

# Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal

Legal Opinion

June 2011



National Human Rights Commission, Nepal



UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER  
*Nepal*

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# 1. Introduction

In October 2008, the Council of Ministers took a decision to withdraw 349 criminal cases against numerous political party cadres, including two senior members of the Cabinet. The case withdrawals were said to be necessary to promote the peace process and fully implement the Comprehensive Peace Agreement (CPA),<sup>1</sup> a provision of which calls for the withdrawal of cases brought against individuals “due to political reasons”.<sup>2</sup> As opposed to political charges, however, the most frequent offences alleged in the cases are murder and attempted murder,<sup>3</sup> numerous incidents reported well after the signing of the CPA in 2006,<sup>4</sup> along with other serious crimes such as rape and mutilation.<sup>5</sup>

According to the Ministry of Law, the Council of Ministers has subsequently recommended the withdrawal of at least 41 additional cases,<sup>6</sup> as successive governments have come under pressure from political parties, armed groups and indigenous and ethnic groups demanding that criminal cases against their supporters be dropped.<sup>7</sup> More than a third of the most recent 41 cases also deal with allegations of murder or attempted murder.<sup>8</sup>

The National Human Rights Commission (NHRC) has consistently requested that the Government justify its rationale for all of those proposed withdrawals.<sup>9</sup> Observing that numerous cases withdrawn by the Government are clearly criminal in nature, and have nothing to do

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<sup>1</sup> See the Ministry of Law, Justice and the Constituent Assembly Affairs’ memo, dated 27 October 2008.

<sup>2</sup> Comprehensive Peace Accord Concluded between the Government of Nepal and The Communist Party of Nepal (Maoist), dated 21 November 2006 (“Comprehensive Peace Agreement” or “CPA”). See Clause 5.2.7, *infra* n 79.

<sup>3</sup> Approximately 40 percent of the 349 cases recommended for withdrawal in 2008 involved charges of murder or attempted murder.

<sup>4</sup> Some 53 of the 349 cases (about 15 percent) were registered at District Courts after the November 2006 adoption of the CPA; approximately 40 percent of those later cases pertained to murders or attempted murders.

<sup>5</sup> Among the cases recommended for withdrawal are two charges of physical assault (mutilation) and one charge of rape.

<sup>6</sup> To that effect, Cabinet decisions were taken on several dates from 2008 to 2010 (2065/7/20; 2066/6/4; 2066/7/12; 2066/12/17; 2067/2/26; 2067/3/16; and 2067/4/28).

<sup>7</sup> Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (16 February 2011), A/HRC/16/23, para. 20.

<sup>8</sup> Information received from the Ministry of Law. Of the 41 cases recommended for withdrawal in 2009, 14 involved charges of murder or attempted murder.

<sup>9</sup> 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 Kapilbastu.

with politics, 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 NHRC has already conducted investigations and recommended actions.<sup>10</sup>

States participating in Nepal's 2011 Universal Periodic Review (UPR) before the Human Rights Council likewise expressed considerable concern about the ramifications of the case withdrawals. On 7 June 2011, as the Human Rights Council adopted its final report on Nepal's UPR, the UK delegation voiced:

*"We are alarmed by recent reports that the Nepalese Government is seeking the withdrawal of conflict-era criminal cases currently before the courts, relating to State and Maoist forces alike. This contradicts the Government's acceptance of several UPR recommendations to tackle impunity, and is against the spirit of the peace agreements. Furthermore, such a move would constitute an effective amnesty for alleged perpetrators of grave human rights violations and abuses, putting Nepal in potential breach of its international legal obligations. We urge the Government to ensure that police investigations and criminal cases are allowed to proceed."<sup>11</sup>*

Case withdrawals have effectually served to protect politically connected individuals from criminal accountability, promoting a policy of *de facto* impunity<sup>12</sup> 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.

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<sup>10</sup> Speaking at a programme marking the 61st International Human Rights Day, NHRC Chairperson Kedar Nath Upadhyay 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.

<sup>11</sup> "UK raises Nepal in the UN Human Rights Council", Statement of UK Permanent Representative in Geneva, Ambassador Peter Gooderham (7 June 2011), available at: <http://ukinnepal.fco.gov.uk/en/news/?view=PressS&id=609785482> [last accessed: 22 June 2011].

<sup>12</sup> In the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (see infra n 63), Principle 1 defines impunity as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account". *De facto* impunity occurs when States lack the capacity or political will to prosecute those responsible for human rights abuses, whereas *de jure* impunity results from limitations of laws and regulations, which prevent accountability either indirectly or through formal legal immunities, such as amnesty laws.



Drawing on Nepal's binding national and international legal obligations, this paper outlines the government's responsibility to investigate and prosecute serious crimes alleged in the withdrawn cases, as well as to provide effective remedies for those found to have suffered abuse. In addition, the paper assesses recent legal reform initiatives, in light of the ongoing case withdrawals and consequent problems of impunity. It then offers recommendations to ensure the compliance of current and future legislative and constitutional provisions with Nepal's international legal obligations.

## 2. International Legal Framework

### 2.1 International Human Rights Law

As a party to numerous international human rights treaties, the Government of Nepal is obligated to respect and ensure a wide range of human rights for individuals in its jurisdiction.<sup>13</sup>

The right to an effective remedy underlies all human rights the Government is obligated to guarantee, including those provided by Nepal's constitution and national laws that implement its international commitments.<sup>14</sup> Effective remedies serve first as a means to repair injuries suffered by individuals whom the Government fails to protect, and then as a deterrent to prevent future violations, which are more likely to occur in conditions of impunity.

In that sense, the withdrawal of cases involving serious crimes denies victims their right to an effective remedy, and consequently denies them the human rights that the Government is obligated to respect and ensure – including the right to life, and freedoms from torture and sexual violence.

Of particular relevance to the cases recommended for withdrawal, and the serious crimes they concern, are the International Covenant on

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<sup>13</sup> Among the human rights treaties ratified by Nepal are conventions on, *inter alia*: civil, cultural, economic, political and social rights; the rights of women, children and persons with disabilities; and a number of optional protocols providing additional protections, complaint mechanisms and public inquiry procedures. For an up-to-date list of treaties to which Nepal is a party, see the Nepal Law Commission's webpage on "Prevailing Laws – Treaties and Conventions" at: [http://lawcommission.gov.np/index.php?option=com\\_repository&Itemid=21&func=select&id=36&lang=en](http://lawcommission.gov.np/index.php?option=com_repository&Itemid=21&func=select&id=36&lang=en) [last accessed: 22 June 2011].

