

Strengthening the rule of law through the United Nations Security Council

Workshop paper series



The United Nations Security Council, Peacekeeping and the Rule of Law

Workshop held at the Australian National University on 8 & 9 December 2011 by the Australian Government's Australian Civil-Military Centre and the ANU Centre for International Governance and Justice

(Project funded by ARC linkage grant LP110100708)

Transitional Justice and Vetting from the Perspective of TCC

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Working paper No. 1.4



Regulatory
Institutions
Network



Australian Government
Australian Civil-Military Centre



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1. Introduction

Lately incidents of sexual violence by United Nations (UN) peacekeepers have continued to surface on a regular basis. This has resulted in discussions about accountability for peacekeepers involved in sexual exploitation and abuse (SEA). In response to repeated scandals, the UN in 2004 commissioned Prince Zeid Ra'ad Zeid Al-Hussein to conduct a comprehensive examination of the widespread problem. It subsequently has developed a "strategy" to address SEA by UN personnel *when on mission*. As the reported incidents concern mainly SEA in host countries, discussions and strategies are limited to this. However, the problem is wider than this and transcends beyond SEA in host countries. This paper highlights the need for increased transparency and accountability in the process of vetting of security forces before they are deployed on peacekeeping missions. It argues that a more transparent vetting system can contribute to strengthening the rule of law, help countries to combat impunity and improve the situation of human rights, including SEA, not only in host countries but also in troop contributing countries (TCCs).

Taking Nepal, as an example, this paper argues that UN peacekeepers coming from a country emerging from internal armed conflict or soldiers involved in internal peace and security operations require vetting to improve the situation in both the host and TCCs. As the paper uses Nepal as a case study, the background of the human rights situation and the role of security personnel, the potential peacekeepers, are discussed first to put the situation into context.

2. Taking Nepal as an example

2.1 Nepal and UN peacekeeping: Nepal is one of the largest TCCs. It stands at sixth position as a troop contributing nation to the UN Department of Peacekeeping Operations. Currently the Nepalese Army (NA) has some 3,551 soldiers serving in 13 different Missions around the world.² Nepal has been serving in peacekeeping since 1958 in more than 30 missions providing more than 85,000 troops.³ Peacekeeping under the blue helmet does not only bring pride and prestige to the country but also improves the economic situation of the serving personnel and military and police institutions.

2.2 Human rights situation of the country: Nepal's human rights situation deteriorated sharply during its ten-year long internal armed conflict between 1996 and 2006, with thousands of extrajudicial executions, enforced disappearances, torture and rape. Maoist insurgents were also responsible for killings, abductions, torture and extortion. Thousands of

¹ Human Rights Activist, Nepal

² NA in UN Peace Support Operations: available at: http://www.nepalarmy.mil.np/na_un.php.

³ *Ibid.*

children were used for military purposes by the Maoist insurgents. Those committing human rights abuses, whether security forces or Maoist fighters, have so far avoided any accountability.

In the early part of the conflict, the ill-equipped and poorly trained Nepal Police bore the brunt of responsibility for fighting the CPN-M. As a key target of the CPN-M, hundreds of police officers lost their lives.⁴ In response, the Nepal Police committed extrajudicial killings, disappearances, torture and rape, in particular targeting people suspected of being members or sympathizers of the CPN-M.

As the situation deteriorated, a nationwide state of emergency was declared in November 2001 and the Royal Nepal Army (RNA, now Nepal Army; NA) was deployed.

As the NA got involved, reports of extrajudicial executions, invariably reported by the army itself as “encounter killings”, escalated. In the first year of the NA deployment, from November 2001 to October 2002, according to figures made public by the Ministry of Home Affairs and the NA, the number of people killed was 4,366. This compares to around 2,700 people killed in the previous five years. According to the same sources, 4,050 of the 4,366 were “Maoists”.⁵ Amnesty International stated it believed that at least half of the killings may have been unlawful. The vast majority of the victims were civilians targeted for their real or perceived support to the CPN-M; others were Maoists deliberately killed after they were taken prisoner or killed instead of being arrested.⁶

In both 2003 and 2004 Nepal took on the ignominious distinction of having the highest yearly number in the world of new cases of disappearances reported to the UN Working Group on Enforced or Involuntary Disappearances (WGEID). More than a thousand cases of disappearances related to the conflict remain unclarified, including the torture and disappearance of 49 individuals from Maharajgunj army camp⁷ and almost two hundred who disappeared mostly after arrest by security forces in Bardiya District.⁸

In September 2005, the UN dispatched the then Special Rapporteur on Torture, Professor Manfred Nowak, to Nepal on a fact-finding visit at the invitation of the Government. Professor Nowak accused the security forces of systematic torture. He concluded that “torture is systematically practiced by the armed police and Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation or rehabilitation.” As a sign of the security forces’ sense of impunity and the acceptance of torture at the higher levels, Professor Nowak “was repeatedly told by

⁴ Advocacy Forum and Human Rights Watch-Nepal, “Waiting for Justice”, September 2008, p. 9.

⁵ Amnesty International, “Nepal: A deepening human rights crisis”, 2002. Available at <http://www.amnesty.org/en/library/asset/ASA31/072/2002/en/dom-ASA310722002en.html>.

⁶ *Ibidem*

⁷ OHCHR-Nepal, “Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003-2004”, May 2006.

⁸ OHCHR-Nepal, “Human Rights in Nepal. One Year after the Comprehensive Peace Agreement”, December 2007, p. 23.

senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.”⁹

The widespread practice of illegal arrest and detention by the security forces outside any legal framework has been documented by many sources.¹⁰ The security agencies frequently ignored *habeas corpus* orders, showing its utter disdain for judicial authorities, while the courts failed to insist upon compliance with their orders and left their non-cooperation unpunished. For some time in May 2005, the International Committee of the Red Cross (the ICRC, which had been present in Nepal since 1998) suspended its visits to army camps after the NA failed to abide by its worldwide working modalities for and with detainees.¹¹

The conflict took a turn after king Gyanendra took power in the February 2005 royal coup and the subsequent crackdown on the press, human rights activists and political party leaders. This was the time when leaders began to call publicly for international intervention, resulting in the establishment of the largest field office of the UN OHCHR in Nepal in April 2005. Unprecedented public protest led to the ultimate ousting of the king in April 2006.

