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**HUMAN RIGHTS SITUATIONS THAT REQUIRE
THE COUNCIL'S ATTENTION**

**Written statement* submitted by the International Commission of Jurists (ICJ),
a non-governmental organization in special consultative status**

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

[18 February 2009]

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

Impunity For Human Rights Violations In Nepal

The International Commission of Jurists (ICJ) is gravely concerned at the widespread impunity in Nepal, in particular the Government of Nepal's failure to address meaningfully the numerous cases of enforced disappearance and past human rights violations. Despite serious advocacy spearheaded by the human rights community in Nepal to address this problem, there is little sign that the Government is exercising the will to ensure accountability and to bring perpetrators of gross human rights violations to justice. The ICJ submits this statement to the UN Human Rights Council to address this situation.

During 10 years of armed conflict, more than 13,000 people have lost their lives, many through unlawful killing, thousands of people have been subjected to torture, including rape, and other cruel, inhuman, and degrading treatment. Many of the hundreds of women who have been the victims of rape and other sexual violence presently suffer from severe physical and psychological trauma. The whereabouts of more than 1,000 people are still unknown.

During her visit to Nepal in 2007, the former UN High Commissioner for Human Rights, Louise Arbour, underscored the need to end impunity. To date not a single perpetrator of past or ongoing human rights violations has been brought to justice. On 16 February 2008, the UN High Commissioner for Human Rights called on Nepal to address the culture of impunity that exists in the country, warning that a failure to do so would threaten the achievement of lasting peace.

The human rights commitments made in the Comprehensive Peace Agreement (CPA) and Interim Constitution raised hopes that past human rights violations would be seriously addressed. Unfortunately human rights have apparently been subordinated to narrow and short-sighted political considerations in the peace process. The ICJ is concerned that the Government may opt not to address past violations through the justice system, but only through a "truth and reconciliation" process, which may compound prevailing impunity.

The National Human Rights Commission (NHRC) has carried out thorough investigations of some cases and made recommendations for the prosecution of those responsible. However, the Government has not acted on these recommendations. The failure of Nepali authorities to adequately investigate and bring alleged perpetrators of human rights violations to justice, is not only a violation of Nepal's obligations under international law, but a serious obstacle to a resolution of the country's political and social disputes.

Enforced Disappearances

The systematic practice of enforced disappearance is a dark chapter in Nepal's recent history. Hundreds of cases of enforced disappearance have not yet been resolved. The OHCHR published two reports focusing on enforced disappearance: the first one on Nepalese Army Bhairabnath Battalion barrack, of May 2006 and the second on enforced disappearance in Bardiya District, of December 2008. In both reports, a number of individual cases of torture and enforced disappearance have been documented, but the Government has not responded in full to those reports.

The Conflict Victim Committee (CVC) has been documenting cases of enforced disappearance, extra-judicial executions and illegal killings, especially in the context of the armed conflict ongoing since August 2005 in Bardiya District. Some 207 cases of enforced disappearance have been documented by the CVC. These cases have been also submitted to the UN Human Rights Council's Working Group on Enforced or Involuntary Disappearances. A just resolution of those cases is essential to building a peaceful, democratic nation.

Disappearance Ordinance does not accord with international standards

On 29 January 2009, the cabinet agreed to introduce a law, in the form of an executive ordinance, on Crime and Punishment of Disappearances. Despite the opposition of the coalition partner CPN (UML), the main opposition party Nepali Congress and most national and international human rights organizations, on 5 February 2009, the cabinet decided to introduce the law on disappearance by executive ordinance, and undemocratic procedure. On 12 February 2009, the President promulgated the Ordinance. In this way, the Government of Nepal undermined the Constituent Assembly and bypassed a public debate on the question.

The Bill on Crime and Punishment of Disappearances was initiated after a Supreme Court of Nepal's ruling of 1 June 2007, in which the Supreme Court ordered to the Government to enact legislation that would criminalize enforced disappearance and establish a credible, impartial and independent commission to investigate past abuses in accordance with international law. For the purpose of drafting such a law, the Supreme Court referred to the contents of the International Convention for the Protection of All Persons from Enforced Disappearance and Nepal's obligations under international law.

The Court observed, *inter alia*, "that it was necessary to urgently enact a law which would include provisions that the acts of disappearance are criminal offences, defining the act of disappearance pursuant to the definition stated in the International Convention for the Protection of All Persons from Enforced Disappearance, which has developed an important standard concerning the obligations of a state with respect to the security of disappeared persons."¹

The Disappearance Ordinance criminalizes the acts of enforced disappearance, establishes a commission to investigate past cases from 1996 to 2006, and provides for prosecution of perpetrators and reparations for victims. However, these welcome steps could be undermined in practice by weakness of certain provisions that are not in line with international standards.

