to obtain intelligence in relation to the conflict. That the Government urgently needs to send a clear and unambiguous message condemning torture and ill-treatment was made dramatically clear to the Special Rapporteur when he received repeated and

¹ The Center for Legal Research and Resource Development, *Analysis and Reform of the Criminal Justice System in Nepal* (Jun. 1999).

² Amnesty International, *Nepal: Make Torture a Crime*, (1 March 2001), Background Section

³ Advocacy Forum, *Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act-1996*, 3 (First.ed 2008).

disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.⁴

Torture continues to be systematically practiced today even after restoration of democracy in 2006, with the difference that the perpetrators are now mainly confined to the police forces, since the army and Maoist combatants have been confined to their barracks or cantonment since November 2006.⁵

The leading human rights NGO on torture in Nepal, Advocacy Forum, reported that: “From July 2001 to April 2006, Advocacy Forum documented 2271 cases of torture. Last year alone (March 2005-April 2006), [Advocacy Forum] documented 951 cases of torture and 17 rape cases. Out of these 951 torture cases, 511 were committed by the police, 371 by the military and 11 by the armed police. (Advocacy Forum] also documented 12 cases of torture by the state sponsored vigilantes and 46 cases of torture inflicted by the Maoists.”⁶ In a different report of June 2007, Advocacy Forum further reports that, “Advocacy Forum interviewed 3908 detainees since April 2006 and 27.6% were victims of torture.”⁷

As shown by these reports, it's clear that torture is widely practiced in Nepal. The report of Special Rapporteur indicates that “Over the last few years, the Special Rapporteur [himself] and his predecessors have received a large number of credible and consistent allegations relating to torture and ill-treatment from Nepal, primarily in the context of the armed conflict”⁸

The statistics aside, it is important to highlight what the statistics mean for victims. The practice of torture in Nepal has been the subject of systematic study from the perspective of torture

⁴ *Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/2006/6/Add.5, 8 (9 January 2006) para 17. (*The Special Rapporteur submitted his report after visiting 10 to 16 September 2005 in Nepal*)

⁵ Advocacy Forum, *Nepal Sharing experiences of Torture Survivors* 1 (26 June 2006).

⁶ *Id.* at 3.

⁷ Advocacy Forum, *Torture Still Continues: A Brief Report on the Practice of Torture in Nepal 2006-2007*, 2 (25 June 2007).

⁸ Report of The Special Rapporteur, *supra*, note 4.

victims.⁹ According to Advocacy Forum, "During the conflict, the Royal Nepal Army (RNA which is changed as Nepal Army- NA, both terminologies are used hereinafter)) was known to systematically arrest and torture not only suspected Maoists and their families, but also others including journalists, lawyers, and human rights defenders accusing them of being the supporters of the Maoist."¹⁰ The NA used methods common in Nepal such as threats, intimidation, deprivation, and beatings. They also used the internationally-used Kubark manual¹¹ as torture methods,¹² such as applying electric shocks to the ears, maintenance of stress positions, and prolonged periods of being blindfolded or hooded and handcuffed.¹³ Moreover of 371 military detainees to whom Advocacy Forum interviewed 100% of those interviewed after release from RNA barracks reported torture by Army officials.¹⁴ Similarly it also reported that, "[. . .] Of those people [Advocacy Forum] interviewed in police detention centers, 35.5% in Nepal [gunj], 43.8% in Kathmandu said that they had been tortured."¹⁵

A UN High Commissioner for Human Rights (OHCHR) report in May 2005 presented in great detail the systematic torture suffered by detainees of the RNA in one urban barracks in Kathmandu during late 2003. A more recent report by OHCHR, just released in December 2008, also describes systematic torture committed by several RNA barracks during the period 2002-2003 in the western part of the country. Together with Advocacy Forum and other NGO reports, there is enough information to suggest a basis for claiming widespread and systematic practice of torture by the RNA during the period from 2002 until 2006.

Of the cases reported by Advocacy Forum (2, 271 cases from 2001 to 2006 including 951 cases from March 2005 (following a coup d'état by the King), the police were the alleged perpetrators in 511 cases, the army in 271 cases, and the Maoists in 46 cases. These are significant statistics but they do not necessarily tell the whole story. Many cases where torture is followed by

⁹ Bhogendra Sharma & Mark Van Ommeren, The Center for the Victims of Torture and the Transcultural Psychosocial Organization, *Preventing Torture and Rehabilitating Survivors in Nepal*, (March 1998).

