THE PROSECUTION OF HUMAN RIGHTS ABUSES IN NEPAL: A HIMALAYAN PERSPECTIVE ON TRUTH AND RECONCILIATION

FRANK GINSBACH

“I see a beautiful city and a brilliant people rising from this abyss, and, in their struggles to be truly free, in their triumphs and defeats, through long years to come, I see the evil of this time and of the previous time of which this is the natural birth, gradually making expiation for itself and wearing out.”

—Charles Dickens

I. INTRODUCTION

On February 13, 1996, the Communist Party of Nepal (Maoist) (“Maoists”) launched coordinated attacks in five districts across Nepal, targeting police, wealthy business owners, and various members and institutions of the state as a means to begin a “people’s war.” The ensuing decade of conflict resulted in more than 13,000 deaths, 1,300 disappearances, and numerous instances of torture at the hands of both Maoist rebels and the state’s security services. On November 21, 2006, the Maoists and a coalition of political parties known as the Seven Party Alliance (“SPA”) signed the Comprehensive Peace Agreement (“CPA”), signaling an end to the conflict and heralding the transition to a peaceful, inclusive government. Yet more than seven years after the signing of the CPA many of its promises remain unfulfilled, and the government’s attempt to implement a truth and reconciliation commission has been met with sharp rebuke by the nation’s highest court over its failure to ensure prosecution for serious human rights abuses. The government of Nepal should remain conscious of its duties under both Nepali and international law and implement legislation that criminalizes serious human rights abuses and follows through with prosecution.

This Article proceeds in three sections. First, the Background section examines the complex and oscillating political history of modern Nepal to establish historical context for the ten-year conflict, the conflict itself, the international legal obligations of truth and
reconciliation commissions that attempt to offer some form of amnesty, and the truth and reconciliation commission ultimately found wanting by the Supreme Court.\textsuperscript{7} Next, the Article advances to the Argument that Nepal must prosecute individuals who have committed serious human rights violations under both Nepali and international law.\textsuperscript{8} The Article also argues that, far from risking further instability, effective prosecution of human rights abuses is a crucial means to ensure a stable government beyond the transitory period.\textsuperscript{9} Finally, the Article concludes with a brief synopsis of the Argument and calls on Nepali policymakers to act on their legal obligations.\textsuperscript{10}

II. BACKGROUND

A. The Political History of Modern Nepal: The House of Gorkha and the Shah Dynasty; The Ranas: A Decade of Democracy; The Panchayat System

The civilizations comprising present-day Nepal have a long and distinguished history all their own.\textsuperscript{11} However, the advent of the modern Nepali state dates to the mid-eighteenth century: in 1744, Prithvi Narayan Shah of the House of Gorkha set forth on series of conquests carving out what became a new power in South Asia—the nascent kingdom of Nepal.\textsuperscript{12} He conquered the Kathmandu Valley, the heart of this empire, in 1769.\textsuperscript{13} Surveying his geopolitical situation, Shah is said to have remarked: “This Kingdom is like a traul [yam] between two boulders. Great friendship should be maintained with the Chinese Empire. Friendship should also be maintained with the emperor beyond the southern seas.”\textsuperscript{14} Expecting several wars with Tibet, Nepal enjoyed relative insulation from the north because of the Himalayas.\textsuperscript{15} The “emperor beyond the southern seas” referred to the British Empire, which had established a firm

\textsuperscript{7} See infra Part II.
\textsuperscript{8} See infra notes 221-43.
\textsuperscript{9} See infra notes 243-57.
\textsuperscript{10} See infra Part IV.
\textsuperscript{12} Deepak Thapa, The Making of the Maoist Insurgency, in NEPAL IN TRANSITION: FROM PEOPLE’S WAR TO FRAGILE PEACE 37, 38 (Sebastian von Einsiedel, David M. Malone, & Suman Pradhan, eds., 2012).
\textsuperscript{14} Rajeev Ranjan Chaturvedy, & David M. Malone, A Yam between Two Boulders: Nepal’s Foreign Policy Caught between India and China, in NEPAL IN TRANSITION: FROM PEOPLE’S WAR TO FRAGILE PEACE 287, 288 (Sebastian von Einsiedel, David M. Malone, & Suman Pradhan, eds., 2012) (internal citations omitted).
\textsuperscript{15} Id. at 290.
hold over much of India. However, “great friendship” was not maintained, and seven decades after it began, the expansion of the House of Gorkha was checked by the British East India Company in 1814. The boundaries drawn as a result of the war with the British coincide approximately with the borders of modern Nepal.

Three decades of political intrigue followed until Prime Minister Jang Bahadur Rana took control of the state in 1846. He did this in a bloodbath that came to be known as the Kot Massacre, wherein young Rana killed off all of his political rivals. The Shah king was reduced to a ceremonial figurehead, and the position of prime minister became a hereditary role kept within the Rana family. What followed was 104 years of this resultant Rana regime, with strong prime ministers pledging superficial fealty to the king but in actuality exercising total political control over the kingdom.

Since their defeat by the British, the Shahs were relatively isolationist. By comparison, the Ranas looked outward with an eye towards building relations with neighboring British colonial officials. The timing of the Rana takeover was particularly apropos, as the East India Company was dissolved and the British government took direct control of British India in 1857 (the “British Raj”). The Ranas mitigated the threat of an expanding British Empire in the region by reaching an accommodation with the Crown: the British would be permitted extensive say over Nepali foreign policy in return for protection against foreign threats and autonomy over domestic matters. The patronage of the British became the cornerstone of the regime, and allowed the Ranas to amass personal fortunes. The corruption of the Ranas was infamous, and the treasury of the country became the personal account of the family. Yet the Ranas were also politically astute, and the mixture of isolation from the north and great power backing from the south allowed them to focus on stabilizing the still nascent kingdom they inherited from the Shahs. They did so in a series of laws that increased and

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16 Id. at 288.
17 Id. at 290-91.
18 Thapa, supra note 12, at 38.
19 Id.
20 Id.
21 Id.
22 Id.
23 Chaturvedy & Malone, supra note 14, at 291.
24 Id.
27 Thapa, supra note 12, at 38.
29 Thapa, supra note 12, at 39.
institutionalized the existing social stratification of the Hindu elite, forcing them upon all subjects, Hindus and non-Hindus alike.\textsuperscript{30}

The legal approach of the Ranas was exemplified in the Muluki Ain, a civil code instituted in 1854 that sought to standardize what it meant to be “Nepali.”\textsuperscript{31} The code, a “Hindu ideological base [...] divided and ranked the entire population into a caste hierarchy.”\textsuperscript{32} Even ethnic groups which were never part of any caste system were forced into this population-wide ranking, and ordered according to practices the Ranas deemed to signify “purity” or “pollution” (such as consumption of alcohol or meat).\textsuperscript{33} These non-Hindu ethnic groups usually found themselves somewhere in the middle.\textsuperscript{34}

