

## **Access to Justice Survey: a report about how legal representation is provided to the indigent accused in six districts of Nepal**

About the Authors:

### *The Judges' Society Nepal*

Judges' Society Nepal, established in 1996, is the only association that brings all the judges of Nepal together, both retired and incumbent. The Judge' Society Nepal is a non-government organization that works for the promotion of the professional interest/welfare of judges, independence of the judiciary, constitutionalism, and the rule of law.

### *The International Legal Foundation*

The International Legal Foundation (ILF), [www.theilf.org](http://www.theilf.org), is the leading global advocate for the right of the indigent accused to legal representation. Driven by the belief that every person accused of a crime deserves to be represented by a well-trained lawyer, no matter their ability to pay, the ILF assists countries emerging from conflict or in transition establish criminal legal aid systems that provide quality, effective criminal defense services to the poor.

In countries emerging from conflict or in transition, criminal legal aid services tend to be limited in scope or non-existent. Without access to effective legal representation, the poor and marginalized are vulnerable to arbitrary and extended pretrial detention, torture, coerced confessions, wrongful convictions, and other abuses.

In 2008, the ILF opened a public defender office in Nepal, ILF-Nepal with the mission to provide quality, effective criminal defense services to the poor. As of the end of 2014, ILF-Nepal has 13 lawyers staffing five offices and has represented approximately 3,500 clients, more than 75% of whom are marginalized and at-risk because of poverty, caste, gender and/or age. ILF-Nepal provides early representation in both judicial and quasi-judicial proceedings, providing a vigorous defense to detainees who would otherwise go unrepresented because they cannot afford to pay for a lawyer. By doing so, it has had a direct impact on its clients' lives and Nepal's criminal justice system; clients who had languished in detention for years have been released, the right to speedy trial is better enforced, and many innocent men, women and children have been acquitted.

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## Executive Summary

Although Nepal's Interim Constitution guarantees the right to counsel to all indigent accused persons from the time of arrest, consistent with the International Covenant on Civil and Political Rights, the Government of Nepal has struggled to provide effective criminal defense services to all indigent accused. In order to determine the availability and quality of criminal defense services provided to the poor in Nepal, the Judges' Society Nepal (JUS Nepal) and the International Legal Foundation (ILF) conducted an access to justice needs assessment in six districts of Nepal: Kalikot, Dailekh, Banke, Parsa, Ramechhap, and Okhaldhunga districts between February and March of 2014. This report examines the extent to which pretrial detainees and convicted prisoners in those six districts have had access to effective legal representation.

JUS Nepal and the ILF selected the districts to include in the surveys in consultation with the Swiss Agency for Development and Cooperation (SDC), the donor agency that funded the survey. Both qualitative and quantitative methods were used to document the nature and availability of criminal defense services for the poor in the surveyed districts. JUS Nepal and the ILF collected primary data through individual interviews with detainees/ prisoners and legal aid providers in six districts of Nepal. Secondary data, such as annual reports provided by the Supreme Court and the Office of the Attorney General, was also used to collect comparative data.

Analysis of the findings of this preliminary survey revealed significant gaps between the rights that Nepal's detainees are guaranteed under both international and Nepali law, and the protection and fulfillment of those rights in practice. The significant findings include:

- At the time of their arrest, 74.8% of the surveyed detainees/ prisoners were not aware of their right to counsel, and 95.4% were not aware that free counsel is available to those who cannot afford to pay for a lawyer. Following their arrest, 63% of surveyed detainees/ prisoners were never informed of the right to counsel, and the minority who were informed were most often informed by friends or family, not a government official.
- Only 2.7% of the surveyed detainees/ prisoners had access to a lawyer within 24 hours of arrest, and only 26.6% of them had obtained a lawyer by the time that the charge sheet was filed, when the prosecutor's investigation is closed.
- Where detainees/ prisoners did have access to counsel, there were questions about the quality of representation they received: 89% of the surveyed detainees/ prisoners who had a lawyer reported that they never met with their attorney while in detention during the pendency of the case; more than 47% of the surveyed legal aid providers do not conduct any investigation when defending indigent clients, only 11% seek out potential witnesses, and only 5% study the case file or collect evidence that supports the defense.
- Surveyed detainees/ prisoners perceived a lack of fairness throughout the criminal justice process, and a lack of quality in their representation. 72% felt they had not been treated fairly by police, 86% expressed the same dissatisfaction with the prosecution, and 85% felt that way regarding the fairness of the judge. 80.7% felt they had not received a fair trial. Regarding their attorneys, 58% of those detainees who had an attorney felt that the representation did not make a positive impact on their case.

- In 2013-2014, nearly 18,000 criminal cases were filed before Chief District Officers, and an undocumented number were filed before other quasi-judicial bodies, yet 71% of the attorneys surveyed do not offer defense services before quasi-judicial bodies.

In order to address these and other issues identified in this report, JUS Nepal and the ILF recommend that the Government of Nepal take the following actions:

1. Enact or revise existing legislation or adopt official procedures to make clear that police and prosecutors must promptly inform all accused persons of the right to counsel, must facilitate access to counsel for indigent accused, and must refrain from interviewing a person who has not given informed and voluntary consent to waive their right to counsel;
2. Work collaboratively with justice sector stakeholders and civil society to develop effective community awareness campaigns to inform the public of their fair trial rights;
3. Adopt minimum qualification and performance standards, as well as training requirements that ensure that all legal aid providers have the education, training, skills and experience necessary to competently represent the indigent accused;

JUS Nepal and the ILF also recommend that further research be conducted on the issue of access to counsel for indigent and marginalized accused, to identify both weaknesses and effective practices, and inform changes that need to be made to Nepal's criminal legal aid system.

## **I. Introduction**

In post-conflict settings such as Nepal, justice institutions are often completely destroyed or debilitated by former conflict, and struggle from a lack of capacity, funding, and structure, as well as rampant corruption. The instability of these institutions creates risk not only for individual citizens, but also for the country as a whole; the World Bank's 2011 World Development Report identified weak institutions which fail to adequately protect citizens, provide access to justice, or guard against corruption as a main predictor of whether violence and instability will occur or reoccur in a fragile country.<sup>1</sup> One crucial, though often neglected, element of a fair and balanced criminal justice system is a strong criminal defense bar and effective criminal legal aid institutions. Criminal defense lawyers and legal aid institutions serve as a check on other branches of the justice system; they ensure that laws are fully and fairly implemented, and that every person has equal access to justice and is afforded due process of law. Defense lawyers also protect the accused from arbitrary detention and other abuses, such as torture and corruption.

The Interim Constitution of Nepal, which came into force in 2007, guarantees the right to counsel to all indigent accused persons from the time of arrest, consistent with the International Covenant on Civil and Political Rights (ratified by Nepal in 1991 and enforced via Nepal's Treaty Act). However, the Government of Nepal has struggled to provide effective criminal defense services to all indigent accused. The general consensus is that neither the Supreme Court's *Baitanik Wakil* program, a contract lawyer system that has served as the de facto government provider of free legal

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<sup>1</sup> World Bank (2011), World Development Report.

aid services for over five decades, nor the Central and District Legal Aid Committees (DLAC), created by the Legal Aid Act of 1997, are meeting the criminal legal aid needs of the poor.

This report examines the extent to which indigent men, women, and children detained or imprisoned in six districts of Nepal had access to effective legal representation. It is the result of findings from an access to justice survey conducted between February and March of 2014 in Kalikot, Dailekh, Banke, Parsa, Ramechhap and Okhaldhunga districts by the Judges' Society Nepal (JUS Nepal) and the International Legal Foundation (ILF).

Though limited in scope, this report is an important first step in determining the availability of effective legal representation for indigent accused men, women and children in Nepal. The findings of this assessment will not only provide insight into specific interventions that will help address immediate needs in the surveyed districts, but will also inform a larger dialogue about reforms needed to address the crisis in criminal legal aid in Nepal.

## II. Survey Background and Design

### 1. Project Design and Methodology

Previous assessments of Nepal's legal aid system have not distinguished between the various types of legal aid, lumping together criminal legal aid, civil legal aid, victim counseling, etc.<sup>2</sup> But it is vital to distinguish and independently assess the provision of criminal defense services to the poor. Unlike other legal aid services, the Government of Nepal has a legal obligation to provide counsel to the criminally accused. The right to counsel is recognized as an essential component of the right to a fair trial.<sup>3</sup> The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, adopted by the General Assembly in 2012, further provide that "States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process."<sup>4</sup>

This survey focuses on the rights of the indigent accused and the extent to which these rights are being implemented in practice. In this way, JUS Nepal and the ILF aim to evaluate the

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<sup>2</sup> USAID, *Study of the Current Legal Aid System in Nepal* (2005); UNDP Nepal, *Assessment of Impact of Legal Aid Services in Nepal* (2011).

<sup>3</sup> See UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (28 March 2013), A/RES/67/187; UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966).

<sup>4</sup> The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 7, states:

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

See also: United Nations Development Project, *Early Access to Legal Aid in Criminal Justice Processes Handbook*, available at [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruloflaw/early-access-to-legal-aid-in-criminal-justice-processes-handbook.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruloflaw/early-access-to-legal-aid-in-criminal-justice-processes-handbook.html), stating that "Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law. Early intervention by legal aid providers helps to ensure that rights are respected, improves the efficiency and fairness of the criminal justice system and represents an important safeguard against torture and other forms of ill-treatment."

effectiveness of Nepal's criminal legal aid system and recommend necessary reforms to ensure that the indigent accused have access to prompt and effective legal representation.

The surveys also focused on the service provided and the experience of lawyers in these districts. The goal was to gather both information from accused subjected to the criminal justice system and lawyers providing representation to them to determine the availability and quality of legal aid services, and gaps in access to justice for indigent and marginalized accused in Nepal.

Six districts (Ramechhap, Okhaldhunga, Parsa, Dailekh, Banke, and Kalikot) were chosen to represent the geographical, social, economic, and legal diversity of both the eastern and western regions of Nepal. These districts represent mountain, hill, and Terai (grassland) development regions of varying populations, from 132,948 in Kalikot to more than 600,000 in Parsa. The number of court cases in these districts in 2011-2012 ranged from 178 to 3,569. Similarly, prison populations range from just 42 people to over 1,300.

### **A. Indicators and Questionnaires (see Annexes B and C)**

In developing the surveys, JUS Nepal and the ILF reviewed the Interim Constitution, the pretrial procedures stated in local laws, and ILF-Nepal's performance standards and guidelines for its advocates, and identified key factors and procedures that would indicate that constitutional guarantees were met and that an accused had meaningful access to justice. This analysis was supplemented by review of 22 indicators derived from the Criminal Justice Assessment Toolkit chapter on Legal Defense and Legal Aid,<sup>5</sup> produced by the United Nations Office on Drugs and Crime (UNODC) and adapted to the Nepal context.

Broadly speaking, the indicators were designed to capture the factors that might reasonably contribute to an accused individual's ability to access justice. These factors include their caste, economic position, and family background; the path of their case through the justice system; and the points and manner of contact they had with attorneys (if any).

Detainee and lawyer questionnaires are included as Annexes B and C to this report.

### **B. District Profiles**

Six districts were included in this survey initiative: Kalikot, Dailekh, Banke, Parsa, Ramechhap, and Okhaldhunga. These six districts were selected both to reflect the priorities of the Swiss Agency for Development and Cooperation in Nepal (SDC) and to reflect a cross-section of experiences within Nepal's justice system.

The SDC concentrates its interventions in geographic cluster areas, addressing the needs of disadvantaged groups and neglected geographical areas. SDC is particularly engaged in Kalikot, Dailekh, Ramechhap, and Okhaldhunga, four of the six districts included in this study, as well as Achham and Janjarkot, which were not included in this study because secondary data showed very low criminal case numbers in those two districts. In addition, two districts in the Terai - Banke and

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<sup>5</sup> See United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit* (2006), available at <http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>

Parsa - were selected for inclusion in the survey due to their proximity to India and, as a result, their high volumes of criminal cases related to drugs and human trafficking, as well as the high numbers of criminally accused in those areas.

Detailed district profiles are included in Annex A to this report.

### **C. Sources and Methods of Information Gathering**

All of the survey data analyzed in this report was gathered in six districts of Nepal: Kalikot, Dialekh, Banke, Parsa, Ramechhap, and Okhaldhunga. The survey subjects consisted of 24 criminal legal aid providers who provide services in one or more of those districts, and 373 detainees and prisoners in one of the district's detention centers or jails. The data was collected through surveys that were taken orally and in person, by a data collector who had been trained by the ILF to carry out that task efficiently and effectively. Participation in the survey was voluntary for the both lawyers and detainees, and surveys were taken of all who were both willing and available at the time the data collector made inquiries.

Additional data was collected from government and civil society reports, including the 2011 Nepal Census; annual reports of the Supreme Court and Office of the Attorney General; reports of the Department of Prison Management and from the Ministry of Finance; statistics from the Bar Council and the Bar Association; previous assessments and surveys of legal aid in Nepal; various impact reports published by nongovernmental organizations; and internal data gathered by the ILF in the daily course of its work.

In preparation for the execution of the survey, the ILF was able to secure written permission from the prison department to gain access to prisoners, but was denied written permission from the police headquarters in each district to access pretrial detainees, and was instead directed to request permission directly from the Ministry of Home Affairs. The ILF began the process of gaining ministerial permission—which would have, ideally, enabled the data collectors to get access to all detainees in each of the target detention centers—but was not able to obtain permission before commencing the survey. To address this issue, the ILF attempted to gain access to pretrial detainees through the assistance of local partners, with the support of JUS Nepal. While the ILF was successful in gaining access to some pretrial detainees, access was often delayed and it could not access all the detainees in each of the districts surveyed.

### **D. Challenges Faced in Data Collection and Analysis**

The most significant challenge to data collection for this survey was gaining access to pretrial detainees. As noted above, the ILF attempted to obtain written permission to access the detention centers from the Ministry of Home Affairs, but was not able to do so before the scheduled data collection period. As a result, multiple detention centers denied the data collectors' access to detainees, either completely, or for a significant period of time until multiple interventions could be made to exhaustively explain the goals and importance of this project. As a result, less data was collected than otherwise could have been, impeding a full analysis of pretrial detainees' access to justice in the districts surveyed.

Another challenge was the relatively small number of detainees in several of the districts in which data was collected. While the Banke and Parsa districts both have high volumes of detainees, the other four districts—Kalikot, Dailekh, Ramechhap, and Okhaldhunga—have comparatively low volumes of detainees. Data collection in those districts offers a helpful look at access to justice for people within those districts, but the lower number of total survey subjects made the analysis provided here less comprehensive and representative of the entire country overall than might have otherwise been the case if districts with higher detention rates had additionally been included.

Shortcomings in the structure of the Attorney Questionnaire became apparent when the data was being aggregated and analyzed. Many of the questions to attorneys were open-ended, calling for a narrative response. For example, attorneys were asked “What petitions have you filed on behalf of public clients before the jail/bail hearing?” and “What types of arguments do you typically make during a final hearing?”, but their responses were not easily grouped together for analysis because of ambiguities in phrasing that made it difficult to know whether two attorneys meant substantially the same thing in their answers, or were making slightly different points. In future surveys, where possible, answers should be given by choosing from a list of options so that direct comparisons can be made.

Finally, survey responses from detainees must be read with the understanding that many (or likely, most) had no prior knowledge of the criminal justice system, their rights within it, or the legal aid system. This lack of knowledge would have curtailed their ability to assess the functioning and fairness of the system. They may have perceived something as fair that legal experts would find patently unfair, simply because ignorance of their rights may have given them low expectations. Alternatively, they may have perceived something as unfair or of insufficient quality based only on the outcome of their case; as a result of their imprisonment, they may not be objective observers and their negative feelings about imprisonment may cause them to misperceive the fairness or quality of the system. This issue was substantially mitigated through the design of the survey, which primarily asked questions that were fact-based rather than opinion-based—for example, a detainee would not have been able to effectively comment on whether their legal aid provider consulted with them sufficiently to meet general standards of quality representation, but they could tell the data collector how many times their lawyer visited with them in detention and what things they talked about. From those fact-based questions, JUS Nepal and the ILF were able to draw significant inferences about the quality of the representation provided. However, it is important to remain mindful that inferences are limited by the questions that were asked, and the manner of asking; given the complete dearth of pre-existing knowledge of the criminal justice system and legal aid that many survey participants had, it is possible that more in-depth conversations with detainees might reveal more nuance and accuracy regarding fairness and quality. Such conversations were outside the scope of this preliminary survey.

This survey project is intended to be a preliminary assessment of access to counsel in Nepal based on a relatively small data set; in the future, JUS Nepal and the ILF recommend building on this data through more extensive and further research.

## 2. Surveyed Detainee Demographics

A total of 373 detainees were surveyed by five interviewers throughout the six surveyed districts. All of them were in prison at the time of the survey; some were pretrial detainees pending trial, but the majority had been convicted and were serving or appealing their sentences. The sections below discuss their demographics more completely.

### A. Age and Gender

The approximate age of detainees was collected in order to develop a profile of prisoners throughout Nepal and to help target future services to particular groups. The results show that the largest group, containing 172 detainees, identified as 25 to 39. Few, only 15, surveyed detainees were more than 60 years old. Three of the detainees were only 15 years old, and considered juveniles under Nepalese law. The sample chosen includes male and female detainees: 80.4% are male and 19.6% are female. (As reference, in Nepalese prisons, women make up about 7% of the total prison population.<sup>6</sup>)

### B. Caste and Ethnicity

The survey obtained information on the caste and ethnicity of detainees, and grouped individuals based on the official categories used by the Government of Nepal and many development donor agencies.<sup>7</sup> The largest group represented in the prison population surveyed is Janajati<sup>8</sup>, making up 22.3% of the total population surveyed. This is closely followed by Dalit<sup>9</sup>, with 21.2% of the sample population. On the other side of the spectrum, the groups least represented in the prison population are Madhesi<sup>10</sup> Dalit and “other caste.” This data shows that marginalized groups (Dalit, Janajati, and Madhesi) represent a larger portion of the prison population in the districts surveyed than non-marginalized groups (Brahmin, Chhettri, Thakuri, and Newar). By way of comparison to the general population of Nepal, Janajati are 36%, Madhesi are 11%, Muslims are 6%, Brahman are 14%, Dalit are 12%, Chhetri are 17%, Thakuri are 2%, and Madhesi Dalit are 2%.<sup>11</sup>

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<sup>6</sup> International Center for Prison Studies, *World Prison Brief, Nepal* (2014); United States Department of State, *Nepal 2013 Human Rights Report* (2013).

<sup>7</sup> See Government of Nepal, *Nepal Living Standards Survey 2010/2011*.

<sup>8</sup> A blanket term for people in Nepal who are outside of the Hindu caste hierarchy.

<sup>9</sup> A group in the Hindu caste system, popularly known in the West as ‘untouchables’

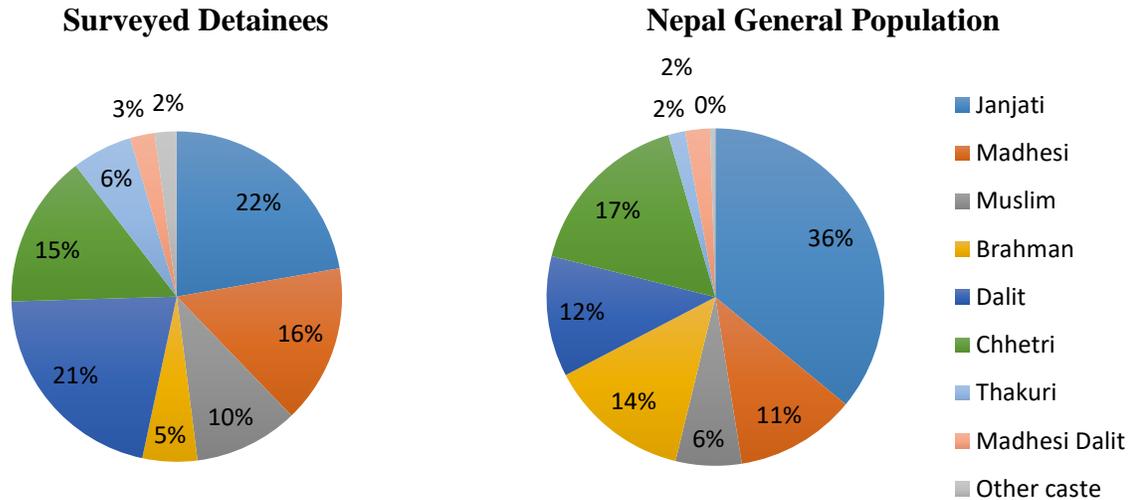
<sup>10</sup> A group of people of Indian origin who inhabit mostly the eastern Terai region of Nepal. The Madhesi comprise a collection of different communities, and Madhesi people don't represent a single ethnicity.

<sup>11</sup> The survey used broad caste classification, but note that the caste distinctions used herein include a broad range of sub-castes. The following are the caste classifications that were used herein:

\*Janajati: Magar, Tharu, Tamang, Newar, Rai, Gurung, Limbu, Dhanuk, Sherpa, Gharti/Bhujel, Kumal, Rajbansi, Sunuwar, Majhi, Danuwar, Chepang/Praja, Satar/Santhal, Jhangad/Dhagar, Gangai, Thami, Dhimal, Bhote, Yakkha, Darai, Tajpuriya. Thakali, Pahari, Chhantyal/Chhantel, Bote, Brahmu/Baramo (Baramu/Bramhu), Jirel, Badi, Meche, Lepcha, Kisan, Raji, Hayu, Koche, Walung, Munda, Raute, Hyolmo, Pattharkatta/Kushwadiya (Patharkata/Kusbadiya), Kusunda, Lhomi, Dhankar/Dharikar (Dhanuk), Kulung, Ghale, Nacchiring, Yamphu, Chamling, Thulung, Mewahang Bala, Bahing, Khaling, Aathpariya, Bantaba, Byasi/Sauka (Byasis), Dolpo, Amat, Lhopa, Loharung, Samgpang, Tokegola, Khawas, Janajati Others

\*Madhesi: Yadav, Nuniya, Koiri/Kushwaha, Kurmi, Kewat, Kalwar, Kanu, Kumhar, Mallaha (Mallah), Sudhi, Halwai, Madhesi Brahman, Rajput, Kayastha, Marwadi, Nurang, Bangali (Bengali), Badhaee (Badhai), Baraee

## Caste Distribution:



The charts above illustrate the caste and ethnicity breakdown of the surveyed detainees and prisoners as compared with Nepal's general population.

### C. Languages, Family Size and Education

#### i. Language

The majority of respondents (70.2%) spoke Nepali. The second most frequent language spoken was Abhadhi (12.1%). By way of comparison, in the general population, 45% speak Nepali, 6% speak Bhojpuri, 5% speak Tamang, 6% speak Tharu, 1% speak Garung, 3% speak Abhadhi, 1% speak Hindi, 12% speak Maithali, and 2% speak Rai.

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(Barai), Kahar, Lodh (Lodha), Rajbhar, Gaderi/Bhedihar, Mali, Kamar, Kalar, Kathabaniyan (Kathbaniyas), Rajdhob, Sarbaria, Dev

\*Muslim: Musalman, Hajam/Thakur, Dhunia, Natuwa, Teli

\*Brahman: Brahman – hill, Sanyasi/Dasnami, Brahman – Tarai

\*Dalit: Kami, Damai/Dholi, Sarki, Chamar/Harijan/Ram, Musahar, Sonar (Sunar), Lohar, Bantar/Sardar, Chidimar, Gaine, Dalit Others

\*Chhetri: Chhetree

\*Thakur: Thakuri

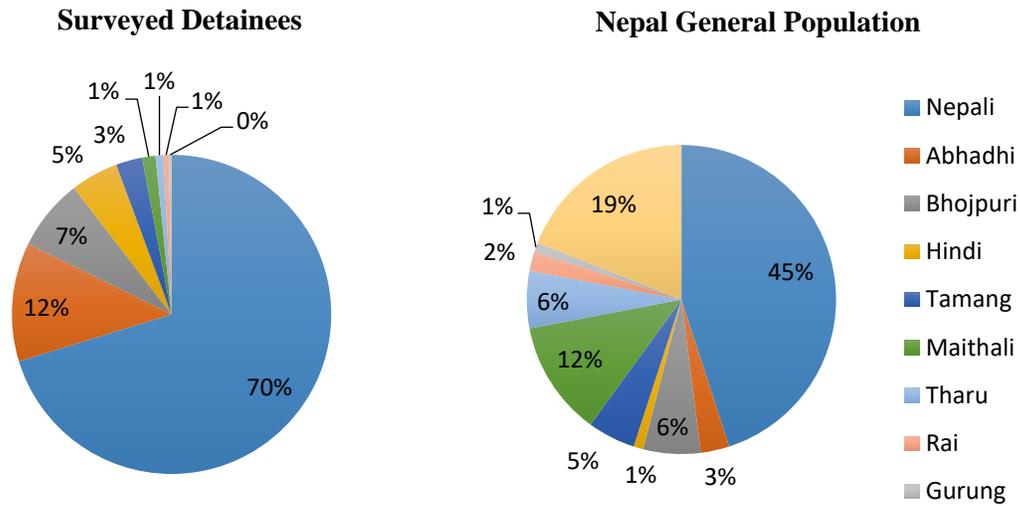
\*Madhesi Dalit: Dusadh/Pasawan/Pasi, Tatma/Tatwa, Dhobi, Khatwe, Bin, Dom, Halkhor, Kori

\*Other caste: Punjabi/Sikh, Dhandi, Terai Others, Undefined Others, Foreigner

See: World Bank, *Unequal Citizens: Gender, Caste and Ethnicity in Nepal, Summary Report*, available at

<http://siteresources.worldbank.org/EXTSOCIALDEV/Resources/3177394-1168615404141/NepalGSEASummaryReport-part1.pdf>

### Language Distribution:

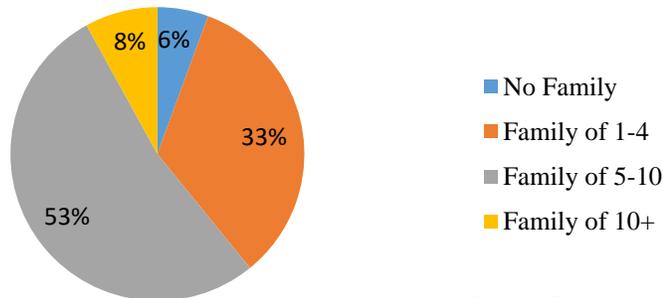


The charts above compare the language distribution of the surveyed detainees and prisoners as compared with Nepal’s general population

#### ii. Family Size

Information about the detainees’ family size was also collected, and more than half (60.8%) had families of 5 or more (52.8% had 5-10 person families, and 8% had families of more than 10). Just 5.6% had no family, and 33.5% had 1-4 family members. According to the Nepal Census conducted in 2011, the national average household size is 4.88.<sup>12</sup> This indicates that most detainees have a larger-than-average family, which may impact their ability to pay for representation—as larger families have more significant economic needs—and will mean that a larger group of people may be negatively impacted by the loss of the detainee (through pre-trial and/or post-conviction detention) as a breadwinner.