¹⁰ Advocacy Forum, *Hope and Frustration*, *supra* note 3 at 5.

¹¹ CIA 'KUBARK' Program, 'KUBARK' Counterintelligence Manual, (July 1963), <http://www.kimsoft.com/2000/kubark.html>

¹² Advocacy Forum, *Hope and Frustration*, *supra* note 3 at 5.

¹³ Report of The Special Rapporteur, *supra*, note 4 at 8 para. 18.

¹⁴ Advocacy Forum, *Hope and Frustration*, *supra* note 3 at 5.

¹⁵ *Id.* at 4.

enforced disappearance or extra-judicial killing are never reported. Also, these statistics may be affected by the ease of access by victims to this particular NGO. Many victims may be too afraid to speak or will not have knowledge of the NGO.¹⁶ Nonetheless, these numbers are significant.

Monitoring and reporting of torture is also carried out by the UN Office of the High Commissioner for Human Rights (OHCHR), which established a large field presence in Nepal in May 2005, and remains present in the country to date.¹⁷ OHCHR-Nepal's reports on human rights in Nepal since 2005 continuously refer to torture as a systematic problem.¹⁸ In its report to the UN Human Rights Council dated 18 February 2008, OHCHR-Nepal cites three different important issues: detainees who died in detention due to torture; detainees were reportedly hidden prior to OHCHR visits; and the pattern of torture and certain practices of torture common during the conflict occasionally reappeared, mostly in connection with detained individuals accused of belonging to armed groups.¹⁹ The report also highlights the abuses by CPN(M) and Youth Communist League (YCL) including abductions, threats, intimidation, physical assault, ill-treatment, torture and forced labor, especially in the context of parallel law-enforcement activities.²⁰

In general, there are three patterns of torture in Nepal from 2002 until 2006, as suggested by the reports mentioned earlier. First, the RNA is the alleged perpetrator in most cases of torture related to the armed conflict. This torture and ill treatment is used systematically for two reasons: to extract information and to degrade and humiliate detainees as Maoist enemies of the State and King. The second perpetrator is the civilian police who have a consistent record of ill treatment against detainees which continues to this day. Third, there are abuses by the Maoist party before and after April 2006. Before 2006, international humanitarian law (IHL) violations

¹⁶ *Id.* at 2.

¹⁷ <http://nepal.ohchr.org/en/resources/Documents/English/mandate/OHCHR%20agreement%20with%20HMG%20MoU.pdf>

¹⁸ UNOHCHR, *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, A/60/359, 29 (16 September 2005).

¹⁹ UNOHCHR, *Annual Report of The United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, A/HRC/7/68, (18 February 2008) para 38.

²⁰ *Id.* at para 44

include actions amounting to torture and ill-treatment that are carried out mainly to punish alleged spies, to send a message of fear to the civilian population, and to extract information. However, confirmed cases of actions of this kind by Maoists are far fewer than by the RNA. Since May 2006, the YCL has also committed acts amounting to ill treatment and torture. The issue of whether YCL abuses should be addressed as torture or a crime under domestic law is not addressed in this paper. In some sense, the YCL acts as an agent of the State, given the influence of Maoist leaders in Government. In another sense, their actions should be addressed within domestic criminal law unless they amount to crimes against humanity under the ICC Rome Statute.²¹

1.2 Nepal's International and Domestic Legal Obligations Related to Torture

Nepal ratified the CAT on 14 April 1991, just after the restoration of parliamentary democracy in 1990. Nepal's first experience of multi-party democracy in 1960 was very brief, and until 1990, its entire history is dominated by monarchic and oligarchic power. The 1990 Constitution, a major political step away from dictatorial and authoritarian rule that occurred in 1990, incorporated the freedom from torture as a fundamental right of the citizens. Art 14(4) of the 1990 constitution expressly prohibited "physical and mental torture" and "cruel, inhuman or degrading treatment", the first time this principle was recognized in the Nepali Law.²² This constitutional provision also required that "persons subjected to torture shall be compensated in a manner determined by law."

The ratification of CAT in 1991 created some important obligations:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

²¹ See Art 7(1) of ICC Statute.

