Advocating against TORTURE in 2016

The Challenges of Achieving Justice

June 26, 2017

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ADVOCACY FORUM

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ABBREVIATIONS

AF	Advocacy Forum
AG	Attorney General
APT	Association for the Prevention of Torture
CAT	Convention against Torture
CPS	Crown Prosecution Service
DIG	Deputy Inspector General
DPO	District Police Office
FIR	Information Report
ICCPR	International Covenant on Civil and Political Rights
NAPHR	National Action Plan on Human Rights
NGO	Non-Government Organization
NHRC	National Human Rights Commission
OPCAT	Optional Protocol to the Convention against Torture
PIL	Public Interest Litigation
SP	Superintendent of Police
TCA	Torture Compensation Act
UK	United Kingdom
UN	United Nations
UPR	Universal Periodic Review
US	United States

FOREWORD

The year 2016 brought some significant ebbs and flows in the 17 years of Advocacy Forum (AF). During this period some ground breaking cases were decided like *Regina vs. Lama* and *Maina Sunuwar*(April 2017). However, AF also faced significant non-cooperation by some of the stakeholders of the criminal justice system.

Though there was an acquittal and the Crown Prosecution Service of UK decided not to go for a re-trial and released the suspect, the *Regina v Lama* case set a precedent that if the justice is not delivered in Nepal it can be prosecuted under universal jurisdiction in another country.

Despite being refused access to places of detention in several districts, AF lawyers managed to meet and interview 1746 detainees in police detention centers and courts. However, we could not be assured of the reliability of data collected in the presence of police and in the court. So, for the first time in more than ten years, Advocacy Forum (AF) felt not in a position to conduct an assessment of whether the overall situation in regard of torture in police custody during the last year had improved or deteriorated. But despite these hurdles AF continued its work providing legal, medical, psychosocial and other supports to the needy detainees and victims of human rights violations.

Advocacy Forum wishes to acknowledge and express its sincere thanks to all the individuals who were involved, both directly and indirectly, in the preparation of this report. They are numerous to be named here, but their inputs were vital. In particular, we would like to extent our gratitude to Morgane Singh for drafting the report and Ingrid Massage and Om Prakash

Sen Thakuri for their inputs and editing of the report. Above all, we are deeply indebted to the victims, their families, and the major stakeholders of criminal justice system in Nepal. We also thank to the police officers who have allowed AF lawyers to visit detainees in some working districts of AF. Finally, we would like to thank to association for prevention of torture (APT) for technical and financial support to run the project and DKA Austria for its support for publication of this report.

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EXECUTIVE SUMMARY

For the first time in more than ten years, Advocacy Forum (AF) is not in a position to conduct an assessment of whether the overall situation in regard of torture in police custody during the last year has improved or deteriorated. This is due to a lack of cooperation from the Nepal Police since mid-2016, when police in some districts started to stop AF lawyers from visiting places of detention and conducting interviews with detainees.

This report focuses on the legal safeguards against torture, namely the right to prompt legal counsel and the right against self-incrimination, more specifically the rule against entering forced confessions into evidence. Monitoring these legal safeguards have been an important aspect of AF's work together with monitoring torture itself as both form part of the organization's overall mission to promote the rule of law in Nepal.

IMPLEMENTING INTERNATIONAL OBLIGATIONS

Having ratified the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT), Nepal is under obligation to incorporate the rights and freedoms set out within these treaties into national law. Although most rights and freedoms have been enshrined within the 2015 Constitution, still major elements of these treaties are missing in Nepalese law. The obligations set out in international law must not only be implemented within national legislation but must also be echoed in practice. Twenty-six years since the ratification of these major international treaties, daily practice does not reflect an adherence to human rights and the rule of law in Nepal.

MONITORING TORTURE

AF has been denied access to detention centers in many districts in Nepal. The reluctance of the police to provide written proof of the grounds for refusal has led to difficulties in appealing this decision. Therefore, this report acts as a public appeal to the government to allow AF to resume its work, without interference.

Obstruction of access to detention centers to AF lawyers is seemingly linked to the publication of a 2014 report highlighting the issue of vetting of security forces personnel in Nepal. As part of an integrated strategy, AF's prevention of torture programme involves advocacy for vetting. Since December 2012, the United Nations (UN) has a policy to screen security officials for any alleged human rights violations as part of selection, appointment, recruitment, contracting and deployment processes of peacekeeping personnel. Furthermore, the US Leahy law prevents the US from providing assistance or training to members of a unit of any nation's security forces that has perpetrated a gross violation of human rights, including torture, with impunity.

AF has had several meetings with the representatives of the Nepal Police Human Rights Unit, Police Headquarters and the US embassy in Nepal regarding its role in these processes as there have been many misconceptions among the police on how the UN and US policies are put in place. Although the police acknowledge that the policy of vetting has forced them to change the way they treat detainees, it has made them feel vulnerable to vetting and more reluctant to allow organizations to visit detention places as they are the source of information of torture and other human rights violations in detention being published and being considered as part of the UN or US vetting processes.

EXCLUSION OF FORCED CONFESSIONS INTO EVIDENCE

Prevention of torture requires all the stakeholders of the criminal justice system to uphold the safeguards guaranteed by the constitution. An analysis of the use of forced confessions as evidence by Advocacy Forum (AF) has

uncovered how fragile the right to fair trial is in Nepal. AF has found that the Nepali courts routinely accept confessions as evidence, providing incentives for the police to torture and coerce confessions from suspects under a criminal charge. The courts' practice has led to a process of normalizing the use of torture and other ill-treatment within the investigatory process, frustrating the entirety of the fair trial procedure.

Out of 2,561 remanded detainees interviewed by AF in six districts between October 2013 and December 2015, 1,357 (52.98%) detainees claimed that they had confessed. Out of these 1,357, only 73.7% detainees claimed that they had signed the confession of their own volition while 27.3% detainees claimed of signing due to torture or threats of torture. Section 9 (10) of the Government Cases Act, 2049 (1992) provides that, "[t]he investigating police personnel … shall take the statement of the concerned accused in front of the Public Prosecutor." Out of the 1,357 detainees, however, only 51.1% said that they had signed the confession at the Public Prosecutor's Office, 45.3% claimed signing the confession at the police station (without the public prosecutor being present) and the rest said they did not recall where they signed. In one district, Rupandehi, 92.8% of detainees stated their confession was taken at the police station. This makes it clear that public prosecutors are not upholding their legal obligations.

Furthermore, during the remand hearings, in only 64.3% of cases, the case hearing authority tested the admissibility of confessions by asking the detainees if the confession was given freely. In other words, 34.7% of detainees claimed that they were not asked by the judge whether there had been any coercion when their statement was taken. 1% claimed not to know either way.

LANDMARK CASES

The last year saw the prosecution on charges of torture of colonel Kumar Lama under universal jurisdiction in the United Kingdom (UK) and the trial in absentia before the Kavre District Court of four army officers accused of the murder of Maina Sunuwar, who died in army custody as a result of torture

in 2004. Both are cases where AF has worked closely with the victims and mother of the victim respectively to ensure justice.

AF and the complainants respect the decision of the UK jury which ultimately acquitted Kumar Lama. The case was difficult, given the challenge of proving allegations of torture arising thousands of miles away to a beyond reasonable doubt standard and some ten years ago, as well as problems of interpretation during the proceedings. Furthermore, there was no cooperation from the Government of Nepal. The UK authorities put a lot of work into bringing the case to trial, and despite the verdicts, AF believes it was right and proper, and important that they did so.

It is hoped that the Nepal authorities will draw lessons from this case, including in terms of the need to properly criminalise torture in Nepal as one of the reasons why it was possible for the UK to prosecute Kumar Lama was because there was no legal framework to prosecute him in Nepal.

Finally, after 13 years long battle, three out of four accused in Maina's case have been found guilty of murder and sentenced to life imprisonment. Considering the current state of impunity in the country, we still have to see these convicted soldiers arrested and sent to jail, respecting the court's decision.

TCA: NO COMPENSATION, NO JUSTICE

All court decisions in cases of torture since 1996 have taken place under the Torture Compensation Act (TCA). Faced with evidence of torture, the judiciary has shown its willingness to rule in favor of the victims, awarding them compensation, and sometimes ordering departmental action. But receiving compensation owed has proven a great, almost impossible challenge, with torture victims having to spend money trying to obtain the compensation and having to wait for years. Victims of torture therefore do not receive the justice they deserved under a system of compensation which is inherently flawed.

CRIMINALIZING TORTURE

Still, torture is only prohibited under the Constitution but not made a criminal act in enabling legislation. AF, along with many other NGOs and international bodies, is continuing to campaign for the criminalization of torture. In the face of the problematic implementation of the TCA related court decisions, it is urgent to adopt new anti-torture legislation. However, an anti-torture Bill has been pending in the Parliament for three years indicating that the Nepalese government continues to fail in implementing one of its key obligations under the CAT and repeated promises to the international community, for instance under the Universal Periodic Review (UPR). Multiple shortcomings in the Bill demonstrate a wider reluctance to uphold international standards.

RECOMMENDATIONS

AF urges that immediate action be taken to reduce and prevent the practice of torture in Nepal. Most importantly, it recommends:

- ☞ The Nepal Police to allow AF lawyers and other NGOs unhindered access to detention centres to offer free legal assistance to the detainees and monitor the observance of human rights in detention fostering transparency.

- ☞ To increase state transparency and accountability, the Nepal Police Human Rights Unit, the Attorney General office and the National Human Rights Commission (NHRC) must be more proactive in fulfilling their mandate to monitor detention and facilitating such monitoring by NGOs.

- ☞ To combat impunity, ensure redress for victims of torture and provide a deterrent, **torture must be criminalised** and penalties established which are appropriate to the gravity of the crime. The Bill preventing torture should be amended in line with AF's previous recommendations and Nepal's international obligations and their enactment should be prioritised.

- **All detainees should be given their constitutional rights to access a legal representative**, who should be present during interrogation and should be able to witness and review a detainee's statement.

- To build faith in the legal system and reduce impunity, **decisions of the courts with regard to compensation should be implemented fully**, and compensation should be readily available to victims.

- In line with UPR recommendations and the National Action Plan central fund for torture compensation should be established.

- Ratify third Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure.

- To ensure accountability and a strong framework against torture, **Nepal should implement its international obligations**, ratify OPCAT as recommended by many UN member states during the UPR and set out in the National Action Plan on Human Rights (NAPHR).The government should ensure that the NHRC as the national monitoring mechanism is well-resourced and independent.

- The **Nepal Police must be reformed** and more **effective training, equipment and knowledge must be provided** to remove evidence incentives on confessions and prevent the use of torture in obtaining confessions.

INTRODUCTION

For the first time since 2001, Advocacy Forum (AF) is not able to properly assess the use of torture in Nepal as police have frustrated it and other NGOs in their endeavours to meet detainees in pre-trial detention. Over the last 15 years, AF has documented the gradual reduction in reported incidents of torture, with a large reduction from more than 40% in 2001 to 17.2% in 2015. But during 2016, due to the lack of cooperation from the police, AF has not been able to reach an overall assessment. Though AF lawyers were able to conduct interviews with 1,746 detainees in police detentions of some working districts of AF and at the time they were presented in court, the circumstances were such that it was clear that those detainees did not always feel in a position to speak freely, and therefore the data are considered to not be reliable enough to conduct the analysis AF normally does.

Among the total interviewed detainees i.e. 1,746 detainees, 357 (Female 20 and male 337) were juvenile detainees. Among them 17.4% (62) detainees claimed that they were tortured by police during their term in pre-trial detention.

The current Torture Compensation Act falls far short of required international standards for ensuring accountability for torture and remedy for victims. Nepal has promised both nationally and internationally to bring about such a legal framework and it is a long due.

In the absence of any accountability for those who commit torture, AF advocates for the vetting of those officials alleged to have been involved in torture. The UN has a policy to screen security officials for their peacekeeping missions for their alleged human rights violations. Furthermore, the US Leahy law prevents the US from providing assistance or training to members

of a unit of any nation's security forces that has perpetuated a gross violation of human rights, including torture, with impunity. AF believes these are some of the measures that have contributed significantly to improve the behavior of individual police officers and reduces the practice of torture in Nepalese detention places. AF has documented the steady decline in torture since it started to advocate for vetting and the UN and the US embassy started implementing their policies.

In AF's assessment, the reduction in torture was largely because of the daily presence of lawyers in detention, monitoring the observance of constitutional safeguards, organising consultation meetings among stakeholders, sharing information with the police and other stakeholders, assisting victims and families to file cases under the TCA and conducting advocacy for vetting. AF believes this holistic intervention that it devised and implemented in a sustained manner over the decades contributed in a reduction of torture in Nepal.

