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Human rights situations that require the Council's attention

Written statement* submitted by the Asian Legal Resource Centre (ALRC), 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).

Nepal: credible action required to address ongoing missing persons tragedy

1. The Asian Legal Resource Centre (ALRC) welcomes the ongoing discussions held by the Human Rights Council concerning the issue of missing persons and the work of the Advisory Committee in this regard. In light of the importance of this issue, the ALRC wishes to take this opportunity to highlight the current difficulties that relatives of missing persons and all those seeking justice are currently facing in Nepal, several years on from the country's internal armed conflict that resulted in thousands of missing persons.

2. The decade-long conflict between the Government of Nepal and the Communist Party of Nepal – Maoist (Maoists), in which grave and widespread human rights violations were committed by both sides, formally ended on November 21, 2006, with the signature of the Comprehensive Peace Agreement (CPA). During the conflict, Nepal topped the list of countries concerning the number of cases of enforced disappearances being communicated to the UN's Working Group on Enforced or Involuntary Disappearances. The National Human Rights Commission of Nepal has reported having received more than 3,000 complaints regarding missing persons during and since the conflict.

3. Four years after the end of the conflict, more than 1300 persons are still missing, according to the data of the International Committee of the Red Cross. The lack of appropriate national legislation, the uncooperative attitude of both sides to the conflict, the general weaknesses of the criminal justice institutions and the lack of necessary levels of political will to address this issue have contributed to the persisting impunity being enjoyed by the perpetrators and ongoing obstacles preventing a number of families from gathering more information about the fate of their loved ones. Political mistrust and rivalries among the different political forces have contributed to ensuring that this issue has remained on the back-burner, despite commitments made as part of the CPA to address the situation of missing persons. At present, a major barrier to advancement remains the lack of cooperation by the various political and security groups, not least the Nepal Army and the Maoists.

4. The progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons reasserts the importance of the enactment of national legislation to deal with the issue of missing persons and to prevent disappearances. In the Comprehensive Peace Agreement both parties had committed to reveal the fate of the disappeared persons within 60 days (Provision 5.2.3) and the Interim Constitution of Nepal mandates the government to *'provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict'*.

5. However, the government has thus far failed to develop legal instruments to tackle this issue and provide the relief that had been promised. A bill on enforced disappearances has been pending before the Parliament since November. Ten months later, there is no sign that the bill will be adopted anytime soon. Despite substantial improvements which had been made to the original October 2008 draft, the bill is still below international standards. As pointed out by the OHCHR field office in Nepal in its latest report,¹ the bill still includes a restrictive six-month limitation to file a case of enforced disappearance and does not define disappearances as a crime against humanity. Moreover, questions and concerns

¹ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal, A/HRC/13/73, 5 February 2010, available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/HC/2010_HRC_Report_E.pdf

raised by Nepalese civil society regarding the nomination process and guarantees of independence of commissioners have not been addressed.

6. Delays in the adoption of appropriate legislation directly impact on families' right to know and right to redress. The legislative limbo also renders more fragile the economic and social situation of the family of the missing persons, especially if the remaining member of the family is a woman, as they cannot inherit the family property unless the missing is declared dead.

7. Obligations related to the issue of missing persons are incumbent on all the parties to a conflict, including non-state actors. Nevertheless, the Nepal Army and the Maoists have adopted an equally uncooperative and hostile attitude to prevent the progress of investigation in cases of persons going missing and the prosecution of their members alleged to be involved in the disappearance. If political interference in the delivery of justice is frequently deplored in Nepal, its impact is particularly regrettable when it prevents families from knowing what happened to their relatives. Two high-profile cases presented below speak to the impact of such interference.

8. In spite of having received local and international attention, the case of 15-year-old Maina Sunuwar continues to be obstructed by the Nepalese authorities. Maina Sunuwar was forcibly disappeared and tortured to death in army custody in February 2004. Despite some progress, not least the issuing of arrest warrants against four army officers accused of her murder by Kavre District Court and the repatriation of one of them, Major Niranjan Basnet, who was serving in an UN Peace-keeping mission in Chad last December, none of the accused has since then been arrested and presented before the civilian courts to face trial. Since the UN repatriated Major Basnet in December 2009, the Nepal Army had refused to hand him over to the police, despite orders from the Prime Minister. On July 14, 2010 the Nepal Army announced that an internal inquiry had found Major Basnet 'innocent' of the accusations of murder, a decision that was immediately endorsed by the Ministry of Defence.

