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A Call to Action—Examining Nepal’s Post-conflict Strategy Toward Persons Accused of Gross Human Rights Abuses

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NOTES

A CALL TO ACTION—EXAMINING NEPAL’S POST-CONFLICT STRATEGY TOWARD PERSONS ACCUSED OF GROSS HUMAN RIGHTS ABUSES

*Jennifer Chiang**

This Note analyzes Nepal’s attempts to establish accountability and the rule of law in the aftermath of its ten-year civil war. It compares Nepal’s treatment of persons implicated in gross human rights violations with the international human rights legal framework surrounding a state’s international obligations, particularly in its use of transitional justice mechanisms. It argues that Nepal’s failure to bring either administrative sanctions or criminal prosecutions against officials accused of human rights abuses—and its reliance instead on truth commissions—undermines the rule of law and violates the country’s international human rights obligations.

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INTRODUCTION

Arjun Bahadur Lama was celebrating his election as president of the local school in April 2005 when he was abducted by members of the Maoist party from the village of Chhatrebanjh in Nepal.¹ Witnesses say he was paraded through villages by his captors and was not seen again.² Several witnesses informed Purni Maya Lama, Arjun Lama's wife, that her husband was brought before Agni Sapkota, a Central Committee Member of the Maoist regime, who ordered Maoist soldiers to kill Arjun Lama and bury his body.³ It was not until after many years and numerous attempts to start an investigation, including an appeal to the Supreme Court of Nepal, that a first incident report (FIR) was finally registered on August 11, 2008.⁴ Sapkota has never faced investigation or suspension from office; instead, despite the allegations against him, he was promoted in May 2011 to Minister for Information and Communications.⁵

1. *Arjun Bahadur Lama*, ADVOC. F.-NEPAL, <http://www.advocacyforum.org/emblematic-cases/2011/01/arjun-bahadur-lama.php> (last visited Oct. 20, 2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. See *Nepal Cabinet Reshuffle Draws UN Fire*, TIMES INDIA (May 5, 2011, 7:45 PM), http://articles.timesofindia.indiatimes.com/2011-05-05/south-asia/29512458_1_human-rights-maoists-people-s-war-information-and-communications-minister.

In Nepal's post-conflict society, there are numerous similar stories of individuals being promoted to positions of public power and influence despite accusations of grave human rights abuses.⁶ These stories serve as examples of how Nepal has fallen short in its attempts to establish the rule of law and meet its international obligations.

Under international law, Nepal is obligated to guarantee fundamental human rights.⁷ This Note focuses on Nepal's human rights obligations regarding the treatment of persons who have had reports of human rights abuses filed against them. Part I of this Note begins by providing a brief history of Nepal and its conflict period. It then discusses the relevant international standards and obligations regarding human rights and explores various post-conflict mechanisms for dealing with persons implicated in human rights abuses, as well as the Nepal's existing transitional framework. Part II compares these mechanisms with international obligations and considers Nepal's use of transitional justice mechanisms. Finally, Part III argues that Nepal's actions to date have not met international obligations, and that Nepal must take affirmative steps to provide accountability for past and continuing human rights violations. If Nepal is to move forward into an era of political stability and democracy, it must strengthen the rule of law by addressing past abuses while maintaining due process.

I. NEPAL AND THE INTERNATIONAL LEGAL FRAMEWORK SURROUNDING ITS TRANSITION

The first part of this Note provides the international legal framework underlying periods of transitional justice. Part I.A provides a brief history of Nepal and the civil war from which the country is attempting to emerge. Next, Part I.B establishes the link between transitional justice and the rule of law. Then, Part I.C discusses Nepal's human rights obligations during its post-conflict transition. Finally, Part I.D provides an overview of various transitional justice mechanisms.

A. *History of Nepal's Internal Conflict*

Prior to any attempts at democracy, a hereditary monarchy governed Nepal for 240 years.⁸ Even under the subsequent *panchayat* system, which was portrayed as a representative government, the reality was that Nepal's government remained a one-party system ruled by the monarchy.⁹

6. See *infra* Part I.A for a brief history of Nepal's civil war.

7. See *infra* Part I.C.1.

8. See Teresa Whitfield, Conflict Prevention & Peace Forum, *Masala Peacemaking: Nepal's Peace Process and the Contribution of Outsiders*, CENTER ON INT'L COOPERATION, 3 (October 2008), http://www.cic.nyu.edu/staff/docs/whitfield/whitfield_masala_peacemaking.pdf ("Nepal was ruled by a feudal and exclusionary monarchy for more than 200 years.").

9. See Warisha Farasat & Priscilla Hayner, Int'l Ctr. for Transitional Justice, *Negotiating Peace in Nepal: Implications for Justice*, INITIATIVE PEACEBUILDING, 10 (June 2009), http://www.initiativeforpeacebuilding.eu/pdf/Negotiating_Peace_in_Nepal.pdf; see also Brad Adams, *Nepal at the Precipice*, FOREIGN AFF., Sept.–Oct. 2005, at 121, 124 ("The

Frustrated with the lack of real representation, the Nepali people started the *Jana Andolan I* (First People's Movement) in 1990.¹⁰ The movement resulted in the overthrow of the old monarchy and the introduction of a multiparty democratic system of governance under a new constitutional monarchy.¹¹ Despite this initial attempt at democracy, the resulting government proved ineffective as political infighting and corruption continued.¹²

Dissatisfied with the government, the Communist Party of Nepal-Maoists (Maoists) released its "Forty-Point Demands" in February of 1996; among them were the expulsion of foreign influences in Nepal and the establishment of a secular democracy.¹³ After the government rejected these demands, the Maoists embarked on a "people's war" against the government.¹⁴ As they fought, both the government and the Maoists committed many human rights abuses including extrajudicial executions, disappearances, abductions, and torture.¹⁵ The abuses increased in 2001 after King Gyanendra declared a state of emergency and passed the Terrorist and Disruptive Activities Ordinance (TADO), which declared the Maoists to be terrorists and granted the security forces broad powers to arrest those involved in terrorist activities.¹⁶ The King continued his efforts to consolidate power, which over time fueled increasing dissatisfaction with the government and urgency among the previously deadlocked political parties, Maoists, and civil society to align against the King.¹⁷

panchayat system was touted as a representative system, but in reality the country was run by a cluster of like-minded undemocratic politicians who obeyed the will of the king.").

10. See Farasat & Hayner, *supra* note 9, at 10; Whitfield, *supra* note 8, at 3 (describing the end of the *panchayat* system of rule in Nepal in 1990 because of a pro-democracy people's movement).

11. See Farasat & Hayner, *supra* note 9, at 10; see also Adams, *supra* note 9, at 124 (stating how King Binendra "gave in to popular demands to lift the ban on political parties and create a democratic state").

12. See Farasat & Hayner, *supra* note 9, at 10 (describing how the ensuing politicians came to be seen as "opportunistic and corrupt"); see also Adams, *supra* note 9, at 125 (noting that the people's movement was followed by thirteen increasingly unstable governments overrun with political feuds and corruption).

13. See Whitfield, *supra* note 8, at 3 ("The start of the 'people's war' waged by the Communist Party of Nepal (Maoist) . . . against the Nepali state dates back to February 1996 when the government rejected a forty-point list of demands.").

14. Farasat & Hayner, *supra* note 9, at 10.

15. *Id.* at 10–11.

16. Advocacy Forum & Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict*, HUMAN RIGHTS WATCH, 10 (Sept. 2008), http://www.hrw.org/sites/default/files/reports/nepal0908web_0.pdf [hereinafter *Waiting for Justice*] (noting that the majority of civilian deaths that occurred during the conflict period occurred after the Royal Nepal Army was deployed); Farasat & Hayner, *supra* note 9, at 10.

17. See Advocacy Forum & Int'l Ctr. for Transitional Justice, *Across the Lines: The Impact of Nepal's Conflict on Women*, OFF. HIGH COMM'R HUMAN RIGHTS, 22 (2010), http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AdvocacyForum_NepalCEDAW49.pdf (discussing how the King's attempt to take power in February 2005 consisted of thousands of arbitrary arrests and detainments and hundreds of deaths, which drove political parties and the Maoists to begin forming an alliance against the King); Farasat & Hayner, *supra* note 9, at 13.

Finally, in April 2006, an extraordinary *Jana Andolan II* (Second People's Movement) successfully forced the King to give up his power and return it to the Parliament, thus restoring democracy.¹⁸ The People's Movement also marked an end to the ten-year civil war between the Maoists and the government during which over 13,000 lives were claimed and both sides of the conflict committed numerous human rights violations.¹⁹ These abuses committed included disappearances²⁰ and the torture of detainees, among others.²¹

In November 2006, peace negotiations began in earnest between the country's major political parties and the Maoists.²² On November 21, 2006, Nepal's government and the Maoists signed the Comprehensive Peace Agreement (CPA), which laid out the basic framework for the country's political transition.²³ Less than a month later, Nepal adopted its Interim Constitution.²⁴ Under the Interim Constitution, the State is required to adopt a political system that upholds fundamental human rights and to eliminate corruption and impunity.²⁵ The Constitution also references the creation of a high-level Truth and Reconciliation Commission (TRC), as well as the Commission of Inquiry on Disappearances (Commission on Disappearances) aligned with the directives of the CPA; both are intended to address the abuses committed during the conflict.²⁶

The signing of these documents signaled Nepal's commitment to account for past violations of human rights and to pave a path for peace and democracy. Yet, Nepal still has not wholly emerged from conflict and authoritarian rule, thus placing it in a transitional period.²⁷

18. See *Waiting for Justice*, *supra* note 16, at 11 (stating that the King announced the reinstatement of the House of Representatives on April 24, 2006).

19. *No. of Victims Killed by State and Maoist in Connection with the "People's War,"* INFORMAL SECTOR SERVICE CENTER, <http://www.insec.org.np/pics/1247467500.pdf> [hereinafter INSEC] (calculating that a total of 13,347 deaths occurred during the conflict period and reporting that the State was responsible for 8,377 deaths while the Maoists were responsible for 4,970 deaths); *Q&A: Nepal's future*, BBC NEWS (May 13, 2009, 10:46 AM), http://news.bbc.co.uk/2/hi/south_asia/2707107.stm.

20. See *Clear Culpability: "Disappearances" by Security Forces in Nepal*, HUMAN RIGHTS WATCH, 24 (2005), <http://www.hrw.org/sites/default/files/reports/nepal0205.pdf>; Farasat & Hayner, *supra* note 9, at 20 (noting the large number of disappearances).

21. See Nat'l Human Rights Comm'n, *Human Rights in Nepal: A Status Report 2003*, ASIA FOUND., 35 (2003), <http://asiafoundation.org/resources/pdfs/nepalhumanrights03.pdf>.