<sup>14</sup> See Article 8 of the Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948, A/810 at 71), which provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Civil and Political Rights (ICCPR)<sup>15</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>16</sup> both of which Nepal has ratified and is therefore legally bound to implement. Those treaties explicitly impose an obligation on Nepal to provide effective remedies for abuses of the rights and freedoms they contain,<sup>17</sup> whether committed by government officials or private citizens.<sup>18</sup>

### ***International Covenant on Civil and Political Rights***

In order to “respect and ensure”<sup>19</sup> the rights provided by the ICCPR, the Human Rights Committee<sup>20</sup> has observed that States must prevent not only abuses of Covenant rights by agents of the State, but also violations caused by “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”<sup>21</sup>

Those obligations are of “immediate effect” with respect to all Covenant rights.<sup>22</sup>

When investigations reveal violations of the Covenant, the Human Rights Committee has further stressed the importance of “guarantees of non-repetition and changes in relevant laws and practices, as well as the bringing to justice of perpetrators of human rights violations.”<sup>23</sup> Failure to investigate and prosecute those responsible, whether for domestic crimes or human rights abuses, may amount to a new and separate violation of the Covenant by the State.<sup>24</sup>

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<sup>15</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR). Nepal ratified ICCPR on 14 May 1991, and is bound by it.

<sup>16</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT). Nepal ratified CAT on 14 May 1991, and is bound by it.

<sup>17</sup> ICCPR, Art. 2.3(a) requires States parties to ensure that victims of violations of the Covenant, “have an effective remedy”; CAT, Arts. 13 and 14 guarantee the rights of torture victims to redress, including effective remedies and reparation.

<sup>18</sup> See below.

<sup>19</sup> ICCPR, Art. 2(1).

<sup>20</sup> The Human Rights Committee is the UN body of independent experts responsible for monitoring the implementation of the ICCPR, including through the review of communications submitted under its complaint mechanism.

<sup>21</sup> Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on State parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>22</sup> *Ibid.*, para. 5.

<sup>23</sup> *Ibid.*, para. 16.

<sup>24</sup> *Ibid.*, para. 18.

In response to allegations of serious human rights violations, particularly violations of the right to life, enforced disappearances and torture, States have an even greater duty to investigate, criminally prosecute, try and punish those deemed responsible for such violations.<sup>25</sup>

In the case of *Sharma v. Nepal*,<sup>26</sup> involving the disappearance and presumed death of the petitioner's husband at the hands of security forces, the Human Rights Committee found the Government of Nepal to have violated the victim's right to liberty and the prohibition on torture or cruel, inhuman or degrading treatment – each in conjunction with the right to an effective remedy.<sup>27</sup> It is notable the Human Rights Committee also found the petitioner herself to have been a victim of cruel, inhuman or degrading treatment, due to the anguish and stress caused by the Government's failure to investigate and clarify the fate of her husband.<sup>28</sup>

The Committee's views reaffirmed its longstanding position that the Government is required:

*“not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future [...] and to provide an effective and enforceable remedy in case a violation has been established.”*<sup>29</sup>

In January 2011, following up on its views in the *Sharma* case, the Human Rights Committee sustained that Nepal is under an immediate obligation to carry out an investigation and prosecute, try and punish those held to be responsible, including separately from nascent

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<sup>25</sup> See: *ibid.*; *Bautista de Arellana v Colombia*, Communication No. 563/1993, CCPR/C/55/D/563/1993 (1995); *Chaparro v Colombia*, Communication No. 612/1995, CCPR/C/60/D/612/1995 (1997); and *Hugo Rodríguez v Uruguay*, Communication No. 322/1988, CCPR/C/51/D/322/1988, para. 12.4 (1994).

<sup>26</sup> *Yasoda Sharma v Nepal*, Communication No. 1469/2006, CCPR/C/94/D/1469/2006 (2008).

<sup>27</sup> *Ibid.*, para. 8. Violations were found with respect to ICCPR, Arts. 7, 9 and 10, each with respect to Art. 2(3). The Human Rights Committee also observed that disappearances constitute a violation of (or grave threat to) the right to life (Art. 6), among other rights, but did not adopt a finding with respect to the presumed death of the complainant's husband, in the absence of an adequate investigation (*ibid.*, paras. 7.4, 7.8).

<sup>28</sup> *Ibid.*, para. 7.9.

<sup>29</sup> *Ibid.*, paras. 9-10.

transitional justice mechanisms, so as to avoid an ongoing denial of the complainant's right to an effective remedy.<sup>30</sup>

The Supreme Court of Nepal ruled similarly in its June 2011 decision in the case of *Sushil Pyakurel, et al. v Right Hon'ble Prime Minister Jhala Nath Khanal et al.*,<sup>31</sup> finding that thorough and effective investigations through the criminal justice system cannot be deferred to non-existent transitional justice mechanisms. The Supreme Court further observed that it must implement both the ICCPR and the UDHR<sup>32</sup> in its own rulings, implicitly including the right to an effective remedy, and that the police are obligated to uphold the human rights of alleged victims by carrying out impartial investigations free from political influence or pressure.

### ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

CAT likewise obligates States in clear terms to criminalize,<sup>33</sup> investigate,<sup>34</sup> prosecute<sup>35</sup> and provide redress (including effective remedies and reparations)<sup>36</sup> for torture or cruel, inhuman or degrading treatment or punishment, whether committed by State officials or private actors.<sup>37</sup>

In response to Nepal's periodic report on its fulfilment of obligations under CAT in 2005, the Committee against Torture<sup>38</sup> recommended that the Government, in order to address endemic problems of impunity:

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<sup>30</sup> Follow-up Progress Report of the Human Rights Committee on Individual Communications, 5 January 2011, CCPR/C/100/3; see Nepal, "Remedy recommended" and "Further action taken or required".

<sup>31</sup> *Sushil Pyakurel, et al. v Right Hon'ble Prime Minister Jhala Nath Khanal et al.*, Writ No. 1904 of 2068 B.S., Supreme Court decision dated 21 June 2011 (2068/03/7).

<sup>32</sup> Universal Declaration of Human Rights (UDHR), supra n 14.

