



Evading accountability by hook or by crook

The issue of amnesties in post-conflict Nepal

Introduction

During the Universal Periodic Review of Nepal's human rights record before the Human Rights Council in January 2011, the government of Nepal indicated that it is "fully committed to establishing Constitutional supremacy, ensuring the rule of law, good governance and human rights, as well as providing a positive conclusion to the peace process by eliminating insecurity and addressing impunity." It added that "addressing impunity entails addressing the past and maintaining the rule of law at present. Nepal is fully committed to work on both fronts."¹

The government also accepted the following recommendations:

- To ensure that all decisions from the judiciary, regarding those presumed responsible for serious human rights violations during and after the conflict, are fully respected by all concerned institutional actors, particularly by the army and the police forces (recommended by France);
- To tackle impunity by investigating and prosecuting human rights violations and abuses committed by state and non-state actors during and since the conflict, implementing court orders including on the Nepal Army, and ending political interference (recommended by United Kingdom).

In addition, it accepted other recommendations on the basis that they had already been implemented or were in the process of implementation:

- Undertake legal and administrative efforts to end torture and related impunity (recommended by Germany);²
- Review legislation, and amend it where necessary, to remove provisions which allow government and military personnel to act with impunity" (recommended by New Zealand)³; and
- Create a system of accountability to investigate and prosecute human rights violators in Nepal's military and law enforcement agencies (recommended by the United States of America).⁴

But, actions speak louder than words. Contrary to these pledges made in Geneva, there have been worrying developments on the ground in Nepal. Consecutive governments have actively ensured that those responsible for human rights violations during the armed conflict between 1996 and 2006 are not held accountable.

This report documents several methods of evading responsibility that have been utilised by those in power. Chiefly among them have been two cabinet decisions authorizing the withdrawal of criminal charges in more than 600 cases (including murder and rape) pending before the courts. The current Government under the leadership of Prime Minister Jhala Nath Khanal is planning to follow suit. Deputy Prime Minister and Minister of Home Affairs, Krishna Bahadur Mahara, told the media on 20 May 2011:

"Cases of political nature and related to the conflict time should be quashed...The cases related to conflict

¹ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review on Nepal', UN document: A/HRC/17/5, 8 March 2011, para. 51.

² Ibid., para. 107.2.

³ Ibid., para. 107.3.

⁴ Ibid., para. 107.24

time are against the spirit of the Comprehensive Peace Agreement and they should be withdrawn.”⁵

Among the cases named by the Minister are a case of murder filed against the Minister for Information and Communications, Agni Sapkota, in the Kavre District Police Office and a further murder case against a major in the Nepal Army relating to the torture and death in custody of 15-year-old Maina Sunuwar. In addition the Government is seeking to pardon a Maoist member of the Constituent Assembly (CA), Bal Krishna Dhungel, whose conviction for murder in Okhaldhunga has been upheld by the Supreme Court. According to media reports, a senior Home Ministry official was transferred after he refused to process the necessary paper work to initiate a pardon for Bal Krishna Dhungel.⁶

In contrast to the stated intentions of the Home Minister is a statement made by the Attorney General (AG) soon after he took office in February 2011. Professor Yubaraj Sangroula publically affirmed that he was in principle opposed to the withdrawal of cases.⁷

While the Supreme Court had earlier passed a number of strong judgements⁸ reaffirming the need to proceed with investigations and prosecutions, there have recently been some worrying judgements, indicating the court may be persuaded by arguments that transitional justice mechanisms are an appropriate substitute for the standard

⁵ Republica, ‘Mahara indicates withdrawal of cases against Sapkota, others’, 20 May 2011, <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=31508> accessed 19 May 2011.

⁶ Anil Giri, ‘Impunity watch: Cases against Maoists being fast withdrawn’, Kathmandu Post, 17 May 2011, <<http://www.ekantipur.com/the-kathmandu-post/2011/05/17/top-story/impunity-watch-cases-against-maoists-being-fast-withdrawn/221795.html>> accessed 19 May 2011.

⁷ Kathmandu Post, ‘Pending cases. New AG opposed to case withdrawal’, 15 February 2011, <<http://www.ekantipur.com/the-kathmandu-post/2011/02/15/nation/pending-cases-new-ag-opposed-to-case-withdrawal/218475.html>> accessed 20 May 2011.

⁸ Chiefly among them were the following eight decisions: Government of Nepal v. Debendra Mandal, Supreme Court decision, Criminal Appeal No. 0197 of 2063, 3 September 2007; Madhav Kumar Basnet, Advocate v Honorable Prime Minister, Puspa Kamal Dahal and Others, Writ No 03557/ 2065, Supreme Court, 1 January 2009.; Government of Nepal vs Gagan Raya Yadav et al, Supreme Court, 13 February 2008; Karna Bdr. Rasaili Vs. DAO, Kavre, 14 December 2009; Kedar Prasad Chaulagain Vs. DAO, Kavre, 14 December 2009; Devi Sunuwar Vs. DAO, Kavre, 20 September 2007; Purnimaya Lama Vs. DAO Kavre et al, Supreme Court, 10 March 2008 and Jai Kishor Lav Vs Dhanusha DAO et al, 3 February 2009.

criminal justice process.⁹ Final decisions in several public interest cases and mandamus and habeas corpus petitions are still pending. The final decisions in these cases will be critical in determining whether Nepal will finally tackle impunity or whether it will be allowed to prevail.

The legacy of enduring impunity for past crimes is having long-lasting negative repercussions on the ability of the country to develop and maintain the rule of law. Accountability for crimes committed during the conflict is needed to create trust in members of the security forces, law-enforcement agencies and government authorities, as well as an independent and trusted judiciary.

Background

Providing amnesties and pardons is a longstanding practice in Nepal. During the armed conflict between the government and the Communist Party of Nepal-Maoist (CPN-M), it was common for the government to urge Maoist cadres to surrender and in return to withdraw any charges pending against them.¹⁰

The procedure to withdraw cases is set out in Section 29 of the State Cases Act 1992.¹¹ It provides that cases can be withdrawn on the basis of a deed of reconciliation between the parties involved (not a formal withdrawal of charges), or if a court agrees to the Government proposal. On 17 August 1998, the government approved the *“Procedures and Norms to be Adopted While Withdrawing Government Cases-1998”* (*“1998 Standards”*) clarifying the nature of the criminal cases qualifying for withdrawal and the process to be followed.

