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## THE WITHDRAWAL OF OHCHR-NEPAL: AGREEING AN ALIBI FOR VIOLATION?

*We cannot afford to have human rights projects which end up being a distraction to the immediate protection crisis, if not an alibi for the continuation of human rights violations.*

William O'Neill, Evaluator of a UN funded review of the Nepal government's National Human Rights Action Plan 2003.<sup>1</sup>

### 1. Introduction

On 9<sup>th</sup> June 2010 the mandate of the UN human rights field mission to Nepal, the Office of the High Commissioner for Human Rights Nepal (OHCHR-Nepal), expires. The Prime Minister MK Nepal has said that a decision will be taken soon, but most observers and media reports suggest that the government is considering three options: no extension to the mandate, the OHCHR-NEPAL moving to a limited advisory role to the NHRC, and thirdly, a three to six month extension with a limited mandate.<sup>2</sup> From 2003 civil society fought and won the battle to introduce international monitors in the face of failing national mechanisms and oppressive government. Now opinions in civil society are more divided.

ACHR examines the case for a withdrawal of external monitoring.

### II. Deteriorating Human Rights Situation

Government moves to end or weaken the mandate of the OHCHR comes at a time when human rights are measurably deteriorating in Nepal, following the improvement brought about by the end of the conflict. As part of the collapse

in public security, ongoing Maoist violence, threats and intimidation continue. It has been accompanied by growing reports of the direct involvement of the other political parties in killings, violence and other criminality.

Of particular concern is the rise in state extra-judicial killings. ACHR warned in May 2008 that a failure to address the institutionalised nature of human rights violations in the security forces would have serious consequences for the human rights situation in Nepal.<sup>3</sup> ACHR underlined in September 2009 that the State's response to the proliferation of armed groups had seen a troubling increase in reports of a return to practices of extra judicial killing.<sup>4</sup>

In February 2010, Advocacy Forum (AF), a well-known Nepalese human rights organization, confirmed patterns of alleged extrajudicial executions and torture by the Nepal Police (NP) and Armed Police Force (APF). There is now a re-emergence of police claims of "encounter" killings (synonymous with a cover up for summary execution in Nepal)<sup>5</sup> and an increase in the incidence of torture in the Terai.

Between February and October 2009, AF recorded 15 potential extra judicial executions mostly by the Police. OHCHR has been investigating most of the same cases with significant resources but has yet to report publicly, consistent with a pattern of delayed public responses to human rights violations.<sup>6</sup> More recently there have been reports of further fake encounter killings in Parsa and Dhanusha.<sup>7</sup>

1 Quoted in "Remembering Doramba" by Seira Tamang, Nepali Times, 20-26 June 2004, available at <http://www.nepalitimes.com/issue/2004/08/20/GuestColumn/1618>

2 Kantipuronline report, 'EU envoys lobby for OHCHR extension' Kantipur report 17th February 2010 '<http://www.ekantipur.com/the-kathmandu-post/2010/02/17/top-stories/Envoys-lobby-for-OHCHR-extension/5240/>

3 ACHR review, Another Commission is not enough: Ram Hari Shrestha and the Corrosive Impact of Impunity on Nepal's Unsteady Peace' ACHR May 2008 <http://www.achrweb.org/Review/2008/216-08.html>

4 ACHR review 'Madhes: The challenges and opportunities for a stable Nepal' ACHR 1st September 2009 <http://www.achrweb.org/briefingpapers/Madhes2009.pdf>

5 The word is synonymous with extra-judicial execution. The best documented and most significant illustration of the use of 'encounter killings' is the case of the killing of 21 people in the village of Doramba, Ramechhap district, on 17 August 2003, the day that the third round of peace talks got underway after a three-month hiatus. The NHRC set up a high-level enquiry team, which included a leading forensic doctor, two former Supreme Court judges and a prominent publisher, to look into the incident which the RNA had tried to portray as two Maoist ambushes.

6 Advocacy Forum report, 'Torture and Extrajudicial Executions amid widespread violence in the Terai' Advocacy Forum February 2010, [http://www.advocacyforum.org/TeraiReport\\_English\\_English.pdf](http://www.advocacyforum.org/TeraiReport_English_English.pdf)

7 ACHR interview with NGOs 22nd February 2010.

The use of human rights violations as part of security force operations is a well established operational practice that predates the conflict.<sup>8</sup> Highly respected NGOs<sup>9</sup>, OHCHR-Nepal and Nepal's own government bodies<sup>10</sup> have warned that police laws and abusive practices generate a cycle of violence.

