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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

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: Families of the disappeared in a legal and emotional limbo**

The Hong Kong-based Asian Legal Resource Centre (ALRC) and Nepalese human rights organisation Advocacy Forum wish to highlight the lack of progress being made in addressing enforced disappearances in Nepal, which is engendering growing frustration and suffering by victims' families.

In 2011, a special taskforce established by the government to ascertain the loss of life and property found that the country’s 1996-2006 conflict resulted in at least 17,265 deaths and 1,302 disappearances;¹ including a significant number of members of minorities and students.

At the end of the conflict in 2006, the former belligerent parties included the rights of the disappeared in both the Comprehensive Peace Agreement (CPA)² and the Interim Constitution. They committed to publicize information about these disappeared persons within 60 days under article 5.2.3 of the CPA. In addition, the Interim Constitution mandated the state to establish a Commission of Inquiry into Disappearances and a Truth and Reconciliation Commission (TRC). However, neither body has yet been established, and six years after the signature of the CPA, the victims’ whereabouts remain unknown.

The rights of the families of the disappeared, enshrined in the ICCPR and the International Convention for the Protection of All Persons from Enforced Disappearance, the latter of which Nepal has still not ratified, and further recognized by the set of principles for The Protection And Promotion Of Human Rights Through Action To Combat Impunity, are two-fold: they have an individual right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate; as well as a right to justice. Delays in establishing the commission on enforced disappearances and in criminalizing enforced disappearances have resulted in equal delays for victims in knowing the truth and obtaining justice, as the regular criminal justice system has proven impotent in providing effective legal remedies.

On June 1, 2007, the Supreme Court (SC) ordered the government to form a commission to probe the whereabouts of disappeared persons and to formulate a law criminalizing disappearances. The government of Nepal thereafter drafted the Bill on Disappearances (Crime and Punishment) Act, 2065, including provisions to establish the commission. The drafting of the bill did not include consultations with the main stakeholders: victims' groups, civil society and the National Human Rights Commission (NHRC). The draft has several shortcomings, which raise concerns that, if adopted, the Commission of Inquiry into Disappearances would be unable to fulfil its mandate or uphold the rights of victims. The bill’s definition of disappearances is not in line with international standards, and it does not establish individual criminal liability or prescribe the minimum and maximum penalty applicable to perpetrators if found guilty, hampering the effective prosecution of such acts.

Likewise, the bill does not contain guarantees ensuring the independence, impartiality and competence of the commission, resulting in doubts as to the commissioners’ selection process. Witness and evidence protection, which are essential components of the right to

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** The Advocacy Forum, Nepal, an NGO without consultative status, also shares the views expressed in this statement.
the truth and a state duty as recalled by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its general comment,¹ are not included in the bill.

The draft has been under consideration before a Parliamentary Committee after being endorsed by the Council of Ministers in November 2008. Although victims’ groups and civil society urge the government to amend the bill in line with international standards, there have been no positive developments so far. On the contrary, in January a Parliamentary taskforce recommended that the Commission on Disappearances should not be established and that provisions granting amnesty for past violations should be introduced into the draft of the Bill establishing a TRC.

The CPA included commitments in which “both parties ascertain that they will not protect impunity and along with it, the rights of […] the families of the people who have been disappeared will be safeguarded”. The government has failed in its primary duty under the Interim Constitution to guarantee victims’ right to justice, by failing to undertake prompt, thorough, independent and impartial investigations into allegations of enforced disappearances and to ensure that perpetrators are prosecuted and punished in a manner that is proportional to the gravity of the crime.

Victims’ families have faced significant obstacles in reporting cases to the police or filing First Information Reports (FIR). They face threats from perpetrators and obstruction by the police, who claim that conflict-era cases should be handled by the yet-to-be-established commissions, despite Section 3 (1) of the State Cases Act-1992, compelling them to register FIRs. In its June 2007 ruling, the Supreme Court ordered the prosecution of perpetrators of disappearances. Despite several additional Supreme Court orders to investigate individual cases, political protection given to leaders and criminals, the failure of police investigations, a lack of political will and non-cooperation by high-ranking army and police officers, have prevented action.

In the case of 15-year old Maina Sunuwar, who was forcibly disappeared and tortured to death by the Army in 2004, the Supreme Court of Nepal in 2007 ordered the civilian authorities to carry out investigations and prosecute the involved army officers. Over four years after this ruling, no progress has been made, as the Army continues to refuse to cooperate with the civilian authorities, arguing that the case was handled by a military court, although the court martial concerned was flawed and resulted in low punishments on minor charges.⁴ Similarly, on June 1, 2007, the Supreme Court of Nepal ordered the arrest and prosecution of Nepal Army officers involved in the arbitrary arrest, enforced disappearance and torture to death in 2001 of Chakra Bahadur Katwal, from Okhaldhunga district, but the police have not complied with the court order.⁵ Similar failures to cooperate have hampered the prosecution of police officers and Maoists involved in other enforced disappearances. The country’s criminal justice system and civilian institutions are too weak to ensure the rule of law.