#### Family Size of Surveyed Detainees

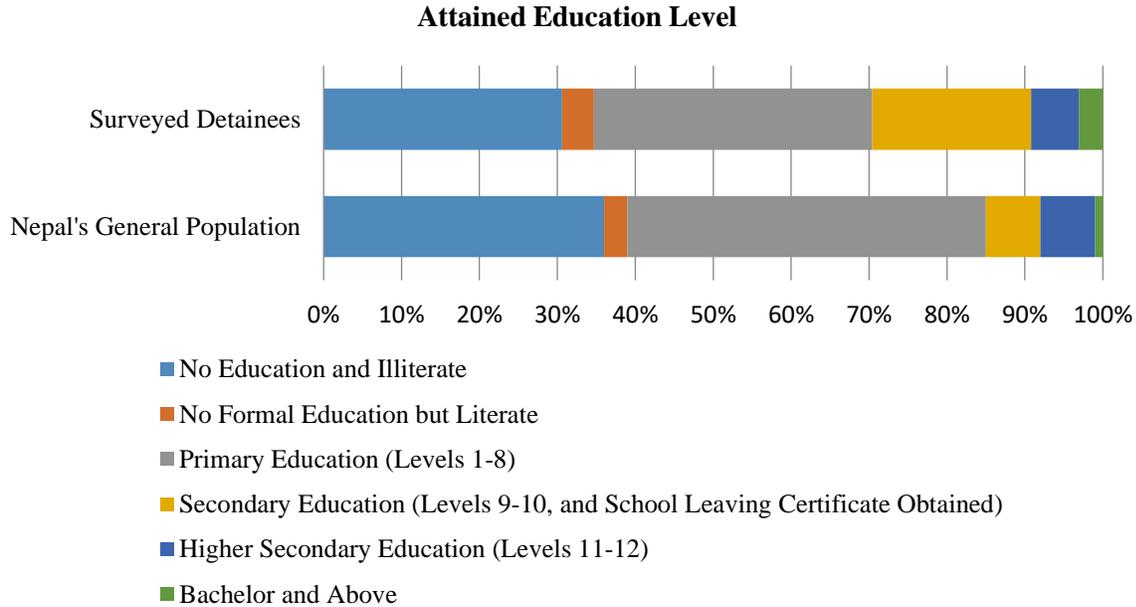


\*Average Family Size in

<sup>12</sup> Census of Nepal (2011) available at: [http://unstats.un.org/unsd/demographic/sources/census/2010\\_phc/Nepal/Nepal-Census-2011-Vol1.pdf](http://unstats.un.org/unsd/demographic/sources/census/2010_phc/Nepal/Nepal-Census-2011-Vol1.pdf)

iii. Education

The responses to questions on detainees' educational attainment shows that nearly one-third have had no formal education and are illiterate, and a further one-third have had only a primary school level of education (levels one through eight). By way of comparison, according to Nepal's 2011 census, nearly one-third of Nepal's general population have had no formal education and are illiterate, and 43% have only completed primary school.



**D. Economic Data**

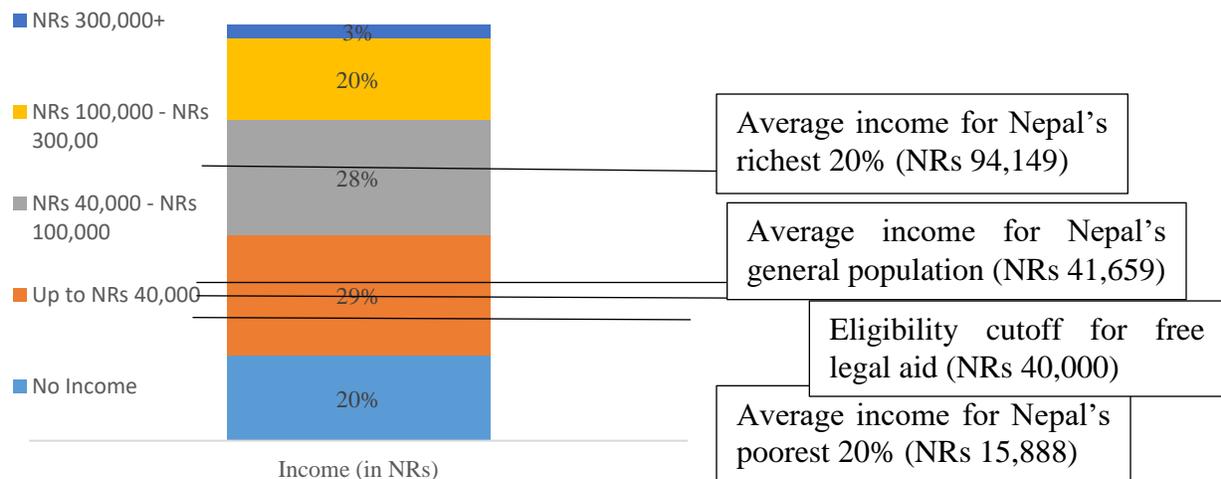
The poverty line adopted by the Nepal government in 2011 was NRs 19,261 per capita per year. According to the Nepal Living Standards Survey conducted in 2011, average per capita income for all of Nepal is NRs. 41,659; the average income for the poorest 20% is NRs 15,888, and the average for the richest 20% is NRs 94,149.

The eligibility cut-off set by the Legal Aid Act is at an annual income of NRs 40,000, which would make the average Nepali eligible for legal aid. Of the detainees surveyed, 20.4% have no income, and 29% have income up to 40,000 rupees—making collectively 49.4% of the surveyed detainees eligible for legal aid.<sup>13</sup> Further, 27.6% reported income between 40,000 and 100,000 rupees; 19.6% reported income between 100,000 and 300,000 rupees; and 3.3% reported income over 300,000 rupees. It is difficult to make a precise comparison between the income of the surveyed detainees and the income of the general public in Nepal because there are no reliable government (or other) sources that break up the data into similar categories. But broadly speaking, the conclusion can be drawn that half of all detainees are eligible for legal aid according to the government's existing standards, and as the analysis of the survey data herein will show, the government is not meeting its obligation to provide legal aid to these individuals.

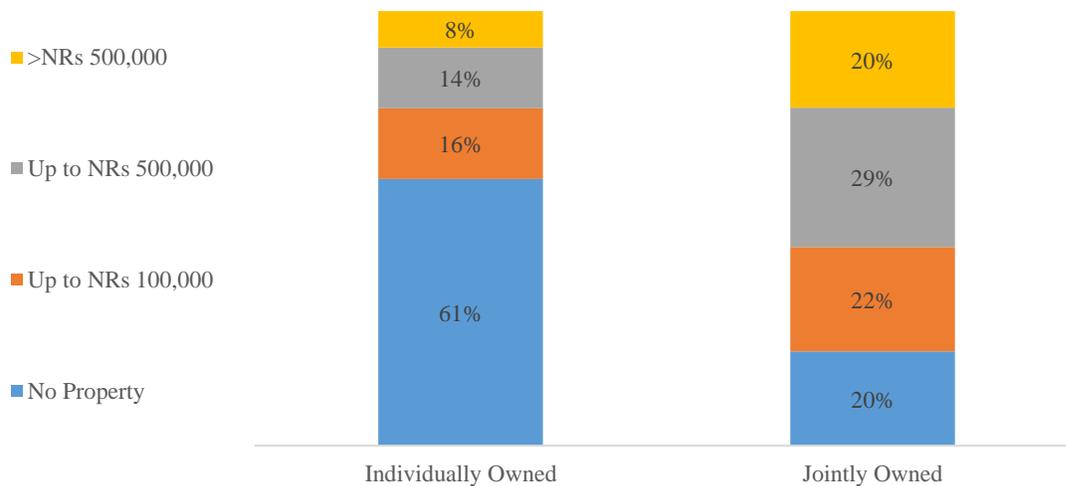
<sup>13</sup> Detainee Question A.2\_2

Questions regarding property revealed that detainees are significantly more likely to have property that is owned jointly with family than owned individually. 60.9% have no individually owned property, while 16.1% individually own property up to NRs 100,000, 13.9% individually own property up to NRs 500,000, and 8.3% individually own property over NRs 500,000. By comparison, 19.6% have no jointly-owned property, while 21.7% jointly own property up to NRs 100,000, 29% jointly own property up to NRs 500,000, and 20.1% jointly own property over NRs 500,000. This disparity between individually owned and jointly owned property may impact an individual’s ability to liquidate property wealth for key defense-related expenses, and also may amplify the negative economic impacts of incarceration in the cases where a family casts out the accused, leaving him or her with little or no individual wealth and no access to family wealth. For families, selling jointly-owned property in order to pay for the defense of an individual family member amplifies the negative impact of the lack of access to counsel beyond the detainee, outward to his family and communities.

### Income of Surveyed Detainees



### Property Ownership of Surveyed Detainees



## E. Type of Charge and Procedural Posture

Data from those surveyed shows that the largest portion of detainees were charged with intentional murder (136 people). This is followed by those charged with possession of drugs (81 people). The next most frequent offence charged is rape (33 people). After that, there are multiple offenses for which only one person was charged. These are abortion, counterfeiting, essential material fact case<sup>14</sup>, grievous assault, IC note<sup>15</sup>, libido,<sup>16</sup> untouchability,<sup>17</sup> and unnatural sex.

Findings on the procedural posture of the case show the stage of the case of each detainee. Of those surveyed, 144 were pretrial detainees (of these, 21 were being held in pretrial detention before the charge sheet was filed, 120 were detained for trial without bail, and 2 were detained as they could not afford to post bail) and 230 were convicted prisoners (of these, 129 had been convicted by a trial court and were awaiting appeal, 81 had their conviction affirmed by an appellate court and were awaiting appeal, and 20 had their conviction affirmed by the Supreme Court).

It is important to note that the majority of the participants in the survey were on trial for or convicted of felonies and that these types of cases are not representative of the vast majority of criminal cases. As a result, their experiences may not reflect the experiences or the nature and availability of legal representation to the vast majority of pretrial detainees. Most people arrested and held in pre-trial custody are charged with relatively minor crimes.<sup>18</sup>

### 3. Surveyed Legal Aid Provider Demographics

This project surveyed 24 lawyers who provide legal aid in the 6 surveyed districts. By district, 7 attorneys were surveyed in Banke, 5 in Ramechhap, 4 in Dailekh, 3 in Okhaldhunga, 3 in Parsa, and 2 in Kalikot. Four of the attorneys were employed by their District Legal Aid Committee (DLAC). Four were *Baitanik Wakil* assigned in their district (1 each in the appeal's court and district court of Balke, 1 in the district court of Dailekh, and 1 in the district court of Kalikot). Of the non-government legal aid providers, 4 were from NGOs, and 11 were from private law firms.

#### A. Gender

Of the attorneys surveyed, 87.5% were male and 12.5% were female. This small survey group is over-representative of the women in legal practice—a 2012 commentary from the Canadian Bar Association noted that fewer than 1% of lawyers in Nepal are women.<sup>19</sup>

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<sup>14</sup> This is a case in which the person has been accused of damaging or stealing an ancient monument or statue.

<sup>15</sup> This charge is identical to counterfeiting, but with Indian rupees instead of Nepali rupees.

<sup>16</sup> This is sexual assault that does not meet the threshold of rape.

<sup>17</sup> This is a charge of discrimination based on caste or ethnicity, often perpetrated against the “untouchable” class

<sup>18</sup> USAID, *Study of the Current Legal Aid System in Nepal* (2005); UNDP Nepal, *Assessment of Impact of Legal Aid Services in Nepal* (2011).

<sup>19</sup> Canadian Bar Association, *Commentary: Women Lawyers Joining Hands*, available at [http://www.wljjh.org/web\\_pages/articles/WLJH\\_Article\\_in\\_CBA\\_SK\\_Bar\\_Notes\\_Fall\\_2012.pdf](http://www.wljjh.org/web_pages/articles/WLJH_Article_in_CBA_SK_Bar_Notes_Fall_2012.pdf)

## **B. Ethnicity**

The ethnicity of the surveyed lawyers was spread over 5 ethnic categories: 37.5% were Chhetri, 25% were Janajati, 20.8% were Brahman, 12.5% were Madhesi, and 4.2% were Muslim. By way of comparison to the general population of Nepal, Chhetri are 16.6% of the overall population, Janajati are 26.1, Brahman are 12.2%, Madhesi are 9.3%, and Muslims are 4.4%.<sup>20</sup>

## **C. Language**

The surveyed lawyers overwhelmingly spoke Nepali, with 87.5% reporting it as their primary language. Additionally, 1 attorney each spoke Tharu, Abhadhi, and Tamang. By comparison, the 2011 Nepali census showed that 44.6% of the general population speaks Nepali, while 5.8% speak Tharu, 2% speak Abhadi, and 5.1% speak Tamang.<sup>21</sup>

## **D. Education and Experience**

Of the surveyed attorneys, 58.3% had obtained a bachelor's degree, and 41.7% had obtained a master's degree or higher. They were primarily advocates—83.3%--but 1 (4.2%) was a pleader and 3 (12.5%) were legal advisors. Additionally, 75% had possessed their legal license for more than 10 years, while 12.5% had possessed it for between 6 and 10 years, and 12.5% had possessed it for 5 years or less. In terms of specific training in criminal defense, the surveyed attorneys were evenly split—50% had received at least some criminal defense training, and 50% had not.

### **III. Relevant International and Domestic Law and Norms**

The right to free legal assistance for criminal defendants who are unable to afford a lawyer is a widely accepted principle of law and an essential component of the right to a fair trial.<sup>22</sup> The right is well-recognized both in international law and in Nepal's Interim Constitution and other legislation. The following section lays out the international and domestic laws relevant to the right to counsel in Nepal, and makes note of the gaps that exist between the right to counsel and the government's ability to provide the poor with access to counsel.

#### **1. The Right to Counsel under International Law**

In 1948, the right to fair trial was affirmed as a basic human right by the Universal Declaration of Human Rights (UDHR).<sup>23</sup> The UDHR sets forth that anyone charged with a crime is entitled to a

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<sup>20</sup> CIA World Factbook, *available at* <https://www.cia.gov/Library/publications/the-world-factbook/fields/2075.html>

<sup>21</sup> Official Summary of the Census (2011) *available at* [cbs.gov.np/wp-content/uploads/2012/11-Summary-Nepali.pdf](https://cbs.gov.np/wp-content/uploads/2012/11-Summary-Nepali.pdf).

<sup>22</sup> See: UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III), annex, Art. 10-11; UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966), United Nations, Treaty Series, vol. 999, p. 171, Art. 14(3)(d); and UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (28 March 2013), A/RES/67/187, Principle 3, Para. 21.

<sup>23</sup> UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III), annex, Art. 10-11.

“fair and public hearing” with “all the guarantees necessary for his defense.”<sup>24</sup> Subsequently, the International Covenant on Civil and Political Rights (ICCPR) made clear that the right of the accused to the assistance of counsel is fundamental to the right to a fair trial.<sup>25</sup> The ICCPR provides that everyone charged with a criminal offense shall have the right “to have legal assistance assigned to him, in any case where the interests of justice so require, and **without payment by him in any such case if he does not have sufficient means to pay for it**”<sup>26</sup> (emphasis added).

Notably, the ICCPR has the force of law in Nepal, given that (1) Nepal is a signatory to the ICCPR;<sup>27</sup> (2) the Nepal Treaty Act 2047 (1990) provides that, in the event a treaty has been signed by the State but has not been ratified by Parliament—as is the case here—the State will “initiate action as soon as possible to enact laws for its execution;”<sup>28</sup> and (3) the Interim Constitution provides that it is an obligation of the government “to effectively implement the international treaties and agreements to which the State is a party.”<sup>29</sup>

Subsequent to the adoption of the UDHR and the ICCPR, the United Nations has adopted several international instruments that develop, elaborate, and interpret States’ obligation to provide legal representation to the criminally accused. This includes the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*,<sup>30</sup> the *United Nations Standard*

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<sup>24</sup> The *Universal Declaration of Human Rights* states:

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

<sup>25</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966), United Nations, Treaty Series, vol. 999, p. 171, Art. 14(3)(d).

<sup>26</sup> The *International Covenant on Civil and Political Rights* states:

Article 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 14(3): 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 defense 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; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

<sup>27</sup> Nepal ratified the ICCPR in 1991.

<sup>28</sup> Nepal Treaty Act 2047 (1990), Art. 9(2): “In case any treaty which has not been ratified, accede to, accepted or approved by the Parliament, but to which the Kingdom of Nepal or HMG has become a party, imposes any additional obligation or burden upon the Kingdom of Nepal, or upon HMG, and in case legal arrangements need to be made for its execution, HMG shall initiate action as soon as possible to enact laws for its execution.”

<sup>29</sup> *Interim Constitution of Nepal*, 2063 (2007), art. 33(m): “The State shall have the following obligations...(m) To effectively implement the international treaties and agreements of which the State is a party”

<sup>30</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (28 March 2013), A/RES/67/187.

*Minimum Rules for the Treatment of Prisoners*,<sup>31</sup> and the *United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*.<sup>32</sup>

The *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* were unanimously adopted by the UN General Assembly in 2012, and expand upon the right to counsel set forth in the ICCPR, providing clear guidance on the steps States should take to fulfill their obligation to provide legal aid to the indigent accused. They emphasize the fact that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, and that States should guarantee the right to legal aid in their national legal systems at the highest possible level. They state that anyone detained, arrested, suspected of, or charged with a criminal offense punishable by a term of imprisonment or the death penalty is entitled to legal aid, regardless of their ability to pay, and that it is the responsibility of police, prosecutors and judges to help ensure this by informing the accused of their rights. They also highlight the importance of early access to a lawyer, and the necessity of ensuring that lawyers have the necessary skills to assist their clients.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* emphasizes prisons right to apply for free legal aid, to receive visits from a legal advisor with a view to his or her defense, and to have these visits outside of the hearing of police or other officials. And the *United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* states that “A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”

## **2. The Right to Counsel under Nepal’s Domestic Law**

Nepal’s domestic laws are largely in line with international laws and norms. The Interim Constitution of Nepal, 2063 (2007)<sup>33</sup> guarantees the right to a fair trial<sup>34</sup>, the right to counsel from the time of arrest<sup>35</sup>, and the right to free legal aid for indigent accused.<sup>36</sup> According to the Interim Constitution, no one shall be deprived of liberty without the protection of these rights.<sup>37</sup> Further, the right to counsel is addressed in Nepal’s Civil Rights Act, 2012 (1955)<sup>38</sup> and Bar Council Act,

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<sup>31</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1955).

<sup>32</sup> UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, (9 December 1988).

<sup>33</sup> Interim Constitution of Nepal, 2063 (2007), available at [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

<sup>34</sup> Interim Constitution, art. 24(9): “Every person shall be entitled to a fair trial by a competent court or judicial authority.”

<sup>35</sup> Interim Constitution, art. 24(2): “The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.”

<sup>36</sup> Interim Constitution, art. 24(10): “The indigent person shall have the right to free legal aid in accordance with law.”

<sup>37</sup> Interim Constitution, art. 12(2): “No person shall be deprived of his/her personal liberty save in accordance with law.”

<sup>38</sup> Civil Rights Act of Nepal, 2012 (1955), available at <http://www.icla.up.ac.za/images/un/use-of-force/asia-pacific/Nepal/Civil%20Rights%20Act%20Nepal%201955.pdf>

2050 (1993)<sup>39</sup>. The Civil Right Act states that an arrested person shall not be deprived of the right to access a lawyer<sup>40</sup>, and the Bar Council Act states that advocates and senior advocates may present, plead, and argue before every court in Nepal.<sup>41</sup>

Nepal's Supreme Court has also affirmed the right to counsel, relying on both the Constitution and international norms. The most prominent Supreme Court right to counsel case is *Som Prasad Luitel v. Government of Nepal*.<sup>42</sup> In this Public Interest Litigation case, the accused asserted that the government of Nepal failed to meet its obligation under the Interim Constitution art. 14(5)<sup>43</sup> and the ICCPR to provide free legal representation to poor Nepalis accused of crimes. The Supreme Court agreed, recognizing that an indigent person, especially one detained in police custody, cannot be expected to request or procure legal representation for him or herself. Rather, it is the duty of the state to ensure that those protections are afforded. In so holding, the Supreme Court made the following statement:

“[I]t is the constitutional obligation of the state to provide free legal aid or legal practitioner's service to the person detained in custody. If the right assured by Article 14(5) is not effectively implemented, has not been implemented or no attempt has been made to implement it, it does not give any meaning. Detainees or prisoners themselves, having a desire, cannot implement the right guaranteed by the constitution. For that to happen, the executive should take appropriate management. The right regarding criminal justice is related to the personal liberty of the person who is charged with a crime. In order to prevent illegal and arbitrary detention from the state, this right is available not only to a citizen but also to every person residing throughout the country.... If the state does not stand in a position to accomplish the notion of the constitution, or is not sensitive to protect the fundamental right of a citizen, or does not take an appropriate action, the right to liberty provided by the constitution cannot be protected.”

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<sup>39</sup> Bar Council Act, 2050 (1993), available at

<http://www.lawcommission.gov.np/site/sites/default/files/Documents/bar-council-act-2050-eng.pdf>

<sup>40</sup> Civil Rights Act, 2012 § 15(1): “Except otherwise provided by the prevailing laws, the person who is being arrested, [...] (b) Shall not be deprived of the right to consult and be defended by the legal practitioner or an attorney pursuant to the law.”

<sup>41</sup> Bar Council Act, 2050 § 22: “Right to be Present, Plead and Advocate: (1) A Senior Advocate and Advocate shall be entitled to be present, plead and argue before the Supreme Court or any Office or Court or Authority of Nepal. (2) A Pleader shall be entitled to be present, plead and argue in Courts, Offices and Authority except the Supreme Court of Nepal.”

<sup>42</sup> *Som Prasad Luitel v. Government of Nepal*, S.Ct. Writ No. 062-WS-3275, Order Date: 2064/10/23 (6 February 2008).

<sup>43</sup> In *Som Prasad Luitel*, the petitioner sought a writ of mandamus to enforce article 14(5) of the Constitution of 2047, which states “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.” Although the Constitution of 2047 has since been replaced by the Interim Constitution of 2063, the language regarding the right to counsel and the government's obligation to provide the same is virtually identical, so the Supreme Court's ruling in this case should still apply. In fact, the Court's holding was arguably codified in article 24(10) of the Interim Constitution.

In 2010, ILF-Nepal brought a Public Interest Litigation case to the Supreme Court in the case of *Neelam Poudel v. Prime Minister of Nepal, the Council of Ministers, et al.*<sup>44</sup> This decision reinforced that the right to counsel and the right to present a defense are, and must be, included in the right to a fair trial. Citing various international and national examples, the Supreme Court enunciated ten ingredients necessary to ensure a fair trial, including that “the litigants also should be provided with sufficient time to prepare their cases. The right to a fair trial refers to that situation or condition in which a person can fearlessly furnish his evidence and is defended by his legal practitioner before an open bench.”<sup>45</sup>

### 3. Lack of Legislation Implementing the Right to Counsel in Nepal

Nepal’s Interim Constitution explicitly guarantees the right to counsel to the indigent accused from the time of arrest and the Supreme Court has stated in case law that this right is fundamental to the right to defense and the right to a fair trial. However, Nepal has not enacted sufficient implementing legislation, regulations or procedures to ensure that every indigent person accused of a criminal offense receives prompt access to effective legal counsel.

For example, the Interim Constitution states that “The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest,”<sup>46</sup> but Nepal does not have any laws or written mechanisms or procedures addressing *how* a person is supposed to be informed of his or her right to counsel, and how an indigent person should be provided access to counsel. Nepal’s State Cases Act, 2049 (1992) explicitly addresses a range of police actions and responsibilities in criminal matters, from the time of suspicion, to arrest, to investigation, and through trials and appeals; however, it does not mention the right to counsel or the police’s obligation to inform the accused of their right to a lawyer.<sup>47</sup> Article 9 of the Act stipulates that the statement of the accused must be taken “in front of the Government Attorney,” and Article 14 addresses the steps that an officer should take when making an arrest.

On the international level, the *UN Principles and Guidelines* address this issue in Principle 3, stating “It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal

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<sup>44</sup> *Neelam Poudel v. Prime Minister of Nepal, the Council of Ministers, et al.*, S.Ct. Writ No. 064-WS-0038, Order Date: 2067/5/10 (26 August 2010).

<sup>45</sup> In *Neelam Poudel v. Prime Minister of Nepal, et al*, ILF-Nepal attorneys challenged section 9 of the Human Trafficking and Transportation Control Act of 2064, which shifts the burden of proof to the accused, in violation of the presumption of innocence, the right against self-incrimination, and the right to a fair trial guaranteed in the Interim Constitution, 2063 (2007), and the ICCPR. The Supreme Court declined to find the provision unconstitutional, but, still, pivotally held that Section 9 simply mandates defense rebuttal once the prosecution has met its burden of proof under law: “[A]fter the prosecution establishes the crime, according to Sec. 9 the legal responsibility to rebut the accusation is prescribed to the accused... The provision and objective of Sec. 9 is rebuttal.” In the course of that explaining their reasoning in the case, the Supreme Court made the assertions regarding the right to fair trial and counsel.

<sup>46</sup> Interim Constitution of Nepal, 2063 (2007), art. 24(2), available at [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

<sup>47</sup> Government Cases Act of Nepal, 2049 (1992), available at <http://www.lawcommission.gov.np/site/sites/default/files/Documents/government-cases-act.pdf>

aid.”<sup>48</sup> Further specifics are provided in Guideline 2 of that document, which finds that in order to guarantee the right to legal aid, States should take certain steps to ensure that information on the availability of legal aid and how to access it is made available to the general public, and especially to marginalized groups, through all appropriate means; that police officers, prosecutors, and judges inform the accused of their rights to legal aid and other procedural safeguards; that information on the rights of the accused be provided in police stations, detention facilities, courts, etc., in a manner appropriate to the age, education, and language of the accused; that remedies should exist for instances in which appropriate procedures are not followed; and that there is an official means of verifying these procedures were followed.<sup>49</sup>

To take another example, both international law and Nepal’s Interim Constitution broadly ensure the right to a “fair” trial in which the accused is assisted by counsel.<sup>50</sup> This implicitly recognizes that access to counsel is necessary for a trial to be “fair,” but fails to address the fact that the mere presence of counsel is not sufficient to fulfill the right to counsel, because the presence of

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<sup>48</sup> UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (28 March 2013), A/RES/67/187, available at [http://www.unodc.org/documents/justice-and-prisonreform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prisonreform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>49</sup> UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (28 March 2013), A/RES/67/187, Guideline 2, para. 43, available at [http://www.unodc.org/documents/justice-and-prisonreform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prisonreform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf):

Guideline 2. Right to be informed on legal aid

42. In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

- (a) Information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means;
- (b) Information is made available to isolated groups and marginalized groups. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following changes to the law or specific issues affecting a community, targeted community meetings;
- (c) Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;
- (d) Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is provided in police stations, detention centres, courts and prisons, for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity;
- (e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include 14 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation;
- (f) Means of verification that a person has actually been informed are put in place.