²² Advocacy Forum, *Hope and Frustration*, *supra* note 3, at 7.

2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.²³

Further, Article 4 of CAT states that each state party “shall ensure that all acts of torture are offenses under its criminal law,” and should be “punishable by appropriate penalties which take into account their grave nature.” It also obliges states to submit preliminary reports after ratifying the CAT and each 4 years periodical report afterwards.²⁴

1.3 Implementation of CAT in Nepal

Despite these constitutional and international legal obligations, the period from 1990 to 2005 saw an increase in the practice of torture. This is almost entirely related to the armed conflict (1996-2006) which arose when the Maoist party abandoned parliament and opted for violent revolution. The Royal Nepal Army (RNA) stayed out of the conflict while the State tried to deal with the uprising as a police issue. However, this lasted until November 2001 when the RNA was called in to lead a unified command, with police acting in support of RNA operations. As we saw earlier, the incidence of torture dramatically increased after that point, particularly by the RNA.

All of this occurred in spite of Nepal’s ratification of CAT and Nepal’s formal status as a multi-party democracy. Multi-party democracy however began to decline in 2002 when the Prime Minister was dismissed by the King, and democratic exercise of political power continued to decline until finally, as many were predicting, the King dissolved Parliament on 1 February 2005. Even with the end of the conflict in May 2006, however, there has been little progress in protecting citizens against torture, and reports indicate that torture by State actors has continued (see section A, above).

²³ Art 2 of the UN Convention Against Torture (CAT).

²⁴ See Art 19(1) of the CAT.

It is interesting to look at the exchanges of reports and observations between the Committee against Torture and the Nepal government. Since 1991, the Nepal government has submitted two different reports to the Committee. The first is the preliminary report on 16 December 1993;²⁵ the second a periodical report on 14 January 2005.²⁶ In addition, the Special Rapporteur on torture visited Nepal in 2005. Most recently, in 2007, the Committee against Torture again reminded the Government of Nepal of the most basic obligations that it had failed to meet since 1991:

The State Party should adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the convention.²⁷

The reality in Nepal today is that none of these basic requirements have been met. Torture is not defined as a crime in criminal law. Not a single individual has been prosecuted in civilian jurisdictions for torture. Instead, if someone wishes to make a criminal complaint about actions amounting to torture or ill treatment, they have to use the provision of "physical assault" in the Muluki Ain (Country Code), which has not specifically mentioned torture inflicted by security officials. If a case is raised with the RNA, then the army will in practice deal with it as an internal matter. The most shocking example of this is the case of Maina Sunwar. She was disappeared by the RNA on 17 February 2004 tortured, and then executed. The facts of the case have emerged and been confirmed due to efforts of her mother. The army insisted on an internal

²⁵ UN Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, CAT/C/16/Add.3 (16 December 1993)

²⁶ UN Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Second periodic Reports of State Parties due in 1996*, CAT/C/33/Add.6 (14 January 2006).

²⁷ UN Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture*, CAT/C/NPL/CO/2* (13 April 2007) para 12.

procedure of Court of Inquiry to address the case. The perpetrator [Colonel Babi Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun] provided a full and detailed confession. He was given an administrative penalty for failing to follow procedures.²⁸ But OHCHR reported that “It appears from the Court of Inquiry Board report that Babi Khatri, who was a Lt. Colonel at the time of the incident, had already been promoted to full Colonel by the time that the Court of Inquiry Board report was finalized.”²⁹

With regard to compensation, this legal regime, based on the 1996 Torture Compensation Act, is of little relevance in practice. The fear and intimidation faced by victims’ prevents them from going to the courts for compensation. Advocacy Forum and other NGOs have documented the need and desire for compensation by victims, but fear remains an obstacle. One of the examples cited by Amnesty International shows that, “During 1998, 12 people claimed compensation. Of these 12 people, six later withdrew their cases because of intimidation and fear for their safety.”³⁰ Moreover, even if compensation is provided, it occurs in exchange for impunity. As Advocacy Forum has stated: “[. . .] the courts have awarded compensation of between NPR. 5’000 (approximately USD \$66) and NPR 100000 (approximately USD \$1333). Over the whole of the 12 years, only 7 victims (13.46%) have thus far received this money. Furthermore, so far none of these perpetrators named in these cases have actually been brought to justice.”³¹