The 1998 Standards classify criminal cases into two broad groups: 1) cases of political nature (Section 3, 4 and 5 of the Crime Against State Act -1989);¹² and 2) general cases (filed under existing laws of Nepal, including homicide, corruption, rape, robbery, drug peddling.)

⁹ These cases include GoN v Keshav Rai, Supreme Court, 13 December 2010; GoN v Anita Ghimire, et al, Writ 913/2067.

¹⁰ For instance, In July 1998 the government announced a general amnesty for members of the CPN (Maoist) who surrendered and agreed to “give up arms and participate within the democratic framework as laid out by the Constitution”, Amnesty International, ‘Nepal: A spiralling human rights crisis’, April 2002, page 13.

¹¹ See Annex 1.

¹² Ibid.

The 1998 Standards provide that the second category of offences shall only be withdrawn in the rarest of instances, taking into account circumstantial evidence, any prior criminal history of the accused, social standing of the accused, and other related factors, including whether the case is filed with a motive of political vengeance or malicious intent.¹³

In essence, the 1998 Standards set the following procedure for withdrawing any case:

1. The Home Ministry may submit an application for withdrawal of a case to the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA). Such application shall include:
 - a. Case dossiers comprising of at least facsimile copies of the First Information Report (“FIR”), statement of the accused, charge-sheet and any court orders;
 - b. Written justification for such a decision, authenticated by an official of Secretary level;
 - c. Information about the status of the case in the courts (whether the case is under appeal, under consideration by a court of first instance);
 - d. Evidence of consent from the concerned Ministry.
2. MoLJPA then considers the application. If the decision to withdraw a case is justified after receiving all the documents, MoLJPA makes the decision and forwards the recommendation to Cabinet.
3. If the Cabinet finds justifiable reasons to withdraw the case, the MoLJPA shall implement the decision.¹⁴

¹³ The 1998 Standards, Nepal Government Policy Document, Criteria 2.

¹⁴ On 20 November, 2009, the then government formed a task force to amend the 1998 Standards. The key recommendations of the task force include:

1) Although the power to withdraw cases fall under its exclusive prerogative, the government does not have carte blanche to withdraw cases being oblivious of victims’ rights and has a duty to protect the right to effective judicial remedy.

2) If a case, which is under consideration in court, lacks solid evidence or the case is weak, the cases can be withdrawn.

3) Cases exacting strict liabilities (including homicide, disappearance, abduction, rape etc) must not be withdrawn.

4) Cases that have already been decided by courts cannot be withdrawn.

The decision of Cabinet to withdraw a case is implemented by the AG at the behest of the MoLJPA. The Office of the AG circulates the decision to the respective District Public Prosecutor’s Office, which, in turn, submits the decision to the relevant court. Here, the role of the prosecutor is neutral. However, as stated, any withdrawal is subject to permission from the relevant District Court. Despite the SC decision in *Gagan Raya Yadav*, in which the SC held that case withdrawals are not be ordered as a matter of course,¹⁵ District Court judges have been passive in their acceptance of case withdrawal applications and there are reportedly very few instances where district courts have scrutinized the Government’s decisions for withdrawal or refused consent for withdrawal.¹⁶ Indeed, in one case, a lawyer appealed against a district court decision to withdraw cases and obtained a stay order. In its judgement, the court reportedly stated:

The government decision has violated the victim’s rights to get justice... To withdraw cases citing political reasons is not valid.”¹⁷

Soon after the end of the conflict, hundreds of political prisoners were released. According to official sources, between 2006 and 2008, the Nepali government released 367 detainees held under the *Terrorist and Disruptive Activities Act* (TADA) and withdrew charges against them.¹⁸ Likewise, many political prisoners who were facing trials on charges of sedition (such as Maoist student leaders Himal Sharma and Krishna K C) under the *Crime against State and Punishment Act* 1989 (CASPA) were also released unconditionally. There is no doubt that these were political cases and valid implementation of Comprehensive Peace Agreement (CPA) of November 2006, in which both parties agreed to “withdraw accusations, claims, complaints and cases under consideration levelled against various individuals due to political reasons.”¹⁹

5) Cases that remain sub judice in appellate courts must not be withdrawn. To AF’s knowledge, these recommendations for changes to the 1998 Standards have not been acted on to date.

¹⁵ Discussed further at page 13-14.

¹⁶ Raju Prasad Chapagai, ‘Withdrawal of criminal charges and other forms of amnesty in Nepal: Reflections on the relevant national and international legal framework’, National Judicial Academy Law Journal, 2010, page 186.

¹⁷ Bimal Gautam, ‘SC stays govt move to withdraw murder cases’, Republica, 14 July 2010, <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=21037>

¹⁸ Annual Report of the Attorney General 2007/2008.

¹⁹ Clause 5.2.7 of the CPA of November 2006

Manoeuvring to evade accountability

Current international practice shows that states have increasingly come to rely on *de facto* amnesties to avoid accountability as *de jure* amnesties have been accepted as being against international law.²⁰ Nepal has seen reliance on both, with political pressure and the introduction of various measures over the years to ensure lack of accountability for human rights violations. Thus the blanket of impunity continues to firmly protect the security forces and those with political connections.

The attempts at evading accountability in post-conflict Nepal have been chiefly through executive decisions of case withdrawals and pardons, utilising Section 29 of the State Cases Act 1992 and the clemency clause at Article 151 of the Interim Constitution respectively.²¹ This report does not address other aspects related to the withdrawal of cases. These include several laws that provide immunity from prosecution to members of the security forces 'acting in good faith.' To date these provisions have not been used in a court of law, as no cases against government security forces have reached trial stage. There is certainly potential that these 'good faith' provisions will form the basis of a defence should a case against a member of the security forces go to trial.²² The report neither addresses the common practice at the community level for those responsible for crimes to engage in mediation (often facilitated by local political or community leaders) and reach a settlement with the victim whereby they provide an apology, a promise not to repeat the crime and provide a meagre amount of money by way of compensation. Such practice clearly sends the wrong message that if one has the right political connections, crime goes unpunished.²³

²⁰ Paul van Zyl, 'The Challenge of Criminal Justice: Lessons Learned from International, Hybrid and Domestic Trials. Dealing with the Past and Transitional Justice: creating Conditions for Peace, Human Rights and the Rule of Law.' Conference Paper 1/2006 FDFA

²¹ Interim Constitution, Article 151; see Annex 1.