22. See Farasat & Hayner, *supra* note 9, at 14.

23. *Id.*

24. INTERIM CONSTITUTION OF NEPAL 2063 (2007), available at <http://www.lawcommission.gov.np/en/documents/prevailing-laws/constitution.html>; see also Donna Lyons, *Maximising Justice: Using Transitional Justice Mechanisms to Address Questions of Development in Nepal*, 13 TRINITY C. L. REV. 111, 114 (2010); Farasat & Hayner, *supra* note 9, at 19–20.

25. Comprehensive Peace Agreement, Nepal-Communist Party Nepal (Maoist), ¶ 7.1, Nov. 21, 2006 [hereinafter CPA], available at http://www.un.org.np/sites/default/files/report/tid_188/2006-11-29-peace_accord-MOFA.pdf (unofficial translation).

26. See Farasat & Hayner, *supra* note 9, at 20.

27. See Lyons, *supra* note 24, at 115 (pointing to the continued political unrest due to the turnover within the government and the continued standstill over the reintegration of Maoist rebels).

B. Transitional Justice and the International Legal Framework

Transitional justice refers to a range of processes and mechanisms that a society can implement to address its history of human rights violations in order to lay a foundation for accountability, justice, and reconciliation.²⁸ Integral to transitional justice is the establishment of the rule of law, a principle of governance in which all persons are held equally accountable to laws that are consistent with international human rights norms and standards.²⁹ For a society to move past a period of conflict and establish a new legacy of peace and democracy, the people must see that the new regime is making a good faith effort to apply justice to the past regime's legacy of human rights abuses.³⁰

1. Linking the Rule of Law to Transitional Justice

Transitional justice and the rule of law represent two integrally connected concepts in assessing and producing change during a society's movement away from a post-conflict regime. In any transition, a divide is created between the old regime and the new regime, and it is within this divide that the officials of the new regime must decide how to respond to calls for justice.³¹

At the core of transitional justice lies the issue of how a state's treatment of its violent past and its associated human rights abuses will impact the success of the state's transition toward a democratic future.³² The notion that a society cannot have closure until it addresses the problems of its past has been noted in transitional justice scholarship.³³ Thus, the principles of transitional justice are often perceived as being focused on the past.³⁴

28. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the Secretary-General*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) (defining transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation").

29. *Id.* ¶ 6 (defining the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards").

30. Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 92 (2001).

31. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 765–66 (2004).

32. RUTI G. TEITEL, TRANSITIONAL JUSTICE 6 (2000) ("As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.").

33. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 127 (1996) ("The assumption that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflict.").

34. See Posner & Vermeule, *supra* note 31, at 766 (describing how scholars often see transitional justice as backward-looking in its goals). Justice is defined as "an ideal of

Transitional justice mechanisms include, among other things, individual prosecutions, truth-seeking, vetting, and dismissals, or some combination of the above.³⁵

The rule of law is an essential element of a democratic state and is increasingly crucial during post-conflict reconstruction.³⁶ One aspect of establishing the rule of law is the reformation of state institutions.³⁷ Standing for the ideal that every person is equally accountable to the laws of the state regardless of their position within society, the rule of law requires measures to ensure the supremacy of, and adherence to, the nation's laws by all people, including those working within state institutions.³⁸

Associating transitional justice with measures focused on the past has often been used to condemn transitional justice mechanisms as preventing the new regime from expending its valuable energies on forward-looking measures that contribute to state building and economic growth.³⁹ Yet, the goals of transitional justice are essential for laying the foundation for the rule of law and creating a society founded on sustainable peace and democracy.⁴⁰ By understanding the relationship between the backward-looking goals of transitional justice and the forward-looking goals related to building a new society, it becomes clear that, in any successful transitional justice regime, addressing the past is a necessary step toward establishing the rule of law as a strong foundation for the future.

A strong message of accountability is integral to the protection of human rights.⁴¹ It provides a legal basis for citizens to challenge the government

accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs." U.N. Secretary-General, *supra* note 28, ¶ 7.

35. See U.N. Secretary-General, *supra* note 28, ¶ 8.

36. See David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, in *ETHICS AND INTERNATIONAL AFFAIRS: A READER* 45, 54 (Joel H. Rosenthal & Christian Barry eds., 3d ed. 2009) ("Rule of law is especially important in a new and fragile democracy bent on distinguishing itself from prior authoritarianism, institutionalized bias, or the 'rule of the gun.'").

37. See *id.* at 56–57 (arguing that a sustainable transition requires the reformation of basic institutions, including, among others, the judiciary, police, military, and structure of economic opportunities).

38. U.N. Secretary-General, *supra* note 28, ¶ 6 ("[The rule of law] requires . . . measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 *GEO. J. INT'L L.* 809, 827 (2005) ("[R]ule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite . . .").

39. See Posner & Vermeule, *supra* note 31, at 801 ("The impulse is to look forward rather than backward; opponents see retroactive justice, and transitional justice generally, as a waste of institutional resources compared to the tasks of regime building.").

40. See *id.* at 765 ("[R]etrospective measures themselves have important forward-looking justifications . . .").

41. See Peerenboom, *supra* note 38, at 812 ("Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world.").

and thus protects the rights of the non-elite.⁴² Respect for the rule of law will not only deter future human rights violations, it will also aid in the development of a democratic state.⁴³

On the other hand, ignoring the human rights abuses committed in the past furthers the injuries of victims who have already been hurt by the conflict.⁴⁴ Victims may see the new society as one based on impunity, which might lead to resentment, vigilante retribution, and further periods of violent conflict.⁴⁵ Thus, a new regime's actions in addressing past human rights abuses committed during a conflict period are integral to allowing the rule of law and democracy to take root in a new society.⁴⁶

2. Difficulties in the Transition Process

Due to the unique factors faced by each post-conflict country, there is no single approach that can guarantee success in the path to reconstruction.⁴⁷ Regardless of which method or combination of methods is pursued by a new regime, efforts to establish the rule of law require, at a minimum, time, money, and manpower.⁴⁸ Yet, these are difficult to come by in war-torn societies marked by devastated institutions, depleted resources, and distrusting populations.⁴⁹

Additionally, a lack of political will within the state regime is a common obstacle in post-conflict countries.⁵⁰ Effective rule of law reform in devastated countries requires enormous amounts of political will, which in turn requires broad consensus and the creation of a united strategy among a country's important stakeholders.⁵¹ This requires that a state's general population support the actions being undertaken by the state. Yet, there is often a general lack of public confidence in state institutions and governing structures in countries emerging from conflict.⁵² Even where institutions

42. *See id.* at 944–45.

43. *See* Kamali, *supra* note 30, at 96.

44. *See* Kritz, *supra* note 33, at 127.

45. *Id.* at 127–28.

46. *See* Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 1 (A. James McAdams ed., 1997) (“In fact, the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.”).

47. Peerenboom, *supra* note 38, at 908.

48. *Id.*

49. *See* U.N. Secretary-General, *supra* note 28, ¶ 3 (“[H]elping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, and diminished security and a traumatized and divided population, is a daunting, often overwhelming, task.”).

50. Peerenboom, *supra* note 39, at 909 (describing how many reconstruction efforts fail due to lack of political will, lack of resources, and lack of funds).

51. *See* U.N. Secretary-General, *supra* note 28, ¶ 20 (arguing that inadequate investment in public consultations on reform questions and a consensus among important stakeholders about the nature of necessary reforms leads to inadequate establishment of the rule of law in post-conflict states).

52. *See id.* ¶ 3.

were once credible, years of war and repressive dictatorship can lead to these institutions being tainted by corruption, thus contributing to a perceived lack of legitimacy by the public.⁵³ Moving ahead with transitional justice mechanisms without addressing the public's skepticism of the state's legitimacy can hinder the state's pursuits.⁵⁴

Beyond the problems of political will and public support, post-conflict countries also face a significant hurdle from a lack of resources—structural, technical, and material. Countries that have experienced conflict are often left with considerably damaged infrastructures.⁵⁵ Thus, state institutions may be minimally functional, with limited capacity to address the process of rebuilding.⁵⁶ Additionally, the technical capacity available to address the multitude of complex questions faced by the state can be limited.⁵⁷ Lastly, any transitional justice mechanism requires a large influx of funds and other material resources that are often unavailable.⁵⁸ Thus, given the multitude of problems inherent in many post-conflict situations, any approach to justice undertaken by a state must factor in these difficulties.

C. Nepal's Human Rights Obligations Under International Law

The transitional justice mechanisms employed by a state must be aligned with the state's human rights obligations. This is particularly true in post-conflict situations where the rule of law and the legitimacy of state regimes already rest on a precarious foundation.⁵⁹ How to handle persons accused of human rights abuses is a particularly difficult question, as it requires states to strike a balance between its various obligations to victims, the accused, and the general population.⁶⁰

53. See Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE* 21, 30 (Alice H. Henkin ed., 2002) (noting how civil war or years under repressive dictatorship can destroy criminal justice systems or leave them tainted by corruption, even where the judicial institutions and their personnel were once credible).

54. See Kamali, *supra* note 30, at 93 (“Hasty prosecutions of human rights violators by a legal system that is incapable of handling numerous cases or that has not yet gained legitimacy in the eyes of the public would have the opposite effect of its intended pursuit of justice.”).

55. See Serge Rumin, *Gathering and Managing Information in Vetting Processes*, in *JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES* 403, 408 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (“Conflicts often bring about the destruction of countries’ infrastructure and institutions.”).

56. See, e.g., Kritz, *supra* note 53, at 35 (“The criminal justice system of every country emerging from a pattern of mass abuses is compromised and minimally functional, with severely limited capacity at best.”).

57. See U.N. Secretary-General, *supra* note 28, ¶ 27; see also Posner & Vermeule, *supra* note 31, at 766 (“Purges, for example, can further political reform by eliminating the influence of officials of the prior regime, but they can also interfere with political reform by depriving the new state of skilled administrators.”).

58. U.N. Secretary-General, *supra* note 28, ¶ 64(1).

59. See *supra* Part I.B.2.

60. See U.N. Secretary-General, *supra* note 28, ¶ 7 (“Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.”).

1. Sources of Nepal's Human Rights Obligations

In 1991, Nepal became a party to most of the major international human rights treaties, including the International Covenant on Civil and Political Rights⁶¹ (ICCPR), the International Covenant on Economic, Social, and Cultural Rights⁶² (ICESCR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶³ (CAT). Along with its international treaty obligations, Nepal is bound by customary international law, which consists of fundamental provisions of international human rights law that have obtained customary international status and thus form part of general international law.⁶⁴

Domestically, the provisions of the human rights treaties to which Nepal is a party are incorporated into, and enforceable as part of, Nepal's domestic law through the Nepal Treaty Act.⁶⁵ Nepal's Interim Constitution further establishes that the government is responsible for adopting a political system fully aligned with fundamental human rights, the rule of law, and the elimination of impunity.⁶⁶ Nepal's government is also responsible for effectively implementing international treaties to which Nepal is a party⁶⁷ and must have as one of its key objectives the promotion of the general welfare by making provisions for the protection and promotion of human rights.⁶⁸

2. The State's Duty to Prevent Human Rights Violations

As a state party to the ICCPR, Nepal must guarantee the full enjoyment of fundamental human rights.⁶⁹ Thus, Nepal has a duty to prevent human

61. See International Covenant on Civil and Political Rights, *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm>; *Ratification of International Human Rights Treaties—Nepal*, U. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-nepal.html> (last visited Oct. 20, 2012) [hereinafter *Ratification of Treaties—Nepal*].