This formal parliamentary enactment of the TCA in 1996, even though it has had no practical consequence in protecting human rights, is the only concrete step taken by the Government of Nepal in relation to CAT and the 1990 constitutional obligation. It is interesting to note that the Government of Nepal showed its willingness to address compensation at least in a superficial way, but not to criminalize acts of torture and ill treatment. This seems consistent with resistance by the political leadership to any attempts to challenge impunity in Nepal by taking

²⁸ Advocacy Forum, *Torture Still Continues*, *supra* note 7 at 6. (The two captains were ordered to pay Rs. 25000 in compensation to Maina’s Family and were held to be ineligible for promotion for a period of one year. One Colonel was ordered to pay Maina’s family rs. 50000 in compensation and was held to be ineligible for promotion for two years).

²⁹ UNOHCHR, *The Torture and Death in Custody of Maina Sunuwar Summary of Concerns* (4 December 2006) (*see* footnote 1).

³⁰ Amnesty International, *Nepal: Make Torture a Crime*, (1 March 2001). (*see* the victim section).

³¹ Advocacy Forum, *Hope and Frustration*, *supra*, note 3 at 2.

seriously the right to freedom from state-sponsored violence as discussed further in the last section of this paper.

In light of this political culture and history in relation to victim compensation for torture, it is interesting to note how the first draft of this compensation legislation was treated by Nepalese authorities and how the UN Committee against Torture responded at that time. When it introduced the Bill in Parliament, the Government stated:

A Compensation Bill has been tabled at the current session of Parliament. Under this legal framework all kinds of torture and other cruel or inhuman treatment or punishment have been totally prohibited. If such happened, the person concerned would be compensated by law. All acts of torture are to be made punishable by appropriate penalties.”³²

The UN CAT Committee noted these commitments with approval, anticipating “[. . .] legislation incorporating a crime of torture into its domestic law and is also enacting a compensation scheme.”³³ Subsequently, the Committee continued to monitor the lack of progress and recommended again that the Government “enact legislation incorporating the definition of torture as contained in the Convention as soon as possible, together with ancillary compensation legislation”³⁴ More than a decade later, the Government of Nepal continued to make promises. It responded to the Committee’s report in 2008 stating that “a draft Torture Act has been prepared which incorporates the definition of torture in the spirit of the Art 1 of the Torture Convention”.³⁵ As of December 2008, no such draft Torture Act has been tabled.

2. Global patterns related to CAT implementation

³² UN Committee Against Torture, *supra*, note 25 at para.1.

³³ UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Nepal*, A/49/44 (12 June 1994) para.140.

³⁴ *Id.* at para. 146.

³⁵ UN Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Comments by the Government of Nepal* to the Conclusions and Recommendations of the Committee Against Torture*, CAT/C/NPL/CO/2/ADD.1 (19 January 2008) para. 1.

This section explores whether Nepal is an unusual case or part of a larger pattern in terms of CAT compliance with a view to put the case of Nepal in some useful perspective. In order to understand the impact of CAT, it needs to be seen as one thread woven with many others in the struggle for human rights protections. As Cassel states,

What pulls human rights forward is not a series of separate, parallel codes, but a “rope” of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International Human Rights is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.”³⁶

The elements that make up the threads include not only formally binding treaties, but also other elements of the Vienna Convention including customary international law, formal international declarations, diplomatic practice, decisions and comments made through regional human rights mechanisms, and the opinions of scholars.

In this section, the paper looks at some early opinions of scholars before the CAT came into force, the impact of the terrorist bombings of 2001 in the USA (9/11), and finally several approaches to understanding the failure to implement CAT in an effective way.

2.1 Views of scholars before CAT

Lippmann (1979), when a treaty against torture was a topic of much debate before the CAT entered into force in 1987 notes what many others have observed, that torture, in that period of time, was still widely practiced in spite of being universally prohibited.³⁷ He makes a statement that “Although torture is absolutely prohibited in virtually every comprehensive human rights instrument and thus can be considered as a fundamental human right, the practice of torture is

³⁶ Dougless Cassel, *International Human Rights Law; Does International Human Rights Law Make a Difference?* 2 Chi. J. Int'l L. 123 (Spring 2001).

