

Authority without accountability: The struggle for justice in Nepal



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**Authority without accountability:
The struggle for justice in Nepal**

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LIST OF ABBREVIATIONS

AF	Advocacy Forum
AG	Attorney General
CA	Constituent Assembly
CAT	Convention against Torture and other cruel inhuman or degrading treatment or punishment
CDO	Chief District Officer
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIAA	Commission for the Investigation of Abuse of Authority
CPA	Comprehensive Peace Agreement
CPN-M	Communist Party of Nepal-Maoist
CPN-UML	Communist Party of Nepal-United Marxist Leninist
CRC	International Convention on the Rights of the Child
FIR	First Information Report
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGP	Inspector General of Police
MoLJPA	Ministry of Law, Justice and Parliamentary Affairs
OHCHR-Nepal	Office of the High Commissioner for Human Rights in Nepal

PSA	Public Security Act
RPP	Rastriya Prajatantra Party
TADO	Terrorist and Disruptive (Control and Punishment) Ordinance
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission

INTRODUCTION AND SUMMARY

Seven years after Nepal's People's Movement halted the country's ten-year civil war and toppled the centuries-old monarchy, there has been almost no justice for the thousands of Nepalis who were subject to extrajudicial execution, enforced disappearance, torture, rape and other gross violations of human rights during the course of the conflict. The failure to address these egregious violations has continued the longstanding expectation of perpetrators that they can, and nearly always will, escape accountability for serious violations of human rights.

Rather than seizing on the momentum, following the signing of the 2006 Comprehensive Peace Agreement and the abolition of the monarchy by the Constituent Assembly in 2008, to make a clean break with the past and to secure accountability for crimes and abuses, those in power in Nepal have used public office to enjoy the fruits of authority without accountability. Thus the impunity once abused by the royal family, high government officials and security personnel is now also being exploited by the army and security forces as well as all the major political parties—Nepali Congress (NC), Communist Party of Nepal-Unified Marxist Leninist (CPN-UML), Unified Communist Party of Nepal-Maoist (UCPN-M), and more recently the Terai-based Madhesi parties.

Alleged perpetrators of gross violations of human rights are not being investigated, tried or punished. Nepalis who have been victims of abuses are being denied their human right to a remedy and reparation and Nepali people as a whole have been denied the right to know the truth about the violations that took place during the armed conflict. Attempts to seek remedies for violations have been stymied by a powerful consensus amongst the political party leadership, security forces and public officials, all of whom have a vested interest in maintaining their own powers and privileges and acting to protect 'their own' from accountability. In Nepal today prominent political figures, members of the government, senior members of Nepal's security forces and those with political affiliation can commit serious crimes without sanction; these include crimes that amount to violations of international human rights law.

Perversely, high-level suspected perpetrators have even been promoted, rewarded with lucrative postings within the United Nations, and in the worst cases allowed to hold high office, including in Nepal's Legislature and Cabinet. One of the most striking examples is the abduction and unlawful killing of Arjun Bahadur Lama, in which UCPN-M Central Committee member Agni Sapkota is credibly alleged to be involved and responsible. Despite a March 2008 Supreme Court order directing the police to register a murder case against Agni Sapkota,

among others, and to carry out full investigations, no proper investigation of the allegations against Sapkota have taken place. Instead he was appointed Minister for Information and Communication in May 2011. This appointment was challenged at the Supreme Court, which questioned the propriety of Agni Sapkota serving in government, but did not suspend him from public office. Even though Agni Sapkota lost his ministerial position in a cabinet reshuffle in August 2011, he remained an active member of the Constituent Assembly/Legislature-Parliament until it dissolved in May 2012. To date, Agni Sapkota continues to be Spokesperson for the UCPN-M, and has never been questioned, let alone charged despite serious allegations of his involvement in the abduction, enforced disappearance and murder of Arjun Bahadur Lama.

Similarly, the current Inspector General of Police, Kuber Singh Rana, faces allegations of the extra-judicial execution of five students in October 2003. The Supreme Court of Nepal, on 3 February 2009, directed police to investigate Rana and the other accused. He was neither arrested nor investigated. He was promoted and then promoted again. He is now the most senior police officer in the country, and is in charge of implementing urgent reforms that focus on accountability.

The expectation that politically powerful people are shielded from accountability is so prevalent in Nepal, including at the highest levels of government, that any attempt to demand justice produces shock—even when it occurs outside Nepal. In early January 2013, police in the United Kingdom arrested Nepal Army Colonel Kumar Lama, charging him with the torture of two detainees in Nepal in 2005. The UK arrested him under its own international obligation to prosecute persons alleged to have committed torture, even where the person is a national of another country. The arrest set off a shrill government response in Nepal, primarily portrayed as a defense of national sovereignty (rather than the well-being of the Nepali people). The response of the Nepali government was notable in that it sought to resolve the issue through political approaches to the United Kingdom government; which in turn claimed, appropriately, that it was unable to interfere with a criminal justice process.

This ongoing and widespread failure to provide justice and accountability has posed a serious obstacle to the creation of a stable and legitimate government in Nepal since the end of the civil war. The lingering instability reconfirms the accumulated experience from around the world that a climate of impunity undermines efforts to re-establish respect for human rights and the rule of law.¹

1 *Preliminary Conclusions of the UN Human Rights Committee on Peru*, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para 10.

It is for this reason that international law demands that States effectively investigate and hold criminally accountable those found guilty of gross human rights violations.² The right of victims to a remedy and reparation is a well-established principle of international law, contained in international human rights treaties and other international standards. It is not only a right in itself; it is the mechanism by which all other rights are realized.

THE COMPLEX WEB OF IMPUNITY

The ICJ has published a substantial number of reports on Nepal over the past decade, documenting impediments to the functioning of the rule of law and the safeguarding of human rights. The ICJ, like many other international and national bodies has highlighted the debilitating problem of impunity in Nepal.³ This report explains the evolution of the system of *de jure* and *de facto* impunity in Nepal. In six chapters, this report describes the historic system of statutory immunities that have protected Nepali political leaders, government officials and security personnel from accountability. The deleterious impact of these laws has been significantly aggravated by the failure or refusal of law enforcement officials—from the Attorney General to District Attorneys to police officers—to pursue cases involving allegations of serious human rights violations by politically powerful people. This combination of *de jure* and *de facto* impunity has persisted despite efforts by the Supreme Court, the National Human Rights Commission, and many *ad hoc* Commissions of Inquiry to push for accountability. Untangling and dismantling this complex web requires determined and sustained efforts from the highest political levels of government. It also requires an understanding of the embedded structures of power and privilege inherited by the young republic that were historically entrenched by centuries of royal rule.

2 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by United Nations General Assembly resolution 60/147, 16 December 2005 (*UN Basic Principles and Guidelines on the Right to a Remedy*), Principle 3.

3 In June 2003, the ICJ issued a report, *Human Rights and Administration of Justice: Obligations Unfulfilled*. It highlighted the near total lack of accountability for enforced disappearances and extrajudicial killings. In March 2005, the ICJ issued a report, *Nepal: The Rule of Law Abandoned*, concluding that the state of emergency was wholly noncompliant with international law. In September 2006, the ICJ issued a report, *Nepal: Recommendations for the amendment to the draft Army Act*, offering 19 recommendations to the Prime Minister on the Nepal Army Act 2006. In February 2008, the ICJ issued a report, *Nepal: Justice in Transition*, focusing on victims' access to justice during the peace process. In March 2009, the ICJ published a briefing paper on *Disappearance in Nepal: Addressing the Past, Securing the Future*, examining the proposed enforced disappearances legislation. In August 2009, the ICJ issued a report, *Nepal: National Security Law and Human Rights Implications*, focusing on security laws and their compliance with international laws and standards. In June 2012, the ICJ issued a report, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, examining 38 commissions of inquiry established between 1990 and 2010, concluding that such mechanisms have become a vehicle of impunity for gross human rights violations, including crimes under international law.

DE JURE IMMUNITY

The application of legal provisions providing immunity to various government officials in Nepal serves as a predictable and avoidable demonstration as to why international law and standards insist on no immunity for gross violations of human rights. Despite some attempts to curtail the range of official immunity after the 2006 People's Movement, Nepal's legal landscape remains rife with constitutional, statutory and regulatory provisions granting political office holders and members of security forces immunity from prosecution for what would otherwise typically be considered criminal acts, including crimes under international law. This catalogue of immunities has contributed to the crisis of impunity plaguing the country, and continues to do so in significant ways.

It is important to point out that not all legal immunities are contentious or foster impunity. Indeed, limited immunities may be important for effective and accountable governance. For instance, members of parliament must be able to discuss contentious political issues; judges must be able to conduct their affairs without fear of official reprisal; and diplomats need some reciprocal protection from local rules. But legal immunity cannot be absolute—it must be qualified and conditional. International law expressly prohibits immunity for gross violations of human rights and crimes under international law. Where immunity is granted for criminal or other legal liability, it must be circumscribed by a particular treaty, statute or other authoritative legal source and subject to review by an independent court who should ultimately decide whether it should apply on a case-by-case basis.

Nepal's constitutional, statutory and regulatory immunities fail these requirements. Nepal's immunities are too often overbroad, poorly defined, interpreted and applied through political considerations and, critically, not subject to judicial review. They offer, in practice and application, immunity not just from serious crimes, but also gross violations of human rights.

The basis of legal impunity in Nepal (as in most other countries) was the position of the monarch. Nepal's first Constitution vested all executive power in the King and granted him absolute immunity for any decision made or any action undertaken.⁴ With the end of the monarchy, the Interim Constitution of

4 1959 Constitution of Nepal, Articles 10(5) and 69

10(5) If any question arises whether any matter is or is not a matter in respect of which His Majesty may act in His discretion, the decision of His Majesty in His discretion shall be final, and the validity of any thing done by His Majesty shall not be called in question on the ground that he ought or ought not to have acted in His discretion.

...

69 His Majesty shall not be questioned before any court for the exercise of the powers or the performance of the duties of His office, or for any other act done..'

2007 granted senior members of the Government (including the President) a significantly limited degree of immunity, to a much lesser extent than under previous constitutions. While under the Constitution the process and procedures of the Government's business cannot be challenged before a court of law, the immunity arguably does not extend to substantive areas-though this has so far not been tested in a court of law. But in practice, ministers and other senior government officials continue to evade accountability despite police complaints, First Information Reports (FIRs), being filed against them for allegations of serious crimes.

Legal immunity has historically extended far beyond senior government officials to cover security personnel. The ICJ, along with Nepali and other international organizations, has repeatedly criticized the misapplication of immunities as set out in the following legislation: the *Public Security Act 2046 (1989)*, the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001*, as well as Section 37 of the *Police Act, 2012 (1955)*, Section 26 of the *Armed Police Force Act, 2058 (2001)*, Section 6, 6A and 6B of the *Local Administration Act, 2028 (1971)*, Section 22 of the *Army Act, 2063 (2006)*, Section 24(2) of the *National Parks and Wildlife Conservation Act, 2029 (1973)*, Section 6 of the *Essential Commodities Protection Act, 2012 (1955)*, and Section 2 and Section 5 of the *Muluki Ain (General Code) 2020 (1963)*.

Broadly, under the General Code, officials are shielded if they have carried out their duties in 'good faith.' This defense has been widely abused as an immunity clause to preclude those persons from being investigated to determine whether actions carried out by them have in fact been carried out in good faith. As explained below, a statutory immunity is a defence that is available to persons or entities excluded from legal liability, and that may be invoked in response to legal action initiated by injured parties against those protected persons or entities by a court of law on a case-by-case basis. But serious human rights violations cannot, by their nature, constitute a 'good faith.' exercise of duties, and thus the investigation and prosecution of such violations cannot be subject to this putative immunity.

Particularly grave is the problem of the immunity granted to the Nepali military, considering its involvement in the country's long civil war as well as the army's role in maintaining political control. Legal efforts following the conflict and the overthrow of the monarchy have not created more accountable internal structures for ensuring discipline. Despite repeated efforts to extend accountability to the Nepal Army, the military remains outside effective civilian jurisdiction. The *Army Act, 2063 (2006)* allows for soldiers accused of homicide and rape to be tried by

civilian courts, but at the same time provides for immunity for these offences if committed by personnel on duty, stating that acts 'shall not be deemed to be an offence committed in the course of discharging duties in good faith.' A June 2011 Supreme Court order for the Government to form a task force to review the new *Army Act* and to provide recommendations on reforming the military justice system to ensure its compliance with Nepal's human rights obligations has not been acted on.

The analysis of the continuing impunity in the Nepali military underscores four crucial points: (1) immunities granted to army personnel mean that State sanctioned use of force is frequently misused and abused, resulting in the commission of crimes and human rights violations; (2) the military justice system as provided in the *Army Act, 2063 (2006)* falls far below international standards to ensure victims' right to an effective remedy and reparation and the right to a fair trial, and must be reformed; (3) the jurisdiction of civilian courts to conduct inquiries, prosecute and try serious human rights violations such as extrajudicial executions, enforced disappearances and torture must be guaranteed; and (4) the military's lack of accountability continues to exercise an undue and destabilizing influence in civilian politics.

DE FACTO IMMUNITY

Confounding the problem of impunity in Nepal is the fact that it does not rely solely, or even mostly, on the *de jure* immunity provisions discussed above. In practice, these immunities have neither been invoked in specific cases nor tested during trials not least because of the refusal or failure of law enforcement officials, including prosecutors and the police, to pursue claims of serious human rights violations. The difficulties begin with the filing of a First Information Report (FIR), which has been almost insurmountably rendered difficult in cases of serious human rights violations. Even if a claim is filed, it may be subject to withdrawal as a result of political intervention by district attorneys, the Attorney General or in some cases even the Cabinet. Compounding these difficulties are efforts by the various political parties to provide for amnesties in cases of serious human rights violations. This pattern of *de facto* impunity has persisted despite efforts by Nepal's Supreme Court, National Human Rights Commission, *ad hoc* Commissions of Inquiry, and in some cases, even legislation, to push for accountability.

The first obstacle to accountability in Nepal has been the lack of progress in complaints filed by relatives of those alleged to have been unlawfully killed or subjected to enforced disappearance during the conflict.⁵ Soon after the end of the conflict, relatives of victims filed FIRs identifying members of the security forces and armed insurgent groups as responsible for crimes.⁶ A recent report of the United Nations office for the High Commissioner for Human Rights, documenting serious violations of international law during the conflict, cited approximately 2,500 cases of alleged torture and ill-treatment, 2,000 incidents of alleged unlawful killings and over 600 cases of enforced disappearance during the conflict.⁷ So far, however, criminal charges have only been filed in three cases:

- (1) Maina Sunuwar, a 15-year old who was subjected to torture and subsequently died in army custody in February 2004;
- (2) Reena Rasaili, an 18-year-old who was killed in February 2004; and
- (3) Dekendra Thapa, a journalist, who was beaten almost to death and buried alive by a group of Maoist cadres in August 2004.⁸

In all other cases, however, there has been little or no progress despite repeated court orders directing the police and the Attorney General's Office to proceed with investigations.

5 See Advocacy Forum and Human Rights Watch, 'Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict,' September 2008, accessed at: <http://www.hrw.org/reports/2008/09/11/waiting-justice-0>; 'Still Waiting for Justice: No End to Impunity in Nepal,' October 2009, accessed at: <http://www.hrw.org/reports/2009/10/15/still-waiting-justice-0>; 'Indifference to Duty: Impunity for Crimes Committed in Nepal,' December 2010 accessed at: <http://www.hrw.org/reports/2010/12/14/indifference-duty-0>; and 'Adding Insult to Injury: Continued Impunity for Wartime Abuses,' December 2011, accessed at: <http://www.advocacyforum.org/downloads/pdf/publications/impunity/adding-insult-to-injury-nov-30-2011-english-version.pdf>

6 For an analysis of 62 cases filed with the assistance of Advocacy Forum, see Annex to the above Advocacy Forum and Human Rights Watch reports.

7 UN High Commission for Human Rights, *Nepal Conflict Report 2012: An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006*, Geneva, 2012, accessed at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_ExecSumm_Nepal_Conflict_report2012.pdf

8 Advocacy Forum: 'Maina Sunuwar: Separating Fact from Fiction', February 2010, accessed at: <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>; 'AF raises concern to AG about lacklustre investigation into Reena murder case,' accessed at: <http://www.advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lackluster-investigation-in-reena-murder-case.php>; and letter to the Attorney General of 5 July 2011 on Reena's case, accessed at: <http://www.advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>; and 'Kantipur, Dekendra murder: 5 remanded to judicial custody,' 1 February 2013, accessed at: <http://ekantipur.com/2013/02/01/top-story/dekendra-murder-5-remanded-to-judicial-custody/366456.html>

Troublingly, the Office of the Attorney General has resisted efforts to provide justice for serious human rights violations, utilizing the Attorney General's powers to initiate and conduct prosecutions, and protected by a statutory immunity from oversight. This immunity makes it difficult to legally challenge any decisions to not prosecute or withdraw criminal cases pending in the courts. Although appointments to the office of the Attorney General are coloured by political considerations the world over, the Attorney General in the Nepali criminal justice system has proven to be an obstacle to protecting human rights, rather than fulfilling his professional responsibility to advance justice. The Attorney General's partisan approach has highlighted the clear conflict of interest between the prosecutorial and representational roles played by the AG in cases involving alleged misconduct by government officials.

This problem is endemic throughout the Nepali government's law enforcement system. As set out in detail below, (1) prosecutors have routinely disregarded their duty to investigate credible allegations of crimes, including crimes under international law; (2) prosecutors are not exercising their functions with the objective of protecting human rights and promoting rule of law; and (3) prosecutors have not been able to function independently or impartially.

WITHDRAWAL OF CASES

Immunity is further compounded by political abuse of Clause 5.2.7. of the *Comprehensive Peace Agreement*,⁹ which allows for the withdrawal of politically-motivated cases; this is in contravention of Clause 7.1.3.,¹⁰ which expresses a commitment to ensuring impartial investigations.

Section 5.2.7. of the CPA states: 'Both sides guarantee to withdraw accusations, claims, complaints and under-consideration cases levelled against various individuals due to political reasons and immediately make public the state of those imprisoned and immediately release them.'

Under a strict reading of this clause, within the context of the CPA, withdrawal of cases could only extend to cases brought during the course of the conflict and up to—and not after—the signing of the CPA against members of the CPN-M and initiated against them for political reasons. Several governments, however,

9 Section 5.2.7 of the CPA states: 'Both sides guarantee to withdraw accusations, claims, complaints and under-consideration cases levelled against various individuals due to political reasons and immediately make public the state of those imprisoned and immediately release them.'

10 Section 7.1.3 of the CPA states: 'Both parties express their commitment that impartial investigation and action as per the law shall be taken against those people responsible for creating obstructions to the exercise of the rights envisaged in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure the rights of the victims of conflict and torture and the rights of the family of disappeared persons to obtain relief.'

have since widened the application of Clause 5.2.7., enabling the withdrawal of ordinary criminal cases which occurred during and after the signing of the CPA as part of political bargaining.

Three successive governments between 2008 and 2012, from across the political spectrum, have withdrawn more than 1055 criminal cases filed in district courts across the country.¹¹ The overbroad and vague definition of what constitutes a 'politically-motivated' allegation has led to the withdrawal of a host of cases that explicitly constitute crimes under international law including, unlawful killings, torture, and sexual violence. For instance, in mid-2011, withdrawal of cases was a pre-condition for cooperation between the Maoists and Madhesi political parties, which led to the formation of a government led by Prime Minister Baburam Bhattarai. Such cases, however, do not fall within the ambit of the CPA; more important, these cases deal with gross violations of human rights and as such their investigation and, if appropriate, prosecution, are legal obligations of the Nepali government.

This pattern of impunity cannot be characterized solely as deriving from political inertia. Rather, more seriously in Nepal there is a tacit consensus across the political spectrum not to hold perpetrators of human rights violations accountable. This view has seriously undermined the rule of law in an already weak criminal justice system.

MISUSE OF POLITICAL PARDONS

Political considerations also obstruct accountability through the misuse of politically motivated pardons. The long-standing prerogative of the Nepali monarch to pardon even those convicted of serious crimes was repeated in Article 151 of the 2007 Interim Constitution, which grants the President (on the recommendation of the Council of Ministers) the power to grant pardons, and to suspend, commute or remit any sentence passed by any court, special court, military court or any other judicial, quasi-judicial, or administrative authority or institution.

But Nepal's Supreme Court has repeatedly affirmed that a pardon can only be exercised in exceptional cases, and that it cannot be invoked for cases still pending before the courts. As explained in detail below, the Supreme Court's

11 Republica, 'Withdrawal of case against Jamakattel's attackers stayed,' 1 January 2011, accessed at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=47509; see also United Nations Office of the High Commissioner for Human Rights in Nepal, 'Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal, Legal Opinion,' June 2011, p 2, accessed at: http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case-Withdrawals_for_Serious_Crimes_in_Nepal_E.pdf

jurisprudence covers the Royal Pardon under the 1990 Constitution as well as the President's power to pardon under the 2007 Interim Constitution.

FAILURE TO IMPLEMENT SUPREME COURT DECISIONS

Even when Nepal's Supreme Court has interceded to protect the right of Nepalis to receive justice, for instance by ordering the investigation or even prosecution of perpetrators of gross violations of human rights, consecutive governments and State agencies have simply ignored the Supreme Court's orders.¹² Similarly, many recommendations by the National Human Rights Commission (NHRC) for further investigations into cases and prosecutions have not been implemented.¹³ As set out throughout this report, Nepal's Supreme Court has repeatedly issued strong judgments in support of human rights. The failure of the Nepali government to implement these judgments is itself a major blow to accountability and the rule of law.

WAITING FOR TRANSITIONAL JUSTICE

Government officials, security commanders as well as the leadership of the major parties have sought to excuse police inaction and even the defiance of court orders on the basis of their apparent belief in the need to wait for a transitional justice mechanism to be set up. This appears to be a misinterpretation of the purpose of any future transitional justice mechanism. Any such body should be complementary to the formal justice system and criminal justice processes should continue in the interim.

In March 2013, the President approved an ordinance to establish just a single transitional justice mechanism, conferring wide discretion on a Commission of Inquiry to recommend amnesties for serious crimes, including those amounting to crimes under international law.¹⁴ Many civil society organizations as well as the United Nations High Commission for Human Rights raised concerns about the Ordinance and its compliance under international law. The caretaker Cabinet delivered the ordinance directly to the President without consulting with victims and their families, the NHRC or with the general public. Immediately following its approval, civil society groups and victims challenged the constitutionality of the Ordinance before the Supreme Court, obtaining a stay order.

12 Himalayan Times, 'Justice Denied,' 1 March 2012, accessed at: <http://www.thehimalayantimes.com/fullNews.php?headline=Justice+denied&NewsID=322615>

13 *Summary Recommendations Upon Complaints in a Decade (2000-2010)*, National Human Rights Commission, November 2010 (document available in Nepali only).

14 International Commission of Jurists, 'Compromising Justice: Nepal's Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation (2012),' October 2012, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>

CONCLUSION AND KEY RECOMMENDATIONS

If peace and political stability are to take root in Nepal, it is critical that the Nepali government dismantle the complex structure of *de facto* and *de jure* impunity that obstructs the rule of law; establish a transitional justice mechanism in line with international human rights law and standards; and bring to justice those responsible for gross human rights violations during the conflict.

The Constituent Assembly of Nepal was dismissed on 27 May 2012 after having failed to reach any agreement on a new Constitution and a transitional justice mechanism. By early 2013, Nepal was heading towards a constitutional crisis. On 13 March 2013, a political agreement was reached among the four main political parties that Chief Justice Khil Raj Regmi would take on the position as Chairman of the Electoral Council of Ministers until an election is held.¹⁵

In this context, and with an eye toward the expected transition to the new elected government, the ICJ calls on the Government of Nepal to act, as a matter of priority:¹⁶

- (1) Enact legislation to ensure that any parliamentarian or State official against whom there is a credible allegation of responsibility for a gross violation of human rights or a crime under international law is suspended from service in public office, including armed forces personnel representing Nepal in international peacekeeping operations, at least pending the outcome of an independent and impartial investigation and fair trial;**
- (2) Repeal or amend Section 11 of the Public Security Act, 2046 (1989), Section 37 and Section 38 of the Police Act, 2012 (1955), Section 26 of the Armed Police Act, 2058 (2001), Sections 6, 6A and 6B of the Local Administration Act, 2028 (1971), Section 22 of the Army Act 2006, Section 24(2) of the National Parks and Wildlife Conservation Act, 2029 (1973), Section 6 of the Essential Commodities Protection Act, 2012 (1955), and parts of the Muluki Ain (General Code), notably Section 2 and Section 5, to remove any immunity afforded to State officials for gross violations of human rights;**

15 The ICJ called on the Chief Justice to step down from his role on the Supreme Court in order to preserve the independence of the judiciary and protect the doctrine of separation of powers. 'ICJ calls on Nepali Chief Justice to step down as judge after appointment as Prime Minister,' 14 March 2013, accessed at: <http://www.icj.org/icj-calls-on-nepali-chief-justice-to-step-down-as-judge-after-appointment-as-prime-minister/>

16 A more detailed list of recommendations appears at the end of this report.

- (3) Ensure the new Constitution does not permit any State official to grant an official pardon, withdraw a case or grant an amnesty to anyone suspected or convicted of a gross human rights violation or crime under international law;**
- (4) Limit the interpretation of Section 5.2.7 of the *Comprehensive Peace Agreement* to ensure that only those cases brought during the course of the conflict and up to—and not after—the signing of the Peace Agreement are eligible for withdrawal, while also ensuring that cases involving credible allegations of gross human rights violations are not withdrawn;**
- (5) Implement the decisions of the Supreme Court in *Kedar Chaulagain v. Kavre District Police Office and District Attorney’s Office (2009)*, *Rabindra Prasad Dhakal v. The Government of Nepal and Others (2007)*, *Devi Sunuwar v. District Police Office, Kavrepalanchok and Others (2007)*, *Purnimaya Lama v. District Police Office, Kavrepalanchok and Others (2008)*, issuing instructions to the Attorney General and all relevant law enforcement personnel to proactively and vigorously pursue all cases alleging serious violations of international human rights law;**
- (6) Issue instructions to the Attorney General and all other relevant law enforcement personnel to implement the decision of the Supreme Court in *Om Parkash Aryal v. the Council of Minister (6 March 2013)*, making it mandatory for the Attorney General to act on the recommendations of the National Human Rights Commission to investigate, and where appropriate prosecute cases.**

INTERNATIONAL LEGAL FRAMEWORK

Nepal is a State party to many of the core UN human rights treaties, notably: *the International Covenant on Civil and Political Rights (ICCPR)*¹⁷ and its First¹⁸ and Second¹⁹ Optional Protocols; *the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)*²⁰; *the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*²¹; *the International Covenant on Economic Social and Cultural Rights (ICESCR)*²²; *the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*²³ and its Optional Protocol²⁴; *the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*²⁵; *the International Convention on the Rights of the Child (CRC)*²⁶ and the *Optional Protocol on the involvement of children in armed conflict*²⁷ as well as the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.²⁸

17 *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force 23 March 1976, Nepal acceded on 14 May 1991 (ICCPR).

18 *The Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302, entered into force 23 March 1976, Nepal acceded on 14 May 1991.

19 *The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 1642 U.N.T.S. 414, entered into force on 11 July 1991, Nepal acceded on 4 March 1998.

