

## Advocacy Forum

Advocacy Forum (AF) has been continuously working to promote the rule of law and uphold the international human rights standards through its advocacy and activism since its establishment in 2001. Besides AF's diverse working areas, one key thematic area is its campaign against the decades-long impunity in the country. Systematic documentation of the cases of human rights violations/abuses, regular and unannounced visits to government detention facilities, national and international litigation and reporting are some of AF's undertakings to combat impunity in Nepal. AF regularly publishes and disseminates its reports on human rights situation and draws the attention of the international community to the current developments in the human rights situation in Nepal.

Our regular consultations with relevant stakeholders of the criminal justice system have helped us draw the attention of the concerned authorities to conflicting issues of human rights and the rule of law and fair trial in Nepal. Besides, we also provide regular trainings on preventive measures, effective documentation of the cases of human rights violations and abuses and redress for the victims. In a nutshell, we are committed to establishing a system that guarantees impartial, speedy and easily accessible justice to the victims of HRVs and abuses. We seek every possible legal and practical step to ensure that the victims of serious human rights violations are protected against widespread impunity, intimidation and reprisals. AF believes that the deeply entrenched impunity of the country can only be challenged through combined efforts of the government, various stakeholders, the civil society organizations and the international community.

AF implements its activities through its central office in Kathmandu, 4 regional offices located in Kanchanpur, Nepalgunj, Biratnagar, Pokhar and 11 district based offices located in Ramechhap, Dolakha, Jhapa, Udaypur, Dhanusha, Surkhet, Bardiya, Kapilbastu, Rupendehi, Siraha and Baglung.



Advocacy Forum – Nepal

The Right to Fair Trial in Nepal: A Critical Study

# THE RIGHT TO FAIR TRIAL IN NEPAL

*A Critical Study*



Advocacy Forum – Nepal

2012

# **THE RIGHT TO FAIR TRIAL IN NEPAL**

## **A CRITICAL STUDY**



**Advocacy Forum – Nepal**  
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## **The Right to Fair Trial in Nepal: A Critical Study**

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Front Cover Photo: *Two handcuffed children waiting to be led into Kathmandu District Court for their trial.*

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A quotation which is displayed in the judges' sitting room,  
Kathmandu District Court:

*'A person is not in prison because he is guilty. He is not in prison because he has been punished. He is not in prison because there was apprehension that he would escape before release. The only reason why he is in prison is that he is poor.'*

— President Lyndon B Johnson



## PREFACE

The legal aid department of Advocacy Forum (AF) has been providing legal aid to numerous detainees since 2001. It has been at the forefront of adopting integrated intervention measures to ensure the right to fair trial of thousands of detainees. Based on the idea that regular visits to all places of detention are one of the most effective ways to prevent torture, AF has been visiting 57 government detention facilities on a regular basis in 20 districts in which it operates. The information provided by detainees during these visits has been relied upon extensively in this report.

AF advocates for the application of international standards guaranteeing the right to fair trial, initiates litigation accordingly and does advocacy for the reform on existing legislation. It provides legal aid for the detainees, submits information and cases, reports to relevant international and national bodies like the UN Special Rapporteur on Torture, the UN Committee against Torture, the UN Human Rights Committee and the UN Working Group on Arbitrary Detention.

Our sincere thanks go to Robert FM Cohen, who is the main author of this report, and who reviewed the AF database, collected information and conducted primary legal research on Nepali law and practice as well as international standards and jurisprudence. We would also like to thank Marc Zemel, Danielle von Lehman, Ambar B. Raut, Hari Phuyal, Tanka Dulal and Susan Carr who assisted in the research at various stages. Special thanks also go to Ingrid Massage for editing the report. I also like to thank Dr. Ananda Mohan Bhattarai, Mr. Yuvraj Subedi and Mr. Navraj Silwal who provided input into the various drafts of this report. I would also like to thank our colleagues Dr. Hari Bansh Tripathi and Kopila Adhikari for their inputs in the report. Our sincere thanks also go to the British Embassy-Nepal for making this work possible. Finally, I wish to thank all the actors in the criminal justice system who agreed to be interviewed and have their views reflected in this report.

**Mandira Sharma**  
Chairperson



# Introduction

Since the inception of Advocacy Forum in 2001, it has been working to promote the rule of law, the right to fair trial and to prevent torture. It visits police detention centres in 20 different districts to provide legal aid for those who are detained and not able to afford a lawyer. Over the period of 10 years, AF has reached out to 27,156 detainees, including 1,881 women and 6,334 juveniles.<sup>1</sup>

- 1.1 One of the major problems that AF has encountered in its work over the last 10 years is the lack of compliance with fair trial standards as required by the constitution and international human rights treaties Nepal has ratified.
- 1.2 A fair trial system is essential for upholding justice and maintaining the rule of law. The rationale for this principle was eloquently restated by Professor Weissbrodt<sup>2</sup> in his preface to *the Amnesty International Fair Trial Manual*:

When a government charges a person with having committed or having been implicated in a criminal offence, the individual is placed at risk of deprivation of liberty or other sanction. The right to a fair trial is a fundamental safeguard to assure that individuals are not unjustly punished.<sup>3</sup>

<sup>1</sup> In 2001 AF visited 359 detainees (28 females, 331 males; of whom 43 were juveniles), in 2002, 749 (61 females, 688 males; of whom 68 were juveniles); in 2003, 1208 (90 females, 1118 males; of whom 106 were juveniles); in 2004, 843 (70 females, 773 males; of whom 77 were juveniles); in 2005, 1683 (116 females, 1567 males; of whom 192 were juveniles); in 2006, 2230 (124 females, 2106 males; of whom 312 were juveniles); in 2007, 3740 (186 females, 3554 males; of whom 726 were juveniles); in 2008, 4085 (197 females, 3888 males; of whom 785 were juveniles); in 2009, 3874 (256 females, 3618 males; of whom 724 were juveniles); in 2010, 4198 (345 females, 3853 males, 2 third gender; of whom 826 were juveniles) and in 2011, 4,187 (408 females and 3,779 males; of whom 1040 were juveniles).

<sup>2</sup> Fredrikson & Byron Professor of Law, University of Minnesota Law School.

<sup>3</sup> *Amnesty International, Fair Trials Manual* (Amnesty International Publications, London, 1998) Pg 1 Available at <<http://www.amnesty.org/en/library/info/POL30/002/1998>>

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In remarks before district judges at the National Judicial Academy in Kathmandu, former Chief Justice of India, P.N. Bhagwati, further laid out the elements of a fair trial:

[A]s far as the criminal jurisprudence is concerned keep a few principles in mind... first the presumption of innocence, the second that the person, the accused, before you is adequately represented by a counsel; and thirdly that there should be no delay in dispensation of justice and no criminal case should be unduly delayed. These are the three requisites of a criminal trial laid down in the International Covenant on Civil and Political Rights. These three elements must be observed in any circumstances.<sup>4</sup>

Internationally, this right is most prominently recognised in the International Covenant on Civil and Political Rights the relevant articles of which are set out in Appendix 1 and will be discussed more fully throughout this report.<sup>5</sup>

- 1.3 This report seeks to examine the extent to which the criminal justice system in Nepal complies with this right and other related rights and state duties under international law. For the purposes of this report a broad view will be taken of the meaning of 'trial'. The guaranteeing of a fair trial encompasses rights beyond the right to a trial by a competent, independent and impartial tribunal established by law. Essential to a fair trial is fair and consistent treatment from the moment an official expresses suspicion in an individual. In this report we will consider the Nepali criminal justice system from the moment of arrest to sentencing and the right to appeal. For this reason our analysis will follow the chronology of the ICCPR, beginning with the pre-trial rights contained in Articles 7, 9 and 10, and then focusing on Article 14, which provides the right to a fair trial *per se*. We also briefly consider other international instruments including the Convention against Torture.<sup>6</sup>
- 1.4 In comparing the situation in Nepal with the requirements of international law, we will also consider the terms of the Interim Constitution of Nepal.<sup>7</sup> The relevant articles will be discussed fully, and are set out in Appendix 2. They include *inter alia* the right to freedom pursuant to Article 12, the right to equality contained in Article 13, and the rights regarding justice found in Article 24.

<sup>4</sup> Remarks before the National Judicial Academy and ICJ in Kathmandu to district judges. Transcript available at <http://www.njanepal.org.np/newsdetail.php?id=13>

<sup>5</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, ratified by Nepal May 1991) 999 UNTS 171 (ICCPR) available at <<http://www2.ohchr.org/english/law/ccpr.htm>>

<sup>6</sup> Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987, ratified by Nepal May 1991) 1465 UNTS 85 available at < <http://www2.ohchr.org/english/law/cat.htm>>

<sup>7</sup> Interim Constitution of Nepal 2063 BS (2007 AD) available at <<http://www.supremecourt.gov.np/ic.pdf>>

## INTRODUCTION

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- 1.5 To make an assessment of the situation on the ground this report will consider research conducted by Advocacy Forum and other non-governmental organisations as well as reports by inter-governmental bodies, eye-witness accounts, and additional research with a focus on specific aspects of the right to fair trial undertaken by the authors of this report.
- 1.6 This comparative exercise has shown that there is often a discrepancy between Nepali laws as they are codified, and how they are implemented. Laws that appear to conform to international standards on paper have proven insufficient to guarantee fair trials in practice as they are largely ignored. The legislature has also been slow to incorporate human rights standards set out in treaties ratified by Nepal, in the Interim Constitution or in rulings of the Supreme Court into statutes, further undermining the fair trial process.
- 1.7 Our concerns are presented in three parts: pre-trial, at trial (including on appeal) and fair trial issues of vulnerable groups, including women, children and people living with disability.
- 1.8 We have presented detailed recommendations at the conclusion of this report and are hoping these will be able to contribute to making the right to fair trial in Nepal a reality.



# A

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## PRE-TRIAL RIGHTS

### 2. The Right to Liberty

#### *International and Domestic Standards*

- 2.1 Article 9(1) of the ICCPR states: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.<sup>8</sup>
- 2.2 This provision has been subject to significant interpretation by the Human Rights Committee of the ICCPR.<sup>9</sup> In *Mukong v Cameroon*,<sup>10</sup> expanding upon *Van Alphen v The Netherlands*,<sup>11</sup> the Committee confirmed that ‘arbitrariness is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law’. The Committee has also concluded that the only pre-trial detention consistent with Article 9 is ‘to prevent flight, interference with evidence or the recurrence of crime’.<sup>12</sup>
- 2.3 An important aspect of the Committee’s approach to this article has been their often stated view that (in line with the requirement in art. 9(3))<sup>13</sup> an unreasonable

<sup>8</sup> ICCPR (n 4) Article 9(1).

<sup>9</sup> The Human Rights Committee is the body established under the ICCPR to oversee its implementation. It examines reports submitted by state parties. For those countries which have ratified the Optional Protocol, such as Nepal, it also considers individual communications.

<sup>10</sup> No 458/1991 (1994) UN Doc CCPR/C/51/D/458/1991 para 4.8 available at <<http://www1.umn.edu/humanrts/undocs/session39/305-1988.html>>

<sup>11</sup> No 305/1988 (1990) UN Doc CCPR/C/39/D/305/1988 available at <<http://www1.umn.edu/humanrts/undocs/session39/305-1988.html>>

<sup>12</sup> Van Alphen (n 10) para 5.8.

<sup>13</sup> ICCPR (n 4) Article 9(3).

delay in bringing a suspect to court renders that suspect's detention arbitrary.<sup>14</sup> In *Fillastre and Bizouarn v Bolivia* they further stated that a 'lack of adequate budgetary appropriations for the administration of criminal justice...does not justify unreasonable delays'.<sup>15</sup> Finding the exact point at which detention in police custody prior to a suspect being brought before a court becomes arbitrary is difficult. However in its 2000 observations on the report by Gabon, the Human Rights Committee commented that, 'the State party should take action to ensure that detention in police custody never lasts longer than 48 hours'.<sup>16</sup> In our opinion this is a useful benchmark, though we would of course urge compliance with the higher standards, discussed below, which already exist in Nepal.

- 2.4 Article 12(2) of the Interim Constitution guarantees that, 'No person shall be deprived of his/her personal liberty unless in accordance with law'.<sup>17</sup> In this vein the State Cases Act 1992 requires the police to bring every suspect before a judicial body within 24 hours of his or her arrest.<sup>18</sup> The Act also provides that following that initial hearing a judge may order the suspect's continued detention for up to 25 days.<sup>19</sup> Various other enactments vary this provision in certain circumstances. For instance, the Narcotic Drugs (Control) Act 1976 allows an extended period of detention of 3 months. Likewise, Section 31(4) of the Prevention of Corruption Act gives power to a judge to remand a person into custody for a maximum period of six months during investigation.
- 2.5 As it stands, the State Cases Act does not envisage granting bail. In fact, it currently provides that as long as the court is satisfied with the investigation it should remand the defendant in custody.<sup>20</sup> The first opportunity that a defendant realistically has to be freed is when, after the initial period of detention, a charge sheet is produced and the judicial process begins. Even at this stage the *Muluki Ain* (the National Legal Code) mandates detention without the opportunity for bail in certain circumstances. These include cases in which a *prima facie* case has been made out and the minimum sentence for the alleged crime is more than three years (or six months for non-permanent Nepali residents).<sup>21</sup>

<sup>14</sup> See *Inter Alia Borisenko v Hungary* No 852/1999 (2002) UN Doc CCPR/C/76/D/852/1999; *Freemantle v Jamaica* No 625/1995 (2000) UN Doc CCPR/C/68/D/625/1995; and *Teesdale v Trinidad & Tobago* No 677/1996 (2002) UN Doc CCPR/C/74/D/677/1996.

<sup>15</sup> No 336/1998 (1991) UN Doc. CCPR/C/43/D/336/1988 para 6.5.

<sup>16</sup> Human Rights Committee 'Concluding Observations on Gabon' (10 November 2000) UN Doc CCPR/CO/70/GAB para 13.

<sup>17</sup> The Constitution (n 6) Article 12(2).

<sup>18</sup> The State Cases Act 2042 BS (1992 AD) s 15(2).

<sup>19</sup> The State Cases Act (n 17) s 15(4).

<sup>20</sup> The State Cases Act (n 18) s 15(4).

<sup>21</sup> *Muluki Ain* 1963 No. 118(3).

*The Situation in Nepal*

- 2.6 In his report after a visit to Nepal in 2004 (i.e. while the armed conflict between the Communist Party of Nepal-Maoist and the security forces was ongoing), the Special Rapporteur on Torture commented that he found,

Wide disparities between...formal guarantees and what actually happens in practice. Routinely, basic requirements are not respected by the police, armed police or the RNA [Royal Nepal Army], such as timely access to a lawyer or bringing suspects before a judge within 24 hours of arrest.<sup>22</sup>

In the addendum to his 2010 Report to the Human Rights Council the then Special Rapporteur on Torture, expressed concern that, ‘the judicial process is not very functional or respected. For example, some suspects do not have a proper medical examination, or have to confess in the absence of their lawyer. In this regard, he also encourages Nepal to standardize its prison registers, and requests police to better respect the maximum time of 24 hours to present a detainee before a judge.’<sup>23</sup> Similarly, the current Special Rapporteur on Torture, in the addendum to his 2012 report to the Human Rights Council, called on the Government “to ensure timely access to independent medical examination at all stages of the criminal process, in particular when the suspect is placed in a temporary police detention facility, when taken out for any investigative activity, and upon return.”<sup>24</sup> This concern is corroborated by Advocacy Forum data collected during detention visits, which found that of 4,247 people who had been detained in 2011, only 55.4% were brought to court within the specified 24-hour period.<sup>25</sup> Fabrication of date of arrest by police is rampant, and in several cases the courts have intervened. As far as this is the case it represents a clear breach of Article 9 of the ICCPR, particularly if the delay exceeds the 48 hour period.<sup>26</sup>

- 2.7 The police routinely falsify arrest records or fail to keep an appropriately detailed arrest record.<sup>27</sup> In the addendum to his 2009 report to the Human Rights Council the Special Rapporteur on Torture reported that the police ‘often do not register the

<sup>22</sup> UNHRC ‘Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal’ (9 January 2006) UN Doc E/CN.4/2006/6/Add.5 para 20 available at <<http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm>>

<sup>23</sup> UNHRC ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum’ (26 February 2010) UN Doc A/HRC/13/39/Add.6, para 55.

<sup>24</sup> UNHRC ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez. Addendum’ (1 March 2012) UN Doc A/HRC/19/61/Add.3, pg 208, para 83.

<sup>25</sup> Coalition Against Torture, *Criminalize Torture* (1st Edition, Kathmandu, 2009) 83.

<sup>26</sup> ICCPR (n 5) Article 9.

<sup>27</sup> see Inter Alia Advocacy Forum and others ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005’ (Kathmandu 2009) available at <<http://www.advocacyforum.org/publications/index.php>> accessed 28 June 2010.

names of arrested/detained persons immediately'.<sup>28</sup> This is an extremely worrying trend and has got the obvious potential to circumvent the guarantees of judicial access found in the State Cases Act.<sup>29</sup>

- 2.8 After the initial period of police custody Nepal routinely detains suspects in judicial custody (remand) for purposes other than those considered by the Human Rights Committee (in *Van Alphen*) to warrant remand.<sup>30</sup> The State Cases Act provides that,

The court, in deciding an application for judicial remand, shall examine the relevant documents and shall take into account whether the investigation is satisfactory or not. If the court finds the investigation satisfactory, it may grant judicial custody not exceeding a total of 25 days upon the request made once or time and again.<sup>31</sup>

Unfortunately this section does not define the limits of individual judges' discretion. More importantly however it does not place any duty on the judge to consider whether or not pre-trial custody is required for the purposes of preventing flight, preventing interference with evidence or preventing the recurrence of crime (as set out in *Van Alphen*).<sup>32</sup> The following excerpt of an interview conducted with a Deputy Superintendent of Police is illuminating:

Advocacy Forum: What do the investigators hope to get from the remand? Is it for more interrogation, or for more ... ?

Deputy Superintendent of Police: You know, to complete all the documents of the court, it is not possible to complete it in a couple of days, so we have to wait for the witness, call the witness, to take their statements, we have to wait for the reports of forensic tests, we have to go to the crime scene, many times, sometimes we have to revisit the crime scene. So there are multiple tasks we have to do in that period.

AF: So for a drug suspect who is remanded for 10 days and is detained for 10 days, is that the time when the forensic investigation is done?

DSP: For forensics in a drug case, that means we send the drugs to a lab for identification, whether it is a drug or not, and we have to finish all the

<sup>28</sup> UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum. Follow-up to the recommendations made by the Special Rapporteur.' (17 February 2009) UN Doc A/HRC/10/44/Add.5 Pg 67.

<sup>29</sup> The State Cases Act (n 18) s 15(2).

<sup>30</sup> This term is used in Nepal to mean detention ordered by a judge i.e. pre-trial remand.

<sup>31</sup> The State Cases Act (n 18) s15(4) .

<sup>32</sup> Van Alphen (n 11) para 5.8.

documentation and everything. Similarly, we try to obtain the authoritative evidence.

AF: And for drug cases it is necessary to detain the suspects while you do all that?

DSP: Yes, it is defined in the law.

AF: Is this because you are afraid they will flee, or... ?

DSP: No, we cannot release anybody in this type of case.

AF: But I mean, do you know why for drugs the government decided that the accused are always in jail and not released during investigation?

DSP: This is a very serious crime in Nepal.<sup>33</sup>

2.9 There appears to be an understanding that remand can serve two purposes in Nepal. Firstly, it ensures that a suspect is available for questioning. Secondly, some offences are thought to be so serious that those accused of them should be held in custody. Whilst a tenuous justification may be made for the latter (that those accused of more serious crimes are more likely to flee) there is no ICCPR compliant reason for the former. Generally, the courts take note of three factors: fleeing, interfering in the collection of evidence and committing further offence. According to judges consulted during this study, owing to the open border between Nepal and India chances of a suspect absconding are higher, and this plays a dominant role when judges review cases for remand during the investigation phase.

2.10 The inability of the Nepali authorities to grant police bail to suspects (assuming that the courts are satisfied with the investigation) means that anyone accused of a crime inevitably spends time in custody. We do not believe that the need for such pre-trial detention has been adequately demonstrated. The fact that the *Muluki Ain* also prevents the court from making an independent determination of the risks involved while eventually setting bail for the suspect compounds this. This statutorily mandated detention during trial seems contradictory to a decision of the Nepali Supreme Court in *Kamlesh Dwibedi v. Ministry of Law and Parliamentary Affairs*.<sup>34</sup> In this case the Court ruled that a provision within the Human Trafficking

<sup>33</sup> Interview with Deputy Superintendent of Police (name withheld), Metropolitan Police Range, Hanuman Dhoka, Kathmandu, Nepal (21 July 2009) Interview conducted by Marc Zemel in English without translation.

<sup>34</sup> Supreme Court of Nepal (25 June 2009) Presiding justices: CJ Min Bahadur Rayamajhi and Justices Anup Raj Sharma and Sushila Karki. (not yet reported).

Act removing the possibility of bail for suspected violators of that act was unconstitutional.<sup>35</sup> By analogy, the statutory removal of the right to bail in the *Muluki Ain* would be similarly unconstitutional.

### 3. The Right to Challenge the Lawfulness of Detention

#### *International and Domestic Standards*

3.1 Article 9(4) of the ICCPR states: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'<sup>36</sup>

3.2 In Nepal, the means by which a detainee can challenge the lawfulness of his detention is by a petition for a Writ of Habeas Corpus. Article 107(2) of the Interim Constitution provides the Supreme Court with jurisdiction to hear challenges to detention and issue such a writ to compel release. Article 107(2) reads:

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 settle the dispute. For these purposes, the Supreme Court may... issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.<sup>37</sup>

3.3 In addition to this, section 8(2) of the Administration of Justice Act provides the same jurisdiction to the court of appeal.<sup>38</sup> A detainee can also challenge the lawfulness of detention while being presented to the court.

3.4 The Interim Constitution is ambiguous on the question of States of Emergency and habeas corpus. Article 143 of the Interim Constitution allows the Council of Ministers to suspend certain fundamental rights during a State of Emergency. A State of Emergency can only be declared when a 'grave crisis arises in regard to the

<sup>35</sup> Human Trafficking and Transportation Control Act 2064 BS (2007 AD) s 8.

<sup>36</sup> ICCPR (n 5) Art 9(4).

<sup>37</sup> The Constitution (n 7) Art 107(2).

<sup>38</sup> The Administration of Justice Act 2048 BS (1991 AD) s 8(2).

sovereignty or integrity of Nepal or the security of any part thereof, whether by war, external invasion, armed rebellion or extreme economic disarray'.<sup>39</sup> Whilst certain rights do remain in place (and habeas corpus applications based on them can be made) the rights regarding justice (Article 24) and the right against preventative detention (Article 25) can be suspended. Article 143(7) does provide that habeas corpus shall not be suspended, but only 'relating to such articles' as the Interim Constitution explicitly provides as remaining in force during a State of Emergency. The majority of Nepali lawyers understand this provision as protecting the right to seek a writ of habeas corpus in totality. However it seems clear that the Interim Constitution could equally bear a more restrictive interpretation.

### *The Situation in Nepal*

- 3.5 The constitutional ambiguity concerning a potential argument in favour of suspending habeas corpus during a state of emergency is troubling. Whilst parts of Article 9 of the ICCPR are open to derogation, judicial access to challenge the lawfulness of detention must be available at all times, even during a 'national emergency'.<sup>40</sup> The Human Rights Committee has confirmed this principle.<sup>41</sup>
- 3.6 As AF and many others have documented during the period of the armed conflict, detainees released pursuant to a writ of habeas corpus were regularly immediately re-arrested without warrant or stated reason.<sup>42</sup> Article 2(3) of the ICCPR requires that 'any person whose rights or freedoms as herein recognised are violated shall have an effective remedy'.<sup>43</sup> The (historical) practice of re-arrest demonstrated a contempt and disregard for the court's decision. It significantly compromises the rights of the detainee; it undermines the respect for the judiciary, the effectiveness of a judicial remedy, and interferes with people's right to liberty.
- 3.7 We also have practical concerns over the ability of detainees to challenge their detention. The geography of Nepal is extreme. The Supreme Court is in Kathmandu,

<sup>39</sup> The Interim Constitution (n 7) Art 143(1).

<sup>40</sup> See Inter Alia Article 17(2)(f) of 'the International Convention for the Protection of All Persons from Enforced Disappearance 2006; Principle 32 of the UN Body of Principles on Detention or Imprisonment 1988; and Article 9 of the Declaration on the Protection of All Persons from Enforced Disappearances 1992, General Assembly resolution 47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49 (1992), adopted on 18 December 1992.

<sup>41</sup> Human Rights Committee 'General Comment No. 29 on States of Emergency (Article 4), derogable rights under the ICCPR include: the right to life; freedom' (24 July 2001) UN Doc CCPR/C/21/Rev.1/Add.11 paras 14 and 16.

<sup>42</sup> ICJ (n 32) citing OHCHR 'Report on Nepal' (2008) paras 38-40; ICJ 'Nepal: Human Rights and Administration of Justice: Obligation Unfulfilled' paras 105 and 106; and ICJ 'Nepal: The Rule of Law Abandoned' (March 2005).

<sup>43</sup> ICCPR (n 5) Article 2(3).

and the 16 Courts of Appeal are spread throughout the country, housed at Zonal Headquarters. The zones are displayed in Figure 1:



The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations or ReliefWeb. These maps may be freely distributed. If more current information is available, please update the maps and return them to ReliefWeb for posting.

Figure 1: A Map of the zones of Nepal

3.8 It is clear that significant practical impediments exist for the families and legal representatives of parties in detention travelling to the courts' location. The United Nations Population Fund ('UNPF') has estimated that more than 80 percent of Nepal's population lives in rural areas.<sup>44</sup> Whilst a rural lifestyle does not necessarily preclude access to urban centres the fact that, as the World Bank put it, 'Nepal's total road network and density are low and only 43 percent of the population has access to all-weather roads' most certainly does.<sup>45</sup> In addition to frequent strikes which can halt transport for hours or days, the largely narrow, unpaved roads are usually heavily congested and serious accidents are a common event due to hazardous conditions, lack of adherence to traffic and safety laws, and poor mechanical conditions of vehicles.<sup>46</sup> This problem is worsened by the monsoon, during which time 'whole sections of road are often washed away by rain and

<sup>44</sup> UNFPA Nepal 'Country Profile' <<http://www.unfpanepal.org/en/countryprofile/index.php>> accessed 16 November 2009.

<sup>45</sup> World Bank: Transport in South Asia, <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSARREGTOPTRANSPORT/0,,contentMDK:20560914~menuPK:869038~pagePK:34004173~piPK:34003707~theSitePK:579598,00.html>> accessed 16 November 2009. In AF's own experience, especially during the height of the armed conflict, relatives of people arrested in remote villages in districts such as Rukum where access to the nearest motorable road is 3 days' walk away faced insurmountable problems in accesses courts at the zonal level. This was further exacerbated by restrictions of freedom of movement imposed by the Maoist party during substantial parts of the conflict period.

<sup>46</sup> See for example 'Locals lift road block', 11 July 2010 The Rising Nepal <[http://www.gorkhapatra.org.np/detail.gopa.php?article\\_id=37147&cat\\_id=8](http://www.gorkhapatra.org.np/detail.gopa.php?article_id=37147&cat_id=8)> accessed 12 August 2010.

mudslides'.<sup>47</sup> Good news is that since xyz district courts are also empowered to consider writ of habeas corpus. This will certainly mitigate some gap. However, even accessing district head quarter is difficult for many Nepalese living in rural areas. It is heartening to note that in view of the difficulty being faced by the people in having easy access to the court, and also in view of the prevailing practice of illegal detention, at the initiative of the judiciary, the District Courts in April 2011 were entrusted with the power to issue the writ of habeas corpus.

## 4. Freedom from Torture and the Right to Humane Conditions of Detention

4.1 This Section considers the general rule. The particular issues arising in relation to the imprisonment of women and children will be considered below in Sections 15 and 17 respectively.

### *International and Domestic Standards*

4.2 Article 7 of the ICCPR provides protection against torture: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This is a peremptory or *ius cogens* norm of international law.<sup>48</sup> Nepal is also bound by its obligations under the CAT which provides a prohibition along similar lines.<sup>49</sup>

4.3 In addition to Article 7, Article 10(1) of the ICCPR requires, 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.<sup>50</sup> In a commentary on the ICCPR, Manfred Nowak (the Special Rapporteur on Torture between 2004 and 2010) clarified that 'inhuman treatment within the meaning of Article 10 evidences a lower intensity of disregard for human dignity than that within the meaning of Article 7'.<sup>51</sup> Therefore, treatment that does not violate Article 7 of the ICCPR can still violate Article 10 of the ICCPR.

4.4 Article 14(3)(g) of the ICCPR, which provides for a right against self-incrimination, complements this aspect of Article 7.<sup>52</sup> In *Singarasa v. Sri Lanka*, the Human Rights

<sup>47</sup> Nepal 2010 Crime & Safety Report, published by Overseas Security and Advisory Council. Available at <https://www.osac.gov/Reports/report.cfm?contentID=114652>, accessed on 12 August 2010.

<sup>48</sup> This term is used to mean a rule of international law, custom, or morality which is of such fundamental importance that no treaty is allowed to derogate from it. In the present case the fact that both Article 4(2) of the ICCPR (n 5) and Article 2(2) of the CAT (n 6) prohibit any derogations makes this a peremptory norm.

