

# NEPAL

## **I. INTRODUCTION**

### **1. THE LEGAL FRAMEWORK**

#### **1.1. Constitution**

Nepal has a population of around 25 million people. The population is composed of numerous ethnic and religious groups. The majority of the population is Hindu.<sup>1</sup>

Nepal was unified in 1768 and has been an independent state ever since. According to its present Constitution, which came into force on 9 November 1990, the Kingdom of Nepal defines itself as follows: "Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom."<sup>2</sup>

The Constitution, in its part 3, guarantees fundamental rights, in particular a number of civil and political rights, but notably no express right to life. Article 23 stipulates an express right to a constitutional remedy before the Supreme Court for the enforcement of the rights conferred by part 3 of the Constitution.<sup>3</sup> Part 4 contains the directive principles and policies of the State, among which Article 25 (4) stipulates: "It shall be the chief responsibility of the State to maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralisation, and to promote general welfare by making provisions for the protection and promotion of human rights, by maintaining tranquillity and order in the society."

The judicial system of Nepal consists of the following three tiers: a) Supreme Court; b) Appellate Court; and c) District Court.<sup>4</sup> In addition, special courts or tribunals may be set up by law for the purpose of hearing particular types of cases. The King appoints all judges upon recommendations from the Constitutional Council or Judicial Council.<sup>5</sup> The Supreme Court supervises all lower Courts and presides over cases submitted by lower Appellate Courts. The Constitution grants the Supreme Court the power of judicial review to adjudicate the constitutionality of any law upon a petition by a Nepali citizen.<sup>6</sup> The Supreme Court is also empowered to issue orders and settle

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<sup>1</sup> See for information on land and people and the general political structure, Core Document Forming Part of the Reports of State Parties, Nepal, UN Doc. HRI/CORE/1/Add.42, 14 June 1994.

<sup>2</sup> Article 4 (1) of The Constitution of the Kingdom of Nepal 1990, Kathmandu, Law Books Management Board, Fourth Edition, December 2001.

<sup>3</sup> "The right to proceed in the manner set forth in Article 88 for the enforcement of the rights conferred by this Part is guaranteed." See next paragraph for Article 88.

<sup>4</sup> Article 85 of the Constitution.

<sup>5</sup> Article 87 of the Constitution.

<sup>6</sup> Article 88 (1): "Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution."

disputes concerning the enforcement of fundamental rights.<sup>7</sup> The Constitution does not expressly stipulate the independence of the judiciary.

## 1.2. Incorporation and Status of International Law in Domestic Law

Nepal has ratified the following relevant international conventions on human rights and humanitarian law:

- Geneva Conventions 1949 (7 February 1964)
- Genocide Convention (30 January 1971)
- CERD (30 January 1971)
- CRC (14 September 1990)
- CEDAW (22 April 1991)
- Convention against Torture (14 May 1991)
- ICCPR (14 May 1991)
- First Optional Protocol to the ICCPR (14 May 1991)
- ICESCR (14 May 1991)
- Second Optional Protocol to the ICCPR (4 March 1998)

International treaties ratified or otherwise approved by the House of Representatives<sup>8</sup> are accorded superiority if and to the extent that they conflict with domestic law as specified in section 9 (1) of the Treaty Act 1990.<sup>9</sup> As the treaty provisions shall be applicable as Nepal law, the Convention against Torture is in theory directly enforceable. The Supreme Court has applied international instruments in several cases before it, quoting in one case various provisions of CEDAW, UDHR and ICCPR.<sup>10</sup> In contrast, the administration and other law enforcement authorities appear to have largely ignored international treaty obligations in the exercise of their duties. Customary international law is not part of Nepalese law unless it is transformed into domestic law.

The Government has not adopted any implementing legislation to incorporate the Convention against Torture into domestic law. The Torture Compensation Act was adopted to fulfil the constitutional obligation under article 14(4) of the Constitution, not the Convention against Torture.<sup>11</sup> The Supreme Court has so far not been called upon to address the issue of the direct applicability of the Torture Convention.

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<sup>7</sup> Article 88 (2): "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or to settle the dispute. For these purposes the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including habeas corpus, mandamus, certiorari, Prohibition and quo warranto."

<sup>8</sup> Section 4 Nepal Treaty Act, 1990.

<sup>9</sup> Nepal Treaty Act, 1990, Kathmandu (*Nepal Press Digest Translation, cited from Nepal's Penal System*) "In case the provisions of a treaty to which the Kingdom of Nepal or His Majesty's Government has become a party following its ratification, accession, acceptance or approval by the Parliament conflicts with the provisions of enforced law, the later shall be held invalid to the extent of such conflict for the purpose of treaty, and the provisions of the treaty shall be applicable in that connection as Nepal laws," quoted in Rabintra Bhattarai and Stephen J Keeling (Ed), NEPAL'S PENAL SYSTEM An Agenda for Change, Kathmandu, Centre for Victims of Torture Nepal, June 2001.

<sup>10</sup> See Rina Bajracharya v. HMG, Council of Ministers et al.; Chandra Kanta Gnyawali et al. v. HMG, Council of Ministers et al and Meera Dhungaga v. HMG, Ministry of Law, Justice and Parliamentary Affairs et al., Supreme Court Bulletin, Vol.11, Issue 5 (2002), at p.13.

<sup>11</sup> Torture Compensation Act 2053 BS (1996).

## **2. PRACTICE OF TORTURE: CONTEXT, OCCURRENCE, RESPONSES**

### **2.1. The Practice of Torture**

From 1960 to 1989, during the Panchayat rule (system of non-party rule centred on the king), political parties were banned and a system of absolute rule by the monarchy was established following the revocation of the then Constitution, the dissolution of parliament and the repression of the political opposition. The Panchayat period was not only characterised by its suppression of any democratic political expression, but it was also accompanied by other human rights violations, including torture of political opponents and others, considered to be state-sponsored.

In 1990, after large-scale public protests, organised by the Movement for the Restoration of Democracy,<sup>12</sup> the Panchayat rule was abolished. A new Constitution was adopted and a new democratically elected government came into power. Torture became much less common, in part due to the heightened attention drawn to this practice by the media and human rights organisations and a greater willingness of the Government to respond to such concerns. The outbreak of the "People's War" in 1996 brought this period to an end, after which torture has been practiced on a widespread scale, predominantly as part of counter-insurgency operations.

This war was declared in February 1996 by the CPN (Maoist), a political group under the leadership of Pushpa Kamal Dahal, alias Prachanda, which broke away from the United People's Front in 1994. It has continued with varying degrees of activity ever since. The CPN (Maoist) has not only carried out armed attacks on members of the police and the armed forces but has also reportedly committed serious human rights abuses. The Government has responded to the attacks launched by the CPN (Maoist) with various operations which have been accompanied by serious human rights violations, such as extra-judicial killings and "disappearances" directed against the population in the areas concerned. In the course of 2001 and 2002, the government passed ordinances and the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) widening its powers in the fight against terrorism.<sup>13</sup>

In November 2001, after the ceasefire that had been agreed in July of that year broke down, the Government declared an emergency, passed the above-mentioned ordinances and acts and called the army out. The conflict has since intensified.<sup>14</sup> Various government forces, police, the army and the paramilitary armed police force (APAF) engaged in joint operations, which resulted in a steep increase in reports

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<sup>12</sup> The movement was a largely peaceful campaign of strikes and demonstrations, which was launched in February 1990 by the Nepali Congress Party and the communist United Left Front.