20 465 U.N.T.S. 85, entered into force 26 June 1987, Nepal acceded on 14 May 1991.

21 660 U.N.T.S. 195, entered into force 4 January 1969, Nepal acceded on 30 June 1971.

22 993 U.N.T.S. 3, entered into force 3 January 1976, Nepal acceded on 14 May 1991.

23 U.N.G.A. Resolution. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, entered into force 3 September 1981, Nepal ratified on 22 April 1991.

24 U.N.G.A. Resolution. 54/4, annex. 54 U.N. GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I) (2000), entered into force 22 December 2000, Nepal acceded on 15 June 2007.

25 96 U.N.T.S. 271, entered into force 25 July 1951, Nepal acceded on 14 September 1990.

26 U.N.G.A. Resolution. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990, Nepal ratified 14 September 1990.

27 *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, U.N.G.A. Resolution 54/263, Annex I, 54 UN GAOR Supp. (no. 49), p 7, UN Doc. A/54/49, Vol. III (2000), entered into force 12 February 2002, Nepal ratified on 3 January 2007.

28 *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, U.N.G.A. Resolution 54/263, Annex II, 54 U.N. GAOR Supp. (no 49) at 6, UN Doc. A/54/49, Vol. III (2000), entered into force 18 January 2002, Nepal ratified on 20 January 2006.

Nepal is also State party to the 1949 Geneva Conventions²⁹ on the law of armed conflict and is bound by rules of customary international law in respect of non-international armed conflict.³⁰

As a Member State of the United Nations,³¹ Nepal is bound by resolutions of the Security Council and should act to give effect to resolutions of the General Assembly and authoritative UN legal standards. Nepal may not invoke provisions of its domestic law to justify non-compliance with treaty obligations.³²

The scope and full content of these rights obligations have been elaborated in authoritative standards, commentaries and jurisprudence. These sources include: general comments from treaty-monitoring bodies; concluding observations from treaty-monitoring bodies; jurisprudence from regional human rights tribunals; jurisprudence from domestic legal systems; commentary from UN experts mandated by the UN Human Rights Council and its predecessor body, the Human Rights Commission; and scholarly writings. There are also a number of non-treaty sources of standards, including declarations and resolutions adopted by UN bodies, such as the General Assembly and the Human Rights Council, and reports of UN Independent experts. The aforementioned sources all serve to clarify and expound upon the content of the enumerated human rights as well as State parties' corresponding obligations in upholding those rights.

29 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention) 75 U.N.T.S. 31, 12 August 1949, entered into force 21 October 1950; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 75 U.N.T.S. 85, 12 August 1949, entered into force 21 October 1950; *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 75 U.N.T.S. 135, 12 August 1949, entered into force 21 October 1950; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Fourth Geneva Convention), 75 U.N.T.S. 287, entered into force 21 October 1950. Nepal acceded on 7 February 1964.

30 Nepal is not a State party to the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977 or the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977. However, Nepal remains bound by the rules of international and non-international armed conflict under customary international law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge 2009.

31 *Declaration of Acceptance of the Obligations contained in the Charter of the UN—Admission of States to Membership in the UN in accordance with Article 4 of the Charter*, U.N.G.A. resolution 955(X), 14 December 1955, 223 U.N.T.S. 39.

32 Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 (Vienna Convention).

The duty to guarantee human rights is grounded in both international law and customary international law.³³ In order to give effect to these guarantees, Nepal must implement its international rights obligations in domestic law; refrain from violating human rights in both its acts and omissions; adopt measures to guarantee the enjoyment of human rights; and protect persons from the impairment of the enjoyment of human rights by third parties, including private actors. Nepal must also act to prevent human rights violations and when such violations occur, investigate and hold accountable those persons responsible and provide for access to a remedy and reparation arising from the violations.³⁴ Where violations constitute gross human rights violations or crimes under international law, perpetrators must be held criminally responsible.

33 Article 2, ICCPR; Article 6, the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2(c), the *Convention on the Elimination of All Forms of Discrimination against Women*; the *International Convention for the Protection of All Persons from Enforced Disappearance*; the *Declaration on the Protection of All Persons from Enforced Disappearance*, 18 December 1992, UN Doc. A/RES/47/133 (*Declaration on the Protection of All Persons from Enforced Disappearance*); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 (*UN Principles on Extra-Legal Executions*); Article 1.1, the *American Convention on Human Rights*; Article 1, the *Inter-American Convention on Forced Disappearance of Persons*; Article 1, the *Inter-American Convention to Prevent and Punish Torture*; Article 1, the *African Charter on Human and Peoples' Rights*; Article 3, the *Arab Charter on Human Rights*; Article 1, the *European Convention on Human Rights*.

34 UN Human Rights Committee, *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (UNHRC General Comment 31); Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velazquez Rodriguez Case*, paras 166 and 174; Inter-American Commission on Human Rights, Report No. 1/96 of 1 March 1996, Case 10,559, *Chumbivilcas v. Peru*; African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001); and the UN Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, UN Doc. A/46/876/S/23580, para 28.

(1) The obligation to provide a remedy for gross human rights violations

The right of victims to a remedy is a well-established principle under international law, contained in international human rights treaties and other international standards.³⁵ It is not only a right in itself; it is the mechanism by which all other rights are realized.

The general standard, accepted by all UN Member States through adoption by UN resolution 147 of 16 December 2005,³⁶ is that

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice... irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation...³⁷

35 Article 2.3, ICCPR; Article 13, CAT; Article 6, *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 12, 17.2(f) and 20, *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 6.2, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime*; Article 6.2, *Universal Declaration of Human Rights*; Articles 9 and 13, *Declaration on the Protection of All Persons from Enforced Disappearance supra* fn. 33; Principles 4 and 16, *UN Principles on Extra-Legal Executions supra* fn. 33; Principles 4-7, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 27, *Vienna Declaration and Programme of Action*; Article 13, 160-162 and 165, the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9, the *Declaration on Human Rights Defenders*; Article 13, *European Convention on Human Rights*; Article 47, *Charter of Fundamental Rights of the European Union*; Article 7.1(a) and 25, *American Convention on Human Rights*; Article XVIII, *American Declaration of the Rights and Duties of Man*; Article III(1), *Inter-American Convention on Forced Disappearance of Persons*; Article 8.1, *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) *African Charter of Human and Peoples' Rights*; Article 9, *Arab Charter on Human Rights*.

36 U.N.G.A. Resolution 60/147, 21 March 2006, UN Doc. A/RES/60/147.

37 *UN Basic Principles and Guidelines on the Right to a Remedy supra* fn. 2, para 3.

The UN Human Rights Committee describes the right to a remedy as 'a treaty obligation inherent in the Covenant as a whole': even in times of emergency, 'the State party must comply with the fundamental obligation, under Article 2, paragraph 3 of the Covenant to provide a remedy that is effective.'³⁸ Effectiveness requires that the remedy is practical and provides real access to justice.³⁹

(2) The duty to ensure accountability for gross human rights violations

Following from the right to a remedy is the obligation to ensure accountability for gross human rights violations. As expressed in the *UN Basic Principles and Guidelines on the Right to a Remedy*

*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*⁴⁰

The *UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* reiterates the obligation on States to

*...undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*⁴¹

38 UN Human Rights Committee, *General Comment 29, States of Emergency (Article 4)*, 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (UNHRC General Comment 29), para 14; see also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioner's Guide*, Geneva, December 2006 (International Commission of Jurists, *Remedies and Reparations*), p 44.

39 *Airey v. Ireland*, European Court of Human Rights, Judgment of 9 October 1979, Series A, No 32, para 24.

40 *UN Basic Principles and Guidelines on the Right to a Remedy*, supra fn. 2.

41 *United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (*Updated Set of Principles to Combat Impunity*).

Nepal is required under Article 2(3) of the ICCPR and Article 12 of the CAT to prosecute and punish perpetrators of human rights violations.⁴² Under Article 13 of the CAT, States must promptly and impartially investigate all allegations of torture and ill-treatment.

In its most recent and in previous unanimous resolutions on the prohibition of torture and ill-treatment, the UN General Assembly has stressed the importance of holding State officials accountable, bringing those responsible to justice, and imposing a punishment that is commensurate with the severity of the offence.⁴³

In respect of humanitarian law, Nepal must prosecute and punish those who commit war crimes or other serious violations of the law on armed conflict.⁴⁴

There must be practical and real access to justice with the capability of determining whether a violation took place.⁴⁵ The matter must be brought before an independent authority.⁴⁶ In cases of serious human rights violations, the State must ensure that [victims] can effectively challenge...violations before a court of law.⁴⁷ Disciplinary and administrative sanctions are not sufficient to constitute an effective remedy under Article 2(3) of the ICCPR.⁴⁸

42 Article 2, paragraph 3 of the ICCPR and UNHRC General Comment 31, *supra* fn. 34; Article 12 of the CAT and Committee Against Torture, *General Comment 2, Implementation of Article 2 by States Parties*, 2007, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, (Committee against Torture, General Comment 2); UN Human Rights Committee, case of *Bautista de Arellana v. Colombia*, Communication No. 563/1993, views of 14 June 1993, UN Doc. CCPR/C/55/563/1993 (1995) para 8.6; UN Human Rights Committee, case of *Jose Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995, views of 14 June 1994, UN Doc. CCPR/C/60/D/612/1995, para 8.8; UN Human Rights Committee, case of *Maria Fanny Suarez de Guerro v. Colombia*, Communication 45/1979, views of 31 March 1982, UN Doc. CCPR/C/15/D/45/1979, para 13.3; Velasquez para 166; see also European Court of Human Rights, judgment of 26 March 1985, *X and Y v. the Netherlands*, Application No. 8978/80, para 27; see also European Court of Human Rights, judgment of 4 December 2003, *M.C. v. Bulgaria*; Application No. 39272/98, para 153; *Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights*, para 60.

43 UN General Assembly Resolution, *Torture and Other Cruel, Inhumane and Degrading Treatment*, 27 March 2012, UN Doc. A/RES/66/150, para 7.

44 Rules 156–160, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2007, pp 568–618.

45 European Court of Human Rights, Judgment of 9 October 1979, *Airey v. Ireland*, Series A, No. 32, para 24; I/ACTHR: Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, Series A, No. 9, para 24; European Court of Human Rights, Judgment of 25 March 1983, *Silver v. the United Kingdom*, Series A, No. 61, para 113.

46 UNHRC General Comment 31 *supra* fn. 34, para 15; ECtHR: Case *Keenan v. the United Kingdom*, Judgment of 3 April 2001, Reports 2001-III, para 122; I/ACTHR: Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, Series A, No. 9, para 24.

47 UN Human Rights Committee, case of *F. Birindwaci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, 29 November 1989, UN Doc. CCPR/C/37/D/241/1987, para 14.

48 UN Human Rights Committee: Case of *Nydia Erika Bautista v. Colombia*, 13 November 1993, UN Doc. CCPR/C/55/D/563/1993, para 8.2; Case *José Vicente y Amado Villafañe Chaparro et al v. Colombia*, 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, para 8.2.

PART I: DIFFERENT IMMUNITIES AFFORDED TO BRANCHES OF GOVERNMENT

This section traces the evolution of immunities afforded to the King, the President, the Cabinet and Ministers, Parliamentarians and the Attorney General under the 1959 Constitution, the 1990 Constitution and the Interim Constitution of 2007. Consideration is also given to Supreme Court jurisprudence on the interpretation of these constitutional provisions. The cumulative effect of these laws helped create a culture of impunity in which victims of human rights violations rarely sought redress, and even less frequently received justice.

The legal immunities that are afforded to the executive and legislative branches of government are not necessarily contentious in and of themselves. Indeed, some form of privilege is deemed essential for the effective functioning of government, such as encouraging freedom of speech with respect to members' conduct of business in Parliament so that any issue that arises may be fully debated.

But as explained below, the legal immunity granted to the King/President, government, parliamentarians and Attorney General cannot extend to criminal acts and human rights violations. Under international law, States must effectively investigate and hold criminally accountable those found guilty of gross human rights violations, including crimes under international law.⁴⁹

The UN Human Rights Committee, the treaty-monitoring body for the ICCPR, stresses that

State Parties...may not relieve perpetrators from personal responsibility...with...prior legal immunities and indemnities...
no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility [emphasis added].⁵⁰

The *UN Principles on Action to Combat Impunity*, reiterate that

*[t]he official status of the perpetrator of a crime under international law—even if acting as head of State or Government—does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.*⁵¹

49 *UN Basic Principles and Guidelines on the Right to a Remedy*, supra fn. 2, Principle 3.

50 UNHRC General Comment 31, supra fn. 34, para 18.

51 *Updated Set of Principles to Combat Impunity*, supra fn. 41, p 6.

As demonstrated in Nepal, immunity provisions in respect of gross human rights violations foster a climate of impunity, undermining efforts to re-establish respect for human rights and the rule of law.⁵² International standards such as the *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*⁵³ and the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* stress that under no circumstances shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.⁵⁴ Where violations constitute gross human rights violations or crimes under international law, perpetrators must be held criminally liable.

1.1 King

Historically, the King was the Sovereign of Nepal and above the law. The Constitution of Nepal 2015 (1959)⁵⁵ vested all executive power in the King and granted him absolute immunity for any decision made or any action undertaken. Article 10(5) provided that:

If any question arises whether any matter is or is not a matter in respect of which His Majesty may act in His discretion, the decision of His Majesty in His discretion shall be final, and the validity of any thing done by His Majesty shall not be called in question on the ground that he ought or ought not to have acted in His discretion.

Article 69 further stated that:

His Majesty shall not be questioned before any court for the exercise of the powers or the performance of the duties of his office, or for any other act done.

Provided that nothing in this Article shall be construed as restricting any right conferred by the law to bring appropriate proceeding against His Majesty's Government or any servant of His Majesty.

52 *Preliminary Conclusions of the UN Human Rights Committee on Peru*, UN Doc. CCPR/C/79/Add.67, para 10.

53 *Updated Set of Principles to Combat Impunity*, *supra* fn. 41, Principles 19 and 24.

54 *UN Principles on Extra-Legal Executions*, *supra* fn. 33, Principle 19.

55 Nepal follows the Bikram calendar. In this report, we give the dates first in the Nepali calendar, and then converted to the Gregorian calendar (in brackets).

As part of his absolute powers, the King was also authorized under Article 55 to declare a state of emergency without having to consult with or seek approval from the cabinet or parliament.

The 1959 Constitution was also framed to enshrine the King and his heirs' superior position in Nepali society, and to ensure that such power and privilege would never be challenged. Article 1(2) stipulated that, '[n]othing in this Constitution shall affect the descendants, usage, tradition and law relating to the succession to the throne of His Majesty the King.' Article 63 further provided that:

His Majesty shall continue to have exclusive power of enacting, amending and repealing the laws relating to the succession to the throne; and this power shall be exercised by him in His discretion.

In 1990, the Jana Andolan (People's Movement) marked the end of absolute monarchy and heralded the beginning of multiparty democracy and constitutional monarchy in Nepal. However, even after the People's Movement, the King continued to enjoy immunity. Under Article 31 of the 1990 Constitution, the King was afforded immunity from legal action:

No question shall be raised in any court about any act performed by His Majesty:

Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty.

Although the 1990 Constitution did not explicitly confer immunity on other members of the royal family, it was clear when read in conjunction with the *Raj Prasad Sewa Ain, 2029 (Royal Palace Service Act, 1973)* that members of four generations of the royal family, including married queens, enjoyed immunity. Section 7 of the *Royal Palace Service Act, 1973* read:

Any decisions related to the members of the royal family are made by His Majesty. And no question can be raised in relation to any of these decisions, actions taken by His Majesty in any court.⁵⁶

⁵⁶ Section 7, *Royal Palace Service Act 1973*, repealed in 2008.

Sections 13 and 15 of the *Succession to the Throne Act, 2044 (1987)* also afforded some degree of immunity. Section 13 provided that if any member of the royal family committed any crime, only the King was empowered to determine the appropriate action/sanction. Section 15 provided that no questions could be raised about any of His Majesty's decisions in this regard.

This direct or indirect immunity also applied to criminal cases, resulting in no action taken when members of the royal family were implicated in crimes. For example, when Crown Prince Paras hit Praveen Gurung—a popular Nepali singer—while driving his car under the influence of alcohol in 1997, he was never criminally charged despite widespread street protests.

(i) The People's Movement and the 2007 Constitution

In 1996, the Nepal Communist Party (Maoist) began an insurrection in what would become a decade long civil conflict aimed at abolishing the monarchy and establishing a parliamentary democracy. The Interim Constitution of 2007, promulgated following the end of the civil war, stripped the King of all his powers. The original Article 159 stated that:⁵⁷

(1) No power regarding the governance of the country shall be vested in the King.

Property of the late King Birendra was put into a trust to be used 'for the interests of the nation'⁵⁸ and property acquired by King Gyanendra in his capacity as King was to be nationalized.⁵⁹

On 28 May 2008, at its first sitting, the 601-member Constituent Assembly (CA) elected in April 2008, passed a bill amending the Constitution, ending the 239-year-old monarchy. Nepal was declared a federal republic. The President was declared head of State, and the Prime Minister head of government—both to be elected by the Constituent Assembly. All laws related to the monarchy were repealed.

Despite the abolition of the monarchy, the concept of royalty and attendant notions of power and influence still appear to carry some currency in the country. For example, in December 2010, former crown prince Paras was arrested for his role in a brawl at a tourist resort in Chitwan, during which he was alleged

⁵⁷ Article 159 was subsequently amended by the Third and Fourth Amendments to the Interim Constitution, where the original clauses (1) to (3) were essentially removed. Clause (1), as quoted above, does not appear in the latest version of the Interim Constitution.

⁵⁸ Article 159(1) of the Interim Constitution.

⁵⁹ Article 159(2) of the Interim Constitution.

to have fired a pistol. He was released on a mere NRs 10,000 (114 US Dollars) bail three days later.⁶⁰

In April 2011, he was again found guilty of causing public disturbance and asked to provide an undertaking to not repeat his misdemeanor. He was acquitted on the more serious charge of illegal possession of a weapon and using it in a public place.⁶¹

1.2 President

The powers of the President and Vice-President are set out in Articles 36A to 36K of the 2007 Interim Constitution. Neither the President nor the Vice-President enjoy immunity for actions carried out in the course of their official duties. To the contrary, Articles 36E(b) and 36H(b) provide for the possibility of their impeachment under the following circumstances:

... if at least two-thirds majority of the total number of the members of the Constituent Assembly adopts a resolution of impeachment against him or her on the charge of serious violation of the Constitution by him or her ...

When the Interim Constitution was adopted in January 2007, there was no provision for the office of the President, and all presidential powers were initially endowed to the Council of Ministers. The office of the President was only introduced through the Fourth Amendment in May 2008 when the CA voted to abolish the monarchy, and the process for election to office was subsequently amended by the Fifth Amendment in July 2008 as part of broader efforts by the Seven Party Alliance and the CPN-Maoist to break the then-existing deadlock over formation of the Government.

Amended as part of the Fourth Amendment to the Interim Constitution, Article 151 now reads:

The President may, on the recommendation of the Council of Ministers, grant pardons and suspend, commute or remit any sentence passed by any court, special court, and military court or by any other judicial or quasi-judicial or administrative authority or body.

60 'Paras released. Lands in Pokhara', *Himalayan Times*, 16 December 2012, accessed at: <http://www.thehimalayantimes.com/fullNews.php?headline=Paras+released%2C+lands+in+Pokhara&newsID=269728>

61 'Paras pardoned after warning', *Republica*, 27 April 2011, accessed at: http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=30698

While the President does not enjoy immunity for his/her acts and decisions, he/she is empowered to grant pardons and to suspend, commute or remit any sentence. Inclusion of the word 'may' in Article 151 has, however, resulted in a confusing delineation of powers between the President and the Council of Ministers. This was demonstrated in the case of Maoist Constitutional Assembly member, Bal Krishna Dhungel, who was convicted of murder but for whom a pardon was recommended by the cabinet. The cabinet's recommendation was forwarded to the President on 8 November 2011, but the President did not act upon it. At the time of writing, a stay order issued by the Supreme Court on 13 November 2011 directing the Government not to proceed with the pardon recommendation remains in force.

1.3 Government

The 1959 Constitution vested executive power in the King, and provided that such power could be exercised by him directly or through Ministers or other duly empowered officials.⁶² As an absolute monarch, the King exercised total and final discretion in the exercise of his executive powers,⁶³ and any question or challenge as to whether he consulted with his government in the exercise of his powers was non-justiciable.⁶⁴

(i) Immunities of cabinet ministers and senior members of Government

The 1990 Constitution continued to afford near absolute immunity to Cabinet ministers in the exercise of their functions and powers, despite the People's Movement demanding greater accountability from the ruling classes and Nepal's transition from absolute to constitutional monarchy. It stipulated that any advice or recommendation provided by the Cabinet to the King for decisions or actions taken in the name of His Majesty's Government would be non-justiciable.⁶⁵ Specifically, Article 35(6) stated:

No question shall be raised in any court as to whether or not any recommendation or advice has been given to His Majesty ... nor shall any question be raised in any court about what recommendation or advice has been given.

Under the 2007 Interim Constitution, senior members of the Government enjoy a degree of immunity, although to a much lesser extent than under previous constitutions. Article 43 provides:

⁶² Article 10(1).

⁶³ Articles 10(6) and 10(5).

⁶⁴ Article 10(4).

⁶⁵ Articles 35(6), 35(3) and 35(4).

(2) The allocation and transaction of the business of the Government of Nepal shall be carried out as set fourth in the rules approved by the Government of Nepal.

(3) No question whether the Rules referred to in Clause (2) have been observed shall be inquired into in any court.

While the process and procedures of the Government's business cannot be challenged before a court of law, it can be argued that formally the law does not extend immunity to substantive issues and areas—though this has so far not been tested in a court of law.

In any case, as most ministers are also members of Parliament, they are also afforded parliamentary privilege—a highly circumscribed degree of immunity in respect of statements made in Parliament and for the conduct of business of Parliament pursuant to Article 56 of the Interim Constitution.

The practical reality, however, is much different. It is not uncommon for ministers and other senior government officials to evade accountability despite police complaints, First Information Reports (FIRs) filed against them for allegations of serious crimes committed during the conflict.

(a) Abduction and killing of Arjun Bahadur Lama (2005)

Arjun Bahadur Lama was abducted from Shree Krishna Secondary School in Kavre district in April 2005. Following the abduction, Purnimaya Lama, his wife, attempted to file a FIR, which named Unified Communist Party of Nepal-Maoist (UCPN-M)⁶⁶ Central Committee member Agni Sapkota, among others, as being responsible.⁶⁷ As the Kavre District Police Office refused to register the FIR, Purnimaya Lama filed a petition at the Supreme Court in July 2007, requesting

66 In January 2009, the Communist Party of Nepal (Maoist) (CPN-M) merged with the Communist Party of Nepal-Unity Centre (Masal) and was renamed the UCPN-M. In June 2012, a faction of the UCPN-M under leader Mohan Baidhya alias Kiran broke away from the UCPN-M, and formed a new party calling itself the CPN-M.

67 According to the FIR filed by Purnimaya Lama, several persons witnessed Maoist cadres taking Arjun Lama to Buddhakani VDC where they killed him in June 2005. Witnesses also informed Purnimaya Lama that her husband was produced before Agni Sapkota at the Buddhakhani Maoist training center. After several requests to the Maoists for information about her husband, the UCPN-M district secretary Suryaman Dong stated at a press conference on 17 December 2005 that Arjun Lama was forcibly taken away by Norbu Moktan (a central committee member of the Tamang Liberation Front, which was affiliated with the UCPN-M) and a platoon commander of Bashusmriti Brigade (who, though present at the killing, was not himself directly involved, according to Maoist sources). Suryaman Dong stated that when the Maoists were in Ghartichhap, the then-Royal Nepal Army launched an aerial attack during which Arjun Lama was killed. After hearing Suryaman Dong at the press conference, Purnimaya Lama made an application to the National Human Rights Commission, asking it to recover her husband's body. The NHRC conducted an investigation and concluded that Arjun Lama had not been killed during the army attack, rather he had been detained and subsequently killed. To date, his body has not been recovered.

the Court to order the police to register the FIR, start impartial investigations, and seek prosecution. The Supreme Court handed down its decision on 10 March 2008, ordering the Kavre police to register a murder case against five Maoist cadres and Agni Sapkota. The FIR was finally registered on 11 August 2008.

In May 2011, Agni Sapkota was appointed as a Cabinet Minister. A group of human rights defenders filed a writ at the Supreme Court on 27 May 2011 challenging the appointment in light of on-going police investigations into his role in the abduction, enforced disappearance and suspected killing of Arjun Lama.⁶⁸ Agni Sapkota was represented by the Attorney General during the hearings—who would otherwise be the State agent responsible for prosecuting him—thereby giving rise to a clear conflict of interest.

On 22 June 2011, the Supreme Court responded to the writ petition, but refrained from issuing an interim stay order. The Court ordered the police and prosecutors to expeditiously investigate the case against Agni Sapkota, and to provide progress reports to the Court every 15 days. While it questioned the moral propriety of Agni Sapkota serving on the Cabinet, the Court did not make any findings in that regard.

By July 2012, the AG had only provided three progress updates to the Supreme Court despite the order to update the Court every 15 days.⁶⁹ The witness statements contained in the three updates confirmed that Arjun Lama was taken away by Maoist cadres Yadav Poudel, Karnakhar Gautam and Bholu Aryal, among others, in line with the information that Purnimaya Lama had provided in her original FIR. In July 2012, the Government decided to put the case on hold. Purnimaya Lama challenged this decision before the Supreme Court and on 26 November 2012, the court issued a stay order. As of May 2013, a final Supreme Court decision was pending.

68 Human Rights Watch and Advocacy Forum, 'Adding Insult to Injury: Continued Impunity for Wartime Abuses', December 2011, accessed at: http://www.hrw.org/sites/default/files/reports/nepal1211Upload_0.pdf, pp 40-41.

69 The first update was sent to the Court on 27 December 2011 (12/09/2068), providing the name of the investigating officer appointed to the case. It also included statements of the teachers who taught at the school where Arjun Lama was abducted and who witnessed the incident. The second update was submitted on 6 February 2012 (23/10/2068) with information from the investigating officer who had collected statements from local people living near the school. The third update was submitted on 2 May 2012 (20/01/2069) with more statements by the school teachers.

In August 2011, Agni Sapkota lost his ministerial post in a cabinet reshuffle, but he remained an active member of the Constituent Assembly until it dissolved in May 2012.⁷⁰

(b) Bal Krishna Dhungel case (2011)

In November 2011, the Cabinet recommended to the President that Constituent Assembly member Bal Krishna Dhungel, who was convicted in 2004 on murder charges and sentenced to life imprisonment, be pardoned despite his sentence being upheld on appeal by the Supreme Court in 2010. Although the Supreme Court issued a stay order to the Government, pending its decision on the constitutionality of the recommended pardon, Bal Krishna Dhungel remained a member of the Constituent Assembly until it dissolved in late May 2012.

Those in power should not be involved in ongoing investigations against them. This is to ensure that they are in no way able to influence the investigation. This is partly accepted in the legal system of Nepal. Under Section 17 of the *Commission for the Investigation of Abuse of Authority Act*, anyone who is detained during investigation for government corruption, is automatically suspended from their job. However, no action is taken against government officials who are under investigation for serious crimes such as murder or implicated in serious human rights violations. This has resulted in several alleged human rights violators serving in senior positions in different ministries and sitting in the cabinet.

