



ASIAN CENTRE FOR HUMAN RIGHTS

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OHCHR Nepal and the log frame for impunity

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1. Executive Summary

On 10th May 2011, the government of Nepal announced a plan to withdraw murder charges against Mr Agni Sapkota, Minister for Information from the Maoists. Sapkota is alleged to have direct involvement in the abduction and killing of Arjun Bahadur Lama in June 2005 in Kavre District. In March 2008, the Supreme Court of Nepal issued an order to the police to register the case. The police registered the First Information Report but three years later, nothing has been done. In the Nepal context, this announcement is an effective declaration of an amnesty. The announcement leaves the rule of law and the transitional justice process in tatters.

There has been no public comment from the United Nations Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal). This only underlines questions over the performance of OHCHR as it approaches the end of its mandate on 9th June 2011. With the government of Nepal proposing to extend the term of the OHCHR only for six months with the same mandate, it is unlikely that OHCHR will speak up. Repeated evaluations have underlined that the High Commissioner (HC) Navi Pillay must address increasingly visible lack of political skills, leadership and strategy. It is difficult to conclude that she has acted appropriately and there is sufficient evidence to suggest that she has actively denied the Nepal Office the support it needs.

The HC's mishandling of the mandate negotiations in 2010 is a case in point. Prior to the negotiation, OHCHR-Nepal had a powerful mandate, strong field representation outside Kathmandu and, enjoyed a formal place in the peace process; an agreement that the Nepal Government had no power to change unilaterally. Yet, in defiance of the peace accords, and the prevailing human rights situation, the HC conceded everything. The field offices outside Kathmandu were abandoned. And, what is less well understood, monitoring of human rights violations were handed over to Nepal's imploding National Human Rights Commission (NHRC).

Yet another emblem of dysfunction has been the recent decision, in January 2011, to place Nepal's National Human Rights Action Plan (NHRAP) at the centre of OHCHR-Nepal strategy. It is now clear that OHCHR-Nepal gave its political support to the NHRAP without actually understanding the content, as they did not have an English translation of the NHRAP when they announced support.

When an English copy became available, the scale of the blunder became clear. The NHRAP is terminally flawed: poorly defined (indeed non-existent) problems, ill-defined outcomes, ill-defined and vague activities, activities that have little link to the problems and, little link between activity and result. The approach to measuring

progress is almost uniquely process oriented, addressing ‘number of attendees’ and training etc.’¹

OHCHR-Nepal continued to offer the NHRAP uncritical support even after these issues became clear. The recent withdrawal of key human rights cases by the government reveals the real agenda behind the NHRAP. The NHRAP appears to be little more than a log frame for impunity: only one dimension of ongoing attempts by all successive Nepal governments to avoid accountability.

Impunity is mentioned only in passing; entirely consistent with the current political environment. The interest in not addressing accountability is a rare example of cross party consensus amongst the major political parties of Nepal. The new government is no different, as the announcement to provide amnesty to Sapkota and many others, demonstrates.

The Maoists could *choose* to cooperate with the civilian judicial system but they instead *choose* intimidation, threat, and now, overruled the civilian judicial system. The Army has the capacity to prosecute. It can and does rapidly prosecute criminals within the military, when it *chooses* to.

The decision not to prosecute human rights violators is a *choice*; and, given that Armies tend to be highly rule bound, this rather implies that this *choice is a policy*; and is a policy because the violations are, and have been, part of military operations; a finding consistent with the large body of documented evidence of OHCHR-Nepal. A conscious policy choice would suggest that the Army’s problems would not be solved by the awareness training offered by the NHRAP. This policy choice explains the ongoing intimidation and threats to lawyers defending victims of crimes.

Nepal is effectively placing conditions on its international human rights obligations. This conditionality is more than sufficient to undermine improvements in human rights. These are conditions that make human rights technical assistance and funding to the NHRC and the NHRAP, at best, a waste of funds.

In terms of the government action on human rights, the only logical position for donors is to suspend human rights and transitional justice funding to government institutions pending a profound review. Funding should only be renewed if and when the government demonstrates political will, by actually implementing commitments and reversing policy decision like the one involving Sapkota.

To lend political support to what is clearly a political agenda deleterious to compliance with international human rights standards and obligations, is to agree to undermine the

1. ACHR recognises that development indicators, in some cases are well developed. The focus of the critique is on civil and political rights.

whole transitional justice process; a critical process at this delicate moment in stalling peace.

How, for example, are transitional justice mechanisms supposed to work if the Nepal Army has already punished all the violators in its ranks, as the prior government repeatedly claimed. And politically, how far will the transitional justice process proceed if one side is exempted? And how convenient would this exemption be to the leadership of the UCPN (M)?

The political risk of continuing with unconditional support, like that extended by OHCHR to the NHRAP, is that engagement, whatever the intention, provides *de facto* political support for a continuance of the current consensus - a policy which add up to little more than a stream of commitments with no visible implementation, balanced by acts like appointing suspected murderers to the cabinet, and declaring an effective amnesty.

OHCHR-Nepal is in a position of leadership; where it leads on human rights, the international community is likely to follow. But, rudderless, maladroit and increasingly impotent, OHCHR is bowing to the agenda of the leading political actors in Nepal, all of them with no interest in addressing impunity.

If OHCHR-Nepal is to have any meaningful role it must now demonstrate willingness to undergo urgent reform. ACHR would suggest that donors' evaluations of OHCHR-Nepal's work would serve as more than an appropriate guide to the changes to the Nepal Office. This should be signalled with the immediate announcement of an expedited process for the appointment of a suitably experienced and high level Country Representative. Technical support should be immediately suspended. And supported by the international community OHCHR-Nepal must now insist on concrete measures of progress on impunity before engaging in any human rights initiatives with the authorities.