<sup>50</sup> See the Universal Declaration of Human Rights, Article 10 (“Everyone is entitled in full equality to a fair and public hearing...”) and Article 11 (“...at which he has had all the guarantees necessary for his defence,” i.e. including legal counsel); the International Covenant on Civil and Political Rights, Article 14 (the right to “adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing”); the Interim Constitution of Nepal, Article 24(2) (“The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner”) and Article 24(9) (“Every person shall be entitled to a fair trial...”).

ineffective counsel—attorneys who do not or cannot provide meaningful, quality representation—is, for all intents and purposes, equivalent to having no counsel at all.<sup>51</sup> In order to address this issue, the *UN Principles and Guidelines* notes in Principle 13 that “States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs;” further, Guideline 15 addresses the need for regulation and oversight of legal aid providers in order to ensure their qualifications for providing criminal legal aid and the quality of their representation.<sup>52</sup>

Nepal’s government has not put in place any monitoring and oversight mechanisms, qualification standards or training requirements for legal aid providers. The Nepal Bar Council, an independent organization established by the government through the Nepal Bar Council Act, 2050 (1993) to regulate the conduct of lawyers, adopted the Code of Conduct for Legal Practitioners, 2051 (1994), but it only addresses how lawyers should conduct themselves respectfully before courts and other justice sector officials; it makes no mention of a lawyer’s obligations to his or her clients in any capacity, including when representing a criminal defendant.<sup>53</sup>

Notably, the Nepal Bar Association (NBA) has begun an initiative to develop performance standards and guidelines for legal aid providers. In coordination with the ILF, which is providing the NBA with examples of standards and monitoring and evaluation systems, the goal is to create universal standards for legal aid providers that are enforceable nationwide. The NBA plans to roll the standards out with the assistance of the ILF through a series of workshops, roundtables, and training sessions. The ILF is also working with the NBA to improve the NBA’s ability to monitor lawyers working under the developing standards. This initiative is an important step toward filling in gaps in the quality of criminal defense services provided to those who receive access to counsel; however, as the responsibility for ensuring the right to counsel rests with the State, it will be crucial that Nepal’s government takes steps to promulgate and enforce such standards.

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<sup>51</sup> See *Strickland v. Washington*, 466 U. S. 668 (1984) at 466 (“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that the right to counsel is the right to the effective assistance of counsel.”)

<sup>52</sup> UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (28 March 2013), A/RES/67/187, Guideline 2, para. 43, *available at* Guideline 15: Regulation and oversight of legal aid providers.

69. In adherence to principle 12, and subject to existing national legislation ensuring transparency and accountability, States, in cooperation with professional associations, should:

- (a) Ensure that criteria are set for the accreditation of legal aid providers;
- (b) Ensure that legal aid providers are subject to applicable professional codes of conduct, with appropriate sanctions for infractions;
- (c) Establish rules to ensure that legal aid providers are not allowed to request any payment from the beneficiaries of legal aid, except when authorized to do so;
- (d) Ensure that disciplinary complaints against legal aid providers are reviewed by impartial bodies;
- (e) Establish appropriate oversight mechanisms for legal aid providers, in particular with a view to preventing corruption.

<sup>53</sup> Nepal Bar Council, Code of Conduct for Legal Practitioners, 2051 (1994), *available at* [http://www.nepalbarcouncil.org.np/documents/Code%20of%20Conduct\\_1.docx](http://www.nepalbarcouncil.org.np/documents/Code%20of%20Conduct_1.docx)

As the results of this survey make clear, there are huge gaps between Nepal's obligation to provide counsel to all indigent persons from the time of arrest the right to counsel and actual practice. One way to narrow that gap would be through more specific laws and procedures that leave little room for interpretation. Laws and procedures that clearly, explicitly address such aspects as the time, place, and manner in which the accused will be informed of their right to counsel, the steps that will be taken to ensure the accused have access to counsel, and that counsel is qualified to provide representation would be an important step to ensuring the constitutional right to counsel.

#### **IV. Current Legal Aid Structure**

Various government and non-governmental schemes provide legal aid services to persons in need in Nepal.<sup>54</sup> The Government of Nepal provides counsel to the indigent accused through both a contract system (the *Baitanik Wakil* program, run by the Supreme Court) and an appointed counsel system (the Central and District Legal Aid Committees, managed by the Nepal Bar Association). The government legal aid system is supplemented by nongovernmental legal aid organizations that employ full-time salaried lawyers. Many of these legal aid organizations handle both criminal and civil cases; ILF-Nepal is the only nongovernmental organization set up as a traditional public defender office, representing the indigent accused both in courts and before quasi-judicial bodies.

Past assessments of legal aid in Nepal have largely shown that this patchwork of legal aid services provided by various organizations fails to adequately address the need.<sup>55</sup> In a 2007 survey of 2,214 prisoners, 43.6% of detainees reported that they were not represented by any lawyer at trial. Approximately 32% reported having assigned their own lawyer (presumably a private, paid lawyer). Of the remainder, 4.6% received a lawyer through an NGO, 1.6% received a *Baitanik Wakil* (a court-appointed lawyer), 0.2% received a lawyer through the Bar Association, and 0.09% received a lawyer through the District Legal Aid Committees (DLAC).<sup>56</sup>

##### **1. *Baitanik Wakil* – Appointed Lawyer Program**

Since 1958, the Government of Nepal has relied primarily on the Supreme Court's *Baitanik Wakil*, or court-paid lawyer, program to meet its constitutional obligation to provide legal aid services. By design, one *Baitanik Wakil* lawyer serves in each of Nepal's 75 district courts and 16 appellate courts, and generally two serve in the Supreme Court. The lawyer is paid a monthly salary by the court for their service.<sup>57</sup>

*Baitanik Wakil* are contracted by Nepal's judicial courts (district courts, appellate courts, and the Supreme Court of Nepal) for a period of one year, and a court is at liberty to assign the *Baitanik*

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<sup>54</sup> USAID, *Study of the Current Legal Aid System in Nepal* (2005); UNDP Nepal, *Assessment of Impact of Legal Aid Services in Nepal* (2011).

<sup>55</sup> USAID, *Study of the Current Legal Aid System in Nepal* (2005); UNDP Nepal, *Assessment of Impact of Legal Aid Services in Nepal* (2011).

<sup>56</sup> Consortium for Assisting Prisoners, National Legal Aid Network, *Prisoners' Access to Justice: Baseline Survey 2007*, (2007). Note that at this point not all districts had District Legal Aid Committees, which may account for some of their inactivity in appointing counsel.

<sup>57</sup> Currently, *Baitanik Wakil* are paid NRs 24,900 per month at the district and appellate court levels, and the two *Baitanik Wakil* at the Supreme Court are paid NRs 27,610 per month.

*Wakil* lawyer to a case at any point during the lawyer's tenure as the *Baitanik Wakil* for that court. During their tenure, they are responsible for representing any legal aid case referred by the court, both civil and criminal (and both victims and defendants in criminal cases).

In practice, the capacity of the *Baitanik Wakil* system to provide meaningful representation is hampered by a lack of funding, resources, and oversight. Only one lawyer is contracted by each court (except the Supreme Court, which contracts two), regardless of the size of the court's caseload. The annual report of the Supreme Court 2068/69 (2012/2013) shows that there were a total of 28,786 criminal cases in Nepal's courts that year. *Baitanik Wakil*, who staff every court in Nepal, represented clients in only 2.2% percent of these cases, or 3,430 cases, and of that number only 2,275 cases were represented at the district court level, where there are opportunities to represent the client during the early stages of the case.

*Baitanik Wakil* are not provided with any specialized training or any other support or oversight. Neither are there basic qualifications or uniform procedures for appointing *Baitanik Wakil* in each court. The Supreme Court's rule<sup>58</sup> ostensibly requires an Advocate, not a Pleader, but the Appellate Court<sup>59</sup> and District Court rules only prefer an Advocate, and will take a Pleader if necessary. In practice, there is no uniformity in the appointment of *Baitanik Wakil*. In some courts they are appointed on the recommendation of the Bar Association, in some there is open competition with a written exam and interview process, and in some they are simply appointed on the unexamined decision of the relevant court authority.<sup>60</sup>

Further, the reach of *Baitanik Wakil* is limited even in cases in which they are actually appointed. Generally, the *Baitanik Wakil* is appointed, if ever, at the jail/bail hearing, despite the fact that the Interim Constitution guarantees the right to an attorney from the time of arrest and that the investigation has already been completed by the time of the jail/bail hearing.

Also, in addition to criminal cases handled in judicial proceedings before district court judges, a significant number of criminal matters (including for offenses that carry a potential prison term) are handled through quasi-judicial proceedings before chief district officers, chief forest officers, and even park wardens; however, the mandate of the *Baitanik Wakil* program is limited to judicial proceedings only. As a result, thousands of people tried each year before quasi-judicial bodies<sup>61</sup> do not have access to counsel, though they can face lengthy prison sentences.

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<sup>58</sup> Rule 111(A) of the Supreme Court Rules, 1992, authorizes the Registrar of the Supreme Court to appoint a *Baitanik Wakil* from among "advocates" through a "fair competition." *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (a contractor of USAID), September 2005, Pp. 24.

<sup>59</sup> Rule 105(A) of the Appellate Court Rules, 1991, and Rule 95(A) of the District Court Rules, 1995, provide that *Baitanik Wakil* will be appointed from "among the applicant advocates available. If advocates are not available in such situation stipendiary lawyer will be appointed among the applicant pleaders." *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> According to the annual report of the Supreme Court, in 2012-2013 13,794 people were tried before Chief District Officers. There are many more criminal cases handled before other types of quasi-judicial bodies including park wardens, forest officers and border officers that are not represented in this figure.

## 2. District Legal Aid Committee

Nepal's Legal Aid Law (2054), passed in 1997, established the Central Legal Aid Committee and District Legal Aid Committees to govern the provision of legal aid in Nepal, and established the Legal Aid Fund to finance legal aid services. The committees were empowered to prepare lists of lawyers from the Nepal Bar Association (NBA), designated based on their subject matter expertise, who could be called upon to provide legal services to indigent clients. "Legal Aid" is defined in the Act as "counseling and other legal services such as correspondence pleadings, preparation of legal documents, and proceedings in the courts or offices on behalf of indigent person,"<sup>62</sup> and is thus not limited to criminal legal aid.

By law, DLACs should have been established in all 75 of Nepal's districts; however, to date offices have been opened in only 34 districts. In those districts, the DLAC is established as a single-room office, often within the courthouse and with one government staff member (who is not a lawyer) who assigns cases to members of the NBA. Though the Legal Aid Act mandates provision of legal aid to any "helpless persons,"<sup>63</sup> lawyers appointed by the DLACs generally do not provide any indigent criminal defense services. UNDP observed in 2012 that "In practice, the *Baitanik Wakil* lawyers tend to be allocated criminal cases, whereas the District Legal Aid Committee scheme tends to support parties to civil cases."<sup>64</sup>

There are a number of factors that contribute to this gap in criminal defense services through DLACs. First, the Legal Aid Act establishing DLACs failed to provide clear guidelines for who is entitled to legal aid, providing only "A person having less than the specified annual income shall only be entitled to Legal Aid under this Act," without specifying what annual income level will be the bar, and that the relevant Committee can choose to provide or deny legal aid to any person.<sup>65</sup> Further, a party that receives any property or economic gain as a result of receiving legal aid is required to reimburse the relevant Committee for any expenses it incurred in providing legal aid, unless the relevant Committee finds reimbursement unfair and waives the requirement.<sup>66</sup> The overbroad language of the Legal Aid Law leaves significant room for misfeasance or malfeasance by the legal aid committees and legal aid providers, though existence of the law at the very least confirms that the right to counsel exists and that the state has a responsibility to provide counsel to indigent persons in need.

Second, when DLACs were first established, the government provided funds sufficient for hiring at least one full time attorney and necessary office support staff, and for paying fees to outside attorneys who were assigned cases. Unfortunately, funding to DLACs was cut, such that only the single staff attorney could be retained; this person is paid a very low annual salary (NRs 40,000, at the non-gazette first class level), and is expected to provide representation in most or all of the cases submitted to the DLAC, regardless of their legal background or expertise—or lack thereof, as is often the case in criminal defense matters. Without support staff, administration of the DLACs

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<sup>62</sup> Section 2(a) [http://www.ncf.org.np/upload/files/184\\_en\\_legal-aid-act.pdf](http://www.ncf.org.np/upload/files/184_en_legal-aid-act.pdf)

<sup>63</sup> Legal Aid Act, 1997, Section 2(a).

<sup>64</sup> United Nations Development Project, *Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013 – 2017)*, pp. 35; available at [http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP\\_NP\\_RoLHR\\_Project-Document.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Document.pdf).

<sup>65</sup> Section 3. [http://www.ncf.org.np/upload/files/184\\_en\\_legal-aid-act.pdf](http://www.ncf.org.np/upload/files/184_en_legal-aid-act.pdf)

<sup>66</sup> Section 4. [http://www.ncf.org.np/upload/files/184\\_en\\_legal-aid-act.pdf](http://www.ncf.org.np/upload/files/184_en_legal-aid-act.pdf)

backed up and became inefficient, and outside lawyers became unwilling to take cases for which they would not be paid or even reimbursed for costs associated with representation (court fees, investigation costs, etc.).

Finally, the accused face significant obstacles to even applying for representation from the DLACs. When an individual is arrested, there is immediately a significant social stigma against the accused and their family, and at that point people—including local government officials—often become unwilling to facilitate the accused and their family in obtaining the financial documents that are required by DLACs to prove indigency. Notably, it is very easy to obtain such documents when one is involved in a civil suit instead of a criminal one, which strongly contributes to the relatively high number of civil cases DLACs provide representation in, as compared to the number of criminal cases they take on.

In addition, there is no oversight of DLAC lawyers, accountability for expenditures, or monitoring of caseloads. These factors create circumstances in which DLACs provide representation in very few criminal cases, and when representation is provided, there is no guarantee that it will be of sufficient quality to be meaningful.

### **3. Nongovernmental Legal Aid Providers**

Domestic and international nongovernmental organizations provide legal aid services in many districts of Nepal with support from outside donors. These organizations include ILF-Nepal, the Center for Legal Research and Resource Development (CeLLRd), Advocacy Forum, and the Terai Human Rights Defenders Alliance (THRD Alliance).

ILF-Nepal, a project of the International Legal Foundation established in 2008, has offices in 5 districts, and from those offices serves a total of 12 districts. In 2014, ILF-Nepal's 17 lawyers represented 1,240<sup>67</sup> indigent accused in cases before judicial and quasi-judicial bodies; in total, as of the end of 2014, ILF-Nepal had represented approximately 3,500 clients, more than 75% of whom are marginalized and at-risk because of poverty, caste, gender and/or age.

CeLLRd is one of the oldest organizations providing legal aid in Nepal. It has several programs, including mediation, legal aid, criminal defense, gender justice, legal education, and juvenile justice. CeLLRd operates in many districts, and at one point ran a Prisoner Legal Aid (PLA) Programme in 28 districts through 5 regional legal aid clinics. To date, its PLA Programme has provided representation in over 12,000 cases, mostly to Dalits, indigenous peoples, and other marginalized communities.<sup>68</sup> Unfortunately, as of February 2015 CeLLRd had to suspend its official representation of indigent accused in all districts due to a lack of funding; however, some of its attorneys continue to represent a limited number of cases pro bono.

Advocacy Forum focuses on a broad number of topics under its overall mission to “combat the culture of impunity by promoting the rule of law,”<sup>69</sup> including some representation of indigent

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<sup>67</sup> This includes 754 new clients in 2014, and 486 carry-over cases from earlier years.

<sup>68</sup> See CeLLRd “Prisoner Legal Aid Programme” available at <http://www.celrrd.org/prisoners-legal-aid-pla/>

<sup>69</sup> See Advocacy Forum, “About Us,” available at <http://advocacyforum.org/about-us/index.php>.

accused through its criminal justice department.<sup>70</sup> Currently, they are also suffering from a lack of funding for this work, and are thus employing only one attorney, in Rubendesi. This attorney is representing indigent accused in addition to human rights and civil cases.

The THRD Alliance began as an informal rights group in Terai in 2006, and in 2011 was officially registered as a nongovernmental organization in Mahottari. The main objectives of the THRD Alliance are to strengthen the voice of Madhes and to promote equity and justice by addressing the issues faced by the people of Terai. It operates out of its Liaison Office in Kathmandu, two regional offices in Janakpur (for the Eastern and Central Terai regions) and Bhairahawa (for the Western and Far Western Terai regions), a sub-regional office in Nepalgunj (for the Mid-Western Terai region), and two contact offices in Biratnagar and Dhangadhi.<sup>71</sup> THRD Alliance's website notes that it has "15 Human Rights Defenders and 15 lawyers [who] have been mobilized to monitor, document, and litigate human rights violations throughout the Terai districts."<sup>72</sup>

## V. Findings and Analysis

The major findings of this survey was that indigent accused are not being adequately advised of their right to counsel and are not receiving prompt access to qualified counsel. JUS Nepal and the ILF found that many detainees had been unaware of their right to counsel at the time of their arrest and were not informed of their rights by the police, prosecution, or the court. Additionally, detainees were not aware that they had the right to free legal assistance if they could not afford a lawyer. As a result, most were unrepresented during their interrogation and throughout the investigation stage—a critical stage of the case during which many rights violations are likely to occur that impact the pretrial detention decision and the right to a fair trial. Where detainees were able to hire counsel, many were unable to afford an experienced lawyer or could not pay for representation throughout the entire criminal process. Ineffective representation was common, lawyers failed to meet with the client with sufficient frequency (if at all), failed to investigate the case sufficiently (if at all), failed to properly inform clients of their rights or the judicial process, and generally failed to provide zealous, proactive advocacy in defense of the indigent accused they represent. Not surprisingly, most detainees felt that Nepal's justice system lacks fairness.

### 1. Detainees Not Advised of Their Right to Counsel

The ability to exercise the right to counsel requires the accused to have knowledge that the right exists. If someone who is arrested does not know that they have the right to counsel, or that free counsel is available for those who cannot afford it, and they are not informed of those facts following their arrest, it is less likely that they will exercise their rights. As noted above, the *UN Principles and Guidelines* put the onus on the State, and specifically on police, prosecutors, and judicial officials, to inform arrestees of their right to legal aid<sup>73</sup> This is appropriate because, firstly,

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<sup>70</sup> See Advocacy Forum, "Criminal Justice Department," available at <http://advocacyforum.org/what-we-do/criminal-justice-department/index.php>.

<sup>71</sup> See Terai Human Rights Defenders Alliance, "About Us," available at <http://www.taraihumanrights.org/pages.php>.

<sup>72</sup> Terai Human Rights Defenders Alliance, "About Us," available at <http://www.taraihumanrights.org/pages.php>.

<sup>73</sup> Principle 3:

It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.

it is the State's obligation to protect the rights of its citizens, and especially those involved in the criminal justice system, where it is the State's power that may be used to deprive someone of their liberty. Secondly, making it the responsibility of police, prosecutors and judges to inform arrestees of their rights is the most effective and efficient manner for ensuring the accused are informed of their rights, because those officials are the first to encounter the accused. Unfortunately, survey data reveals that the responsibility to inform the accused of the right to counsel was not fulfilled by the State in any meaningful way, leading to many detainees being denied the right to counsel.

Nearly three quarters of respondents (74.8%) were not aware at the time of their arrest that they have the right to have a lawyer to defend their case.<sup>74</sup> From the time of arrest, 63% were *never* informed by any party that they have this right.<sup>75</sup> Some of the 63% who were never informed may overlap with the 25.2% of respondents who already knew of their right to counsel at the time of arrest;<sup>76</sup> however, it is important that the government have a procedure in place through which they inform every arrestee of their right to counsel, because they do not have a means of knowing ahead of time which arrestees may know of their rights and which do not.

Of those respondents who were informed of their right following arrest, friends (either in prison with them or from outside of prison) and family, not the government or anyone in the justice sector, were the greatest resource for informing them of their right—14.2% were told by friends that they

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#### Guideline 2. Right to be informed on legal aid

42. In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

- (a) Information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means;
- (b) Information is made available to isolated groups and marginalized groups. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following changes to the law or specific issues affecting a community, targeted community meetings;
- (c) Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;
- (d) Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is provided in police stations, detention centres, courts and prisons, for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity;
- (e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include 14 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation;
- (f) Means of verification that a person has actually been informed are put in place.

UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187, Principle 3, available at: [http://www.unodc.org/documents/justice-and-prisonreform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prisonreform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>74</sup> Detainee Question E.1

<sup>75</sup> Detainee Question E.2 (note that 316 of the 373 detainees surveyed answered this question; survey takers did not make it clear why some respondents did not answer this question)

<sup>76</sup> Detainee Question E.1

have the right to counsel, and 6.3% were told by relatives.<sup>77</sup> Of government officials, police were the most informative—5.4% learned of the right to counsel from the police—followed by court employees at 3.4%, judges at 2.5%, and prosecutors at 0.6%.<sup>78</sup> Lawyers themselves informed the accused of their right to counsel in 3.7% of cases (see chart in Annex C).<sup>79</sup>

**Detainee Question: At the time of arrest,  
did you know that you have the right to counsel?**



The survey responses also show that, of the 37% of detainees who were informed of their right to counsel (whether through an official or a personal relationship), most were not informed sufficiently early in the process to effectively protect their right to meaningful representation (see the next sub-section on early access, for more information on its importance to ensuring meaningful representation).<sup>80</sup> Just 3.5% of the total detainees surveyed were informed within 24 hours of arrest. Given that the right to counsel attaches at the time of arrest,<sup>81</sup> this number should be much higher.<sup>82</sup> A further 9.8% of the surveyed detainees were informed of the right to counsel at or before their first remand hearing. It should be the case that any accused should be informed of his or her right to counsel at the first remand hearing, when they are standing in front of a judge without legal representation.<sup>83</sup> After that, 12% of the total detainees surveyed were informed of the right to counsel sometime between the first remand hearing and the start of the jail/bail hearing, 6.3% were informed between the jail/bail hearing and the final hearing, 1.2% were informed at the final hearing, and 1.3% were informed after the appeal was filed.<sup>84</sup>

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<sup>77</sup> Detainee Question E.2 (note that 316 of the 373 detainees surveyed answered this question; survey takers did not make it clear why some respondents did not answer this question)

<sup>78</sup> Detainee Question E.2 (note that 316 of the 373 detainees surveyed answered this question; survey takers did not make it clear why some respondents did not answer this question)

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<sup>80</sup> Detainee Question E.2 (note that 316 of the 373 detainees surveyed answered this question; survey takers did not make it clear why some respondents did not answer this question)

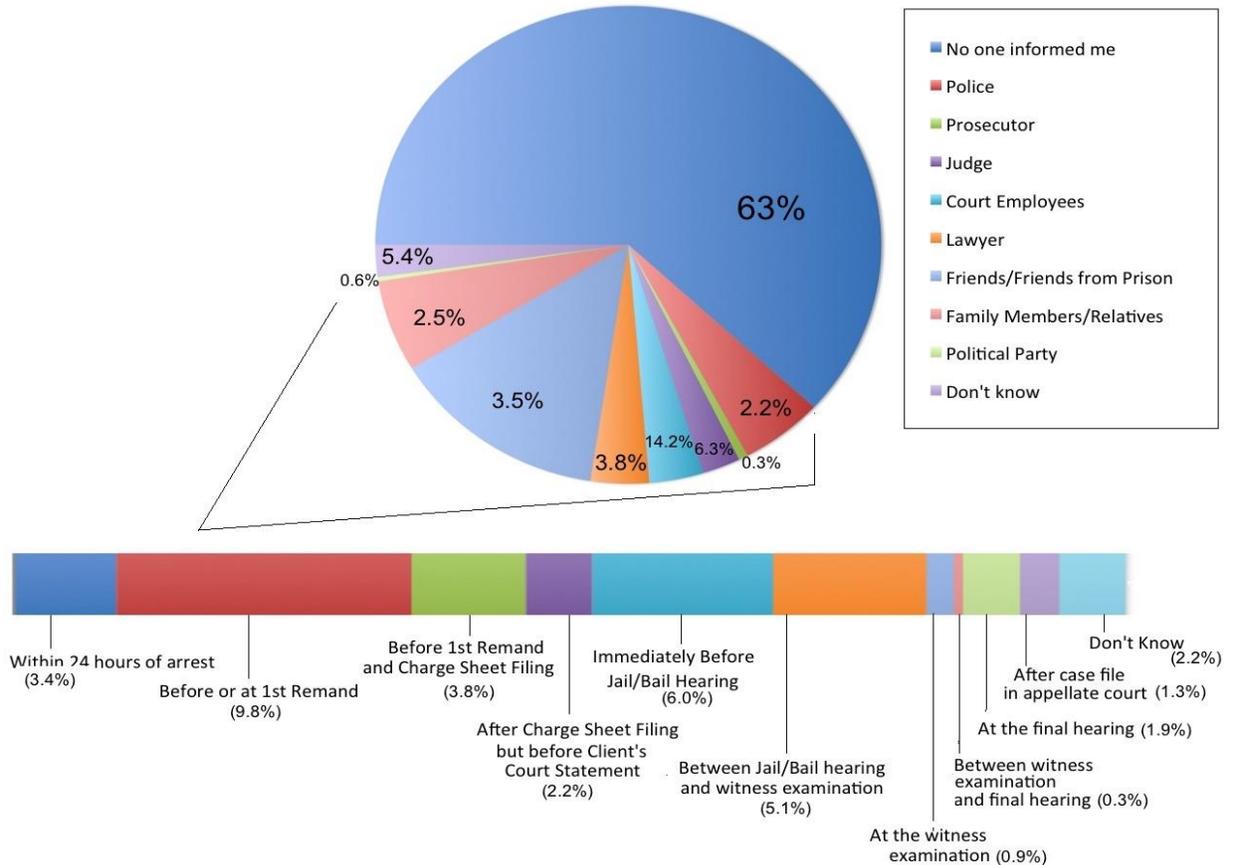
<sup>81</sup> Interim Constitution of Nepal, art. 24(2): The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of arrest.” Interim Constitution of Nepal, 2063 (2007), available at: [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

<sup>82</sup> Detainee Question E.3 (note that this question was posed as a follow-up to Question E.2, which was answered by only 316 of the 373 total detainees surveyed)

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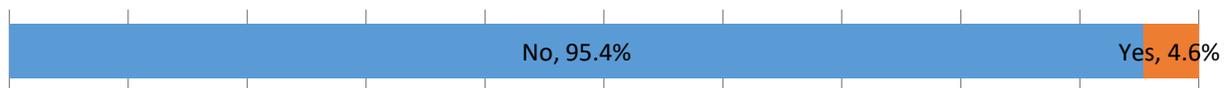
<sup>84</sup> Detainee Question E.3 (note that this question was posed as a follow-up to Question E.2, which was answered by only 316 of the 373 total detainees surveyed)

**Manner in which Detainee was Informed of the Right to Counsel, and Point at which the Detainee was Informed**



Further, despite Nepal’s constitutional guarantee of *free* legal representation for indigent accused,<sup>85</sup> the vast majority of respondents—95.4%—did not know at the time of arrest that free defense services were available, and the same percentage were not informed of that fact by a judge or court officer when they were brought before the court.<sup>86</sup> Nearly half of the surveyed detainees (49.4%) have an annual income of NRs 40,000 or less (the government’s cut-off for legal aid eligibility), and yet nearly all of them were not informed of their right to, and the availability of, free criminal defense services.