When a proposal was tabled in April 2012 to amend the rules of Legislature-Parliament to ensure that any MP convicted of a crime with a minimum three-year prison sentence would be suspended, the Maoists objected. The rule did not pass despite support for it by the Nepali Congress (NC), the Communist Party of Nepal–United Marxist Leninist (CPN-UML), the Madheshi Morcha, the Rastriya Prajatantra Party (RPP) and others, stating that it would lead to the suspension of many of its parliamentarians.⁷¹

1.4 Parliamentarians

In line with global practice, members of parliament in Nepal are afforded legal indemnity for conduct in the course of parliamentary business.

70 In November 2011, Surya Man Dong, another Maoist leader alleged to have been involved in the abduction and subsequent killing of Arjun Bahadur Lama, was appointed as State Minister for Energy. See 'Dong's Appointment as Minister Raises Hackles', *Kantipur*, 9 November 2011, accessed at: <http://www.ekantipur.com/2011/11/09/top-story/dongs-appointment-as-minister-raises-hackles/343535/>

71 Advocacy Forum interview with officer of the Legislative Parliament Secretariat, 7 June 2012.

Under the 1959 Constitution, parliamentarians were provided immunity for certain conduct in the course of their duties. Article 38(3) stated:

No Senator or member of the House of Representatives shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Senate or the House of Representatives or any Committee thereof.

In one case, *Sarbagya Ratna Tuladhar v. Ganesh Kumar Pokhrel*, the then Attorney General had tried to get the immunity of Ganesh Kumar Pokhrel as member of the House of Representatives lifted to allow for him to be prosecuted for comments made about the lack of independence of the judiciary. The Supreme Court however did not permit the lifting of immunity.

Article 62(1) of the 1990 Constitution provided that:

Subject to the provisions of this Constitution, there shall be full freedom of speech in both Houses of Parliament and no member shall be arrested, detained or prosecuted in any court for anything said or any vote cast in the House.

It is worth noting that the 1990 Constitution expressly stipulated that parliamentary privilege did not extend to parliamentarians' criminal conduct.⁷²

The 2007 Interim Constitution also provides immunity to members of the Legislature-Parliament with respect to statements made and conduct carried out in the course of parliamentary business. Article 56 reads as follows:

(1) There shall be full freedom of speech in any meeting of the Legislature-Parliament; and no member shall be arrested, detained or prosecuted in any court for anything expressed or any vote cast by him or her in such meeting.

...

(4) No proceedings shall be initiated in any court against any person in respect of the publication under the authority of the Legislature-Parliament of any document, report, vote or proceeding.

⁷² Article 62(6): No Member of Parliament shall be arrested between the date of issuance of the summons for a session and the date on which that session closes: Provided that nothing in this clause shall be deemed to prevent the arrest under any law of any member on a criminal charge.

As with the 1990 Constitution, the Interim Constitution provides that such privilege precludes arrests of MPs on grounds of criminal charges. Article 56(5) stipulates that:

No member of the Legislature-Parliament [shall] be arrested during the session of the Legislature-Parliament.

Provided that nothing in this Clause shall be deemed to prevent the arrest under any law of any member on a criminal charge.

In practice, however, Article 56(5) has done little to foster accountability for Parliamentarians suspected of committing serious crimes. This is clearly the case in Agni Sapkota and Bal Krishna Dhungel as described above. Babban Singh, a Madheshi politician wanted by police in connection with the killing of 27 people in Gaur, Rautahat District in 2007 was elected and sworn in as an independent member of the Constituent Assembly in 2008. He continued to serve as a member until the dissolution of the Assembly in May 2012.⁷³

1.5 Attorney General

The Attorney General enjoyed statutory immunity under the *State Cases Act, 1955* in respect of his prosecutorial discretion. While not explicitly provisioned in the 1959 Constitution, it can be argued that the AG was afforded immunity under the general provisions applicable to government officials.

Under Article 110(2) of the 1990 Constitution, the Attorney General had the right to make the final decision in respect of initiating proceedings. The Article read as follows:

The Attorney-General or officers subordinate to him shall represent His Majesty's Government in suits wherein the rights, interests or concerns of His Majesty's Government are involved. The Attorney-General shall have the right to make the final decision as to whether or not to initiate proceedings in any case on behalf of His Majesty's Government in any court or judicial authority.

73 Babban Singh was arrested briefly and a remand order had been issued in 2009. 'Hearing on Babban Singh begins', *Republica*, 21 January 2009, accessed at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=1303

The immunity granted to the Attorney General under the 1990 Constitution was challenged before the Supreme Court on two occasions, each time involving investigations into corruption allegations by the Commission for the Investigation of Abuse of Authority (CIAA).

(i) Attorney-General Badri Bahadur Karki v. Commission for Investigation of Abuse of Authority (CIAA) (2001)⁷⁴

In 1996, the then Attorney General Badri Bahadur Karki was investigated by the Commission for Investigation of Abuse of Authority in relation to his decision to not prosecute a case involving the misappropriation of foreign currency, i.e. Indian 500 rupees denomination banknotes, which are illegal currency under Nepal's *Foreign Exchange (Regulation) Act, 1962*. The AG was asked by the CIAA to furnish information in writing about his decision to not prosecute the case.

The AG responded to the request by filing a case in the Supreme Court challenging the jurisdiction of the CIAA, claiming that his discretion could not be questioned. The Attorney General cited Article 110 of the 1990 Constitution, claiming professional immunity for any decision made as to whether or not to prosecute a case.

The CIAA argued that professional immunity could not be used to shield anyone from being investigated for corruption. It also argued that it had the jurisdiction to investigate the AG on allegations of corruption as he was a public official.

The Supreme Court held that pursuant to Article 110 of the Constitution, the Attorney General had the right to make the final decision on whether to initiate proceedings. The right afforded to the Attorney General fell under his/her professional immunity and therefore precluded judicial review. However, if there was evidence that a decision to not prosecute was manifestly arbitrary and made with *mala fide* intention, the CIAA could initiate an investigation.

(ii) Narendra Bahadur Chand v. CIAA (2002)

The Supreme Court had occasion to consider the issue again in the case of *Narendra Bahadur Chand v. CIAA*.⁷⁵ Narendra Bahadur Chand was District Attorney in Kapilvastu, against whom the police had submitted a file for prosecution claiming that the District Attorney had decided to not prosecute a case where a non-Nepali person had obtained Nepali citizenship by forgery.

⁷⁴ *Attorney-General Badri Bahadur Karki v. Commission for Investigation of Abuse of Authority (CIAA)*, 31 May 2001 (18/2/2058).

⁷⁵ *Narendra Bahadur Chand v. CIAA*, 27 May 2002.

A case of corruption was filed against Narendra Bahadur Chand by the CIAA, accusing him of making the decision with *mala fide* intent.

While his case was under consideration at the Butwal Appellate Court, Narendra Bahadur Chand requested the Supreme Court to review the case under Section 15 of the *Judicial Administration Act, 2048 (1991)*. In the Supreme Court, Narendra Bahadur Chand claimed that there was no evidence of corruption, that the decision was made to not prosecute because of insufficient evidence, and that cases alleging forgery had to adhere to different procedures instead of filing an FIR. As such, the District Attorney had the discretion to decide whether or not to prosecute, and this discretion was neither subject to judicial review nor investigation by the CIAA. In its decision of 27 May 2002, the Supreme Court laid down two major principles: 1) the immunity enjoyed by the Attorney General under the 1990 Constitution also applied to District Attorneys at the district and appellate levels; and 2) unless there was *prima facie* evidence of corruption, the CIAA had no jurisdiction to investigate a case merely on the basis of a District Attorney's decision to prosecute or not prosecute. The court, however, did not rule out the CIAA's jurisdiction to investigate a case if there was *prima facie* evidence that a decision was made due to corruption.

Thus, a public attorney enjoys professional immunity in deciding whether or not to prosecute a case, and his/her discretion cannot be questioned. If, however, there is evidence of corruption, then the case can be investigated by the CIAA. What is not clear is what will happen to the decision in the case *per se*. For example, if the public prosecutor is convicted for corruption for making a decision not to prosecute a case, will that case be reconsidered and, if so, how? There is no clear answer to this question.

The role of the Attorney General under the 2007 Interim Constitution will be considered in detail in Part III. It is, in many ways, a significant role in the post-conflict context where the question of accountability for the many human rights abuses remains critical.

PART II: POWERS OF THE EXECUTIVE TO WITHDRAW CRIMINAL CHARGES, SUSPEND, COMMUTE OR REMIT A SENTENCE AND TO GRANT PARDON⁷⁶

During the decade long civil conflict, it was not uncommon for the Government to arrest and detain people on the basis of their political beliefs. In post-conflict Nepal, the Government has sought to withdraw and pardon cases in the view of seeking redress for those arrested and detained on the basis of political beliefs. Unfortunately, however, many of the cases withdrawn involve gross human rights violations contravening international law and standards.

Where conduct constitutes a gross human rights violation, notably torture, extrajudicial killing, or enforced disappearance, the Government is bound by domestic and international law to ensure those persons responsible are investigated; prosecuted and brought to trial; and where convicted, adequately punished. Victims of human rights abuses must be afforded effective remedy and reparations.

All credible allegations involving gross human rights violations or crimes under international law cannot be withdrawn from the criminal justice process until the cases have been duly investigated, prosecuted where there is sufficient evidence, and brought to trial. The role of an independent judiciary in this regard is paramount. It acts as a check in ensuring the government respects its obligations under international law and cases involving gross human rights violations or international crimes are not withdrawn or pardoned.

2.1 Mass withdrawal of criminal cases by executive decision

Three successive governments since the Constituent Assembly elections have withdrawn a significant number of criminal cases filed in several district courts across the country. First, the CPN-Maoist-led government withdrew approximately 349 cases on 27 October 2008. Second, the CPN-UML-led coalition government under Madhav Kumar Nepal withdrew approximately 282 cases on 17 November 2009. Third, the CPN-Maoist-led government withdrew approximately 424 cases in March 2012. Furthermore, there have been additional reports of specific cases being withdrawn by cabinet decisions.⁷⁷ It may be that there are other instances

⁷⁶ For the purposes of this report, the definitions 'amnesty' and 'pardon' as set out in the OHCHR publication, 'Rule-of-law tools for post-conflict states: Amnesties,' are adopted. 'Amnesty' refers to legal measures that have the effect of: (a) prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or (b) retroactively nullifying legal liability previously established. 'Pardons' are official acts that exempt a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, without expunging the underlying conviction.

⁷⁷ 'Withdrawal of case against Jamakattel's attackers stayed', *Republica*, 1 January 2013, accessed at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=47509

where cases were withdrawn within the criminal process, though such decisions have not been made public.⁷⁸

Nepal came under heavy criticism by other States over the withdrawal of criminal cases during the country's UN Universal Periodic Review (UPR) in 2011.⁷⁹ The National Human Rights Commission and the Office for the High Commissioner for Human Rights in Nepal issued a legal opinion in June 2011 making the following observations:

*Case withdrawals have effectually served to protect politically connected individuals from criminal accountability, promoting a policy of de facto impunity for the perpetrators of hundreds of serious crimes. This trend has **undermined the rights of alleged victims to an effective remedy** in those cases, and has impeded efforts to transition from the existing culture of impunity to a stronger judicial system based on impartiality and the rule of law—critical foundations for a sustainable peace.⁸⁰ [emphasis added]*

The National Human Rights Commission requested that the Government justify its rationale for the proposed withdrawals. Observing that numerous cases withdrawn by the Government are clearly criminal and not political in nature, the NHRC has also maintained that the Government needs to consult the Commission prior to withdrawing cases involving human rights violations, especially cases on which the NHRC has already conducted investigations and recommended actions.⁸¹

Cases withdrawn in 2008 included a significant number of cases filed by State agencies against Maoist leaders and cadres during the conflict. The withdrawals by the CPN-UML government in 2009 were made under pressure from the Terai-based political parties, and included many cases filed against their members and

⁷⁸ *Ibid.*

⁷⁹ UK embassy in Nepal, 'Ambassador's remarks on human rights', 2 June 2011, accessed at: <http://ukinnepal.fco.gov.uk/en/news/?view=Speech&id=604902782>

⁸⁰ United Nations Office of the High Commissioner for Human Rights in Nepal, 'Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal, Legal Opinion' June 2011, accessed at: http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case_Withdrawals_for_Serious_Crimes_in_Nepal_E.pdf, p 2.

⁸¹ NHRC and OHCHR, 'Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal', June 2011, accessed at: http://nhrcnepal.org/nhrc_new/doc/newsletter/Legal%20Opinion%20II%20-%20Remedies%20and%20Rights%20Revoked%20-%20Case%20Withdrawals%20for%20Serious%20Crimes%20in%20Nepal.pdf, p 4.

supporters for crimes allegedly committed after the signing of the CPA.⁸² These cases had been filed in various courts and District Administration Offices across the country and covered a wide range of crimes including murder, rape, attempted murder, treason, conducting subversive activities, arson, possessing illegal weapons, robbery, drug-dealing, as well as some offences that are considered civil offences in Nepal, such as damage to property.

There is some confusion as to the exact number of cases that were withdrawn, and cases where proposals were made for withdrawal from the criminal process. Lawyers from Advocacy Forum on 3 April 2012 made requests under the *Right to Information Act, 2064 (2007)* to obtain information on the cases included in the March 2012 cabinet decision. In response, the Ministry of Law, Justice and Parliamentary Affairs stated that 'in the fiscal year 2010-2011 (2067-2068), 426 cases were proposed for withdrawal and 190 applications for pardon were lodged.'⁸³ However, no further details were provided in relation to the nature of the cases to be withdrawn, the district courts at which they were filed, the names of the accused, the legal status of the cases, etc. In terms of applications for pardon, only two were forwarded to the cabinet according to the response from the Ministry.

As follow-up, Advocacy Forum made an additional request for information on 6 June 2012, but the Office of the Prime Minister responded that

...as the requests for case withdrawals come from various ministries such as the Ministries of Home, Law, Justice and Parliamentary Affairs, the files are returned to the respective ministries. As such, we do not have the required details; please submit your request to the respective ministries.

Advocacy Forum has, however, received unofficial information from the Law Ministry that it does not have an up-to-date list of cases withdrawn and that it is in the process of updating the list. On 21 August 2012, Advocacy Forum formally requested full details of all withdrawn cases from the Law Ministry. As of May 2013, the information had not been provided.

There remains a risk that other cases will be withdrawn in the future. On 9 September 2011, Mukti Pradhan, a lawyer and member of the CPN-M, was appointed Attorney General of Nepal. At a public event immediately following

82 'Government withdraws some 300 murder, arson cases', *Republica*, 17 November 2009, accessed at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=11876

83 Advocacy Forum letter of 3 April 2012 to the Minister of Law, Justice and Parliamentary Affairs and response of 28 April 2012.

his appointment, he stated that '[a]ll politically motivated and baseless cases against Maoists will be withdrawn, including cases against leaders and cadres of the Madhesi parties.'⁸⁴

An analysis by Advocacy Forum in its Periodic Review *'Evading Accountability: By Hook or Crook'* concluded that cabinet decisions to withdraw cases in October 2008 and November 2009 relied on an expansive interpretation of Clause 5.2.7 of the CPA. It was a deliberate misinterpretation used to justify the withdrawal of the cases that constituted *prima facie* violations of international humanitarian law and international human rights law.⁸⁵

Cabinet decisions to withdraw criminal charges through executive order have been made in the name of advancing the peace process and implementing Clause 5.2.7 of the CPA. The decision to withdraw cases, as communicated by the Government's Chief Secretary to the Ministry of Law, Justice and Parliamentary Affairs on 27 October 2008, was stated as:

*...the proposal to withdraw [349] cases filed during the period of armed conflict between 14 February 1996, and 21 November 2006 in various courts and quasi-judicial bodies, including those which do not fall under the categories specified in the 'Procedures and Norms to be Adopted while Withdrawing Government Cases 1998' has been submitted as it is expedient to retract them as exceptions to steer the peace process forward and to implement the Clause 5.2.7 of the Comprehensive Peace Agreement.*⁸⁶

Under a strict reading of Clause 5.2.7 of the CPA, withdrawal of cases would extend only to cases against members of the CPN-M, initiated against them for political reasons. Indeed, immediately following the signing of the CPA, the then-government withdrew cases against 367 Maoist detainees who had been charged under the *Terrorist and Disruptive (Control and Punishment) Ordinance, 2004* (TADO).⁸⁷ Likewise, many persons detained for political reasons who were then facing trials under the *Crime against the State and Punishment Act, 2046 (1989)* (CASPA) were also released unconditionally as the charges made against them related to lawful political activities involving no crimes relating to personal property (i.e. not violating Section 29(2) of the *State Cases Act, 1992*).

84 'Beware, Attorney General,' *Republica*, 15 September 2011, accessed at: http://archives.myrepublica.com/2012/portal/?action=news_details&news_id=36015

85 Advocacy Forum, 'Evading accountability by hook or by crook: The Issue of Amnesties in Post-Conflict Nepal', Year 2, Vol. 1, June 2011.

86 Proposal No. 67 of 2008 sent by Chief Secretary Bhojraj Bhimire to Ministry of Law, Justice and Parliamentary Affairs.

87 Annual Report of the Attorney General 2007/2008.

Since then, however, several governments have widened the application of Clause 5.2.7, enabling the withdrawal of criminal cases as part of political bargaining. For instance, in mid-2011, withdrawal of cases was a pre-condition for cooperation between the Maoists and Madhesi political parties, which led to the formation of a government led by Prime Minister Baburam Bhattarai. One of the main points of agreement between the CPN-M and the Madheshi parties was that both sides would agree to withdraw criminal cases that were filed during various political movements, including the Maoist insurgency and the Madheshi uprising.

Following strong objections from many human rights advocates, National Human Rights Commissioner Chief Kedar Nath Upadhyaya wrote a letter to the Prime Minister on 4 September 2011, warning that withdrawing such cases would be against the political parties' commitment to defend and promote human rights. In a subsequent meeting with representatives of the human rights community, the Prime Minister stated that only cases of a 'political nature' would be withdrawn. What constitutes a crime of a 'political nature,' and how this is determined remain open questions.

(i) Prakash Thakuri case (2007)

Prakash Thakuri was allegedly abducted by Maoist People's Liberation Army cadres, including Pom Lal Sharma, on 5 July 2007. Janaki Thakuri, his wife, filed an FIR on 7 November 2007. Police investigations identified Pom Lal Sharma, Jagat Chhetri and Chandrakanta Bhatta as suspects in the killing of Prakash Thakuri, and the District Public Prosecutor filed murder charges against them at the Kanchanpur District Court. While the case was under judicial consideration, the Government decided on 27 October 2008 to withdraw charges against Pom Lal Sharma and the others accused in the case. Based on a cabinet decision, the Attorney General's Office asked the Kanchanpur District Attorney to execute the decision, which was acted upon.

With legal assistance from Advocacy Forum, Janaki Thakuri challenged the cabinet decision in the Supreme Court. On 23 February 2011, the Supreme Court stated that although the CPA allowed for the withdrawal of politically motivated cases during the conflict, Prakash Thakuri's case took place after the signing of the CPA and arguments that the case be withdrawn on the basis of the CPA therefore could not be sustained. The Supreme Court also stated that the District Court made an error in allowing the case to be withdrawn without first analyzing the facts. It overruled the decision of the District Court and ordered it to rectify its error.

As discussed above in the International Legal Framework section, Nepal is under an obligation to provide effective remedy and reparation to victims of human rights violations as part of its overall obligation to ensure and respect the human rights of individuals within its jurisdiction.

In respect of gross human rights violations, including crimes under international law, there is an obligation on the State to investigate and, if there is sufficient evidence, prosecute and bring to trial those persons responsible for committing such offences.

The sections below set out the applicable international and domestic legal framework in greater detail, and then analyze Supreme Court jurisprudence relating to the withdrawal of cases.

2.2 International law

As a State party to the ICCPR and the CAT, there is an explicit obligation on Nepal to provide effective remedies and reparation for any violation of rights or freedoms set out in each of the respective treaties.⁸⁸

The UN Human Rights Committee, the treaty-monitoring body for the ICCPR, stresses that State Parties must investigate and bring to justice perpetrators of human rights violations under the ICCPR. The UN Human Rights Committee further stresses the importance of this obligation in cases involving violations recognized as crimes under international law, such as torture and other cruel, inhuman and degrading treatment,⁸⁹ summary and arbitrary killing⁹⁰ and enforced disappearances.⁹¹ The UN Human Rights Committee notes that 'the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of violations.'⁹²

The UN Human Rights Committee goes on to state that

*where public officials or State agents have committed violations of the Covenant rights...the State Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties...and prior legal immunities and indemnities.*⁹³

88 See International Legal Framework, pp 12-15.

89 See Article 7, ICCPR.

90 See Article 6, ICCPR.

91 See Article 7, Article 9 and Article 6, ICCPR.

92 UNHRC General Comment 31, *supra* fn. 34, para 18.

93 *Ibid.*

The Committee against Torture in its most recent concluding observations on Nepal further noted with concern, 'the prevalent climate of impunity for acts of torture and ill-treatment.'⁹⁴ The Committee against Torture recommended that Nepal 'send a clear and unambiguous message condemning torture and ill-treatment to all persons and groups under its jurisdiction' by ensuring that

*all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and the perpetrators punished. In connection with prima facie cases of torture, the accused should be subject to suspension or reassignment during the investigation.*⁹⁵

Withdrawing cases against politically-affiliated persons, despite them being implicated in crimes, goes directly against Nepal's obligations under international law.

2.3 Domestic legal framework

There is no clear provision allowing for the withdrawal of cases under Nepalese law.⁹⁶ Section 29 of the *Government Cases Act, 2049 (1992)* has been used by consecutive governments in post-conflict Nepal to withdraw cases. On 17 August 1998, during the conflict, the Government approved the *Procedures and Norms to be adopted while Withdrawing Government Cases, 1998* ('1998 Standards'). The use of Section 29 of the *Government Cases Act, 2049 (1992)* and the *1998 Standards*, along with Clause 5.2.7 of the CPA—all in a context where the Attorney General, a political appointee, enjoys professional immunity—has been instrumental in ensuring that persons from political organizations or armed groups against whom criminal cases were pending evade prosecution.

(i) Government Cases Act, 2049 (1992)

Section 29 of the *State Cases Act* states:

(1) In the cases where the Government of Nepal has to be a plaintiff or where the Government of Nepal has filed a case or where the Government of Nepal is a defendant pursuant to the prevailing laws, if there is an order of the Government

⁹⁴ Committee against Torture, *Conclusions and recommendations of the Committee against Torture: NEPAL*, 13 April 2007, UN Doc. CAT/C/NPL/CO/2 (CAT Committee Concluding Observations), para 24.

⁹⁵ *Ibid.*

⁹⁶ Bandi, Govinda Sharma and Madhav Kumar Basnet, in '*Withdrawal of the Serious Criminal Cases and Impunity in Nepal*,' FOHRID, December 2010 (Bandi and Basnet, 2010).

of Nepal, the Government Attorney, with the consent of other parties, may make a deed of reconciliation or with the consent of the court, may withdraw the criminal case in which the Government of Nepal is plaintiff. In such a situation, the following as indicated below shall be prescribed:

(a) if reconciliation is made, no one shall be charged any fee for the same.

(b) in case of withdrawal of the case, the criminal charge or the Government claim ceases and the defendant gets release from the case.

(2) Notwithstanding anything contained in Sub-Section (1), if the case has an effect on the property of any civilian, such case shall not be withdrawn from the court under this Section.

When the Government decides to withdraw any case, the District Attorney is required to submit an application at the relevant court. Once an application is received, the court conducts a hearing, and after considering the appropriateness of the causes and bases for withdrawal, makes a decision as to whether the case can be withdrawn.

Even though the *Government Cases Act, 2049 (1992)* appears to provide an unconditional power to the Government to withdraw cases,⁹⁷ thereby denying victims their right to effective remedy by favoring reconciliation over normal investigation and prosecution, the Supreme Court has held that this power is not absolute as demonstrated in the cases below.

(ii) Procedures and Norms to be Adopted while Withdrawing Government Cases, 1998

The *Procedures and Norms to be Adopted while Withdrawing Government Cases, 1998*, approved by the cabinet on 17 August 1998, lays down the bases for the withdrawal of cases and the process to be followed.

The 1998 Standards classify criminal cases into two broad categories: (1) cases of a political nature (Sections 3, 4 and 5 of the *Crimes against the State (Offences and Punishment) Act, 2046 (1989)*;⁹⁸ and (2) general cases (filed

⁹⁷ Section 29(1) of the Government Cases Act 2049 (1992).

⁹⁸ Section 3. *Subversion*:

3.1. If someone causes or attempts to cause any disorder with an intention to jeopardize sovereignty, integrity or national unity of Nepal, he/she shall be liable for life imprisonment.

3.2. If someone causes or attempts to cause any disorder with an intention to overthrow the

under existing laws of Nepal), including homicide, corruption, rape, robbery, drug dealing, etc.,⁹⁹ which are to be withdrawn only in the rarest of instances taking into account circumstantial evidence, any prior criminal history of the accused, his or her social standing and reputation, and other related factors, including whether the case was filed with a motive of political vengeance or malicious intent.¹⁰⁰ The ICJ is not aware of any case where a court has considered what constitutes 'political vengeance' or 'malicious intent' and therefore this remains unclear to date. The 1998 Standards (Standard No. 5) further restrict the withdrawal process to cases 'which have not been filed, or which have already been decided by the district court or are under consideration of the appellate court.' The Standards favour, as far as possible, the recommendation of an all-party mechanism rather than that of one particular political party for the withdrawal of cases. Such recommendation should preferably also incorporate recommendations from the local administration and if possible, local bodies, on the basis of which the Home Ministry can then recommend withdrawal of the cases to the Ministry of Law, Justice and Parliamentary Affairs.

Government of Nepal by exhibiting or using criminal force, he/she shall be liable for life imprisonment or an imprisonment up to Ten years.

3.3. If someone causes or attempts to cause a conspiracy to jeopardize the sovereignty, integrity or national unity of Nepal with the help of a foreign state or organized force, he/she shall be liable for life imprisonment or an imprisonment up to Ten years.

3.4. If someone causes conspiracy of a crime as referred to in Subsections 3.1 or 3.2 or gathers people, arms and ammunitions with such intention or incites, he/she shall be liable for an imprisonment up to Ten years.

Section 4. *Treason:*

...

4.2. If someone causes or attempts to cause or incites to create hatred/enmity (*dwesh*) or contempt to any class, caste, religion, region or other similar acts to jeopardize the independence and sovereignty and integrity of independent and indivisible Nepal, he/she shall be liable for an imprisonment up to Three years or a fine up to Three Thousand Rupees or the both.

4.3. If someone causes or attempts to cause an act to create hatred, enmity (*dwesh*) or contempt of the functions and activities of the Government of Nepal in writing or orally or through shape or sign or by any other means mentioning baseless or uncertified (unauthentic) details, he/she shall be liable for an imprisonment up to Two years or a fine up to Two Thousand Rupees or the both. Provided that, it shall not be deemed to be an offence under this Sub-section if anyone criticizes the government of Nepal.

Section 5. *Revolt against friendly states:* If someone causes or attempts to cause or incites to revolt against any friendly state by using arms from the territory of Nepal, he/she shall be liable for an imprisonment up to seven years or a fine up to Five Thousand Rupees or the both.