Despite its unsatisfactory performance, it would be wrong for OHCHR to withdraw now as this would imply that the concerns over human rights in Nepal had been addressed. The reality is the opposite; national institutions to promote and protect human rights are as weak as or weaker than in 2005, a low point for human rights in Nepal.

Human rights defenders are reporting increasing concern over their security suggestive of levels similar to the take over of 2005 which triggered the establishment of the deployment in the first place.

To withdraw OHCHR-Nepal now or to simply extend it with its current lack of strategy and leadership would be to publicly acknowledge that five years of funding since mid

2006 has been wasted. This outcome would reflect badly both on the HC and also on donors who have failed to insist on a serious standard of work by the Nepal office.

2. A short history of OHCHR-Nepal

'[H]uman rights protection must be recognized as the first and foremost priority of (the Office of the High Commissioner for Human Rights), as it is the basis for all human rights work: capacity-building, technical assistance and mainstreaming are of little or no value ... if the basic fundamental of protection is not secured. ...' Louise Arbour, statement when in her former position as United Nations High Commissioner for Human Rights²

"Some governments still use 'technical assistance' to blunt and avoid tougher accountability measures and direct protection activities."- Late Nicolas Howen, International Jurist and Nepal expert.³

From 2003 Nepalese civil society fought and won a long battle to introduce international human rights monitors in Nepal, in the face of failing national mechanisms, oppressive government and the growing power of the military and King.

OHCHR-Nepal had an immediate impact on the human rights situation, *'the office rapidly and quite boldly extended itself in the field combining advocacy and visible presence towards the objective of direct physical protection against abuses. It established sub-offices throughout the country, assisting human rights defenders facing grave threats, issuing prominent reports calling attention to serious abuses during the conflict, visiting arrested human rights defenders and political party activists in detention and calling attention to the dubious legality of their detention. At key moments of public unrest between 2005 and the April 2008 elections, the office mobilized all its resources to have a prominent preventive presence at demonstrations and bandhs, and this presence is widely credited with reducing the risk of massive violence.'*⁴

An independent expert assessment of OHCHR's Nepal Field mission noted, *'the presence of OHCHR field offices outside the Kathmandu valley has been of particular importance. Human rights officers on the ground have provided much needed information on the situation outside the capital through their monitoring and investigation efforts in addition to their very presence having a significant deterrent effect'*⁵

And as ACHR has commented elsewhere, *"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*

2. Protecting Human Rights: Charting the Way Forward, Speech by Louise Arbour, United Nations High Commissioner for Human Rights, at the 2004 Heads of Field Presences Meeting, 22 November 2004, Geneva, Switzerland

3. Nicholas Howen, 'The Fundamental Protection Function of the Human Rights Field Operation', Submitted to the Expert Consultation on "The Overarching Protection Role of the Human Rights Field Officer", held in Freetown, Sierra Leone May 24-25, 2006, Second Expert Consultation on "Consolidating the Profession: The Human Rights Field Officer", a project of the Human Rights Law Centre, University of Nottingham.

4. Evaluation of OHCHR – Nepal, October, 2010 – Fieldview Solutions

5. idem

*confidence that assisted the development of the peace process. (...) 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.”*⁶

OHCHR-Nepal loses direction as the conflict ends

As the conflict ended and the King was ousted following popular uprising, OHCHR Nepal visibly struggled to adapt to a radically changed political environment. This was compounded by the lack of a Country Representative for the last 18 months.

The elections in April 2008 ended the national consensus on human rights. The political parties returned to the patronage politics of the 1990s. They made little effort, beyond lip service, to address human rights once in power. And with a few notable exceptions, Kathmandu-based human rights groups returned to the comfort of party political alignment.

OHCHR-Nepal increasingly demonstrated a lack of vision, strategy and leadership, both internally as well as amongst the international community. These problems first came into the public purview in a European Commission funded independent evaluation.⁷ The evaluation noted that the lack of leadership had resulted in the absence of a *'coherent strategy'*⁸ that had seriously impaired OHCHR's impact in the last two years.⁹ Leadership absence was compounded by a *'serious absence'*¹⁰ of political analysis. Lack of leadership impacted on planning and vision. It was *'unclear (...) exactly what the agency wants to achieve in concrete terms before the present mandate expires and where it sees its added value'*¹¹. Finally the report noted, *'there was little strategic thought and planning given to a generalized strategy which encompassed the issuing of the report and post report activities and follow-up including vetting and criminal prosecution'*.¹² The result, was *'OHCHR's influence and credibility have waned, particularly in the period from the signing of the CPA in November 2006 to date'*.¹³

i. No remedial action taken by OHCHR-Nepal

The recommendations of the European Commission funded independent evaluation did not lead to visible ameliorative action on the part of the OHCHR-Nepal, and ACHR's discussions with OHCHR-Nepal staff suggested at the time that the evaluation

6. ACHR Nepal Briefing paper, 'The Withdrawal of OHCHR-NEPAL: Agreeing an Alibi for Violation?', 4 March 2010, <http://www.achrweb.org/briefingpapers/BPNepal-01-10.pdf>

7. Final evaluation of European Union support to the United Nations Office of the High Commissioner of Human Rights Field Operation Nepal Evaluation undertaken by independent consultants Daniel Alberman and Govinda Bandi in August 2008

8. Idem

9. Idem

10. Idem

11. Idem

12. Idem

13. Idem

was not highly regarded.¹⁴ There was no visible pressure from OHCHR-Nepal's donors to implement the recommendations.

ii. Deteriorating political environment for OHCHR

The ouster of the Maoist (CPN-M)-led coalition government in May 2009 led to a further deterioration in relations with the Nepal Government. A new administration headed by the unelected Prime Minister Madhav Kumar Nepal, was formed. The Nepal Army, backed by India, played the key role in forming and in the new government. The Army had a significant influence in all key political decisions.¹⁵