³⁷ Matthew Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, 1 Universal Hum. Rts. 4, 25-28 (Oct-Dec 1979).

widespread and used by governments of every political ideology in every geographies region in the world.”³⁸ Around the same time, Shue similarly wrote that “...it is undisputed today that torture is absolutely prohibited. There is no other crime of international character except slavery and torture that is ‘unanimously condemned in law and human conventions.’”³⁹

Almost 30 years after these scholarly opinions were stated, and twenty years after the CAT came into force, international human rights organizations report that overwhelming majority of states still practice torture or other forms of ill- treatment. Moreover, one third of them use it in a widespread and systematic manner.⁴⁰

Lippman suggested that “it is futile to attempt to protect individuals from torture through treaties and legal instruments when most government systematically using torture might be categorized as “lawless”.”⁴¹ Fischer had earlier noted a similar view when he said in 1961 that “The problem of torture cannot be attacked in an isolated fashion, but must be viewed as being related to the general denial of human rights and general manipulation of legal and governmental process.”⁴² After the World Trade Center terror attacks on September 11 2001, these views seem quite important reminders of the limits of human rights protections in any particular context.

2.2 Post-CAT Views

As early as 1991, Bassiouni went further than Fischer and Lippman when he stated that the prohibition against torture was part of the small list of prohibitions considered *jus cogens* norms internationally.⁴³ These obligations are considered *obligatio ergo omnes*.⁴⁴ Supporting this view, to date, 146 States have ratified/acceded to the CAT and 76 countries are signatories.⁴⁵

³⁸ *Id.* at 53.

³⁹ Henry Shue, *Torture*, 7 *Philosophy and Public Affairs* 124 (1978).

⁴⁰ Amnesty International, *Torture Worldwide: An Affront to Human Dignity*, 2 (2000).

⁴¹ Lippman, *supra* note 37 at 5.

⁴² Roger Fisher, *Bringing Law to Bear on Governments*, 74 *Harv. L. Rev.* 1130 (1961).

⁴³ Bassiouni & Edward M. Wisw, *Aut Dedere, Aut Judicare* (1995); M. Cherrif Bassiouni, *Crimes Against Humanity in International Criminal Law* 499-527 (1992).

⁴⁴ Andre De Hoogh, *Obligations Erga Omnes and International Crimes* 45-46 (1996).

⁴⁵ UNOHCHR, <http://www2.ohchr.org/english/bodies/ratification/9.htm>

Forty states have ratified the Optional Protocol to the CAT (OPCAT) and 62 countries are signatories.⁴⁶ The CAT is one of seven UN treaties with the largest number of States parties.⁴⁷ Yet, in spite of these strong opinions regarding the absolute prohibition against torture, the practice of torture is still widespread. Of perhaps greater concern is the fact that the legitimacy of torture is still debated. This is true in large part due to the US (President George Bush administration's) approach to terrorism after 9/11. It cannot be denied that the behavior of the US has great influence around the world, including small countries like Nepal. In relation to the Bush administration's practice, some scholars give weight to the view that torture is permissible in the "ticking bomb" scenario. Others point out that this scenario is highly rare and not the usual context of torture and that, even in the case of a ticking time bomb, torture is unacceptable and even ineffective.⁴⁸

These developments during a thirty-year period suggest that torture not only has a way of persisting in state practice, but that there is no guarantee that progress in reaching a consensus among States will not be reversed by events like 9/11 that cause governments to put greater priority on national security at the expense of fundamental individual rights.

2.3 Theories to explain the impact of the CAT

Does state ratification of CAT directly lead to decreases or increases in that states' practice of torture?⁴⁹ It seems that one cannot assume that states parties tend to reduce the practice of torture after ratifying CAT. Hathaway attempts to explain unexpected results by comparing

⁴⁶ *Id.*

⁴⁷ According to the counting of State Parties in major human rights treaties.

⁴⁸ See e.g., Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 131 (Yale University Press 2002); Alan Dershowitz, *Is It Necessary to Apply "Physical Pressure" and To Lie About it?* 23 *Isr. L. Rev.* 192 (1989); Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstance in which Torture is Morally Justified?* 39 *U.S.F.L. Rev.* 581 (2005); Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric & Clarke*, 40 *U.S.F.L. Rev.* 479 (2006). Examples of views against torture include: Anna O'Rourke et al., *Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke*, 40 *U.S.F.L. Rev.* 85 (2005), Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric & Clarke*, 40 *U.S.F.L. Rev.* 479 (2006).

