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NEPAL
Make Torture a Crime

Introduction

"All acts of torture are to be made punishable by appropriate penalties."

The above quote from Nepal's initial report to the Committee against Torture dates from 30 September 1993. More than seven years later and nearly ten years after it became party to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the Convention against Torture), the country still lacks a domestic statutory provision under which those responsible for torture can be brought to justice. Amnesty International believes that introducing such a provision would be one important step towards ending the current wide-scale impunity enjoyed by members of the police and others who commit acts of torture or cruel, inhuman or degrading treatment or punishment.

The government in 1996 passed the Torture Compensation Act (TCA) which provided that victims of torture or relatives of people who died in custody as a result of torture can apply for compensation to the local district courts. Regrettably the definition of torture in the law is not in line with the one contained in the Convention against Torture. The law also fails to stipulate specific criminal punishments that can be imposed on the perpetrators as required in the Convention. It merely gives the judge the power to direct the concerned authority to take **disciplinary** action against the officers involved without even putting a burden upon the government department concerned to report back to the court or any other authority on the action taken. No penal provision under which alleged perpetrators of torture can be brought to justice was included in the Act.

During a workshop organized in Kathmandu on 24 November 2000, Amnesty International members and a gathering of lawyers, doctors and public prosecutors discussed how the TCA could be made more effective. They recommended specific amendments to the Act and made dozens of recommendations for changes to the current way in which the law is being put into practice. These included measures which can be introduced or enforced immediately. They are summarized at the end of this document.

Background

Hopes for an end to torture were high when democracy was restored in Nepal in 1990. The country adopted a Constitution outlawing torture and ratified all major human rights treaties, including the International Covenant on Civil and Political Rights and its two optional protocols, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture. Several leading members of the political parties had been victims of torture under the *panchayat* (partyless) system and when coming to power in 1990 had pledged their commitment to uphold human rights.

But, due to a complexity of factors, including lack of training among police personnel, a lack of effective investigative mechanisms and a general climate of impunity in relation to human rights violations, torture has persisted and continues to be reported almost daily. Over the last five years, reports of torture by police have increased in the context of police actions against alleged members and sympathizers of the Communist Party of Nepal (CPN) (Maoist) after the latter declared a "people's war" in February 1996.

There are also regular reports of torture committed by members of the CPN (Maoist). Amnesty International has repeatedly appealed to the leadership of the CPN (Maoist) to treat humanely anyone taken captive by them. It has urged the leadership to publicly pledge that it will abide by international humanitarian law principles applicable to situations of armed conflict as laid down in the Geneva Conventions. Both governments and armed opposition groups should refrain from torturing or killing people taking no active part in hostilities, they should not take hostages, or harm anyone who is wounded, captured or seeking to surrender.

Nepal has a historical tradition of torture and humiliation of criminals by police and local authorities.[1] 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.

The victims of torture include criminal suspects and people taken into custody in the context of local disputes over land or other private issues rather than on criminal charges. They also include political detainees, particularly people arrested on suspicion of being members or sympathizers of the CPN (Maoist). Among them are women and children. The large majority of allegations of torture concern the police. Sometimes other state agents such as army personnel, forest guards or prison guards are implicated.

In April 1994, Nepal appeared for the first time before the Committee against Torture, the international body of experts monitoring the implementation of the Convention against Torture. The government's initial (two-page) report of September 1993 on the implementation of the provisions of the Convention against Torture was described by the Committee as "scant on detail". It was supplemented at the time of the meeting by a six-page statement and a 10-page background note. The Committee recommended that a supplementary report be submitted

[1] For more details, see for instance: Indelible Scars. A study of torture in Nepal. Published by the Centre for Victims of Torture, Kathmandu, 1994.

within 12 months. To Amnesty International's knowledge, no such report has been submitted in the nearly seven years since the Committee asked for it . Nepal's second report, which had been due to be submitted by June 1996, has to date not been submitted to the Committee either.

