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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by 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.

[24 August 2012]

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

Nepal: The ALRC calls on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to focus on Nepal as a priority

The Asian Legal Resource Center (ALRC) wishes to congratulate Mr. Pablo de Greiff, the new Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, on his appointment and thank him for his initial report.

In the course of his mandate, we would like to encourage the Special Rapporteur to closely monitor the current situation in Nepal. The newly established mandate has a strong role to play in engaging with the government to ensure that it respects its obligations to provide an effective right to remedy to the victims of the country's decade-long conflict and to durably transform its criminal justice institutions to effectively protect the rights of its citizens and prevent impunity as the best guarantee of non-recurrence of violations.

Nepal's conflict, from 1996 to 2006, resulted in over 13,000 deaths, and scores of civilians being tortured or raped by both sides of the conflict. In 2003 and 2004 Nepal topped the list of countries with the highest number of disappearances being reported to the WGEID, with the whereabouts of more than 1400 persons remaining unknown to date, according to the ICRC.¹

A comprehensive peace agreement was signed in 2006, in which the former belligerents committed to investigate and prosecute human rights violations and not to foster impunity (Article 7.1.3), to publish the names of the persons killed or disappeared within 60 days (5.2.3), and to form a high-level Truth and Reconciliation Commission (TRC) to investigate conflict-era crimes against humanity and gross human rights violations (5.2.5). The 2007 interim constitution stipulated the state's duty to establish a high-level TRC and to provide relief to victims of disappearances, and in June 2007 the Supreme Court ordered the government to establish a commission of inquiry into allegations of enforced disappearances.

However, thus far, not a single perpetrator of grave human rights violations has been held accountable for the crimes committed during the conflict.

The transitional justice mechanisms are yet to be established. Since 2007, different versions of two bills have been drafted without the political parties reaching an agreement on their content. Throughout 2011 and 2012, political parties called for the bills to emphasize "reconciliation" over "justice", opening the door for amnesty for perpetrators of human rights violations.

At the end of March 2012, political party leaders suggested removing Section 25 (2) of the draft TRC Bill which incorporated a list of crimes for which amnesty was not permitted and instead proposed that the Commissions would grant amnesty when both victims and perpetrators agree to reconcile. In the absence of reliable victim and witness protection mechanisms, this clearly would put the victims at great risk.

It is in this context that on the eve of the dissolution of the constituent assembly/legislative parliament of Nepal on 28 May 2012, the draft bills were withdrawn. Since then, Nepal is without an elected legislative authority, however the government has announced that it was prepared to recommend to the president to promulgate the transitional justice bill through ordinance. According to news reports, the new draft merges the two bills and proposes a single Integrated Reconciliatory Commission whose members would be appointed by

¹ <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-nepal.pdf>.

political consensus, endangering the independence of the commission. In addition, the ordinance would provide for the victims and the perpetrators to “reconcile”, providing the perpetrator with amnesty, if the perpetrator files an application for reconciliation, accepts the crime and shows regret. The perpetrator would also have to pay compensation to the victim. In the absence of a victim and witness protection mechanism this emphasis on reconciliation may put the victims at high risk of being pressurized and threatened. The adoption of the commission through ordinance without parliamentary oversight or consultation with the victims’ groups prevents any possibility to contest or amend the content of the bills.

Victims and their families wishing to file complaints concerning violations committed during the conflict by the security forces or the Maoists at police stations have routinely been sent home under the pretext that such cases fell outside the scope of the regular criminal justice system and will be dealt with by the TRC instead. This argument has been a permanent feature in the rhetoric of those with personal, institutional or political connections with persons accused of such crimes. However, the Supreme Court repeatedly found that transitional justice mechanisms do not supersede the regular criminal justice system and has repeatedly directed the police to register such cases and conduct investigations within an assigned timeframe.²

One such example is the struggle by Maina Sunuwar’s family to seek redress, which speaks at length to the institutional deficiencies that deny victims their right to remedies. On February 17, 2004, the fifteen-year old school girl was illegally arrested by Royal Nepal Army soldiers. The army initially denied detaining her, but her family later came to know that she had been tortured to death in army custody to force her to confess that she was a Maoist. Before the clandestine burial of Maina’s body, she was shot to make it appear as if she had been killed while trying to escape. On September 8, 2005, a court martial ruled that three military personnel were guilty of not having observed the proper procedures and gave them minor sentences. This was challenged by Maina’s mother, and on September 18, 2007, the Supreme Court ordered the civilian authorities to carry out investigations within three months and prosecute the offenders, thereby confirming the jurisdiction of civilian courts. A case was subsequently filed and arrest warrants were issued against four military officers on January 31, 2008.