**Detainee Question: At the time of arrest, did you know that you have the right to *free* counsel?**



<sup>85</sup> Interim Constitution (Interim Const.)85, 2063 art. 24(10)

<sup>86</sup> Detainee Questions E.4 and E.5 respectively

The attorney survey revealed a troubling lack of understanding amongst legal aid providers about detainees’ level of awareness of their rights, and who has the obligation to advise detainees of their rights. Only 8.3% of surveyed attorneys reported that they believed their clients are completely unaware of their rights relating to fair trial,<sup>87</sup> in contrast to the above-noted 74.8% of detainees who reported that they did not know of their right to counsel prior to their arrest.<sup>88</sup> Only 33.3% stated that they believed the police and/or court have an obligation to ensure clients are aware of their fair trial rights, and 45.8% stated that they believe the onus is with “Government Lawyers”. The failure of these legal aid providers to understand how important it is for the police and courts to proactively inform the accused of their rights related to fair trial, including their right to counsel, indicates that they are also ill-equipped to identify and challenge violations of those rights.

## 2. Detainees Don’t Have Access to the Government Legal Aid System

Despite the fact that the majority of surveyed detainees did not know of their right to counsel before arrest and were never informed of that right, nor of the availability of free counsel for indigent accused, 65.1% reported that they were represented by a lawyer at some point during their case.<sup>89</sup> (Note that this does not mean that that detainees received quality, meaningful representation, a point which is further discussed in the next section.) It is notable that this percentage who had counsel at some point—65.1%—is much higher than the percentage of detainees who reported that they knew of the right to counsel before their arrest (25.2%<sup>90</sup>) or were informed of their right to counsel at some point following arrest (37%<sup>91</sup>).

Of the 65.1% of surveyed detainees who ever had a lawyer, the following table represents how they were able to attain a lawyer and whether they received a legal aid lawyer.<sup>92</sup>

| <b>Means of Access to Counsel</b>   | <b>% of the number of detainees who had an attorney at any point (65.1% of total)</b> | <b>% of the total number of detainees surveyed</b> |
|-------------------------------------|---|--|
| Paid for by self or family          | 74.1%   | 48.3%  |
| NGO                                 | 12.3%   | 8%   |
| Court Appointed (Baitanik Wakil)    | 9.9%  | 6.4%   |
| Nepal Bar Association               | 1.6%  | 1.1%   |
| Through a Political Party           | 0.8%  | 0.54%  |
| District Legal Aid Committee (DLAC) | 0.4%  | 0.27%  |
| Friends from Prison                 | 0.4%  | 0.27%  |
| Appointed by Co-Accused             | 0.4%  | 0.27%  |

<sup>87</sup> Attorney Question D.1

<sup>88</sup> Detainee Question E.1

<sup>89</sup> Detainee Question C.1

<sup>90</sup> Detainee Question E.1

<sup>91</sup> Detainee Question E.2 (note that 316 of the 373 detainees surveyed answered this question; survey takers did not make it clear why some respondents did not answer this question)

<sup>92</sup> Detainee Question C.2 (note: this question asked detainees to select from these options: self/family, court-appointed, DLAC, NGO, Bar Association, or other. The answers “Through a political party,” “Friends from prison,” and “Appointed by co-accused” were given but are not further explained in the data.

Of note only 11.5% of the detainees who had representation (6.67% of the total detainees surveyed) received government-funded legal aid either the *Baitanik Wakil* or through a DLAC.

Of those detainees who hired a private attorney, 46% were able to pay for that attorney through family savings, while 29.6% had to sell family property to raise the funds, and 14.8% took out a loan.<sup>93</sup> Other means of paying for a private attorney included raising funds from the community (2.1%), receipt of support from political or community associations (2.6%), receipt of support from a business committee (1.1%), collecting money from the detainees' parents and other family members (3.2%), and earning money in prison (0.5%).<sup>94</sup> Of those detainees who did not have a lawyer during pre-trial and trial proceedings, 40.8% reported that it was because they were ignorant of the need for and availability of a lawyer, 53.1% said they lacked the financial resources to pay for a lawyer, 5% claimed an inability to contact a lawyer, and 1% reported that they rejected the available free lawyer because they do not trust free lawyers.<sup>95</sup>

### **3. Detainees Aren't Provided Early Access to Counsel**

This assessment shows that accused in the assessed districts are not, by and large, receiving sufficiently early access to counsel, when they receive counsel at all. In the survey of legal aid providers, only 15% reported that their representation of appointed clients (as opposed to their private, paying clients) begins before the first remand hearing.<sup>96</sup> Only 40% reported that their representation usually begins before the jail/bail hearing; thus, 60% usually begin their representation of indigent accused at or after the jail/bail hearing, when the accused has already been charged and likely interrogated, and a remand to pre-trial detention is much more likely.<sup>97</sup> The abuses that occur in the absence of a lawyer in these early stages—physical and psychological intimidation, torture, forced confessions, and more—plague the accused's case from that point forward and make extended pre-trial detention and conviction much more likely.

For example, only 36.8% of the surveyed attorneys reported that an appointed client had ever invoked the right to remain silent, on their advice, at the police stage, and only 26.3% reported that an appointed client had ever invoked the right to silence, on their advice, during the court statement.<sup>98</sup> The right to remain silent is fundamental in the early stages of a case, where an

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<sup>93</sup> Detainee Question E.7.2. Note that only 170 detainees responded to this question, despite that in response to Question C.1 180 detainees reported that they hired a private attorney; various factors may contribute to detainees not answering all of the questions.

<sup>94</sup> Detainee Question E.7.2. Note that only 170 detainees responded to this question, despite that in response to Question C.1 180 detainees reported that they hired a private attorney; various factors may contribute to detainees not answering all of the questions.

<sup>95</sup> Detainee Question E.8. Note that this question was answered by 179 detainees, despite that in response to Question C.1, 130 detainees reported that they did not have a lawyer in pre-trial and trial proceedings. This disparity may be due to poor phrasing of the question—Question C.1 simply asked “Did you have a lawyer representing you during pre-trial and trial proceedings of the case? [yes/no],” while Question E.8 somewhat confusingly asked “If you had no lawyer assigned during your pre-trial or trial proceedings, why did you not have a lawyer?” and asked them to select one of several options; we can conjecture that the use of “assigned” in Question E.8 but not in Question C.1 may have caused some to interpret the questions differently.

<sup>96</sup> Attorney Question C.1

<sup>97</sup> Attorney Question C.1

<sup>98</sup> Attorney Question C.8 and C.9, respectively.

accused without knowledge of the criminal justice system or the nature of the charges against him may make statements that incriminate him, and may be coerced by the police and prosecution. Without an attorney present in the early stages of questioning and investigation who can inform the accused of their right to remain silent and encourage them to invoke it where necessary, the accused is vulnerable to involuntarily waiving their right to silence.

The lawyer survey additionally revealed that failings in early access are much more pronounced for appointed clients than for private clients accused of a crime. In the case of private clients, 54.6% of the surveyed lawyers reported that their representation usually begins at or before the first remand hearing, while for appointed clients only 15% of the surveyed lawyers said they typically begin representation that early.<sup>99</sup> This stark disparity in early access to counsel between appointed and private clients clearly illustrates the disparity in access to justice given to the poor.

The detainee survey response reveals further detail on this gap in early access. As previously stated, only 65.1% of the total surveyed detainees had a lawyer represent them at some point in the case.<sup>100</sup> Of those, only 4.1% (2.7% of the total surveyed) first obtained a lawyer within 24 hours of arrest; 27.2% (17.7% of the total surveyed) obtained a lawyer before or at their first remand hearing; and a further 9.5% (6.2% of the total) obtained one between the first remand hearing and the filing of the charge sheet, which is filed at the close of the prosecutor's investigation.<sup>101</sup> Thus, only 40.8% of those who ever had a lawyer (26.6% of the total surveyed) initially obtained their lawyer before the investigation stage was closed; the majority of the surveyed detainees—57.6% (72.3% of the total surveyed)<sup>102</sup>—did not obtain an attorney until after the investigation was closed. At that point, common abuses and oversights in the early stages of the criminal justice process may have crippled the ability of a lawyer to effectively represent and protect their client.

The surveys showed that of the total surveyed detainees, 19.3% obtained representation immediately before their jail/bail hearing, and 16.9% obtained representation at some point between the jail/bail hearing and the witness examination(s).<sup>103</sup> This lack of representation within a sufficient time period for preparation before the jail/bail hearing may have contributed to the fact that 75.6% of respondents remained in custody at least up to the point of witness examinations.<sup>104</sup> Notably, 6.6% of respondents who had counsel at any point did not obtain that representation until they were at their final hearing.<sup>105</sup>

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<sup>99</sup> Attorney Question C.2

<sup>100</sup> Detainee Question C.1

<sup>101</sup> Detainee Question C.3

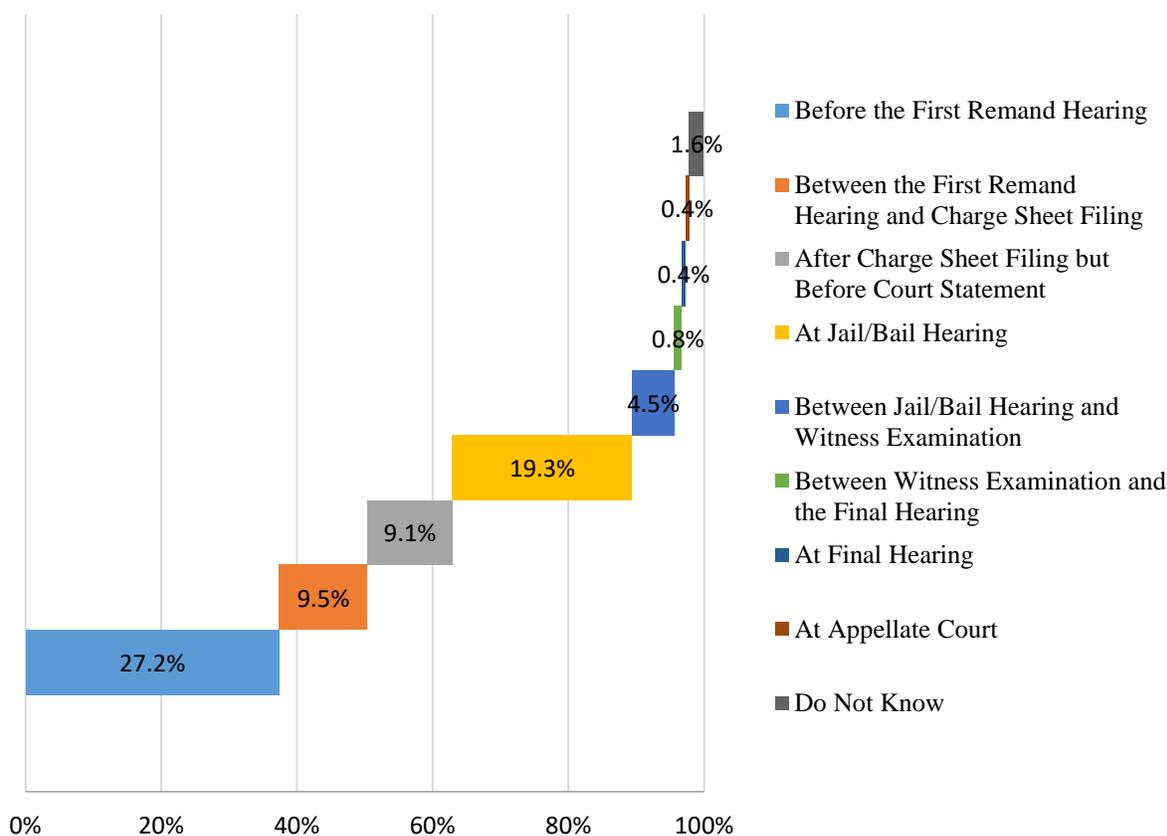
<sup>102</sup> Note that 1.6% of the surveyed detainees who had ever had a lawyer, or 1.1% of the total surveyed, reported that they did not know at what point their lawyer was appointed. Detainee Question C.3

<sup>103</sup> Detainee Question C.3

<sup>104</sup> Detainee Question B.4

<sup>105</sup> Detainee Question C.3

### Stage at which the accused accessed an attorney



#### 4. Detainees Aren't Provided Quality Legal Representation

Each person, who is accused of a crime and who cannot afford to hire an attorney, is entitled to be represented by a lawyer who has “education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offenses dealt with, and the rights and needs of women, children and groups with special needs.”<sup>106</sup> The ILF has developed *Performance Standards* that define what constitutes effective defense representation in criminal cases in Nepal. The *Performance Standards* address the steps in representing a client from the moment of appointment through to sentencing, including requiring the attorney to: meet with, interview, and advise the client; prepare and file necessary motions; receive and review the prosecution’s responses to motions; conduct a factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; perform legal research; conduct motion hearings; prepare for the trial; and prepare for and advocate at the sentencing proceeding when there is a conviction following trial.

<sup>106</sup> See UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (28 March 2013), A/RES/67/187, Principle 13, para. 37.

To determine the quality of legal representation provided to indigent accused in the districts surveyed, interviewers asked detainees and attorneys fact based questions regarding attorney performance based on the ILF's Performance Standards. Detainees' were also asked questions about their perceptions of the quality of their representation and fairness of the process.

### **A. Prompt Access to Legal Representation**

The survey of legal aid providers also revealed a lack of appreciation for the need to provide representation promptly at all stages of a case, including for the indigent accused. When asked "What services pertaining to criminal legal defense does your agency/firm offer for poor defendants?" 79.2% reported that they do not currently offer defense from the time of arrest, 66.7% reported that they do not file petitions during the remand period, and 50% reported that they do not offer defense from the time of the filing of the charge sheet.<sup>107</sup> While recognizing that a lack of representation at these early points in the criminal process often results from detainees lacking awareness of their rights and the absence of formal mechanisms in place to connect the accused to counsel early in the criminal process, the answers to this question reveal that the problem also relates to legal aid providers unwillingness to provide pretrial defense services.

### **B. Attorney-Client Meetings**

The initial client meeting is critical, as it gives a lawyer the opportunity to inform the client of his/her rights, explain the upcoming judicial process, discuss the allegations, and begin collecting information to build an effective defense and prepare for any pretrial detention/ bail hearing. Providing quality representation requires having meaningful interactions with the accused, beginning as early as possible in the criminal justice process. Meaningful interactions with a client start with the initial client meeting. Ideally, the attorney will take that opportunity to hear from the client what happened that lead to his or her arrest; identify key witnesses and avenues for investigation; identify whether any abuse has occurred while the client has been in custody; and inform the client of their rights going forward and the likely next steps in their case. Each of these topics is important in order for the attorney to be able to plan for their investigation and defense strategy going forward, to build an effective attorney-client relationship, and address any immediate needs, e.g., health needs that the client may have.

The survey of lawyers revealed, however, that many lawyers are failing to take the opportunity at initial client meetings to meaningfully consult with and advise the client. When asked what topics they typically discuss during the first meeting with an appointed client, only 10.5% said they discuss the possible bases for defense, potential witnesses, the court statement, or possible incidents of torture, and only 5.3% discuss the legal rights of the accused, the client's wishes regarding the case, or investigation of the case going forward.<sup>108</sup>

There is a striking difference between the data from the lawyer survey and the detainee survey regarding attorney-client meetings while the accused is detained. 80% of lawyers surveyed reported that they visit clients at the detention center, but 88.5% of surveyed detainees who had

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<sup>107</sup> Attorney Question B4

<sup>108</sup> Attorney Question C.6

access to a lawyer reported that they *never* met with their attorney while in detention during the pre-trial and trial stages.<sup>109</sup> These numbers do not significantly change when assessing representation at the appellate stage. Of those who had a lawyer for their appeal(s), 66.19% indicated that they had not met with their lawyer even once in jail, and a further 25.17% indicated that they had met with their lawyer 1-3 times (the remaining 8.64% met with their lawyer anywhere between 4 and 15 times). These responses demonstrate that even when the accused has representation, this is no guarantee that they are receiving meaningful, quality representation.

### **C. Ability to Understand the Proceedings**

The survey shows that 24.4% of detainees did not feel that they understood the criminal proceedings.<sup>110</sup> Of that 24.4%, 45.1% said they failed to understand because they do not speak Nepali and no interpreter was provided; 28.6% said their lawyer failed to explain the confusing terminology used in court; and 25.3% said they had no lawyer to explain things.<sup>111</sup> It is a fundamental component of the right to a fair trial that all defendants have access to an interpreter, and be informed about the case; the inability to understand the proceedings suggests a violation of the rights of the accused and reflects on the quality of representation being provided.

### **D. Investigation and Preparation**

One of the products of an initial client meeting is the ability to begin to engage in proactive defense investigation based on information collected during the meeting. Defense investigation is one of the most important functions of a defense lawyer. The purpose of the investigation is to determine whether the charges and disposition are factually and legally correct and whether there are any potential defenses to the charges, and uncover all facts relevant both to the merits and to the penalty in the event of conviction. Without defense investigation, the attorney cannot provide informed advice or assistance. However, more than 47% of lawyers surveyed for this report reported that they have not conducted any investigation in their cases representing appointed clients.<sup>112</sup> Only 10.5% reported that they have talked to potential witnesses, and only 5.3% reported that they have studied the case file, examined the police reasoning behind the arrest, visited the place of the alleged incident, or collected supportive documentation. It is impossible to provide meaningful, quality representation without performing some of these most basic investigative activities.

### **E. Attorneys' Attendance at Hearings**

Once an attorney has been contracted by a client for criminal defense, whether private or appointed, they have a professional obligation to prepare for and attend all hearings in the case. The detainee survey asked the detainees who reported having a lawyer at some point during the criminal justice process—65.1% of the total—some follow-up questions, including “At what point in the pre-trial and trial proceedings of the case did you first obtain/receive a lawyer?”<sup>113</sup> and “At

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<sup>109</sup> Detainee Question C.6.a

<sup>110</sup> Detainee Question E13\_1.

<sup>111</sup> Detainee Question E13\_2.

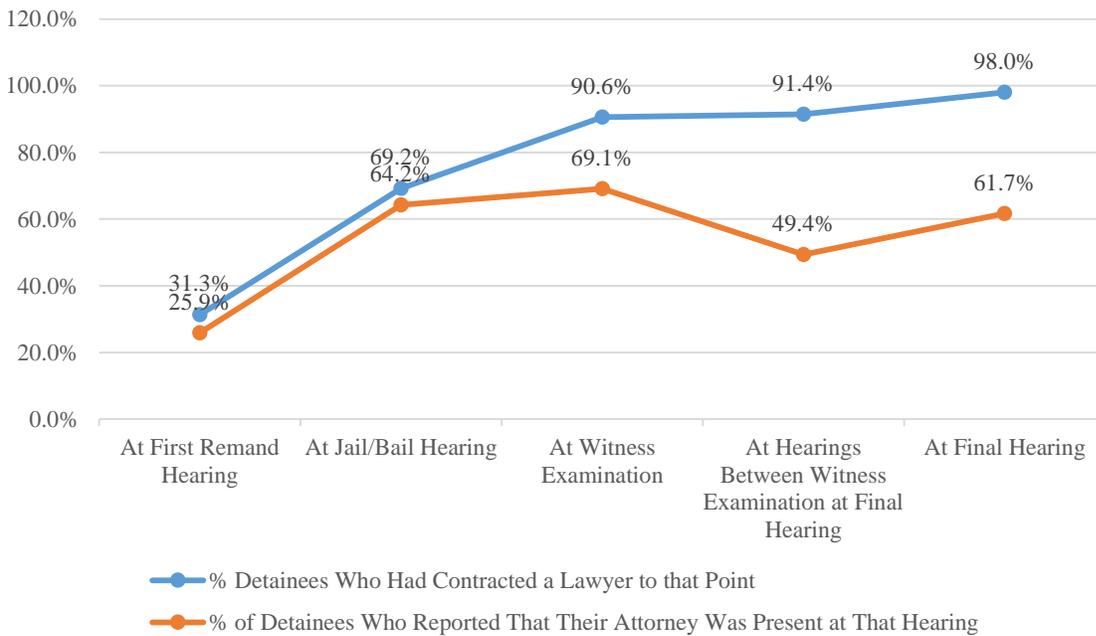
<sup>112</sup> Attorney Question C.3

<sup>113</sup> Detainee Question C3

which pre-trial and trial proceedings did your lawyer appear to advocate on your behalf?”<sup>114</sup> By the time of the witness examination, 90.6% of the detainees who had a lawyer had contracted that lawyer, but only 69.1% reported that their lawyer was present for the witness examination. Similarly, in the time between the witness examination and the final hearing, 91.4% of the detainees who had an attorney had contracted that attorney, but only 49.4% reported that they were represented by that lawyer in hearings during that time. At the final hearing stage, despite the fact that 98% of the detainees who had an attorney had contracted that attorney, just 61.7% reported that they were represented by that attorney at the final hearing.

|   | % Detainees who had Contracted a Lawyer by that Point | % Detainees who Reported their Attorney was Present at that Hearing |
|---|---|---|
| At the First Remand Hearing                                   | 31.3  | 25.9  |
| At the Jail/Bail Hearing                                      | 69.2  | 64.2  |
| At the Witness Examination                                    | 90.6  | 69.1  |
| At Hearings Between Witness Examination and the Final Hearing | 91.4  | 49.4  |
| At the Final Hearing  | 98  | 61.7  |

### Stage at Which Detainees Had Counsel vs Attorney Presence at Key Hearings



*\*Note that both the table and chart reflect questions that were posed only to the 65.1% of all detainees who reporting having had an attorney at any point; the percentages shown are therefore not percentages of the entire group of surveyed detainees, but rather percentages of that sub-group.*

<sup>114</sup> Detainee Question C5

Attorneys surveyed also responded that they often don't appear at court hearings; 29.2% reported that they do not offer representation during witness examination and/or in the final hearing.<sup>115</sup> It is not clear why lawyers who indicated providing criminal defense services would not appear at their client's court hearings as there were no follow up survey questions on this point. It is hoped that any future research would address this issue with attorneys.

#### **F. Access to Counsel on Appeal<sup>116</sup>**

A client's right to counsel, and counsel's responsibilities to the client, do not terminate upon conviction. Regardless of whether appointed or retained, counsel should continue to represent the client until appeals are exhausted. While many detainees surveyed reported that their convictions were appealed, more than half weren't represented by their trial lawyers on appeal. In 79.9% of cases in which detainees had been convicted, a first-level appeal had been lodged, and following the first-level appeal, 82.2% had further appealed to the Supreme Court.<sup>117</sup> In 82.1% of appeal cases, the appeal was initiated by the defendant and/or his counsel, rather than by the government.<sup>118</sup> While 92.1% of detainees reported that they had a lawyer represent them during the appeal of their case, and 85.6% received that lawyer before their first appellate court hearing,<sup>119</sup> just over half of those were represented by a different lawyer than the one who had represented them at trial—52.5% did not have the same trial and appellate lawyer.<sup>120</sup>

Further, the vast majority had to hire lawyers for their appeal, despite the fact that many were eligible for appointed counsel: 74.1% of detainees who had an attorney on appeal paid for it themselves or through family; 11.5% had one appointed by the court; 11.5% had one from an NGO; and 2.9% were represented by a lawyer from the NBA's legal aid program.<sup>121</sup> The fact that nearly 75% of the detainees paid for the lawyer themselves or through family indicates that a significant number of detainees and their families accepted a huge financial burden that they were not in a position to undertake, exacerbating and contributing to the continuance of their poverty.

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<sup>115</sup> Attorney Question B4. Note that those categories were posed separately, i.e. 29.2% responded that they do not provide representation during witness examination, and 29.2% responded that they do not provide representation at final hearings, but we do not know whether it was the same individuals who gave that response for each of the 2 categories—the extent of overlap between the groups who gave that answer to each of those 2 categories is not made clear by the data.

<sup>116</sup> Note that, for reasons that were not made clear by the data collectors, the number of individual detainees who answered each of the questions regarding the appellate stage varies significantly from question to question; i.e. 230 detainees reported that they had been convicted and their case was in some stage of appeal (Detainee Question B3), but only 172 detainees provided an answer regarding whether they had lodged an appeal following their conviction (Detainee Question B6\_1), only 151 detainees answered questions regarding who initiated their appeal (Detainee Question D1\_2) whether they had representation at the appellate level (Detainee Question D1\_1), and only 123 detainees answered a question regarding their lawyer's attendance at appellate hearings (Detainee Question D5). This variance in the number of detainees who answered questions about appellate level representation makes comparing the data from each question more difficult and less reliable; however, it is still valuable to look at each of the questions individually and assess the state of appellate representation based on the percentages of detainees that expressed certain answers.

<sup>117</sup> Detainee Questions B6\_1 and B6\_3, respectively.

<sup>118</sup> Detainee Question D1\_2.

<sup>119</sup> Detainee Questions D1\_1 and D4, respectively.

<sup>120</sup> Detainee Question D2.

<sup>121</sup> Detainee Question D3.

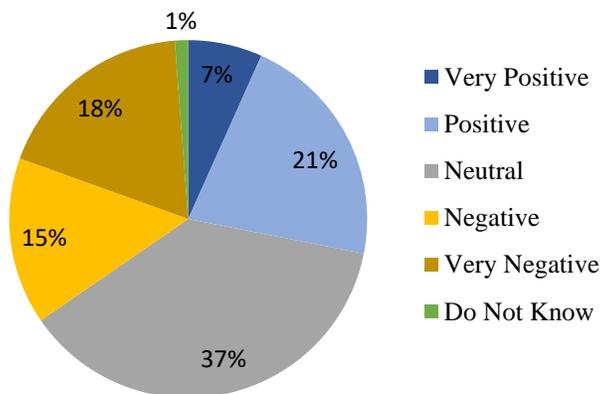
An interesting follow-up to this study would be one that assesses the financial impact of paying for counsel on detainees and their families who live below the poverty line.

Even if they had retained or been appointed counsel, detainees reported that their attorneys didn't always appear at their appellate court hearing. At the initial appellate court hearing, 87% of the detainees who had an appellate lawyer had their lawyer there to represent them. At subsequent appellate hearings, only 74% of those detainees had their lawyer there, and at the final appellate hearing, only 61% of those detainees had their lawyer present. The number then drops precipitously to 28.5% at the Supreme Court. As noted in the above sub-section about attorney attendance at hearings, being prepared for and present at all hearings in a contracted client's case is unequivocally necessary in order to provide meaningful counsel to the accused.

#### 4. Perceptions of Quality and Fairness

Detainees were asked to rate their overall experience of having a lawyer defend their case and whether they felt they received a fair trial. Their responses are an important measure of the level of trust accused persons have in the criminal justice system. Of those surveyed, 37.3% reported feeling neutral about having a lawyer defend their case, while 28.1% felt positive or very positive about the experience and 33.4% felt negative or very negative. When asked why they rated their experience as they did, the most frequent responses were “because of the responsible and effective advocacy of the lawyer” (34.5%)—from people who felt positive about their experience—and “the lawyer did not present my story effectively in the hearing session” (29.4%)—from people who felt negatively about their experience. In response to the statement “I feel I received a fair trial,” 80.7% responded that they disagreed (17.4%) or strongly disagreed (63.3%).