The Comprehensive Peace Agreement (CPA) of November 2006 provided for the establishment of a Constituent Assembly (to draw up a new Constitution). It also promised the establishment of a Truth and Reconciliation Commission and a Commission of Inquiry on Disappearances to address the concerns of the thousands of victims and their families. Another fundamental commitment of the CPA was the transformation of the security sector and the “integration and rehabilitation” of former Maoist combatants, and the development of an action plan for the “democratization” of the NA, determining its appropriate size, developing its national and inclusive character, and training it in the norms and values of democracy and human rights. However, as the political situation deteriorated and reached a stalemate in the subsequent years, there has been little progress in delivering on these CPA commitments.

During the most recent period, the political leaders have increasingly attempted to avoid accountability for past human rights abuses.¹² Advocacy Forum and Human Rights Watch have found that families of those killed or disappeared have fought hard to obtain justice, but not a single perpetrator has been successfully prosecuted in a civilian court for serious abuses. Evidence shows that police face intense pressure from senior government officials, political parties (in particular, the UCPN-M, now in government), and the NA to obstruct justice, ignore Supreme Court rulings and evade prosecution. In the absence of a robust legal

⁹ See “Report by the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment. Mission to Nepal”, 9 January 2006, UN Document, E/CN.4/2006/6/Add.5, p. 2.

¹⁰ See numerous reports of UN Special Procedure mechanisms, Amnesty International, Human Rights Watch, International Commission of Jurists, Asia Human Rights Commission, Asia Centre for Human Rights, Advocacy Forum, Informal Service Sector (INSEC) and others.

¹¹ Amnesty International, “Nepal: Military assistance contributing to grave human rights violations”, 2005. Available at <http://www.amnesty.org/en/library/asset/ASA31/047/2005/en/dom-ASA310472005en.html>.

¹² Advocacy Forum, “Avoiding Accountability by Hook or by Crook. The Issue of Amnesties in Post-Conflict Nepal”, Occasional Brief Vol. 2, No. 1, June 2011, <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

system that would force compliance, perpetrators of human rights violations continue to enjoy impunity.¹³

2.3 The legal framework

The international human rights treaties to which Nepal is a party are incorporated into and enforceable as part of Nepal's domestic law.¹⁴ In the Interim Constitution of January 2007, Nepal committed itself to respecting and ensuring human rights, as well as to eliminating impunity.¹⁵ A National Human Rights Commission (NHRC, initially set up as a statutory body in 1997, but made a constitutional body in 2007) is mandated, among others, to investigate human rights violations and recommend actions against perpetrators.¹⁶ The Interim Constitution also provides for a Public Service Commission to be consulted in any permanent civil service appointments including appointments in the army and the police.¹⁷

The operations of internal disciplinary mechanisms in both the army and the police lack transparency; and have not acted as mechanisms to reinforce adherence to human rights.

According to the Army Act, a recruitment committee presided by a member of the Public Service Commission oversees officer-level appointments. At the recommendation of the recruitment committee, the Government appoints army officers. Similarly, a police officer can be dismissed if he or she has been convicted of a criminal offence involving moral turpitude or if he or she is involved in misconduct.¹⁸

The Government has the authority to dismiss army officers. Persons convicted of a crime or a human rights violation are not eligible for army appointments.¹⁹ The December 2004 WGEID report on its visit to Nepal called for amendments to the Army Act to provide that security forces personnel accused of the "disappearance," murder, or rape of civilians be tried only in civilian courts.²⁰ Rather than implementing this recommendation, the new 2006 Army Act has put many perpetrators of torture and enforced disappearances outside the ambit of any punishment. While section 62 of the 2006 Army Act provides that a special committee will be formed to investigate cases of corruption, theft, torture, and "disappearances" and that any prosecution will take place before a Special Court Martial (consisting of a Court of Appeal judge, the Secretary of the Ministry of Defence and the Judge Advocate-General of the NA), section 22 provides that such actions shall not be considered an offence when committed "in good faith in the course of discharging duties." The punishment for committing these offences is not specified in the 2006 Army Act.²¹ The sanctions a Court

¹³ Advocacy Forum and Human Rights Watch, "Adding Insult to Injury. Continued Impunity for Wartime Abuses", November 2011, http://www.hrw.org/sites/default/files/reports/nepal1211Upload_0.pdf.

¹⁴ Treaty Act 1990, Article 9; see also Advocacy Forum and Redress, 19-20.

¹⁵ The Interim Constitution of Nepal 2007, Article 33 (c).

¹⁶ The Interim Constitution of Nepal 2007, Article 132.

¹⁷ The Interim Constitution of Nepal 2007, Article 126.

¹⁸ Police Rules, Article 88.

¹⁹ Army Act 2006, Articles 12-14 and 18.

²⁰ Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal, E/CN.4/2005/65/Add.1.

²¹ Advocacy Forum and Human Rights Watch, "Waiting for Justice", p 48-9.

Martial can impose for various crimes or misconduct include, among others, imprisonment, dismissal and demotion.²²

Senior appointments in the police are made by the Government on the recommendation of an inter-departmental recruitment committee. Past conduct and satisfactory character represent criteria for appointment. A person who has been convicted of a criminal offence involving moral turpitude or who was a member of an organization with a destructive objective cannot be appointed to the police. The Government also has the authority to promote senior police officers on the recommendation of a promotion committee. Personal quality is one of the criteria for promotion.²³

The Nepali legal framework does not explicitly provide for a vetting of security personnel for past abuses. The above provisions proscribing the appointment of convicted personnel are of little use since no army or police officers have yet been prosecuted for conflict-related crimes. Because of this culture of impunity, no one has been prosecuted, so the suspects of these abuses are not being vetted (despite the seriousness of the allegations) because vetting only applies to convicted perpetrators.