<sup>13</sup> See on this and the preceding paragraphs Amnesty International, Nepal, A spiralling human rights crisis, AI Index: ASA 31/016/2002, 4 April 2002, Chapter I, p.7 et seq. and Amnesty International, Nepal, A deepening human rights crisis, AI Index: ASA 31/072/2002, 19 December 2002, pp.1 et seq. An analysis of Nepal's human rights obligations and its anti-terrorism legislation can be found in International Bar Association, Nepal in Crisis: Justice Caught in the Cross-fire, September 2002, pp.37 et seq.

<sup>14</sup> Several attempts have been made over the last few years, among them the establishment of a "High Level Consensus Seeking Committee" in 1998, to find a peaceful solution to the conflict but have failed which is also due to the diametrically opposed positions of the CPN as a Maoist revolutionary movement and the Kingdom of Nepal as a constitutional monarchy.

about extra-judicial killings, "disappearances", torture and other serious human rights violations.<sup>15</sup>

While it is difficult to determine the true extent of the practice of torture, reports from Nepalese organizations dealing with torture victims indicate that there has been another dramatic rise of torture cases after 26 November 2001. From 1992 to 2000, at least 23 people have reportedly died as a result of torture and more than 200 persons disappeared between 1997 and 2002.<sup>16</sup>

The main perpetrators of torture are reportedly police personnel, including the Anti-Terrorist Unit, forest guards, authorised senior prisoners, local administrator officers and as of recently, military personnel and the armed police. A wide range of torture techniques are used.<sup>17</sup> Predominantly, victims have been those suspected of having committed a crime.<sup>18</sup> Torture is routinely used as an almost integral part of police investigations that rely heavily on confessions. In a national prison survey carried out by CVICT in 1996, 70% claimed to have been tortured in police custody.<sup>19</sup>

After 1996 and especially since November 2001, the majority of torture victims have been those suspected of supporting or belonging to the Maoist groups. Marginal and poor people, including children, as well as members belonging to ethnic minorities, among them also Bhutanese refugees, have been more victimised than others. This is seen to be due to their lack of influence in government, the media and the public in general. There have also been regular reports of rape by police officers.<sup>20</sup>

## 2.2. Domestic Responses

In the popular movement of 1990, the eradication of torture was one of the demands of those opposing the Panchayat regime. The leaders of the democratic movement expressed their full commitments in favour of torture-free investigations. As a result, Nepal ratified the Convention against Torture and the prohibition of torture was enshrined in the Constitution of 1990.

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<sup>15</sup> See on this section Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31, Addendum, Mission to Nepal, UN Doc. E/CN.4/2001/9/Add.2, paras. 7 et seq., AI, Nepal, A spiralling human rights crisis, supra, Chapter 2, p.10 et seq. and AI, Nepal, A deepening crisis, supra, documenting Maoist abuses and human rights violations by security forces. AI stated that it believes that at least half of the officially acknowledged killings (4,366 out of which 4,050 were held to be "Maoists") may have been unlawful whereby the vast majority have been civilians.

<sup>16</sup> See annual human rights yearbooks of the NGO Informal Sector Service Centre, INSEC, cited in Nepal's Penal System, p. 56. The Centre recorded 137 cases of "disappearances" between 1997 and 2000. AI recorded more than 130 "disappearances" between 1998 and mid-2001. Since the state of emergency in late November 2001 until late August 2002 66 cases were recorded, AI, Nepal, A deepening human rights crisis, *ibid.*, p.11.

<sup>17</sup> See AI, Nepal, A spiralling human rights crisis, supra, pp.26 et seq. and AI, Nepal, A Deepening Crisis, supra, pp.12 et seq. for details.

<sup>18</sup> According to Mandira Sharma, Executive Director of Advocacy Forum, more than fifty percent of the accused (in custody) are suffering extreme physical torture, in: The Kathmandu Post, 19 September 2002: Mistreatment of people in custody alleged.

<sup>19</sup> Confirmed by a study of the Centre for Legal Research and Resource Development according to which 69 percent of the accused questioned had been subjected to ill-treatment. See CVICT, Nepal's Penal System, Agenda for Change, 56.

<sup>20</sup> See AI, Nepal, A spiralling human rights crisis, supra, for details., p. 26 et seq.

Two commissions were set up in 1990, under the Commission of Inquiry Act of 1969, to investigate a) "the loss of life and property" during the demonstrations in 1990 and b) "disappearances" during the Panchayat area. However, the recommendation to prosecute the alleged perpetrators of human rights violations was not put into practice. The only significant legal step to combat torture after 1990 has been the enactment of the Torture Compensation Act in 1996, as a measure to fulfil the obligations set out in the Constitution. While some officials have acknowledged the existence of torture, and the Government has run a number of human rights training programmes, it has failed to speak out expressly against torture and to take vigorous measures aimed at its prevention. Moreover, the National Human Rights Commission only became operational in May 2001, more than four years after the act envisaging its establishment had been enacted.<sup>21</sup> The early indications relating to the impact of its work, which has reportedly been hindered by a lack of required funds and limited cooperation by official bodies, particularly the police and the army, are not promising.<sup>22</sup> Recently, human rights cells have been set up to, *inter alia*, investigate human rights violations by members of the respective forces. In July 2002, the Army set up a Human Rights Cell.<sup>23</sup> A human rights cell has also been established within the Home Ministry for the police forces and the APAF in January 2003.<sup>24</sup>

### 2.3. International Responses

In 1994, the Committee against Torture noted with concern the failure of Nepal to implement fully the Convention, in particular the lack of legislation incorporating the crime of torture.<sup>25</sup> The Special Rapporteur on Torture has followed up several cases of torture in Nepal and has highlighted the worsening situation in the course of the armed conflict.<sup>26</sup> It has commented on the inadequacies in the legal framework governing torture, noting the absence of penal provisions in the 1996 Torture Compensation Act.<sup>27</sup> Since 1996, UN bodies such as the Working Group on Arbitrary Detention<sup>28</sup> and individual states have expressed their concern over the increase of

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<sup>21</sup> See The Human Rights Commission Act, 2053 (1997).

<sup>22</sup> See *infra* III, 3.2.

<sup>23</sup> AI, Nepal, A deepening crisis, *supra*, p.18.

<sup>24</sup> See <http://www.nepalnews.com/>, News for 16 January 2003.

<sup>25</sup> UN Doc. CAT/C/SR.180, 26 April 1994, in the course of considering the initial report of Nepal submitted under Article 19 of the Convention (the only one submitted by Nepal at the time of writing), contained in UN Doc. CAT/C/16/Add.3, 16 December 1993, which the Committee considered as "in many respects incomplete."