Prior to the introduction of the Muluki Ain, Nepal had three regionally autonomous castes—the Parbatiya, the Newar, and the Terai peoples—as well as aforementioned non-Hindu ethnic groups.\textsuperscript{35} The Rana regime’s national restructuring created a three-tiered caste system applicable to all Nepalese. Broadly speaking, it was as follows: at the top were the Bahuns and Chhetris of the Parbatiya, the so-called hill Hindu elites.\textsuperscript{36} A second tier comprised the Tibeto-Burman tribes in the middle (including “Gurungs, Tamangs, Limbus, Rais and Sherpas, now self-defined as Adivasi Janajatis.”)\textsuperscript{37} The bottom tier encompassed the Dalits (the “untouchables”).\textsuperscript{38} This nationalized caste system restructuring had very real consequences: the Bahuns and Chhetris were to reap the benefits of land reform measures that took much from the lower castes and redistributed it to the newly institutionalized elites.\textsuperscript{39} In addition to a national caste system, the Muluki Ain instituted Hinduism as the national religion and Nepali as the national language, policies that further favored the Bahuns and Chhetris.\textsuperscript{40}

The British Raj came to an end in 1947, and with it ended British patronage of the Rana regime.\textsuperscript{41} Without its great-power patron, the Ranas were quickly topped by an armed rebellion in 1951.\textsuperscript{42} King Tribhuvan came to power promising a democratic

\begin{thebibliography}{99}
\bibitem{30} \textit{Id}.
\bibitem{32} \textit{Id}.
\bibitem{34} \textit{Id}.
\bibitem{35} Thapa, \textit{supra} note 12, at 39-40.
\bibitem{36} Tamang, \textit{supra} note 31, at 298.
\bibitem{37} \textit{Id} at 298 n.14.
\bibitem{38} \textit{Id}.
\bibitem{39} Thapa, \textit{supra} note 12, at 39-40.
\bibitem{40} \textit{Id}.
\bibitem{41} \textit{Id}.
\bibitem{42} Catinca Slavu, \textit{The 2008 Constituent Assembly Election: Social Inclusion for Peace, in NEPAL IN TRANSITION: FROM PEOPLE’S WAR TO FRAGILE...}
An interim constitution was quickly established and called for constituent assembly elections. However, these elections were postponed, and amendments added concentrating royal power. King Tribhuvan died in 1955, succeed by his son, Mahendra, who continued to concentrate royal power and ignore calls for a constituent assembly. He instead promulgated his own constitution a week before the first general elections for Parliament in 1959. Shortly thereafter, in 1960 King Mahendra staged a coup, ending Nepal’s brief experiment with democracy.

In the place of democracy, King Mahendra implemented the Panchayat system, which derived its name from the from village councils—“panchayats.” King Mahendra claimed he would establish democracy based on the model of these panchayats. What resulted was an authoritarian monarchy with government based on party-less political assemblies at the local and national level. This Panchayat system was established in 1960 and formally enshrined in the new constitution in 1962. Like the Muluki Ain before it, the Panchayat system sought to define what it meant to be Nepali and in doing so created lasting social cleavages. It promoted a “monocultural nationalism” based on four identifying factors: the Nepali language, the Hindu religion, the Daura Suruwal dress, and the Hill Hindu culture. It also stifled the nascent political campaigns begun in the 1950s to establish rights for some of Nepal’s disparaged groups—chiefly the Dalits, Janajatis, and Madhesis. These defining features once again prioritized the rights of the Hill Hindu elites and ensured that two-thirds of Nepal’s population—be it for linguistic, caste, ethnic, or religious reasons—could not identify with what it meant to be “Nepali.”

B. TWO DECADES OF TURBULENCE: DEMOCRATIC ELECTIONS; THE PEOPLE’S WAR; THE COMPREHENSIVE PEACE AGREEMENT; THE CONSTITUENT ASSEMBLY

After three decades, popular resentment led to the overthrow of the Panchayat system—the 1990 People’s Movement (Jana Andolan) resulted in a new constitution and the establishment of

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43 Tamang, supra note 31, at 295.
44 Id.
45 Id.
46 Id.
47 Id.
48 Slavu, supra note 42, at 233.
49 Thapa, supra note 12, at 40.
50 Id.
51 Rawski & Sharma, supra note 28, at 176 n.1.
52 Id.
53 Thapa, supra note 12, at 40.
54 Hangen, supra note 13, at 77.
55 Thapa, supra note 12, at 40.
56 Id.
parliamentary government, albeit while retaining the monarchy.\textsuperscript{57} Elections resulted in the Nepali Congress Party and the Communist Party of Nepal United Marxist-Leninist (CPN-UML) being the two dominant parties.\textsuperscript{58} Despite being free and fair, however, the elections failed to see tangible results for historically disenfranchised groups, such as Dalits, Janajatis, Madhesis, and women.\textsuperscript{59} The 1990 constitution contributed to the continued disenfranchisement by once more declaring Nepali the national language and Hinduism the national religion. The drafters of the constitution were aware of the demands being made by minority groups for a greater voice in the political process and for some redress on issues of caste, religion, ethnicity, and gender; however, they failed to incorporate anything of substance, viewing these issues as peripheral to the political process.\textsuperscript{60}

The constitution also maintained “highly centralized state structures” that contributed to the various political parties’ efforts to resist internal democratization.\textsuperscript{61} The structural deficiencies did not end there: the constitution instituted a first-past-the-post system, wherein the candidate in single-member districts receiving a plurality of votes is elected.\textsuperscript{62} The reasoning was such candidates will be more directly linked with their constituents and therefore subject to greater accountability.\textsuperscript{63} However, several factors thwarted this logic. First, the lack of internal democracy within the parties meant traditional elites continued to dominate positions of influence and power, and minorities continued to lack a meaningful voice in the political process.\textsuperscript{64} Second, discriminatory registration of voters was a widespread problem: proof of residence practices prevented many migrant workers from registering (a problem particularly felt by Dalits and Madhesis), lack of up to date voter lists, and the outright refusal of the Electoral Commission to register some parties representing minority groups.\textsuperscript{65} Efforts to impose some manner of proportional representation in the system as a means to curb the predisposed effects of first-past-the-post voting were successfully blocked by the main parties.\textsuperscript{66}

The embers of discontent continued to smolder, and in the years to come would spark an inferno that threatened to burn the kingdom down. In 1995, the Communist Party Nepal – Maoist (“Maoists”) launched their People’s War, a campaign of violence self-described as fulfilling the People’s Movement of 1990.\textsuperscript{67} The Maoists

\textsuperscript{57} See Slavu, supra note 42, at 233.
\textsuperscript{58} Id. at 233-34.
\textsuperscript{59} See id. at 234, 234 n.9 (discussing minimal and declining election results for these groups)
\textsuperscript{60} Tamang, supra note 31, at 300.
\textsuperscript{61} Slavu, supra note 42, at 235.
\textsuperscript{62} Id. at 235.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 236.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Rawski & Sharma, supra note 28, at 176.
claimed to seek an end to caste-based and ethnic discrimination, as well as other forms of biased-jusice from the Panchayat regime and its parliamentary successor. Their rights-laden rhetoric—appealing to the Universal Declaration on Human Rights and Geneva Convention, among others—failed to influence their own actions. Serious human rights abuses—coercion, abduction, forced labor, extrajudicial killing, and the intentional targeting of civilians—were common practices.