National and international non-governmental organizations have recommended that independent external oversight bodies should be established with a mandate to receive and investigate public complaints, as well as to monitor the functioning of the internal recruitment, promotion and disciplinary mechanisms.²⁴

2.4 Use of vetting of troops in peacekeeping as leverage to reduce impact of conflict on civilians: In the absence of effective accountability in the country and the Nepal government's failure to conduct effective vetting, national and international non-government organizations (NGOs) started looking at the international level to create pressure to bring an end to impunity. In this context, using vetting was first mooted in 2005. Nepal's most successful experience in using vetting as a lever goes back to the period in the immediate aftermath of the King taking power in February 2005. A concerted effort by INGOs and NGOs to make appeals to the UN Secretary-General and the UN Department of Peacekeeping Operations (DPKO) started around mid-March 2005, in the immediate aftermath of the royal coup.

Amnesty International wrote to UN Secretary-General (SG) Kofi Annan expressing concern that it had received reports that Nepalese soldiers involved in the killing of Maoists were rewarded with peacekeeping duties.²⁵ It stated that such a policy would not only fuel the extremely high level of extrajudicial killings of suspected Maoists committed by the NA, but

²² Army Act 2006, Article 101.

²³ Police Act 1955, Articles 9-11; Police Rules 1992, Articles 10-15, 22-28.

²⁴ United Nations General Assembly, "United Nations Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials", A/44/162 (15 December 1989); see also Committee of Ministers of the Council of Europe, European Code of Police Ethics, Recommendation 10 (19 September 2001), Article 59; and European Code of Police Ethics, Commentary to Article 59, 42.

²⁵ Amnesty International, "Nepal: Military assistance contributing to grave human rights violations", June 2005, available at: <http://www.amnesty.org/ar/library/asset/ASA31/047/2005/en/a6772182-d4e4-11dd-8a23-d58a49c0d652/asa310472005en.pdf>.

could also facilitate the “export” of human rights violations. Amnesty International said that insisting on thorough vetting by the UN would not only help protect the UN from attacks on its peacekeeping troops’ record but would also send a powerful signal to the NA that the international community will not tolerate the gross and persistent human rights abuses committed by it.

The human rights standards of UN peacekeepers from Nepal were also raised as a concern by the then High Commissioner for Human Rights Louise Arbour and her representative in Nepal, Ian Martin, in 2005. Louise Arbour and Ian Martin had some success in using the threat of exclusion from UN peacekeeping as leverage. As they made public statements declaring their intention to recommend to DPKO the banning of any units involved in serious human rights violations from peacekeeping missions, it was remarkable to see how reports of enforced disappearances ceased and the number of civilians killed in the conflict reduced to very low levels.²⁶

The logic that more transparency about selection criteria and heightened accountability will result in people with poor human rights records being unable to qualify; and that this in itself works as an incentive for security forces personnel to improve their conduct in-country even during a conflict period was proven in Nepal in 2005-2006.

However, after the conflict ended, the security agencies and UCPN-M continued to insist on impunity for perpetrators within their ranks, lied to and defied the courts, and failed to cooperate with the reforms demanded in the CPA. On that basis, some individual NA candidates were disqualified for UN peacekeeping roles (see below). The CPA provides for the reintegration of the People’s Liberation Army (PLA, the Maoist army) into security forces, mainly into the NA, but fails to set out the procedures for the vetting out of those with bad human rights records, leaving potential future peacekeepers out of checks. Furthermore, the NA does not have transparent procedures to fulfill its commitment to screen those it puts forward for UN peacekeeping. We would argue that the lack of effectiveness in addressing impunity and bringing about accountability at a more general level is connected to the policy-level position taken by the NA and Maoist leadership to resist any accountability for past human rights violations and to the failure and reluctance of the UN to use selection for peacekeeping as a holistic sanction and a lever.

Experience shows that the success of efforts to enforce discipline and standards in security forces depends critically on the quality and involvement of the commanders. That is why vetting during conflict, but especially in post-conflict transition, should focus on officers, and be proportionate in thoroughness to the rank. So far, in Nepal it has been difficult to influence selection at this level as much as one would have liked to. One can believe that only when it starts, accountability will also start to be established.

2.5 Repatriation of two officials (emblematic cases): Lately, the UN had to repatriate two peacekeepers serving in Chad and Liberia respectively to Nepal, namely, Nepal Army *Major Niranjana Basnet* and Nepal Police *Deputy Superintendent of Police (DSP) Basanta Bahadur*

²⁶ Commission on Human Rights, OHCHR-Nepal report, E/CN.4/2006/107, para. 99.

Kunwar in connection with human rights violations that occurred in Nepal, not while they were deployed on peacekeeping.

Major Niranjan Basnet is one of four soldiers charged *in absentia* with the murder of 15-year-old Maina Sunuwar by the Kavre District Court.²⁷ Maina was arrested by a group of soldiers in February 2004; and initially the NA denied she had been arrested. After she died in custody her body was buried illegally in the grounds of the army camp, which is also the place where NA personnel receive training before they are deployed as peacekeepers. Her body was later exhumed from a shallow grave at the outskirts of this camp.

After a long legal battle, on 13 September 2009, the Kavre District Court ordered the NA Headquarters to immediately proceed with the automatic suspension of Niranjan Basnet (the only one of the four accused still serving, who had since been promoted from captain to major) and for Army Headquarters to submit all the files containing the statements of the people interviewed by the Court of Inquiry. The NA, ignoring court orders, sent Niranjan Basnet abroad on coveted UN peacekeeping duties.

Although the UN repatriated Basnet in December 2009 after it became publically known that he was on a UN mission, the NA immediately took him under its control upon his arrival in the country and has not handed him over to the police, despite orders from the then prime minister to do so. On 13 January 2010, UN Secretary-General Ban Ki-moon urged the NA to comply urgently with the September 2009 court order and suspend Major Basnet. The NHRC also urged the NA to hand over Major Basnet.²⁸ To date, Basnet remains under army protection.