OHCHR-Nepal, along with UN Mission in Nepal (UNMIN), became the subject of sustained government attack. And, as ACHR noted at the time, the most visible opposition came from the politically ascendant Army.¹⁶

iii. Shaky handling of the renewal of the OHCHR-Nepal mandate

OHCHR-Nepal's mandate was renewed on 9 June 2010. The OHCHR conceded significant weakening of the mandate (signed with the government on July 10). ACHR commented on the concessions at the time and identified three main concerns: the agreement to close the field offices outside Kathmandu, the effective transfer of monitoring of all new human rights cases to the NHRC, and finally the ongoing failure of the High Commissioner to appoint new leadership.¹⁷

iv. Closure of the field offices and the impact on protection

Although difficult to quantify, the presence of an international human rights body provides political protection for Nepal's human rights defenders as well as development work. In the absence of external monitoring and, in a context of increasing lawlessness and weakness of relevant state institutions, provides an opportunity to silence dissent. 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 using human rights violations as a means to end the peace talks, as has happened in the past.¹⁸ Individual acts of violence lead to increasing levels of public insecurity and a climate of fear that silences dissent.

14. ACHR confidential interview December Kathmandu 2008

15. ACHR Nepal briefing paper, 'Pax Indianus', 14th July 2009, <http://www.achrweb.org/briefingpapers/BPNepal-07-09.pdf>

16. Nepalnews report, 'Maoist leaders revive threats to take up arms again', 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>

17. No half measures please, by Suhas Chakma, Director, Asian Centre for Human Rights published in The Kathmandu Post, 22 October 2010, <http://www.ekantipur.com/2010/10/22/oped/no-half-measures-please/323908.html>

18. On 17th August 2004 A ceasefire was in effect when 19 suspected Maoists, including five women, were captured. When news got out, the Royal Nepali Army initially said the rebels had been killed during an ambush. A fact-finding team sent by the National Human Rights Commission (NHRC) concluded that 'the majority had died of gun shots to the head, fired from close range'.

v. OHCHR-Nepal's capacity building and Nepal's National Human Rights Commission

The National Human Rights Commission of Nepal has long been a contentious issue in Nepal. The history and operations of the NHRC are covered in detail in ACHR's report, *"The Withdrawal of OHCHR-NEPAL: Agreeing an Alibi for Violation?"*¹⁹

In February 2009, OHCHR-Nepal and the NHRC signed a set of guidelines on future cooperation. The guidelines focused on strengthening the NHRC's role in monitoring and investigating human rights violations. OHCHR-Nepal agreed to give up its monitoring role and to refer all new cases to the NHRC. OHCHR-Nepal would support the NHRC investigations. NHRC would take the lead in all new cases. There was considerable diplomatic unease over the signing of the agreement. OHCHR-Nepal's own reporting demonstrated that the NHRC lacked the capacity to carry out this role. OHCHR-Nepal was unable to provide a clear logic behind its decision at the time but went ahead anyway.²⁰

As part of the new mandate OHCHR-Nepal agreed to cement this practice into the new mandate. Again the substantive evidence to support this strategic change is difficult to discern. The failure of the NHRC is an open secret. There are regular press articles highlighting the ongoing fights between individual Commissioners, corruption and incompetence. As recently as 18 March 2011, the press reported that two of the five commissioners have been boycotting all board meetings for the last 15 months, based on a lack of financial and management transparency in donor-funded projects under the NHRC (including the \$2 million UN-funded project); weak management and leadership; illegal, unilateral and unconstitutional decisions taken by the board in the absence of two commissioners; and irregularities in vehicle purchases and their abuses, are among the reasons cited.²¹ Of 309 staff positions only 120 are filled. 102 of these 120 staff are contract workers. In defiance of a Supreme Court ruling the NHRC extended the tenure of its entire temporary staff by a year through a board decision on 12 March 2010. This illegal extension was extended again on 14 March 2011.²²

Even without these scandals, meaningful cooperation between OHCHR-Nepal and the NHRC remains a fantasy. Independent evaluation described the relationship as 'poisonous'.²³ There is little evidence to suggest an improvement in the meantime. The NHRC has repeatedly and publicly attacked OHCHR-Nepal, enthusiastically pushing

19. ACHR Nepal briefing paper, 'The Withdrawal of OHCHR-NEPAL: Agreeing an Alibi for Violation?', 4 March 2010, <http://www.achrweb.org/briefingpapers/BPNepal-01-10.pdf>

20. In its 2009 annual report to the UN, the OHCHR-N expressed concerns over the NHRC's ability to 'undertake its caseload properly' including a specific concern that 'the Commission has not initiated investigations into nearly 75 per cent of cases referred by the OHCHR-N, including cases of alleged extra-judicial executions and torture'.

21. Kantipur report 'Body being run unilaterally', Kantipuronline 29 March 2010, <http://www.ekantipur.com/2010/03/29/top-story/nhrc-split-in-open/311258/>

22. Idem

23. Final evaluation of European Union support to the United Nations Office of the High Commissioner of Human Rights Field Operation Nepal Evaluation undertaken by independent consultants Daniel Alberman and Govinda Bandi in August 2008

for an end to the mandate since 2008.²⁴ Indeed it would not be an exaggeration to contend that the NHRC has invested more resources and achieved far greater visibility on its attacks on OHCHR-Nepal than it has managed on its human rights work.

Despite the very clear failings in the NHRC and by inference the capacity building support, OHCHR-Nepal went ahead with a new US \$2 million capacity-development project in July 2009 to be implemented jointly by OHCHR-Nepal and UNDP.²⁵ Again OHCHR-Nepal failed to provide a satisfactory account behind the logic of funding further capacity building given the failure of prior capacity building programmes. After ten years very public failure of the NHRC it should now be evident to supporters of the NHRC that capacity building is failing because it is poorly designed and most fundamentally there is no political will on the institutional and governmental side to reform.