Central to the growing crisis are state institutions which remain weak, tolerate routine abusive behaviour by their officials, and lack institutional integrity due to political interference and pressure. This includes local government, security forces, and the criminal justice system as a whole. The same institutionalized sources of impunity that block judicial remedies for past and present abuses, also block reform efforts aimed at creating respect for rule of law which would be a stabilizing force in the fragile peace process. Particularly damaging to the peace process has been the failure to reform the police as part of an integrated approach to the overall security and justice sector. This has led to the public security crisis central to the poor human rights situation, particularly in the Tarai.

### III. Failing Peace Process

The human rights situation is deteriorating at a time when Nepal faces a series of political challenges in the near future. These events are creating an environment conducive to increased human rights violations. Most worryingly, the drafting of the constitution by the May deadline now appears unlikely. While a new agreement can and should be found to give the politicians more time to draft the constitution post May, there will be a further loss of public faith in the Constituent Assembly process in particular and the peace process in general.

The parties appear to be in no mood to resolve their differences. On 7<sup>th</sup> January, for the first time tacitly threatening military action, Prime Minister MK Nepal threatened that the Maoists would 'face the fate' of the LTTE if they tried to seize power.<sup>11</sup> On 18<sup>th</sup> January Maoist leader Pushpa Kamal Dahal accused the government of plotting against the peace process and renewed threats to 'take up arms again'.<sup>12</sup> Rumours of Indian backed military takeovers continue to circulate.<sup>13</sup> The Nepal Army's continued defiance of civilian control including the courts and the police<sup>14</sup> and their increasingly aggressive public stance throw a further shadow over the peace process.<sup>15</sup> An example amongst many has been the new Army Chief's apparent refusal to meet with the OHCHR country representative and the Government's and indeed international community silence over the issue.<sup>16</sup>

The peace process is highly unstable. On 14<sup>th</sup> January 2010 the United Nations Secretary-General Ban Ki-Moon warned: "The major disagreements that have brought the peace process close to a standstill remain unresolved, increasing the risk of its collapse."<sup>17</sup>

### IV. Consequences of OHCHR withdrawal

Given the centrality of human rights to the peace agreement a withdrawal of international monitoring at this critical juncture would be a grave mistake. In terms of human rights work, it would leave Nepal's dysfunctional National Human Rights Commission with primary responsibility to address the rapidly deteriorating human rights situation and further political crisis.

8 In May 1998 on the instructions of then Prime Minister GP Koirala, the police launched the Kilo Sierra operations against Maoist insurgents. The widespread violations committed by the security forces against the civilian population projected what was an insignificant Maoist movement to the national stage.

9 On 3rd August 2009, the International Commission of Jurists (ICJ) warned that Nepal's outdated and defective security legislation – instruments supposed to maintain state and human security – are in themselves sources for insecurity. Kantipur report, 'ICJ: Flawed laws a threat', Kantipuronline, 3rd August 2009, <http://www.kantipuronline.com/kolnews.php?&nid=207666> 10 On 20th July 2009 the media published the findings of the 'Commission for the Administration Restructure'. They found that rather than deterring crime, police actions were actually contributing to increase crime: 'criminals' esteem has been boosted due to the rampant corruption, and they now believe they can get away with anything by using political connections and money (...) and that corrupt police officers use political connections to evade action' Kathmandu Post report, 'Report lambasts police corruption Task force points out rampant irregularities in functioning', Kantipuronline 20th August, <http://www.ekantipur.com/kolnews.php?&nid=205290>

11 Republica report, 'Maoists pelt PM with stones', Republica online 7th January 2010 [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=13787](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=13787)

12 Nepalnews report, 'Maoist leaders revive threats to take up arms again', nepalnews report 18th January 2010 <http://www.nepalnews.com/main/index.php/news-archive/1-top-story/3573-maoist-leaders-revive-threats-to-take-up-arms-again.html>

13 Telegraph Nepal report, 'Nepal President India trip: Questions Galore, Telegraph Nepal Online 19th February 2010 [http://telegraphnepal.com/news\\_det.php?news\\_id=7196](http://telegraphnepal.com/news_det.php?news_id=7196)

14 In early December 2009 Major Niranjana Basnet was expelled from a UN mission for his involvement in the torture and subsequent killing of 15 year old, Maina Sunawar, during the conflict. He was sent home. Before Basnet arrived, on 12th December 2009, the Nepal Prime Minister communicated to the Defence Minister that Basnet should face the charges made in the Court arrest warrant. In defiance of the court and the law, the NA took Major Basnet from the airport to Army HQ. On 13th December 2009 the Nepal Police requested that Basnet be handed over. As this publication goes to press he remains in Army custody.