Deputy Superintendent of Police Basanta Bahadur Kunwar was repatriated from peacekeeping duties in Liberia in October 2011, after the UN was informed that a case relating to torture was pending against him in the Kathmandu District Court.

More specifically, Basanta Bahadur Kunwar, faced a case for damages filed in September 2009 by a victim of torture who was tortured when held in police custody on suspicion of theft. Nevertheless, the Nepalese authorities selected him to serve in the UN Mission in Liberia (UNMIL).²⁹

The DPKO spokesperson, Kieran Dwyer, informed the media in an email statement that: "A Nepalese police officer was repatriated following information that he had a case to answer in the national courts for alleged torture in his home country. The United Nations acted as soon as it received informal information about this police officer. After satisfying ourselves about

²⁷ For more details on Maina Sunuwar's case, see Advocacy Forum, "Maina Sunuwar. Separating Fact from Fiction", February 2010, <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>.

²⁸ Nepalnews, *NHRC urges govt to proceed cases of HR violation through civil courts*, December 24, 2009, <http://www.nepalnews.com/main/index.php/news-archive/19-general/3068-nhrc-urges-govt-to-proceedcases-of-hr-violation-through-civil-court.html>.

²⁹ Column Lynch, "Is Nepal Sending Accused Criminals to Serve in U.N. Peacekeeping Missions?", Turtle Bay blog, 11 November 2011, http://turtlebay.foreignpolicy.com/posts/2011/11/11/is_nepal_sending_accused_criminals_to_serve_in_un_peac_keeping_missions.

the facts raised, we worked with the government of Nepal and the officer was withdrawn within weeks."³⁰

3. Who is responsible?

However welcomed the action by the UN to repatriate suspects of serious human rights violations, there remains a need to ensure accountability. So far, there has been a complete failure on this front in Nepal.

The UN maintains that its peacekeeping operations hold personnel accountable to the highest standards of behaviour *when on peacekeeping missions*.³¹ In response to repeated scandals of sexual abuse of women by peacekeepers, the UN has developed a “strategy” to address sexual exploitation and abuse (SEA) by UN personnel *when on mission*, normally resulting in individual peacekeepers or units being repatriated. However, the subsequent accountability process is the responsibility of the troop contributing country. As seen in many troop contributing countries, such as recently in India, Sri Lanka³² there is no guarantee (and the UN has no sanction) to ensure those responsible for SEA (or any other human rights violations, for that matter) will be held accountable. Therefore, in the absence of accountability measures, soldiers are protected from any means of accountability.

The Nepal experience demonstrates a chilling lack of credible accountability for human rights violations. In the few cases where a court martial has been initiated, they appeared to have been inspired by a desire to silence international criticism, rather than a genuine wish to hold soldiers accountable – a fact borne out by the punishments imposed which bear no relationship to the gravity of the crimes. This is also borne out by the occasional action taken against soldiers deployed on peacekeeping duties. For instance, in July 2005, the NA, in a court martial, found six soldiers guilty of sexual-related misconduct while on peacekeeping duty in the Democratic Republic of Congo. All offenders received three-month prison sentences and a reduction in rank.³³

SEA by UN peacekeepers were first documented “in Bosnia, Herzegovina and Kosovo in the early 1990s, and then later in Mozambique, Cambodia, East Timor and Liberia.”³⁴ Abuses included sexual exploitation of children, pornography, and sexual assaults. UN Secretary-General (SG) Annan at the time acknowledged that acts of gross misconduct had clearly

³⁰ *Ibidem*

³¹ <http://www.un.org/en/peacekeeping/documents/backgroundnote.pdf>

³² In May 2011, India’s Ministry of Defence and Indian Army were forced to start a Court of Inquiry (military) into sexual abuse committed by Indian soldiers as part of a UN peacekeeping mission in the Democratic Republic of Congo. In 2009, the alleged victims of sexual exploitation involving more than 50 Indian soldiers (6th Sikh Regiment) in the Democratic Republic of the Congo started giving birth. This prompted the UN to order an inquiry. The Office of Internal Oversight Services (OIOS) of the UN had conducted a probe which revealed “prima-facie evidence” against a number of Indian peacekeepers. The DNA tests commissioned by the UN in Durla, Congo showed that the children were born with “distinctive Indian features”. The allegations of sexual abuse date from 2008 but India refused to take action until May 2011.

³³ US State Department, “Country reports on human rights practices”, January 2006. Also available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61709.htm>.

³⁴ Elisabeth F. Defeis, UN Peacekeepers and Sexual Abuse and Exploitation: an end to impunity, Washington University, Global Studies, Law Review, Volume 7, Number 2, 2008.

taken place, stating: ‘This is a shameful thing for the United Nations to have to say, and I am absolutely outraged by it.’³⁵

Following a spate of scandals, the UN SG promulgated the Secretary-General’s *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse 2003 (the bulletin)*.³⁶ In 2004, the SG also appointed Prince Zeid Ra’ad Zeid Al-Hussein to conduct a comprehensive examination of the problems of SEA in UN peacekeeping operations in the DRC. In March 2005, Prince Zeid issued his report, detailing pervasive abuse and exploitation of women and girls. The Zeid report highlighted the need for reforms to address the problem of SEA on missions. Subsequently, two separate groups of legal expert (GLEs) were tasked to examine how to make the standards set out in the SG’s 2003 bulletin binding on members of UN military contingents prior to the negotiation of a MoU and to explore the legal aspects of criminal accountability of UN officials and experts on mission.³⁷ Furthermore, the UN has established investigative teams in regional hubs along with resident investigators in some missions.³⁸ Focal points have also been designated in different missions.

In March 2006, the second GLE presented its report with a number of recommendations to overcome the obstacles that exist in holding UN peacekeeping personnel accountable for crimes committed during peacekeeping operations. The group has recommended that the UN should give priority to the host country to assume jurisdiction and, if it is not possible in host countries, then some other countries should assume the responsibility. To provide a sound legal basis for the exercise of jurisdiction by States other than the host state, the Group recommends the development of a new international convention to address jurisdiction and related issues.³⁹ The report also highlighted the issues of immunity and potential threats of impunity by the provision of immunity.⁴⁰ To date, however, there have been no reports of any host countries prosecuting UN peacekeeping personnel for crimes committed while on peacekeeping duty.

