NUANCES OF DE FACTO AMNESTY: A CASE OF NEPAL

BY

DHIRAJ KUMAR POKHREL

MA HUMAN RIGHTS THESIS

SUPERVISOR: DR. MICHAEL JAMES HAMILTON

CENTRAL EUROPEAN UNIVERSITY

1051 BUDAPEST, NADOR UTCS 9

HUNGARY

ABSTRACT

The present study focuses on the problem of amnesties in post-conflict societies, evaluating specifically the practice of *de facto* amnesties currently practiced by the government in Nepal. Having examined prior studies focussing on the prohibition of *de jure* amnesties for gross violations of human rights, grave breaches of humanitarian law and crimes against humanity, it is shown that how post-conflict regimes, despite commitments to end impunity nationally and internationally, strive to adopt a number of backdoor avenues to protect the perpetrators of human rights violations amidst sustained monitoring and interventions by ever-vigilant victims' organizations, civil society, international human rights organizations and the diplomatic community. The study suggests that the shift from *de jure* amnesty to *de facto* amnesty has several long-lasting negative repercussions on a transitional society by reinforcing impunity, eroding the rule of law, weakening the criminal justice system and undermining public confidence in political parties and state institutions. It further demonstrates that the continuing trend of *de facto* amnesties for crimes committed in the aftermath of conflict and failure to respect rights of victims might push a transitional society towards a legal vacuum. Furthermore, it concludes that a deliberate seeking of *de facto* amnesties by successor governments in post-conflict societies encourages the institutionalization of impunity and hinders in carrying out of institutional reforms in particular.

DECLARATION

I, **DHIRAJ KUMAR POKHREL,** do hereby declare that this Thesis is my individual work and has not to the best of my knowledge been submitted partially or in whole to any other Institution of learning. All primary and secondary sources have been fully acknowledged. It is hereby presented as a partial fulfillment of the requirement of the requirements for the Degree of MA Human Rights at Central European University, Budapest Hungary.

Signed…….

DHIRAJ KUMAR POKHREL

Date……

DEDICATION

This study is dedicated to Chadani (THE MOON) for my inspiration

And also to my late wife Sandhya Pokhrel,

May her departed soul rest in peace!

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LIST OF ACRONYMS

AF	Advocacy Forum
AI	Amnesty International
CA	Constituent Assembly
CRC	Convention on the Rights of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPA	Comprehensive Peace Accord
CPN (Maoist)	Communist Party of Nepal (Maoist)
CPN (UML)	Communist Party of Nepal (Unified Marxist Leninist)
CVSJ	Conflict Victims' Society for Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
INSEC	Informal Sector Service Centre
NC	Nepali Congress
NHRC	National Human Rights Commission
OHCHR	Office of the High Commissioner for Human Rights
OHCHR-Nepal	The Office of the High Commissioner for Human Rights-Nepal
PLA	People's Liberation Army
RNA	Royal Nepal Army
SC	The Supreme Court of Nepal
SCR	Security Council Resolution
SPA	Seven Party Alliance
TADA	Terrorist and Disruptive Activities (Control and Punishment) Act
TADO	Terrorist and Disruptive Activities (Control and Punishment) Ordinance
TRC	Truth and Reconciliation Commission
UCPN (Maoist)	Unified Communist Party of Nepal (Maoist)

INTRODUCTION

Background and Thesis

Societies emerging from authoritarian rules or internal armed conflicts to democratic orders are faced with a predicament. Oft termed as *justice vs. peace*[1], this transitional dilemma is essentially concerned with whether to address the legacies of past violations of human rights by bringing perpetrators to book and providing adequate redress to victims or to be amnesiac towards the past and promote reconciliation in society by amnestying the perpetrators of gross violations. "Amnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.[2]" Such amnesties have mostly been carried out through the introduction of amnesty legislation or by including amnesty provisions in peace accords and transitional justice mechanisms. However, recent developments in international law and evolving international practice that outlaw amnesties to gross human rights violations,[3] grave breaches of the Geneva

[1] See Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition*, Frank Cass, London, 2004. Teitel poses the following characteristic of the transitional dilemma:

'*Whether to punish or to amnesty? Whether punishment is a backward-looking exercise in retribution or an expression of the renewal of the rule of law? Who properly bears responsibility for past repression? To what extent is responsibility for repression appropriate to the individual, as opposed to the collective, the regime, and even the entire society?* (see Ruti G. Teitel, *Transitional Justice*, Oxford University Press, 2002, p. 28).

[2] Ronald C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible', 43 *J. Int'l L.* 173, 179 (2002), cited in Elizabeth B. Ludwin King, 'Amnesties in a Time of Transition' 41 *Geo Wash. Int'l L. Rev.* 577.

[3] Working paper submitted by Mr. Stanislav Chernichenko to Sub-Commission on Prevention of Discrimination and Protection of Minorities under regarding definition of gross and large-scale human rights violations as an international crime identifies the following as gross violations: murder, including arbitrary execution; Torture; Genocide; Apartheid; Discrimination on racial, national, ethnic, linguistic or religious grounds; Establishing or maintaining over persons the status of slavery, servitude or forced labour; Enforced or involuntary disappearances; Arbitrary and prolonged detention; Deportation or forcible transfer of population; the report is available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0fbfa353eea4c65d802567620054f3d0

Conventions[4] and crimes against humanity[5] have made it difficult for transitional regimes to pursue *de jure* amnesty.[6]

Given this difficulty, some governments coming out of conflict have deliberately sought new avenues of evading accountability and the responsibility to punish perpetrators of gross human rights violations.[7] Several reasons compel governments to adopt such measures: increasing global consensus and developments in international criminal law and international human rights law that prohibit amnesties for gross violations of human rights, crimes against humanity and war crimes; the ethical and moral necessity to adhere to customary international law, the need to observe *pacta sunt servanda* and respect *obligations erga omnes*; the all-reaching influence of media; proactive domestic and international non-governmental organizations; and increasing oversight of international community and human rights protection mechanisms.

[4] Grave breaches include: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (GC I art. 50, GC II art 51, GC III 130, GC IV 147)

[5] Article 7 of the Rome Statute of the International Criminal Court considers the following acts as crimes against humanity when perpetrated means "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"

[6] 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*. (2006) Conference Paper 1/2006 FDFA, pp. 23-32. See also Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,' *Marquette University Law School Legal Studies Research Paper Series*, Research Paper No. 08-26, Vol. 49.4, Oct 2008, p. 915-982.

[7] Ibid., p.28.

Against this backdrop, the thesis evaluates the problem of amnesties in post-conflict societies, focusing specifically on the practice of *de facto* amnesties currently in vogue in Nepal, a country in South Asia which has recently emerged out of a decade-long internal armed conflict (1996-2006). It is estimated that the conflict in Nepal claimed around 17,265 lives, left 1302 individuals disappeared, 4305 disabled and 78, 675 dispossessed and displaced.[8] Both the warring parties to the conflict, i.e. the State forces and the Maoist rebels, were involved in serious violations of human rights.[9] However, even six years after the formal ending of the conflict and cessation of hostilities neither a single perpetrator of gross human rights violations and war crimes during the conflict has been prosecuted in a civilian court.[10]

The thesis shows that the successor governments in Nepal are seeking to avoid accountability for gross violations and war crimes by adopting *de facto amnesty* measures. Beleaguered by clamorous victim organizations, a vibrant civil society, influential international human rights organizations and the diplomatic community, successor governments in Nepal are finding it increasingly difficult to opt for *de jure* amnesty measures and is attempting to implement a policy of amnesia towards its violent past via adopting avenues of *de facto* amnesty. It is hypothesized that post-conflict regimes, despite expressing commitments to end impunity nationally and internationally, and under constant pressure from civil society and human rights groups to deal with the past through criminal justice and redress, may instead be led to seek backdoor avenues to protect the perpetrators of human rights violations.

The thesis, nevertheless, is limited to explore the nuances of *de facto* amnesty, in that it discusses how such a measure is being sought, pursued and practiced in Nepal amidst rigorous

[8] Media Foundation, *Healing the Wounds: Stories from Nepal's Transitional Justice Process*, Kathmandu, 2011, page 72-75.
[9] Advocacy Forum, *Maina Sunuwar: Separating Fact From Fiction*, Kathmandu, 2010, page 9
[10] *Ibid.*, p. 25.

scrutiny by relevant stakeholders. Since the issue of *de facto* amnesty is a new phenomenon and relatively under-researched, the paper aims to contribute to the existing discourse on transitional amnesties by bringing to light the consequences of such measures. Previous research neither documents the nuances and consequences of de facto amnesties nor details the key strategies and methods applied by post-conflict regimes to evade accountability. Bridging this gap in existing literature is significant as it provides addition evidence that suggests that the deliberate practice of *de facto* amnesties might push a transitional society towards a legal vacuum.

This research is based on doctrinal method and, therefore, is qualitative in its approach. Analytical study and the relevant data are collected from various sources such as national and international legal instruments and practices, books, journals, newspapers and reports. The research also reflects the first-hand experience of the researcher who has been actively working in the field of human rights and rule of law in Nepal since 2007. The thesis is largely based on a previous research carried out by this researcher in this area.[11]

Structurally, the thesis is divided into four parts. The first chapter of this thesis starts with a short introduction to the Nepalese conflict, and then proceeds with a brief discussion on the terms "amnesty" and "de facto amnesty" followed by the trend of post-conflict amnesties in Nepal with a discussion on Nepal's domestic and international obligations and commitments to provide justice to victims of human rights violations. The second chapter extensively discusses the status and legality of amnesties in international law and practice. The third chapter discusses in detail the practice of *de facto* amnesty in Nepal and its legality with a brief with a focus on the negative repercussions of such a practice in Nepal. The final chapter concludes the findings.

[11] For accessing the findings of the research please see:
http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf

CHAPTER 1 - POST CONFLICT AMNESTIES IN NEPAL

1.1 A Short Introduction to Nepalese Conflict

Expressing dissatisfaction over enduring 'discrimination, injustice and exclusion'[12] despite the restoration of democracy in 1990, the then Communist Party of Nepal-Maoist (CPN-Maoist) declared a 'People's War' on 13 February 1996, and started an armed rebellion against the state aiming to establish a communist republic by subverting the existing constitutional monarchy and multi-party parliamentary democracy. As counterinsurgency measures, the government responded with a series of brutal police operations to quell the Maoist uprising.[13] On 1 June 2001, the King and his family members were killed in a shootout allegedly by crown Prince Dipendra Shah. The only surviving brother of King, Prince Gyanendra Shah, ascended to the throne. Meanwhile, the government declared a unilateral ceasefire and as goodwill gesture freed some Maoists leaders and cadres. The rebels reciprocated and peace talks started in August 2001. After four months of protracted negotiations, the talks failed in November 2001 and the hostilities resumed. As a response, the government formally branded the CPN-Maoist as a terrorist organization, declared a state of emergency and promulgated an anti-terrorist legislation – *Terrorist and Disruptive Ordinance* (TADO) -2001 to contain the rebels.

On October 4, 2002, King Gyanendra launched a virtual coup under Article 127 of the constitution[14] and started second round of peace parleys with the Maoists on January 2003.

[12] See Advocacy Forum and International Center for Transitional Justice, *Nepali Voices: Victims' Perceptions of Justice, Truth, Reparations, Reconciliation, and the Transition in Nepal*, 2007, p.19

[13] For a detailed analysis of Maoist insurgency and counterinsurgency measures from the Nepalese state see Deepak Thapa, *A kingdom under Siege*: Nepal's Maoist Insurgency, 1996 to 2003, Kathmandu, The Printhouse, 2003, p. 51-74

[14] King dismissed prime minister Deuba for incompetence and inefficiency and assumed the mantle under Article 127 which authorized the king to "remove difficulties" in the functioning of the constitution of Nepal

However, just a day before the fourth rounds of talks on 17 Aug 2003, the then Royal Nepal Army (RNA) brutally killed 19 unarmed Maoists cadres.[15] After the incident, the Maoists formally decided to resile in 27 Aug 2004 and resumed fighting. On 12 October 2004, the government introduced a more draconian version of the earlier TADO[16] that gave the security officials an unlimited authority and they literally ran amok taking their toll on civilian population.

Later on 1 June, 2005, the king staged a *coup* a *coup d'état* and assumed executive responsibility. Nearly nine months year after the King imposed his authoritarian rule did the disillusioned political parties sign a historic 21-point pact with the warring Maoists on 22 November, 2005, to start a peaceful democratic movement. Shortly after the restoration of democracy in April 2006, a new government was formed and a Comprehensive Peace Agreement (CPA) [17] was signed between the then seven-party alliance government and the Maoists on Nov 21 2006. The signing of the peace accord marked the beginning of the end of formal conflict in Nepal.

