

**Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE:  
AL NPL 2/2021

19 April 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 41/12, 45/3, 43/16, 44/8 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **appointment of new members of the National Human Rights Commission (NHRC), that is not in compliance with the Paris Principles and severely undermines the NHRC's independence.**

According to the information received:

On 20 April 2020, the President issued Ordinance 1 (of Nepali year 2077) aimed at restructuring the Constitutional Council. The Ordinance attracted a good deal of political and public opposition and was rolled back on 24 April 2020.

On 15 December 2020, the President of Nepal issued Ordinance 10 (of Nepali year 2077) to amend the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2010, allowing the Council to hold its meetings without fulfillment of the quorum and to take decisions based on simple majority. Following this, the Constitutional Council made recommendations for key appointments to several Constitutional bodies including the NHRC.

On 20 December 2020, the President dissolved the House of Representatives (HoR) on advice of the Prime Minister. On the same day, the Parliament Secretariat received the list of nominees to constitutional bodies, including the NHRC.

The recent appointments to the NHRC and other constitutional bodies were made following the passage of Ordinance 10. This Ordinance and ensuing appointments processes have been challenged in the Supreme Court of Nepal. These lawsuits are pending since December 2020.

On 31 January 2021, the Speaker of the House returned the letter received from the Constitutional Council on the recommendations it made on 15 December with regard to appointments to constitutional bodies, stating that the

parliamentary committee mandated to conduct hearings in relation to such appointments was ipso facto dissolved due to the dissolution of the HoR on 20 December. The appointments to the Constitutional bodies including the NHRC were therefore confirmed without the mandatory parliament hearing process, which is necessary pursuant to Article 292 of the Constitution of Nepal.

As a result, on 3 February 2021, five new members of the NHRC were appointed by the President, in presence of the Chief Justice of Nepal, despite the fact that proceedings challenging the constitutionality of the Ordinance were pending at the Supreme Court. New Commissioners of the Constitutional bodies established to protect the rights of Dalits, Madhesi, Women, Adivasi, Janjati, Muslim, and Tharus were also sworn in on the same day.

Following the oath taking ceremony, that took place on 3 February 2021, the names of the new NHRC commissioners were made public .

The NHRC retained its ‘A’ status accreditation with GANHRI in March 2019. At Nepal’s Universal Periodic Review on 21 January 2021, the Government of Nepal asserted that NHRC Nepal was fully in compliance with the Paris Principles. Earlier, while presenting its candidature for membership in the Human Rights Council for the 2021-2023 period, Nepal had pledged to strengthen the NHRC.

As a way of background, we would like to recall the following facts:

The NHRC has worked on a number of human rights issues and made important recommendaitons to the Government including in relation to extrajudicial killings, enforced disappearances and torture.

In April 2019, the Government introduced an amendment to the NHRC Act, 2012, that intended to remove NHRC’s authority to open provincial offices, exercise financial autonomy and empower the Attorney General to decide which NHRC recommendations merit further action including in relation to the prosecution of individuals or organisations allegedly involved in human rights violations.

In July 2019, Special Procedures mandate holders raised concern that if that amendment were adopted, it would “severely undermin[e] the NHRC’s authority, effectiveness and independence and [limit] the Nepali people’s ability to access justice” (OL NPL 2/2019).

In its response of 17 January 2020 Your Excellency’s Government informed that the proposed amendment, and in particular the granting of discretionary powers to the Attorney General over NHRC recommendations for prosecution of individuals implicated in human rights violations, would not compromise the independence of the NHRC (OHCHR.SP.2020.11).

We understand that while this amendment has not yet been adopted, the bill continues to be pending in the Parliament.

On 15 October 2020, the NHRC released a stock-taking report on the status of the recommendations it made to the Government. The report concluded that in the 20 years since NHRC’s establishment, only 14% of its recommendations

have been fully implemented, with 37% partially implemented and 49% not implemented at all. This report included a list of 286 names of “individuals/officials” recommended by the NHRC for prosecution for human rights violations including torture, enforced and involuntary disappearances and extrajudicial killings.

We are deeply concerned that the recent appointment process of the new members of the NHRC is not in compliance with international standards on the selection and appointment of members of NHRIs. More specifically, this appointment process fails to meet the standards set out in the Principles relating to the Status of National Institutions (The Paris Principles). In its General Observations on the essential requirements of the Paris Principles, the Sub-Committee on Accreditation (SCA) says the selection and appointment of the decision-making body of a NHRI should be characterized by “openness and transparency”, “broad consultation and participation” and “advertising vacancies broadly”. The SCA says such a process “is fundamental in ensuring the independence and effectiveness of, and public confidence in the NHRI”.

We are concerned that the NHRC appointment process has failed to implement the extensive guidelines of the SCA, a key body of the Global Alliance of National Human Rights Institutions (GANHRI), on the basis of which the NHRC was conferred its ‘A’ status.

As a result, the independence, integrity and legitimacy of the NHRC is undermined, thereby restricting the ability of the people of Nepal to have access to appropriate remedies for alleged human rights violations. This would also have a chilling effect on civil society actors and the legitimate work carried out by human rights defenders in the country.