It is paramount for a democratic society to adhere to the key values and rights set out in international law. Freedom from torture and the right to a fair trial are cornerstones of democratic societies. Torture is an *ius cogens* norm – a fundamental, overriding principle of international law, which cannot be derogated from and there are rights and freedoms that surround it in order to prevent the police from using of torture.

This year's report seeks to bring to light the key issues encountered by AF in its work to prevent torture. It focuses on the problems in implementing the legal rights and safeguards in place in international and national laws to prevent torture in Nepal. These rights and safeguards are all encompassed within the right to a fair trial. It is incumbent on the state to combat the use of torture and protecting and rehabilitating victims of torture in the different stages of the criminal justice process: pre-trial, during the trial and post-trial.

After the methodology section, the first chapter will present the international and national legislation that directly and indirectly prevent the use of torture. It will focus on two key issues encountered by AF lawyers: the detainees' right to prompt legal counsel, the right against self-incrimination

and the exclusion of forced confessions into evidence. It will assess the implementation of international obligations within national legislation.

Chapter 2 will present the recent difficulties in accessing detainees in pre-trial detention, contrary to constitutional rights. It will show how recent practice in Nepal is frustrating these rights as well as AF's ability to access detainees and properly monitor torture in detention. Within this chapter, the complex relationship between NGOs, the police and the government will be examined to advocate for further transparency and communications to protect human rights and the rule of law.

The third chapter will delve further into the issue of fair trial by investigating the practice of admitting forced confessions within criminal trial proceedings. An analysis of data gathered over the past three years will offer insights into the use of forced confessions as the sole basis for a conviction. It will bring to light problems inherent in the investigatory process which frustrate the right to a fair trial to criminal suspects.

In the final chapter, we present two landmark torture cases (the case of Kumar Lama and Maina Sunuwar) and analyse the failings in implementation of the Torture Compensation Act. Finally, the pending anti-torture Bill will be assessed against international law.

METHODOLOGY

DETENTION MONITORING

AF STRATEGY FOR MONITORING TORTURE IN DETENTION

The recorded progress in reducing torture over the years has been due to an overall integrated strategy that has been put in place by AF, encompassing many different activities to prevent torture in detention. They include:

- ☞ Visits to detention centres
- ☞ Legal challenges in relation to illegal detention and torture cases
- ☞ Filing cases under the Torture Compensation Act (TCA)
- ☞ Sharing information with actors of the criminal justice sector in close door meetings
- ☞ Regular consultation meetings with stakeholders
- ☞ Using information from detention for wider advocacy on issues such as criminalisation of torture, vetting, ratification of OPCAT etc.

AF's usual method for monitoring torture in detention was by having its lawyers conducting regular visits to detention centres and offer needy detainees the option of a legal aid lawyer. Under the rights guaranteed by the Constitution, the police must ensure that the detainees have access to a

lawyer. Since the poor and illiterate detainees have no other opportunities to meet legal aid lawyers and nobody was providing such a service, AF offered free lawyers for detainees to help police implement their constitutional obligation. During such time, AF lawyers would present the detainees with a questionnaire that would help AF monitor the observance of their rights. The questionnaire would entail basic information about the detainee and observance of their constitutional rights.

RECENT DEVELOPMENTS IN MONITORING DETENTION

However, since July 2016 (as will be detailed further in Chapter 2), the police have refused detainees access to AF lawyers across many districts of Nepal. The inability for AF to gain access to many detention centres means that it has not been able to generate data across districts which have been collected through a similar methodology that would permit meaningful comparison. Although, AF lawyers can meet detainees at court and some detention centers, the circumstances of such meetings (i.e. in the presence of police authority and/or public prosecutor, co-detainees and sometime public) can impact their willingness and ability to speak truthfully. As such, AF has not been able to compile a data set which would match the previous year's accuracy. Thus, this year we are not presenting the data analysing whether reports of torture have increased or decreased. This year's torture report will therefore focus on different aspects of torture prevention, by tackling the legal safeguards within the fair trial right.

Although it has faced difficulties in accessing detention in all the districts, AF has interviewed 1,746 (among them 357 juvenile detainees) detainees in court and some detention centers and continued the following activities:

- Providing legal aid and counselling to detainees
- Individual case litigation and public interest litigation
- Communicating and referring cases to international and regional bodies and mechanisms

- Facilitating and holding stakeholder meetings and forums with principal stakeholders of the criminal justice system
- Holding independent sectoral meetings with the different stakeholders
- Providing medical and legal training to doctors, lawyers, judges

Therefore, although access to detention centres being restricted, individual case litigation, court hearings and stakeholder meetings have provided legitimate information to analyse the protection of the legal safeguards within the fair trial right. We have used the fair trial related rights that international law and national laws offer to detainees, while analysing our data.

1

LEGAL SAFEGUARDS FOR TORTURE PREVENTION

The right to a fair trial is intrinsically linked to the right to freedom from torture. There are several safeguards to ensure the right to fair trial that international law and the constitution of Nepal offer to detainees. Observance of those safeguards is critical for the promotion of fair trials for detainees. This report discusses two interlinked major safeguards which are found to be critical not only to promote fair trial but also to prevent torture and ill-treatment in detention: 1. The authorities allowing the accused the time and means to defend him/herself in a court of law. 2. It is therefore crucial for an individual under a criminal charge to be allowed access to legal counsel from the moment s/he is deprived of their liberty.

Nepal has ratified the two main treaties that provide the rights and safeguards for a fair trial and for the prohibition of torture:

The International Convention on Civil and Political Rights (ICCPR)

The United Nations Convention Against Torture (CAT)

In 1990, Nepal showed willingness to abide by its international obligations by adopting the Treaty Act. Under section 9 of the act, all treaties ratified by Nepal prevail in Nepal as national law and treaty provisions trump national law in case of any discrepancies.

Under international treaty provisions, Nepal's new constitution of 2015 and national laws the right to a lawyer in pre-trial detention for any possible criminal charge is guaranteed. Therefore, anyone who is arrested or suspected under a criminal charge has the right to counsel.

This section will focus on the pre-trial rights of detainees, especially the right to legal counsel which is critical to the whole fairness of the judicial process.

Firstly, during questioning, there are several rights and legal safeguards to protect the person suspected of a criminal offence from abuse. The most important of these safeguards are the right to presence and assistance of legal counsel, the right to be presumed innocent, the right to remain silent and the right against self-incrimination.

RIGHT TO PROMPT LEGAL COUNSEL

The right to prompt legal advice is enshrined in article 14(3) of ICCPR:

> "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…"

This international right guarantees that everyone who is arrested or suspected under a criminal charge has the right to have access to a lawyer. The rights of a person who is detained or arrested must be protected and allowing for the presence of a lawyer from such a moment is a legal safeguard to protecting those rights.

As specified by the Human Rights Committee in General Comment 32, "the right to communicate with counsel requires that the accused is granted prompt access to counsel."[1]

Although an individual's right to prompt access to counsel during pre-trial detention is not expressly set out in the treaty itself, it is still protected

[1] HRC General Comment 32, para 34.

by international treaty standards. The monitoring mechanisms have been clear that assistance of a lawyer should be given at the start of the pre-trial detention and continue throughout questioning and all other preliminary investigations. In its Concluding Observations on Georgia, the Human Rights Committee recommended that "detention and pre-trial detention should, in practice, be effected consistent with the requirements of the Constitution and the Covenant; it stresses, inter alia, that all persons who are arrested must immediately have access to counsel, […]"[2] It is also further emphasised in its Concluding Observations on the Netherlands that, the right to counsel is "an important safeguard against abuse,"[3] and it is therefore an important international obligation that must be respected and applied from the pre-trial phase onwards.

The UN Special Rapporteur on torture stated that "torture most often takes place during incommunicado detention, when the detainee is refused access to legal counsel."[4] The Human Rights Committee explicitly states that "keeping 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 is an effective means of preventing cases of torture and ill-treatment."[5]It is thus tantamount in preventing torture, forced confessions and other human rights violations, to allow the right to prompt legal counsel especially during pre-trial detention.

This right starts from the moment a person enters into police custody since it allows those suspected or charged with a criminal offence to know and protect their rights and begin the process of preparing their defence. Indeed, in its Concluding Observations on Latvia, the Committee against Torture, reiterated the need to implement all the fundamental legal safeguards afforded to detainees "from the outset of their being deprived of liberty, in particular

[2] HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) para 28.

[3] HRC Concluding Observations Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) para 11.

[4] UN Special Rapporteur on torture, UN Doc. E/CN.4/1992/17 (1991) para 284.

[5] HRC General Comment 20, para 11.

prompt access to a lawyer."[6] Therefore, as soon as an individual is deprived of their liberty, they are entitled to access to a lawyer, as now guaranteed in the 2015 Nepal Constitution.[7]

The Human Rights Council in 2010 adopted without a vote a resolution to call upon States in the context of criminal proceedings to "ensure access to lawyers from the outset of custody and during all interrogations and judicial proceedings, as well as access of lawyers to appropriate information in sufficient time to enable them to provide effective legal assistance to their clients."[8]Such protection and access to counsel must continue throughout the investigative process including during any questioning by the police or judiciary.[9] The Human Rights Committee notes in multiple cases such as Japan and the Netherlands that the right to counsel during interrogation by the police is not respected and has urged the State parties to give full effect of the right to contact counsel during a police interrogation and the right to remain silent and not testify against oneself.

The generally accepted guidance of the circumstances under which legal counsel must be allowed is prescribed in General Comment 8 of the Human Rights Committee:

> 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*

[6] CAT Concluding Observations: Latvia, UN Doc. CAT/C/LVA/CO/3-5 (2013) para 9(a).

[7] Article 20 (2) provides that: "Any person who is arrested shall have the right to consult a legal practitioner of his or her choice from the time of such arrest and to be defended by such legal practitioner. Any consultation made by such person with, and advice given by, his or her legal practitioner shall be confidential."

[8] Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19 (2010) para 6.

[9] HRC Concluding Observations: Japan, UN Doc. CCPR/C/JPN/CO/5 (2008) para 18; Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) para 11.

> *professional ethics without restrictions, influence, pressure or undue interference from any quarter*.[10]

The right to prompt access to counsel means that persons charged with a criminal offence must be given adequate provisions to confer with said counsel. These are additional safeguards which crystallise a fair judicial system, allowing for the presumption of innocence from the start of the legal process. Although this right applies during the whole criminal proceedings, it is acutely important for individuals in pre-trial detention as they must prepare their defence in a just manner.

The Human Rights Council has stated that: "To ensure that anyone who is arrested or detained on a criminal charge has adequate time and facilities for the preparation of his or her defence, including the opportunity to engage and communicate with counsel."[11]

Most of all, communication with counsel must be kept confidential and authorities must ensure to respect the professional relationship between lawyers and their clients and must not interfere or be present during such communication.[12]

This right has been incorporated in the investigative process in Nepal since the 1990 Constitution. It was further detailed in 1992, in so far as it introduced some legal safeguards during the investigation process, in the Government Cases Act 2049 (1992). The Act requires the police must only take statements from the accused in front of a government attorney.[13]

This right was also protected under the Interim Constitution and is incorporated into the new Constitution of 2015. The Nepal Constitution guarantees the right to prompt legal assistance in Article 20(2):

[10] HRC General Comment 32, para 34.
[11] Human Rights Council Resolution 15/18 para 4(f).
[12] HRC General Comment 32, para 34.
[13] Government Cases Act 2049 (1992), s. 9(1).

> "The person who is arrested shall have the right to consult a legal practitioner of her/his choice and be defended from the time of arrest. The consultations held with the legal practitioner and the advice given thereon shall remain confidential."

It must be stressed that the right to consult with a lawyer from the time of the arrest and for such consultation and advice to be and remain confidential are constitutional guarantees. This means that any act preventing an individual's access to a lawyer or any act impeding on the meetings between attorney and client is unconstitutional.

AF's contribution was instrumental in making sure that the new Constitution explicitly mentioned the stage at which the right to access a lawyer began, was from the time of the arrest. It was AF's lobby and advocacy works and that AF was able to advise the drafters of the Constitution based on their experiences. Considering that AF's visits to places of detention and access to detainees are a crucial contribution to reducing the practice of torture and ill-treatment, from more than 40% in 2001 to 17.2% in 2015, as well as improving the compliance of other safeguards, allowing access to NGOs is instrumental to assess whether Nepal is complying with international and national human rights standards.

RIGHT AGAINST SELF-INCRIMINATION

The right against self-incrimination is enshrined in Article 14(3)(g) of the ICCPR as such:

> "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."

It prohibits any type of coercion including torture and other cruel, inhuman and degrading treatment.The Human Rights Committee has stated that the prohibition of coerced confessions requires "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."[14]

The rights at trial are crucial to allow for the due process of law to operate. Allowing forced confessions into evidence, and more so finding confessions as the most important source of evidence above others does not give rise to fairness in judicial proceedings. All evidence must be weighed equally to come to a judgement.