<sup>26</sup> Report of the Special Rapporteur on Torture submitted pursuant to Commission on Human Rights resolution 2000/43, UN Doc.E/CN.4/2001/66, 25 January 2001, para.823: "The consistency of the reports reaching the Special Rapporteur over the years is highly suggestive of a generalized problem of torture and ill-treatment at the hands of law enforcement officials, which the Government is strongly urged to address as a matter of priority."

<sup>27</sup> Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, Addendum, Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2002/76/Add.1, para.1104 et seq.

<sup>28</sup> See Report of the Working Group on Arbitrary Detention, Addendum, Visit to Nepal, UN Doc. E/CN.4/1997/4/Add.2, 26 November 1996, para.26: "While the prisoners seen by the Working Group very rarely reported ill-treatment in prisons, the same cannot be said for police detention centers. In the light of its inquiries into this matter, the Working Group considers that such dysfunctions are due primarily to the greater weight attached to confessions in the scale of evidence. This is probably one of the main reasons for the quite frequent cases of ill-treatment inflicted during investigations and, consequently, a source of judicial error..." The Working Group recommended, in para.35 j), the: "Adoption of domestic legislative measures to incorporate the provisions of the Convention against Torture, to which Nepal has acceded into national law so that persons who engage in torture can be prosecuted (and appropriate penalties imposed on those found guilty)."

human rights violations, including torture, which have been well-documented by domestic and international human rights organisations.<sup>29</sup>

The Special Rapporteur on extra-judicial, summary or arbitrary executions, following a country mission in 2000, expressed his concerns over reports of extra-judicial killings and "disappearances" and the prevailing climate of impunity.<sup>30</sup> In December 2002, the European Union expressed its concern at the deteriorating security and law and order situation and violations of human rights, including those by security forces in Nepal and urged the government of Nepal to take further immediate action in conformity with its international obligations.<sup>31</sup>

## **II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW**

The Constitution of Nepal prohibits torture. Its Article 14(4) reads: "No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law." In statutory law, the prohibition of torture is laid down in the Torture Compensation Act 2053 BS (1996) which stipulates that "torture shall not be inflicted on any person who is in detention for investigation or awaiting trial or for any other reason."

The Children Act, 1992, also includes a prohibition of torture and cruel treatment, albeit a qualified one.<sup>32</sup> Moreover, Article 9 of the Evidence Act, 1974, stipulates that confessions made through the use of torture are inadmissible as evidence in court.

The only available definition of torture is contained in the Torture Compensation Act according to which: "the term 'torture' shall be understood as physical or mental torture inflicted on a person who is in detention for investigation or awaiting trial or for any other reason, and this term includes cruel, inhuman or degrading treatment that person is subjected to."<sup>33</sup>

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<sup>29</sup> See especially the reports of Amnesty International, *supra*.

<sup>30</sup> Report of the Special Rapporteur on extra-judicial, summary or arbitrary executions, *supra*, para.43: "The case and incidents related above illustrate the pervasive climate of impunity for human rights violations, including extra-judicial executions, which prevails in Nepal"; para.44: "Legal remedies available for victims of human rights violations remain weak"; para.50: Under the Torture Compensation Act of October 1996, victims of torture and their relatives can seek compensation for their suffering and loss. However, the Special Rapporteur understands that this remedy has largely been ineffective, and that none of the cases filed under the Act so far have resulted in compensation being paid to the victims or their families. In this context, the Special Rapporteur further wishes to emphasize that paying compensation to victims and their families should in no way be seen as a substitute for investigating and prosecuting human rights violations." The Special Rapporteur recommended, para.52, "that the Commission be authorized to award compensation to victims of human rights abuses and their families in quasi-judicial proceedings" and stated, para.60, that "there is an urgent need to put in place strong, independent and credible mechanisms to investigate and prosecute alleged human rights abuses... attributed to the police and other State agents."

<sup>31</sup> The Kathmandu Post, 19 December 2002. The statement issued by the Danish Embassy, Presidency of the EU in Kathmandu, on 18 December 2002 condemned the campaign of killings, harassment and destruction by the Maoist insurgents and human rights violations committed by security forces with impunity and called for a halt of such actions. See for further international reactions, AI, A deepening crisis, *supra*, p.6.

<sup>32</sup> Section 7: "No child shall be subjected to torture or cruel treatment. Provided that, the act of scolding and minor beating by his father, mother, member of family, guardian or teacher for the interests of the child shall not be deemed to violate the provisions of this section."

<sup>33</sup> Section 2 (a).

The prohibition of torture is absolute and cannot be suspended or derogated from.<sup>34</sup>

### **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

#### **1. THE SUBSTANTIVE LAW**

##### **1.1. Criminal Offences and Punishment**

There is no specific criminal offence of torture in Nepalese domestic law. Acts of torture could be prosecuted as criminal offences only by using the provisions of the Muluki Ain - a country code containing chapters on substantive criminal and civil law and procedural rules.<sup>35</sup>

Inhuman detention, i.e. depriving a detainee of food and water, carries a punishment of imprisonment equalling the imprisonment of the victim of such treatment.<sup>36</sup> In certain cases, the punishment might be one and a half times or twice the length of the illegal detention.<sup>37</sup>

The Muluki Ain (Country Code) contains a chapter on battery.<sup>38</sup> There are three types of battery, i.e. intentional, causing serious bodily injury and accidental battery.<sup>39</sup> Intentional battery covers all other forms of battery not resulting in serious bodily injury as defined in No.2 of the said chapter. It is punishable by a maximum of two years imprisonment and a fine of 250 rupees (100 rupees = ca. \$1.3 at the time of writing). Grievous bodily harm caused by battery is characterised by the types of injuries inflicted which are listed as damaging a person's backbone, limbs and powers of sight, hearing, smell, taste and sexual reproduction as well as damaging a woman's ability to breastfeed. The offence carries a punishment of up to 8 years imprisonment and 10,000 Rupees fine if it causes the blindness or impotence of the victim, in all other cases up to 8 years imprisonment and a fine of 5,000 Rupees, and half of the prison term and the fine in those cases where the victim loses one but not both organs in question.

In cases of accidental battery, the offender is, depending on the consequences and the degree of negligence liable to pay between 250 and 500 Rupees for medical

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<sup>34</sup> See Article 115 (8) of the Constitution, which regulates emergency powers.

<sup>35</sup> See CVICT, Nepal's Penal System, An Agenda for Change, 2001, p.16. In August 2000 a Criminal Justice Task Force was formed under the Attorney General to make recommendations for the reform of the criminal justice system. The task force reported to the government in August 2001. It reportedly recommended that a new Penal and Criminal Procedure Code would be drawn up to replace the Muluki Ain (Country Code) of 1962.

<sup>36</sup> Clause 3 Of Inhuman Detention, Country Code (Muluki Ain).

<sup>37</sup> If the detainee was detained with neck and handcuffs and held without food and water or if the detainee is a woman or a child.

<sup>38</sup> There has been some confusion as to whether the Nepalese term "Kutpit" means "assault" or "battery." This report follows the latter meaning in the sense of: "A person is guilty of battery if he intentionally or recklessly applies force to another person to which that person has not given a valid consent and which is unlawful." Fagan v. Metropolitan Police Comr., [1969] 1 QB 439.