Meanwhile the accreditation status of the NHRC is being considered for a downgrade by the ICC – the International Coordinating Committee of National Human Rights Institutions (NHRIs). The NHRC of Nepal would move from ‘A’ status (fully compliant with the ‘Paris Principles’) to B (not fully compliant). In a recent interview, Jyoti Sanghera, the current head of OHCHR-Nepal provided a questionable defence for the NHRC, *‘one of the main reasons behind this situation [ICC warning] is that the draft NHRC legislation is not in compliance with the Paris Principles (internationally recognised principles for the establishment of national human rights institutions). This issue is not in the hands of the NHRC, it is in the hands of the government. The NHRC cannot be held responsible for a process that it does not control. Similarly, the question of financial independence of NHRC is again in the hands of the government.’*

This appears to be a dubious argument. The Paris Principles are very clear. They do not and for good reasons should not, differentiate about who is responsible for non-compliance. They are standards that serve both to promote and protect NHRIs.

3. A critique of the OHCHR’s new mandate

Considerable private diplomatic concern was expressed over the High Commissioner’s handling of the negotiation in 2010. External evaluators suggested that OHCHR had not appreciated that it was in a *‘far stronger negotiating position’* than it thought.²⁶

24. On 11th July 2008 Commissioner Dr. K. B. Rokaya gave an interview to the Himalayan Times on 11 July 2008 in which he is quoted as saying that OHCHR “must leave as soon as possible because it has been weakening human rights movement in Nepal...It has been investigating rights abuse cases that come under the purview of NHCR and seeks publicity for the same...The NHCR will remain weak till OHCHR- Nepal remains here...The donor agencies have been promoting the OHCHR-Nepal by favouring it, instead of the NHCR, to launch human rights programmes...Definitely, the rights situation is not so good, but it is not as bad as the OHCHR and other international bodies have been portraying”.

25. No half measures please, by Suhas Chakma, Director, Asian Centre for Human Rights published in The Kathmandu Post, 22 October 2010, <http://www.ekantipur.com/2010/10/22/oped/no-half-measures-please/323908.html>

26. Evaluation of OHCHR – Nepal, October, 2010 – Fieldview Solutions

Most others, off the record, were far less generous. Active external support to retain the mandate was limited. OHCHR-Nepal's performance had alienated natural constituencies in the international community and national NGOs.²⁷ The Nepalese government, the military, and the NHRC sustained their attacks against OHCHR-Nepal.

If OHCHR-Nepal or its headquarters were interested in maintaining the mandate there was little evidence of assertive advocacy. This is particularly difficult to comprehend given OHCHR's extraordinarily strong negotiating position. OHCHR-Nepal's role was a formal part of the Comprehensive Peace Agreement (CPA). As a bilateral agreement, the Government had no case to demand changes to the CPA without agreement from the UCPN (M). The CPA is 'owned' by two parties – the UCPN (M) and the Seven Party Alliance. In changing the OHCHR-Nepal mandate without consulting the UCPN (M), the government expressly violated the CPA.²⁸ Yet when the Government demanded the change, OHCHR meekly conceded.

It is also of deep concern that the new mandate did not appear to reflect OHCHR-Nepal's own analysis of the human rights situation, or the shaky peace.²⁹ Indeed the concessions came just as OHCHR-Nepal had released a new report on persistent patterns of extrajudicial killings in the Tarai that made clear that the human rights situation was continuing to deteriorate.³⁰

Leadership concerns

ACHR's concern focused on the failure of the High Commissioner to address the strategic and managerial failings of OHCHR-Nepal, pointed out in the 2008 European Commission evaluation. ACHR recommended that if OHCHR-Nepal was to have a future, the High Commissioner must demonstrate public commitment to her field office and, as a priority, expedite the appointment of new leadership.

i. Donor evaluation highlights problems

Increasing donor unease was reflected in another long overdue external evaluation. The evaluation again mirrored the concerns of the 2008 evaluation, but reserved particular concern over the loss of the field offices.

27. No half measures please, by Suhas Chakma, Director, Asian Centre for Human Rights published in The Kathmandu Post, 22 October 2010, <http://www.ekantipur.com/2010/10/22/oped/no-half-measures-please/323908.html>

28. Idem

29. Idem

30. Idem

It stressed the imperative of *'recuperating'* field offices in a future mandate negotiation.³¹ They warned that OHCHR-Nepal should indicate its *'willingness to leave if minimum conditions [meaning a restoration of the field offices as a minimum] are not met'*.³² The evaluation referred, less than obliquely to the need to ensure that OHCHR- Nepal *'gets appropriate support from Geneva'* in the mandate negotiation.³³

The evaluators shared the 2008 evaluation's concerns over leadership, *'strong leadership will help OHCHR to retain respect, credibility and influence – and in some cases to win them back. It will need the clear direction and courage to take strategic, principled stands even when they meet external pressure.'*³⁴

They urged that recruitment of a new representative be expedited: *'previous leadership gaps have resulted in serious loss of momentum, something OHCHR cannot afford to repeat.'*³⁵

The High Commissioner responded by ending the process of recruitment for a new Country Representative and cutting the Deputy position. The current Country Representative meanwhile has been seconded elsewhere and he is not due to return until the end of his secondment.

ii. Enter the National Human Rights Action Plan

The consequences of a failure to address serious institutional dysfunctions have been laid out by external evaluation: ever greater policy error and diminishing influence. This has been most recently demonstrated by OHCHR-Nepal's ham fisted handling of recent events. In January 2011, OHCHR-Nepal announced that: *'OHCHR's principal focus is to work closely with the Office of the Prime Minister and Council of Ministers in supporting the three-year National Human Rights Action Plan (NHRAP).'*