<sup>49</sup> CAT (n 6).

<sup>50</sup> ICCPR (n 5) Article 10(1).

<sup>51</sup> Manfred Nowak 'UN Convention on Civil and Political Rights: Commentary' (1993, NP Engel) 186.

<sup>52</sup> ICCPR (n 5) Article 14(3)(g).

Committee established that in domestic proceedings the burden of proof in respect to violations of Article 14(3)(g) of the ICCPR and Article 7 of the Protocol, falls to the prosecution.<sup>53</sup>

- 4.5 The Human Rights Committee has expanded on the meaning of 'humanity and respect' in Article 10. In their General Comment No. 21 they stated that detainees must not be,

subjected to any hardship or constraint other than that resulting from the deprivation of their liberty...persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.<sup>54</sup>

- 4.6 In *Mukong* the Human Rights Committee gave more precise guidance.<sup>55</sup> They held that all detention should particularly be in line with Rules 10, 12, 17, 19 and 20 of the UN Standard Minimum Rules for the Treatment of Prisoners.<sup>56</sup> The general obligation to comply with the totality of these rules still applies.<sup>57</sup> These rules provide guidance as to *inter alia* the minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing, provision of a separate bed, and provision of food. The committee has also commented in *Mukong* that a lack of financial or material resources is not an excuse for inhumane treatment.<sup>58</sup> All detainees and prisoners have the right to services that will satisfy their essential needs.

- 4.7 Article 10 further provides that 'Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons'.<sup>59</sup> This provision is related to the presumption of innocence, found in Article 14. Article 14 section 2 reads: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.<sup>60</sup> This relationship was confirmed by the Human Rights Committee in their General Comment No. 21.<sup>61</sup>

<sup>53</sup> No 1033/2001 (2004) UN Doc. CCPR/C/81/D/1033/2001 available at <<http://www1.umn.edu/humanrts/undocs/html/1033-2001.html>>

<sup>54</sup> Human Rights Committee 'General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10)' (10 April 1992) para 3.

<sup>55</sup> *Mukong* (n 10) paras 9.3-9.4.

<sup>56</sup> First United Nations Congress on the Prevention of Crime and the Treatment of Offenders 'UN Standard Minimum Rules for the Treatment of Prisoners' (Geneva 1955) approved by Economic and Social Council resolutions 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977) available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>

<sup>57</sup> United Nations (n 58) para 1.

<sup>58</sup> *Mukong* (n 9) para 9.3.

<sup>59</sup> ICCPR (n 5) Article 10(2)(a).

<sup>60</sup> ICCPR (n 5) Article 14(2).

<sup>61</sup> Human Rights Committee (n 56) para 9.

4.8 In General Comment No. 20 the Human Rights Committee interpreted the Covenant as requiring states to hold detainees in officially recognised places. They argued that this was important 'to guarantee the effective protection of detained persons'. To that end the Committee stated, 'it is important for the discouragement of violations under article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment'.<sup>62</sup>

4.9 States have an affirmative obligation to systematically review the rules and conditions of detention with the aim of reducing torture and coercion during interrogation and detention. Article 11 of the Convention against Torture therefore stipulates that

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

4.10 Finally, Article 15 of the CAT provides that, 'each State Party shall 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'.<sup>63</sup>

4.11 In respect of Nepali law, Article 26 of the Interim Constitution provides that,

(1) 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.

(2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by law.<sup>64</sup>

Unfortunately Sub-Article (2) remains unsupported due to absence of a statute criminalising torture. Nepal has enacted the Torture Compensation Act, which defines torture as:

Any act...whether physical or mental, inflicted upon a person who is in detention for investigation, awaiting trial or for any other reason and this term includes [any] cruel, inhuman or degrading treatment that person is subjected to.<sup>65</sup>

<sup>62</sup> General Comment 21 (n 56) para 3.

<sup>63</sup> CAT (n 6) Article 15.

<sup>64</sup> Constitution (n 7) Article 26.

<sup>65</sup> The Torture Compensation Act (2053 BS) 1996 AD s 2(a).

The Act also provides for compensation, as specified by Sub-Article 2 of Article 26. It does not directly criminalise torture and there is no criminal accountability for the perpetrators. In May 2012, the government tabled a bill for the criminalisation of torture in the Legislative Parliament.<sup>66</sup> Furthermore, a draft Penal Code - which includes a provision criminalising torture - Criminal Procedure Code and Sentencing Bill were submitted to the parliamentary secretariat in late January 2011.<sup>67</sup> This is the first step towards adopting them. However they have yet to be circulated among the members of parliament and to proceed ahead of adopting them as Act.

4.12 The Interim Constitution also imposes the right for everyone to be presumed innocent until proven guilty. Article 24(5) reads: 'No person who is accused of an offence shall be considered guilty unless the person's crime is proven'.<sup>68</sup> In addition, the language of the Prison Act provides for segregation of detainees and convicts in detention and prison facilities, although the text of the Act leaves segregation as optional.<sup>69</sup>

4.13 Finally, the Evidence Act prohibits the use of coerced confessions. Section 9 of that Act reads,

Statements made by any accused in any criminal suit, in respect to the charges against him, at any place other than a court may be accepted by the court as evidence, provided it is satisfied that: The accused had not been forced to make such statements, or that such statements had been extorted by torturing or threatening to place him in a situation in which he was compelled to do so against his will.<sup>70</sup>

Contrary to international law, the burden of proving torture under section 9 lies with the defendant.<sup>71</sup>

<sup>66</sup> For AF and REDRESS recommendations relating to torture, see Advocacy Forum, Letter Submitted to PM Regarding Torture Bill, <http://www.advocacyforum.org/news/2012/04/letter-submitted-to-pm-regarding-torture-bill.php>

<sup>67</sup> For AF and REDRESS recommendations relating to fair trial issues in the draft Penal Code, Criminal Procedure Code and Sentencing Bill, see <<http://www.advocacyforum.org/downloads/pdf/press-statement/Fair-trial-perspectives.pdf>>

<sup>68</sup> Constitution (n 7) Article 24(5).

<sup>69</sup> The Prison Act 2012 BS (1963 AD) s 6(1).

<sup>70</sup> Evidence Act 2021 BS (1974 AD) Ch 3 s 9(2)(a)(1).

<sup>71</sup> See *Sachin Shresta v The Nepal Government NKP 2063*, Case: Drugs, Vol. 2, Pg 183 and Advocacy Forum and others, 'Review of the implementation of recommendations made by the Special Rapporteur, Manfred Nowak, after his mission to Nepal in 2005', (Kathmandu 2009), available at [http://www.advocacyforum.org/SubmissiontoNowak\\_28\\_August\\_Final.pdf](http://www.advocacyforum.org/SubmissiontoNowak_28_August_Final.pdf), accessed 28 June 2010.

### *The Situation in Nepal in Respect of Torture*

- 4.14 In his January 2006 report after his visit to Nepal, the UN Special Rapporteur on Torture stated that,

The Special Rapporteur concludes unequivocally that torture and ill-treatment are systematically practised in Nepal by the police, armed police and the RNA primarily to extract confessions and to obtain intelligence.<sup>72</sup>

In the addendum to his 2008 report to the Human Rights Council, the Special Rapporteur commented that ‘the torture and arbitrary detention of criminal suspects by police has persisted’.<sup>73</sup> This is in line with more recent Advocacy Forum research. According to an AF survey of 4,247 (419 females and 3,828 males; including 848 juveniles) detainees interviewed in 65 places of detention in 20 districts over the course of 2011, 24.8% of all detainees suffered torture while in custody.<sup>74</sup> That is 1,053 cases of documented torture, with an unknown number undocumented in the rest of the country.

- 4.15 The following is a torture account by a 48-year-old woman from Ramechhap District arrested with two others in January 2010 in connection with a murder:

The head SI was sitting outside the premises of the office where he started investigation with us. I was at first asked about the incident. I told the things that I knew. Then, they investigated [the other two people] and tortured them. Afterwards, the policemen took me to a room where they asked me to tell whether I had killed him and how I killed him. They made me sit on the floor and one of the policemen stood on my knee and another one beat me on the soles of my feet for around 80 to 90 times. I couldn’t count how often and fell unconscious. Then, they left me. After some time, I got up and we three were taken to have food. After having food, they again brought us back. Afterwards, the three policemen who were there for the check-up of the death body returned and had further investigation. They said my daughter had told them that I have killed him. I denied my involvement. One of the unidentified policemen in Madheshi language told others to take me to the room and beat me so I will speak truth. They took me to the kitchen room and in the same manner tortured me again and later they made me stand and with the same stick beat me on my hip. When I tried to avoid the attack I got hurt in my hands. My hands were swollen as a result. I counted till 12 times and couldn’t count further. Then, one unidentified policemen came and in Madheshi language said don’t beat her anymore or she will die and a case will be filed against him. Then, only he stopped torturing me. The police said tell the truth or he will put *sishnu* [nettle] leave in my vagina. I denied my involvement and they left the room verbally abusing me.

<sup>72</sup> Special Rapporteur (n 22) para 17.

<sup>73</sup> Nowak Addendum (n 23) para 456.

<sup>74</sup> Criminalize Torture (n 25) Pg 81.

4.16 A similar account was presented by a professional driver who was arrested in April 2009 in Surkhet district,

I was kept alone in a room and the police started to inquire about my involvement in the incident [a case of attempted murder]. In the evening a policeman came who started to ask about my involvement in the incident and others' involvement. I pleaded with him that I was innocent and didn't know any other accused in the case.... But he punched and kicked me on my chest, backside, and other parts of my body randomly for 10 to 15 minutes for not telling him the truth. Next morning, there came 5, 6 civil dressed policeman from Metropolitan Police Crime Branch (This I came to know later). Among them, one was [name] who pulled my hair for 4, 5 times during the interrogation. Then they blindfolded me and kept me alone in the same room. After a while, 2, 3 policemen asked me about my involvement...but I pleaded that I was innocent...Then a policeman said, 'He will not tell the truth without beating'. Then they started to punch and kick me randomly. They banged my head for 2, 3 times against the wall. Some 2, 3 policemen beat me randomly for 15 to 20 minutes and then left me alone. In this way they tortured me for 3 days. They used to torture me thrice a day. Even while going to the toilet I was kept with my hands tied on my backside. They used to tie my hands in the front only while eating food and only removed the blindfold while I was sleeping.<sup>75</sup>

4.17 The Torture Compensation Act fails to criminalise torture and instead merely contains a general prohibition of its use; in other words it fails to provide for any criminal sanctions for those who engage in torture.<sup>76</sup> Without punishments set out in law, the police have no fear of repercussions and continue to inflict torture. Whilst the act does call for examination of all detainees by government doctors "as far as possible", this is expressed in such equivocal terms as to be of only limited effect. When AF started to visit detention centres in 2001 the percentage of detainees who confirmed they had a medical check-up was 14.2%. This has improved significantly. For instance between April and June 2009, 85% of 1047 detainees visited by AF in 65 different detention centres confirmed they had been medically examined after they were taken into custody. By 2011, 93.3% of detainees confirmed they had been taken to see a doctor. There was however a compelling suggestion that the examinations that had taken place had been largely cursory. Furthermore, despite a requirement in the Torture Compensation Act, few medical check-ups are done at the time detainees are released from custody. Lately, because of the consistent interventions from organisations like AF and the courts' scrutiny, investigating agencies have started to maintain a document relating to physical check-up of detainees on file.

<sup>75</sup> AF Interview, Kathmandu (27 April 2009).

<sup>76</sup> The Torture Compensation Act (n 67) s 3(1).

- 4.18 In their joint submission to the Special Rapporteur on Torture AF, Redress, and the Association for the Prevention of Torture commented,

There nevertheless remain serious concerns about the way in which medical examinations are conducted. For example, in many cases, the police insist on being present, thereby preventing the detainee from speaking openly to the doctor for fear of reprisals; also, doctors often do not fully document the wounds they observe on the body out of fear of repercussions from the police, misplaced loyalties or because of a lack of knowledge and skills in medico-legal documentation. In addition, there are concerns that detainees are not provided adequate medication.<sup>77</sup>

- 4.19 This failure to conduct proper medical examinations and provide documentation can have very serious consequences; it undermines the ability of torture victims to make allegations against the police. This is partly because periods of detention are lengthy in Nepal. By the time that the victim is taken to court (which in practical terms may be his first opportunity to make an allegation of torture) the external wounds may have healed. It is only if that detainee has been competently examined by a doctor, at an early stage, that sufficient evidence will exist to prove torture.<sup>78</sup>

### *The Situation in Nepal in Respect of Other Rights*

- 4.20 The conditions of detention in Nepal are often poor. The Special Rapporteur after his visit to Nepal in 2005 noted that inadequate sanitation was usually provided and that cells were overcrowded.<sup>79</sup> He recognised that a lack of resources is probably to blame for this. In the 20 districts where AF visits detention places on a regular basis, it has found the same problem. When we interviewed the jailer of a prison he agreed that resources were a constant challenge. He said that sometimes the prison was so short of money the staff could not even afford to replace a light bulb. He also described the prison as being overcrowded and said that there was a lack of basic facilities (including toilets and washing facilities).<sup>80</sup>
- 4.21 This problem was further corroborated when we visited a jail to interview prisoners. They reported that the prison was seriously overcrowded with as many as 20 prisoners sharing a single cell. They explained that the prisoners often had to share a common bed.<sup>81</sup>

<sup>77</sup> Advocacy Forum and Others (n 27) Pg 15.

<sup>78</sup> Advocacy Forum and Others (n 27) Pg 21.

<sup>79</sup> Special Rapporteur (n 22) para 28.

<sup>80</sup> Interview with a Chief jailer, Kathmandu (18 November 2009) by Robert Cohen with Sarika Mishra.

<sup>81</sup> Interview with prisoners by Robert Cohen, Kathmandu Central Jail, 11 December 2009.

4.22 There has been recently a suggestion that prison conditions and some disciplinary measures used in Nepali prisons are particularly concerning. This issue was addressed by the Human Rights Committee in *Sobhraj v Nepal*. The Committee commented:

The Author has been held almost permanently in solitary confinement, with no possibility to challenge this decision; during the summer of 2008, he was put in isolation with shackles, on the ground that he had a disagreement with another prisoner; and because of inadequate and unsanitary conditions at Kathmandu Central Prison, as well as a lack of medical health care, the author's health condition has deteriorated dramatically....The Committee does not have enough elements to determine whether the treatment the author has been subject to amounts to a violation of article 10. It however finds that those conditions of detention, as described by the author, including placement in solitary confinement, shackling without a possibility to appeal, and alleged lack of access to appropriate health care, fail to respect the inherent dignity of the human person, in violation of article 10, paragraph 1, of the Covenant.<sup>82</sup>

4.23 A particular feature of jails in Nepal is that they practice a system of inmate control. In each prison the Prison Regulations permit the appointment of *chaukidars*, *naikes*, and assistant *naikes*. These trusted prisoners are given responsibility for a particular section of the jail.<sup>83</sup> The inmates we interviewed described them as being the principal authority within the prison.<sup>84</sup> One prisoner went so far as to say that he didn't know who was who amongst the official prison guards but that he regarded the *chaukidars* etc as the real rulers of the prison. This was demonstrated when we interviewed a *naike*. He was able to walk into the room unaccompanied and unhandcuffed (in contrast to all the other prisoners we met). He also gave instructions to other prisoners in the room which they followed without demur. This raises concerns that the environment within each jail is lawless. In such conditions it would be very easy for an atmosphere of bullying and intimidation to flourish. This was highlighted by the OHCHR-Nepal who commented that 'Additionally, *chaukidars* and *naikes* often abuse the power delegated to them in the prison regulations, creating internal rules that eventually result in the jailers' losing overall control of the jails'.<sup>85</sup> In *Silbert Daley v Jamaica* the Human Rights Committee made it clear that the obligation under article 10 includes a positive obligation to protect prisoners from other inmates.<sup>86</sup>

<sup>82</sup> No 1870/2009 (2010) UN Doc CCPR/C/99/D/1870/2009 para 7.7 available at <<http://www1.umn.edu/humanrts/undocs/1870-2009.html>>

<sup>83</sup> Prison Regulations 2020 BS (1963 AD) 10th Amendment 2061 BS (2004 AD) Rule 24(a).

<sup>84</sup> Interview with prisoners (n 83).

<sup>85</sup> OHCHR-Nepal 'Inside Prisons and the Rights of Detainees' (10 December 2008) Kathmandu, Nepal pg 3.

<sup>86</sup> No 750/1997 UN Doc CCPR/C/63/D/750/1997 (3 August 1998) para 7.6.

- 4.24 In Nepal, conditions in police custody generally are below international standards. When AF interviews detainees they nearly always report that they share a small cell with other people, that the toilets are dirty and broken, and the cells are unheated and cold in winter.<sup>87</sup>
- 4.25 The OHCHR in Nepal has issued reports, which support our findings.<sup>88</sup> It has conducted interviews with prisoners and prison staff who described the conditions in jail as ‘appalling’. They drew attention to the poor quality of medical facilities.<sup>89</sup> They commented that within jails there was no mechanism for the protection of detainees’ human rights.<sup>90</sup> They concluded that the lack of a professional corps of prison guards (currently security is provided by the police and the jailer is drawn from the civil service) contributed to this problem.<sup>91</sup>
- 4.26 If a suspect is remanded in custody whilst awaiting trial the Prison Act is not stringent enough to ensure his separation from convicted prisoners. The act simply requires that the two classes of detainees should be kept separate ‘as far as possible’.<sup>92</sup> The Supreme Court, in *Som Luitel on behalf of People’s Forum v. Home Ministry*,<sup>93</sup> has made this separation mandatory. However in practice the Nepali prison service does not make a distinction.<sup>94</sup> This is confirmed by the following interview with a chief jailer:

Advocacy Forum: Are convicted prisoners and those on remand segregated?

Jailer: No, although there is an Act covering this, there isn’t space. After all, the jail is 100 years old and we don’t have sufficient facilities.

AF: Is there any difference in the treatment that the two categories of prisoners receive?

J: No, the facilities are just the same for both.

AF: What about regime within the jail?

<sup>87</sup> Numerous AF visits to police stations and prisons in 20 districts.

<sup>88</sup> OHCHR-Nepal (n 82) pg 6.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid pg 5.

<sup>91</sup> Ibid pg 2.

<sup>92</sup> The Prison Act (n 71) s 6(1).

<sup>93</sup> Decided April 16, 2008, case number 2063 writ number 0646.

<sup>94</sup> *Sangroula Nepalese Legal System: Human Rights Perspective Kathmandu* (Kathmandu, 2005, 1st Edition, Kathmandu School of Law) pg 144.

J: No, everything is the same for both types of prisoners.<sup>95</sup>

4.27 The Standard Minimum Rules for the Treatment of Prisoners provide that untried prisoners 'shall benefit from a special regime'.<sup>96</sup> Because of the failure to segregate convicted and un-convicted inmates in Nepali prisons, both groups experience exactly the same regime.

4.28 In our opinion these failures cannot be justified as resulting from the "exceptional circumstances" provided for in Article 10 of the ICCPR (as explained in paragraph 4.7 above). Whilst we acknowledge that budgetary constraints might make full segregation impossible, we recall that the Human Rights Committee has not accepted that a lack of resources justifies breaching the Covenant.<sup>97</sup>

4.29 In the course of its work, AF frequently encounters police officers defending torture on the basis that they lacked the resources to conduct advanced forensics and therefore required torture to supplement their investigatory technique.<sup>98</sup> We remind the government of Nepal that the prohibition of torture is a peremptory norm of international law. It allows no derogation, and there can be no excuse for failure to comply. We entirely reject any attempt to justify non-compliance based on lack of funds which, in any event, is expressly rejected (in the admittedly less stringent but related context of Article 10) in *Mukong*<sup>99</sup> and confirmed by the Human Rights Committee in General Comment No. 21 where the Committee stated:

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.

4.30 While torture, cruel, inhuman and degrading treatment in any form cannot be condoned, we understand that more resources especially forensic laboratories and other technical requirements would assist in making police investigations, evidence oriented rather than confession oriented.

4.31 Another aspect of Nepal's prison system which gives grounds for concern is the practice of holding detainees outside of official detention facilities. Detention in

<sup>95</sup> Interview with a Chief jailer (n 82).

<sup>96</sup> UN Minimum Rules (n 58) rule 84(3).

<sup>97</sup> *Mukong* (n 10).

<sup>98</sup> See Inter Alia: Interview with a Surkhet Police Officer, Summer 2007. For: Asian Human Rights Commission Survey Report 'Policing Norms and Necessary Reforms: Are Police Adapting to the Changing Political Context in Nepal?' (2007) pg 5.

<sup>99</sup> *Mukong* (n 10).

unofficial places was routine during the armed conflict. It has since become less frequent. Nevertheless, AF has recently documented cases where the police detained suspects in un-marked, unofficial buildings. In October 2010, two men and a women arrested from Makwanpur were held in a private residence in Kathmandu where they were tortured over several days, before being taken to court and remanded into custody.<sup>100</sup> Unfortunately this is not an isolated incident. In Surkhet District, in April 2009, the police abducted two people on suspicion of the attempted murder of a government aid. The police blindfolded them and eventually flew them to Kathmandu where they were detained in a private house. Here the suspects where punched, kicked and beaten in an attempt to secure a confession.<sup>101</sup> This unlawful detention lasted four days. Any detention in an unofficial place is a violation of international and Nepali law. As the detainees interviewed by AF attest, detention in unofficial places creates an environment where torture or other ill-treatment is more likely.

4.32 In addition the practice of detaining and interrogating individuals in unofficial places of detention threatens access to justice. For example, it impacts on the right to prompt legal advice and (because of the lack of detention records or medical examinations) can make proving detention and any subsequent torture or ill-treatment more difficult. Detaining and interrogating individuals in unofficial places also allows police to circumvent the law requiring defendants to be presented before a judicial body within 24 hours, since the period of 24 hours only begins once they are registered at an official place of detention.<sup>102</sup> Transfer time often exceeds 24 hours because people are often detained and mistreated at unofficial detention facilities.

4.33 *General Comment 20* of the Human Rights Committee contains guidance on the issue of unofficial places of detention. It states that,

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.<sup>103</sup>

This confirms that utilising unofficial places of detention does not only increase the risk of torture or other ill-treatment, but that it is also, of itself, a breach of the ICCPR.

<sup>100</sup> Advocacy Forum, *Recent Trends and Patterns of Torture in Nepal*, July to December 2010, Pg 7-8, <<http://www.advocacyforum.org/download/pdf/publications/Briefing-July-to-Dec-2010-final.pdf>>

<sup>101</sup> AF Interview, Kathmandu, April 2009.

<sup>102</sup> The State Cases Act (n 18) s15(2).

<sup>103</sup> Human Rights Committee 'General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment' 10 March 1992 para 11.

## 5. The Right against Self-incrimination and the Prohibition of Coerced Confessions

### *International and Domestic Standards*

- 5.1 Article 14(3) of the ICCPR states: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...(g) Not to be compelled to testify against himself or to confess guilt'.<sup>104</sup> In *Paul Kelly v Jamaica* the Human Rights Committee clarified that the right against self incrimination included a right not to be forced to give a confession:

The wording of Article 14(3)(g)...must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.<sup>105</sup>

- 5.2 This protection is expanded by Article 15 of the CAT (considered above at paragraph 4.10) which provides for the exclusion of evidence gained through torture. The basis of this rule is the principle of 'tainted fruit of a poisonous tree' whereby any evidence gained through torture is taken to be irrevocably tainted. Perhaps for this reason the protection goes beyond the rights of the accused. As Nowak and MacArthur explain, 'it excludes any use of the tainted fruit...as evidence in any proceedings both judicial and non-judicial'.<sup>106</sup>
- 5.3 Article 24 of the Interim Constitution contains the right to remain silent, stating, 'no person accused of any offence shall be compelled to be a witness against oneself'.<sup>107</sup> In addition, the Evidence Act prohibits the use of coerced confessions. Section 9 of that Act reads,

Statements made by any accused in any criminal suit, in respect to the charges against him, at any place other than a court may be accepted by the court as evidence, provided it is satisfied that: the accused had not been forced to make such statements, or that such statements had been extorted by torturing or threatening to place him in a situation in which he was compelled to do so against his will.<sup>108</sup>

<sup>104</sup> ICCPR (n 5) Article 14(3)(g).

<sup>105</sup> No 253/1987 (17 October 1989) UN Doc CCPR/C/41/D/253/1987 para 5.5 available at <<http://www1.umn.edu/humanrts/undocs/session41/253-1987.html>>; see also *Conteris v. Uruguay* No. 139/1983 (17 July 1985) UN Doc Supp.No.40 (A/40/40) at 196 available at <<http://www1.umn.edu/humanrts/undocs/new%20scans/139-1983.html>>

<sup>106</sup> Nowak and MacArthur *The United Nations Convention against Torture: A Commentary* (OUP 2008) pg 504.

<sup>107</sup> Constitution (n 7) Article 24(7).

<sup>108</sup> Evidence Act 2021 BS (1974 AD) Ch 3 s 9(2)(a)(1).

The burden of proving torture under Section 9 lies with the defendant.<sup>109</sup> Although the prosecution carries the burden of ultimately proving a defendant's guilt, under Section 28 of the State Cases Act each defendant has to "convince" the court of the "specific fact" that a statement was not given freely. In practice, this means that forced confessions are routinely accepted unless the defendant is able to produce some compelling evidence demonstrating that coercion or torture took place. In other words, Nepali law, if not in law then at least in practice, reverses the burden of proof and expects detainees to prove that they were in fact tortured. This is in contrast to decisions of the Committee Against Torture which, in *GK v Switzerland*, confirmed that an applicant only needed to demonstrate that his allegations of torture were well founded, and therefore placed the burden of proof on the state.<sup>110</sup>

- 5.4 This issue is related to torture in the sense that the method of coercion employed by the authorities may amount to a breach of Article 7 (as discussed above in Section 4). However in this chapter we will focus entirely on the right of an individual to remain silent and not on the means that might be employed to extract a confession.

### *The Situation in Nepal*

- 5.5 Yubaraj Sangroula, in 2005 wrote in his book, *Nepalese Legal System: Human Rights Perspective*

The police and government lawyers...still believe in confession as a decisive evidence for conviction. The courts enjoy entertaining such evidence without much care about the Constitution, Evidence Act and other international instruments.<sup>111</sup>

This observation was made at the time of the armed conflict and demonstrated a widespread problem in Nepal at the time. The emphasis in police investigations was focused on confessions rather than other forms of evidence. This continues to be very common. It has two effects. In the first place it makes torture more likely. In the second, it undermines rule of law and the protection provided under Article 24(7) of the Interim Constitution leading to many innocent people languishing in prison.

<sup>109</sup> *Sachin Shresta v The Nepal Government NKP 2063*, Case: Drugs, Vol. 2, pg 183.

<sup>110</sup> No 219/2002 UN Doc CAT/C/30/D/219/2002 para 6.6, see also *P.E. v France* No 193/2001 UN Doc CAT/C/29/D/193/2001 available at <<http://www1.umn.edu/humanrts/cat/decisions/193-2001.html>>

<sup>111</sup> Sangroula Yubaraj (n 96) pg 149.

5.6 This issue has been the subject of conflicting decisions by the Nepali Supreme Court. In *Netra Bahadur Karki v His Majesty's Government* a murder suspect confessed to the crime in police custody, under duress, but later denied the allegations in court.<sup>112</sup> The Supreme Court held that an uncorroborated custodial confession is inadmissible at trial and cannot prove guilt 'beyond reasonable doubt' (the criminal burden of proof). They accordingly allowed his appeal. However, in *Sachin Shrestha v Nepal Government* the Court did allow an uncorroborated confession to remain in evidence.<sup>113</sup> The heart of this case concerned an unrelated issue of who the burden of proving that a confession had (or had not) been obtained by torture rested on. However, once that issue was settled, the Court proceeded to allow the evidence notwithstanding that it was uncorroborated. Even though the reason behind the point of departure is not mentioned in the decision in the latter case, a study of the two verdicts reveals that the presence of independent evidence refuting the custodial confession in the former case and the absence thereof in the latter seems to have guided the departure in the decisions.

## 6. Right to Prompt Legal Advice

### *International and Domestic Standards*

6.1 Article 14(3) of the ICCPR says,

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing...(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; [and] to be informed, if he does not have legal assistance, of this right...<sup>114</sup>

6.2 It is clear that in the complex field of criminal justice a trained lawyer should represent a lay person to ensure he receives a fair trial. The Human Rights Committee has clarified this. They stated in their Concluding Observations on Georgia 'all persons arrested must have immediate access to counsel'.<sup>115</sup> This view was further clarified in an addendum to that report where 'the Committee notes with disquiet that court proceedings do not meet the conditions required by article 14 of the Covenant, for

<sup>112</sup> NKP. 2062, Case: Murder, Decision No. 7555 pg 742.

<sup>113</sup> NKP 2063, Case: Drugs, Vol. 2, pg 183.

<sup>114</sup> ICCPR (n 5) Article 14(3)(b); Article 14(3)(d).