The right against self-incrimination and coercion is very broad as it prohibits any form of coercion, including torture and cruel, inhuman and degrading treatment. It is a fundamental aspect of the presumption of innocence and reinforces the prohibition against torture. At the heart of the notion of fair trial and procedure, confessions resulting from such coercion must be excluded. Criminal justice systems which rely heavily on confessions as evidence provide incentives to police to coerce suspects. Therefore, international law dictates that confessions cannot be the sole basis of evidence for a conviction and criminal justice systems must eliminate incentives to coercion. Investigations must use other methods of gathering different types of evidence and must rely on those more so than on confessions.

Within the right against self-incrimination, lies the right to remain silent as it is a safeguard against it, inherent as well in the presumption of innocence. Together they protect the freedom of a suspect. Although it is not expressly guaranteed in the ICCPR, it is implicit as part of the guarantees at the heart of the notion of fair trial. It is written into the Rome Statute to apply to everyone and to any crime.

Article 20(7) of the 2015 Constitution of Nepal guarantees the constitutional right that "no person charged with an offence shall be compelled to testify against himself or herself," which protects the right to remain silent.

The right against self-incrimination and the right to remain silent are rooted in the presumption of innocence. As a norm of customary international law, the presumption of innocence always applies. It is an essential element to

[14] HRC General Comment 32, paras 41, 60.

fair criminal proceedings and the protection of the rule of law and applies throughout the whole criminal proceedings from the very start before being charged.

The presumption of innocence is guaranteed under the Nepalese Constitution article 20(5), but further in this report, practice will show that such a guarantee is not respected, endangering the whole fair trial process.

EXCLUSION OF FORCED CONFESSIONS INTO EVIDENCE

Since torture is illegal, it stands to reason that anything said while being tortured or suffering any other form of cruel, inhuman or degrading treatment, has been coerced and is therefore tainted by the preceding criminal act of torture. Within the principle of the 'tainted fruit from a poisonous tree' lies the exclusion of forced confessions into evidence.

Inherent to prohibition against torture and rights against self-incrimination and to remain silent, such protection is expanded by article 15 of the CAT:

> "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."

The scope of the exclusionary rule goes beyond the rules laid down in the CAT, which means it also excludes evidence obtained not only from torture but also cruel, inhuman and degrading treatment, as well as any other methods of coercion.

The Special Rapporteur on torture has clarified that confessions obtained in custody are only admissible if they have been recorded in the presence of a lawyer and have been later confirmed by a judge. Nevertheless, he did specify that even if all these criteria are met, the exclusionary rule will still apply if the confession has been coerced. This shows that the exclusion rule provides substantial protection.

The exclusion of forced confessions into evidence is provided for under Nepalese law. Article 9(2)(a)(2) of the Evidence Act 2031 (1974) grants that the court can only admit a fact set out in a confession as evidence if "[t]he fact was not expressed putting pressure on him/her or with torture to him/her or with a threat to torture to him/her or any other person or putting him/her in a condition to express the fact against his/her will." It clearly establishes that a confession obtained through torture or coercion is not admissible as evidence.

In principle, confessions cannot be admitted into evidence unless proof can be shown that they were voluntarily given. Thus, if there is any doubt about the admissibility of a confession, there is an obligation on the authorities to give information as to the circumstances under which they were obtained, held in a separate hearing. Therefore, this brings about the question of the burden of proof. In accordance with the requirement of the presumption of innocence, the burden of proof must be put on the prosecution to prove beyond a reasonable doubt that the confession was given voluntarily.[15]

Therefore, if there are any doubts about the voluntariness of a statement, they should be excluded according to the Special Rapporteur. Furthermore, the Committee against Torture stated in *GK v Switzerland* that allegations of torture only need to be well-founded for the burden of proof to be imposed on the state.[16]

However, contrary to international legislation, in Nepal section 28 of the Evidence Act puts the burden of proof that statements were coerced on the defendant. According to Nepali law, it is therefore up to the defendant to prove that such a "particular fact" (coercion) existed. This means that claiming that a confession was made under torture is only viewed as an additional "fact" of the case, putting the defendant in the difficult position of having to prove that his/her confession was forced. Placing the burden of proof on the defendant leads to a common practice of consistently accepting forced confessions into evidence as the means and costs to find compelling

[15] *Singarasa v Sri Lanka*, HRC, UN Doc. CCPR/C/81/D/1033/2001 (2004) para 7.4.

[16] *GK v Switzerland*, CAT, UN Doc. CAT/C/30/D/219/2002 (2003) para 6.11.

evidence of torture in police detention is typically beyond that of a criminal suspect.

The emphasis and pressure during a police investigation is much too focused on confessions rather than other forms of evidence. Not only does it make torture more likely but it also undermines the rule of law and violates the rights provided under articles 20(5) and 20(7) of the Constitution, which protect the presumption of innocence and the right against self-incrimination respectively.

2

PRE-TRIAL ACCESS TO JUSTICE

In 2012, AF conducted an in depth analysis of the right to fair trial in Nepal. It highlighted two fundamental concerns about the right to legal counsel in the country: the government of Nepal creating barriers to effective access to legal counsel and the failures of the Nepali legal aid system as few detainees can afford proper counsel. AF's survey showed that only 21.8% of 4328 detainees interviewed knew about their right to legal counsel showing the institutional failures present in ensuring the right to consult with a lawyer provided by the Supreme Court ruling in *Netra Bahadur Karki v His Majesty's Government*.[17]

Despite constitutional provisions, in the past year, AF lawyers have been partially refused access to visit detainees in pre-trial detention. Since we have seen that there are more than sufficient legal provisions to allow such access, it is important to understand at what stage of implementation flaws exist. This chapter will observe instances in which access to detention centres was obstructed to understand the reasons behind this sudden change, while calling for the government to make sure that monitoring work should continuously be carried out.

INSTANCES OF OBSTRUCTION OF ACCESS TO DETENTION CENTRES

We detail below some of the instances during which acceees to pre-trial detention was denied and the attempts by AF lawyers to rectify the situation and identify the reasons for such an obstruction in detention monitoring.

[17] Case No: 2061-CR-3689, Nepal Law Paper (2062), Vol. 6, p.742.

AF has been visiting detainees under the custody of the District Police Office, Rupandehi for several years. However, since July 2016, the District Police Office (DPO) Rupandehi has denied AF representatives any contact with detainees and have not allowed AF lawyers to fill out the organization's monitoring questionnaire. The Rupandehi police informed AF's lawyers that this was due to orders from Nepal Police Headquarters, Kathmandu.

AF RUPANDEHI INTERNAL NOTE OF 18 JULY 2016:

A request to meet with the detainees was denied. In response, the orders from Superintendent of Police (SP) were sought. However, since a meeting was not possible due to the SP being 'unavailable', the Information Center and Nepal Human Rights Commission Sub-Regional Office Butwal were alerted. On 18 July 2016, representatives from AF[names not disclosed] met with SP [name not disclosed] and had an elaborate discussion to allow visits and regular contact with detainees.

However, SP [name not disclosed] declared that orders from the Police Headquarter were required and without such orders, he could not go against the order of Deputy Inspector General (DIG)(name not disclosed) not to let any NGOs to visit detainees and to not permit any contact with the detainees. AF lawyers made the arguments that such action was against Article 20(2) of the Constitution, against the rule of law and a previous agreement between AF and the Police that police headquarter has allowed AF lawyers to visit detention centers and provide free legal aid to the needy detainees,[18] and that it would lead to a vilification of the entire police institution. However, access was still denied unless the higher authority gave express orders.

24 JULY 2016

During a sectoral meeting between AF Rupandehi and Area Police Office Butwal, a formal request was made for permission to allow AF lawyers to

[18] In June 2006, Police Headquarters provided AF formal written permission to visit police detention centers in 12 districts and provide free legal aid to the needy detainees.

meet the detainees. This request was denied on the basis that a DIG (name not disclosed) of Nepal Police Headquarters Kathmandu, had given orders to the SP, head of DPO Rupandehi, saying not to allow detainees visit to any organization except National Human Rights Commission (NHRC) and Attorney General's Office. The AF lawyer argued that, being lawyers, they should be allowed to meet detainees as it is the constitutional and fundamental right of detainee to have a legal representative. He further asserted that prohibition to meet the detainees would violate their human rights and national law of the land. However, the Superintendent of Police (SP), the head of DPO Rupandehi, replied that until a superior official issues orders to allow the detainee visit, they cannot give the permission as actions could be taken against them and it could affect their work, as they would fear that departmental action would be taken against them.

Around the same time, similar experiences were recorded in Siraha, Dhanusha and Mahottari districts.

Similarly, on 24 April 2017, one DIG and Police Inspector [name not disclosed] visited to AF head office and expressed their dissatisfaction on AF's role on vetting.

27 JULY 2016

AF lawyer [name not disclosed] went to DPO Kaski to visit three detainees and was granted access but only under the supervision of a police constable and was only granted five minutes per detainee. The AF lawyer went to voice her dissatisfaction to the SP [name not disclosed]. They discussed the issue with the DSP [name not disclosed] who informed them that Nepal Police Headquarters Kathmandu had given an order not to allow the representative of any organizations to visit the detainee, unless a lawyer wants to make a personal visit and then, only to allocate five minutes for such visits. The reason given by the SP to the AF lawyer for such orders was that a report regarding human rights violations in detention had been published and AF was the only organization meeting the detainees. The SP said that they must follow superior orders and that they would stop the obstruction of such visits only if they receive orders allowing them to do so. He said that he would allow visits with the detainees on a personal basis by his/her

legal representative but would not allow them on an organizational basis. Therefore, from 27 July 2016 onwards, AF detention visits have not been carried out in Kaski District.

28-29 DECEMBER 2016

During a national conference of human rights defenders in Dhulikhel, Kavre, chaired by one of the Commissioners of the National Human Rights Commission (NHRC), Govinda Sharma Poudyal, AF was specifically targeted by a SP [name not disclosed] from Human Rights Unit of Nepal Police. He stated that "AF has caused many problems by raising the issue of vetting. Many police officers are now barred from taking part in international training programs and UN Peacekeeping Missions. AF has defamed the Nepal Police on an international level. You should stop it." Although the representing AF lawyer attempted to clarify that AF has not specifically said to vet the Nepal Police in any of their cases, he responded: "You have published a report on vetting. You have links all over the world. Your work has put the police in a difficult position."

In the past AF had several joint meetings with representatives of the Human Rights Unit of the Nepal Police and the US embassy in Kathmandu to discuss how the US law on vetting functions. The police had raised concerns about individual police officers being barred from participating in trainings offered by the US Government and alleged that AF monitoring reports provide a basis for the US to make vetting decisions.

Vetting of those involved in human rights violations is international practice. It is also widely practiced as a tool of accountability in transitional justice. In 2014 AF published a report on vetting "Vetting in Nepal: Challenges and Issues".[19] Security personnel including police officers have since then been barred from international programs.

AF feels strongly that by denying detainees access to lawyers and preventing NGOs like AF to visit detention, vetting cannot be prevented. Instead, it could cause more harm to the entire police institution, as it could be seen as

[19] See, http://advocacyforum.org/downloads/pdf/publications/impunity/vetting-report-july-2014.pdf

condoning torture. AF hopes that the Nepal Police would understand that training abroad is an opportunity for the police to introduce more scientific investigation techniques into its practice. If the quality of investigations is increased, the reliance on torture will decrease. This will also increase public confidence in the police, promote the rule of law and prevent cases under universal jurisdiction like Kumar Lama. Vetting is part of a larger requirement for more transparency and accountability in the police.

ARGUING FOR ACCESS TO MONITORING DETENTION

At this stage, the police are arguing that the constitutional guarantee is only to provide legal access, but AF is also monitoring the observance of detainee's rights. The police's arguments are based on Article 20(2) of the Constitution allows the detainee a right to consult a lawyer of his/her choice, meaning that a lawyer can only visit a detainee if he/she has been chosen by the said detainee.

However, there are two issues that this argument of police does not recognise. Firstly, detainees are under the custody of police. Unless they facilitate access, provide information about lawyers, no detainee will have access to lawyers, let alone choose who would represent them. The constitutional rights of the detainees to visit lawyers could only be implemented if lawyers visit detention centres in order to offer their services and counsel to detainees, before being able to get the authorisation, the *wakalatnama,* from a specific detainee.