The response to the Maoist insurgency was mixed—the state initially deployed the Nepali Police Force (“NPF”) as the means to contain the insurgency, which at that point was confined mostly to the rural hill regions. However, a number of crucial events occurred in 2001. The first was the massacre at the palace on June 1, when Crown Prince Dipendra killed nine members of the royal family, including King Birendra, and then himself. In the charged and uncertain hours immediately preceding the murder, the successor, King Gyanendra, deployed the Royal Nepalese Army (“RNA”) twice. In contrast to his predecessor Birendra, King Gyanendra was viewed by many Nepalese as a man who wanted power for its own sake: his use of the RNA would reinforce this image and prove ominous foreshadowing.

Three months later, jihadist terrorists flew hijacked airplanes into the Twin Towers and the Pentagon, triggering a massive shift in global diplomatic and military efforts. India, the shadow on the borders of all Nepali foreign policy and most domestic policies, had until this point largely ignored the past five years of Maoist activity; however, motivated chiefly by their own concerns over Pakistan, India quickly allied with the United States in the Global War on Terror. The Maoists themselves attacked an RNA compound in November, a fundamental shift in strategy resulting in their classification by the United States as a terrorist organization in this new, post-9/11 realm. Against a complex diplomatic backdrop, the palace responded with their own strategic shift: where once the

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68 Id.
69 Id. at 177.
70 Id.
73 Interview with G. Michael Fenner, Professor of Law, Creighton University School of Law, in Omaha, Neb. (Sept. 5, 2013).
74 Id.
76 Id.
77 Id.
78 See id. at 319-322.
insurgency was handled by solely the police forces, King Gyanendra now deployed the RNA as well as the NPF.\textsuperscript{79}

The Nepali government issued the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), which authorized preventative detention and granted the RNA primary oversight of counterinsurgency operations.\textsuperscript{80} Human rights abuses increased, with both Maoist and RNA/police forces utilizing retaliatory rape and extrajudicial killings as part of a broader wartime strategy designed to off-balance the other side.\textsuperscript{81} For example, in 2003 Maoist forces ambushed and killed Inspector-General of the Armed Police Force Krishna Mohan Shrestha, his wife Nudup, and their bodyguard while the three were out on a morning walk, then immediately called for a ceasefire.\textsuperscript{82} In turn, that ceasefire soon ended with the RNA descending upon a Maoist gathering in Doramba and executing 19 suspected members.\textsuperscript{83}

King Gyanendra, already showing signs of growing authoritarianism, began a series of increasingly repressive and autocratic measures predicated on combating the Maoists.\textsuperscript{84} He dissolved parliament in May of 2002, and shortly thereafter invoked Article 127 of the 1990 constitution to dismiss the elected government and suspend elections.\textsuperscript{85} In their place, he appointed a series of Prime Ministers from his own Nepali Congress (Democratic) Party—all of whom refused the Maoist demands for constituent assembly elections for the formation of a new constitution.\textsuperscript{86} This demand for a constituent assembly dated back to September of 2001 at least and would become increasingly prominent in the years ahead.\textsuperscript{87}

The progressively autocratic nature of King Gyanendra’s rule coupled with mounting human rights abuses precipitated both domestic and international backlash. Human rights lawyers bravely risked detention and torture by seeking judicial redress of the situation, with hundreds of habeas corpus petitions filed before the Nepali Supreme Court.\textsuperscript{88} The leadership of many major political parties swept aside by Gyanendra also began expressing their criticisms of human rights abuses.\textsuperscript{89} At the same time, in June of 2002, India granted the Maoists’ request to present their proposals to Indian leaders as, despite remaining officially opposed to the Maoist

\textsuperscript{80} Rawski & Sharma, supra note 28, at 178.
\textsuperscript{82} Rawski & Sharma, supra note 28, at 179.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} Whitfield, supra note 79, at 156.
\textsuperscript{85} \textit{Id.} at 157.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} Tamang, supra note 31, at 296.
\textsuperscript{88} Rawski & Sharma, supra note 28, at 179 n.13.
\textsuperscript{89} \textit{Id.} at 179.
insurgency, they began to doubt the possibility of Gyanendra’s strategy to defeat it.  "Further, the presence of United States security assistance forces in Nepal raised fears in New Delhi that China may seek to counterbalance the American presence. This combination of factors—Gyanendra’s repressive measures and risk of a growing Chinese influence—led many in New Delhi to seek some form of political accommodation to end the conflict."

Maoist representatives were allowed to present their proposals to Indian leadership on the condition they submit these proposals in writing, which they did. This led to increasing contacts between the two and eventually provided a means for the Maoists to reach out to dispossessed political leaders in Kathmandu, with the Maoists declaring they were willing to join the democratic process if the mainstream parties would join Maoist demands for an end to the monarchy. Most were not yet willing to forego the monarchy entirely, but in light of recent abuses saw the need to at least institute some means of curtailing the king’s powers.

Instead of seeking some manner of compromise, even with the domestic political parties, King Gyanendra continued to consolidate power in the monarchy and eliminate dissent, culminating in the February 1, 2005, coup wherein Gyanendra seized power by declaring a state of emergency and imprisoning many civil and political leaders. Gyanendra justified his actions on the need to suppress the insurgency: free from the constraints imposed on him by shared power, he could now deploy the RNA to its full capacity. He badly miscalculated, however, as his actions provided a lowest-common-denominator around which the vast majority of domestic and international actors found consensus.

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90 Muni, supra note 75, at 321.
91 A common misconception is the existence of some link between the Maoists and Chinese government at this point. There was none. Though China and the Maoists did form ties subsequent to the Maoist electoral victory in 2008, China initially ignored the Maoists and if pressed, reacted with some embarrassment and confusion over the co-opting of the “Mao” brand. China would later become the primary ally of King Gyanendra in his fight against the Maoists, even after his other allies abandoned him due to his human rights abuses. China, ever sensitive to issues of internal sovereignty, decried the Maoists guerrillas as a separatist organization warranting repressive measures. This helps explain why India was so concerned over a Chinese counter-balance to the American presence—not as an ally of the Maoists, but as competition for influence over King Gyanendra. See Chaturvedy & Malone, supra note 14, at 307.
92 Muni, supra note 75, at 321.
93 Id.
94 Id.
96 Muni, supra note 75, at 321.
97 Whitfield, supra note 79, at 157.
98 Id.
99 Rawski & Sharma, supra note 28, at 180-81.
Hundreds of complaints soon flooded in to various United Nations agencies by a diverse assortment of Nepali leaders, who also lobbied various foreign governments.\textsuperscript{100} They found support from many sources, particularly amongst the United Nations' humanitarian agencies and committees.\textsuperscript{101} Also joining the ranks of opposition to King Gyenendra were the United States and the United Kingdom, previously two major financers and supporters of the RNA.\textsuperscript{102} Even India, traditionally wary of a United Nations presence in Nepal, came to tacitly endorse the creation of an Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal due to Gyanendra's ill-advised coup and mounting human rights abuses (though India at this time still endorsed the institution of the monarchy, if not the monarch).\textsuperscript{103}

