



17 April 2012

Dear Prime Minister,

We are writing in response to the recently announced government plan for a law to criminalize torture. Nepal has been a party to the Convention Against Torture (CAT) since 1991, and it has been a longstanding concern that despite this, torture has not been adequately defined as a crime in law.

International law regards torture as among the most serious of all offences, amounting to a crime against humanity under certain circumstances. The severity of the problem of torture in Nepal is confirmed by the experiences of the many torture victims interviewed by our organizations and the devastating injuries resulting from it, both physical and mental, that thousands of Nepalese people are plagued by.

We therefore welcome the government's initiative to table a bill in parliament shortly. During the Universal Periodic Review in January 2011, at least twelve countries (including Austria, Brazil, Denmark, Germany, Hungary, Japan, Maldives, New Zealand, Slovenia, Sweden, Switzerland and the United Kingdom) expressed concerns relating to torture. Many also made specific recommendations for the prevention, investigation and reparation relating to torture.

The Committee against Torture, the body supervising implementation of the CAT, has also repeatedly expressed concern at the lack of criminalization of torture. In April 2005, when considering Nepal's second periodic report under the Convention, the Committee recommended that Nepal should "adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed."

Similarly, the Human Rights Committee, the body supervising implementation of the International Covenant on Civil and Political Rights, to which Nepal has been a party since 1990, has made repeated recommendations for the criminalization of torture. The Human Rights Committee has also found singular and cumulative violations of Article 7 of the Covenant in two communications under the Optional Protocol alleging torture and enforced disappearances: in *Yubraj Giri v. Nepal* decided in March 2011 and *Sharma v. Nepal* decided in October 2008.

In addition, the UN Special Rapporteur on Torture and other special procedures of the Human Rights Council have repeatedly made recommendations to the Government of Nepal for the criminalization of torture and the establishment of effective safeguards for its prevention as well as the proper independent investigation and prosecution of alleged perpetrators; and the provision of adequate redress.

We strongly recommend that the Government of Nepal ensures that the views of these expert bodies are fully incorporated into the bill to be put before the Legislative Parliament.

Indeed, in December 2007, the Supreme Court made public a detailed judgment in which it ordered the Government of Nepal to criminalize torture. In its opinion, the court affirmed that Nepal has an international obligation to pass a law criminalizing torture in accordance with Articles 2 and 4 of the CAT.

Torture has been one of the prime human rights concerns of civil society; and much work has been done by national and international human rights organizations to assist the government in upholding the state's obligations under the CAT and other treaties. You may recall that in June 2009, Advocacy Forum, FOHRID, REDRESS, INSEC, CVICT, PPR, ICJ, INHURED- International, AWC and other organizations as well as the National Human Rights Commission submitted a model bill for the criminalization of torture to the then government, a copy of which is attached here.

We request as a matter of urgency to be provided with a copy of the bill to be put before the parliament shortly. This will provide us with an opportunity to submit more detailed comments. In the meantime, please find attached a note setting out a number of priority issues to take into account to ensure Nepal's obligations under the CAT are fully upheld.

Yours sincerely,

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CC:

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TORTURE ACT: PRIORITY ISSUES

Definition: The definition of torture should be compatible with the definition provided by the Convention Against Torture (CAT). **The Act should apply to conduct committed by or with the consent or acquiescence of all public officials, not just “law-implementing officials”.** Such officials may include, for example, doctors or nurses in state-run hospitals, or public servants in government departments. **The Act must apply to official conduct in all contexts, and should not be limited only to torture of those arrested or held in detention.** The Act should also include all of the prohibited purposes including “discrimination of any kind”.