²² Among these are the Nepal Army Act, the Nepal Police Act and the Public Security Act. The arguments put forward by the Nepal Army in the Maina Sunuwar case to date are an indication of the likely defence arguments that would be made in the event the case went to trial. For full details of these, see Advocacy Forum, 'Maina Sunuwar. Separating Fact from Fiction', February 2010, <http://www.facebook.com/note.php?note_id=204224852928171>

²³ CIJ Nepal, 'Impunity in Nepal', October 2010, <<http://www.asiafoundation.org/resources/pdfs/EnglishImpunitydesignNepal.pdf>>, page 111.

This report will also address the continuing strong assertions that an envisaged transitional justice process will provide truth, justice and reparations to victims and their relatives instead of prosecutions and a fair trial in the normal criminal justice system.

Attempting to provide amnesty through the Truth and Reconciliation Commission

One of the foremost arguments put forward by pro-amnesty groups in Nepal is that the crimes committing during the conflict should be addressed by transitional justice mechanisms, including the proposed Truth & Reconciliation Commission (TRC) and Commission of Inquiry on Disappearances (Disappearances Commission).

There has been a tendency to invoke Article 33(q) of the Interim Constitution, specifying the provision of relief to the victims of disappearances; Clause 166(3) of the Interim Constitution that annexes the CPA to the Constitution and the amnesty clause of the CPA (5.2.7). These provisions form the basis of the argument that the Interim Constitution mandates the use of transitional mechanisms to address past violations of human rights and humanitarian law, therefore normal criminal investigations and prosecutions should not be initiated, or alternatively stayed, until such mechanisms are established. It is to be noted that the SC has decided that the CPA, though persuasive as a means of interpreting the Constitution, is not independently legally enforceable in the courts.²⁴ This has not quieted the voice of pro-amnesty groups, both in the courts and the media.²⁵

In addition, the transitional justice mechanisms are seen as an opportunity to put in place clear amnesty provisions. On this basis, on 17 July 2007, the then government of Prime Minister Girija Prasad Koirala made an attempt to foreclose prosecutions on cases of human rights violations by proposing an amnesty clause in the draft bill creating the Truth and Reconciliation Commission. Section 25 of the draft bill stated:

²⁴ See *Liladhar Bhandari v Government of Nepal Writ 0863/2064 BS*, SC decision dated 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.

²⁵ See, for example, *GoN v Keshav Rai*, Supreme Court, 13 December 2010; media reports, *supra*, n5 & n6.

“Notwithstanding anything contained in the Section 24,²⁶ if any person is found to have committed gross violations of human rights or crime against humanity in course of abiding by his/her duties or with the objective of fulfilling political motives, the Commission may make recommendations for amnesty to such person to the Government of Nepal.”

However, intense lobbying by various national and international human rights organizations led the government to amend this provision in the bill.²⁷

The Appropriate Use of Transitional Justice Mechanisms

Transitional justice mechanisms have an important role in assisting a country to move from a conflict-ridden society to a more democratic society. However, the assertion that crimes committed during the conflict can be or should be addressed solely by such mechanisms has no basis in Nepali or international law.

These commissions will accomplish two important things; they will make a public declaration about the causes and consequences of the conflict; and, they will recommend both reparations and, where information discloses crimes, recommend prosecutions. The proposed TRC and Disappearances Commission do not have prosecutorial powers or any role in making individual determinations of guilt and are therefore insufficient to adequately end impunity for crimes committed during conflict. The Office of the High Commissioner on Human Rights (OHCHR) has come to the same conclusion in a recent report:

“OHCHR has consistently affirmed that, “a truth commission should be viewed as complementary to judicial action”²⁸ not as a basis to supplant or suppress the regular judicial system.”²⁹

²⁶ “The Commission Shall make recommendations to the Government of Nepal for necessary for action against such persons who is found guilty while carrying out inquiry and investigation in accordance with this Act” (Section 24, TRC 1st Draft Bill).

²⁷ As of May 2011, the bill is under consideration of the Legislative Committee of the Parliament. It provides for the TRC to recommend amnesties but excludes international crimes.

²⁸ See OHCHR Rule of Law Tools for Post-Conflict Countries: Truth Commissions (2006), p. 27.

²⁹ OHCHR, March 2011, ‘The relationship between Transitional Justice mechanisms and the Criminal Justice system: Can conflict related violations and abuses be deferred on the basis of commitments to establish a Truth Commission?’ available at <http://nepal.ohchr.org/en/resources/publications/2011_03_29_Legal_Opinion_E.pdf> accessed on 19 May 2011.

The TRC’s role can never replace the role of the court. The Nepali government has the duty to promptly investigate and prosecute serious crimes; this must be reflected in the current bills before Parliament. In ignoring this duty the Government risks further deterioration of the justice system in Nepal and denies the right of all persons to an effective remedy. It is also risking a repetition of past crimes if they are left unpunished.

Providing amnesty through cabinet decision

Two successive governments formed after the CA elections of April 2008 used executive power to withdraw a substantial number of cases filed in several district courts across the country.

The decisions to withdraw criminal cases were made via executive orders in the name of steering the peace process and to implement Clause 5.2.7 of the CPA. In a memo to the Ministry of Law, Justice and Parliamentary Affairs, the Chief Secretary of the Government explained the Cabinet’s decision to sanction the withdrawal of 349 cases on 27 October 2008, stating:

“... the proposal to withdraw cases filed during the period of armed conflict between 14 March, 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*,” have 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.”³⁰ [emphasis added]

The exact number of case withdrawals approved by both governments could not be independently established.³¹ Those that stand out include the authorisation of the blanket withdrawal of 349 cases by the Maoist-led government³² and the decision of the Madhav Kumar Nepal-led government to retract 282 cases on 17 November 2009. According to information collected by AF, the cases approved to

³⁰ Proposal No. 67 2008 sent by Chief Secretary Bhojraj Bhimire to Ministry of Law, Justice and Parliamentary Affairs.

³¹ Republica, ‘Government withdraws some 300 murder, arson cases’, 17 November 2009 <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=11876> accessed 25 May 2011.