62. See International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm>; *Ratification of Treaties—Nepal*, *supra* note 61.

63. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, [hereinafter CAT], available at <http://www2.ohchr.org/english/law/cat.htm>; *Ratification of Treaties—Nepal*, *supra* note 61.

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

65. Nepal Treaty Act, 1990, ¶ 9, Nov. 9, 1990, available at <http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts.html>.

66. NEPAL INTERIM CONST. art. 33(c), available at <http://www.lawcommission.gov.np/en/documents/prevailing-laws/constitution.html>.

67. *Id.* art. 33(m).

68. *Id.* art. 34(2).

69. ICCPR, *supra* note 61, art. 2(3). Nepal became party to the ICCPR in 1991. See *Ratification of Treaties—Nepal*, *supra* note 61.

rights violations⁷⁰ and to end impunity for human rights abuses that occurred during its ten-year conflict.⁷¹ This duty to prevent and punish human rights abuses is part of its obligation to guarantee the full enjoyment of rights and has been reaffirmed under international jurisprudence.⁷²

The duty to prevent human rights violations calls into question the practice of allowing persons implicated in human rights abuses to serve in a state's public institutions.⁷³ As a means of guaranteeing the nonoccurrence of human rights violations, it has been recommended that states remove officials who have been found responsible for human rights violations from public service.⁷⁴ This includes refraining from hiring or recruiting persons implicated in human rights violations, and permanently removing members of a state's security forces implicated in such violations.⁷⁵

The duty extends to the suspension of state agents implicated in human rights violations while investigations into the alleged abuses are ongoing.⁷⁶ This has been especially important when the individual is accused of forced disappearances;⁷⁷ extralegal, arbitrary, and summary executions;⁷⁸ or torture.⁷⁹

70. Federico Andreu-Guzmán, *Due Process and Vetting*, in JUSTICE AS PREVENTION, *supra* note 55, at 449, 450.

71. *Id.* at 449.

72. *See, e.g.*, U.N. Comm'n on Human Rights, Husband of Maria Fanny Suarez de Guerrero v. Colombia, Commc'n No. 45/1979, U.N. Doc. CCPR/C/15/D/45/1979 (1982), available at <http://www.unhcr.ch/tbs/doc.nsf/0/44cf17fed78ca4e7c1256ab5002b7234?Opendocument>. Although Nepal is not a state party to the regional human rights bodies that have adjudicated on this issue, those decisions hold the weight of customary international law and point to the rising status of this duty within international human rights law. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 166, 174 (July 29, 1988); Mahmut Kaya v. Turkey, App. No. 22535/93, Eur. Ct. H.R., ¶ 102 (2000).

73. Andreu-Guzmán, *supra* note 70, at 450 ("The duty to prevent raises the question as to the presence in the public administration . . . of persons implicated in gross human rights violations.").

74. U.N. Comm'n on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 36(a), U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

75. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Argentina, ¶ 9, U.N. Doc. CCPR/CO/70/ARG (Nov. 15, 2000), available at <http://www.unhcr.org/refworld/pdfid/3b39f0977.pdf>; U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Brazil, ¶ 325, U.N. Doc. CCPR/C/79/Add.66 (July 24, 1999) [hereinafter Concluding Observations: Brazil], available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/9d8f4abc5536855fc12563ea0057e768?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/9d8f4abc5536855fc12563ea0057e768?Opendocument); U.N. Human Rights Comm., Concluding observations of the Human Rights Committee: Guatemala, ¶ 26, U.N. Doc. CCPR/C/79/Add.63 (Apr. 3, 1996), available at <http://www.unhcr.ch/tbs/doc.nsf/0/176bb26c29e92ac2c12563dc0050f64a?Opendocument>; U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Serbia & Montenegro, ¶ 9, U.N. Doc. CCPR/CO/81/SEMO (Aug. 12, 2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/c4f9dd7baa1e61aec1256ee1004c4a96?OpenDocument>.

76. Concluding Observations: Brazil, *supra* note 75, ¶ 325.

77. *See* Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 16(1), U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (providing that alleged perpetrators of a forced disappearance must be suspended from any official duties during the investigation into the crime).

3. Victims' Rights to an Effective Remedy

Turning to the victims of abuses, where a person's human rights have been violated, there are rights held by the victim that must be protected. One of the overarching rights is the right to an effective remedy.⁸⁰ In respecting this right, the state has the obligation to ensure that individuals have remedies that are both accessible and effective.⁸¹ The right to an effective remedy is an obligation inherent in the ICCPR that must be complied with even in times of emergency.⁸² Connected to this is the duty to take state action against those implicated in human rights violations.⁸³ To fully give effect to the rights of victims, all human rights and international humanitarian law violations must be thoroughly investigated and, if appropriate, prosecuted and punished.⁸⁴ Failing to do so may give rise to a separate breach by the state of its human rights obligations.⁸⁵

The duty to conduct official investigations into allegations of human rights violations for which complaints have been filed, or which are otherwise known, is presumed by the U.N. Human Rights Committee (HRC), the Inter-American Court of Human Rights, and the European

78. See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, ¶ 15, U.N. Doc. E/RES/1989/65 (May 24, 1989).

79. See Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 55/89, ¶ 3(b), U.N. Doc. A/RES/55/89 (Dec. 4, 2000) (stating that persons involved in such crimes must be "removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation").

80. ICCPR, *supra* note 61, art. 2(3)(a); U.N. Human Rights Comm., The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> [hereinafter General Legal Obligation].

81. See U.N. Human Rights Comm., *George Kazantzis v. Cyprus*, Comment No. 972/2001, ¶ 6.6, U.N. Doc. CCPR/C/78/D/972/2001 (2003), available at <http://www.unhcr.org/refworld/country,,HRC,,CYP,,4282286d4,0.html>.

82. See U.N. Human Rights Comm., Article 4: Derogations During a State of Emergency, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), available at <http://www.unhcr.org/refworld/pdfid/453883fd1f.pdf> (describing the right to an effective remedy as a "fundamental obligation" that cannot be derogated from).

83. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 4, U.N. Doc A/RES/60/147 (Mar. 21, 2006).

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

85. See General Legal Obligation, *supra* note 80, ¶ 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.").

Court of Human Rights to be a measure owed to the individual victim.⁸⁶ These bodies also stress that the obligation to investigate is born once authorities gain knowledge of alleged misconduct and does not rest on whether an individual has lodged a formal complaint.⁸⁷ Additionally, these bodies have held that state officials implicated in human rights offenses should be suspended pending completion of investigations into the allegations.⁸⁸

Once investigations are completed, there is a further duty to bring criminal prosecutions against those who have been implicated.⁸⁹ This is necessary not only to protect the rights of victims but also to preserve the rule of law.⁹⁰ Specific provisions lay out the duty to prosecute specific types of crimes. Each of the four Geneva Conventions, which govern war crimes and grave breaches of human rights during international armed conflict, imposes a duty to search for persons who have allegedly committed crimes, to provide penal sanctions, and to bring alleged perpetrators to justice.⁹¹ Regarding crimes against humanity, HRC General Comment Number 31 discussing duties under the ICCPR provides that,

86. ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 190 (2009). States have the duty to combat impunity and to ensure effective investigation and prosecution of those responsible for serious violations of international law. *See* U.N. Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, ¶ 55, U.N. Doc. A/HRC/12/18 (Aug. 6, 2009) [hereinafter *Report of the High Commissioner*].

87. *See, e.g.*, *Musayeva v. Russia*, App. No. 74239/01, Eur. Ct. H.R. ¶¶ 85–86 (2007) (reiterating that “authorities must act of their own motion once the matter has come to their attention”); *Yaşa v. Turkey*, 1998-VI Eur. Ct. H.R. 98, 100 (stating that the mere fact that authorities were informed about the murder of a victim led “ipso facto to an obligation under Article 2 to carry out an effective investigation”).

88. *See, e.g.*, Concluding Observations: Brazil, *supra* note 75, ¶ 325 (stating that “the forces against whom allegations of such offences are being investigated be suspended from their posts pending completion of the investigation”); Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment, *Report of the Special Rapporteur on the Question of Torture*, ¶ 26(k), U.N. Doc E/CN.4/2003/68 (Dec. 17, 2002) (by Theo van Boven) (suggesting that when complaints have been lodged against an official, the public officials should be suspended unless the allegation is “manifestly ill-founded”).

89. The Inter-American Court and Commission have found an individual right to criminal prosecution and punishment of those found responsible for serious human rights violations. *See* SEIBERT-FOHR, *supra* note 86, at 191.

90. *Id.* at 189.

91. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument> (setting out states’ obligations during periods of international and internal armed conflict); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, available at <http://www.icrc.org/ihl.nsf/FULL/370?OpenDocument> (same); Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> (same); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument> (same). Nepal became a party to the Geneva Conventions in 1964. *See Ratification of Treaties—Nepal, supra* note 61.

where investigations lead to information about perpetrators, “failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.”⁹² Similarly, the CAT requires that all cases of alleged torture be submitted to the proper authorities for prosecution.⁹³

4. Due Process Rights of the Accused

Any state action against those accused of human rights violations must be undertaken in a manner that respects the due process rights of the accused. Due process and fair trial rights are guaranteed under international standards and have become a *jus cogens*⁹⁴ norm of international criminal law.⁹⁵ Due process guarantees, among other things, the presumption of innocence, the right to a defense and to be assisted by counsel, the right to prior and detailed notice of charges, and the right to appeal judgments to a higher court.⁹⁶

The presumption of innocence is one of the most fundamental due process rights held by the accused.⁹⁷ Any action taken against those accused of human rights abuses must ensure that criminal guilt does not attach prior to proof of guilt.⁹⁸ With regard to public officials accused of abuses, the right to hold a job in public service in conditions of equality and without unlawful discrimination or unreasonable restrictions may be implicated.⁹⁹ While the right does not entitle every citizen guaranteed employment in the public service sector, it does necessitate a right of equal access to such positions.¹⁰⁰ This right has also been interpreted to encompass the freedom to engage in political activity, to debate about public affairs, and to criticize the existing government.¹⁰¹

92. General Legal Obligation, *supra* note 80, ¶ 18.

93. CAT, *supra* note 63, arts. 4(1), 7(1).

94. *Jus cogens* refers to norms “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 for general international law having the same character.” Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

95. GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 252 (2d ed. 2008) (“It is tenable that the principle of due process and fair trial has evolved to a *jus cogens* norm of [international criminal law] . . .”).