15 The withdrawal of international monitoring would suit the military. As ACHR has noted elsewhere The Army continues to talk about Maoist insurrection and a military response to the 'Maoist problem'. There should be no doubt about the nature of the Army's planned operations. The Chief of Army Staff (COAS) has defiantly pushed the new government to promote officers who have a well publicised involvement in massacre, torture, summary execution and disappearance of detained Maoists. See ACHR review issue number two, 'Pax indianus crumbles' <http://www.achrweb.org/briefingpapers/BPNepal-07-09.pdf>

16 Newsfront weekly, 15 Feb, p 1 - full text 'Enraged: NA says OHCHR chief's conduct 'improper'

17 Kantipur report, 'UN envoy voices cautious optimism' e-kantipur 16th January 2010, <http://www.ekantipur.com/2010/01/16/headlines/UN-envoy-voices-cautious-optimism/306464/>

The NHRC is incapable of performing that function. The organisation is in crisis. Two of the five NHRC Commissioners have themselves publicly condemned the organisation, describing it as ‘deteriorating by the day’, ‘plagued by internal problems’, ‘self serving’, and ‘corrupt’<sup>18</sup>. National NGOs have repeatedly expressed deep concern over the NHRCs capacity and the institutions inability to work with civil society.<sup>19</sup> Donors too, have a hand in the failure. Despite the injection of millions of dollars through a UN basket fund in the last years, there is a consensus amongst NGOs, many of the Commissioners themselves, former staff and OHCHR that the NHRC has less than limited capacity.<sup>20</sup>

Although difficult to quantify, the presence of an international human rights body provides political protection for Nepal’s human rights defenders – including the NHRC. It is notable that OHCHR-NEPAL protection has been poorly understood by some NGOs. Many of the currently most vocal opponents of OHCHR-NEPAL currently including the NHRC were themselves subject to death threats and pressure from both the Army and Maoists. These threats eased and even disappeared with the arrival of the OHCHR-NEPAL. However, a context of increasing lawlessness and weakness of relevant state institutions provides an opportunity to silence dissent that is far greater now than in the past. Given the operating environment, acts of violence and threat can be attributed to unknown armed men.

The absence of international monitoring increases the prospects of extremists from either side using human rights violations as a means to end the peace talks, as has happened in the past. They would be emboldened without the possibility of being found out. One of the most important examples of this occurred on 17<sup>th</sup> August 2003 when the Royal Nepal Army massacred nineteen people who had been detained for several hours (two civilians and seventeen Maoist cadres) in Doramba, Ramechaap district.<sup>21</sup> It is widely accepted that the timing of the act was deliberate – coinciding with renewed peace talks during the second ceasefire – and led to the collapse of the peace talks and a return to war some ten days later. The most devastating period of systematic human rights violations followed during the ensuing months.

Without an authoritative view that an international observation body makes available, the extent to which peace spoilers will inevitably be able to exploit these actions for political purposes will increase.

## V. Political Prospects for OHCHR

A withdrawal would have serious consequences for human rights, the political space for civil society and the political situation including the faltering peace process.

However, there is strong national opposition to a renewal of the mandate. A government spokesperson told the media “a majority of stakeholders seem to be at odds with the request for extension”.<sup>22</sup> Amongst those opposing are many members of the current government, members of Nepal’s Human Rights Commission (NHRC) but, perhaps most surprisingly, some members of civil society. The most visible opposition comes from the politically ascendant Army who in talking up military solutions have the most to gain.<sup>23</sup> The only political group supporting an extension appears to be the Unified Communist Party of Nepal (Maoist) (UCPN-M) Party.<sup>24</sup>

Ending the OHCHR mandate rests on an assumption that the NHRC is a credible institution capable of undertaking OHCHR-NEPAL tasks. Not only is this demonstrably false but there is compelling evidence suggesting that the government intends to further weaken the NHRC. In the current draft law on the NHRC, key adjectives like “independent” and “autonomous” have been left out. It is instructive that when challenged, the Minister for Law and Justice Prem Bahadur Singh told to the media that he regarded the words ‘independent’ and ‘autonomous’ to be ‘redundant’.<sup>25</sup>