The United Nations reacted quickly, and on April 10, 2005, the OHCHR was established in Nepal.\textsuperscript{104} The OHCHR arrived with the overarching goals of reducing the culture of impunity, so deeply and firmly established in Nepal's political history, and engaging in capacity building for protecting human rights.\textsuperscript{105} The OHCHR would come to provide logistical and financial assistance in efforts to investigate human rights abuses, technical assistance in bringing abusers to trial, education on relevant aspects of international human rights law, and advice on implementing relevant legislation.\textsuperscript{106} While the OHCHR had their work cut out for them, there was an immediate, substantial drop in human rights violations by both Maoist forces and the RNA.\textsuperscript{107} In part, the pride of the RNA contributed to this—as longstanding participants in UN peacekeeping operations, the RNA risked losing its ability to contribute troops to future deployments if abuses were not curtailed.\textsuperscript{108} For their part, the Maoists saw they were on the cusp of receiving long-sought international legitimacy, and compliance with the OHCHR provided a means to do so.\textsuperscript{109}

Meanwhile, the Nepali political landscape was awash with activity. The authoritarian practices of King Gyanendra provided

\footnotesize{\textsuperscript{100} Id. at 181.}
\footnotesize{\textsuperscript{101} Id.}
\footnotesize{\textsuperscript{102} Id. at 182.}
\footnotesize{\textsuperscript{103} Whitfield, supra note 79, at 165.}
\footnotesize{\textsuperscript{104} OHCHR in Nepal (2006-2007), OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS (Mar. 23, 2014), http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NPSummary.aspx.}
\footnotesize{\textsuperscript{105} Id.}
\footnotesize{\textsuperscript{107} Rawski & Sharma, supra note 28, at 182.}
\footnotesize{\textsuperscript{109} Whitfield, supra note 79, at 162.}
common ground for the most prominent of Nepal’s disparate political parties to form the Seven Party Alliance (SPA).\footnote{Id. at 157.} Joint discussions were held in India, and on November 22, 2005, the SPA and the Maoists published the results—the 12-Point Agreement.\footnote{Id.} This agreement found compromise by at once committing the SPA to a Constituent Assembly whilst committing the Maoists to democratic norms and values.\footnote{Martin, supra note 108, at 203.} Soon after, the SPA and Maoists furthered their joint efforts by engaging in a series of strikes and protests, which the public readily embraced, giving rise to the “Jana Andolan II.”\footnote{Whitfield, supra note 79, at 168.} On April 24, 2006, the culmination of the massive popular movement against the King eventually forced Gyanendra to announce a compromise wherein he recognized the sovereignty of Nepal was inherent in the people, endorsed the SPA’s proposals to resolve the conflict, and restored parliament.\footnote{Id. at 169.} The newly restored government immediately began a series of talks with the Maoists that led to the signing of the Comprehensive Peace Agreement (CPA) on November 21, 2006.\footnote{Id. at 158.} The CPA signaled the end of a decade-long conflict that saw more than 13,000 dead and 1,300 disappeared persons.\footnote{United Nations Human Rights Office of the High Comm’r, Nepal Conflict Report 14, 26 n.1 (October 2012), http://www.ohchr.org/Documents/Countries/NP/OHCHR_ExecSumm_Nepal_Conflict_report2012.pdf.} There were also many instances of torture throughout the conflict, with some victims still caught between a desire to seek justice and a fear of retribution at the hands of their tormentors.\footnote{Testimony by a victim of Maoist torture, IRIN News (Feb. 2006), http://www.irinnews.org/indepthmain.aspx?InDepthId=11&ReportId=33609; Testimony by a victim of torture at the hands of the army, IRIN News (Feb. 2006), http://www.irinnews.org/indepthmain.aspx?InDepthId=11&ReportId=33610.}

The CPA committed the parties to implementing an interim constitution, assembly and government (inclusive of the Maoists), as well as deciding the future of the monarchy.\footnote{Whitfield, supra note 79, at 171-72.} This decision would occur in the first meeting of the long-sought Constituent Assembly, which was to be composed of members elected by June 2007.\footnote{Id.} In December 2006, the interim constitution was drafted.\footnote{Jha, supra note 95.} The CPA, as well as the Interim Constitution, both contain commitments to establish a truth and reconciliation commission.\footnote{The Interim Constitution of Nepal, 2063 (2007), art. 33(s); Unofficial Translation of the Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), § 5.2.5, November 21, 2006, Government of Nepal Ministry of Foreign Affairs [hereinafter CPA], available at http://www.mofa.gov.np/uploads/files/document/Comprehensive_Peace_Agree
In addition to its other provisions, the CPA attempted to allay the grievances of Nepal’s traditionally marginalized groups by declaring the state shall “eliminate the current centralized and unitary form of the state in order to address problems related to women, Dalit, indigenous ethnic people, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on caste, language, gender, culture, religion, and region.” However, implementation of such grand intentions proved difficult as the CPA lacked an overarching vision for Nepal’s future and was instead “a temporary convergence of interests.” While this was conducive to ending the conflict and bringing the parties together, it was not a document capable of creating the bedrock for long-term stability.

The task of guiding Nepal’s transition and charting a course forward therefore fell to the Constituent Assembly, with elections scheduled a mere seven months after the signing of the CPA (the reason for such a rushed time table being that the Maoists and the SPA both believed early elections would favor themselves). This self-interested approach to elections would foreshadow much of the resulting political process: instead of prioritizing an overarching representative scheme that would allay the concerns of marginalized groups and lay the foundation for effective state-building, rushed political settlements were reached reflecting the temporary, pragmatic calculations of the stakeholders. Minorities faced wide-scale exclusion, as they lacked the time to garner the ten thousand signatures necessary to register a party, let alone actually adequately build those parties and field candidates. These barriers faced by perpetually marginalized groups resulted in nationwide strikes and outbursts of violence in the Terai region, forcing the elections back several times until they ultimately occurred in April 2008 after concessions were made regarding the proportional representation scheme and special exemptions to the quota system. Though the election was relatively calm, pre-election reports of violence with some 50 deaths were ignored by the Electoral Commission, reinforcing antagonism toward a culture of impunity in the mind of those dispossessed.

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122 Tamang, supra note 31, at 297 (citation omitted).
123 Id. at 306.
124 Id.
125 Id. at 238.
126 Id. at 242.
127 Id. at 240.
128 Id. at 247.
129 Id. at 248: But see Bhojraj Pokharel, Elections: A Nepali Perspective, in NEPAL IN TRANSITION: FROM PEOPLES’ WAR TO FRAGILE PEACE 255, 261 (Sebastian von Einsiedel, David M. Malone, & Suman Pradhan, eds., 2012) (For their part, the Electoral Commission chose not to act on such reports due to the significance of the election itself. They worried that their interruption and interference would undo years of negotiations, and the relatively undisputed overall results of the election did not justify such a risk.).
The result of the April 2008 Constituent Assembly election was a sweeping victory for the Maoists, with a clear plurality at 38% of seats. Yet the rise of identity politics that resulted created fractures within the system even as the Constituent Assembly itself was to be a means of healing such rifts. While the Constituent Assembly was the most representative body in Nepal's history, physical presence alone did not translate into political voice or participation. High-caste, male leaders still helmed the major parties, and both seating and speaking times for members were based upon votes garnered coupled with internal party control. Major political issues were passed along party lines and with little input from marginalized groups and lacking broader public outreach. The federalism question Nepal is still faced with is representative of this, with the overarching focus on decentralization in a subsequent federal system suggesting an inability or lack of desire to deal with many of the social issues that have made Nepal so conflict prone in the first place. Another difficult issue made more so by shortsighted self-interest was the establishment of a truth and reconciliation commission.