For instance, the Ordinance fails to provide that the widespread or systematic practice of enforced disappearance constitutes a 'crime against humanity' under international law, explicitly recognized in the statute of the International Criminal Court, and the jurisprudence of other international criminal tribunals and domestic courts.

Section 26(2) of the Ordinance is especially problematic in that it fails to recognize the continuing nature of the violation, as long as the fate and whereabouts of the victims have not been established and the case remains unresolved. Instead, it provides a six-month period of

¹ *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date January 21, 1999, decision June 1, 2007, known as "Disappearance case." Also see, the Criteria for Commissions of Inquiry developed by the OHCHR.

limitations from the date when a disappearance became known or made public, which is not commensurate with the gravity of the offence, as stipulated in Article 8(a) of the Convention. This period is far too short given the climate of fear under which enforced disappearances were committed and the consequent reluctance of people to report these grave violations to law enforcement authorities. It also contradicts the Supreme Court ruling, “requiring the provisions on continuous inquiry until the status of an allegedly disappeared person is determined.”²

An essential ingredient of any system of justice founded on the rule of law is that penalties be proportionate to the offence. In contrast, Section 6 of the Ordinance provides that a person who commits the crime of enforced disappearance will be imprisoned for up to five years and fined up to 300,000 rupees. This maximum penalty is not proportionate to the gravity of the offence.

To ensure competence, effectiveness, independence and impartiality, the Commission should consist of persons with a proven expertise and experience in the field of human rights. However, the Ordinance provides no guidance on the procedure or criteria for selecting Commissioners, no mechanism for ensuring public participation and it empowers two ministers appointed by the Government of Nepal and the Chairperson of the Constituent Assembly to recommend the appointment of Commissioners. This is not a credible process for selecting members of this important public institution responsible for addressing a systematic violation of human rights that affected many groups and individuals throughout Nepal.

Under the Comprehensive Peace Accord of 12 November 2006, all parties to the conflict committed to respect human rights and undertake specific measures to resolve disappearances and establish accountability during the transition to democracy. The Interim Constitution of 2007 reiterated these commitments.

The ICJ therefore urges the UN Human Rights Council to call on the Government of Nepal:

- To conduct prompt and thorough investigations into alleged cases of past human rights violations, prosecute and punish their perpetrators, including by invoking command responsibility, in a proceedings before a civilian court.
- To fully implement the Supreme Court decision of June 2007, which ordered the Government to establish a commission of inquiry on conflict-related enforced disappearances, in compliance with international standards; and to enact a law to criminalise and punish enforced disappearance in accordance with the International Convention for the Protection of All Persons from Enforced Disappearance and other international legal standards;
- To ratify the International Convention for the Protection of All Persons from Enforced Disappearance;
- To provide effective redress to victims of human rights violations, including full reparation to families of victims of enforced disappearance.

² *Op. cit.* 1

Torture

Although Nepal is a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Interim Constitution provides that torture is criminal offence as established by legislation, Nepal's legal system does not criminalize torture. The Torture Compensation Act (TCA) neither requires the Government to take action against a perpetrator of torture nor to provide effective redress to torture victims. Although compensation may be awarded to torture victims in accordance with the TCA, perpetrators are not punished because, as stated in law, they are not considered to have committed a criminal act.

The Act only recognizes claims filed by torture victims within 35 days of the alleged act of torture, or within 35 days of the victim's release from detention. Furthermore, according to the legal system in Nepal, the burden of proof is placed on the complainant (the victim), who is often incapable of providing sufficient evidence to support his claim. In this regard, in November 2005 the United Nations Committee against Torture recommended to the Government of Nepal to adopt domestic legislation, "which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the Convention."³

The ICJ urges the Human Rights Council to call on the Government of Nepal to criminalize and adequately punish torture in order to meet its international obligations under the Convention against Torture. The Council should also call on Nepal to ratify the Optional Protocol to the Convention against Torture.

Given the prevalence of human rights concerns and a slow progress of fostering democracy through observance of human rights and the administration of justice in accordance with the rule of law principles, the ICJ also requests that the mandate of the OHCHR's country office in Nepal be extended beyond June 2009 and that the Government of Nepal implement all outstanding recommendations addressed to it by the OHCHR.

³ Concluding Observations by the Committee against Torture on Nepal, CAT/C/NPL/CO/2 of 22 November 2005, issued on 13 April 2007.