<sup>115</sup> Human Rights Committee 'Concluding Observations of the HRC: Georgia' (9 April 1997) UN Doc. CCPR/C/79/Add.74 para 28.

example, although the law provides for access to the assistance of counsel, in practice this is made difficult because of excessive bureaucracy'.<sup>116</sup>

6.3 *General Comment 32* of the Human Rights Committee has given guidance as to the effect of the article. The General Comment states,

The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.<sup>117</sup>

6.4 In *General Comment 32*, the Human Rights Committee explained:

What counts as "adequate time" depends on the circumstances of each case. If counsel reasonably feels that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.<sup>118</sup>

6.5 In addition to constituting a denial of the right to prompt legal advice, the Human Rights Committee has ruled that incommunicado detention can also constitute a violation of Article 7 of the ICCPR, which prohibits torture and other ill-treatment.<sup>119</sup> In *Yasoda Sharma v. Nepal* where the detainee was held incommunicado for nine days (before being killed by the army), 'The Committee conclude[d] that to keep the author's husband in captivity and to prevent him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant'.<sup>120</sup>

6.6 The Interim Constitution of Nepal guarantees the right to prompt legal assistance. Article 24(2) reads,

<sup>116</sup> Human Rights Committee 'Concluding Observations of the HRC: Georgia' (5th May 1997) UN Doc: CCPR/C/79/Add.75 at para 18.

<sup>117</sup> The Human Rights Committee, 'General Comment 32: Right to equality before courts and tribunals and to a fair trial' 23 August 2007 para 34.

<sup>118</sup> General Comment 32 (n 119) para 32.

<sup>119</sup> ICCPR (n 5) Article 7.

<sup>120</sup> No.1469/2006 (6 November 2008) UN Doc CCPR/C/94/D/1469/2006 para 7.2 available at <<http://www1.umn.edu/humanrts/undocs/1469-2006.pdf>>

The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.<sup>121</sup>

- 6.7 In an attempt to introduce further safeguards into the investigation process, the State Cases Act also requires that all statements made by the accused should be made in the presence of a Government Lawyer.<sup>122</sup> However, as found in a survey conducted in 2003 by the Centre for Legal Research and Resource Development ('CeLRRd'), investigating police officers often ignore these additional safeguards. According to that survey, 50% of suspects had their depositions recorded in the absence of government lawyers.<sup>123</sup> Report observes, 'instead of protecting the suspect's right of consulting the lawyer, the government lawyers are found actively supporting the police in evading the rights'.<sup>124</sup> This is of particular concern because presently neither audio nor video recordings of interrogations are made.

### *The Situation in Nepal*

- 6.8 Fundamental problems exist in Nepal in respect of the right to prompt legal advice. These problems broadly fall into two categories. The first concerns barriers to effective legal access that arise as a result of the conduct of the government of Nepal. The second (which will be discussed below in Section 7) concerns the inability of many Nepalis to afford competent counsel and the failures of the Nepali legal aid system.
- 6.9 It is particularly significant that so few detainees even know that the right to legal representation exists. AF's own survey shows that among 4,328 detainees, only 21.8% knew about their right to consult with a lawyer.<sup>125</sup> Despite the Supreme Court's ruling in *Netra Bahadur Karki v. His Majesty Government*, requiring that the police inform the detainees of their rights, there is still an institutional failure to ensure that those recently arrested are told that they are entitled to a lawyer.<sup>126</sup>
- 6.10 Immediate access to counsel is especially important in Nepal because of the widespread use of torture to secure confessions during the pre-trial detention period

<sup>121</sup> Constitution (n 7) Article 24(2).

<sup>122</sup> State Cases Act 1992 (n 18) s 3(9)(1).

<sup>123</sup> Center for Legal Research and Resource Development (CeLRRd) Baseline Survey on Criminal Justice System of Nepal (CeLRRd, Bhaktapur, Nepal: 2003) pg xvii.

<sup>124</sup> Sangroula (n 96) pg 144.

<sup>125</sup> Coalition Against Torture (n 25) pg 83.

<sup>126</sup> Cited in Sangroula (n 96) pg 142.

(as discussed in detail in Section 3 and 4). The frequency of police misconduct during the pre-trial period is best illustrated by statistics accumulated by AF. According to a survey that identified 844 instances of custodial torture in one year, 840 of those instances occurred before remand, during interrogation in the immediate period after being arrested.<sup>127</sup>

6.11 The culture amongst Nepali lawyers has been not to focus on the investigatory phase of the criminal justice system. Many lawyers believe that the legal representation commences at court along with the bail hearing. AF is the only organisation reaching out to detainees at pre-trial stage. AF reports elaborate on the difficulties that its lawyers face in custody. Police argue that lawyers' access is needed only to defend the case in the court. They argue that legal counsel at the pre-trial stage negatively effects the investigation as lawyers advise detainees to lie. Because of this attitude, AF lawyers are often prevented by police from visiting detainees at pre-trial stage. However, AF has challenged this and was able to convince the drafter of the Interim Constitution to include a provision ensuring access to legal counsel from the point of arrest.<sup>128</sup>

6.12 Whilst there has been a reduction in the rate of *incommunicado* detention since the end of the armed conflict and AF lawyers now conduct frequent visits to people in detention, there are still some areas of concern. For instance our research indicates that detainees are rarely allowed to meet with lawyers within the first 24 hours of their detention and that visits take place mostly in supervised conditions. We are concerned that the latter might compromise the confidential quality of such meetings and, in particular, it might also dissuade detainees from disclosing the fact of torture or other ill-treatment to their lawyers. There are no facilities for lawyers to visit detention centres at pre-trial stage and many lawyers do not go to detention to provide legal counselling to detainees complaining of police behaviour, lack of private space and lack of respect for lawyers. Similarly, even at the trial stage, consultation with legal counsel is often not confidential. When asked about this a senior jailer said:

Advocacy Forum: Are there facilities for lawyers to visit prisoners who are awaiting trial?

Jailer: Yes

AF: Are those visits supervised?

<sup>127</sup> Coalition against Torture (n 25) Pg 83.

<sup>128</sup> The Constitution (n 6), Article 24.2.

J: Yes

AF: Would it be possible for a lawyer or a prisoner to request an unsupervised visit?

A: No. The facilities don't exist for us to be able to allow this. There is no such place in the prison where it could happen.<sup>129</sup>

It needs to be noted that the Interim Constitution guarantees the right to consult a lawyer at the time of arrest, with further guarantee that such consultation and advice shall remain confidential.

## 7. The Right to Receive Free Legal Advice, if Needed

### *International and Domestic Standards*

7.1 Article 14(3)d of the ICCPR says that everyone has the right,

...To have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.<sup>130</sup>

Section 10 of Article 24 of the Interim Constitution holds that, 'indigent person[s] shall have the right to free legal aid in accordance with law'.<sup>131</sup>

### *The Situation in Nepal*

7.2 Due to widespread poverty in Nepal, the typical cost of legal advice is too high for many.<sup>132</sup> In such circumstances defendants have four options. They can receive free legal aid provided pursuant to the Legal Aid Act via the Legal Aid Committee; they can seek a *Vaitanik Wakil* (court appointed lawyer); they can request legal aid from the Nepal Bar Association or they can rely on some NGOs such as Advocacy Forum. For reasons of objectivity, in this report we have chosen to focus on the first three options.

<sup>129</sup> Interview with Senior Jailer (n 82).

<sup>130</sup> ICCPR (n 5) Art 14(3)d.

<sup>131</sup> Constitution (n 7) Article 24(10).

<sup>132</sup> The average cost of a lawyer for a criminal matter was suggested to be NPR10-50,000 in Mackenzie 'Trip Report: Institutionalizing a criminal, legal aid or "public defender" system in Nepal' USAID (30 May- 14 June 2006) pg 9.

7.3 It is important to note that whilst the Interim Constitution guarantees legal aid as a fundamental right, the government will only provide counsel if the defendant makes an explicit request. Those who are unaware of their constitutional rights or unfamiliar with the judicial system will likely be deprived of legal representation from the Legal Aid Committee, the court appointed lawyer system, and the Nepal Bar Association.

### The Legal Aid Act and Legal Aid Committee

7.4 The Legal Aid Act empowers the Legal Aid Committee to grant or deny free legal aid to those requesting it.<sup>133</sup> The Committee has instituted rules governing the circumstances in which legal aid is available. One of these rules prevents a detainee from receiving legal aid unless they earn less than NPR 40,000 per year.<sup>134</sup> According to research conducted by the environmental think tank World Resources Institute, 82.5% of the population in Nepal lives on less than two dollars per day<sup>135</sup> (this is regarded by the World Bank as a measure of moderate poverty).<sup>136</sup> At current exchange rates two dollars per day, represents an annual income of NPR 60,991.<sup>137</sup> Whilst it is true that some of the population within this group will fall within the legal aid band there are inevitably some who do not. On this basis there are persons in poverty in Nepal who do not qualify for legal aid.

7.5 In addition, the Legal Aid Committee rules (ratified by the Law Ministry) explicitly deny free legal assistance to non-Nepali citizens. This rule denies legal aid to some of Nepal's most vulnerable residents such as Bhutanese and Tibetan refugees. According to the United Nations High Commissioner for Refugees ("UNHCR"), there are 89,808 refugees and 938 asylum seekers.<sup>138</sup> That is a total of 109,439 UN-documented people living in Nepal without citizenship who cannot receive legal aid. On this point the Human Rights Committee has stated in *General Comment 15* that 'once aliens are allowed to enter the territory of a state party they are entitled to the rights set out in [the ICCPR]'.<sup>139</sup> It is also a breach of Article 16 of the Refugee

<sup>133</sup> Legal Aid Act 2054 BS (1997 AD) s 3.

<sup>134</sup> Legal Aid Committee Rules 2055 BS (1998 AD) Rule 6.

<sup>135</sup> World Resources Institute 'Earth Trends Report' (2003) <[http://earthtrends.wri.org/pdf\\_library/country\\_profiles/eco\\_cou\\_524.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/eco_cou_524.pdf)>

<sup>136</sup> The World Bank 'The Developing World is Poorer than we thought, but no less successful in the fight against poverty' Policy Research Working Paper 4703 (August 2008).

<sup>137</sup> NPR 84.70 to USD1, Government approved exchange rate for 9 May 2012, Published on the front page of The Kathmandu Post.

<sup>138</sup> United Nations High Commissioner on Refugees website, Nepal: Country Operations Profile, <<http://www.unhcr.org/pages/49e487856.html>> updated January 2011 accessed 12 May 2012.

<sup>139</sup> Human Rights Committee 'General Comment No. 15' (11 April 1986) para 1.

Convention 1951 (although Nepal is not currently a signatory).<sup>140</sup> As such the refusal to grant legal aid to non-Nepalis is a breach of the Covenant. This has particular relevance to the right to equality before the law (discussed below at Section 8).

- 7.6 There are also practical objections to the way in which the legal aid system operates. In order to qualify for aid the accused must obtain a 'low income certificate' from their local government authority.<sup>141</sup> This certificate is then presented to the detainee's district legal aid committee. At present technically speaking all 75 districts have established such committees.<sup>142</sup> However, not all these committees are functional. It is only possible to get the requisite 'low income certificate' from one's local government. Whilst a lawyer or family member can make the application on behalf of the detainee that process will inevitably take longer if it occurs 'cross-district'. This means that it becomes exceptionally unlikely that indigent defendants who were arrested away from home will receive any legal advice until their trial. There are also 800,000 people in Nepal who are entitled to citizenship but who have never been registered.<sup>143</sup> In these circumstances it is impossible to get a low income certificate without significant bureaucratic procedure. In practical terms this is likely to delay the provision of legal aid so much as to render the defendant unrepresented.
- 7.7 The fund of this legal aid system has been very limited. For instance, in the financial year 2004/5 the total budget was only NPR 1,400,000.00. This had to be shared between each district, which in practice meant that each district on average only received NPR 44,000 (\$594 at present exchange rates) whereas the need for legal aid is immense.<sup>144</sup> For the fiscal year 2068/69, the government has substantially increased the allocation to NRs. 8,000,000.00 for the central legal aid committee. Still, this remains a challenge. The legal aid department of Advocacy Forum alone represented 467 detainees in different courts across the country in 2011.<sup>145</sup>
- 7.8 We welcome the increase in legal aid provision through the Legal Aid Committees. We do not consider however that it will solve all the problems of legal aid in Nepal. The existing bureaucratic inefficiencies are likely to continue, as is the existing low threshold, and the problems of being arrested in a district other than one's home. It

<sup>140</sup> Convention relating to the Status of Refugees (Adopted 1951, entered into Force 22 April 1954) 189 UNTS 150 Article 16.

<sup>141</sup> Legal Aid Committee Rules (n 136) Rule 6.

<sup>142</sup> Information from the Nepal Bar Association Home page, <http://www.nepalbar.org/pro.html>

<sup>143</sup> UNHCR (n 140).

<sup>144</sup> Surendra Bhandari & Buddhi Karki 'Study of the Current Legal Aid System in Nepal' (2 September 2005, USAID)

Pg 19 N.B. in that financial year only 33 districts had committees.

<sup>145</sup> Advocacy Forum 'Annual Report- 2009' (Advocacy Forum, Kathmandu).

is our opinion that until these situations are remedied then there will be significant problems associated with the Legal Aid Act.

### *'Vaitanik Wakil'* (Court Appointed Lawyers)

- 7.9 If a detainee, as an alternative to relying on the Legal Aid Act, decides to seek a court appointed lawyer, the system is far more predictable in the sense that each court in Nepal has, at least, the same system in place. Despite this predictability, as a district judge we interviewed put it, 'legal aid appointed by the court is not effective'.<sup>146</sup> There are a number of reasons for this.
- 7.10 Firstly, there is only one court appointed lawyer for each court in the country. They are required to act in both civil and criminal cases. In Kathmandu for example, 13 benches all operate simultaneously within the District Court complex. This makes it impossible for the court appointed lawyer to represent everyone who needs him; the demand is simply so high. For instance when interviewed by Stephen Mackenzie, a lawyer undertaking research for USAID observed, 'Each of the...lawyers indicated a caseload of 80-100 open files at any given time'.<sup>147</sup>
- 7.11 Secondly, a senior district judge we interviewed indicated that court appointed lawyers were unlikely to receive any of the documents in the case until the moment they came into court to argue that case.<sup>148</sup> This renders it almost impossible for the lawyer to provide effective presentation or advice. This concern was echoed by USAID.<sup>149</sup>
- 7.12 Until recently these lawyers were paid very poorly, only receiving NPR 2000/- per month. This means that most of these lawyers 'are young, inexperienced and beginners'.<sup>150</sup> As the USAID report acknowledged, 'the quality of service always depends on the quality of the service provider'.<sup>151</sup> It is not surprising that a system which can only afford the least experienced lawyers does not function as well as we would hope and expect.
- 7.13 However, from this fiscal year (2011/12) this policy has been revised and remuneration for the court appointed lawyers has been increased significantly.

<sup>146</sup> Interview with a district judge (21 July 2009), Kathmandu, interview by Marc Zemel translated by Ambar Raut.

<sup>147</sup> Mackenzie 'Trip Report, Institutionalizing a criminal legal aid, or "public defender" system in Nepal' 30 May – 14 June 2006, Pg 9.

<sup>148</sup> Interview with a district judge (n 149).

<sup>149</sup> Bhandari & Karki (n 146 ) Pg 25.

<sup>150</sup> Bhandari & Karki (n 146) Pg 25.

<sup>151</sup> Bhandari & Karki (n 146) Pg 25.

With the onset of the reform initiative based on the Strategic Plan of the Nepali Judiciary, the lawyers appointed at the Supreme Court get a remuneration equivalent to that of a gazetted second class officer which is around NRs. 21,000/- (US\$ 263) while at the Court of Appeal and District Court level they get remuneration equivalent to that of gazetted III class officer which is around NRs. 18,000 (US\$ 225). They are now given an expanded terms of reference where they are required to write plaint, defence and appeal as well as argue the case on their behalf. Besides, as they are considered as court officers, they face no problem in accessing the case file.<sup>152</sup>

- 7.14 However, after the increase in remuneration, distortions are appearing in a few areas. For instance in some courts, the local Bar units have begun pocketing huge commissions (in one instance almost half the salary). And in some instances they recommend the name of the highest bidder to the court and when the court declines to appoint such lawyer, they boycott the judge's bench. For example, this occurred at Mahendranagar Court of Appeal. This seriously compromises the quality of the lawyer and in the ultimate analysis impacts upon the practice of fair trial.

### **Legal Aid from Nepal Bar Association**

- 7.15 The final category of legal aid is that provided by the Nepal Bar Association. Whilst this scheme is invaluable, it still has significant problems. In the first place it relies on international donors for funding. This means that its long-term future is not guaranteed. Secondly, the lawyers who take part in this scheme are necessarily equally committed to private practice. The USAID study concluded that the lawyers 'always give priority to their clients and give less time for the preparation of the case under legal aid'.<sup>153</sup>

<sup>152</sup> Rule 95, District Courts Rules (2049), Rule 105 A, Appellate Court Rule (2048), Rule 111 A, Supreme Court Rule (2049).

<sup>153</sup> Bhandari & Karki (n 146) Pg 34.

## **B**

# **RIGHTS AT TRIAL**

## **8. The Right to Equality Before the Law and Courts**

### *International and Domestic Standards*

- 8.1 The right to equality before the law is contained in the ICCPR. Article 2(1) establishes the foundation. It states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>154</sup>

- 8.2 Article 26 asserts that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>155</sup>

- 8.3 Article 14 further confirms that 'All persons shall be equal before the courts and tribunals'.<sup>156</sup> It continues (at Article 14(3)):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the

<sup>154</sup> The ICCPR (n 5) Article 2.

<sup>155</sup> The ICCPR (n 5) Article 26.

<sup>156</sup> The ICCPR (n 5) Article 14(1).

charge against him... (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>157</sup>

- 8.4 In their *General Comment 32* the Human Rights Committee provided further commentary on this Article 14. They commented that

The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.<sup>158</sup>

- 8.5 In its *General Comment 18*, the Human Rights Committee defined discrimination as:

Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>159</sup>

This does not require that every person should be treated identically, as was confirmed by the Human Rights Committee in *General Comment 18* where it said:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant... as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>160</sup>

In fact, the ICCPR itself recognises distinctions in treatment. For instance Article 10(3) of the Covenant requires the segregation of adult and juvenile convicts.<sup>161</sup>

- 8.6 Another vital aspect of the right to equality is the principle of equality of arms. This means that both parties to the case should be treated in a manner ensuring they are procedurally equal. This right is of particular significance in criminal proceedings. In such cases the prosecution (in the form of the state) can be assumed to have significantly greater resources than the defendant. The Human Rights Committee has observed,

That the principle of equality of arms implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments,

<sup>157</sup> The ICCPR (n 5) Article 14(3).

<sup>158</sup> General Comment 32 (n 119) para 8.

<sup>159</sup> The Human Rights Committee 'General Comment 18: Non-Discrimination' (10 November 1989) para 7.

<sup>160</sup> General Comment 18 (n 162) para 10.

<sup>161</sup> ICCPR (n 5) Art. 10(3).

which, in turn, requires access to the documents necessary to prepare such arguments.<sup>162</sup>

- 8.7 This principle has even been cited by the Human Rights Committee as supporting the right to have a translation of proceedings provided. It said in *General Comment 32*:

In exceptional cases, it [the principle of equality between parties] also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.<sup>163</sup>

- 8.8 Nevertheless the rigour of this principle was somewhat compromised later in the same General Comment,

The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.<sup>164</sup>

- 8.9 Article 13 of the Interim Constitution guarantees the right to equality in Nepal. It states that: 'All citizens shall be equal before the law. No person shall be denied the equal protection of the laws'.<sup>165</sup> Similarly, this constitutional right to equality before the law incorporates the principle of equality of arms.<sup>166</sup>

- 8.10 However this provision of the Interim Constitution should be considered in the light of the caveat provided by the Human Rights Committee in *General Comment 18* that,

States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies.<sup>167</sup>

<sup>162</sup> *Perterer v Austria* No. 1015/2001 (20 July 2004) UN Doc CCPR/C/81/D/1015/2001 para 10.6.

<sup>163</sup> General Comment 32 (n 119) para 13-14.

<sup>164</sup> General Comment 32 (n 119) para 40.

<sup>165</sup> The Constitution (n 7) Article 13.

<sup>166</sup> The Constitution (n 7) Art 13.

<sup>167</sup> General Comment 18 (n 162) para 9.

*The Situation in Nepal*

- 8.11 We have already considered the unsatisfactory nature of the legal aid system in Nepal.<sup>168</sup> In *General Comment 32* the Human Rights Committee considered the particular importance of legal representation to equality of arms. It commented that, ‘the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way’.<sup>169</sup> For this reason, our conclusion that significant groups of people in poverty don’t qualify for legal aid is important to the issue of equality.<sup>170</sup> Some unrepresented parties manage to secure lawyers from NGOs but others remain without legal advice. We interviewed a member of the Nepali judiciary who confirmed that there was no change to trial procedure when a defendant was unrepresented.<sup>171</sup> We believe that as well as suffering the inherent detriment of not receiving legal advice, unrepresented parties are also more likely to suffer discrimination in the Nepali Courts. This is because the vulnerable groups are statistically more likely to be unrepresented and, without a lawyer, will not be well equipped to enforce their constitutional protection from discrimination.
- 8.12 This discrimination is largely indirect. This means that the law does not set out to draw an unlawful distinction but achieves such a distinction unintentionally. This, for instance, arises in Nepal because low caste individuals (Dalits) tend to experience greater poverty.<sup>172</sup> As such they are less likely to be able to afford legal advice, and more likely to rely on the legal aid system. The deficiencies of that system will therefore have a more significant impact on Dalits. We believe that this is indirect discrimination contrary to Nepal’s obligations under the ICCPR. Nepal has acknowledged the risk of such discrimination against children and the elderly. To that end, the Children’s Act forbids criminal proceedings taking place against a child until the court has appointed a lawyer.<sup>173</sup> The Senior Citizen Act provides similarly for those over 60.<sup>174</sup> However, to date no such provisions have been put in place to protect Dalits, women, the disabled, or other vulnerable groups.
- 8.13 The problem of discrimination is heightened when one considers that Dalits are significantly more likely to be illiterate than other groups in the population.<sup>175</sup>

<sup>168</sup> See above at Section 7.

<sup>169</sup> General Comment 32 (n 119) para 10.

<sup>170</sup> See above at para 7.4.

<sup>171</sup> Interview with a district judge (n 149).

<sup>172</sup> Do and Iyer ‘Poverty, Social Divisions and Conflict in Nepal’ (May 2007) World Bank Policy Research Working Paper Pg 26.

<sup>173</sup> The Children’s Act 2048 BS (1992 AD) s 19.

<sup>174</sup> The Senior Citizen Act 2063 BS (2007) s 10.

<sup>175</sup> Bhattachan, Sunar and Bhattachan ‘Caste-based Discrimination in Nepal’ Indian Institute of Dalit Studies (Working Paper Series Vol. III, 2009) para 5.1.

Similarly rates of literacy amongst women are 27.6% lower than amongst men<sup>176</sup>, and the Committee on the Elimination of Discrimination Against Women ('CEDAW') expressed concern in its 2011 *Concluding Observations on Nepal* about the low illiteracy rate among adult women in Nepal.<sup>177</sup> We believe that it is unreasonable to expect the illiterate to represent themselves in court proceedings; whilst such proceedings are oral, they naturally generate a great deal of written material. We are of the opinion that it is vital that the illiterate are legally represented and given free legal representation where necessary.

8.14 Within Nepal there is enormous linguistic diversity. Only 47.8% of the population speak Nepali as a first language.<sup>178</sup> Whilst a great deal of the remaining population will have, at the very least, a functional understanding of Nepali there are some for whom the language is practically incomprehensible. Whilst the Interim Constitution provides that any language spoken as a mother tongue in Nepal is an official language it also holds that Nepali in Devnagari script is the official language of the nation.<sup>179</sup> This means that courts (as official state bodies) exclusively use Nepali. In these circumstances court proceedings are likely to be very daunting for those who do not use Nepali as a mother tongue. This is especially true if such persons do not have a lawyer. In our opinion this indirectly discriminates against such defendants on the grounds of language or ethnicity.

8.15 Members of the judiciary have explained to AF that on the occasions when the defendants do not speak Nepali as a first language they try to provide a translator. They explained that these translators were unpaid and were actually court staff or lawyers who happened to be able to speak the language.<sup>180</sup> The reliability of such amateur, voluntary translators is questionable. The availability of such translators is also limited. This situation was canvassed by the Human Rights Committee in their recent decision in *Sobhraj v Nepal*. They commented that:

The importance of this principle has also been emphasized in the Committee's jurisprudence where it considered that the right to a fair trial implies that the accused be allowed, in criminal proceedings to express himself in the language in which he normally expresses himself, and that the denial of an interpreter constitutes a violation of article 14, paragraph 3 (e) and (f). In the present case, the

<sup>176</sup> Acharya 'Democracy, Gender Equality, and Women's Literacy: Experience from Nepal' (UNESCO, Kathmandu, 2004) pg 12.

<sup>177</sup> Committee on the Elimination of Discrimination Against Women 'Combined second and third periodic report, Nepal, Concluding Observations: 49th Session' UN Doc CEDAW/C/NPL/CO/4-5 para 27.

<sup>178</sup> The CIA World Factbook 'Nepal' available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/np.html>> accessed 26 November 2009.

<sup>179</sup> The Constitution (n 7) Article 5(2).

<sup>180</sup> Discussion with judges (n 52).

Committee considers that the author's lack of access to an interpreter from the time of arrest and during the District Court hearings...not only violates the two provisions cited above but also violates the right to a defence, under article 14, paragraph 3 (a), (b) and (d), of the Covenant.<sup>181</sup>

- 8.16 It has also been reported that there are occasions when the lawyers for the defendants will not receive any of the papers in a case until the day of the trial,<sup>182</sup> a practice which AF has seen to be widespread.<sup>183</sup> This renders it practically impossible for the defence lawyer to effectively test the prosecution case. This seems to be a clear breach of the principle of equality of arms. This analysis conforms with *General Comment 32* in which the Human Rights Committee explained:

Subparagraph 3 (b) [of article 14] provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.<sup>184</sup>

- 8.17 The rights of foreign nationals who are detained by the Nepali criminal justice system also give cause for concern. The current system prevents citizens from other countries receiving legal aid. Having in mind the view of the Human Rights Committee that foreign nationals should still benefit from the rights set out in the ICCPR, we are of the opinion that this direct discrimination is in violation of Article 2(1) of the ICCPR which prohibits discrimination based on nationality.<sup>185</sup>

## 9. The Right to a Fair and Public Hearing

### *International and Domestic Standards*

- 9.1 The ICCPR states that: 'In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing...'<sup>186</sup>

<sup>181</sup> Sobhraj (n 84) para 7.2.

<sup>182</sup> See para 7.1.

<sup>183</sup> Second court visit by Robert Cohen to Kathmandu District Court (4 December 2009).

<sup>184</sup> General Comment 32 (n 119) para 32.

<sup>185</sup> See above para 7.5.

<sup>186</sup> ICCPR (n 5) Article 14(1).

9.2 The Human Rights Committee has recognised that a fair hearing requires the observance of a number of different rights, including *inter alia* that trials should take place expeditiously, recognising the presumption of innocence, the right to legal representation, and respect for the adversarial nature of proceedings.<sup>187</sup> It should not be assumed that meeting these standards necessarily results in a fair trial. As Amnesty International has put it, 'The right to a fair trial is broader than the sum of the individual guarantees.'<sup>188</sup>

9.3 In *General Comment 32* the Human Rights Committee also considered the issue of courts practising customary or religious law. They commented:

Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrust them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant.<sup>189</sup>

9.4 Another important aspect of this right is that criminal trials should take place in public. In *General Comment 32* the Human Rights Committee gave a full explanation of this element of the right:

All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, *inter alia*, the potential interest in the case and the duration of the oral hearing.

9.5 Within Nepal, Article 24 of the Interim Constitution guarantees the right to a fair trial, the presumption of innocence, and the right to remain silent.<sup>190</sup>

9.6 Hearings are generally open to the public except for certain offenses such as human trafficking and rape, which are always tried *in camera*, so no members of the public

<sup>187</sup> General Comment 32 (n 119) paras 23-30.

<sup>188</sup> AI Fair Trials Manual (n 3) Pg 82.

<sup>189</sup> General Comment 32 (n 119) para 24.

<sup>190</sup> The Constitution (n 7) Art 24.

are permitted to observe. A schedule of the day's proceedings, including the name of the defendant and nature of the crime, is posted outside each courtroom at the District, Appeal, and Supreme Court in Kathmandu. At the Kathmandu District Court the schedule of hearings for the week is posted on a board near the inside of the entrance to the court complex. At the Supreme Court, visitors must get a badge from security in order to sit in on one hearing per day.

- 9.7 The criminal justice system in Nepal operates in a unique way. After the investigation is complete the State Cases Act requires the police to hand a report to the public prosecutor.<sup>191</sup> If the public prosecutor believes that the case merits prosecution he then submits a charge sheet to the 'competent judicial authority'.<sup>192</sup> The trial proceedings then commence with the *Thunchhek Ades* (jail/ bail hearing). This begins with the registration of the charge sheet and then involves the recording of the defendant's evidence. The court then considers legal argument from both parties as to whether or not bail should be granted.
- 9.8 Prior to the *Sunuaai* (final hearing), witness depositions are held. These take place in the court and in the presence of the lawyers. Once all the evidence has been recorded the final hearing is scheduled. At this hearing both the prosecution and defence speak. After that the judge makes a final determination of the facts and records a verdict. Sentencing then follows. There is no jury system.