The CPA turned out to be a Nepalese Magna Carta lucidly outlining the rights of the citizens. It refers to human rights altogether 18 times, provides for separate provisions on a number of rights and makes references to international human rights instruments including the Universal Declaration of Human Rights (UDHR). The preamble of the CPA obligates the signatories "to create an atmosphere where the Nepali people can enjoy their civil, political,

[15] National Human Rights Commission - Nepal, "Doramba Incident, Ramachap: On the spot Inspection and Report of the Investigation Commission," September 2003

[16] Clause 9 of the TADO " "If a security official feels the need to prevent a person from carrying out any terrorist and disruptive activity, such a person can be kept under house arrest for a maximum period of one year, six months at his [Security Official's] discretion and another six months after obtaining permission from the home ministry, in any place after fulfilling common humanitarian conditions"

[17] Comprehensive Peace Agreement -2006 available at <http://lawcommission.gov.np> (last visited 16 September, 2011).

economic, social and cultural rights and . . . to ensuring that such rights are not violated under any circumstances in the future.[18]" With provisions for the formation of transitional justice mechanisms and promises of rooting out impunity and establishing accountability, the CPA made explicit the commitment of the signatories to deal the violent past with justice and redress. In fact, the rebels during the conflict had repeatedly reiterated their commitment to abide by the Geneva Conventions and other relevant international human rights law[19] and the government was bound to adhere to national laws and its international treaty obligations to prosecute serious offences, which is discussed in detail in the later section.

In January 2007, the Interim Constitution of Nepal was adopted and the Maoists joined the interim parliament and were later included in the government. The same month, the United Mission to Nepal (UMN) was established by the United Nations Security Council, Resolution 1740, to support the peace process by monitoring the management of arms and armed personnel of both sides as per the Comprehensive Peace Agreement and assisting the both parties via a Joint Monitoring Coordinating Committee for the same, providing technical support and monitoring for the successful conduct of an impartial CA elections.[20] The first meeting of the

[18] Ibid.,art. 5.2.5

[19] See, e.g., Statement of Maoist leader Prachanda on March 16, 2004: "Our Party has been committed to the fundamental norms of human-right [sic] and Geneva Convention since the historic initiation of the People's War. Anyone who without prejudicially [sic] judges the facts of eight years can find that our People's Liberation Army has been providing a respectful behaviour, treatment to the injured and release in good conditions of the prisoners of war who have been arrested from the army and police of the enemy combatant. Our Party has been expressing its commitment not only on the Geneva Convention in relation to the war but also on the international declarations in relation to the human rights." (from Appeal of the CPN-M) [online] http://www.cpnm.org/Notices (retrieved September 27, 2004); Prachanda statement from December 15, 2003: "The CPN (Maoist) has consistently sought to uphold the universal principles of human rights and relevant clauses of Geneva Conventions on war. The Party has time and again publicly welcomed any international monitoring, preferably under the UN auspices, of the human rights situation in the country." (from Maoist Information Bulletin, No. 7, News and Views.) (Cited from Human Rights Watch, *Between a Hard Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War*, October 2004, pp. 22-23)

[20] UN Security Council, *Security Council resolution 1740 (2007) [on establishment of the UN Political Mission in Nepal (UNMIN)]*, 23 January 2007, S/RES/1740 (2007), available at: http://www.unhcr.org/refworld/docid/46d2e58c2.html [accessed 12 September 2011].

reinstituted parliament declared Nepal a democratic republic and formally ousted the institution of monarchy. After being postponed on two consecutive times, the government was finally able to hold the much-awaited Constituent Assembly polls on 10 April 2008. The CPN-Maoist emerged as the biggest party in the election and formed a coalition government.

1.2 Introduction to Amnesties

Etymologically, the word *amnesty* is said to be derived either from the French word *amnestie* meaning intentional overlooking or the Greek word *amnestia* meaning forgetfulness of wrongdoing.[21] In the crudest sense, amnesty, therefore, refers to the intentional exemption of punishment for some wrongdoing. In a legal sense, amnesties have been traditionally been understood as "efforts by governments to eliminate any records of crimes occurring, by barring criminal prosecutions and/or civil suits.[22]" A recent OHCHR document proposes the following characteristics of an amnesty measure:[23]

> . . . Amnesty refers to legal measures that have the effect of:
> a) Prospectively barring criminal prosecution, and in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
> b) Retroactively nullifying legal liability previously established.
> Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law.

[21] Merriam Webster Online Dictionary, http://www.merriam-webster.com/dictionary/amnesty [accessed on 26 February 2013]
[22] Louise Mallinder *Amnesty, Human Rights and Political Transitions: Bridging the peace and Justice Divide"* Hart Publishing, Oxford & Portland, 2008, p.5.
[23] *See* United Nation Office for High Commissioner for Human Rights (OHCHR), *Rule-of-law Tools for Post-conflict States: Amnesties* (HR/PUB/09/1), p. 5, available at <http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf>

Amnesties were largely used in Latin America following the democratic movement during the 1980's mainly as a political tool to broker peace and reconciliation. With the use of amnesty measures in negotiated transitions, the trend of amnestying perpetrators became an important bargaining chip in solving political impasses.[24] The key rationales for such amnesty measures were almost always reconciliation in society and sustainable peace. The very nature of transition often determines the nature of the amnesties granted. In other words, amnesties will likely differ significantly depending on whether they result from a unilateral "exercise of executive discretion", or whether instead they emerge through a "negotiated peace agreement.[25]" Even within unilateral or negotiated processes, a range of competing interests may shape the nature of any emerging amnesty provision – these range from, for example, "alleviating internal pressure, protecting state agents from prosecution; promoting peace and reconciliation responding to international pressure providing reparations, encouraging exiles to return, and adhering to cultural or religious traditions.[26]" Greenawalt summarizes the following seven dimensions of amnesties:[27]

> (1) An amnesty may be blanket or limited, extended to all crimes committed within a particular period, or restricted to less serious crimes or to less responsible actors, or both.
> (2) An amnesty may be automatic; covering all individuals within the classes named, or requires applications by individuals.
> (3) For amnesties that require individual application, an individual may or may not have to disclose exactly what crimes he or she has committed. In South Africa, for example, individuals had to make a "full disclosure" of their

[24] See also Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,' p. 915-916.
[25] Mallinder, *Amnesty, Human Rights and Political Transitions*, p. 30
[26] Ibid., see also Leslie Vinjamuri 'Trends Regarding Peace Agreements and Accountability from 1980 to 2006,' Workshop 6 Expert Paper, *Building a Future on Peace and Justice*, Nuremberg, available at http://www.peace-justice-conference.info/download/Vinjamuri%20expert%20paper.pdf [accessed 23 November 2011]
[27] Kent Greenawalt, 'Amnesty's Justice', *Truth v Justice: The Morality of Truth Commissions*, ed. Robert I. Rothberg and Dennis Thompson, Princeton, Princeton University Press, 2000, pp. 189-210 at 200.

> violations of human rights; the amnesty covers only crimes that have been fully disclosed.
> (4) An amnesty may affect only criminal liability or also civil liability.
> (5) An amnesty may be total or partial. A partial amnesty is one that exempts those covered from the full measure of criminal and civil liability, but would allow some lesser degree of punishment or liability for damages.
> 6) An amnesty may or may not protect persons from consequences other than legal liability. Notably, it might ensure that individuals will not be fired from jobs on the basis of criminal acts that are revealed.
> (7) An amnesty from civil liability may or may not be accompanied by some alternative scheme to compensate victims.

Amnesties, as Greenwalt demonstrates, can be of different dispositions and can be adopted in a multifarious ways to suit the needs of circumstances. The essence of amnesty, however, is to foreclose prosecutions for a supposed criminal offence. Presenting a summary of current practice in international law and United Nations policy on amnesties, the OHCHR tool summarizes that amnesties are not permissible in circumstances where they:

> (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights;
> (b) Interfere with victims' right to an effective remedy; or
> (c) Restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law

1.3 De Facto Amnesties

Although there is a growing international consensus that a certain set of serious crimes are non-amnestible, the practice of amnesty endures through various backdoor measures, especially during political transitions. A recent report of the UN Secretary General about the rule of law and transitional justice in conflict and post-conflict societies also acknowledges that "justice and accountability measures in peace agreements remain uneven" despite there has been

a significant decline in the trend of blanket amnesties.[28] This unevenness has been caused by the newer measures adopted by states to avoid accountability. In this context, Van Zyl correctly infers that the post conflict societies have been seeking *de facto* amnesty measures to evade accountability for gross violations of human rights as "*de jure* amnesties have become increasingly unenforceable and unacceptable.[29]" According to the OHCHR manual, de facto amnesties essentially involve two measures:

> 1) Decrees or regulations, while not explicitly ruling out criminal prosecutions or civil remedies, but having the same effect as an explicit amnesty law;
> 2) the practices of impunity, including a state's failure to investigate and prosecute crimes even when its law appears to enable prosecution.[30]

Giving an example of *de facto* amnesty, Zyl writes:

> The domestic trials of senior military figures before the *ad hoc* human rights court resulted in wholesale acquittals and were universally regarded as a sham. They served to delay and reduce the extent and urgency of calls for justice. Indonesia now has a bilateral Truth and Friendship Commission (TFC) with Timor-Leste. The TFC has the power to grant amnesty, and is strongly opposed by victim groups and civil society because they correctly suspect it has not been established to deal with the justice deficit in Timor-Leste but rather to produce a watered-down and cosmetic truth as opposed to real justice. It has been prevented by its mandate from identifying responsibility for human rights abuses and from recommending justice measures. The TFC has nonetheless succeeded to a considerable extent in reducing pressure on Indonesia to pursue real justice for the crimes that occurred in Timor-Leste, and it is succeeding in removing justice for these crimes from the UN Security Council's agenda. The TFC has succeeded both with UN member states and within the UN Secretariat in muddying the waters, and there is a very real prospect that there will be de facto impunity for human rights crimes without there being a de jure amnesty.[31]

[28] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies :Report of the Secretary-General*, 12 October 2011, S/ 2011/634, available at: http://www.unrol.org/doc.aspx?d [accessed 23 November 2011]
[29] Paul van Zyl., "The Challenge of Criminal Justice: Lessons Learned from International, Hybrid and Domestic Trials.", p.28
[30] OHCHR, *Rule-of-law Tools for Post-conflict States: Amnesties*, p. 43
[31] Paul van Zyl, p. 29

The TFC, however, didn't recommend for any of the 62 alleged perpetrators who testified before the commission on the ground that they didn't fully reveal the truth and with an argument that individuated amnesties violated the principle of equality. But prosecutions didn't follow despite the commission's recommendation. A recent report by Human Rights Watch (HRW) mentions the continuation of the trend and portrays how the impunity has rolled on unabated to include the current violations by the military and the security forces.[32]

It has been argued that such amnesties are not permitted should such measures foreclose "prosecutions of offences that may not lawfully be subject to an explicit amnesty.[33]" In this sense, *de facto* amnesty is equivalent to a deliberate, unlawful and obtrusive attempt to reinforce impunity[34] rather than *de jure* measures which are, though losing their sway in contemporary experience as discussed above, supported by law.

1.4 The Trend of Post-Conflict Amnesties in Nepal

Similar to the negotiated transitions in post-conflict Latin American and African countries, the issue of amnesty was raised, albeit vaguely, in the peace agreement signed between the government and the rebels in November 2006. The CPA, although with the mechanism and promises of establishing accountability in the form of the TRC, contains a poorly-drafted clause on amnesty:

[32] Human Rights Watch, *World Report 2012 : Events of 2011*, New York, 2012, available at: http://www.hrw.org/sites/default/files/reports/wr2011.pdf
[33] *Ibid*.
[34] The UN Commission of Human Rights defines impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."
See UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, available at: http://www.unhcr.org/refworld/docid/42d66e780.html [accessed 23 November 2011].

> Both parties guarantee to withdraw accusations, claims, complaints and cases under consideration [in courts] levelled against various individuals due to political reasons and immediately release those who are in detention by immediately making their status public. [35]

This clause merely mentions the commitment between two signatories of the CPA – the government headed by seven political parties and the Maoists – to withdraw allegations made and cases formally registered against each other by the predecessor government before the formal end of conflict. Further, it does not define what actually constituted a political crime. As discussed below, this clause, however, has been used elastically to cover a wide range of crimes committed during the conflict.

Initially, the clause was invoked by the government of Nepal to release 367 Maoist leaders and cadres (including prisoners of conscience) convicted during the conflict under the Terrorist and Disruptive Act (TADA) and the Crime against State and Punishment Act-1989[36]. Since there were a substantial number of cases *sub judice* in courts against both the Maoists leaders and the members of state security apparatuses, the government made an abortive attempt to grant amnesty to the alleged perpetrators by proposing an amnesty clause in the proposed bill for the formation of the Truth and Reconciliation Commission:

> Notwithstanding anything contained in the Section 24[37], 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

[35] CPA, Clause 5.2.7
[36] Office of the Attorney General of Nepal, *Annual Report* , Kathmandu, 2008.
[37] (Section 24, TRC 1st Draft Bill): "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".

> motives, the Commission may make recommendations for amnesty to such person to the Government of Nepal[38]

This provision expressly favoured amnesty for crimes committed as a part of duty or with political motive. However, it again failed to define what constituted duty and political motive. The national and international human rights organizations in Nepal came down heavily on this express amnesty plan of the government. Through a series of reports, submissions and lobbying, these organizations were able to persuade government to withdraw the provision along with other amendments regarding a host of issues including impartiality of the commission, selection criteria of the commissioners, reparations and implementation of the commission's recommendation of prosecution. [39] Cornered, the government then started fresh consultations with victims and relevant stakeholders.