Refusing outright access to AF lawyers hinders the detainee's right to legal counsel and deprives him/her of his/her liberty. The police are violating the detainees' constitutional right to seek counsel from a lawyer of his/her own choosing, thereby denying them their right to a defence from the time of arrest.[20]

Although there were no official grounds for refusal, it was implicitly understood by AF lawyers that human rights defenders working for NGOs

[20] Constitution of Nepal, 2015, Article 20(2).

were the problem, as they have a specific task to protect human rights which would be problematic for the police investigation as it would seemingly frustrate their investigation and their ability to investigate. The police has been denying access to AF lawyers using the argument that all lawyers from all NGO cannot be allowed access to detention centers.AF argues that it is primarily providing free legal assistance. It is also not capable of monitoring fully as it does not have full access. AF is simply interviewing detainees and monitoring the observance of their right. AF is not monitoring all aspects of detention such as

- The infra-structure
- Living conditions: are the cells dark, overcrowded?
- Access to food and water: is the quality of food and water adequate?
- Sanitary conditions: do detainees have access to toilets, showers,
- Medical aid?

AF is a legal entity authorised by the Government. AF's registration has been renewed every year and it has the right to do work to "promote human rights and the rule of law in Nepal". Its mandate is to monitor the human rights situation, expose any violations, increase victims' access to justice and promote the rule of law. If by its monitoring of detention AF is suspected of not functioning as per its mandate, it is upon relevant bodies of the Government to take action against AF, not the police.

Additionally, the manner in which AF's denial of access was communicated and managed has not shone a favourable light on the Nepal Police's ability for transparency, efficiency and human rights compliance. AF is appealing on the Nepalese government to allow the constitutional and fundamental right to legal counsel to detainees.

ALTERNATIVE MONITORING

Monitoring of places of detention is crucial in preventing torture and illegal detention. If police prevent the monitoring of NGOs, the government has to designate a National Preventive Mechanism as envisioned by the Optional Protocol to CAT. Since Nepal has still not ratified the Optional Protocol to the Convention against Torture (OPCAT) and has not designated a National Monitoring Mechanism, preventing visits by AF lawyers and other organisations is creating a gap. Such a situation would call for the NHRC to be proactive and conduct regular visits to police detention places and ensure legal assistance to detainees. Unless that is put in place in a systematic way, the denial of lawyers' visits would mean to allow torture to happen without any checks.

3

UNFAIR TRIALS – USE OF EXCLUSIONARY RULES IN NEPAL

During the last 15 years when Advocacy Forum (AF) has visited places of detention, it has found that forcefully extracting confessions and using them as evidence during legal proceedings is widely practiced in Nepal.

In October 2012, the United Nations Committee against Torture (the Committee) published a report of its findings after a six-year long confidential inquiry into allegations of widespread torture in Nepal from November 2006 to May 2012. The Committee concluded that "torture is being systematically practiced, and has been for some time, often as a method for criminal investigation and for the purpose of obtaining confessions, in a considerable part of the territory of Nepal."[21]

This systematic practice of inflicting torture on detainees to obtain confession or information and using them as evidence against the suspect continues to date. AF and the Association for the Prevention of Torture (APT), in 2013, jointly initiated a project to observe the fair trial situation and use of exclusionary rules in Nepal. This chapter summarizes the findings covering the period from October 2013 to December 2015.

[21] United Nations Committee against Torture Annex XIII, Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party, 46th Session (9 May-3 June 2011), Section V, para 100.

During the period from October 2013 to December 2015, AF lawyers interviewed 2,771 detainees in six districts.[22] Among them were 334 females and 2,437 males.

Among them 4.4% claimed that they were given the reason for their arrest at the time of their arrest, 12.7% claimed that they were not given reason of arrest and 82.9% (2,297) detainees claimed that they were not given the reason for their arrest at the time they were taken into custody but only after they were in detention. Among the interviewed detainees 97% detainees claimed that they were provided health check-up before keeping them in detention which is very encouraging progress. However, among these remanded detainees, only 69.07% detainees were presented before the case hearing authority within 24 hours of their arrest. That shows that 30.93% detainees were detained illegally. (See Annex 1, Table 1-4)

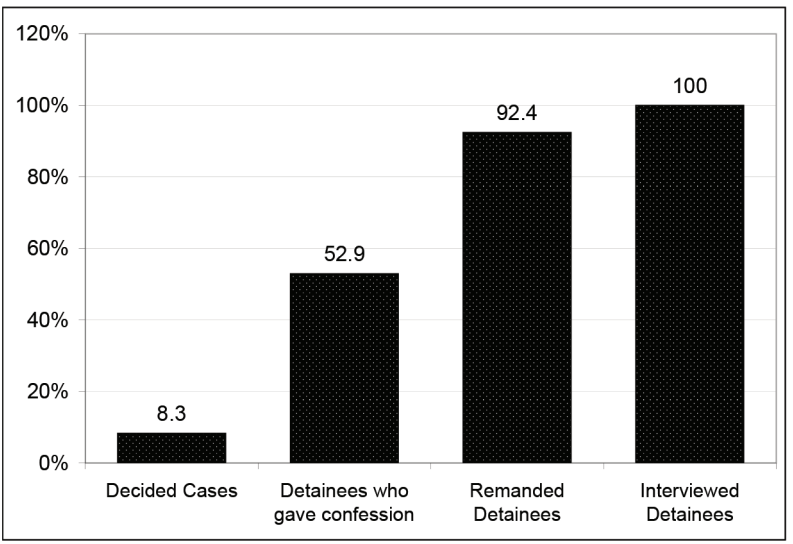

Figure 1: Total interviewed, remanded, confessed and decided cases

Figure 1 makes clear that among the 2,771 interviewed detainees, 92.4% detainees were remanded and among the remanded detainees, 52.9% were

[22] Morang, Kanchanpur, Banke, Kaski, Rupandehi and Kathmandu.

forced to confess. AF closely followed 213 (8.3%) cases which proceeded to trial during this period. The findings are discussed in detail below.

DATA ANALYSIS OF THE 1,357 CONFESSION CASES

Out of 2,561 remanded detainees, 1,357 (52.98%) detainees claimed that they had confessed. A district-wise analysis shows that in Kathmandu 23 (42.8%) out of 552 detainees said that they had provided a confession; in Morang 136 (35.5%) out of 383 detainees said so; in Banke 315 (56.7%) out of 556 detainees did, in Kaski 273 (80.8%) out of 338 detainees, in Kanchanpur 229 (84.2%) out of 272 detainees and in Rupandehi1 67 (36.3%) out of 460 detainees claimed they had made a confession. (See Figure 2; also see Annex 1, Table 2)

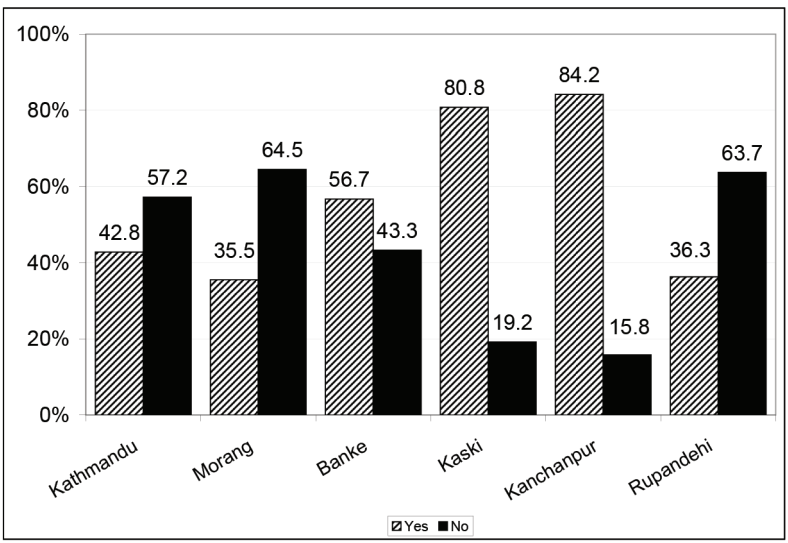

Figure 2: Did you give confession?

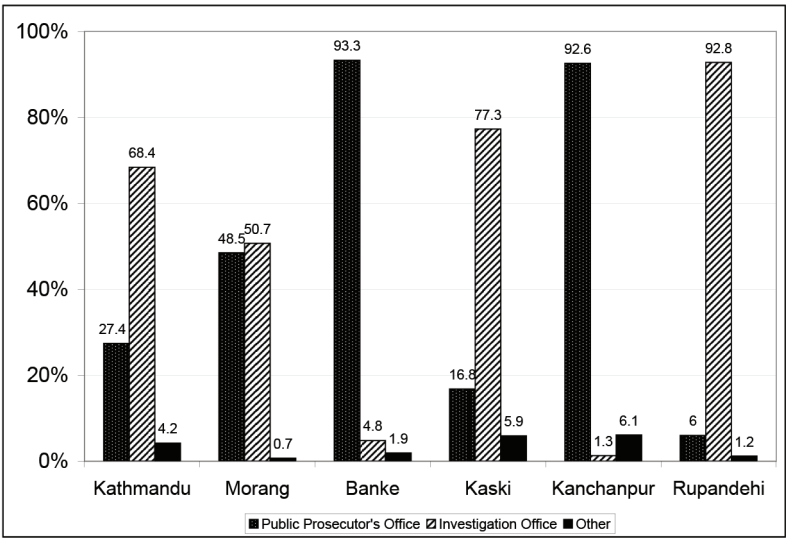

Figure 3: Where was the confession signed?

Among the 1,357 detainees who signed their confession, 51.1% said that they had signed the confession at the Public Prosecutor's Office, 45.3% claimed signing the confession at the police station (without the public prosecutor being present) from where it was taken by police to the Public Prosecutor's Office for verification and 3.6% claimed they did not know where they signed the confession. Section 9(10) of the Government Cases Act, 2049 (1992) provides that, "[t]he investigating police personnel relating to the crime stipulated in Schedule-1 shall take the statement of the concerned accused in front of the Public Prosecutor."[23] The district with the highest percentage (92.8%) of detainees whose confession were taken in police station (without the public prosecutor present) was Rupandehi district; followed by 77.3% in Kaski, 68.4% in Kathmandu and 50.7% in Morang district. Only in Banke (93.3%) and Kanchanpur (92.6%) the majority of detainees signed the confession at the public prosecutor's office. (See Figure 3; also see Annex 2, Table 2)

[23] Government Cases Act, 2049 available here: https://www.yumpu.com/en/document/view/33939417/government-cases-act-2049-1992

Article 20 (7) of the Constitution provides that "[n]o person charged with an offence shall be compelled to testify against himself or herself".[24] However, out of the 1,357 detainees who claimed they signed a confession, only 72.7% detainees claimed that they had signed it of their own volition while 27.3% detainees claimed of signing confession due to other reasons.

A close analysis of the data concerning 370 detainees (27.3%) who claimed of not signing a confession of their own volition showed that 29.2% of them claimed that they had given confession due to torture or ill-treatment[25] and 23.51% detainees claimed that they had signed the confession due to threat of torture or ill-treatment. Both are contrary to Article 22(1) of the constitution and contrary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Nepal. In addition, 18.64% detainees claimed of signing confession due to inducement by police, 4.6% due to advice of public prosecutor, 16.49% due to advice of defence lawyer and 7.56% signed due to other reasons which they did not want to disclose. (See Annex 2, Table 3)

Among the 1,357 detainees who claimed they signed a confession only 14.1% said they were provided a chance to read the statement they had signed, 67.4% detainees claimed that they were not provided a chance to read their statement, 1.8% detainees claimed that the confession paper they had signed was read out to them and 16.7% detainees said that they could not recall what happened. The highest number of detainees who complained of not getting a chance to read the statement was in Morang (83.1%) followed by 82% in Rupandehi, 77.3% in Kaski, 69.8% in Banke, 56.8% in Kanchanpur and 43.5% in Kathmandu. (See Figure 4; also see Annex 2, Table 5)

[24] Constitution of Nepal: http://www.lawcommission.gov.np/en/documents/2016/01/constitution-of-nepal-2.pdf

[25] Out of 2,771 detainees, 474 (17.1%) claimed they were tortured and out of these 474, 90 claimed that they had given confession due to torture and ill-treatment and remaining 384 detainees were tortured to extract information or other reasons.

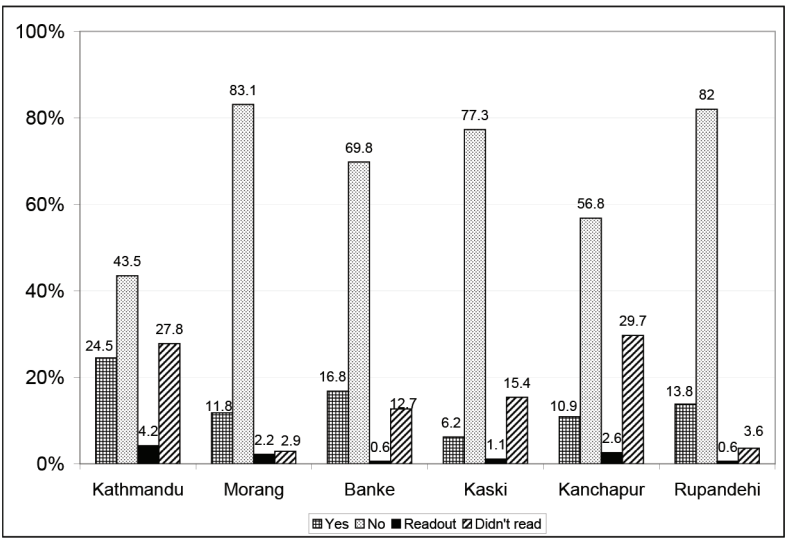

Figure 4: Where you able to read the confession before signing it?