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- 9.9 AF lawyers when attending District Courts have recorded how these provisions function in practice. It is commonplace for several different proceedings to take place at once before a single judge. In one example the judge was giving his full attention to a murder trial, at the same time the clerk of the court was recording the deposition of a defendant in another case who was charged with attempted murder, and on the other side of the court another clerk was recording a witness deposition in another unrelated case. At one point another defendant was brought into the court in handcuffs. He had been recently arrested and was to be remanded in custody. The judge paused the murder trial and remanded him after a hearing lasting no longer than five minutes.<sup>193</sup> Interviews with judges<sup>194</sup> confirmed that this practice is widespread. We are concerned that this procedure significantly limits the rights of the various defendants to have their cases judicially scrutinised. Whilst every

<sup>191</sup> State Cases Act (n 18) s 17.

<sup>192</sup> State Cases Act (n 18) s 18.

<sup>193</sup> First court visit by Robert Cohen to Kathmandu District Court (25 November 2009).

<sup>194</sup> Discussion with judges (n 52).

defendant can expect that his case will, eventually, receive the full attention of a judge (at the final hearing stage) this is not sufficient. We are of the view that the early stages of proceedings do not take place ‘in court’ in anything other than a literal sense of the term. The Convention requires that a defendant should have the full and uninterrupted attention of a judge, court staff and lawyers in their particular case. This requirement is not met simply by having a number of proceedings take place in the presence (but not with the attention) of a judge. Whilst this particular circumstance has not been considered by the Human Rights Committee, the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia considered an analogous situation in the *Celebici Appeal*.<sup>195</sup> In this case the appellants alleged that one of the trial judges had fallen asleep in the course of the trial. The Appeals Chamber commented:

No precedent in the international context was cited in relation to the specific issue raised by this ground of appeal, and none has been discovered by the Appeals Chamber’s own research. Guidance as to the legal principles relevant to an allegation that a trial judge was not always fully conscious of the trial proceedings may therefore be sought from the jurisprudence and experience of national legal systems. The national jurisprudence considered by the Appeals Chamber discloses that proof that a judge...was not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of proceedings to such a degree as to give rise to a right to a new trial or other adequate remedy.<sup>196</sup>

In the present case it seems clear that no judge can have been attentive to all the cases taking place and, as such, the right to a fair trial is jeopardised. The judges we discussed the issue with shared this view. They felt that a lack of resources was to blame.<sup>197</sup>

- 9.10 Furthermore, the nature of proceedings (in which the defendant’s deposition was taken whilst another case was being heard) prevented the defendant’s lawyers from hearing the deposition. The deposition in question is particularly important. It is the only opportunity that the defendant gets to give evidence, and their first opportunity to rebut any confessions given under duress. This is the accepted practice in the Nepali courts that the defendant’s deposition should not be interrupted by their lawyers.<sup>198</sup> Whilst judges<sup>199</sup> and academics<sup>200</sup> are of the view that lawyers are entitled to interrupt, lawyers say that this is difficult in a crowded

<sup>195</sup> The ICTY The Hague 20 February 2001, JL/P.I.S./564-e para 625.

<sup>196</sup> The ICTY (n 198) para 596.

<sup>197</sup> Discussion with judges (n 52).

<sup>198</sup> Statements by Raut and Rai (n 212).

<sup>199</sup> Discussion with judges (n 52).

<sup>200</sup> Interview with Prakash KC, Kathmandu School of Law (11 December 2009).

and busy court. This deprives defendants of the right to legal representation at a crucial stage of the case and therefore possibly deprives them of a fair trial.

- 9.11 Finally, police are invariably present in court when a defendant gives his statement to the court clerk.<sup>201</sup> The police in question may have been involved with investigating the offence and it seems possible that their presence might place undue pressure on the defendant. Although the Nepali Supreme Court in a General Order has explicitly forbidden this practice it remains common.<sup>202</sup> Members of the judiciary have commented that they consider themselves unable to direct the police on questions of security.<sup>203</sup>

## 10. The Right to Trial by a Competent, Independent and Impartial Tribunal

### *International and Domestic Standards*

#### **Absolute Nature of the Right**

- 10.1 Article 14 of the ICCPR asserts that the fair trial must be ‘...by a competent, independent and impartial tribunal established by law’.<sup>204</sup> This right is unqualified and cannot be derogated from. As the Human Rights Committee stated in *Gonzalez del Rio v. Peru*, ‘The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception’.<sup>205</sup>

#### **Definitions**

- 10.2 The meaning of tribunal was defined by the Human Rights Committee in its *General Comment 32*:

The notion of a ‘tribunal’ in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.<sup>206</sup>

<sup>201</sup> First court visit (n 196) and second court visit (n 172).

<sup>202</sup> General Order of Supreme Court No 6 (11/13/2015 ) 2016 Nepal Law Reporter.

<sup>203</sup> Discussion with judges (n 52).

<sup>204</sup> ICCPR (n 5) Article 14(1).

<sup>205</sup> No 263/1987 (28 October 1992) UN Doc CCPR/C/46/D/263/1987 para 5.1.

<sup>206</sup> General Comment 32 (n 119) para 18.

10.3 The same document also provided definitions of a number of other important concepts including 'independence' about which the Human Rights Committee said:

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.<sup>207</sup>

10.4 In relation to 'impartiality' the Human Rights Committee concluded that:

The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.<sup>208</sup>

10.5 In respect of the question of impartiality, the Human Rights Committee stated in *Karttunen v. Finland* that impartiality, 'implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties'.<sup>209</sup>

### Selection of Judges

10.6 As for the selection process for judges in criminal cases, the Human Rights Committee has emphasised the need to select judges based on their legal qualifications and merits. In its Observations on the United States of America's compliance with the ICCPR, the Human Rights Committee expressed deep concern that 'in many rural areas justice is administered by unqualified and untrained persons'.<sup>210</sup>

<sup>207</sup> General Comment 32 (n 119) para 19.

<sup>208</sup> General Comment (n 119) para 21.

<sup>209</sup> No. 387/1989 (23 October 1992) UN Doc CCPR/C/46/D/387/1989 para 7.2 available at <<http://www1.umn.edu/humanrts/undocs/dec38746.pdf>>

<sup>210</sup> Human Rights Committee 'Observations of the HRC: USA' (7 April 1995) UN Doc CCPR/C/79/Add.50 paras 23 and 36.

10.7 Additionally, the Human Rights Committee has expressed concerns where a country's methods of selection tend to unreasonably discriminate against particular groups. For instance, in their 'Concluding Observations on Sudan', the Human Rights Committee did not find the judiciary independent, stating:

The Committee is concerned that in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications, that judges can be subject to pressure through a supervisory authority dominated by the Government, and that very few non-Muslims or women occupy judicial positions at all levels.<sup>211</sup>

### Appointment and Dismissal of judges

10.8 A number of international instruments are relevant to the appointment of the judiciary including the 'Basic Principles on the Independence of the Judiciary',<sup>212</sup> and the Bangalore Principles of Judicial Conduct 2002.<sup>213</sup> All these guidelines include a common thread, that the involvement of the executive in judicial appointments compromises judiciary's independence, and that appointment panels should be comprised of other members of the judiciary.

10.9 Indeed, the manner in which judges can be appointed and dismissed has caused the Committee some concern. In their 'Concluding Observations on Belarus', the Human Rights Committee stated:

The Committee notes with concern that the procedures relating to tenure, disciplining and dismissal of judges at all levels do not comply with the principle of independence and impartiality of the judiciary. The Committee is particularly concerned that the judges of the Constitutional Court and Supreme Court can be dismissed by the President of the Republic without any safeguards.<sup>214</sup>

By analogy any situation in which the executive is able to control the appointment of judges without any requirement of due process breaches the requirements of the ICCPR as is confirmed by the Human Rights Committee's *General Comment 32*

<sup>211</sup> Human Rights Committee 'Concluding Observations of the HRC: Sudan' (19 November 1997) UN Doc CCPR/C/79/Add.85 para 21.

<sup>212</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>213</sup> The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

<sup>214</sup> Human Rights Committee 'Concluding Observations of the HRC: Belarus' (19 November 1997) UN Doc CCPR/C/79/Add.86 para 13.

(at paragraph 10.3) providing as it does that the requirement of independence is especially relevant to the appointment of judges.

10.10 The Committee has further clarified that,

A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.<sup>215</sup>

### Domestic Law and Practices

10.11 Article 24 of the Interim Constitution protects this right. Article 24(9) states ‘every person shall be entitled to a fair trial by a competent court or judicial authority’.<sup>216</sup> Article 33 emphasises the importance of the independence of the judiciary, guaranteeing that: ‘The State shall have the following responsibilities: (c) To adopt a political system that fully abides by the universally accepted concept of...independence of judiciary.’<sup>217</sup> Article 100 continues: ‘(1) Powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, the laws and the recognized principles of justice. (2) Following the concept, norms and values of the independent judiciary...’<sup>218</sup>

10.12 In Nepal the Chief Justice is appointed by the President on the advice of the Constitutional Council, the Chief Justice then appoints the other judges on the advice of the Judicial Council.<sup>219</sup> The Constitutional Council is composed of the Prime Minister, the Chief Justice, the Speaker of Parliament and three ministers chosen by the Prime Minister.<sup>220</sup> The Judicial Council consists of the Chief Justice, the Minister of Justice, a Senior Advocate or Advocate with at least twenty years experience, a jurist nominated by the Prime Minister, and the senior most Justice of the Supreme Court.<sup>221</sup> There are also opportunities for Parliamentary committees to examine judicial candidates.

10.13 Once appointed there are two methods by which Nepali judges can be disciplined. Firstly, Supreme Court Justices can be impeached by the legislature (although the

<sup>215</sup> General Comment 32 (n 119) para 20.

<sup>216</sup> Constitution (n 7) Article 24(9).

<sup>217</sup> Constitution (n 7) Article 33(c).

<sup>218</sup> Constitution (n 7) Article 100(2) and (3).

<sup>219</sup> Constitution (n 7) Article 103.

<sup>220</sup> Constitution (n 7) Article 149.

<sup>221</sup> Constitution (n 7) Article 113.

legislature has not exercised this authority since the early 1990s).<sup>222</sup> Secondly, all other judges can be subject to inquiry, suspension, and removal by the Judicial Council.<sup>223</sup> The Interim Constitution also contains detailed provisions regarding the Commission for the Investigation of Abuses of Authority and extends the jurisdiction of that authority to cover cases of judicial corruption, but only as provided for by further law.<sup>224</sup> Unfortunately no such laws have been enacted.<sup>225</sup>

10.14 The Judicial Council Act of 1991 lists the grounds on which the Judicial Council could find that a judge lacks competence, has behaved dishonestly, or has engaged in misconduct.<sup>226</sup> The Council is authorised to either give a warning or initiate proceedings immediately. Among several others, the bases for incompetence include failure to initiate proceedings within the prescribed timeframe, applying inapplicable law, and coming down inconsistently on the same question of law in different cases.<sup>227</sup> Dishonesty includes failure to prepare the final written opinion within the time prescribed by law. Misconduct includes any sort of corruption or participation in politics. Should the Judicial Council choose to pursue an investigation and find grounds for disciplinary action, it lodges its complaints to the Court of Appeal in the relevant region, which then acts as the court of first instance in the case against the judge. The Court of Appeal then ‘may exercise the power of an initial court and follow the appropriate procedure’.<sup>228</sup>

10.15 Alongside the established judiciary the Interim Constitution also provides for various quasi-judicial bodies to hear cases (including criminal cases). Article 101, section 2, states:

In addition to the courts referred to in clause (1) above, the law may also constitute and establish special types of courts, judicial institutions or tribunals for the purpose of proceeding and hearing special types of cases.<sup>229</sup>

The primary quasi-judicial body that presides over criminal and other cases are Chief District Officers (CDOs). The Judicial Council does not have authority to warn or sanction CDOs. Advocacy Forum challenged the constitutionality of the provisions in Nepali law granting CDOs judicial powers by filing a public interest litigation

<sup>222</sup> Constitution (n 7) Article 105.

<sup>223</sup> Constitution (n 7) Article 109(10)(C).

<sup>224</sup> Constitution (n 7) Part 11.

<sup>225</sup> Transparency International Global Corruption Report 2009 (Cambridge, Cambridge University Press, 2009) pg 277.

<sup>226</sup> Judicial Council Act 2047 BS (1991) s. 4A.

<sup>227</sup> Judicial Council Act (n 229) s. 4A.

<sup>228</sup> Judicial Council Act (n 229) s. 7.

<sup>229</sup> Constitution (n 7) Article 101(2).

petition in the Supreme Court in April 2010. On 22 September 2011, the Supreme Court handed down its judgment, ruling that the provisions are unconstitutional, breaching Articles 24, 100 and 101 of the Interim Constitution.<sup>230</sup> It expressed serious concerns about untrained quasi-judicial officers hearing criminal cases, and held that granting any criminal jurisdiction to a CDO is unconstitutional because, as members of the executive, such officers are unable to be impartial. The court ordered the government to redefine which cases should be given to executive officers and which cases should be heard by courts or specialised tribunals. To do so, it requires the government to form a committee to review comparative practice on the extent of judicial powers exercised by executive officers, and to recommend necessary changes within six months of its formation. As an interim measure while reforms are carried out, the court ordered that, within the next year, all CDOs must be shown to have a law degree or be given three months of legal training. As of May 2012, the government had not started to implement this judgement.

### *The Situation in Nepal*

#### **The Mainstream Courts**

10.16 In terms of judicial appointments, it is clear that the Executive dominates the Constitutional Council.<sup>231</sup> Whilst in many countries the executive appoints the chief justice, the advisory councils tend to consist much more substantially of members of the judiciary.<sup>232</sup> Given that they appoint the Chief Justice, who in turn is responsible for the Judicial Council that appoints other judges, this risks politicising the judiciary.<sup>233</sup> At present the Constitutional Council has tended to observe the

<sup>230</sup> *Advocacy Forum v Ministry of Home Affairs, Secretariat of the Prime Minister and Ministry of Law and Justice, Secretariat of the Prime Minister and Ministry of Law and Justice, Judgment of Supreme Court Justices Kalyan Shrestha, Girish Chandra Lal and Sushila Karki, 22 September 2011.*

<sup>231</sup> See inter alia Shrestha K *Nepali Judiciary: Achievements and Challenges*, National Judicial Academy Journal Volume 1 no.1 2007, Kathmandu, Pg 17 for more on this subject.

<sup>232</sup> For a comparative overview of the judicial appointments process in numerous countries, see Annex A to *The Governance of Britain: Judicial Appointments, "International Comparisons."* <[www.justice.gov.uk/docs/cp2507.pdf](http://www.justice.gov.uk/docs/cp2507.pdf)> accessed 15 August 2010.

<sup>233</sup> The judiciary has in fact been quite politicized. See Senior Supreme Court Advocate Krishna Prasad Bhandari's comments cited in Transparency International's *Global Corruption Report 2007* pg 238, Originally entitled: 'Opportunity knocks for Nepal's flawed judiciary' See Supreme Court Advocate's comments on judicial reform, explaining, 'After the restoration of democracy in 1990, most new appointees to judgeships had close personal links with the ruling Nepali Congress party and its leaders, and the same occurred when the Communist Party of Nepal and Rastriya Prajatantra Party shared power. During King Gyanendra's direct rule, royalist lawyers were appointed as judges and the King promoted his then lawyer general, Pawan Kumar Ojha, to the Supreme Court in the face of strong opposition from the Nepal Bar Association. Honest legal practitioners with no links to partisan politics have tended to be sidelined in the appointment process.'

tradition of appointing the next most senior Supreme Court Justice as the Chief Justice.<sup>234</sup> However there is no guarantee that this will continue.

10.17 There are also concerns that the current composition of the judiciary is not representative. For instance a recent report has revealed that as of 2010-11 six of the 246 judges in Nepal of whom only 6 were women: one at Supreme Court level, four at Courts of Appeal and one at a District Court.<sup>235</sup> Similarly the Committee on the Elimination of Racial Discriminations has said of Nepal that, ‘while welcoming the State party’s efforts to implement special measures to advance and protect persons subjected to discrimination, the Committee remains concerned over the underrepresentation of disadvantaged groups in government, legislative bodies and the judiciary’.<sup>236</sup>

10.18 To that end it is only over the last year, for instance, that the first ever judges from the Dalit castes or Tharu communities were appointed.<sup>237</sup> This was only because the Judicial Council has now adopted a policy of inclusiveness (which has been subject to a great deal of criticism by some of the more conservative elements in Nepali politics).<sup>238</sup> It seems the Nepali judiciary felt the need to have more diversity much before arguments for inclusion began to be raised in the political landscape. The first Strategic Plan of the Judiciary in 2004 wrote that “the judiciary should be demographically representative.” The Second Strategic Plan aspired to “promote inclusive institutional culture.” The appointment of the judges from the minority community should, therefore, be taken in the light of internal initiative of the judiciary. Furthermore, following amendments to the Civil Service Act, more women (30 plus), Dalits, Madheshis, Janajatis and other minority groups have entered the “Nepal Judicial Service”. As these officers grow to be appointed as district judge while progressing in their career path, this is going to have a “trickle up effect” and the judiciary of the future is likely to be more diverse. The entry from the Bar, though the Bar like in other countries, is elitist, will in some ways hopefully promote diversity.

10.19 Having in mind the concerns articulated by the Human Rights Committee in their *Concluding Observations on Sudan* (see above at paragraph 10.7) it is difficult to say that the Nepali judiciary appears to be entirely independent. We do not believe

<sup>234</sup> Kamal Raj Sigdel ‘Sharma in CC pick for Chief Justice’ *The Kathmandu Post* (Kathmandu 1 December 2009) pg 4.

<sup>235</sup> Supreme Court ‘Annual Report’ (March 2011, Kathmandu).

<sup>236</sup> Committee on the Elimination of Racial Discrimination ‘Concluding Observations on Nepal’ 16/2004 UN Doc CERD/C/64/CO/5 para 17.

<sup>237</sup> Ananta Raj Luitel ‘Minister Skeptic about Judiciary’ *The Himalayan Times* (Kathmandu 14 September 2009).

<sup>238</sup> Ananta Raj Luitel ‘Inclusiveness: A lip service’ *The Himalayan Times* (Kathmandu 17 September 2009).

that inclusiveness is likely to harm the calibre of the Nepali judiciary given the rigorous standards imposed by the Interim Constitution.<sup>239</sup> As such we welcome the new policy.

10.20 There have also been suggestions of corruption on the part of members of the Nepali judiciary. In the *Global Corruption Report 2007* Transparency International stated that 'The courts are riddled with irregularities in which court employees are the main actors, often in collusion with lawyers'.<sup>240</sup> In the same vein a 2008 report by the Nepal Bar Association commented that:

Nepal has been suffering from corruption of all kinds, including judicial corruption, proliferated by autocratic royal regimes, political upheavals, armed conflict and socio-economic injustice. Judicial corruption, besides bribery, also includes extortion, intimidation, influence peddling and the abuse of court procedures for personal gains. However, bribery is regarded as the most widely practiced in the form of petty corruption.<sup>241</sup>

10.21 The provisions regarding judicial discipline (outlined above at paragraph 10.13) in the Interim Constitution do go some way to ending the culture of corruption. However, there is worrying evidence that little has changed. The annual report of Transparency International (TI) on the perception of corruption index has listed Nepal as 154<sup>th</sup> out of 183 countries around the world it has assessed.<sup>242</sup> Nepal was ranked 121<sup>st</sup> in 2008, and is the lowest placed South Asian country after Afghanistan. Nepal scored only 2.2 out of 10 where below 3.0 is considered a high percentage of corruption. In February 2012, Prime Minister Bhaburam Bhattarai admitted that corruption is rampant in Nepal.<sup>243</sup> The Auditor General's Annual Report for 2011 brought to light the extent to which money laundering takes place in the government sector. According to the report, from the total amount of Rs 29,91,4,000,000 collected from the tax some 1,26,95,00,000 (approximately US\$ 15, 868,750) was not deposited in the state coffers during the fiscal year 2010/11.<sup>244</sup>

10.22 Judges who consider they are not adequately paid, often get 'incentives' from lawyers. In this system the richer party will generally prevail, and many, especially poor or disadvantaged people, have given up on the judiciary as a fair arbiter of justice. A report by Transparency International on corruption in the Rupandehi district

<sup>239</sup> Constitution (n 7) Article 109.

<sup>240</sup> Transparency International Global Corruption Report 2007 (Cambridge, Cambridge University Press, 2007) Pg 238.

<sup>241</sup> Nepal Bar Association (n 238) Pg 48.

<sup>242</sup> See <[http://www.tinepal.org/CPI\\_press\\_release2011.pdf](http://www.tinepal.org/CPI_press_release2011.pdf)>

<sup>243</sup> See <<http://www.nepalhorizons.com/news/english-news/pm-bhattarai-corruption-has-crossed-tolerable-limits/>>

<sup>244</sup> See <<http://www.oagnep.gov.np/>>

found widespread collusion between court staff, lawyers, judges and defendants' intermediaries to negotiate payments for the release of defendants. In the words of one disillusioned woman, 'in a criminal justice system that is brazenly pro-rich, for the poor chasing justice is like chasing a mirage'.<sup>245</sup> In a nationally televised interview, former Prime Minister Krishna Prasad Bhattarai implied an official sanction for the culture of bribery when he said it was understandable that a poorly paid judge would be compelled to seek other forms of remuneration.<sup>246</sup> The public perception of a corrupt judiciary creates an environment where bribes are likely to be paid and complaints are unlikely to be lodged.

10.23 According to the Secretary of the Judicial Council, there have been about 500 complaints against judges since the inception of the Council 20 years ago, and they have completed the investigation of 480 cases.<sup>247</sup> Out of these 480 completed investigations, only six judges have been removed from office.<sup>248</sup> Six judges have received warnings. In the entire history of the Judicial Council, only one judge has been prosecuted on corruption charges.<sup>249</sup> Birendra Kumar Karna was caught accepting a bribe in 2007 and a case against him, was pending before the Supreme Court at the time of writing.<sup>250</sup>

10.24 We are concerned by corruption in the Nepali judiciary. We note some positive steps recently introduced, such as the setting up of a telephone hotline service for use by persons who wish to register a complaint about irregularities within the judicial system and the installation of CCTV in the Supreme Court so as to enhance transparency.<sup>251</sup> On the other hand, increasing demand to widen the ambit of the Commission for the Investigation of Abuse of Authority has not been pursued.<sup>252</sup> We believe that enhancing the powers of the Commission may be construed as an attempt at eroding judicial independence. So it would be more appropriate to either create a more powerful and functional oversight mechanism within the judiciary itself empowered to prosecute the erring judges or to strengthen the present Judicial Council. Besides, in order to eradicate corruption, cooperation of the Bar is crucial as it is often said, "In front of a corrupt judge there is always a corrupt lawyer".

<sup>245</sup> Transparency International (n 243) Pg 238.

<sup>246</sup> Krishna Prasad Bhattarai (n 236) Pg 238.

<sup>247</sup> Transparency International 2009 Corruption Perceptions Index, Regional Highlights: Asia Pacific Region' pg 1.

<sup>248</sup> Krishna Prasad Bhandari (n 236) Pg 236-239.

<sup>249</sup> Nepal Bar Association (n 235) Pg 48.

<sup>250</sup> 'Image Building in the Judiciary', by Ananta Raj Lutel, *The Himalayan Times*, 24 July 2010. <<http://www.thehimalayantimes.com/fullNews.php?headline=Image+building+in++the+judiciary&NewsID=250967>> accessed 15 August 2010.

<sup>251</sup> OHCHR, 'OHCHR-Nepal welcomes judicial reform of the Supreme Court', 19 May 2009, <[http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202009/May%202009/2009\\_05\\_19\\_\\_CJ\\_RB\\_%20Meeting\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202009/May%202009/2009_05_19__CJ_RB_%20Meeting_E.pdf)> accessed 29 June 2010.

<sup>252</sup> Transparency International (n 228)pg 277.

The Nepali Bar has very minimum or lax rules to discipline lawyers and even shown reluctance to exercise whatever limited disciplinary provisions it has to restrain its members. The NBA always presents corruption being one of the big bottle-necks to judicial reform. However, it has also not played significant role to prevent this.

### The ‘Special Tribunals’

10.25 The special tribunals referred to above (at paragraph 10.15) are also a cause for concern. CDOs are appointed by the Home Ministry and represent the ministry at a district level. The administration of the local police force falls within their responsibilities. The Home Ministry defines the role as: ‘The CDO has been empowered with the necessary authority to maintain law and order in the respective districts and he has also been made *responsible to act as the representative of the central Government*.’<sup>253</sup> They also play a part in elections with the Election Commission confirming that ‘the practice has been to appoint Chief District Officers as Returning Officers’.<sup>254</sup> We are therefore concerned that CDOs occupy a position which defies the principle of separation of powers. This means they do not qualify as a truly independent or impartial tribunal.

10.26 In addition, as regards the ‘competency’ requirement, CDOs are appointed by the Home Ministry from a pool of civil servants who have reached the standard of ‘gazetted officer’ within the public service commission. There is no requirement for such officers to have received legal training. When asked about the judicial power of the CDO, a judge we interviewed commented, ‘They have no legal knowledge, no background in the law, and one does not need to be a lawyer.’<sup>255</sup> Whilst it is entirely possible that some CDOs may be trained lawyers there is no guarantee that they will receive any formal legal training. We believe that this compromises their ability to make legal judgments.

10.27 The special tribunals have jurisdiction in a variety of areas. For instance, the Food Act provides a number of criminal sanctions for those who sell sub-standard food (including imprisonment).<sup>256</sup> The authority to decide such issues is placed with the CDO.<sup>257</sup> Similarly the Some Public (Offences and Punishment) Act introduced a

<sup>253</sup> Statement by the Nepal Ministry of Home Affairs <<http://www.moha.gov.np/abtministry.php>> accessed 17 November 2009 emphasis added.

<sup>254</sup> Statement by Election Commission <<http://www.election.gov.np/EN/legal/returning.php>> accessed 30 November 2009.

<sup>255</sup> Interview with a district judge (n 149).

<sup>256</sup> The Food Act 2023 BS (1967 AD) s 5.

<sup>257</sup> The Food Act (n 259) s 11.

number of crimes ranging from causing obstruction to a public official, sexual molestation of females, and spreading terror.<sup>258</sup> Once again jurisdiction to hear cases arising under this enactment is vested with the CDO.<sup>259</sup> There are many similar enactments, giving judicial powers to CDOs, in Nepali law.<sup>260</sup> Indeed, CeLRRd in its baseline survey (completed in 2003) determined that approximately 35% of all criminal cases in Nepal are tried by executive tribunals, such as the CDO.<sup>261</sup>

10.28 In addition to these tribunal responsibilities the Public Security Act gives a large and worrying discretion to CDOs.<sup>262</sup> Specifically, the Act provides that the CDO has jurisdiction to make detention or internment orders of up to an initial period of 90 days (which can be extended by further administrative decisions at a higher level up to 6 months, and one year). The discretion to make such an order exists as long as ‘adequate and appropriate grounds to prevent any person from doing anything which may immediately undermine the sovereignty, integrity or public tranquillity and order of Nepal’ exist.<sup>263</sup> The International Commission of Jurists (ICJ) have commented that this Act contains provisions which are ‘overbroad and vague’. There is certainly compelling evidence that this Act was seriously misused during the armed conflict to keep people in administrative detention for long periods of time.<sup>264</sup>

10.29 Under the Arms and Ammunition Act, CDOs have the authority to pass sentences of up to seven years and fines of up to Rs. 140,000.<sup>265</sup> The severity of the punishments and lack of procedural safeguards are especially disturbing in light of the fact that civilian informants are entitled under the Act to half of the fine paid by the offender, and government employees are entitled to one fourth of the fine. Because fines can be anywhere from Rs. 20,000 to Rs. 140,000, informing on violations of the Arms and Ammunitions Act can be quite lucrative for civilians and government employees alike. Remarkably, there is no punishment for anyone making a false claim against someone under the Act. This is a striking oversight as such a provision is included in the Black Marketing Act, which details a number of other offenses over which the CDO has original jurisdiction. A number of offenses under the Black Marketing and Some Other Social Offenses and Punishment Act carry sentences up to ten years.

<sup>258</sup> Some Public (Offences and Punishment) Act 2028 BS (1970 AD) s 2.

<sup>259</sup> Some Public (Offences and Punishment) Act (n 261) s 5.

<sup>260</sup> See inter alia The Arms and Ammunition Act 2019 BS (1963 AD) s 24. For more details on the laws granting powers to CDOs, see Advocacy Forum and REDRESS, *Held to Account. Making the Law Work to Fight Impunity in Nepal*, December 2011, Pg 43-47.

<sup>261</sup> CeLRRd (n 125) Pg 77.

<sup>262</sup> The Public Security Act 2046 BS (1989 AD).

<sup>263</sup> The Public Security Act (n 265) s 3(1).

<sup>264</sup> Lori Anderson, “Emergency and public safety laws in Nepal,” Seminar, Issue No. 512, April 2002.

<sup>265</sup> The Arms and Ammunition Act 2019 BS (1962 AD) s. 20.