After nineteen rounds of consultations, the government produced a revised version of the TRC bill that stated that amnesty cannot be recommended for five categories of gross human rights violations : "1) Any kind of murder committed after taking control; 2) Murder of an unarmed person; 3) Torture; 4) Rape; 5) Disappearance of person, abduction and hostage taking).[40] Nevertheless, another clause that provisioned that the Office of the Attorney General will have the final say on whether or not to prosecute cases recommended by the commission remained problematic. This left a loophole where the AG's Office may decide not to prosecute persons who have committed gross human rights violations. Also, crimes such as enforced

[38] First Draft bill unveiled by the Ministry of Peace and Reconstruction of Nepal for the establishment of the Truth and Reconciliation Commission (TRC) on 2 Aug, 2007

[39] Amnesty International, *Nepal: Reconciliation Does Not Mean Impunity - a Memorandum on the Truth and Reconciliation Commission Bill*, 13 August 2007, available at: http://www.unhcr.org/refworld/docid/46c2d54e2.html [accessed 24 November 2011].
Comments were also submitted to the government by International Center for Transitional Justice (ICTJ) and Accountability Watch Committee (AWC), a loose forum of leading human rights defender in Nepal.

[40] All versions of the TRC bill available at the official website of Ministry of Peace and Reconstruction (see www.peace.gov.np)

pregnancy, enforced prostitution and other serious crimes of gender and sexual violations, which were demanded by the human rights organizations and victims to be put under the non-amnestible crimes, were not included in the bill. When the bill was tabled in the Legislature Parliament on 17 February 2010, twenty- three lawmakers submitted 90 different amendments proposals which addressed almost all of the concerns raised by the human rights organizations and victims.

Along with the TRC, the government also tried to deal separately the issue of enforced disappearances in Nepal. Although agreed to publicize the whereabouts of the disappeared within sixty days of the signing of the CPA,[41] both the signatories of the conflict did not make public the status of the disappeared. However, the Interim Constitution -2007 held that it was the duty of the state "[t]o 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."[42] Initially, an apparently unwilling government attempted to criminalize disappearance by registering a Disappearance and Abduction Bill to amend the existing Civil Code. The government claimed that the introduction of the amendment bill was on a par with the international treaty obligations of Nepal and was also consistent with the recommendations made by the UN Working Group on Enforced or Involuntary Disappearance (WGEID) during its mission in 2004.[43] Releasing a comprehensive commentary on the bill, the International Commission of Jurists (ICJ) pointed out that the bill was not in line with the directive of the

[41] 5.2.3 of the CPA stated: "Both sides agree to make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed."
[42] Article 33(q)
[43] Dhiraj Pokhrel. "Droit Ne Poet Pas Morier" , *The Voice*, March, 2010, Asian Federation against Involuntary Disappearances, Manila, pp. 25-28, available at http://www.afad-online.org/voice/march_2010/pdf/25-28.pdf

Supreme Court and the recommendations of the WGEID.[44] Besides victims groups and civil society organizations, some members of the parliament expressed resentment over the bill forcing the government to withdraw the amendment proposal. On 1 July 2007, the Supreme Court of Nepal directed the government to introduce legislation criminalizing disappearances as a non-amnestiable offence and to ensure the establishment of a "credible, competent, impartial and fully independent commission to address the issue of the disappeared during the conflict."[45] The directive order was issued in relation to 83 writs of habeas corpus pending in the Supreme Court. The writs were separately submitted to the court on behalf of individuals allegedly detained and disappeared by the security forces between 1999 and 2004.

Acting on the SC decision, the government finally unveiled the draft bill on Enforced Disappearances (Charge and Punishment) Act -2008. The bill was regarded "more effective, substantial and up-to-the-mark"[46] as compared to the TRC bill as it had clear provisions of prosecution of the perpetrators involved. Although, questions were raised regarding the definition of disappearance (which was not in line with the United Nations Convention for the Protection of All Persons from Enforced Disappearances -2006), leniency in punishment (five years of imprisonment and a fine of $ 1180 for perpetrators), no mention of command responsibility and 6-month statute of limitation for filing of cases.[47] After making some cosmetic amendments,[48] the government tabled the bill in the parliament on 4 December 2009. Twenty

[44] See Advocacy Forum, *Bepatta Ko Kanoon ma Ke Hudaichha*, Advocacy Forum, Kathmandu, 2009
[45] *Rajendra Prasad Dhakal et.al v the Government of Nepal*, writ no.3575, registered on Jan 21, 1999, decision June 1, 2007
[46] Kopila Adhikari & Dhiraj Pokhrel, "Nepal: Disappearance Commission on Cards" The Voice, Vol. 8, No.2, December 2008, available at http://www.afad-online.org/voice/dec_08/main_dec09.htm
[47] Ibid.
[48] The punishment was increased to 7 years and a fine up to half million Nepalese rupees and under reparations all five types of reparations (restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition) were added

three lawmakers put forward seventy-seven amendment proposals which were on a par with the demands of the victims and human rights community in Nepal.

Because of the apparent delay in the formation of these commissions, the victims and their families, with help from various non-governmental organizations, started submitting First Information Reports (FIR), a formal complaint, to the Police authorities demanding investigations into cases and prosecutions of the alleged perpetrators who included Maoist leaders and cadres and members of the state forces. In response, the courts started issuing orders in favour of victims and their families. In some cases, the Supreme Court issued directive orders to the authorities concerned (especially Nepal Police and the Ministry of Home Affairs) to initiate investigations and arrest the alleged perpetrators.[49] However, the police, the army, the former rebels and the government routinely defy court orders. Instead of initiating investigations as directed by the court, the government busied itself in promoting public officials and leaders of the political parties to high-ranking posts and ministerial berths.[50] In many instances, the police denied registering the FIRs and did not proceed with the investigations citing that the cases dating back to the conflict fall under the jurisdiction of the proposed transitional justice mechanisms.[51]

Citing similar reasons, even the recommendations of prosecution after field investigations by the National Human Rights Commission (NHRC) were not implemented. Moreover, the Nepali judiciary, which stood by the speedy delivery of justice and held that justice should not be

[49] See Human Rights Watch & Advocacy Forum, *Waiting for Justice: Unpunished Crime From Nepal's Armed Conflict*, Kathmandu, 2008, available at : http://advocacyforum.org/downloads/pdf/publications/waiting-for-justice-sep-10.pdf (accessed at Nov 23)
[50] Human Rights Watch and Advocacy Forum, *Adding Insult to Injury: Continued Impunity for Wartime Abuses*, December 2011, page 40-41, available at http://www.hrw.org/sites/default/files/reports/nepal1211Upload_0.pdf
[51] Ibid.

suspended in the pretext of future transitional justice mechanism, slowly began to show deference to the executive decrees of amnesties via case withdrawals.[52]

The government in October 2008 made an announcement to withdraw 349 criminal cases en masse granting *de facto* amnesty to those responsible for gross violations during the conflict. The rationale was that these cases were of political disposition as hence should be withdrawn as per the amnesty clause of the CPA. Almost all of these selected cases were *sub judice* in various Court of First Instance in different parts of the county.[53] The cases selected for withdrawal included murder (98), attempt to murder (30), robbery (98), civil offences (20), rape (1), arms and ammunition (39), drug peddling (1), treason (5) and arson (57). In doing so the government bypassed the jurisprudence of the Supreme Court that categorically prohibited arbitrary withdrawal of serious criminal cases, misinterpreted the existing law and procedures to bring about such withdrawals (this is discussed in detail in Chapter III). A joint report by the OHCHR-Nepal and the NHRC showed that the cases withdrawn by the government were beyond the scope of the amnesty clause in the CPA as the cases retracted included gross violations and war crimes.[54]

Nevertheless, the decision of the cabinet to withdraw cases established precedent and successive governments followed suit. In November 2009, the government headed by CPN-UML decided to retract 282 cases.[55] This time the government withdrew, under the pressure of political parties which were influential in the southern Terai belt of the country,[56] cases including murder, attempt to murder, arms and ammunitions and arson perpetrated after the signing of the

[52] Advocacy Forum, *Evading Accountability by Hook and By Crook*, Kathmandu, 2010
[53] Court of First Instance in Nepal is referred to as District Court
[54] OHCHR-Nepal & NHRC, *"Rights and Remedies Revoked: Case Withdrawals for Serious Crimes in Nepal*," Legal Opinion, June 2011.
[55] Republica. Government withdraws some 300 murder, arson, available at: caseshttp://www.myrepublica.com/portal/index.php?action=news_details&news_id=11876
[56] ibid

CPA. On 27 June 2011, the government planned to withdraw few more cases dating back to the conflict.[57] These cases included those cases in which the courts had either issued arrest warrants or served subpoenas against the Maoist leaders and high-ranking officials of the security forces involved. Some of these cases included those recommended for prosecution by the NHRC.

Though the decision was revoked following national and international pressure, the two key partners of the new coalition government, the UCPN-Maoists and the United Democratic Madhesi Front (UDMF), however, signed a pact before forming the government to grant general amnesty to those criminally charged during the period of the conflict and several post-conflict movements, especially the Madesh Movement of 2007. These movements were launched by various ethnic groups with various demands including a separate federal structure and a guarantee of inclusiveness in all state machineries.

On the one hand, the government was busy withdrawing the cases, the Legislative committee of the Legislature Parliament, after the completion of section-wise discussion in April 2011, was due to table the bill for adoption, differences of opinion regarding some provisions in the bill including amnesty, reconciliation and definitions of human rights violations prevailed among the committee members, on the other. To iron out differences and to resolve problematic clauses in the bill, a five-member sub-committee was formed. The Sub-Committee was expanded with two additional members in May 2011. Initially provided a ten-day time-limit to finalize the

[57] 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 on 21 September 2011

bill, the Sub-Committee failed to meet the deadlines even after repeated extensions. A standoff between the UCPN-Maoist and the Nepali Congress[58] stalled the process.

In November 2011, the political parties signed a 7-point agreement and agreed to for the commission without further ado. As a result, a high-level political Task Force consisting of representatives from the three main parties (the UCPN-Maoist, the NC and the CPN-UML) was formed to finalize the bill. In January 2012, the Task Force submitted a 'Suggestion Paper' proposing merger of the Disappearance commission and TRC and stressed on truth-seeking. Regarding amnesty, the paper offered contradictory view in that it stressed on ruling out amnesty for crimes of serious nature and granting amnesty at the same time. In May 2012, the government submitted a motion in the parliament to withdraw both the draft bills with a proposal of merger of both the commissions. With the dissolution of the parliament on 28 May 2012, the process stalled.

On 27 August 2012, the caretaker government forwarded a single ordinance for the formation of a Disappearance, Truth and Reconciliation Commission to the President for promulgation. Although not formally disseminated, human rights defenders managed to procure a copy of the ordinance. Besides other lacunae in the ordinance,[59] the ordinance granted broad amnesty powers to the future transitional justice mechanism, including for those who might have committed gross human rights violations. Unlike the previous bills, the Ordinance does not provide the list of non-amnestiable crimes and exclusively empowers the commission to make recommendations for amnesty for any crime if it deems suitable. The Ordinance has no express

[58] The issue of the standoff was which commission should be established first: the UCPN-Maoist were rooting for Disappearance commission as most of the victims were their cadres and the Nepali Congress was in favor of prioritizing the TRC as this would ensure return of the property confiscated by the Maoists during the conflict.
[59] See Mandira Sharma, *Letting them Off the Hook,* Op-ed, The Kathmandu Post, available at http://www.ekantipur.com/the-kathmandu-post/2012/09/18/oped/letting-them-off-the-hook/239810.html

provision to make recommendation for prosecution although it provisions that the Attorney General or a prosecutor may decide to file or not to file a case when the Ministry of Peace, on the basis of the recommendation of the TRC, writes to prosecute a person who has been found guilty for the allegation of serious human rights violation. But, the power to grant amnesty for serious crime in the other section of the Ordinance makes this provision merely cosmetic. Till the writing of this thesis, the ordinance stands shelved at the presidential office.