On 17<sup>th</sup> February, the media reported lobbying from EU Ambassadors to extend the mandate,<sup>26</sup> but international support generally has waned. Some of its strongest supporters, most notably the UK, have recently sent increasingly negative or ambiguous signals on the UK’s commitment to promotion and protection of human rights in Nepal. At the meeting on human rights convened by the

18 See NHRC section

19 See for example, most recently, Advocacy Forum report, ‘Torture and Extrajudicial Executions amid widespread violence in the Terai’ Advocacy Forum February 2010, [http://www.advocacyforum.org/TeraiReport\\_English\\_English.pdf](http://www.advocacyforum.org/TeraiReport_English_English.pdf)

20 OHCHR document A/HRC/13/73 Human Rights Council, Thirteenth session, Agenda item 10, ‘Technical assistance and capacity-building’ February 2010

21 Kathmandu post report, “Doramba killings were ‘cold blooded’”, The Kathmandu Post, 18 September 2003, accessible at <http://www.kantipuronline.com/php/kolnews.php?nid=66> ...

22 Idem

23 See reference 12

24 Idem

25 Idem.

26 Kantipuronline report, ‘EU envoys lobby for OHCHR extension’ Kantipur report 17th February 2010 ‘<http://www.ekantipur.com/the-kathmandu-post/2010/02/17/top-stories/Envoy-lobby-for-OHCHR-extension/5240/>

British Embassy for international diplomats and Nepali human rights defenders on 16<sup>th</sup> November 2009, despite full knowledge of the Nepal Army cover-up, the UK Defence Section Head took it upon himself to publicly present and, in effect, lend credibility to the Nepal Army's patently false version of the killing of Maina Sunawar.<sup>27</sup> Even the posture of OHCHR in Geneva – at best always ambivalent about the value of their own large office - is indecisive.

Waning international and civil society support is based on a range of arguments – some valid, some less so. Civil society repeatedly suggested that OHCHR- Nepal's move into economic social activities was premature and the emerging human rights situation would appear to confirm that concern. Others have – rightly - questioned the logic behind some of OHCHR-NEPAL's activities. Again, the Tarai killings underline existing concerns over the credibility of OHCHR-NEPAL awareness training programme for the Nepal police and Armed Police. OHCHR-NEPAL responds that training in human rights is essential. But OHCHR-NEPAL's analysis strongly suggests that the use of human rights violations as part of police operations is an institutional reform issue. The logic behind awareness training as a response appears counter intuitive. The failure to raise concerns over these grave human rights violations compounds the strategic failing.

But if OHCHR-NEPAL has to an extent lost direction, the actions of the wider diplomatic and donor community should also be the subject of civil society concern. Here again the killings in the Tarai are instructive. The emerging pattern of human rights violations in the Tarai does not appear to differ greatly from prior security operations. This strongly suggests that optimism by international observers – not shared by many national human rights NGOs - about the state of human rights in Nepal was misplaced, as was the policy prescription. As in analogous situations in other cease-fire or post-conflict countries, accountability for past violations is all too frequently regarded as an inconvenient impediment to peace and reconciliation.

In the light of the emerging human rights situation, international pressure to change OHCHR-NEPAL's strategic direction appears to have been at best premature. Similar pressure to sign the agreement between OHCHR-NEPAL and NHRC in 2009<sup>28</sup> - when NGOs had repeatedly raised concerns about a demonstrable lack of NHRC capacity - was equally ill-judged.

In 2003, the highly respected international human rights lawyer, William o' Neill warned that as Nepal's human rights situation was deteriorating the government's response was to create human rights institutions whose purpose was to appease international concern.

In 2010 as the human rights situation deteriorates, the government is pushing for the end to the OHCHR-Nepal, it is simultaneously weakening an already weak NHRC. The government's move to end the OHCHR mandate underlines worrying political motives. Most starkly, it reveals the growing political influence and decreasing accountability to civilian authority of a Nepal Army increasingly talking up military solutions.<sup>29</sup>

The events of last year in Sri Lanka have had a damaging effect on the respect for human rights in the whole South Asian region. The ability of the Sri Lankan security forces to gain a military victory with a clear and constant policy of violation of both international human rights law and international humanitarian law led to a resolution at the United Nations Human Rights Council in May 2009 that broadly praised the government's commitment to human rights and exonerated the Sri Lankan authorities focusing only on the abuses committed by the LTTE.<sup>30</sup>

In Nepal, the ramifications have been felt ever since the military victory in Sri Lanka. The Prime Minister's threat of a 'Sri Lankan solution' was not accidental and articulated in public a discussion which had been ongoing in private particularly in royalist and military circles.