<sup>39</sup> See No. 1, No.2 and No.3, Of battery Country Code (Muluki Ain) respectively. See for justifiable and excusable battery, No.4 and Country Code (Muluki Ain), No. 1, Of Punishment and Fine.

treatment, between 1000 and 2000 Rupees for medical treatment for each of the damaged organs and between 50 and 500 Rupees fine.

Rape is punishable by three to five years imprisonment if the victim is over 14 years old, and six to ten years imprisonment if the victim is below the age of 14.<sup>40</sup> Rape in detention by a government official carries an additional punishment of one year imprisonment.<sup>41</sup> Murder carries a punishment of life imprisonment and confiscation of property for various forms of intentional homicide<sup>42</sup>, ten years imprisonment for homicide which has been provoked<sup>43</sup> and up to two years imprisonment and/or 50 to 500 Rupees fine for accidental homicide.<sup>44</sup>

## **1.2. Disciplinary Sanctions**

Under the Torture Compensation Act, a civil court can order the concerned authority to take departmental action against the government employee who committed the act of torture,<sup>45</sup> however no follow-up procedure is envisaged. The Police Act 1955 also contains provisions which allow the superior police authority to impose a range of disciplinary measures against a police officer for a breach of duty. Disciplinary measures against civil servants can be imposed pursuant to the Civil Service Act. Disciplinary action against army members can be taken according to the Military Service Act.

However, disciplinary punishment may not, according to the Police and the Civil Service Act, be imposed for unlawful conduct if the government employee acted with good intentions.<sup>46</sup>

## **2. THE PROCEDURAL LAW**

### **2.1. Immunities**

There are no amnesty laws or general immunities. However, government employees who mistreat a person accused in a criminal case, are provided immunity if they had "good intentions" such as wanting to discipline the person."<sup>47</sup> Moreover, section 20 of the Terrorist and Disruptive Activities (Control and Punishment) Act enacted in April 2002 for the duration of two years, members of the security forces "or any other

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<sup>40</sup> No.3, Of Rape, Country Code (Muluki Ain).

<sup>41</sup> No.5, Of Rape, Country Code (Muluki Ain).

<sup>42</sup> No. 13, Of Murder, Country Code (Muluki Ain).

<sup>43</sup> No.14, Of Murder, Country Code (Muluki Ain).

<sup>44</sup> No. 6, Of Murder, Country Code (Muluki Ain).

<sup>45</sup> Section 7, Torture Compensation Act.

<sup>46</sup> See Section 37 of the Police Act 1955: "the Chief District Officer or the police employee ... while performing duties or exercising authority may not be punished for ... if performed with good intentions." A similar provision is contained in Section 57 of the Civil Service Act.

<sup>47</sup> Clause 5, Country Code (Muluki Ain). See also Police Act and Civil Servant Act for disciplinary punishment, cited supra.



person” are immune from prosecution for “any act or work performed or attempted to be performed by him in good faith under the Act.”<sup>48</sup>

## **2.2. Statutes of Limitation**

The criminal offences of battery, inhuman detention and rape will only be prosecuted upon a complaint made within 35 days after the offence was committed. If battery results in serious bodily harm, the time limit is three months from the date of the incident. Homicide is not subject to any statutes of limitation.<sup>49</sup>

## **2.3. Investigations into Torture**

### **2.3.1. The legal framework**

The Muluki Ain and the State Cases Act of 1993 govern the investigation and prosecution of most crimes. However, there are also numerous other acts vesting various bodies with power to investigate offences as specified.<sup>50</sup>

Under the Muluki Ain, prosecutions are private. This traditional system was partially supplanted by the first State Cases Act of 1961 that introduced an adversarial justice system and the new State Cases Act of 1993 according to which those crimes classified as State Crimes are for the first time prosecuted by the State.<sup>51</sup>

### **2.3.2. The criminal procedure**

Victims of torture may either complain to the police or any other body charged with investigating such cases if the crimes are to be prosecuted according to the State Cases Act. They may also directly file a case against the alleged perpetrator in form of a private prosecution in the local court in order for charges to be brought under the applicable provisions of the Muluki Ain. Such complaints have to be brought within the limitation period prescribed in the governing Act.<sup>52</sup> In the absence of such limitation periods, the case may be filed at any time.<sup>53</sup>

In general, anyone can inform the police, either verbally or in writing, as a result of which a First Information Report is to be drawn up.<sup>54</sup>

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<sup>48</sup> See AI, Nepal, A deepening crisis, supra, pp.1, 2.

<sup>49</sup> The statutes of limitation are stipulated in the respective provisions on the specific criminal offences.

<sup>50</sup> At least 53 statutes have been identified which vest the power of investigation, prosecution and adjudication concerning offences not covered by the State Cases Act with institutions other than the courts. This state of affairs has been criticized by the Center for Legal Research and Resource Development (CeLRRd) in: “Improvement in Criminal Legal Regime,” available on its website [www.celrrd.com/html/page1.html](http://www.celrrd.com/html/page1.html). On 17 August 2000, the Government set up a Criminal Justice Study and Recommendation Task Force with the task of modernizing Nepal’s “archaic laws” (in the words of a senior official at the Law Ministry). See Rudra Sharma, Report proposes radical reforms in criminal justice system, in: The Kathmandu Post, 29 August 2001.

<sup>51</sup> These crimes are listed in Schedule 1 of the State Cases Act 1993 as amended since. Murder, rape and battery causing grievous bodily harm, but not other types of battery or inhuman detention are currently listed in the schedule. See, Also Public Offences and Punishment Act, 1970, see P.47 Agenda for Change.

<sup>52</sup> No.27, Of Battery Country Code (Muluki Ain).

<sup>53</sup> No.36, Of Court Management, Country Code (Muluki Ain).

<sup>54</sup> Sec. 3 (1) and (2) State Cases Act.

According to the State Cases Act, the public prosecutor<sup>55</sup> is responsible for the prosecution of crimes and the police for conducting criminal investigations. While the Attorney General can direct the police to procure additional evidence if needed for prosecution, he/she does not monitor the investigation mechanism as such.<sup>56</sup> No specific or independent institution is charged with investigating complaints about torture. There are however Authority Abuse Cells which were set up in all regional police headquarters in 1993 and these are charged with investigating reports of human rights violations by the police.<sup>57</sup>

The police investigate crimes falling under the State Cases Act *ex officio*.<sup>58</sup> If the police refuse or do not register such a complaint, the complainant may file his/her complaint before a higher police authority which may then direct the police officer in question to begin an investigation.<sup>59</sup> The police may arrest and detain a suspect if there are sufficient grounds that he/she has committed a crime.<sup>60</sup> Evidence relating to torture may be obtained through medical reports, which should be available in all cases pursuant to the applicable provision of the TCA providing for medical examinations of detainees,<sup>61</sup> and an autopsy in case of death.<sup>62</sup>

Upon completion of their investigation, the police are required to submit a report with the collected evidence and their assessment as to whether there is sufficient evidence to file a case to the public prosecutor for a final decision. The latter may either direct the police to carry out further investigations, file an indictment within 25 days or close the investigation.<sup>63</sup> The victim or complainant does not have a right to appeal such a decision.