Three of them have been declared as absconders, but no credible action has been taken to locate and arrest them. The fourth accused, Major Niranjan Basnet, was repatriated from a United Nations Peace-Keeping Mission in Chad in December 2009, but was taken into the custody of the Nepal Army upon his return. Contravening court orders, the army refused to transfer him to police custody. On July 14, 2010, the army announced that he had been found innocent by an internal army investigation, as the army had been acting under the Terrorist and Disruptive Activities (Control and Punishment) Act, 2002 at the time, which shielded army personnel from prosecutions in civilian courts. No action was taken by the civilian authorities to make the army comply with the Supreme Court ruling; instead the Defense Ministry immediately endorsed the military decision.

The justice system’s failure to hold perpetrators to account has also been preventing the family of Arjun Bahadur Lama from their right to legal redress. Arjun was forcibly disappeared and later killed by Maoist cadres in 2005. The police initially refused to register the case for fear of reprisals and the case was filed only after a Supreme Court’s order on March 10, 2008. The investigation has been slow and ineffective. Agni Sapkota,

² For a list of such decisions see Advocacy Forum June 2011 report “Evading accountability by hook or by crook”, <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

the main accused was a Constitutional Assembly member and a minister from May to July 2011. He is the current spokesperson of the UCPN-M, and remains a fugitive.

These cases not only illustrate resistance by the former parties to the conflict to attempts to hold their personnel accountable, and the lack of political commitment to accountability and justice, but also speak to the inability of different components of the criminal justice system to uphold the law. Strengthening and reforming the criminal justice system to ensure that it can function effectively and free from political interference would be the strongest guarantee of non-recurrence, and is an aspect that we hope the Special Rapporteur will look into in the course of his work.

As explained above, the police routinely refuse to register FIRs in cases dating back to the conflict, and when these are filed following court orders, lack diligence in conducting investigations. A strong feeling of impotence among the police to investigate cases involving the army or the political parties has led to an unwillingness to get involved unless there is strong government backing.

The judiciary remains relatively independent and has repeatedly - although inconsistently - passed progressive and human rights-based rulings, but its orders and findings are typically being ignored when they run contrary to the interests of major institutional actors, and therefore do not result in any significant impact on the prevailing impunity. Orders by the judiciary for investigations and prosecutions have been ignored and no-one has been held accountable for contempt of court. Members of the military, police forces and political parties, including Maoists, accused of human rights violations during the conflict, have remained beyond the reach of the law, ensuring persisting injustices and violating the rights of victims to legal remedies.

Political interference at all levels of the criminal justice system continues and, alongside undermining individual victims' right to legal redress, is undermining the country's rule of law framework. Since 2011, attempts by government to shield their supporters from prosecutions have intensified. The practice by successive governments of withdrawing criminal cases filed against political party supporters on the grounds that they are deemed to be politically motivated has had a corrosive effect on the rule of law. In 2008, the Maoist government withdrew 349 criminal cases against its cadres, the majority of which concerned allegations of rape, murder and attempted murder. On August 30, 2011, a 4-point deal before the election of the prime minister provided for the mass withdrawal of cases against Maoists and Madhesi leaders, paving the way for the government to recommend the withdrawal of 425 cases in February 2012, including cases of murder, attempted murder, abduction, arson and robbery.

In his report, the Special Rapporteur stresses the importance of rule of law reform, but in Nepal this remains lacking. Failure to address human rights violations committed during the conflict has further weakened the country's criminal justice institutions and fostered impunity for human rights violations and violence which occurred since 2006.

The strengthening political discourse to justify inaction regarding the crimes committed during the conflict is all the more worrying as it coincides with the closure of the OHCHR's office in Nepal and the adoption of a law in January 2012 curtailing the independence and the power of the National human Rights Commission.³ Weakened national and international scrutiny should not be allowed to turn into a vacuum of monitoring of Nepal's human rights situation.

³ For a full review of the NHRC Act see <http://www.advocacyforum.org/downloads/pdf/nhrc-act-review.pdf>.

The Special Rapporteur and the Human Rights Council therefore have a key role to play in ensuring scrutiny of Nepal's government actions to hold perpetrators of human rights violations to account. The ALRC encourages the Special Rapporteur not only to monitor the developments linked to the adoption of special mechanisms to deal with transitional justice, but also to ensure that institutional reforms necessary to strengthen the criminal justice system are carried out, delivering truth and accountability, which are the most effective safeguards against recurrence of violations. We also urge the Special Rapporteur to support the civil society in Nepal by addressing in detail the thematic issues of the relationship between transitional justice mechanisms and the regular criminal justice system; how alleged perpetrators of grave human rights abuses should be prevented from being promoted or deployed on lucrative peacekeeping duties in line with the emphasis on vetting in his annual report, and how state institutions responsible for shielding alleged perpetrators can be held accountable and made to cooperate with ongoing investigations.

We welcome the Special Rapporteur's official request for a visit to Nepal, which underlines the international community's interest in ensuring accountability for human rights violations in Nepal. We urge the government of Nepal to grant a country visit without delay and fully cooperate with this important mandate at all times.