#### Detainee Question: How do you feel about your overall experience of having a lawyer defend your case?



#### A. Detainee Perceptions of Quality of Representation

The survey reveals that detainees have a predominantly negative perception of the quality of defense lawyers. To assess quality, respondents were asked whether they “strongly agree,” “agree,” feel “neutral,” “disagree,” or “strongly disagree” with a series of statements about the conduct of their lawyer. (See Annex C for the full list of questions to which participants were

asked to respond.) Perhaps the clearest indicator of dissatisfaction was the responses to the statement “lawyer’s representation made a positive impact on my case.” For this question, 58.4% responded that they either disagree (15.6%) or strongly disagree (42.8%), 22.8% were neutral, and only 18.8% responded that they agreed (12%) or strongly agreed (6.8%).<sup>122</sup> Other responses showed specific areas of dissatisfaction. More than 40% of respondents disagreed or strongly disagreed with the following statements: “lawyer was respectful and attentive to my problems” (41.6%),<sup>123</sup> “lawyer made sure I understood my rights and case proceedings” (50%),<sup>124</sup> “lawyer made strong arguments for me in court” (43.2%),<sup>125</sup> “lawyer worked hard to defend my rights” (46.4%),<sup>126</sup> and “I trusted my lawyer” (44.8%).<sup>127</sup>

Some positive experiences emerged from the questions. For example, 55.2% disagreed or strongly disagreed with the statement “it was difficult to contact my lawyer,”<sup>128</sup> 60% disagreed or strongly disagreed that the “lawyer did not explain what was happening with my case,”<sup>129</sup> 59.2% disagreed or strongly disagreed that the “lawyer did not challenge the government’s version of the facts,”<sup>130</sup> and 72% disagreed or strongly disagreed that the “lawyer was working on the side of the prosecutor/police.”<sup>131</sup> These responses represent areas in which the majority of respondents was positive about their experience with their lawyer.

## **B. Detainee Perceptions of Fairness**

Detainees were asked about their perceptions of fair treatment by the police, prosecutors, and courts respectively. The responses were overwhelmingly negative. In response to the statement “I feel I was treated fairly by the police,” 72.4% disagreed (31.9%) or strongly disagreed (40.5%); 13.4% were neutral; and 14.2% agreed (12.3%) or strongly agreed (1.9%).<sup>132</sup> In response to “I feel I was treated fairly by the prosecution,” 85.6% disagreed (22.3%) or strongly disagreed (63.3%); 9.1% were neutral; and 5.3% agreed (4.8%) or strongly agreed (0.5%).<sup>133</sup> In response to “I feel I was treated fairly by the judge,” 84.7% disagreed (15.5%) or strongly disagreed (69.2%); 12.6% were neutral; and 2.7% agreed (2.4%) or strongly agreed (0.3%).

More broadly, in response to the statement “I feel I received a fair trial,” 80.7% responded that they disagreed (17.4%) or strongly disagreed (63.3%); 12.3% were neutral; and 6.9% agreed (6.4%) or strongly agreed (0.5%) (see chart in Annex C).<sup>134</sup> In response to “I feel the sentence I received was fair,” 82.9% disagreed (16.1%) or strongly disagreed (66.8%); 6.2% were neutral; and 5.3% agreed (4.8%) or strongly agreed (0.5%).<sup>135</sup>

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<sup>122</sup> Detainee Question E11\_L.

<sup>123</sup> Detainee Question E11\_A.

<sup>124</sup> Detainee Question E11\_C.

<sup>125</sup> Detainee Question E11\_D.

<sup>126</sup> Detainee Question E11\_H.

<sup>127</sup> Detainee Question E11\_I.

<sup>128</sup> Detainee Question E11\_J.

<sup>129</sup> Detainee Question E11\_E.

<sup>130</sup> Detainee Question E11\_G.

<sup>131</sup> Detainee Question E11\_B.

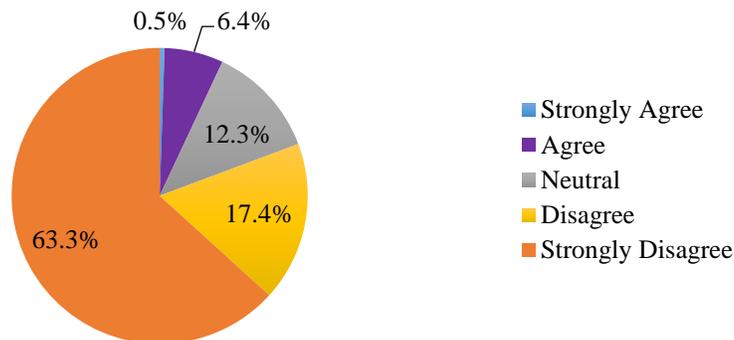
<sup>132</sup> Detainee Question E14\_1.

<sup>133</sup> Detainee Question E14\_2.

<sup>134</sup> Detainee Question E14\_4.

<sup>135</sup> Detainee Question E14\_5.

### Detainee Question: "I Feel I Received a Fair Trial"



### C. Attorney Perceptions of Fairness

In contrast to the detainees’ decidedly unfavorable perception of the fairness of the criminal justice system, the surveyed attorneys were evenly split between “yes” and “no” when asked “In your opinion, do you feel that detainees’ fair trial rights are being respected?”<sup>136</sup> In a follow-up, open-ended question asking why the attorneys felt the way they did, those who responded “yes” noted that cases are decided in the presence of a lawyer, arguments are presented in court, hearings are based on evidence, and hearings are overseen by impartial judges.<sup>137</sup> Those who responded “no” believed that the system lacked fairness because, for example, attorneys are not provided from the time of arrest, physical and psychological abuse are used to extract confessions, the accused are not presented before the relevant authority within 24 hours of arrest, there is no real presumption of innocence, detainees are not aware of their rights, and there is corruption.<sup>138</sup>

### D. Corruption

Though identifying corruption was not a focus of the survey, detainees’ responses revealed one particular area of corruption: a minority of attorneys employed by the government (as *Baitanik Wakil* or through DLACs), the NBA, or an NGO to provide free legal services sometimes requested fees for all or parts of their services. Of detainees who had “free” representation, 12.7% reported that their attorney had requested fees from them, for things like filing petitions, providing copies of documents, and making court appearances. Further, when the surveyed attorneys were asked what services they provide for poor defendants, in every category of service some percentage of respondents reported that they offer that service “with minimal money contributed for court fees.” For example, only with a minimal contribution will 8.3% provide defense from the time of arrest, 16.7% provide argument at the jail/bail hearing or witness examination, 37.5% obtain a copy of the court file, and 12.5% provide representation at the final hearing.<sup>139</sup>

<sup>136</sup> Attorney Question D5.

<sup>137</sup> Attorney Question D5

<sup>138</sup> Attorney Question D5

<sup>139</sup> Attorney Question B4.

## **5. Survey Respondents' Recommendations for Systems Reform**

### **A. Detainee Recommendations for Change**

Detainees were asked what they felt must be changed to ensure a fair trial for someone in their circumstances. This was posed as an open-ended question where detainees could provide narrative answers. (As noted above, opinion-based questions such as this one must be considered with the caveat that the surveyed detainees often have minimal knowledge of the criminal justice system.)

Several detainees made similar suggestions. These included suggestions that fair and impartial justice should be ensured; that legal awareness programs should be conducted in additional locations; that economically vulnerable people should be supported with free legal counseling; and that forceful mistreatment and punishment by police should be corrected. Several others suggested that the search and investigation process should be fair and impartial; the investigation should be justifiable; and that justice must be delivered in a quick and impartial matter.

One response—given by several detainees—that revealed a fundamental lack of understanding of criminal justice systems was that a system of prosecuting only the guilty should be adopted; this suggestion misunderstands that it is only through prosecution that the State can determine whether an individual is guilty, but it also reveals a sense amongst some detainees that unfair prosecutions, with insufficient initial evidence of guilt, is occurring regularly.

### **B. Attorney Recommendations for Change**

The most frequent attorney recommendation for reforms that would improve respect for detainees' fair trial rights was conducting legal awareness programs at the local level—45.8% of respondents identified that as a necessary reform.<sup>140</sup> The next most frequent recommendation, made by 33% of the surveyed lawyers, was expansion of free legal aid to all districts; given that this is already required under the Legal Aid Law, it can be presumed that the attorneys who made this recommendation meant that efforts to fulfill that legal obligation should be expanded. Codifying the right to keep one's legal practitioner throughout the criminal justice process was identified by 16.7% of the lawyers. The need for fair and impartial investigations by police, and for increased visits to detention centers by attorneys were both identified by 12.5% of the lawyers; and 12.5% also identified the need for an official system by which legal aid practitioners are informed by police of the need for their services.<sup>141</sup>

Other recommendations (all recommended by fewer than 10% of the lawyers) included improving compliance with the accused's right to be informed of the reason for arrest; providing training to legal aid lawyers; improving information sharing about hearings; allowing the detainee to attend every hearing in his case; providing more information to detainees about their rights and about the availability of free legal aid; delivering on the right to speedy trial; and training quasi-judicial authorities on constitutional rights and fundamental human rights.<sup>142</sup>

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<sup>140</sup> Attorney Question D6

<sup>141</sup> Attorney Question D6

<sup>142</sup> Attorney Question D6

## **VI. Recommendations**

The access to justice survey is an important initial step in identifying barriers to access to counsel for poor men, women and children accused of crimes in Nepal. This report is intended to document and analyze the findings of the survey, and initiate dialogue on removing barriers to access to counsel for the indigent accused. Based on the information collected and analyzed in this report, JUS Nepal and the ILF have set out recommendations below. It is hoped that these recommendations will assist the government of Nepal, justice sector actors, and civil society organizations to strengthen access to justice for the poor and marginalized.

### **1. Increase Early Access to Legal Representation**

To ensure that all indigent and marginalized accused have prompt access to effective legal representation at all stages of the criminal process, the Government of Nepal should:

- A. Enact new legislation or revise existing legislation to make clear that both the police and the prosecution must promptly inform the accused of his or her right to counsel at the time of arrest and prior to any questioning by the police or prosecution, and must take reasonable steps to provide indigent accused persons with access to free legal aid services.
- B. Facilitate legal aid providers' access to indigent detainees from the time of their arrest, and before authorities conduct any questioning of the accused.
- C. Prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police or prosecution in the absence of a lawyer, unless the accused gives his or her informed and voluntary consent to waive a lawyer's presence.
- D. Implement a formal mechanism for appointment of counsel that ensures that every indigent person arrested for a criminal offense has prompt access to legal representation. Such a mechanism should include requiring courts to appoint counsel prior to the accused's first appearance in court and before any pretrial detention decision is made, and establishing duty lawyer programs in police stations which enable persons who are under arrest to consult with a lawyer, and to be represented by counsel during any questioning.
- E. Adopt qualification and performance standards that ensure that all legal aid providers possess sufficient education, training, skills, and experience to competently represent the indigent accused, taking into consideration that lawyers may need additional training and experience depending on the nature and complexity of the case, and the rights and needs of the client, e.g., women, children and groups with special needs.

### **2. Increase Public Awareness of the Right to Counsel**

To ensure that every person arrested or charged with a crime is aware of their fundamental rights, including the right to counsel and the right to appointment of counsel at government expense if they cannot afford a lawyer, the Government of Nepal should:

- A. Ensure that police, prosecutors and courts inform every accused person in a language that they understand of their right to a lawyer, and the right to have a lawyer appointed to represent them if they cannot afford one. Such information should be provided in a manner that corresponds to the needs of illiterate persons, those that don't speak the Nepali language, minorities, persons with disabilities and children.
- B. Work collaboratively with justice stakeholders, the Nepal Bar Association, and civil society organizations to develop effective programs for increasing community awareness of people's rights if arrested for a criminal offense, such as the right to remain silent, the right to be represented by counsel from the time of arrest, the right to apply for bail, prohibitions on torture and other abuse, and the right to a defense.
- C. Facilitate the distribution of information about accused's rights awareness in a format and medium that is easily understood, taking into consideration low literacy rates and minority languages spoken, and ensure that this information is accessible to all, including those in isolated and rural communities with limited electricity and internet access.
- D. Require the police, prosecution, and courts to ensure that information regarding the right to counsel, the right to a free lawyer, and how to access a lawyer (including government and nongovernmental legal aid providers) are prominently displayed for all to see in police stations, detention centers, jails, prosecutor's offices, and courthouses throughout Nepal.

### **3. Increase the Quality of Services Provided by Legal Aid Providers**

The right to counsel is the right to a lawyer *who is qualified to provide effective legal representation*. In order to improve the quality and effectiveness of legal representation provided by government and nongovernmental legal aid providers, the government of Nepal, working collaboratively with the Nepal Bar Association, should:

- A. Develop and implement recruitment and eligibility standards for government funded legal aid providers, to ensure that providers possess the basic education, training, skill and experience necessary to provide effective representation to their clients.
- B. Create and implement performance standards and guidelines for the provision of criminal legal aid services. Performance standards, which can be applied to both government and nongovernmental legal aid providers, should set clear expectations about the role and responsibilities of legal aid providers and can be used to measure their performance.
- C. Develop and implement a monitoring and evaluation system that allows the legal aid system to track and evaluate the performance of individual legal aid providers, empowering the Government of Nepal to address issues with proper training and supervision as well as track and evaluate the overall effectiveness of the legal aid system.
- D. Create and implement mandatory new lawyer trainings and continuing legal education training requirements for lawyers who represent the indigent accused.

- E. Seek expert guidance from local and international civil society organizations, and incorporate best practices from legal aid providers from inside and outside the country.

In addition to the above recommendations, JUS Nepal and the ILF additionally recommend that further research be conducted on the issue of access to counsel for indigent and marginalized accused. One of the major hurdles that the ILF experienced in gathering data for this report is the lack of access to pretrial detainees. This information is critical because most people arrested and held in pretrial custody are poor and marginalized and charged with minor offenses. As mentioned in the introductory section of this report, further data would be useful in developing effective early access interventions that would benefit all indigent accused persons.

## VII. Annexes

### Annex A: District Profiles

| District     | District HQ | Region   | Development Region | Population 2011  | Prison Population March 2012 <sup>143</sup> | Total District Court Cases 2068/69 <sup>144</sup> (2011/12) |
|--------------|-------------|----------|--------------------|------------------|---|---|
| Kalikot      | Manma       | Mountain | Mid-West           | 136,948          | 45  | 261   |
| Dailekh      | Dailekh     | Hill     | Mid-West           | 261,770          | 42  | 178   |
| Banke        | Nepalgunj   | Terai    | Mid-West           | 491,313          | 390   | 3569  |
| Parsa        | Birgunj     | Terai    | Central            | 601,017          | 1374  | 4928  |
| Ramechhap    | Mainthali   | Hill     | Central            | 202,646          | 197   | 302   |
| Okhaldhunga  | Okhaldhunga | Hill     | East               | 147,984          | 47  | 384   |
| <b>TOTAL</b> |             |          |                    | <b>1,841,678</b> | <b>2095</b>                                 | <b>9622</b>   |

The mountain and hill districts of Kalikot, Dailekh, Ramechhap, and Okhaldhunga are priority districts for the SDC. They are relatively less populated, and have fewer detainees and court cases per district. However, the availability of legal services also appears extremely low. While a single *Baitanik Wakil* is assigned in each district, no Legal Aid Committee lawyers are posted to these districts, and with the exception of Advocacy Forum in Ramechhap, none of the primary legal aid NGOs<sup>145</sup> providing criminal defense services have offices in these districts.

Outside of Kathmandu, Parsa District has by far the highest number of people detained in its prison (which also serves as the prison for Bara District). While there is a Legal Aid Committee lawyer posted to Parsa District, in addition to the *Baitanik Wakil*, it is also underserved by legal aid NGOs. The prison in Parsa District also reports the highest number of women detainees outside of Kathmandu. In contrast, Banke District, which has approximately 400 detainees, has numerous NGOs in operation—including the ILF-Nepal—in addition to the *Baitanik Wakil* and Legal Aid Committee lawyer.

<sup>143</sup> Government of Nepal, Department of Prison Management.

<sup>144</sup> Supreme Court of Nepal, 2068/69 Annual Report, Annex 85. This figure includes both civil and criminal cases.

<sup>145</sup> CeLLRD, ILF-Nepal, Advocacy Forum, THRDAlliance and Legal Aid and Consultancy Center

### *Brief District Data*

(The data listed throughout this section reflects the 2011 National Census, the most recent year such information was officially gathered, unless otherwise noted)

| <b>District</b> | <b>Population</b> | <b>Area (sq km)</b> | <b>Literacy rate</b> | <b>Arrested (2011)</b> |
|-----------------|-------------------|---------------------|----------------------|------------------------|
| Okhaldhunga     | 147,984           | 1,074               | 65.2                 | 28                     |
| Ramechhap       | 202,646           | 1,546               | 63.1                 | 28                     |
| Parsa           | 601,017           | 1,353               | 55.4                 | 874                    |
| Kalikot         | 136,948           | 1,741               | 56.8                 | 34                     |
| Dailekh         | 261,770           | 1,502               | 62.9                 | 100                    |
| Banke           | 491,313           | 2,337               | 62.5                 | 718                    |

### *Okhaldhunga District:*

Okhaldhunga District is located in the eastern part of Nepal, in the Sagarmatha Zone, with area 1074 km<sup>2</sup>. Total Population according to the 2011 census is 147,984, largely dominated by indigenous communities such as Rai and Sunuwar<sup>146</sup>. Most depend on agriculture and are guided by traditional ideology. The literacy rate of this district is 65.2%. According to the *Annual Report of the Office of the Attorney General 12/13*, the total number of people arrested in their 2012-2013 reporting period was 28.<sup>147</sup> During that period, there were altogether 54 prisoners in jail and 3 active legal practitioners in the district.<sup>148</sup>

The detailed case type in previous and current year is given in the table below.

| <b>Court type<sup>149</sup></b>       | <b>Cases from 2011/2012</b> | <b>Cases in 2012/2013</b> | <b>Total</b> |
|---------------------------------------|-----------------------------|---------------------------|--------------|
| Court Cases                           | 31                          | 17                        | 48           |
| CDO Cases                             | 11                          | 4                         | 15           |
| Total Prisoner in Jail <sup>150</sup> |                             |                           | 54           |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

### *Ramechhap District:*

Ramechhap District is a hilly district located in the Janakpur zone. It covers an area of 1546 km<sup>2</sup> and has a population of 202,646. This district is largely populated by the indigenous/ethnic community Tamangs, which is generally considered to be a disadvantaged group. The main occupation of this district is agriculture, and the literacy rate is 63.1%.<sup>151</sup> This district has the

<sup>146</sup> CBS, Nepal Population and Housing survey, 2011

<sup>147</sup> Annual Report of the Office of the Attorney General 2012/13

<sup>148</sup> Data found from field survey 2014

<sup>149</sup> Annual Report of the Office of the Attorney General 2012/13

<sup>150</sup> Central Department of Prisoner Nepal, Jan, 2014

<sup>151</sup> CBS, National Population and Housing Survey, 2011

highest population of the Kusunda, an endangered native group, and has the lowest population growth rate in Nepal. The main languages spoken in this district are Nepali and Tamang.

The detailed case type in previous and current year is given in the table below.

| <b>Court type</b>      | <b>Case from previous year</b> | <b>Case in this year</b> | <b>Total</b> |
|------------------------|--------------------------------|--------------------------|--------------|
| Court Cases            | 14                             | 16                       | 30           |
| CDO Cases              | 28                             | 7                        | 35           |
| Total Prisoner in Jail |                                |                          | 178          |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

*Parsa District:*

Parsa district is a part of Narayani Zone located in the Terai region along the Indian border; Birganj is its district headquarters. It covers an area of 1353 km<sup>2</sup> and has a population 497,219. The main languages spoken in this district are Nepali and Bhojpuri. This district is largely populated by the Madeshi caste and communities, which are known marginalized and disadvantaged groups. Agriculture is the main profession of the population, though in this district there is also a considerable number of people engaged in business. The literacy rate is 55.4 %.

The detailed case type in previous and current year is given in the table below.

| <b>Court type</b>      | <b>Case from previous year</b> | <b>Case in this year</b> | <b>Total</b> |
|------------------------|--------------------------------|--------------------------|--------------|
| Court Cases            | 191                            | 331                      | 522          |
| CDO Cases              | 231                            | 170                      | 401          |
| Total Prisoner in Jail |                                |                          | 1315         |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

*Kalikot District:*

Kalikot District is a part of the Karnali Zone, with Manma as its district headquarters. It is located in a hilly area, covering 1741 km<sup>2</sup>, and has a population 136,948. It is one of the most underdeveloped and isolated district in Nepal. Inaccessible geography and uncultivable land have triggered mass migration to other places for job opportunities. The main language spoken in this district is Nepali. Chhetri Brahman and Dalit communities are the primary groups. The literacy rate of this district is 56.8%.

The detailed case type in previous and current year is given in the table below.

| <b>Court type</b> | <b>Case from previous year</b> | <b>Case in this year</b> | <b>Total</b> |
|-------------------|--------------------------------|--------------------------|--------------|
|-------------------|--------------------------------|--------------------------|--------------|

|                        |   |    |    |
|------------------------|---|----|----|
| Court Cases            | 8 | 4  | 12 |
| CDO Cases              | 5 | 11 | 16 |
| Total Prisoner in Jail |   |    | 60 |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

*Dailekh District:*

Dailekh District is a part of the Bheri Zone, with Dailekh as its district headquarters. It covers an area of 1502 km<sup>2</sup>, and has a population of 261,770. This district is underdeveloped and isolated because of its difficult terrain. Chhetri Brahman and Dalit communities are the main inhabitants. The literacy rate is 62.9 %.

The detailed case type in previous and current year is given in the table below.

| <b>Court type</b>      | <b>Case from previous year</b> | <b>Case in this year</b> | <b>Total</b> |
|------------------------|--------------------------------|--------------------------|--------------|
| Court Cases            | 11                             | 38                       | 49           |
| CDO Cases              | 9                              | 16                       | 25           |
| Total Prisoner in Jail |                                |                          | 67           |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

*Banke District:*

Banke District is a part of the *Bheri* zone, located in the Mid-Western Region with Nepalganj as its district headquarters. It covers an area of 2337 km<sup>2</sup> and has a population of 491,313. The main languages spoken in this district are Nepali and Tharu. Agriculture is the main profession. The literacy rate is 62.5%.

The detailed case type in previous and current year is given in the table below.

| <b>Court type</b>      | <b>Case from previous year</b> | <b>Case in this year</b> | <b>Total</b> |
|------------------------|--------------------------------|--------------------------|--------------|
| Court Cases            | 340                            | 301                      | 641          |
| CDO Cases              | 474                            | 192                      | 666          |
| Total Prisoner in Jail |                                |                          | 455          |

Note: This data only includes cases brought through Nepal's official criminal court system or the CDO, as case details from other quasi-judicial bodies were not available.

## Annex B: Attorney Questionnaire and Guidance Note

### Questionnaire - Lawyer Interviews

|                     |                   |
|---------------------|-------------------|
| Name of Interviewer | Date of Interview |
|---------------------|-------------------|

#### A. Background Information

| A1 - Lawyer's Personal Data <sup>1</sup> |           |                                |  |
|--|-----------|--------------------------------|--|
| 1. Name                                  |           | 2. Phone                       |  |
| 3. Age                                   | 4. Gender | 5. Ethnicity (Self-Identified) |  |
| 6. Languages spoken                      |           |                                |  |

| A2 - Lawyer's Professional Data <sup>2</sup> |                                     |
|--|-------------------------------------|
| 1. Organization/Agency or Firm Name          | 2. Job Title                        |
| 3. Districts of current practice             |                                     |
| 4. Highest Educational Degree Obtained       | 5. Year Advocate's License Obtained |

| A3 - Previous Trainings Attended <sup>3</sup>                    |                |
|--|----------------|
| 1. Have you ever received training in criminal defense? Yes / No |                |
| 2. Please list the last three legal trainings you have attended: |                |
| Training Name/Subject  | Number of Days |
| 1)   | 1)             |
| 2)   | 2)             |
| 3)   | 3)             |

| A4 - Previous Case Experience <sup>4</sup>        |  | A5 - Current Caseload <sup>5</sup> |  |
|---|--|------------------------------------|--|
| 1. # Criminal Defense Clients Represented To Date |  | 3. # Criminal Defense Clients      | a. Public clients (i.e., Baitanik wakil) |

|   |  |                                 |                    |
|---|--|---------------------------------|--------------------|
|   |  | (open cases)                    | b. Private clients |
| 2. # Other Clients (i.e., civil, property, victims) Represented |  | 4. # Other Clients (open cases) | a. Public clients  |

<sup>1</sup> Indicator 2.3.5

<sup>2</sup> Indicator 2.2

<sup>3</sup> Indicator 1.2.4

<sup>4</sup> Indicator 1.2.4 <sup>5</sup> Indicator 1.2.4

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Last Updated: 9/13/13

|         |  |  |                    |
|---------|--|--|--------------------|
| To Date |  |  | b. Private clients |
|---------|--|--|--------------------|

**B. Agency/ Organization Information**

|   |                                  |                        |
|---|----------------------------------|------------------------|
| B1 - How is your agency/firm currently funded? <sup>152</sup> |                                  |                        |
| Government of Nepal   | International or National Donors | Other (please explain) |

B2 - Did you undergo an interview process for your present position?<sup>153</sup> Yes / No

(a) If yes, were there other persons interviewed for your present position at the same time? Yes / No / Don't Know

B3 - How long is the tenure for your current position?<sup>154</sup><sup>155</sup><sup>156</sup>

|   |
|---|
| B4 - What services pertaining to criminal legal defense does your agency/firm offer for poor defendants in criminal cases? <sup>9</sup> |
|---|

<sup>152</sup> Indicator 1.3.3

<sup>153</sup> Indicator 1.2.3

<sup>154</sup> Indicator 1.3.3

<sup>155</sup> Indicator 2.2.4

<sup>156</sup> Indicator 1.1.2, 2.3.3

|   | Not offered | currently | Offered minimal contribution court fees | with \$ for | Offered completely free of cost |
|---|-------------|-----------|---|-------------|---------------------------------|
| Defense from time of arrest   |             |           |   |             |                                 |
| Petitions filed during remand period                                  |             |           |   |             |                                 |
| Defense from time of charge sheet filing                              |             |           |   |             |                                 |
| Argument at Jail/Bail hearing   |             |           |   |             |                                 |
| Petitions filed post-charge sheet to District Court                   |             |           |   |             |                                 |
| Petitions filed post-charge sheet to appellate court or Supreme Court |             |           |   |             |                                 |
| Obtaining copy of the court file                                      |             |           |   |             |                                 |
| Representation during witness examination                             |             |           |   |             |                                 |
| Argument at Final Hearing   |             |           |   |             |                                 |
| Obtaining copy of final decision                                      |             |           |   |             |                                 |
| Filing appeal of conviction to Appellate Court                        |             |           |   |             |                                 |
| Filing appeal of conviction to Supreme Court                          |             |           |   |             |                                 |
| Defense of persons prosecuted before quasi-judicial authorities       |             |           |   |             |                                 |
| Others (please explain):  |             |           |   |             |                                 |

| B5 - How do public clients obtain your services? <sup>10</sup>            |       |        |           |            |
|---|-------|--------|-----------|------------|
|   | Never | Rarely | Sometimes | Frequently |
| Referral by court (including clerks)                                      |       |        |           |            |
| Referral by police  |       |        |           |            |
| Referral by prosecutor  |       |        |           |            |
| Referral by administrative official (i.e., VDC)                           |       |        |           |            |
| Direct contact (through phone, family, or in person)                      |       |        |           |            |
| Solicited by you, the lawyer (i.e., through visits to detention or court) |       |        |           |            |

B6 - How do you determine eligibility of the client for free legal defense services?<sup>11</sup>

|   |        |         |              |        |
|---|--------|---------|--------------|--------|
| B7 - How often are you required to submit reports of your representation of public clients to your Agency/Firm? <sup>12</sup> |        |         |              |        |
| Daily   | Weekly | Monthly | No reporting | Other: |

|  |                        |                 |              |       |             |  |
|--|------------------------|-----------------|--------------|-------|-------------|--|
| B8 - How is your representation of public clients counted by your Agency/Firm? <sup>13</sup> |                        |                 |              |       |             |  |
| Per Court Appearance   | Per Activity Conducted | Per Client only | Time Working | Spent | Not Counted |  |

**c. Details of Representation of Public Clients**

|   |  |  |  |
|---|--|--|--|
| C1 - When representing Public clients, when does your representation typically begin? (Check one) <sup>14</sup> |  | C2 - When representing Private clients, when does your representation typically begin? (Check one) |  |
| Within 24 hours of arrest   |  | Within 24 hours of arrest  |  |
| Before 1 <sup>st</sup> Remand   |  | Before 1 <sup>st</sup> Remand  |  |
| At 1 <sup>st</sup> Remand   |  | At 1 <sup>st</sup> Remand  |  |
| Between 1 <sup>st</sup> Remand and Charge Sheet Filing  |  | Between 1 <sup>st</sup> Remand and Charge Sheet Filing   |  |
| After Charge Sheet Filing but before Client's Court Statement   |  | After Charge Sheet Filing but before Client's Court Statement                                      |  |
| Immediately Before Jail/Bail Hearing  |  | Immediately Before Jail/Bail Hearing   |  |
| After Jail/Bail Hearing   |  | After Jail/Bail Hearing  |  |
| Other (please explain):   |  | Other (please explain):  |  |

C3 - What investigative activities have you conducted on behalf of Public clients?<sup>15</sup>

C4 - What is the average amount of time you spend reviewing the police file prior to jail/bail hearing on behalf of public clients?<sup>16</sup>

<sup>11</sup> Indicator 2.3.3

<sup>12</sup> Indicator 1.2.2

Indicator 1.2.2

<sup>14</sup> Indicator 1.1.1

<sup>15</sup> Indicator 1.2.4

<sup>16</sup> Indicator 1.2.4

C5 - What is the average amount of time you spend interviewing a public client prior to the jail/bail hearing? <sup>157</sup>

C6 - What topics do you typically discuss during the first meeting with a public client?  
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|   |        |           |            |        |
|---|--------|-----------|------------|--------|
| C7 – Have any of your public clients ever invoked the right to remain silent on the advice of a lawyer during the police statement? <sup>19</sup><br>Yes / No |        |           |            |        |
| C8 – Have any of your public clients ever invoked the right to remain silent on the advice of a lawyer during the court statement? <sup>20</sup><br>Yes / No  |        |           |            |        |
| C9 - How often are you present with a Public client throughout the taking of his or her court statement? <sup>21</sup>  |        |           |            |        |
| Never   | Rarely | Sometimes | Frequently | Always |

C10 - What petitions have you filed on behalf of public clients before the jail/bail hearing?  
162

C11 - What petitions have you filed on behalf of public clients after the jail/bail hearing?  
163164

|   |  |
|---|--|
| C12 - How do you prepare for witness examination? <sup>24</sup> |  |
| Review case file  |  |

<sup>157</sup> Indicator 1.2.4

<sup>158</sup> Indicator 1.2.4

<sup>159</sup> Indicator 1.2.4

<sup>160</sup> Indicator 1.2.4

<sup>161</sup> Indicator 1.2.4

<sup>162</sup> Indicator 1.2.4

<sup>163</sup> Indicator 1.2.4

<sup>164</sup> Indicator 1.2.4

|  |  |
|--|--|
| Review witness statements  |  |
| Interview prosecution witnesses in advance of the witness examination (not on the same day as examination, not in court) |  |
| Investigate the behavior & character of prosecution witnesses  |  |
| Determine which witnesses should be precluded as hearsay   |  |
| Petition for witness preclusion  |  |
| Prepare witness examination questions in advance   |  |
| Other (please explain):  |  |

C13 - Do you meet with public clients at the detention center? <sup>165</sup> Yes / No

(a) If yes, how many times on average do you meet over the course of the client's case?