⁴⁹ Edith Brown Weiss & Harold K. Jacobson, *A Framework for Analysis, in Engaging Countries: Strengthening Compliance With International Environmental Accords*, Yale L. J. 4-6 1998.

“rational actor models” (realism, institutionalism, liberalism) with models that put more emphasis on norm creation (managerial, fairness, and transnational models). The rational actor model says that human rights treaties will matter to States if they provide some strategic advantage. In this view, it does not matter whether torture is acceptable or not, but whether signing the CAT brings some advantage for the State. “International treaties and institutions exist only because powerful states benefit from their presence.”⁵⁰ Hathway notes that this perception of strategic advantage is affected by the kind of cooperation that a State has with other States and by the kind of internal politics within the State. In other words, State leaders are influenced by their desire to have good relations with certain other States or by the power of actors inside the country, including civil society actors. In this view, states are motivated exclusively by their geopolitical interests.⁵¹ International law exists and is complied with only when it is in the interests of hegemony or a few powerful states, which coerce less powerful states into accepting the regime and complying with it. International law is therefore in this view largely “epiphenomenal.”⁵²

The normative model emphasizes factors other than the selfish behavior of states. It refers to norms; in other words, to the ideals that should guide action. These norms may influence states because they become persuasive. They become persuasive because they are repeated in many interactions between states that allow the “management” (rather than just the “enforcement” of norms)⁵³ because the form of implementation (like the ICCPR) seems fair⁵⁴ and/or because of transnational mechanisms.⁵⁵ Transnational mechanisms do not work through interaction between states, but between other levels of institutions and individuals. Hathway points to various examples, including intergovernmental and non-governmental actors. Hathway, indeed, finds that democracies that do not practice torture sign and ratify at the highest rates, and

⁵⁰ Hathway A. Hathway, *Do Human Rights Treaties Make a Difference?* 111 *The Yale L.J.* 8, 1944 (June 2002).

⁵¹ Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *Am. J. Int'l L.* 260 (1940).

⁵² Louis Henkin, *How Nations Behave* 49 (2d ed. 1979), (labeling as “ [t]he cynic's formula” the realist view that “since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance”).

⁵³ Hathway, *supra* note 52 at 1955.

⁵⁴ *Id.* at 1959.

⁵⁵ *Id.* at 1960.

“democratic regimes with poor practices are statistically significantly less likely to join human rights treaties.”⁵⁶

Avdeyeva discusses a different view of rational actor motivation which relates to the way states accept certain norms over time for different reasons. This approach shows that States might become convinced that torture is wrong regardless of what advantage it might offer. Although she applies this model to the adoption of CEDAW norms, it can be applied to CAT as well. In particular, she notes two kinds of international action that most agree can promote domestic compliance: coercion and persuasion.⁵⁷ However, she argues that these methods, while of limited effect, do not explain the reasons for failed implementation nor the whole range of methods for addressing this problem. She therefore adds a third factor affecting implementation: acculturation:⁵⁸ “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.”⁵⁹

Vreeland discusses three different political systems and status of CAT within those systems. The first system he describes is democratic countries that do not practice torture and mostly ratify the CAT. The other is the one party dictatorship countries which, in fact, have full control and they don't need to practice torture and at last his empirical statistics shows that torture rate increases in dictatorships which have multi-party legal opposition.⁶⁰

3. Addressing torture in Nepal; an analysis and conclusion

3.1 Why did torture increase in Nepal a decade after signing CAT?

⁵⁶ *Id.* at 2001-2002.

⁵⁷ Olga Avdeyeva, *When Do States Comply with International Treaties? Policies on Violence against Women in Post-Communist Countries*, 51 *International Studies Quarterly* 879 (2007).

⁵⁸ *Id.* at 897(2007). (*she concluded that contemporary research on international law, however, is dominated by two strategies, coercion and persuasion; these mechanisms alone cannot explain the complexity of the states' behavior*)

⁵⁹ *Id.* at 879,882.

⁶⁰ James Raymond Vreeland, *Political Institutions and Human Rights: Why dictatorships Enter into the United Nations Convention Against Torture*, 62 *International Organization* 76 (winter 2008).