96. Andreu-Guzmán, *supra* note 70, at 463.

97. ICCPR, *supra* note 61, art. 14(2).

98. Andreu-Guzmán, *supra* note 70, at 463.

99. See ICCPR, *supra* note 61, art. 25.

100. See U.N. Human Rights Comm., Wieslaw Kall v. Poland, Comment No. 552/1993, ¶ 13.6, U.N. Doc. CCPR/C/60/D/552/1993 (1997), available at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/49c77b8ab56f2eed41256d64003865d9?OpenDocument>.

101. U.N. Human Rights Comm., Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo, Comment Nos. 422/1990, 423/1990, 424/1990, ¶ 7.5, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990, 424/1990 (1996), available at <http://www1.umn.edu/humanrts/undocs/html/VWS422R1.htm> (“The rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through

Procedural rights are also implicated. The core procedural right is the right to have one's case heard fairly and publicly "by a competent, independent and impartial tribunal established by law."¹⁰² The U.N. Secretary-General has identified the following procedural guarantees for those accused of human rights violations: the right to be informed of allegations against them, the right to address the entity in charge of the investigation, the right to be informed of the charges within a reasonable time, and the right to appeal an adverse decision to a court or other independent body.¹⁰³

D. Transitional Justice Mechanisms and the Rule of Law

Given the unique nature of conflicts faced by individual countries, the response of new regimes can vary widely.¹⁰⁴ Criminal proceedings, administrative sanctions, and truth commissions are often used as responses to the different needs and problems emerging during a conflict's aftermath that operate to address periods of massive human rights violations.¹⁰⁵

1. Criminal Investigations and Prosecutions

Criminal proceedings can play a vital role in transitional contexts for many reasons. One of the benefits resulting from bringing those responsible for serious human rights violations to justice in a public manner is the restoration of dignity for victims.¹⁰⁶ Furthermore, the victim's opportunity to witness human rights abusers answer for their crimes may restore the victim's sense of justice.¹⁰⁷

For the larger society, public denunciation of criminal behavior demarcates the regime of the past from the regime of the present and sends a credible signal to the public that the new order is committed to the rule of law.¹⁰⁸ This hopefully infuses individuals with greater public confidence in the new regime's ability, willingness, and commitment to enforce both domestic and international laws.¹⁰⁹ The declaration of a commitment to prosecute violators of human rights and the consequential rise in the

political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.").

102. ICCPR, *supra* note 61, art. 14(1).

103. U.N. Secretary-General, *supra* note 28, ¶ 52.

104. *See* Peerenboom, *supra* note 38, at 908.

105. U.N. Secretary-General, *supra* note 28, ¶ 8.

106. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991) (arguing that the inherent dignity of individuals can be restored through trials).

107. U.N. Secretary-General, *supra* note 28, ¶ 39.

108. *See* Kritz, *supra* note 33, at 128 ("A public airing and condemnation of these crimes may be the best way to draw a line between times past and present, lest the public perceive the new order as simply more of the same.").

109. *See* U.N. Secretary-General, *supra* note 28, ¶ 39.

public's confidence in the new regime help establish the rule of law in the post-conflict regime.¹¹⁰

The direct accountability provided by criminal trials also furthers the goal of deterrence.¹¹¹ Criminal prosecutions play an essential role in preventing the reoccurrence of human rights abuses, both individually with regard to the perpetrator and generally with regard to society as a whole.¹¹² By deterring further abuses, criminal prosecutions contribute to the establishment of peace.¹¹³

2. Administrative Sanctions

Vetting is the process by which an individual's integrity is assessed for the purpose of determining his or her suitability for employment as a public official.¹¹⁴ From the transitional justice perspective, the most important consideration in evaluating suitability is a person's observance of human rights standards and professional conduct.¹¹⁵ This extends beyond the individual to the institutional level, such that the institutions most complicit in engaging in human rights violations during the conflict must also be vetted.¹¹⁶ Removing from service those officials responsible for violations of human rights is critical in the transformation of a society into one run by institutions that respect human rights.¹¹⁷ Ultimately, the goal of vetting is to build fair and effective institutions that are able to prevent future recurrences of the human rights abuses that plagued a society's past.¹¹⁸

The intended end result of a vetting process is the identification and exclusion from public offices of individuals found to be responsible for

110. See Kritz, *supra* note 53, at 25 (arguing that criminal prosecutions replace impunity with accountability and establish credibility for distrusted institutions).

111. U.N. Secretary-General, *supra* note 28, ¶ 39.

112. See Orentlicher, *supra* note 106, at 2542 (stating that the arguments in favor of criminal punishment rest on the idea that "it is the most effective insurance against future repression").

113. U.N. Secretary-General, *supra* note 28, ¶ 38.

114. See Ved P. Nanda, *Civil and Political Sanctions As an Accountability Mechanism for Massive Violations of Human Rights*, 26 DENV. J. INT'L L. & POL'Y 389, 396 (1998) (describing vetting as the exclusion from public office and positions of influence those who are found to have committed serious violations of human rights).

115. See U.N. Dev. Programme, Bureau for Crisis Prevention & Recovery, *Vetting Public Employees in Post-conflict Settings: Operational Guidelines*, INT'L CENTER TRANSITIONAL JUST., 20 (2006), <http://ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf> (describing gross violations of human rights as serious crimes, involvement in which "indicate[s] a lack of integrity at a level that fundamentally affects a person's credibility to hold public service").

116. Roger Duthie, *Introduction*, in JUSTICE AS PREVENTION, *supra* note 55, at 17, 20–21.

117. See Andreu-Guzmán, *supra* note 70, at 470 (stating that the question of vetting proceedings "is crucial for the effectiveness of the rule of law, the strengthening, construction, or reconstruction of a state that guarantees human rights, and the restoration of the public's confidence").

118. See *Report of the High Commissioner*, *supra* note 86, ¶ 37; see also W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 75 (1996) (citing the "fundamental sanctioning goals" as being the "protection, restoration, and improvement of public order").

abuses.¹¹⁹ Generally speaking, individuals who are under investigation are notified of the allegations against them, given the opportunity to respond to the allegations, and provided the right to appeal an adverse decision to another independent body.¹²⁰ The resulting exclusions tend to be temporary and are meant to provide a new regime with a period during which the people's confidence in the governing institutions can be reformed before allowing members of the old regime to participate again.¹²¹

Administrative sanctions have long been used to address serious violations of human rights.¹²² Due to its importance as a component of transitional justice and the establishment of the rule of law, vetting is a mechanism that has been applied to a large number of people in post-conflict situations.¹²³ This mechanism provides protection for newly formed democratic states from the dangers associated with institutions run by untrustworthy or insufficiently loyal officials.¹²⁴ Furthermore, vetting helps facilitate the establishment of the rule of law in new regimes by sending a "salutary signal" to victims and to society that those responsible for human rights violations will not be permitted to stay in power, thus adding to the credibility of post-conflict regimes.¹²⁵

Transitions require that public institutions previously complicit in perpetuating conflict "be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law."¹²⁶ The vetting or screening of public officials for human rights violations committed in the past has proven to be critical as an accountability mechanism¹²⁷ and for strengthening institutions in post-conflict societies.¹²⁸

119. See U.N. Secretary-General, *supra* note 28, ¶ 52. For purposes of vetting, exclusion includes both the termination and restriction of access to public employment. See Andreu-Guzmán, *supra* note 70, at 452.

120. U.N. Secretary-General, *supra* note 28, ¶ 52.

121. Kritz, *supra* note 33, at 139.

122. After World War II, many European countries used civil and political sanctions against those who had aligned themselves with the Nazis. See Nanda, *supra* note 114, at 390. For example, France sanctioned more than 7,500 alleged collaborators with the Vichy regime, which led to the removal from office of over nearly 1,500 politicians and diplomats. See Kritz, *supra* note 33, at 139. Also, Italian authorities temporarily dismissed nearly 1,600 government employees based on their wartime activities and human rights violations. See *id.*

123. See Kritz, *supra* note 33, at 139–40 (arguing that vetting mechanisms make more plausible the ability to process large numbers of potential cases as often exist in post-conflict situations); see also U.N. Secretary-General, *supra* note 28, ¶ 52 (noting how U.N. assistance has frequently been sought in vetting processes).

124. Jiri Priban, *Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law*, in JUSTICE AS PREVENTION, *supra* note 55, at 308, 318 (noting how the Constitutional Court of the Czech Republic upheld the constitutionality of the lustration law as an instrument "requesting the political loyalty of civil servants and protecting the democratic regime against political threats").

125. U.N. Secretary-General, *supra* note 28, ¶ 52; Kritz, *supra* note 33, at 140; Nanda, *supra* note 114, at 396.

126. *Report of the High Commissioner*, *supra* note 86, ¶ 37.

127. See Nanda, *supra* note 114, at 389 ("Civil and political sanctions applied on an individual basis and with due process for the defendant serve an important function as one of the accountability mechanisms available to redress massive violations of human rights.").

128. Farasat & Hayner, *supra* note 9, at 22.

3. Truth Commissions

Truth commissions are temporary, nonjudicial, official bodies created to understand the broader causes, consequences, and patterns of past human rights violations that occurred during a conflict.¹²⁹ This broader analysis can include an investigation of the structural elements of the government and security forces that allowed human rights abuses to occur.¹³⁰ The impetus behind truth commissions is the belief that understanding *why* events occurred can be as important as knowing exactly *what* happened.¹³¹ Ultimately, the work of a truth commission helps a society transition toward peace by creating an official and public acknowledgement of the past, allowing the voices of victims to be heard, and submitting recommendations for reforms needed to prevent further abuses.¹³²

To achieve its goals, the core activities of truth commissions include taking statements, investigating, researching, holding public hearings, and creating a final public report.¹³³ Statement taking involves obtaining statements directly from victims and witnesses of human rights violations in a process designed to allow them to recount their experiences in a safe environment.¹³⁴ With regard to investigations and research, commissions will typically select a few emblematic cases for investigation.¹³⁵ Public hearings conducted by the commission give victims and survivors the opportunity to share their stories in front of a public audience and thus serve as a forum for publicly acknowledging past wrongs.¹³⁶ This not only gives victims the opportunity to be heard and to have their stories be made part of the country's official records, but it can also facilitate a public debate about how to address the past.¹³⁷ The work that a commission does is incorporated into a final report that summarizes its findings and provides recommendations for reforms to the state.¹³⁸

Truth commissions have been established as a means of addressing historical injustices in various contexts worldwide and have enjoyed

129. See Kritz, *supra* note 33, at 141 (stating that truth commissions are perceived to be legitimate and impartial official bodies charged with investigating violations of human rights under the conflict in question and producing an official history of the abuses); see also Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-conflict States: Truth Commissions*, 1–2, U.N. Doc. HR/PUB/06/1 (2006) [hereinafter *Rule-of-Law Tools: Truth Commissions*].