Giving continuity to the case withdrawals, the cabinet decided to shelve the case of a conflict-era murder of a civilian by two influential Maoist leaders[60] just three days before the UN-OHCHR released its report on Nepal's conflict. [61] The 235-page report, based on more than 30,000 documents gathered from the OHCHR's field investigation reports and reports from other organizations, is a comprehensive analysis of over 9,000 cases of human rights violations and war crimes. The report concluded that "there exists a credible allegation amounting to a reasonable basis for suspicion that a violation of international law has occurred" and ". . . these cases merit the prompt, impartial, independent and effective investigation by competent judicial authorities."[62] The government, however, dismissed the report calling it conclusions "out of context" and "irrelevant" and claimed that the report was prepared without the prior consent of the government and without proper consultations with the stakeholders.[63]

[60] The Kathmandu Post, *Criminal Charges Against Maoist Leaders Withdrawn, available at http://www.ekantipur.com/the-kathmandu-post/2012/10/05/top-story/criminal-charges-against-maoist-leaders-withdrawn/240415.html*

[61] United Nations Office of the High Commissioner for Human Rights, *Nepal Conflict Report: An Analysis of Conflict-Related Violations of International Human Rights Law and International Humanitarian Law between February 1996 and 21 November 2006*, Geneva, 2012

[62] Ibid. p. 28

[63] India Today, *Nepal Dismisses UN Report on War Crimes*, available at http://indiatoday.intoday.in/story/nepal-dismisses-un-report-on-war-crimes/1/224220.html

1.5 Nepal's Domestic and International Obligations to Prosecute

In sharp contradiction to its practice of institutionalizing impunity, Nepal has pledged, both domestically and internationally, to establish accountability for human rights violations and to deal its violent past with justice and reparations. Besides express provisions to establish a truth commission and a commission of enquiry into disappearances as discussed in the previous section, the CPA obliges the signatories to ensure that impunity is not encouraged and the rights of the victims and/or their families are safeguarded with a commitment on the part of the State to carry out "impartial investigation and action . . . in accordance with law against the persons responsible for creating obstructions to exercise the rights stated in the accord.[64]" Also, there are several domestic legal frameworks governing investigations and prosecutions of serious human rights abuses, including those conducted by the Nepal Police and public prosecutors,[65] National Human Rights Commission (NHRC), the Human Rights units at the Nepal Police and the Nepal Army, ad hoc commissions of inquiry[66], and the Attorney General.[67]

In addition to these domestic obligations and commitments, Nepal has also pledged at the international level to combat impunity vis-à-vis all forms of abuses and violations. Nepal has ratified eight core international human rights treaties, including the Convention Against the Elimination of All forms of Racial Discrimination, International Covenant on Civil and Political Rights (including the first and second optional protocol), International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women (including the optional protocol), the Convention against Torture and Other

[64] CPA, Clause 7.1.3
[65] State Cases Act 2049 (1992), Sections 6 – 17.
[66] Commissions of Inquiry Act,2026 (1969)
[67] Interim Constitution 2063 (2007), Section 135(2) and Section 135(3)(c).

Cruel, Inhuman or Degrading Treatment, the Convention on the Rights of the Child (including the first and second optional protocol), International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families, and Convention on the Rights of Persons with Disabilities (including its optional protocol). Also the government of Nepal has passed the *Treaty Act* (1990) to domesticate the international instruments.[68] These treaties require Nepal to observe tripartite obligations to respect, protect and fulfill the rights enumerated in those instruments.[69]

Moreover, Nepal has ratified all four Geneva Conventions on 7 Feb 1964. The conventions require states parties to "enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches.[70]" Nepal has failed, even after 48 years of their ratification, to enact a comprehensive legislation to enforce them. Nepal also acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[71] on 17 January 1969 but, as a rule, has not taken legislative measures as required by the convention.[72]" Besides,

[68] Section 9 of the Treaty Act 1990 provides as follows:

> (1) In cases [where] provisions of a treaty, to which Nepal or Government of Nepal is a party, upon its ratification, accession, acceptance or approval by the Parliament, [are] inconsistent with the provisions of prevailing laws, the inconsistent 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 Nepali law.
>
> (2) Any treaty which has not been ratified, acceded to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.

[69] See, for example, ICCPR, Article 2: "(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant… (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant …(3) Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…".

[70] Art. 49 GC I, Art. 50 GC II, Art. 129 GC II, Art. 146 GC IV

[71] Convention on the Prevention and Punishment of the Crime of Genocide, *Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.*

[72] Ibid. Art. 5

Nepal, under the customary international law, is bound to observe *jus cogens*[73] – law considered so fundamental that it overrides all other sources of international law.

In addition, Nepal's judiciary has recognized the country's legal obligations both under domestic and international laws. In a PIL (Public Interest Litigation filed by advocates Raja Ram Dahal and Gopal Krishna Ghimire on behalf of Foundation for Human Rights, Environment and Alternative Development (HEAD-Foundation) , the Supreme Court (SC) of Nepal, on 9 January 2004, directed the government to make legislation to implement its obligations under the Geneva Conventions.[74] The petitioners had filed the petition seeking order of mandamus citing the arbitrary killings and other war crimes committed by the warring parties in the context of the conflict. In yet another PIL filed by advocates Rajendra Ghimire and Kedar Prasad Dahal, the SC, on 2 December 2007, held that Nepal should introduce legislation criminalizing torture in line with the UN-CAT.[75] Despite ratifying the torture convention back in 1990 and recognition of torture as a criminal offence by the Interim Constitution of Nepal[76], the government had not promulgated an anti-torture legislation. Similarly, the SC, as discussed in previous section, had

[73] Article 64 of the Vienna Convention Law of Treaties defines Jus cogens as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'
Jus cogens norms prohibit crimes against humanity (Murder; Extermination,; Enslavement; Deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape; sexual slavery; enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; Enforced disappearance of persons; the crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health); the crime of aggression; war crimes and the crime of genocide.

[74] *Ram Raja Dhakal & Raju Gurung vs HMGoN* ,Writ No. 2942 (2004), (Summary available at : http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/cf4f47f94e214e42c1256e8c002a8d79!OpenDocument

[75] *Ghimire & Dahal v. Nepal*. Writ No. 3219, the Supreme Court Judgment, 17 December, 2007.

[76] Interim Constitution of Nepal article 26:

> Right against Torture: (1) No person who is detained duringinvestigation, or for trial or for any other reason shall be subjected tophysical or mental torture, nor shall be given any cruel, inhuman or degrading treatment.
>
> (2) Any such an action pursuant to clause (1) shall be punishableby law, and any person so treated shall be compensated in a manner as determined by law.

issued directive order to the government to criminalize enforced disappearances and immediately put on place a commission of enquiry on disappearances.

In addition to the domestic courts, International mechanisms have also directed the government to provide effective remedies and take appropriate legislative measures to prevent and remedy the future commissions of crimes. In a communication submitted by the wife of a victim, who was arrested from his home and subsequently disappeared by the then Royal Nepal Army in 2002,[77] the UN Human Rights committee affirmed:

> The Committee nevertheless considers the State party duty-bound 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.

Responding to this decision, the government stated that the proposed commission of enquiry on disappearances will investigate into the matter. The Committee also reiterated this view in Giri *v Nepal*.[78] The author of the communication Yubraj Giri was illegally detained, tortured and held incommunicado for 13 months by the RNA in 2004. In yet another communication concerning torture and disappearance of a school teacher in 2003, the Committee again urged the Nepali government to immediately repeal laws immunizing alleged perpetrators of torture and enforced

[77] *Yasoda Sharma v Nepal*, Communication No. 1469/2006, CCPR/C/94/D/1469/2006 (2008), para. 9
[78] *Yuvraj Giri v Nepa*l. Communication No. 1761/2008, CCPR/C/101/D/1761/2008 (2011),

disappearances and reaffirmed, like in previous two cases, that the failure of the state to carry out investigations into allegations by the author was itself a separate breach of the Covenant.[79]

Besides, various international human rights mechanisms have repeatedly recommended the government to adopt effective legislative remedies to address gross human rights violations. As early as 1994, the UN Human Rights Committee, expressing concerns with a dramatic rise in the cases of torture, summary and arbitrary executions, enforced disappearances in its comment to Nepal's initial report to the ICCPR, had pointed out the need to adopt a legislation to criminalize torture.[80] During her visit in 2000, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, recommended the government to criminalize torture and not to see compensation "as a substitute for investigating and prosecuting human rights violations."[81] Similarly, the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) after its visit to Nepal in December 2004 recommended the army to undertake "aggressive prosecution of army personnel accused under the existing law of kidnapping and torturing civilians.[82]" However, the Army even failed to provide the registry of detainees as recommended by the UNWGEID. Likewise, UN Special Rapporteur on Torture recommended immediately introducing legislation criminalizing torture and starting investigations and prosecutions in incidents of torture, ratifying the Rome Statute and

[79] *Dev Bahadur Maharjan v Nepal*, Communication No. 1863/2009, CCPR/C/105/D/1863/2009

[80] Concluding Observations of the Human Rights Committee: Nepal (1994), para. 10 Retrieved August 4, available at: http://www.unhchr.ch/TBS/doc.nsf/0b2627a0b2f3c07d8025677e004ba618

[81] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31 http://www.extrajudicialexecutions.org/application/media/2000%20mission%20report%20E_CN_4_2001_9_Add_2.pdf

[82] The Report of UNWGID available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/105/23/PDF/G0510523.pdf?OpenElement

scrupulously vetting the security forces personnel recommended for the United Nations Peacekeeping operations.[83]

The government of Nepal has expressed its commitment to duly implementing the recommendations of these mechanisms. Besides expressing commitments to combat impunity and promoting human rights and rule of law in international fora, the government in March 2006 formally announced a 25-point commitment paper regarding the implementation of human rights and humanitarian law.[84] The paper charted out at length the fundamental rights of citizens along with provisions to punish the public officials involved in illegal detention, arbitrary killings, torture, disappearances and other violations of human rights and humanitarian law. Most notably, the government of Nepal expressed its firm commitment to addressing impunity via "addressing the past and maintaining the rule of law"[85] during the Universal Period Review (UPR) before the Human Rights Council in 2011. Further, the government also accepted the recommendations by other states regarding establishing accountability to serious violations committed during the conflict.[86]

[83] Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Nepal, E/CN.4/2006/6/Add.5, 9 January 2006

[84] *His Majesty's Government's Commitment on the Implementation of Human Rights and Humanitarian Law*.Announced on 26 March, 2006, Unofficial translation available at http://www.satp.org/satporgtp/countries/nepal/document/papers/implement.htm

[85] 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.

[86] For instance, Recommendation by France: "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"; Recommendation by the United Kingdom: "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"; Recommendation by Germany: "Undertake legal and administrative efforts to end torture and related impunity"; Recommendation by New Zealand: "Review legislation, and amend it where necessary, to remove provisions which allow government and military personnel to act with impunity"; Recommendation by the United States of America: "Create a system of accountability to investigate and prosecute human rights violators in Nepal's military and law enforcement agencies" (Ibid., para. 51, 107.2. 107.3. 107.24).

1.6 Conclusion

Invariably, the successor governments in Nepal have used their time in power to seek blanket amnesty for perpetrators of grave violations. Further, the practice of case withdrawals has furthered severed the gap, which has gradually been widening after the signing of the CPA, between victim's demand for justice and reparations and the authorities' stance in favour of amnesties. This legacy of enduring impunity for past crimes is having long-lasting negative repercussions on the ability of the country to develop strong deterrent to violence in the post-conflict period, an independent and trusted judiciary and accountable members of public authorities. The OHCHR has warned that the culture of impunity to the past violations has not only "encouraged further serious violations" but also "risks continuing to do so.[87]"

Moreover, there is a wider discrepancy between actions and words of the Nepali government. Pushing its legal obligations and commitments to shadows, the successor governments formed after the 2006 revolution has devoted their time and energy to institutionalize impunity by acting as a protective shield to alleged human rights violators by defending war crimes and gross violations as politically-motivated crimes, withdrawing criminal cases and laurelling alleged violators to high-ranking posts and ministerial berths, promoting public officials implicated in serious violations and sending them to lucrative UN Peacekeeping Mission and routinely defying court orders and recommendations from the NHRC to start investigations and prosecutions on incidents of alleged violations. Notwithstanding explicit provisions in Nepali criminal law which requires prosecutions of serious crimes, the government, apparently unsuccessful in introducing *de jure* measures, has deliberately chosen to legitimize *de*

[87] UN OHCHR Nepal Report, p. 28

facto amnesty via executive decisions of case withdrawals. The rationales for such withdrawals being the violations committed during the conflict are of political nature and these cases fall within the purview of to-be-formed transitional justice mechanisms, which are discussed in detail in chapter 3. The next chapter discusses the legality of amnesties in international law and practice.

CHAPTER 2 – AMNESTIES IN INTERNATIONAL LAW AND PRACTICE

2.1 Amnesties in International Criminal Law and Customary International Law

Despite the near-universal application of amnesty measures during political transitions, there is not a single separate international treaty specifically dealing with amnesties. Moreover, the legality of amnesties in international law is a matter of contention as international customary law does not explicitly prohibit amnesties (which will be discussed later in the chapter). However, a substantial body of evolving jurisprudence, especially two important developments after the end of Cold War, has established that amnesty for gross violations is not permissible.

First, the international community has increasingly insisted on making perpetrators of gross human rights violations accountable for their crimes. This is especially true after the establishment of two international war crime tribunals, i.e. the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR), as well as special courts in Sierra Leone and East Timor. This practice culminated in the formation of the International Criminal Court (ICC) in 2002 with a professed aim to 'to put an end to impunity for the perpetrators of these [serious] crimes and to contribute to the prevention of such crime'[88].

Second, prohibitions for amnesties are often considered as *lex feranda* (future law)[89] and it is increasingly held by academics, experts and indeed some state practices that there are certain peremptory norms of general international law (known as *Jus Cogens*) which must be respected and adhered to and a breach of these norms are not justifiable under any circumstances. The

[88] Preamble of the Rome Statute
[89] Mallinder, *Amnesty, Human Rights and Political Transitions*, p. 9

primary reason for outlawing amnesty for gross violations has been the emerging consensus that amnesty promotes and institutionalizes impunity. Amnesty measures aggravate impunity, as Doxtedar summarizes, by: condoning accountability to criminal behavior, acting as deterrent to human rights, favoring power over truth, re-victimizing the victims of gross human rights violations, violating the constitutional rights of the victims, violating their constitutional rights to seek redress from the courts and finally by violating victims' right to truth creating hurdles to meaningful reconciliation.[90] It is stressed that states must prosecute the perpetrators of gross human rights violations and justice must not be sacrificed at the expense of political expediency.

