Authority without accountability: The struggle for justice in Nepal

Executive summary
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Executive Summary
'In the decade-long conflict, at least 17,000 people were killed and over 1,300 subjected to enforced disappearance. There has yet to be a single prosecution or conviction for these crimes.'
EXECUTIVE SUMMARY

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

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

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

Perversely, high-level suspected perpetrators have even been promoted, rewarded with lucrative postings within the United Nations, and in the worst cases allowed to hold high office, including in Nepal’s Legislature and Cabinet. One of the most striking examples is the abduction and unlawful killing of Arjun Bahadur Lama, in which UCPN-M Central Committee member Agni Sapkota is credibly alleged to be involved and responsible. Despite a March 2008 Supreme Court order directing the police to register a murder case against Agni Sapkota, among others, and to carry out full investigations, no proper investigation of the allegations against Sapkota have taken place. Instead he was appointed Minister for Information and Communication in May 2011. This appointment was challenged at the Supreme
Court, which questioned the propriety of Agni Sapkota serving in government, but did not suspend him from public office. Even though Agni Sapkota lost his ministerial position in a cabinet reshuffle in August 2011, he remained an active member of the Constituent Assembly/Legislature-Parliament until it dissolved in May 2012. To date, Agni Sapkota continues to be Spokesperson for the UCPN-M, and has never been questioned, let alone charged despite serious allegations of his involvement in the abduction, enforced disappearance and murder of Arjun Bahadur Lama.

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

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

This ongoing and widespread failure to provide justice and accountability has posed a serious obstacle to the creation of a stable and legitimate government in Nepal since the end of the civil war. The lingering instability reconfirms the accumulated experience from around the world that a climate of impunity undermines efforts to re-establish respect for human rights and the rule of law. It is for this reason that international law demands that States must effectively investigate and hold criminally accountable those found guilty of gross human rights violations. The right of victims to a remedy and reparation is a well-established principle of international law, contained in international human rights treaties and other international standards. It is not only a right in itself; it is the mechanism by which all other rights are realized.
Relevant international legal instruments cited in this report

- Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights (ICCPR) and its First and Second Optional Protocols
- The International Covenant on Economic, Social and Cultural Rights
- The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol
- Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflicts
- Declaration on the Protection of All Persons from Enforced Disappearance
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
- Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

**The complex web of impunity**

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

**De Jure immunity**

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

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

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

The basis of legal impunity in Nepal (as in most other countries)
was the position of the monarch. Nepal’s first Constitution vested
all executive power in the King and granted him absolute immunity
for any decision made or any action undertaken. With the end
of the monarchy, the Interim Constitution of 2007 granted
senior members of the Government (including the President) a
significantly limited degree of immunity, to a much lesser extent
than under previous constitutions. While under the Constitution
the process and procedures of the Government’s business cannot
be challenged before a court of law, the immunity arguably does
not extend to substantive areas – though this has so far not
been tested in a court of law. But in practice, ministers and other
senior government officials continue to evade accountability
despite police complaints (First Information Reports, FIRs) being
filed against them for allegations of serious crimes.

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

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

Dekendra Thapa

On 26 June 2004, radio journalist
Dekendra Thapa was abducted by
Maoists supporters. Dekendra Thapa
was subjected to torture and then
allegedly buried alive on 11 August
Thapa’s wife filed a first information
report with the Dailekh police. The
police refused to investigate. After
four years, a writ of mandamus was
issued ordering the police to act. On
4 January 2013, five suspects were
arrested. Shortly thereafter, the
Attorney General under pressure
from the Maoist government, issued
a letter to halt the investigation.
The Supreme Court intervened and
ordered the police to disregard the
Attorney General’s letter and continue
the investigation. No further arrests
have been made and the investigation
was ongoing at the time of publication
of this report.
Particularly grave is the problem of the immunity granted to the Nepali military, considering its involvement in the country’s long civil war as well as the army’s role in maintaining political control. Legal efforts following the conflict and the overthrow of the monarchy have not created more accountable internal structures for ensuring discipline. Despite repeated efforts to extend accountability to the Nepal Army, the military remains outside effective civilian jurisdiction. The Army Act, 2063 (2006) allows for soldiers accused of homicide and rape to be tried by civilian courts, but at the same time provides for immunity for these offences if committed by personnel on duty, stating that acts ‘shall not be deemed to be an offence committed in the course of discharging duties in good faith.’ A June 2011 Supreme Court order for the Government to form a task force to review the new Army Act and to provide recommendations on reforming the military justice system to ensure its compliance with Nepal’s human rights obligations has not been acted on.