<sup>33</sup> CAT, Art. 4.

<sup>34</sup> CAT, Art. 12.

<sup>35</sup> CAT, Art. 7.

<sup>36</sup> CAT, Arts. 13-14. The provision of redress required of States under Art. 14 in response to abuses comprises access to effective remedies and reparations (including compensation, guarantees of non-repetition, rehabilitation, restitution and satisfaction). See the Committee against Torture's draft General Comment No. 3 on CAT, Art. 14, available at: [http://www2.ohchr.org/english/bodies/cat/comments\\_article14.htm](http://www2.ohchr.org/english/bodies/cat/comments_article14.htm) [last accessed: 22 June 2011].

<sup>37</sup> Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, paras. 7, 18.

<sup>38</sup> The Committee against Torture is the UN body of independent experts responsible for monitoring the implementation of CAT, including through the review of communications submitted under its complaint mechanism.

*“take effective legislative, administrative and judicial measures to ensure 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.”*<sup>39</sup>

The Government of Nepal in 2007 responded to the Committee against Torture’s concerns by committing to condemn impunity, prosecute abuses, suspend officials charged with torture until a final verdict, enforce court orders, and punish and compensate for future incidents of torture.<sup>40</sup>

In a list of issues submitted to the Government of Nepal in November 2010, in advance of its next periodic reporting process, the Committee against Torture voiced specific concerns regarding *de facto* impunity<sup>41</sup> that may result from recently proposed case withdrawals, noting:

*“Following the Government’s recommendation to withdraw 349 cases of ‘a political nature’, including against some senior CPN(M) members of the Cabinet, please provide information on steps taken to avoid the recurrence of such a measure in the future, and to ensure transparent, impartial proceedings so that individuals responsible for gross violations and international crimes do not benefit from de facto amnesty, as recommended by the United Nations High Commissioner for Human Rights.”*<sup>42</sup>

The Committee against Torture has further observed that “no exceptional circumstances whatsoever” may be invoked to justify incidents of torture, rape or other ill-treatment, whether committed in

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<sup>39</sup> Committee against Torture, Conclusions and recommendations of the Committee against Torture – Nepal, 13 April 2007, CAT/C/NPL/CO/2, para. 24.

<sup>40</sup> Comments by the Government of Nepal to the conclusions and recommendations of the Committee against Torture, 1 June 2007, CAT/C/NPL/CO/2, paras. 10, 12, 16, 21, 23.

<sup>41</sup> List of issues prior to the submission of the third, fourth and fifth periodic reports of Nepal, 17 February 2011, CAT/C/NPL/3-5, para. 30.

<sup>42</sup> *Ibid.*, para. 32. For a definition of “*de facto* amnesty”, see UN Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, p. 43: “*De facto* amnesties [...] describe legal measures such as State laws, decrees or regulations that effectively foreclose prosecutions. While not explicitly ruling out criminal prosecution or civil remedies, they have the same effect as an explicit amnesty law. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an explicit amnesty.”

the context of Nepal's previous internal conflict<sup>43</sup> or in any other situation, as the prohibition of such treatment is absolute and non-derogable.<sup>44</sup>

Stressing the importance of providing effective remedies for victims of torture – including rape and other gender-based violence – the Committee against Torture highlighted the necessity of due diligence in the investigation and prosecution of alleged abuses to combat continued impunity:

*“Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape [...]”*<sup>45</sup>

In keeping with Nepal's obligations under CAT, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>46</sup> likewise commits the Government to investigate, prosecute, punish and provide remedies for gender-based violence whenever it occurs<sup>47</sup> – including in cases of rape by private individuals.<sup>48</sup>

Recognizing its obligations to investigate, prosecute, punish and provide remedies for incidents of torture or ill-treatment (among other abuses), the Government of Nepal in March 2004 promulgated a 25-point commitment to implement human rights and international humanitarian law,<sup>49</sup> declaring that: “Any person so treated shall be provided with the

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<sup>43</sup> Conclusions and recommendations of the Committee against Torture – Nepal, CAT/C/NPL/CO/2, para. 10.

<sup>44</sup> Committee against Torture, General Comment No. 2, supra n 37, para. 5.

<sup>45</sup> Ibid, para. 18. See also, Committee against Torture, Conclusions and recommendations of the Committee against Torture – Nepal, 13 April 2007, CAT/C/NPL/CO/2, para. 27.

<sup>46</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13 (CEDAW). Nepal ratified CEDAW on 22 April 1991, and is bound by it.

<sup>47</sup> See: CEDAW, Art. 2(b); and CEDAW Committee, General Recommendation No. 19: Violence against women, 29 January 1992, A/47/38, para 9.

<sup>48</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 23 April 2010, A/HRC/14/22, para. 16.

<sup>49</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Mission to Nepal (6-14 December 2004), 28 January 2005, E/CN.4/2005/65/Add.1, para. 23: “On 26 March 2004, then Prime Minister Surya Bahadur Thapa announced a 25-point “commitment on the implementation of human rights and international humanitarian law” (appendix), which contains detailed and concrete steps to protect and

compensation stipulated by the law and any person responsible for such treatment shall be prosecuted and punished according to the law.”<sup>50</sup>

***Responsibility to investigate, prosecute, punish and provide redress for domestic crimes***

As illustrated in the above analysis of Nepal’s obligation to provide effective remedies for human rights abuses, the responsibility of the Government is engaged under international law whenever it systematically fails to investigate, prosecute and punish domestic crimes, especially serious abuses such as murder, torture and rape.

In a recent report to the Human Rights Council, the Special Rapporteur on extrajudicial executions elaborated that:

*“Where there is a pattern of killings and the government’s response (in terms either of prevention or of accountability) is inadequate, the responsibility of the State is engaged. Under human rights law, the State is not only prohibited from directly violating the right to life, but is also required to ensure the right to life, and must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.”<sup>51</sup>*

In that sense, Nepal’s responsibility to ensure human rights generates its duty of due diligence when violations have occurred. When the Government fails to respect or ensure human rights, it is obligated to cease those actions or omissions and offer guarantees of non-repetition to avoid recurrence of the breach.<sup>52</sup>

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prevent human rights violations in the context of the Maoist conflict. The commitment includes provisions for the protection of human rights without discrimination (para. 1); for the respect and protection of a wide array of civil and political rights, including the right to life (para. 2), freedom from torture and other ill-treatment (para. 8), fair trial rights (paras. 3-11), freedom of expression (para. 15) and the rights of women and children (para. 17); for working, together with the International Committee of the Red Cross, to establish the fate and whereabouts of reported missing persons (para. 22); for the respect of norms of international humanitarian law (preamble, paras. 3, 21); for the protection of human rights defenders (para. 18), for cooperation with international organizations such as the ICRC and the United Nations in the fields of international human rights and humanitarian law; and for strengthening of the NHRC (para. 24).”