99 Advocacy Forum, 'Evading Accountability by Hook or by Crook: The Issue of Amnesties in Post-Conflict Nepal,' Year 2, Vol. 1, June 2011.

100 *The 1998 Standards*, Nepal Government Policy Document, Criteria 2. See also Human Rights and Democracy Forum (FOHRID), 'Withdrawal of the Serious Criminal Cases and Impunity in Nepal,' December 2010.

The 1998 Standards set out the following procedure for the withdrawal of cases:

- (1) *The Home Ministry shall submit an application for the withdrawal of a case to the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA). The application should include:*
 - *Relevant case dossier and written justification for the withdrawal decision, which has been authenticated at least by a secretary-level decision*
 - *Dossier sent must include at least facsimile copies of the FIR, statement of the accused, charge-sheet and relevant court orders relating to remand*
 - *Details about the stage of the legal process (whether the case is at trial stage, is under appeal, or has been appealed)*
 - *Prior consent from the concerned ministry*
- (2) *If the decision to withdraw a case is justifiable, the MoLJPA, after having received all documents according to the aforementioned procedures, shall make a decision and forward a recommendation to the Cabinet.*
- (3) *If the Cabinet finds justifiable reasons to withdraw the case, the MoLJPA shall implement the decision.*¹⁰¹

The decision to withdraw cases against Maoist leaders in return for their cessation of hostilities during the armed conflict followed these guidelines, as did the withdrawal of cases against hundreds of detainees charged under the TADA and the CASPA (see above). However, the 1998 Standards were not aimed at addressing a mass number of cases, some of which involve international crimes. As noted in the International Law Framework section, international law requires the State to investigate, and if there is sufficient evidence to prosecute and bring to justice perpetrators of gross human rights violations and crimes under international law.

¹⁰¹ Advocacy Forum, 'Evading Accountability by Hook or Crook,' Occasional Brief, Year 2, Vol. 1, June 2011.

In October 2008, the then-Maoist led government, while deciding to propose the withdrawal of 349 cases pending in the courts, suspended Standard 4 of the 1998 Standards for three months to facilitate the implementation of the withdrawal decision.¹⁰²

Standard 4 states that:

Regardless of what is stated in Standard 2 [on the withdrawal of politically motivated cases], while implementing the withdrawal of cases that give benefit to the accused (such as corruption, misuse of power, foreign employment, ... and cases committed because of the conduct of the perpetrator such as rape, drug trafficking, espionage, arson,...) shall not be withdrawn.

(iii) Proposed amendments to the 1998 Standards

On 20 November 2009, amid widespread protests against its decision to withdraw 282 criminal charges, the then-Government formed a task force to review the 1998 Standards. The task force made a number of recommendations to ensure that the standards complied with judicial independence and the right to an effective remedy. Its key findings submitted to the Government reportedly included:

- (1) Although the power to withdraw cases falls under exclusive prerogative, the government does not have carte blanche to withdraw cases, oblivious to victims' rights and its duty to protect the right to an effective judicial remedy.*
- (2) If a case, which is under consideration in court, seems to lack substantive evidence or if the case is weak, it can be withdrawn.*
- (3) Cases that have already been decided by the courts cannot be withdrawn.*
- (4) Regardless of what is stated in the three points above, if those who commit strict liability criminal offences are not held accountable, impunity will prevail. Therefore, such cases, including the following, must not be withdrawn:*
 - forged passport and citizenship related offences*

¹⁰² Petition filed by *Madhav Kumar Basnet v. Government of Nepal*, Supreme Court decision of 11/11/2067 (23 February 2011).

- *immigration-related offences*

- *corruption-related offences*

...

- *homicide*

- *enforced disappearance*

- *abduction*

- *rape*

(5) *Cases that are sub judice at the appellate courts must not be withdrawn.*¹⁰³

At the time of writing, it was unclear whether the Government had taken any steps to implement the task force's recommendations. What is clear, however, is that if and when the proposed amendments are adopted, the Government must ensure they are consistent with Nepal's obligations under international law.

In other words, any proposed amendments must guarantee victims' right to a remedy¹⁰⁴ and suspects' right to a fair trial.

2.4 Supreme Court rulings on the withdrawal of criminal cases

An analysis of relevant Supreme Court jurisprudence reveals that the Government's competence to withdraw cases is not absolute, even under the domestic law of Nepal. Although there seems to be longstanding judicial consensus dating back to the mid-1990s (i.e. under the 1990 Constitution) that cases of a political nature can be withdrawn, such decisions have to be subjected to judicial scrutiny on a case by case basis.

According to the June 2011 Legal Opinion produced by the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) and the National Human Rights Commission (NHRC), cases withdrawn in 2008 and 2009, comprising of murder, attempted murder, rape and mutilation, went beyond the ambit of Clause 5.2.7 of the CPA. The withdrawals included the period after the signing of the CPA, and there was a lack of uniformity in the way in which district courts

103 Human Rights and Democracy Forum (FOHRID), 'Withdrawal of the Serious Criminal Cases and Impunity in Nepal,' 2010, page 50 (in Nepali language).

104 Including immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. See *UN Basic Principles and Guidelines on the Right to a Remedy, supra* fn. 2, Principles 8 and 9.

considered whether or not to endorse Cabinet decisions on case withdrawals. In other words, district courts do not comply with Supreme Court rulings in a uniform manner, which has undermined the authority of Supreme Court decisions.¹⁰⁵

(i) Dil Bahadur Lama v. Government of Nepal (1994)

Dil Bahadur Lama, who was Inspector General of Police (IGP) in the 1980s, was convicted of corruption by the Patan Appellate Court on 29 July 1992. While his appeal was under consideration by the Supreme Court, the cabinet on 2 April 1994 decided to withdraw the case under Section 29 of the *Government Cases Act*. When the AG's Office sought the Supreme Court's permission to withdraw the case, the Court referred it to the full bench of the Supreme Court on the basis that it involved complex legal issues and had long-term implications.

The full bench of the Supreme Court inquired into the following four issues:

- (1) *Whether the right of the government to withdraw criminal cases under section 29 of the Government Cases Act is an absolute right, or whether it can only be exercised on certain grounds;*
- (2) *Whether the provision of seeking consent of the court for the case withdrawal is a mere procedural formality, or whether the court has to analyse the rationale and reasoning of such a decision and decide whether or not to grant its consent;*
- (3) *Whether decisions to withdraw cases are only applicable to cases under consideration at a district court, or whether it could also apply following conviction and while a case is under consideration at the appellate level;*
- (4) *Whether the court can allow withdrawal of a case when the government itself is appealing against the decision.*

In rejecting the Government's proposal to withdraw the case against Dil Bahadur Lama, the Supreme Court laid down a number of principles:

- (1) *The right of the government to withdraw criminal cases is not an absolute right;*
- (2) *The government must seek permission from the court to*

¹⁰⁵ OHCHR and NHRC, 'Rights and Remedies Revoked: Case Withdrawals for Serious Crimes in Nepal,' Legal Opinion, June 2011.

withdraw a case. A decision made by the government to withdraw a case is in and of itself not sufficient, and permission of the court is necessary. Until a court gives its permission, no case can be withdrawn. This provision was envisioned to prevent misuse of power by the government, and seeking approval from the court is not a mere procedural formality;

- (3) *Case withdrawal is dissimilar to a pardon. When a person has been already convicted by a court, the case cannot be withdrawn. The right to withdraw a case and the right to pardon are two different things. The right to pardon lies with the King pursuant to Article 122 of the 1990 Constitution.*

This was a landmark decision on the issue of case withdrawals. However, in subsequent cases filed on the same issue, the Supreme Court has become more ambiguous in considering cases withdrawn on the basis of Clause 5.2.7 of the CPA.

(ii) Advocate Trilochan Gautam v. Government of Nepal (1996)

In 1996, advocate Trilochan Gautam filed a writ petition in the Supreme Court challenging the constitutionality of Section 29 of the *Government Cases Act*, the legal provision that allows the withdrawal of criminal cases under the Act. The petitioner sought to have Sections 29(1) and 29(1)(a) declared *ultra vires*. The petitioner argued that in the absence of a clear legal framework that stipulated the types of cases that can be withdrawn, the provision had been used arbitrarily and affected the constitutional guarantee of equality before the law and equal protection of the law.

The Supreme Court on 7 November 1996 held that the provisions in Section 29 could be applied only with the consent and decision of the court. The consent of the court is mandatory for withdrawing any criminal case under Section 29 of the *Government Cases Act*. In the course of making its decision for such a withdrawal, the court can test and observe the rationality, justice and fairness of such decisions. Based on the merits of each case, the court can permit its withdrawal, where appropriate. The Government's decision is on its own insufficient for withdrawing a criminal case. As such, Sections 29(1) and 29(1)(a) can only be implemented under judicial control and with the consent of the concerned court, which can test the Government's decision and ascertain whether it is rational, just and fair. As it is not an absolute provision, it is not unconstitutional and thus cannot be declared *ultra vires*.

(iii) Government of Nepal v. Devendra Mandal (2007)

The Supreme Court had opportunity to further consider the rationale behind Article 29 of the *Government Cases Act 1992* in its decision in *Government of Nepal v. Devendra Mandal*.¹⁰⁶ The Court held that its consent is necessary to proceed with case withdrawals, including in order to uphold victims' access to justice and their right to justice:

*As the decision of the government to withdraw the case is an executive decision, the Court should make necessary and reasonable judgment regarding whether or not to withdraw the case, balancing the test of reasonableness to withdraw the case and the victim's right to justice.*¹⁰⁷

Referring to jurisprudence from India, the Court concluded that permission to withdraw a case should only be given if the Court is convinced that the decision serves the larger public interest.¹⁰⁸ The Court emphasized that the Government is required to put forward its grounds and reasons for withdrawing any case, demonstrating that the Court would consider proposed case withdrawals in some circumstances using a 'reasonableness' test, though it would give a degree of deference to the discretion of the Executive. The Court indicated that it would not evaluate the grounds and reasons for proposed case withdrawals, but would assume that case withdrawals were undertaken 'in accordance with the law and necessity unless it is proved otherwise.' The Court also stated that its permission was not a mere 'rubber stamp,' and that case withdrawals must be weighed against potential denials of victims' access to justice and effective remedies.¹⁰⁹

In this case, the Supreme Court further clarified that if a case has been decided and the accused is convicted, and the case is then under consideration at the appellate level, it cannot be withdrawn under Section 29 of the *Government Cases Act*.¹¹⁰ The decision of the Government to withdraw the case under Section 29 of the *Government Cases Act* is applicable only in cases which have not been decided and where the district court has given its permission to do so.¹¹¹

106 *Government of Nepal v. Devendra Mandal and others*, Criminal Appeal No. 0197 of the year 2064, Supreme Court decision of 3 September 2007, Nepal Law Magazine, 2064, No. 6.

107 *Ibid.*

108 *Ibid.*

109 The Supreme Court observed: 'In every criminal case having state as plaintiff, citizens have been victimized. In homicide, someone's father, someone's mother, someone's husband, someone's wife, someone's son/daughter, someone's brother, someone's sister has been killed. Can the government scot free the accused released from the charge and deprive victim from the right to speedy justice by withdrawing the case? [...] Can the government withdraw any case, at any time it desires and from any stage without mentioning any ground and reason just because of the provision in the [...] State Cases Act?'

110 Supreme Court decision, *ibid.*, para 19.

111 Supreme Court decision, *ibid.*, para 18.

The Supreme Court also spelled out in this case situations where case withdrawals could be justified, such as when there is a 'paucity of evidence' to justify the charges, and/or when it might be against public interest to proceed with the case.

(iv) Government of Nepal v. Gagan Dev Ray Yadav (2009)

Gagan Dev Ray Yadav was sentenced to life imprisonment by the Rautahat District Court for the unlawful killing of Shambhu Patel.¹¹² The Hetauda Appellate Court subsequently approved the District Court's decision, but recommended Gagan Dev Ray Yadav's sentence be reduced to 10 years using Section 188 of the Court Management Chapter of the *Muluki Ain*. The Appellate Court's decision was appealed by the prosecutor to the Supreme Court, who argued that those convicted should be sentenced as demanded in the charge-sheet as the Appellate Court did not have occasion to analyse the evidence presented at trial. Gagan Dev Ray and Mohamad Alam also appealed to the Supreme Court stating that the decision of the Appeal Court was unfair.

While the case was under consideration by the Supreme Court, the AG submitted a request to withdraw the case, quoting a 17 December 2008 decision of the Office of the Prime Minister and the Cabinet, which requested the Supreme Court for the withdrawal of the case against Gagan Dev Ray Yadav and others on the grounds that the case was politically motivated and that the CPA provided that all politically motivated charges should be withdrawn.

The Supreme Court concluded that the case could not be withdrawn:

*Section 29(1) of the Government Cases Act requires permission of the court when withdrawing a criminal case; this is not just a formality. It is a substantive issue and the court has to look into the merits, using its judicial mind to determine whether or not to grant such permission.*¹¹³

112 The District Attorney initially filed charges against six persons alleged to be Maoist cadres, including Gagan Dev Ray Yadav, for the shooting and killing of Shambhu Patel. The prosecutor asked for life imprisonment for Gagan Dev Ray Yadav pursuant to Section 13(1) of the Homicide Chapter of the *Muluki Ain* claiming that he was the main perpetrator, and sought punishment for the rest under Section 13(4) of the same chapter of the *Muluki Ain* for abetting the crime. Gagan Dev Ray Yadav was eventually sentenced to life imprisonment, and another Mohammad Alam to six months' imprisonment. The Rautahat District Court acquitted the four other accused.

113 *Government of Nepal v. Gagan Dev Ray Yadav, 2009*, para 4.

The Court further warned:

... the power to withdraw cases cannot be misused. That is the reason why the district court should analyse the facts while considering granting its permission. ...The Supreme Court has laid down a number of principles such as: It is not the intention of the laws and the Constitution to allow the withdrawal of any kind of case and to promote impunity in society. If the government continues withdrawing cases without analysing the gravity of the case, and courts grant permissions without testing the reasons, then the accountability and responsibility of the government to protect the life and property of individuals will be eroded, thus destroying the very basic fabric of the rule of law. The court cannot take a back seat in protecting the rights of individuals according to the law and the Constitution under the pretext of political change.¹¹⁴

(v) Madhav Kumar Basnet et. al. v. Government of Nepal (2011)¹¹⁵

A writ of *certiorari* was filed by advocates Madhav Kumar Basnet, Lok Dhvaj Thapa and Binod Phuyal at the Supreme Court in 2008¹¹⁶ challenging the decision of the Cabinet of Ministers on 27 October 2008 to withdraw 349 cases. The writ claimed that the decision violated the Preamble, Articles 12(1),¹¹⁷ 13(1),¹¹⁸ Article 33(c) and (n),¹¹⁹ Article 34 (1) and (2),¹²⁰ Article 132 (1),¹²¹ Article 135¹²²

¹¹⁴ *Ibid.*, para 8.

¹¹⁵ Supreme Court decision of 11/11/2067 (23 February 2011).

¹¹⁶ Certiorari Writ No. 0357, lodged by Advocate Madhav Kumar Basnet, Lokdhaj Thapa and Binod Phuyal against Prime Minister Pushpa Kamal Dahal, 'Prachanda,' Deputy Prime Minister and Home Minister Bamdev Gautam, Minister Dev Prasad Gurung, Minister for Law, Justice and Parliamentary Affairs, The Attorney General, and the National Human Rights Commission.

¹¹⁷ Article 12 Right to Freedom: (1) Every person shall have the right to live with dignity, and no law which provides for capital punishment shall be made.

¹¹⁸ Article 13 Right to Equality: (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

¹¹⁹ Article 33 Responsibilities of the State: (c) to adopt a political system which fully abides by the universally accepted concepts of fundamental human rights, multi-party competitive democratic system, sovereign authority inherent in the people and supremacy of the people, constitutional checks and balances, rule of law, social justice and equality, independence of judiciary, periodic elections, monitoring by civil society, full independence of the press, right to information of the people, transparency and accountability in the activities of political parties, people's participation, neutral, competent and clean administration and to maintain good governance by eliminating corruption and impunity; (n) to repeal all discriminatory laws.

¹²⁰ Directive Principles of the State: (1) It shall be the chief objective of the State to promote conditions of welfare on the basis of the principles of an open society, by establishing a just system in all aspects of national life, including social, economic and political life, while at the same time protecting the lives, property, equality and liberty of the people; and (2) It shall be the objective of the State to maintain law and order and peace, protect and promote human rights, promote public welfare in the society, and create opportunities for participation of the people through self-governance, while maintaining a system where people can reap the benefits of democracy.

¹²¹ Article 132 Functions, Duties and Powers of the National Human Rights Commission: (1)It shall be the duty of the National Human Rights Commission to ensure the respect, protection and promotion of human rights and their effective implementation.

¹²² Article 135 Functions, Duties and Powers of the Attorney General.

of the Interim Constitution and Article 2 of the ICCPR.¹²³ It claimed additionally that the decision also violated Article 13 of the CAT and Article 6 of the CERD, which are implemented under Nepalese Law pursuant to Section 9 of the *Nepal Treaty Act, 1990 (2047)*.¹²⁴

The petitioners argued that the law does not cover each and every crime committed for political reasons or by political actors. They maintained that cases to be withdrawn should be limited to situations where the accused has not actually committed the offense, but rather a case has been brought for political vengeance or simply because the accused holds a different political view. The petitioners also submitted that the provision for the withdrawal of cases is not intended to relieve political party leaders and cadres who have committed crimes of any accountability. They argued that by including a clause stating that 'action should be initiated to withdraw the cases in the enclosed annex involving the CPN-Maoist and other political parties' in the proposal from the Home Ministry, other political parties have also withdrawn cases implicating their cadres.¹²⁵ The result of such political intervention in the dispensation of justice is impunity.

The petition was quashed by the Supreme Court, on the basis that

*... even though the law has not imposed any conditions for the withdrawal of cases, the Government should provide adequate and relevant bases and follow certain standards. The law leaves the decision at the discretion of the Government, but it is required that such decision of the Government should be 'fair, reasonable and just.' Different Acts concur that consent from the other party is mandatory for mediation; and for case withdrawals, consent from the court is a must. If the Government withdraws cases in the absence of such bases, reasons, relevance and standards, it would render a blow to the rule of law.*¹²⁶

The Supreme Court, relying on its decision in *Gagan Dev Ray Yadav* reaffirmed

¹²³ Article 2 of the ICCPR.

¹²⁴ Section 9 of the *Treaty Act* states: Provisions of Treaties to be Applicable Like Laws: (1) In case of the provisions of a treaty to which the Kingdom of Nepal or HMG has become a party following its ratification accession, acceptance or approval by the Parliament conflict with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as Nepal laws; (2) In case any treaty which has not been ratified, acceded 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.

¹²⁵ Bandi and Basnet, 2010, *supra* fn. 96.

¹²⁶ *Madhav Kumar Basnet v. Government of Nepal*, 23 February 2011.

that the Government's decision to withdraw a case is unsubstantiated if the process of such withdrawal is carried out without consent from the court. The consent of the Court is not just a formality but rather a substantive legal provision. The district court must use its discretion to allow or deny a case withdrawal, and look into whether or not such a right is being used for a positive purpose with good intention before giving consent for the case withdrawal. The Supreme Court, however, did not issue a stay order to prevent implementation of the cabinet decision as requested by petitioners who argued that the withdrawal was prohibited even under the 1998 Standards and many previous decisions of the Supreme Court.

(vi) Gopi Bahadur Bhandari v. Government of Nepal (2012)¹²⁷ & Suk Dev Ray Yadav v. Government of Nepal (2012)¹²⁸

The Supreme Court issued judgments in *Gopi Bahadur Bhandari v. Government of Nepal*¹²⁹ and *Suk Dev Ray Yadav v. Government of Nepal*¹³⁰ on 17 April 2012. Both cases related to the same unlawful killings.¹³¹ The Supreme Court issued an order against the Government, and importantly, guidelines on the withdrawal of cases (stating that it had received a number of cases relating to cabinet decisions to withdraw criminal cases using Section 29 of the *Government Cases Act*).

Responding to a petition for *mandamus* seeking to challenge the Government's decision to withdraw the criminal case, Judges Kalyan Shrestha and Gyanendra Bahadur Karki on 17 April 2012 observed:

127 Writ No. 2066- WO- 1345, Justice Kalyan Shrestha and Gyanendra Bahadur Karki, 17 April 2012.

128 Writ No. 2066-WO-1333, Justice Kalyan Shrestha and Gyanendra Bahadur Karki, 17 April 2012.

129 Writ No. 2066- WO- 1345, Justice Kalyan Shrestha and Gyanendra Bahadur Karki, 17 April 2012.

130 Writ No. 2066-WO-1333, Justice Kalyan Shrestha and Gyanendra Bahadur Karki, 17 April 2012.

131 One writ was filed by Suk Dev Yadav, whose two sons were killed; and the other writ was initiated as public interest litigation by advocate Gopi Bahadur Bhandari who sought judicial orders and guidelines. The facts of the case were: Suk Dev Yadav's two sons (and three others) were killed by a group of people, including Raj Kishor Yadav. Along with 20 others, Raj Kishor Yadav was prosecuted for murder and attempted murder at the Bara District Court. When the case was still under court consideration, the cabinet decided on 30 June 2010 to withdraw the case, stating that Raj Kishor Yadav and the others were Maoist cadres against whom the case was initiated for political reasons. The main argument presented by the respondents at court was that the decision to withdraw a case or to grant pardon was an executive discretion, and that the government had made its decision taking into consideration wider public interest. The plaintiffs argued that the government's decision to withdraw a murder case was unconstitutional, and that such a course of action should be prevented as it served only to entrench impunity and deny the victims' family justice.

A crime is a crime under the criminal law, no matter who committed it. A crime committed by politically-affiliated persons is not a political crime, and no one can argue that crimes are committed for political reasons. If the elements of a crime are present, it does not matter what the objectives are, and the crime is a crime.

Crimes can sometimes be defined in a political way. In that case, the problem is in the law but not its execution. Changing such laws could be an option in such a situation. If we have a prevailing law, application of that law cannot be different according to who it is used against. We cannot implement a law differently to how it would apply to the general population if politically-affiliated persons are involved. Section 29 of the Government Cases Act cannot be used as an instrument to exempt anyone from criminal liability in the name of political belief, on the basis of a political activist's involvement, or as a result of political negotiation.¹³²

The Court noted that the cabinet had time and again withdrawn cases using Section 29 of the *Government Cases Act*, providing different and contradictory reasons in similar cases. The Supreme Court issued an order of *mandamus* against the Government, the Prime Minister's Office and the Office of the Council of Ministers, and to the Bara District Court for carrying out the decision of the case while it is *sub judice* along the following lines:

- *To not carry out the executive decision of withdrawing cases for crimes listed in Standard 4 of the 1998 Standards, and for other serious crimes such as homicide, crimes against the state, war crimes, any human rights violations, crimes against humanity, genocide, etc.*
- *To develop the process of arriving at decisions for withdrawing cases only after consulting with the Attorney General or the public prosecutor under AG about the appropriate reason for withdrawal*
- *To consider that compensation to which victims are entitled under the applicable law will not be compromised by withdrawal of the case*

¹³² *Suk Dev Ray Yadav v. Government of Nepal and Ors*, Writ No. 2066-WO-1333, decided on 17 April 2012.

- *To not consider case withdrawal if the respondent has ignored a court hearing date and is absconding*
- *To provide an opportunity to the petitioner or to the victim of a crime to express his/her views during the hearing for case withdrawal*
- *To make necessary amendments to the 1998 Standards for the effective implementation of the abovementioned points.*

Two significant highlights emerge from the above analysis of Supreme Court jurisprudence. First, the Government's use of withdrawals cannot be undertaken without judicial scrutiny. Although the Supreme Court has not been entirely consistent in its jurisdiction, it has been unequivocal in holding that the withdrawal of cases must be subject to the consent and approval of the judiciary. Second, the judiciary must play an important role in ensuring the State upholds its obligation to ensure those persons responsible for gross human rights violations and crimes under international law are held accountable.

2.5 Pardons by executive decision

The power to pardon convicted criminals is part of the legal framework of many countries. It usually involves cancellation of a penalty imposed by a court on humanitarian grounds or the interests of justice.

(i) Legal provisions

In Nepal, the right to grant a pardon has historically been with the King. Article 66 of the 1959 Constitution stated:

His Majesty shall have the power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence given by any court, tribunal or authority established by the law.

Article 122 of the 1990 Constitution similarly stated:

His Majesty shall have the power to grant pardons and to suspend, commute or remit any sentence passed by any court, special court and military court or by any other judicial, quasi-judicial or administrative authority or institution.

As indicated above, Article 151 of the 2007 Interim Constitution initially provided that the Council of Ministers had the power to grant pardons and to suspend, commute or remit any sentence passed by any court, special court, military court or any other judicial, quasi-judicial, or administrative authority or institution. The provision was later amended to similarly empower the President who would act on the recommendation of the Council of Ministers. The way Article 151 has been amended creates confusion about the delineation of pardon powers between the President and the Council of Minister.

(ii) Supreme Court decisions relating to pardon

The Supreme Court has repeatedly affirmed that a pardon can only be exercised in exceptional cases, and that it cannot be invoked for cases still pending before the courts. It did so in some cases considered under the 1990 Constitution as well as the 2007 Interim Constitution.

(a) *Government of Nepal v. Daman Kumar Lama alias 'Raju' (2007)*¹³³

Following their arrests on suspicion of murder, Daman Kumar Lama Raju and Subba Tamang were charged under Section 13(3) of the Homicide Chapter of the *Muluki Ain*, and Ram Bahadur Tamang Thewa was charged by the District Attorney under Section 17(3) for abetting in the crime. After trial, the District Court sentenced Daman Kumar Lama and Subba Tamang to 10 years' imprisonment each under Section 14, but acquitted Ram Bahadur Tamang.

The District Attorney appealed the sentence, arguing that the District Court's decision of 10 years' imprisonment under Section 14 and the acquittal were flawed, and demanded the sentences that were claimed in the charge-sheet originally presented by the prosecutor. The decision of the District Court was upheld by the Appellate Court.

The prosecutor then appealed the decision of the Appellate Court at the Supreme Court. While the case was still under the Supreme Court's consideration, both Daman Kumar Lama and Subba Tamang were pardoned and released from prison on the occasion of the then King's 55th birthday in December 2000.

¹³³ Supreme Court decision of 3/12/2063 (17 March 2007).

In its judgement of 17 March 2007, the Supreme Court affirmed the decision of the Appellate Court. The Court also issued judicial guidelines to the Prison Management Department, stating that whenever a recommendation for pardon is made, it had to confirm: whether any appeal against the decision of a lower court has been submitted; whether the case has been finalized; what the maximum sentence of the accused was; what the offense was; and what the gravity of the offense was. The Court held that although Article 122 of the 1990 Constitution empowered the King to pardon anyone sentenced by a court, it was limited only to those cases where the court had rendered its final judgment.

(b) *Pramod Kumar Jha v. Government of Nepal (2010)*

When the Cabinet decided on 13 January 2010 to seek a pardon for Mukeshwar Das Kathwania, Pramod Kumar Jha challenged the constitutionality of the executive decision on the basis that Mukeshwar Das Kathwania had been convicted in 1985 for the murder of his father. The Supreme Court had affirmed the conviction of Mukeshwar Das Kathwania in 1997 but Kathwania had remained a fugitive from the law.