When Nepal ratified the CAT in 1991, it had just established multi-party democracy with free and fair elections in 1990. Its entire history before, except for a brief moment in the early 1960s, was one of authoritarian rule under a Hindu State religion that explicitly treated people as unequal under the caste system. After about a decade of parliamentary politics and the use of tactics by the political elite to undermine citizens' voices in favour of elite interests, the internal armed conflict (1996 to 2006) began to dominate every aspect of Nepal's weak democracy. This is especially true after November 2001, when a state of emergency was declared and the Royal Nepal Army was deployed for the first time to combat the Maoist insurgency, which was declared a "terrorist" organization. The Government also introduced drastic legal measures to detain suspected terrorists.⁶¹ In November 2003, the Government put the police and the paramilitary Armed Police Force (APF) under the unified command of the army.

In the international environment, after the US World Trade Center attacks of September 11 2001, international opinion following US Government behaviour changed and it seemed that any measure was legitimate to combat terrorism. With regard to Nepal, the US State Department declared the Maoists a terrorist organization and refused to have any direct contact with them until the Maoist leader was elected Prime Minister in the 2007 elections. During the period of intense internal armed conflict between 2002 and 2003, Nepal could not be expected to set the standard of protection against torture any higher than that set by the world's leading "democratic" power. Human rights violations escalated dramatically in that period. Vreeland's model above fits the case of Nepal from 2002 until 2006. The King had increasing dictatorial powers, but he also had to tolerate multiple interest groups represented by the political parties. This created a context in which the practice of torture was like a symptom of the political tensions from top to bottom. CAT seemed to have little importance in this context. There was little pressure or coercion from the international community, since the main actor, the US, was also using torture as a legitimate means to combat terrorism, and was also supporting and training the RNA along with the UK during this period.

⁶¹ The state of emergency lapsed in August 2002. The provisions of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) were adopted into law by the Parliament in 2002. After it lapsed and in the absence of Parliament, it was re-promulgated repeatedly by royal decree from October 2004. It was not renewed after it lapsed in September 2006 and is no longer in force.

3.2 Other factors affecting implementation of CAT in Nepal

Nepal's case also demonstrates how persuasion and coercion have little impact without some process of acculturation as depicted by Avdeyeva above.⁶² From 2002 to 2005, Avdeyeva's categories of realist and normative mechanisms favoured the occurrence of torture in Nepal. Between countries like China, India, and Pakistan, with military support from the US and the UK, it was not to Nepal's advantage (from a realist perspective) to take any strong action against abuses by the RNA. It is also difficult to find any effective normative mechanisms that would help Nepal "manage" its approach to human rights protections, including torture. An important exception to this, however, begins in 2005 when the King took full power. Some international actors at first approved but soon most understood that this was the King's personal ambition to implement his dislike for political parties, not a move necessary to defeat the Maoist insurgency. International actors thus cooperated intensively to protect human rights defenders and to find a way to establish an OHCHR office in Nepal, as well as support the National Human Rights Commission and they were successful in achieving these things. This shows that not all can be explained by realism.

We can see the limits of the realism theory in the failure to date to enact legislation to implement CAT. As Vreeland states, domestic action is needed to make the CAT effective and international mechanisms of pressure are weak when this does not occur.⁶³ As noted above, the UN Committee Against Torture has repeatedly reminded Nepal of its obligations, but without impact except for promises from the Government. Especially, the recommendation made by the special Rapporteur on Torture that "The Optional Protocol to the Convention against Torture be ratified and a truly independent monitoring mechanism established to visit all places where persons are

⁶² Avdeyeva, *supra*, note 59 at 897. (*She concluded that contemporary research on international law, however, is dominated by two strategies, coercion and persuasion; these mechanisms alone cannot explain the complexity of the states' behavior.*)

⁶³ Vreeland, *supra*, note 62 at 71.

deprived of their liberty throughout the country”⁶⁴ is never taken into consideration by the government. Nepal can also rely on the pattern of governments using national sovereignty as an excuse to avoid responsibility to international bodies.⁶⁵ As stated in a Human Rights Watch report, persuasion does not succeed in Nepal: “Under intense international pressure to improve its human rights record, the Nepali government acknowledged “occasional aberrations” in 2004 and publicly renewed its pledge to abide by its human rights and humanitarian law obligations. In spite of this pledge, the government has not improved its conduct of the war.”⁶⁶

This takes us to the third method after persuasion and coercion as discussed by Ayeveda: acculturation.⁶⁷ The most important aspect of acculturation in Nepal is the way institutions like the civilian police or the military are reformed. Two issues are germane to acculturation in Nepal: the role of human rights defenders in Nepal, and the fact that some part of Nepali culture tolerates the use of violence by the State against those it suspects of acting against the State (still a Hindu Kingdom).

