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Human rights situations that require the Council's attention

Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Council urged to learn from situation in Nepal when addressing impunity

1. The Asian Legal Resource Center (ALRC) recalls the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”¹ and urges the Human Rights Council to strengthen its capacity to address impunity. The impunity enjoyed by the majority of perpetrators of human rights violations in the Asian region is a clear indicator of the necessity for concerted action by the Council.

2. The situation in Nepal is illustrative of many of the challenges faced in post-conflict contexts. The problem of impunity in Asia is not restricted to post-conflict or post-dictatorship situations, but blights the majority of States in the region, including those that have an ostensibly democratic governmental system. Action taken by the Council concerning impunity must, as a minimum, be effective in addressing violations in conflict and post-conflict affected societies, but must also be capable of addressing the root causes and institutional failings that enable systems of impunity.

3. Nepal is struggling to address impunity for a range of grave violations committed during its decade-long conflict as well as the period since the Comprehensive Peace Agreement (CPA) was signed by the government and the Maoists in 2006. The OHCHR’s office in Nepal has been significant in preventing a range of abuses, such as forced disappearances, since it was established. However, the Nepalese authorities have failed to establish a functioning justice system to investigate and prosecute past and ongoing violations, due to a protracted political stalemate that has obstructed institution-building and prolonged impunity.

4. The 2006 CPA comprised the following articles, which reflect approaches suggested by the Set of principles. Five years on, these have yet to be implemented:

- Publication of the names of the persons killed or disappeared within 60 days (Article 5.2.3)
- Formation of a national Peace and Rehabilitation Commission to provide relief support to conflict victims (5.2.4)
- Formation of a high-level Truth and Reconciliation Commission to investigate conflict-era crimes against humanity and gross human rights violations (5.2.5)
- Commitment to investigate and prosecute human rights violations and guarantee not to foster impunity (7.1.3)

5. These commitments were upheld in the 2007 Interim Constitution. However, the Nepalese authorities have failed to carry out appropriate institutional reforms necessary to establish a system that fosters truth and accountability. Not a single perpetrator of grave human rights violations - such as arbitrary detention, rape, torture, forced disappearances and extra-judicial killings - has been held accountable, which in turn fails to create conditions to prevent the recurrence of violations.

6. Non-cooperation by parties to the conflict: Both the Army and the Maoists have resisted attempts to hold their personnel accountable and refused to cooperate with police investigations. Both have tampered with evidence, pressured the police, threatened

¹ E/CN.4/2005/102/Add.1: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2005/102/Add.1&Lang=E>

witnesses, victims or their families, or simply refused to provide any information, and have remained above the law.

7. Failing transitional justice: transitional justice institutions are yet to be established, and instead now serve as excuses to postpone concrete action to combat impunity. The government has repeatedly stated that cases cannot be investigated by other entities, including the regular justice system and the National Human Rights Commission (NHRC), until the TRC has been created; an argument with no legal basis. The police consequently frequently refuse to file cases concerning conflict-era violations.

8. Legislation establishing the TRC and Commission on Enforced Disappearances has been drafted but remains pending before the Parliament, with no government timeframe for its adoption. The draft legislation prohibits amnesties for human rights violations, but the political parties have tabled a number of amendments targeting this prohibition which, if successful, would render the commissions meaningless. The commissions will not have prosecutorial powers, suggesting that the primary responsibility to undertake investigations and prosecutions concerning conflict-related human rights violations remains with the regular justice system, contradicting the government's position.

9. Reforms lacking: action to reinforce the criminal justice system to ensure that "those responsible for serious crimes under international law are prosecuted, tried and duly punished," as outlined in principle 19 of the Set of principles, is lacking, resulting in a failure by the State to ensure the right to truth, both individual and collective, the right to justice, and the rights to reparation and redress for conflict victims. While Nepal's justice system has been hindered by the conflict, the lack of financial and human resources, ongoing political instability and the high level of corruption, the greatest challenge remains the lack of political will to conduct reforms. During the transition phase, efforts must concentrate on strengthening the criminal justice system, enabling it to effectively prosecute human rights violations, in particular by strengthening courts, the police and the Public Prosecutor and Attorney General's offices.

- a. Toothless courts: since the conflict, the Supreme Court has passed a series of landmark judgments ordering immediate investigations into violations and prosecutions of those responsible. It has also repeatedly found that commitments to transitional justice mechanisms do not supersede the role of the regular justice system. During Nepal's Universal Periodic Review in January 2011, the government lauded the judiciary's independence, but continues to ignore its orders and findings, as do members of the military, police forces and the Maoists.
- b. Defective policing: Nepal's police is crippled by high levels of corruption and inefficiency. The police argue that they are under significant pressure from influential individuals and local political leaders, but the lack of mechanisms to hold police officers accountable for abuses of power is the key aspect preventing the police from ensuring the rule of law and rights.
- c. Flawed prosecution: The Attorney General's Office has contributed to ongoing impunity, both passively by being lethargic in filing charge-sheets against alleged perpetrators of human rights violations, and actively in approving repeated mass withdrawals of criminal cases instigated by the government. Furthermore, notably at the District level, Public Prosecutors collude with the police to prevent cases from progressing.