Clearly, a *sine qua non* would be to remove or marginalised the international community in Nepal as Sri Lanka has so successfully done over past years. In Nepal this would mean the removal of OHCHR or its reduction to symbolic Technical Assistance presence and a further weakening of UNMIN.

If OHCHR-Nepal is withdrawn the Nepalese people once again face the very real prospect of *an alibi for the continuation of human rights violations*

## VI. Recommendations

There needs to be recognition of a collective failure on human rights in Nepal, including the role of the international community and donors and diplomats in particular.

27 ACHR interview with NGO representatives 22 February 2010

28 Guidelines for cooperation between the National Human Rights Commission (NHRC) and the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) July 2009, [http://nepal.ohchr.org/en/resources/Documents/English/other/2009/2009\\_02\\_20\\_NHRC\\_Guidelines\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/other/2009/2009_02_20_NHRC_Guidelines_E.pdf)

29 See note 13 discussing military solutions.

30 UN Human Rights Council 11th special session of the Human Rights Council: "The human rights situation in Sri Lanka" resolution adopted May 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/11/index.htm>

OHCHR-NEPALs problems are not intractable but must be addressed.

Unless action is taken there is a strong possibility that OHCHR will depart from Nepal with impunity intact and human rights protection institutions weaker than when it arrived. Civil society struggled to win the entry of international monitoring. International monitoring has provided a strong measure of protection for human rights defenders and democrats in times of crisis. OHCHR should be subject to reform but for civil society to argue for withdrawal as crisis approaches would be high risk.

There is a case for agreeing an exit strategy for OHCHR-NEPAL over the medium-term. But the case for closure of the Office needs to be made on the basis of an informed human rights assessment and the existence of functioning national human rights protection bodies, notably a non-predatory police, a politically neutral judiciary and an empowered NHRC.

ACHR recommends and urges civil society groups in Nepal to advocate for:  
OHCHR

- the extension of the OHCHR mandate and a return to field based protection and monitoring and an increased internal capacity for advocacy and analysis;
- that the extension is regarded a primary indicator of government commitment to human rights in Nepal;
- an immediate suspension of the current NHRC OHCHR agreement on the basis of lack of capacity of the NHRC to carry out its role; and
- an immediate suspension of OHCHR training to the Armed Police Force and Nepal Police Force pending appropriate investigation of repeated allegations of extra-judicial executions and the initiation of legal proceedings where appropriate.

### International community

- an urgent donor led evaluation of a medium term OHCHR exit strategy which would include ToRs to develop of sectoral indicators including: police reform, NHRC, end to threats to HRDs, end to impunity and properly functional Disappearances Commission and Truth and Reconciliation Commission;
- ensure sufficient funding to the OHCHR office to carry out the mandate recommended by the evaluation;
- Any future assistance to the security forces and security sector in general should be conditional on a renewal of the OHCHR mandate, existing programmes should be immediately suspended in the absence or weakening of the OHCHR mandate;

### National Human Rights Commission:

- an immediate independent donor funded assessment of the capacity of the NHRC and the current OHCHR/NHRC agreement. The assessment should include – given existing donor’s public commitments to transparency – an examination of the role of donors and the modalities of basket fund support in line with repeated recommendations of prior evaluations. As a minimum any future donor support must ensure sufficient levels of human rights expertise in any basket fund agreement, again in line with prior evaluations of the NHRC;
- Any future assistance to the NHRC must be conditional on demonstrable action by the government and tied into wider indicators as part of the OHCHR exit strategy;
- any indicators agreed with the NHRC should be focussed on human rights outcomes and supported by implementation mechanism at government level.
- new assistance to the NHRC must be underpinned with legislation on the NHRC that conforms with the Paris Principles guiding the establishment and operations of national human rights institutions;

### Annex I: Background of OHCHR -Nepal

In April 2005, OHCHR was granted a strong mandate to set up a considerable presence in the country – its largest field operation to date. OHCHR has had an enormous influence on human rights in Nepal. Its action led to a reduction in human rights violations. What is less well understood was that it provided a large measure of the political space for the people’s movement and provided the context of confidence that assisted the development of the peace process.