With regard to human rights defenders, Vreeland suggests points to the important role that civil society plays in maintaining CAT implementation as a domestic issue.⁶⁸ This is very important in Nepal, where political parties rarely express any opinion about human rights. In other words, human rights defenders have a role to play in changing the political culture. The problem is that they are caught up in the same political culture in different ways. It is important to note that the struggle of political parties in the 1980s was more focussed on power-sharing through democratic mechanisms, but without much emphasis on human rights principles. For example during the Royal Coup of 1 February 2005, when opposition leaders were arrested or intimidated, the human rights agenda became the central focus of all advocacy by political parties but when this period ended in April 2006, human rights disappeared from the agenda.⁶⁹ There is a strong sense that political leaders decide on the agenda, and that human rights defenders do not have an independent voice. With this kind of dynamic, human rights defenders

⁶⁴ The Special Rapporteur on Torture, *supra* note 4 at 14 para. 33(m).

⁶⁵ Vreeland, *supra*, note 62 at 72.

⁶⁶ Human Rights Watch, *World Report Index Nepal* (12 January 2005).

⁶⁷ Avdeyeva, *supra*, note 59 at 877-900.

⁶⁸ Vreeland, *supra*, note 62 at 71.

⁶⁹ Author’s personal observations, while living in Kathmandu, Nepal from 2005 to 2008.

and organizations like Advocacy Forum have a big challenge to keep human rights on the political agenda. In the current moment, when past human rights violators are in Government, the tendency is for continued impunity. How can police and other institutions be expected to change in this environment? The most important changes needed are for political independence and for public accountability, but this requires what Avdeyeva calls ‘acculturation’. This means that human rights principles must be brought into the mainstream of political thinking that shapes institutions like the police and army.

Without going into the details of how Nepali society and culture may tolerate torture, even some minor anecdotes give an idea of the problem. For example, a Nepali schoolchild is expected to tolerate corporal punishment by teachers in class. If the child complains to his or her parents, they will ask what wrong the child committed, not the appropriateness of the punishment. In a similar way, it is impossible in practice for a wife to complain to family or to the police about a beating by her husband because it is culturally assumed that she committed a wrong justifying the beating. The police will thank a crowd for turning in a criminal suspect, even though the suspect shows signs of being assaulted by the crowd. An army officer will torture a Maoist suspect and justify it commonly by saying it is like a father disciplining his child. All these are considered acceptable behavior. In his report following a visit to Nepal in September 2005, the UN Special Rapporteur on Torture explicitly highlighted the fact that:

That the Government urgently needs to send a clear and unambiguous message condemning torture and ill-treatment was made dramatically clear to the Special Rapporteur when he received repeated and disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practised. Some of these admissions were made by officers who had served in United Nations peacekeeping operations abroad, namely the chief and deputy superintendents of Hanuman Dhoka District Police Office[Kathmandu], and the commanding officer of the RNA Kohalpur barracks.[Western Nepal]⁷⁰

⁷⁰ The Special Rapporteur on Torture, *supra*, note 4 at 8 para. 17.

There is also an absence of public concern in the media or expressed by political leaders about the right to integrity and security of the person as a principled position. The reaction of leaders tends instead to be based on the political, ethnic, and caste identity of the victim.

All of these factors are part of the broader political and social culture that puts a limit on the steps that political leaders are willing to take to address torture in a principled way. For example, in recent communication on 1 June 2007, the government of Nepal stated to the Committee against Torture that “A draft Torture Act has been prepared which incorporates the definition of torture in the spirit of the Article 1 of the Torture Convention.” But on the ground there were different drafts that NGOs were discussing with much confusion and great difficulty of finding the correct version of draft bill. The government was strategically restricting the possible force of persuasion. The media in Nepal is not effective to focus on the issue. Overall, the solution lies in changing the culture; changing the people’s mind that literally accepts torture, changing the political culture and changing the behavior of security forces will more effectively contribute to enforcement of CAT in the domestic level through reforming domestic laws.