<sup>50</sup> Ibid., see Appendix: “His Majesty’s Government’s Commitment on the Implementation of Human Rights and International Humanitarian Law” (Announced by Rt. Hon. Prime Minister Surya Bahadur Thapa on 26 March 2004), para. 8.

<sup>51</sup> Report of the Special Rapporteur on extrajudicial executions to the Human Rights Council, 20 May 2010, A/HRC/14/24, para. 46(d).

<sup>52</sup> See: International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), “Article 30, Cessation and non-repetition”.

The withdrawal of criminal cases concerning human rights abuses does the opposite – it responds to crimes by ensuring impunity instead of ensuring the rights abused, and thus invites new violations.

By preventing investigations and prosecutions, case withdrawals moreover render meaningless victims' right to reparations, whether through compensation or in other forms.

To be compliant with its international human rights obligations, the Government must cease withdrawing cases and instead address abuses by guaranteeing victims' access to justice for injuries they have endured.

## **2.2 International Humanitarian Law**

Any of the cases being considered for withdrawal that involve the conduct of members of armed forces during Nepal's internal conflict also engage the Government's obligations under international humanitarian law (IHL).

Nepal has ratified all four Geneva Conventions of 12 August 1949, and is therefore bound by those treaties as well as the customary laws of war.

While human rights law is always and generally applicable, IHL applies *lex specialis* in the context of armed conflicts, and in some circumstances supersedes the broad protection of the right to life under human rights law.

Similar to human rights law, however, IHL provides numerous protections for combatants and non-combatants alike, as well as a strict regime of violations obligating the State to investigate, prosecute and punish impermissible conduct.

Especially relevant to crimes committed in Nepal's conflict is Article 3 common to the four Geneva Conventions (known as Common Article 3), which applies to all armed conflicts "not of an international character" and binds all sides reciprocally, including non-State actors.

Common Article 3 provides minimum protections that must be guaranteed to all persons not taking an active part in hostilities, whether civilians or members of armed forces – including combatants who have surrendered or are wounded, sick or detained.



Those individuals with protected status are to enjoy humane treatment without discrimination – including based on sex, birth or other status – “in all circumstances [...] at any time and in any place whatsoever”.

Forms of ill-treatment explicitly prohibited under Common Article 3 are:

- “(a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- (b) taking of hostages;*
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;*
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”*

As hostage-taking, murder, mutilation and rape are among the crimes specified in cases the Council of Ministers has proposed for withdrawal, Common Article 3 would certainly apply at a minimum to any of those abuses carried out by armed groups on either side in the context of hostilities.

Under all four Geneva Conventions, parties to international armed conflicts are required to search for and prosecute individuals who committed (or ordered to be committed) grave breaches of the laws of war.<sup>53</sup>

In non-international armed conflicts, States are likewise obligated under customary IHL to investigate and prosecute any serious violations of Common Article 3 or the laws and customs of war that are committed by any party, including by non-State actors.<sup>54</sup>

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<sup>53</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), Art. 50; Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), Art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Art. 146.

<sup>54</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Vol. I* (ICRC and Cambridge University Press, 2009), Rule 158; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force, 1 July 2002) 2187 UNTS 3, Arts 7 and 8; Security Council, Resolution 955 (1994), Annex, Art. 4, “Statute of the International Tribunal for Rwanda”; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Duško Tadić* (2 October 1995), No. IT-94-I-AR72, Decision on the Defense Motion for an Interlocutory Appeal on Jurisdiction, para. 117. For a lengthier analysis of these customary obligations, as reflected in the above instruments and jurisprudence, see: Rodley and Pollard,

Customary IHL furthermore prohibits amnesties for war crimes in non-international armed conflicts.<sup>55</sup>

### **2.3 UN Principles Relevant to Accountability and Impunity in Post-Conflict Situations**

In several sets of principles and guidelines reflecting international law, the United Nations and its member States have condemned *de facto* and *de jure* impunity for serious violations of human rights and the laws and customs of war, particularly in the context of States transitioning out of conflict.

In a 2004 report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies, the Secretary-General stressed that: “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.”<sup>56</sup>

The Commission on Human Rights explicitly recognized<sup>57</sup> the Secretary-General’s conclusion in its 2005 resolution endorsing the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity,” and further reiterated States’ obligation to investigate, prosecute and punish violations of human rights and humanitarian law.<sup>58</sup>

The Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution similarly state that peace negotiators and staff “cannot condone amnesties regarding war crimes, crimes against humanity, genocide, or gross violations of human rights, or foster those that violate relevant treaty obligations of the parties in this field”.<sup>59</sup>

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*The Treatment of Prisoners under International Law* (Oxford University Press: Third Edition, 2009), pp. 262, 271.

<sup>55</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Vol. I* (ICRC and Cambridge University Press, 2009), Rule 159.

<sup>56</sup> “The rule of law and transitional justice in conflict and post-conflict societies”, 23 Aug 2004, S/2004/616, para 10.

<sup>57</sup> Commission on Human Rights, Resolution 2005/81 on impunity (21 April 2005), para. 3.

<sup>58</sup> *Ibid.*, see preamble: “*Reaffirming* the duty of all States to put an end to impunity and to prosecute or extradite, in accordance with their obligations under international law, those responsible for all violations of human rights and international humanitarian law that constitute crimes, including genocide, crimes against humanity and war crimes, in order to bring them to justice, promote accountability, respect for international law and justice for the victims, deter the commission of such crimes and fulfil the responsibility of States to protect all persons from such crimes.”

<sup>59</sup> Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution (1 December 2006).