³² One of the last decisions made by the Maoist-led government included the withdrawal of 10 criminal cases levelled against cadres of various armed groups in Terai; Ministry of Law, Justice and the Constituent Assembly Affairs’ memorandum, dated 27 October. 2008 and AF internal records.

be withdrawn in October 2008 by the Maoist-led government covered a wide range of crimes whereas those approved to be withdrawn by the CPN-UML government were murder and arson cases.³³

The cases approved for withdrawal by the Maoist government included a significant number of cases filed by the state agencies against Maoist leaders and cadres during the period of conflict, while the sanctioned withdrawal by the CPN-UML government was done under pressure from the Terai-based political parties mainly regarding incidents that occurred after the signing of the CPA.³⁴ The cases had been filed in various courts and District Administration Offices across the country. It is of significance that most if not all of these alleged crimes were said to have been committed after the CPA, and therefore would not be subject to the argument that transitional justice mechanisms would substitute for normal criminal justice procedures in these cases, nor that Clause 5.2.7 is a relevant consideration in justifying such withdrawals.

Categories of Crimes	Withdrawal approved by the Maoist-led Government	Withdrawal approved by the CPN(UML)-led Government
Murder	97	200
Attempt to murder	30	-
Robbery	98	-
Robbery + Murder	1	-
Civil Offenses	20	-
Rape	1	-
Arms and Ammunition	39	-
Drug Peddling	1	-
Treason	5	-
Arson	57	82
Total	309	282

The cabinet decisions of October 2008 and November 2009 to withdraw cases are not in line with the State Cases Act (to the extent that they did not seek a deed of reconciliation with the victim or families of victims) or with the 1998 Standards. Instead they rely on an expansive interpretation of Clause 5.2.7 of the CPA which states: "Both parties guarantee that they will withdraw accusations, claims, complaints and sub-judice cases levelled against various individuals due to political reasons and immediately release those who are in detention by immediately making their status public." The provision was instrumental in

³³ Ministry of Law, Justice and the Constituent Assembly Affairs' memorandum, dated 27 October 2008, AF internal records and, Republica, supra note 31.

³⁴ Republica, supra note 31.

freeing political prisoners and others illegally detained under the TADA and related acts. However, the provision has been deliberately misinterpreted and misused as a justification for the withdrawal of cases which constitute apparent violations of international humanitarian and human rights laws. The statistics confirm that successive governments since the CPA have withdrawn at least 297 cases of murder and 1 case of rape.

The poorly drafted CPA clause clearly highlights the pledge between two warring parties – the State and the Maoists – to withdraw cases and complaints lodged against each other before the end of conflict. The clause is silent however on the crimes committed against civilians and the cases filed by victims and their families.

Under domestic law, where any inconsistency between domestic and international law exists Nepal is obliged to implement the provisions of any international treaty ratified by Nepal. Furthermore, Nepal, like all nations, is obligated to adhere to jus cogens and provide effective remedy to the victims, as discussed in detail below.

The way successive governments have used Clause 5.2.7 of the CPA to undermine justice is not in line with Nepal's treaty obligations and is in no way justifiable. Amnesties can be permitted in a number of cases considering the gravity of the offence and their political nature; it is, however, against international law to withdraw cases of gross violations of human rights, including extrajudicial executions, torture, disappearances and rape and other gender-specific instances of these offences.

Successive governments have stretched the meaning of the term "political crimes" or prosecutions "for political reasons" from its early narrow meaning, as reflected in the withdrawal of cases under the TADA and CASPA, to a very wide one including serious crimes such as murder and rape. World-wide practice shows that only a limited number of crimes are plausibly referred to as "political crimes". Based on her research on amnesty laws, Mallinder (2008) has identified the following activities as purely political crimes: "treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, and membership of banned political or religious organizations."³⁵ Those cases that were sanctioned for withdrawal on 27 October 2008 and 17 November 2009 are clearly over-stretching the meaning of the term "political crime,"

³⁵ Mallinder, Louise. Amnesty, Human Rights and Political Transitions, 2008, page 136.

as well as diffusing the distinction between category 1 and 2 in the 1998 Standards. The basic nature of the crimes listed in the table above, except the one case of treason and possibly the Arms and Ammunitions Act offences, by definition, fall outside the prescriptive list of “political crimes” as identified by Mallinder. The definition of ‘political crime’ is being expanded more and more broadly by politicians to suit their own aims. To try to dub criminal offences as politically-motivated crimes and withdrawing cases on that basis is not justifiable and is a flagrant attempt to avoid accountability and introduce amnesties through the back door.

The role of the Supreme Court

The Nepali judiciary initially took a firm stand against impunity, repeatedly ruling that cases should be dealt with by civilian courts under standard criminal procedures. More recently, it seems to be more ambivalent about the executive’s powers to grant amnesties, and swayed by arguments that the transitional justice mechanisms are an appropriate substitute for normal criminal investigations and trials. This has been reflected in some recent verdicts passed by higher courts regarding case withdrawals, particularly in cases pre-dating the CPA.

In an early ruling on 13 February 2008 regarding case withdrawals, the Supreme Court clearly articulated why such withdrawals are not permissible. In the case of *Government of Nepal vs. Gagan Raya Yadav et.al*, the court held that:

- The intention of the law and the constitution is not that any case may be withdrawn, nor is encouraging impunity the objective of the government.
- Just because the political system and government have changed, it does not allow compromising or influencing the fundamental right to life of the people. If such a situation arises, the courts must not hold back in protecting the rights of the people in accordance with the constitution and the laws.
- On the issue of withdrawal of cases, a matter that requires approval of the court, if it is viewed only procedurally and if the court does not give attention to the rationale for the withdrawal of cases of a serious nature or those that could affect society for a long time, then such crimes could

increase and, rather than result in crime control, lead to the likelihood of chaos and insecurity.

- Therefore, it is inherent in the law that the right of the government to withdraw cases has to be used with good intention, it cannot be said to be absolute. The approval of the court is also not only a procedural formality it is a substantive legal provision.
- The court has to be more sensitive (in cases) where human rights and humanitarian laws have been violated, and those that have raised serious questions about social security and morale. Just because of the (government’s) right to withdraw cases, it would not be fitting for the court (in the context of its legal rights) to allow withdrawal of any type of case at any time. The courts have to become the protectors of justice. Only the protection of the rights of victims of crime, mainly the weak or those who are unable to defend themselves can ensure justice in society, which is why such questions have to be considered sensitively.³⁶

The Supreme Court has also favourably heard petitions from families who have filed First Information Reports about extrajudicial executions at their local police station and who have sought writs of mandamus from the court to force the police to investigate the cases. Repeatedly, the court has expressly rejecting the argument that the TRC is an adequate substitute for criminal procedure.³⁷ A majority of these judgments occurred between the beginning of 2009 and mid-2010.³⁸ For example, in a 14 December 2009 judgment in the cases of murder victims Reena Resaili and Subhadra Chaulagain, the Supreme Court was explicit about the state’s responsibilities regarding investigation and prosecution in cases involving serious human rights violations:

“An act declared a crime by the law is a crime... no matter who the perpetrator is or what the circumstances are. The law does not prevent anyone from investigating an FIR stating that a woman

³⁶ Excerpts of the judgment adapted from Bhattarai, et al., ‘Impunity in Nepal’, CIJ Nepal, October 2010, available at <<http://www.asiafoundation.org/resources/pdfs/EnglishImpunitydesignNepal.pdf>> at page 90-92.