On 16 November 2010, the Supreme Court issued a stay order on grounds that the convicted person had remained a fugitive, defying its orders and therefore held that he was not eligible for pardon. The Court stated that a pardon should be a possibility only in the 'rarest of rare cases' where there was a well-founded suspicion that misleading evidence had resulted in a miscarriage of justice. The final decision of the case is yet to be made available.

(c) *Sabitri Shrestha v. Government of Nepal (2011)*

On 8 November 2011, the UCPN-Maoist coalition government submitted a request pursuant to Article 151 of the Interim Constitution to the President, asking that Bal Krishna Dhungel, a Constituent Assembly Member who had been convicted of murdering Ujjan Kumar Shrestha,¹³⁴ be pardoned.

134 Bal Krishna Dhungel was convicted by the Okhaldhunga District Court for the murder of Ujjan Kumar Shrestha on 24 June 1998, and was sentenced to life imprisonment. Although the killing occurred during the conflict, the dispute arose out of personal reasons between the families of the victim and Bal Krishna Dhungel. When the case was appealed, the Rajbiraj Appellate Court overturned the District Court's decision and released Bal Krishna Dhungel, stating that the case would be dealt with by transitional justice mechanisms. The District Attorney appealed the Appellate Court's reversal at the Supreme Court, which on 8 September 2010 upheld the original murder conviction.

The victim's sister, Sabitri Shrestha, successfully applied to the Supreme Court for an interim order to halt the pardon proceedings on 23 November 2011. As of May 2013, the President had yet to decide the matter nor had the Supreme Court given its final ruling on the case. Bal Krishna Dhungel continued to be an active member of the CA until it dissolved in May 2012. He has yet to be arrested.¹³⁵

As part of her petition, Sabitri Shrestha had also sought an interim order to suspend Bal Krishna Dhungel from his position as a CA member, for his arrest and to carry out the Supreme Court judgment. In response, the Supreme Court merely stated that there was 'no legal obstruction' to the imprisonment of Bal Krishna Dhungel, but refrained from issuing the demanded interim order.

135 Bal Krishna Dhungel spent eight years in prison (including in pre-trial detention) after his conviction by the District Court, though he was released after his acquittal by the Rajbiraj Appellate Court. It is worth noting that those who have been sentenced to life imprisonment in Nepal typically spend at least 20 years in prison.

PART III: IMMUNITIES FOR THE ATTORNEY GENERAL

The role of the Attorney General has come under heavy criticism for the Office's failure to pursue cases of gross human rights violations. Following his appointment as Attorney General, Mukti Pradhan—a member of the CPN-M—publicly stated that '[a]ll politically motivated and baseless cases against Maoists will be withdrawn, including cases against leaders and cadres of the Madhesi parties.'¹³⁶ The role of the Attorney General in the withdrawal of cases, as well as in the investigation and prosecution of complaints relating to human rights abuses during the conflict, are two highly contentious issues.

Similar to Article 110(2) of the 1990 Constitution, under the 2007 Interim Constitution the Attorney General is empowered to make the final decision on prosecutions. Article 135(2) provides that

... Unless this constitution otherwise requires, the Attorney General shall have the right to make final decision to initiate proceedings in any case on behalf of the Government of Nepal in any court or judicial authority.

The Attorney General's professional immunity has not been subjected to intense scrutiny by the Supreme Court under the 2007 Interim Constitution following the end of the conflict. Under the applicable legal framework set out in the *Government Cases Act*, the police and District Attorneys have sole responsibility for initiating investigations into and prosecution of cases of alleged human rights violations. The AG's Office through its actions (when deciding not to prosecute) and inaction (when not making a decision to prosecute where prosecution seems reasonable) is promoting impunity.

In many cases, the police fail to send preliminary reports of their investigations to the public prosecutor, contrary to requirements in the *Government Cases Act*.¹³⁷ Section 6 of the Act states that upon receipt of the report, 'the Government Attorney shall give necessary direction to the investigating police officer.' The Act, however, is silent as to what should happen if the police do not provide their preliminary report. District Attorneys have been very passive in the face of these provisions. To the knowledge of the ICJ, the large majority of District

136 Damakant Jayshi, 'Beware Attorney General', *Republica*, 15 September 2011, accessed at: http://archives.myrepublica.com/2012/portal/?action=news_details&news_id=36015

137 Section 17(3) of the *Government Cases Act* states that, 'If the government attorney finds it necessary to collect additional evidence or to enquire with any person, after studying the file in the course of making a decision on whether or not the case qualifies for further actionhe/she may give direction to the investigating Police Personnel to collect and provide such evidence or to conduct and provide enquiries with such person; and it shall be the duty of such investigating Police Personnel to abide by such direction.'

Attorneys have not actively questioned the police when they do not receive the preliminary reports.

In instances where police delay investigations, the only recourse for the victims and victims' families is to file a writ to seek court orders directing the State authorities to act in accordance with the law. The mother of 15-year-old Maina Sunuwar, who died allegedly from torture in army custody in February 2004, had to file a petition at the Supreme Court to obtain an order directing the Kavre police to investigate her case. After the order was obtained, the police finally submitted the file with its investigations to the public prosecutor in January 2008, who then filed murder charges at the Kavre District Court in early February 2008. The case, however, has still not proceeded in the face of blatant non-cooperation by the Nepal Army to secure the arrests of the four accused.

Both the failure of the police to take action and the AG's Office to prosecute have been repeatedly criticised by the Supreme Court in response to applications for *mandamus* and *certiori* writs filed by relatives of the 'disappeared' or those unlawfully killed. The Supreme Court has ordered these agencies to proceed with investigations in the large majority of cases. In some cases, the Court has gone further and criticized both the Nepal Police and the Attorney General's Office for having failed in their duty to investigate and to actively supervise investigations, and has exceptionally ordered the prosecution of named individuals.¹³⁸

(i) Kedar Chaulagain v. Kavre District Police Office, et. al. (2009)

Kedar Chaulagain, father of 17-year-old Subhadra Chaulagain who was dragged from her home by her hair and questioned for over an hour before she was allegedly killed by a group of soldiers in February 2004, filed a complaint with the Kavre District Police Office (DPO) in June 2006 immediately after the end of the conflict. When the police did not proceed with investigations, Kedar Chaulagain filed a petition at the Supreme Court. Following strong criticism of the police, the Supreme Court issued a writ in December 2009:

¹³⁸ For details of the case of *Subhadra Chaulagain*, see Advocacy Forum and Human Rights Watch, *Waiting for Justice*, *supra* fn. 5, pp 80-81 and 'Adding Insult to Injury', December 2011, p 38: on 14 December 2009 the Supreme Court ordered the police and Attorney General's office to conduct a prompt investigation. But in the two years following the only action taken has been recording depositions of three witnesses and a visit to the site (which was more than a year after the issuance of the order); and the case of Reena Rasaili: Advocacy Forum, 'AF raises concern to AG over lack luster investigation into Reena murder case', <http://www.advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lackluster-investigation-in-reena-murder-case.php>; see also the letter to the Attorney General of 5 July 2011 on Reena's case: <http://www.advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>

*[A] writ of mandamus has been issued against the opponents directing them to conduct prompt investigation as per the FIR. Similarly, a judicial order has been issued against the Police Headquarters, the Mid-regional Police Office, and the Zonal Police Office, Bagmati, to be serious, proactive, and alert, and to take the necessary and appropriate steps as they have continuously shown indifference in fulfilling their duty to investigate.*¹³⁹

The Court found that the Kavre DPO had completely overlooked the investigation, thereby failing in its legal duties. It noted that the District Attorney had been 'passive' in fulfilling his legal duties, failing to give necessary direction to the police personnel. The court concluded that

*It sends the wrong message to the public when authorities involved in a criminal investigation remain indifferent to its progress. It also mortifies the common person's desire to see justice done promptly. The delay in investigation becomes advantageous to the criminal because he can find an easy way to conceal the evidence. It can render the whole criminal justice system a failure.*¹⁴⁰

(ii) Rasaili v. Government of Nepal (2009)

The failure of the AG's Office to guide the police in investigations is further demonstrated in the case of Reena Rasaili, who was raped and killed in February 2004.¹⁴¹ As in the Subhadra Chaulagain case above, the Supreme Court in December 2009 ordered the Kavre DPO and the District Attorney to proceed with investigations. This resulted in the arrest of one suspect (an army deserter) in September 2010.

139 *Kedar Chaulagain v. Kavre District Police Office and District Attorney's Office*, Supreme Court of Nepal, Chief Justice Anupraj Sharma and Justice Ram Kumar Prasad Shah, Writ No. 064-WO-0339, 14 December 2009.

140 *Ibid.*

141 *Rasaila v. Government of Nepal*, Supreme Court of Nepal, order of December 14, 2009 in Writ No. 0339/2064 (2007).

In June 2011, Advocacy Forum raised concerns with the AG in relation to the poor quality of police investigations in the case.¹⁴² Advocacy Forum pointed out the poor quality of the statement taken from the suspect, which contained several contradictions, and how there had been a lack of focus in the investigations on the rape allegations. The Office of the Attorney General never responded to Advocacy Forum's letter. In September 2012, the trial against the army deserter was set to start, but was postponed at the request of both parties. At the time of publication of this report, there had been no further developments in the case.

(iii) Rajendra Prasad Dhakal & Ors. v. Government of Nepal, et. al. (2007)

In some cases, the Supreme Court has gone even further and ordered prosecutions of alleged perpetrators.

In July 2007, the Supreme Court delivered a landmark judgment considering dozens of pending *habeas corpus* petitions filed during the conflict. The Supreme Court found evidence that Chakra Bahadur Katwal had died in army custody as a result of torture and ordered the police and prosecutors to initiate criminal prosecutions.¹⁴³

Chakra Bahadur Katwal was chairman of the Nepal Teachers Association in Okhaldhunga district. After being arrested he had been kept at the local 'Ranasingh Dal Gulma' military barrack and was later transferred to the Okhaldhunga DPO where he was allowed to meet his family. After some days, he was transferred to the Saptari DPO and then to the Central Jail in Kathmandu and denied access to his family members who sought to meet him. The Court took into account evidence such as the fact that the District Education Office had in a letter to the Court admitted that Chakra Bahadur Katwal had been asked to attend at the District Administration Office on the day of his 'disappearance,' and that after he went there he did not return, as well as the admission by the District Administration Office that after Chakra Bahadur Katwal appeared at the office he was sent to the local military barracks (Ranasingh Dal Gulma) and had later been transferred to the District Police Office.

142 Advocacy Forum, 'AF raises concern to AG about lacklustre investigation into Reena murder case', accessed at: <http://www.advocacyforum.org/news/2011/07/af-raises-concern-to-ag-over-lackluster-investigation-in-reena-murder-case.php>; see also the letter to the Attorney General of 5 July 2011 on Reena's case: <http://www.advocacyforum.org/downloads/pdf/press-statement/letter-to-attorney-general-reena-english.pdf>

143 *Rabindra Prasad Dhakal & Ors. v. Nepal Government, Home Ministry & Ors*, Decision of the Supreme Court on Disappearance Cases, 1 July 2007, p 7.

Despite the order of the Supreme Court, no progress has been made in the investigations. In October 2010, Chakra Bahadur Katwal's wife filed a communication to the UN Human Rights Committee under the Optional Protocol to the ICCPR.¹⁴⁴

(iv) Suntali Dhami v. Government of Nepal (2010)¹⁴⁵

In *Suntali Dhami v. Government of Nepal*, where a policewoman was allegedly raped by a group of her colleagues, the Supreme Court gave precise directions to the Nepal Police and AG's Office as to how to proceed with investigations.

After being allegedly raped by a group of policemen in Achham district in September 2009, Suntali Dhami filed an FIR. The police initially did not conduct a proper investigation and no prosecution was initiated. It was only after women's organizations exerted public pressure that an investigation was undertaken. Eventually, the District Attorney submitted a charge-sheet against three of the six alleged perpetrators against whom Suntali Dhami had filed her complaint. It was publicly reported that the District Attorney's decision was biased and not based on merit and the evidence available as the other three suspects, who were not indicted, were close to a political leader and the head of the police force.¹⁴⁶

A public interest litigation petition was filed at the Supreme Court seeking an order in relation to the procedures to be followed in the investigation of the case and further asking for the existing statutory limitation of 35 days for filing a complaint in rape cases to be removed. The AG's Office responded that it had decided not to prosecute the other three alleged perpetrators due to lack of evidence, and that its decision was covered by immunity and was not subject to judicial review.

On 2 December 2010, the Supreme Court held that the extraordinary power given to it under Article 107 of the Interim Constitution cannot be limited by the AG's professional immunity as elaborated in Article 135, and that his decision to not initiate proceedings in a case may be subject to judicial review.¹⁴⁷ The Court

144 'Enforced Disappearance of Chakra Bahadur Katwal in December 2001,' *The Advocacy Center - Trial*, accessed at: <http://www.trial-ch.org/en/activities/litigation/the-advocacy-center-trial-act/acts-cases/nepal/affaire-katwal-octobre-2010.html>

145 *Suntali Dhami v. Government of Nepal*, Writ No. 0584/2066, verdict of 2 December 2010.

146 'Protest against Dhami rape turns violent', *Ekantipur*, 9 December 2009, accessed at: <http://174.120.89.170/2009/12/09/national/protest-against-dhmi-rape-turns-violent/304144.html>

147 Article 107 states: (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extra-ordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution; (2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of

stated that professional immunity cannot be sustained with respect to 'decisions made with malicious intent and in an arbitrary fashion.' The Court further stated that 'there can be no dispute that the object and intent of Article 135 of the Constitution is that any decision regarding whether or not to prosecute in any case falling under Annex one of the Government Cases Act, 2049 B.S. shall be made without any bias and only after proper evaluation of evidence.'¹⁴⁸ This statement by the Court is highly significant as this is the only apparent instance where the Supreme Court has provided an interpretation of Article 135 of the 2007 Interim Constitution.

The Supreme Court directed the Accham District Attorney Office to file cases against all six suspects allegedly involved in the rape.¹⁴⁹ While the prosecutor was in the process of filing charges, however, three police officers concerned sought a review of this decision at the Supreme Court. At the same time, the three other police officers (namely Biradutta Badhu, Naravan Mahatara, Dan Singh Bhandari) filed a separate writ petition before the Supreme Court demanding orders, including a stay order to prevent their prosecution. They argued that they were neither consulted nor given any opportunity to state their position in the case where the Supreme Court had ordered the authorities to initiate investigations and prosecution against them, in contravention of Article 24(9) of the Interim Constitution and the principles of natural justice.

Responding to this second writ petition, the Supreme Court on 7 July 2011 issued an interim order to the Accham District Attorney to not execute the decision of the Supreme Court against those three suspects until the review case had been decided by the Court. As of May 2013, the Supreme Court had not made any decision on the review petition, meaning that no prosecution has been initiated against these three police personnel.

any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto*.

148 *Suntali Dhami v. Government of Nepal*, Writ No. 0584/2066 verdict of Supreme Court of Nepal.

149 'SC orders govt lawyers to file cases against all accused in Suntali Dhami rape case', *Nepalnews*, 2 December 2010, accessed at: <http://www.nepalnews.com/home/index.php/news/2/11216-sc-orders-govt-lawyers-to-file-cases-against-all-accused-in-suntali-dhami-rape-case.html>

In the meantime, on 8 December 2011, Birendra Bahadur Bam, Kar Bir Thalal and Jagadish Pandey (the other three police officers against whom prosecution was initiated) were found guilty of rape. One was sentenced to six years imprisonment and the other two to two years imprisonment each.¹⁵⁰ They appealed against their conviction and the case is pending at the Doti Appellate Court.

The cases reviewed above point to several problems: (1) prosecutors have routinely disregarded their duty to investigate credible allegations of crimes, including crimes under international law; (2) prosecutors are not exercising their functions with the objective of protecting human rights and promoting rule of law; and (3) prosecutors have not been able to function independently or impartially.

The *UN Guidelines on the Role of Prosecutors* set out international standards aimed at ensuring that prosecutors are able to perform their functions impartially and independently, and thus able to uphold their international duty to investigate and bring to justice perpetrators of human rights violations.¹⁵¹ Prosecutors must be in a position to prosecute public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law.¹⁵²

States must 'ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.'¹⁵³

The office of the prosecutor must be strictly separated from judicial functions. It is understood that in many jurisdictions prosecutors exercise certain judicial functions, particularly in relation to collecting evidence or ordering preventative detention. Such functions, however, must be limited to the pre-trial stages of the proceedings and subject to independent judicial review.¹⁵⁴

150 'Suntali Dhami rape case: Achham district court slaps jail sentence to three policemen,' *Nepalnews*, 9 December 2011, accessed at: <http://www.nepalnews.com/home/index.php/news/1/15163-suntali-dhami-rape-case-achham-district-court-slaps-jail-sentence-to-three-policemen.html>

151 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, (International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*), p 71.

152 Recommendation 19, *Council of Europe Committee of Ministers*, (2000) Committee of Ministers to member states on the role of public prosecution in the criminal justice system.

153 *Ibid.*, Guideline 4.

154 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors supra* fn. 151, p 75.

Prosecutors must perform their duties fairly, consistently and expeditiously, respecting and protecting human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.¹⁵⁵

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption; abuse of power; grave violations of human rights and other crimes recognized by international law; and, where authorized by law or consistent with local practice, the investigation of such offences.¹⁵⁶

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through unlawful methods violating a suspect's human rights, notably torture or ill-treatment, they must refuse to use such evidence and take all necessary steps to ensure that those responsible for using such methods are brought to justice.¹⁵⁷

Where a prosecutor has knowledge that his or her actions or inactions may facilitate or enable the perpetration of an international crime, he or she may be complicit in the crime.¹⁵⁸

155 Guideline 12, *UN Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (*UN Guidelines on the Role of Prosecutors*).

156 *Ibid.*, Guideline 15

157 *Ibid.*, Guideline 16.

158 See *United States v. Ernst von Weizsaecker et al.*, Trials of war criminals before the Nuremberg Military Tribunals, in which 2 senior legal advisors were convicted of crimes against humanity for not objecting to the deportation of 6000 Jews from France to Auschwitz. The Tribunal held that Ernst von Weizsaecker (Secretary of State, Foreign Office) and Ernst Woemann (Under-Secretary of State and Head of Political Department, Foreign Office) had an absolute duty to object to actions they knew were violations of international law. 'If the program was in violation of international law the duty was absolute to so inform the inquiring branch of government. Unfortunately for Woermann and his chief von Weizsaecker, they did not fulfil that duty. By stating that they had no 'misgivings' or 'no objections', they gave the 'go ahead' signal to the criminals who desired to commit the crime.' Control Council Law No. 10, volume 14 (1952).

The UN Committee against Torture stresses the role of government legal advisors in preventing torture:

...State parties are obligated to adopt effective measures to prevent public authorities and **other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention**. Thus, States parties should adopt effective measures to **prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture**. [emphasis added]¹⁵⁹

The Committee against Torture has indicated that a public Prosecutor violates his duty of impartiality if he fails to appeal the dismissal of a judicial decision in a case where there is evidence of torture.¹⁶⁰

¹⁵⁹ Committee against Torture, General Comment 2, *supra* fn. 42, para 17.

¹⁶⁰ Committee against Torture, Decision of 10 November 1999, case of *Khalen Ben M'Barek v. Tunisia*, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para 11.10.

PART IV: IMMUNITIES AFFORDED TO THE ARMY

A history of royal, rather than civilian, control over the Army has meant an almost complete lack of accountability for crimes and human rights violations committed by army personnel. As the Army was traditionally answerable only to the palace and the King, changes to the *Army Act* following the conflict and the overthrow of the monarchy have not brought about greater professionalization of the Army nor created more accountable internal structures for ensuring discipline.

The cases reviewed below underscore two salient points: (1) immunities granted to army personnel mean that state sanctioned use of force is frequently misused and abused, resulting in the commission of crimes and human rights violations; and (2) the military justice system as provided in the 2006 *Army Act* must be reformed in line with international standards to ensure victims' right to an effective remedy and to ensure the right to a fair trial.

As noted above in the International Legal Framework section, States must investigate, and where sufficient evidence warrants, prosecute and bring to trial those responsible for human rights violations.¹⁶¹ Immunity provisions foster a climate of impunity, undermining efforts to re-establish respect for human rights and the rule of law.¹⁶² The UN Human Rights Committee affirms that State Parties cannot relieve perpetrators from personal responsibility using statutory immunities and indemnities. The UN Human Rights Committee also stresses that 'no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.'¹⁶³

Military tribunals can never, under any circumstances, be competent to try gross human rights violations.¹⁶⁴ Civilian courts are the courts of competent jurisdiction to prosecute and punish gross human rights violations. The UN Human Rights

161 *UN Basic Principles and Guidelines on the Right to a Remedy, supra* fn. 2, Principle 3.

162 *Preliminary Conclusions of the UN Human Rights Committee on Peru*, UN Doc. CCPR/C/79/Add.67, para 10.

163 UNHRC General Comment 31, *supra* fn. 34, para 18.

164 Diane Orentlicher, *Report of the Independent expert to update the set of principles to combat impunity*, 8 February 2006, UN Doc. E/CN.4/2005/102/Add.1, p 16; Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, 14 June 2004, UN Document E/CN.4/Sub.2/2004/7, para 19.

Committee,¹⁶⁵ the Committee against Torture¹⁶⁶ and the Committee on the Rights of the Child,¹⁶⁷ as well as various special procedures of the UN Human Rights Council considering extrajudicial executions,¹⁶⁸ enforced disappearances,¹⁶⁹ torture or ill-treatment,¹⁷⁰ arbitrary detention¹⁷¹ and the independence of judges and lawyers¹⁷² firmly reject the use of military courts or courts martial to try serious human rights offences.

- 165 *Concluding Observations on the UN Human Rights Committee on Guatemala*, UN Doc. CCPR/CO/72/GTM (2001), para 20; *Concluding Observations of the UN Human Rights Committee on Colombia*, 25 September 1992, UN Doc. CCPR/C/79/Add.2, para 393; *Concluding Observations of the UN Human Rights Committee, Colombia*, UN Doc. CCPR/C/79/Add.76 (1997), para 18 and 34; *Concluding Observations of the UN Human Rights Committee, Peru*, 25 September 1992, UN Doc. CCPR/C/79/Add.8, para 8; *Concluding Observations of the UN Human Rights Committee, Croatia*, 28 December 1992, UN Doc. CCPR/C/79/Add.15-A/48/40, para 369; *Concluding Observations of the UN Human Rights Committee, Brazil*, 24 July 1996, UN Doc. CCPR/C/79/Add.66, para 10; *Concluding Observations of the UN Human Rights Committee, Lebanon*, 1 April 1997, UN Doc. CCPR/C/79/Add.78, para 14; *Concluding Observations of the UN Human Rights Committee, Chile*, 30 March 1999, UN Doc. CCPR/C/79/Add. 104, para 9; see also *Concluding Observations of the UN Human Rights Committee, Bolivia*, UN Doc. CCPR/C/79/Add.74, para 11; *Concluding Observations of the UN Human Rights Committee, El Salvador*, 18 April 1994, UN Doc. CCPR/C/79/Add.34, para 5; *Concluding Observations of the UN Human Rights Committee, Ecuador*, 18 August 1998, UN Doc. CCPR/C/79/Add.92, para 7; Case of *Jos Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres v. Columbia*, Communication No. 612/1995, decision dated 29 July 1997, UN Doc. CCPR/C/60/D/612/1995; Case of *Nydia Erika Bautista v. Columbia*, Communication No. 563/1993, decision dated 13 November 1995, UN Doc. CCPR/C/55/D/563/1993.
- 166 Committee against Torture, *Conclusions and Recommendations of the Committee against Torture, Peru*, 16 November 1999, UN Doc. A/55/44, para 62; Committee against Torture, *Concluding Observations of the Committee against Torture, Colombia*, 9 July 1996, UN Doc. A/51/44, para 80; Committee against Torture, *Concluding Observations of the Committee Against Torture, Venezuela*, 5 May 1999, UN Doc. A/54/44, para 142.
- 167 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Colombia*, 15 February 1995, UN Doc. CRC/C/15/Add.30, para 17.
- 168 *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, 20 August 2008, UN Doc. A/63/313, para 48; *Human Rights Questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Report on Extrajudicial, Summary or Arbitrary Executions*, prepared by Mr Bacre Waly Ndiaye, Special Rapporteur, 7 October 1996, UN Doc. A/51/1457, para 125; *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, prepared by Ms Asma Jahangir, Special Rapporteur, 6 January 1999, UN Doc. E/CN.4/1999/39, para 67; *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, prepared by Ms Asma Jahangir, Special Rapporteur, 25 January 2000, UN Doc. E/CN.4/2000/3, para 89.
- 169 *Report of the Working Group on Enforced or Involuntary Disappearances: Best practices on enforced disappearances in domestic criminal legislation*, Addendum, prepared by the Working Group on Enforced or Involuntary Disappearances, 28 December 2010, UN Doc. A/HRC/16/48/Add.3, para 57.
- 170 *Question of torture and other cruel, inhuman or degrading treatment or punishment*, prepared by Sir Nigel Rodley, Special Rapporteur, 3 July 2001, UN Doc. A/56/156, para 39(j).
- 171 *Report of the Working Group on Arbitrary Detention*, prepared by the Working Group on Arbitrary Detention, 18 December 1998, UN Doc. E/CN.4/1999/63, para 80.
- 172 *Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled 'Human Rights Council: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, 18 January 2007, UN Doc. A/HRC/4/25, para 29; *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Special Rapporteur on the Independence of Justice and Lawyers Mr Param Cumaraswamy*, Addendum, 19 February 1998, UN Doc. E/CN.4/1998/39/Add.1 paras 79, 80 and 133.

Trying cases of serious human rights violations before military courts has been cited as a key contributor to impunity: 'even when an isolated act is involved, one may question the willingness of the military hierarchy to shed full light on an incident that is likely to damage the army's reputation and spirit de corps.'¹⁷³

The United Nations *Principles Governing the Administration of Justice through Military Tribunals* require that in all circumstances, the jurisdiction of military courts should be set aside in favour of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture or ill-treatment, and to prosecute and try persons accused of such crimes.¹⁷⁴

Moreover, military courts may not assume jurisdiction over civilians. Under Principle 5 of the UN Principles, military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.¹⁷⁵

The UN Human Rights Committee has said that in exceptional cases where military courts may be used, they must comply fully with fair trial guarantees under Article 14 of the ICCPR.¹⁷⁶

Under the 1959 Constitution, the King was Supreme Commander of the then Royal Nepal Army. Article 64 stated:

Supreme Command of the Military

(1) The Supreme Command of military forces is vested with His Majesty and the exercise thereof shall be as regulated by the Act.

(2) Until and unless the Act provides in that behalf, His Majesty shall do as follows: (a) Establishment and management of military forces; (b) Granting the post of Commission to the military officers and cadres; (c) Appointment of Commanders-in-Chief and fixing the powers, duties and remunerations.

173 Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, 14 June 2004, UN Doc. E/CN.4/Sub.2/2004/7.

174 The Updated Set of Principles (Decaux Principles), adopted by the UN Sub-Commission on the Promotion and Protection of Human rights was submitted to the UN Human Rights Commission on Human Rights on 2 June 2005, which passed it on to its successor body, the UN Human Rights Council. *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, 2 June 2005, UN Doc. E/CN.4/Sub.2/2005/9, Principle 8 (*Decaux Principles*).