Clarifying the obligations incumbent upon States in post-conflict situations, the Secretary-General in March 2010 issued a Guidance Note on the United Nations Approach to Transitional Justice.<sup>60</sup> The note reaffirmed that, to be compliant with international law, transitional justice mechanisms must ensure that States investigate, prosecute and punish violations of human rights and humanitarian law, as well as provide victims with reparations including guarantees of non-repetition.<sup>61</sup> To comply with those obligations, States must furthermore maintain an independent, effective and impartial judiciary that prosecutes in a timely manner and in accordance with international standards.<sup>62</sup>

The United Nations' Updated Set of principles for the protection and promotion of human rights through action to combat impunity ("Principles"),<sup>63</sup> endorsed in 2005 by the Commission on Human Rights, is consistent with the Secretary-General's observations. The Principles define impunity as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account",<sup>64</sup> and note the special importance of appropriate criminal justice measures to prevent impunity:

*"States shall 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."*<sup>65</sup>

To ensure respect for the rule of law, the Principles underscore the need for prompt and effective remedies to be made available to victims, including adequate reparations and guarantees of non-repetition.<sup>66</sup>

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<sup>60</sup> Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010).

<sup>61</sup> *Ibid.*, see section A(1): "To comply with these international legal obligations, transitional justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law."

<sup>62</sup> *Ibid.*, section B(1).

<sup>63</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1; endorsed by Commission on Human Rights, Res. 2005/81.

<sup>64</sup> *Ibid.*, Principle 1.

<sup>65</sup> *Ibid.*, Principle 19.

<sup>66</sup> *Ibid.*, Principles 32, 35.

With special regard to gross violations of human rights and serious violations of IHL, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations (“Basic Principles”)<sup>67</sup> lay out more comprehensively what the provision of remedies and reparations to victims should entail, particularly following systematic violations.

The Basic Principles emphasize that States’ obligations under international human rights and humanitarian law to investigate, prosecute and punish violations must also be reflected in domestic law to ensure that victims have access to justice and remedies, including reparations.<sup>68</sup>

Investigations must be effective, prompt, thorough and impartial,<sup>69</sup> yet the Basic Principles also importantly note that “a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted,”<sup>70</sup> thereby obligating the State to provide prompt and effective remedies and guarantees of non-repetition irrespective of a criminal conviction.<sup>71</sup>

### **3. National Legal and Policy Framework**

#### **3.1 Interim Constitution**

The Interim Constitution of Nepal 2007 (“Interim Constitution”) recognizes, among other responsibilities, the obligation of the Government “to adopt a political system which fully abides by the universally accepted concepts of fundamental human rights, [...] rule of law, [...] independence of judiciary, [...] and to maintain good governance by eliminating corruption and impunity”.<sup>72</sup>

In contrast with those general responsibilities, the Interim Constitution also gives the President the power, on the recommendation of the Council of Ministers, to grant pardons to convicted persons and suspend, commute or reduce any sentence imposed by any court (including special and military courts) or by any other judicial or quasi-

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<sup>67</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005.

<sup>68</sup> *Ibid.*, Principles 3-4.

<sup>69</sup> *Ibid.*, Principle 3.

<sup>70</sup> *Ibid.*, Principle 9.

<sup>71</sup> *Ibid.*, Principles 2, 11, 14, 15, *inter alia*.

<sup>72</sup> The Interim Constitution of Nepal, 2063 (2007) as amended by the first to eight amendments (UNDP Nepal, July 2010), Part 4 – Responsibilities, Directive Principles and Policies of the State, Art. 33.

judicial, or administrative authority or institution.<sup>73</sup> By virtue of this provision, even perpetrators of serious crimes under national and international law – including enforced disappearance, torture and rape – could potentially be pardoned, allowing perpetrators to go unpunished.

It is important to observe, however, that such pardons could only occur following the investigation and prosecution of crimes, and thus do not relieve the Government's duty of due diligence to investigate, prosecute and punish violations of international human rights and humanitarian law, in keeping with its general obligation under the Interim Constitution to eliminate impunity.

The Constituent Assembly has failed to propose a provision forbidding such pardons in the context of serious crimes. Rather, the preliminary text proposed for the new constitution contains a provision identical to the relevant Article 151 of the Interim Constitution.<sup>74</sup> In keeping with Nepal's international obligations, the new Constitution should explicitly prohibit *de jure* and *de facto* impunity, including that facilitated by the withdrawal of criminal charges and pardons for serious crimes under national and international law.

Provisions prohibiting amnesties or impunity have been successfully adopted by a number of other countries in analogous circumstances. For instance, the Ethiopian Constitution forbids amnesties and pardons for international crimes including genocide, enforced disappearances, summary executions and torture.<sup>75</sup> Similarly, the Venezuelan Constitution comprehensively addresses the issue of impunity in relation to gross violations of human rights and humanitarian law, including by prohibiting amnesties, pardons and any other form of immunity from punishment, and imposing an obligation

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<sup>73</sup> Ibid., see Art. 151: "The President on the recommendation of the Council of Ministers may 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."

<sup>74</sup> See Preliminary Draft of the Committee on Determination of Forms of Governance of the State, Clause 4.

<sup>75</sup> See Ethiopian Constitution (1994), Art 28: "(1) Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ. (2) In the case of persons convicted of any crime stated in sub-article 1 of this article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions here in above, commute the punishment to life imprisonment."

upon the State to investigate, adjudicate and punish human rights violations.<sup>76</sup>

### **3.2 The Comprehensive Peace Agreement (CPA)**

The Comprehensive Peace Agreement includes a verbatim recital of the Government's obligation – subsequently included in the Interim Constitution – to eliminate impunity by upholding the rule of law, and maintaining an independent judiciary and good governance in compliance with universally accepted human rights standards.<sup>77</sup>

With respect to human rights and humanitarian law in particular, the CPA records the commitments made by both parties to the conflict:

*“that impartial investigation and action shall be carried out in accordance with law against the persons responsible for creating obstructions to exercise the rights stated 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.”<sup>78</sup>*

Both sides thus clearly and concisely committed to condemn impunity and carry out impartial investigations and other actions to ensure relief for victims of human rights and IHL violations.

Those commitments stand in clear opposition to the withdrawal of cases involving serious violations of international human rights and humanitarian law, which the Council of Ministers justified under Clause 5.2.7 of the CPA. That clause provides for the withdrawal of accusations, claims, complaints and *sub-judice* cases brought against various individuals “due to political reasons.”<sup>79</sup>

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<sup>76</sup> See Venezuelan Constitution (1999), Art 29: “The State is obliged to investigate and legally punish offences against human rights committed by its authorities. Actions to punish the offence of violating humanity rights, serious violations of human rights and war crimes shall not be subject to statute of limitation. Human rights violations and the offences of violating humanity rights shall be investigated and adjudicated by the courts of ordinary competence. These offences are excluded from any benefit that might render the offenders immune from punishment, including pardons and amnesty.”