³⁷ Supra note 33.

³⁸ See Human Rights Watch and Advocacy Forum, ‘Indifference to Duty: Impunity for Crimes Committed in Nepal’, December 2010, <http://www.hrw.org/en/reports/2010/12/14/indifference-duty>, page 7.

sleeping at night in her home was forcefully arrested... and shot dead by the army or security personnel. It would be a mockery of the law and the natural rights of civilians.”³⁹

While some appellate courts have also followed these Supreme Court precedents, others have supported the argument of the Government, that the TRC will adequately address these issues. Upon further litigation the Supreme Court has overturned the decisions of the Appellate Court, in a majority of cases.⁴⁰

Pardons: The Clemency Clause in the Interim Constitution

On 8 September 2010, Supreme Court upheld a murder conviction against UCPN-Maoist CA member Balkrishna Dhungel. Dhungel was initially tried and sentenced to life imprisonment with confiscation of property by the District Court of Okhaldhunga for the murder of Ujjawal Kumar Shrestha on June 24, 1998. When Dhungel appealed the verdict, the Appellate Court of Rajbiraj overturned the verdict of the District Court, accepting the transitional justice argument. The public prosecutor then appealed to the Supreme Court, which, on 8 September 2010, upheld the District Court decision, convicting Dhungel of murder. Following the court’s decision, the UCPN-Maoist formally requested the then Prime Minister and Home Minister to pardon Dhungel, invoking Article 151 of the Interim Constitution,⁴¹ fortunately, to no avail. Dhungel continues to be an active member of the CA and is yet to be arrested.⁴²

³⁹ Supreme Court of Nepal, Writ No.0339/2064 (2007), order of 14 December 2009, page 4.

⁴⁰ The cases of victims Data Ram Timsina, judgment of the Biratnagar Appellate Court, August 2007 (notably the Supreme Court rejected this argument in this case and overturned the decision of the Biratnagar Appellate Court in an appeal judgment dated 28 October 2010); Jag Prasad Rai, Dhananjaya Giri, and Ratna Bahadur Karki mandamus petitions to the Biratnagar Appellate Court quashed on the basis of the argument about the jurisdiction of the TRC; the family of Dhananjaya Giri appealed to the Supreme Court, which granted their petition of mandamus on 22 April 2010.

⁴¹ Article 151 of the Interim Constitution of Nepal-2007 allows the cabinet to “grant pardons [to persons convicted], and suspend, commute or reduce any sentence imposed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.”

⁴² The Kathmandu Post, ‘Plea to ban Dhungel from entering CA hall’, 4 November 2010 <<http://www.ekantipur.com/the-kathmandu-post/2010/11/04/nation/plea-to-ban-dhungel-from-entering-ca-hall/214532/>> accessed 26 May 2011.

A further petitioner, Mukeshwor Das Kathwania, who was convicted by the Supreme Court in 1997 of murder, has also attempted to invoke the clemency clause at Article 151 of the Interim Constitution. In a 16 November 2010 ruling, the Supreme Court held that “the power to pardon can only be exercised in the rarest of rare cases;” hence the article cannot be exercised as common practice after this verdict. The petitioner had claimed that the cabinet had decided to seek pardon for him in January 2010 and had forwarded the decision to the Office of the President.

The Worrying Trend

In stark contradiction to these earlier rulings,⁴³ there are several recent decisions in which the Supreme Court granted interim orders to halt proceedings in cases dating back to the conflict period citing Article 33 (q) of the Interim Constitution and clause 166(3) of the CPA.

Supreme Court suspends district court decisions to issue arrest warrants against CA members

On 2 July 2010, a number of cadres of the CPN (Maoist), including CA member, Keshav Rai, were charged *in absentia* with the murder of a civilian, Padam Bahadur Tamang, on 3 August 2005. The Okhaldhunga District Court issued an arrest warrant for the accused and ordered that they be produced to the court within 70 days. On 7 December 2010, Keshav Rai challenged the arrest warrant before the Supreme Court on the grounds that Article 33 and 166(3) of the Interim Constitution and the CPA mandate the formation of a TRC to deal with cases of human rights violations arising during the period of the conflict, therefore, the District Court lacks the power to issue such a warrant.

On 13 December 2010, the Supreme Court granted his request and issued an interim order not to execute the directives of the district court. The decision of the Supreme Court is yet to be published; however, it appears that the court was persuaded by Rai’s arguments that such cases should and will be dealt with by the transitional justice mechanisms.

In a similar case involving Maoists cadres who allegedly murdered Guru Prasad Luitel in September 2003, the Supreme Court, on 18 January 2011, issued

⁴³ *Supra*, n8.

an interim order preventing the execution of arrest warrants issued by of the District Court of Okhaldhunga.⁴⁴ The court again appeared to be swayed by the transitional justice argument.

In a seemingly strong judgement, responding to a PIL case in *Madhav Basnet et al v. Prime Minister Puspa Kamal Dahal et al*, the Court issued an interim order on 1 January 2009 preventing the implementation of the Council of Ministers' decision of 27 October 2008 to approve the withdrawal of 349 criminal charges. The interim order was based on the argument that the CPA only allows the government to withdraw "the cases which have been filed with political motive" and the list of the cases recommended for withdrawal appears to have involved a number of cases which have no connection with politics; the case is also important in that the SC explicitly stated that the decision of the Government to withdraw a cases is not absolute and unconditional, rather the decision is that of the District Court to be decided after applying a reasonable test.

The Supreme Court, however, reversed this strong position in its final decision in this case on 23 February 2011, where the Division Bench decided that the decision of the Government to withdraw the 349 cases was lawful as per the case withdrawal policy standard (1998 Standards) and Clause 5.2.7 of the CPA; the petition was consequently quashed. The Supreme Court in this case seemed to confirm the broad definition of "political crime" argued by the pro-amnesty camp; in that, a case committed during the conflict will, *prima facie*, be of a political nature and come under Clause 5.3.7 of the CPA. Despite this disappointing ruling, it is to be noted that the Supreme Court emphasised in its judgement that the District Court must carefully and in good faith, on a case by case basis, consider its final decision whether to accept or refuse a case withdrawal. It remains to be seen what position the district courts will uphold as the withdrawal applications flow in.⁴⁵

As the discussion above highlights, the Supreme Court appears to have become politicised over this

⁴⁴ GoN v Anita Ghimire, et al, Writ 913/2067, Supreme Court, 18 January 2011.