Victims do not enjoy any specific protection during the investigation nor are they granted any specific procedural rights.<sup>64</sup>

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<sup>55</sup> The Public Prosecutor works for the Attorney General's office. 75 District Prosecutor offices in each of the districts and 16 General Attorney's offices attached to the appellate courts. In 25 districts there is only one prosecutor and in the others there are two.

<sup>56</sup> Center for Legal Research and Resource Development (CeLRRd) in: "Improvement in Criminal Legal Regime," supra, 1.2.4.2.

<sup>57</sup> The working methods of the Authority Abuse Cells are however not clear because of a lack of transparency in their work, see Amnesty International, *Spiralling Crisis*, supra, p.16.

<sup>58</sup> See supra III 2.2.1.

<sup>59</sup> Sec.3, Sub-Section 5, State Cases Act.

<sup>60</sup> See Section on Court Management of the Country Code (Muluki Ain).

<sup>61</sup> Section 3 of the TCA provides: "2.) The concerned officer, at the time of detention and release of any person shall have that person's physical condition examined as far as possible by a doctor in government service and when the doctor is not available, by himself and shall keep and record thereof."

Explanation: For the purpose of this sub-section, the term "doctor" shall be understood as doctor, Kawiraj, health assistant, auxiliary health worker or Baidya in government service. 3). A copy of the report concerning the examination of the physical or mental condition referred to in sub-section (2) shall be submitted to the concerned district court."

<sup>62</sup> According to Sec. 11, 3) State Cases Act, government medical doctors shall carry out autopsies and submit a report to the investigating authorities within 24 hours of completing an autopsy.

<sup>63</sup> Section 17, State Cases Act.

<sup>64</sup> See Dr. Shanker Kumar Shrestha, *A Step Towards Victim Justice System*, 2001, p.116 et seq.

### **2.3.3. Investigations by national human rights commission**

A victim of a human rights violation or any person acting on his or her behalf may also lodge a complaint with the National Human Rights Commission. The Commission can investigate a complaint about human rights violations within the limits imposed by Section 10 of the Human Rights Commission Act.<sup>65</sup> It has the power to make a recommendation to the concerned authorities to take the appropriate steps, such as prosecuting the alleged perpetrator(s) of torture, which is however not binding.<sup>66</sup>

### **2.4. Trials**

If charges for acts of torture are brought against the alleged perpetrator, the competent court, usually the District Court in the area concerned, will hear the case. The trials are governed by the chapter in the Muluki Ain on court management, the State Cases Act and the Evidence Act. The Evidence Act sets out the applicable procedures and stipulates that the onus of proof rests on the prosecution. Victims of crimes, including torture, may submit evidence but do not enjoy any further procedural rights in cases prosecuted by the State. They may proceed to withdraw a state case where the Government has given him an order to do so provided that the concerned court consents and that the case should not affect a private party's property.<sup>67</sup> The Supreme Court upheld the legality of this provision in two recent judgments.<sup>68</sup> In case of a conviction, the Courts have discretion in deciding whether to reduce or to suspend sentences whereas amnesties can only be granted by royal decree.

Military personnel who commit offences in the course of their duty are brought before a court martial whereas other offences committed by military personnel are dealt with through the criminal justice system.

Finally, a civil court may order disciplinary action against the perpetrator to be taken by the concerned authority in cases brought under the Torture Compensation Act.<sup>69</sup>

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<sup>65</sup> The Commission may not investigate cases specified in the Army Act, cases certified by the Chief Secretary of His Majesty's Government in a treaty between HMG and any foreign state or international or inter-governmental institution or cases that negatively affect the security of the Kingdom of Nepal and cases certified by the Attorney General as negatively affecting the investigation of a crime or the identification of a culprit.

<sup>66</sup> Chapter 3, The Human Rights Commission Act, 2053 (1997).

<sup>67</sup> Section 29, State Cases Act, 1993.

<sup>68</sup> Supreme Court, Supreme Court Bulletin, Year 5, Vol.24, p.12 and Supreme Court, Nepal Law Journal, Vol.66, Issue 7, 1994, pp.505-506, cited in: Dr. Shanker Kumar Shrestha, A Step Towards Victim Justice System, 2001, p.97, 98. In the latter case, Dil Bahadur Law vs. State, the Court reasoned that cases may need to be ended for the better advancement of the country and society, for social, religious and communal patience and harmony and for keeping diplomatic relations sound and better. The Court stressed that it should not consent in the absence of proper reason and in the presence of any abuse in the exercise of power.

<sup>69</sup> See infra IV, 1.1.1.

### **3. THE PRACTICE**

#### **3.1. Complaints**

No statistics are available as to the overall number of complaints relating to torture and ill-treatment. The national human rights commission recorded a total of 528 complaints in its first year (June 2000 - July 2001), 255 of which related to political rights. Since the imposition of the emergency, "complaints of violations of law by the security personnel have been pouring in," according to the NHRC Chairman.<sup>70</sup> However, a large number of victims reportedly refrain from complaining about torture. This appears to be due to the widely held view that torture is a normal practice in the course of arrests seen as a legitimate method by police officers and accepted by victims out of ignorance of their rights or fear of reprisals.<sup>71</sup> Additionally, given the prevailing impunity, many victims decide against complaining because they do not trust the authorities to carry out appropriate investigations.

#### **3.2. Investigations**

Investigations tend to be slow and are not seen as being carried out impartially or thoroughly. Torture allegations against police officers are investigated by the police where the prevailing spirit is one of protecting fellow officers. The complainants are faced with a hostile reaction, ranging from deliberate inaction to outright threats and physical attacks, including further torture, also of family members. The provisions relating to medical examinations and drawing up of medical reports in the TCA are only rarely followed in practice, in some cases because they are simply not known by police officers, and in others because it is deliberately obstructed by the police. Police officers have in numerous cases refused to allow injured detainees to see a doctor, to consult a doctor in their absence or have delayed access to a doctor.<sup>72</sup> Moreover, the law only validates examinations carried out by government employees who are often lower level health professionals without the necessary expertise. Finally, investigations tend to be inadequate, largely due to the poor methods employed by the police in investigating crime.

The Human Rights Cell set up by the Army in July 2002 was investigating between six and ten cases in September 2002. While it has taken disciplinary action against army personnel held responsible for the torture of three individuals employed by GTZ (a German development organisation), it has apparently not initiated any criminal trials or court martial.<sup>73</sup>

It may be too early to assess the performance of the NHRC though at the time of writing it appeared that insufficient financing and staffing hampered its effectiveness. In 2000, the government allocated only 5 million Rupees (about \$65,400) against the

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<sup>70</sup> See The Kathmandu Post, 2 April 2002: Govt indifferent to human rights: NHRC.

<sup>71</sup> See Dr. Shanker Kumar Shrestha, A Step Towards Victim Justice System, 2001, 150, 151, also citing various studies on the subject.