The increasing global consensus that impunity for gross violations is not condonable has culminated into the idea and practice of "universal Jurisdiction," which is the "ability of the court of any state to judge or try persons for crimes committed outside its own territory (territorial jurisdiction," not being linked to state by the nationality of the suspect (active personality jurisdiction) or the victims (passive personality jurisdiction), or by harm to the state's won national interests (protective jurisdiction).[91]" The doctrine is based on the global consensus that "certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrators or the victim, regardless of the location of the crime and the nationality of the perpetrator or the victim.'[92] Besides customary international law, various international treaties[93] obligate signatories to exercise these jurisdictions.

[90] Doxtedar, Erik. "Amnesty." In *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, by Villa Vecenio Charles and Erik Dixtedar, Cape Town: Institute of Justice and Reconciliation, 2004, p. 39-45

[91] EDIEC, What is Univesal Jurisdiction?, available at http://www.ediec.org/areas/international-remedies/universal-jurisdiction/

[92] Mary Robinson, 'Foreword', *The Princeton Principles* on *Universal Jurisdiction*, Princeton University Press, 2001, p. 16.

[93] 1999 Second Hague Protocol, article 17(1). 1949 Geneva Convention I, article 49; 1949 Geneva Convention II, article 50; 1949 Geneva Convention III, article 129; 1949 Geneva Convention IV, article 146; Unlawful Seizure of Aircraft Convention, article 7; Unlawful Acts against Aircraft Convention, article 7; Internationally Protected Persons Convention, article 7; Hostages Convention, article 8(1); Nuclear Material Convention, article 10; Torture

The indictment of the former Chilean dictator Augusto Pinochet in the United Kingdom under this doctrine is emblematic of the fact that justice transcends geographical frontiers and a third state is obliged to initiate prosecution of perpetrators in their own respective states if another state continues to overlook its obligations to prosecute and punish war criminals and perpetrators involved in gross violations. During his sixteen years of dictatorship after a bloody in 1973, Pinochet was responsible for gross violations including enforced disappearances, arbitrary killing and torture.[94]

Despite such developments, Rome Statute of the International criminal court [95] (ICC), however, is unclear regarding its rules on the exercise of jurisdiction over individuals who have been granted amnesty under the municipal law. Former President of the ICC, Philippe Kirsch, referred to this vagueness presented by Articles 16 and 53 as 'creative ambiguity.'[96] Article 34 allows the UN Security Council to request the ICC to hold back investigation or prosecution for a year (which is renewable) by adopting a resolution under Chapter VII of the United Nations Charter. This means that the Council has the powers to withhold prosecutions and can endorse amnesty measures for the sake of international peace and order, although this has never happened in practice. Likewise, Article 53 grants the ICC prosecutor a broad political decision-making power by providing that:

Convention, article 7(1) and (2); Unlawful Acts against Maritime Navigation Convention, article 10(1); Mercenaries Convention, article 12; UN and Associated Personnel Convention, article 14; Terrorist Bombings Convention, article 8; Financing of Terrorism Convention, article 10(1); Nuclear Terrorism Convention, article 11(1); Convention against Torture, article 5; Enforced Disappearance Convention, article 11(1) and (2)

[94] Clifford Krauss, *Chilean Military Faces Reckoning for its Dark Past, New Yprk Times, Oct 3, 1999, available at http://www.nytimes.com/1999/10/03/world/chilean-military-faces-reckoning-for-its-dark-past.html?pagewanted=all&src=pm*

[95] Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/STATUTE/romefra.htm

[96] Charles P. Trumbull IV, 'Giving Amnesties a Second Chance', *Berkeley Journal of International law*, Vol 25:2, 2007, p. 292

> (1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> > (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'

This provision gives the prosecutor *the carte blanche* to use his/her own discretion whether to proceed with prosecution to establish accountability. This is both problematic and paradoxical. It is problematic in the sense that to defer prosecution means to sacrifice justice at the expense of political expediency; it is paradoxical as amnesties for systematic violation are not permissible in customary international law. In this context, a scholar has even suggested drawing up some form of guidelines vis-à-vis the exercise of discretionary power by the ICC prosecutor.[97] To mitigate this accountability gap, O'Shea has put forward draft guidelines titled 'Protocol to the ICC on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition'.[98]

2.2 Amnesties in International Humanitarian Law

[97] See John Dugard. 'Dealing With the Crimes of the Past: Is Amnesty Still an Option' (2000), *Leiden Journal of 'International Law*, 1999, p. 1000-1015

[98] See Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International, the Netherlands, 2002, pp. 330-336

Under international humanitarian law, the grave breaches of Common Article 3[99] of all four *Geneva Conventions* require High Contracting parties to provide "effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches."[100] In the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, International Court of Justice (ICJ) recognized the Common Article 3 of the *Geneva Conventions* as "elementary considerations of humanity" and "applicable under customary international law to any conflict.[101]" Regarding the applicability of the Geneva Conventions in non-international armed conflict, similar views were also echoed by the International Criminal Tribunal of Yugoslavia (ICTY) in the famous case of *Tadic v Prosecutor*.[102] In a nutshell, these international practices point toward the fact that amnesty is not possible vis-à-vis grave violations.

However, Additional Protocol II to the Geneva Conventions establishes that "at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to

[99] In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.

[100] Article 146 (Part IV: Execution of the convention #Section I: General provisions), Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva,12 August 1949

[101] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, para 140

[102] "Why protect civilians from belligerent violence, or even ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? *If international laws, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight*. . ." International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Tadic, Appeal on Jurisdiction, Case No. IT-94-1-T (Appeals Chamber, 2 October 1995), para. 134 (Italics mine)

persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[103]" In its commentary on the provision, the International Red Cross had initially endorsed it by referring amnesty as "a matter within the competence of the authorities.[104]" However, the ICRC later interpreted the non-application of the article to those who were involved in perpetrating crimes under international law[105].

2.3 Amnesties in Human Rights Law

There is a substantial body of international and regional human rights law that obligates states to protect and promote human rights, investigate incidents of alleged human rights violations, prosecute the perpetrators involved following due process of law and if found guilty punish them and provide adequate redress to victims[106]. Likewise, the United Nation Human Rights Committee, in its General Comments[107], Concluding Observations[108] on state reports and

[103] Protocol II Additional to the 1949 Geneva Conventions on the Laws of War of 1977, Art. 6(5)
[104] Charles P. Trumbull IV, 'Giving Amnesties a Second Chance', p. 308
[105] *Ibid.*
[106] See International Covenant on Civil and Political Rights, Article 2.1; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment,
[107] For example: Human Rights Committee, General Comment No. 31, 80th session (2004), para. 18 :
"As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment "
See also Human Rights Committee, General Comment No. 20, 44th session (1992), para. 15:
. . . [A]mnesties 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.
[108] See for instance: Concluding Observations of the Human Rights Committee: Chile 30/03/99. United Nations document CCPR/C/79/Add.104, par. 7; Concluding Observations of the Human Rights Committee: Argentina. 05/04/95. United Nations document CCPR/C/79/Add.46; A/50/40, par. 144; Concluding Observations of the Human Rights Committee: Argentina. 03/11/2000. United Nations document CCPR/CO/70/ARG, par. 9; United Nations document CCPR/C/79/Add.67, par 9; Concluding Observations of the Human Rights Committee: Peru CCPR/CO/70/PER, par. 9; United Nations document CCPR/C/79/Add.78, par. 12.

in decisions on individual complaints[109] under the optional protocol of the ICCPR, has also articulated the state's duty to prosecute and criticized amnesty initiatives taken by parties to the covenant vis-à-vis the gross violations of rights.

Further, a state's duty to put in place effective remedies for serious violations has been underscored by the UN General Assembly Resolution 60/147. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* requires states to adopt and implement domestically the norms of international human rights and humanitarian law and significantly overhaul the overall criminal justice system to ensure effective remedies and redress.[110]

Additionally, there is an exhaustive list of the UN soft laws [111] requiring states to establish accountability for serious abuses and violations. Moreover, the Security Council, in its

[109] For example, *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994) (para 12.3 and 12.4).

[110] Principle 2 provides that:

"If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations."

GA Res 60/147, UN GAOR, 60th session, 64th plenary meeting, UN Doc A/RES/60/147 (2005) ('*Resolution 147*')

[111] Most prominent of them include: The Principles of International Cooperation in Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, principles 18 and 19.2 (Adopted by UN General Assembly resolution 3074 (XXVIII) on 3 December 1973); The Declaration on the Protection of All Persons from Enforced Disappearances (Adopted by the UN General Assembly (Resolution 47/133 of 18 December 1992); The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (Adopted by UN General Assembly Resolution 43/173 of 9 December 1988, Principle 7); The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Adopted by General Assembly resolution 40/34 of 29 November 1985, para. 21) ; The Vienna Declaration and Programme of Action (Endorsed by General Assembly Resolution 48/121 of 20 December 1993), para. 60 (Courtesy: http:// www. Redress.org//)

resolution 1325[112], underscores that "the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls,' and stresses the need to exclude these crimes, where feasible from amnesty provisions." In addition, the *Guidelines for U.N. Representatives on Certain Aspects of Negotiations for Conflict Resolution* instruct peace negotiators and its staff members not to "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.[113]"

However, a clearly contradictory attitude shown by the United Nations (UN) regarding amnesties is problematic. On the one hand, it advocates ending all forms of impunity by stressing the imperative of prosecuting gross violations. On the other hand, however, it has been found to both explicitly and implicitly condone amnesties in practice. For example, the UN supported the South African Amnesty in 1994 via two resolutions[114] Regarding the UN's nod of approval for amnesties in certain situations, the ICRC notes:[115]

> The UN Security Council has encouraged the granting of such amnesties, for example, in relation to the struggle against apartheid in South Africa and the conflicts in Angola and Croatia. Similarly, the UN General Assembly adopted resolutions encouraging the granting of such amnesties in relation to the conflicts in Afghanistan and Kosovo. Furthermore, the UN Commission on Human Rights adopted resolutions to this effect in relation to Bosnia and Herzegovina and

[112] UN Security Council, Adopted at 4213th meeting, 31 October 2000, 12 October 2011, S/ RES/1325 (2000), para. 11, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement
[113] Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution , 1 December 2006
[114] UN Security Council, *Resolution 190 (1964) of 9 June 1964*, 9 June 1964, S/RES/190 (1964), available at: http://www.unhcr.org/refworld/docid/3b00f1df6c.html [accessed 7 February 2012]; see also UN Security Council, *Resolution 191 (1964) of 18 June 1964*, 18 June 1964, S/RES/191 (1964), available at: http://www.unhcr.org/refworld/docid/3b00f1538.html [accessed 7 February 2012]
[115]International Committee of the Red Cross (ICRC), Henckaerts & Doswald-Beck, eds., *Customary International Humanitarian Law*, Cambridge University Press, 2005, rule 159.

> Sudan. Some regional bodies have welcomed such amnesties, for example, the European Union and NATO in relation to the Former Yugoslav Republic of Macedonia and the OSCE in relation to Tajikistan. It is noteworthy that the resolutions adopted by the United Nations were in relation to States not party to Additional Protocol II (South Africa, which did not ratify the Protocol until 1995, Angola, Afghanistan and Sudan), and that not all of the States voting in favour of these resolutions were themselves party to Additional Protocol II.
>
> With the exception of the UN Security Council resolutions, which called on the South African government to grant amnesties for opponents of apartheid, the other resolutions adopted by the United Nations and statements by regional bodies take the form of encouragement to grant amnesty or approval of amnesties adopted.

Further, UN Security Council also supported blanket amnesty measures in Haiti,[116]Besides the resolutions proper, the UN has been found to be involved in tacitly approving amnesty moves by states, which Trumbull IV refers to as *de facto legitimization of amnesty.*[117] For example, the UN implicitly endorsed amnesty in El Salvador, Guatemala and Sierra Leone.[118] Though Sierra Leonean government abandoned the blanket amnesty measures in the Lome Accord after the establishment of an UN-assisted special court, the vacillating approach has been equated to "divergence in UN attitudes' towards amnesty.[119]"

Similar to international instruments, regional human rights instruments[120] also oblige state parties to investigate incidents of alleged human rights violations, prosecute the perpetrators involved following due process of law and if found guilty punish them and provide adequate redress to victims. Among the regional human rights mechanisms, it is the Inter-American Court

[116] UN Security Council, *Security Council Resolution S/RES/861 (1993) Resolution 861 (1993) Adopted by the Security Council at its 3271st meeting, on 27 August 1993*, 27 August 1993, S/RES/861 (1993), available at: http://www.unhcr.org/refworld/docid/3b00f28428.html [accessed 7 February 2012]
[117] Charles P. Trumbull IV, 'Giving Amnesties a Second Chance', p. 294
[118] *Ibid*
[119] See Louise Mallinder *Amnesty, Human Rights and Political Transitions*, p. 335-338
[120] Article 1 of the African Charter for Human and People's Rights; article 2 of the Inter-American Convention on Human Rights; and article 13 of the European Convention on Human Rights and Fundamental Freedoms

of Human Rights (IACtHR) and Inter-American Commission that has explicitly prohibited amnesties for serious violations. In the landmark *Barrios Altos v. Peru case*, the court ruled that:

> . . . all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[121]

The decision has a set a precedent that amnesties for the violation of non-derogable rights are not permissible under the American Convention. Similarly, in *Almonacid Arellano et al. v. Chile*[122] , the IACtHR held that the "States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions." Further, the Commission , in yet another case,[123]opined that "legal consequences of the amnesty law and its application by the agencies of the State under the democratic governments that followed the military regime, as was intended by the de facto government [of Chile], are entirely incompatible with the provisions of the American Convention." Moreover, the court, in *Mendoza et al. v Uruguay*[124], established that "a country

[121] *Barrios Altos Case,* Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001), para. 41.
[122] *Almonacid Arellano et al. v. Chile*, Judgment of September, 26, 2006, Inter-Am. Ct H.R. (Ser. C) No. 154 (2006), para 114

[123] *Catalán Lincoleo* v. *Chile* Case 11.771, Report No. 61/01, Inter-Am. Comm.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 818 (2000), Inter-Am. Comm. H.R, para. 41
[124] *Mendoza et al.* v. *Uruguay* Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993)

cannot by internal legislation evade its international obligation" adding that it, along with the commission, is "authorized to examine even domestic laws which allegedly abrogate or violate rights and freedoms embodied" in the convention.