For the politicians and civil society opposing the renewal of the OHCHR mandate it is an inconvenient truth that they themselves were protected from ill-treatment while detained en masse during the 2005 royal regime. GP Koirala’s - then the Prime Minister - first speech following the people’s movement explicitly thanked OHCHR not just for its role in human rights but equally for its defence of democracy.

The post-Jana Andolan period ended the strong national consensus on human rights. The political parties demonstrated that they had little interest in addressing human rights once in power. With a few notable exceptions, the Kathmandu-based human rights groups returned to the patronage of their political parties.

OHCHR struggled to adapt in this new environment and its record since then has been less clear. It has had very low visibility. It has been slow to adapt to changed political circumstances, it has distanced itself from meaningful

dialogue with civil society and alienated NGOs. It has failed to show international leadership on human rights on many crucial issues, particularly on the importance of ensuring that human rights remains a central part of the peace process, including the need directly and urgently to address impunity. It has been painfully slow in reporting and capitalizing on time-bound public interest around emerging and emblematic cases of impunity. In 2009 OHCHR produced no reports, except those bound for the Security Council and its own Geneva headquarters.

The OHCHR's lack of strategic direction is revealed by questionable policy choices. OHCHR-NEPAL provided the international community with compelling analysis of the nature of human rights violations committed by Nepal's security forces. OHCHR's documentation is conclusive that the human rights issues the security forces are not related to a problem of lack of awareness of human rights yet OHCHR has worked – and indeed promoted its work in the media – with the security forces on substantial awareness raising programmes. The effectiveness of these programmes must be assessed in the light of the patterns of human rights violations emerging in the Tarai, and by the continuing lack of independence, accountability, and effectiveness of security and justice sector institutions across the country.

Internally these problems stem from a number of factors, including a lack of commitment of OHCHR at the international level to this large office. But the problems, as OHCHR is aware, primarily stem from lack of political analysis since late 2006 which has severely impaired strategic planning and effective human rights reporting in spite of seemingly interminable inward-looking organisational restructuring.

### **International Community Support**

International community support for OHCHR has also waned. But the international community must share the blame for OHCHR's current weakness. Amongst donors there is very limited understanding of the role of human rights in Nepal's peace process and little institutional memory of the role OHCHR played in prior crises.

While playing lip service to human rights commitments, despite often enormous opportunity, donors and diplomats too have allowed human rights to slide from political priorities and donor funding. As in analogous situations in other cease-fire or post-conflict countries, accountability for past violations is all too frequently regarded as an inconvenient impediment to peace and reconciliation.

### **Flawed international community analysis**

Growing extra judicial violations by the state in the Tarai, intra political party violence, and societal violence and criminality demonstrate that while human rights violations

dropped following the end of the conflict, Nepal's structural human rights issues remain intact.

Human rights violations committed by the state during the conflict were not random acts committed by individual errant officers. Rather the 'disease' is located at the sectoral and institutional level: OHCHR has repeatedly underlined that violations are an inherent part of security force operations; and stress that it is impunity that perpetuates the problem. Yet impunity has too often been discarded by donors and diplomats to the 'too hard' pile. Despite the importance of impunity as a political issue during the Kings regime, human rights quickly slipped down political priorities after April 2006. Since the symptoms – individual violations – had been reduced, international observers concluded that human rights had improved.

And this approach explains why a section of donors pressed OHCHR to move the focus away from protection and monitoring and toward capacity building of the NHRC.

## **Annex II. Background of National Human Rights Commission**

Established in 2000, Nepal's National Human Rights Commission (NHRC) has had a turbulent history. Initially the subject of civil society cynicism, and fears that the Commission would serve as a fig leaf for government inaction, a number of Commissioners – some with more enthusiasm than others - demonstrated a real commitment to fulfilling the mandate of the organisation. The institution's credibility and legitimacy was subsequently transformed by independent investigations into high profile human rights cases, such as the Nepal Army massacre of nineteen detainees in Doramba in September 2003.

As democratic space for NGOs withered during the conflict, the institution's work revealed the extraordinary influence of the Army over Prime Minister Deuba's administration (2003) and the numerous governments that rose and fell in the run up to the Kings formal takeover in June 2005. The NHRC was equally influential in alerting an often reluctant international community to the very serious human rights violations by both sides – not just the Maoists. The NHRC at that time was a critical actor in bringing about the establishment of the OHCHR office in Nepal in 2005.