Criminalising complicity and participation: Under the CAT, acts by which any person participates in or is complicit in torture must be criminalised. The meaning of being “complicit” in torture is wider than the meaning of “directly or indirectly assisting”. **Conduct including acquiescence**, that is, turning a blind eye to torture where an official knew or should have known that such torture was taking place, **must also be criminalised.**

Jurisdiction: Under the CAT, Nepal has the obligation to establish jurisdiction over the offence of torture when (a) it is committed in any territory under its jurisdiction; (b) the alleged offender is a national of that State; and (c) the alleged offender is present in any territory under its jurisdiction and it does not extradite him or her. Nepal also has the explicit option to establish jurisdiction where the victim is a national. **Jurisdiction over torture under the Act must therefore extend to torture committed abroad.**

Amnesties, immunities and pardons: To meet its obligations under CAT, the Act must **explicitly prohibit immunities**, the granting of **amnesty from prosecution**, and **pardons** for torture. Similarly, the Committee has made it very clear that there can be **no defence or justification** for torture based on **good faith.**

Lawful Sanctions: Pain and suffering incidental to acts which are legal under domestic law should only be excluded from punishment under the Act **where those acts are also in accordance with international law.**

No statute of limitations: The Committee Against Torture and Human Rights Committee have made it clear that to comply with international human rights obligations statutes of limitation should not apply to the crime of torture. **There should be no statute of limitations under the Act on the filing of complaints, the prosecution of offences or the provision of reparations.**

Complaint mechanisms: Nepal must ensure that any person who alleges they have been tortured has the right to complain to competent authorities, and that such right is available and effective in practice. Nepal will only ensure that such a right is effective in practice by **recognising a wide range of bodies to which a person may complain – including, but not limited to the courts – and by ensuring that those in detention are made aware of and have access to those mechanisms.**

Duty to investigate: To fully comply with Article 12 of the CAT, the Act should make clear that **the Nepalese Government has the duty to investigate and prosecute those responsible** for acts of torture and cruel, inhuman or degrading treatment or punishment **whenever there are reasonable grounds to believe that such offences have taken place, even if no complaint has been made.**

Rights of victims: The Act should set out the **rights of victims – including to information on the progress of an investigation, to participate in proceedings, and to appeal decisions of prosecution authorities.**

Punishment for torture: Under the CAT Nepal must provide appropriate penalties for torture that reflect the grave nature of the crime. While the Committee has not prescribed a rule for the required length of punishment, it has made it clear that a significant custodial sentence is generally appropriate and a fine is not a sufficient penalty. **The Act should include a prescribed penalty of imprisonment for a minimum of three and a maximum of 20 years for torture, and imprisonment for a maximum of 10 years for cruel, inhuman or degrading treatment.**

Reparation: It is clear both in general international law and under the CAT that compensation alone is likely to be an insufficient remedy for victims of torture. **The Act must provide for the possibility of awarding other forms of reparation in addition to compensation – these should include restitution, rehabilitation, satisfaction and guarantees of non-repetition. Compensation which can be awarded as part of reparation must not be subject to an arbitrary cap but must instead reflect the gravity of the crime and compensate for the full value of pecuniary and non-pecuniary losses.** The Act must provide that the Nepalese government has the **primary obligation to provide reparation to a victim of torture**, even though the law may provide the ability to claim recourse from the principal offender. **The Act should also provide for the establishment of a compensation fund and the establishment of a rehabilitation centre or centres.**

Interim relief: The Act should include a mechanism by which a court may order the **provision of funds in the form of interim relief** to a victim who alleges they have been tortured, to cover urgent medical care or other dire financial need brought about by the alleged crime.

Inadmissibility of evidence obtained by torture: The Act must make it clear that the **burden of proof to show that a statement was not made by torture shifts to the prosecution where credible allegations of torture are raised.**

Non-refoulement: The Act should include a provision **prohibiting the expulsion, return or extradition** of a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

Training, monitoring and health check-ups: Under the CAT Nepal has specific obligations to take effective legislative, administrative, judicial or other measures to prevent torture, to punish torture, and to provide reparations to victims. In order to help meet these obligations, the Act should include specific provisions concerning:

- **the training of public officials** on the prohibition of torture and other cruel, inhuman or degrading treatment;
- **the role of the National Human Rights Commission in monitoring places of detention;** and
- **detailed provisions on a system of health checkups of those in detention**, which requires such health check-ups, specifies the modalities of those health check-ups, and includes victims' right of access to records.

Repeal of the Torture Compensation Act: The Act should **repeal the Torture Compensation Act 1996** in its entirety, and **include a transitional provision** for all pending cases filed under it to be considered as filed under the new Act.