10. Political interference: political pressure by politicians on the police not to investigate cases and to release connected individuals is perhaps the greatest obstacle to due process and efforts to combat impunity in Nepal. Conflict-era cases have been withdrawn en-masse, allegedly because they were filed for "political considerations" and therefore fell under a provision of the CPA providing for the withdrawal of such cases. In October 2008, 349

criminal cases were withdrawn by the Maoist government, which opened the gates for similar moves by subsequent governments. As noted in the OHCHR-Nepal 2011 report to the Human Rights Council, this practice has “expanded to cases occurring after the conflict, with political parties, armed groups and indigenous and ethnic groups demanding that criminal cases against their supporters be withdrawn...The practice has continued despite a Supreme Court interim order in 2008 directing the suspension of further withdrawals.” In June 2011, the Maoist Home Minister submitted a proposal to the cabinet to withdraw 300 criminal cases concerning Maoist cadres, including the case of Arjun Bahadur Lama detailed below.

11. Obstructed NHRC: The NHRC has been seriously weakened by a lack of cooperation by the government. According to the NHRC, only 8.8% of its recommendations have been fully implemented between 2000 and 2010. Furthermore, in July 2011, the government demanded that the NHRC halt its investigations into twenty cases of gross human rights violations, claiming that they fall under the jurisdiction of the TRC.

12. Examples: 15-year-old girl Maina Sunuwar was tortured to death by military personnel on 17 February 2004. The military has consistently obstructed investigations, threatened witnesses, and tampered with evidence. The police also initially refused to file the case because it concerned the military. On September 8, 2005, a Court Martial ruled that three military personnel were only guilty of not having observed the correct procedures in the disposal of her body. The Army and Defence Ministry are now using the pretext of “double jeopardy” to obstruct justice. On September 18, 2007, the Supreme Court ordered the civilian authorities to carry out investigations within three months and to prosecute the perpetrators. The District Court of Kavre subsequently issued an arrest warrant against four military officers on January 31, 2008. These warrants have still not been executed; three of the accused have been declared missing with no action taken to locate them, while the fourth was repatriated from a UN peace keeping mission in Chad and taken into custody by the Nepal Army who pledged to produce him before court the next day. This never happened. The army declared on July 14, 2010, that an internal investigation had found him innocent of the charges pending against him and no action has been taken since then.

13. Arjun Bahadur Lama was abducted and murdered by Maoist personnel on April 29, 2005. The Maoists refused to provide information concerning his whereabouts and have instead claimed that he was killed in an army attack. The District Police Office (DPO) repeatedly refused to file an FIR lodged by his widow, arguing that the case fell under the jurisdiction of the TRC. In March 2008, the Supreme Court issued a writ of mandamus to the DPO to register the FIR and initiate investigations. However, the police failed to implement the Supreme Court's instruction for 5 months, only registering the FIR on August 11, 2008. Partially due to the refusal by the Maoists to cooperate with the police, the investigation has been ineffective, with no perpetrators having been brought to court. Agni Sapkota, who reportedly ordered the execution of the victim, was promoted within the Maoist party, becoming a Constituent Assembly member. The US and Australian embassies refused him a visa on the grounds of 'serious and specific human rights allegations associated with his conduct during the insurgency. The Maoist party rallied behind Agni Sapkota and publicly accused international human rights organizations of conspiring to defame them. Involved lawyers and human rights defenders have been threatened. Agni Sapkota was nominated Minister for Information and Communication in May 2011, but subsequently removed during a reshuffle.

14. Conclusion: the above illustrates key challenges raised that the Human Rights Council must address concerning post-conflict impunity. The Council is urged to establish a mechanism that is mandated to monitor the implementation of commitments taken as part of peace agreements, such as the CPA in Nepal. The Council must also have the capacity to monitor actions that aim to undermine such processes, such as the non-cooperation with

investigations; political interference, including the mass dropping of criminal cases; and threats or attacks against witnesses, victims and their families, lawyers and human rights defenders working to combat impunity. The Council must assist States in reforming domestic justice systems. The prompt and effective establishment of transitional justice institutions must be monitored, to avoid delays to justice as witnessed in the limbo in Nepal. The ALRC is firmly of the view that while transitional justice institutions have an important role to play in resolving post-conflict societal rifts, they cannot replace the regular criminal justice system as a tool to eradicate impunity, create lasting justice or prevent further abuses.

15. The Asian Legal Resource Centre also takes this opportunity to urge the government of Nepal to step up its efforts to establish transitional justice commissions, to strengthen its criminal justice system and to ensure the cooperation of former parties to the conflict with attempts to hold accountable those responsible for human rights violations. All parties must desist from politically influencing the course of justice. The government is urged to clearly and publicly state that the regular criminal justice system is primarily responsible for establishing accountability for conflict-related and post-conflict human rights violations, and ensure that no pretexts can be used to prevent the investigation and prosecution of cases of human rights violations, regardless of the state of establishment of transitional justice institutions. The government must also support the NHRC in the fulfilment of its mandate, without further obstruction, and ensure the full cooperation with the Human Rights Council's mechanisms and the OHCHR. All parties are also urged to immediately desist from the practice of mass-removal of criminal cases for political reasons.