Under the Black Marketing Act the CDO can impose a fine of up to Rs. 25,000, and informants receive 25% commission. Knowingly making a false report under this Act, however, carries a punishment of up to three months in prison or a fine of Rs. 5,000.

10.30 The Black Marketing Act contains several disturbing provisions granting very wide discretion to CDOs. The CDO can issue an order to have someone arrested ( para 13), and will then preside over that person's hearing. The CDO has the authority to impose fines of up to Rs. 25,000 and sentence people to life imprisonment. Terms of imprisonment for failure to pay a fine are at the discretion of the CDO. The Black Marketing Act goes on to say that 'where life imprisonment has been imposed, no additional imprisonment shall be set for the fine'.<sup>266</sup> This is very troubling because it suggests the CDO has authority to impose life imprisonment, despite the absence of all procedural safeguards as described further below.

10.31 Under both the Black Marketing Act and the Arms and Ammunition Act the potential fines are substantial when compared to an average Nepali annual income of approximately USD 400.<sup>267</sup> This is especially concerning having in mind that the CDO has authority to imprison those who are unable to pay such fines under both acts.

10.32 Hearings before a CDO lack all elements of a fair trial. In addition to the lack of legal competence of the decisionmaker and the lack of independence and impartiality of the body as described more fully below, there are additional problem areas. For example, no witness statements are taken, there is no opportunity for cross-examination, and proceedings are not adversarial. There is no right to representation and no provision of legal aid. As with a hearing before a district court there is no opportunity for defendants to prepare their defence.

10.33 Although the Judicial Council does not have authority to monitor and punish the misconduct of CDOs, the Supreme Court has recently initiated contempt of court charges against the CDO of Dhanusha for failing to take action in an Arms and Ammunition case pending for two years while a suspect (Shankar Sah) waited in jail. The Supreme Court reasoned that a person arrested for a specific charge deserves a fair trial, and is entitled to prompt justice, despite being tried by a quasi-judicial body. The Supreme Court issued a directive to all DAOs to decide all pending cases. Shankar Shah had been detained for two years, since receiving notice of detention, without a hearing.<sup>268</sup>

<sup>266</sup> The Black Marketing and Some Other Social Offenses and Punishment Act 2032 BS (1975 AD).

<sup>267</sup> The World Bank, 'Nepal at a glance', 12 September 2009, pg 1.

<sup>268</sup> 'SC Warns CDO of Contempt Action', *The Himalayan Times* 11 August 2010. <<http://www.thehimalayan.com/fullNews.php?headline=SC+warns+CDO+of+contempt+action&NewsID=253281>> accessed 15 August 2010.

10.34 The CDOs' apparent conflict of interest, lack of judicial training, and lack of proper codes of conduct all effectively demonstrate the risks involved with using a CDO as adjudicator in criminal cases. The clearest evidence of the endemic fair trial abuses that CDOs cause is in their conviction rates. In the fiscal year of 2063 – 2064 (BS), the District Courts decided 4,524 criminal cases and CDOs decided 2,516 criminal cases. The District Court convicted the defendant in 72.67% of their 4,524 criminal cases. The CDOs convicted in 98.27% of the cases.<sup>269</sup> We believe that this demonstrates that the procedural protections observed in the mainstream courts are not given an appropriate emphasis by the CDO. We do not believe that there can be any objective justification for this disparity: the nature of cases which CDOs hear are closely related to those heard in the District Court. For instance, the Some Public (Offences and Punishment) Act gives CDOs jurisdiction to hear cases of hooliganism and battery. This provision is closely related to the prohibition against assault already contained in the *Muluki Ain*.<sup>270</sup> As stated above, this has been successfully challenged in the Supreme Court, though the government has so far failed to implement the September 2011 ruling. In the meantime, the practice continues.

10.35 There are other Acts that designate other officers, such as a 'District Forest Officer'<sup>271</sup> or 'Customs Officer'<sup>272</sup> as similar quasi-judicial adjudicators in criminal cases. Because the CDO is most commonly assigned this role and scrutiny of the CDO as adjudicator illustrates many of the same problems associated with all quasi-judicial bodies for criminal cases, this report focuses on the shortcomings of the quasi-judicial role of CDOs. The reader should not confuse this focus with approval of other quasi-judicial bodies. As stated above, this has been challenged in the Supreme Court and the court has found it unconstitutional to provide judicial power to CDO.

## 11. The Right to be Present at Trial and Appeal

### *International and Domestic Standards*

11.1 Everyone charged with a criminal offence has the right to be tried in their presence, so that they can hear and challenge the prosecution case and present a defence.<sup>273</sup> In *Mbenge v Zaire* the Human Rights Committee accepted that it was only

<sup>269</sup> The Attorney General of Nepal 'Annual Report' (Fiscal Year 2063-64, Kathmandu) Pg 55.

<sup>270</sup> *Muluki Ain* 1963, Ch 9, No 1.

<sup>271</sup> Forest Act 2049 BS (1993 AD) s 65.

<sup>272</sup> Customs Act 2013 BS (1962 AD) s 30.

<sup>273</sup> ICCPR (n 5) Article 14(3)(d).

permissible for a trial to take place in the absence of the accused, if they had been informed of the trial and declined to attend. In *General Comment 32* the Committee clarified that:

Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present.<sup>274</sup>

As such there are very few circumstances in which the member state can justify a failure to produce the defendant.

- 11.2 In Nepal the Interim Constitution provides that ‘every person shall have the right to be informed about the proceedings of the trial conducted against him/her’ but is silent on the right to be present.<sup>275</sup> There is no provision as to when an accused should be informed and no further explicit guarantee that the accused should be present.

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- 11.3 The Interim Constitution does not meet international standards. There is a marked difference between allowing a defendant to be present in court, and simply informing them about what will happen or has happened. The rationale for the provision in Article 14(3)(d) of the ICCPR is to allow the defendant to answer allegations made against them as they arise. Simply informing people about such allegations does not provide a similar or sufficient protection. When we attended the Kathmandu District Court we witnessed a murder trial taking place in the absence of the defendant, even though that defendant was in custody.<sup>276</sup>
- 11.4 Discussions with members of the judiciary revealed that this problem is widespread within the Kathmandu valley and less common elsewhere. They blamed a lack of resources for this problem, and confirmed that they had all conducted trials in the absence of the accused and had even sentenced people in their absence.<sup>277</sup>
- 11.5 The lack of resources of the Nepali courts and prisons in our view cannot be considered to be in ‘the interests of justice’ as contemplated by the Human Rights

<sup>274</sup> General Comment 32 (n 119) para 36.

<sup>275</sup> The Constitution (n 7) art 24(8).

<sup>276</sup> First Court Visit (n 196).

<sup>277</sup> Discussion with judges (n 52).

Committee. We consider that such a justification is also unsustainable. Given the number of previous occasions when the law obligates the authorities to produce the defendant (first for remand, and second to have a statement recorded, and without which trials do not occur) it seems unlikely that they are suddenly unable to do so as soon as they are no longer obligated.

- 11.6 The fact of budgetary constraints is not disputed. However the Human Rights Committee have confirmed that such constraints are not an acceptable reason for breaching the Convention. For instance, in their *Concluding Observations on Central African Republic* it said:

The Committee is concerned by reports suggesting that the independence of the judiciary is not guaranteed in practice (article 14 of the Covenant). The State party should endeavour to suppress corrupt practices in the judiciary. It should also recruit and train a sufficient number of judges in order to ensure adequate administration of justice throughout the country and to combat crime and impunity. Sufficient budgetary resources should be allocated for the administration of justice'.<sup>278</sup>

## 12. The Presumption of Innocence

### *International and Domestic Standards*

- 12.1 Article 14(2) of the ICCPR enshrines the principle that everyone has the right to be presumed innocent (and treated as such) until they are convicted, following a fair hearing, by an independent, competent, and impartial tribunal.<sup>279</sup>
- 12.2 This right is not understood to be limited to the treatment one receives at trial. It also applies to the treatment that the defendant receives before the trial. It requires that all public officials, especially those with direct involvement with the case, avoid doing anything which prejudices a case's outcome. For instance according to the settled jurisprudence of the Human Rights Committee, public officials should refrain from making statements asserting the guilt of the defendant until after the end of the trial.<sup>280</sup>

<sup>278</sup> Human Rights Committee 'Concluding Observation on the Central African Republic' 1/2006 UN Doc CCPR/C/CAF/CO/2 para 16.

<sup>279</sup> ICCPR (n 5) Article 14(2).

<sup>280</sup> Gridin v Russian Federation No. 770/1997 (20 July 2000) UN Doc CCPR/C/69/D/770/1997 para 8.3, available at <<http://www1.umn.edu/humanrts/undocs/session69/view770.htm>>

12.3 In *General Comment 32* the Committee expanded upon this in detail:

According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.<sup>281</sup>

12.4 Article 24(5) of the Interim Constitution establishes this right in Nepal.<sup>282</sup> There are also numerous statutory provisions that detail the treatment of persons awaiting trial. These include the sections of the *Muluki Ain* dealing with bail,<sup>283</sup> and the rules relating to the treatment of prisoners on remand.<sup>284</sup>

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12.5 As we have already observed the Nepali criminal justice system routinely fails to distinguish between convicted prisoners and those on remand (see above at paragraph 4.26). This obligation to distinguish is closely connected to the presumption of innocence. The clear implication of a system that treats those on remand and those convicted in exactly the same way is that they both ‘deserve’ such treatment. Given that convicted prisoners are imprisoned because of their conviction this might give the impression that prisoners on remand are similarly likely to be convicted.

12.6 The fact that the *Muluki Ain* does not extend the possibility of bail to those who are suspected of certain crimes has a similar effect. The importance of bail is that the state should only exceptionally detain someone who is presumed to be innocent.

<sup>281</sup> General Comment 32 (n 119) para 30.

<sup>282</sup> The Interim Constitution (n 7) Article 24(5).

<sup>283</sup> *Muluki Ain* (n 21) No 118.

<sup>284</sup> See para 4.26.

Imprisonment is properly to be regarded as a punishment only to be employed against the guilty. The Human Rights Committee in *Van Alphen* explains the limited circumstances in which those awaiting trial can be detained, saying that:

The drafting history of article '9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>285</sup>

As it stands, the *Muluki Ain* fails to give any justification for automatically remanding a defendant in custody; it does not require, for instance, that an assessment is carried out to ensure that remand is 'reasonable and necessary'. It therefore gives the impression that the guilt of the defendant has already been established.

- 12.7 It is common for defendants to be brought before the court in handcuffs.<sup>286</sup> Members of the judiciary have confirmed that this regularly happened. When asked why they allowed this, there was a general consensus that it was a matter for the police and that, whilst it was improper, 'sometimes we have to close our eyes to it'.<sup>287</sup> This gave the impression that the defendants were automatically regarded as dangerous criminals prior to any enquiry being made into whether such restraints were necessary on a case by case basis. In that sense it seemed to be in violation of both the letter and spirit of the General Comments of the Human Rights Committee.

## 13. Sentencing

- 13.1 The fundamental rule in relation to sentencing in international law is that the punishments imposed must be in accordance with the law<sup>288</sup> and always be proportionate to the gravity of the crime.<sup>289</sup>

<sup>285</sup> *Van Alphen* (n 11) para 5.8.

<sup>286</sup> During one visit to a court in Kathmandu we observed eleven different defendants being brought in handcuffs (n 196).

<sup>287</sup> Discussion with judges (n 52).

<sup>288</sup> ICCPR (n 5) Art 9(1).

<sup>289</sup> *Eversley Thompson v. St. Vincent and the Grenadines* 806/1998 UN Doc CCPR/C/70/D/806/1998 para 8.2. Available at <<http://www1.umn.edu/humanrts/undocs/806-1998.html>>

- 13.2 It is also imperative that the defendant should know the reason for any judgment. In *Hamilton v Jamaica* the Human Rights Committee noted that by failing to give reasons for a particular sentence the state had violated the rights of the defendant.<sup>290</sup>
- 13.3 In addition, the Human Rights Committee has held that the continued imprisonment of anyone after an unfair trial may violate the ICCPR.<sup>291</sup>
- 13.4 In Nepal, Article 24(4) of the Interim Constitution provides that all punishments imposed must be according to the law.<sup>292</sup> The individual punishments applicable to each crime are found in the relevant statute of sections of the *Muluki Ain* and other statutes.

### *The Situation in Nepal*

- 13.5 As in many countries Nepali law often provides for a range of sentences for convicted offenders. For instance the *Muluki Ain* provides for a sentence between five and twelve years for attempted murder<sup>293</sup>, and seven to fifteen years for abduction.<sup>294</sup> The Trafficking Act provides for a sentence between ten and fifteen years for a person who takes another out of the country for the purpose of buying or selling them.<sup>295</sup> There is no official guidance as to how a judge should exercise the discretion that measures such as these give. There is also no publication that assists judges by giving them the factors which mitigate or aggravate a particular offence. This problem is exacerbated by the fact that the decisions of the Nepali District Courts are not routinely published. This makes it difficult for judges to know how other members of the judiciary view similar offences. It also makes it less likely that judges will exercise the full extent of their discretion: in the absence of knowledge of how other judges have acted it is possible that other judges will not feel inhibited about straying from the middle of the road on sentencing questions.
- 13.6 We have already commented that conditions within Nepali jails do not meet international standards.<sup>296</sup> This increases concerns that terms of imprisonment

<sup>290</sup> No 333/1988 (23 March 1994) UN Doc CCPR/C/50/D/333/1988 para 5.6, available at <<http://www1.umn.edu/humanrts/undocs/html/vws333.htm>>

<sup>291</sup> *Pinto v Trinidad and Tobago* No. 512/1992 (16 July 1996) UN Doc CCPR/C/37/D/512/1992, available at <<http://www1.umn.edu/humanrts/undocs/512-1992.html>>

<sup>292</sup> The Constitution (n 7) Article 24(4).

<sup>293</sup> *Muluki Ain* (n 21) Ch 10 No 15.

<sup>294</sup> *Muluki Ain* (n 21) Ch 8A No 3.

<sup>295</sup> The Human Trafficking and Transportation (Control) Act 2064 BS (2007 AD) s 15(1)(e)(1).

<sup>296</sup> See Section 4.

represent an infringement of the defendant's human rights. One aspect of this is that the conditions within prison fail to provide a high standard of education or rehabilitation. The UN Minimum Standards on imprisonment assert that,

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.<sup>297</sup>

13.7 This concern is particularly pressing given that Nepali law provides for only very limited forms of community service or rehabilitation based punishment instead of prison, and whilst such schemes may exist in some prisons there is no uniformity of approach. There are occasions in which rehabilitation programmes exist. However these are of limited effect.<sup>298</sup> This is corroborated by Advocacy Forum lawyers visiting prisons who have found no evidence of efforts made to prepare prisoners for their return to society.<sup>299</sup>

13.8 The need to consider prisoners' rehabilitation is confirmed by Rule 61 of the UN Standard Minimum Rules which provides that:

The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.<sup>300</sup>

<sup>297</sup> UN Minimum Standards (n 58) Rules 65 and 66.

<sup>298</sup> OHCHR-Nepal (n 87) p 2.

<sup>299</sup> See also interview with chief jailer (n 82).

<sup>300</sup> UN Minimum Standards (n 58) Rule 61.

## 14. Appeals

### *International and Domestic Standards*

14.1 Everyone convicted of a criminal offence has the right to have that conviction and sentence reviewed by a higher tribunal; as the right is phrased in the ICCPR, everyone has the right to have both their conviction and sentence ‘reviewed by a higher tribunal according to law’.<sup>301</sup>

14.2 The nature of this right was explained by the Human Rights Committee in *General Comment 32*:

The right to have one’s conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.<sup>302</sup>

14.3 ‘According to law’ means the accused should be guaranteed full and effective access to all pathways of appeal provided for in domestic law.<sup>303</sup> If domestic law provides for more than one level of appeal, the accused must have access to all of them.<sup>304</sup> Confirmation of a conviction by the original court does not satisfy the requirement of an appeal to a higher tribunal.<sup>305</sup>

14.4 All the requirements of a fair trial carry over through the appeals process. Criminal proceedings, from the initial hearing to the final appeal are regarded as forming a single entity, and the protection afforded by Article 6 (for example) does not cease upon the decision of the court of first instance.<sup>306</sup> The right to a full and fair appeal, and the attendant requirements of a fair trial are not limited to only the most serious offences. In *General Comment 13* the Human Rights Committee cited a sentence of one year as ‘serious enough to warrant a review by a higher tribunal regardless of whether the domestic law classified the offence as “criminal”’.<sup>307</sup> Further, if domestic law only provides for one level of trial, or if the highest court of a country was the

<sup>301</sup> ICCPR (n 5) Article 14(5).

<sup>302</sup> General Comment 32 (n 119) para 45.

<sup>303</sup> General Comment 32 (n 119) para 45.

<sup>304</sup> General Comment 32 (n 119) para 45.

<sup>305</sup> General Comment 32 (n 119) para 47.

<sup>306</sup> General Comment 32 (n 119) para 3.

<sup>307</sup> Human Rights Committee ‘General Comment No. 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law’ (1984) UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) para 7.

first and only arbiter of the case, the system itself is in violation of international law.<sup>308</sup> Similarly, if the conviction was rendered by a court of appeal, reversing a lower court's acquittal, the accused is entitled to an additional, higher level of review even if there is no such provision in domestic law.<sup>309</sup>

14.5 Substantive review requires that the defendant has not only access, but effective access, to a higher tribunal. 'Effective access' means that the accused have a reasonable opportunity to prepare the appeal. According to General Comment 32 this entails that 'the convicted person is entitled to have access to duly reasoned, written judgements in the trial court and at least in the court of first appeal'.<sup>310</sup> Effective access also requires that the accused have access to all relevant documents necessary to make use of the right to appeal. In *Lumley v. Jamaica*, for instance, the HRC found that not having access to the trial transcript deprived the complainant of his right to a genuine review of his conviction.<sup>311</sup>

14.6 Under international law, the accused is guaranteed legal aid throughout the appellate proceedings. If the state denies legal aid to a defendant who cannot otherwise access the further stages of appellate judicial proceedings as constitutionally guaranteed it is the equivalent to denying the right to appeal to a higher tribunal.<sup>312</sup> For the same reasons a lawyer's conduct of a case must also be compatible with the interests of justice. If lawyers make a decision, that is adverse to the interests of their client,

the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel.<sup>313</sup>

14.7 Under international law, defendants also have a right to be present at the appeal, unless they have had a full and fair opportunity to present all the evidence in their case, and the prosecution is not going to be presenting any new evidence or arguments. Further if the accused had an opportunity to present a defence in the original trial, an appeal does not require a full re-hearing of the case,

as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations

<sup>308</sup> General Comment 32 (n 119) para 47.

<sup>309</sup> General Comment 32 (n 119) para 47.

<sup>310</sup> General Comment 32 (n 119) para 49.

<sup>311</sup> No 662/1995 (1999) UN Doc CCPR/C/65/D/662/1995 para 7.5.

<sup>312</sup> *LaVende v. Trinidad and Tobago* No. 554/1993 (1997) UN Doc CCPR/C/61/D/554/1993 para 5.8.

<sup>313</sup> No. 680/1996 (1999) UN Doc CCPR/C/66/D/680/1996 para 7.4.

against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.<sup>314</sup>

14.8 In *Carlton Reid v Jamaica* the Human Rights Committee decided that the presence of the accused was not always required at an appeal.<sup>315</sup> However they indicated that if a defendant does not have legal representation then the accused should normally be present.

14.9 Article 14 also provides the right to have an appeal determined without unreasonable delay. In *Pratt and Morgan v Jamaica* the Human Rights Committee said

The Committee first notes that article 14, paragraph 3(c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without undue delay. In this context the Committee recalls its general comment on article 14, which stipulates, *inter alia*, that “all stages [of judicial proceedings] should take place without undue delay, and that in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal.”<sup>316</sup>

This was repeated in the Committee’s decision (in *Xavier Evans v Trinidad and Tobago*) that ‘the Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay’.<sup>317</sup>

14.10 In theory, Nepal’s appellate procedures comply with international standards. Section 8(1) of the Judicial Administration Act provides the right to everyone convicted of a criminal offence to appeal.<sup>318</sup> Appeals can challenge conviction or sentence.<sup>319</sup> Appeals are normally heard by a judge or judges of the Court of Appeal. Legal aid is extended to the conclusion of the appeals process.<sup>320</sup> At appeal hearings lawyers for both the prosecution and the defence may make submissions. The court considers the merits of those submissions before making a decision as to the strength or otherwise of a conviction or sentence. Both questions of law and fact can be examined by the appeal court.<sup>321</sup>

<sup>314</sup> General Comment 32 (n 119) para 48.

<sup>315</sup> No. 250/1987 (1990) UN Doc CCPR/C/39/D/250/1987 available at <<http://www1.umn.edu/humanrts/undocs/session39/250-1987.html>>

<sup>316</sup> Nos 210/1986 and 225/1987 (6 April 1989) UN Doc Sup. No 40 (A/44/40) at 222 para 13.3.

<sup>317</sup> No. 908/2000 (1999) UN Doc CCPR/C/77/D/908/2000 para 6.3.

<sup>318</sup> The Administration of Justice Act (n 38) s 8(1).

<sup>319</sup> The Administration of Justice Act (n 38) s 8(1).

<sup>320</sup> Legal Aid Act (n 135) s 2(d).

<sup>321</sup> Nepali Lawyers imply this from The Administration of Justice Act (n 38) s 8.

- 14.11 Section 9 of the Judicial Administration Act provides that appeals to the Supreme Court can be made against the decision or final order of the Court of Appeal in four circumstances. The first is where the Court of Appeal adjudged the initial proceeding. The second is if a sentence of ten years imprisonment or more has been imposed. The third is where the Court of Appeal has awarded punishment of three years' imprisonment or above, or a fine of Rs 25,000.00 or above or where the amount in dispute is Rs 50,000.00 or above or where the amount in dispute could not be ascertained and the Court of Appeal reversed the decision of the initial court in whole or in part. The fourth is if the case is specifically sent to the Supreme Court for *Sadhak* (reference).<sup>322</sup>
- 14.12 Under the Interim Constitution defendants are guaranteed access to legal aid throughout the appeals process as a fundamental right, 'according to the law of the land.' The relevant law of the land is the Legal Aid Act.<sup>323</sup>
- 14.13 The appeals process is split into two hearings. At the first hearing, the lawyer for the defendant appears to before two judges with a petition for appeal against the lower court's verdict. The judges then decide whether to allow the appeal to go forward or to dismiss it. The decision to dismiss it can be appealed only on issues of law, not of fact. If the appeal goes forward, then the next hearing is scheduled. The submission points out the factual and/or legal errors in the decision of the lower court. At the first hearing the lawyer on behalf of the appellant submits why the decision of the lower court should be reversed. If the Bench is convinced with the statement in the appeal and oral submission, then it passes an order citing reasons why the decision of the lower court should be reconsidered/re-examined. Through the same order, the court summons the winning party to appear before it upon which the second hearing takes place where both the parties make oral submission. The party thus summoned, if it wishes, can submit a written rebuttal of the appeal. But where the appellant cannot establish his/her case before the court at the first hearing the court does not call the winning party and issues a decision confirming the decision of the lower court/or judicial institutions.
- 14.14 Lawyers and clients on both sides are provided notice of the second hearing. If the first hearing is scheduled and no lawyer appears for the defendant, the court will request that a legal aid lawyer be assigned to the case, and the initial hearing will be delayed for another two to four weeks. If the case goes forward after this initial hearing, it will be another two to four weeks before the adversarial hearing.<sup>324</sup>

<sup>322</sup> The Administration of Justice Act (n 38) s 9 (as amended in 2011).

<sup>323</sup> The Legal Aid Act (n 135).

<sup>324</sup> Interview with a lawyer at Kathmandu Court of Appeal, by Danielle Von Lehman 28 July 2010.

Usually a legal aid lawyer will only look at the case file and will not meet with the defendant except as a formality. All meetings that take place in prison will be in the presence of prison guards.<sup>325</sup>

14.15 Appeals from CDO decisions also go to the Court of Appeal.<sup>326</sup> Generally CDOs are expected to follow the same procedures as district courts, and are required to have the final text of the reasoning of the decision in the same format and in the same timeframe (seven days) as a decision from a district court. Adherence is generally at least as poor as for district courts, with delays of one to three months an expected and accepted norm, meaning the defendant will be detained for at least several months while awaiting an appeal.

14.16 The *Muluki Ain* gives the courts power to release appellants on bail whilst their appeal is being prepared.<sup>327</sup> Under the *Muluki Ain* the time limit for filing an appeal is 35 days.<sup>328</sup> Under the State Cases Act, the time limit for filing a criminal appeal was increased to 70 days, with the possibility of a 30 day extension at the court's discretion if the concerned party submits an application to the court indicating reasonable grounds for the extension.<sup>329</sup> The time period starts when the losing party formally gets information about the verdict or when the text of the final decision becomes available. The Interim Constitution does not give defendants a right to be present at trial or appeal. Instead they are simply entitled to be informed of the proceedings.<sup>330</sup> No new evidence is allowed on appeal except in extraordinary situations at the judges' discretion. Although there is no body of law governing procedures in CDO hearings, in practice they are generally expected to abide by the same time limits, which both the CDOs and regular courts rarely do.<sup>331</sup>

### *The Situation in Nepal*

14.17 The protections of a fair trial should extend throughout the appeals process but this is not the case in either the law or practice of Nepal. For instance, the law requires judges to have the final text of their decisions prepared within 7 days of the judgement.<sup>332</sup> However in AF's experience this deadline is rarely met and it is

<sup>325</sup> See para 6.12.

<sup>326</sup> This is provided for by each individual statute. See inter alia the Arms and Ammunition Act (n 263) s. 24(2).

<sup>327</sup> *Muluki Ain* (n 21) No. 194.

<sup>328</sup> *Muluki Ain* (n 21) No. 193.

<sup>329</sup> The State Cases Act (n 18) s 24.

<sup>330</sup> The Constitution (n 7) Art 24(8).

<sup>331</sup> Interview with Ambar Raut by Danielle Von Lehman – 28 July 2010.

<sup>332</sup> *Muluki Ain* (n 21).

much more likely that more than three months elapse before a judgment is produced. The defendant is kept detained for this entire period. Judges argue that this is the result of heavy case loads.

14.18 Further delays result from the difficulty of filing an appeal. The usual practice is for the appeal to be filed at the prison office rather than the court.<sup>333</sup> The law provides that the prison office should forward this application on to the Court within three days.<sup>334</sup> However, the remote nature of some districts can make this process very difficult.<sup>335</sup> This is especially true when a general strike is called. The result is that prisoners can remain in a legal limbo whilst their appeal application is in transit.

14.19 In any event the Nepali appeal court system is heavily backlogged.<sup>336</sup> This means that the system is slow and appellants face substantial delays during which they remain imprisoned. In addition, the Nepali court system is inefficient and this increases the extent of delays. The Human Rights Committee commented on this in *Sobhraj*, where the Appellant's case had been the subject of forty fruitless hearings at the Supreme Court. The Committee commented that they 'also consider[ed] that his right to have his sentence reviewed by a higher tribunal ha[d] been undermined by the excessive length of the proceedings before the Supreme Court'.<sup>337</sup>

14.20 Nepali courts do not produce trial transcripts. There is no stenographer in court and the clerk is generally occupied with other matters.<sup>338</sup> Therefore the only documents produced are the final judgement of the lower court and whatever is included in the case file (usually the charge sheet, signed statements from witnesses, a signed confession, and any evidence collected during the police investigation while the defendant was in jail). This can make it extremely difficult for a Court of Appeal to conduct any form of meaningful review of a conviction; they are not able, for instance, to assess the approach which the judge took to a hearing.

14.21 Further delays are likely for those relying on legal aid. There are many limitations of the Legal Aid Act and Nepal's legal aid system as outlined above in Section 7. The lack of effective access to legal aid, or legal representation of any sort once a person enters the criminal justice system, and the possibility of 'constructive incommunicado detention' (see paragraph 6.12) make the guarantee of legal aid to the end of the appeals process meaningless. Furthermore, because defendants are

<sup>333</sup> The Prisons Act (n 71) s 21(1).

<sup>334</sup> The Prisons Act (n 71) s 21(1).

<sup>335</sup> See paragraph 3.5.

<sup>336</sup> USAID 'Nepal Rule of Law Assessment' September 2009 pg 8.

<sup>337</sup> *Sobhraj* (n 84) para 7.5.

<sup>338</sup> See paragraph 9.9.

never present at appeal and are not allowed unsupervised visits with their family, lawyer, or anyone else who might be able to help them with their case, the right to representation is equally limited.

14.22 There are many problems with the appeal relying on the contents of the case file. As noted in Section 4 above, written confessions play a central role in the judicial process. A recent report issued by the Special Rapporteur on Torture noted that though some judges have taken it upon themselves to inquire into the voluntary nature of confessions or have detainees show their torsos to check for signs of abuse, but regrettably this is not systematic.<sup>339</sup> Often the police officers against whom such allegations would be made are present in the court room, so defendants will decline to say they were tortured for fear of reprisals.

14.23 It is highly unlikely that CDOs inquire into conditions of detention. Normal practice is for CDOs to actually sign detention orders without the detainee being present, meaning that a person can be remanded without ever being brought before even a quasi-judicial authority.<sup>340</sup>

<sup>339</sup> Advocacy Forum & Redress 'Review of the implementation of recommendations Made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005' August 2009 pg 20.