A number of UN Security Council resolutions have been passed on the issue of sexual violence and armed conflict.⁴¹ A new model Memorandum of Understanding (MoU) has been drafted.⁴² All these efforts are useful in order to make people accountable when they commit crimes of sexual violence but not sufficient to prevent and to respond to the systemic failures exposed by cases like Niranjan Basnet and Basanta Kunwar of Nepal.

³⁵ <http://www.un.org/News/Press/docs/2004/sgsm9605.doc.htm>.

³⁶ United Nations, Secretary-General’s Bulletin, Special measures for protection from sexual exploitation and sexual abuse, October 2003, UN doc: ST/SGB/2003/13, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/550/40/PDF/N0355040.pdf?OpenElement>.

³⁷ ToR of the GLS.

³⁸ UN Office of Internal Oversight Services, Booklet, p. 12.

³⁹ United Nations, “Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations”, UN Document: A/60/980.

⁴⁰ A/60/980, para D.

⁴¹ Chiefly among them are Security Council resolution 1325 (2002) and 1820 (2008).

⁴² Standard Memorandum of Understanding between the UN and the member States Contributing Personnel and Equipment to the UN peacekeeping operations State, UN Doc. A/46/185 (1991), 23 May 1991.

Vetting of troops who have prior records of human rights violations (including sexual violence) is the first step in the prevention of SEA in host countries. All the recent initiatives tend to forget the roles of the UN and TCCs in this regard and take a reactive approach to the problem. The only document that speaks about the roles of TCCs is the MoU that the UN has with the TCC. The model MoU was revised in 2007.⁴³ The revised version of the MoU attempts to enhance the criminal accountability of Military Members of National Contingents (MMsNCs) accused of having committed serious misconduct and criminal acts in the mission area. Article 3 of the model MoU defines its objective as: to establish administrative, logistic and financial arrangements on the contribution of personnel, equipment and services, provided by the Government in support of United Nations peacekeeping missions and to specify United Nations standards of conduct for personnel provided by the Government.⁴⁴ Though the UN standards of conduct such as “We are United Nations Peacekeeping Personnel” (as set out in Annex H of the MoU) and the “Code of Personal Conduct for Blue Helmets” (Ten Rules) set out detailed requirements from peacekeepers, all of these are generally forward-looking and have no specific reference to checks of the backgrounds of the troops before they are deployed on peacekeeping missions.

Article 7bis and 7quarter of the MoU speak about the responsibility of the TCC to ensure that all members of its national contingent are made familiar with and fully understand the UN standards of conduct.⁴⁵ Furthermore, article 7quarter makes the government of the TCC responsible for the investigation of any acts of misconduct or serious misconduct committed by a member of its national contingent and also to report to the UN. In all these recent changes and Model MoU no requirement is put to check the background of the troops who are supposed to be of the highest standards in TCC. This has left a huge gap and provides space for personnel having bad human rights records, being able to be sent on UN peacekeeping mission.

When both Nepal cases were brought to the attention of the UN, the UN maintained that it is the responsibility of governments that supply peacekeepers to ensure that military or police sent on UN missions are not facing investigation or prosecution for crimes, human rights abuses, or other disciplinary matters. This shifting of responsibility to the TCCs does not help to improve the situation in the host and TCCs or to implement the Security Council’s resolutions mentioned above. A system of vetting needs to be in place so screening is done at both levels. The UN needs to engage with the TCC to devise the standards and procedures that ensure the vetting of the troops before sending them on a mission. The UN should also develop a system within the organization to have better response in case these situations arise.

Major TCCs keep protecting the soldiers accused of human rights violations though the government keeps promising to address impunity and acknowledges that impunity is a

⁴³ For the text of the revised MoU, see Chapter 9 of the 2008 Manual on Policies and Procedures concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/ Police contributors participating in Peacekeeping Missions, UN Doc: A/C.5/63/18, available at http://www.un.org/en/peacekeeping/sites/coe/referencedocuments/COE_manual_2008.pdf.

⁴⁴ Model MoU.

⁴⁵ Model MoU, para 7.3.

serious human rights concern. For example, on the one hand, Nepal keeps promising to address impunity and, on the other, it has withdrawn cases pending in the courts and attempted to provide amnesty and pardon, and to send people on peacekeeping duties against whom cases are pending in the courts.⁴⁶ Thus, by relying only on TCCs like Nepal, Bangladesh, India, Nigeria, Pakistan, Sri Lanka which tolerate impunity to such an extent, the UN is somehow contributing to entrenching impunity and undermining the rule of law. In the absence of a proper vetting system and going through the examples of Nepal and elsewhere, one could easily argue that hundreds of other perpetrators are working in UN peacekeeping missions. In both cases from Nepal, it was NGOs who brought the issue before the UN. This was possible only because such NGOs were following up these cases for several years. In the case of Maina Sunuwar, the UN OHCHR had repeatedly asked the NA and Nepalese government to cooperate with the investigation and prosecution of these accused. The UN High Commissioner for Human Rights even personally wrote to the government of Nepal seeking NA cooperation in the investigation and to bring those responsible to justice. Cases where one body of the UN asks for the prosecution but the other body sends the person to serve in a peacekeeping missions, raises serious questions of credibility, reputation and image of the UN and warrants systems to be put in place so this is not to be repeated in future.

4. Vetting of troops prior to deployment (criteria for vetting)

One of the issues underlying the UN failure to vet prospective peacekeepers is the fear within the institution of not having sufficient troops at its disposal if human rights standards for peacekeepers' selection prior to deployment are set too high. Peacekeeping is founded on voluntary contributions from member states of the UN and may suffer if TCCs would decide to stop sending troops on the grounds that the UN was being "too demanding" by asking for the screening out of those who have bad human rights records. If this is a genuine fear then it raises a number of questions. Firstly, does the UN then believes that it is prepared to have people with poor human rights record to serve as peacekeepers but pretends that it does not know it? Secondly, does the UN assume that all troops in TCCs have bad human rights records? Thirdly, when we say that the "UN carries the highest standards in peace keeping" is that just an unachievable aspirational statement but has nothing to do with the conduct of peacekeeping.