C. TRUTH AND RECONCILIATION COMMISSIONS: THE INTERNATIONAL CONTEXT

When the parties signed the CPA, and later implemented the Interim Constitution, their commitment to a truth and reconciliation commission and affirmation to uphold human rights placed them in a position familiar to many other conflict-emergent states undergoing democratic transitions. Though each State's truth commission is tailored to fit that State's circumstances, such commissions nonetheless tend to share four common features:

A truth commission focuses on the past. A truth commission does not concentrate on a specific event in the past but attempts to paint an overall picture of certain human rights violations over a period of time. A truth commission exists for a predetermined period of time and ceases to exist when its mandate ends, usually with the submission of a report.

130 Id. at 249.
131 Tamang, supra note 31, at 306.
132 Id.
133 Id. at 306-07.
134 Id. at 307.
135 Id.
of its findings; and finally [a] truth commission is
vested with certain authority.\textsuperscript{137}

While truth commissions are valuable means of helping societies recover from past human rights violations, their effectiveness depends upon the support they receive—both from those in power as well as from the broader public.\textsuperscript{138} Financial and temporal resources are important considerations also when designing an effective truth commission.\textsuperscript{139} However, the most important factor in determining the extent to which they can carry out their examination and exposition of the past is the legal power they are imbued with.\textsuperscript{140}

This legal power need not be prosecutorial; indeed, the primary purpose of a truth commission is just that—establishing the truth of the past, the events that happened and the actors who took part.\textsuperscript{141} While truth commissions investigate human rights abuses criminalized both by international law as well as (usually) that State’s domestic law, actual prosecution of such abuses is still a function of the State’s judiciary working in tandem with the truth commission.\textsuperscript{142} Truth commissions bring about justice not by punishing perpetrators but by providing explanations for what happened and recommendations for how to go forward as a society.\textsuperscript{143} Truth commissions examine both the human rights abuses that occurred as well as the complex economic and social factors that led to their occurrence in the first place.\textsuperscript{144} By speaking truth to power and giving voice to the victims, they challenge cultures of impunity.\textsuperscript{145} They also can be a means for providing compensation to victims or victims’ families.\textsuperscript{146}

States emerging into a post-conflict environment often face a perceived choice between justice and stability.\textsuperscript{147} In the wake of years (if not decades) of conflict, newly-emergent regimes may fear to antagonize groups responsible for past abuses—particularly if those groups remain part of a power sharing agreement.\textsuperscript{148} For example, in the wake of “seventeen years of military rule,” the newly-emergent civilian government of Chile sought to address past human rights abuses committed under the Pinochet regime through the creation of a truth and reconciliation commission.\textsuperscript{149} However, General Pinochet still remained head of the country’s military, itself an institution

\begin{itemize}
\item \textsuperscript{138} Id. at 419.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. at 421.
\item \textsuperscript{141} Id. at 418.
\item \textsuperscript{142} Id. at 421-22.
\item \textsuperscript{143} Id. at 420.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 422.
\item \textsuperscript{146} Id. at 421.
\item \textsuperscript{148} Id. at 2545.
\item \textsuperscript{149} Vasallo, \textit{supra} note 136, at 162-63.
\end{itemize}
responsible for many of the human rights abuses.\textsuperscript{150} Time constraints also meant that only the most grievous infractions fell within the mandate of the commission, those resulting in death or documented disappearance.\textsuperscript{151} Further, the commission lacked the power to subpoena witnesses and received little cooperation from military and police forces.\textsuperscript{152} The resulting, admittedly compromised, policy was “all the truth and as much justice as possible.”\textsuperscript{153}

Despite these constraints, the commission did a laudatory job of fulfilling its role as a transitional justice mechanism.\textsuperscript{154} Constrained as it was in its ability to investigate and report on many of the individuals and groups responsible for human rights abuses, it instead focused a large part of its efforts on the effects of those abuses and the experiences of the victims.\textsuperscript{155} The commission advocated justice based on compensation to the victims rather than punishment for the perpetrators, as well as calling for structural reforms such as greater judicial independence and widespread human rights education for the police and military.\textsuperscript{156} The commission refrained from advocating for prosecutions based on a fear of the resulting instability such could trigger: many (including Pinochet himself) remained in powerful positions within the state.\textsuperscript{157}

States fearing instability may even go so far as to implement amnesty provisions for particular acts or actions.\textsuperscript{158} Chile was one such country, though restraints faced by the commission when dealing with the military and police forces meant that many of those responsible never had the need to seek out such amnesty.\textsuperscript{159} South Africa most famously implemented a policy of “conditional amnesty” in the creation of its truth and reconciliation commission, owing to concerns that without some form of amnesty offered to the security forces it would be impossible to secure their cooperation in the transition to a peaceful democracy.\textsuperscript{160} East Timor granted a limited amnesty, though its circumstances are particularly unique: the Commission for Reception, Truth and Reconciliation in East Timor was a United Nations-mandated organization designed to address human rights violations during Indonesia’s rule of the country from 1975-1999.\textsuperscript{161} Individualized amnesty was offered to individuals who were found to have committed “lower-level crimes” as a means to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{150} Id. at 162.
\item \textsuperscript{151} Id. at 163.
\item \textsuperscript{152} Id. at 165.
\item \textsuperscript{153} Id. at 163.
\item \textsuperscript{154} Id. at 166.
\item \textsuperscript{155} Id. at 165.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Orentlicher, supra note 147, at 2545.
\item \textsuperscript{159} Vasallo, supra note 136, at 166.
\item \textsuperscript{160} OLE BUBENZER, POST-TRC PROSECUTIONS IN SOUTH AFRICA: ACCOUNTABILITY FOR POLITICAL CRIMES AFTER THE TRUTH AND RECONCILIATION COMMISSION’S AMNESTY PROCESS 12 (2009).
\end{itemize}
\end{footnotesize}
have them return to their homes in the hope of better managing the transition to democratic rule. However, in keeping with international law amnesty was not offered to those found to have committed a “serious criminal offence,” including “genocide, crimes against humanity, and war crimes: torture: and murder and sexual offenses.” This is a distinct difference from the South African model, which did not distinguish based on the seriousness of the crime in its amnesty provision.

As exemplified by the East Timorese case, international law has substantial weight in State considerations when designing a truth and reconciliation commission. State capitulation to violations so egregious that they belie any sense of rule of law represents an existential threat to the creation of a legitimate legal system, for the future is stymied and sabotaged in the name of present convenience and the foundations for post-transition state are weakened. In this way, retributive justice through prosecution of human rights abuses serves as a bulwark towards future abuses and shows that the new regime does not endorse impunity. New regimes worry about stability during the transition, but the choice between stability and justice is a false one that reliance on international law solves. Prosecutions based on international law transform what may be seen as victor’s justice into legitimate expressions of the rule of law. Use of international law gives the newly emergent regime weight and credibility through the support of other States and international bodies. Further, international law does not force States to engage in zero-sum calculations; as in the case of East Timor, it allows for amnesty in certain instances for certain actions, which in turn allows the regime greater flexibility in the pursuit of justice during a transitory period.

The Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment are two

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162 Id. at 957.  
163 Id. at 958.  
164 Id.  
165 Id. at 954.  
166 Orentlicher, supra note 147, at 2542.  
167 Id.  
168 Id. at 2549.  
169 Id.  
170 Id.  
171 Id. at 2550.  
treaty regimes to which most States are members and which mandate prosecution of those found in breach of them. Another important treaty regime is the International Covenant on Civil and Political Rights, a document which does not textually require States to punish those found to have breached its provisions but whose implementing and monitoring committee (the Human Rights Committee) has asserted that States must investigate “summary executions, torture, and unresolved disappearances; bring to justice those who are responsible and provide compensation to victims” (emphasis added). Customary international law further provides similar sanction for violations of torture, extra-judicial killings, and importantly disappearances, all of which are jus cogens; as such, “punishment plays a necessary part in States’ duty under customary law to ensure the rights to life, freedom from torture, and freedom from involuntary disappearance.”

The duty to punish under international law can be mitigated in several instances. The core purpose of prosecuting violations of human rights abuses is twofold: to establish the effective rule of law, and to deter future transgressions. Accordingly, States need not prosecute all violations when doing so would prove beyond the capacities of their judiciaries; nor must they prosecute all violations when doing so would pose a very real and very imminent risk to national stability (though this is an exceedingly narrow exception, far narrower than States facing an uncertain future may wish to make it). Related, States may derogate some of their duties under international law when a public emergency exists that “threatens the life of the nation.” Therefore, States may limit their retributive justice so as to alleviate some of the burden on their judiciaries and allay potential instability that may result, provided these prosecutorial limitations still ensure the twofold purposes of establishing rule of law and deterring future aggression.

D. 

TRUTH AND RECONCILIATION COMMISSIONS: THE NEPAL EXPERIENCE

When the Seven Party Alliance and the Maoists signed the Comprehensive Peace Agreement, one of the provisions they set forth

\[ \text{\textsuperscript{174} Orentlicher, supra note 147, at 2555-62.} \]


\[ \text{\textsuperscript{176} Orentlicher, supra note 147, at 2571.} \]

\[ \text{\textsuperscript{177} Id. at 2583.} \]

\[ \text{\textsuperscript{178} Id. at 2595.} \]

\[ \text{\textsuperscript{179} Id. at 2598.} \]

\[ \text{\textsuperscript{180} Id. at 2596.} \]

\[ \text{\textsuperscript{181} Id. at 2607.} \]

\[ \text{\textsuperscript{182} Id. at 2599.} \]
was the establishment of a truth and reconciliation commission.\textsuperscript{183} Article 5.2.5 of the CPA specifically calls for:

\begin{quote}
a High-level Truth and Reconciliation Commission in order to probe into those involved in serious violation of human rights and crime against humanity in course of the armed conflict for creating an atmosphere for reconciliation in the society.\textsuperscript{184}
\end{quote}

Furthermore, there is no shortage of good intentions—the entirety of Article 7 of the CPA is an affirmation of the parties’ commitment to the 1948 Universal Declaration of Human Rights and International Humanitarian Laws.\textsuperscript{185} Of particular relevance, 7.3.1 states that no person shall be “subjected to torture or any other cruel, inhuman or degrading behaviour or punishment;” 7.3.2. states that no person shall be kept “under arbitrary or illegal detention” as well as committing the parties to make known the status of those persons disappeared or held captive.\textsuperscript{186} The Interim Constitution makes similar promises: Article 33(s) mandates:

\begin{quote}
[A] high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society.\textsuperscript{187}
\end{quote}

And as with the CPA, the Preamble asserts a full commitment to human rights.\textsuperscript{188} Article 24 sets forth the right to a fair trial before a competent judicial body with representation by legal practitioners.\textsuperscript{189} Article 25 prohibits preventative detention except in cases of national emergency.\textsuperscript{190} Finally, Article 26 prohibits physical and mental torture as well as cruel, inhuman, or degrading treatment.\textsuperscript{191}

Supporters of the Truth and Reconciliation Commission welcomed these commitments, believing that the traditional justice system of Nepal was too narrow to address the diverse array of incidents that occurred during the conflict.\textsuperscript{192} Additionally, concerns arose the judiciary would not be capable of handling the immense task set before it.\textsuperscript{193} Yet the promise of transitional justice mechanisms like the Truth and Reconciliation Commission was also used to justify far more self-serving initiatives: both the Royal

\textsuperscript{183} CPA, \textit{supra} note 121.
\textsuperscript{184} Id. at 8.
\textsuperscript{185} Id. at 10-13.
\textsuperscript{186} Id. at 11.
\textsuperscript{187} The Interim Constitution of Nepal, 2063 (2007), art. 33(s).
\textsuperscript{188} Id. at Preamble.
\textsuperscript{189} Id. at art. 24.
\textsuperscript{190} Id. at art. 25.
\textsuperscript{191} Id. at art. 26.
\textsuperscript{192} Rawski & Sharma, \textit{supra} note 28, at 198.
\textsuperscript{193} Id.
Nepalese Army and the Maoists have predicated their refusals to cooperate with investigations into human rights abuses on the grounds that such incidents would be dealt with by a yet-to-be-implemented Truth and Reconciliation Commission. Many of these same individuals began to call for South African-style blanket amnesty as well, for much the same self-interested reasons.

The bipartisan calls for amnesty, by both the Maoists and the RNA, grew as the Maoists began to see their efforts to radically reform the army stall and their political strength weaken. While the Maoists were concerned with obtaining amnesty for their cadres responsible for human rights abuses during the conflict, they were also interested in reforming the RNA to make it more inclusive—one such way was through prosecutions for wartime abuses. Human rights advocates similarly called for reform of the RNA, with an eye towards prosecutions for crimes committed during the conflict. As the Maoists attempts at reform proved unsuccessful, however, they diverged from the human rights advocates and came to adopt a more conciliatory approach to dealing with the RNA in the hopes of advancing their own interests through cooperation. One point of cooperation was their shared interest in obtaining amnesty for their respective members: the Maoists and the Nepali Congress Party came to an agreement regarding blanket amnesties, and human rights defenders were left holding the bag.