### **The legacy of the King**

If a demonstration of the NHRC influence at that time is required it was provided by the King: one of his first acts following the Royal takeover was to appoint his own Commissioners. This destroyed the credibility of the institution and it withered as those committed to human rights left. Although most donors continued to fund the institution, both political and financial support was cut back and began the long history of tensions that colours relations to this day.

The international community compounded tensions the quality of international advice provided to the NHRC. The appointments of more junior advisers were less contentious. They fulfilled the agreed criteria of extensive human rights knowledge and experience of national human rights institutions, but the agreed candidate for the Senior Adviser was less easy to understand. The Senior Adviser is supposed to have the capacity to advise Commissioners at a strategic level. The Adviser who was actually appointed by UNDP, OHCHR and NHRC had neither human rights experience nor an appropriate academic background.

### New beginning for the NHRC

Following the fall of the Royal Regime new Commissioners were appointed in 2007. The Interim Constitution established a new appointment procedure for NHRC Commissioners. It granted the Prime Minister the authority to appoint the commissioners on the recommendation of the Constitutional Council. If the legal process was strongly suggestive of executive influence, Prime Minister GP Koirala made it clear to a wide range of international and national interlocuteurs that the appointment of Commissioners would be made on a party political basis. Maoist leader Prachanda voiced similar sentiments.

Donors were divided on how to respond. Some felt that applying the *Paris Principles* (the principles guiding the establishment and functioning of National Human Rights Institutions) in the current environment would be impossible. They wanted to focus on building the capacity of the NHRC with little regard for the independence of the Commissioners. Others argued that if the current constitutional process was applied, then the NHRC could no longer be considered an independent National Human Rights Institution. Rather the NHRC would be both *de jure* and *de facto* an arm of the Executive.

OHCHR failed to provide leadership on what was an obvious issue for them Lena Sundh – made only one public reference to the process as part of speech made on 8 December 2006. Louise Arbour – then the High Commissioner -made no reference to this issue in her address to the Human Rights Council on Nepal in February 2007.<sup>31</sup> In the event, many of the Commissioners chosen by the political parties were less than qualified, and demonstrated little or no understanding of international human rights law.

### UN Technical Support

In February 2009, OHCHR-NEPAL and the Commission signed a set of guidelines on future cooperation.<sup>32</sup> The guidelines focused in particular at strengthening the Commission's role in monitoring and investigating human rights violations; OHCHR-NEPAL refers new cases to the Commission and follow up with active cooperation and support in the investigation of those cases.

The agreement was subject to considerable internal OHCHR Nepal unease and, at least sections of, the represented diplomatic community. These concerns were primarily on the logic of such high levels of monitoring responsibility to an institution with a very evident lack of capacity to monitor and where there were real questions over the independence of the institution. As will be demonstrated in the results section, implementation has demonstrated that the NHRC is incapable of carrying out the tasks defined in the agreement.

### Results

With this legacy, the outcomes are unsurprising, and hardly unique for a Nepalese institutions. Rather than address human rights - with notable exceptions - the new Commissioners have often appeared interested in self aggrandisement, power and protecting the political parties they represent.

The most damning indictments of the institution come from the Commissioners themselves. The former Maoist supported NHRC Commissioner Dr KB Rokaya, is perhaps unsurprisingly condemnatory, telling the media that the NHRC is: 'powerless and inactive organization' (...) 'divided' (...) and 'plagued with internal problems' (...).<sup>33</sup> But while Dr Rokaya's remarks might be dismissed in isolation, they are lent credence by the more condemnation that has come from the former General Secretary of Transparency International, Nepal, and now NHRC Commissioner Dr. Leela Pathak who provided a damning account of NHRC performance in an interview given to the Republica newspaper. In the interview the former head of an anti corruption NGO alleged serious financial irregularity and serious gender discrimination in the NHRC. She described an organisation in collapse, 'deteriorating by the day'. 'Whatever it [the NHRC] is

31 UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN NEPAL Press Release - 22 February 2007 High Commissioner Tables Report on the Human Rights Situation and the Activities of her Office in Nepal to the Human Rights Council, [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/FEB2007/2007\\_02\\_22\\_HC\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/FEB2007/2007_02_22_HC_E.pdf)

32 Guidelines for cooperation between the National Human Rights Commission (NHRC) and the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) July 2009, [http://nepal.ohchr.org/en/resources/Documents/English/other/2009/2009\\_02\\_20\\_NHRC\\_Guidelines\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/other/2009/2009_02_20_NHRC_Guidelines_E.pdf)