<sup>340</sup> Ibidem Pg 21.



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# VULNERABLE GROUPS

## 15. The Rights of Children

### *International and Domestic Standards*

- 15.1 Children are entitled to all the fair trial rights we have already discussed.<sup>341</sup> Indeed, the Convention on the Rights of the Child ('CRC') explicitly codifies many of these fair trial guarantees.<sup>342</sup> This chapter will only consider the extra protection that children benefit from.
- 15.2 Article 14(4) of the ICCPR requires that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting rehabilitation.<sup>343</sup> This functioned as the foundation for the CRC to state that 'the best interests of the child must be the primary consideration in all actions concerning children, including those undertaken by courts of law.'<sup>344</sup>
- 15.3 Amnesty International has described it as an 'emerging consensus in international law' that a child is anyone under the age of 18.<sup>345</sup> It is certainly true that the UN Rules for the Protection of Juveniles Deprived of their Liberty define a child as 'every person under the age of 18'.<sup>346</sup> Similarly the CRC defines a child as anyone

<sup>341</sup> General Comment 32 (n 190) para 42.

<sup>342</sup> The Convention on the Rights of the Child (Adopted: 20 November 1989, Entered into Force: 2 September 2002, Ratified by Nepal: 14 September 1990) 1577 UNTS 3 Article 40(2)(b) available at <<http://www2.ohchr.org/english/law/crc.htm>>

<sup>343</sup> ICCPR (n 5) Article 14(4).

<sup>344</sup> CRC (n 345) Article 3(1).

<sup>345</sup> Fair Trials Manual (n 3) para 27.2.

<sup>346</sup> UNGA, 'UN Rules for the Protection of Juveniles Deprived of their Liberty' (14 December 1990) UN Doc A/RES/45/113 Rule 11(a).

less than 18 'unless majority is attained earlier under national law'.<sup>347</sup> Whilst this does give state parties the right to establish the age of majority earlier than 18 it is suggested that it should never deviate too far from this standard. There is also a principle of international law that states should establish a minimum age for criminal responsibility.<sup>348</sup> There is an understanding that this should not be set too low.<sup>349</sup> And, according to General Comment 10 of the Committee on the Rights of the Child, the minimum age for criminal liability is internationally recognised as 12 years of age.<sup>350</sup>

- 15.4 Article 40(3) of the CRC encourages state parties to establish separate/specialised procedures for children.<sup>351</sup> This is partly designed to fulfil the requirement of the ICCPR that cases involving juveniles should be dealt with especially quickly.<sup>352</sup> It also enables the justice system to observe the requirement of the CRC that the privacy of every child accused of a crime should be protected.<sup>353</sup>
- 15.5 The CRC recognises that the best interests of the child usually involve them remaining with their parents.<sup>354</sup> For this reason children should only exceptionally be arrested, detained or imprisoned. When a child is subject to imprisonment the ICCPR requires that they should be segregated from adults, unless their best interests require otherwise.<sup>355</sup>
- 15.6 In terms of trial procedure, Article 14(4) of the ICCPR requires that all procedures should take account of the age of the child and the desirability of promoting the child's rehabilitation.<sup>356</sup> The CRC also asserts the importance of legal representation for a child.<sup>357</sup>
- 15.7 When it comes to sentencing the CRC once again requires that the best interests of the child are to be the primary consideration of the courts. They also require that any penalty imposed should be proportionate to the circumstances of the young person.<sup>358</sup>

<sup>347</sup> CRC (n 345) Article 1.

<sup>348</sup> CRC (n 345) Article 40(3)(a).

<sup>349</sup> UNGA, 'UN Standard Minimum Rules for the Administration of Juvenile Justice' ('The Beijing Rules') 29 November 1985 UN Doc A/RES/40/33 Rule 4.

<sup>350</sup> UNGA (n 352) para 11.a.

<sup>351</sup> CRC (n 345) Article 40(3).

<sup>352</sup> ICCPR (n 5) Article 10(2).

<sup>353</sup> CRC (n 345) Article 40(2)(b)(vii).

<sup>354</sup> CRC (n 345) Article 9.

<sup>355</sup> ICCPR (n 5) Article 10(2)(b).

<sup>356</sup> ICCPR (n 5) Article 14(4).

<sup>357</sup> CRC (n 345) Article 40(2)(b)(ii).

<sup>358</sup> CRC (n 345) Article 40(4).

- 15.8 Nepali law defines a child as being ‘a minor not having reached the age of sixteen years’.<sup>359</sup> It further specifies that children under the age of ten do not have criminal responsibility,<sup>360</sup> that children under the age of fourteen shall only receive a maximum of six months<sup>361</sup> and that children under the age of sixteen should only receive half the punishment of adults.<sup>362</sup>
- 15.9 As already noted the Children’s Act also provides that no trial should proceed against an unrepresented juvenile defendant.<sup>363</sup> The act also provides for the establishment of juvenile courts.<sup>364</sup> The implementation of this provision has been slow and remains incomplete. In April 2000, 10 districts were declared model districts for the establishment of juvenile benches.<sup>365</sup> In addition, juvenile benches have been set up in 34 districts, with child psychologists and social workers sitting alongside the judge. However this leaves 41 districts where juveniles are still tried in the same court system as adults.
- 15.10 The Children’s Act specifies that in the event of a child being punished they should not be handcuffed or fettered. It also provides that if children are to be imprisoned they should not be kept in jail with adult prisoners.<sup>366</sup> To that end the Nepali government has to undertake fully establish ‘Children’s Rehabilitation Homes’.<sup>367</sup>
- 15.11 According to Rule 15 of the Juvenile Justice Regulations, age verification should be carried out at a “government hospital”.<sup>368</sup> However the rule does not set out what methods are to be used. In Nepal most doctors use bone structure tests, which have been internationally recognised as less reliable than other methods such as dental and hair checks.

### *The Situation in Nepal*

- 15.12 The UN Committee on the Rights of the Child has expressed its concern on the state of juvenile justice in Nepal. After consideration of the second periodic report of Nepal they stated:

<sup>359</sup> The Children’s Act (n 176) s 2(a).

<sup>360</sup> The Children’s Act (n 176) s 11(1).

<sup>361</sup> The Children’s Act (n 176) s 11(2).

<sup>362</sup> The Children’s Act (n 176) s 11(3).

<sup>363</sup> The Children’s Act (n 186) s 19.

<sup>364</sup> The Children’s Act (n 186) s 55.

<sup>365</sup> Official Gazette, 10 April 2000.

<sup>366</sup> The Children’s Act (n 176) s 15.

<sup>367</sup> The Government of Nepal ‘Second Periodic Report to the Committee on the Rights of Child’ 2005 UN Doc CRC/C/65/Add.30 para 325.

<sup>368</sup> Juvenile Justice Regulations 2006 Rule 15.

## VULNERABLE GROUPS

The Committee remains of the view that the legislation and policies of the State party are not in conformity with international juvenile justice standards. The Committee reiterates its concern that the minimum age of criminal responsibility is set as young as 10, and that there is no official system of age verification in place. The Committee is also concerned about conditions of detention, and that persons under 18 are in most cases not separated from adults while in detention due to lack of juvenile detention facilities.<sup>369</sup>

15.13 Research conducted in preparing this report has confirmed that these concerns are still relevant. For example, when visiting court the lawyers of Advocacy Forum met three defendants in an attempted murder case. All three defendants appeared to be young. When asked two of them said they were fifteen and the third one said he was thirteen. The mother of the thirteen year old confirmed his age. The court nevertheless concluded that the older two were above the age of sixteen based on medical examinations. The doctor was not called to give evidence of his opinion. All three were being tried in a District Court. There was no alteration of court procedure. The two elder defendants were handcuffed for the duration of the court appearance. The younger defendant was also handcuffed when entering and leaving the court (for instance when he went to the bathroom).<sup>370</sup>

15.14 In general terms the Nepali criminal justice system has set a low age of majority and of criminal responsibility. We are similarly concerned that the age verification procedures are not clear. According to UNICEF only 35% of rural and 42% of urban children have their births registered.<sup>371</sup> This means that a great number of juvenile litigants' age is likely to be disputed and may rely on age verification tests. The laws and regulations in Nepal do not set out a written duty for the judge to question the age of a suspect. In AF's experience most age verification tests are not conducted to any standard international procedure.<sup>372</sup> There is also a lack of doctors adequately trained in internationally recognised methods of age determination.

15.15 The practice of keeping children in adult detention is widespread.<sup>373</sup> Advocacy Forum found during its monitoring visits to detention centres that 99% of juvenile detainees are held in adult facilities.<sup>374</sup> In the facilities visited during the period

<sup>369</sup> Committee on the Rights of the Child 'Consideration of reports submitted by state parties under Article 44 of the Convention: Concluding observations: Nepal' (21 September 2005) UN Doc CRC/C/15/Add.261 para 97.

<sup>370</sup> First Court Visit (n 196).

<sup>371</sup> UNICEF, Nepal- Country Statistics, available at <[http://www.unicef.org/infobycountry/nepal\\_nepal\\_statistics.html](http://www.unicef.org/infobycountry/nepal_nepal_statistics.html)> accessed 11 December 2009.

<sup>372</sup> First Court Visit (n 196).

<sup>373</sup> UNHCR (n 28) pg 76.

<sup>374</sup> Advocacy Forum, 'Torture of Juveniles in Nepal. A Serious Challenge the Justice System', June 2010 pg 34, available at <[http://advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal\\_26\\_June\\_2010.pdf](http://advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf)>

from April 2011 to March 2012, 2 detainees were under the age of 9; 24 were aged between 9 and 12; 290 were between 13 and 15; and 353 were 16 to 17 and 268 were 17 to 18.<sup>375</sup> Though the Children's Act set out that juveniles who have been arrested should be transferred to the custody of their guardians, or to a child rehabilitation home, the Juvenile Justice Regulations do not specify precisely how these provisions are to be implemented. Nepal has only two child rehabilitation centres, with the capacity to house 60 children in Bhaktapur and 50 in Pokhara. In March 2012, the Bhaktapur centre was housing 78 children and the centre in Pokhara was housing 31 children. This facility lacks basic infrastructure and services. Only those juveniles who have been sentenced or are awaiting trial are transferred to this facility. Those in pre-trial detention are always kept in adult facilities. Under the current circumstances, only those accused of serious crimes are transferred to these facilities, there is no rehabilitation facility for those accused of lesser offences.

15.16 Having in mind that the adult justice system provides very few opportunities for rehabilitation or education<sup>376</sup> and is instead focused on punishment it is particularly unsuited to children.<sup>377</sup> Nevertheless there is currently only a very limited separation between juvenile and adult justice. There have been cases before the Nepali courts in which this issue has been considered. For instance in *Bablu Godia v His Majesty's Government*<sup>378</sup> the court issued an order that the appellant, who was fourteen, should be sent to a Children's Rehabilitation Centre and not kept in an ordinary prison. Whilst this is laudable it is of only symbolic value; as there at that time there was only one Children's Rehabilitation Centre in the entire country clearly lacking the capacity to deal with every child sentenced to imprisonment.<sup>379</sup> Following a habeas corpus petition filed by Advocacy Forum on behalf of Suresh B.K and one other juvenile and a Public Interest Litigation, the Supreme Court ordered the government to improve the physical infrastructures of the existing rehabilitation home and to establish more rehabilitation homes in other regions. The court also explicitly prohibited child rehabilitation homes from returning children to police custody. Despite the ruling many children are still sent to adult prisons though some progress has been noticed recently. The new rehabilitation home in Pokhara was inaugurated only in February 2012.

<sup>375</sup> Advocacy Forum, database information.

<sup>376</sup> See para 42.

<sup>377</sup> Sangroula (n 96) pg 130.

<sup>378</sup> *Bablu Godia v. His Majesty's Government, Supreme Court judgment*, March 2009.

<sup>379</sup> OHCHR-Nepal (n 87) pg 13.

15.17 A second problem is the detention of children whose parents have been arrested. The practice of keeping children in jail with their parents seems to be widespread.<sup>380</sup>

## 16. The Rights of the Disabled

### *International and Domestic Standards*

16.1 Article 14(2) of the Convention on the Rights of Persons with Disabilities ('CRPD') provides that,

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.<sup>381</sup>

16.2 In the same vein Article 15(2) states that,

States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>382</sup>

16.3 The objectives of the convention are 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.<sup>383</sup>

16.4 For the purposes of the Convention persons with disabilities,

...include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>384</sup>

16.5 In Nepali law the Protection and Welfare of Disabled Persons Act provides rights to the disabled.<sup>385</sup> It defines a disabled person as 'a Nepalese citizen who is physically

<sup>380</sup> ACHR, 'Nepal: The Maoists' conflict and impact on the rights of the child' (20 May 2005), pg 9.

<sup>381</sup> Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008, signed by Nepal 3 January 2008, ratified 7 May 2010) 993 UNTS 3 Article 14(2).

<sup>382</sup> CRPD (n 385) Article 15(2).

<sup>383</sup> CRPD (n 385) Article 1.

<sup>384</sup> CRPD (n 385) Article 1.

<sup>385</sup> The Protection and Welfare of Disabled Persons Act 2039 BS (1982 AD).

or mentally unable or handicapped to do normal daily lifework'.<sup>386</sup> The act contains the provision that,

No disabled persons suffering from mental disease, save those against whom proceedings are being taken or who have been punished in a criminal offence under the prevailing law, shall not withstanding anything mentioned in the prevailing law, be kept in a jail except for treatment or security arrangements.<sup>387</sup>

The fact that jail is considered an appropriate place for treatment, and that there is no statutory prohibition on imprisoning the mentally disabled as a punishment, is regrettable.

16.6 In addition the Nepali constitutional right against discrimination as set out in the Interim Constitution does not include a prohibition on discrimination on grounds of disability.<sup>388</sup> There is also no requirement that the disabled should be guaranteed legal representation.

16.7 Whilst the *Muluki Ain* does make some provision for insanity as a ground for non-prosecution it imposes a high threshold, stating that,

If one who did any act which is an offence according to the law was, at the time of the commission of the offence, mad or in such mental disorder as a result of which he was unable to know the nature and consequences of the act he had performed, he is not subject to any type of penalty.<sup>389</sup>

Protection against adverse effect discrimination (substantive equality) is not guaranteed in the Nepali legal system nor in the constitutional provision. For example, if a disabled person is suspected of a crime and it is determined that he or she should be detained and/or brought to the court for trial, there is no provision for disabled-friendly access nor do provisions exist to provide a translator to deaf persons in the court room or during the investigation.

### *The Situation in Nepal*

16.8 The absence of any guarantee of legal representation for the disabled gives cause for concern. It is clear that the disabled are an especially vulnerable group of the

<sup>386</sup> The Protection and Welfare of Disabled Persons Act (n 389) s 2(a).

<sup>387</sup> The Protection and Welfare of Disabled Persons Act (n 389) s 16(2).

<sup>388</sup> Constitution (n 7) Article 13.

<sup>389</sup> *Muluki Ain* (n 21) Chapter on Punishment No. 1.

population, and therefore in order to protect their legal rights it seems essential that they should have representation.

16.9 In principle Dhulikhel Prison in Kavrepalanchok District is meant to be a specialist facility for the mentally disabled. The Nepal Disabled Human Rights Centre ('DHRC') is aware of 27 people with disabilities in this facility.<sup>390</sup> The OHCHR-Nepal report that,

The section provided for mentally disabled detainees represents the poorest living conditions that OHCHR-Nepal has witnessed in a place of detention in Nepal, and amount to cruel and inhumane treatment. The only stimulation offered to the detainees is an old TV. In addition, the lack of appropriate medical treatment and follow-up of these detainees raises serious concerns.<sup>391</sup>

OHCHR-Nepal recalled that in 2008 the Supreme Court issued a mandamus writ ordering that mentally disabled prisoners should be housed in hospitals.<sup>392</sup> This order has not yet been complied with.

16.10 For instance, when we visited Kathmandu Central Jail to interview prisoners we received several reports of inmates who had clear physical or mental disabilities.<sup>393</sup> The prisoners reported that these inmates were unable to care for themselves, to the extent that they described how they were unable to wash without assistance. They told us that these prisoners were kept together in a single cell. A member of the prison staff subsequently confirmed this. We were not allowed access to this area of the jail. This accords with a report written by Sudharsan Subedi (the founder of the DHRC) in which he commented that 'mental illness in Nepal is still not appropriately categorised and many mentally ill people are sent to prison'.<sup>394</sup>

16.11 Further discussions indicate that DHRC have serious concerns about the extent of medical provision within Nepali prisons. They are of the opinion that the particular needs of people with disabilities are rarely considered when deciding what medical facilities are needed in prisons.<sup>395</sup>

<sup>390</sup> Interview with Sudharsan Subedi, by Robert Cohen, Kathmandu, August 2010.

<sup>391</sup> OHCHR-Nepal (n 87) pg 14.

<sup>392</sup> *Raju Prasad Chapagain and Others v Prime Minister and Council of Ministers*, Writ no 129 of the year 2063, decision dated 2065/6/30/5) N.K.P 2066 no 1 p 34.

<sup>393</sup> Interview with prisoners by Robert Cohen, Kathmandu Central Jail, 11 December 2009.

<sup>394</sup> Sudharsan Subedi 'New Nepal builds new hope' (December 2009) available at <<http://www.disabilitynow.org.uk/latest-news2/world-view/new-nepal-builds-new-hope>> accessed 14 December 2009.

<sup>395</sup> Interview with Sudharsan Subedi (n 394).

## 17. The Rights of Women

### *International and Domestic Standards*

17.1 Article 3 of the ICCPR asserts that ‘the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant’.<sup>396</sup>

17.2 This is underscored by the UN Convention on the Elimination of All Discrimination Against Women which provides that: ‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women’.<sup>397</sup>

17.3 The effect of these statements is clarified in the Declaration on the Elimination of Violence Against Women which recognised that:

That violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.<sup>398</sup>

The declaration then goes on to recognise that ensuring equal application of all existing international instruments between men and women, is central to eliminating violence against women.

17.4 The Declaration recognises that violence should be defined as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.<sup>399</sup> In terms of the right to fair trial, there are two important points in this definition: the first is that violence can occur by way of arbitrary detention, the second is the acknowledgement that such violence is not limited to the private sphere: violence by the state is equally (if not more) seriously prohibited. It is therefore the case

<sup>396</sup> ICCPR (n 5) Article 3.

<sup>397</sup> The Convention on the Elimination of All Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981, ratified by Nepal 22 April 1991) 1249 UNTS 13 (‘CEDAW’) Article 1 available at <<http://www2.ohchr.org/english/law/cedaw.htm>>

<sup>398</sup> UNGA ‘Declaration on the Elimination of Violence Against Women’ (23rd February 1994) 48/104 UN Doc. A/RES/48/104.

<sup>399</sup> UNGA (n 402) Article 1.

that failing to afford women (and girls) fair trial standards, failing to protect women in state custody, and failing to appropriately punish those who are violent toward women can all constitute breaches of international law.

17.5 Article 13 of the Interim Constitution provides for equality before the law. It also prohibits discrimination based on sex.<sup>400</sup>

17.6 Furthermore, the Gender Equality Act amended a large number of Nepali laws to delete previously discriminatory provisions.<sup>401</sup>

### *The Situation in Nepal*

17.7 In its Concluding Observations on Nepal the Committee on the Elimination of Discrimination Against Women concluded in relation to Nepal:

Despite significant progress achieved in the advancement of women, major socio-cultural, governance, economic, legal and psychological challenges remained. Socio-cultural challenges included the prevalence of traditional culture and customs leading to patriarchy; discriminatory social practices, negative attitudes and gender stereotypes; the prevalence of gender-based violence and the subordination of women in society; the lack of adequate gender awareness and awareness of women's rights; and the marginalization of women's issues. Challenges in the governance sector included non-existent or insufficient implementation of international instruments; insufficient institutional capacity of the government machinery for policy and programme implementation and the lack of effective law enforcement; the need to mainstream gender concerns into governance; the need to institutionalize cooperation with civil society and other partners; and the need to provide effective service delivery for marginalized sectors of the population.<sup>402</sup>

17.8 Broadly speaking, these issues fall into three categories. Firstly, the criminal justice system contains an institutional bias against women. Secondly, the already described inadequacies of the Nepali prison system have a particularly severe impact on women. And thirdly, the Nepali criminal justice system fails to adequately protect women who are victims.

17.9 In relation to the first category of issues, we have already explained that there is a dearth of female judges.<sup>403</sup> Furthermore, as has already been noted, the

<sup>400</sup> Constitution (n 7) Article 13.

<sup>401</sup> The Gender Equality Act 2063 BS (2006 AD).

<sup>402</sup> CEDAW (n 180) para 186.

<sup>403</sup> See above at para 10.17.

inadequacies of the legal aid system are particularly likely to adversely affect women.<sup>404</sup>

17.10 Also, women in the Nepali criminal justice system suffer for being in the minority. As CeLRRd discovered, the proportion of women in jail is as low as 20%, partly as a result of which their welfare is not placed at the centre of initiatives to improve the system.<sup>405</sup> AF's annual survey shows that women detainees constitute nearly 10% of the total pre-trial detention population visited by AF lawyers.

17.11 This is a significant issue. Nepal is currently undergoing a process of reform; that reform will have failed if it does not adequately address the needs of women in the criminal justice system.

17.12 This need is particularly well illustrated by the second aspect to this discrimination. In the Nepali prison system women receive comparatively worse treatment than men. The reasons for this are partly social. As the CEDAW Committee noted traditional Nepali practices tend to be patriarchal. For this reason female convicts experience double discrimination: as convicts and as women they have an especially low status.

17.13 This inferior status translates into a lack of appropriate facilities. For instance, OHCHR-Nepal has highlighted its concerns relating to pregnant prisoners.<sup>406</sup> They also noted that no special facilities were provided for mothers with babies. Similarly, Nepali culture has traditionally regarded menstruation as a spiritual pollutant. For that reason women who are menstruating are sometimes excluded from society in a practice known as *chaupadi*. It is suggested that this traditional attitude feeds into the poor quality of sanitary facilities provided for women in Nepali jails.

17.14 The third category of issues is extremely significant. In the first place there are some areas in which Nepali law fails to take due regard of the importance of protecting women. For instance, the sentence for marital rape in Nepali law is not proportionate to the gravity of the crime in that it appears to be too lenient. The Gender Equality Act amended the *Muluki Ain* to increase the penalty for rape.<sup>407</sup> However it also introduced a provision that 'notwithstanding anything contained elsewhere in this Number [which increased the tariffs], in case a husband rapes his wife, [the sentence shall be] from three months to six months'.<sup>408</sup> The belief that

<sup>404</sup> See above at para 8.13.

<sup>405</sup> CeLRRd (n 125) Pg 137.

<sup>406</sup> OHCHR-Nepal (n 87) pg 12.

<sup>407</sup> An Act to Amend Some Nepal Acts for Maintaining Gender Equality 2063 BS (2006 AD) s 12(2).

<sup>408</sup> *Muluki Ain* (n 21) Ch 14 No. 3(6).

the fact of marriage lessens the gravity of rape is outdated. In the UN Declaration on the Elimination of Violence Against Women marital rape was specifically included as a form of 'violence' to be eliminated.<sup>409</sup> Furthermore, in a number of cases, in various jurisdictions, national courts and legislatures have refused to accept that a marriage can excuse rape and have imposed punishments at the same level imposed on all convicted rapists.<sup>410</sup> The right to a fair trial does not mean that offenders should be excused punishment. In fact, if one offender is sentenced to a significantly more lenient term than another despite their having committed offences of similar gravity then the judicial process, and the fairness of their trials, is undermined.

17.15 A report found worrying evidence that the Nepali authorities did not go far enough to protect women who were the victims of crime. During research conducted in 2003, they discovered that 83% of women who complained of rape and were willing to give evidence in court received threats. 57% reported that the police had been unwilling to record the crime in the first place and 54% were harassed during the investigation.<sup>411</sup> These figures are unacceptable, having in mind that international law imposes a clear duty on states to protect women; in contrast, in Nepal women who complain of criminal treatment are marginalised and discriminated against.

17.16 There have been some positive initiatives to address gender discrimination taken in recent years but the effects of it in the criminal justice system is yet to be felt. The government has decided to recruit more women police which as of May 2012 numbered 3575. Women and Children Service Centres have been set up in all 75 district; with 514 women police officers working in those centres.

<sup>409</sup> UNGA 'Declaration on the Elimination of Violence Against Women' (23 February 1994) UN Doc A/RES/48/104 Article 2.

<sup>410</sup> See inter alia *R v R* [1992] 1 AC 599 (United Kingdom), California Penal Code § 1203.065 (2003), The Marital Rape Act 2007 (Thailand).

<sup>411</sup> CeLRRd (n 125) pg 125.

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# **CONCLUSIONS**

### **18. Does the Nepali Criminal Justice System meet International Standards?**

- 18.1 The Nepali criminal justice system fails to guarantee a fair trial to defendants.
- 18.2 A thorough, sweeping and far reaching set of reforms are required to bring the Nepali criminal justice system into line with international standards. The problems with the system are multi-fold: they are structural and cultural, social and economic and based on failures to incorporate international standards as well as failures to observe the standards that have been incorporated.
- 18.3 We are particularly concerned by the continued prevalence of torture in Nepal. Torture is recognised internationally as representing a great evil. There is never an excuse or rationale for its use. The government of Nepal should take firm action to eliminate all torture and the prevailing impunity for torturers which exists in the country. The bill tabled in the Legislative Parliament in May 2012 should be strengthening by incorporating provisions from the model bill presented by civil society (seen Annex 3) as a first step in this process.
- 18.4 The condition of detention in Nepal falls well below international standards. There is a problem of severe overcrowding in both judicial and police custody. Inadequate sanitation is provided and the quality of life is poor. Prisoners routinely suffer treatment that breaches Article 10 (if not Article 7) of the ICCPR. We recognise that the significant sums of money are needed to improve this situation. However we believe that such investment is vital; the basic rights of detainees must not be sacrificed.

## CONCLUSIONS

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- 18.5 We are also concerned that current trial procedures in Nepal fail to give defendants a fair hearing. It is of fundamental importance that if the state is putting the liberty of citizens in jeopardy they must be given every opportunity to defend themselves fully. At present we believe that the Nepali courts do not give its citizens this opportunity.
- 18.6 A constant theme of our research has been the suggestion put forward by certain officials within the Government of Nepal that standards are not met because of a lack of resources. Clearly Nepal is not a wealthy country. We have tried, on this basis, to make our recommendations as cost effective as possible. Where we have felt compelled to suggest significant investment it is because we see it as the only alternative. Whatever the political imperatives involved with being seen to spend money on suspected or convicted criminals, we nevertheless believe that this investment is vital. As stated by the Human Rights Committee, it is never appropriate to deny an individual's basic rights on financial grounds. Approximately 5% of the national budget goes to security, meaning police. However, very little has been spent in improving the investigation system. Similarly, more resources should be allocated to the judiciary and prosecutor's office.
- 18.7 The recommendations outlined here, if implemented, will go some way to addressing the many fair trial issues in Nepal. They are not, however, an exhaustive list. It is of great importance that as Nepal drafts a new constitution and embarks on the reforms of pivotal laws - such as the Penal Code and Criminal Procedure Code - the aspiration of a fair trial for all is firmly entrenched and that the rights of the individual are allowed to flourish.
- 18.8 Ultimately, structural change will be insufficient to solve the problems faced by the Nepali criminal justice system. Instead an entire change of culture is required. All sectors of society have a role to play in this; politicians, lawyers, academics, judges, defendants, prisoners (both convicted and remanded), victims, lay people and the media all have a unique perspective on the system. Their views should be sought and taken into account to ensure that a meaningful dialogue can take place. Not only can such dialogue improve the system, it will also ensure the longevity of any new system by giving wider society a stake in the process.

## RECOMMENDATIONS

### Pre-trial rights

- 18.9 Nepal is in violation of its international obligations under article 9 of the ICCPR.<sup>412</sup> The widespread failure of the Nepali authorities to produce suspects before a judge within the required 24 hour period is especially concerning. We note that there have been allegations of torture made against the Nepali police. We recognise that the requirement of judicial access is a significant protection from torture. We therefore recommend that the State Cases Act should be amended to introduce compensation for detainees who are held in arbitrary detention for longer than 24 hours and for departmental sanction against those who officers responsible for breaching the law.
- 18.10 The common practice of police circumventing the provisions of the State Cases Act by maintaining false or inadequate custody records is seriously concerning. We recommend that a system of independent monitoring is set up (such as provided for in the Optional Protocol to the Convention against Torture) and that the Nepali police should provide access to such independent monitors to ensure that this does not take place. We also recommend that the State Cases Act should be amended to require that detainees countersign the arrest record confirming its truth.
- 18.11 We recommend that the State Cases Act 1992 and the *Muluki Ain* are amended to alter the basis upon which suspects can be remanded in custody. In our opinion the primary justification for any remand must be one of the three outlined by the Human Rights Committee in *Van Alphen*: to prevent flight, prevent interference with evidence or prevent the recurrence of crime.

<sup>412</sup> ICCPR (n 5) Article 9.