<sup>72</sup> See AI, A deepening crisis, supra, p.19, according to which security forces have repeatedly ignored district court orders to take prisoners for medical examination. In addition, in six report cases, the police did not allow medical examination of prisoners it had brought to hospital after it became clear that the prisoners could not pay for the treatment.

<sup>73</sup> The information was provided to a delegation of Amnesty International during its visit to Nepal in September 2002. See for further details AI, Nepal, A deepening crisis, supra, p.18.

25 million Rupees (about \$330,700) requested by the Commission for its first year.<sup>74</sup> The record of cooperation by the police and other official bodies with the NHRC in its early stages has apparently been unsatisfactory.

### **3.3. Prosecution: Indictments, Convictions, Sentencing**

The overwhelming majority of cases have not resulted in a trial. Prosecutions have either been discontinued, dismissed for lack of evidence or the only action taken was disciplinary punishment.<sup>75</sup> The low number of indictments appears to be due to a combination of factors, in addition to the ones mentioned above, such as poor investigation techniques, a weak position of the prosecutors in directing the police to carry out more efficient investigations and a short deadline for bringing charges inducing prosecutors to drop cases.

This record appears to bear out the perception that the judiciary lacks genuine independence and is prone to outside influence, be it by the authorities or the accused themselves.<sup>76</sup> The judiciary has also not taken a proactive role in the prosecution of perpetrators of torture. While confessions obtained by means of torture are inadmissible according to Article 9 of Evidence Act 1974, the burden of proof is on the complainant who alleges he or she has been tortured.<sup>77</sup> Accordingly, a torture survivor has to seek a separate decision by the court during the criminal case against him or her with regard to the allegation of torture. As a consequence, torture survivors have found it difficult to prove torture and courts have hardly taken any action in urging authorities to investigate allegations of torture and prosecute the perpetrators, with the exception of asking the authorities to impose disciplinary punishment in the cases under the TCA.

Since its inception in May 2000, 65 cases of torture have been filed with the NHRC. It recommended disciplinary action and prosecution of the perpetrators in several cases but by December 2002, it was not known to Commission members whether any such action had been taken.

According to information provided by the Inspector General of Police in 2000 to Amnesty International, action had been taken against 23 police officers for abuse of authority and human rights violations. Nine of the suspects were only subject to disciplinary action while the remaining fourteen were charged in relation to three cases of human rights violations, including charges of rape and murder but ultimately not convicted.<sup>78</sup> One of these cases concerned the death in custody of Suk Bahadur Lama from Dolakha district as a result of torture inflicted at Kawasoti Ilaka police post in 1999. A post-mortem showed clear signs of torture. The eight police officers were arrested but subsequently released before the start of the trial. All of the police

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<sup>74</sup> The government had later provided another Rs 664,000 since the allocated money was not sufficient to pay the salaries. However, for 2001 it allocated again only Rs 5,000,000, which drew bitter criticism of the National Human Rights Commission in its first Annual Report published in 2002.

<sup>75</sup> There is no follow up to orders by courts under the TCA so that it is not known whether the disciplinary punishment ordered has actually been carried out.

<sup>76</sup> See International Bar Association, *Nepal in Crisis*, supra, in particular pp.33, 34.

<sup>77</sup> The rulings of the Supreme Court are inconsistent in this regard but appear to endorse this rule. See Amnesty International, *Spiralling Human Rights Crisis*, supra, p.29.

<sup>78</sup> Amnesty International, *Nepal: Make Torture a Crime*, March 2001, AI Index: ASA 31/002/2001, p.6.

officers, who were charged with murder, were acquitted by the Nawalparasi court on 6 November 2001. The only step taken against the alleged perpetrators was a recommendation by a three-member committee coordinated by the Joint Secretary of Home Affairs to take departmental action against the police officers responsible for the treatment of Suk Bahadur Lama which was described as "heavy-handed."<sup>79</sup>

In one case, a police officer who was convicted of "physical assault" in the Muluki Ain and ordered to pay a fine of Rupees 400 (\$5.5). While the court acknowledged that Sitaram Yadav, who was tortured in Sunsari District in 1998, had been beaten, it found that this treatment did not amount to torture.<sup>80</sup>

Moreover, in February 2001, the Dolakha District Court sentenced Assistant Sub-Inspector Rakesh Kumar Singh to four year's imprisonment for raping an 18-year old woman, Himali Gole, at gunpoint when on duty patrol in 2000. Thereafter he had been taken into custody and was suspended from his job. The court also ordered that half his property be transferred to the victim.<sup>81</sup>

#### **IV. CLAIMING REPARATION FOR TORTURE**

##### **1. AVAILABLE REMEDIES**

##### **1.1. The Torture Compensation Act**

##### **1.1.1. Substantive rights**

The Constitution spells out an express right to compensation for torture and some limited form of rehabilitation but not to other forms of reparation. Article 14(4) of the Constitution states: "Any person so treated (subjected to physical or mental torture or cruel, inhuman or degrading treatment) shall be compensated in a manner as determined by law." This law, the Torture Compensation Act (hereinafter TCA), which came into force in 1996, provides in its Section 4: "if it is held that any employee of His Majesty's Government has inflicted torture on any person, the victim shall be provided compensation in accordance with this Act." Only the government bears liability under the TCA. There are no express provisions providing for a right of the government to have recourse to the individual perpetrator for the compensation paid under the TCA nor are there any precedents to this effect.

Under the TCA, a torture victim, any adult member from his family or a legal practitioner may file a petition and the Court may order the physical or mental examination of the detainee within three days. If treatment is deemed necessary, 'it shall be undertaken by His Majesty's Government, who will cover the costs of such treatment.'<sup>82</sup> Thus, a torture survivor has, under the conditions just outlined, a right to free medical treatment.

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<sup>79</sup> Amnesty International, Nepal: Spiralling Human Rights Crisis, supra, p.31.

<sup>80</sup> Amnesty International, Make Torture a Crime, supra, p.12.

<sup>81</sup> The Kathmandu Post, 27 February 2001: Cop gets jail term on rape charges.

<sup>82</sup> Section 5(3) TCA..

The maximum amount of compensation that can be awarded under the TCA is 100,000 Rupees (\$1,358).<sup>83</sup> Compensation can be claimed for pecuniary and non-pecuniary harm. In determining the amount of compensation, the Court shall take into consideration the following matters: the physical or mental pain or hardship caused to the victim and their gravity; the decline in income-earning capability of the victim resulting from physical or mental harm; the age of the victim and his/her family liabilities in case he/she has suffered physical or mental damage which cannot be treated; in circumstances when the damage can be treated, the estimated expenses of such treatment; in case the victim of torture dies, the number of members of his family dependent on his/her income, and the minimum amount necessary for their livelihood and finally any other proper and appropriate matters from among those contained in the claim filed by the victim.<sup>84</sup>

In addition to awarding compensation, the District Court shall, if it holds that torture has been committed in accordance with this Act, order the concerned authority to take a departmental action according to existing law against the government employee who committed the act of torture.<sup>85</sup>

### **1.1.2. Procedure**

A victim of torture, or any adult member from his family or his legal practitioner in cases where the victim has died or cannot file a complaint himself, may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of release from detention.<sup>86</sup> The complaint must, *inter alia*, contain the particulars of torture inflicted while in detention, the particulars of losses caused by such torture and the amount of compensation claimed.<sup>87</sup>

Upon a request by the victim or his/her relatives for a medical examination, the District Court may issue an order to the police to present the detainee to the government medical institution nearby.<sup>88</sup> The authorised medical personnel may provide medical treatment that is available and, if specialist treatment is required, they may refer him/her to the nearest government medical institution that has the necessary expertise and equipment. If the victim or his family fails to request the court for examination while in detention, the Court may not order the medical treatment requested.