9. The case of Arjun Bahadur Lama, who was forcibly disappeared by the Maoists during the conflict in 2005 shows similar patterns of non-cooperation resulting in impunity. An investigation by the National Human Rights Commission has concluded that the victim had been arrested by the Maoists and had been 'deliberately' killed. Fearing reprisals by the Maoists, the police initially refused to file a First Information Report. It took the police five months following a Supreme Court decision ordering them to do so to eventually accept to file a murder case against six Maoist cadres allegedly involved in the abduction in August 2008. Since then the police investigation has been slow and they have failed to locate and arrest the suspects. Since the abduction, the Maoists have refused to cooperate with the investigation. Recently, following a US embassy decision to issue a visa to Maoist cadre Agni Sapkota, who allegedly ordered the execution of the victim, the chairman of the Maoist party dismissed the accusations against the cadre as being 'false' and lawyers and human rights defenders involved in the case have been intimidated to discourage them from taking the case any further.

10. These cases also illustrate the lack of political will to ensure accountability concerning human rights violations committed during the conflict and the general weakness of the post-conflict criminal justice institutions. These factors are at the core of the continuing impunity which accompanies the wide range of conflict-related human rights violations in Nepal. In particular, these prevent the families of missing persons from locating their loved ones whereabouts. Forced disappearances are widely acknowledged as continuing ongoing violations of human rights for the relatives of missing persons, so the government as well as the Nepal Army and the Maoists must immediately improve their cooperation to put a halt to this ongoing abuse. Missing persons' families have complained about the lack of interest being shown by the police in dealing with their complaints. The

struggle of Arjun Lama's widow to have her complaint registered clearly speaks to this problem.

11. The criminal justice system has thus far shown itself to be incapable of playing an active and effective role in protecting the rights to truth and to remedy for the victims' families, as well as in tackling impunity. Police negligence coupled with a lack of mechanisms designed to protect complainants, witnesses and their lawyers, puts them at risk of threats and intimidation. Such threats, compounded by the economic and psychological burden that disappearances place on a family, frequently deter families from pursuing justice and potential witnesses from coming forward and testifying.

12. The signature of the Comprehensive Peace Agreement did not put an end to cases of persons going missing. Even if the number of new cases of disappearances has diminished since the signature of the peace agreement, there are still regular reports of persons being abducted by armed groups or by the Maoists and whose whereabouts and fates then remain unknown. The National Human Rights Commission of Nepal (NHRC) reports concerning cases in which civilians go missing after being abducted by the Maoists that: 132 cases were documented in 2007, 37 in 2008 and 24 in 2009. The case of Surendra Tamang from Dhading district who has been missing since May 7, 2010, allegedly after he refused to give money to a Maoist activist during the Maoists' indefinite strike, illustrates the persistence of this problem to date. The police were reportedly very reluctant to tackle the case at first. In spite of reports that he had been taken by Young Communist League cadres and kept in detention in a local private school where the Maoists were stationed during the strike, the Maoists have denied all involvement in the incident and refused to cooperate with the police investigation.

13. The progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons has rightly pointed to the fact that the strict observance of other fundamental rights is necessary to prevent persons from going missing. The Asian Legal Resource Centre (ALRC) therefore wishes to draw the attention of the Human Rights Council to the worrying upsurge in extra-judicial killings in the increasingly insecure Terai region of Nepal, and to the regular reports of torture and arbitrary detentions that the organisation continues to receive. Again, according to NHRC statistics, in 2009, 105 cases of arbitrary and illegal detention were been recorded, opening the doors for further abuses.

14. The issue of missing persons is therefore intrinsically related to the establishment of functioning rule of law institutions that ensure the primacy of rights effectively. Developing adequate legislative tools and strengthening the independence of the criminal justice institutions are therefore two pre-requisites that are urgently required, alongside the need for all parties in Nepal to begin to cooperate effectively, if the issue of missing persons is to be resolved in a just and timely manner in Nepal. The ongoing presence of an office of the OHCHR in Nepal is vital in order to assist the government in establishing a functioning system of justice delivery and to protect against a return to a period marked by widespread forced disappearances, as had been the case before the establishment of its office in Nepal.