This paper, at least from the perspective of the TCC, argues that this cannot be a genuine fear. First of all, as expressed in a number of documents of the UN and even just for the sake of the UN's own reputation and credibility, the UN cannot afford to have publicly known human rights violators as peacekeepers. Secondly, not all the soldiers in the troop contributing countries are human rights violators. For example, in Nepal, there are many soldiers, who genuinely try their best to uphold human rights and humanitarian laws and maintain professional standards. Thus, removing some bad apples would provide respect and incentive for those soldiers who respect human rights and humanitarian law in their conduct. Thirdly, peacekeeping brings pride and prestige to the country and recognition for the work

⁴⁶ Human Rights Council, "Report of the Working Group on the Universal Periodic Review, Nepal", UN Ref: A/HRC/17/5, 8 March 2011.

that any soldier does to uphold human rights and humanitarian laws. Thus, the UN cannot compromise its very basic objective of upholding human rights due to a fear of not having enough troops. In any case, if we buy this logic, then we are not keeping the peace but migrating the problem of human rights violations from TCC to host countries.

There are number of other fears and challenges too. Whom to vet and which agencies to be used to provide information regarding the backgrounds of the troops can pose practical challenges when trying to put a workable vetting system in place. Who will verify which soldiers have a bad human rights record? Can we just rely on NGO reports? Are reports by NGOs not sometimes biased? Are all NGOs professional? Is it possible to create a database of all soldiers? Who will maintain and update that database? Is that feasible? These are some of the questions that are raised when the issue of vetting of troops at the pre-deployment phase is raised.

This paper offers a very practical and doable reference check to uphold the UN promises that UN peacekeepers uphold the highest standards of conduct.

4.1 *Arrest warrants*: In a number of countries, courts and police have ordered the arrest or the prosecution of perpetrators. For example in Nepal, there was an outstanding arrest warrant against Niranjan Basnet. In countries like Nepal, the military is de facto very strong, and does not respect court orders; even defying the orders of the Supreme Court. Armies in many other countries of South Asia carry the colonial legacy and maintain the legal and institutional setting that would provide them immunity from any accountability. By checking the records of the courts, or police the UN is not just preventing possible human rights violations in troop hosting countries but also helping to strengthen the judiciary of the TCC and strengthen the rule of law.

For the TCC or the UN to check court records is somewhat analogous to provisions in the Consolidated Appropriations Act, 2010 passed by President Obama in the United States, which included a prohibition on assistance to the NA unless it, among other things, is cooperating fully with investigations and prosecutions by civilian judicial authorities of violations of internationally recognized human rights.

4.2 *Using information of national human rights institutions*: In many countries we now have national human rights institutions (NHRIs). These institutions were created following the guidelines on the structure and functioning of national and local institutions for the promotion and protection of human rights endorsed by the General Assembly in its resolution 33/46 of 14 December 1978 (the Paris Principles) and subsequent resolutions of the UN Human Rights Commission.⁴⁷ In this sense, these institutions were envisioned by the UN to do investigations into cases of human rights violations. Legislation setting out the functioning of the National Human Rights Commission (NHRC) in Nepal provides that the NHRC can publish names of perpetrators. Once investigations are done by the national human rights

⁴⁷ See Commission on Human Rights resolutions 1987/40 of 10 March 1987, 1988/72 of 10 March 1988, 1989/52 of 7 March 1989, 1990/73 of 7 March 1990, 1991/27 of 5 March 1991, 1992/54 of 3 March 1992 and 1993/55 of 9 March 1993.

institutions, they recommend for necessary action to be taken by relevant government authorities. If a NHRI's investigation report has named any perpetrators and the NHRI is asking the government to further investigate those people, they should be vetted out and not be deployed on peacekeeping duties. In many countries, the decision and recommendations of the NHRI are not implemented. As a result the credibility and existence of these institutions are undermined. By taking the NHRI's recommendations to prosecute as one reference, NHRIs will also be strengthened. This will assist to hold the security forces to be more responsible in cooperating with investigations by the NHRIs.

Similarly, countries have also established NHRIs designated to look after the human rights compliance by the government of the human rights of some marginalised and specific groups. For instance, in Nepal, the government has established a National Women's Commission and a National Dalit Commission. Both these agencies also have a mandate to document allegations of human rights violations of women and dalits respectively and to make recommendations. The reports of these commissions could also be used as a reference to check the "bad apples" among candidates for deployment of peacekeepers.

4.3 UN treaty bodies and special procedures: The reports of UN special procedures (and more exceptionally treaty bodies), including reports of country visits and annual reports to the Human Rights Council (and previously the Human Rights Commission) (which often have detailed information on individual cases of human rights violations) could also be considered as possible sources to check information relating to individual members of the security forces proposed as peacekeepers. When applied to Nepal, one could in particular check the records of the UN Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture for any reference to proposed candidates for deployment of peacekeepers.

4.4 Credible national and international organisations' reports: One can imagine that in certain (especially, so called "closed") countries, it would be difficult to obtain information from court proceedings, NHRIs or UN bodies and procedures. In such cases, reliable information from reputed NGOs and INGOs may also be checked for any reference to proposed candidates for deployment of peacekeepers.

4.5 Standards of evidence: For the purpose of vetting, the information and evidences by above mentioned bodies could be sufficient. These vettings are often not based on criminal convictions nor are they based on ambient rumors, but rather are based on information and evidence on a spectrum between these two classifications. As vetting is not criminal prosecution the argument of "proof beyond a reasonable doubt" would be inappropriate for reviewing the records of candidates for peace operations.