⁴⁵ Raju Prasad Chapagai, supra note 15, page 186; Madhav Kumar Basnet, Advocate v Honorable Prime Minister, Puspa Kamal Dahal and Others, Writ No 03557/ 2065, Supreme Court, 1 January 2009.

issue. Respective governments have made continuous, deliberate attempts to evade responsibility of their allies for crimes committed during the conflict and, unfortunately, the Supreme Court's formerly staunch position against impunity seems to be waning in the face of political pressure.

The role of the Attorney General's Office

Under Article 135 (2) of the Interim Constitution⁴⁶ and Section 29 of the State Cases Act, public prosecutors have the final say whether to initiate a prosecution by court proceedings. It is common practice for public prosecutors to take the decision not to prosecute based on the analysis of the evidence.

The annual report (2066/67) of the Attorney General, for instance, shows that public prosecutors declined to initiate prosecutions in 1,795 out of 9,682 cases due to lack of adequate evidence.⁴⁷ This is a critical issue as in most of the cases involving past human rights violations, there have not been proper investigations by the police – suspects have not been interviewed and no evidence has been collected. There are serious concerns that this supposed lack of evidence will provide space to formally allow public prosecutors to withdraw cases. It is a well-established fact that performance of police in carrying out investigations is brazenly lackluster.⁴⁸ While according to the State Cases Act public prosecutors should give direction to the police to ensure thorough investigations take place,⁴⁹ there have been many instances where public prosecutors have colluded with police to ensure certain cases did not proceed.

AF has first-hand experience of such attempts by public prosecutors in a number of cases. One recent one is the case of Sahidullah Dewan, who was killed by three policemen in broad daylight on 26 October 2009 in Rupandehi District. When family members of the victim tried to file an FIR at the DPO Rupandehi, police refused to register the complaint stating that

⁴⁶ See Annex 1.

⁴⁷ Annual Report the Attorney General 2066/67, pg. 109.

⁴⁸ See AF & HRW. Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict, 2008, Still Waiting For Justice: Unpunished Crimes from Nepal's Armed Conflict, 2009 and Indifference to Duty, 2010.

⁴⁹ Section 6 states that upon receipt of the police's preliminary report, "the Government Attorney shall give necessary direction to the investigating police officer".

the victim was killed during crossfire. The victim's father moved the Appellate Court and the court issued an order of mandamus for police to file the complaint and step up investigations. However, the Public Prosecutor Office (PPO), Rupandehi, surprisingly failed to file court proceedings in the case. This decision was communicated to the PPO at the Appellate Court as per required procedures. The Appellate PPO reviewed the decision of the District PPO and directed the latter to file court proceedings and move the case forward. Defying the directive from the Appellate PPO, the District PPO directly corresponded to the AG Office seeking approval to of the decision not to initiate proceedings. As of late May 2011, the decision is pending at the AG Office.

A further possibility for intervention in failing to prosecute cases comes from the AG's role in implementing the decision of Cabinet pursuant to the 1998 Standards. Theoretically, the AG could refuse to comply with a MoLJPA directive to implement a Cabinet decision to withdraw a case. Practically, however, as the position of AG is a political appointment, the likelihood of such a refusal occurring is slim.⁵⁰

Given the stated opposition to the withdrawal of cases by the AG and his public commitment to improving communication and coordination between the Police and Public Prosecutor for the purposes of effective prosecutions,⁵¹ the manner in which the AG Office will handle both mediocre investigations by police and any cabinet decisions to withdraw cases will be a critical test of the office's independence.

International standards and best practices

Under treaty and customary international law, Nepal has obligations to guarantee fundamental human rights, to prosecute persons accused of crimes under international law and gross violations of human rights, and to provide remedy and reparation to victims. Amnesties that prevent the prosecution of perpetrators of crimes under international law and

gross violations of human rights are inconsistent with those obligations.

Although jurisprudence to outlaw amnesty for gross human rights violations can be found in state practice, there is no precise definition of the term. An OHCHR document⁵² uses the word "amnesty" to mean 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.

Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law.

Amnesty differs from pardon, which "refers to an official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, *without expunging the underlying conviction*."⁵³

Amnesties have been justified by states following conflict ostensibly to broker peace and promote reconciliation. Formal amnesties have been granted depending on the nature of transition, through mechanisms such as "the exercise of executive discretion", "negotiated peace agreements", "promulgated amnesty laws" and "referenda".⁵⁴ For example, amnesties were used in Latin America following the "third wave of democratization" in the 1980's as a political tool. As a rule, the human rights violations committed during the internal armed conflicts in Latin America were loosely labeled as "political crimes" and justice was deliberately sacrificed on the altar of political expediency.

However, national and regional courts and international human rights mechanisms have recognized that blanket amnesties for certain crimes including war crimes, crimes against humanity and

⁵⁰ A senior Home Ministry official was transferred after he refused to process the necessary paper work to initiate a pardon for Bal Krishna Dhungel; Kathmandu Post, supra note 6.

⁵¹ Kathmandu Post, supra note 7.

⁵² OHCHR, Rule-of-Law Tools for Post Conflict States. Amnesties: 2009, p.5.

⁵³ Ibid., (emphasis added).

⁵⁴ Mallinder, Louise, 'Amnesty, Human Rights and Political Transitions', 2008.

gross violations of human rights violate basic principles of international law and human rights.

Such amnesties are incompatible with:

- States' obligations to guarantee respect for fundamental human rights by preventing violations, investigating them, bringing to justice and punishing perpetrators and providing remedy and reparation for the damage caused.

States are required under comprehensive human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), to refrain from violating human rights and to guarantee respect for such rights.⁵⁵ To fulfill their obligations in relation to the second aspect it has been consistently held that States must conduct an effective investigation and ensure criminal prosecution of gross violations of human rights such as torture and similar cruel, inhuman or degrading treatment; extrajudicial, summary or arbitrary executions; slavery; and enforced disappearance, including gender-specific instances of these violations, such as rape.⁵⁶

The Human Rights Committee has criticized states that have sought to impose amnesties for serious violations.⁵⁷ In its General Comment No. 31, it stressed that States have obligations to investigate and bring to justice perpetrators of violations including *"torture and similar cruel, inhuman and degrading treatment..., summary*

⁵⁵ See International Covenant on Civil and Political Rights, Article 2.1; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 2.1; African Charter on Human and Peoples' Rights, Article 1; Inter-American Convention on Human Rights, Article 1; European Convention on Human Rights, Article 1.

