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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.

[13 February 2012]

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

Nepal: Council action required to prevent blanket impunity for conflict-era violations

The Asian Legal Resource Centre (ALRC) and Advocacy Forum wish to alert the Human Rights Council to multiple attempts by the government of Nepal to shield perpetrators of human rights abuses committed during the conflict from prosecution, which promote impunity and threaten the development of functioning rule of law institutions, in violation of Nepal's obligations under the ICCPR.

The gains achieved by human rights defenders to develop a democratic state that protects human rights through an effective rule of law framework are fragile and remain under threat. Political instability, accompanied by a lack of political commitment to accountability and weak institutions - including an unaccountable policing system and a toothless judiciary, whose orders are routinely ignored - have resulted in a lack of investigations and prosecutions concerning human rights violations.

The organisations have regularly submitted information to the Council regarding the difficulties faced by conflict-victims in accessing justice. Filing complaints has often proven impossible for these victims, due to reluctance by the police to register cases involving the security forces or Maoists. The excuse that conflict-related human rights violations fall under the jurisdiction of the yet-to-be-established transitional justice mechanisms is typically invoked to justify refusal to register cases, in spite of several Supreme Court orders to the contrary. The investigation process concerning cases that have been registered has been slow and ineffective, due to resistance from the formerly-belligerent parties to collaborate with investigations and problems arising from a dysfunctional and corrupt policing system, which remains subject to influential individuals and political leaders. Court orders, including by the Supreme Court, to launch investigations into violations or to arrest perpetrators have been ignored without consequence. Successive governments have failed to show commitment and take necessary action concerning accountability, including by failing to give clear instructions to the police to register and conduct effective investigations concerning conflict-era human rights violations. The cases of Arjun Lama and Maina Sunuwar cited below speak clearly to this failure.

School teacher Arjun Bahadur Lama was abducted, disappeared and killed in 2005 by local Maoist cadres. At the end of the conflict, the police refused several attempts by the victim's wife to file a First Information Report. Only after the Supreme Court issued an order instructing the police to register the widow's complaint in 2008 was the FIR eventually filed. Four years on, the police's investigation has been limited and insufficient. One of the main accused in the case, Agni Sapkota, was promoted within the Maoist party, becoming a member of the Constituent Assembly, and in May 2011, was appointed as Minister to Information and Communication. In response to a Public Interest Litigation seeking his immediate suspension for his involvement in a murder case, the Supreme Court refused to issue an interim order in the case, but expressed concern about the slowness of the police investigation and directed the police to report every 15 days to the court via the Attorney General's Office. Agni Sapkota was recalled from his post on 24 July, after a reshuffle of Maoist ministers to produce a more inclusive government. He remains free to date. Furthermore, in spite of the Supreme Court order, no progress has been seen in the investigation, with the police failing to submit its progress report every fifteen days to the AG Office. In addition, another Maoist cadre allegedly involved in the case, Surya Man Dong, was sworn in as State Minister of Energy in November 2011 and continues to occupy this position to date.

The case of Maina Sunuwar is well known to the international community but, eight years after she was illegally arrested, disappeared and tortured to death in military custody in February 2004, her family is still waiting for justice. Even though the perpetrators have been named and the district court of Kavre has issued arrest warrants in 2008 concerning them, following a Supreme Court order to carry out investigation and prosecute the perpetrators, the army continues to defy the court order by refusing to hand them over to the court. Three of the perpetrators have not presented themselves before the court and have been declared as absconders, but no action has been taken to locate or arrest them. The fourth accused, Major Nirajan Basnet, was serving in a United Nations Peace-Keeping Mission in Chad. He was repatriated in December 2009 in light of the serious nature of the allegations pending against him and upon his arrival in Nepal, was taken into the custody of the Nepal Army, which has since refused to transfer him to police custody, challenging court orders and calls by the Prime Minister, the NHRC, the OHCHR and the UN Secretary General to abide by these orders. The Army instead announced on July 14, 2010, that an internal investigation had found him not guilty concerning the charges against him and concluded that he could not be tried by a civilian court on the basis of the double jeopardy principle. The updated UN Set of Principles to uphold human rights through action to combat impunity calls upon the States to adopt safeguards against abuses of rules such as those pertaining to the jurisdiction of military courts. In its December 2009 report, in the section regarding Nepal, the UN Working Group on Enforced Disappearances reminded the government that persons alleged to have committed acts of enforced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts" In addition, the 2007 Supreme Court decision ordering the Kavre police and prosecutor to proceed with the case has already dealt with the issue of double jeopardy and jurisdiction of civilian courts.

As mentioned earlier, the lack of progress in the investigation and prosecution of human rights violations has been a source of frustration for victims' families since the end of the conflict. Furthermore, throughout the last year, direct government intervention to prevent the prosecutions of conflict-related human rights violations has increased.