175 *Ibid.*

176 UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 22 August 2007, UN Doc. CCPR/C/GC/32, para 22 (UNHRC General Comment 32).

(3) No Bill or amendment relating to the Military forces shall be introduced in either House of Parliament without the recommendation of His Majesty.

The 1959 Constitution was otherwise silent as to how the conduct of the Army was to be regulated. In practice, the Army remained outside civilian control, and reported directly to the palace and the King.

Under the 1990 Constitution, the Supreme Court was prohibited under Article 88(2)(a) from

interfer[ing] with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army.

Except in one case where a civilian had been charged by a court martial, all court martial proceedings have gone unchallenged, despite serious procedural shortcomings. There are three reasons for this. First, there is no transparency in court martial decisions; therefore challenging them is extremely difficult as information is not readily accessible.¹⁷⁷ Second, the *Army Act* does not allow for appeals against court martial decisions in civilian courts. Third, in those cases that have gone through court martial proceedings and where subsequent complaints were filed with the police resulting in investigations through the regular criminal process, the army refuses to cooperate with the police investigations claiming that the subsequent proceedings would amount to double jeopardy.

(i) Dhan Kumari Gurung on behalf of Iman Singh Gurung v. Government of Nepal (1992)

In *Dhan Kumari Gurung on behalf of Iman Singh Gurung v. Government of Nepal (1992)*¹⁷⁸ Iman Singh Gurung, a civilian, was arrested with a soldier (Bharat Gurung) and five other civilians on accusations of handling illegal foreign currency. A court martial sentenced the soldier to two years and six months' imprisonment, and Iman Singh Gurung and the other civilians to eight years' imprisonment each for instigating Bharat Gurung to commit the crime.

177 Several of the court martial decisions referred to in this report (including in the cases of Subhadra Chaulagain, Reena Rasaili and Maina Sunuwar) were obtained informally. They are not formally published by the Army.

178 Supreme Court decision of 4/5/2949 (21 August 1992).

Iman Singh Gurung's wife, Dhan Kumari Gurung challenged the court martial's decision at the Supreme Court, among others raising the issue of the court martial's jurisdiction over civilians. The Supreme Court held that the prohibitory provision under Article 88(2)(a) of the 1990 Constitution did not specify all types of crimes as being crimes related to the army. The Court stated that it was unjustifiable for a military court to try a civilian for non-military crimes, and that the military court may not lawfully try a civilian by using the statutory immunity granted to courts martial under Article 88(2)(a).

(ii) Maina Sunuwar: Torture, enforced disappearance and death in army custody (2009)¹⁷⁹

Many of the challenges described above were exemplified in the widely reported case involving the torture, enforced disappearance and death of 15-year-old Maina Sunuwar in army custody. On 8 September 2005, a court martial convened under the 1959 *Army Act* convicted three military officers of using wrongful interrogation techniques and not following proper procedures in the disposal of her body. In the court martial judgement, Maina Sunuwar's death by prolonged torture was described as 'accidental' and put down to 'carelessness' and a failure to follow procedures. Maina Sunuwar was blamed for her 'physical weakness' in not being able to withstand the simulated drowning and electrocution acknowledged by the court martial. Based on this representation of the facts, the three accused were sentenced to six months' imprisonment, temporary suspensions of promotions and a small monetary fine as 'compensation' to Maina Sunuwar's family. The military Court of Inquiry Board report implicated a fourth person, then-Captain Niranjana Basnet, but did not recommend that he be brought before a court martial.¹⁸⁰ It is unclear from an unofficial (and possibly partial) copy of the report on what basis the Court of Inquiry Board decided not to recommend him for prosecution.¹⁸¹ Niranjana Basnet, who was subsequently promoted to the rank of Major, was later selected to serve as part of the UN peacekeeping forces in Chad, despite a court summons from the Kavre District Court pending against him. He was repatriated to Nepal in December 2009 after this became known. However, as of May 2013, the Nepal Army had not handed him or the other three accused over to the civilian authorities, in defiance of the Supreme Court ruling discussed below.

179 Supreme Court decision of 18 September 2007.

180 For copies of the original judgement of the court martial and the preceding military board of inquiry report and English translations, see <http://justiceformaina.com/>

181 Advocacy Forum, 'Maina Sunuwar: Separating Fact from Fiction', February 2009, p 2.

Facing widespread negative reaction to the court martial decision, the Nepal Army repeatedly claimed that its own internal military proceedings ensure that human rights are protected. Military court proceedings are not open to the public, their decisions are not necessarily made public and they cannot be appealed against in the civilian court system. Therefore, doubt remained whether internal military proceedings were in fact in line with international standards. The Maina Sunuwar case has served to expose the shortcomings of the military court system. The very fact that the proceedings were closed and not subject to appeal are in contravention of Nepal's human rights obligations. Under international law, all military court proceedings must under all circumstances adhere to fair trial standards. As a State party to the ICCPR, courts martial in Nepal must guarantee all of the fair trial rights enumerated in Article 14 of the Covenant, including the right to a fair trial and the right to an appeal.¹⁸²

The Nepal Army put forward several arguments to exclude the jurisdiction of the civilian courts, including the notion that Maina Sunuwar was killed in the context of a battlefield. The Nepal Army also argued that because the court martial had concluded the matter, any future civilian court proceedings would violate the principle of double jeopardy.¹⁸³ This was the position conveyed to the Kavre DPO in a letter from Brigadier General B A Kumar Sharma of the Nepal Army's Legal Section. In his letter of 22 May 2006, he stated that since the Court Martial had rendered its verdict, 'it is not lawful to initiate actions' against the four officers.¹⁸⁴ Neither of these arguments, however, can be sustained under Nepal's international and domestic legal obligations.

In a landmark ruling, the Supreme Court in September 2007 unanimously decided that the case should be dealt with in a civilian court, thus implicitly rejecting the double jeopardy argument, though it did not explicitly address the question. The Court also did not make any comments on the application of Article 88(2)(a) of the 1990 Constitution.

Despite the Supreme Court's judgment, the Nepal Army has not cooperated with the civilian criminal proceedings before the Kavre District Court. On 31 January 2008, the Kavre District Attorney finally filed murder charges at the Kavre District Court against the four army officers, against whom the Court also issued arrest warrants. However, the Nepal Army has not cooperated with the criminal proceedings before the District Court. As of May 2013, the case

182 UNHRC, General Comment 32, *supra* fn. 176, para 22.

183 The principle of double jeopardy has been used to argue that the accused army officials cannot be re-tried for violation of Section 13(3) of the Homicide Chapter of the *Muluki Ain* as an independent and competent body such as the Court Martial has already presided over the case and issued its verdict (Section 1 of the Chapter on Court Proceedings of the *Muluki Ain*).

184 OHCHR-Nepal, 'The Torture and Death in Custody of Maina Sunuwar', December 2006, p 24.

before the Kavre District Court had not progressed any further. The Nepal Army's lack of cooperation has been facilitated by the Police and the Attorney General, neither of whom have sought further action from the Army.

4.1 Army Act, 2015 (1959)

Nepal has traditionally maintained a system whereby only the monarch, rather than the parliamentary government, has maintained authority and supervision over the army. The result has been an absence of judicial supervision in respect of the conduct of the Nepal Army.

Section 24A of the *Army Act* provided any person covered by the Act immunity from prosecution for conduct during the discharge of their duties. It provided that, '[n]otwithstanding anything contained in current law, in case any person dies or suffers any loss as a result of any action taken by any person to whom this act is applicable while discharging his duties, no case may be filed in any court against him.' It further provided the following explanation: 'For the purpose of this Section, the term 'any action taken while discharging duties'' means any action to be taken for internal security or self-defense, including flag march, patrolling and guard duty.'

Article 60 of the Act provided that those covered by the Act were also protected from prosecution under other laws, including laws enacted under foreign jurisdictions. Article 60 reads

subject to the provisions of section 61 of this Act, in case any person to whom this Act is applicable commits any crime within or outside of the kingdom of Nepal which is punishable under any other law, he shall be deemed to have committed a crime under this act, and in case he is accused of the crime under this section, he shall be liable to action by court-martial.

Section 61 further provided that those charged under other laws should be kept in army custody pending investigations. It said

In case it becomes necessary to take action by keeping in detention according to law any person to whom this act is applicable on the charge of having committed a crime which is not to be heard by a court-martial according to section 61, he shall be placed in military custody on the order of the authority who is responsible for investigation, or the court hearing the case, from the time of initial investigation into the case until the court pronounces its present the concerned person to the appropriate authority or military authority shall act accordingly.

The 1959 *Army Act* provisioned the establishment of a Court of Inquiry Board and a court martial for any violations of the Act.¹⁸⁵ In principle, this included making soldiers accountable for human rights violations. While some cases were tried before military tribunals, these tended to be cases involving crimes and violations such as torture, enforced disappearance, and death in army custody, and cases where there was significant public outcry, such as in the case of Maina Sunuwar. No cases were brought before civilian courts against members of the armed forces for any conduct while on duty, although some cases were filed in the normal courts against members of the army for acts committed while off duty. In the few cases that proceeded before military courts, trials were conducted without participation of the families of the victims.

There were no provisions in the 1959 *Army Act* (or any other legislation for that matter) that stipulated cases in which the Army was obliged to release full and complete details of court-martial proceedings and any resulting judgments, including when an FIR was filed and if the police commenced criminal investigations. The Army manipulated provisions providing for internal inquiries and courts martial in order to avoid accountability before civilian courts, and has typically obstructed police investigations into alleged extrajudicial executions and other abuses.

The December 2004 UN Working Group on Enforced or Involuntary Disappearances report on its visit to Nepal called for amendments to the 1959, *Army Act* so as to provide that army personnel accused of the 'disappearance,' murder, or rape of civilians be tried only in civilian courts.¹⁸⁶

4.2 Army Act, 2063 (2006)

After the political change in 2006, a new *Army Act* was adopted by Parliament. Since the 2006 *Army Act* came into force, its provisions have been misused to try and punish officers for inappropriate and minor offences by court martial where gross human rights violations have in fact been committed on the same facts, and should according to international standards be tried before a civilian court.¹⁸⁷

Furthermore, the Army continues to withhold its cooperation despite a provision in the revised *Army Act* that puts the investigation and prosecution of cases of unlawful killings and rape clearly under the jurisdiction of the civilian authorities.¹⁸⁸

185 *Army Act, 1959*, Sections 97, 98 and 107.

186 *Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal*, January 2005, UN Doc. E/CN.4/2005/65/Add.1, para 58.

187 Advocacy Forum and REDRESS Trust, 'Held to account. Making the law work to fight impunity in Nepal', December 2011, p 27.

188 See *Army Act, 2063 (2006)* Section 66(1).

The ICJ submitted a paper commenting on the draft bill for the new *Army Act*¹⁸⁹ in September 2006. The ICJ wrote to the Speaker of the House of Representatives urging him to ensure that the bill was not adopted in its existing version and that enough time be allowed during the debate for a considered revision to bring the bill in line with international standards and good practice. However, the legislation was adopted on 28 September 2006.

Section 22 of the *Army Act, 2063 (2006)* provides that, 'If any person dies or suffers loss due to any action taken in good faith by the person falling under the jurisdiction of this Act in the course of discharging [his/her] duties, no action shall be taken against such person in any court.'

As the ICJ said in its letter to the Speaker of the House of Representatives:

[Section 22] is the most problematic and objectionable provision of the Bill. It provides a statutory bar, or blanket immunity, from legal proceedings in any court, for acts carried out by a member of the Nepal Army in the 'course of discharging his duties' that result in the death of, or loss to, any person. This provision will entrench impunity, cannot be improved by redrafting and should be deleted.

When reading Section 22 along with other provisions, the scope of potential immunity given to persons 'under the jurisdiction' of the Act mentioned in Section 22 becomes even wider. This is due to the fact that Section 3 of the Act, which defines who is 'under the jurisdiction of this Act' includes a vague and imprecise sub-section 3(1)(b), which could bring under the Act not only members of the regular armed forces, but also paramilitary groups and other individuals.¹⁹⁰ Given that such persons would enjoy absolute immunity from any suit in the discharge their duties, this broad and unclear definition has the potential to further entrench impunity.

Section 22 has so far not been subject to a legal challenge in court.

189 International Commission of Jurists, 'Nepal: Recommendations for Amendments to the Draft Army Act', September 2006, accessed at: <http://www.icj.org/nepal-recommendations-for-amendments-to-the-draft-army-act/>

190 Sub-section 3(1)(b) states that individuals who are, 'assigned for some acts, or persons in the service of the Nepal Army staying in a camp or in a march for military operation, or staying in an area declared by the Government of Nepal as a military operation zone; or civilian persons who assist the works of Nepal Army...'

Section 23 of the *Army Act, 2063 (2006)* also overrides proceedings in civilian courts and provides immunities from arrest to persons while they are involved either as parties or as officials in court martial proceedings. The provisions of Section 23 read as follows:

(1) The chairperson or member of Court Martial or Judge Advocate General Department or a person related to the proceeding to the Court Martial, legal counsel, attorney (waris) or witness attending pursuant to the summons issued by the Court Martial, shall not be arrested on the order of any court or quasi-judicial authority at the time of entering into or returning from the Court Martial.

(2) If the information of arrest is received pursuant to Sub-section (1), the Court Martial may request the concerned authority to release such person immediately.

(3) If a person under the jurisdiction of this Act is undergoing military proceedings, s/he shall not be detained as per the decision, verdict or order of any court or quasi-judicial authority for a loan to be paid or reimbursed by him/her.

(4) If information about the arrest of a person who is not to be arrested pursuant to Sub-section (1) is received, any Court or Quasi-judicial Authority shall release such person immediately.

Section 25 further provides that:

A person belonging to the reserve force shall have all the privileges and facilities as referred to in Sub-section (3) of Section 23 and Section 24 while coming into and returning from training or service when called by the Government of Nepal or serving in the job.

In principle, the *Army Act, 2062 (2006)* makes a distinction between military offences that are tried in a court martial and other crimes, some of which would amount to human rights violations, which can be tried in a civilian court. Section 66 provides that the crimes of homicide and rape committed by soldiers against civilians shall fall under the jurisdiction of other courts. Section 66(2) further provides a procedure by which members of the armed forces can be handed over to the ordinary courts to face ordinary criminal charges.

However, several other sections of the Act defeat these provisions and provide members of the Nepal Army with absolute or partial immunity from prosecution. Five key issues arise with respect to this seeming demarcation of jurisdiction between the Nepal Army to hear criminal matters arising from internal discipline and that of the ordinary criminal process and civilian courts to hear all other criminal and civil matters:

- (1) While Sections 62 and 66 highlight the specific offences of corruption, theft, torture, 'disappearance,' homicide and rape, and make specific provision for their investigation and adjudication, Section 22, which provides blanket immunity (see above), also specifically stipulates that, '... any of the offences as referred to in Sections 62 and 66 shall not be deemed to be an offence committed in the course of discharging duties in food faith.'
- (2) While Section 62 provides that special committees chaired by the Deputy Attorney General will be formed to investigate cases of corruption, theft, torture, and 'disappearances,' such cases will ultimately be prosecuted at a Special Court Martial,¹⁹¹ which consists of a civilian Court of Appeal judge, the Secretary of the Ministry of Defence and the Judge Advocate-General of the Nepal Army and for which a majority decision is considered the opinion of the Court.¹⁹²
- (3) Despite their gravity, penalties for committing the offences set out in Section 62, including torture and enforced disappearance, are not specified in the Act. Furthermore, the offences of torture and enforced disappearance have not been incorporated as specific crimes under Nepali law, in spite of their absolute prohibition under international law, and the express obligation assumed by Nepal under the Convention against Torture to criminalize torture and ill-treatment.

191 The Special Court Martial set up under Section 119 of the 2006 *Army Act* hears appeals against decisions of the general court martial or summary court martial, and has original jurisdiction for cases under Section 62.

192 See *Bhuwan Prasad Niroula & Ors. v. Government of Nepal & Ors.* (Writ No. 65-ws-0010), 30 June 2011, where as part of its review of the military justice system and *Army Act* 2006, the Supreme Court stated that it was imperative to carry out timely reform of the structure of Special Courts Martial so as to ensure its independent, impartiality, fairness and accountability.

- (4) The Act contains an over-broad formulation of double jeopardy,¹⁹³ to which the ICJ commented in August 2006:¹⁹⁴

[This] rightly prohibits a soldier from being tried a second time for the same facts or offence (rule against 'double jeopardy'), but fails to recognise that the rule should not apply if the original trial was intended to shield the accused from responsibility or was unfair or was carried out by a tribunal that was not independent. The same section even blocks any criminal charges being laid against a soldier who has been the subject of only an internal, administrative ('departmental') action.

- (5) To the extent that Courts Martial deal with acts that amount to human rights violations, that the Army Act, 2063 (2006) permits alteration of penalties (Section 116) serves to perpetuate impunity.

(i) Bhuwan Niraula, et. al. v. Government of Nepal, et. al. (2011)¹⁹⁵

Responding to a public interest litigation petition that the military justice system as set out in the *Army Act, 2063 (2006)* does not adhere to constitutional principles for an independent judiciary, the rule of law, a fair trial and the right to justice as guaranteed under Article 24 of the Interim Constitution, the Supreme Court in June 2011 ordered the Government to: (1) form a task force to review the existing *Army Act* and to provide recommendations on reforming the military justice system, ensuring its compliance with Nepal's human rights obligations; and (2) implement the recommendations of the task force.¹⁹⁶ As of the end of May 2013, the Government has not acted on this court order.

193 *Army Act, 2006*, Section 70 reads: 'Any person under the jurisdiction of this Act, after being subjected to trial, hearing and adjudication of an offence mentioned in Section 38 to 65 of this Act by a Court Martial, or after being subjected to departmental action, shall not be subjected to action again for the same offence.'

194 International Commission of Jurists, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity* (International Commission of Jurists, Commissions of Inquiry Report), June 2012, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Nepal-Commissions-of-Inquiry-thematic-report-2012.pdf>

195 Decision of the Supreme Court.

196 Judgment of Chief Justice Khil Raj Regmi, Justices Kalyan Shrestha and Krishna Prasad Upadhaya in case brought by Bhuwan Niraula, Prem Chandra Rai and Bhakti Shah, 30 June 2011, 'SC directs govt to review military laws,' 30 June 2011, *Himalayan Times*, accessed at: <http://thehimalayantimes.com/fullToday.php?headline=SC+directs+govt+to+review+military+laws&NewsID=293802>

(ii) Sapana Gurung and six others (2006)

The case of *Sapana Gurung and six others*, where six people were killed and many others injured,¹⁹⁷ exemplifies the misuse of army immunity. The military officer (Captain Pralhad Thapa Magar) in charge of crowd control operations told the Parliamentary Probe Committee that was set up to investigate the incident that 'when there is a need to save lives and weapons, we are not supposed to hit under the knees or anything, we are told to shoot to kill.'¹⁹⁸

In all of the statements submitted to the Parliamentary Committee, the army and police personnel who were deployed in the area claimed that even though there were no orders to shoot, they resorted to firing because the crowd was uncontrollable and it was causing harm to the buildings and the barbed wire fences.

The immunity afforded to the army and police personnel under Section 22 enabled them to engage in unlawful conduct, notably the excessive use of force, without any investigation or prosecution. This unlawful and excessive use of force left six people dead and dozens others permanently injured.

The Parliamentary Committee recommended court martial against the various army personnel pursuant the 1959 *Army Act*. A military Board of Inquiry also recommended the same. As of May 2013, it is not known what action, if any, has been taken against the relevant army personnel. No court martial decision has been made public.

The 'good faith' requirement as provided under Section 22 of the 2006 *Army Act* is vaguely worded, and appears to be construed to confer a very wide-reaching immunity to army personnel. Granting statutory immunity for carrying out certain acts in 'good faith' is not unknown in other legal frameworks, and is linked closely to the law of torts under the common law system. However, there has been no clarification of the good faith standard by the Nepali judiciary.

Even if good faith were defined, international law rejects the defence of obedience to superior orders for human rights violations.¹⁹⁹ The Committee against Torture in its General Comment states that 'an order of a superior or public authority

197 Sapana Gurung was killed by a bullet fired by army personnel allegedly on 'ambush duty' on 25 April 2006. The day after her death, villagers demonstrated against the killing, suspecting it as being murder after rape. The police and army personnel who were deployed could not control the crowd and opened fire. See: Advocacy Forum and Human Rights Watch, *Waiting for Justice*, *supra* fn. 5, p 107-110, accessed at: <http://www.advocacyforum.org/downloads/pdf/publications/waiting-for-justice-sep-10.pdf>

198 Report of the Parliamentary Inquiry Committee, page 47 (available in Nepali only).

199 *Concluding Observations of the UN Human Rights Committee on Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009), para 8(b).

can *never* be invoked as a justification of torture.²⁰⁰ Subordinates may not seek refuge in superior authority and should be held to account individually.²⁰¹ The UN Human Rights Committee calls on States to remove the defence of obedience to superior orders for State agents committing human rights violations.²⁰² The *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*,²⁰³ reiterate under Principle 27 that acting on orders of a superior does not exempt an individual from responsibility, in particular criminal responsibility.²⁰⁴ The defence of obedience of superior orders is also rejected under international criminal law, notably in the statutes of the UN *ad hoc* tribunals²⁰⁵ established by the UN Security Council resolutions as well as under the Rome Statute for the International Criminal Court.²⁰⁶

As will be seen from the discussion further below, immunity from criminal or civil liability will attach if the circumstances meet the requirements of a particular statute granting immunity, which will fall to be decided by a court of law on a case-by-case basis. Only in instances where acts or omissions are determined by a court to fall within the conditions set out by legislation will the immunity be sustained. What this means is that the process of adjudication by a competent, independent and impartial tribunal is essential in determining whether a good faith defence can be sustained—and not just invoked to prevent any investigation and adjudication of the facts.

As part of the State's duty to guarantee human rights under international human rights law, the Military must be made accountable to the civilian government. Any proceeding that is undertaken in a court martial or military tribunal must guarantee the full ambit of rights afforded under Article 14 of the ICCPR, including the right to a hearing before a competent, impartial and independent tribunal established by law, the right to a public hearing, the right to an appeal, and the right to a fair trial. The court must be competent to decide whether a human rights violation has taken place, or is taking place, and must be empowered to offer a remedy by ordering cessation of the violation and/or reparation.²⁰⁷ In Nepal, ensuring this right means that the military justice system must be reformed in line with international standards guaranteeing victims' right to an effective remedy and suspects' right to a fair trial, and that the jurisdiction of

200 Committee against Torture, General Comment 2, *supra* fn. 42, para 26.

201 *Ibid.*

202 UNHRC General Comment 31, *supra* fn. 34, para 18.2.

203 *Updated Set of Principles to Combat Impunity*, *supra* fn. 41.

204 *Ibid.*, Principle 27.

205 International Criminal Tribunal for the Former Yugoslavia, Article 7, para 4; International Criminal Tribunal for Rwanda, Article 6, para 4.

206 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, accessed at: <http://www.refworld.org/docid/3ae6b3a84.html>

207 International Commission of Jurists, *Remedies and Reparations*, *supra* fn. 38, p 46.

civilian courts to conduct inquiries, to prosecute and try persons accused must be guaranteed in respect of serious human rights violations such as extrajudicial executions, enforced disappearances and torture and ill-treatment.

PART V: IMMUNITY PROVISIONS IN LEGISLATIVE ACTS

There are a number of laws in Nepal that provide immunities to different government officers in the exercise of their duties. These laws grant immunity for acts and omissions. While such immunities are sometimes crucial for the effective discharge of responsibilities, they are also sometimes abused so as to evade criminal and/or civil liability, thereby promoting and entrenching impunity.

As noted above in the International Legal Framework section, under international law, a State cannot relieve perpetrators from personal responsibility with prior immunities and indemnities.²⁰⁸

A review of 302 prevailing laws in Nepal revealed that many of them contain immunity provisions. General immunities are provided in legislation such as the *Army Act*, the *Police Act*, the *Armed Police Force Act*, and the *Public Security Act (PSA)*. These provisions grant members of the security forces and civil servants immunity from prosecution for all conduct—including those amounting to serious human rights violations—that are carried out in ‘good faith’ in the discharge of their duties. Specific immunities are also provided, for example, in laws that allow the use of ‘necessary force’ such as the *Local Administration Act, 2028 (1971)*, the *Essential Commodities Protection Act, 2012 (1955)* and the *National Parks and Wildlife Act, 2029 (1973)*. While such statutory immunities vary somewhat in their legislative expression, some common elements can be discerned. What is also clear is that legally indemnifying certain categories of persons or entities for their acts or omissions has led to abuse of power and contributed to the institutionalization of impunity in Nepal.

5.1 General Immunities

(i) Public Security Act, 2046 (1989)

The *Public Security Act* confers authority on the Chief District Officer (CDO) to issue detention orders for preventive detention for a period of up to 90 days,²⁰⁹ after which they can be extended for a maximum of 12 months by the Home Minister.²¹⁰ Section 11 of the PSA provides, ‘No question may be raised in any court against an order issued under this Act.’ This sweeping provision is ameliorated

208 UNHRC General Comment 31, *supra* fn. 34, para 18.

209 Section 5.1.

210 Section 5.2.2. CDOs are the most senior officials at district level. They are appointed by and represent the Home Ministry at the district level and play the leading role in administering each district. CDOs have been given considerable quasi-judicial powers under numerous Acts. In particular, they are effectively in control of the district police force and jail and adjudicate civil and criminal cases. On 22 September 2011, the Supreme Court ruled that the provisions granting judicial powers to CDOs are unconstitutional. To date, these laws have however not been amended.

somewhat through two other provisions in the Act,²¹¹ and when read together with Article 25(1) of the Interim Constitution which provides that, '[n]o person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty, integrity or law and order situation of the State of Nepal.' This allows for Supreme Court oversight of such orders by way of *habeas corpus* petitions, through which the Court has on more than one occasion found that the use of Section 11 of the PSA fails to meet with Constitutional requirements.²¹²

There is also a provision in the PSA allowing people to seek compensation for 'mala fide' detention.²¹³ However, there is a requirement that complaints be lodged while still in detention, or within 35 days after release. This means that for the thousands of people who were arbitrarily arrested and detained under the PSA during the conflict, the limitation period has long expired. Additionally, the Act does not stipulate a standard amount of compensation for such cases. Section 12A.2 merely provides that District Courts can award a 'reasonable' amount of compensation, taking into account factors such as the duration of detention, the age of the person, 'social prestige' and financial loss suffered, thereby leaving much open to subjective interpretation. The ICJ in its August 2009 Report, *Nepal: National Security Laws and Human Rights Implications* examined the *Public Security Act*, noted the general immunity clause in Section 11, and observed that immunity provisions wholly undermined the ability to hold officials accountable.²¹⁴

(a) Subash Nemwang v. Government of Nepal (2005)

On 26 September 2005, Subash Nemwang, who later became Speaker of the Constituent Assembly, was awarded NRs 70,000 (795 US Dollars) in compensation for being arbitrarily detained. On the same day, another politician, Mahendra Bahadur Pandey, was awarded NRs 70,000 (795 US Dollars) for being detained in bad faith. While these two individuals have received some form of reparation, many others who were arbitrarily detained under the PSA have not received any compensation.