The Committee on the Rights of the Child, the monitoring body for the implementation of the UN Convention on the Rights of the Child, when it examined Nepal's initial report in June 1996, listed the lack of conformity of legislative provisions concerning torture and corporal punishment with the principles and provisions of the Convention among its principal concerns.[2]

Amnesty International has welcomed several measures taken over the last few years which, if fully implemented, could go a long way towards assisting the eradication of torture in Nepal. It has welcomed the ratification of the Convention against Torture and the introduction of the TCA. It has also welcomed the establishment in May 2000 of the National Human Rights Commission (NHRC), with a mandate, among other issues, to investigate reports of torture.

Despite these measures, torture prevails.

The definition of torture and its prohibition in law

Article 14 (4) of the Constitution of 1990 prohibits "physical or mental torture" and "cruel, inhuman or degrading treatment" and states that any person so treated shall be compensated "in the manner determined by the law."

Article 4 of the Convention against Torture requires state parties to make torture an offence under criminal law punishable by "appropriate penalties which take into account their grave nature." However, under Nepali law at present, torture is not defined as a specific criminal offence. On occasion, Nepali government officials have commented that because the Treaty Act of 1993 provides that the provisions of international treaties prevail even if they contradict the provisions of national law, to the extent of such contradiction, the Convention against Torture provisions are fully in force in Nepal. While this can be argued in pure legal terms, in practice it cannot be denied that **there are no legal provisions which make torture *per se* an offence in Nepalese domestic law** and that it is thus currently impossible for the authorities to prosecute police responsible for torture and send them to prison, even if they wanted to.

The Human Rights Committee, the body of experts monitoring the implementation of the International Covenant on Civil and Political Rights in 1994, when Nepal's initial report was

[2] See UN document CRC/C/15/Add.57, paragraph 10.

considered, listed as one of its principal subjects of concern the unclear status of the Covenant within the legal system of Nepal. It emphasized the need for the provisions of the Covenant to be fully incorporated into domestic law and made enforceable by domestic courts.[3]

At the moment, the only provisions that could be used to bring alleged perpetrators of torture to justice are contained in the *Muluki Ain* (Civil Code) of 1962 which prohibits acts such as mutilation, beating and physical assault. They carry penalties ranging from a maximum of eight years (for mutilation) to a maximum of two years (for physical assault) and one year's imprisonment and a fine for beating.

Under the *Muluki Ain*, victims of crimes such as assault by police or others can directly file a case against the alleged perpetrator as a civil suit in the local court in order for charges to be brought under the above provisions.

Only in relation to some crimes, the state has the power to initiate action regardless of whether or not the victim has filed a complaint. The state does not for instance have this power in relation to the above three provisions. One such crime defined in the *Muluki Ain* is *beritsanga thuneko* which prohibits "sub-human treatment" described as illegal detention without food and water. The maximum penalty prescribed is a fine of Nepali Rupees 6,000 ($82) and imprisonment of the same length as the imprisonment of the victim of the "sub-human treatment". The punishment is one and a half time the length of the illegal detention if the detainee was detained with neck and handcuffs as well as held without food and water. When applied to women and children, the maximum punishment is imprisonment for twice the length of the imprisonment of the victim. However, these provisions have very rarely been used.

[3] See UN document M/CCPR/52/C/CMT/NEPAL/3, paragraphs 6 and 12.

Torture, including rape: patterns and victims

In addition to the legal impediments to bringing perpetrators to justice, there are many reasons for the continuing prevalence of torture in both political and non-political cases.

In relation to political detainees, key factors include the wide powers given to the police to detain suspects under the Public Security Act (PSA). The PSA allows for people to be held in preventive detention for a period of up to 90 days to prevent them from taking any action which could have an adverse effect, among others, on the security or order and tranquillity of the country. This period can be extended for another 90 days by the Home Ministry and a further extension up to 12 months from the original date of issue can be obtained subject to the approval of an Advisory Board established under the Act.

Scores of political activists suspected of being members or sympathizers of the CPN (Maoist) or its front organizations have been repeatedly arrested and detained without charge or trial under the PSA despite court orders for their release.