This unifying pragmatism between the Maoists and Nepali Congress in the creation of The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2069 (2012), which was promulgated on March 14, 2013, by the president (as the Constituent Assembly had at that point been dissolved and fresh elections had yet to take place). Section 23 specifically deals with amnesty, granting the Commission the ability to recommend amnesty to the Government of Nepal if it believes such to be “reasonable.” Thereafter, this discretion is immediately qualified by §2, which directs the Commission not to recommend amnesty in the case of “serious crimes... including rape,” though ultimately leaving to the Commission’s discretion what, other than rape, is a serious crime. Section 25 then specifies the Commission “may” recommend

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194 Id. at 199.
195 Id.
197 Id.
198 Id.
199 Id.
202 Id. § 23.
203 Id.
those not granted amnesty “for action.”\footnote{Id § 25(1).} Section 29 further insulates perpetrators from facing any meaningful consequences through procedures that specify how cases shall be filed: once the Attorney General has received a recommendation from the Commission to prosecute, the Attorney General shall investigate the case and ultimately decide whether to bring charges,\footnote{Id § 29(1).} provided he states a reason in instances wherein he decides not to pursue charges\footnote{Id § 29(2).} and the case is filed within 35 days of the decision to prosecute,\footnote{Id § 29(4).} Lastly, the Government of Nepal may itself direct the Attorney General to prosecute individuals provided notice is satisfied.\footnote{Id § 29(3).}

The superficial, self-serving nature of the amnesty provisions as well as the overarching crux of discretionary authority was patently apparent upon the ordinance’s issuance, leading one justice on the Nepali Supreme Court to enjoin it from going into effect barely two weeks later, on April 1, 2013.\footnote{Nepal court blocks civil war truth commission, BBC NEWS (Apr. 1, 2013), http://www.bbc.co.uk/news/world-asia-21996638.} Justice Sushila Karki issued the order, suspending the ordinance on the grounds that the ordinance could violate the constitution by allowing the Commission to grant amnesties for serious crimes.\footnote{Id.} This preliminary injunction lasted while the Court reviewed the legality of the Commission.\footnote{Id.}

The review of the ordinance ultimately found it wanting, and on January 2, 2014, a Special Branch of the Supreme Court held the ordinance violated both Nepali and international law.\footnote{See Kosh Raj Koirala, SC rejects TRC ordinance over blanket amnesty, REPUBLICA, Jan. 2, 2014, available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id =67287.} By including acts of disappearances (some 1,300 at least) in the purview of the ordinance, the Court held the ordinance violated both international humanitarian law as well as Nepali constitutional law.\footnote{Writ Petition No. 069-WS-0058, [2014], http://www.ccprcentre.org/doc/2014/03/INT_CCPR_CSS_NPL_16473_E.pdf, 31 (Nepal).} The Court asserted that justice demands the state be subject to the law, else it will lose the support of the people and rule of law becomes meaningless.\footnote{Id at 22.} Nor can those challenging the state evade justice by arguing the greater good of their cause—bringing, preventing, or managing political change never justifies the commission of such grave criminal acts.\footnote{Id.} Just as truth may not “be achieved through the nurturing of falsehood,” so too “justice may not be achieved through the way of crimes.”\footnote{Id.}

\begin{itemize}
  \item 204 Id § 25(1).
  \item 205 Id § 29(1).
  \item 206 Id § 29(2).
  \item 207 Id § 29(4).
  \item 208 Id § 29(3).
  \item 210 Id.
  \item 211 Id.
  \item 214 Id at 22.
  \item 215 Id.
  \item 216 Id.
The Court went on to issue an order of mandamus directing the Nepali Government to establish a separate commission to either investigate disappearances or remedy the existing powers of the TRC so that those responsible for disappearances are not given amnesty. Further, the Court took issue with the discretionary and ambiguous nature of Sections 25 and 29 of the ordinance, asserting such hindered the prospect of justice and need be remedied to satisfy Nepali constitutional requirements. The thirty-five day statute of limitations, because of its incredibly short duration for such serious crimes, was specifically singled out by the Court as threatening unjust results and fostering a culture of impunity. The Court ordered the government to criminalize serious human rights violations committed during the conflict, to make sufficient reparations to victims or their families, to ensure the impartiality of any truth and reconciliation commission, and to implement measures for witness protection in the course of such a commission’s investigations.

III. ARGUMENT

Criminalization and prosecution of serious human rights abuses—genocide, crimes against humanity, war crimes, torture, murder, sexual offenses, and importantly disappearances—by the government of Nepal would fulfill the requirements of the CPA and Interim Constitution as well as the requirements of international law while strengthening domestic stability. The Nepali Supreme Court was correct in ruling the CPA’s attempt at a Truth and Reconciliation Commission was invalid because it granted amnesty both explicitly and implicitly (through its fundamentally discretionary nature) for violations of serious crimes, specifically forced disappearances. The government of Nepal may now either reform the existing commission or create a new, distinct commission to deal with disappearances. Though the government has cited concerns of instability resulting from punishing those responsible for human rights abuses, adherence to both Nepali and international law in carrying out prosecutions for serious human rights abuses will vindicate victims as well as guide—not disrupt—the state’s fragile transition.

Nepal has a duty under international law to prosecute instances of forced disappearance. The International Covenant on Civil and Political Rights, to which Nepal acceded on May 14, 1991, does not expressly proscribe disappearances in the main body of the

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217 *Id.* at 31.
218 *Id.*
219 *Id.* at 32.
220 *Id.*
221 See generally *supra* notes 213-20 and accompanying text.
222 See *supra* text accompanying notes 213-20.
223 See *supra* text accompanying note 217.
224 See *supra* text accompanying note 217.
225 See *supra* notes 172-76 and accompanying text.
text. However, the Human Rights Committee, established to implement and monitor the Convention, has stated that States must investigate instances of forced disappearance and bring to justice those responsible. The Committee has also asserted States have a duty to pay compensation to the victims and ensure that such disappearances do not happen in the future. As a member of this treaty, Nepal has these duties. Moreover, customary international law would impose such a duty even if Nepal weren’t a member. Under international law, forced disappearance is a jus cogens norm, and the Nepali Supreme Court’s interpretation of Nepal’s domestic laws and international obligations confirms the Nepali state evinces such a view.

Besides the immediate issue of disappearances addressed by the Supreme Court, the ambiguous, discretionary nature of Nepal’s truth and reconciliation commission and its amnesty provision also violates international law by not ensuring the State carries out its duty to investigate and prosecute other serious crimes. Nepal acceded to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment on January 17, 1969 and May 14, 1991, respectively. The Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) is particularly relevant to the Nepali context, as reports of torture at the hands of both the Maoists and the security forces have emerged. The Torture Convention prohibits any

[A]ct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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226 See International Covenant on Civil and Political Rights, supra note 175.
228 Id. at 2574-75.
229 Id. at 2582-83, 2599.
230 See generally id.
231 See supra note 213, at 24.
232 See supra notes 172-73.
233 See supra note 117 and accompanying text.
234 Torture Convention, supra note 173, at art. 1.
Further, the Torture Convention is clear that no exigent circumstances exist which permit derogation from this prohibition.\textsuperscript{235} Nepal, as a member of this convention, is duty-bound to both criminalize torture and prosecute such violations when they are found to occur.\textsuperscript{236}

International law firmly places these crimes in the realm of \textit{jus cogens}; Nepal as a member of the international community has a duty to investigate and punish transgressors.\textsuperscript{237} Although Nepal's Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2069 (2012) directs the commission not to recommend amnesty for serious crimes, it imposes no corresponding duty to prosecute those violations on the Attorney General, instead leaving such a decision to the Attorney General's discretion.\textsuperscript{238} While defenders of the commission may respond that such violations are so patently illegal as to make their prosecution obvious, it then begs the question why such patently illegal crimes are only given a thirty-five day statute of limitations to bring charges, following a recommendation.\textsuperscript{239}