⁵⁶ See OHCHR, Rule-Of-Law Tools for Post-Conflict States: Amnesties: 2009, p. 20.

⁵⁷ For example: Comments on Uruguay, U.N. Doc. CCPR/C/79/Add.19 (1993); Concluding Observations on the Second Periodic Report of El Salvador CCPR/C/79/Add.34 (1994); Nineteenth Annual report of the Human Rights Committee A/50/40 (1995) Nineteenth Annual report of the Human Rights Committee A/50/40 (1995); Preliminary Observations of the Human Rights Committee: Peru CCPR/C/79/Add.67 (1996); Concluding Observations to France May 1997 CCPR/C/79/Add.80; Concluding Observations of the Human Rights Committee: Lebanon. 01/04/97. CCPR/C/79/Add.78. (Concluding Observations/Comments); and Concluding Observations on the Fourth Periodic Report of Chile (1999), CCPR/C/79/Add.104; Concluding observations of the Human Rights Committee: Argentina. 03/11/2000. CCPR/CO/70/ARG; Concluding Observations on the second periodic report of the Congo: Congo. 27/03/2000. CCPR/C/79/Add.118; Concluding observations of the Human Rights Committee: Croatia. 30/04/2001.

and arbitrary killing... and enforced disappearance". The Committee recognized 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 the violations"*, and that States *"may not relieve"* public officials or state agents who have committed criminal violations *"from personal responsibility, as has occurred with certain amnesties"*.⁵⁸

In its General Comment on Article 7 of the ICCPR prohibiting torture the Human Rights Committee stated that:

"amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee prosecution of such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".⁵⁹

Amnesty laws have also been held to violate regional human rights treaties. In the case of *Barrios Altos Case (Chumbipuma Aguirre et al. v Peru)*, the Inter-American Court of Human Rights held in relation to a blanket amnesty provision that:

*"all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are impermissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-judicial summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."*⁶⁰

Likewise, in its report on the Las Hajas massacre in El-Salvador, the Inter-American Commission on Human Rights held that:

"the present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of most basic human rights. It eliminates perhaps the single most effective means of

⁵⁸ Human Rights Committee, General Comment No. 31, 80th session (2004), para. 18.

⁵⁹ Human Rights Committee, General Comment No. 20, 44th session (1992), para. 15.

⁶⁰ Inter-American Court of Human Rights (IACtHR), *Barrios Altos Case (Chumbipuma Aguirre et al. v Peru)*, 75 Inter-Am Ct HR (Ser. C) (Judgment) (2001), para. 41.

enforcing such rights, the trial and punishment of offenders".⁶¹

Last year the Inter-American Court ruled against Brazil's 1979 amnesty law, which exonerated those who committed political crimes during the dictatorship, and had been interpreted by the Brazilian Supreme Court as pardoning government actors responsible for torture, murder, and enforced disappearance. The Inter-American Court's judgment requires Brazil to ensure that the Amnesty Law does not preclude the investigation and punishment of human rights violations committed during the dictatorship.⁶²

- States' specific duties under treaties and general international law to punish perpetrators for certain international crimes and to provide a remedy to victims.

States also have specific duties to punish and provide remedies for crimes including war crimes;⁶³ crimes against humanity;⁶⁴ genocide;⁶⁵ torture;⁶⁶ enforced disappearances,⁶⁷ arbitrary

⁶¹ Inter-American Commission on Human Rights, El Salvador Report – State's responsibility for 1983 Las Hajas massacre, 24 September 1992, para. 169.

⁶² IACrHR, Gomes-Lund et al. (*Guerrilha do Araguaia*) v. Brazil, 24 November 2010.

⁶³ This requirement is included in each of the four Geneva Conventions in relation to "grave breaches" in international armed conflict: see, eg. Article 146 of the Fourth Geneva Convention. Serious violations of the rules of humanitarian law applying in non-international armed conflicts (set out in common Article 3 of the four Geneva Conventions and the Additional Protocols) are also recognised under customary international law as serious violations of the "laws and customs of war": International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case No. IT-94-1-T (Appeals Chamber, 2 October 1995), paragraph 134. See also the International Court of Justice decision in the Nicaragua Case, Judgment of 27 June 1986 (1986) ICJ Rep at 114.

⁶⁴ Statute of the International Criminal Court, preamble; see also Human Rights Committee, general Comment No. 31 (2004); Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, para. 114.

⁶⁵ Genocide Convention, Article 1.

⁶⁶ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 7.

⁶⁷ International Convention for the Protection of All Persons from Enforced Disappearance, Article 6.1 and Article 11.1, and under the ICCPR: see eg. *Quinteros v Uruguay*, communication No. 107/1981. See also Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the UN General Assembly (Resolution 47/133 of 18 December 1992) which states: "Persons who have or are alleged to have committed offences referred to in Article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

and summary executions,⁶⁸ and to punish perpetrators of other crimes whose prohibition has the status of a *jus cogens* norm.⁶⁹

In addition, there is an extensive body of general principles of law and customs, including resolutions of the United Nations (UN) General Assembly and UN human rights bodies, obligating states to establish accountability for human rights violations. The Principles of International Cooperation in Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity⁷⁰ and the Declaration on the Protection of All Persons from Enforced Disappearances⁷¹ include the duty to investigate, try and punish perpetrators of respective crimes. Article 18 of the later declaration interdicts any special amnesty law or similar measures for perpetrators of enforced disappearances that might have the effect of exempting them from any criminal proceedings or sanction. Principle 7 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment includes the obligation to sanction and investigate acts of unlawful detention.⁷² The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power asked states to enact and enforce legislation proscribing acts that constitute serious abuses.⁷³ In similar vein, the Vienna Declaration and Programme of Action called on states to "*abrogate legislation leading to impunity for those responsible for grave violations of human rights ... and prosecute such*

⁶⁸ General Assembly Resolution 1989/65 adopting the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 19.2 of which states." In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions." Note also the absolute obligation to prosecute under Principle 18.