211 *Public Security Act*, Section 12A and 13, providing for compensation and disciplinary action in the event of mala fide prosecutions.

212 Sambhu Thapa on behalf of *Rajendra Rai v. Tulsi Giri*, the Vice Chairman of the Council of Ministers et. al, Habeas Corpus, 20 May 2005, Supreme Court Bulletin, Year 14, No. 3, p 7, Nepal Law Magazine, 2062, No. 4, Decision No. 7521, p 425, and Raju Thapa on behalf of *Gagan Kumar Thapa v. Ministry of Home Affairs et. al.*, 24 May 2005, Supreme Court Bulletin, Year 14, No. 3, p 12.

213 *Public Security Act*, Section 12A.

214 International Commission of Jurists, *Nepal: National Security Laws and Human Rights Implications*, August 2009 (International Commission of Jurists, *Nepal: National Security Laws and Human Rights Implications*), accessed at: <http://www.icj.org/national-security-laws-and-human-rights-implications-in-nepal/>

(ii) Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) (2001)

During the state of emergency imposed by King Birendra in November 2001, the King promulgated the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001*.²¹⁵ Parliament adopted the Ordinance into law in 2002, renaming it *Terrorist and Disruptive (Control and Punishment) Act (TADA)*. The TADA had a sunset clause, meaning it would lapse in two years. When TADA lapsed in 2004, it was re-promulgated as an Ordinance and renewed continually from October 2004 until September 2006.

The ICJ issued two reports examining the TADO/TADA and its compliance with international law and standards. In 2005, the ICJ issued *Nepal: The Rule of Law Abandoned*, urging the Government to implement nine recommendations to avert what was described as a 'dire human rights and rule of law crisis.' The ICJ called on the Government to immediately repeal, or at least amend offending provisions of the TADO as well as the Public Security Act.

In 2009, the ICJ issued a report, *Nepal: National Security Law and Human Rights Implications*²¹⁶ where a more in-depth analysis was undertaken. In that report, the ICJ highlighted a number of serious issues with TADA/TADO: it empowered security forces to preventatively detain suspects without trial initially for 90 days with the right to renew detention for another 180 days; it permitted security forces to detain suspects for the purpose of investigation for 60 days; it denied suspects access to counsel; it set out extremely wide and vague definitions for 'terrorist' and 'disruptive activities,' enabling security forces to arrest almost any individual on suspicion of terrorism; it excluded cases instituted under TADO/TADA from being subjected to a statute of limitations; it did not provide for judicial oversight of the detention; and Section 20 of TADO provided a broad immunity clause for security forces: 'any act or work performed or attempted to be performed with bona fide motives while undertaking their duties.'²¹⁷

215 Under Article 72 of the 1990 Constitution, the King had the power to promulgate Ordinances at any time, except when both Houses of Parliament are in session, if he was satisfied that circumstances existed which rendered it necessary for him to take immediate action. Ordinances had the same power as laws passed by parliament provided that any Ordinance be tabled at the next session of both Houses of Parliament, and if not passed by both Houses, it would *ipso facto* cease to be effective. It could also be repealed at any time by the King; and Article 72(c) provided that it *ipso facto* cease to have effect at the expiration of six months from its promulgation or sixty days from the commencement of a session of both the Houses.

216 International Commission of Jurists, *Nepal: National Security Laws and Human Rights Implications*, *supra* fn. 214.

217 TADA, Section 20.

In practice, the implementation of TADO/TADA was worse than its provisions. Security forces used the sweeping powers to broadly target anyone suspected of having Maoist sympathies, including lawyers who defended Maoist detainees, members of left-of-center political parties, human rights defenders, and civilians who were forced to provide food and shelter to Maoists cadres. In addition to the extrajudicial killings, the security forces committed thousands of 'disappearances' and arbitrary arrests.²¹⁸

The ICJ in its previous missions and research found that it was not uncommon for Chief District Officers (the officer in charge of judicial oversight of the detention) to pre-sign blank detention forms, passing them onto security forces who would then fill in a name of a person already in custody. This practice was confirmed by the UN Working Group on Enforced and Involuntary Disappearances. Furthermore, under Section 9 of the 2001 TADO, the same CDOs who had in the first instance issued the detention orders (often pre-signed) could renew the orders with permission from the Home Ministry. The above provisions of TADO, when read together with Section 20 of the TADO, established the framework for the use of force with impunity.

The ICJ repeatedly and consistently called for the repeal of TADO/TADA from 2004 until it lapsed in September 2006.²¹⁹

(iii) Police Act, 2012 (1955)

Section 37 of the *Police Act* states that the CDO or any police employee shall not be liable to any punishment or payment of fines for any action taken by him or her in good faith while discharging his or her duties under the Act or other laws in force, or for carrying out decrees, orders or warrants issued by a court.

Section 38 further provides that:

No suit shall be filed against the Chief District Officer or any police employee in respect to any action taken by him under this Act or the rules or regulations framed hereunder if he acted in the belief that he was doing so in exercise of the powers conferred by this Act or the regulations, or to any step taken by him with the intention of taking such action, unless:

218 Human Rights Watch, 'Between a Rock and a Hard Place', October 2004, accessed at: <http://www.hrw.org/reports/2004/10/06/between-rock-and-hard-place>, p 14.

219 International Commission of Jurists, *Nepal: National Security Laws and Human Rights Implications*, August 2009, accessed at: <http://www.icj.org/national-security-laws-and-human-rights-implications-in-nepal/>; see also International Commission of Jurists, *Nepal : The Rule of Law Abandoned*, March 2005, accessed at: <http://www.icj.org/royal-coup-plunges-nepal-deeper-into-human-rights-crisis-icj-urges-united-response-at-united-nations-commission-on-human-rights-2/>

(a) If there is a reason to proceed, one month's notice should be given to the police or CDO or their attorney by registered post, mentioning their name and address. A copy of such notice has to be sent to the Nepal Government.

(b) If there is a reason to proceed, a case has to be filed within eight months of the occurrence of the alleged offence.

It is clear from the provisions cited above that CDOs and police employees are afforded almost blanket immunity for their acts and omissions, except in the grossest instances of abuse of power. While 'good faith in the discharge of duty' is accepted as a qualified immunity for State officials in many jurisdictions around the world, the problem in Nepal is that the acts leading to claims for such immunity are not reviewed by the courts. Whether an act was carried out in bad faith must to be examined on a case-by-case basis. In addition, due to the vague and overbroad good faith defence clause in Section 37, any attempt at holding officers to account for misconduct under Section 38 would require an analysis of what the individual thought or believed. Together, these two provisions enable officers to act beyond what is reasonable and necessary and ultimately foster impunity for crimes and abuses.

(iv) Armed Police Force Act, 2058 (2001)

Similar to the provisions above, Section 26 of the *Armed Police Force Act* states that '[a]n armed policeperson shall not be liable to punishment for the consequence as they discharge their duty or exercise the power in good faith.'

(v) Local Administration Act, 2028 (1971)

Sections 6, 6A and 6B allow CDOs to give orders to open fire for the purposes of controlling a situation and for maintaining peace and security. These provisions permit CDOs to issue orders that risk the use of unnecessary or disproportionate use of force, in violation of international law and standards. Lethal force may only be resorted to when strictly necessary to protect the life of the person exercising the force or other persons in the given circumstances. The right to life is protected under the ICCPR and the rules governing the use of force by police set out in the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

Section 7(1)(d) of the *Local Administration Act* provides that complaints about police employees are to be investigated by the CDO, which gives rise to a conflict of interest given that the CDO is responsible for the 'direct supervision and direction'²²⁰ of the police force in a district. Article 7(1)(d) states that

[i]f a person files a complaint that a police employee has acted in contravention of the law while discharging his/her duties, the Chief District Officer shall investigate the matter as required and submit a report along with the recommendations and opinions to the Regional Administrator and Ministry of Home Affairs for necessary action.

Such conflict of interest has the effect of promoting impunity, as there is no independent authority to hold the police to account for unlawful use of force, and to act as a check against the CDOs' wide powers.

5.2 Specific Immunities

(i) National Parks and Wildlife Conservation Act, 2029 (1973)

While the Nepal Army has been confined to military barracks since the signing of the CPA, it remains active in defending sites of national interest (such as power stations) and troops are also deployed alongside officers from the Department of National Parks and Wildlife Conservation in national parks as regulated under the *National Parks and Wildlife Conservation Act*.

In a July 2010 report on extrajudicial executions in the Terai region, OHCHR-Nepal documented six deaths alleged to have resulted from the use of unlawful force by Nepal Army personnel while patrolling in Bardiya and Chitwan National Parks and the Parsa Wildlife Reserve. The report states:

Army and National Park officials have justified the killings by claiming that the victims were poachers killed by Army personnel in self-defence. There is evidence in all of these cases casting doubt on these claims, and warranting an independent investigation. In these cases, the Army has not cooperated with police investigations, including by failing to make personnel available to the police for questioning. In a Bardiya National Park case ... in which three women including a 12-year-old child were killed, Army and National Park officials played an active role in obstructing criminal accountability by pressuring the

²²⁰ Section 6(1)(e).

families of the victims to withdraw criminal complaints. The Army continues to withhold its cooperation despite language in the revised Army Act that puts the investigation and prosecution of such cases clearly under the jurisdiction of the civilian authorities. These cases also highlight weaknesses in the National Parks and Wildlife Conservation Act, which appears to permit the use of firearms in situations where there is no immediate threat to life.²²¹

Section 24(2) of the *National Parks and Wildlife Act* states

In case any offender, or any of his/her accomplices resort to violence in an attempt to free him/her or resist his/her arrest or struggles after his/her arrest by the authorized officer under the Sub-Section (1), or if a circumstance arises when the offender tries to escape or his accomplices try to free him/her or in case the life of the person making the arrest appears to be in danger, or in case he has no alternative but to resort to the use of arms, he/she may open fire aiming, as far as possible, below the knee, and if the offender or the accompanies dies as a result of such firing, it shall not be deemed to be an offense.

(a) Bardiya National Park case (Killing of Amrita Sunar, Devisara Sunar and Chandrakala Sunar) (2010)

In the case of *Bardiya National Park*, 29-year-old Amrita Sunar, 28-year-old Devisara Sunar, and her 12-year-old daughter, Chandrakala Sunar, were shot from behind at a distance on 10 March 2010.²²² Despite findings of multiple

221 OHCHR-Nepal, 'Investigating Allegations of Extra-Judicial Executions in the Terai: OHCHR summary of concerns', (July 2010), accessed at: <http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/Investigating%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf>, p 9.

222 Amrita Sunar, Devisara Sunar and Chandrakala Sunar were collecting *kaul* (tree bark) with others in a group when they were shot by Army personnel from the Jwala Battalion who were accompanied by National Parks and Wildlife Conservation Department officials in Baspani, Bardiya National Park. There are contradictory reports from different parties as to when and how the women were killed. It is alleged that the women were detained after trying to hide and that they were later shot dead while they were under the control of army personnel. Ratna Bahadur Sunar and Durga Bahadur B.K., men in the group, made the following statement describing what happened: *Suddenly a long log fell near us. When we looked up, a person was holding a torch towards our faces from around 5 to 8 meters away, and he opened fire as soon as he saw us and threatened to kill us if we tried to run away. Baldev, who had been sleeping, ran after hearing the gunfire. Another gun shot was fired in the air. Bhumisara and Bhaktaraj Giri ran towards the jungle. I, along with my brother Krishna Bahadur, ran after the gun was fired again. I hid behind a bush and my brother hid in a water hole nearby. Devisara, Amrita and Chandrakala were terrified and sat crouched in one place. The soldiers took them under their control. It was dark so I do not know how many of them there were. After five minutes, I heard my brother's daughter cry saying 'Baba, save*

inquiries concluding that army personnel had used excessive force, no arrests have been made. The post mortem reports indicate that the victims were all shot from behind and from a distance. The reports further state that it could not be established that any of the women had not been subjected to rape before being killed.

On 11 March 2010, the day following the incident, the Nepal Army put out a press release alleging that the women and the girl had been killed during an 'encounter' with a group of poachers.

On 1 April 2010, the National Human Rights Commission published its report on its investigation, concluding that army personnel had used excessive force, and recommending legal action against those involved in the incident, notably 15 army personnel. The NHRC investigation affirmed that the three women were shot in the back from a distance.²²³ Further, the NHRC report suggested that army officials had tampered with crime scene evidence in order to make the incident appear as an 'encounter' with heavily armed poachers. The NHRC report recommended that the alleged perpetrators be prosecuted in a civilian court on criminal charges relating to deprivation of the right to life, as well as on charges for tampering with crime scene evidence. Two additional investigations were commissioned, the Parliamentary Sub-Committee for Women and Children²²⁴ and a Government committee.²²⁵ The Sub-Committee reaffirmed the findings of the NHRC. The Government Committee's findings have yet to be released.

me, they will kill me.' My brother could not bear hearing his daughter's cry so he went to her and was also detained. I thought that I would be caught so I ran and reached home at around 3am the next morning. I could not find out what had happened to my brother, sister-in-law, wife and Chandrakala. On 11 March 2010, I heard on the radio that three hunters were killed in the shootout by the Army and that one Krishna Bahadur B.K. had been detained after being injured. The news said that three guns and four rounds of bullets were seized. We had nothing but two basulo (hoes), three sickles and two axes, extracts from an interview with Ratna Bahadur Sunar of Advocacy Forum and INSEC, conducted March 2010.

Krishna Bahadur B.K. was arrested by the army patrol and led away from the area. He therefore did not witness the precise circumstances of the killing of his wife, daughter and sister-in-law. There were reports by some women's rights organisations that the women may have been taken into custody and then possibly raped before they were killed, although Advocacy Forum is not aware of any conclusive evidence in that regard.

223 United States Bureau of Democracy, Human Rights and Labor, '2010 Human Rights Report: Nepal,' 8 April 2011, accessed at: <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154484.htm>

224 The Legislature-Parliament's Sub-Committee for Women and Children held a separate investigation into the killings and on 7 April 2010 released a report which concluded that Army personnel were responsible for the killing of the three women. Additionally, the report suggested that Army officials manipulated the Police so that the outcome of police investigations would be in line with the Army's version of events.

225 Following public pressure, the Government on 17 March 2010 decided to appoint a committee to investigate the killings. On 19 April, the probe committee handed over its report to the Government, which then formed a ministerial-level committee to study the report and its recommendations. The findings of the report have not been made public, and no decisive action has yet been taken by the Government in implementing the recommendations.

There have been allegations that others in the group with Amrita Sunar, Devisara Sunar and Chandrakala Sunar are being threatened by army officers that they would be charged with offences under the *National Parks and Wildlife Act* unless they withdrew their complaint.

On 16 March 2010, the police filed an FIR on grounds of involuntary manslaughter. The victims' families with the assistance of Advocacy Forum filed a complementary FIR (Reg. No. 71) at Bardiya DPO on 28 March 2010 on grounds of murder and possibly rape. As of May 2013, the Bardiya DPO had yet to receive any reply.

Following several rounds of negotiations involving local politicians and representatives from the Army and Forestry Department, an agreement to withdraw the FIR against the 17 Army personnel and four Forestry Department Officials, in exchange for dropping charges against Krishna Bahadur B.K was made on 7 April 2010. As part of the agreement, Devisara Sunar's eldest son would be provided with a job at Bardiya National Park, among other promises for financial compensation.²²⁶

(ii) Essential Commodities Protection Act, 2012 (1955)

Section 6 of the *Essential Commodities Protection Act* states:

In case, an offender tries to flee by using or without using any force in the course of arrest from the spot (crime scene), he/she shall not be given any opportunity to run away. In case the situation demands to use any arm or ammunition, the Head Constable or officer senior to him/her from the Police Force or by the command or officer senior to him/her from

²²⁶ At first, the authorities initiated negotiations with the victims' families and promised to pay a total of NRs.75,000 in relief (NRs.25,000 for each victim) so that the families would remove the bodies and perform burial rites. The CDO paid NRs.20,000 on the day of the negotiations and promised to pay the remaining amount at a later date. On 7 April 2010, a group of six people, including Krishna Bahadur B.K. and local Maoist politician Ganga Bahadur Sunar, went to the Bardiya National Park forest ward office in Thakurdwara to claim the remaining amount that had been promised to the family. At the forest ward office where Acting Forest Warden Ramesh Thapa was present, the group also met Jwala Battalion Chief Prakash Deuja who accused Krishna Bahadur B.K. of having given too much information to journalists and human rights activists, an accusation that was denied by Krishna Bahadur B.K. The other agreements that were made at this meeting at the forest ward office were: (i) the family of the victims would receive the remaining NRs.55,000 within a week; (ii) the National Parks administration would file for monetary compensation to the victims' family; (iii) the National Parks administration would withdraw charges filed against the other four persons who had escaped from the national park on the night of the killings; and (iv) the Bardiya National Park authorities would provide NRs.750,000 for a major road construction in Telpani. The forest ward officials also asked the victims' families and the local villagers to keep details of the agreement confidential. The agreement was mainly promoted by the local Maoist politician Ganga Bahadur Sunar, and his involvement in the case was likely due to the fact that the labour union of the forest ward is affiliated with the Maoists. Ganga Bahadur Sunar, however, has not been supported in endorsing this agreement by the district level Maoists, who issued a statement proclaiming Ganga Bahadur Sunar had 'worked against the policy of our party.'

Nepal Army or if it is from any other force, the command or officer of the same rank may, on their own or through any subordinate, issue an order to use weapons or shoot below the knee and arrest such person. No Government employee shall be punished for the death of any person in the course of arresting him/her, as mentioned herein. Explanation: For the purpose of this Section, other force means Militia, Pioneer, reserve, garizon, or any other organized force.

(iii) Muluki Ain (General Code), 2020 (1963)

The *Muluki Ain* (General Code) affords immunity to officials in certain cases of death in custody.

For example, under the Chapter on Illegal Detention:

Section 2: ... if a detainee below the age of 12 or above 60 is detained for more than three days or a detainee of another age is detained for more than seven days without providing food and water and the detainee dies as a result, the perpetrator shall be held accountable and shall be convicted for his/her death. However, if the person so detained is provided with food and water but dies of some other illness or s/he dies due to starvation caused by his/her refusal to take food and water, the person detaining him/her shall not be held accountable.

...

Section 5: If, in any course of action relating to a suit, detention is made with good intention in the belief that the law prescribes detention, and if it is later established that detention was unjustified, the concerned government employee shall not be punished under the law.

Law enforcement officials who are empowered to detain individuals on suspicion of committing an offence must be fully knowledgeable as to the circumstances that allow pre-trial detention or detention pending conclusion of the trial. To permit detention on the basis of 'belief that the law prescribes [it]' highlights a serious problem in the Nepali criminal justice system where there is a grave lack of legal certainty as to when lawful deprivation of an individual's liberty is justified, and where State officials are granted wide discretion in their powers of arrest and detention.

As indicated above in Part 4, Section 4.2, 'made with good intention' is an extremely vague and subjective criterion that is easily open to abuse. Such a subjective test encourages State officials to act beyond what is necessary and reasonable in any given situation and promotes impunity for crimes and abuses.

The review of legislation and cases above highlight two main issues with respect to statutory immunities in Nepal. The first concern is that the 'good faith' clause has in practice been interpreted to confer some kind of defence to certain categories of protected persons, which then precludes those persons from being investigated to determine whether actions carried out by them have in fact been carried out in good faith.

A statutory grant of immunity does *not* mean that legal action cannot be brought against those entitled to such protection. Rather, once an action is filed and served by the injured party, the action may be dismissed upon proper request (e.g. motion for summary judgment) by the person or entity claiming entitlement to the immunity. Statutory immunity is therefore a defence that is available to persons or entities excluded from legal liability, and that may be invoked in response to legal action initiated by injured parties against those protected persons or entities. Whether the particular circumstances meet the requirements of the legislation granting immunity will fall to be decided by a court of law on a case-by-case basis. The process of adjudication by an independent judiciary is a critical component of a State's fulfilment of its duty to guarantee human rights, which is enshrined in Article 2 of the ICCPR, and to which Nepal is a State party.²²⁷ The State's duty to guarantee human rights under international human rights law requires that victims are also guaranteed the right to a remedy and to reparations whenever a violation occurs. This recognised consequence of State responsibility for human rights violations means that a victim has 'the right to vindicate [his or her] right before an independent and impartial body, with a view to obtaining a recognition of the violation, cessation of the violation if it is continuing, and adequate reparation.'²²⁸

227 ICCPR, *supra* fn. 17. Section 9 of the *Nepal Treaty Act* 1990 further provides that: (1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, [are] inconsistent with the provisions of prevailing laws, the inconsistent provisions[s] of the law shall be void for the purpose[s] of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

228 International Commission of Jurists, *Remedies and Reparations*, *supra* fn. 38, p 43; see also Principle 9, 'Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objective. In any event, intentional lethal use of firearms may only be made strictly unavoidable in order to protect life,' *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990), (Basic Principles on Use of Force and Firearms).

The second concern is that authorization to use lethal force and corresponding immunity granted to various actors under a multitude of different legislative acts, without giving any consideration to the principle that such force may only be used when strictly necessary to protect life, has clearly led to many instances of the violation of the right to life. This is in clear contravention of international standards.

PART VI: COMMISSIONS OF INQUIRY AND TRANSITIONAL JUSTICE

Following the termination of the armed conflict and the 2006 People's Movement, certain political commitments were made to investigate and address the crimes that occurred during the conflict. The Comprehensive Peace Agreement (CPA) of November 2006 committed all signatories to respect human rights, to reveal the whereabouts of those 'disappeared' during the conflict within 60 days,²²⁹ and to set up a high-level Truth and Reconciliation Commission (TRC).²³⁰ These commitments were also enshrined in the Interim Constitution of January 2007 as responsibilities of the State.²³¹ In addition, a December 2007 agreement committed the Government to set up a Commission of Inquiry into Enforced Disappearances within a month.²³² Bills to set up a TRC and a Disappearances Commission have been pending in Parliament for a number of years: the prospect of any such transitional justice (TJ) mechanisms have dwindled further after dissolution of the Legislature Parliament in late May 2012.

In March 2013, the President approved an ordinance to establish just a single transitional justice mechanism, conferring wide discretion on a Commission of Inquiry to recommend the granting of amnesties for serious crimes, including those amounting to crimes under international law.²³³ The caretaker cabinet delivered the ordinance directly to the President without consulting with victims and their families, the NHRC or with the general public.

The International Commission of Jurists is opposed to the use of ordinances as they do not follow democratic processes and potentially blur the distinction between the executive and the legislature. Where the subject matter is legislative in nature, such as putting in place TJ mechanisms, an ordinance issued by executive order violates the separation of powers.²³⁴

229 CPA, Clause 5.2.3.

230 CPA Clause 5.2.5. stated: Both parties agree to set up a High-level Truth and Reconciliation Commission through mutual consensus in order to dig up the truth about those violating human rights and those involved in crimes against humanity in the course of the armed conflict and to build an atmosphere for reconciliation in society.

231 Interim Constitution 2063 (2007), See Article 33 (c), (m), (q), (s).

232 Point 6 of the 23-point agreement of 23 December 2007 between the government and the CPN-M, which committed the parties of the government to establish the Disappearances Commission, Truth and Reconciliation Commission, State Reconstruction Commission, Study and Recommendation Commission for Scientific Land Reform, a High Level Peace Commission and a High Level Committee to Monitor the Effective Implementation of the Comprehensive Peace Accord and other Agreements, none of which have been established as of early 2012.

233 International Commission of Jurists, 'Compromising Justice. Nepal's Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation (2012),' October 2012, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>

234 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*, supra fn. 151, pp 18-19.

6.1 The Comprehensive Peace Agreement and the commitment to address impunity

Clause 5.2.7. of the CPA (see above) is used by some who argue that the Interim Constitution mandates the use of TJ mechanisms to address past violations of human rights and international humanitarian law, and that normal criminal investigations and prosecutions should therefore not be initiated. Furthermore, there are arguments that any criminal investigations and prosecutions should be stayed until such mechanisms are established.

Article 166(3) of the Interim Constitution refers to Schedule 4, which contains the CPA and the 'Agreement on the Monitoring of the Management of Arms and Armies' of 8 December 2006. The International Institute for Human Rights, Environment and Development (INHURED International) argued in a case filed before the Supreme Court that by including such a reference in the body of the Interim Constitution, the Government considered the CPA as part of the Constitution. However, the Supreme Court has ruled that even though it appears to be part of the Constitution, it is not a Constitutional or legal provision, and is merely a political document.²³⁵ In another case, the Supreme Court held that the CPA, while annexed to the Interim Constitution, does not give rise to any rights on its own, i.e. there is no judicial remedy for any violation of the provisions contained in the CPA. The Court held further that as part of the constitution, however, the CPA expresses the will of the political parties to fulfill certain obligations, and therefore constitutes a persuasive document, and the Court can draw the attention of the Government to its provisions, although it is not independently legally enforceable in the courts.²³⁶

6.2 The Truth and Reconciliation Commission bill in its various incarnations

As stated above, the establishment of a TRC was included in the CPA of November 2006. A first draft of the bill was made public on 17 July 2007. The Government attempted to include provisions that excluded the prosecution of human rights violations by proposing an amnesty clause. Section 25 of the proposed bill stated, 'Notwithstanding anything contained in the Section 24,²³⁷ if any person is found to have committed gross human rights violations or crimes against humanity in

235 *Gagan Raya Yadav v. the Government of Nepal*, Decision No. 8013, Nepal Law Reporter 2065, No.9, p 1108.

236 See *Liladhar Bhandari v. Government of Nepal* Writ No. 0863/2064 BS, SC decision, 7 January 2009, in which the Supreme Court considered the status of the CPA as a result of claims for return of property seized by the Maoists during the conflict.

237 'The Commission Shall make recommendations to the government of Nepal for necessary action against such person who is found guilty while carrying out inquiry and investigation in accordance with this Act' (Section 24, TRC First Draft Bill).

the course of abiding by his/her duties or with the objective of fulfilling political motives, the Commission may make recommendations of amnesty for such person to the Government of Nepal.' However, following intensive advocacy by various national and international human rights organizations, the Government subsequently adopted a more cautious approach regarding the matter and in 2010 submitted a bill for the establishment of the TRC, together with a bill to establish a Commission of Inquiry into Disappearances to the parliament.

Repeated amendments were made to the draft bills while they were pending before the Legislative Committee of the House of Representatives. Just before the Constituent Assembly/Legislature Parliament dissolved in May 2012, the Government withdrew the two pending bills.

In August 2012, the Government approved an ordinance to establish just a single TJ mechanism, empowered with wide discretion to recommend the granting of amnesties for all crimes, including those amounting to crimes under international law.²³⁸ The caretaker cabinet delivered the ordinance directly to the President without any consultation with the public or the National Human Rights Commission. The President initially did not promulgate the Ordinance saying he would only do so if there was political consensus.

On 13 March 2013, the main political parties agreed to form an 'interim election government' under the Chief Justice of the Supreme Court. As part of an 11-point political agreement, the Ordinance for the establishment of a Truth and Reconciliation Commission was presented to the President of Nepal and signed into law the next day. The Ordinance does not comply with international standards and has been strongly criticised by the UN High Commissioner for Human Rights. In a public statement released on 20 March, the High Commissioner said that she

*deeply regrets the passing of an ordinance to establish a Truth and Reconciliation Commission in Nepal with power to recommend amnesties for serious human rights violations, and strongly urged the government to rectify this and other provisions which would contravene international standards.*²³⁹

238 International Commission of Jurists, 'Compromising Justice. Nepal's Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation (2012),' October 2012, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>

239 OHCHR, 'Pillay says Nepal commission must not grant amnesties for serious violations,' 20 March 2013, accessed at: <http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true&LangID=E>.