The added burden of increased prosecutions on Nepal's judiciary is manageable—the Supreme Court's own order directing the government to criminalize disappearances (and therefore see an increase in prosecutions) is evidence of the judiciary's willingness and ability to handle it.\textsuperscript{240} This burden will be further alleviated once the commission is reformed to extend the unreasonably short thirty-five day statute of limitations as directed by the Supreme Court.\textsuperscript{241} Not only will this be in keeping with the Court's order, it will also allow the State adequate time to gather the necessary evidence to ensure due process of law, and mitigate the possibility the State may need to drop charges in instances where the Attorney General cannot meet the thirty-five day deadline to file charges.\textsuperscript{242} Further, should the resultant amount of cases threaten to overwhelm the judiciary, the state may still fulfill its international obligations if it limits some cases, provided the limiting guidelines conform to the obligations of ensuring effective rule of law and deterring future instances of such human rights abuses.\textsuperscript{243}

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at art. 2.
\item \textsuperscript{236} \textit{Id.} at art. 7.
\item \textsuperscript{237} Orentlicher, \textit{supra} note 227, at 2583.
\item \textsuperscript{239} \textit{Id.} at 11.
\item \textsuperscript{240} See generally Writ Petition No. 069-WS-0058, [2014], http://www.ccprcentre.org/doc/2014/03/INT_CCPR_CSS_NPL_16473_E.pdf (Nepal).
\item \textsuperscript{241} \textit{Id.} at 30.
\item \textsuperscript{242} \textit{Id.} at 32.
\item \textsuperscript{243} See \textit{supra} text accompanying notes 180-82.
\end{itemize}
Those responsible for crafting Nepal’s truth and reconciliation commission who advocate for blanket amnesty based on the threat of internal instability succumb to nomological desperation—Nepal’s political history has shown a process of subduction, wherein the old regime is subsumed in the rifts of its neglect even as the new is built atop it.\textsuperscript{244} When the isolationist Shah dynasty was forced into submission by the Rana regime, it was the neglect to account for the power and possibility of the changing international system that had weakened it to such a vulnerable state.\textsuperscript{245} When the Ranas, in turn, fell to a popular revolt, it was their autocratic rule predicated on the suddenly anachronistic concept of a great-power patron that turned so much of the populace against them.\textsuperscript{246} The lack of sufficiently strong civil institutions doomed Nepal’s nascent experiment with democracy in the 1950s to subduction beneath a once-more dictatorial monarchy.\textsuperscript{247} The resultant Panchayat system’s authoritarian and exclusionary measures lit the fires of the Jana Andolan and inspired the establishment of parliamentary government following the fall of the Panchayat system.\textsuperscript{248} Here as well, highly centralized state structures remained and perpetuated many of these same exclusionary ends even if they were felt through different means, and this popular indignation fueled ten years of conflict in which more than 13,000 died, 1,300 more disappeared, and yet untold numbers were subjected to torture.\textsuperscript{249}

Laplace’s demon can be overcome, however, if the State does not shirk from its duty under both Nepali and international law to bring to justice those who have inflicted lasting wounds on so many of the Nepali people.\textsuperscript{250} Nepal has not fully emerged from this turmoil, as the first Constitutional Assembly failed to deliver an actual constitution, and the situation remains delicate.\textsuperscript{251} Yet far from intimidating those in power, the need to ensure an effective transition into a stable, just, and democratic state should galvanize parties across the political spectrum into action.\textsuperscript{252} Shortsighted appeasement measures in the face of massive popular cries against impunity simply are not sustainable, as they neglect to account for the structural weakness such widespread anger can create, and far from stabilizing the state they are instead likely to trigger more manifestations of popular discontent.\textsuperscript{253}

Implementation of a truth and reconciliation commission that truly gave voice to the victims and closure to victims’ families, that spoke truth to power, and that above all contributed towards preventing such human rights abuses from occurring again would

\textsuperscript{244} See supra text accompanying notes 12-115.
\textsuperscript{245} See supra text accompanying notes 23-26.
\textsuperscript{246} See supra text accompanying notes 41-42.
\textsuperscript{247} See supra text accompanying notes 44-48.
\textsuperscript{248} See supra text accompanying note 57.
\textsuperscript{249} See supra text accompanying notes 61-66.
\textsuperscript{250} See supra text accompanying notes 166-71.
\textsuperscript{251} See Robins, supra note 238.
\textsuperscript{252} See supra text accompanying notes 166-71.
\textsuperscript{253} See supra text accompanying notes 166-71.
help stabilize and strengthen the transitional Nepali state.\textsuperscript{254} A crucial component of this is the criminalization and prosecution of serious human rights abuses that occurred during the ten years of conflict.\textsuperscript{255} Those prosecutions, in turn, must be based on, and carried out in accordance with, impartial legal rationale that accords both with Nepali constitutional requirements as well as with the twin requirements of international law: establishing effective rule of law and deterring future human rights abuses.\textsuperscript{256} Such unbiased exercise of retributive justice will strengthen and legitimize the nascent government, providing it with needed political capital to deal with other pressing domestic concerns (such as the divisive federalism question), and giving it greater standing on the international stage.\textsuperscript{257}

IV. CONCLUSION

Criminalization and prosecution of serious human rights abuses by the government of Nepal is necessary both to fulfill the legal obligations of the CPA and Interim Constitution as well as the requirements of international law, and at the same time is a means to strengthen domestic stability during the transitory period and beyond.\textsuperscript{258} The Supreme Court has already struck down one attempt by the government to shirk its responsibilities in this realm, and any subsequent attempt must account for both the constitutional and international obligations that States have when dealing with serious human rights violations.\textsuperscript{259} Prosecution of human rights abuses is important not only for moral and legal reasons, but for politically existential reasons as well.\textsuperscript{260} If Nepal is to fulfill the promise of the CPA and bring about a peaceful, inclusive, and stable form of government, it must destroy the culture of impunity that threatens to usurp the effective rule of law, and it must deter future violations of human rights.\textsuperscript{261} Criminalization and prosecution of serious human rights abuses are a necessary means to this ultimate end.\textsuperscript{262}

The people of Nepal have been through much, and their continued fortitude, their continued striving towards inclusive democracy, and their continued quest for justice speak volumes of their national character and warrant the respect and admiration of the outside world. The truth and reconciliation commission with its concomitant part in the investigation and prosecution of human rights abuses is but a segment of a road that must be tread to arrive at a stable, inclusive constitutional structure. Other segments include the best means to ensure inclusivity, the proper balance in the proposed federal structure between states and the national government (as well as the boundaries of those states), and how the

\textsuperscript{254} See supra text accompanying notes 166-71.
\textsuperscript{255} See supra text accompanying notes 166-71.
\textsuperscript{256} See generally Orentlicher, supra note 227, at 2598.
\textsuperscript{257} Id. at 2549.
\textsuperscript{258} See supra text accompanying notes 213-20.
\textsuperscript{259} See Writ Petition No. 069-WS-0058, supra note 221, at 31..
\textsuperscript{260} Orentlicher, supra note 227, at 2542.
\textsuperscript{261} Id. at 2598.
\textsuperscript{262} See supra text accompanying notes 166-71.
rights of the individual are to be ensured. Yet these are hardly insurmountable, and the Nepali people have shown an ability and willingness to handle all issues that will need to be addressed. Of primary important to all of this is effective rule of law and a State that is seen as just and fair in the dispensation of it. This begins with a willingness to confront and punish those who have committed serious human rights abuses, no matter their power or status. In doing so, the State will demonstrate both to its people and to the international system that impunity shall not be condoned and justice shall be ensured.