<sup>77</sup> CPA, supra n 2, Clause 3.4.

<sup>78</sup> Ibid., Clause 7.1.3.

<sup>79</sup> Ibid., Clause 5.2.7: “Both sides guarantee to withdraw accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately.”

The CPA does not define what motivations would constitute “political reasons” *per se*, though this category of cases would presumably include those relating to political offences, such as subversion and treason,<sup>80</sup> and any cases brought forward on solely political motives. Such a definition would not include prosecutions of individuals for serious crimes including, *inter alia*, murder, rape or torture.

If this clause is read together with the rest of the CPA, in particular those clauses requiring accountability and effective remedies, it becomes clear that the CPA does not provide for a systematic withdrawal of criminal prosecutions of crimes committed during the conflict. In addition to Clause 7.1.3, which condemns impunity and calls for investigations and other actions to bring perpetrators of serious human rights violations to justice, Clause 5.2.5 of the CPA likewise provides for the establishment of a high-level Truth and Reconciliation Commission (TRC) “in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the armed conflict”.<sup>81</sup>

Despite the fact that the CPA is annexed to the Interim Constitution, it does not independently form a part of law that is enforceable by the courts. According to the Supreme Court, the CPA should instead be taken as an important agreement influencing the constitutional development of Nepal, even though it has not been integrated into the legal system.<sup>82</sup>

In light of the Supreme Court’s interpretation, Clause 5.2.7 of the CPA cannot serve as a legal basis for the withdrawal of criminal prosecutions against those charged with serious violations of human rights and humanitarian law, or other abuses committed during the conflict. Moreover, in constellation with other relevant provisions of the CPA, Clause 5.2.7 is not even an adequate aspirational basis to justify the withdrawal of such cases. Accordingly, this “political cases clause” must not be misused to provide *de facto* impunity for perpetrators of

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<sup>80</sup> In accordance with the “Policy Guidelines and Procedures in Relation to Withdrawal of Criminal Charges Lodged on behalf of the Government of Nepal, 1998”, only the crimes that fall under the “Crimes against State and Punishment Act 1989” are crimes of political nature, whereas crimes other than these are deemed common crimes. These guidelines have not yet been publicized officially. See, Human Rights and Democratic Forum (FOHRID), “Withdrawal of Serious Crimes and Impunity in Nepal” (2011), pp. 43-45.

<sup>81</sup> See below for more on the formation of a TRC.

<sup>82</sup> *Liladhar Bhandari and others v Government of Nepal, Office of the Prime Minister and Council of Ministers and others*, NKP 2065 (2008/09) Vol. 9, p. 1108, WPN 0863 of the Year 2064 B.S. Supreme Court decision dated 7 January 2009.

serious crimes that occurred during the armed conflict – in violation of national and international law.

### **3.3 Statutory Provisions Related to Impunity for Serious Crimes**

The State Cases Act is the only legislation that deals with the withdrawal of criminal charges in Nepal. The Act permits the withdrawal of any of the “state cases” filed by the Government, subject to permission from respective district courts. If a case has been withdrawn, the criminal charge or governmental claim ceases to exist and the accused is freed from criminal charge.<sup>83</sup> The withdrawal provisions apply to any type of state case.

The Act provides neither procedural nor substantive safeguards against arbitrary withdrawals of cases. The only limitation is that no withdrawal is permitted if a case involves a matter relating to private property.<sup>84</sup> It therefore appears that the existing provision of the State Cases Act that allows for the withdrawal of criminal charges is in breach of the right to an effective remedy, which underlies numerous human rights Nepal is legally bound to respect and ensure.<sup>85</sup>

Nonetheless, many of the proposed case withdrawals seem not to satisfy even the State Cases Act, as more than 40 percent of the cases involve crimes of robbery, theft and arson – thus crimes relating to private property, for which the Act prohibits the withdrawal of charges. More than a tenth of those property crimes also involve murders or attempted murders.<sup>86</sup>

The Draft Bill on Criminal Procedure Code, 2010 (“Draft Code”)<sup>87</sup> proposes some important amendments to the State Cases Act

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<sup>83</sup> See State Cases Act, 1990, Sec. 29: “(1) If the Government of Nepal issues an order, in a case or dispute prosecuted by the Government or submitted on behalf of the Government or submitted against the Government, the Government Attorney may undertake Milapatra (compromise) if agreed by the other party to the case or withdraw a criminal case from prosecution by the Government subject to the permission of the Court; in case of aforesaid activities, it shall be carried out as follows: a) No fee for arbitration shall be imposed, b) The criminal charge or Governmental claim ceases to exist with the withdrawal of the case. (2) Notwithstanding anything provided by sub-Section (1) if the case affects the property matters of a person who is not a Government employee, such case shall not be withdrawn from the court in accordance with this Section.”

<sup>84</sup> See *ibid.*

<sup>85</sup> See *supra* n 13 for a list of human rights treaties to which Nepal is a party.

<sup>86</sup> See *supra* nn 3, 6.

<sup>87</sup> On 3 December 2008, a task force was formed by the Government to develop a draft Penal Code and Criminal Procedure Code (modifying a draft prepared in 2002), for submission to the Government. The task force members include: Honorable Kalyan Shrestha (Supreme Court Judge and Chair), Madhav Paudel (Secretary, Ministry of Law and Justice), Mohan Prasad Banjade (Secretary, Nepal Law Commission), Dr. Govinda Prasad Kusum (Secretary, Ministry of Home Affairs), Trilochan Upreti (Secretary, Office of the



provisions. Under the current Draft Code, case withdrawals would not be permitted for a significant number of crimes, including murder, rape, abduction and enforced disappearance.<sup>88</sup> It otherwise allows for the withdrawal of cases, however, unless specifically prohibited by law. Withdrawals of cases involving torture, physical assault and illegal detention, which are not listed in the exempt categories, would therefore appear to remain possible, potentially in conflict with international standards.

The Draft Code also requires the adoption of detailed procedural rules for governing the withdrawal process, as well as mandatory hearings in the respective district court to decide whether or not to allow the withdrawals in question, and a prohibition of case withdrawals at the appellate level. These legal requirements would provide important checks and balances to prevent the arbitrary withdrawal of criminal cases.

