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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 the International Commission of Jurists, 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.

[8 February 2013]

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

Nepal: Compromising justice and promoting impunity

The International Commission of Jurists (ICJ) welcomes the report of the High Commissioner for Human Rights on democracy and the rule of law (A/HRC/22/29). The report identifies key challenges in the process of transition to democracy, including where the rule of law has been eroded following the eruption of armed conflict. It reflects established international law and standards by stating that:

“Newly elected authorities must address the question of impunity, and ensure accountability for serious and systematic violations of human rights and international humanitarian law involving State and non-State actors, through effective redress and remedial strategies. This includes, inter alia, criminal prosecution and national investigation commissions.”¹

On 8 October 2012, the Office of the High Commissioner for Human Rights (OHCHR) released a comprehensive report documenting and analyzing serious violations of international law in Nepal between 1996 and 2006, along with a database of around 30,000 documents. The Report archive records up to 9,000 gross violations of international human rights law or serious violations of international humanitarian law.² It addresses the need for accountability and redress in Nepal.

Rather than acting to address impunity, accountability and redress, the Government of Nepal has in the past few months continued to take measures to ensure that those responsible for gross human rights violations and serious crimes under international law will escape justice. This approach is exemplified in various ways, including through:

- The adoption of an Ordinance for the establishment of a Commission on Disappeared Persons, Truth and Reconciliation (TRC Ordinance) in such terms so as to provide virtual amnesty to perpetrators of human rights violations;
- Non-compliance with international standards to combat impunity and ensure accountability concerning persons holding public office; and
- Political interference in the investigation and prosecution of alleged perpetrators of human rights violations.

TRC ordinance

The August 2012 Ordinance proposes the establishment of a TRC that will: (i) be appointed on the basis of political consensus; (ii) lack any mandate to recommend prosecutions for potential crimes committed; and (iii) be mandated to recommend the granting of amnesties for all gross human rights violations and crimes under international law, including torture, enforced disappearance and crimes against humanity.³ The Ordinance represents a grand bargain struck between the political parties.

The granting of amnesties in respect of gross human rights violations and crimes under international law violate the State’s duty under international law to hold perpetrators accountable and to provide effective legal remedies and reparations to victims and victims’ families. They perpetuate impunity and contravene Nepali Supreme Court jurisprudence,

¹ UN Doc A/HRC/22/29 (2013), para 50.

² OHCHR, Nepal Conflict Report, available at URL: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>.

³ ICJ, Compromising Justice: Nepal’s Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation (2012), available at URL: <http://www.icj.org/nepal-icj-urges-accountability-for-violations-detailed-in-ohchr-report/>.

notably in the Rabindra Prasad Dkahal case where the Court held that those accused and convicted of enforced disappearance can neither be granted amnesty nor pardoned.⁴

The Commission has been excluded from making recommendations for the prosecution of persons in respect of whom it might find credible information of responsibility for gross human rights violations. Without such recommendations from the Commission, the Ministry of Peace and Reconstruction, and Council of Ministers, would have to act on their own initiative before investigations and prosecutions might occur. This is highly unlikely given the control exerted by the political parties over the process. The previous experience of Commissions of Inquiry in Nepal shows that these Commissions have in fact been used to avoid prosecution.⁵

The Ordinance also empowers the Commission to promote reconciliation between victims and perpetrators, even where neither party has requested such intervention, in effect forcing victims to give up their right to justice as part of the “reconciliation” process.

Persons holding public office

Principle 36 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity provides that: “Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal... proceedings”. With a view to giving effect to this principle, the Supreme Court directed the Government of Nepal in August 2012 to put in place vetting guidelines to prevent those implicated in human rights violations from holding public office.⁶

Despite this, on 13 September 2012, the Government promoted Kuber Singh Ran from Assistant Inspector General to the rank of Inspector General of Police. Ran is subject to ongoing criminal investigations (as ordered by the Supreme Court in February 2009) relating to the enforced disappearance and extrajudicial killing of five students in Dhanusha in October 2003.⁷