C14 - Do you meet with public clients at the jail? <sup>166</sup> Yes / No

(a) If yes, how many times on average do you meet over the course of the client's case?

C15 - What is the legal standard of proof for conviction at final hearing? <sup>27</sup>

C16 – What types of arguments do you typically make during a final hearing? <sup>167</sup><sup>168</sup>

#### D. Perspectives on Criminal Legal Aid

|  |
|--|
| D1 - In your opinion, how aware are your clients of their rights relating to fair trial? <sup>29</sup> |
|--|

<sup>165</sup> Indicator 1.3.2

<sup>166</sup> Indicator 1.3.2 <sup>27</sup> Indicator 1.2.4

<sup>167</sup> Indicator 1.2.4

<sup>168</sup> Indicator 2.3.1 <sup>30</sup> Indicator 2.3.5

|            |                |                |                    |
|------------|----------------|----------------|--------------------|
| Very aware | Somewhat aware | Not very aware | Completely Unaware |
|------------|----------------|----------------|--------------------|

D2 - In your opinion, whose obligation is it to ensure clients are aware of their rights relating to fair trial?

D3 - In your opinion, how should poor defendants be made aware of their rights relating to fair trial?

D4 - Have you ever represented a client who did not speak or understand Nepali? <sup>30</sup> Yes / No

(a) If yes, was an interpreter available in court to interpret the proceedings into the client's language? Yes / No

D5 - In your opinion, do you feel that detainee's fair trial rights are being respected? Yes / No

Why or why not?

D6 - In your opinion, what reforms can better ensure poor detainees' access to a fair trial?

Guidance Note:  
Questionnaire - Lawyer Interviews

A. Background Information

A1 - Lawyer's Personal Data<sup>169</sup>

1. & 2. Name and phone are only for verification purposes and any necessary follow-up. It will be kept entirely confidential. All personally identifiable information (PII) shall be kept strictly confidential, though aggregate results will be reported and published. This needs to be clearly communicated to each interviewed person.

3. & 4. These categories will serve inform a profile of legal aid providers.

Ethnicity/Caste is an important identifier for the purposes of determining the extent to which the legal profession reflects the diversity of the client population (i.e., the prison population). The Government of Nepal (GoN) has official categories used by many development donor agencies (see Nepal Living Standards Survey 2010/2011), and ILF-N should use seek to use the same categories to ensure that information from our research can be more broadly used and compared with other studies.

Languages spoken by lawyers will help inform the question of whether the criminally accused are able to understand the proceedings against them. Because lawyers partially facilitate that understanding, this is not possible if the lawyer doesn't speak the language of the client. The right to have an interpreter if you don't understand the language of the proceedings is also a fair trial right.

A2 Lawyer's Professional Data<sup>170</sup>

1. & 2. The organization/agency name should be as detailed as possible, and should certainly be sufficient to indicate whether the lawyer is providing free legal representation to the criminally accused via (1) the baitanik wakil program, (2) the DLAC, (3) an NGO, (4) a bar association program, or some other entirely different project/initiative.

This question refers ONLY to districts in which the lawyer is providing free legal representation on behalf of criminal defendants, and does NOT refer to any other kinds of services that might be provided (such as awareness raising or mediation or civil services). This data will help map out services available in various districts.

The response should include the subject of the highest degree (i.e., business, development, etc). The standard responses include IL, BL, MA, LLM, but there are some lawyers who did not obtain IL level degrees. For those, the response should be SLC.

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<sup>169</sup> Indicator 2.3.5

<sup>170</sup> Indicator 2.2, 1.2.4

Some lawyers have become advocates without having been awarded an Advocate’s license through bar council examination. In such cases, the interviewer should not leave this field blank, but should write that the lawyer does NOT have a license (i.e., “N/A”).

#### A3 - Previous Trainings Attended<sup>171</sup>

These questions help determine the exposure lawyers have had to concepts relevant to criminal defense specifically, and fair trial rights generally. This is important because prior surveys have shown that lawyers seem to have disproportionately received training in “mediation,” which involves substantially different laws and skills than those necessary to provide competent criminal defense.

#### A4 - Previous Case Experience<sup>172</sup>

These questions seek to gauge the level of experience the lawyer has through the number of clients s/he has represented throughout his/her entire career, disaggregated by type of case (specifically, criminal defense and anything else). The number reported should only include cases on which the lawyer was the primary lawyer assigned to the client, and should NOT include clients represented by the lawyer’s entire firm (i.e., a firm may have 200 clients total, but each lawyer of that firm cannot claim to represent 200 clients).

#### A5 - Current Caseload<sup>173</sup>

These questions seek to gauge the general caseload carried by both free legal aid providers and private lawyers, which will help identify potential trends (i.e., whether lawyers with few private clients tend to work in NGOs or other free legal aid services). “Open cases” refers to clients for whom the lawyer is presently undertaking legal representation. If the lawyer has no intention of performing more work on the case without a directive from his/her supervisor or the court, such case may not be considered “open.” “Public” clients refer to those clients who are being represented by the lawyer through the free legal representation program (baitanik wakil, DLAC, bar programs, NGOs). “Private” clients are those clients who retained the lawyers’ services through payment of fees or promise of such payment.

Again, the number reported should only include cases on which the lawyer was the primary lawyer assigned to the client, and should NOT include clients represented by the lawyer’s entire firm (i.e., a firm may have 200 clients total, but each lawyer of that firm cannot claim to represent 200 clients).

## B. Agency/ Organization Information

### B1174

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<sup>171</sup> Indicator 1.2.4

<sup>172</sup> Indicator 1.2.4

<sup>173</sup> Indicator 1.2.4

<sup>174</sup> Indicator 1.3.3

This data goes to the sustainability of the program providing free legal representation, and only funding for free legal representation should be included.

#### B2175

This data will help inform the analysis of whether the process for selecting free legal aid providers is sufficiently competitive to ensure motivated and qualified lawyers are providing these services.

#### B3176

This means how long the lawyer has been employed by his/her present agency or firm as an advocate. The length of a lawyer's tenure impacts the continuity of service provided to the client, as well as the lawyer's ability to develop his/her skills and expertise in the practice through an extended period of practice.

#### B49

These questions seek to identify with greater specificity the breadth of criminal defense services offered to accused persons in Nepal, and by which service providers. This data will allow a more detailed mapping of services currently available and will better expose gaps.

Each of the activities are described in greater detail below, but in order for each activity to be considered "offered" by the lawyer, the activity should be considered as part of the lawyer's regular practice while representing criminal defendants. That is to say, the activity should be part of the lawyer's ordinary practice on behalf of most of his/her criminal defense clients, and not a one-time activity that occurred or a special case.

#### Defense from time of arrest

This item refers to the practice of regularly seeking to represent free of cost, a criminally accused person as soon as possible after the arrest. This may be indicated where the lawyer regularly visits detention centers to identify and meet persons who are newly arrested, and to screen such persons for eligibility (i.e., if the NGO will only represent women). This does NOT apply if the lawyer defers representation based on charge sheet filing (i.e., if the lawyer advises the detainee to contact the lawyer only once the charge sheet is filed).

#### Petitions filed during remand period

This item refers to whether the lawyer or the lawyer's organization have a regular practice of filing petitions on behalf of the criminal defendant - and NOT the victim or complainant - before the charge sheet is filed. Such petitions may demand access to or copies of the police investigation file, request dismissal of the case, or release of the defendant.

#### Defense from time of charge sheet filing

This item refers to the common practice of beginning legal representation once a charge sheet has been filed by the prosecutor in the district court. Most lawyers in Nepal, including

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<sup>175</sup> Indicator 1.2.3

<sup>176</sup> Indicator 1.3.3 <sup>9</sup> Indicator 2.2.4

private lawyers, have the regular practice of beginning legal representation from the time of the charge sheet filing.

#### Argument at Jail/Bail hearing

This item refers to the practice of appearing in court on behalf of the defendant to argue for release (or, sometimes, bail) from detention pending trial. This is a common practice by most lawyers in Nepal.

#### Petitions filed post-charge sheet to District Court

This item refers to the regular practice of filing petitions on behalf of the defendant to the district court in which the defendant's case is being heard. Such petitions may include routine requests to summons of defense witnesses, to obtain a copy of the case file, as well as more innovative petitions, such as those to introduce new defense evidence or suppress evidence illegally seized by police.

#### Petitions filed post-charge sheet to Appellate Court or Supreme Court

This item refers to the regular practice of filing petitions on behalf of the defendant to any higher (appellate) court, including the Supreme Court. This applies only if the initial trial is still proceeding (i.e., at the district court), and the petition challenges the orders or decisions of the trial court in some way. Examples include any No. 17 petition filed to an appellate court, any writ petition (common ones include habeas, mandamus, and prohibition), and any petition challenging detention or bail/detention status. This answer does not include filing of PILs. If the only petitions regularly filed to appellate court by the lawyer are PILs, then this service should not be considered to be offered.

#### Obtaining copy of the court file

This item refers to the regular practice of obtaining a copy of the court's file of the client's case. The court makes this available for copy, but often charges a small fee. According to anecdotal information, many lawyers pass this fee on to even indigent clients. Consequently, many lawyers will not obtain a copy of the file at all because the lawyer doesn't want to spend his/her own money to pay the fee. To distinguish which option to select, the interviewer should ask the lawyer for the most common practice (i.e., what happens in a majority of the lawyers' cases for poor clients).

#### Representation during witness examination

This item refers to the lawyer's regular practice of appearing at each witness examination date and participating in a cross-examination of the government's witnesses.

#### Argument at Final Hearing

This item refers to the lawyer's regular practice of appearing at each final hearing date scheduled (sometimes they are postponed and rescheduled due to calendaring problems) and arguing on behalf of the client's interests (i.e., for acquittal, but also occasionally for a lesser punishment).

#### Obtaining copy of final decision

This item refers to the lawyer's regular practice of obtaining a written copy of the final decision on behalf of the client. Typically, the written decision is issued days (or months) after the decision has been made in court, so the interviewer should ask whether the lawyer waits to obtain a copy of the written decision for his/her client in the majority of the lawyer's public cases.

#### Filing appeal of conviction to Appellate Court

This item refers to the lawyer's regular practice of advising the client of his/her right to appeal, discussing the consequences and benefits of appeal, and then drafting and filing the appeal of the initial trial decision. Appeal is automatic in serious cases in Nepal, but this item seeks to determine whether filing an appeal of conviction is part of the lawyer's routine practice even where appeal is not automatically initiated by the prosecution.

#### Filing appeal of conviction to Supreme Court

This item refers to the lawyer's regular practice of advising the client of his/her right to appeal, discussing the consequences and benefits of appeal, and then drafting and filing the appeal of the appellate decision (typically, after the appellate court has affirmed the conviction and punishment imposed by the district court).

#### Defense of persons prosecuted before quasi-judicial authorities

This item refers to the lawyer's regular practice of providing legal representation to persons prosecuted in the CDO equivalent to the legal representation the lawyer provides to persons prosecuted in district courts. This would include the various aspects covered in previous items: participating in jail/bail argument, witness examination, and final hearing argument. If the service provided at CDO consists of negotiating outcomes or merely posting bail, that does NOT count as offering a service for the purpose of this question.

#### B5177

This question seeks to determine with greater specificity how lawyers who provide legal representation tend to receive client referrals, and to distinguish between more passive and proactive solicitation by the lawyer.

#### B6178

This question seeks a narrative response from the lawyer regarding determination of eligibility in order to obtain more detail about how organizations/individuals make that decision.

How eligibility for free legal representation is determined is critical to whether poorly-resourced persons are able to access justice. Presently, the eligibility cut-off set by the Legal Aid Act is 40,000 rupees, and eligibility for DLAC services additionally requires certification by the VDC. As of 2007, approximately 52% of prisoners surveyed reported no income at all, and an additional 19% reported an income of below 40,000 rupees (the 2007 baseline survey disaggregated by: (1) No income; (2) Below 40,000; (3) Between 40

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<sup>177</sup> Indicator 1.1.2, 2.3.3

<sup>178</sup> Indicator 2.3.3

and 100,000; (4) Above 100,000). A significant proportion of respondents (14%) during the 2007 survey declined to mention their income level and the value of their property.

Considering inflation at a rate of 11-13% in Nepal over the last several years, the income cut-off for eligibility should be raised substantially from 40,000. Advocacy efforts have been made by civil society organizations to reduce lower the threshold for eligibility, as well as streamline the process so that certification from a local VDC is not a prerequisite to service, as it is presently and substantial obstacle. However, as reform efforts progress, there is also a great likelihood that the government, under budget pressure, would seek to limit the number of eligible persons, or create a more multi-variable means test that takes into account value of assets held by a defendant and his/her family.

#### B7179

This question seeks to determine how frequently the lawyer is required to report his/her activities on behalf of public clients to his/her line supervisor. “Report” may be defined in different ways, and includes written or orally-delivered reporting of the lawyer’s activities on behalf of indigent criminal defense clients.

#### B8180

Variations in the way that legal service providers count and report lawyers’ work on behalf of public clients confound attempts to accurately map the extent of legal services provided around Nepal. This question seeks to distinguish the various ways in which different providers/organizations are counting – or are not counting – the work lawyers do on behalf of their indigent criminal defense clients. Only one answer should be selected.

#### Per Court Appearance

This item should be selected if the lawyer reports that activity is counted based on the number of times s/he appears in court on behalf of a client. “Court appearances” include arguments at court hearings, appearing for witness examinations, and other appearances in court that require the lawyer to be present in court.

#### Per Activity Conducted

This item includes court appearances, but also includes phone consultations, petitions filed, client meetings held, etc.

#### Per Client only

This item refers to counting based on the number of clients with open cases represented at a given point in time, regardless of the number of activities performed on behalf of those clients. For example, a lawyer may have only 10 clients, and appear in court more than 30 times over the course of the month; however, his/her line supervisor reports that the lawyer represented 10 clients that month.

#### Time Spent Working

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<sup>179</sup> Indicator 1.2.2

<sup>180</sup> Indicator 1.2.2

This item should only be used if the lawyer is reporting how much time they spent on each individual case in addition to the number of clients they are representing. This should not be used if the lawyer is required to work a certain number of hours or completes a time sheet.

Not counted

This item refers to a lawyer who does not regularly report activities conducted on behalf of his/her indigent criminal defense clients.

### C. Details of Representation of Public Clients

#### C1 & C2181

These questions seek to determine the stage at which lawyers begin to provide legal representation to both their public and private clients. Only one answer should be selected for each question, and should represent the lawyer's practice in the majority of his/her cases (and should not represent the earliest stage they ever became involved in a case). Early access to legal representation is a right guaranteed by the Interim Constitution of Nepal.

#### C3182

This question seeks to determine the scope of work conducted by lawyers on behalf of their public clients. A narrative response is sought in order to reduce over-reporting found in previous surveys when a checklist was used.

Conducting independent investigation into the facts of the incident underlying the criminal charge is an essential task of defense attorneys, as it provides a necessary counterpoint the version of events espoused by the government attorney (and police) and checks potential abuses of authority by the police. For the purposes of this question "investigative activities" includes visiting a crime scene, photographing the location of the incident, interviewing government witnesses as soon as possible after the incident and in advance of the witness examination, examining physical evidence seized by police in the case, examining the background and potential biases of witnesses, looking for potential eyewitnesses, seeking the assistance of medical experts in reviewing medical reports, etc.

#### C4183

This question seeks to help determine how much time lawyers devote to reviewing the client's case file before making an argument at jail bail hearing. This estimate should include any time the lawyer reviewed the file prior to the jail/bail argument, not necessarily immediately before the jail/bail argument. (If the lawyer had obtained a copy of the case file during the remand period, then the lawyer could have plausibly spent several hours reviewing the case file in the weeks leading up to the hearing).

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<sup>181</sup> Indicator 1.1.1

<sup>182</sup> Indicator 1.2.4

<sup>183</sup> Indicator 1.2.4

#### C5 184

This question seeks to help determine how much time lawyers devote to speaking with the client before making an argument at jail bail hearing. This estimate should include any meetings with the client at the detention center or jail where s/he was held, so long as such conversations were made prior to the jail/bail hearing. (If the lawyer began representation soon after arrest, and visited the client in detention several times, the lawyer could have plausibly spent several hours speaking with the client in the weeks leading up to the jail bail hearing).

Based on prior surveys of lawyers in Nepal, the time spent reviewing the file is generally much longer than the time spent speaking with the client, and the amount of time can be influenced by administrative pressure from the court or the police who bring the client to court. The amount of time spent speaking with the client may correlate strongly with the client's perception of how well s/he has been treated/represented by his/her lawyer.

#### C6185

This question intends to determine the range of subjects covered during an attorney's conversation with his/her client. Specifically, the question hopes to determine whether or not the attorney advises the client properly of his/her right to counsel and the right to remain silent. By asking the open-ended question, we are relying on the lawyers who regularly discuss right to counsel and right to remain silent with their clients to volunteer this information, and avoid over-reporting.

#### C7 & C8186

These questions seek to determine whether the lawyers' public clients have ever invoked the right to remain silent on the advice of the lawyer in the two contexts in which invocation would tend to be beneficial (the taking of statements to be used as evidence against them in a criminal prosecution). Whether or not a lawyer has ever had a client invoke the right reflects whether the lawyer has ever advised his/her clients of such rights, and has ever persuaded a client successfully to invoke.

If the lawyer does not understand the question, the interviewer may clarify by asking whether any of the lawyer's public clients have refused to make any statement (such refusal is NOT the same as making a denial statement) on the advice of the lawyer.

#### C9187

This question seeks to determine whether the lawyer has a regular practice of being present throughout the taking of the client's statement in court. The lawyer may only answer in the affirmative if s/he is with the client – from start to finish – throughout the taking of the statement by the clerk of court. This question does not ask anything more than mere presence (i.e., it does not ask whether the lawyer intervenes in questioning by the clerk).

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<sup>184</sup> Indicator 1.2.4

<sup>185</sup> Indicator 1.2.4

<sup>186</sup> Indicator 1.2.4

<sup>187</sup> Indicator 1.2.4

An answer of “frequently” is only appropriate if this is the practice in more than 75% of the lawyer’s cases.

#### C10& C11188

These questions seek to determine the extent of activity – in the form of petition-filing – conducted by lawyers on behalf of their public clients. The narrative response will reduce over-reporting. Before the jail/bail hearing, the answer is expected to be none. After jail/bail hearing, there should be a few routine petitions regarding defense evidence, etc., and possibly some substantive petitions.

#### C12189

This question examines the extent of preparation conducted by lawyers in advance of witness examination. Clarification regarding interviewing prosecution witnesses is based on confusion found with previous surveys.

#### C13 & C14190

These questions seek to measure accessibility of lawyers through point of access (i.e., if there are lawyers visiting the detention centers and jails, detainees in those facilities who don’t have lawyers have a greater opportunity to access counsel) as well as measure the level of engagement of lawyers (which relates to competency and the quality of service experienced by the claim-holder). This will be disaggregated by type of lawyer assigned (private, government-funded, or NGO/bar).

#### C15191

The interviewer should simply ask the question and record the narrative response. Understanding the burden of proof required for conviction of a criminal offense is so fundamental to the work of defense lawyers – and indeed, to the work of any criminal justice sector actors – that the answer should be easily answered by the lawyer. Further explanation or clarification would only serve to skew the results.

#### C16192

The interviewer should simply ask the question and record the narrative response. Hopefully they will mention arguing the burden of proof, having been primed by the previous question, but this may provide some insight into the practice of criminal defense.

### D. Perspectives on Criminal Legal Aid

#### D1193

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<sup>188</sup> Indicator 1.2.4

<sup>189</sup> Indicator 1.2.4

<sup>190</sup> Indicator 1.2.4, 1.3.2

<sup>191</sup> Indicator 1.2.4

<sup>192</sup> Indicator 1.2.4

<sup>193</sup> Indicator 2.3.1

Whether the lawyer feels clients are aware of their rights relating to fair trial reflects the lawyers' attitudes and motivations in their work on behalf of those detainees (i.e., whether the lawyers feel obligated to advise the clients thoroughly of those rights). Lawyers' perceptions of client awareness can be compared with the prisoner/detainee responses for an (imperfect) idea of how lawyer perceptions may or may not accord with reality.

#### D2 & D3

These questions simply call for a narrative of the lawyer's opinions. Results will be coded after the surveys are conducted.

#### D4194

The right to an interpreter is a fundamental right for the criminally accused, and this question seeks to determine the frequency with which the right is not met. However, whether an indigent, uneducated person truly understands the case proceedings against him/her is a deeper question than one of language alone. The role of a defense lawyer is in part to facilitate that understanding, so that the defendant can then participate in his/her own defense (another fair trial right).

#### D5

This question simply calls for a narrative of the lawyer's opinions. Results will be coded after the surveys are conducted. Whether the lawyer feels the detainees' fair trial rights are being respected also reflects their attitudes and motivations in their work on behalf of those detainees.

#### D6

This question simply calls for a narrative of the lawyer's opinions regarding reform of the system to ensure better access to fair trial. Results will be coded after the surveys are conducted.