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- 18.12 The current practice of keeping detainees in pre-trial detention for long periods is unacceptable. We regard automatic detention as arbitrary (in the Article 9 sense).<sup>413</sup> In our opinion the concept of police bail should be incorporated into the Nepali legal system.
- 18.13 We are concerned that the *Muluki Ain* makes pre-trial custody automatic for some offences. In our opinion there is no ICCPR compliant (within the framework discussed in *Van Alphen*) reason for this.<sup>414</sup> We would therefore recommend that the law is amended to include a presumption in favour of granting bail.
- 18.14 In the past the difficulty of accessing a court with the power to issue a writ of habeas corpus was a significant impediment to the rights of detainees. However, the recent extension of habeas corpus jurisdiction to the 75 District Courts is expected to play a very effective role in making justice accessible to the people at large in regard to seeking quicker relief in case of unlawful deprivation of personal liberty. This should be closely monitored.
- 18.15 The state of emergency provisions found in Article 143 of the Interim Constitution can be read in a manner contrary to Nepal's international obligations. We highlight the fact that Article 9 of the ICCPR is not open to derogation in this respect. This concern should be addressed when a new constitution is adopted.
- 18.16 We condemn the practice of taking back into preventive detention those persons released pursuant to a writ of habeas corpus, which violates a detainee's constitutional rights to be free from arbitrary arrest and presumed innocent. It also denies the persons concerned with their right to avail themselves of an effective remedy. Whilst it is welcome that this practice has become much less common, work should be done to ensure that loopholes in existing legislation and regulations which facilitated the practice are closed. With the lapse of the previous anti-terrorism legislation, the government has brought an end to the practice of preventive detention beyond ninety days. Courts should therefore take due notice of this strict limitation and avoid in all circumstances practices which serve to circumvent the government's intention in this regard. Legislation prohibiting the practice of re-arrests (in the absence of new evidence) should be introduced and those authorities misusing the legislation or ignoring court orders should be appropriately sanctioned, including where relevant with contempt of court proceedings. The need for contempt of court legislation was endorsed by an outgoing Chief Justice of the

<sup>413</sup> ICCPR (n 5) Article 9.

<sup>414</sup> Van Alphen (n 11) para 5.8.

## RECOMMENDATIONS

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Nepali Supreme Court, in a speech, where he called for the creation of just such an act.<sup>415</sup>

18.17 The current widespread prevalence of torture represents a violation of Nepal's obligations under the ICCPR, the CAT, and customary international law. We recommend that the government of Nepal prioritizes the passing of the draft bill criminalising torture currently before parliament. The bill should be strengthened by incorporating key provisions from the model bill previously presented by AF and other civil society organisations.<sup>416</sup>

18.18 We join with the OHCHR in recommending the following initiatives, which would significantly improve conditions in jails.

- The creation of a professional corps of prison staff
- Visits from members of the judiciary
- The creation of new facilities
- More training for prison staff<sup>417</sup>

18.19 The practice of keeping convicted prisoners and detainees under trial in the same jails and under the same regime is systematic and widespread in Nepal though the Supreme Court has already ordered for there to be separate facilities. In *Som Prasad Luitel vs Office of Prime Minister and other* (16 April 2008), the Supreme Court has held if it is possible the convicted prisoners and detainees awaiting trial should be kept in separate prison facilities. If it is not possible to have them in separate prisons, they have to be kept separate block. Despite this decision of the Supreme Court they are neither kept in different prison nor in separate block. We regard this as a serious breach of international standards. We emphasise that those persons awaiting trial are innocent in the eyes of the law. We believe that any restrictions on their liberty should be as limited as possible. We recommend that the government of Nepal institute measures to affect a greater distinction between the two classes of prisoners in mixed prisons as directed by the Supreme Court in the above mentioned case law.

18.20 The practice of keeping detainees in unofficial places of detention still occur. This practice is contrary to Nepal's international obligations. We recommend that, as an additional safeguard against torture, the government of Nepal must provide for

<sup>415</sup> Himalayan News Service 'Contempt of Court Act key to enforce court orders: CJ' *The Himalayan Times* (9 December 2009).

<sup>416</sup> Criminalize Torture (n 25) Pg 49.

<sup>417</sup> OHCHR-Nepal (n 87), Pg 2.

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statutory disciplinary action against police officers who utilise private homes or other unofficial places of detention. The law should require the publication of all official places of detention on a regular basis and explicitly forbid and penalise the use of unofficial places for detention in line with the Human Rights Committee's General Comment No. 20.

18.21 The confusion apparent in the decisions of the Supreme Court on the admissibility of confessions as evidence represents a worrying trend. Whilst the right to remain silent in the Nepali Interim Constitution meets the obligations of the ICCPR, it is important that this and other rights are respected in practice. The apparent confusion as to the admissibility of uncorroborated confessions as evidence could be remedied by an amendment to the Evidence Act. This amendment should clarify that no defendant is compelled to give evidence and that any evidence which is the result of coercion is inadmissible. We also recommend that the burden of proof under this Act is reversed, in line with Article 15 of the CAT, the decisions of the Committee Against Torture, and the civil society model bill on torture.<sup>418</sup>

18.22 Whilst the overt practice of keeping people in incommunicado detention is declining, there are nevertheless failures on the part of the Nepali authorities which cause a situation of 'constructive incommunicado detention' to exist. This term is used to mean any situation where although a detainee is not directly prevented from consulting lawyers the regime which he is subject to has a detrimental effect on that right. For instance, any circumstance where the nature of the prison regime or police detention facilities makes it less likely that detainees will be able to be completely candid with their lawyers can be so described.

18.23 We are concerned that detainees are unlikely to be accorded a truly confidential meeting with their lawyers. We recommend that the Government of Nepal enact legislation safeguarding this right guaranteed in the Interim Constitution. We further recommend that police stations and prisons should be equipped with rooms in which private meetings can take place.

18.24 In our opinion the legal aid system in Nepal fails to provide a sufficient service to the very large number of litigants who rely on it. The requirement that a defendant should have an income lower than NPR 40,000 is unrealistically low. We recommend that the Legal Aid Act and Regulations are amended to increase the threshold amount. We also believe that unreasonable bureaucratic burdens are placed on those trying to use legal aid. For example, the need to obtain a certificate from

<sup>418</sup> See Annex 3.

## RECOMMENDATIONS

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one's local authority makes it difficult to ensure prompt representation. We recommend that legal assistance should be advanced to those who claim that their income falls below the limit, with the contribution to be repaid if subsequent investigations show that this estimate of income was inaccurate. Care would be required to ensure that such a system didn't cause further injustice and was not administered unfairly. In order to prevent such injustices we therefore recommend that such repayment could only be required upon order of the district court following an oral hearing. In addition, the income level threshold should not be applicable to those who are in pre-trial detention as they will not have access to local government bodies to obtain the certificate.

18.25 We are particularly concerned at the plight of refugees and stateless people (who we regard as especially vulnerable). We note that at present they are unable to obtain legal aid. We regard this as a breach of the 1951 Refugee Convention<sup>419</sup> as well as the ICCPR.<sup>420</sup> We recommend that the legal aid rules are amended to remove this discrimination. We also believe that Nepal should take steps to ratify the Refugee Convention.

18.26 We also believe that the system of court appointed lawyers needs further improvement. We recognise that at present such lawyers are carrying a tremendous caseload in some busy courts having heavy case loads. We also recommend that more than one lawyer be appointed in such courts. Fundamentally we believe that the Nepali legal aid system is unduly complex. We suggest that the multiple systems of having both legal aid and court appointed lawyers could be consolidated. In our opinion this would mean that fewer resources would need to be spent on administration and more could be spent on the provision of legal services.

18.27 The existing custody management standards, including the policy on visits, access to lawyers, family members and medical services need to be reviewed and systems of independent supervision and monitoring need to be established. We recommend to ratify Optional Protocol to CAT.

## Rights at Trial

18.28 The criminal justice system in Nepal does not meet the requirements of the ICCPR or the Interim Constitution regarding discrimination. We are of the opinion that the

<sup>419</sup> The Refugee Convention (n 425) Article 16.

<sup>420</sup> ICCPR (n 5) Article 14.

## RECOMMENDATIONS

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failings of the legal aid system have a particular impact on those who are illiterate, and those with low income including, for example, Dalits. We accordingly recommend that the Legal Aid Act is amended to raise the threshold for the provision of legal aid. We also note that the Human Rights Committee has stated that states are under a duty to take affirmative action to 'diminish or eliminate' discrimination.<sup>421</sup> With this in mind we recommend that a new provision is drafted preventing any trial taking place if an illiterate defendant is unrepresented (along the same lines that the Children's Act provides for minors) and for free legal representation for such individuals where necessary.<sup>422</sup>

18.29 The current system indirectly discriminates against ethnic minorities in Nepal by failing to ensure that they understand the language of proceedings. We recommend that free interpreters should be provided in circumstances where a defendant does not understand or speak Nepali, in line with Article 14(3) of the ICCPR.<sup>423</sup>

18.30 Failing to provide the defendant's lawyers with all the case papers is in breach of the principle of equality of arms. It deprives the defendant of a fair hearing. We recommend that the courts are prevented from hearing any case unless and until the defendant's lawyers have been in possession of the relevant documents for an adequate length of time. In assessing the adequacy of a particular time period the courts should have regard to *General Comment 32* of the Human Rights Committee.

18.31 We believe that preventing foreign citizens from receiving legal aid is direct discrimination. We are of the view that the Legal Aid Regulations should be amended to provide that foreign citizens (who have no means of financial support within Nepal) should be entitled to legal aid.<sup>424</sup>

18.32 The practice of a single court hearing more than one case at the same time breaches the defendant's right to a fair hearing. We recommend statutory reform clarifying the meaning of any provision which requires proceedings to take place 'in court'. Such provisions should be interpreted as meaning that each case must enjoy the undivided attention of the court.

18.33 Whilst security must always be high in any court building, it is inappropriate for policemen who are closely involved in the case to be present in an official capacity when the defendant gives evidence. Given that the number of policemen in Nepal

<sup>421</sup> General Comment 18 (n 162) para 10.

<sup>422</sup> See para 8.12.

<sup>423</sup> ICCPR (n 5) Article 14(3).

<sup>424</sup> These regulations were made in 1998 and are cited by Mackenzie at pg 18 (n 150).

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swelled considerably during the armed conflict it can be argued that there is currently an excess of police in the country.<sup>425</sup> We suggest that some of these police could be diverted to a newly formed, independent, court police force. They would wear a different uniform to the regular police and fall under a different authority such as the Ministry of Justice. We believe that this would reduce the regular Nepal Police capacity to intimidate defendants.<sup>426</sup>

18.34 In practice, the executive has on occasion indirectly interfered with judicial appointments, thereby compromising the judiciary's independence. We therefore recommend that the new constitution creates an independent judicial appointments commission. We also believe that the judiciary should always be a representative body and accordingly recommend that the policy of inclusiveness should be continued.

18.35 Allegations of corruption are deeply concerning. Even one allegation of corruption has the possibility to significantly damage the legitimacy of the judiciary, by causing the public to perceive that justice will not be done. We believe that the disciplinary measures enshrined in the Interim Constitution.

18.36 The practice of vesting significant judicial functions in the hands of any senior government official (including the CDO) is fraught with difficulty. Excessive fines, ill-defined sentences, the official relationship between the CDO and police, and complete lack of procedural safeguards make CDO hearings particularly unsafe. Having functions as a member of the executive and judiciary places them in an untenable position. Thus, in line with the Supreme Court judgement of September 2011, the government should review the law and make necessary amendments.

18.37 It is also recommended that the Public Security Act should be abolished or fully brought in line with international standards; the need for such potentially draconian legislation has never been appropriately demonstrated.

18.38 The current Interim Constitution fails to grant sufficient rights to defendants. We believe that the failure to ensure that all defendants are present at their trial represents a fundamental breach of their human rights. We recommend that, when a new constitution is drafted, it contains a right for all defendants to be present at trial.

18.39 We are also concerned by the common practice of handcuffing defendants in court. Whilst the impact of this is less than it would be if Nepal employed trial by jury, we

<sup>425</sup> Statement by the ACHR '513 bands in the last six months cripple Nepal' 14 July 2009 available at <<http://www.achrweb.org/press/2009/NP0209.html>> accessed 10 December 2009.

<sup>426</sup> This proposition won the support of an academic we discussed it with. Interview with Prof. Prakash KC (n 203).

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nevertheless are of the opinion that it is an unnecessary interference with the rights of the defendant and that it compromises the presumption of innocence. We recommend that the State Cases Act should be amended to outlaw this practice unless it can be shown that, because of the danger posed by a specific defendant, such restraints are proportionate, reasonable and necessary.

18.40 Given that we have serious concerns about the fairness of the Nepali criminal justice system, we note that there is a grave risk that the rights of those imprisoned are further violated. This is particularly true following our conclusion that Nepali prisons fail to meet international standards. Alongside our previous recommendations to improve the quality of Nepali jails we are of the opinion that a greater emphasis should be placed on rehabilitation, both within and without prison.<sup>427</sup> We therefore recommend that more educational opportunities are provided for prisoners. We also believe that sending fewer people to prison and instituting more community-based punishment would have the benefit of decreasing the demands placed on prison resources. We therefore recommend that further research is undertaken on which alternative forms of punishment such as suspended sentencing, community service or probation would function best in Nepal.

18.41 The potential lack of coherence in sentencing breaches Nepal's obligations under international law.<sup>428</sup> This could easily be remedied. Better communication between district judges is essential. We recommend the formation of a sentencing guidelines council to include judges, lawyers and lay members (the inclusion of lay members is designed to improve the democratic credentials of the council). They should have the responsibility for publishing public guidance to judges as to which aggravating and mitigating factors should be considered. They should also publish sample cases illustrating best practices in sentencing and alternative forms of punishment, where possible.

18.42 We have already commented that it is unsatisfactory that Nepali courts routinely sit regardless of the absence of the defendant.<sup>429</sup> Whilst this is less problematic in the appeal court, it is nevertheless the case that the defendant should be there, particularly if matters of fact are at issue.<sup>430</sup> We repeat our suggestion that the new constitution should contain a general right for a defendant to be present in court.

<sup>427</sup> See Section 4.

<sup>428</sup> ICCPR (n 5) Art 9(1).

<sup>429</sup> See Section 11.

<sup>430</sup> This would reflect the situation in (for instance) the Court of Appeal in England and Wales which holds that the presence of the appellant is always preferable but only absolutely guaranteed where matters of fact are under discussion.

18.43 We are concerned that the Nepali Court of Appeal does not more routinely allow appeals on the basis that the defendant did not get a fair trial. Given the abundant evidence of miscarriages of justice it also seems curious that these issues are not raised more often at an appellate level. Ideally a culture should develop in which the judiciary and legal profession become more proactive about considering appeals based on these issues.

## Vulnerable groups

18.44 Nepal systematically fails to accord children a fair trial within the framework of the ICCPR or the CRC. Instead the justice system nearly always views children and adults in the same light. Though there has been some positive measures taken recently, children still are often tried as if they were adults. Whilst they are guaranteed legal representation at trial we do not believe that this goes far enough to safeguard their rights. We recommend that juvenile benches are established everywhere, and procedures are strengthened.

18.45 The failure to uphold the right to a fair trial of children is compounded by the low age of majority and criminal responsibility in Nepal. We note that the Committee on the Rights of the Child has called on the Nepali Government to increase both these ages.<sup>431</sup> We agree that this is a priority. We are also of the opinion that current age verification procedures in the Nepali courts are insufficient. We recommend that efforts are made to systematize the issuing of birth certifications, and that a particular procedure for age verification, based on internationally accepted scientific procedures, should be created.

18.46 Imprisoning children in adult jails is a serious breach of international standards. We believe that it places vulnerable children in an extremely dangerous situation. We therefore recommend that children should not be imprisoned unless as a last resort.<sup>432</sup> If they are imprisoned, they should always be segregated from adult prisoners and held in separate facilities, such as rehabilitation homes. In terms of the children of inmates who are imprisoned with them we recommend that other alternatives (including housing them with their extended family) are explored.

18.47 The Nepali criminal justice system provides no recognition of the particular needs of the disabled. It does not comply with the CRPD, to which Nepal became a party in

<sup>431</sup> Committee on the Rights of the Child (n 373) para 97.

<sup>432</sup> UNGA 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice' ('The Beijing Rules') (29 November 1985) 40/33 Rule 19.

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early 2010. We welcome the ratification and recommend that the Nepali government should at the first available opportunity reform any legislation which does not comply with the Convention's provisions and take all necessary measures to address discriminatory social practices, negative attitudes and stereotypes affecting disabled people.

18.48 We are especially concerned at the high likelihood that the disabled will be unrepresented in the Nepali courts. We are of the opinion that to fail to ensure access to legal representation to such a potentially vulnerable group violates international law. We recommend that the Protection and Welfare of Disabled Persons Act is amended to guarantee that any disabled defendant receives legal advice and legal aid, if so needed.

18.49 The practice of keeping the mentally ill in mainstream jails, or in conditions such as those described by the OHCHR-Nepal, is a serious and worrying violation of international law. We agree with the OHCHR-Nepal that it constitutes inhuman and degrading treatment. We therefore recommend that the Prison Act should be amended to prohibit this practice.

18.50 Many of the defects of the Nepali criminal justice system place a particular burden on women. This is unacceptable, it is a central point of the ICCPR and every other relevant international instrument that provisions should apply equally between men and women. The Nepali criminal justice system fails to meet this duty. We would therefore recommend that all measures recommended in this report are implemented on an equal basis: their very purpose will be undermined unless they apply equally to men and women.

18.51 The Nepali prison system is worryingly patriarchal. It is notable that the jailer of each of Nepal's women's prisons (including prisons with both male and female inmates) is a man. This contributes to a system in which the needs of female inmates are not adequately addressed. This represents discrimination contrary to international and national law. We would therefore recommend that urgent research is undertaken to discover the needs of Nepal's female prison population. That research findings and recommendations should be implemented as soon as possible.

18.52 The Nepali criminal justice system fails to attach due significance to violence against women. This is a clear violation of the Declaration on the Elimination of Violence against Women and a variety of other international instruments. We therefore recommend that measures are introduced to increase the penalty for violence of this nature. Particularly the laws on marital rape require wholesale reform. We also

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recommend that police are given training on the correct procedures to follow when investigating these crimes.

18.53 It is also recommended that the following principles laid down by the Supreme Court of Nepal, in the leading case of *Kishor alias Ram Bahadur Hamal vs. the Prison Management Department & Others*<sup>433</sup>, need to be ensured and complied with by the concerned stakeholders of the criminal justice system to promote the right to fair trial in practice:

- A court or an adjudicating authority having jurisdiction for trial of a case must be constituted by law.
- An adjudicating authority must be competent, independent and impartial.
- The accused must be informed immediately about the accusation against him in the language that he understands.
- The accused should be provided with adequate time and opportunity for preparation of defence in regard to the accusation against him.
- The accused reserves the right to be defended by a legal practitioner of his choice. However, where an accused cannot afford a legal practitioner due to his indigence, the State must arrange one free of cost for his defence.
- The accused must be allowed to be physically present in the court during the proceedings of the case and also present his evidence and witnesses before the court. He should also be allowed to examine his witnesses and cross-examine those of the opponent.
- Where the accused does not understand the language of the court proceedings, he should be provided with the service of an interpreter.

<sup>433</sup> NKP, vol. 52, no. 4, (2067), pg 574.



# Appendix 1

## The Relevant Articles of the International Covenant on Civil and Political Rights<sup>434</sup>

### *Article 2*

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

<sup>434</sup> ICCPR (n 5).

- (c) To ensure that the competent authorities shall enforce such remedies when granted.

*Article 7*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

*Article 9*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

*Article 10*

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
  - (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

*Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

### *Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## Appendix 2

### The Fundamental Rights provided by the Interim Constitution of Nepal<sup>435</sup>

#### *12. Right to Freedom*

- (1) Every person shall have the right to live with dignity, and no law shall be made which provides for capital punishment.
- (2) No person shall be deprived of his/her personal liberty save in accordance with law.
- (3) Every citizen shall have the following freedoms:
  - (a) freedom of opinion and expression;
  - (b) freedom to assemble peaceably and without arms;
  - (c) freedom to form political party or organisations;
  - (d) freedom to form unions and associations;
  - (e) freedom to move and reside in any part of Nepal; and
  - (f) freedom to practice any profession, or to carry on any occupation, industry, or trade.

<sup>435</sup> Constitution (n 7).

Provided that,

- (1) nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or on any act of defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality.
- (2) nothing in sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or law and order situation of Nepal.
- (3) nothing in sub-clauses (c) and (d) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes religion or communities, which may instigate violence, or which may be contrary to public morality.
- (4) nothing in sub-clause (e) shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities.
- (5) nothing in sub-clause (f) shall be deemed to prevent the making of laws to impose restriction on any act which may be contrary to public health or morality, to confer on the State the exclusive right to undertake specific industries, businesses or services; or to impose any condition or qualification for carrying on any industry, trade, profession or occupation.

### *13. Right to Equality*

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.

- (3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.  
Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madeshi, or peasants, labourers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated.
- (4) No discrimination in regard to remuneration and social security shall be made between men and women for the same work.

#### ***14. Right against Untouchability and Racial Discrimination***

- (1) No person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability of any form. Such a discriminating act shall be liable to punishment and the victim shall be entitled to the compensation as provided by the law.
- (2) No person shall, on the ground of caste or tribe, be deprived of the use of public services, conveniences or utilities, or be denied access to any public place, or public religious places, or be denied to perform any religious act.
- (3) No person belonging to any particular caste or tribe shall, while producing or distributing any goods, services or conveniences, be prevented to purchase or acquire such goods, services or conveniences; or no such goods, services or conveniences shall be sold or distributed only to a person belonging to a particular caste or tribe.
- (4) No one shall be allowed to demonstrate superiority or inferiority of any person or a group of persons belonging to any caste, tribe or origin; to justify social discrimination on the basis of cast and tribe, or to disseminate ideas based on caste superiority or hatred; or to encourage caste discrimination in any form.
- (5) Any act contrary to the provisions of sub-clauses (2), (3) and (4) shall be punishable in accordance with law.

#### ***15. Right Regarding Publication, Broadcasting and Press***

- (1) No publication and broadcasting or printing of any news items, editorial, article, writings or other readings, audio-visual materials, by any means including electronic publication, broadcasting and press, shall be censored.

Provided that nothing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty or integrity of Nepal, or which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes or communities; or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality.

- (2) No radio, television, online or any other types of digital or electronic means, press or any other communication media shall be closed, seized or be cancelled the registration because of publishing and broadcasting or printing any material by such means of audio, audio-visual or electronic equipments.
- (3) No newspaper, periodical or press shall be closed, seized or be cancelled the registration for printing and publishing any news items, articles, editorial, writings or other reading materials.
- (4) No communication means including press, electronic broadcasting and telephone shall be obstructed except in accordance with law.

#### *16. Right Regarding Environment and Health*

- (1) Every person shall have the right to live in clean environment.
- (2) Every citizen shall have the right to get basic health service free of cost from the State as provided for in the law.

#### *17. Education and Cultural Rights*

- (1) Each community shall have the right to get basic education in their mother tongue as provided for in the law.
- (2) Every citizen shall have the right to free education from the State up to secondary level as provided for in the law.
- (3) Each community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civility and heritage.

#### *18. Right regarding Employment and Social Security*

- (1) Every citizen shall have the right to employment as provided for in the law.

- (2) Women, labourers, the aged, disabled as well as incapacitated and helpless citizens shall have the right to social security as provided for in the law.
- (3) Every citizen shall have the right to food sovereignty as provided for in the law.

### ***19. Right to Property***

- (1) Every citizen shall, subject to the laws in force, have the right to acquire, own, sell and otherwise dispose of the property.
- (2) The State shall not, except in the public interest, requisition, acquire, or create any encumbrance on the property of any person.

Provided that this clause shall not be applicable on property acquired through illegal means.

- (3) Compensation shall be provided for any property requisitioned, acquired or encumbered by the State in implementing scientific land reform programme or in public interest in accordance with law. The compensation and basis thereof and operation procedure shall be as prescribed by law.

### ***20. Right of Women***

- (1) No one shall be discriminated in any form merely for being a woman.
- (2) Every woman shall have the right to reproductive health and other reproductive matters.
- (3) No physical, mental or any other form of violence shall be inflicted to any woman, and such an act shall be punishable by law.
- (4) Son and daughter shall have equal rights to their ancestral property.

### ***21. Right to Social Justice***

- (1) Women, Dalit, indigenous tribes, Madheshi community, oppressed group, the poor peasant and labourers, who are economically, socially or educationally backward, shall have the right to participate in the state mechanism on the basis of proportional inclusive principles.

## 22. *Right of the Child*

- (1) Every child shall have the right to his/her own identity and name.
- (2) Every child shall have the right to get nurtured, basic health and social security.
- (3) Every child shall have the right against physical, mental or any other form of exploitation. Any such an act of exploitation shall be punishable by law and the child so treated shall be compensated in a manner as determined by law.
- (4) Helpless, orphan, mentally retarded, conflict victims, displaced, vulnerable and street children shall have the right to get special privileges from the State to their secured future.
- (5) No minor shall be employed in factories, mines or in any other such hazardous work or shall be used in army, police or in conflicts.

## 23. *Right to Religion*

- (1) Every person shall have the right to profess, practise and preserve his/her own religion as handed down to him/her from ancient times having due regards to the social and cultural traditional practices.

Provided that no person shall be entitled to convert another person from one religion to another, and shall not act or behave in a manner which may jeopardize the religion of others.

- (2) Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.

## 24. *Rights Regarding Justice*

- (1) No person who is arrested shall be detained in custody without being informed of the ground for such arrest.
- (2) The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.

Explanation: For the purpose of this clause, the words “legal practitioner” means any person who is authorized by law to represent any person in any court.

- (3) Every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such a person shall be detained in custody beyond the said period except on the order of such authority. Provided that nothing in clauses (2) and (3) shall apply to preventive detention or to a citizen of an enemy state.
- (4) No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.
- (5) No person accused of any offence shall be assumed as an offender until proved guilty committed by him.
- (6) No person shall be prosecuted or punished for the same offence in a court of law more than once.
- (7) No person accused of any offence shall be compelled to be a witness against oneself.
- (8) Every person shall have the right to be informed about the proceedings of the trial conducted against him/her.
- (9) Every person shall be entitled to a fair trial by a competent court or judicial authority.
- (10) The indigent person shall have the right to free legal aid in accordance with law.

### ***25. Right against Preventive Detention***

- (1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty and integrity or law and order situation of Nepal.
- (2) Any person held under preventive detention shall, if his/her detention was contrary to the law or was in bad faith, have the right to be compensated in a manner as prescribed by law.

**26. *Right against Torture***

- (1) 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.
- (2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by law.

**27. *Right to Information***

- (1) Every citizen shall have the right to demand or obtain information on any matters of his/her own or of public importance.  
Provided that nothing shall compel any person to provide information on any matter about which secrecy is to be maintained by law.

**28. *Right to Privacy***

- (1) Except on the circumstance as provided by law, the privacy of the person, residence, property, document, statistics, correspondence and character of anyone is inviolable.

**29. *Right against Exploitation***

- (1) Every person shall have the right against exploitation.
- (2) Exploitation on the basis of custom, tradition and convention or in any manner is prohibited.
- (3) Traffic in human beings, slavery or serfdom is prohibited.
- (4) Force labour in any form is prohibited.  
Provided that nothing in this clause shall prevent for enacting a law allowing the citizen to be engaged in compulsory service for public purposes.

**30. *Right Regarding Labour***

- (1) Every employee and worker shall have the right to proper work practice.
- (2) Every employee and worker shall have the right to form trade unions, to organise themselves and to perform collective bargaining for the protection of their interest in accordance with law.

***31. Right against Exile***

(1) No citizen shall be exiled.

***32. Right to Constitutional Remedy***

The right to proceed in the manner set forth in Article 107 for the enforcement of the rights conferred in this part is guaranteed.

## **Appendix 3**

### **The Coalition against Torture Model Bill**

#### **Bill on the Prohibition of Torture, 2009 (2066)<sup>436</sup>**

##### **PREMBLE**

Considering that the dignity of the human being is the highest value of human society,

Taking into account the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Nepal on 14th May 1991 and thus forming part of the law of Nepal,

Considering that it is the fundamental duty and responsibility of each State Party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to implement effective legislative, administrative, judicial and other measures to prevent all acts of torture and other forms of cruel, inhuman and degrading treatment or punishment and to ensure accountability and redress for all acts of torture,

Recognizing the fundamental importance of securing a society free from torture, and that, for this to occur, the cooperation of all citizens and public officials is necessary,

Noting the vital importance of ensuring that victims of torture are treated with dignity and respect and that their interests in safety, security and participation are ensured throughout the legal process.

It has been enacted by the legislature parliament.

<sup>436</sup> Criminalize torture (n 25).

## §1. SHORT TITLE AND COMMENCEMENT

- (1) This Act shall be called “Torture Prohibition Act”, 2009 (2066).”
- (2) This Act shall come into force immediately on signature of the President.