Compensation cases under the TCA are heard by the District Court, which follows the procedures mentioned in the Summary Trial Procedure Act, 1971.<sup>89</sup> The Government

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<sup>83</sup> Section 6: "... and, if the matter of the complaint is found to be true, may make adjudication to have compensation in maximum of one hundred thousand rupees paid by His Majesty's Government to the victim."

<sup>84</sup> Section 8 TCA.

<sup>85</sup> Section 7, TCA.

<sup>86</sup> Section 5, TCA.

<sup>87</sup> Section 5 (4) (b), (c) and (d) TCA.

<sup>88</sup> Section 5 (3) TCA.

<sup>89</sup> Section 6, 1) TCA. According to recent reports, the Supreme Court is set to make public a Civil Procedure Guidelines with the purpose of ensuring homogeneity in court procedures to be adopted by all judges and other court officials throughout the country. The Kathmandu Post, 27 May 2002: Civil Procedure Guidelines to be public.

Attorney shall, upon request of the head of the concerned office, defend the alleged perpetrator of torture.<sup>90</sup> The burden of proof lies on the plaintiff seeking compensation. When the victim requests a medical examination, the courts generally issue an order to this effect. If the medical report indicates the recent occurrence of torture, the court may consider it as a proof of the complaint. It is however not clear whether the courts are to accept as evidence a medical report by a private physician following an examination at the request of the victim since the TCA specifies that such examinations are to be carried out by government officials.<sup>91</sup> The court may also consider other circumstantial evidences in deciding on the merits of the case. The award of compensation under the TCA is independent of the outcome of any criminal proceedings.<sup>92</sup>

While court fees are not required for criminal and certain other types of legal action provided for by law, they are generally required for civil suits and seemingly also for cases under the TCA. In a case that is still pending, the father of a torture victim attempted to file a complaint in the Kathmandu District Court claiming 100,000 Rupees compensation. The Shreshtedar (Registrar) ordered the complainant to deposit court fees and refused to register the case on these grounds. However, on appeal, the judge ordered that the case be registered without court fee. This case illustrates the lack of legal certainty in regard to court fees and the award of costs under the TCA.<sup>93</sup> The torture survivor or the relatives of a torture victim have to bear the costs of the trial if their case does not succeed. Under the Legal Aid (Support) Act (1996), a party to a case is entitled to legal aid if he/she has an income of less than 40,000 rupees a year.

If the District Court awards monetary compensation, the victim has to ask for payment by way of an application to the District Administration Office within one year of the final decision.<sup>94</sup>

## **1.2. Compensation through Criminal Proceedings**

The victim may file a private criminal case directly to the competent court which may award compensation as part of the criminal punishment. While the torture survivor or relatives of a torture victim may urge the Court in criminal cases to award compensation, the Court has discretion as to what kind of punishment to impose. According to the Muluki Ain, a court may order the perpetrator to pay up to 250 Rupees for treatment costs in assault cases. In grievous bodily harm cases, the sum ordered to be paid by the perpetrator to the victim for treatment is 500 to 2000 Rupees. In rape cases, a court may award 50% of the property of the perpetrator as compensation to the victim.

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<sup>90</sup> Section 10 TCA.

<sup>91</sup> See Section 3 TCA. See for text, *supra*.

<sup>92</sup> See in this connection also Section 12 TCA, which provides that the institution of action for compensation under the TCA or receipt of compensation shall not be a bar to the institution of a separate criminal action.

<sup>93</sup> Moreover, pursuant to Section 6, 2) TCA, the District Court may impose a fine of up to 5,000 Rupees if it is found that the complaint was filed with malafide intention.

<sup>94</sup> Section 9, TCA: “(1) After the final adjudication made on providing compensation to the victim, the victim or in case of his death, his nearest heir, shall submit an application to the Chief District Officer of the District in which he was detained, accompanied by a copy of the District Court’s adjudication on the provision of compensation, within one year of receiving information of the adjudication.2) The Chief District Officer shall provide the amount of compensation to the applicant within thirty-five days of the receipt of the application referred to in sub-section (1).”



### **1.3. Compensation through the National Human Rights Commission**

Torture victims may also seek to obtain reparation through the National Human Rights Commission. While the National Human Rights Commission may institute an investigation into such complaints, it does not have the power to award reparation itself. It may only make recommendations to the responsible authorities to provide compensation to torture victims.<sup>95</sup> In April 2001, the NHRC passed regulations for awarding compensation according to which compensation can be recommended for up to 100,000 Rupees depending on the seriousness of the case. The NHRC may also recommend that part of the compensation be paid by the perpetrator him/herself.

## **2. THE PRACTICE**

### **2.1. Use and Effectiveness of Available Remedies**

Torture survivors and relatives of torture victims have filed only a few compensation cases. As of early 2002, around forty such cases had been filed. This is due to a combination of factors, such as lack of access to courts, especially in rural areas, a lack of financial resources to pursue a case and the inadequate implementation of the legal aid scheme. The short time limit also contributes to the relatively small number of cases before the competent District Courts. Moreover, victims, witnesses and victim's lawyers have in several cases been threatened and intimidated by police. In other instances, torture survivors and relatives of victims have reportedly been bribed to drop their case.<sup>96</sup>

### **2.2. Reparation Cases**

Before the coming into force of the TCA, the Supreme Court had decided one case relating to torture, the case of *Purna Bahadur Chhantel v. Chief District Officer, Dang et al.*<sup>97</sup> The petition for compensation was quashed by the Supreme Court on the ground of lacking legislation.

Victims have been awarded compensation in three cases under the TCA. However, only one decision has become final whereas the others are still under appeal.

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<sup>95</sup> Chapter 3, of The Human Rights Commission Act, 2053 (1997), 5 (1): "If, during proceedings by the Commission on the complaints and petitions filed within its jurisdiction pursuant to Section 11, the accused is found guilty, it shall write to the organization or authority concerned to take necessary action against the guilty person; 5, (2):" While writing pursuant to sub-section (1), if the Commission thinks it necessary to provide the victims with necessary compensation it shall also mention the nature of compensation in its recommendation; (3) "The basis and procedures to be followed for allowing compensation pursuant to sub-section (2) shall be as prescribed; (4): "Upon receiving written recommendation for action pursuant to sub-sections (1) and (2), the concerned body or authority shall take action as required by the Commission, or if such action cannot be taken, having set out the reasons therefore, the concerned body or authority shall send its report of the action taken within three months from the date of receipt of the intimation from the Commission."