Most people arrested under the PSA are not brought before the court within the required 24 hours after arrest, as laid down in the Constitution. Instead, they are held in secret detention, often in unofficial places of detention. Although the remedy of *habeas corpus* is guaranteed in the Constitution and declared non-derogable, it has repeatedly proved ineffective, especially in relation to cases of "disappearances" and people held under the PSA.

In relation to the torture of common criminal suspects and people taken into custody in a non-political context, the main contributing factors to the persistence of torture are the lack of investigative skills among the police where police take the easy option of beating a confession out of a suspect (not necessarily the culprit) rather than finding evidence that will stand up in court and ultimately result in the conviction of the culprit.

According to Article 9 of the Evidence Act 1974, confessions taken through the use of torture are inadmissible as evidence in court.[4] However, the district courts usually will accept the confession as *prima facia* evidence on the basis of which a person is detained. The courts assume all statements or confessions taken by the police are not extracted by the use of torture unless proven otherwise. In other words, the onus of proof is put on the accused person who alleges he or she has been tortured. These persons have to seek to get the confession declared inadmissable as evidence in an administrative ruling by the court during the criminal case

[4] Article 15 of the Convention against Torture requires states parties to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

proceeding against them. So far, the Supreme Court has not taken a clear stand on whether the burden of proof should be reversed under certain circumstances. In several judgements by the Supreme Court, it has been upheld that the person who alleges torture should produce evidence of torture and prove the confession was extracted by torture.

Both in relation to political and common criminal cases, a major factor that has contributed to the continuing prevalence of torture is the lack of an effective investigative mechanism into human rights violations such as torture. The establishment of the NHRC in May 2000 may remedy this to some extent but a lot will depend on the resources it is given and the cooperation it receives from the authorities concerned, specifically the Ministry of Home Affairs and its Police Department.

In late 1993, Authority Abuse Cells were set up in all regional police headquarters to investigate reports of human rights violations by the police. The exact working methods of these cells are unclear, nor are data publicly available about the number or kinds of cases investigated by them. During a mission to Nepal in February 2000, Amnesty International delegates were told by the then Inspector General of Police that "in cases where there is controversy", the Home Minister will appoint a special team to investigate the incident; this team will include at least one representative of the police department. He provided Amnesty International with a list of 23 police officers against whom action had been taken for "abuse of authority and human rights violations". On examination, Amnesty International found that 14 of the 23 officers were facing criminal charges in a court of law relating to three cases of human rights violations, including charges of rape and murder. The other nine officers were facing only disciplinary action. One of the cases involving criminal charges concerns eight police officers charged with murdering Suk Bahadur Lama in August 1999. He had been tortured for six successive days at Kawasoti Ilaka police post, Nawalparasi district after he was arrested on a criminal charge. A post-mortem found he had multiple burn injuries on both feet, cauterized abrasions on his upper back, subcutaneous and intramuscular contusions on the back and sides of his trunk, up to middle upper third of both thighs and contusions on both calves and soles. The eight police officers alleged to have tortured Suk Bahadur Lama are currently released on the sole condition that they appear in court when the case comes to trial and are reportedly back in active service. The trial against them is proceeding slowly.

In a letter to Amnesty International, the government stated that a three member committee coordinated by the Joint Secretary of the Ministry of Home Affairs investigated the death of Suk Bahadur Lama and recommended departmental action. The family of the deceased has been provided with Rs50,000 ($679) financial assistance by the government. This was reported to be the first time that the government has provided such assistance.

Other factors contributing to the prevalence of torture include the practice by local police of denying prisoners access to a lawyer, a doctor or their relatives during the initial period

of detention at a police station.[5] In addition, police regularly keep prisoners in police custody for several days before producing them before a court. This is in breach of provisions in the Constitution which require that prisoners have to be produced before the court within 24 hours of their arrest.[6]

The Torture Compensation Act, 1996

Victims of torture or their relatives can make claims for compensation under the TCA. To date, an estimated 35 victims have filed claims, and to Amnesty International's knowledge so far only two have been awarded compensation. One of them is Hasta Bahadur Chamling who was awarded Nepali Rupees 5,000 ($68) by the Ilam district court in August 2000. He had been tortured by police in September 1999 (see also below, part 5.2.6).