The question also arises whether it is necessary for there to be a uniform standard across TCCs. Human rights is a state responsibility, thus we can assume that different standards will prevail as individual countries monitor their own human rights enhancement. Whereas the benchmark for preventing deployment of aspiring peacekeeping personnel from countries where accountability levels are generally high could be a criminal conviction, arrest warrants

but it may be necessary to accept lower standards in other countries. In Nepal, where there are no criminal convictions but there are complaints pending with local police stations, the government of Nepal might rule that anyone named in a police complaint cannot participate in a peacekeeping operation unless they have presented themselves to the police to be questioned and their name has been cleared. This could be a good standard in countries such as Nepal, India, Pakistan, Sri Lanka, Bangladesh, and Nigeria etc where there are traditionally few instances of people making false claims against fellow citizens to the police.

In other countries it is simply too dangerous to try to bring a complaint against a soldier or member of the security sector, in which case corroborated evidence from NGO sources may be accepted.

4.6 Individual vs. unit level vetting: When considering the question of vetting, it is also important to address the question as to whether members of individual units deployed in large batches should be subject to less formal recruitment processes than more senior officers. It is recognized that it would be an administrative nightmare for the UN to conduct screening of members of individual units deployed in large batches. However, resources should be created urgently to ensure that at least the applications of officers above a certain rank would be more systematically scrutinized by the UN. Then, the screening of members of larger units logically has to be the responsibility for TCCs. UN should engage with TCCs in developing national standards and procedures for screening, selection and removal of military and police deployed on UN peacekeeping operations and create the necessary legal and policy framework to ensure transparency and accountability in the selection processes.

5. Need for increased transparency: The current process of selection of troops for peacekeeping missions lacks transparency. No TCC makes public the list of the personnel serving on peacekeeping missions. Internal criteria for selection of individual personnel are also not transparent. Transparency in selection of troops is crucial. The UN should engage with the TCCs in developing the minimum benchmarks, criteria and procedures. The respective institution i.e. military or police headquarters should be held responsible for making reference checks in their records to make sure that the name of the individual proposed peacekeepers is not linked to grave human rights violations. Any MoU that the UN has with a TCC should govern and address this. As already indicated above, the current (revised) MoU is limited in scope and does not include any provisions ensuring transparency and accountability in the process of selection of individual troops.

6. Democratization of the security forces in transitional countries and peacekeeping

In Nepal it is argued that in order for the transition to peace and democracy to be successful, many key institutions, including the army, police, Attorney General's Office and indeed the political parties need to be thoroughly reformed.

The UN set of principle on combating impunity requires a formal process of screening out public servants responsible for past abuses, especially from the army, the police and the

judiciary.⁴⁸ In the aftermath of serious international crimes, states have a legal obligation, among others, to prevent a recurrence of these crimes.⁴⁹ Vetting and the removal of individuals who committed such crimes is one of the prevention measures.⁵⁰

Nepal's CPA provides for the re-integration of the PLA into the security forces. The priority of the UCPN-M was to reintegrate them in the NA. Nepal's peace process is centralised on this issue and has been halted for many years now while negotiations on the numbers of the PLAs to be reintegrated in the security forces have continued. Recently, the parties have agreed the modality and the numbers of PLA to be reintegrated in the security forces, mainly the NA. After a long period of negotiations, in November 2011, they agreed to reintegrate 6,500 PLA into NA. However, none of the agreements signed between the parties, have ensured the vetting of those PLA based on their human rights records. These PLA members are among the potential peacekeepers of the future as they will be serving in the security forces. Many of them have allegations of gross human rights violations, such as torture, extrajudicial killings and extortion against them. Having these people both from NA and PLA into the new NA is a potential threat to the rule of law and it erodes the public confidence in the security forces and the rule of law. They will be the potential spoilers of any accountability measure to be put in place and any future reforms. Not to screen them out at this stage constitutes a threat to many potential countries requiring peacekeeping in the future.

The urgency of the need of vetting in the context of Nepal's human rights situation was also highlighted by the OHCHR-Nepal. In a letter to the government, the Nepal representative of OHCHR expressed concern over the government's decision to promote a number of NA personnel such as Major General Toran Jung Bahadur Singh and Brigadier General Victor Rana, who were in command of barracks where OHCHR had conducted investigations and found serious breaches of human rights and violations of humanitarian law. He suggested that a comprehensive vetting of both NA personnel and Maoist cadres be conducted as part of the peace process.⁵¹ Similar calls have been made by a number of national and international human rights organizations. For instance, Advocacy Forum-Nepal and Human Rights Watch have repeatedly urged the Nepal authorities to revise the vetting procedures for members of the security forces proposed for promotion, overseas UN peacekeeping duties, or specialized training abroad to ensure that human rights violators are identified.⁵² Similarly, in December 2009, in the aftermath of the repatriation of major Niranjana Basnet (see above), Amnesty International called upon the Nepal Government to re-assess every member of the NA

⁴⁸ United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General*, S/2004/616 (3 August 2004) [hereinafter: *The Rule of Law and Transitional Justice*], p 17.

⁴⁹ *Ibid*, p 6.

⁵⁰ *Ibid*, p 17-19.

⁵¹ http://www.un.org.np/sites/default/files/press_releases/tid_74/2009-09-02-Press-Release-OHCHR-vetting-as-part-of-peace-process.pdf.

⁵² See for instance, Advocacy Forum and Human Rights Watch, "Indifference to Duty. Impunity for Crimes Committed in Nepal", December 2010, p 19, available at <http://www.hrw.org/sites/default/files/reports/nepal1210webwcover.pdf>.

participating in UN missions to ensure that they are not implicated in serious human rights violations.⁵³

While civil society organizations in Nepal challenged the issue of those who are publicly known as human rights violators being promoted to senior positions, the argument of "presumption of innocence until proven guilty" was raised. It is important to note that as the vetting proceedings are not criminal but administrative proceedings, not all due process rights that are applicable in criminal proceedings are applicable here. However, a vetting decision should be based on evidence that is substantiated by multiple reliable sources, as discussed above. It also has to be administered through clear procedures. It is important that all the standards applicable to an administrative process such as giving sufficient notice, providing opportunities to present a defence and present arguments applies.⁵⁴

In the Nepal context, the democratisation of the NA is provided for under the CPA. The Council of Ministers is given the responsibility to "control, mobilise and manage the Nepal Army as per the new Military Act. The Interim Council of Ministers shall prepare and implement a detailed Action Plan for democratisation of the Nepal Army through political consensus and by taking suggestions including from the concerned committee of the Interim Parliament."⁵⁵

The need for reform of the police and public prosecutor's offices has been recognized by the international community. Some initiatives are underway (including from the United Kingdom's Department for International Development, DFID). However, the prevailing institutional culture of the police and especially the expectations on the part of politicians to be able to influence the police's legitimate duties will be difficult to change.