Though the Draft Criminal Procedure Code provides some statutory guidance in relation to pardons and case withdrawals in the context of serious crimes such as murder and rape, the exclusion of enforced disappearance and torture from the list of non-pardonable offences could allow the Government to shield perpetrators of such crimes from punishment. Thus, its provisions should be strengthened to include, *inter alia*, enforced disappearance and torture in the list of non-pardonable offences provided under Section 159(4) of the Draft Code.

The Draft Bill on Truth and Reconciliation Commission (TRC) 2010<sup>89</sup> does not contemplate criminal case withdrawals, though would allow the TRC to recommend amnesty for “any person found guilty under this Act”. The Draft Bill thus allows amnesties in principle, though notwithstanding a number of exemptions set out in section 26(2) of the

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Prime Minister), Dr. Ram Krishna Timilsina (Registrar of the Supreme Court), Kumar Chudal (Deputy Attorney General), Surya Prasad Koirala (Deputy Attorney General), Kalyan Kumar Timilsina (Assistant Inspector General, Nepal Police), Badri Bahadur Karki (Nepal Bar Association), Dr. Rajit Bhakta Pradhananga (Nepal Law College), Indira Dahal (Under-Secretary, Ministry of Law and Justice – and only female member), Raju Man Singh Malla (Joint Secretary, Ministry of Law and Justice). As mandated to codify relevant criminal law provisions of the Muluki Ain and other existing law into a single set of legislation, in early 2010, the task force produced a compilation of three draft laws: The Proposed Draft Criminal Code 2066 BS (2010); The Draft Criminal Procedure Code 2066 BS (2010); The Proposed Sentencing Act 2066 BS (2010). After consulting with the relevant stakeholders particularly at national level, the task force revised the drafts and submitted them to the Office of Prime Minister. Subsequently, on 24 June 2010, the Ministry of Law and Justice called for public comments and input on the draft codes, which have since been incorporated into the draft texts.

<sup>88</sup> Section 116(2) of the Draft Criminal Procedure Code proposes a provision prohibiting withdrawal of a number of serious crimes under domestic law.

<sup>89</sup> Since early 2010, the TRC Bill has been pending before the Legislature-Parliament.

bill, which specifically prohibits amnesties for: “any kind of killing after taking [the person] under control”, “killing of unarmed persons”, “torture”, “enforced disappearance”, “rape”, and “abduction and hostage taking”.

That list of exceptions fails to include numerous serious crimes and violations under national and international law.<sup>90</sup> In view of the growing misuse of case withdrawals as a measure to shield political cadres from criminal responsibility, consideration should be given to strictly prohibit the withdrawal of criminal charges in the context of serious crimes – including those for which amnesties would be prohibited under the present Draft Bill on TRC.

### **3.4 Developing Jurisprudence on Case Withdrawals**

Despite the absence of explicit procedural and substantive safeguards under the State Case Act, the Supreme Court is developing jurisprudence relevant to the proposed withdrawal of criminal cases.

In its 1994 decision of *Government of Nepal v Dil Bahadur Lama*,<sup>91</sup> the Supreme Court established that: “Before permission is granted to the Government for the withdrawal of cases, the court should investigate whether the intention is for good cause or not.”

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<sup>90</sup> Sec. 25 of the Draft TRC Bill currently reads: “(1) Notwithstanding anything contained in Section 24, the Commission may, if deemed reasonable for amnesty to any person found involved in any accusations of gross violations of human rights, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof. (2) Notwithstanding anything contained in Sub-Section (1), no recommendation for amnesty shall be made to a person involved in the following crimes: (a) Any kind of murder committed after taking under control; (b) Murder of an unarmed person (c) Torture; (d) Rape; (e) Disappearance of person (f) Abduction and Hostage taking. (3) Prior to making recommendation by the Commission pursuant to Sub-section (1), such person shall be required to submit an application in writing for amnesty to the Commission by repenting for the misdeeds carried out by oneself during the armed conflict to the satisfaction of the victim within a time period as prescribed by the Commission. (3) In case of application for amnesty pursuant to Sub-section 3, the Commission may, prior to decide in relation to make recommendation or not for amnesty to such person, consult the victim as per need in such matter. (5) Prior to submit an application for amnesty pursuant to Sub-section (3), the applicant shall have to express the details of the truth and facts to the full extent of his/her knowledge in relation to activities conducted by him/her during the course of armed conflict and also the Commission shall have to document such details. (6) The bases and criteria to be adopted while making recommendation pursuant to Sub-section (1) shall be as prescribed. (7) The name of such person, who is granted amnesty by the Government of Nepal upon the recommendation of the Commission pursuant to Sub-section (1), shall be published in the Nepal Gazette. (8) In case a person recommended for amnesty pursuant to Sub-section (1) is denied for amnesty by the Government of Nepal, the Ministry shall act pursuant to Clause (a) of Sub-section (2) of Section 28 relating to such person.”

<sup>91</sup> *Government of Nepal v Dil Bahadur Lama and others*, NKP 2051, Vol. 7, p. 504; Criminal Appeal No. 4940 of the year 2051, Supreme Court decision dated 18 August 1994 (2051/5/2).

More recently, in the 2007 decision on *Government of Nepal v Devendra Mandal*,<sup>92</sup> the Court similarly found that its consent is necessary to proceed with case withdrawals, including in order to uphold victims' access to justice and right to an effective remedy:

*“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 reasonable cause to withdraw the case and right to justice of the victim.”*<sup>93</sup>

Referring to jurisprudence from India, the Court concluded that permission to withdraw the case should only be given if the Court is convinced that the decision serves the larger public interest.<sup>94</sup>

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 defers to the discretion of the Executive branch to some extent. The Court indicated it would not evaluate the grounds and reasons, but would assume that the case withdrawals were undertaken ‘in accordance with law and necessity unless it is proved otherwise’. However, 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.<sup>95</sup>

In the 2007 case of *Government of Nepal v Gagandev Raya Yadhav*,<sup>96</sup> the Supreme Court also held that respective district courts must give special scrutiny to the withdrawal of cases involving violations of human rights and humanitarian law, and weigh such withdrawals against potential denials of justice. The Court’s decision reaffirmed the sanctity

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<sup>92</sup> *Government of Nepal v Devendra Mandal and others*, Criminal Appeal No. 0197 of the year 2064, Supreme Court decision dated 3 September 2007.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> 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?”