## §2. DEFINITIONS

In this Act, unless the subject or the context otherwise requires:

- (1) “Detainee” shall denote a person who is deprived of personal liberty.
- (2) “Detention” shall denote the condition of a detainee as defined in Section 2(1).
- (3) “Detention facility” shall denote any location where any person as defined in Section 2(7) is kept as a “detainee” as defined in Section 2(1), or subjected to interrogation.
- (4) “Domestic partner” of the victim shall denote a person (not necessarily a spouse) with whom he/she cohabits and shares a long-term intimate relationship.
- (5) “Health check- up” shall denote a full examination of a detainee’s physical and mental health.
- (6) “Physician” shall denote a physician certified by the Nepal Medical Council or a medical practitioner certified by the Health Professionals’ Council.
- (7) “Person” means every human being, regardless of his/ her religion, caste, ethnicity, gender, sexual orientation, political affiliation or citizenship.
- (8) “Prescribed” or “as prescribed” shall denote procedures prescribed or as prescribed in this Act or the Rules framed under this Act.
- (9) “Public official” shall denote an official in public service who may exercise authority or has an obligation to fulfill certain duties or responsibilities under the Constitution, other laws or decisions, or under an order of an agency of the Nepali government. The term specifically includes, but is not limited to, the officials or staff of the Nepal Army, Nepal Police, Armed Police Force, Forest Guards, and other authorities working for wildlife preservation, incumbent or retired, as well as any other person acting in an official capacity.
- (10) “Reparation” shall denote restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to be provided to the victim by the state and the offender.

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- (11) "Torture" shall denote any act through which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person detained or controlled in any way by a public official or officials, or by any other person acting in an official capacity or a person with whom a public official knowingly collaborates or acquiesces, with the purpose of obtaining a confession or information from the victim or a third person, punishing the victim for an act committed or suspected of having been committed by the victim or a third person, or intimidating or coercing the victim or a third person for any reason based on discrimination of any kind.
- (12) "Cruel, inhuman or degrading treatment or punishment" shall include:
- (a) Any of the acts set out in §2(13) or 2(14) below, irrespective of whether the said acts were perpetrated for any of the purposes listed in §2(11); or
  - (b) Any act causing pain or suffering of significant gravity irrespective of whether the said act amounts to "severe pain or suffering" as per §2(11).
- (13) Acts of physical torture shall include acts such as, but not limited to, the following:
- (a) Systematic beating, headbanging, punching, kicking striking with truncheons, rifle butts, or jumping or walking on a person's body;
  - (b) Deprivation of food or water, or forced feeding with spoiled food or drink, animal or human excrement, wine or other noxious substances;
  - (c) Electric shocks;
  - (d) Cigarette burning, burning by electrically heated rods, hot oil, or acid;
  - (e) Water treatment or the submersion of the head in water until, or almost to, the point of suffocation;
  - (f) Tying-up, hanging or forcing to assume fixed and stressful bodily positions;
  - (g) Rape, including the insertion of foreign objects into the sex organ or rectum, or electrocution of the genitals, nipple, breast or rectum, and all other forms of sexual abuse;
  - (h) The amputation of any body part;
  - (i) Forced extraction of teeth;

- (j) Harmful exposure to elements such as extreme heat or cold, animals or insects;  
or
  - (k) Suffocation, including using plastic bags or other implements placed over the head to deprive air almost or up to the point of asphyxiation.
- (14) Acts of mental torture shall include acts such as, but not limited to, the following:
- (a) Prolonged blindfolding;
  - (b) Threatening a detainee or a detainee's family member or friend with death, rape, abuse, or other severe harm;
  - (c) Arbitrary and extended confinement in solitary cells;
  - (d) Extremely prolonged interrogation;
  - (e) Unscheduled or arbitrary transfers from one place to another so as to create a reasonable belief of execution;
  - (f) Demeaning a person's dignity by, for example, forcing him or her to strip or to engage in acts reprehensible to his or her religion or belief system;
- (15) "Victim" shall denote a person subjected to torture or other cruel, inhuman or degrading treatment. The term "victim" shall also denote the immediate family, dependants or domestic partner of the direct victim insofar as they have suffered harm or distress directly or indirectly caused by the unlawful treatment of the victim. Additionally, the term shall denote other persons who have suffered harm while intervening to assist victims in distress or to prevent victimization.

### **§3. PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

- (1) No one shall inflict torture or cruel, inhuman or degrading treatment or punishment. Torture and cruel, inhuman or degrading treatment or punishment constitute crimes punishable in accordance with this Act.
- (2) A person shall be criminally responsible and individually liable for punishment of the offences of torture or cruel, inhuman or degrading treatment or punishment if that person:

- (a) inflicts torture or cruel, inhuman or degrading treatment or punishment; or
  - (b) attempts to inflict torture or cruel, inhuman or degrading treatment or punishment; or
  - (c) inflicts or attempts to inflict torture or cruel, inhuman or degrading treatment or punishment jointly with another party; or
  - (d) inflicts or attempts to inflict torture or cruel, inhuman or degrading treatment or punishment through another party, regardless of whether that other person is also criminally responsible; or
  - (e) orders, incites, instigates, participates in or is otherwise complicit in the inflicting of torture or cruel, inhuman or degrading treatment or punishment, or an attempt to do so by another party; or
  - (f) acts on the instruction, supervision, order or will of a public official or other person acting in an official capacity in inflicting or attempting to inflict torture or cruel, inhuman or degrading treatment or punishment.
- (3) No circumstances whatsoever may be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment including, for example, war, or threat of war, national emergency threatening the life of the nation, terrorism, internal political instability or armed conflict, riots or any other type of public emergencies. Such circumstances will never give rise to a valid legal defense against the offence of torture or cruel, inhuman or degrading treatment or punishment.
- (a) An order from a superior officer or a public authority may not be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment.
- (4) No person, as a result of their position, capacity or for any other reason, shall be immune from investigation or prosecution for torture or cruel, inhuman or degrading treatment or punishment.

#### §4. RECORD OF HEALTH CHECK-UP

- (1) While a person is detained, health check-ups shall be administered in accordance with this Act.

- (2) All health check-ups shall clearly record the physical and mental condition of the detainee and especially all possible evidence of torture and be administered in accordance with any standards set by the Nepal Medical Council and the Health Professionals' Council and in keeping with international standards such as the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Istanbul Protocol") and the Principles of Medical Ethics adopted by UN General Assembly resolution 37/194..
- (3) A health check-up of a person shall be administered by a physician as promptly as possible after the person is arrested. Thereafter, health check-ups, medical care and treatment shall be provided at regular intervals and whenever necessary. Sick detainees, those who complain of illness, injury or ill treatment, and any detainee to whom a physician's attention is specially directed shall be seen regularly by a physician. A health check-up shall be administered to each detainee upon his/her transfer to another place of detention and/or upon release from detention. The health check-ups, care and treatment provided for by this Act shall be provided free of charge.
- (4) A detainee or his or her counsel shall have the right to request and appoint a second physician to provide a medical examination or opinion. Additionally, the competent court may order an independent medical examination or opinion, in which case the examination or opinion shall be provided free of charge.
- (5) All examinations shall be carried out in private, unless an examination within sight (but not within hearing) of public officials is expressly requested by the detainee or physician. The detaining officials and all other public officials shall fully respect doctor-patient confidentiality.
- (6) The fact that a detainee received a health check up, the name of the physician, any other persons present at the check-up and the results of such an examination shall be duly recorded. Upon request of the detainee or his/her counsel, a copy of the aforementioned medical record shall be produced by the competent public official.
- (7) When a detainee is produced in court, the court shall receive and preserve the sealed envelopes containing health records as defined by §4(6), and they shall be attached to the dossier of the case after the charge-sheet is lodged.
- (8) If there is any reason to believe that torture has been inflicted on a detainee, the detainee, his or her immediate family members or domestic partner, guardian, authorized representative or counsel, may petition the competent district court to order an immediate additional health check-up. The competent district court may,

when making such an order, require the physician to provide the examination findings directly to the court and, when appropriate, to the National Human Rights Commission (NHRC) as well.

- (9) If a public official responsible for the detention of the detainee intentionally fails to guarantee health check-ups in accordance with this Act, he/she shall be punished in accordance with §6(6) of this Act. Intentional failure to conform to the aforementioned health check-up provisions of this Act shall be assumed, unless an honest failure to conform to said provisions can be proven by the public official.

## §5. INVESTIGATION AND PROCEDURE

- (1) An investigation into an allegation of torture or cruel, inhuman or degrading treatment or punishment shall be initiated by the filing of a complaint by the victim or some other person or institution acting on his or her behalf, or on the own motion of the district government lawyer or competent judge.
- (2) 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 is reasonable grounds to believe that such offences have taken place.
- (3) The Nepalese Government shall take such measures as may be necessary to establish its jurisdiction over any act of torture or cruel, inhuman or degrading treatment or punishment when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered to Nepal, when the alleged offender is a national of Nepal or when the victim is a national of Nepal. In addition, in cases of torture, the Nepalese Government shall also take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him to any other State.
- (4) If a district government lawyer receives information of a possible offence or has otherwise reasonable ground that an offence under this act may have been committed, he must start an investigation ex officio.
- (5) All detainees, while being processed for detention, shall be informed of their right to file a torture complaint and the procedure for filing complaints.
- (6) Complaints may be filed orally or in writing with the official in charge of the place of detention, another body carrying out independent monitoring of places of

detention, the National Human Rights Commission, the competent judge reviewing the legality of detention, or directly with the district government lawyer.

- (7) All complaints filed shall, immediately on receipt, be forwarded to the district government lawyer. A central log of all complaints received by the district government lawyer shall be kept, and shall include the date on which the complaint was made, the nature of the complaint, and the follow up. Annual statistics of the central log shall be produced by the Lawyer General and publicly disseminated.
- (8) If a detainee dies in detention, suffers mutilation, or there is other evidence or information to suggest that torture or other cruel, inhuman or degrading treatment or punishment may have taken place, the detaining public officials are immediately required to inform the district government lawyer and the National Human Rights Commission.
- (9) Upon receiving information of a possible offence or upon otherwise having reasonable ground to suspect that torture or other cruel, inhuman or degrading treatment or punishment may have been committed, an investigation shall be immediately opened by the district government lawyer. The district government lawyer shall have the obligation to carry out the investigation promptly, thoroughly and impartially.
- (10) The district government lawyer shall keep the Lawyer General regularly informed of all torture and cruel, inhuman or degrading treatment or punishment investigations. The district government lawyer shall immediately advise the Lawyer General of any real or perceived conflicts of interest which may affect the impartiality of the investigation. In cases of conflicts of interest, the Lawyer General shall immediately designate another investigative officer to carry out the investigation.
- (11) While conducting investigations and prosecutions of torture and cruel, inhuman or degrading treatment or punishment cases, the district government lawyer or other competent authority shall conduct a full and thorough investigation of the facts surrounding the incident, with regard to all potential witnesses of the incident, and any documentary or other evidence obtainable from all possible sources,
- (12) The district government lawyer can request and receive assistance from experts for investigation and prosecution, as is necessary to conduct a full investigation and prosecution.
- (13) For the purpose of investigations, the district government lawyer or other competent investigation officer shall enjoy all the rights similar to that of a police

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officer as set forth in Nepal law including: access to custody records, permission to interrogate and compel witnesses and full access to all material and information relevant to the investigation.

- (14) The burden of proof shall be on the detaining officials to demonstrate that the death or injury of the detainee was not caused as a result of torture or other cruel, inhuman or degrading treatment or punishment.
- (15) After completion of an investigation, the district government lawyer shall, where the evidence discloses the commission of a crime, prepare a charge sheet and file a public criminal case on behalf of Nepal government as plaintiff in the court and also prosecute it.
- (16) If, after completion of an investigation, the evidence does not disclose the commission of a crime, the Lawyer General may decide that the case cannot be prosecuted as a public case according to this Act or other Nepal law. In this event, the Lawyer General shall issue a motivated decision and the district government lawyer shall, within 5 days of the issuance of the decision, inform the victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents, and his counsel.
- (17) The victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents, may file an appeal against the decision of the Lawyer General not to pursue the prosecution as a public case. The request for appeal shall be filed within 60 days from the notification of the decision of the Lawyer General.
- (18) In case the Lawyer General decides, according to the provisions of §5(16), that a case cannot be filed as a public case, the victim or, in case of the victim's death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents may file a case as plaintiff on behalf of the victim in the district court.
  - (a) The conversion of a torture or cruel, inhuman or degrading treatment or punishment case into a private plaintiff criminal case under this subsection shall not otherwise affect the prescribed legal procedures governing the case.
- (19) Legal aid shall be provided as prescribed in the Nepalese Legal Aid act 1997.

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- (20) Unless a case is brought as a private plaintiff criminal case according to §5(18), the Nepalese government shall be the plaintiff in all torture and cruel, inhuman or degrading treatment or punishment cases brought under this Act.
- (a) If a victim of torture believes that the government is not adequately representing his/her interests while acting as plaintiff, the victim may step in as the plaintiff at any stage in the case, in which event the proceedings will continue as a private plaintiff criminal case in accordance with §5(18).
- (21) For the purpose of facilitating the investigation and prosecution of torture and cruel, inhuman or degrading treatment or punishment under this Act, the district government lawyer, Investigation Officer, members of the investigation team, defense lawyers, plaintiff's lawyers, and any persons authorized by the competent court shall each have the authority to inspect all detention facilities throughout Nepal.
- (a) Consent from the public official or officials responsible for detention facility shall not be required in order for the aforementioned inspection and monitoring activities.
- (b) Public officials who prevent authorized persons from inspecting or monitoring detention facility shall be subject to penalties as prescribed by §6(7) of this Act.
- (22) The victim, the victim's lawyer or, in case of death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependents must regularly be kept informed of the progress of the investigation. A written report about the progress of the investigation shall be sent to the victim or the victim's lawyer at least every 30 days.
- (23) Protection of the witness.
- (a) Victims shall be considered to be witnesses of the plaintiff in the adjudication of claims under this Act.
- (b) Victims of torture and other cruel, inhuman or degrading treatment or punishment and witnesses of the offence shall be protected as prescribed in Section 23, Subsection (c).
- (c) The office of the Lawyer General is entitled and obliged to take all appropriate measures to guarantee the personal security and safety of the victim, all

witnesses, and the victim's lawyer, relatives of those and any other endangered as a result of any proceedings under this Act before, during and after the investigation and until such time as protection measures are no longer necessary. The victim or any other person endangered as a result of any such proceedings may apply to the Court for a protective order when necessary if such order has not otherwise been provided by the lawyer general.

- (24) Automatic suspension and disciplinary sanctions. Upon commencement of an investigation for an offence under this Act,
- (a) Any incumbent public official shall be automatically suspended from his/her position upon commencement of an investigation into accusations against him/her of an offence under this Act. Such suspension shall remain in effect until the final adjudication of the case.
  - (b) Any public official indicted for an offence under this Act shall be immediately suspended from duty pending trial and duly prosecuted.
- (25) No Statute of Limitations for Prosecution or Reparation.
- (a) There shall be no statute of limitations for the investigation or prosecution of cases under this Act.
  - (b) There shall be no statute of limitations to file complaints and claims under this Act, including initial complaints of torture and other cruel, inhuman or degrading treatment or punishment and claims for interim relief.
  - (c) Nothing in this Act shall affect any right of victims of torture and other cruel, inhuman or degrading treatment or punishment or any other persons to receive reparation which they are otherwise entitled to under Nepalese law.
- (26) All other procedures governing the investigation, prosecution and proceedings of claims under this act shall be as prescribed by Nepalese law.

## §6. PENALTIES

- (1) The following provisions shall serve as guidelines governing the sentencing of public officials convicted under this Act.

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- (2) Public officials guilty of torture as defined by §2(11) of this Act shall be sentenced to:
  - (a) 20 years imprisonment, if the victim of said torture dies as a result;
  - (b) A minimum of 10 and a maximum of 20 years imprisonment, if the victim of said torture is permanently disabled or severely disfigured;
  - (c) A minimum of 10 and a maximum of 20 years imprisonment, if the victim of said torture is raped or sexually assaulted;
  - (d) A minimum of 3 and a maximum of 20 years imprisonment in all other cases.
- (3) When sentencing public officials under §6(2)(d) of this Act, judges shall impose punishment proportional to the harm inflicted in each individual case, taking into account:
  - (a) the method, duration, and cruelty of the torture or other cruel, inhuman or degrading treatment;
  - (b) the duration and severity of the pain or suffering, both mental and physical, suffered by the victim ;
  - (c) whether the offender actually inflicted the torture or merely encouraged the commission of the crime; and
  - (d) any other circumstances or factors relevant to the relative culpability of each individual offender.
- (4) Public officials guilty of cruel, inhuman or degrading treatment or punishment as defined by §2(12) of this Act shall be sentenced to:
  - (a) A minimum of 6 months and a maximum of ten years imprisonment proportional to the harm inflicted in each individual case.
- (5) When sentencing public officials under §6(4)(a) of this Act, judges shall impose punishment proportional to the harm inflicted in each individual case, taking into account:
  - (a) the method, duration, and cruelty of the treatment or punishment;

- (b) the duration and severity of the pain or suffering, both mental and physical, suffered by the victim ;
  - (c) whether the offender actually inflicted the torture or merely encouraged the commission of the crime; and
  - (d) any other circumstances or factors relevant to the relative culpability of each individual offender.
- (6) Public officials guilty of the intentional failure to provide health check-ups in accordance with §4(9) of this Act shall be punishable by a minimum of permanent dismissal from their positions with the government and automatic disqualification from any future government service and a maximum of 1 year imprisonment.
- (7) Public officials guilty of refusing authorized persons access to detention facilities in accordance with §5(21) and §13 of this Act shall be punishable by a minimum of permanent dismissal from their positions with the government and automatic disqualification from any future government service and a maximum of 1 year imprisonment.

#### **§7. RIGHT TO APPEAL**

- (1) The victim and, in case of death or incapacity, the victim's immediate family members or domestic partner, guardian, authorized representative or dependants, and the defendant shall each have the right to appeal the District Court's decision, in relation to whether the offence of torture was committed, whether an appropriate penalty was imposed and regarding the amount and form of compensation awarded.
- (2) Other rules and procedures governing appeals under this Act shall be as prescribed by Nepalese law.

#### **§8. COMPENSATION FUND**

- (1) The Nepalese government shall create and sustain a Compensation Fund for the purpose of providing compensation to victims of torture and other cruel, inhuman or degrading treatment or punishment under this Act.
- (2) A Compensation Fund Management Committee comprised of the following shall be formed to manage the Compensation Fund:
  - (a) Law Secretary - Convener

- (b) Assistant Registrar designated by Registrar of the Supreme Court - Member
  - (c) Assistant Secretary designated by Secretary of the Finance Ministry – Member
  - (d) A member of civil society, working in the area of human rights, appointed by the Human Rights Committee of the parliament
- (3) Annual allocations by the government, donations from national and international donor agencies or individuals, and fines collected from individual offenders under this Act shall be collected in the Fund.
- (4) All expenses incurred related to reparation awarded to victims of torture and other cruel, inhuman or degrading treatment or punishment, as prescribed by §9 and §10 of this Act, will be written expenses under the Fund.
- (5) The compensation fund must never be exhausted.
- (a) insufficient funds within the Compensation Fund shall not prevent the prompt payment of reparation to any victim.
  - (b) in case the compensation fund is exhausted, the Nepalese Government must immediately provide reparation from other sources.
- (6) Other provisions regarding the Compensation Fund will be as prescribed by the Rules promulgated under this Act.

#### **§9. INTERIM RELIEF**

- (1) If a victim has been rendered unable to support his or her family or domestic partner due to injuries allegedly suffered as a result of torture or other cruel, inhuman or degrading treatment or punishment, requires funds to pay for urgent medical care required to treat injuries allegedly suffered as a result of torture or other cruel, inhuman or degrading treatment or punishment, or is otherwise in dire need of financial assistance due to any circumstances brought about by alleged crime, the Investigation Officer, the victim, the victim’s counsel, or the victim’s immediate family or domestic partner may petition the competent court for interim relief.
- (2) If the competent judge determines that interim relief is required, he or she shall issue an order to the Chief District Officer of the district of the alleged victim to provide relief out of the Compensation Fund.

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- (a) The Chief District Officer must promptly provide the determined amount of relief to the alleged victim after receiving such an order.
- (3) In determining the amount of interim relief necessary to sustain an alleged victim under this Act, the judge should, among other factors, consider the following:
  - (a) The scale and gravity of physical or mental torture or other cruel, inhuman or degrading treatment or punishment alleged to be suffered by the victim;
  - (b) The age, familial responsibility and condition of the alleged victim's dependents;
  - (c) Expenses incurred or likely to be incurred during treatment of the alleged torture-related injuries;
  - (d) Duration and necessary means and resources for the rehabilitation of the victim.
  - (e) Urgent funds for medical treatment and financial supply of the victim's family, domestic partner or other dependants.
- (4) All further procedures governing awards of interim relief shall be as prescribed by the Rules promulgated under this Act.

### §10. PROVISIONS AND PROCEDURES OF REPARATION

- (1) The Nepalese Government shall pay and/or provide the full cost and service of reparations to victims of torture and other cruel, inhuman or degrading treatment or punishment promptly after the amount and form of reparations has been determined. Such payment and/or provision shall, in no event, be awarded more than one month after sentencing.
- (2) A victim of torture or other cruel, inhuman or degrading treatment or punishment shall promptly receive adequate, substantial and effective reparation as set forth in this Act. Reparation shall be granted in the form of restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition or other measures which are adequate to secure the victim's health, property and security.
- (3) The Nepalese government has the right to recourse from an individual offender for all costs incurred as a result of his/her unlawful actions.

- (a) Such recourse shall be limited in cases wherein forcing an individual offender to repay the full amount of reparation would subject any member of the offender's immediate family, dependents and/or domestic partner to a substantial risk of danger to their health or life due to said financial burden.
  - (b) The immediate family, dependents and/ or domestic partner shall have the right to apply to the district court rendering judgment if they believe they will be subjected to a substantial risk of danger to their health or life due to the financial burden imposed upon the offender.
    - (i) The court, in considering such applications, shall evaluate the applicants' financial situation and, if it is found that the mandated recourse would expose the applicants to a substantial risk of danger to their health or life, reduce the amount of recourse accordingly.
    - (ii) There shall be no right for the offender's immediate family or domestic partner to protect or restore their usual living standard, as before the recourse.
- (4) In the case that multiple offenders are found guilty of torturing or otherwise committing cruel, inhuman or degrading treatment or punishment to a single victim, the aforementioned costs shall be shared by all offenders sentenced under this Act. These costs shall be divided relative to each offender's guilt and responsibility for the committed offence. The court shall decide each offender's guilt and responsibility during sentencing. That an offender held a position of command or significant responsibility, in the police, army, or another security institution, shall be considered an indicator of substantial responsibility.
- (5) If a person requires diagnosis or treatment for physical or mental health problems suffered due to torture at the hands of public officials, treatment shall be provided at the expense of the Nepal government. Financial assistance shall also be provided to the dependents or family members if immediate relief is required to sustain such persons in the event of the torture-related death or incapacitation of a victim.
- (6) A person determined to be a victim under this Act shall receive reparations as determined by the court.
- (7) Reparation must include all pecuniary and non-pecuniary damages suffered due to torture and other cruel, inhuman or degrading treatment or punishment, insofar as they are not covered by the immediate relief granted by the investigation officer. Reparation, at the least, must include:

- (a) adequate compensation for all non-pecuniary damages, including pain, anguish, fear and any other emotional distress suffered by the victim;
  - (b) all costs of necessary medical treatment and all material losses suffered by the victim due to torture-related harms. Material losses shall include, but are not limited to, loss of income, loss of economic opportunities, expenses incurred in procuring legal or expert assistance, insofar as these costs are not covered by the free legal aid or interim relief; and
  - (c) compensation for all non-pecuniary damages suffered by a victim.
- (8) Each court, when awarding reparation, must clearly indicate the amount of the total sum to be used for each of the categories outlined in §10(7)(a-c). Each court shall give a reasonable explanation for this allocation.
- (9) Considering international compensation standards, the reparation shall be proportional to the gravity of the acts of torture or other cruel, inhuman or degrading treatment, and to the harm suffered. The reparation will be limited by the actual damages caused by torture or other cruel, inhuman or degrading treatment and further punitive damages shall not be awarded to victims.
- (10) Procedures for Reparation
- (a) When a case under this Act proceeds with the Nepalese government as plaintiff, the district government lawyer must include a claim for reparation according to the guidelines set forth in §10(7)(a-c).
  - (b) When a case under this Act proceeds as a private plaintiff criminal case, the victim's lawyer must include a claim for reparation according to the guidelines set forth in §10(7)(a-c).
  - (c) A victim can apply independently to the District Court demanding reparation related to emotional distress suffered due to torture or other cruel, inhuman or degrading treatment of the victim.
  - (d) After a court decides to award reparation to a victim under this Act, a letter along with a copy of the amount and form of reparation shall be sent to the Compensation Fund Management Committee.

- (e) Upon receipt of a letter detailing reparation as outlined in §10(10)(d), the Compensation Fund shall disburse the ordered compensation to the victim within one month.
  
- (11) A rehabilitation centre with adequate medical and rehabilitation facilities shall be established to take care of those who are mutilated or have sustained physical or mental injuries requiring treatment and care. The Nepal government shall bear the cost of its operation.

### **§11. TRAINING OF PUBLIC OFFICIALS**

- (1) The Nepal Government shall take effective legislative, administrative, judicial or other measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment contained in this Act shall be incorporated into all the curriculum and relevant textbooks for competitive examinations and training for entry into public service and shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.
  
- (2) Those working in civil or military law enforcement, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention shall be trained on the basis of a common curriculum stressing all relevant duties and obligations under this Act.
  
- (3) The training of concerned medical personnel shall specifically emphasize the rules established in the Principles of Medical Ethics relevant to the Role of Health Personnel. Particularly, physicians shall be trained in the protection of detainees and prisoners against torture, and other cruel, inhuman or degrading treatment or punishment.
  
- (4) Incumbent personnel and future recruits of the police, armed police and Royal Nepalese Army shall undergo extensive and thorough training including human rights education, training in effective interrogation techniques and the proper use of policing equipment.
  
- (5) The Nepalese government shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture and other cruel, inhuman or degrading treatment or punishment.

- (6) The Nepalese government shall incorporate the prohibition on torture and other related human rights issues into the primary, secondary and university level curriculum within 5 years of the passage of this Act.
- (7) To promote the rule of law in Nepal, the government shall organize regular and at least once per year human rights awareness campaigns to raise awareness of the general public on the importance of human rights protections and the rights of citizens. The government may seek advice and assistance from the NHRC, human rights NGOs and civil society in the conceptualization and/or implementation of such programs.

#### §12. NON-REFOULEMENT

- (1) No one at risk of torture or other cruel, inhuman or degrading treatment or punishment shall be extradited, returned or expelled from Nepal.
  - (a) Whatsoever written elsewhere in Nepalese law, the Nepalese government shall not expel, return (“refouler”) or extradite a person to another state when there are substantial grounds for believing that he/ she would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.
  - (b) For the purpose of determining whether such circumstances exist, the competent authorities shall take into account all relevant considerations including, where applicable, a consistent pattern of gross, flagrant or mass violations of human rights in the state concerned.

#### §13. MONITORING SYSTEM

- (1) Under this Act, the National Human Rights Commission (NHRC) is mandated to monitor all detention facilities and other places where individuals are detained throughout the country. The condition of such places of detention, as well as any human rights abuses, breaches or other compliance issues under this Act shall be recorded in the Annual Reports of the NHRC.
  - (a) Competent civil society organizations may apply to the NHRC to receive monitoring rights and, if approved, will be entitled to rights equivalent to those guaranteed to the NHRC under this Section.

- (2) To facilitate the monitoring process, unrestricted access to all places of detention shall be granted to officials of the NHRC and all organizations approved under §13(1)(a) of this Act.
- (3) The NHRC and all organizations approved under §13(1)(a) of this Act shall be entitled to visit all detention facilities unannounced, immediately and at any time. The NHRC shall have access to all existent data, detention facilities, detainees, and available personnel.
- (4) The monitoring shall be carried out impartially, independently and with all necessary care.
- (5) In the event that the NHRC or any organization approved under §13(1)(a) of this Act finds evidence of the possibility of torture, they must immediately inform the Lawyer General and advise that an investigation be launched.
- (6) Public officials who prevent authorized or approved persons, organizations, or institutions from inspecting or monitoring detention facilities shall be subject to penalties as prescribed by §6(7) of this Act.

#### **§14. NO USE OF EVIDENCE OBTAINED THROUGH TORTURE**

- (1) No information or any other evidence obtained through torture or other cruel, inhuman or degrading treatment can be used in any proceedings in accordance with the Evidence Act of 1974 except in proceedings against a person accused of torture as evidence that the statement was made..
- (2) A court shall regard such information or any other evidence as nonexistent. In the event that a court or other adjudicating body receives notice, during or after proceedings, that any information has been obtained through torture, the proceeding shall be declared a mistrial and a new trial, under a new judge, shall be ordered.
- (3) Upon notice that any information has been obtained through torture, the competent judge shall order the opening of a criminal investigation for torture under this Act, in accordance with §5 of this Act.

**§15. FRAMING OF RULES**

- (1) The Nepalese Government shall promptly frame Rules necessary for implementation of this Act.

**§16. REPEAL**

- (1) The Torture Compensation Act of 2053 (1996) has been repealed.
- (2) Past cases tried under the Torture Compensation Act of 2053 (1995) shall be regarded as having been tried under this Act and pending torture cases, at the time of this Act's passage, shall proceed in accordance with this Act.
- (3) Past cases of torture and other cruel, inhuman or degrading treatment or punishment which took place after Nepal ratified the Convention against Torture can be investigated, prosecuted and tried under this Act.