DATA ANALYSIS OF THE 213 DECIDED CASES

By December 2015, out of 1,357 confession cases AF closely followed 213 cases which were decided during the period. AF closely followed those cases by interviewing the detainees during their pre-trial detention, during trial proceedings, by collecting court documents and processing all data using an SPSS database system. An analysis of the legal proceedings in those 213 cases shows that 99.5% of confessions obtained from the suspects were presented as evidence against them during their trial. This illustrates the high value placed on confession as evidence by the investigating authorities.

Out of 99.5% confession cases submitted by the investigating authorities, only in 85.9% of these cases there was found to be corroborating evidence like seizure of stolen goods, fingerprints, swab, weapons etc. supporting the confession. That means in 13.6% of cases, suspects were tried by the public prosecutors on the strength of confession evidence alone. As AF and APT data shows, confession evidence is regularly coerced, there must therefore be serious doubt as to whether judgments based on confessions alone came to the right decision. (See Figure 5; also see Annex 3, Table 2)

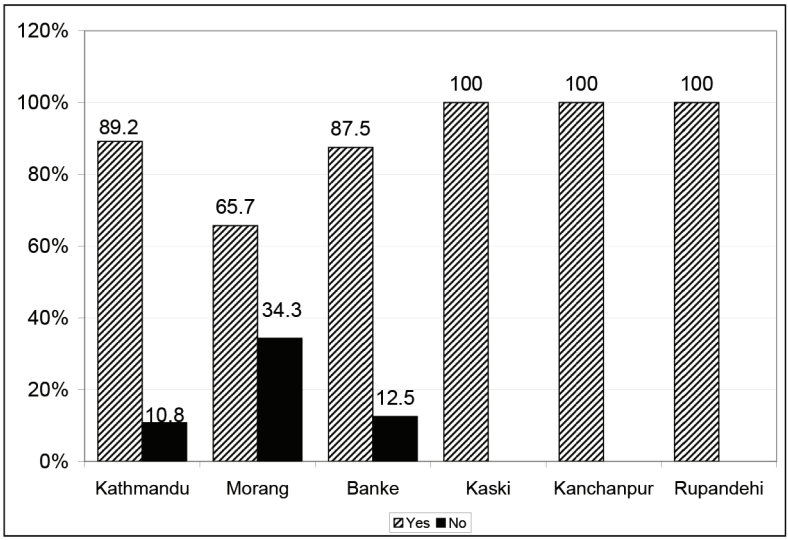

Figure 5: Did evidence corroborate the confession?

Furthermore, during the remand hearing, in only 64.3% of confession cases, the case hearing authority tested the admissibility of confessions by asking the detainees if the consent was given freely. In other words, 34.7% of detainees claimed that they were not asked by the judge whether there had been any coercion when their statement was taken. 1% claimed not to know either way. (see Annex 1, Table 3)

District-wise, in Kathmandu 64.9% detainees, in Morang 52.2%, in Banke 79.2%, in Kaski 89.5%, in Kanchanpur 80% and in Rupandehi in 45.2% of cases the judges took some steps to ensure the confession were taken lawfully i.e. inquired from detainees about whether they freely consented when providing a confession (see Figure 6).

Despite the fact that AF data show that only in 85.9% (183) of cases the confessions were corroborated by other supporting documents, it was found that in 90.6% (193) of such confession cases, the case hearing authority admitted confessions as evidence without the supporting documents. That means in 4.7% (10) cases there were no corroborating evidence

accompanying the confession submitted but the judges nevertheless accepted the confession as evidence. (See Annex 3, Table 4)

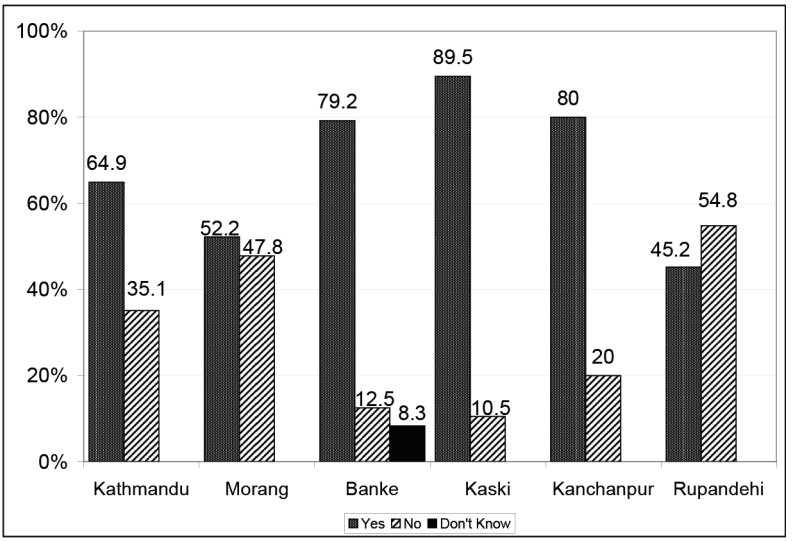

Figure 6: Steps taken to ensure confession was obtained lawfully

Among the 90.6% (193) cases in which the judges admitted a confession as evidence, 68.4% (132) detainees were convicted, 15.5% (30) were converted charge and partially convicted and 16.1% (31) were acquitted.

Further clarifies that out of 99.5% confession cases submitted by the prosecutor, 90.6% cases were admitted by the court and only 85.9% had corroborating evidence and only 68.4% of these cases resulted in a conviction. That means 31.2% of cases submitted by prosecutors failed to result in a conviction due to a lack of supporting evidence apart from a confession (see Figure 7).

Only in 2.8% of these cases the judge ordered additional steps to be taken against the investigation officer or other authorities. As judges are public authorities, there is a duty to pass any allegation of coercion or torture along to a competent authority to begin a criminal investigation wherever there are reasonable grounds to believe that an offence has been committed.

Certainly, this data should cause the judiciary to consider whether they have the necessary skills and tools to be able to refer cases of suspected torture to the appropriate authorities more regularly.

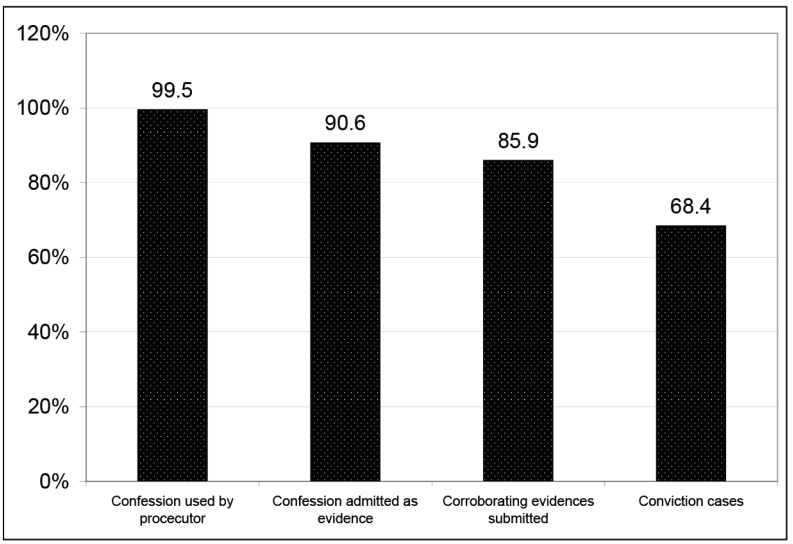

Figure 7: Data result from confession to conviction

During the project period, it was learnt that the police investigation is more focused on a confession-based investigation system rather than evidence-based investigation. The reason for that is that there is no proper guidance to the police by public prosecutors to collect evidences on scientific methods, case hearing authorities accepts confession as evidence during legal proceedings despite no proper supporting evidences to the confession. Likewise, in the absence of proper trainings, frequent transfers for trained police officers to other departments and no access to scientific equipment, the investing authority finds it easy to get information through confession from the suspect rather than searching for other proofs and evidence. Furthermore, as the case hearing authority accept confessions as evidence during jail/bail hearing and mostly the final hearing is based on the jail/bail hearing, the investigating authority is encouraged to obtain confession and information from suspects rather than investigating to obtain physical and circumstantial evidence.

Likewise, the public prosecutors do not get directly involved in fact finding and scientific investigation. The practice of instructing police officers to collect more evidence is rare in Nepal.

AF and APT have concluded that that there is a need for separate guidelines for each stakeholder of the criminal justice system and close follow-up to check on their implementation from the very beginning of the case to its end.

RELEVANT CASE STUDIES

CASE NO: 1

PERSONAL DETAILS

Thankot Pa (Changed name), 14 years old boy (DoB: 09 April, 2003) was arrested by police on 30 August 2016 on charge of theft.

INCIDENT DETAILS

Statement of Thankot Pa: On 30 August, 2016, Santosh, one local boy of Satungal whom I had known, came with a bike pushing it and asked me to help him to push the motorbike as it had some engine problems. I agreed to help him to push the bike to the bus park. However, on the way there was a police checking and a policeman asked me for documents of bike. I replied him that it was not my bike and informed him that it was Santosh's bike so the documents must be with him. After a while, I came to know that the bike was stolen one.

TORTURE DETAIL

Then (At around 6/7pm on 30 August, 2016), 2/3 unidentified policemen in police uniform from Metropolitan Police Circle, Thankot arrested me under

the offense of motorcycle theft. I was taken to Metropolitan Police Circle Thankot and kept in the Case Litigation Section. During the interrogation, 2/3 unidentified policemen beat me with a bamboo stick for 2/3 times on my thighs and slapped on my cheeks twice. Later, they forced me to lie down on the floor in supine position and prop my legs up. Then they beat me with the bamboo stick for 4/5 times on the soles of my feet. They tortured me even when I said that I had not stolen the bike. They threatened to torture me further and coerced me to give the statement saying that I was offered Rs. 10,000 (Ten thousand in words) in order to steal the bike.

I informed the police that I was 14 years old only but they wrote my age as 18 years in the police record. During remand, the judge of Kathmandu District Court asked my age. I said I was 14 years old. Then, the judge asked whether I had birth certificate or not. I replied that it is with my parents and subsequently he scolded the police who had taken me for remand. Afterwards, the police informed my parents, and hence they brought my birth certificate. I was detained in the Metropolitan Police Circle Thankot for 19 days with other adult detainees. On 2073/06/06 (22 September, 2016), I was taken to Juvenile Correction Home.

I came to know about my rights when AF's lawyer informed me about it during interview. I have received legal support from AF.

CASE NO: 2

DETAILS

Kaluka Bahadur, 28, a resident of Rasuwa district was arrested by police in Kathmandu on suspicion of faking documents and swindling on 14 November 2013 [2070/07/28].

CONFESSION

Kaluka, "As the complainant wanted to join temporary police force, I told her that I have someone whom I know but you need to pay some money for it. Then I had taken five thousand rupees from her for the service. I gave her an appointment letter but she wanted an identity card also. So I made a photocopy of my identity card and made a fake ID card and gave it to her."

He informed AF lawyers that he had confessed to the crime with police but in the Court he claimed that he had confessed due to torture and denied committing any crime.

COMPLAINT

Defendant Kaluka had promised to enrol us in temporary police force and had taken Rs 50,000/- from me, Usha, 7 thousand rupees from Urmila and 7 thousand from Birbal and had given us an appointment letter. When we visited the police station with our appointment letter we came to know that those appointment letters were fake. So, we have filed a complaint against him.

STATEMENT OF WITNESS RAM KUMAR

Defendant had taken fifty thousand rupees from Usha, 7 thousand from Urmila and 7 thousand from Birbal promising of recruiting them in the temporary police force and had given them fake enrolment contracts and ID cards and swindled them so he must be punished as per law.

CHARGE SHEET

As he has committed the crime under chapter 1, 9 and 12 of government document fraud and chapter 2 and 4 of Swindling of Court Management Section of Country Code, he should be fined NPR 67,000/- as per chapter-7 of Document Fraud and Chapter-4 of Swindling.