On 4 October 2012, the Government promoted Colonel Raju Basnet to Brigadier General. Raju Basnet was commander of the Bairabnath Battalion in 2003, when systematic enforced disappearance and torture were alleged to have been committed by forces under his command at the battalion’s Maharajgunj Barracks, according to investigations carried out by OHCHR and the NHRC. In a mandamus petition that was submitted to the Supreme Court seeking the prosecution of Raju Basnet, the petitioners alleged that:

“While in custody [in the Maharajgunj Barracks], they were blindfolded and subject to extreme torture such as immersion in water and sometimes hot water, compelled to urinate on a burning electric heater, and had pins inserted under their fingernails by Lt. Col. Raju Basnet, Maj. Bibek Bista, Cap. Indiber Rana and the Chief of Military Intelligence Dilip Rayamajhi on the order of Pyar Junga Thapa, the Chief of Army Staff.”

In response to that petition, the Supreme Court ruled in June 2007 that:⁸

⁴ Rajendra Dhakal v Government of Nepal, Nepal Law Journal 2064, Vol 2.

⁵ See ICJ, Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity, available at URL: <http://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>.

⁶ Sunil Ranjan Singh v Council of Minister, Supreme Court of Nepal, judgment of 7 August 2012.

⁷ See ICJ and Human Rights Watch Press Release, available at URL: <http://www.ekantipur.com/2012/09/19/top-story/rights-groups-jittery-over-rana-promotion/360425.html>.

⁸ Above note 4.

“A writ of mandamus... is thereby issued to the respondents, the Ministry of Home Affairs and the Government of Nepal, ordering that any agency, official or employee, or any other person, who was involved in the disappearance.... be investigated for their criminal actions, and that departmental action and punishment be initiated and finalized to those concerned offices, agencies, or officials. This order is also issued to those concerned agencies or employees as necessary to implement this writ of mandamus.”

Political interference in investigations and prosecutions

Despite a Supreme Court order to investigate the allegation, the Cabinet decided in October 2012 to suspend the on-going criminal investigation against a senior Maoist leader, Agni Sapkota. Agni Sapkota was allegedly involved in the murder of Arjun Lama in 2005. On 10 March 2008, the Supreme Court had issued an order to the District Police Office (DPO) and District Administration Office (DAO) of Kavre District to register a First Information Report (FIR) and conduct a murder investigation against six Maoist cadres. The DPO and DAO had earlier refused to register the petitioner's FIR stating that the issue would fall under the jurisdiction of the proposed Truth and Reconciliation Commission.

On 11 January 2013, Nepal's Attorney General, Mukti Pradhan, issued a written instruction to the local police and prosecutor not to move forward with the investigation and prosecution concerning the murder of Dekenra Raj Thapa, who was allegedly subjected to torture and buried alive by Maoist cadres in 2004 during the country's decade-long civil war. The Prime Minister himself approached the Attorney General's Office and the Police Headquarters asking for an immediate halt to the investigations. The criminal investigation has resumed, following the Supreme Court's order on 1 February 2013.⁹

Call for action

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

- Withdraw the TRC Ordinance of August 2012 and promptly establish a Truth and Reconciliation Commission and a Commission of Inquiry on Disappearance as agreed in the 2006 Comprehensive Peace Agreement, and in accordance with international standards and the Supreme Court ruling in *Rajendra Dhakal v Government of Nepal*;
- Implement the recommendations made by the OHCHR in its “Nepal Conflict Report” of October 2012;
- Conduct prompt, independent and thorough investigations into alleged cases of past human rights violations and prosecute and punish their perpetrators, including by invoking command responsibility, in proceedings before civilian courts;
- Establish and implement vetting guidelines to ensure that persons implicated in human rights violations are prevented from holding public office, and that those in public office who are subject to investigation for serious crimes under international law are suspended from official duties pending the disposition of the investigation; and
- Fully respect the rule of law and the separation of powers by desisting from interference in criminal investigations and prosecutions.

⁹ The Kathmandu Post, ‘Dist Court sends five accused in custody’, 1 February 2013, available at URL: <http://www.ekantipur.com/the-kathmandu-post/2013/02/01/top-story/dist-court-sends-five-accused-in-custody/244794.html>.