Although the content of the NHRAP was unavailable at the time, ACHR underlined its concerns over the *'political wisdom of the UN associating itself so unconditionally with the launch of a three-year plan designed by a caretaker government of dubious constitutional legitimacy, headed by an unelected prime minister, dominated by the military and with a clearly time-limited expiry date.'*³⁶

31. Evaluation of OHCHR – Nepal, October, 2010 – Fieldview Solutions

32. Idem

33. Idem

34. Idem

35. Idem

36. No half measures please, by Suhas Chakma, Director, Asian Centre for Human Rights published in The Kathmandu Post, 22 October 2010,

<http://www.ekantipur.com/2010/10/22/oped/no-half-measures-please/323908.html>

Analysis of the NHRAP

The NHRAP was subsequently made available to ACHR. What follows is a brief examination of the plan.³⁷ The 2011-2014 NHRAP lacks a logical basis for intervention. It invokes prior NHRAPs as a justification for an intervention. The 2011-2014 NHRAP notes that all the activities of prior NHRAPs were implemented. It concludes that the results are poor: *'the incidents of human rights violation are not found to have decreased whereas it is voiced that there is an increase in impunity as well'*.³⁸

The 2011-2014 NHRAP does not consider what lessons can be learnt from this negative result, nor infers any failings on the part of prior NHRAPs. Despite this, the poor human rights environment provides the justification for the 2011-2014 NHRAP:

'there is a need for Nepal to give continuity to National Human Rights Action Plan to fulfill its commitments to respect, protect and promote human rights expressed before the international community'

The intervention logic appears flawed: if in the past NHRAPs did not improve the human rights situation, it is unclear what basis there is to justify further action based on the same modalities. Nor is it clear why this NHRAP should provide greater results than the last.

Programme design

The 2011-2014 NHRAP provides no overall problem analysis, beyond limited generalities and commitments. As the problems are defined so loosely, it provides no clear basis for a defined intervention. Any activity that is focused on human rights, no matter their relevance to the real problems, can be said to fall under what is more wish list than plan.

From a project design perspective the current NHRAP appears to suffer from the same intrinsic design faults of its predecessors: poorly defined problems, ill-defined outcomes, ill-defined and vague activities, activities that have little discernible link to the problems and, little clear mechanism between the activity and result. The 2011-2014 NHRAP mirrors its predecessor in its approach to measuring progress, being almost uniquely process oriented addressing 'number of attendees, training etc'.³⁹

For the most part, as with the prior NHRAP, undefined awareness and capacity building are proposed throughout the document as a solution to all human rights problems. The 2011-2014 NHRAP provides no reasoning behind the choice of intervention. The 2004 review of the prior NHRAP rejected this approach: *'the priority*

37. This analysis does not attempt to examine the whole document and seeks rather to examine the issue of the Nepal army and impunity.

38. NHRAP, unpublished, English translation available from OHCHR-Nepal

39. ACHR recognises that development indicators, in some cases are well developed. The focus of the critique is on civil and political rights.

in Nepal is not “awareness raising” or more human rights promotion; there has already been plenty of both.’⁴⁰

The section addressing the Army is particularly bleak, and, as we shall see indicative of a wider reluctance of the government to address accountability. The 2011-2014 NHRAP provides instead of an analysis, a list of positive actions taken by the Nepal Army. It is not a list based on evidence or fact. The list includes the extraordinary claim that all personnel in the Nepal Army that have violated human rights have been punished.⁴¹

Rather than addressing the now hundreds of well documented cases of human rights violations, the sole challenge to addressing human rights in the Nepal Army in the 2011-2014 NHRAP is found to be the lack of human rights cells at division and brigade level.⁴² The activities proposed to address the Army focus on human rights awareness and general undefined ‘capacity building’.

NHRAP conclusions

The current NHRAP is little different to its predecessors and the findings of the 2004 review appear appropriate: *The NHRAP, as currently written, is bloated, vague and unrealistic. (...)It is not really a plan at all, but rather a broad overview of human rights issues, with no priorities, measures, assessment mechanisms or other core elements necessary for any plan.*⁴³

The government may respond that there are mechanisms being put in place, they can point to progress in the drafts of transitional justice instruments, in the form of the Disappearances Commission Act and the Truth and Reconciliation Commission Act. And these are indeed cited as indicators within the plan. But these are deceptive. As Human Rights Watch notes, *‘Drafts of transitional justice instruments, in the form of Disappearances Commission Act and the Truth and Reconciliation Commission Act have been widely discussed. The drafting committees have been open to suggestions and all new drafts, although still far from perfect, have seen amendments rectifying certain problems. There are still concerns that these transitional justice mechanisms might be used as venues to avoid prosecution, but at least the drafting committees have shown an interest in dialogue on the matter’.*⁴⁴

40. Nepal Report for UNDP on the National Human Rights Action Plan (NHRAP), William G. O’Neill, 5 April 2004

41. ‘Human rights fantasy in Geneva’ by Tejshree Thapa, South Asian Researcher at Human Rights Watch published in The Kathmandu Post February 17, 2011, <http://www.hrw.org/en/news/2011/02/17/human-rights-fantasy-geneva>

42. Though the Government of Nepal has set up the Directorate of Human Rights in the army headquarters and has been executing works by creating different posts, this is not the case in the divisional and brigade level offices of human rights. These offices are being run by the officers appointed under different other posting and no positions have been created for this particular purpose. Therefore, it is necessary to create separate postings for the division and sections.”⁴²

43. Nepal Report for UNDP on the National Human Rights Action Plan (NHRAP), William G. O’Neill, 5 April 2004

44. ‘Human rights fantasy in Geneva’ by Tejshree Thapa, South Asian Researcher at Human Rights Watch published in The Kathmandu Post February 17, 2011, <http://www.hrw.org/en/news/2011/02/17/human-rights-fantasy-geneva>