DENIAL OF CRIME BEFORE COURT

The confession statement presented by the Investing Officer is not mine. I was enrolled in temporary police force in the first constitutional election. Among the complainants, I knew Birbal when I was in temporary police force. I have not promised to anyone to enrol them in the temporary police force and have not taken money. The confession taken by police is taken under torture.

JAIL/BAIL HEARING

On [2070/08/23] the Kathmandu District Court heard jail/bail hearing and decided that the FIR and defendant's confession before the police are heard. So, the court will decide later as per evidence found by investigation and for now release him taking deposit of NPR 22,000 bail amount. On 2070/12/3, he deposited the bail amount and got released.

CASE NO: 3

CASE STUDY

Bishal, 24, a permanent resident of Myagdi district and temporarily living in Rupandehi district was arrested by police on 3 November 2014 [2071/07/17] on charge of human trafficking. He gave statement to the investigating officer on 7 November 2014 [2071/07/21].

His statement before the Investigating Officer: I had a love affair with her and had lulled her to go with me to India. We had planned to live in India and I brought her with me on 4 November 2014 [2071/7/16]. I had not thought of trafficking her but I knew that girls and women are sold in India. I had promised to get married with her and taken her with me.

CONFESSION

He informed the AF lawyer that he had given confession before the police due to the threat of torture and ill-treatment.

CHARGE

The charge sheet was filed before District Court Rupandehi on 30 November 2014 [2071/08/14] (case no: 071-CR-0166). As he has committed crime under sub-section 4 (2) (b) of Section 3 of Human Trafficking and Transportation (Control) Act, 2064, it is claimed that he should be punished as provided by Section 15 (1) (e) (1) of the same Act and provide compensation to the victim as provided by Section 17 (1) of the same act.

STATEMENT BEFORE THE COURT

He had given statement before the court on 1 December 2014 [2071/8/15]. He said, "We got married with mutual consent and had planned to live in India. I wanted to live in Pokhara, Nepal but she said that her family won't let her live peacefully if we live in Pokhara. So, she had planned to live in India with the support of her sister who lives in India. I got married with her consent and I had not taken her to India to sell her."

COURT'S ORDER DURING JAIL/BAIL HEARING

It was found that the defendant has given confession before the investigating officer. The court will decide later as per available evidence (FIR, incident report, seizure report, defendant's statement before the investigating officer) but for now send him to detention for trial as per paragraph (2) of Court Management Section of Country Code."

AF INTERVIEWER'S OBSERVATION

The confession was used by investigation and prosecution officers and confession was supported by FIR, incident report and seizure report. However, there is no strong supporting evidence to the confession.

COURT'S VERDICT

He was sentenced for 15 years' imprisonment by the order of District Judge. Despite strong supporting documents the confession was used a basis for judgement.

CASE NO: 4

CASE STUDY

Sunil, 17, temporarily living in Pokhara, Kaski was arrested by police on 15 November 2013 [2070/8/30] on charge of theft and a policeman had slapped him on his cheeks for 1, 2 times during interrogation.

STATEMENT BEFORE THE INVESTIGATING OFFICER

He had given his statement on 20 November 2013 [2070/9/5] before the investigating officer. In the statement he has said, "On 13 November 2013 [2070/08/28] I had agreed with my friend Suman to rob and planned to meet at 2am in the night at Hotel Third Pole and left for our residence. On the way back to my residence, I met Roshan and I shared our plan with him. He also joined in our plan and went with me to his rented room and slept. At around 1.30am Roshan and I went to Hotel Third Pole where Suman was already there. We entered the compound of the hotel, broke a window of a delivery van, robbed half of the goods found there and brought to my room. Roshan and I slept in my room but Suman went to his home. The following day we planned to sell the stolen goods. On 15 November 2013 [2070/08/30], I put the stolen goods in a scooter and went to sell them in Iceland Refrigerator Shop in Naya Bazaar. In a while some policemen arrived and arrested me."

Other defendants Roshan and Suman also have given similar statements before the police.

Witnesses have given statements that they heard that he had broken the window of a delivery van and stolen goods.

STATEMENT BEFORE THE COURT

On 7 January 2014 [2070/09/23] he gave a statement before the court. He said, "I know Suman for last one year and he used to come to my room frequently. One day he had said that he has kept some goods in my room and asked me to sell them because he is in need of money. I didn't know what goods he had and how costly they were. So, I had taken Bishnu uncle's scooter on rent for the purpose."

Defendant Roshan also gave a similar statement and another defendant Suman took all the responsibilities on him and claimed that Roshan and Sunil are innocent.

COURT DECISION ON JAIL/BAIL HEARING

District Court Kaski gave an order to release on bail for amount Rs 89,000/- (which is the calculated amount of stolen goods) in cash or goods. However, he could not deposit the bail amount and was sent to detention for trial.

COURT DECISION

On [2071/01/28] the District Court, Kaski gave its verdict in the case. In this case, identical complaint was filed against the defendant and the complainant gave the statement before the court verifying his complaint. Among the stolen goods mentioned in the complaint, some goods were seized from Sunil whilst he was selling it and others were seized from the defendant's rented room according to the police report of seized objects. The complainant has identified the objects on the spot and before the court claiming that it belonged to him. The defendants confessed to the crime and they accused one another saying three of them together had carried out the theft whilst giving statement before the investigating officer. Similarly, the people on the spot have given statements entailing that the defendants must have carried out the theft. Hence, from all of the above, it is clear that the defendants had committed the offense.

The court order was based on the FIR, complainant's statement, goods seize report, defendants' confession before Investigating Officer and defendant Suman's confession before the court. The court ordered 1 month jail and NPR

89,025/- fine as per no.12 of the Chapter on Theft for the crime committed against no. 1 and 12 of the same Chapter.

Sunil, 17, temporarily living in Pokhara, Kaski was arrested by police on 15 November 2013 [2070/8/30] and claimed that the policeman slapped him on the cheeks during the interrogations.

4

ACHIEVING JUSTICE FOR VICTIMS OF TORTURE

The period under review has seen two landmark cases relevant to justice for victims of torture: the prosecution of colonel Kumar Lama under universal jurisdiction in the United Kingdom (UK) and the trial in absentia before the Kavre District Court of four army officers accused of the murder of Maina Sunuwar, who died in army custody as a result of torture in 2004.

KUMAR LAMA CASE

After numerous lengthy delays, the trial of Colonel Kumar Lama on two counts of torture finally began on 6 June 2016 in the Central Criminal Court in London known as the Old Bailey. After some eight weeks of evidence and argument the British jury acquitted him on 1 August 2016 on one charge, but could not reach a verdict on the second count. On 5 September 2016 the Crown Prosecution Service (CPS) told the trial judge that it would not proceed with a re-trial on this second charge, and the following day the accused was acquitted on that count too.

The charges against Colonel Lama related to acts of torture committed during 2005 at Gorusinghe army barracks, Kapilvastu District. Two victims, Janak Raut and Karam Hussein, claimed soldiers at the barracks tortured them, and that Colonel Lama gave orders to do so.

AF had played a key role in gathering evidence for this prosecution. Several of its staff had to give evidence during the trial. Because of reporting

restrictions imposed by the court, it was not possible to comment on proceedings until the case concluded.

AF wants to make it clear that it would have preferred it if Colonel Lama was prosecuted for torture in Nepal as is Nepal's obligation under international law, including treaties to which it is a party.[26] It strongly believe that in those cases where there is sufficient admissible evidence, it is to the benefit of the country and its people that the rule of law prevails and all those suspected of criminal responsibility are brought to justice in fair trials before ordinary civilian courts.

The chances of an acquittal were always quite high, given that the Nepal authorities did not provide assistance to the UK police investigations and did not permit UK police to visit Nepal and conduct its own investigations nor provided documents and evidence required by the investigators, despite being requested to do so. The defence lawyers faced no such restrictions; they were allowed to visit Nepal to collect evidence that could help to defend the accused and weaken the prosecution's case.

After a seven-week trial the 12-member lay jury took a week considering its verdict. The judge gave directions on reaching a majority decision after it became clear that they could not reach a unanimous verdict. In the end, they acquitted Col Lama on the one count (the torture of Karam Hussein) on 1 August 2016. The jury could not reach even a majority verdict on the other count (the torture of Janak Raut).

As there was a lot of misinformation and general confusion about the decision of the jury, AF wants to make it clear that there was never any doubt that both complainants were tortured at the Gorusinghe army barracks. If there had been doubts about that, Colonel Lama would never even have been arrested. What was before the jury was the question on Colonel Lama's role in the torture. The jury could only convict Lama if they felt they had evidence **beyond reasonable doubt** that he was involved in the torture. In the end, in the mind of at least 10 of the 12 members (the definition of a majority in UK law) of the jury, it had to be the case. In the case of Janak Raut, the jury

[26] Nepal's status of ratification can be accessed at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN

simply could not agree – i.e. less than 10 of them felt that either he should be acquitted or convicted.

AF and the complainants respect the decision of the jury. The case was difficult, given the challenge of allegations of torture arising thousands of miles away and some ten years ago, as well as problems of interpretation during the proceedings. Furthermore, there was no cooperation from the Government of Nepal. The UK authorities put a lot of work into bringing the case to trial, and despite the verdicts, AF believes it was right and proper, and important that they did so.

It is hoped that the Nepal authorities will draw lessons from this case, including in terms of the need to criminalise torture in Nepal itself as one of the reasons why Kumar Lama had to be prosecuted in the UK was because there was no legal framework in Nepal to prosecute him in the country.

MAINA SUNUWAR CASE

After 13 years of legal battle, the District Court of Kavrepalanchok on 17 April 2017 convicted Army Officers Babi Khatri, Amit Pun and Sunil Prasad Adhikari and sentenced them to life (20 years in Nepal) imprisonment for the murder of 15-year-old Maina Sunuwar in 2004. The court acquitted a fourth accused, Major Niranjan Basnet, who is still serving in the army.[27] None of the officers were present in the Court, and it remains to be seen whether they will be arrested and forced to serve their sentence.

Maina's mother, Devi Sunuwar had filed a First Information Report (FIR) with the District Police Kavre on 13 November 2005. Even after several months, no investigation was carried out so she was forced to knock on the Supreme Court's door. On 18 September 2007, the Supreme Court had ordered the police to complete the investigation within 3 months. Accordingly, on 31 January 2008, a charge sheet was filed in Kavre District

[27] For more detail of the case see, Advocacy Forum: "Maina Sunuwar: Separating Facts from Fiction", available at http://advocacyforum.org/downloads/pdf/publications/maina-english.pdf

Court by the Public Prosecutor, demanding life imprisonment for four alleged perpetrators. The District Court issued an arrest warrant against the perpetrators on 14 February 2008. However, they were said to remain absconded and that police could not find them.[28]

Many of the victims of the conflict era were encouraged by the district court verdict. However, their enthusiasm was dampened about a month later when the Attorney General decided not to appeal against the acquittal of the serving army officer and the state appeared to not make any effort to arrest the absconding former army officers.

Reports by several witnesses, national and international organizations, as well as the military's own investigation, show that Maina Sunuwar was subjected to enforced disappearance on 17 February 2004 in a military operation by a team including then Captain Niranjan Basnet. She was then tortured and killed on the same day. The district court's decision to acquit now Major Niranjan Basnet is problematic on a number of grounds, including:

1. The report of the Nepal Army's Court of Inquiry Board provides details of how Maina Sunuwar was subjected to torture upon arrival at the Army's Peacekeeping Training Barracks in Panchkhal on 17 February 2004. According to the inquiry report, seven military personnel witnessed or participated in her torture for at least 90 minutes: Lieutenant Colonel Bobby Khatri; Captain Niranjan Basnet, Captain Sunil Prasad Adhikari, Captain Amit Pun, Sergeant Non-Commissioned Officer Khadak Bahadur Khatri and two soldiers, Dil Bahadur Basnet and Shrikrishna Thapa. An analysis of the district court's judgment, however, shows it did not consider this report in its decision to acquit Major Niranjan Basnet.

2. It is an acknowledged fact that Major Niranjan Basnet arrested Maina Sunuwar and subjected her to enforced disappearance on 17 February 2004. The district court's decision to acquit him based on his argument that he was only acting on superior orders is in stark contrast to rules and principles of international law, which explicitly prohibits invoking

[28] For more details, see Advocacy Forum press release, available at http://advocacyforum.org/press-statement/2017/MainaPressRelease-ENG1.pdf

orders by superiors as justification for committing serious human rights violations.[29]

Appeals by the prosecutor against acquittals in cases of murder are standard practice in Nepal. It is extremely worrying that in this case the AG instructed the district and appeal prosecutors not to do so. At the time of writing, Maina's mother, Devi Sunuwar, is considering whether to appeal against the AG's decision in the Supreme Court.