Promotions of individuals accused of involvement in enforced disappearances within the security forces have posed further challenges to the rule of law. As early as 2009, the OHCHR in Nepal expressed concern about Army personnel with command responsibility over the Maharajgunj Barracks, where hundreds of individuals were arbitrary detained, tortured and forcibly disappeared between 2003 and 2004, having been recommended for

³ http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf
⁴ http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf,
promotion within the Nepal Army. In June 2011, a police officer against whom an enforced disappearance complaint concerning five students is pending in Dhanusha district was promoted to Additional Inspector General of Police, despite NHRC recommendations for him to be prosecuted.

One woman, whose husband was forcibly disappeared during the conflict, has encapsulated the plight of hundreds of victims’ families when stating that, "The perpetrator is in the position of imparting justice. The coordinator of the local peace committee is the person who forcefully disappeared my husband. The Committee Secretary is also one of the perpetrators. I recognize the persons who abducted, disappeared my husband and later issued a press release saying that "enemy was destroyed." Many times I have tried to file a case against them but my attempts were rejected by the police and since then my life is at risk. If my case is rejected like this, I will never get justice."  

The inadequacy of investigations and the legal framework concerning disappearances is evident in the lack of a systematic approach to exhumations, in the few cases in which exhumations were conducted (the Shivapuri National Park case in which some human remains, possibly of an estimated 49 enforced disappearance victims from Maharajgunj Army Barracks in 2003; and the case of five missing students in Dhanusha district). Advocacy Forum, which participated in most of these exhumation processes wrote in a 2011 report that, "the ad hoc nature in which exhumations to date have been processed, with a lack of clarity on the responsibilities of individual authorities, the slowness of the process, the lack of attention to safeguarding evidence and ensuring it is admissible in legal proceedings, the lack of focus on the needs of the relatives during the exhumation processes in Dhanusha and elsewhere – all draw attention to the urgent need for a comprehensive policy framework to regulate exhumations undertaken as part of the gathering of evidence in criminal investigation procedures and/or as part of any future transitional justice mechanisms."

Persisting impunity for widespread human rights violations in Nepal has long been of serious concern. In its 2004 country visit, the WGEID raised concerns about the existing “culture of impunity.” A number of attacks on the notion of accountability and justice in the name of reconciliation by Nepal’s leading political parties have created further challenges to the rights to the truth and justice. In August 2011, the Maoist party reached an electoral four-point agreement with the Madhesi Morcha political party, in which they agreed to withdraw cases pending against individuals involved in the Maoist and Madhesi movements and declared a general amnesty for conflict-era crimes, including enforced disappearances. Concern about the withdrawal of criminal cases was raised by a number of states during Nepal's 2011 Universal Periodic Review, but the government has failed to respond. In December 2011, two major political parties reached an agreement to provide amnesty for all conflict-era crimes in the pending bill on the TRC. According to principle 22 of the Set of Principles to Combat Impunity, states should adopt and enforce safeguards against any abuse of rules, including those pertaining to amnesty. Under domestic and international law, the government of Nepal is obliged to protect and promote human rights by addressing past human rights violations. Developing adequate legislative tools and

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7 Interview in a Strategic Litigation Meeting organized by Advocacy Forum on 20 October 2011 in Western Nepal
9 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement
strengthening the independence of criminal justice institutions, are two urgently-required pre-requisites for this.

The ALRC and Advocacy Forum welcome the WGEID’s request for a follow-up visit to Nepal and deplore the government’s lack of a positive response to date, and urge the WGEID to intervene with the government of Nepal concerning the unsatisfactory implementation of its 2004 recommendations. The WGEID is urged to renew its call for the adoption of measures permitting the effective realization of the fundamental rights to truth and justice for the victims of forced disappearances and their families.

The government of Nepal is urged to:

• Adopt without delay legislation criminalizing enforced disappearances in line with international standards, notably in terms of the definition of the crime, individual criminal liability and the adoption of specific punishments.

• Establish the commission of inquiry into disappearances without further delay, providing it with adequate powers and resources to fulfil its mandate, guaranteeing the independence and transparency of its commissioners’ appointment process and its procedures, and establishing adequate protection mechanisms for victims and witnesses. Special arrangements should be made for the safeguarding of evidence;

• Ensure the right to truth for victims’ families by making public all the commission’s recommendations and findings, and by ensuring their full and timely implementation;

• Publicly oppose amnesties for perpetrators of grave human rights violations in the bill establishing the commission of inquiry into disappearances;

• Ensure wider reforms to the justice system, including the strengthening of the independence and authority of the judiciary, and compliance by the security forces and political parties with court orders;

• Remove limitations concerning the filing of human rights violation cases committed during conflict period;

• Remove obstacles faced by victims filing FIRs at police stations and publicly order the police to conduct fair and prompt investigations into such complaints and to implement court orders concerning arrests and prosecutions of alleged perpetrators;

• Ratify without delay the Convention for the Protection of All Persons from Enforced Disappearance.

The recommendations made to the government of Nepal by the governments of Argentina, Australia, Chile, the Czech Republic, Denmark, Hungary, the Netherlands, Slovenia, Switzerland and the United Kingdom during Nepal’s UPR, concerning forced disappearances are welcomed, and these states are urged to intervene with the government of Nepal to ensure that it is fulfilling its commitments in this regard.