But the crucial point is that new laws have no value if they cannot be enforced. As Human Rights Watch noted during the Universal Periodic Review discussion, the Nepal Government representative, then Deputy Prime Minister Sujata Koirala, *'insisted that the judiciary is fiercely independent, without remarking on the fact that, whether independent or not court orders are not worth the paper they are printed on and that the courts have become paper tigers whose rulings the government can wave around but in reality achieve nothing'*.⁴⁵

What is left in the NHRAP is a series of poorly defined awareness and capacity building activities with little discernible connection to reality. As the 2004 review noted: *'What is the point of raising awareness of human rights if there is no medium or mechanism to deliver the information about rights abuses and then have remedial action taken? Rights without remedies are empty rights.'*⁴⁶

Unless pervasive impunity ends it is not difficult to find models of how these bodies are likely to perform. According to the NHRC's own figures after ten years of operations, this Constitutional body reported that 86 percent of its recommendations had not been implemented.⁴⁷ Figures relating to its successes on impunity were not recorded.

OHCHR and the NHRAP

It would appear difficult for OHCHR-Nepal to provide a credible substantive justification for support to the NHRAP. When OHCHR-Nepal announced its support for the NHRAP in January 2011, OHCHR-Nepal was not, in fact, in possession of a translation of the NHRAP, OHCHR-Nepal only finished a translation and made it available to ACHR on 22 February. In other words, the details of the content were actually unknown to OHCHR-Nepal.

OHCHR-Nepal may claim the NHRAP as a centrepiece of its work. But the government does not agree. OHCHR-Nepal is not mentioned as a partner for a single activity proposed by the NHRAP. Certainly OHCHR-Nepal's announcement was more than a timely political gift for the Government who were just about to appear before the United Nations Universal Periodic Review.

OHCHR-Nepal has responded to ACHR's initial concern suggesting that the earlier NHRAP has little relevance. It was written during a time of conflict. Such an explanation would need to explain why the earlier NHRAP failed at a time of greater respect for human rights, stronger institutions and greater checks and balances than are currently available in Nepal. And OHCHR-Nepal would need to demonstrate how the actions proposed by the NHRAP conform with OHCHR-Nepal's own monitoring.

45. Idem

46. Idem

47. "86 percent of NHRC recommendations have been ignored," The Himalayan Times, July 6, 2010

OHCHR-Nepal has equally suggested that the NHRAP is a work in progress and a draft. There is no reason to doubt this. But it is unclear what logic there was behind backing a draft. It is certainly unorthodox. Draft or otherwise misses the point - there is clear reason to doubt the political wisdom of providing political support to a document that so clearly undermines OHCHR-Nepal's strategy. The NHRAP places conditions on international norms. International norms should frame OHCHR-Nepal's position.

ACHR does not reject capacity building as a central function of OHCHR-Nepal. It supports OHCHR-Nepal's view that capacity building should supplant protection over time as the situation improves. ACHR accepts that the rate of change and the trajectory of that change is extremely difficult to get right. But ACHR rejects the view that capacity building should be designed without sufficient reference to the external environment. There is an imperative need for human rights field missions to ensure that technical assistance *'should be shaped by the diagnostic provided by the UN's protection activities.'*⁴⁸ The diagnosis provided by the UN in Nepal is that the situation is not improving and indeed appears to be deteriorating.

Understanding the political place of the NHRAP

Like its predecessor, there is compelling evidence to suggest that the 2011-2014 NHRAP is only one dimension of ongoing attempts by all successive Nepal governments to avoid accountability.

The new government offers no prospect of a positive change. If the prior government was dominated by the military, this government has senior ranking Maoists in the cabinet. During the conflict the Maoists committed systematic violations of International Humanitarian Law. The emblem of failure to address Maoist abuse is underlined by the failure to prosecute those responsible for the bus bombing in Madi, Chitwan District, in June 2005 in which the CPN-M acknowledged responsibility for killing 36 persons and wounding 72 others.

In the period of transition the Maoist leader Prachanda has repeatedly claimed that violence by the Young Communist League, as well as other affiliates, is not policy. The Party has endlessly committed to addressing the issue. The Maoists have no desire to see criminal proceedings applied to their leadership. The appointment of the Maoist leader Agni Sapkota to Minister for Information is indicative of the Maoist position with regard to the rule of law. Sapkota is alleged to have direct involvement in the abduction and killing of Arjun Bahadur Lama in June 2005 in Kavre District. In March

48. Nicholas Howen, 'The Fundamental Protection Function of the Human Rights Field Operation', Submitted to the Expert Consultation on "The Overarching Protection Role of the Human Rights Field Officer", held in Freetown, Sierra Leone May 24-25, 2006, Second Expert Consultation on "Consolidating the Profession: The Human Rights Field Officer", a project of the Human Rights Law Centre, University of Nottingham.

2008 the Supreme Court issued an order to the police to register the case. The police registered the FIR but three years later there has been no progress in the prosecution.

But the recent announcement by the government to withdraw the charges against Sapkota and a host of others is effectively to declare an amnesty. In issuing this amnesty the government has declared an effective end to the rule of law in Nepal.

But it should also be understood that the so-called democratic parties share the blame. Both the UML and the NC must accept a large measure of responsibility for the failure to tackle impunity. Impunity did not start during the Royal takeover. For example, in 1992 GP Koirala as Prime Minister buried the government inquiry into the human rights violations committed during the first (1990) People's Movement – the Mallik Commission. The report was never published nor was any action ever taken.

Similarly the majority of the Army's violations were committed under the nominally democratic Premiership of Nepali Congress leader Sher Bahadur Deuba⁴⁹. It should be clearly understood that many of Nepal's nominally 'democratic' politicians have themselves overseen large-scale violations of human rights.