Since the signature of the Comprehensive Peace Agreement in 2006, more than 600 cases pending in the courts have been arbitrarily withdrawn following orders by the government, causing long-term damage to the country's rule of law and criminal justice system, and eroding public confidence in the state. In none of these cases was permission taken from victims or their family members. In June 2011, the government announced its intention to withdraw further cases involving Maoist cadres. In the wake of an agreement signed between the Maoist party and the United Democratic Madhesi Front, prior to the election of Baburam Bhattarai as the Prime Minister of Nepal, in which both parties agreed to withdraw cases pending against those involved in the Maoist party and Madhesi ethnic movements, the Attorney General announced in September that his offices are preparing the withdrawal of criminal cases filed against Maoist leaders during the conflict. The government failed to give sufficient guarantees that this withdrawal will be restricted to cases of a strictly political nature, raising concerns that the withdrawal will likely include cases of rape, killings, torture and enforced disappearances.

A report released following these developments by the OHCHR-Nepal denounced successive governments' practices to withdraw cases and underlined that, "The national legal framework and practice in relation to case withdrawals does not appear to be consistent with an international consensus that impunity for serious violations of human rights and international humanitarian law is impermissible under international law."

Sustained pressure from Nepal's human rights community, with the support of the international community, has made it difficult for the government to carry out these withdrawals to date. However, the November 8, 2011 cabinet decision to recommend

Balkrishna Dhungel, a Maoist lawmaker convicted of murder, for a presidential pardon raised further concerns that the government is seeking alternative ways to shield its supporters from prosecution.

Dhungel was convicted concerning the 1998 murder of Ujjawan Kumar Shrestha, a shopkeeper from Okhaldhunga, and sentenced to life imprisonment and confiscation of property by the Okhaldhunga District Court. In September 2010, the Supreme Court upheld his life sentence. Despite this, Dhungel remained a member of the Constituent Assembly and remains free, although the Supreme Court found again in June 2011 that there were no legal obstacles preventing his arrest. On November 8, 2011 the government decided to recommend that President Dr. Ram Baran Yadav pardon Dhungel, stating that it had found the case to be "politically motivated". The Supreme Court stayed the government decision to grant him a pardon on 13 November, and reasserted its order on 23 November. On January 22, 2012, the Prime Minister submitted a written reply to the Supreme Court reasserting the government's decision to demand a pardon in this case, and stating that the government's decision was taken in accordance with the Constitution and that the Supreme Court should not interfere in the process.

In a country where victims face significant difficulties in filing cases with the police and have little hope of having their case properly investigated, let alone prosecuted, convictions of perpetrator are extremely rare. Granting a pardon to Dhungel therefore sends a strong signal that even in cases in which the highest judicial authority of Nepal upholds the conviction of a perpetrator of human rights violations, there are no guarantees that this will result in justice being achieved.

Of recent concern has been a proposal for blanket amnesty to be provided for all crimes committed during the conflict by a parliamentary taskforce comprising members of the major political parties and set up to examine the bills to establish the country's transitional justice institutions. The taskforce recommended amnesty on the basis of an "emotional appeal" from the country's President and Prime Minister. Since the signing of the CPA, victims have been made to wait for the establishment of these institutions before justice can be done. Despite the Supreme Court repeatedly ruling that commitments to transitional justice commissions do not supersede the regular justice institutions, the police have again and again refused to register and investigate conflict-related cases, claiming that they should fall under these commissions' jurisdiction. Should these institutions now be used as a means to provide amnesty to perpetrators, victims' fundamental rights to justice will have been cynically abused.

This pattern of interference by the executive into the due course of justice has greatly undermined the prospects for a functioning system of democracy and rule of law in Nepal. Fundamental principles of democracy and justice such as the separation of the executive and judicial branches of government or equality of all before the law must be implemented, and efforts to undermine these must be halted. In particular, an independent judiciary with strong authority remains to be built. During Nepal's Universal Periodic Review, many recommendations addressed this fundamental aspect and Nepal committed to ensure the implementation of all orders by the judiciary, to end political interference, and to facilitate victims' access to justice. None of these commitments have yet begun to be implemented, leading the ALRC and Advocacy Forum to urge the Czech Republic, Denmark, France, Germany, Hungary, Malaysia, the Netherlands, New Zealand, Spain, Switzerland and the United Kingdom, which all expressed concerns regarding impunity, to follow-up on their recommendations and assist Nepal in their implementation.

We welcome the engagement of the international community, including foreign diplomats and OHCHR officials in Nepal, who have unequivocally expressed their opposition to all forms of amnesty. This engagement has done much to protect and support the work of human rights defenders, and accounts for the difficulties that the government has faced in

attempts to withdraw cases and openly providing amnesty. Recalling the Set of Principles to uphold human rights through action to combat impunity, and in view of the upcoming closure of the OHCHR's offices in Nepal, it is essential that the international community continue to engage with the government of Nepal, in order to prevent case withdrawal and blanket amnesty for the many grave human rights violations that have been committed in the country.