The small number of complaints filed in comparison to the vast number of reports of torture received by Amnesty International and other non-governmental organizations indicates that there is a problem with the law and its application. The Minister of Home Affairs in November 2000 claimed that the fact that only two people were awarded compensation is proof that no-one is being tortured in Nepal and that prisoners make false accusations against the police.

Provisions of the TCA falling short of international standards

The definition of torture contained in the TCA is not in line with the definition in the Convention against Torture.

Article 2 (a) of the TCA states:

"Torture" means physical or mental torture inflicted on a person who is in custody in the course of investigation or for trial or for any other reasons and this term also includes cruel, inhuman or degrading treatment given to such a person.

[5] This is in breach of Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

[6] It is also in breach of Article 9(3) of the ICCPR which requires that anyone "arrested or detained on a criminal charge shall be promptly brought before a judge or other officer authorized by law to exercise judicial power...". It is also in breach of Principle 11(1) of the above mentioned UN Body of Principles. Principle 11(1) states that a "person shall not be kept in detention without being given an effective opportunity to be heard by a judicial or other authority."

The definition contained in Article 1 of the Convention against Torture, on the other hand, is far more detailed. It states as follows:

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

The government has also failed in its duty under Articles 2 and 10 of the Convention against Torture to take "effective legislative, administrative, judicial or other measures to prevent acts of torture" and "ensure education and information regarding the prohibition of torture are fully included in the training of law enforcement personnel, ..., medical personnel, public officials,...". During meetings with judges, public prosecutors, lawyers and doctors during a recent visit to Nepal, it became clear to Amnesty International researchers that one of the main problems in relation to the application of the TCA is a lack of awareness.

Many of the professionals directly empowered by the law in relation to the prevention and investigation of torture, when interviewed by Amnesty International, appeared unaware of many of the TCA's provisions. They were particularly unaware about the provisions of Article 3 (2) and (3) of the TCA which state:

> *"While detaining any person in or releasing from custody, the concerned authority shall have such a person checked up on his physical condition by a doctor in government service, if possible, and where a doctor is not available, shall himself check up or cause to be checked up his physical condition, and keep and maintain records thereof.*
>
> *One copy of the report on the checking up of physical and mental condition, ..., shall be required to be sent to the concerned District Court."*

Unfortunately, this provision is not adhered to. The police do not request doctors to examine prisoners at the time they are admitted into custody; judges do not ask for copies of the medical report when prisoners are produced before them. If this provision were to be fully implemented, it would serve as a significant measure to prevent torture from occurring, and would also serve as a significant piece of evidence in the event prisoners later made allegations of torture during their trials or filed complaints under the TCA.

In relation to the role of doctors, the provision that the examination of prisoners can only be done by doctors "in government service" is also an obstacle to the effective functioning of the TCA. Doctors in government service can be retained free of cost, which may have been the reason why this provision was incorporated in the law. However, a government doctor functions under the control of the Chief District Officer, who also controls the local police. This puts doctors in a position where they can be put under pressure, by, for example, threats of transfers or witholding of recommendations for promotion.

The TCA sets the maximum amount of compensation to be granted at Nepali Rupees 100,000 ($1,358). According to Article 8 of the TCA, this amount is supposed to include any loss of earnings or, in the event of death due to torture, the expenses required for the livelihood of the dependants of the victim. It is clear that this ceiling is too low.

The major weaknesses in the TCA relate to the lack of provisions to bring perpetrators to justice. The provisions in the Act allowing the judge to order disciplinary action by the police or other relevant department against the alleged perpetrators of torture are inadequate. If anything, they give police a sense of protection rather than lead to scrutiny of their actions. For instance, under the Act the judge can only recommend departmental action and is not empowered to order investigations with a view to bringing criminal prosecution against the alleged perpetrators. There is also no provision requiring the department concerned to report back to the court about the departmental action taken. In addition, the police or other officers against whom a case for compensation under the TCA has been filed can be defended by a representative of the Attorney General's department, if so requested by their officer-in-charge. The victim of torture, on the other hand, has to retain a private lawyer. Often, lawyers engaged by non-governmental organizations or appointed through the legal aid scheme appear on their behalf. They are generally less experienced lawyers then those belonging to the Attorney General's department.