130. Kritz, *supra* note 33, at 141.

131. See *Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 1–2.

132. See Kritz, *supra* note 33, at 141 (noting the cathartic effects that the public airing of the pain inflicted during the conflict period and the creation of an official record of the truth can have).

133. See *Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 1.

134. *Id.* at 17.

135. *Id.* at 18.

136. *Id.*

137. See U.N. Secretary-General, *supra* note 28, ¶ 50; see also Kritz, *supra* note 33, at 141.

138. See *Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 19.

varying levels of effectiveness.¹³⁹ They play an important role in providing a full account of past human rights violations and addressing the larger context and root causes of a conflict.¹⁴⁰ Furthermore, they can serve many reconciliatory purposes such as giving voice to victims, providing meaningful societal acknowledgement of the abuses that occurred, and educating the public.¹⁴¹ Truth commissions can also be necessary due to the high levels of corruption and incompetence within the security forces and the judiciary in transitional states; they can provide a way to avoid postponing justice until the existing institutions are adequately reformed.¹⁴² Ultimately, truth commissions can play an important role in fostering accountability, preserving evidence, and identifying perpetrators of crimes.¹⁴³

II. IMPLEMENTATION STANDARDS AND STRATEGIES IN POST-CONFLICT SITUATIONS

Every country in a post-conflict situation must grapple with the question of how best to embark upon the journey toward a new society. Still, every transition must be framed by a set of minimum standards in which domestic and international laws are respected. Part II of this Note first explores the ability of each of the aforementioned transitional justice mechanisms to enable a state to meet its human rights obligations in post-conflict situations. It then compares these mechanisms to the current methods employed by the government of Nepal in addressing the abuses that occurred during Nepal's civil war.

A. *Achieving Balance in the Use of Transitional Justice Mechanisms in a Post-conflict Society*

Criminal proceedings, administrative sanctions, and truth commissions serve different functions and thereby make different contributions to restoration in post-conflict societies. This section will look at the benefits and drawbacks of each mechanism in relation to international human rights obligations and at how the three mechanisms can interact together in post-conflict societies.

139. See *id.* at 20 (comparing the relative effectiveness of different truth commissions).

140. See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 484 (2003).

141. *Id.*

142. See Kristin Bohl, *Breaking the Rules of Transitional Justice*, 24 WIS. INT'L L.J. 557, 573 (2006) ("In addition, some scholars explain that truth commissions become necessary in light of the corruption and incompetence of both the police and the judiciary in many transitional states. By circumventing the 'normal investigatory channels,' truth commissions avoid postponing justice until an independent, capable judiciary is established, constitutional reforms are implemented, and political concerns about the power of the past regime are overcome." (quoting Juan Méndez, Book Review, 8 N.Y.L. SCH. J. HUM. RTS. 577, 584 (1991)) (internal quotation marks omitted)).

143. U.N. Secretary-General, *supra* note 28, ¶ 50.

1. Criminal Investigations and Prosecutions

Criminal proceedings offer a number of benefits in a post-conflict society, including reestablishing public confidence in government institutions¹⁴⁴ and the rule of law.¹⁴⁵ History has shown that the investigation and prosecution of a nation's leaders for human rights abuses can benefit countries emerging from conflict. For example, the International Criminal Tribunal for the former Yugoslavia indicted Yugoslavian President Slobodan Milosevic and four other top officials for multiple counts of alleged human rights abuses and war crimes.¹⁴⁶ Conventional wisdom at the time was that an indictment against a top official would serve only to disrupt the peace process by making Milosevic unwilling to contribute to negotiations aimed at ending the armed conflict.¹⁴⁷ Instead, a week later, Milosevic had accepted the terms of an international peace plan for Kosovo.¹⁴⁸ In this example, provisions relating to accountability did not interfere with peace but helped to establish a foundation for emergence from conflict.

Criminal prosecutions do, however, face unique limitations as mechanisms of transitional justice. In post-conflict situations that involve mass conflict, the sheer number of potential criminals to process through the criminal justice system can overwhelm an already fragile judicial system.¹⁴⁹ Thus, in virtually all cases of mass abuse, accountability through criminal prosecutions must be sought selectively.¹⁵⁰ A state seeking to hold responsible those who have violated human rights must use pragmatism to

144. See *supra* notes 108–10 and accompanying text.

145. See *supra* notes 111–13 and accompanying text.

146. See Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, President Milosevic and Four Other Senior Fry Officials Indicted for Murder, Persecution and Deportation in Kosovo, U.N. Press Release JL/PIU/403-E (May 27, 1999), available at <http://www.icty.org/sid/7765>.

147. Marcus Tanner, *War in the Balkans: Milosevic Charge Splits Allies*, INDEPENDENT (May 28, 1999), <http://www.independent.co.uk/news/war-in-the-balkans-milosevic-charge-splits-allies-1096257.html>.

148. *Milosevic Accepts Peace Plan, Finnish Envoy Says*, CNN (June 3, 1999, 9:12 AM), <http://www.cnn.com/WORLD/europe/9906/03/kosovo.peace.04/>.

149. See Peerenboom, *supra* note 39, at 907–08 (“In the wake of regime change in failed and transitional states in particular, the legal system is often weak or non-existent.”); see also Kritz, *supra* note 53, at 35 (arguing that in societies that have witnessed systematic patterns of atrocity that consistently violated human rights, every person in the system is potentially implicated in the crimes committed); Orentlicher, *supra* note 106, at 2596 (arguing that even under a well-established judicial system, prosecuting all those responsible for crimes would be virtually impossible). An example of a country undergoing a difficulty like this one is Rwanda, where insisting that every person who participated in the genocide be prosecuted would have led to putting more than 100,000 Rwandans on trial, which would have been unmanageable and destabilizing in a country whose criminal justice system was decimated. See Kritz, *supra* note 33, at 135.

150. Kritz, *supra* note 33, at 138; Peerenboom, *supra* note 38, at 917 (“[T]he reality is that relatively few people are ever prosecuted either in domestic or international courts for their participation in mass societal violence, war crimes or abuses under authoritarian regimes.”).

temper an absolutist approach to criminal prosecutions, making strategic choices in structuring criminal prosecution systems.¹⁵¹

2. Administrative Sanctions

In certain situations, noncriminal mechanisms may be a better method of pursuing justice for violators of human rights abuses.¹⁵² In most Eastern and Central European countries, lustration was the administrative mechanism used in lieu of criminal prosecutions.¹⁵³ Czechoslovakia was among the first to adopt lustration laws in Eastern Europe.¹⁵⁴ These laws prohibited former Communist officials and secret police collaborators from holding a variety of public positions, including positions in the state administration, the army, the federal police, the judiciary, state-owned businesses, and academic institutions.¹⁵⁵ These laws were inherited by the Czech Republic but not by Slovakia when the two nations split.¹⁵⁶ The resulting difference in the integrity of those in public service was ultimately a factor in the Czech Republic's transition to a liberal democracy as compared to Slovakia's subsequent authoritarian regime.¹⁵⁷

In practice, however, civil and political sanctions have rarely been applied fairly.¹⁵⁸ For one, such procedures may violate the right to the presumption of innocence since public officials may be removed from office prior to undergoing a process through which guilt is determined.¹⁵⁹ As one commentator notes, "It is very important that the trials are not conducted as 'witch hunts,' where the accused are summarily found guilty without any sort of due process rights to answer their accusers."¹⁶⁰ Additionally, the procedural right to have one's case heard fairly and

151. U.N. Secretary-General, *supra* note 28, ¶ 46 (advocating that a state's prosecutorial strategy must be strategic due to the reality that the vast majority of human rights perpetrators will never be tried); Kritz, *supra* note 53, at 35 ("Attempting to prosecute or purge all those implicated would be politically destabilizing, economically devastating and logistically impossible.").

152. See Kritz, *supra* note 33, at 135 ("[I]n most cases of mass abuse, those whose offenses were minimal should probably be handled through a non-criminal mechanism . . .").

153. Nanda, *supra* note 114, at 393.

154. Posner & Vermeule, *supra* note 31, at 802.

155. *Id.* at 806; see also Nanda, *supra* note 114, at 393–94. The lustration laws prohibited certain persons from having access to key positions in the public administration and the judiciary because of the posts they previously held. See Posner & Vermeule, *supra* note 31, at 806.

156. Posner & Vermeule, *supra* note 31, at 807.

157. *Id.*

158. See Kritz, *supra* note 33, at 140.

159. See Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 124 (1994).

160. Adrienne M. Quill, Comment, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 165, 190 (1996); see also Andreu-Guzmán, *supra* note 70, at 449 (arguing that vetting procedures "raise the question of the rights of the persons targeted by such measures, for in the past these measures have repeatedly assumed the dimensions of veritable purges or witch hunts").

publicly by a competent, independent, and impartial tribunal¹⁶¹ may be implicated.¹⁶² Another common concern with vetting processes is that they tend to be conducted on a large-scale basis and thus fail to provide the level of individual due process protections to defendants as would be found in traditional criminal proceedings.¹⁶³ Vetting processes tend to bar entire groups of people from holding public positions, which “smacks of imposing collective guilt.”¹⁶⁴

Some international bodies have implied, however, that administrative sanctions may by themselves be insufficient. Vetting procedures are administrative by nature in that the aim is to prevent further perpetuations of regimes in which human rights violations run rampant.¹⁶⁵ They are not “punitive per se” and thus cannot be seen as a replacement for criminal prosecutions aimed at determining an individual’s criminal liability.¹⁶⁶ In *Bautista de Arellana v. Colombia*,¹⁶⁷ the HRC rejected the notion that disciplinary sanctions and judgments of an administrative tribunal could constitute an effective remedy.¹⁶⁸ Rather, the HRC said that purely disciplinary and administrative remedies were inadequate under the effective remedy provision of Article 2(3) of the ICCPR.¹⁶⁹ Again, the HRC reiterated that state parties are under a duty to thoroughly investigate violations of human rights and to criminally prosecute those found responsible.¹⁷⁰

When used in combination with other transitional mechanisms, vetting and the application of civil or political sanctions can be extremely effective in helping a country transition toward peace. For example, under the Peace Accords in El Salvador, two commissions were appointed—a Truth Commission and an Ad Hoc Commission.¹⁷¹ The Truth Commission was tasked with investigating serious allegations of human rights violations and taking measures necessary to prevent the repetition of such crimes.¹⁷²

161. ICCPR, *supra* note 61, art. 14(1).

162. *See, e.g.*, U.N. Human Rights Comm., Felix Enrique Chira Vargas-Machuca v. Peru, Comment No. 906/2000, ¶ 7.3, U.N. Doc. CCPR/C/75/D/906/2000 (2002), available at <http://www1.umn.edu/humanrts/undocs/906-2000.html> (holding that Article 14(1) guarantees everyone the right to a hearing by an impartial tribunal or court, including the right of access to a civil court).