After the People's Movement in April 2006, power was restored to the democratic parties. But again they squandered another opportunity to tackle impunity. The Government quickly demonstrated its intent. Prime Minister Koirala limited the terms of the investigation into the Royal takeover (the Rayamahji Commission). No-one was held to account. The then CPN(M) participation in government only increased the momentum against tackling impunity.

Koirala appointed himself Defence Minister. He retained General Rukmangat Katuwal as Chief of the Army Staff (COAS) despite Katuwal's direct and leading role in the Royal takeover.

A political context of impunity?

The 2011-2014 NHRAP should be viewed in political context. The plan for the security sector reflects the position of the Army; a position ventriloquised by the recent government, and neatly summarized by the Foreign Minister, Sujata Koirala, during the January 2011 United Nations Universal Periodic Review of Nepal's human rights record: *'The security agencies, including the Nepal Army, are fully committed to respect and support the protection of human rights and international humanitarian law. The isolated and unintended incidents of human rights and humanitarian law violations, if any, are not policy driven. The institution strictly observes a zero-tolerance policy against all kinds of human rights*

49. See INSEC annual reports for the period. <http://www.inseconline.org/index.php?type=reports&id=3&lang=en>

*violations. The Nepal Army is a disciplined and professional institution. It is supportive of democratic transformation.*⁵⁰

This world view also finds expression in the 2011-2014 NHRAP. The only problem the Army has to address is awareness of human rights. While the 2011-2014 NHRAP contains references to mechanisms to address human rights, they and their outcomes, are not developed with sufficient rigour. The results must be examined within the national political context. And an examination of the direction of laws very clearly shows government intent, with the NHRC law, the transitional justice process and the disappearance law all falling far short of international norms. Government intent is further spelt out in the section of the NHRAP addressing the Army.

The key to understanding human rights approach of the government of Nepal, including the 2011 -2014 NHRAP is impunity.

Here it is worth quoting the 2004 evaluation of the NHRAP in full: ‘The RNA [Royal Nepal Army as it was then known] consistently maintains that any violations committed by its soldiers do not reflect official policy; “rogue elements” of the army are responsible. Yet the RNA’s reluctance to investigate and punish soldiers belies this position. If they are truly aberrations by “rogue elements,” operating on their own, outside official orders and policies, then why is it so difficult to take strong action against them? If they violate standing orders, then shouldn’t it be easy and quick to discipline soldiers who violate human rights? The inescapable inference is that the RNA’s extreme reluctance to punish soldiers indicates a tolerance of, if not real support for, actions taken by soldiers that violate the laws of war and human rights in this conflict against the Maoists and that these acts reflect the counter-insurgency doctrine of the RNA, regardless of limits placed by human rights and the laws of armed conflict. The RNA could easily disprove this inference, yet they have failed to do so’.⁵¹

Seven years later, they continue to fail to act. Yet the NA has demonstrated extraordinary effectiveness in prosecuting criminals within the ranks, when it wants to. This can be seen in the following cases:

On 29th May 2002, four RNA soldiers, Nawaraj Karki, Lal Bahadur Shrestha, Bishnu Pandey and Uttam Silwal dressed in combat fatigues demanded money from Raj Kumar Sharma, a businessman, residence Anamnagar, Kathmandu. Following an investigation the General Court -Martial convicted these army personnel and sentenced the accused Nawaraj Karki for 3 years, Lal Bahadur

50. February 2011, Draft report of the Working Group on the Universal Periodic Review Nepal*http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NP/Nepal-A_HRC_WG.6_10_L.3-eng.pdf

51. Nicholas Howen, ‘The Fundamental Protection Function of the Human Rights Field Operation’, Submitted to the Expert Consultation on “The Overarching Protection Role of the Human Rights Field Officer”, held in Freetown, Sierra Leone May 24-25, 2006, Second Expert Consultation on “Consolidating the Profession: The Human Rights Field Officer”, a project of the Human Rights Law Centre, University of Nottingham.

Shrestha for 4 years, Bishnu Pandey and Uttam Silwal for 6 months of imprisonment and all of them were discharged from service.

On 13th May 2002, 6 army personnel and some civilians pretending to be Maoists extorted Rs 125,000 from Samsuddin Darji resident of Kamdi VDC, Banke district. They were charged with dacoity and sentenced 4 persons to 2 to 3 years of imprisonment.

The clear inference from these cases is that addressing impunity is a question of political will. As Human Rights Watch's Nepal expert Tejshee Thapa has noted: *'The main problem has been the refusal of the Army or Maoists, the two main perpetrators of human rights violations, to take action, or allow the police and courts to take action, against abusers in their ranks. Any small step forward in ending impunity has been met with denial or simple non-cooperation. Impunity is so institutionalised that Supreme Court orders directing the Army and police to cooperate change nothing.'*⁵²

The NHRAP and the most recent decision of the new government to withdraw a host of cases would appear to be part of a pattern of government efforts to combat the increasing criticism of its failure to address human rights by a series of public relations exercises rather than remedial action to prevent violations and to prosecute those guilty of human rights abuses and violations.

4. Conclusions

OHCHR-Nepal's extraordinary political bungling of the NHRAP and its silence on the government's withdrawal of cases is confirmation of the 'absences of political capacity',⁵³ strategy and leadership; something evaluators have been underlining for years.

Demonstrating a marked disinclination for accountability, OHCHR-Nepal has failed to reform. The most recent evaluation called on the High Commissioner to urgently address leadership and staffing concerns. But perhaps most seriously the HC has consistently failed to let strategy be guided by her own field Office monitoring. OHCHR-Nepal has clearly been repeatedly pushed toward capacity building when the political circumstances suggested otherwise. In the context of the NHRAP this is all the more stunning given that OHCHR-Nepal actually has no implementing role.