The appointment process also fails to adhere to domestic rules as enshrined in the Constitution of Nepal. The appointments were confirmed without the mandatory Parliamentary hearing process, as required by Article 292 of the Constitution. The Parliamentary hearing process includes calling on registration of complaints against the nominees, opportunity for them to clarify their stand, discussion on their plans after taking office and commitments for fulfillment of the provided mandate. These are important elements of a transparent and fair appointment process, which seem to have been deliberately avoided in this instance. According to Rule 26 (2) of the joint meetings of the Federal Parliament and Joint Committees (Operation) Regulation, nominees to Constitutional bodies can assume office if the Parliamentary hearing committee fails to take any decision within 45 days from the receipt of letter from the Constitutional Council. However, the Parliamentary hearing could not take place due to the fact that the House of Representatives was dissolved on 20 December 2020 and only reinstated by a Supreme Court judgement on 24 February 2021. Authorities seemed to have shown unwarranted haste in avoiding this crucial step while swearing in new NHRC members on the 46th day. The parliamentary hearing process was bypassed even though the Supreme Court of Nepal was hearing petitions challenging the Parliament dissolution order.

Furthermore, we believe this process also contravenes article 4 (2) of the NHRC Act of 2012, which stipulates that the NHRC “shall be independent and autonomous in fulfilling the work of ensuring respect, protection and promotion of human rights”. While the other Constitutional Commissions that focus on the rights of marginalised communities do not hold a mandate as broad as that of the NHRC, they contribute towards the protection and promotion of the rights of vulnerable and

marginalized communities in Nepal. Their independence and impartiality is vital for the effective functioning of a democratic State based on the rule of law.

Any compromise on the NHRC's independence and transparency may also have an adverse impact on other human rights issues, such as the transitional justice process. The NHRC has been an important voice on transitional justice supporting the advocacy of the conflict victims groups, human rights defenders and civil society and engaging authorities for ensuring accountability for crimes committed during Nepal's armed conflict including enforced disappearances and extrajudicial killings.

Ordinance 10 and the appointments to the Constitutional bodies, including the NHRC, have been challenged before the Constitutional Bench of the Supreme Court. The Chief Justice of Nepal presides the Constitutional Bench and is mandatorily part of the bench proceedings. However, as the Chief Justice is part of the Council that recommended the names for appointment to the Constitutional bodies, including NHRC, it would be preferable for the Chief Justice to recuse himself, so as to avoid any perception of lack of independence or bias.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As is our responsibility under the mandates provided to me by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information as to how the appointment process to the NHRC is compliant with the Paris Principles on NHRIs.
3. Please provide information as to why it was deemed necessary to bypass the Parliamentary hearing process mandated by the Constitution.
4. Please provide information on the status of the amendment to the NHRC Act 2021 and any plans in this regard.
5. Please provide information as to what mechanisms/process have been established to fully implement the recommendations made by the NHRC including in its October 2020 report.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to suspend the appointment process and engage in dialogue with the NHRC and civil society actors in relation to an appointment process which meets international and national human rights standards.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Clement Nyaletsossi Voule  
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Tae-Ung Baik  
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

Mary Lawlor  
Special Rapporteur on the situation of human rights defenders

Diego García-Sayán  
Special Rapporteur on the independence of judges and lawyers

Nils Melzer  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we wish to also draw your Excellency's Government's attention to article 22 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Nepal on 14 May 1991, which guarantees the right to freedom of association and which states that no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

We would like to recall that according to the Paris Principles, National Human Rights Institutions are established by States for the specific purpose of advancing and defending human rights at the national level, and are acknowledged to be one of the most important means by which States bridge the implementation gap between their international human rights obligations and actual enjoyment of human rights on the ground. The Sub-Committee on Accreditation states in its General Observations of the Paris Principles, adopted on 21 February 2018, that "the establishment and strengthening of National Human Rights Institutions pursuant to the Paris Principles falls within the set of international human rights commitments made by States." Therefore, it is the responsibility of the State to ensure that its National Human Rights Institution is compliant with the Paris Principles.

Furthermore, we would like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Right Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. We would also like to refer to article 14 (3) which declares that States shall ensure and support the creation and development of further independent national institutions, including ombudspeople, national human rights commissions or any form of national institution that protect and promote human rights and fundamental freedoms, and article 16 which emphasises the important role these institutions play in raising awareness of human rights at a national level.

In relation to the NHRC's work on investigating extrajudicial killings, and recommending the prosecution of perpetrators, we would like to refer to article 6 of the ICCPR guaranteeing the right to life and to highlight the State's duty to investigate, prosecute, and punish all violations of the right to life. We further refer to Human Rights Committee, General Comment No. 36, which notes investigations into allegations of violations of article 6 must always be independent, impartial, prompt, thorough, effective, credible and transparent and in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death. We further refer to paragraph 28 of the Minnesota Protocol which states that investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence and investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong (para 28).