163. Kritz, *supra* note 33, at 140.

164. *See* Nanda, *supra* note 114, at 397; *see also* U.N. Secretary-General, *supra* note 28, ¶ 52 (noting how vetting processes without due process elements can become wholesale purges involving wide-scale dismissal and disqualification based on party affiliation, political opinion, or association with a prior State institution instead of on individual records).

165. *See* Andreu-Guzmán, *supra* note 70, at 455.

166. *See id.* at 455–56.

167. U.N. Comm’n on Human Rights, Comment No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), available at <http://www1.umn.edu/humanrts/undocs/session55/vws56355.htm>.

168. *Id.* ¶ 10.

169. *Id.*

170. *Id.*

171. *See* Nanda, *supra* note 114, at 392.

172. *Id.*

Alongside the Truth Commission, El Salvador's Ad Hoc Commission was given the task of cleansing the military by making recommendations about the transfer or discharge of military officers based on their past history of human rights abuses.¹⁷³ Ultimately, the Ad Hoc Commission recommended the transfer or discharge of 102 active-duty officers.¹⁷⁴ In addition to cleansing the army, the implementation of the recommendations from the Ad Hoc Commission led to a "greater degree of accountability than many in El Salvador had thought possible."¹⁷⁵ Thus, administrative sanctions have been shown to positively affect a transitional state when used in conjunction with other transitional justice mechanisms.

3. Truth Commissions

Truth commissions, while an important component of transitions, cannot themselves sufficiently provide justice.¹⁷⁶ Truth commissions serve many important functions in post-conflict situations, such as providing a full account of the given conflict and ensuring that victims are fully heard.¹⁷⁷ Still, while it is generally recognized that truth commissions can positively complement criminal tribunals,¹⁷⁸ they are by themselves an incomplete method of establishing the rule of law and addressing past abuses, as they are limited in function.¹⁷⁹

By mandate, truth commissions are investigative, nonjudicial bodies and thus do not have any prosecutorial powers.¹⁸⁰ They cannot determine culpability, punish perpetrators, or have their recommendations enforced.¹⁸¹ Thus, the idea that truth commissions and criminal trials are mutually exclusive is a misperception, and a common one at that.¹⁸² Rather, it is through the judicial system's criminal justice mechanisms that the need for

173. *See id.* at 393.

174. *Id.*

175. Kritz, *supra* note 33, at 140.

176. *Id.* at 141 (arguing that truth commissions cannot substitute for prosecutions); *see also* Bohl, *supra* note 142, at 573 ("[T]ruth commissions suffice only as complements, not replacements, for prosecutions.").

177. *See* Amnesty Int'l, *Truth, Justice and Reparation: Establishing an Effective Truth Commission* 1, AI Index POL 30/009/2007 (June 11, 2007), available at <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/77ee33de-d38a-11dd-a329-2f46302a8cc6/pol300092007en.pdf> (showing how truth commissions "can play an important role in providing a full account of past human rights violations, contributing to their investigation and eventual prosecution, preventing their repetition, and ensuring that victims and their relatives are provided with full reparation").

178. *See* U.N. Secretary-General, *supra* note 28, ¶ 26.

179. *See* Bohl, *supra* note 142, at 575 ("The positive by-products of their efforts are undeniable, but any government seeking to facilitate a just transition must view truth commissions merely as predecessors or complements to prosecutions, not as replacements.").

180. *See Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 1.

181. *Id.* at 11.

182. Kritz, *supra* note 33, at 143.

accountability, deterrence, and guarantees of nonrepetition is more adequately met.¹⁸³

It is the practice of many truth commissions to hold themselves out as favorable toward prosecutions for violations of international law.¹⁸⁴ Many truth commissions recommend that the evidence gathered through their proceedings be handed over to the prosecuting authorities to be used in further judicial investigations and potential criminal prosecutions for the events documented.¹⁸⁵ For example, the vast amounts of information produced by the Argentinean truth commission were used to prosecute members of the military junta implicated in human rights abuses.¹⁸⁶ Additionally, in Peru, a special investigation unit was created to investigate cases of human rights violations in which there was information of clear individual responsibility and the evidence gathered was submitted to the prosecutor's office for potential prosecution.¹⁸⁷ Similarly, in Chile, a truth commission was able to establish individual responsibility in a number of cases and the list of alleged perpetrators was then submitted to the Chilean President to further the cases against those individuals.¹⁸⁸ These examples serve to affirm the importance of justice as an objective in its own right—one that cannot easily be supplanted by the existence of a truth commission. Truth commissions, then, must remain part of a comprehensive transitional justice strategy.¹⁸⁹

B. Transitional Justice Mechanisms at Play in Nepal

During Nepal's ten-year conflict, thousands of people died at the hands of both the state government and the Maoist army.¹⁹⁰ This section examines the methods utilized by the Nepali government in addressing Nepal's history of human rights abuses. It begins by looking at the status of criminal investigations and prosecutions in the country. It then looks at the government's use of amnesties, pardons, and withdrawals in dealing with human rights violators. Finally, this section examines Nepal's Truth and Reconciliation Commission.

183. Bidhya Chapagain, *Withdrawal of Criminal Charges: Mockery of National Framework and International Commitments*, 31 *INFORMAL* 27, 31 (2011).

184. Amnesty Int'l, *Commissioning Justice: Truth Commissions and Criminal Justice* 16, AI Index POL 30/004/201 (Apr. 2010), available at <http://www.amnesty.org/en/library/asset/POL30/004/2010/en/1f74d7de-f82d-4942-8b3a-a5f8f7858d77/pol300042010en.pdf> [hereinafter *Commissioning Justice*].

185. *Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 11.

186. *Commissioning Justice*, *supra* note 184, at 17.

187. *Id.*

188. *Id.*

189. See *Rule-of-Law Tools: Truth Commissions*, *supra* note 129, at 5 (stating as a general principle that truth commissions should be coupled with other initiatives such as prosecutions, reparations, vetting, and other accountability or reform programs).

190. See *supra* notes 19–21 and accompanying text.

1. Status of Criminal Investigations and Prosecutions

Nepal's Supreme Court has acknowledged the duty to thoroughly investigate alleged abuses. For example, in the December 14, 2009, judgment in the cases of murder victims Reena Rasaili and Subadhra Chaulagain, the court explicitly held that the State had a responsibility to investigate and prosecute cases involving human rights violations.¹⁹¹ In its decision, the court stated that “[a]n act declared a crime by the law is a crime . . . no matter who the perpetrator is or what the circumstances are.”¹⁹² It emphasized that nothing should prevent the investigation into the alleged abuses because noninvestigation would make a “mockery of the law and the natural rights of civilians.”¹⁹³ The court urged police to become “serious, proactive, and alert” in taking the necessary steps for proper investigation, as they had continuously shown indifference to fulfilling their duty to investigate.¹⁹⁴

As a practical matter, however, investigations into complaints have often been stalled or conducted haphazardly. In the case of *Yasoda Sharma v. Nepal*,¹⁹⁵ the enforced disappearance of Surya Prasad Sharma has not been investigated despite holdings from the HRC that Nepal has an obligation to conduct thorough investigations into alleged violations and to prosecute those held responsible.¹⁹⁶ Similarly, the police have delayed their investigation into the alleged murder of Arjun Lama and the possible involvement of Minister Agni Sapkota's in the murder.¹⁹⁷

This failure to adequately investigate affects Nepal's ability to bring criminal prosecutions against those responsible for human rights violations. Article 135(2) of Nepal's Interim Constitution gives public prosecutors the final say about whether to initiate a prosecution through court proceedings based on the information gathered from investigations.¹⁹⁸ Additionally, section 6 of the State Cases Act states that public prosecutors “shall give necessary direction to the investigating police officer” to ensure that thorough investigations into filed complaints are taking place.¹⁹⁹ It often

191. Advocacy Forum & Human Rights Watch, *Indifference to Duty: Impunity for Crimes Committed in Nepal*, HUMAN RIGHTS WATCH, 7 (2010), <http://www.hrw.org/sites/default/files/reports/nepal1210webwcover.pdf>.

192. *Id.* at 6.

193. *Id.*

194. *Id.* at 7.

195. U.N. Human Rights Comm., Comment No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006 (2008).

196. *Id.*

197. *Sushil Pyakurel v. Prime Minister Jhalanath Khanal*, WN 1094 2068 (2011), 2–3 (Nepal) (translation provided by Advocacy Forum) (expressing the Court's disapproval at the unreasonable delay in investigation by the police and stating that Sapkota had a moral and legal responsibility to cooperate with the police investigation).

198. NEPAL INTERIM CONST. art. 135.

199. *Waiting for Justice*, *supra* note 16, at 34 (citing State Cases Act 2049, § 6 (1991) (Nepal)).

happens that, after investigations are completed, public prosecutors will decide not to proceed with a prosecution due to a lack of evidence.²⁰⁰

One concern raised among human rights actors has been the existence of situations where the structure of prosecutorial powers has allowed public prosecutors to collude with police officers to ensure certain cases did not proceed. In the case of Sahid Ullah Dewan, the local police initially refused to register the complaint, instead claiming that the victim was killed in crossfire and was not murdered.²⁰¹ The appellate court issued a writ of mandamus, ordering the police to file the report and start investigations into the situation.²⁰² However, the district Public Prosecutor's Office (PPO) failed to file the court proceedings.²⁰³ When the court decision was communicated to the PPO at the appellate court, the appellate PPO directed the district PPO to file the court proceedings and aid the investigation.²⁰⁴ Instead, the district PPO continued to seek approval of the decision not to initiate investigations.²⁰⁵ Examples like this one, of slow and often nonexistent criminal proceedings against perpetrators of human rights abuses, remain part of Nepal's transitional justice landscape.

2. Amnesties, Pardons, and Withdrawals

Another method that Nepal has implemented in its transitional justice pursuits is that of amnesties, pardons, and withdrawals. Amnesties are legal measures having the effect of "(a) [p]rospectively 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) [r]etroactively nullifying legal liability previously established."²⁰⁶ Although the method of implementing amnesties has varied from state to state, they have been widely used by states during transitional periods.²⁰⁷ Similarly, pardons are official

200. For example, in Annual Report 2066/67 of the Attorney General, it was stated that public prosecutors had declined to initiate prosecutions in 1,795 out of 9,682 cases because they believed there was a lack of evidence. *Evading Accountability by Hook or by Crook: The Issue of Amnesties in Post-conflict Nepal*, ADVOCACY FORUM, 9 (June 2011), <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

201. See Advocacy Forum & Human Rights Watch, *Adding Insult to Injury: Continued Impunity for Wartime Abuses*, PEACE BRIGADES INT'L, 23 (Dec. 2011), http://www.peacebrigades.ch/fileadmin/user_upload/documents/publikationen_pbi_international/adding-insult-to-injury-nov-30-2011-english-version.pdf.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 23–24.

206. Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-conflict States: Amnesties*, 5, U.N. Doc. HR/PUB/09/1 (2009) [hereinafter *Rule-of-Law Tools: Amnesties*].

207. See Peerenboom, *supra* note 38, at 916 (noting that virtually every transition in the last several decades has involved some form of amnesty); see also Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 174 (2002).

government acts that exempt an already convicted criminal or criminals from serving the prescribed sentence, in whole or in part.²⁰⁸

For some regimes, amnesties are seen as a necessary step in stopping a conflict or in securing and maintaining a transition toward a democratic government.²⁰⁹ Amnesties may be considered the price that must be paid to rid the country of conflict and war.²¹⁰ During the armed conflict in Nepal, it was common for the government to induce Maoists to surrender by offering to withdraw any charges pending against them.²¹¹ In addition, in July 1998 the government of Nepal announced a general amnesty for members of the Maoist party who surrendered and agreed to give up arms.²¹²

Nepal also allows for pardons through Article 151 of its Interim Constitution, which allows the government to “grant pardons [to persons convicted], and to suspend, commute or remit any sentence passed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.”²¹³ In the case of Mukeshwor Das Kathwania against Constituent Assembly member Bal Krishna Dhungel, Maoists used Article 151 to attempt to secure a formal pardon for Dhungel after he had been tried and sentenced to life.²¹⁴ The Supreme Court of Nepal held in an interim order that pardons should only be allowed in the “rarest of rare cases” and should never be exercised as common practice.²¹⁵ Despite the court upholding the conviction, Dhungel continues to be an active member of the Constituent Assembly and has yet to be arrested.²¹⁶ Media reports also show that a senior Home Ministry official was transferred after he refused to process the necessary paperwork to initiate a pardon for Dhungel.²¹⁷

An additional and related mechanism operating in Nepal is the withdrawal of cases against individuals. In Nepal, the procedure for withdrawing cases is governed by section 29 of the State Cases Act, which states that cases of a political nature can be withdrawn on the basis of (a) a deed of reconciliation between the parties involved; or (b) a court agreeing to the government proposal.²¹⁸ The 1998 Procedures and Norms to be Adopted While Withdrawing Government Cases states that this category of

208. *Rule-of-Law Tools: Amnesties*, *supra* note 206, at 5.

209. Robinson, *supra* note 140, at 495.

210. *Id.*

211. See ADVOCACY FORUM, *supra* note 200, at 2.

212. *Id.* at 2 n.10.

213. NEPAL INTERIM CONST. art. 151.

214. See Advocacy Forum & Human Rights Watch, *supra* note 201, at 26.

215. ADVOCACY FORUM, *supra* note 200, at 8.

216. See *Plea to Ban Dhungel from Entering CA Hall*, KATHMANDU POST (Nov. 5, 2010), <http://www.ekantipur.com/the-kathmandu-post/2010/11/04/nation/plea-to-ban-dhungel-from-entering-ca-hall/214532/>.

217. Anil Giri, *Impunity watch: Cases Against Maoists Being Fast Withdrawn*, KATHMANDU POST (May 18, 2011), <http://www.ekantipur.com/2011/05/18/top-story/impunity-watch-cases-against-maoists-being-fast-withdrawn/334165.html>.

218. See ADVOCACY FORUM, *supra* note 200, at 15.

offenses “shall only be withdrawn in the rarest of instances.”²¹⁹ Yet, case withdrawal has been one of the chief methods of evading accountability for crimes committed during the conflict.²²⁰ A substantial number of cases filed in the district courts across Nepal have been withdrawn by executive order in an effort to further the peace process.²²¹

In *Nepal v. Gagan Raya Yadav*, involving case withdrawals, the Supreme Court of Nepal articulated that case withdrawals were not permissible.²²² The court held that an inherent understanding behind the case withdrawal provision was that it would be used with good intention and does not stand as an absolute right.²²³ In 2011, the court reversed its position and broadened the standard for what could be considered a political crime by holding that a crime committed during the conflict period is *prima facie* political in nature, and thus was appropriate for case withdrawal.²²⁴

3. Establishment of a Truth Commission

The Comprehensive Peace Accord signed in 2006 obliged the government to set up the TRC to investigate the truth about those who have seriously violated human rights.²²⁵ The Interim Constitution further affirms the establishment of a high-level TRC charged to “investigate the facts” in order to “create an atmosphere of reconciliation.”²²⁶ In addition, the Interim Constitution provides for an investigation commission to be set for investigating disappearances that occurred during the ten-year conflict.²²⁷

The draft bills of the transitional justice mechanisms indicate that both the TRC and the Commission on Disappearances are given broad powers to investigate and establish the truth behind the conflict and disappearances.²²⁸ Yet, neither draft bill provides the commissions with prosecutorial powers, nor is there any indication that these transitional justice mechanisms

219. *Id.* at 3.

220. See Advocacy Forum & Human Rights Watch, *supra* note 201, at 25 (“Successive governments have so far withdrawn more than 600 wartime criminal cases (including murder and rape), citing authority from the Comprehensive Peace Agreement (CPA), section 29 of the State Cases Act, 1992, and the August 1998, Procedures and Norms to be Adopted While Withdrawing Government Cases.”).

221. See ADVOCACY FORUM, *supra* note 200, at 5 (discussing Chief Secretary Bhojraj Bhimire’s authorization of a blanket withdrawal of 349 cases by the Maoist-led government in 2008 and noting the step as an action to “steer the peace process forward and to implement the clause 5.2.7 of the Comprehensive Peace Agreement”).

222. BINOD BHATTARAI, *IMPUNITY IN NEPAL* 90–92 (2010).

223. *Id.* at 92 (noting that “it would not be fitting . . . to allow withdrawal of any type of case to be withdrawn anytime”).

224. See Chapagain, *supra* note 183, at 30.

225. See CPA, *supra* note 25, ¶ 5.2.5.

226. NEPAL INTERIM CONST. art. 33(s).

227. *Id.* art. 33(q).

228. Truth and Reconciliation Act 2066, art. 15 (2009) (Nepal) (Draft Bill) (translation provided by Int’l Ctr. for Transitional Justice); Act of Disappearing a Person (Crime and Punishment) Act 2066, art. 16 (2009) (Nepal) (Draft Bill) (translation provided by Int’l Ctr. for Transitional Justice).

override the already established criminal justice mechanisms.²²⁹ Rather, they provide that each commission should submit to Nepal's Attorney General the necessary information for criminal prosecutions.²³⁰

Despite multiple drafts of the Commission's bills, neither the TRC nor the Commission on Disappearances has been formed in Nepal. Nepal's Supreme Court has publicly stated that the failure to form a truth and reconciliation commission given the obligation of the State to do so under Article 33(n) of the Interim Constitution and section 5.2.5 of the CPA is a "sad aspect."²³¹

III. NEPAL'S (IN)ACTIONS IN FULFILLING ITS OBLIGATION TO ENSURE ACCOUNTABILITY

One of the central questions of this Note is how a transitioning state should address allegations of human rights abuses submitted against public officials in positions of influence and power. The transitional justice context poses unique challenges—a transitioning state not only has to deal with a record of past human rights violations, but is also looking forward and attempting to secure peace, enhance democracy, and develop.²³² Transitioning states must also address many unique problems including, among other things, the people's wariness of political regimes, a lack of political will, and an overwhelming number of problems to address and solve.²³³ Despite these difficulties, the transitional justice context does not change the legal obligations of a state.²³⁴

Part III of this Note examines how Nepal's actions in response to the abuses committed during its civil war have been inadequate, especially in light of the transitional justice mechanisms employed by other countries in post-conflict situations. Part III begins by looking at Nepal's reliance on the use of amnesties and then turns to look at its reliance on the pending creation of a truth commission. Ultimately, the two together have led to years of virtual inaction by the Nepali government, which flies in the face of its international human rights obligations.

A. Nepal's Reliance on Amnesties As a Violation of International Law

There is a growing consensus in international law that sweeping amnesties for serious violations of human rights are illegal, regardless of

229. See generally Truth and Reconciliation Act 2066; Act of Disappearing a Person (Crime and Punishment) Act 2066.

230. Truth and Reconciliation Act 2066, art. 24; Act of Disappearing a Person (Crime and Punishment) Act 2066, art. 25.

231. See *Sushil Pyakurel v. Prime Minister Jhalanath Khanal*, WN 1094 2068 (2011), 4 (Nepal) (translation provided by Advocacy Forum).

232. See *supra* Part I.B.1.

233. See *supra* Part I.B.2.

234. See generally *supra* Part I.C.

whether they are given in exchange for a confession or apology.²³⁵ This is especially true for amnesties that “prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, gross violations of human rights, or serious violations of international humanitarian law.”²³⁶

Amnesties violate victims’ fundamental rights under international law.²³⁷ It has been well established that victims have a fundamental right to an effective remedy, which imposes a duty on states to thoroughly investigate and prosecute perpetrators of human rights abuses.²³⁸ Amnesties, by their very nature, deny victims the right to have the perpetrators of abuse brought to justice.

Additionally, amnesties have been shown to impede the desired objective of peace in post-conflict societies.²³⁹ Peace conditioned on impunity for serious crimes in violation of human rights is not sustainable.²⁴⁰ In Sierra Leone, for example, the existence of three blanket amnesty provisions hindered the peace process and indeed failed to solidify peace during the eleven-year civil war.²⁴¹ Under the belief that amnesty was necessary for a ceasefire, a provision providing amnesty to all combatants who had committed human rights abuses during the conflict was included in the 1999 Lome Peace Accord.²⁴² Rather than secure peace, the amnesty provisions created an expectation that later agreements would contain similar provisions, thus further emboldening human rights abusers.²⁴³ What followed after each peace agreement was an increase in violations of

235. See Kritz, *supra* note 33, at 134 (“There is a growing consensus in international law that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.”); see also Slye, *supra* note 207, at 175 (“[A] consensus has emerged in the last fifty years that certain acts by official actors are no longer beyond the reach of legal accountability.”).

236. *Report of the High Commissioner*, *supra* note 86, ¶ 52; see also E.S.C. Res. 1989/65, *supra* note 78, ¶ 19 (“In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.”).

237. See Kritz, *supra* note 33, at 129 (describing total impunity in the form of amnesties as “immoral, injurious to victims, and in violation of international legal norms”).