⁶⁹ *Prosecutor v Anto Furundzija*, case No. IT-95-17/1-T, judgment of 10 December 1998, para. 155. In that case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that an amnesty for torture and other crimes with the status of *jus cogens* norms "would not be accorded international legal recognition."

⁷⁰ Adopted by UN General Assembly resolution 3074 (XXVIII) of 3 December 1973.

⁷¹ adopted by the UN General Assembly (Resolution 47/133 of 18 December 1992.

⁷² Adopted by UN General Assembly Resolution 43/173 of 9 December 1988, Principle 7.

⁷³ Adopted by General Assembly resolution 40/34 of 29 November 1985, para. 21.

violations, thereby providing a firm basis for the rule of law.”⁷⁴

Treaty monitoring bodies including the Committee against Torture have criticized the use of amnesties as violations of state parties’ obligations. That Committee has, for example, repeatedly recommended that:

“In order to ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach.”⁷⁵

- **The rights of victims of international crimes and human rights violations to an effective remedy, including reparation, under general international law.**

Alongside the specific rights to remedy granted by treaty, general international law recognises victims’ right to remedy and reparation. The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law call on states to provide reparation, rehabilitation, satisfaction and guarantees of non-repetition to victims of gross human rights violations. These include inter alia “the verification of the facts and full and public disclosure of the truth” and “judicial or administrative sanctions against persons responsible for the violations”.

While the term “gross violations of human rights” has not been defined by treaty, it is widely accepted to include genocide, slavery and the slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment (including gender-specific forms such as rape), prolonged arbitrary

⁷⁴ Endorsed by General Assembly Resolution 48/121 of 20 December 1993, para. 60.

⁷⁵ Conclusions and recommendations of the Committee against Torture, Azerbaijan, A/55/44, paras.64-69, 17 November 1999, para 69(c). See also: Conclusions and recommendations of the Committee against Torture, Senegal, A/51/44, paras. 102-119, 9 July 1996; Conclusions and recommendations of the Committee against Torture, Peru, A/55/44, paras.56-63, 15 November 1999; Conclusions and recommendations of the Committee against Torture, Kyrgyzstan, A/55/44, paras.70-75, 18 November 1999; and Conclusions and recommendations of the Committee against Torture, Croatia, A/54/44, paras. 61-71, 11 November 1998. For full text of relevant parts of these documents, see Appendix C.

detention, deportation or forcible transfer of population, and systematic racial discrimination.⁷⁶

In addition, Principle 19 of the *UN Updated Principles on Combating Impunity* requires states “to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished”.

Nepal is a party to almost all the core human rights treaties, including the ICCPR and the Convention Against Torture, and has ratified the four Geneva Convention of 1949. Nepal is bound, by international and domestic law,⁷⁷ to guarantee fundamental human rights and to provide effective remedy to victims of humanitarian and human rights violations. International customary law and international treaty obligations require Nepal to establish individual criminal responsibility for gross violations of human rights and crimes whose prohibition has *jus cogens* status in international customary law.

Conclusions and recommendations

Nepal currently stands at the crossroads between a future that honours and enforces human rights and the rule of law, and a future that merely perpetuates past inaction and abuse. There can be no concrete political stability and democracy without addressing past abuses. If the mass approval of case withdrawals continues and perpetrators of gross human rights violations go unpunished, it will widen the room to rationalize the retracting of cases against those who commit gross violations of human rights in the future.

Nepal is on the threshold of restructuring its army by accommodating PLA combatants. There is a risk that the practice of amnesty may also accompany this process and thus further institutionalize impunity and abandon victims of such violations. Instead, rigorously and fairly revealing the truths of human rights violations and abuses during the conflict and years of oppression and prosecute those against whom there is *prima facie* evidence of heinous crimes will allow current policymakers to

⁷⁶ OHCHR, Rule-of-Law Tools for Post Conflict States. Amnesties: 2009, p. 21.

⁷⁷ Treaty Act 1990, s9 provides that ratified treaties take precedence over domestic law, where a conflict exists; see Annex 1.

address the roots of the conflict and prevent further outbreaks of violence.

AF calls on the Nepali government to:

- 1) Immediately retract the decisions to withdraw cases involving gross human rights violations and initiate prosecutions;
- 2) Include a prohibition on amnesty for serious crimes in national and international law in Nepal's Constitution;
- 3) Amend the law (including Section 29 of the State Cases Act) after public consultation to bring it into line with international law obligations, including an explicit ban on withdrawals of criminal charges, amnesties, pardons and other forms of immunity for crimes under international law and

gross violations of human rights;

- 4) Preclude any form of amnesty for serious violations of human rights and humanitarian laws during the armed conflict in the TRC bill;
- 5) Respect Nepal's international obligations by providing effective remedy to victims and by ensuring their right to the truth, justice and reparation.

AF further calls on the Supreme Court to issue guidelines to district and appellate courts to ensure there can be no arbitrary withdrawals of criminal charges. Such guidelines may serve as law until the necessary legal arrangements are in place.⁷⁸ Similarly, AF calls on the Attorney General to issue guidelines to public prosecutors at district and appellate court level.

⁷⁸ Recommendation also made by Raju Prasad Chapagai, *Supra* note 15.

Annex 1: Relevant Legislation

Interim Constitution of Nepal 2007

Article 33. Responsibilities of the State: The State shall have the following responsibilities:

(q) 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 disappearances made during the course of the conflict.

Article 135 Functions, Duties and Rights of the Attorney General:

(2) The Attorney General or officers subordinate to him/her shall represent the Government of Nepal in suits in which the rights, interests or concerns of the Government of Nepal are involved. Unless this Constitution otherwise requires, the Attorney General shall have the right to make the final decision to initiate proceedings in any case on behalf of the Government of Nepal in any court or judicial authority.

Article 151. Pardon: The Council of Ministers may grant pardons, and to suspend, commute or remit any sentence passed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.

Article 166. Short Title and Commencement: ...

(3) 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 “Monitoring of Arms and Army Management” reached on Mangsir 22, 2063 (December 8, 2006) are exhibited in Schedule 3.

State Cases Act 1992

Section 29: Withdrawal of the Government Case or reconciliation:

(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 defendant pursuant to the prevailing laws, if there is an order of the Government 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. If so happens, the following matters shall happen as following:

(a) If reconciliation is done, 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.

Crime against the State and Punishment Act-1989

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 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 organised 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.

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.

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.

Treaty Act 1990

9. Treaty Provisions Enforceable as Good as Laws: (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, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.



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