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<sup>194</sup> Indicator 2.3.5

## Annex C: Blank Detainee/Prisoner Questionnaire

DRAFT Detainee/Prisoner Interviews

Last Updated: 12/11/13

### Questionnaire – Detainee/Prisoner Interviews

|                     |                         |
|---------------------|-------------------------|
| Name of Interviewer | Date of Interview       |
| Jail/Prison Name    | District of Jail/Prison |

#### A. Background Information

|                                       |            |                           |          |                    |
|---------------------------------------|------------|---------------------------|----------|--------------------|
| <b>A1 - Personal Data<sup>1</sup></b> |            |                           |          |                    |
| 1. Name                               |            |                           | 2. Phone |                    |
| 3. Age                                | 4. Gender  | 5. Ethnicity / Caste Code |          |                    |
| 6. Languages spoken                   |            |                           |          |                    |
| 7. District                           | 8. VDC/MCC | 9. Ward                   | 10. Tole | 11. Family members |
| 12. Education Code                    |            |                           |          |                    |

|  |   |
|--|---|
| <b>A2 - Economic Data<sup>2</sup></b>  |   |
| 1. Occupation Code   | 2. Annual income before incarceration   |
| 3. Value of property held jointly with family                                | 4. Value of property under own disposal |
| 5. Effect of detention on income after release (only if previously released) |   |

| <b>A3 - Dependents<sup>3</sup></b> |     |        |          |                   |                          |              |                                   |
|------------------------------------|-----|--------|----------|-------------------|--------------------------|--------------|-----------------------------------|
| Name                               | Age | Gender | Relation | Currently Living: |                          |              | Effect of detention on dependents |
|                                    |     |        |          | With prisoner     | Under institutional care | In community |                                   |
|                                    |     |        |          |                   |                          |              |                                   |
|                                    |     |        |          |                   |                          |              |                                   |
|                                    |     |        |          |                   |                          |              |                                   |
|                                    |     |        |          |                   |                          |              |                                   |

<sup>1</sup> Indicator 2.1.2

<sup>2</sup> Indicator 2.1.2, 2.3.6

<sup>3</sup> Indicator 2.3.6

**B. Information about the criminal case**

| B1 - Offense Charged <sup>4</sup> | B2 - Court or Quasi-judicial Authority <sup>5</sup> |         |            |
|-----------------------------------|---|---------|------------|
|                                   | Court   | CDO/DAO | DFO/Warden |

| B3 - Current stage of case (procedural posture)  |  |                                   |                                 |   |   |                                      |
|--|--|-----------------------------------|---------------------------------|---|---|--------------------------------------|
| Pre-trial detention (charge sheet not yet filed) | Out on bail or other pre-trial release | Detained for failure to post bail | Detained for trial without bail | Convicted by trial court, awaiting appeal | Conviction affirmed by appellate court, awaiting appeal | Conviction affirmed by Supreme Court |

| B4 - Dates of case proceedings    |      |   |    |
|-----------------------------------|------|---|----|
|                                   | DATE | In custody (detention/jail)? <sup>6</sup> |    |
| Incident occurred                 |      | Yes                                       | No |
| FIR filed                         |      | Yes                                       | No |
| Arrest                            |      | Yes                                       | No |
| First appearance in court         |      | Yes                                       | No |
| Charge sheet registered           |      | Yes                                       | No |
| Jail/Bail hearing                 |      | Yes                                       | No |
| Witness examination               |      | Yes                                       | No |
| Decision of trial /district court |      | Yes                                       | No |
| Decision of appellate court       |      | Yes                                       | No |
| Decision of Supreme Court         |      | Yes                                       | No |
| Released pre-trial (on bail)?     |      |   |    |

| B5 - Appellate review during the course of the case (interlocutory review) <sup>7</sup>                                 |  |  |        |
|---|--|--|--------|
| <b>1. At any stage before conviction, did you ever receive any review by any appellate court of your case? Yes / No</b> |  |  |        |
| <b>2. How was the review initiated?</b>   |  |  |        |
| My lawyer filed a petition or helped me file it   | I filed a petition myself without assistance | I was summonsed by the court without filing a petition | Other: |
| <b>3. What was the substance / subject of the review?</b>   |  |  |        |
| Challenging jail/bail order   | Challenging illegal detention                | Other:   |        |
| <b>4. What was the outcome of appellate review?</b>   |  |  |        |
| Initial decision endorsed   | Lower court decision partially altered       | Lower court decision completely altered                |        |
| <b>5. Were you released from custody as a result of this interlocutory review? Yes / No</b>                             |  |  |        |

<sup>4</sup> Indicator 2.1.2<sup>5</sup> Indicator 2.1.2<sup>6</sup> Indicator 3.1.1, 3.1.2<sup>7</sup> Indicator 3.1.3

| <b>B6 - Appeals from conviction</b>            |                               |   |                              |           |
|--|-------------------------------|---|------------------------------|-----------|
| 1. First appeal of conviction                  | Appeal lodged                 | Not appealed                            |                              |           |
| 2. Outcome of first appeal                     | Trial court decision affirmed | Conviction affirmed, Punishment changed | Convicted on a lesser charge | Acquitted |
| 3. Second appeal of conviction (Supreme Court) | Appeal lodged                 | Not appealed                            |                              |           |
| 4. Outcome of second appeal                    | Trial court decision affirmed | Conviction affirmed, Punishment changed | Convicted on a lesser charge | Acquitted |

| <b>B7 - Case Outcome</b>      |                                   |
|-------------------------------|-----------------------------------|
| Convicted offense             |                                   |
| Sentence imposed              |                                   |
| Trial court decision received | Appellate court decision received |

**C. Access to Legal Representation During Pre-trial and Trial Proceedings**

**C1 - Did you have a lawyer representing you during pre-trial and trial proceedings of the case?<sup>8</sup> Yes / No**

| <b>C2 - How was your lawyer assigned to you?</b> |                 |                              |     |                                   |        |
|--|-----------------|------------------------------|-----|-----------------------------------|--------|
| Paid by self/family                              | Court appointed | District Legal Aid Committee | NGO | Bar association legal aid program | Other: |
| Name of lawyer or organization:                  |                 |                              |     |                                   |        |

| <b>C3 - At what point in the pre-trial and trial proceedings of the case did you first obtain/receive a lawyer?<sup>9</sup> (Check one)</b> |  |
|---|--|
| Within 24 hours of arrest   |  |
| Before or at 1 <sup>st</sup> Remand (first court appearance)  |  |
| Between 1 <sup>st</sup> Remand and Charge Sheet Filing  |  |
| After Charge Sheet Filing but before Client's Court Statement   |  |
| Immediately Before Jail/Bail Hearing  |  |
| Between jail/bail hearing and witness examination   |  |
| At the witness examination  |  |
| Between witness examination and final hearing   |  |
| At the final hearing  |  |
| Other:  |  |

|  |  |
|--|--|
| <b>C4 - About how many days after arrest did you first obtain/receive a lawyer?<sup>10</sup></b> |  |
|--|--|

| <b>C5 - At which pre-trial and trial proceedings did your lawyer appear to advocate on your behalf?<sup>11</sup> (Check all that apply)</b> |  |
|---|--|
| At the 1 <sup>st</sup> remand (first court appearance)  |  |
| During police interrogation/ statement-taking   |  |
| At other remand hearings (subsequent pre-trial court hearings)  |  |
| At the taking of the court statement  |  |
| At jail/bail hearing  |  |
| At hearings between jail/bail and witness examination   |  |
| At witness examination  |  |
| At hearings between witness examination and final hearing   |  |
| At final hearing  |  |
| At hearings on interlocutory appeals (appellate/supreme court)  |  |
| Other:  |  |

| <b>C6 - During the pre-trial and trial proceedings, did your lawyer meet with you in detention or jail?<sup>12</sup></b> |  |                    |  |
|--|--|--------------------|--|
| # Meetings in Detention  |  | # Meetings in Jail |  |

<sup>8</sup> Indicator 2.1.3

<sup>9</sup> Indicator 1.1.1

<sup>10</sup> Indicator 1.1.1

<sup>11</sup> Indicator 1.3.1

<sup>12</sup> Indicator 1.3.2

|   |
|---|
| <b>C7 - NGO Involvement</b>   |
| 1. If your lawyer was assigned through an NGO, please provide the name and location of the NGO: |
| <br><br><br><br>  |

**D. Access to Legal Representation During Post-Conviction Appellate Proceedings**

**D1 - Did you have a lawyer representing you during the appeal of your case?**<sup>13</sup> Yes / No

**Was the appeal initiated by you or the government?** Self / Government

**D2 - Was your appellate lawyer the same lawyer as your trial lawyer?**<sup>14</sup> Yes / No

| <b>D3 - How was your appellate lawyer assigned to you?</b> <sup>15</sup> |                 |                              |     |                                   |        |
|--|-----------------|------------------------------|-----|-----------------------------------|--------|
| Paid by self/family  | Court appointed | District Legal Aid Committee | NGO | Bar association legal aid program | Other: |

| <b>D4 - At what point after the trial court conviction did you first obtain/receive a lawyer?</b> |  |
|---|--|
| Before the first hearing in appellate court   |  |
| At the first hearing in appellate court   |  |
| During subsequent hearings in appellate court   |  |
| At the final argument in appellate court  |  |
| Other:  |  |

| <b>D5 - At what point during appeal proceedings did your lawyer appear to advocate on your behalf?</b> <sup>16</sup> |  |
|--|--|
| At the first hearing in appellate court  |  |
| During subsequent hearings in appellate court  |  |
| At the final argument in appellate court   |  |
| At the supreme court   |  |
| Other:   |  |

| <b>D6 - During appeal proceedings, did your lawyer meet with you in jail?</b> |  |
|---|--|
| # of meetings in Jail   |  |

| <b>D7 - NGO Involvement</b>   |
|---|
| 1. If your lawyer was assigned through an NGO, please provide the name and location of the NGO: |
| <br><br>  |

<sup>13</sup> Indicator 2.1.3

<sup>14</sup> Indicator 1.3.1

<sup>15</sup> Indicator 2.1.3

<sup>16</sup> Indicator 1.3.1

**E. Awareness of Rights and Resources Available**

**E1 - At the time you were arrested, did you know that you have a right to have a lawyer defend your case?<sup>17</sup>** Yes / No

| <b>E2 - Did anyone inform you that you have a right to defend your case through a lawyer?<sup>18</sup> (Check all that apply)</b> |        |            |       |                 |        |        |
|---|--------|------------|-------|-----------------|--------|--------|
| No one informed me  | Police | Prosecutor | Judge | Court employees | Lawyer | Other: |

| <b>E3 - If you were informed of your right to have a lawyer, at what stage in the proceedings were you informed?<sup>19</sup></b> |  |
|---|--|
| Within 24 hours of arrest   |  |
| Before or at 1 <sup>st</sup> Remand (first court appearance)  |  |
| Between 1 <sup>st</sup> Remand and Charge Sheet Filing  |  |
| After Charge Sheet Filing but before Client's Court Statement   |  |
| Immediately Before Jail/Bail Hearing  |  |
| Between jail/bail hearing and witness examination   |  |
| At the witness examination  |  |
| Between witness examination and final hearing   |  |
| At the final hearing  |  |
| Other:  |  |

**E4 - At the time you were arrested, did you know that if you cannot afford to hire a lawyer to defend your case, that a lawyer could be appointed to represent you free of cost?<sup>20</sup>** Yes / No

**E5 - When you were brought to court, did the judge or court officer tell you that if you could not assign a lawyer yourself, the court could assign one for you free of cost?<sup>21</sup>** Yes / No

**E6 - To your knowledge, how much does it cost to hire a private lawyer to defend a criminal case?**

| <b>E7 - Hiring Private Defense Counsel<sup>22</sup></b>   |
|---|
| <b>1. Were you able to raise the money to hire a private lawyer?</b> Yes / No                           |
| <b>2. If yes, how were you able to raise the money to hire a private lawyer? (Check all that apply)</b> |

<sup>17</sup> Indicator 2.3.1  
<sup>18</sup> Indicator 2.3.2  
<sup>19</sup> Indicator 2.3.2  
<sup>20</sup> Indicator 2.3.1  
<sup>21</sup> Indicator 2.3.2  
<sup>22</sup> Indicator 2.3.6

|  |   |                                |  |        |
|--|---|--------------------------------|--|--------|
| Family savings/<br>liquid assets   | Sold family<br>property to raise<br>funds | Raised funds from<br>community | Received support<br>from political or<br>community<br>associations | Other: |
| <b>3. Were you able to keep the hired lawyer for the entire case proceedings? Yes / No</b>   |   |                                |  |        |
| <b>4. If you were not able to keep the lawyer for the entire case proceedings, did you receive free legal counsel? If so, how?</b> |   |                                |  |        |

|  |   |                                  |  |   |
|--|---|----------------------------------|--|---|
| <b>E8 - If you had no lawyer assigned during your pre-trial or trial proceedings, why did you not have a lawyer?<sup>23</sup> (select one)</b> |   |                                  |  |   |
| Ignorant of the need<br>for and availability of<br>lawyers   | Lack of financial<br>resources to pay a<br>lawyer | Inability to contact a<br>lawyer | Rejected free lawyer<br>because thought case<br>outcome would be<br>better without a<br>lawyer | Rejected free lawyer<br>because I don't trust<br>free lawyers |
| Other:   |   |                                  |  |   |

**E9 - If you received a free lawyer (NGO, Baitanik Wakil, DLAC, Bar association, or other), please describe how you were made aware of these services, and how the lawyer was assigned.<sup>24</sup>**

|  |   |   |        |  |
|--|---|---|--------|--|
| <b>E10 - If you received a free lawyer (NGO, Baitanik wakil, DLAC, Bar association, or other), did that lawyer request money from you for any legal services?<sup>25</sup></b> |   |   |        |  |
| No   | Yes, only for filing<br>petitions (court<br>fees) | Yes, for various legal services,<br>including court appearances, and<br>copies of documents | Other: |  |

|   |                   |       |         |          |                      |
|---|-------------------|-------|---------|----------|----------------------|
| <b>E11 - If you had a lawyer, how do you feel the lawyer took care of your case?<sup>26</sup></b> |                   |       |         |          |                      |
|   | Strongly<br>Agree | Agree | Neutral | Disagree | Strongly<br>Disagree |
| Lawyer was respectful and attentive to my problems  |                   |       |         |          |                      |
| Lawyer was working on the side of the prosecutor/police   |                   |       |         |          |                      |
| Lawyer made sure I understood my rights & case proceedings  |                   |       |         |          |                      |
| Lawyer made strong arguments for me in court  |                   |       |         |          |                      |
| Lawyer did not explain what was happening with my case  |                   |       |         |          |                      |
| Lawyer would have filed more petitions if I had paid more   |                   |       |         |          |                      |
| Lawyer did not challenge the government's version of the facts                                    |                   |       |         |          |                      |
| Lawyer worked hard to defend my rights in court   |                   |       |         |          |                      |

<sup>23</sup> Indicator 2.3.6

<sup>24</sup> Indicator 2.3.3

<sup>25</sup> Indicator 2.3.6

<sup>26</sup> Indicator 4.1.1

|   |  |  |  |  |  |
|---|--|--|--|--|--|
| I trusted my lawyer                                       |  |  |  |  |  |
| It was difficult to contact my lawyer                     |  |  |  |  |  |
| Lawyer was representative of my ethnicity/caste/gender    |  |  |  |  |  |
| Lawyer's representation made a positive impact on my case |  |  |  |  |  |

| E12 - How do you rate your overall experience of having a lawyer defend your case? <sup>27</sup> |          |         |          |               |
|--|----------|---------|----------|---------------|
| Very positive  | Positive | Neutral | Negative | Very Negative |
| Please tell us why:  |          |         |          |               |

| E13 – 1. Did you feel you understood the pre-trial and trial proceedings held in the Nepali language? <sup>28</sup> Yes / No |   |   |        |
|--|---|---|--------|
| 2. If no, why not?   |   |   |        |
| I don't speak/understand Nepali and no interpreter was provided in my language   | The terminology was confusing and my lawyer did not adequately explain it | The terminology was confusing and I had no lawyer to explain it to me | Other: |

| E14 - How do you feel about your experience in criminal justice system? <sup>29</sup> |                |       |         |          |                   |
|---|----------------|-------|---------|----------|-------------------|
|   | Strongly Agree | Agree | Neutral | Disagree | Strongly Disagree |
| I feel I was treated fairly by the police   |                |       |         |          |                   |
| I feel I was treated fairly by the prosecution  |                |       |         |          |                   |
| I feel I was treated fairly by the judge  |                |       |         |          |                   |
| I feel I received a fair trial  |                |       |         |          |                   |
| I feel the sentence I received was fair   |                |       |         |          |                   |

| E15 - In your opinion, how important were each of the factors below to the outcome of your case? <sup>30</sup> |                |           |                    |         |               |
|--|----------------|-----------|--------------------|---------|---------------|
|  | Very Important | Important | Somewhat Important | Neutral | Not Important |
| Honest and fair judges   |                |           |                    |         |               |
| Good Lawyer  |                |           |                    |         |               |
| Fair application of the relevant law   |                |           |                    |         |               |
| Political support/pressure   |                |           |                    |         |               |
| Media support/pressure   |                |           |                    |         |               |
| Community support/pressure   |                |           |                    |         |               |

| E16 - Are you receiving any other services other than defense of your case from NGOs or projects? <sup>31</sup> Yes / No |
|--|
|  |

<sup>27</sup> Indicator 4.1.1

<sup>28</sup> Indicator 2.3.5

<sup>29</sup> Indicator 4.1.2

<sup>30</sup> Indicator 4.1.2

<sup>31</sup> Indicator 2.3.4

If yes, NGO Name:

Please describe what other services you are receiving

**E17 - What do you feel must be changed to ensure a fair trial for someone in your circumstance?**

## Guidance Note:

### Questionnaire – Detainee/Prisoner Interviews

This guidance note explains the nature of the data sought for each question in the detainee/prisoner questionnaire, as well as – briefly – the data’s relevance to the A2J indicators.

#### A. Background Information

##### A1 - Personal Data<sup>195</sup>

Name is only for verification purposes and any necessary follow-up, and will be kept entirely confidential. All personally identifiable information (PII) shall be kept strictly confidential, though aggregate results will be reported and published. This needs to be clearly communicated to each interviewed person.

For most persons in custody, they will not have a phone number available to direct communication (few exceptions are expected). The phone number should be for a family member or friend through whom we can get in touch in order to get in touch with the prisoner/detainee. It is unlikely we will actually need to contact these people. The interviewer should explain that this is voluntary and will be kept strictly confidential.

Approximate age is the best we can hope for. This data will be used to help develop a rough profile for prisoners throughout Nepal, and is particularly important in targeting future services to particular groups (i.e., juveniles, young men) and identifying trends (i.e., who is getting arrested for what kinds of offenses).

Gender breakdown for prisoners can generally be obtained through Office of Prison Management. Women constitute less than 10% of the population but for the purposes of the assessment, we should oversample women who are in the prison system to ensure a sufficient sample size.

Ethnicity/Caste is another important identifier for the purposes of profiling the prison population of Nepal and identifying trends (i.e., whether particular groups are being targeted). The Government of Nepal (GoN) has official categories used by many development donor agencies (see Nepal Living Standards Survey 2010/2011), and ILF-N should use seek to use the same categories to ensure that information from our research can be more broadly used and compared with other studies. Data collectors should complete this field using the following codes:

1=Hill Brahmin 2=Hill Chhetri 3=Terai Brahmin 4=Terai Chhetri 5=Hill Middle Caste  
6=Terai Middle Caste 7=Hill Dalit 8=Terai Dalit 9=Newar 10=Hill Janjati 11=Terai Janjati  
12=Muslim 13=Other Minorities

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<sup>195</sup> Indicator 2.1.2

Languages spoken by the prison population will help inform the question of whether the criminally accused are able to understand the proceedings against them. The right to have an interpreter if you don't understand the language of the proceedings is also a fair trial right. (Later questions seek to determine the extent to which lawyers act to facilitate that understanding.) If the interviewer is unable to speak with a detainee because of language barriers they should NOT avoid interviewing the detainee, even if only to determine what language they speak.

Information about the home district of the prisoner will tell us more about what resources this person may have at his/her disposal. If there is a high proportion of persons from districts far from the prison, these persons may have substantially less access to resources because their families are difficult to contact and unavailable to support them.

8., 9. & 10. Information about the VDC/Municipality, ward and street address level may inform us of trends surrounding the population centers from which prisoners are mostly drawn (or conversely, whether prisoners tend to be from rural areas).

The composition of the prisoner's family network (i.e., dependents, below) will inform a broader understanding of the true socio-economic cost and impact of incarceration. For this question, however, the intention is to understand the prisoner's family living situation (i.e. father/mother, spouse, etc.).

The prisoner's educational history should be recorded based on the following codes:  
1=Pre school/Kindergarten, 2=Class 1, 3=Class 2, 4=Class 3, 5=Class 4, 6=Class 5, 7=Class 6, 8=Class 7, 9=Class 8, 10=Class 9, 11=Class 10, 12=SLC, 13=Class 12/intermediate level, 14=Bachelor, 15=Master level, 16=Professional degree, 17=Literate(Non formal education), 18=Illiterate

## A2 - Economic Data<sup>196</sup>

1., 2., 3. & 4. A prisoner's self-identified occupation, or means of earning income, and annual income before incarceration are critical pieces of data that inform both the resources available to him/her and the impact/cost of incarceration. Value of property held jointly or singly by the prisoner also directly relates to resources available to seek legal services (or otherwise influence his prosecution). These will, of necessity, be self-reported. Occupation should be coded based on the three digit Nepal Living Standard Survey (NLSS) occupation codes.

Research regarding income as well as value of assets held by both the defendant and his family are critical to policy level decisions about eligibility for government-funded legal representation. Presently, the eligibility cut-off set by the Legal Aid Act is 40,000 rupees. As of 2007, approximately 52% of prisoners surveyed reported no income at all, and an additional 19% reported an income of below 40,000 rupees (the 2007 baseline survey

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<sup>196</sup> Indicator 2.1.2, 2.3.6

disaggregated by: (1) no income; (2) below 40,000; (3) between 40 and 100,000; (4) above 100,000). A significant proportion of respondents (14%) during the 2007 survey declined to mention their income level and the value of their property. Considering inflation at a rate of 11-13% in Nepal over the last several years, the income cut-off for eligibility should be raised substantially from 40,000. Advocacy efforts have been made by civil society organizations to reduce lower the threshold for eligibility, as well as streamline the process so that certification from a local VDC is not a pre-requisite to service. However, as reform efforts progress, there is also a great likelihood that the government, under budget pressure, would seek to limit the number of eligible persons or create a more multi-variable means test that takes into account value of assets held by a defendant and his family.

5. An important factor rarely considered in discussions surrounding a means test for eligibility for government-funded services is the considerable effect that arrest and incarceration can have on a person's income. In addition to the days of work lost while a person is held in custody, the stigma of arrest also affects the person's ability to secure new employment, whether or not s/he is convicted of the original offense. This question seeks a narrative response of how the prisoner reports the arrest and subsequent detention impacted his/her income, the consequences of which will also be felt by any dependents. This data will be crucial in painting a more complete picture of the socio-economic costs of arrest and detention. If the person is currently in detention, and has not previously been detained and later released, mark this "N/A."

### A3 - Dependents<sup>197</sup>

This question is intended to capture the number of persons who depend upon the prisoner/defendant for their income. This includes children, spouses, elderly parents/grandparents, or other underemployed family members who are or were sustained through the prisoner's income prior to arrest and incarceration. This question also hopes to capture specific outcomes for children of the prisoner/defendant (whether raised in or out of prison, with family or away from family) when the parent/guardian is arrested and incarcerated, as well as the prisoner's narrative report of how his/her dependents have been impacted by his/her incarceration.

Eligibility for government-funded legal representation will be a key area of debate in the coming years for institutional legal aid reform in Nepal (and will continue to be a contentious area if the example of other jurisdictions is any indication). However, an income-only means test for eligibility fails to take into account the full complexity of what "poverty" entails for differently situated people. Additionally, this data helps to complete the picture of the socio-economic costs of incarceration.

### B. Information about the criminal case

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<sup>197</sup> Indicator 2.3.6

#### B1 - Offense Charged<sup>198</sup> and B2 - Court or Quasi-judicial authority<sup>199</sup>

Disaggregation by type of offense charged and the court or quasi-judicial authority in which prosecution is commenced is critical to identifying where the greatest need for legal representation is. Based on known practices, the greatest proportion of persons incarcerated without ever having accessed a lawyer will likely be persons prosecuted before the quasi-judicial authorities where there is no practice of hiring a lawyer for one's defense at trial (except by a handful of NGO lawyers), and minimal understanding of fair trial rights by the authority.

#### B3 - Current stage of case (procedural posture)

Data about the procedural posture of the case disaggregates the proportion of prison populations into pretrial, pre-conviction, and various appellate-review-stage detainees. The prisoner may not be fully aware of where his/case is at, procedurally, so follow up questions may need to be asked of both the prisoner and the officials managing the prison facility to ascertain exact stage of the proceedings. If the detainee does not know the stage their case is at, this should NOT be left blank, and a note should be made to that effect.

#### B4 - Dates of case proceedings & custody status<sup>200</sup>

This data is incredibly important for determining the median and average length of pre-trial and trial detention experienced by prisoners. While exact dates are preferable (and may be ascertained through documents possessed by the prisoner or the local jail official), it is possible that the prisoner will not have such precise dates available. In such a situation, the month and year should be noted. Follow up questions may need to be asked of both the prisoner and the officials managing the prison facility to ascertain exact dates to the extent possible.

#### B5 - Appellate review during the course of the case (interlocutory review)<sup>201</sup>

1. & 2. Through these questions, we want to measure the relative frequency of review, disaggregated by the catalyst for review, to ascertain any correlation between having a lawyer and the rate of interlocutory review. The expected result would show a strong correlation between having a lawyer and receiving such review. The 2007 survey found review initiated sua sponte by the appellate court (which is authorized in the Muluki Ain) in the absence of a petition from either the defendant himself or a lawyer on his behalf in less than 1% of prisoners' cases. The 2007 survey also found that fewer than 20% of prisoners surveyed made interlocutory appeals through their lawyers. Only 8 of 2214

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<sup>198</sup> Indicator 2.1.2

<sup>199</sup> Indicator 2.1.2

<sup>200</sup> Indicator 3.1.1, 3.1.2

<sup>201</sup> Indicator 3.1.3

prisoners surveyed in 2007 had the wherewithal to initiate such review on their own motion unassisted by lawyers.

The substantive reason for interlocutory review is also important, but may be inaccurate due to a lack of understanding about what exactly was challenged. For the purpose of data collection, the distinction should be made between whether the appeal was made to challenge the jail/bail order (a relatively common practice conducted by private lawyers and NGO lawyers) and some other appeal which primarily argues that detention is unlawful (i.e., habeas).

& 5. A positive outcome of review, particularly release from custody - unlikely to be found, considering the sample survey population is in custody - may be correlated as well with representation by a lawyer.

### B6 Appeals from conviction

Data relating to outcomes of appeals of conviction may be correlated to data provided below about whether the prisoner was defended by a lawyer during the appellate process. Some prisoners may not know much about what happened throughout their case, let alone through the appellate process (or whether any process happened at all). While all reasonable attempts should be made to obtain accurate information about the process of the case, the fact that the prisoner is utterly ignorant about the case proceedings is also an indicator of the failure of the justice system to properly ensure notice and meaningful representation by counsel.

### B7 - Case Outcome

Depending on the quality and quantity of data obtained through this survey, data regarding final outcomes may be correlated with representation by a lawyer. Again, because the sample population is limited to prisoners, outcomes are de facto not ideal: presumably all the surveyed prisoners would have preferred acquittal and release. However, it may be interesting to look at case outcomes and perceptions of having received a fair trial, to see whether having had a lawyer - and what kind of lawyer - impacted a person's perception of having been treated fairly by the system.

## C. Access to Legal Representation During Pre-trial and Trial Proceedings

### C1202

This question seeks to determine whether the prisoner/detainee was assigned a lawyer at any time between arrest and conviction at the trial stage. Even if the prisoner/detainee only had a lawyer for one hearing, and was left without counsel for the rest, the answer to this

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<sup>202</sup> Indicator 2.1.3

question should be yes. Later questions will break down exactly when/how a lawyer provided service.

However, in order to answer yes, the lawyer must have actually been assigned/appointed, either by being privately retained (hired, for example, to argue the jail/bail hearing), or appointed by the court/NGO/bar. To be considered to have “represented” the prisoner/detainee, the lawyer must have either filed petition(s) to the court regarding the criminal case and/or appeared in court for at least one hearing. If the prisoner/detainee merely spoke to a lawyer in order to provide information (i.e., interview about torture in detention, or negotiation of appointment without success) that does not count, and the answer should be no.

## C2

This question seeks to identify which of the various potential criminal legal defense resources was accessed by the prisoner/detainee. This question should be self-explanatory and easy to understand on the part of the prisoner/detainee. However, it is possible some probing questions may be necessary to identify exactly which service was accessed, particularly in distinguishing between the baitanik wakil and DLAC, between DLAC and the bar association programs, and between NGOs and the bar association programs.

This data will be useful in mapping services available and the relative accessibility of those services to persons in custody.

## C3203

This question seeks to identify exactly when – if the prisoner/detainee obtained a lawyer – the lawyer first intervened in the case. The answer may be difficult to ascertain with great accuracy, as the prisoner/detainee may not be sufficiently aware of all the various stages in his/her criminal case (due to lack of sophistication, but also because it is likely s/he was often not produced in person to the court/authority for those proceedings). The interviewer will need to be educated to be familiar with the various stages in order to be able to ascertain through probing questions at what stage the lawyer first intervened.