The reform of the CPN-M from an armed opposition group to a responsible political actor in national and local politics is another aspect which has barely been considered in the peace process so far. As there remains suspicion among some sectors that the UCPN-M is after "state capture", the Maoists need to show a convincing commitment to independent state institutions, especially an independent judiciary. But so do other parties: some aspects of alleged Maoist state capture seem not so different from the way in which each party in government has sought to have its supporters in the institutions of the state.⁵⁶

The NA maintained that its formal acceptance of the authority of the interim governments and of the transition to a republic, distasteful as it was to many of its officers, meant that it was now democratized. In fact, accountability to the Palace having come to an end, the Army is more autonomous than ever, with no effective control by an acutely under-developed

⁵³ Amnesty International, "Nepal must bar human rights violators from UN peacekeeping missions", December 2009, available at <http://www.amnesty.org/en/news-and-updates/nepal-must-bar-human-rights-violators-un-peacekeeping-missions-20091218>.

⁵⁴ *International Covenant on Civil and Political Rights*, Article 14(1); *The Rule of Law and Transitional Justice*, 17; United Nations Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, E/CN.4/2005/102 (18 February 2005), p. 20.

⁵⁵ CPA, Section 4.7.

⁵⁶ Ian Martin, "The Peace Process in Nepal: is it failing?", Notes of lecture at New School, New York, 6 November 2009.

Ministry of Defence. Although the CPA required the Interim Council of Ministers to prepare and implement the action plan for the NA, the Army has argued publicly that any downsizing should only be considered by a government elected under a new constitution, still awaited amid protracted deliberations by the Constituent Assembly.⁵⁷ In addition to that, professionalizing Nepal police is another challenge.

One of the most important steps to restore the rule of law in Nepal is to bring the NA under effective civilian control. Currently, it remains outside the purview of the law for all intents and purposes and there is no sign of political will to “grip the generals, or to build the capacity to make civilian control of the military a reality – both essential foundations for a democratic state.”⁵⁸

Given that no army and police personnel have yet been prosecuted for offences of violating human rights during the conflict period – despite the enormous evidence of such violations – there are no provisions to ensure that those facing serious allegations of human rights violations are not promoted to positions of power. There is therefore an urgent need to develop, whether through law or policy, comprehensive human rights-compliant vetting procedures, whether for UN peacekeeping deployment, promotion within the ranks of the NA or Nepal Police or the integration of the Maoist combatants into the NA. Those who do face serious allegations of human rights violations should be suspended pending the outcome of proceedings against them; and anyone who is suspended should not be eligible for peacekeeping duties.

The failure to vet compromises the security institutions themselves and all their officers in that it is not possible to distinguish between those officers who were involved in abuses and those who behaved correctly and upheld fundamental human rights standards. The public image of the security institutions remains tainted by retaining the abusive officers. In addition, the failure to hold abusive officers to account signals that not only these officers but that the entire security sector with its leadership has not yet turned the page and is not fully committed to fundamental human rights standards and the rule of law. It also indicates a culture of cronyism that protects abusive officers from being held accountable for their crimes. This failure to turn away from the abusive past almost provides an invitation to keep old habits and repeat some of the abuses when considered necessary and appropriate. In addition, it will contribute to an increased respect for the rule of law, the judiciary and national institutions such as the NHRIs.

A vetting process would also likely remove spoilers of the army’s democratization and of the peace process as a whole, thereby accelerating the implementation of reforms that have stalled for too long already. Removing abusive officers from the army and the police may also facilitate the criminal prosecution of these officers and other perpetrators of conflict-era crimes. Last but not least, a fair and effective vetting process that results in the removal of

⁵⁷ Ian Martin, *ibidem*

⁵⁸ Sam Cowan, “The Lost Battles of Khara and Pili”, *Himal magazine*, September 2008, Vol. 21, No. 9, p. 25-30.

abusive officials would raise the reputation of the army and the police internationally, and would make their officers more attractive for peacekeeping assignments.

7. Conclusion

From a Nepalese Human Rights and Rule of Law's perspective, vetting of peacekeepers can present an effective form of leverage to improve not only the human rights records of TCCs but also the human rights situation more generally in host countries. It can play a catalytic role in strengthening the national human rights institutions, judiciary and civil society. It can contribute to enhancing respect for the rule of law in both TCCs and host countries and helps to fight impunity and promotes credibility of the UN.

The present state of complete absence of reference checks for peacekeepers has been posing a threat to the UN, TCCs, and host countries. To prevent human rights violations including the SEA and to implement the UN Security Council resolutions fully, it is imperative that a more holistic vision is adopted and observed for the system of screening (vetting) of troops at pre-deployment phase. To facilitate this, the model MoU should be amended. A unit at the UN need to be designated to look and act promptly when cases like Basnet and Kunwar arise. In the initial phase, the vetting should focus on officers, and be proportionate in thoroughness to the rank. As this starts, accountability will also start to be established.

At the national level, existing procedures, particularly the functions of the departmental recruitment and promotion committees, could be built upon to set up more transparent and accountable vetting processes. Whatever vetting mechanism is established, it should be based on broad consultations that include the parliament and relevant civil society actors. Such consultations would not only help to design the most appropriate mechanism but also contribute to the credibility of the vetting process itself and thus strengthen the public confidence in the relevant institutions and the rule of law more generally.