TORTURE COMPENSATION ACT

As AF has repeatedly pointed out, at this point in time, the only judicial remedy that is available to torture victims in Nepal is the Torture Compensation Act, 1996 (TCA).[30] Pending the adoption of a bill to criminalize torture (see below), despite all its shortcomings, the TCA provides a possibility for victims of torture to obtain compensation to a maximum of NRs 100,000 and get an order from the court for disciplinary action to be taken against those responsible.

In 2016, 4 cases relating to torture brought by victims with the assistance of AF were decided. Three of them (Padam Bahadur Khadka, Tika Prasad Dahal and Jhup Bahadur Bista) were decided in favour of the victims and in one (Man Bahadur Khadka) the District Court ruled that the victim's claim could not be established. The three victims whose cases were successful are satisfied with the compensation awarded and in 2 cases, the additional departmental action ordered.

[29] Amnesty International and the International Commission of Jurists, Open Letter to the Attorney General, 19 May 2017, available at https://www.amnesty.org/en/documents/asa31/6301/2017/en/

[30] Advocacy Forum, Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act 1996, 26 June 2008, available at http://advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf

TCA: DIFFICULTIES WITH IMPLEMENTATION OF COURT DECISIONS AWARDING COMPENSATION

AF has found over the years that there are many obstacles put in the way of victims when they try to get the decisions of the district courts in TCA cases enforced.

The compensation available for victims of torture is minimal and due to institutional problems, there is delayed implementation. Most of the torture victims never receive the compensation awarded by the court because of 1) the difficult, long and tenuous process that is demanded of victims of torture in order to access it; and 2) the lack of funds.

The additional remedy of ordering departmental action does not make up for the lack of imprisonment to the perpetrators, especially since the courts decisions are hardly implemented on that front either.

AF has been monitoring the torture cases they have won over the years and the results are astounding. Almost none of the victims who were awarded compensation by the court have received it, some have been waiting from 9 to 10 years.

The amount of compensation ranges from Rs 3, 000 to Rs 10,000 in most of the cases which is not much considering that they are all victims of torture, which has lifelong repercussions on the victims mind and body.

It also shows that the laws provided for compensation in the TCA are not being respected as it should only take a maximum of 35 days to receive compensation from the period of submission of the application, per section 9(2).

Table 1: Decided cases that have not received compensation yet

S.N.	Name	Date filed	Where filed	Decision Date	Compensation Amount	Departmental Action	Filed Application for compensation at DAO
1	Pitamber alias Narayan Thapa	4-Feb-09	Morang DC	23-Feb-11	15,000	No	Yes
2	Binod Kumar Bishwakarma	28-Feb-11	Jhapa DC	15-Apr-12	15,000	No	Yes
3	Bharat Sharma	25-Sep-11	Kathmandu DC	29-Mar-12	20,000.00	No	No
4	Pradip Singh Khand	26-Jun-12	Rupandehi DC	24-Jul-13	10, 000	Yes	No
5	Raj Kumar Mahaseth	29-Feb-08	Dhanusha DC	10-Jul-11	25,000	No	Yes
6	Rajendra Bahadur K.C	6-Nov-06	Baglung AC	6-Jan-08	10,000	Yes	Yes
7	Susan Kirati	6-Dec-06	Morang DC	13-Nov-07	30,000	Yes	No
8	Ram Biraji Devi Mukhiya	22-Mar-12	Dhanusha DC	21 Apr 14	25,000		Yes
9	Ful Chandra Pasi	8-Apr-13	Rupandehi DC	22-Jun-14	3,000	Yes	No

S.N.	Name	Date filed	Where filed	Decision Date	Compensation Amount	Departmental Action	Filed Application for compensation at DAO
10	Dinesh Kumar Teli	8-Apr-13	Rupandehi DC	22-Jun-14	3,000	Yes	No
11	Ramesh Yadav	8-Apr-13	Rupandehi DC	22-Jun-14	3,000	Yes	No
12	Kamal Pun	1-Aug-08	Baglung AC	17-Jan-11	20,000	Yes	Yes
13	ChinkuTharu	21-Jun-09	Bardiya DC/ AC	5-Apr-11	50,000	Yes	Yes
14	Padam Bdr Khadka	11-Nov-11	Bardiya DC	16-Mar-16	50,000	Yes	No
15	Ratna Bdr Pariyar	15-Aug-13	Bardiya DC	19-Jun-14	25,000	No	Yes
16	Jhup Bdr Bista	24-Jul-13	Banke DC	2-Feb-15	1,00,000	Yes	Yes
17	Santosh Sah	17-Sep-09	Dhanusha DC	15-Jun-11	25,500	Yes	No

Note: Some torture survivors who have not filed application for compensation at District Administration Office, are not in contact with AF due to foreign job and other reasons.

An AF lawyer, Raj Kumar Mahasheth, who was beaten by the police and was awarded compensation for his ill-treatment, registered a Public Interest Litigation (Case No. 2072-WO-1102) on 23 June 2016, a petition to issue an order of mandamus, on the subject of compensation for torture victims. This case is under consideration at the Supreme Court of Nepal and is due for hearing on 29 June 2017. Since he is still to receive compensation and has himself been through the hurdles of the bureaucratic administration in order to process his application for compensation, he is bringing the case to ensure the state addresses the institutional failings in providing compensation for victims.

The PIL brought up the following difficulties faced by victims in receiving their compensation awarded by the courts:

- It is the duty of the victim to submit an application to the District Administrative Office in order to receive the compensation awarded by the court.
- In the absence of compensation pursuant to 35 days of application submitted against the torture related act as per Section 9(2) of Torture Compensation act 2053, it is again up to the victim to continuously visit the District Administrative Office to request the amount owed.
- The District Administration Office then sends notice to the Ministry of Home Affairs and the Ministry of Finance.
- Only after the execution of budget from these ministries would the victim be able to receive the amount of compensation.
- Still, after these procedures, most victims are yet to receive the compensation owed.
- In addition to the inability and various procedural complexities in receiving compensation, victims face harassment and disdain from society.

Therefore, within the PIL, AF has suggested the following orders be issued to improve the accessibility of receiving justice for victims of torture in relation to cases decided and to be decided under the TCA:

Issuance of order to Ministry of Home Affairs and Ministry of Finance to establish within one month from the date of the order a separate fund by allocating adequate amount to it for the instant and effective execution of orders made under Section 9 of the TCA.

Issuance of order to all Chief District Officers to review all outstanding applications made under Section 9 of the TCA prior to the date of this order and to provide payment of the amount awarded within two months of the order.

Issuance of order for departmental action to be taken against the Chief District Officer, if the compensation for any application made under Section 9(1) of the TCA after the date of the order is not provided in accordance within Section 9(2), i.e. within 35 days.

Order to Home Ministry to review judgments issued under Section 7 of the TCA and implement within one month any orders for departmental action against the person involved in the act of torture as found in line with Section 7 of the TCA.

THE PENDING ANTI-TORTURE BILL

Since Nepal became a party to the Convention against Torture in 1991, successive governments had repeatedly promised to make torture a crime but to this date this has not happened.[31] As stated above, the non-criminalisation of torture was a factor that made the prosecution of Kumar Lama possible.

[31] However, the Attorney General of Nepal confirmed that the Truth and Reconciliation Commission Act is under review and that an amendment proposal includes the criminalization of serious violations such as torture, enforced disappearance, extra-judicial killings and sexual abuse. Mandira Sharma interview with AG, 27 March 2017.

Possibly due to the Lama case, there has been an effort to pass a Bill to criminalise torture in Nepal. The Bill has been pending in parliament since August 2014, with no actual end in sight. AF is urging the state to view implementing this Bill as a priority amending flaws in the bill.

The Bill is not in line with Nepal's international obligations. In summary, these are its main shortcomings:

- It only criminalizes torture that happens "in police custody"
- It sets a ceiling on the amount of compensation at 500,000 Rs.
- The bill is silent on its possible retroactive effect to provide justice to conflict cases
- A statute of limitation on the time to file cases is against the CAT
- The bill continues to allow for departmental action
- The bill is silent on command responsibility – acts of omissions by superior officers should be criminalised
- It does not provide for protection for victims involved as witnesses in prosecution of cases under the bill

AF has done an analysis of the Bill.[32] Here are some key observations:

The maximum penalty provided for in the Bill is five years' imprisonment.[33] International law does not expressly state the specific punishments or the standard of punishment for perpetrators of torture that should appropriately reflect the severity of torture. However, it is understood through international jurisprudence, that the punishment must fit the crime and that too light of a

[32] Advocacy Forum et al, Allegation Letter concerning the "Draft Torture and Cruel, Inhuman or Degrading Treatment (control) Bill", 2014, Submitted to the UN Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment in June 2015.

[33] Bill on Controlling Acts of Inflicting Torture and Cruel, Inhuman and Degrading Treatment, s. 20(a).

sentence for those guilty of torture is incompatible with article 4(2) CAT by not fulfilling the duty to impose appropriate punishment.[34]

The remedies available to victims of torture according to the Bill does not meet international standards either. There are international obligations for an additional duty on the state to grant redress and provide adequate compensation for victims of torture and ill-treatment. It is understood in the case of *Urra Guridi v Spain* that compensation "should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case."[35]

Although Chapter 4 of the Bill does attempt to give guidelines as to how much compensation should be awarded, the Bill do not actually meet the standard set in *Urra Guridi v Spain*. According to the guidance by the Committee against Torture given in General Comment 3, compensation awarded to victims of torture should provide for "any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary."[36] The Committee offers the following examples to base the calculation of the compensation: "reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education."[37]

[34] *Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005, para 6.7.

[35] *Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005, para 6.8.

[36] CAT General Comment 3, para 10.

[37] CAT General Comment 3, para 10.

CONCLUSION

In his address to the 35th session of the UN Human Rights Council in Geneva, Zeid Ra'ad Al Hussein stated:

> "I am told repeatedly we should not be 'naming and shaming' States. But it is not the naming that shames. The shame comes from the actions themselves, the conduct or violations at issue."[38]

This could not resonate more true to AF's ears as the refusal of access to detention to its lawyers comes in the aftermath of reports which denounce the practice of torture and the challenges and issues of vetting in Nepal.

The two landmark cases of Kumar Lama and Maina Sunuwar have shown how important the prevention and criminalization of torture is for Nepal. The Torture Compensation Act falls far short of required international standards for ensuring accountability for torture and remedy for victims. Nepal has promised both nationally and internationally to bring about such a legal framework and it is a long overdue.

In the absence of any accountability for those who commit torture, AF has advocated for the vetting of those officials alleged to have been involved in torture. The UN has a policy to screen security officials for peacekeeping

[38] OHCHR, Denial of access and lack of cooperation with UN bodies will not diminish scrutiny of a State's human rights record, Human Rights Council 35th session Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, 6 June 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21687

missions for their alleged human rights violations. Furthermore, the US Leahy law prevents the US from providing assistance or training to members of a unit of any nation's security forces that has perpetuated a gross violation of human rights, including torture, with impunity. AF believes these are some of the measures that have contributed significantly to improve the behavior of individual police officers and reduces the practice of torture in Nepalese detention. AF has documented the steady decline in torture since it started to advocate for vetting and the UN and the US embassy started implementing their policies.

This report has stressed the need to increase transparency and accountability of state and police actions, by fulfilling the objectives and mandates given to governmental bodies to monitor detention. Also, allowing NGOs the ability to challenge reports and statements made by the government is key in improving adherence to human rights and the rule of law.

Resulting from an analysis of the use of forced confessions as evidence, this report has highlighted the fragility of the right to fair trial in Nepal. The report has revealed that the focus on a confession-based investigation rather than an evidence-based investigation has provided further incentives to torture and coerce confessions from suspects under a criminal charge. Several legal and practical barriers to the criminal justice system in Nepal result in difficulties in implementing the exclusionary rule and underlines the need to criminalise torture.

RECOMMENDATIONS

AF urges that immediate action be taken to reduce and prevent the practice of torture in Nepal. Most importantly, it recommends:

- ☞ The Nepal Police to allow AF lawyers and other NGOs unhindered access to detention centres to offer free legal assistance to the detainees and monitor the observance of human rights in detention fostering transparency.
- ☞ To increase state transparency and accountability, the Human Rights Unit, the Attorney General office and the National Human Rights Commission (NHRC) must be more proactive in fulfilling their mandate to monitor detention and facilitating such monitoring by NGOs.
- ☞ To combat impunity, ensure redress for victims of torture and provide a deterrent, **torture must be criminalised** and penalties established which are appropriate to the gravity of the crime. The Bill preventing torture should be amended in line with AF's prior recommendations and Nepal's international obligations and their enactment should be prioritised.
- ☞ **All detainees should be given their constitutional right to access a legal representative**, who should be present during interrogation and should be able to witness and review a detainee's statement.
- ☞ To build faith in the legal system and reduce impunity, **decisions of the courts with regard to compensation should be implemented fully**, and compensation should be readily available to victims.