This data will help determine where the gaps are legal representation. For example, based on other survey data, we know that baitanik wakil almost never intervene before the charge sheet is filed. It is highly likely based on anecdotal evidence that this trend will be reflected in the practice of private lawyers as well as DLAC and bar association lawyers, and less so for NGO lawyers.

## C4204

This question also seeks to identify exactly when – if the prisoner/detainee obtained a lawyer – the lawyer first intervened in the case. As the question above may prove more

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<sup>203</sup> Indicator 1.1.1

<sup>204</sup> Indicator 1.1.1

difficult for the prisoner/detainee to answer, asking the prisoner/detainee to recall in days between arrest and representation by a lawyer will help triangulate a more accurately point at which intervention occurred.

#### C5205

This question seeks to help identify the scope of work actually conducted by the lawyer in the course of the criminal case. The prisoner/detainee may not be fully aware of these details, so the interviewer will likely need to ask probing questions to attempt to determine these answers.

Of course, mere presence at court hearings says little about the quality of the legal representation provided (lawyer interviews may reveal more about competencies of lawyers), but the a higher rate of appearances, disaggregated by the type of attorney who was assigned, should tell us something about the relative level of engagement by private, government-funded, and NGO lawyers.

#### C6206

This question seeks to measure accessibility of lawyers through point of access (i.e., if there are lawyers visiting the detention centers and jails, persons in those facilities who don't have lawyers have a greater opportunity to access counsel) as well as measure the level of engagement of lawyers (which relates to competency and the quality of service experienced by the claim-holder) disaggregated by type of lawyer assigned (private, government-funded, or NGO/bar).

#### C7

This data will help in the mapping of services available in the districts studied.

### D. Access to Legal Representation During Post-Conviction Appellate Proceedings

#### D1207

This question seeks to determine whether the prisoner/detainee was assigned a lawyer at any time between conviction at the trial stage and any subsequent appeals (including at the Supreme Court). Even if the prisoner/detainee only had a lawyer for one hearing, and was left without counsel for the rest, the answer to this question should be yes. Later questions will break down exactly when/how a lawyer provided service.

However, in order to answer yes, the lawyer must have actually been assigned/appointed, either by being privately retained (hired, for example, to write the appeal), or appointed by the court/NGO/Bar. To be considered to have “represented” the prisoner/detainee, the

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<sup>205</sup> Indicator 1.3.1

<sup>206</sup> Indicator 1.3.2

<sup>207</sup> Indicator 2.1.3

lawyer must have either filed petition(s) to the court regarding the appeal/detention and/or appeared in court for at least one hearing. If the prisoner/detainee merely spoke to a lawyer in order to provide information (i.e., interview about torture in detention, or negotiation of appointment without success) that does not count, and the answer should be no.

#### D2208

This question seeks to measure the extent to which any legal defense service provider is providing continuity of service from trial through appeals of conviction, as well as gaps in these services. Changing lawyers is not itself indicative of a problem with continuity, but it is expected that many persons in Nepal will not have a lawyer in one or the other of these phases. The likelihood that a change of lawyers does not result in a loss of knowledge to the detriment of the case also depends on what organization assigns the lawyer (see next question). If the prisoner paid for limited private lawyer services during trial, but due to subsequent resource problems, obtains a baitanik wakil for appeal, there may be greater knowledge loss in that transfer than if the same NGO appointed different lawyers to represent the same prisoner over the course of the case.

#### D3209

This question seeks to measure the extent to which any legal defense service provider is providing continuity of service from trial through appeals of conviction, as well as gaps in these services.

#### D4

This question also seeks to identify exactly when – if the prisoner/detainee obtained a lawyer – the lawyer first intervened during the post-conviction phase of the case. If the prisoner/detainee had the same lawyer that continued representation through trial and post-conviction, the answer should be “Before the first hearing in appellate court”.

#### D5210

This question seeks to help identify the scope of work actually conducted by the lawyer in the course of the post-conviction proceedings. The prisoner/detainee may not be fully aware of these details, so the interviewer will likely need to ask probing questions to attempt to determine these answers.

Mere presence at court hearings says little about the quality of the legal representation provided (lawyer interviews may reveal more about competencies of lawyers), but the a higher rate of appearances, disaggregated by the type of attorney who was assigned, should tell us something about the relative level of engagement by private, government-funded, and NGO lawyers.

#### D6

This question seeks to measure accessibility of lawyers through point of access (i.e., if there are lawyers visiting the detention centers and jails, persons in those facilities who

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<sup>208</sup> Indicator 1.3.1

<sup>209</sup> Indicator 2.1.3

<sup>210</sup> Indicator 1.3.1

don't have lawyers have a greater opportunity to access counsel) as well as measure the level of engagement of lawyers (which relates to competency and the quality of service experienced by the claim-holder) disaggregated by type of lawyer assigned (private, government-funded, or NGO/bar).

D7

This data will help in the mapping of services available in the districts studied.

## E. Awareness of Rights and Resources Available

E1211

This question hopes to measure the prisoner's awareness before arrest of the right to counsel. The prisoner/detainee's aware of the right may have progressed or developed since the arrest due to his/her interaction with the system, so it is important for the interviewer to ensure the answer is about the prisoner/detainee's awareness prior to his/her arrest.

E2212

This question helps to determine whether justice sector stakeholders with the opportunity (and arguably, obligation) to inform an arrested person of his/her right to counsel utilize that opportunity, and is relevant to the analysis of what points of access exist for an indigent accused person.

For this question, the interviewer should indicate all parties within the system who informed the prisoner/detainee of the right. "Inform" may include any mention to the prisoner/detainee that s/he should assign a lawyer because it is his/her right but may NOT include advice to retain a lawyer where the fact that it is a right is not explicitly mentioned. "Inform" also does not include merely asking the question, "Do you have a lawyer?" unless of course, that question is followed by information about the right to free legal representation to persons who cannot afford it. Telling someone they should hire a lawyer is not equivalent to informing them of their right to a service. Arrested persons without financial resources or political/social connections may be aware that it would be beneficial to hire a lawyer, but if they are unaware that it is a right, they may feel less empowered to seek those services through alternative less-costly means (such as an NGO).

E3213

This question seeks to determine the stage at which prisoners/detainees are informed of their right to counsel. Obviously, the earlier a detainee is informed, the more opportunity s/he has to access a lawyer. The earlier a lawyer is assigned, the more likely – depending on lawyer competency – that the detainee's fair trial rights will be protected. The prisoner/detainee may not fully recall exactly when s/he was informed, so the interviewer

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<sup>211</sup> Indicator 2.3.1

<sup>212</sup> Indicator 2.3.2

<sup>213</sup> Indicator 2.3.2

will likely need to ask probing questions to attempt to determine these answers, based in large part on who the informer was.

E4214

This question takes the fact of awareness a step further, to determine to what extent the prisoner/detainee knew that legal representation free of cost was available, and that it is a right guaranteed for indigent persons. The prisoner/detainee's awareness of the right may have progressed or developed since the arrest due to his/her interaction with the system, so it is important for the interviewer to ensure the answer is about the prisoner/detainee's awareness prior to his/her arrest.

E5215

It is not clear in Nepali law whose obligation it is to ensure that a criminally accused person is informed of his/her right to counsel. Considering the various points at which a government actor could inform the client (including police at arrest and during custody and interrogation, the government attorney during interrogation, and the judiciary and court officials when the person is brought before court), there are many ways to ask this question. Considering the size of the Nepal Police, and the number of personnel staffing government attorneys' offices, the point of contact that seems more susceptible to reform is the judiciary because of the relatively low number of judges who would need to be trained/directed to relay this information. Additionally, because the court manages the baitanik wakil program directly, it is (in theory) the government actor most likely to inform an unrepresented defendant of the availability of free legal representation. For that reason, this question seeks to determine whether the court or court employees are, in practice, advising defendants of the availability of legal representation free of cost.

E6216

This data will help inform the analysis of the costs of obtaining legal counsel as one aspect of the barriers to access to counsel. This data may be collected in narrative form, in whatever terms of retaining a private lawyer the prisoner/detainee understands. The narrative answers will undoubtedly reveal a diversity in the ways private lawyers charge for their services, and the way that persons in need of lawyers understand that cost. The answer may involve, for example, per-hearing or per-petition payment, or may involve a lump sum for representation throughout the entire case (unlikely). The interviewer should endeavor to obtain a figure (an estimation, in rupees) of the cost of retaining private counsel in addition to the service that such a figure buys. Hard numbers will be used to compare charges and practices across districts to ascertain trends amongst legal practitioners, but also in comparison to the burden such costs impose considering the income/assets (or lack thereof) of the vast majority of prisoners/detainees.

E7 - Hiring Private Defense Counsel<sup>217</sup>

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<sup>214</sup> Indicator 2.3.1

<sup>215</sup> Indicator 2.3.2

<sup>216</sup> Indicator 2.3.6

<sup>217</sup> Indicator 2.3.6

This question seeks to help measure the cost, beyond a simple financial transaction, of retaining private counsel, but identifying the related resources (financial and socio-political) that enable and limit the ability to retain private counsel.

The last questions are incredibly important, and seek to determine whether the defendant and his/her family were able to secure the services of the private lawyer for the entire period for which the service was needed. Sometimes, accused persons on the edge of poverty deplete their limited resources to hire private counsel for one or more hearings, and are subsequently abandoned by their private lawyers when they are no longer able to pay. It is not known with what frequency this occurs, but it is likely to be very high. It is further unknown whether such defendants are then able to access the services of free legal representation.

E8218

This question was asked in the 2007 baseline survey, with slightly different options. In that survey 42% of respondents who had no lawyers cited lack of financial resources to pay, and 22% cited an inability to contact a lawyer (13% cited ignorance). The perceptions of the claim-holder with regard to his/her personal barrier(s) to access are very important and may help determine the best intervention strategies (i.e., if nearly half of all respondents cited financial reasons, that points to insufficient awareness of the availability of free representation, and a failure of the courts to both ascertain need and assign the baitanik wakil).

The respondent should be asked to choose the answer that best represents their feeling about why they did not have a lawyer.

Ignorant of the need for and availability of lawyers

This answer should be selected if the primary reason the prisoner/detainee feels both that (1) s/he did not have a lawyer was because s/he didn't realize s/he needed one, and (2) s/he did not realize that free legal representation might be available. This answer should NOT be selected if, while the prisoner/detainee says s/he is ignorant of why she needs a lawyer but also indicates that s/he met with a free legal aid provider and declined services for any reason (see other options).

Lack of financial resources to pay a lawyer

This answer should be selected if the primary reason the prisoner/detainee feels s/he did not have a lawyer was because s/he did not have the resources to pay for one. Selection of this answer reflects the lack of awareness of the prisoner/detainee about the availability of free legal representation from the court or other providers. This answer should NOT be selected if the prisoner/detainee reports that s/he met with a free legal aid lawyer (i.e., baitanik wakil), but that the lawyer demanded some form of payment. Such an answer should be noted in "Other". If the prisoner/detainee met with a free legal aid lawyer, but did not want the service for another reason, the interviewer should consider whether one of the other options (i.e., rejected free lawyer because don't trust lawyers).

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<sup>218</sup> Indicator 2.3.6

#### Inability to contact a lawyer

This answer should be selected only if the primary reason the prisoner/detainee feels s/he did not have a lawyer was due to the inability to contact one, either through access to a telephone or family or government agents (police, government attorneys, judges, court employees). This answer should NOT be selected, for example, if the prisoner/detainee also states that “even if I did contact a lawyer, I wouldn’t be able to pay him/her”.

#### Rejected free lawyer because thought case outcome would be better without a lawyer

This answer should be selected only if the prisoner/detainee met with a lawyer who offered free legal representation (i.e., from NGO, Bar, baitanik wakil, etc) and then declined the service primarily because s/he felt that the presence of a lawyer would lead to a worse outcome in the case, or that the judge/quasi-judicial authority would look unfavorably upon the defendant because s/he had obtained a lawyer. This answer should NOT be selected if the prisoner/detainee did not actually meet with a lawyer who offered free legal representation. If the prisoner/detainee never met with any free lawyers, but decided s/he would receive a more favorable outcome without any lawyer, that should be noted in “Other”.

#### Rejected free lawyer because don’t trust (free) lawyers

This answer should be selected only if the prisoner/detainee met with a lawyer who offered free legal representation (i.e., from NGO, Bar, baitanik wakil, etc) and then declined service primarily because s/he did not trust the free service being offered. Reasons to distrust the free service offered may include, but is not limited to, believing that the service will be low quality, believing that the lawyer will cheat him/her and later demand payment, etc. This answer should NOT be selected if the prisoner/detainee did not actually meet with a lawyer who offered free legal representation. If the prisoner/detainee never met with any free lawyers but decided s/he could not trust lawyers, that should be noted in “Other”.

#### E9219

This question calls for a narrative description of how the prisoner/detainee recalls that s/he was made aware of legal defense services and how the lawyer was eventually assigned. Considering the great variety of ways in which prisoners/detainees may access free legal representation, this question does not attempt to pre-categorize the answers.

The interviewer should record the process described with as much detail as possible, from the point of view of the prisoner/detainee (i.e., one day, I was called by the jailer to see a visitor, who turned out to be a lawyer. The lawyer told me...).

#### E10220

This question seeks to help determine the costs of assigning a lawyer, even a lawyer whose services are supposed to be “free”. Anecdotal evidence suggests that free legal aid lawyers (from NGOs, baitanik wakil, DLAC, and bar programs) sometimes require financial contributions from the defendant for various reasons. If no financial contribution was sought, the answer should be no. Otherwise, the other options seek to disaggregate the kind

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<sup>219</sup> Indicator 2.3.3

<sup>220</sup> Indicator 2.3.6

of contributions being sought (from the benign contribution to offset court filing fees to potentially unethical demands for payment to continue representation).

#### E11221

This series of Likert items seeks to measure how prisoners/detainees who had lawyers felt about the services their lawyers provided (or rather, failed to provide). Specific items also seek to tease out the clients' perception of the lawyers' abilities as to particular activities such as making oral arguments, filing petitions, or keeping the client informed of what was happening.

Some of the questions are conveyed as negative statements in order to reduce possible acquiescence bias.

#### E12222

This question seeks to obtain an overall positive/negative impression of the legal representation provided. Potentially, this data can be used to determine whether there is any correlation between when representation commenced, activities performed by the lawyer, and the positive/negative impression on the client.

#### E13223

The right to an interpreter is a fundamental right for the criminally accused, and this question seeks to determine whether, from the prisoner/detainees' perspective, this right was being met. However, whether an indigent, uneducated person truly understands the case proceedings against him/her is a deeper question than one of language alone. The role of a defense lawyer is in part to facilitate that understanding, so that the defendant can then participate in his/her own defense (another fair trial right). This questions goes beyond simply asking whether language was a barrier, and asks whether the prisoner/detainee was able to understand proceedings, whether through a lawyer or otherwise.

#### E14224

This series of Likert items seeks to measure how prisoners/detainees perceive the fairness of the proceedings, and the fairness with which they felt various government actors treated them.

#### E15225

This series of Likert items seeks to measure how prisoners/detainees perceive the importance and influence of various factors and actors in the outcome of a criminal case.

#### E16226

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<sup>221</sup> Indicator 4.1.1

<sup>222</sup> Indicator 4.1.1

<sup>223</sup> Indicator 2.3.5

<sup>224</sup> Indicator 4.1.2

<sup>225</sup> Indicator 4.1.2

<sup>226</sup> Indicator 2.3.4

This question seeks to identify any other NGO-provided services other than legal representation in the criminal case that the prisoner/detainee is receiving, in order to start mapping services in the district. It will also help to identify any missed opportunities (i.e., if the NGO providing other legal services is NOT providing legal representation in the criminal case, why not?).

E17

This question calls for a narrative, and is an opportunity to allow the prisoner/detainee to answer in any way that is not pre-formed or imposed by the interviewer. This will allow some insight into what the prisoner/detainee really cares about from their own point of view, rather than what the designer of this study cares about, and can serve as a critical reality check and counterpoint to the data collected above.

## **Annex D: The Code of Conduct for Legal Practitioners, 2051 (1994)**

The Code of Conduct for Legal Practitioners, 2051 (1994)

The Nepal Bar Council has, in exercise of the powers conferred on it by section 27 of the Nepal Bar Council Act, 2051, (1994) framed the following Rules.

1. **Short Title and Commencement:** (1) These Rules may be cited as the "Code of Conduct for Legal practitioners, 2051".

(1) This Regulation shall commence on such a date as the Council may appoint.

2. **Definition:** Unless the subject or context otherwise requires, in this Rules:

(a) "Act" means the Nepal Bar Council Act, 2050.

(b) "Disciplinary Committee" means the Disciplinary Committee referred to in section 11 of the Act.

(c) "Court" includes also a quasi-judicial body.

(d) "Bar Association" means the Nepal Bar Association and includes also the units thereof.

3. **Professional Conduct of the Legal Practitioners:** (1) A Legal practitioner shall abide by the following professional conducts:

(a) A legal practitioner shall not commit any act contrary to the basic principles of morality.

(b) A legal practitioner shall not induce his client to initiate any false case.

(c) A legal practitioner shall not fabricate a case with an intention to harass or to avenge any person.

(d) A legal practitioner shall not withhold his cooperation to the court in the disposal of cases either directly or indirectly.

(e) A legal practitioner shall not abuse or cause to abuse the judicial process.

(f) A legal practitioner shall not prohibit his client from making true statement before the court.

(g) A legal practitioner shall not spread or disseminate or transmit a false information of any kind which may bring dishonor to the court or Judge or legal practitioner during the course of the discharge of judicial function.

(h) A legal practitioner shall not return the brief to his client in such a way that the service of a new lawyer could not be availed of by him.

(i) A legal practitioner shall not misappropriate the funds of any organization or association.

(j) A legal practitioner shall not act contrary to the following codes of conduct:

- Shall be punctual to the court;

- shall appear in court in prescribed dress with black coat;

- shall show due respect to the Bench and opposing Counsel;

- shall refrain from making false accusation, expressing hatred or angers or enmity against opposing counsel and his client;

- shall treat with courtesy to the officers/staffs of the Court;

- shall plead his case with due respect to the Bench only when his turn comes up.

(k) No precedent to be cited and knowingly pleaded which has been already overruled and no law be pleaded which is not applicable or is repealed or which has been amended subsequently, in order to benefit one's client.

(l) A legal practitioner shall not knowingly assert any fact before the Bench unless the same could be substantiated from the documents from his case file.

(m) A legal practitioner shall not accept a case involving a document in which he has reason to believe to be called himself as a witness.

(n) A legal practitioner shall not disclose any information communicated to him by his client in his professional capacity in any manner.

(o) A legal practitioner shall not raise/use large signboard, no previous designation or status not related to the legal practice to be published in name card or visiting card or file or letter-pad with an objective of commercial publicity.

(p) A legal practitioner shall not raise/use large signboard, no previous designation or status not related to the legal practice to be published in name card or visiting card or file or letter-pad with an objective of commercial publicity.

Provided that this restriction shall not apply in case of those documents in which a legal practitioner's field of specialization or expertise on particular type of cases are indicated or printed.

(q) A legal practitioner shall not stipulate his fees on percentage or on contractual basis or by way of bidding from the client.

(r) A legal practitioner shall not appear before a court under the influence of any intoxicating drinks or drug the course of his professional duty.

(s) A legal practitioner shall not base his fees on the outcome of a case.

(t) A legal practitioner shall not submit any false record/statement to the council as and when demanded.

(u) A legal practitioner shall not certify or sign any document which has not been prepared by himself or under his instruction or advise the same is prepared by his junior working in his firm/chamber.

(v) A legal practitioner shall not use or engage any tout or agent for commission with a view to solicit any client.

(w) A legal practitioner shall not engage himself in the business/transaction of transfer of properties as a broker.

(x) A legal practitioner shall not involve in drafting or pleading of the same case on behalf of both the plaintiff and defendant and also shall not instruct knowingly any other law practitioner or writer or other persons who work under/with him.

(y) A legal practitioner shall not prepare/use any blank paper obtained from the client converting the same into a legal deed or construct a document with a view to gain benefit for himself and causing harm to the client;

(z) A legal practitioner shall not destroy or otherwise render invalid as evidence any original document obtained from the client on instance from the opposite party to the case;

(aa) A legal practitioner shall not make available any original documents/evidence received from his client to the opposite party with a motive to bestow benefit to the latter.

(ab) A legal practitioner shall not commit any kind of corruption related offence.

(ac) A legal practitioner shall not commit any crime related to moral turpitude.

(2) A Senior Advocate shall abide by the following code of conducts in addition to the codes as referred to above in sub-rule (1):

(a) While pleading before a Bench in any case he shall not appear without engaging at least one advance with him.

(b) A Senior Advocate, under normal circumstances, shall not appear before an administrative offices for pleading.

4. Complaints:

(1) A complaint may be lodged with the Council on the matter of violation of professional conduct by any legal practitioner.

(2) Every complaint to be filed pursuant to sub-rule (1), shall accompany with Rs. 100/ case or Bank draft as fees and must specify the allegation of breach of code of conduct by a particular legal practitioner with evidential support.

Provided that no fee shall be payable on complaints pertaining to the information or notice forwarded by the Court or Bar Association.

(3) The Disciplinary Committee before initiating actions in connection with a complaint may direct the complainant to place further information or documents.

5. Confidentiality to be Maintained:

The Council and the Disciplinary Committee shall maintain confidentiality as to the name of the complainant.

6. Inquiry:

The Council prior to award a punishment for violation of the professional conduct against any legal practitioner shall observe the following procedures:

(1) Where a complaint has been lodged with the Council against a legal practitioner or any information has been received in this connection the Disciplinary Committee may on the basis thereof, carry out of cause to be carried out an inquiry as to whether or not it was necessary to initiate proceedings against the legal practitioner.

(2) If as result of an inquiry conducted under sub-rule (1) a case is established against any accused legal practitioner, the Disciplinary Committee shall give reasonable opportunity requiring him to explain his position against the charges.

(3) While giving an opportunity to defend the charges leveled against the concerned legal practitioner, pursuant to sub-rule (2), the grounds on which the charge is based and the punishment that may be awarded to him shall also be specified.

7. Punishment:

(1) If any legal practitioner is found to have for the first time, violated the conducts referred to in clause (a) to (u) of sub-rule (1) and in sub-rule (2) or Rule 3, he shall be admonished.

(2) If any legal practitioner is found to have violated the conducts referred to in clauses (v) and (2) of sub-rule (1) or Rule 3, or violated the conducts after having been awarded the punishment of admonition once before, his licence shall be suspended restricting him from legal practice for a specific period of time.

(3) If any legal practitioner is found to have violated the conducts referred to in clauses (x) to (ac) of sub-rule (1) of Rule 3 or if he is found to have violated the conducts again

even after having been awarded the punishment of suspension of the licence restricting the practice of law for a specific period of time, the licence of such a law practitioner shall be revoked.

8. Notice of Punishment:

The notice of punishment awarded to a legal practitioner shall be communicated to the courts, the Judicial Council, the Office of the Attorney-General of the Kingdom of Nepal and the Nepal Bar Association.

9. Letter of Appointment of a Legal Practitioner:

In order to defend and to plead in a case before any court a legal practitioner shall submit a letter of appointment as a law practitioner in the form as prescribed in schedule-1 of this code.

10 **Repeal** : The Law Practitioners' Regulations, 2025 (1968) has been hereby repealed.



## Annex E: ILF-Nepal Advocate Standards of Performance

### **The International Legal Foundation – Nepal Advocate Standards of Performance**

The primary goal of ILF Nepal is to provide quality legal aid to indigent people accused of a crime. Standards of performance allow advocates to understand their role and, as a result, provide clients with effective and meaningful legal representation. The performance standards included here are general standards that should serve as a guide; they are in no way exhaustive or meant to encompass all of the activities necessary to providing quality representation to the client. They should be used in conjunction with office policies and guidelines on case preparation and in court representation. In the future, ILF-Nepal will introduce more detailed standards of performance.

#### **Role of Defense Counsel**

The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Advocates also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel must actively engage in training and CLE's provided by the office.

#### **Role of Defense Counsel in Client Intake Activities**

Defense counsel must actively seek new clients through visits to detention centers and jails and through coordination with courts to provide legal representation to indigent accused and must abide by updated office policies on case intake activities.

#### **Defense Counsel's Obligations regarding Pre-Trial Release**

Defense counsel must file motions, and be prepared, for remand, jail/bail and habeas hearings.

Defense counsel must be prepared to argue persuasively for the release of his/ her client using relevant sections of the code, case law and relevant facts about the client.

Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

If the court sets conditions of release defense counsel should make sure the client understands the available options and the procedures that must be followed to satisfy

those conditions. Where appropriate, counsel should advise others acting on his or her behalf how to satisfy those conditions.

### **Initial Consultation and Comprehensive Client Interviews**

Defense counsel has a duty to keep the client continuously informed and involved in the case; making the client aware of all the facts, risks and options that he or she has. The duty begins at the initial consultation. Within 24 hours of appointment, defense counsel must consult with the client and advise the client of the charges filed against him/her, the information used by the prosecution to support the charges, the court procedures and his/her bail status.

Within 72 hours after the first consultation, defense counsel should conduct a Comprehensive Client Interview. During the interview counsel should obtain information including but not limited to: a detailed account of the incident, possible witness name and contact information, information on the crime scene, background information on the client (education, health and mental health, family, prior arrest and convictions, etc).

### **Role of Defense Counsel in Case Investigation**

Defense counsel has a duty to conduct an independent investigation regardless of the client's admissions or statements of facts constituting guilt. The investigation should be conducted as promptly as possible and should begin no less than 24-48 hours after the comprehensive interview.

Investigation should include but is not limited to: interviews and statements from complainants, witnesses and police officers, visiting the scene of the incident, photographing the scene as well as any injuries to the client or damage to property, collecting evidence and viewing evidence in the possession of the government and consulting with experts about facts and evidence pertaining to the case.

Defense counsel must memorialize the investigation in an investigation memo which should be placed inside of the case file and available for review by the supervisor.

### **Case Preparation**

Defense counsel has a duty to take necessary preparation to provide effective representation for the client. This includes but is not limited to, analyzing the facts of the case, researching and identifying relevant statutes and precedent law, developing a theory of defense, investigation, preparing cross and direct witness examinations based on the theory of defense.

Proper case preparation also includes participating in case review and seeking the advice of supervisors and fellows. Advocates should review all cases with a supervisor or the international fellow.

Defense counsel should abide by case preparation policies established by the office and supervisors.

### **Pre-Trial Motions and Hearings before the Court**

Defense counsel must file pre-trial motions in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

Defense counsel should also be prepared to readdress issues raised in pre-trial motions in subsequent court proceedings.

In all hearing before the court, defense counsel must zealously advocate on behalf of the client.

Defense counsel should also take every opportunity to advocate for the client in informal conversations with government attorney, police, court staff and other relevant parties.

### **Defense Counsel Role at Trial and/or Final Hearing**

Defense counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the government attorney's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

Defense counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

Throughout the trial process defense counsel make proper objections and should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.

Defense counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

## **Role of Defense Counsel during Sentencing**

Defense counsel must develop a sentencing plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

Defense counsel must ensure that the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed and counsel should present mitigating and favorable information, which is likely to benefit the client. Defense counsel should consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and necessary.