<sup>96</sup> NKP 2065 (2008) No. 9, p. 1108.

of the victim's right to justice, and the corresponding responsibility of the judiciary to ensure that justice is done.

Responding to the public interest litigation case of *Madhav Basnet et al. v Prime Minister Puspa Kamal Dahal et al.*,<sup>97</sup> the Court issued an interim order (dated 1 January 2009) preventing the further implementation of the Council of Ministers' decision of 27 October 2008 recommending the withdrawal of 349 criminal charges. The Court based its interim order on the fact that the Comprehensive Peace Agreement (CPA) provides only for the withdrawal of cases filed with political motives, while the list of cases recommended for withdrawal included numerous charges seemingly unrelated to political offenses.

Delivering its verdict in *Madhav Basnet et al.* on 23 February 2011, the Supreme Court generally maintained that any decision of the Government of Nepal recommending a withdrawal of criminal cases under the State Cases Act must be fair, reasonable and just. However, the Court chose not to consider the reasonableness of the Government's decision recommending the withdrawal of 349 criminal cases, stating that it is the competence of respective district courts to confirm the compliance of a specific case withdrawal with applicable law. In that regard, the Court's decision differs from its earlier position in the interim order. In addition, the Supreme Court refused the petitioner's demand to issue a set of judicial guidelines to control arbitrary case withdrawals, stating that the Policy Guidelines and Procedures in Relation to Withdrawal of Criminal Charges Lodged on behalf of the Government of Nepal (1998) are already in effect and delineate the permissible grounds of case withdrawals. However, the Court failed to clarify the legal status of those Guidelines.<sup>98</sup>

Moreover, despite the recognition of district courts' competence to rule on the matter, there is still a lack of uniformity among their considerations of whether or not to endorse Cabinet decisions on case withdrawals. This means that district courts do not comply with

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<sup>97</sup> On 29 December 2008, a group of lawyers filed with the Supreme Court a public interest litigation case demanding, *inter alia*: the invalidation of the Council of Ministers' decision to have 349 criminal cases withdrawn; the setting and enforcement of judicial guidelines to govern future withdrawals of criminal charges until another appropriate legal arrangement is made; and an interim order staying the implementation of the respective Government decision. The petitioners based their demands on ICCPR, Art. 2 (including the right to effective remedies) along with constitutional provisions and relevant jurisprudence developed by the Supreme Court of Nepal.

<sup>98</sup> These guidelines have not yet been publicized officially. See, Human Rights and Democratic Forum (FOHRID), "Withdrawal of Serious Crimes and Impunity in Nepal" (2011), pp. 43-45.

Supreme Court rulings in a uniform fashion,<sup>99</sup> which has undermined the authority of Supreme Court decisions.

In the interest of justice, the Supreme Court should take steps to fill that legal gap, including by issuing a set of judicial guidelines on the matter, until necessary legislation is passed to regulate withdrawals of criminal cases.

#### **4. Conclusion and Recommendations**

The national legal framework and practice in relation to case withdrawals does not appear to be consistent with an international consensus that impunity for serious violations of human rights and international humanitarian law is impermissible under international law.

Since Section 29 of the State Cases Act permits withdrawal of criminal charges in relation to any of the crimes under domestic and international law, it leaves the Government of Nepal in breach of its international legal obligations under several treaties, including the ICCPR.

The constitution-making process, as well as legislative development of the Draft Bill on TRC and Draft Bill on Criminal Procedure Code, should be utilized as opportunities to bring the national legal framework into line with international standards and best practices.

In view of Nepal's international obligations identified in the preceding analysis, it is recommended that:

- The new Constitution should obligate the State to investigate and prosecute serious violations of human rights and humanitarian laws, and include a clear prohibition on amnesty for serious crimes under national and international law.
- The Draft Bill on Criminal Procedure Code should be revised to ensure that neither withdrawals of criminal charges, nor pardons and clemency, would be permitted for serious crimes under national and international law.

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<sup>99</sup> Numerous participants in an Interaction Program organized by Human Rights and Democratic Forum (FOHRID), entitled "Withdrawal of Criminal Charges: International Legal Standards and Best Practice" (16 November 2010), highlighted lower courts' lack of compliance with Supreme Court rulings on withdrawal of criminal cases. Participants observed that district court judges seldom scrutinize the Government's decisions on case withdrawals or reject them based on relevant Supreme Court rulings.

- The Draft Bill on TRC should not permit any form of amnesty for serious violations of international human rights and humanitarian law committed during the armed conflict. This can be achieved by removing from its potential coverage all crimes recognized under international law requiring prosecution as serious violations of human rights or the laws and customs of war.
- The Supreme Court rulings that give guidance on withdrawal of criminal charges should be duly followed by the Council of Ministers, Attorney General and respective district courts.
- Section 29 of the State Cases Act should be invalidated to the extent that is inconsistent with Nepal’s international legal obligations. This can be done through a public interest law case invoking the Supreme Court’s “constitutional review jurisdiction” under the Interim Constitution.
- The Supreme Court, following its own precedents including in relation to protection of confidentiality,<sup>100</sup> should consider issuance of a set of judicial guidelines to prevent the arbitrary withdrawal of criminal charges. Such guidelines may serve as law until the necessary legal arrangements are made.
- The National Human Rights Commission should be consulted with regard to potential withdrawals of criminal cases, and its recommendations should be given due consideration. This provision should be mandatory for cases in which NHRC has already submitted its recommendations.
- Respective investigative and prosecutorial authorities should be consulted prior to making decisions that recommend any withdrawals of criminal cases.

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<sup>100</sup> See *Sapana Pradhan Malla and others v Office of the Prime Minister and others*, WPN 3561 of the Year 2006, SC decision dated, 25 December 2007. In this case, the Supreme Court directed the Government to formulate laws protecting anonymity and information privacy for special categories of persons involved in court proceedings (i.e. women victims of violence, abuse and exploitation; children; and persons living with HIV and AIDS), in compliance with Nepal’s treaty obligations. As a stopgap measure until such a law is enacted, the Supreme Court also issued “A Procedural Guideline for the Protection of Privacy of Parties in the Entire Prosecution and Court Process in regard to the Cases of Special Nature 2007.”