Amnesty International recommends that the government of Nepal, as a matter of priority, introduces amendments to the TCA to redress the shortcomings listed above. For more details of Amnesty International's recommendations, see below.

The application of the law

Nearly all parties involved in the application of the TCA reported problems.

The victim

Many victims of torture who filed a complaint under the TCA reported being threatened by the police. Some of them were re-arrested. For instance, 13-year-old Deepak Raut, who had been arrested with four other children on 30 January 2000 in Saptari district and held for 18 days was re-arrested after he filed a complaint under the TCA. He had visible signs of torture on his body and these had been confirmed in a medical report. He was re-arrested without charges on 26 May 2000 and intimidated into withdrawing his complaint. He was released after 24 hours on the intervention of a lawyer. The case is currently proceeding before the Saptari district court.

During 1998, 12 people claimed compensation. Of these 12 people, six later withdrew their cases because of intimidation and fear for their safety.

A case filed for compensation for the death due to torture of Suk Bahadur Lama (see above) was withdrawn after police allegedly bribed his family. The father and brother of Suk Bahadur Lama are believed to have received Rs100,000 from the police officers involved and subsequently withdrew the case on 29 October 1999.

As complaints under the TCA are of the nature of civil complaints, both the filing and withdrawing of the complaints are at the decision of the victim. This would not be the case if torture were to be defined as a criminal offence, the prosecution of which would be in the hand of the state authorities.

In addition to intimidation and threats, poverty pushes victims to accept money offered by police out of court rather than go through the often protracted process in the courts. Some lawyers allege that an inadequate legal aid scheme is a contributing factor.

The witness

Several people who are listed as witnesses by victims of torture filing a case for compensation under the TCA have also been threatened by the police officers involved. One man arrested in July 2000 in Morang district reported how a local teacher and others who saw the scars on his body soon after he was released from custody were in turn being threatened in an attempt to stop them from appearing as witnesses in the case he filed under the TCA.

The lawyer

Lawyers appearing for the victims have also reported receiving threats. One of them explained how the police threatened to make it difficult for him to continue his legal practice. They said: "You will need some service from the police in future."[7]

The public prosecutor's role

Public prosecutors have a dubious role in relation to complaints under the TCA. On the one hand, they are seen to be "on the side of the police". They often have a personal relationship with the police who produce prisoners before them prior to them being remanded into custody. In addition, as pointed out above, police officers against whom complaints under the TCA are filed, can request public prosecutors to appear on their behalf. On the other hand, as representatives of the Attorney General's department, public prosecutors have the duty to ensure the law is upheld and due process is followed. They have to ask prisoners produced before them whether they have any complaints. In practice, this happens very rarely, and some public prosecutors who have gone against the police and taken action in relation to torture, have also been threatened. [8]

The judiciary's role

Although the Constitution guarantees the independence of the judiciary, the overall perception of the judiciary in the country is not a positive one. Judges are often accused of lack of impartiality and corruption.

Some lawyers allege that the conservative attitude of the judiciary in the application of the TCA has been the main factor contributing to its ineffectiveness to date. They attribute this attitude to the fact that most judges start their career as government officers/civil servants and

[7] This is in breach of Principles 17 and 18 of the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in 1990. Principle 17 states that where "the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities. Principle 18 states that "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

[8] Principle 16 of the UN Guidelines on the Role of Prosecutors, adopted at the same UN Congress in 1990, states that "when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods,..., especially involving torture or cruel, inhuman or degrading treatment or punishment,..., they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

thus may have personal relationships with the Chief District Officers and senior police officers in their area with whom they studied or worked prior to their appointment as a judge.