52. 'Human rights fantasy in Geneva' by Tejshee Thapa, South Asian Researcher at Human Rights Watch published in *The Kathmandu Post* February 17, 2011, <http://www.hrw.org/en/news/2011/02/17/human-rights-fantasy-geneva>

53. Final evaluation of European Union support to the United Nations Office of the High Commissioner of Human Rights Field Operation Nepal Evaluation undertaken by independent consultants Daniel Alberman and Govinda Bandi in August 2008

Independent evaluation of OHCHR-Nepal has consistently expressed concern over the failure of OHCHR-Nepal to understand the role of capacity building. In 2008, the EU evaluation noted that OHCHR-Nepal ‘training did not take place within a larger strategic framework *and was not sufficiently informed and focused by input from protection staff.*’⁵⁴ The 2010 evaluation repeated the concern over the ‘*absence of a joined-up approach between protection and training/capacity building has plagued the operation since the beginning*’.⁵⁵

There is now an unambiguous consensus in development assistance that political will is both a necessary and sufficient condition for reform. Human rights is not an exception: ‘*where human rights violations are deliberately carried out by or on behalf of the government, or there is a lack of political will to end the violations, putting money into ‘technical assistance’ is at best ineffectual.*’⁵⁶ The evidence from Nepal supports this and is most clearly demonstrated in the collapsing NHRC. The ‘poisonous’ relationship between OHCHR-Nepal and NHRC is an unrealistic basis for capacity building.

Donors need to begin to draw lessons from ten years of experience with the NHRC. Building human rights reform requires more than technical assistance. The proposed NHRAP is a case in point. It is an appalling example of project design, but that is not the main obstacle rather it can be better understood as a log framed expression of the Government of Nepal attempts to avoid accountability. It makes numerous commitments but none of them are measurable nor commit the government to actually doing anything that can be measured; like chewing water, as the Nepalese expression goes. It contains measurable legal reform but what purpose does this serve if the actors can ignore Court rulings?

And what is the value of legal reform if the crime of murder does not prevent elevation to senior government office?

Addressing impunity is central to Nepal’s peace and indeed human rights. In rejecting accountability the Government is defying the international obligations of the state. Donors and diplomats should clearly understand the implications. The position undermines the whole transitional justice process and rule of law framework.

What purpose does a transitional justice mechanisms serve if the Nepal Army has already punished all the violators in its ranks [if the NHRAP or the government is to be believed]? Where is the logic for a transitional justice process – bound to cost the international community tens of millions of dollars – if there were only a handful of

54. Idem

55. Evaluation of OHCHR – Nepal, October, 2010 – Fieldview Solutions

56. Nicholas Howen, ‘The Fundamental Protection Function of the Human Rights Field Operation’, Submitted to the Expert Consultation on “The Overarching Protection Role of the Human Rights Field Officer”, held in Freetown, Sierra Leone May 24-25, 2006, Second Expert Consultation on “Consolidating the Profession: The Human Rights Field Officer”, a project of the Human Rights Law Centre, University of Nottingham.

'errors' and 'rogue elements'? And politically how far will the transitional justice process get if one side refuses to take part? And how will it implement its decisions if the Maoists and Nepal Army can empower themselves to withdraw charges in existing judicial process?

OHCHR officials have responded defensively to ACHR's critique arguing that they must engage to seek change. ACHR is not opposed to engagement *per se*. But engagement is a means to an end, not an end. There is value in engagement but not, as is so often the case, when it is mistaken for influence. If technical assistance is to be provided to NHRAP or the NHRC and indeed any institution in Nepal, it should now be provided on the basis of stringent conditionality. The Government of Nepal has placed conditions on its international obligations that make technical assistance, at best, a waste of funds.

The political risk of continuing with unconditional support, like that extended by OHCHR-Nepal, is that the engagement provides *de facto* political support for a continuance of the current direction of policy; a policy that seeks to avoid accountability and in so doing undermines large sections of the peace agreement and the aspirations of the people of Nepal for an end to the 1990 settlement.

OHCHR-Nepal is in a position of leadership; where it leads on human rights, the international community is likely to follow. It has a responsibility to be guided by international norms. It has a responsibility to be guided by political reality and the human rights situation.

If the international community is to support Government of Nepal's efforts it is neither unreasonable nor indeed imperialistic to expect the NHRAP to be founded on international norms. It is not unreasonable to expect, for example that the decision of the Supreme Court are respected and complied with. It is not unreasonable to expect that if the international community is to pay for and be involved with in the capacity building of the army, this should be based on a realistic presentation of the facts not the longstanding fantasy that thousands of violations were committed by a 'few bad apples'.

If OHCHR-Nepal is to have any meaningful role it must now demonstrate willingness to undergo urgent reform. ACHR would suggest that donors' evaluations of OHCHR-Nepal's work would serve as more than an appropriate guide to the changes to the Nepal Office. This should be signalled with the immediate announcement of an expedited process for the appointment of a suitably experienced and high level Country Representative. Technical support should be immediately suspended. And supported by the international community OHCHR-Nepal must now insist on concrete measures of progress on impunity before engaging in any human rights initiatives with the authorities.

Despite its unsatisfactory performance, it would be wrong for OHCHR to withdraw now as this would imply that the concerns over human rights in Nepal had been addressed. The reality is the opposite; national institutions to promote and protect human rights are as weak as or weaker than in 2005, a low point for human rights in Nepal.

Human rights defenders are reporting increasing concern over their security suggestive of levels similar to the take over of 2005 which triggered the establishment of the deployment in the first place.

To withdraw OHCHR-Nepal now or to simply extend it with its current lack of strategy and leadership would be to publicly acknowledge that five years of funding since mid 2006 has been wasted. This outcome would reflect badly both on the HC and also on donors who have failed to insist on a serious standard of work by the Nepal office.