2.4 Amnesties in Peace Agreements

The worldwide experience shows that amnesties are originally conceived in peace agreements aftermath of a political transition. Whilst a specific clause or mechanism of accountability to address past violations is mentioned in such negotiated transitions, a Faustian Clause[125] is almost always there to absolve perpetrators of heinous crimes of their offences. Analytical research[126] conducted by juxtaposing 2002 documents of peace agreements, ceasefires and additional protocols concluded between 1980 and August 2006 showed the existence of both accountability mechanism and amnesty measures. The contradictory nature of amnesty and accountability is reconciled, as the research suggests, for "the rapid transformation towards a stable and functioning society by transitioning all participants from a state of war to a situation where building the institutions and political arrangements for the future take primacy[127]."

In yet another research analyzing peace agreements in Cambodia, El Salvador, Mozambique, Bosnia-Herzegovina, Guatemala, Northern Ireland, Sierra Leone and Burundi, International Council of Human Rights Policy concluded that some form of reference to amnesty

[125] The phrase 'Faustian Clause' is used by this researcher as a gloss on the phrase 'Faustian Pacts' used by Mallinder to describe negotiated peace agreements which focus 'on the supposedly contradictory goals of peace and justice faced by transitional regimes responding to periods of mass violence' (see Mallinder, *Amnesty, Human Rights and Political Transitions*,p. 2)

[126] Leslie Vinjamuri 'Trends Regarding Peace Agreements and Accountability from 1980 to 2006,' Workshop 6 Expert Paper, *Building a Future on Peace and Justice,* Nuremberg, 25-27, available at http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=39727 (accessed in Jan 2012)

[127] Ibid, p. 4-5

is desirable in peace agreements as an all-out attempt to end impunity might cost the peace because:[128]

1. Investigations, prosecutions and punishment may block negotiation or reignite conflict.
2. They raise complex issues of due process (related to the nature of crimes committed) that new and fragile democracies cannot satisfactorily deal with.
3. Mechanisms often fail to achieve the moral, legal or political objectives that processes linked to efforts to hold accountable those who committed abuses were expected to achieve.
4. Traditional forms of legal actions and punishment may not always be appropriate to the conflict or the culture in which they take place.
5. When guilt and responsibility are shared by a large proportion of the population, truth-telling and acknowledgement that abuses have occurred may be more successful at enabling all sides to participate in the new political order.

The compromise in the peace agreements creates a foundation upon which future amnesties can be ensured. The amnesty measures are viewed from the lens of reconciliation and the crimes committed during the conflict are ascribed to be political crimes for the benefit of the rebels and crimes done while the discharge of duties to exonerate the state actors. However, the term political crimes, like the legality of amnesty in international law, are inherently vague and indefinable as Van den Wyngaert[129] observes:

> Most definitions of the term 'political offence" are tautologous rather than explanatory since they refer mostly to the political 'motivation' or the political 'context' of the act without, however, defining the element 'political' itself ... It is probably impossible to give a non-tautological definition of the term 'political crime" because it does not have an independent legal content: rather it is to be

[128] International Council on Human Rights Policy, Negotiating *Justice? Human Rights & Peace Agreements* (Summary), 2006, Geneva, available at http://www.ichrp.org/files/summaries/29/128_summary_en.pdf (accessed on Jan 25 2011)

[129] Christine Van den Wijngaert. *The Political Offence Exception to Extradition: The delicate problem of balancing the rights of the Individual and the International Public Order,* 1980, pp. 2

> considered as a label which, as soon as a number of criteria are fulfilled, may be attached to every crime ... Thus the term 'political offence" is probably indefinable.

Although Wyngaert stresses on the ambiguity of the term, he opines that political crimes might include a wide range of offences from 'extreme purely passive offences as political dissidence' to "other active offences of opposition against the prevailing social order or against the ruling group in power."[130] Based on the worldwide amnesty database, Mallinder lists the following as falling under the category of political crimes: "treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, membership of banned political or religious organizations, desertion, and defamation." [131] As there always remains the room for extrapolation, governments broaden the concept to include all forms of crimes including the gross human rights violations and economic crimes committed against civilian populations. In the famous *Doherty Case*, a district court of the United States ruled: [132]

> How then is the political exception doctrine to be construed and what factors should limit its scope? Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense. Surely the atrocities at Dachau, Auschwitz, and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been, and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offense.

[130] Mallinder, *Amnesty, Human Rights and Political Transitions*, p. 135
[131] *Ibid.*, 136
[132] In the Matter of the Requested Extradition of Joseph Patrick Thomas Doherty by the government of the United Kingdom of Great Britain and Northern Ireland , United States District Court, S.D, New York, No. 83 Cr. Misc 1 (JES). Dec. 12, 1984 (available at http://uniset.ca/other/cs4/599FSupp270.html

The court concluded that "no act is regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct." Although ambiguous in itself, the term political crime, as it is assumed in international practice, does not cover the gross violations.

2.5 Amnesties in Truth Commissions

A research conducted by Amnesty International to analyze the practice of criminal prosecutions and amnesty of the 40 truth commissions established around the world between 1974 and 2010 concluded that the practice of truth commissions: [133]

1. [R]ejects the granting of amnesty for crimes under international law (only three were given the power to recommend or grant amnesty or immunity
2. [A]llows the granting of amnesty in connection with truth-seeking processes only when the amnesty excludes crimes under international law (five were allowed to recommend or grant amnesty)
3. [S]trongly supports the prosecution of crimes under international law (more than half of the 38 truth commissions recommended and/or actively contributed to the prosecution of all crimes under international law.

Despite these positive findings, it has been held that truth commissions should not be viewed a substitute for criminal justice, as the former are recognized to be complementing the latter, as OHCHR views:

> Generally, a truth commission should be viewed as complementary to judicial action. Even where prosecutions are not immediately expected, it is important to keep that option open, and to act accordingly. Possibilities for prosecution may open up in time, and the commission's report and its other records might then be important as background materials and to provide leads to witnesses. Even if the

[133] Amnesty International, *Commissioning Justice: Truth Commissions and Criminal Justice*, Amnesty International Publications, London, 2010.

> commission's report does not point to specific perpetrators, the commission's information would reveal greater patterns of violations and can show institutional involvement and responsibility, as well as command responsibility of those at the top.

Although extremely helpful, truth commissions alone could not be viewed as a sovereign remedy to combat impunity in a transitional society. Further, the state is obligated to investigate and conduct criminal trials despite the fact that the truth commission had thoroughly investigated the case, as the IACtHR stressed: [134]

> [D]espite the importance of the Truth Commission in establishing the facts related to the more serious violations and in promoting national reconciliation, the functions it carried out cannot be considered to be an appropriate substitute for the judicial process. Neither does it replace the State's obligation to investigate the violations which were committed within the scope of its jurisdiction, as well as to identify those responsible, impose sanctions, and assure the victim appropriate reparation (Article 1(1) of the Convention).

Thus, the Court flatly rejects the idea that truth commissions are sovereign remedy for investigating and prosecuting crimes committed during the conflict. It is to be noted that that such commissions are specifically focused on unraveling truth about human rights abuses and policies/practices that triggered those violations rather than on initiating prosecutions at its own disposal.[135] In this context, Moreover, the trend of amnesty clauses exonerating perpetrators if they showed readiness to confess their crime followed by admission of guilt and seeking of forgiveness, following the example of South Africa, become a regular feature in a number of truth commissions like in Indonesia (including Aceh and Joint Commission), Timor-Leste,

[134] *Parada Cea et al. v. El Salvador* Case 10.480, Report No. 1/99, Inter-Am. Comm.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 531 (1998), para 146.
[135] OHCHR Rule of Law Tools for Post-Conflict Countries: Truth Commissions (2006), p. 27.

Guatemala even though not explicitly permitting amnesties for gross violations. It is interesting to note that Liberian Truth commission's mandate expressly guaranteed prosecution for the violations of international humanitarian law and crimes against humanity '[136] but made a volte-face in the commission's preliminary report:

> General amnesty for children is desirable and appropriate. Amnesty for crimes lesser than gross violations is also desirable and in certain circumstances appropriate to foster national healing and reconciliation . . . the commission however holds that all individuals admitting their wrongs and speaking truthfully before or to the TRC as an expression of remorse which seeks reconciliation with victims and the people of Liberia will not be recommended for prosecution.[137]

However, the Liberian Truth Commission, in its final report stated that the amnesty for international crimes is undesirable and refrained itself from exculpating the perpetrators of gross violations.[138]. However, the recommendations of the commission were never implemented. On January 2011, the Supreme Court of Liberia even ruled against the commission's recommendations to vet political leaders from joining active politics.[139] Besides, these commissions operate within a stipulated period of time and fundamentally inclined to reveal the patterns of violations and deal with selected emblematic cases rather than focussing on

[136] Section 26 (g)
amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards'
See *Truth and Reconciliation Commission of Liberia Mandate*, available at Commission's webpage http://trcofliberia.org/about/trc-mandate (accessed on 25 Dec 2010)

[137] Republic of Liberia Truth & Reconciliation Commission, Preliminary Findings and Determinations, Vol. I, pp.6, available at http://trcofliberia.org/resources/reports/final/volume-one_layout-1.pdf (accessed on 25 Dec 2011).

[138] Truth and Reconciliation Commission of Liberia, *Final Report, Vol II: Consolidated Final Report*, 2009, pp.288.

[139] Net News Publisher, 'Liberian Supreme Court Squashes Truth And Reconciliation Commission Ban on Politicians', January 24, 2011, available at: http://www.netnewspublisher.com/liberian-supreme-court-squashes-truth-and-reconciliation-commission-ban-on-politicians/ (accessed on Jan 27, 2012).

individual cases. As the so-called 'impunity gap'[140] will persist even after the transitional justice process and it takes years to bring about desired institutional reforms, there are, therefore, reasonable grounds to be cautiously optimistic about the effectiveness of these commissions to break the cycle of impunity by prosecuting the perpetrators of serious violations. This provides a tacit approval for amnesty.

2.6 Conclusion

Despite apparent contradiction regarding legality of amnesties in international law and practice, it cannot be negated that there is an overwhelming body of opinion against the practice of amnesty for gross violations that has constrained transitional states to introduce amnesty laws exculpating the violators of international crimes. However, amnesties for gross violations are legalized or condoned in international practice to facilitate peace process and bring about reconciliation by successor governments in societies emerging out of the conflict. "Despite the uncertainty over the de jure legality of amnesties, most scholars agree that the international community can de facto legitimize an amnesty."[141] Moreover, it has always been contended that "peace could never be achieved without some form of amnesty in transitional societies."[142] Still, it is held that amnesties should be viewed not only as "instruments of impunity" but as " important institutions in the governance of mercy, the reassertion of state sovereignty and, if properly constituted, the return of law to a previously lawless domain."[143] Such rationales

[140] OHCHR, *Rule of Law Tools for Post-Conflict Societies: Prosecution Initiatives, 2006, pg. 9*
[141] Charles P. Trumbull IV, 'Giving Amnesties a Second Chance', p. 286.
[142] Louise Mallinder, "Can Amnesties and International Justice be Reconciled?" *International Journal of Transitional Justice*, Vol. 1, 2007, 208–230 (accessed on November 5, 2011).
[143] Kieran McEvoy & Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," Journal of Law and Society, Vol.39, September 2012, p. 410-40

provide a room for transitional regimes state actors to *de facto* legitimize amnesty in post-conflict societies. The next chapter discusses in detail the practice of *de facto* amnesties in Nepal.

CHAPTER 3 – DE FACTO AMNESTIES AND ITS CONSEQUENCES IN NEPAL

3.1 De Facto Amnesties via Case Withdrawals

As discussed in the first chapter, de facto amnesties in Nepal are carried out via executive decisions of case withdrawals. Arguing that the cases selected to be withdrawn were of political nature and invoking the amnesty clause in the CPA, the successor governments have used a problematic and ambiguous provision in the State Cases Act -1992. Section 29 of the said legislation, which is related to "Withdrawal of Cases or Reconciliation," stipulates that:

> (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.