33 Kantipur, 'Sorry state of National Human Rights Commission' Kantipur 13th January 2010, page 6–

doing now is aimed at serving the vested interests of the people working here'.<sup>34</sup>

She provided a damning account of the Commissioners working methods: 'we read newspapers in the morning and issue press releases in the evening on human rights issues raised by the newspapers'. She stated that the NHRC was being driven by news rather by human rights and that the NHRC turned a 'deaf ear' to many cases of serious human rights violation.<sup>35</sup>

The NHRC has very publicly failed to cooperate with the OHCHR-NEPAL but its relations with civil society are equally poor. In a memorandum to the Prime Minister in June 2009, the Commission claimed a monopoly on the protection and promotion of human rights in Nepal, by inference civil society and OHCHR-NEPAL had no role.<sup>36</sup>

The NHRC does not merit even a single mention in INSECs (a prominent NGO) annual assessment of human rights.<sup>37</sup> Most recently Advocacy Forum raised public concern over the ability of the NHRC to credibly monitor even a limited number of cases.

In its annual report OHCHR-NEPAL publicly concurred with these concerns noting that *'there have been concerns regarding the current capacity of the Commission to undertake its caseload properly, particularly in the volatile Tarai districts. The Commission has not initiated investigations into nearly 75 per cent of cases referred by OHCHR, including cases of alleged extra-judicial executions and torture.'*<sup>38</sup>

### Future prospects

The agreement between OHCHR-NEPAL and NHRC must be re-negotiated as a priority. NHRC visibly does not have the capacity to effectively carry out the tasks set out in the agreement. To handicap the monitoring capacity of OHCHR-NEPAL presents considerable risks at a time of deteriorating human rights.

For the future of the NHRC there appears to be a consensus amongst the donors, the NHRC, OHCHR-NEPAL, UNDP and the government. The OHCHR report to the Human Rights Council notes that 'Further capacity-strengthening is required for the Commission to be able to fulfil its mandate effectively and this will be a core component of the \$2 million capacity-development project agreed in July 2009, which will be implemented jointly by OHCHR-NEPAL and UNDP'.<sup>39</sup>

The logic of funding further capacity building based on the failure of prior capacity building is hard to discern. After ten years of now very public failure it should now be evident to supporters of the NHRC that capacity building works in an environment where there is political will on the institutional and governmental side. There is little evidence for either. Rather the available evidence is suggestive of government intent to weaken the institution still further. Key adjectives like "independent" and "autonomous" have not been included in the government draft bill on the NHRC. And it should be instructive that the Minister for Law and Justice Prem Bahadur Singh told the media that he regarded the words 'independent' and 'autonomous as 'redundant'.<sup>40</sup>

It also requires trust between the organisation 'giving' the capacity building and the 'recipient'. The active lobbying by the NHRC for the end of the OHCHR-NEPAL mandate would hardly support a conclusion of trust between the two institutions.

Donors must take responsibility for some of the problems. The NHRC has been subject to repeat evaluation. Many problems have been repeatedly raised but never addressed by the donors. For example, the fund is managed by UNDP. Evaluations have repeatedly expressed concern over the limited resources UNDP commits to management despite the substantial funds provided for management. It should be clear after ten years of the NHRC's existence that the basket fund requires senior human rights expertise.

34 Republica newspaper, 'NHRC Is Marred By Financial Irregularities' Republica page 6, 23rd July 2009.

35 Republica newspaper, 'NHRC Is Marred By Financial Irregularities' Republica page 6, 23rd July 2009.

36 OHCHR document A/HRC/13/73 Human Rights Council, Thirteenth session, Agenda item 10, 'Technical assistance and capacity-building' February 2010

37 INSEC executive summary 'INSEC annual human rights report 2010' [http://www.inseconline.org/linkedfile/Executive\\_Summary\\_Eng.pdf](http://www.inseconline.org/linkedfile/Executive_Summary_Eng.pdf)

38 OHCHR document A/HRC/13/73 Human Rights Council, Thirteenth session, Agenda item 10, 'Technical assistance and capacity-building'

39 OHCHR document A/HRC/13/73 Human Rights Council, Thirteenth session, Agenda item 10, 'Technical assistance and capacity-building' February 2010

40 The Kathmandu Post, p 1 - full text New Bill proposes toothless NHRC Friday 11 092009

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