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

**De facto immunity**

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

The first obstacle to accountability in Nepal has been the lack of progress in complaints filed by relatives of those alleged to have

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**Arjun Bahadur Lama**

Arjun Bahadur Lama was abducted and killed in April 2005. Purnimaya Lama, Arjun’s wife, filed a police complaint naming Agni Sapkota, a Unified Communist Party of Nepal-Maoist (UCPN-M) Central Committee member as one of the accused. The Police refused to register the complaint. Purnimaya Lama filed a petition before the Supreme Court in July 2007. The Supreme Court ordered the Kavre police to register a murder case against five Maoist insurgents, including Agni Sapkota. In May 2011, Agni Sapkota was appointed Cabinet Minister. In July 2012, the Government put the Arjun Bahadur Lama murder investigation on hold.
been unlawfully killed or subjected to enforced disappearance during the conflict. Soon after the end of the conflict, relatives of victims filed FIRs identifying members of the security forces and armed insurgent groups as responsible for crimes. A recent report by the United Nations Office for the High Commissioner for Human Rights, documenting serious violations of international law during the conflict, cited approximately 2,500 cases of alleged torture and ill-treatment, 2,000 incidents of alleged unlawful killings and over 600 cases of enforced disappearance during the conflict. So far, however, criminal charges have only been filed in three cases:

(1) Maina Sunuwar, a 15-year old who was subjected to torture and subsequently died in army custody in February 2004;

(2) Reena Rasaili, an 18-year-old who was killed in February 2004; and

(3) Dekendra Thapa, a journalist, who was beaten almost to death and buried alive by a group of Maoist cadres in August 2004.

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

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

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

Maina Sunuwar

In the early morning on 17 February 2004, Nepal Army soldiers came looking for Devi Sunuwar. The soldiers took 15-year old Maina Sunuwar instead. The 15-year old girl was subjected to torture, which included simulated drowning and electrocution. Maina Sunuwar died as a result of her injuries. On 8 September 2005, three military officers were convicted in a court martial for wrongful interrogation and improper disposal of a body. A fourth military officer, Niranjan Basnet, was never arrested or prosecuted. Instead, Basnet was promoted to the rank of Major and then selected to serve as a UN peacekeeper in Chad.
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Withdrawal of cases

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

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

Under a strict reading of this clause, within the context of the CPA, withdrawal of cases could only extend to cases brought during the course of the conflict and up to-and not after-the signing of the CPA against members of the CPN-M and initiated against them for political reasons. Several governments, however, have since widened the application of Clause 5.2.7, enabling the withdrawal of ordinary criminal cases which occurred during and after the signing of the CPA as part of political bargaining.

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

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

Misuse of political pardons

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

Kuber Singh Rana

Kuber Singh Rana is allegedly involved in the enforced disappearance and extrajudicial killing of five students in October 2003. The Supreme Court of Nepal directed police to investigate Kuber Singh Rana on 3 February 2009. While being investigated, Kuber Singh Rana was promoted to Inspector General of Police, the most senior police post in the country, on 13 September 2012.
But Nepal’s Supreme Court has repeatedly affirmed that a pardon can only be exercised in exceptional cases, and that it cannot be invoked for cases still pending before the courts. As explained in detail below, the Supreme Court’s jurisprudence covers the Royal Pardon under the 1990 Constitution as well as the President’s power to pardon under the 2007 Interim Constitution.

**Reena Rasaili**

On 12 February 2004, ten security personnel broke into the family home of Reena Rasaili and took her from her bed. The security personnel allegedly gang-raped 18-year old Reena Rasaili for several hours before killing her. A first information report was registered on 25 May 2006 but no subsequent investigation was initiated. Despite the Supreme Court ordering the District Police to proceed with investigations, no arrests have been made to date.

**Failure to Implement Supreme Court decisions**

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

**Waiting for Transitional Justice**

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

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

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

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

In this context, and with an eye toward the expected transition to the new elected government, the ICJ calls on the Government of Nepal to act, as a matter of priority, as set forth below (for a full list of recommendations, please refer to the Report):

1. **Enact legislation to ensure that any parliamentarian or State official against whom there is a credible allegation of responsibility for a gross violation of human rights or a crime under international law must be suspended from service in public office, including armed forces personnel representing Nepal in international peacekeeping operations, at least pending the outcome of an independent and impartial investigation and fair trial;**

2. **Repeal or amend Section 11 of the Public Security Act, 2046 (1989), Section 37 and Section 38 of the Police Act, 2012 (1955), Section 26 of the Armed Police Act, 2058 (2001), Sections 6, 6A and 6B of the Local Administration Act, 2028 (1971), Section 22 of the Army Act 2006, Section 24(2) of the National Parks and Wildlife Conservation Act, 2029 (1973), Section 6 of the Essential Commodities Protection Act, 2012 (1955) and parts of the Muluki Ain (General Code), notably Section 2 and Section 5, to remove any immunity afforded to State officials for gross violations of human rights;**
(3) Ensure the new Constitution does not permit any State official to grant an official pardon, withdraw a case or grant an amnesty to anyone suspected or convicted of a gross human rights violation or crime under international law;

(4) Limit the interpretation of Section 5.2.7 of the Comprehensive Peace Agreement to ensure that only those cases brought during the course of the conflict and up to-and not after-the signing of the Peace Agreement are eligible for withdrawal, while also ensuring that cases involving credible allegations of gross human rights violations are not withdrawn;


(6) Issue instructions to the Attorney General and all other relevant law enforcement personnel to implement the decision of the Supreme Court in Om Parkash Aryal v the Council of Minister (6 March 2013), making it mandatory for the Attorney General to act on the recommendations of the National Human Rights Commission to investigate, and where appropriate prosecute cases.
ICJ Previous work on Nepal