The provision clearly provisions that the government of Nepal and the attorney general, with a nod of approval from the court, can withdraw a criminal case and mediate the litigating parties for reconciliation. However, the procedural law to carry out such withdrawals, i.e. "*The Procedures and Norms to be Adopted While Withdrawing Government Cases -1998"* (Hereinafter *Standards-1998*)[144] categorizes criminal cases into two distinct groups: 1) Cases of Political Disposition (which included Section 3, 4 and 5 of the Crime Against State Act -

[144] Approved by the Cabinet of Ministers on 17 August 1998

1989)[145]*;* and 2) Cases of General Dispositions (filed under existing criminal laws of Nepal), including homicide, corruption, rape, robbery). While the cases falling under the former group could be easily withdrawn by the government, the Standards-1998 provided that the cases falling under the latter category should be withdrawn as exceptions in the rarest of instances taking into account the gravity of the crime and the nature of allegations. Indeed, it was not legally possible for the government legitimize the mass withdrawals with such an apparent limitation as the cases to be withdrawn included gross violations like homicide, torture, enforced disappearances and rape, the government tried to bring about withdrawals by am On 27 October 2008, the government finally declared to have withdrawn the cases. The decision of the cabinet communicated by the Chief Secretary of the Government of Nepal to MoLJPA says:

> . . . the proposal to withdraw [349] cases filed during the period of armed conflict between 14 March, 1996, and 21 November, 2006 in various

[145] 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 organized force, he/she shall be liable for life imprisonment or an imprisonment up to Ten years.

3.4 If someone causes conspiracy of a crime as referred to in Subsections3.1 or 3.2 or gathers people, arms and ammunitions with such intention or incites, he/she shall be liable for an imprisonment upto 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 upto Three years or a fine upto 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 upto 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 upto Seven years or a fine upto Five Thousand Rupees or the both.

> 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[146]

On the basis of this decision, the government legitimized the mass withdrawals of cases. This trend continued with a series of withdrawals and it is rolling unabated to date. Besides, the Standards-1998 prescribes a procedure which included recommendations from the political party concerned intending to withdraw the cases after seeking consensus of all political parties, local administration (possibly from the local authority concerned) and finally in writing from the Home Ministry. After the recommendations, the following procedure is to be followed: [147]

1. Separate files should be prepared and brought to the Ministry of Law, Justice and Parliamentary Affairs with at least Secretary level decision by mentioning all the required information in the Standard, showing the appropriate cause, necessity and utility
2. While sending file for case withdrawal, at least copies of the complaint letter statement of the accused person and accusation letter as well as the decision of the court for imprisonment should be enclosed in the file.
3. Clear description of the current status of the case to be withdrawn, whether the court has made any decision, whether any complaint or application is filed at the appellate level should be made while sending it.
4. For case withdrawal, prior approval should be sought from the ministry concerned with the subject of the case.
5. After receipt of the documents fulfilling the procedures of Sections a. to d. above, the proposal should be submitted to Nepal Government (Council of Ministers) through the decision of the Ministry of Law, Justice and Parliamentary Affairs if there is appropriate reason.
6. If Nepal Government (Council of Ministers) decides to withdraw the case determining the proposal to be appropriate, action should be taken

[146] See Advocacy Forum, *Evading Accountability by Hook or by Crook,* June 2011

[147] Human Rights & Democratic Forum (FOHRID), *Withdrawal of Serious Criminal Case and Impunity in Nepal,* No.23, December 2010, p.37

> to implement the decision through the Ministry of Law, Justice and Parliamentary Affairs.

The government of Nepal did not follow this procedure either.[148] The arbitrary decision of the cabinet was authenticated by the attorney general and cases were withdrawn without seeking recommendations from other political parties, local bodies and consent of the court and the aggrieved party. Also, the article 135.2 in the Interim Constitution[149] that allows the attorney general (a political appointee) to use discretion on matter of case withdrawals made life easy for the government to withdraw cases en masse.

In pursuing the case withdrawal trajectory, the government, despite bypassing the national and international obligations to prosecute gross violations, also overlooked the jurisprudence of Nepalese Supreme Court. As early as 1995, the Supreme Court *the Government of Nepal v Dil Bahadur Lama* that ' the court should investigate whether the intention is for good cause or not before permission is granted to the Government for the withdrawal of cases"[150] In yet another momentous and comprehensive decision passed on 13 February 2008, the SC, emphasizing that " the intention of the law and constitution is not that any case may be withdrawn," [151] held that:

> .Just because the political system and government have changed, it does not allow compromising or influencing the fundamental right to life of the people.

[148] Ibid.,37
[149] Article 135.2 of the Interim Constitution of Nepal provides: "The Attorney General or officers subordinate to him/her shall represent the Government of Nepal in usits 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 initate proceedings in any case on behalf of Government of Nepal in any court or judicial authority."
[150] NHRC and UNOHCHR-Nepal, *Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal*, June 2011
[151] *Government of Nepal v Gagandev Raya Yadhav*, Nepal Kanoon Patrika, 2065 (2008) No. 9 (Cited in Advocacy Forum, *Evading Accountability by Hook or by Crook,* June 2011)

> 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. [152]

The Court further opined that the government's right to withdraw the case is not "absolute" and warned that serious criminal cases withdrawn without proper rationale and procedure would be detrimental to the society invite "chaos and insecurity" in the long run. Urging the lower courts to be more sensitive towards the issue of withdrawing criminal offences of serious nature, the judgment further pointed out that the court should not view such withdrawals as mere "procedural formality" and should decide on case-by-case basis.

This comprehensive analysis by the Supreme Court avowedly proclaims that that reckless withdrawal of cases fosters impunity and dwindles public confidence, and henceforth such decisions must pass the rigorous scrutiny of the courts before being implemented. Despite such orders, the government has forwarded a set of rationale to bring about case withdrawals.

3.2 Rationale for Case Withdrawals

There are several closely linked rationales put forward by the Nepalese government and the political parties concerned for their bid to grant amnesty to perpetrators of gross violations via the withdrawal of cases. The decision of the government, as discussed in above section, to withdraw cases has been based on the two broad rationales of moving the peace process forward and to implement the amnesty clause of the CPA, though no clear-cut explanation has been provided regarding what these two terms really refer to. Besides, two arguments have been advanced to legitimize the case withdrawals in Nepal.

[152] ibid

First, the cases withdrawn are labeled as "political crimes." The so-called Faustian clause (5.2.7) of the CPA, however, does not define what constituted politically-motivated crimes and merely mentions the commitments made by two signatories of the CPA. As a result, the term has been used elastically as a cover to all sort of hideous crimes committed during the conflict and also in its aftermath. Although the Standards-1998 had clearly pointed out that the cases of political nature include sedition, treason and revolt, there is no jurisprudence from the Supreme Court regarding what types of crimes fall under the ambit of political crimes. The international practice, as listed by Mallinder and discussed in the previous section, identifies "treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, membership of banned political or religious organizations, desertion, and defamation."[153] As most of the cases withdrawn in Nepal are gross violations, the rationale of the government seems lame and weak.

Second, it is also a common argument presented by those with personal, institutional, or ideological links to alleged perpetrators of gross violations and war crimes in Nepal that cases cannot proceed in the courts, as they will be dealt with by the proposed TRC and the Commission of Inquiry on Disappearances. Their argument is based on some constitutional provisions on the establishment of truth and reconciliation commission, 1 June 2007 decision of the Supreme Court on the establishment of the Commission of Enquiry on Disappearances and the Faustian clause in the CPA mentioned in the constitution. Still, they justify the constitutionality of the CPA by invoking the clause 166 .3 of the Interim Constitution, which is annexed in the CPA. As a result, it is claimed that regular criminal investigations and prosecutions must be held in abeyance till the two commissions are established.

[153] Mallinder, *Amnesty, Human Rights and Political Transitions*, p. 136

Although cases have been withdrawn despite relentless uproar from victims and human rights community in Nepal, there is no legal basis for the argument of pro-amnesty groups. Even the Supreme Court of Nepal acknowledged that the CPA, being entirely a political agreement, is not "independently legally enforceable in the courts.[154]" Also, truth commissions, as discussed in the previous chapter, play a complementary role to regular justice system and a truth commission investigation does not fulfill the state's duty to investigate gross violations. Even the latest ordinance for the formation of such a commission does not authorize it to initiate criminal investigations and prosecutions and the latest edition does not even have a provision for recommending for prosecutions. Therefore, it is evident that the transitional justice theory put forward by the government to bring about case withdrawals is a mere stratagem to legitimize *de facto* amnesty in Nepal.

3.3 Repercussions of De Facto Amnesty in Nepal

3.3.1 Denial of Justice

The practice of case withdrawals by the government of Nepal has categorically denied justice for victims of human rights violations and war crimes during the conflict in Nepal. As discussed in the first chapter the report, impunity has become has become a norm in Nepal as the Nepali state as failed to prosecute even a single prosecute a single perpetrator of human rights violation in civilian courts even after the passage of six years since the signing of Comprehensive Peace Accord-2006. Despite persistent efforts from national and international human rights organizations and victim groups, no substantial initiative has been taken to prosecute the perpetrators of gross human rights abuses during the conflict. Despite the existence

[154] Liladhar Bhandari v Government of Nepal Writ 0863/2064 BS, SC decision dated 7 January 2009 (cited in Advocacy Forum, *Evading Accountability by Hook or by Crook*).

of several accountability mechanisms in place and in the face of "equivalent prohibition" of many "offences that amount to serious violations of human rights or international humanitarian law in Nepal's domestic law[155]," justice for the criminal acts committed by both state and rebels during the conflict remains elusive.

Research conducted by Advocacy Forum (AF) and Human Rights Watch (HRW)[156] on the existence of *de facto* and *de jure* impunity in Nepal details the endemic problems with police investigations of First Investigation Reports (FIRs)[157]. These reports have primarily kept track of the progress of 49 FIRs that had been filed in relation to prosecution initiatives in sixty two cases of gross violations including extrajudicial executions and enforced disappearances committed between 2002 and 2006. According to existing Nepali law, the Nepal Police must thoroughly investigate an FIR and report its findings to the district's public prosecutor. However, in many of the cases that were followed by AF and HRW police only filed an FIR after the victim or their families appealed to the Chief District Officers. In other cases, the filing of the FIR was denied by the police, who claimed that the issue would be investigated by the Truth and Reconciliation Commission, and thus not come under the police's purview. More than half of the cases that were documented by AF and HRW involved FIRs that were refused. Often the police would claim that the issue was *political*, and they were not supposed to take steps that would be stumbling blocks to the peace process. The report shows how mandamus orders from the courts are sought by victims even to register an FIR. Although the battle has been won by registering

[155] OHCHR, Nepal Conflict Report, p. 25

[156] AF and HRW's quadrilogy on impunity : *Waiting for Justice*(2008), *Still Waiting for Justice* (2009), *Indifference to Duty* (2010) and *Adding Insult to Injury* (2011) available at *http://www.advocacyforum.org/publications/impunity-reports.php*

[157] FIR (First Investigation Report) is a formal complaint lodged with the police or District Administration Office by the victim of a cognizable offence or by someone on his/her behalf.

around 105 cases,[158] the police and the CDO denied registering FIR in a case dating back to conflict. On 20 July 2011, the District Police Office (DPO) and the District Administration Office (DAO) of Dhading denied registering an FIR vis-à-vis the murder of a woman by some Maoist cadres during the conflict.[159]

Even so, there are several domestic legal frameworks governing investigations of serious human rights abuses. However, the trend of case withdrawals practiced by the government has rendered these mechanisms inherently dysfunctional. Moreover, these mechanisms are plagued with an array of problems like: "lack of independence of investigative mechanisms and susceptibility to political or other interference; lack of cooperation by state security services and political parties and inadequate powers of investigative bodies; reluctance or refusal of authorities to follow procedures to investigate criminal complaints; lack of provisions mandating immediate investigation in cases of use of force by state agents resulting in death, failure to protect witnesses lodging complaints from intimidation and reprisals;" [160] and, above all, failure of the government to follow the recommendations of these mechanisms.[161] Instead of working to strengthen and reform them, the government seems to close all the avenues of justice to victims of human rights abuses by rendering these mechanisms defunct.

Similarly, the denial has reinforced impunity in the society, eroding rule of law. As a result, directives and orders from the courts are defied by those in power: a person convicted by

[158] AF and HRW, *Adding Insult to Injury* (2011) available at http://www.advocacyforum.org/publications/impunity-reports.php (accessed on 23 February 2012)
[159] Advocacy Forum, *Police Denies Registering FIR*, News, available at http://www.advocacyforum.org/news/2011/07/police-denies-registering-fir.php (accessed on 23 February 2012)
[160] See AF and Redress, *Held to Account: Making the Law Work to Fight Impunity in Nepal*, 2011
[161] Especially recommendations by the NHRC; In August 2010, it stated that among 386 recommendations made, the government had implemented only 34, see The Himalayan Times, *86 percent of NHRC recommendations have been ignored*, July 6, 2010

the Supreme Court walks freely with the Prime Minister[162] and an army officer repatriated from the UN Mission for his alleged involvement in murder of a juvenile is not produced in court.[163] Issuance of orders of mandamus and judicial strictures to investigate cases of human rights violations remains unimplemented.[164] Recommendations of prosecutions by the National Human Rights Commissions go unheard. As a result, the basic norms like supremacy of law, equality before law and equal protection of law, on which the edifice of democracy and rule of law lie anchored, are shaken.