Amnesty International has been informed of instances where judges presiding over a complaint under the TCA have unofficially encouraged the victim and police to settle out of court. One lawyer reported that the district judge told his client "not to wage war against the police".

In the case of Sitaram Yadav, who was tortured in Sunsari district in 1998, the court recognized he had been beaten but ruled that it did not amount to torture. The police officer concerned was charged under the provision of "physical assault" in the *Muluki Ain* and ordered to pay a fine of Rupees 400 ($5.5). A complaint filed under the TCA on the other hand was dismissed.

The medical profession's role

Doctors also report that pressure is brought to bear on them to ensure their complicity in covering up torture. Amnesty International has documented cases of doctors in Nepal who reportedly resisted pressure from the authorities not to report on marks consistent with torture, resulting in negative consequences for doctors themselves.

In one case reported from Nepalgunj, a doctor was allegedly transferred by the health authorities under alleged pressure from the Chief District Officer and the police after he had certified that torture had taken place. A similar case was reported from Bardia district where a doctor who had confirmed that a detainee had sustained injuries consistent with being hit with a gun butt, was transferred from the district within seven days.

The organization has also documented cases of doctors who were pressured to comply with requests by authorities not to document marks consistent with torture allegations. Bishnu Lal Batar, an accused in a theft case, was presented in Jhapa district court with a wound on his arm. The judge made an order for the wound to be examined and Bishnu Lal Batar was taken to the local government doctor. There were allegations that the police had called the doctor soon after the judge had made the order to ensure that a medical report would not cause them problems. The doctor in his report said the wound had been inflicted "a long time ago", i.e. before the accused was taken into custody. The case was further investigated, resulting in the court conducting a mediation process between the alleged torturer and Bishnu Lal Batar under provisions contained in the *Muluki Ain*. The case was concluded when the police officer who inflicted the torture paid Rs.9,000 ($122).

In another documented case, police allegedly tried to discard a medical report noting injuries on a prisoner who had filed a case under the TCA against the police. In November 1999,

a health assistant examined detainee Hasta Bahadur Chamling and recorded "bruises and lacerations". Police officers allegedly tore and threw away the hospital register containing details of the detainee's examination at Ilam hospital. The Ilam district court later awarded Hasta Bahadur Chamling Nepali Rupees 5,000 ($68) on the basis that the police and hospital authorities did not produce the medical report of the examination under court order. This has been one of two cases in which compensation has been awarded by the court under the TCA (see also above, part 5).

In June 2000 in Ilam a young woman student alleging torture was not offered a medical examination by a doctor. The student was allegedly tortured by having a stick inserted into her vagina in police custody. When she was taken to hospital for examination, the doctor was not present. The police reportedly asked the nurses to conduct a medical examination but the student refused to be examined by them and also objected to the police being present. The hospital authorities reported to the court that the student had refused to have an examination. As a result, further investigations of the alleged torture were terminated and a complaint for compensation could not be filed.

A comprehensive medical evaluation of torture allegations is often essential for a complaint under the TCA to be successful. In Dhankuta district, a doctor who had initially reported that "there were wounds" and subsequently called by the court to provide further details about the possible causes of the wounds, allegedly under pressure from the police told the court that if the wounds are more than four weeks old, medical science cannot establish the cause. The district judge subsequently dismissed the complaint under the TCA.

For the effective investigation of torture, Amnesty International believes that doctors need to be given adequate resources to enable comprehensive examinations to be carried out to establish whether marks of observable physical and psychological effects are consistent with the torture that has been described. The principles for comprehensive examinations, as well as details of the required methodologies, are set out in *'The Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'*, an international standard on the medical investigation of torture allegations adopted in March 1999. The Protocol includes the *'Principles for the Effective Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment'*. These Principles make clear that a doctor's examination of a person alleging torture should include:

- a history, including alleged methods of torture or ill-treatment, the times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms';
- a physical and psychological examination; and

- an opinion, "an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment".