<sup>96</sup> According to Amnesty International, during 1998 6 out of 12 complainants withdrew their claims for compensation because of intimidation and fear for their safety, in: Amnesty International, *Make Torture a Crime*, supra, p.10.

<sup>97</sup> Nepal Kanoon Patrika, Supreme Court of Nepal; Kathmandu, Vol.33, Issue 12, b (1992) at p.298.

- Minor Deepak Raut, a minor, was awarded 10,000 Rupees compensation by the Saptari District Court on 21 March 2001 in the case of *Ram Bahadur Raut v Dy. S. P. Sanandan Prasad Kurmi*. Minor Deepak Raut, who had claimed 20,000 Rupees compensation, was compelled to put his head in a bucket of water, forced to inhale water through the nose, had his hands beaten with sticks and was verbally abused. The case has been appealed and is under consideration of the Appellate Court.
- Amar Narayan Lonia was awarded 50,000 Rupees compensation by the Nawalparasi District Court in June 2001 in the case of *Amar Narayan Lonia v. Gambhira Prasad Sha and others*. It also awarded departmental action to be taken. In so doing, the court evaluated not only the evidence of both parties and medical reports but also a report of its own official regarding wounds on the victim's body. The case is also at the time of writing pending before the Appellate Court.
- In the case of *Hari Bhadur Lama v Inspector Dhiraj Pratap Singh and others* the Nawalparasi District Court awarded 5,000 Rupees compensation for beatings suffered at the hands of the police. The court arrived at its decision after it had summoned a key witness who corroborated the account of the plaintiff.
- Hasta Bahadur Chamling was awarded 5,000 Rupees compensation by the Ilam District Court in August 2000 but did not collect the award within the prescribed time limit.
- In the case of Bishu Lal Batar, the victim received Rupees 9,000, paid by the police officer who inflicted the torture, as the result of a mediation procedure pursuant to the Muluki Ain which had been followed by the court.

The family of Suk Bahadur Lama received 50,000 Rupees (ca.\$654) financial assistance from the Government, the first time that such assistance has been provided by the Government.<sup>98</sup>

In the rape case mentioned above, the victim was handed over half the property of the perpetrator.<sup>99</sup>

The NHRC has as of December 2002 recommended compensation to be paid in four out of its 113 cases of torture.<sup>100</sup> Compensation has been awarded in two cases. In its first compensation case, which concerned the right to life, the NHRC decided that the families of two prisoners killed by the police in the Nepalgunj prison are to be compensated with Rs 100,000 each. 5 % of this amount should be borne by the then Chief District Officer of Banke who had ordered the shootings leading to the deaths and 2.5 % by Superintendent of Police Arun Kumar Singh.<sup>101</sup> In the second case of Harikirtan Chowk, a case of torture, the NHRC recommended that Rs. 10,000;

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<sup>98</sup> See details of this case of death in custody resulting from torture, supra III, 3.3.

<sup>99</sup> See supra III, 3.3.

<sup>100</sup> 85 of which related to state actors and 28 to non-state actors.

<sup>101</sup> The Kathmandu Post, 25 May 2001: NHRC awards compensation.

25,000; 25,000 and 40,000 respectively be paid to the four torture survivors by the government. At the time of writing, the NHRC has not been informed as to whether the recommended compensation had been paid to the victims.

## **V. GOVERNMENT REPARATION MEASURES**

There is presently no scheme of reparation for torture survivors and relatives of torture victims. A fixed amount of compensation has been paid to around 200 persons for imprisonment and torture suffered during the Panchyat rule. The money has been awarded by a high level political committee headed by the former Prime Minister Krishana Prasad Bhattarai since 1990 but presently no compensation is paid out due to lack of funds. The Government provides, upon request, free medical treatment to torture victims but neither runs its own nor supports independent rehabilitation centres, such as the Centre for the Victims of Torture in Kathmandu.<sup>102</sup>

## **VI. LEGAL REMEDIES FOR ACT OF TORTURE COMMITTED IN THIRD COUNTRIES**

### **1. PROSECUTION OF ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY**

#### **1.1. The Law**

##### **1.1.1. Criminal law**

The legal system of Nepal does not allow for the exercise of universal jurisdiction for acts of torture. As there is no general provision in the Muluki Ain or the State Cases Act on universal jurisdiction or prosecution of crimes committed abroad, such prosecution could only be carried out on the basis of specific legislation. Such legislation is in place in the Narcotic Drug (Control) Act, 1976, and the Trafficking of Person Act, 1986, and in form of the active personality principle, in the Treason and Punishment Act, 1989 and Detective Act, 1962. There is however no comparable legislation for acts of torture or any other international crimes. While a prosecution for torture and war crimes appears to be possible on the basis of the direct applicability of the Torture Convention and Geneva Conventions, in accordance with the Treaties Act, the lack of implementing legislation casts doubt whether the Nepalese prosecuting authorities and courts would deem the relevant treaty provisions a sufficient legal basis for prosecuting anyone suspected of having committed acts of torture abroad.

Diplomats are awarded immunity from criminal prosecution while in office according to the Privileges and Immunity to the Foreign State and Diplomatic Representative Act, 1970 that follows the treaty provisions of the Convention on Diplomatic Relations.

##### **1.1.2. Extradition laws**

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<sup>102</sup> See [www.cvict.org.np](http://www.cvict.org.np).

Extradition is carried out pursuant to the Extradition Act 2045 BS (1988).<sup>103</sup> In general, extradition is carried out in accordance with an extradition treaty in line with the Extradition Act.<sup>104</sup> Accordingly, extradition should only be allowed for the most serious offences, there should be no extradition for political crimes and Nepalese nationals are not to be extradited.

## **1.2. The Practice**

There are no known cases in which perpetrators of torture committed abroad have been prosecuted in Nepal or extradited following an extradition request.

## **2. CLAIMING REPARATION FOR ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY**

Victims of torture committed abroad cannot claim compensation under the TCA. Nepalese civil law does not provide any legal avenues for claiming reparation for torture committed in third countries since the courts do not have jurisdiction to entertain such claims.

Diplomats are awarded immunity while in office according to the Privileges and Immunity to the Foreign State and Diplomatic Representative Act, 1970 Foreign States also enjoy immunity for official acts.

There have consequently been no known cases in which a victim of torture committed abroad has taken legal action in Nepal against individual perpetrators or a foreign State with a view to obtain reparation.

There is no criminal offence of torture as such. The existing corpus of criminal offences that might be applied to prosecute perpetrators of torture is inadequate as the crimes in question do not encompass all forms of torture.

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<sup>103</sup> Extradition Act 1990 (Sapurdagi Ain 2045), *Nepali Edition*, Kathmandu, Nepal Ain Sanghaha Purak Khanda (supplementary part) 1990, Law Book Management Committee. See also Acts and Rules Related to Police Administration, Chautari Publication, Kathmandu, Second Ed 1996, introductory comment.

<sup>104</sup> Politically, the most important extradition treaty is the one with India, which was concluded in the 1950s and is currently being reconsidered.