3.3.2 Contradictory Court Rulings

Nepalese judiciary, apparently caught between the political compromise that ushered democratic system in Nepal and the on-going culture of impunity, seems to be marred by a sort of ambivalence whether to hold justice in abeyance. The hesitation has been clearly noticed in some conflicting decisions issued by the Nepalese courts vis-à-vis the case withdrawals and the cases during the conflict.

However, the SC issued an interim order on 13 Dec 2010 not to execute directives of a district court vis-à-vis a murder case during the conflict invoking clause 166(3) of the interim constitution. Keshav Rai, a member of the dissolved Constituent Assembly (CA), member was "tried *in-absentia*" by the Okhaldunga District court for murdering a civilian during the conflict

[162] Responding to a writ petition filed on 14 June 2011, the Apex Court had issued on 26 June 2011 an order that there is no obstacle in implementing the court's earlier verdict to incarcerate then UCPN-Maoist CA member Balkrishna Dhungel who is convicted in the murder of Ujjen Kumar Shrestha of Okhaldhunga back on 24 June 1998. With legal assistance from Advocacy Forum, the petition was filed by victim's sister Sabitri Shrestha after the implementation of Apex Court's order on 8 September 2010. In its ruling of 8 September, the SC had upheld the decision of Okhaldhunga District Court in which the law maker was tried and sentenced to life imprisonment with confiscation of property.

[163] See Advocacy Forum, *Maina Sunuwar: Separating Fact from Fiction*, 2008

[164] AF & HRW, *Adding Insult to Injury* (2011) available at http://www.advocacyforum.org/publications/impunity-reports.php

in July 2010.[165] Lawmaker Rai challenged the arrest warrant issued against him before the Supreme Court on 7 December 2010 on the ground of article 33 and 166 (3) of the Interim Constitution and the CPA respectively. As a result, the Apex court, arguing the relevancy of transitional justice to a case in question, issued an interim order to halt proceedings in the District Court. Following suit, the Supreme Court in January 2011 ordered to invalidate the arrest warrants to perpetrators issued by the District Court of Okhaldhunga until final decision is passed on the case of Guru Prasad Luitel who was allegedly killed by a number of Maoist cadres back in September 2003.[166] The Apex court again put forward the transitional justice theory in passing such a decision.

The two decisions stand in stark contradiction with 3 January 2010 decision of Supreme Court regarding yet another case from Okhaldhunga in which a UCPN-Maoist CA member Balkrishna Dhungel was slapped a life imprisonment with confiscation of property. Dhungel had been convicted for murdering a teenager Ujjawal Kumar Shrestha by Okhaldhunga District Court in June 24, 1998.[167] When Dhungel made an appeal, the Appellate Court of Rajbiraj overruled against the district court's verdict putting forward the same transitional justice mechanism theory. However, the public prosecutor filed another appeal at the Supreme Court which held Dhungel guilty of murder and passed its verdict. However on 24 February 2010[168], the Supreme Court of Nepal, citing the same Faustian clause of the CPA, validated the government's drive for withdrawing 349 cases dating back to conflict. In doing so, the SC held that the final decision to judge the legitimacy of such case withdrawals on a case-by-case basis falls under the discretion of the district courts concerned.

[165] Advocacy Forum, *Evading Accountability by Hook or by Crook,* June 2011
[166] Ibid
[167] ibid
[168] *Madhav Basnet et al v Prime Minister Puspa Kamal Dahal et al*, 23 February 2011

Such contradictory decisions from the SC, among other things, has further severed the gap, which has gradually been widening after the CPA of November 2006, between victim's demand for justice and reparations and the authorities' stance in favour of *de facto* amnesties via case withdrawals.

3.3.3 Role Reversal of Public Prosecutor

The practice of case withdrawals have negatively impacted on the role of the Attorney General in Nepal. In two high-profile public interest litigations, the AG defended the alleged perpetrators of human rights violations during the conflict; one of the perpetrators is an incumbent Minister (who is charged of the murder of Arjun Lama) and the other a recently promoted Assistant Inspector General of Police (AIG, who is charged of the murder of five students in Dhanusha). In both cases, the Supreme Court had previously asked the police and AG Office to initiate immediate investigation and prosecution. This has raised serious questions about conflict of interest and fairness in investigation and prosecution. This has also invited a serious legal crisis in Nepal as both the writ petitions had challenged the promotion of the alleged perpetrators and had sought that they be removed from office to ensure the protection of evidence and effective investigations and prosecution. During hearings, the AG argued that they cannot be removed from the office until the AG's office files a charge-sheet against them. One of the major obstacles in establishing accountability in these cases is that despite the order of the Supreme Court in relation to the *mandamus* petitions filed in both murder cases of Arjun Lama and the Dhanusha case to start prompt and effective investigation, neither the police have done the investigation nor the prosecutors have filed the charge sheets. Now this very dereliction of

the respective duties by the police and the public prosecutor has been used as an excuse to shield the perpetrators.

The case of Kuber Singh Rana, the AIG, has also raised serious question about the government's responsibilities in implementation of the NHRC's recommendations. In this case, the NHRC has made a recommendation for prosecution of those responsible for the disappearance and murder of the five students, including the AIG. Although the Supreme Court has ordered to initiate investigation in both cases and report on the findings on a regular basis, the Janus-like role of the AG has an enmeshing effect on the entire judicial process. Such a dual role of the AG points towards de facto amnesty vis-à-vis the human rights violations committed during the conflict.

3.3.4 Fizzling Out of Human Rights Movement

One of the starkest impacts of the continual denial of justice has been experienced in the human rights movement of Nepal. The human rights community, which a range of political actors considered closest ally during the conflict and popular uprising, is seen as enemies of peace process and reconciliation. Also, those at helm of affairs have started viewing international human rights monitoring "as a form of interference in sovereign affairs and to make claims that the national human rights agenda was being driven by interests outside Nepal"[169] The exit of the OHCHR amidst protests by the human rights community and the significant curtailing of the NHRC's powers in the new NHRC Act -2012 shows government's aversion towards human

[169] Frederick Rawski Mandira Sharma, "A comprehensive Peace? Lessons from Human Rights Monitoring in Nepal," Sebstian Von Einsiedel, David M. Malone, and Suman Pradhan (ed.), *Nepal in Transition: From People's War to Fragile Peace*, 175-200, Cambridge University Press,2012

rights issues.[170] The human rights space, which was widened after the restoration of democracy in 2006, seems to have been shrinking lately with deliberate attempts to muffle the impact of the rights advocacy. Also, rights advocates claim that international community in Nepal, aftermath of the signing of the CPA, has become increasingly less vocal in their condemnations, diplomatic interventions and ever more acquiescent in the face of an institutionalized impunity and deteriorating situation.

3.3.5 Criminalization of Politics

Foremost, the inclination of state towards blanket amnesty via case withdrawals has seriously impacted the politics. Given the fluidity and fragility of the transitional period, politics remains the be-all and end-all for the institutionalization of democratic norms and values. However, the trend of impunity has given way for criminalization of politics. Political parties have become safe haven for criminals and they act as protective shields to perpetrators of human rights violations during the conflict. Furthermore, the sister organizations and youth wings of the prominent political parties commit crimes with impunity.[171] This has significantly eroded public image of the political parties and confidence of public on them. Such a situation is a direct threat to a nascent democracy like Nepal. Moreover, the increasing assertiveness of the armed criminal/separatists groups in Terai, the southern belts of the country, and efforts from the government to contain them has triggered in its wake new patterns of torture and extrajudicial execution, torture and illegal detention.[172]

[170] http://www.advocacyforum.org/news/2012/07/new-nhrc-act-curtails-commission-powers.php
[171] OHCHR-Nepal, *Allegations of Human Rights Abuses by the Young Communist League (YCL)*, June 2007, http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2007/YCL.ENG.pdf
[172] http://www.advocacyforum.org/downloads/pdf/publications/terai-report-english.pdf

3.4 Conclusion

The discussion above clarifies that the government of Nepal is trying its best to legitimize *de facto* amnesty via a set of poorly-reasoned arguments that has no basis in international and national law. In the process, it has been denying justice to thousands of victims of conflict. Such a denial has had negative repercussions on the ability of the country to develop strong deterrent to violence in the post-conflict period. The governments formed after the restoration of democracy in 2006 have used their time in power to withdraw cases pending before district courts, thereby granting amnesty for perpetrators of grave human rights abuses, despite commitments to the contrary in the CPA and the Interim Constitution. As the transition unfolds, the impact of *de facto* amnesties has not slowly been beginning to shake the legal edifice of the country but also making a travesty of transitional justice efforts. The next chapter discusses the repercussions of *de facto* amnesties in Nepal as it staggers to institutionalize democracy, rule of law and human rights in Nepal.

A policy of forgetting the past has been rightfully referred to as 'political correlate of suicide'.[173] As forewarned by the OHCHR, the institutionalization of impunity has damaged the rule of law institutions in Nepal:

> Persistent impunity for human rights violations has had a corrosive effect on rule of law institutions and has further damaged their credibility. Impunity has contributed directly to widespread failings in public security by sending a message that violence carries no consequences for the perpetrator. Nepal has relatively independent rule of law institutions, but they remain vulnerable to political pressure and manipulation and are in need of support[174].

[173] Nir Eisikovits, "Transitional Justice", *Stanford University Encyclopedia of Philosophy*, 2009 *p.20* http://plato.stanford.edu/archives/spr2009/entries/justice-transitional

[174] Human Rights Council, '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' (2010) (above n.), para. 27.

An obvious dearth of political will to carry out criminal investigations and prosecutions with regard to the gross violations committed in the context of the conflict "has only encouraged further serious violations and risks continuing to do so.[175]" In fact, the attempt to sacrifice justice on the altar of reconciliation, sustainable peace and political expediency is likely to reinforce impunity and historical inequalities that prevail pervasive will contribute to breed new conflict in Nepal.

[175] OHCHR Nepal Conflict Report, p. 28

CHAPTER 4 – CONCLUSION AND FINDINGS

The present study evaluated the problem of amnesties in post-conflict societies, focussing specifically on the practice of *de facto* amnesties currently practiced by the government in Nepal, a country in South Asia which has recently come out of a decade-long internal armed conflict (1996-2006). This study set out with the aim of assessing the prior studies that have noted that post-conflict societies are bent on seeking *de facto* amnesty measures as *de jure* amnesties for gross violations are increasingly forbidden internationally. In this context of this evolving international consensus that forthright outlaws amnesties to gross violations, war crimes and crimes against humanity, and against the backdrop of state practices of introducing amnesties to evade accountability of individuals involved in serious human rights abuses, it was hypothesized that post-conflict regimes, despite commitments to end impunity nationally and internationally, strives and strains to and adopts a number of backdoor avenues to protect the perpetrators of human rights violations. The study was designed to determine the consequences of such *de facto* amnesty measures on a transitional society like Nepal amidst sustained monitoring and interventions by ever-vigilant victim organizations, civil society, international human rights organizations and diplomatic community aligning together to lobby and pressurize the government not to grant amnesty for individuals responsible for heinous offences.

The findings of the current study corroborate the proposition of Van Zyl who correctly infers that the post conflict societies have been seeking *de facto* amnesty measures to evade accountability for gross violations of human rights as *de jure* amnesties have become increasingly unenforceable and unacceptable".[176] As the current study shows, the trend of

[176] Paul van Zyl., p.28

subordinating principles of accountability and justice to political imperatives continues in a post-conflict society like Nepal via various measures and strategies despite commitments nationally and internationally to combat impunity and deal with the violent past through justice and redress. The government, although making reiterative commitments to end impunity and bound by existing domestic legislation and obligations under international law, is adopting strategies like interpreting law to suit executive decisions, misappropriating lacunae in criminal justice system, issuing ordinances and putting forward specious and fallacious reasoning to institutionalize *de facto* amnesties via case withdrawals.

The evidence from this study suggests that the shift from *de jure* amnesty to *de facto* amnesty has several long-lasting negative impacts on a transitional society. The blanket denial of justice reinforces impunity in the society and erodes rule of law. It further erodes public image of political parties and their leaders and confidence of citizenry on them. The wider discrepancy between letter and deed to combat impunity shown by the successor governments puts their credibility and legitimacy in peril thereby making a travesty of democracy, rule of law and transitional justice efforts. It weakens the criminal justice system and public confidence on state institutions.

The current findings contribute to the existing discourse on transitional amnesty by bringing to light the consequences of *de facto* amnesties to evade accountability. While confirming previous findings, it contributes additional evidence that suggests that seeking *de facto* amnesties in post-conflict societies encourages the institutionalization of impunity and hinders in carrying out desired institutional reforms. Whilst the study did not confirm that persistence of impunity could contribute to breed a new conflict, it did partially substantiate that the continuing trend of case withdrawals for crimes committed aftermath of the conflict and

failure to respect rights of victims might push country towards a legal vacuum, and ultimately towards a state of lawlessness.

This study has thrown up many questions in need of further investigations. The issue of *de facto* amnesty is itself new and intriguing one which could be usefully explored in further research. It would be interesting to compare the repercussions of *de facto* amnesties and *de jure* amnesties with regard to the democratization and institutional reforms in transitional societies. More research is needed to better understand the role of judiciary in a transitional society pursuing *de facto* amnesties.

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