Conclusions and recommendations

Amnesty International is making the following recommendations for **amendments** to the TCA, in order to make the investigation and prosecution of alleged perpetrators and reparation for victims more effective:

1. Nepal should ensure that all acts of torture are clearly defined in law as offences under criminal law in accordance with the provisions set out in Article 1 of the Convention against Torture and shall be made punishable with appropriate penalties which take into account the grave nature of the crimes as required under Article 4 of the Convention against Torture. This could be done by passing an amendment to the TCA, by introducing a new law or by an amendment to the *Muluki Ain*.

2. The Convention against Torture requires that states parties make torture a crime over which their courts exercise universal jurisdiction, i.e. when persons suspected of torture are found in their territories they are legally obliged to bring them to justice or extradite them. Nepal should amend its laws to allow for the effective exercise of universal jurisdiction.

3. There has to be an amendment to the TCA to permit the medical examination of a detainee to be carried out by any doctor registered with the medical council rather than only doctors in government service, as is currently the case.

4. The TCA should be amended to include the right of a detainee to consult a lawyer before his/her statement is taken.

5. The time limit currently set out in the TCA that complaints have to be filed within 35 days after release should be amended so that any person with a complaint that torture has taken place can institute a prompt and impartial investigation.

6. The government should ensure that the compensation awarded is fair and adequate. The minimum amount of compensation that can be awarded by the court under the TCA should be specified and be commensurate with the gravity of the crime of torture. The current maximum amount of Rs100,000 ($1,358) should be removed and replaced by an itemized tariff similar to the one used in Nepal's Labour Act and other criminal compensation schemes applied around the world.

7. The provision in the TCA that government attorneys appear on behalf of alleged perpetrators should be removed; alleged perpetrators should be required to retain their own lawyers.

8. As required by Article 13 of the Convention against Torture, steps should be included into the TCA to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of a complaint filed under the Act.

9. In addition to the recommendation that the authorities initiate criminal prosecution in a fair trial in all cases of torture, there is a need to amend the provision in the TCA that where disciplinary action against the torturer is recommended by the judge, that the department concerned is obliged to report to the court within a time limit on the nature of the disciplinary action taken.

10. A provision should be included in the TCA which reconfirms that it is state responsibility to pay adequate compensation to the victim and allows the state to recover the amount of compensation paid from the perpetrator(s).

11. As required by Article 11 of the Convention against Torture, the TCA should be amended to ensure that interrogation rules, instructions, methods and practices and custody arrangements are kept under review, with a view to prevent any cases of torture. Alternatively, this could be done through amending or passing other legislation.

12. In relation to the current lack of clarity in the law and practice regarding the burden of proof during administrative rulings in criminal cases where it is alleged that a confession was extracted under torture, the government should take the necessary measures to ensure that the burden of proof is laid with the prosecution as part of the state's obligation not to commit torture and the right of the accused to be presumed innocent until proven guilty.

Amnesty International is making the following recommendations for changes to the **application** of the TCA:

1. All necessary measures should be taken to ensure that the provisions of Article 3 which stipulate that all prisoners should be examined by a doctor at the time of their arrest and their release are fully implemented and that action is taken against those police officers who fail to do so.

2. District judges should systematically demand to see the report of medical examination of the prisoner when a prisoner is first produced before the court and should file contempt of court procedures against police officers who fail to submit such report. They should also refer the matter to the prosecutor if it appears that torture has taken place.

3. The public prosecutor should systematically demand to see the record of the medical examination carried out at the time the suspect was taken into custody at the first instance when the suspect is produced before him or her and should institute a prompt, impartial and

independent investigation into the matter, and if the investigation shows that torture has occurred, institute a prosecution.

4. The police department, Judicial Services Commission and Medical Council should take all necessary measures to familiarize police officers, judges and doctors respectively with the provisions of the TCA.

5. Those police officers against whom a case for compensation under the TCA is filed should be suspended pending the outcome of the case. This measure would aim to stop them from issuing threats against complainants, witnesses, lawyers, doctors or others involved in cases.

6. The NHRC should be given permission to carry out regular, independent, unannounced and unrestricted visits to all places of detention, including places where it is suspected prisoners are held illegally.