6.3 The Enforced Disappearances Bill

In its landmark June 2007 judgement, the Supreme Court ordered the Government to form a commission to investigate the whereabouts of enforceably disappeared persons and to formulate a law criminalizing enforced disappearances.²⁴⁰ The Government drafted the *Enforced Disappearances (Crime and Punishment) Bill, 2065 (2008)*, by executive ordinance. The process of elaboration of the Bill did not include consultations with the main stakeholders such as victims' groups, civil society and the National Human Rights Commission.²⁴¹ The Ordinance criminalized acts of enforced disappearance and provided for the establishment of a commission to investigate past cases from 1996 to 2006 with the objective of initiating prosecutions and providing victims with reparations. The draft had several shortcomings. The ICJ in its August 2009 Report, *Nepal: National Security Laws and Human Rights Implications*, noted provisions for what were in effect amnesties to those responsible for serious human rights violations. The ICJ joined with other human rights organizations to note that the definition of enforced disappearance did not comport with the international definition in the *United Nations International Convention for the Protection of all Persons from Enforced Disappearance*. Moreover, the Ordinance did not establish individual criminal liability or prescribe the minimum and maximum penalty applicable to perpetrators if found guilty, potentially hampering the effective prosecution of such acts.

Additionally, the Bill did not contain guarantees ensuring the independence, impartiality and competence of the commission, and raised doubts as to the selection process for commissioners. Witness and evidence protection, both of which are essential for realising the right to the truth and elements of a State's obligations under this right²⁴² were not included in the Bill.

The President promulgated the Ordinance on 12 February 2009. However, the Ordinance lapsed when Parliament failed to adopt legislation (as required under article 88 of the Interim Constitution).

240 *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khila Raj Regmi and Hon. Justice Kalyan Shrestha issued on 18 Jyestha 2063 (2007). For an unofficial translation of the judgment, see *National Judicial Academy Law Journal* (2007), pp 301–339.

241 ICJ press release on 30 January 2009, *Nepal: Government should allow Parliament to debate*, accessed at: http://www.icjcanada.org/en/news/pr_2009-06-01.htm

242 Working Group of Enforced or Involuntary Disappearances, General Comment on the Right to Truth, accessed at: http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf, para 5.

In January 2012, while the legislation was under consideration by the Parliamentary Committee, a Parliamentary taskforce recommended that the Commission on Disappearances not be established as a separate commission, but instead be incorporated into the TRC. At the same time, provisions for amnesty were inserted into the draft of the Bill establishing a TRC. As stated above, just before the Constituent Assembly/Legislature Parliament dissolved in May 2012, the Government decided to withdraw the two pending Bills for the establishment of a Truth and Reconciliation Commission and a Commission of Inquiry into Disappearances and in August 2012, approved an ordinance to establish just one TJ mechanism.

6.4 Transitional justice vs. criminal justice

The Supreme Court of Nepal made clear in several judgments²⁴³ that crimes committed during the conflict should be prosecuted under the existing criminal system. Subsequently, however the Court issued interim orders that contradicted its earlier precedents. In some cases, the Court has maintained that criminal investigations must proceed. Yet in others, it has issued interim orders staying proceedings until TJ mechanisms are in place.

Among the cases in which the Supreme Court has directed investigations and prosecutions to proceed under the normal criminal justice system are: (1) the alleged torture and murder of Maina Sunuwar; (2) the alleged abduction and murder of Arjun Lama; (3) the alleged torture and murder of Reena Rasaili; and (4) the alleged enforced disappearance of five students of Dhanusha.²⁴⁴ In each of these cases, the Court made clear that cases occurring during the conflict fall within the jurisdiction of the regular criminal justice system, and the non-establishment of the Truth and Reconciliation Commission or the Commission of Inquiry on Enforced Disappearances (CED) need not be a reason for stalling prosecution. More recently, however, the Supreme Court has issued contradictory interim orders, citing Articles 33(q)²⁴⁵ and 166(3)²⁴⁶ of the 2007 Interim Constitution.

243 Maina Sunuwar's case on 18 September 2007, *Devi Sunuwar v. District Police Office, Kavrepalanchok and Others*, Writ No. 0641 of Year 2063 (2007); *Rasaila v. Government of Nepal*, Supreme Court of Nepal, order of December 14, 2009 in Writ No. 0339/2064 (2007); and *Kedar Chaulagain v. Kavre District Police Office and District Attorney's Office*, Supreme Court of Nepal, Chief Justice Anupraj Sharma and Justice Ram Kumar Prasad Shah, Writ No. 064-WO-0339, 14 December 2009).

244 See Advocacy Forum and Human Rights Watch, *Waiting for Justice*, *supra* fn. 5, pp 81-85, 79, 71-72.

245 Article 33(q) of the Interim Constitution of Nepal, 2007, says 'to provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict.

246 Article 166(3) of the Interim Constitution of Nepal, 2007, says 'The Comprehensive Peace Accord concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) on Mangsir 5, 2063 [November 21, 2006], and an agreement relating to Agreement on the Monitoring of the Management of Arms and Armies reached on Mangsir 22, 2063 [December 8, 2006] are exhibited in Schedule 4.'

(i) **Keshab Rai v. District Court of Okhaldhunga (2010)**

On 2 July 2010, a number of CPN-Maoist cadres, including CA member Keshav Rai, were convicted *in absentia* for the August 2005 murder of Padam Bahadur Tamang and arrest warrants were issued for those convicted demanding that they present themselves at court within 70 days. On 7 December 2010, Keshav Rai challenged the arrest warrant issued in his name before the Supreme Court on grounds that Articles 33 and 166(3) of the Interim Constitution, as well as the CPA, mandated the formation of a TRC to deal with cases of human rights violations that occurred during the conflict. The Supreme Court on 13 December 2010 granted his request that the arrest warrant issued in his name be nullified, and issued an interim stay order to the effect that the Okhaldhunga District Court's decision not be executed on the basis that the case would be dealt with by future TJ mechanisms.

Such contradictory outcomes from the Court represent a significant obstacle to the fight against impunity and create space for political maneuvering to evade prosecution.

Several appellate courts have also dismissed *mandamus* petitions on the same ground: that cases from the conflict will be dealt with by TJ mechanisms.²⁴⁷

It is worth highlighting at this juncture that while TRCs play a critical role in establishing the truth as to past events, they are not empowered to prosecute crimes—although they may make recommendations - nor do they have the power to determine the criminal responsibility of a person.²⁴⁸ The role of a TRC cannot supplant that of the regular criminal justice system. In other words, while a TRC 'can play an important role in fulfilling victims' right to truth, [it] does not serve to fulfill their right to justice.'²⁴⁹

As discussed above in the International Legal Framework section, Nepal is under an obligation to prosecute persons accused of responsibility for crimes under international law. These crimes include torture and ill-treatment, enforced disappearance, crimes against humanity, and war crimes. While satisfying the right to truth in relation to such acts, this right can only fully be discharged when a court of law establishes facts regarding criminal responsibility. Along the same line, amnesties for such crimes are not permitted under international law.

²⁴⁷ Advocacy Forum and Human Rights Watch, 'Indifference to Duty', 2010, p 7.

²⁴⁸ *Updated Set of Principles to Combat Impunity*, *supra* fn. 41, Principle 8.

²⁴⁹ International Commission of Jurists, Commissions of Inquiry Report, *supra* fn. 194, p 23.

6.5 Past commissions of inquiry and their history

The ICJ published a report on Commissions of Inquiry in Nepal in June 2012, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*. After reviewing 38 commissions of inquiry established between 1990 and 2010, the ICJ made the follow observations

Commissions of Inquiry have promoted impunity by diverting investigation of human rights violations and crime through the criminal justice process into a parallel ad hoc mechanism vulnerable to political interference and manipulation.

...

At a time during which the establishment of transitional justice mechanisms ... is being debated, it is especially pertinent to reflect upon the long legacy of failed commissions in Nepal. There is reason to suspect that any proposed transitional justice institution will be equally vulnerable to the weaknesses and political influences that have plagued the numerous inquiry commissions dotting Nepal's social and legal-political landscape.²⁵⁰

(i) Commissions inquiring into enforced disappearances from the 1980s

Impunity for human rights violations was widespread during the Panchayat period (between 1960 and 1990). Prominent among the many cases that went unpunished were six 'disappearances' reported in mid-1985 during a civil disobedience campaign against the Government and a series of bomb explosions in the capital.

The UN Working Group on Enforced or Involuntary Disappearances at present retains four unresolved cases from that period. In at least two of these cases, credible reports indicate that the detainees had been held at the Maharajgunj Police Training Centre.

The commission of inquiry that was appointed to locate persons allegedly subject to enforced disappearance during the Panchayat period found that a total of 35 persons were 'disappeared' by State agents, out of which five were killed and the status of the remaining 30 is unknown.²⁵¹ The commission's findings were never made public or acted upon.

²⁵⁰ *Ibid.*, pp i-ii.

²⁵¹ International Commission of Jurists, *Commissions of Inquiry Report*, *supra* fn. 194, p 37.

(ii) Mallik Commission (1990)

The inability of the State to punish perpetrators of human rights abuses during Nepal's turbulent transition from an absolute monarchy to multi-party democracy in the early 1990s signalled the continuation of *de facto* and *de jure* impunity for human rights abuses. In the aftermath of the 1990 Jana Andolan, Prime Minister Krishna Prasad Bhattarai's interim government established a judicial commission to investigate human rights violations committed by the Panchayat government in suppressing the protests. The three-member commission — named after its lead investigator, Justice Janardan Mallik — submitted its report to the Government in December 1990. The report concluded that 45 people had been killed and 23,000 others injured during the Jana Andolan and named over 100 officials and politicians as directly or indirectly responsible for the violence. Prime Minister Baburam Bhattarai's interim government did not take action against any of the perpetrators named in the report, arguing that establishing law and order took priority over punishing those guilty of past offenses. None of the subsequent governments have acted on the report.²⁵²

A petition filed in the Supreme Court in January 1999 by 121 law students and lawyers from 38 of Nepal's 75 districts, as well as some relatives of those killed or injured during the 1990 *Jana Andolan*, seeking judicial orders to direct responsible government agencies to act on the Mallik Commission report, was summarily dismissed by the registrar of the Supreme Court.²⁵³

The failure of Nepali authorities to prosecute those responsible for human rights violations committed during the 1990 *Jana Andolan* represents a major missed opportunity, as the establishment of more democratic governing structures in 1990 provided a unique opportunity to introduce effective systems that could ensure that perpetrators of human rights violations would be held accountable.

(iii) Rayamajhi Commission (2006)

The Rayamajhi Commission was set up in 2006 to investigate human rights violations, including excessive use of force, during the April 2006 protests that led to the King stepping down. It recommended prosecution of 31 members of the Nepal Army, Nepal Police and Armed Police Force, largely in connection with killings that had occurred in the context of the protests. No action, however, was taken to initiate prosecutions, and no one has ever been prosecuted for

252 *Ibid.*, pp 7-8.

253 The Asia Foundation, 'Impunity in Nepal—An Exploratory Study' accessed at: http://www.asiafoundation.org/pdf/nepal_impunity.pdf. See also: International Commission of Jurists, Commissions of Inquiry Report, *supra* fn. 194, p 8.

the many cases of serious beatings that occurred in the context of the protests. When the Commission's report was tabled before Parliament in August 2007, the then Home Minister stated that the Government had already taken action against those responsible; that 'most recommendations' of the report had already been implemented; and that others had been forwarded to the relevant competent authority for further investigation. The Attorney General took no action to prosecute, as he believed that the evidence gathered was insufficient.²⁵⁴

If the track records of the Mallik and Rayamajhi Commissions are any indication, expectations of the effectiveness of any TJ mechanism will be correspondingly low.

(iv) Durja Kumar Rai (2006)

During the 2006 *Jana Andolan*, two people were killed and dozens others injured in Kalanki where Durja Kumar Rai was Superintendent of Police of the Armed Police Force. He was identified and photographed pointing his gun at the crowd. Despite a recommendation by the Rayamajhi Commission, he was never prosecuted. To the contrary, in November 2011, Durja Kumar Rai was promoted to the post of Deputy Inspector General of Police.²⁵⁵

The promotion of Durja Kumar Rai, despite being seriously implicated in grave human rights violations, is unfortunately not a unique case.²⁵⁶ The recommendations of a myriad of other smaller *ad hoc* commissions established to investigate particular incidents (such as the communal violence in Kapilvastu in September 2007) have suffered the same fate of being completely and utterly disregarded.

6.6 National Human Rights Commission

Not unlike the fate suffered by high-level commissions of inquiry, recommendations made by the National Human Rights Commission are similarly not implemented.

254 Review of the Implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his Mission to Nepal in 2005, *Human rights Watch, Advocacy Forum, Redress*, 5 November 2008, accessed at: <http://www.advocacyforum.org/downloads/pdf/publications/af-briefing-series-II-torture.pdf>

255 'Impunity watch: Tainted officer's promotion raises eyebrows,' *The Kathmandu Post*, 4 November 2011, accessed at: <http://www.ekantipur.com/the-kathmandu-post/2011/11/03/nation/impunity-watch-tainted-officers-promotion-raises-eyebrows/227806.html>

256 'Col. Basnet promoted despite rights groups protests,' *Republica*, 4 October 2012, accessed at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=42965

The NHRC was established in 2000 under the 1997 *National Human Rights Commission Act*. It was transformed into a constitutional body under the 2007 Interim Constitution with a mandate to ensure respect and promotion of human rights, notably by means of inquiries, investigations and recommendations to State authorities. It is not a judicial body, and hence cannot issue binding decisions.²⁵⁷

A new law was passed in January 2012 to govern the functioning of the institution. It curtails the powers and jurisdiction of the NHRC, reducing it to an administrative branch of the State rather than a constitutional body that functions as the effective watchdog for upholding human rights in Nepal. While Article 11 of the original 1997 NHRC Act had granted the Commission the same powers as a court of law, the new 2012 Act takes this power away in direct contradiction of the *Paris Principles relating to the Status of National Institutions (Paris Principles)*, which demands a broad mandate for institutions to promote and protect human rights. This curtailment is evident from the preamble of the new Act itself where the phrases 'independent' and 'autonomous' have been removed, though they are later briefly mentioned in Section 4(2). Principle 3(b) of the Paris Principles explicitly provides that national human rights institutions have responsibility for promoting and ensuring the harmonization and implementation of international human rights instruments, an important responsibility that the new Act is silent upon.²⁵⁸

Another worrying aspect of the new statute is that it introduces a time limit of six months within which complaints must be lodged, thereby completely preventing victims from lodging complaints about human rights abuses during the conflict.

On 6 March 2013, the Supreme Court declared Sections 17(10) and 10(5) of the *National Human Rights Commission Act, 2012*, null and void. Section 17(10) allowed the Attorney General the discretion to not implement NHRC recommendations to initiate legal action as long as the NHRC was informed in writing about the reasons for non-implementation. The judgment means the Attorney General now is required to follow NHRC recommendations as per Section 17(5) of the Act if the NHRC recommends legal action against human rights violator (s).²⁵⁹ It remains to be seen how this will be implemented in practice. It is also unclear how, if at all, this decision impacts on past NHRC recommendations.

257 For a critique of the new NHRC Act of January 2012, see Advocacy Forum, 'Necessity of amendments in National Human Rights Act 2012 for competence, autonomy and independence of the NHRC,' July 2012, accessed at: <http://www.advocacyforum.org/downloads/pdf/nhrc-act-review.pdf>.

258 See also, Suhas Chakma, 'Money for Justice', *Kathmandu Post*, 30 April 2012, accessed at: <http://www.ekantipur.com/the-kathmandu-post/2012/04/29/oped/money-for-justice/234330.html>

259 'SC rules NHRC Act provisions null and void,' *The Himalayan Times*, 6 March 2013, accessed at: <http://www.thehimalayantimes.com/fullNews.php?headline=SC+rules+AG%27s+discretionary+power+null+and+void&NewsID=368500&a=3>

It is also important that the NHRC is afforded sufficient functional independence, as required by the Paris Principles. The Commission should be able to recruit its own staff, including its Secretary. The new Act, however, provides for the appointment of the NHRC's Secretary by the Government, thereby politicizing the position and seriously jeopardizing the Commission's independence.

The NHRC is also not given explicit power to investigate cases of human rights violations that have been allegedly perpetrated by Army personnel in the new Act. This has the potential of perpetuating the Army's impunity for egregious human rights violations committed during the conflict, and even in the post-conflict period.

(i) Kuber Singh Rana

The National Human Rights Commission launched an investigation into the alleged enforced disappearance and unlawful killing of Sanjeev Kumar Karna and four other students in Dhanusha district in October 2003. Following its investigations, the NHRC made recommendations to the Government for the investigation and prosecution of certain named individuals.

Amidst a continuing lack of action by the police, the NHRC in September 2010 began exhuming the bodies at a demarcated site, albeit without properly involving the families of the victims in identifying personal effects and physical remains.²⁶⁰ Four bodies were recovered in September 2010, and a fifth one in February 2011.

Shortly after the NHRC started the exhumations, the ICJ learned that the Government asked the Commission to stop the investigation, stating that 'as per the Interim Constitution, only the proposed commission on disappearances could handle conflict-related cases.' The Home Ministry reportedly argued that it was beyond the jurisdiction of the courts to deal with 'wartime crimes.' The NHRC, however, ignored the Government and continued investigations, stating that justice cannot be denied to victims and that the transitional justice mechanisms had not yet been set up.²⁶¹

In June 2011, senior police officer Kuber Singh Rana, identified by the NHRC as one of those responsible for the enforced disappearance of the five students,

²⁶⁰ The expert team consisted of national forensic experts assisted by two forensic experts from Finland, staff at the National Forensic Science Laboratory, the Forensics Medicine Department of the Institute of Medicine, the Department of Archaeology, and the forensic laboratory of the Nepal Police.

²⁶¹ 'Dhanusha killings: Five youths died at hands of government forces,' *Kantipuronline*, 12 August 2011, accessed at: <http://www.ekantipur.com/2011/08/12/top-story/dhanusha-killings-five-youths-died-at-hands-of-govt-forces/339007.html>

was promoted to Assistant Inspector General of Police. A group of human rights defenders filed a petition at the Supreme Court in July 2011, seeking a court order to suspend his promotion to prevent him from interfering with the investigations. The Court refused to provide the requested stay order, but in an interim ruling directed the police and the Attorney General's Office to report back on a monthly basis to the Court and the NHRC on progress in the case. On 13 August 2012, the Court held that there were no reasonable grounds to suspend Kuber Singh Rana's promotion, but stated that the Government should in the future be extremely cautious about the transfer and promotion of officials implicated in human rights violations. The Court ordered the Government to frame vetting laws that would regulate the promotion and transfer of government officials, including those from the security forces. The division bench of Justices Kalyan Shrestha and Tarka Raj Bhatta further directed the Government to adhere to Article 126(5) of the Interim Constitution, which expressly provides for consulting with the Public Service Commission in matters relating to promotions and other issues regarding government officials.

In September 2012, however, Kuber Singh Rana was appointed as Inspector General of Police, the most senior officer within the Nepal Police.

Other concerns expressed by the NHRC have similarly been ignored by the Government. In response to the Government's withdrawal of cases from the criminal justice process, especially those involving human rights violations, the NHRC has requested the Government to justify its rationale,²⁶² and to consult with the Commission prior to withdrawing cases, particularly in relation to those in which the NHRC has already conducted investigations and submitted recommendations.²⁶³ To date, the Government has not responded to the NHRC.

Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions,²⁶⁴ in his global assessment of commissions of inquiry, found that 'many commissions have achieved very little ... [and] that many of them have in fact done little other than deflect criticism.'²⁶⁵ The Special Rapporteur's conclusion is that

262 The NHRC formally requested an explanation of the Government's decision to withdraw the 349 cases in 2008 (NHRC letter no. 618, dated 17 November 2008), as it also has with respect to the 41 cases withdrawn since 2008, and 238 previous cases against the alleged perpetrators of September 2007 violence in Kabilbastu.

263 Speaking at a programme marking the 61st International Human Rights Day, NHRC Chairperson Kedar Nath Upadhaya highlighted that the Government's hasty decision to withdraw hundreds of cases involving killings, abductions, rape and torture appeared to endorse an official policy of impunity in the eyes of the public.

264 Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008).

265 *Ibid.*, para 50-51, 27.

The basic question that must guide an assessment of a commission is whether it can, in fact, address impunity...The commission's mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether [a] commission meets the relevant international standards. Experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective.²⁶⁶

Fundamentally, it is important to recognise that although *ad hoc* commissions of inquiry and the NHRC have the potential to aid States in satisfying their obligation to investigate and fulfil victims' right to truth, they are no substitute for the regular criminal process and by themselves do not fulfil the right to justice and States' duty to provide effective remedies for violations. A commission will only be effective 'to the extent that the normal criminal justice system is strengthened parallel to the work of the commission.'²⁶⁷

At a time when debates are underway regarding the possible creation of transitional justice mechanisms such as a truth and reconciliation commission, it is essential to ensure that lessons learned from the failures of past commissions be strongly taken into account.²⁶⁸ International standards—in particular the UN Impunity Principles—that govern the functioning of COIs should be adhered to when establishing the proposed transitional justice mechanisms, or any other future *ad hoc* inquiry commission, so that they represent genuine efforts at addressing impunity in Nepal.

²⁶⁶ *Ibid.*, para 53.

²⁶⁷ Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of law, the criminal justice system and commissions of inquiry since 1977* (2010), p 161.

²⁶⁸ International Commission of Jurists, *Commissions of Inquiry Report*, *supra* fn. 194.

CONCLUSION AND THE RECOMMENDATIONS

If peace and political stability are to take root in Nepal, it is critical that the Nepali government dismantle the complex structure of *de facto* and *de jure* impunity that obstructs the rule of law; establish a transitional justice mechanism in line with international human rights law and standards; and bring to justice those responsible for gross human rights violations during the conflict.

The Constituent Assembly of Nepal was dismissed on 27 May 2012 after having failed to reach any agreement on a new Constitution and a transitional justice mechanism. By early 2013, Nepal was heading towards a constitutional crisis. On 13 March 2013, a political agreement was reached among the four main political parties that Chief Justice Khil Raj Regmi would take on the position as Chairman of the Electoral Council of Ministers until an election is held.²⁶⁹

Heading the Interim Election Council, Chief Justice Khil Raj Regmi is now in a unique position to implement the significant body of jurisprudence the Supreme Court espoused to promote rule of law and combat impunity for human rights violations in post-conflict Nepal.

In this context, and with an eye toward the expected transition to the new elected government, the ICJ calls on the Government of Nepal to act, as a matter of priority, as set forth below:

- (1) Enact legislation to ensure that any parliamentarian or State official against whom there is a credible allegation of responsibility for a gross violation of human rights or a crime under international law is suspended from service in public office, including armed forces personnel representing Nepal in international peacekeeping operations, at least pending the outcome of an independent and impartial investigation and fair trial;
- (2) Repeal or amend Section 11 of the *Public Security Act, 2046 (1989)*, Section 37 and Section 38 of the *Police Act, 2012 (1955)*, Section 26 of the *Armed Police Act, 2058 (2001)*, Sections 6, 6A and 6B of the *Local Administration Act, 2028 (1971)*, Section 22 of the *Army Act 2006*, Section 24(2) of the *National Parks and Wildlife Conservation Act, 2029 (1973)*, Section 6 of the *Essential Commodities Protection*

²⁶⁹ The ICJ called on the Chief Justice to step down from his role on the Supreme Court in order to preserve the independence of the judiciary and protect the doctrine of separation of powers. 'ICJ calls on Nepali Chief Justice to step down as judge after appointment as Prime Minister,' 14 March 2013, accessed at: <http://www.icj.org/icj-calls-on-nepali-chief-justice-to-step-down-as-judge-after-appointment-as-prime-minister/>

Act, 2012 (1955), and parts of the *Muluki Ain (General Code)*, notably Section 2 and Section 5, to remove any immunity afforded to State officials for gross violations of human rights;

- (3) Ensure the new Constitution does not permit any State official to grant an official pardon, withdraw a case or grant an amnesty to anyone suspected or convicted of a gross human rights violation or crime under international law;
- (4) Limit the interpretation of Section 5.2.7 of the *Comprehensive Peace Agreement* to ensure that only those cases brought during the course of the conflict and up to—and not after—the signing of the Peace Agreement are eligible for withdrawal, while also ensuring that cases involving credible allegations of gross human rights violations are not withdrawn;
- (5) Implement guidelines on the withdrawal of cases under Section 29 of the *State Cases Act 1992* set out in *Suk Dev Ray Yadav v. Government of Nepal (17 April 2012)* and *Gopi Bahadur Bhandari v. Government of Nepal (17 April 2012)*;
- (6) Implement the decisions of the Supreme Court in *Kedar Chaulagain v. Kavre District Police Office and District Attorney' Office (2009)*, *Rabindra Prasad Dhakal v. The Government of Nepal and Others (2007)*, *Devi Sunuwar v. District Police Office, Kavrepalanchok and Others (2007)*, *Purnimaya Lama v. District Police Office, Kavrepalanchok and Others (2008)*, issuing instructions to the Attorney General and all relevant law enforcement personnel to proactively and vigorously pursue all cases alleging serious violations of international human rights law;
- (7) Issue instructions to the Attorney General and all other relevant law enforcement personnel to implement the Supreme Court judgment *Om Parkash Aryal v. the Council of Minister (6 March 2013)*, making it mandatory for the Attorney General to act on recommendations of the National Human Rights Commission to investigate, and where appropriate prosecute cases;
- (8) Implement the *Bhuwan Niraula, et al. v. Government of Nepal et al (2011)* decision of the Supreme Court relating to the reform of the military justice system, ensuring that any allegations involving gross human rights violations or crimes under international law such

as extrajudicial killings, torture and cruel, inhuman and degrading treatment, including rape and other sexual violence, enforced disappearances and arbitrary detentions, are investigated, prosecuted and tried before civilian authorities;

- (9) Ensure that civilian courts have exclusive jurisdiction over civilians and under no circumstances are civilians tried before a military court;
- (10) Repeal the Ordinance on Commission on Investigation of Disappeared Persons, Truth and Reconciliation and engage in meaningful consultation to enable the new Parliament to enact legislation that is fully in line with international standards and best practices, and in particular is complementary to regular criminal justice processes;
- (11) Establish a specific crime in domestic law for torture and enforced disappearance in line with international standards and the Supreme Court Order in *Rabindra Prasad Dhakal v. the Government of Nepal and Others (2007)*, punishable with appropriate penalties which take into account the seriousness of these offences and ensuring that it is not subject to a statute of limitation and not eligible for an amnesty;
- (12) Amend the *State Cases Act 1992*, making it mandatory for the Attorney General and Police to act on the findings of Commissions of Inquiries;
- (13) Amend the *State Cases Act 1992*, making it mandatory for the Attorney General and Police to act on the findings and recommendations of the National Human Rights Commission; and
- (14) Enact legislation to enable victims or their relatives to initiate private prosecutions in line with their right to an effective remedy and reparations under international law.

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Authority without accountability: The struggle for justice in Nepal