238. See *supra* Part I.C.3.

239. See Nanda, *supra* note 114, at 389 (“[A]s a matter of policy, there must be accountability and no political tradeoffs which result in the sacrifice of justice at the altar of perceived but illusory peace, for the dichotomy is false, as justice is a prerequisite for obtaining a peace that is to endure.”); Robinson, *supra* note 140, at 496 (“[R]ecent experience has tended to contradict the supposedly ‘pragmatic’ view that prosecution is destabilizing and that amnesties are necessary for peace, as indeed the very opposite propositions have been recently borne out.”).

240. Kritz, *supra* note 33, at 128 (“Legal or political protection from prosecution following the commission of mass crimes only gives confidence to those who would contemplate perpetrating them.”).

241. See Robinson, *supra* note 140, at 496.

242. Peace Agreement, Sierra Leone-Revolutionary United Front of Sierra Leone, art. 9, July 7, 1999, available at http://www.usip.org/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf; see also Robinson, *supra* note 140, at 496.

243. Robinson, *supra* note 140, at 496 (“[I]nstead this merely reinforced a culture of impunity in which brutal acts of mutilation and lawlessness continued.”).

human rights and the progressively numerous and severe instances of rape, torture, and summary executions instead of the peace that was hoped for.²⁴⁴ After the rise in atrocities, the policy was reversed in favor of the prosecution and punishment of those involved in international crimes.²⁴⁵ This policy was solidified in the Statute of the Special Court of Sierra Leone, which stated that prior amnesty provisions would not bar the prosecution of those implicated in human rights abuses.²⁴⁶

As in the case of Sierra Leone, justice may require setting aside previously agreed upon amnesty laws entered into as a condition for ending conflict.²⁴⁷ This may very well be the case in Nepal, where numerous members of Nepal's Army and individuals within the Maoist ranks who were responsible for abuses during the conflict period continue to evade accountability, thus pointing toward limited political commitment to serious accountability processes that would challenge the current culture of impunity.²⁴⁸ Without a threat of action against human rights abusers, Nepal will be unable to sufficiently transition into a state premised on the rule of law.

B. Nepal's Reliance on Truth Commissions As a Violation of Domestic and International Law

One of the primary arguments put forward by authorities in Nepal against prosecutions of human rights violators is that the crimes committed during the conflict should be addressed by transitional justice mechanisms, including the proposed TRC and Commission on Disappearances, neither of which has been formed.²⁴⁹ The transitional justice mechanisms of truth commissions in their varied forms have an important role in assisting a country to move from a conflict-ridden society to a more democratic society.²⁵⁰ However, the assertion that crimes committed during the

244. *Selling Justice Short: Why Accountability Matters for Peace*, HUMAN RIGHTS WATCH, 57–61 (July 2009), http://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf.

245. U.N. Secretary-General, *The Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General*, U.N. Doc. S/2000/915 (Oct. 4, 2000), available at <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx>.

246. *Statute of the Special Court for Sierra Leone*, S.C. Res. 1315, art. 10, U.N. Doc. S/2002/246, app. II Attachment (Jan. 16, 2002) (stating that any amnesties that were granted “shall not be a bar to prosecution”).

247. Peerenboom, *supra* note 38, at 914 (“Holding former leaders accountable may require setting aside laws that legitimated their actions and ignoring amnesty agreements entered into as a condition for relinquishing power.”).

248. See Farasat & Hayner, *supra* note 9, at 15 (noting how “discussions of accountability were supplanted by lengthy negotiations on political issues” and that there was a tacit agreement among parties that conflict-related human rights abuses would be granted blanket amnesty).

249. See, e.g., Advocacy Forum & Human Rights Watch, *supra* note 201, at 12 (showing defendant arguing that his case fell under the jurisdiction of the TRC, thus precluding the application of existing laws).

250. See *supra* Part I.D.3.

conflict can or should be addressed solely by such mechanisms has no basis in Nepali or international law.

Nepal's national legal and policy framework support the contention that criminal justice mechanisms must be pursued independent of the efforts of both the TRC and Commission on Disappearances. Even within the language contained in the CPA and Interim Constitution obliging the Nepali government to set up the TRC, there is no mention of the TRC having exclusive powers to deal with international crimes and serious violations of human rights.²⁵¹ Nor does the language suggest that regular judicial mechanisms be suppressed.²⁵² Rather, when read in conjunction with Clause 7.1.3 of the CPA, which affirms the commitment of the parties to ensuring that impunity is combated and the rights of victim are protected, it is clear that the criminal justice system is meant to function in parallel with the establishment of the TRC.²⁵³ Additionally, Article 100 of the Interim Constitution reaffirms that the "[p]owers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, the laws and the recognized principles of justice."²⁵⁴ Nepal's Supreme Court jurisprudence further indicates that the transitional justice system does not supersede criminal justice mechanisms. Rather, the court has held that the regular justice system gains increasing momentum and importance in situations where the transitional justice system has not yet been established.²⁵⁵ The court stressed that the "law and justice system is never inactive in a democratic country; law is never vacant."²⁵⁶

One of the greatest advantages of a truth commission is that it can begin its functions relatively quickly, as compared to the processes within the criminal justice system.²⁵⁷ But, a delay in a commission's tasks will quickly deplete this benefit and instead lead to a loss of confidence and interests in the commission's potential to bring accountability and change.²⁵⁸ In light of the State's inability to create either the TRC or the Disappearances Commission, the Supreme Court of Nepal in June 2007 issued a decision on a case involving enforced disappearances that stressed the urgency of investigating and prosecuting such offenses, as required by

251. *See supra* notes 225–30 and accompanying text.

252. *See supra* notes 225–30 and accompanying text.

253. *See Report of the High Commissioner, supra* note 86, ¶ 5.

254. NEPAL INTERIM CONST. art. 100.

255. *Sushil Pyakurel v. Prime Minister Jhulanath Khanal*, WN 1094 2068 (2011), at 4–5 (Nepal) (translation provided by Advocacy Forum).

256. *Id.* at 4.

257. Kritz, *supra* note 33, at 141–42 (describing how truth commissions can be organized and start functioning quickly, thus standing as a way to "buy time" and relieve immediate pressure to take action against those who committed human rights abuses while the criminal justice gets organized).

258. *See Bohl, supra* note 142, at 573 ("[A]voiding delays does compromise the resulting quality of justice."); Kritz, *supra* note 33, at 142 (describing how in Uganda the Commission's effectiveness was reduced in inverse relation to its longevity).

constitutional and international law.²⁵⁹ It stated that “the legal investigation, prosecution and remedies to be implemented with respect to a remedial mechanism involving fundamental rights cannot be a matter of secondary priority and in addition, are not outside the jurisdiction of this Court.”²⁶⁰ Thus, the rights of victims to an effective remedy must be protected through effective mechanisms.

C. Inaction is Not Action

Combating impunity in a post-conflict society hoping to emerge from its past by establishing the rule of law can only be done by holding perpetrators accountable and thereby showing that consequences will swiftly follow those who choose to commit human rights violations.²⁶¹ Through the use of administrative sanctions or criminal prosecutions, the new government will be able to show its commitment to combat impunity, which will not only deter future crimes from being committed but also promote public confidence in the new regimes. Accountability processes are an essential component of longer term peace building and failure to pursue civil or criminal actions against perpetrators of human rights only serves to undermine the legitimacy of new governments.²⁶²

Justice will inevitably be imperfect in the transitional context.²⁶³ Despite the problems associated with the pursuit of justice, newly democratic states must continue the pursuit in order to establish a society reflecting a firmly established rule of law.²⁶⁴ The multitude of challenges faced in post-conflict environments necessitates an approach that balances various goals, including the pursuit of accountability, the need for truth, the preservation of peace, and the building of democracy.²⁶⁵ Successful transitional justice programs will likely necessitate the use of various mechanisms to meet all the goals of transitional justice.

The use of various mechanisms in conjunction with one another ensures that all gaps in the justice spectrum are filled. A comprehensive program will ensure that every victim will receive some justice and ensure that all of

259. *Rajendra Dhakal v. Government of Nepal Ministry of Home Affairs*, NKP 3575 (2007), 25 (Nepal) (translation provided by Advocacy Forum) (“The State has the responsibility to address the incidents and realities of the degrading situation of human rights and violation of humanitarian law during the time of conflict in a serious and responsible manner for the purpose of promoting the peaceful transformation of the conflict.”).

260. *Id.*

261. Marco Fanara, *Prosecution or Impunity? Is there an Alternative?*, PEACE & CONFLICT MONITOR (May 13, 2011), http://www.monitor.upeace.org/printer.cfm?id_article=799.

262. U.N. Secretary-General, *supra* note 28, ¶ 2.

263. See Kritiz, *supra* note 53, at 30–32 (commenting that “imperfect justice” in transitional contexts is nearly inevitable because such transitional criminal justice systems tend to be dysfunctional).

264. See Kamali, *supra* note 30, at 92 (arguing that even if the mechanisms employed by a state in its pursuit of justice are employed imperfectly, they are necessary in sustaining the new democratic order).

265. U.N. Secretary-General, *supra* note 28, ¶ 25.

society will benefit. For example, criminal prosecutions through court systems can help to determine individual culpability and to punish individuals accordingly.²⁶⁶ Meanwhile, a vetting process can aim at reforming institutions through linking the past conduct of individuals to institutions.²⁶⁷ And finally, a truth commission provides an accounting of the social dynamics behind the conflict and builds a collective memory of the nation's conflict.²⁶⁸ With the different types of information and different methods of action, a holistic approach toward justice can be implemented and can help pave the way for a holistic peace.

Nepal's current approach of inaction is not only unsound as a legal matter but is also unlikely to sustain peace and democracy. Impunity is the current standard of reality in Nepal. The legacy of enduring impunity for past crimes could have long-lasting negative repercussions on Nepal's ability to develop and maintain the rule of law. As Jyoti Sanghera, the chief of HRC for Nepal, said, "Lack of accountability in cases of alleged human rights violations not only sends a message that there are no consequences for the perpetrators of such violations, but further adds to the suffering of the victims and their families who have been awaiting justice for many years."²⁶⁹

CONCLUSION

Nepal is at a tipping point—its decisions during this transition period will set a tone for its development as a country and the possibility of a peaceful, democratic future. There are a wide range of transitional justice mechanisms within Nepal's reach. Regardless of the combination of mechanisms that Nepal chooses to implement, one lesson that cannot be ignored is that inaction during such a critical period will only prove detrimental. Nepal must act. Creating a "new Nepal" will require much more than political statements and formal agreements; it will require serious political commitment to the principle of the rule of law and challenging the culture of impunity.

266. See *supra* notes 111–13 and accompanying text.

267. See *supra* notes 116–18 and accompanying text.

268. See *supra* notes 130–32 and accompanying text.

269. *Nepal: UN Rights Office Deplores Appointment of Man Suspected of Serious Crime*, UN NEWS CENTRE (May 5, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38284&Cr=nepal&Cr1#.UE6EsLJmQWk>.