- ☞ In line with UPR recommendations and the National Action Plan a central fund for torture compensation should be established.
- ☞ Ratify third Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure.
- ☞ To ensure accountability and a strong framework against torture, **Nepal should implement its international obligations**, ratify OPCAT as recommended by multiple UPR parties and the National Action Plan on Human Rights (NAPHR) and ensure the NHRC as the national monitoring mechanism is well-resourced and independent.
- ☞ The **Nepal Police must be reformed** and more **effective training, equipment and knowledge must be provided** to remove evidence incentives on confessions and prevent the use of torture in obtaining confessions

ANNEX 1

ANALYSIS OF SPSS DATA FROM OCTOBER 2013 TO DECEMBER 2015

OVERALL DATA ANALYSIS

Table 1: Gender-wise detainees interviewed

Districts	Female	Male	Total
Kathmandu	94	537	631
	14.9%	85.1%	100%
Morang	53	348	401
	13.2%	86.8%	100%
Banke	63	554	617
	10.2%	89.8%	100%
Kaski	66	312	378
	17.5%	82.5%	100%
Kanchapur	12	264	276
	4.3%	95.7%	100%
Rupandehi	46	422	468
	9.8%	90.2%	100%
Total	**334**	**2437**	**2771**
	12.1%	**87.9%**	**100%**

Table 2: Were you given the reason for arrest?

Districts	Yes	No	Given but after bringing in detention	Total
Kathmandu	64	100	420	584
	11%	17.1%	71.9%	100%
Morang	9	118	321	448
	2%	26.3%	71.7%	100%
Banke	10	47	560	617
	1.6%	7.6%	90.8%	100%
Kaski	24	29	325	378
	6.3%	7.7%	86%	100%
Kanchapur	5	1	270	276
	1.8%	0.4%	97.8%	100%
Rupandehi	10	57	401	468
	2.1%	12.2%	85.7%	100%
Total	**122**	**352**	**2,297**	**2,771**
	4.4%	**12.7%**	**82.9%**	**100%**

Table 3: Did you have health check-up before being kept in detention?

Districts	Yes	No	Total
Kathmandu	564	20	584
	96.6%	3.4%	100%
Morang	429	19	448
	95.8%	4.2%	100%
Banke	602	15	617
	97.6%	2.4%	100%
Kaski	358	20	378
	94.7%	5.3%	100%

Districts	Yes	No	Total
Kanchapur	271	5	276
	98.2%	1.8%	100%
Rupandehi	465	3	468
	99.4%	0.6%	100%
Total	**2,689**	**82**	**2,771**
	97%	**3%**	**100%**

Table 4: Presented before a judge/competent authority within 24 hours of arrest?

Districts	Yes	No	Total
Kathmandu	405	148	553
	73.2%	26.8%	100%
Morang	265	118	383
	69.2%	30.8%	100%
Banke	353	203	556
	63.5%	36.5%	100%
Kaski	206	132	338
	60.9%	39.1%	100%
Kanchapur	221	50	271
	81.5%	18.5%	100%
Rupandehi	319	141	460
	69.3%	30.7%	100%
Total	**1,769**	**792**	**2,561**
	69.1%	**30.9%**	**100%**

Table 5: Were you taken to the court?

Districts	Yes	No	Total
Kathmandu	553	31	584
	94.7%	5.3%	100%
Morang	383	65	448
	85.5%	14.5%	100%
Banke	556	61	617
	90.1%	9.9%	100%
Kaski	338	40	378
	89.4%	10.6%	100%
Kanchapur	271	5	276
	98.2%	1.8%	100%
Rupandehi	460	8	468
	98.3%	1.7%	100%
Total	**2,561**	**210**	**2,771**
	92.40%	**7.60%**	**100%**

ANNEX 2

DATA ANALYSIS OF 1,357 CONFESSION CASES

Table 1: Did you give confession?

Districts	Yes	No	Total
Kathmandu	236	316	552
	42.8%	57.2%	100%
Morang	136	247	383
	35.5%	64.5%	100%
Banke	315	241	556
	56.7%	43.3%	100%
Kaski	273	65	338
	80.8%	19.2%	100%
Kanchapur	229	43	272
	84.2%	15.8%	100%
Rupandehi	167	293	460
	36.3%	63.7%	100%
Total	**1,356**	**1,205**	**2,561**
	52.9%	**47.1%**	**100%**

Table 2: Where did you sign the confession?

Districts	Public prosecutor's office	Investigation Office	Other	Total
Kathmandu	65	162	10	237
	27.4%	68.4%	4.2%	100%
Morang	66	69	1	136
	48.5%	50.7%	0.7%	100%
Banke	294	15	6	315
	93.3%	4.8%	1.9%	100%
Kaski	46	211	16	273
	16.8%	77.3%	5.9%	100%
Kanchapur	212	3	14	229
	92.6%	1.3%	6.1%	100%
Rupandehi	10	154	2	166
	6%	92.8%	1.2%	100%
Total	**693**	**614**	**49**	**1,356**
	51.1%	**45.3%**	**3.6%**	**100%**

Table 3: Why did you give confession?

Districts	Torture/ill-treatment	Threat of torture/ ill-treatment	Inducement by police	Advice of public prosecutor	Advice of defence lawyer	Other	Total
Kathmandu	35	21	6	1	5	3	71
	49.30%	29.57%	8.45%	1.40%	7.05%	4.23%	100%
Morang	15	11	6	7	16	6	61
	24.6%	18.04%	9.84%	11.47%	26.22%	9.83%	100%
Banke	25	20	14	2	1	6	68
	36.76%	29.42%	20.58%	2.94%	1.47%	8.83%	100%
Kaski	11	12	4	3	9	3	42
	26.19%	28.57%	9.53%	7.14%	21.43%	7.14%	100%
Kanchapur	13	3	3	2	13	2	36
	36.12%	8.33%	8.33%	5.55%	36.12%	5.55%	100%
Rupandehi	9	20	36	2	17	8	92
	9.78%	21.74%	39.14%	2.17%	18.47%	8.69%	100%
Total	108	87	69	17	61	28	370
	29.20%	23.51%	18.64%	4.60%	16.49%	7.56%	100%

Table 4: Did you sign the confession of your own volition?

Districts	Did you sign the confession of your own volition		Total
	Yes	**No**	
Kathmandu	180	57	237
	75.9%	24.1%	100%
Morang	79	57	136
	58.1%	41.9%	100%
Banke	193	122	315
	61.3%	38.7%	100%
Kaski	257	16	273
	94.1%	5.9%	100%
Kanchapur	223	6	229
	97.4%	2.6%	100%
Rupandehi	55	112	167
	32.9%	67.1%	100%
Total	**987**	**370**	**1,357**
	72.7%	**27.3%**	**100%**

Table 5: Were you given to read the statement or read it out for you before signing it?

Districts	Yes	No	Readout	Didn't read	Total
Kathmandu	58	103	10	66	237
	24.5%	43.5%	4.2%	27.8%	100%
Morang	16	113	3	4	136
	11.8%	83.1%	2.2%	2.9%	100%
Banke	53	220	2	40	315
	16.8%	69.8%	0.6%	12.7%	100%
Kaski	17	211	3	42	273
	6.2%	77.3%	1.1%	15.4%	100%
Kanchapur	25	130	6	68	229
	10.9%	56.8%	2.6%	29.7%	100%
Rupandehi	23	137	1	6	167
	13.8%	82%	0.6%	3.6%	100%
Total	**192**	**914**	**25**	**226**	**1,357**
	14.1%	**67.4%**	**1.8%**	**16.7%**	**100%**

ANNEX 3

DATA ANALYSIS OF 213 DECIDED CASES

Table 1: Was confession used by investigation officer or prosecutor?

Districts	Yes	No	Total
Kathmandu	36	1	37
	97.3%	2.7%	100%
Morang	67	0	67
	100%	0%	100%
Banke	24	0	24
	100%	0%	100%
Kaski	19	0	19
	100%	0%	100%
Kanchapur	35	0	35
	100%	0%	100%
Rupandehi	31	0	31
	100%	0%	100%
Total	**212**	**1**	**213**
	99.5%	**0.5%**	**100%**

Table 2: Was confession corroborated by other evidence?

Districts	Yes	No	Total
Kathmandu	33	4	37
	89.2%	10.8%	100%
Morang	44	23	67
	65.7%	34.3%	100%
Banke	21	3	24
	87.5%	12.5%	100%
Kaski	19	0	19
	100%	0%	100%
Kanchapur	35	0	35
	100%	0%	100%
Rupandehi	31	0	31
	100%	0%	100%
Total	**183**	**30**	**213**
	85.9%	**14.1%**	**100%**

Table 3: Was the confession tested by the case hearing authority for admissibility during jail/bail hearing?

Districts	Yes	No	Don't know	Total
Kathmandu	24	13	0	37
	64.9%	35.1%	0%	100%
Morang	35	32	0	67
	52.2%	47.8%	0%	100%
Banke	19	3	2	24
	79.2%	12.5%	8.3%	100%
Kaski	17	2	0	19
	89.5%	10.5%	0%	100%
Kanchapur	28	7	0	35
	80%	20%	0%	100%

Districts	Yes	No	Don't know	Total
Rupandehi	14	17	0	31
	45.2%	54.8%	0%	100%
Total	**137**	**74**	**2**	**213**
	64.3%	**34.7%**	**1%**	**100%**

Table 4: Was the confession admitted as evidence by the judge?

Districts	Yes	No	Total
Kathmandu	32	5	37
	86.5%	13.5%	100%
Morang	59	8	67
	88.1%	11.9%	100%
Banke	22	2	24
	91.7%	8.3%	100%
Kaski	19	0	19
	100%	0%	100%
Kanchapur	35	0	35
	100%	0%	100%
Rupandehi	26	5	31
	83.9%	16.1%	100%
Total	**193**	**20**	**213**
	90.6%	**9.4%**	**100%**

Table 5: Did the prosecution submit other evidence during the trial?

Districts	Yes	No	Don't know	Total
Kathmandu	13	24	0	37
	35.1%	64.9%	0%	100%
Morang	38	29	0	67
	56.7%	43.3%	0%	100%
Banke	15	8	1	24
	62.5%	33.3%	4.2%	100%
Kaski	17	2	0	19
	89.5%	10.5%	0%	100%
Kanchapur	29	6	0	35
	82.9%	17.1%	0%	100%
Rupandehi	5	26	0	31
	16.1%	83.9%	0%	100%
Total	**117**	**95**	**1**	**213**
	54.9%	**44.6%**	**0.5%**	**100%**

Table 6: Was any other prosecution evidence obtained as a result of the confession?

Districts	Yes	No	Total
Kathmandu	6	31	37
	16.2%	83.8%	100%
Morang	18	49	67
	26.9%	73.1%	100%
Banke	9	15	24
	37.5%	62.5%	100%
Kaski	13	6	19
	68.4%	31.6%	100%
Kanchapur	6	29	35
	17.1%	82.9%	100%
Rupandehi	13	18	31
	41.9%	58.1%	100%
Total	**65**	**148**	**213**
	30.5%	**69.5%**	**100%**

Table 7: If confession was excluded, did the judge require additional steps be taken against the investigation officer or other authority?

Districts	Yes	No	Total
Kathmandu	4	33	37
	10.8%	89.2%	100%
Morang	0	67	67
	0%	100%	100%
Banke	0	24	24
	0%	100%	100%
Kaski	0	19	19
	0%	100%	100%
Kanchapur	2	33	35
	5.7%	94.3%	100%
Rupandehi	0	31	31
	0.00%	100%	100%
Total	**6**	**207**	**213**
	2.80%	**97.20%**	**100%**

About ADVOCACY FORUM

Advocacy Forum (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold international human rights standards in Nepal. Since its establishment in 2001, AF has been at the forefront of human rights advocacy and actively confronting the deeply entrenched culture of impunity in Nepal.

AF's contribution in the human rights advocacy in Nepal has been recognized by Human Rights Watch (HRW) in terms of "One of Asia's most respected and effective human Rights Organization". AF is a recipient of a number of awards including "Women In Leadership Award" (conferred by Swiss Agency for Development and Cooperation)

AF's mission is to combat the culture of impunity by promoting the rule of law. AF seeks to achieve this mission through a number of activities, including capacity development of the victims themselves, legal aid and high level policy advocacy aimed to create effective institutions and legal and policy frameworks necessary for fair and effective delivery of justice.

The objectives of AF are to provide legal aid to the victims of human rights violations, including children and women suffering from impacts of armed conflict, and juveniles in detention center; to undertake systematic monitoring and documentation of human rights violations; to promote comprehensive transitional justice mechanisms; to advocate for the reforms of legislations; to combat impunity and to work to prevent torture.

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