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political, economic, social and cultural rights,
including the right to development**

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).

South Asia: Institutional overhaul required to prevent torture in the South Asian sub-region

In the South Asian sub region, the widespread use of torture remains the central deficit for the realisation of a rule of law framework. The Asian Legal Resource Centre (ALRC) has documented hundreds of cases of torture that show that torture is not merely practiced as a crude tool for criminal investigation in countries like India, Nepal, Bangladesh and Pakistan, but that it is also used as a tool for social control in these countries. States use torture, and the fear it generates within society, to enforce their will, allowing law enforcement agencies, paramilitary units and armed forces to practice torture widely with impunity. This impunity makes any challenge against torture at the domestic level practically impossible.

There is no functional legislative framework in the sub-region that can facilitate seeking legal redress concerning acts of torture. Neither India, Pakistan, Bangladesh nor Nepal have any legislation criminalizing torture at present. Even though Pakistan (23 June 2010), Bangladesh (5 October 1998) and Nepal (14 May 1991) have ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), none have yet criminalized torture in their domestic law.

Nepal's domestic law concerning torture, the Compensation for Torture Act, 1996 merely provides monetary compensation for an act of torture. Ignoring international principles and theory, the law does not consider torture to be a criminal act having equal implications against the state as well as the state agent committing it, but reduces the act to a monetary claim against the government by virtue of Sections 6 and 9. It merely fastens a vicarious liability upon the state for the act of a state agent and provides only for a limited compensation to be paid. Successive governments since the Comprehensive Peace Accord was signed on November 21, 2006, bringing to an end the country's decade-long conflict, have not brought any change to the law or its practice.

The governments of Pakistan and Bangladesh meanwhile, have not demonstrated any will to criminalize torture. With the country having ratified the CAT in 2010, the ALRC, in consultation with its local partners, proposed to the Pakistan government a draft model law to criminalize torture. The government's response has been reticent, with no further discussions initiated on the issue. Similarly, the ALRC drafted a 'Private Member Bill' against torture on behalf of a private member of the Bangladeshi Parliament who was a victim of torture, upon his request. A Legislative Committee reviewed the Bill and passed it back to the parliament for its consideration and appropriate legislation. However, the process is slow and lacks the support the Bill deserves from the parliament and government.

In India, the Ministry of Home Affairs has tabled and passed a law, the Prevention of Torture Bill, 2010 in the lower house of the Indian parliament, the Lok Sabha, in 2010. The Bill was then passed to the upper house of the parliament, the Rajya Sabha, for consideration. In the Rajya Sabha, after a short debate on the proposed law, a Parliamentary Select Committee was constituted to review the Bill. The ALRC submitted its views on the Bill and also a model draft law to the Parliamentary Select Committee. After reviewing the Bill and taking note of views expressed by entities like the ALRC, the Committee suggested comprehensive and far-reaching amendments be made to the Bill. These are now with the Indian government for its consideration. It is unknown however, what action the government will adopt to realise the changes required to make the Bill meaningful and ensure that torture is criminalized and prevented in the country.

Legislation, however, is not enough by itself to prevent the entrenched practice of torture in the South Asian sub-region. Today, there are no credible procedures by which a complaint

of torture can be impartially and scientifically investigated in any of these countries. Investigation of torture in all the mentioned countries entirely depends upon the same police force accused of committing torture, or upon an agency like the Indian Central Bureau of Investigation, which is overwhelmingly staffed by officers on deputation from the local police. The comradeship between the accused officers and the investigating officers negates the basic premises of impartiality in a torture investigation.

In cases involving the paramilitary or other divisions of the armed forces, the statutory impunity provided to them against civilian claims, civil or criminal, ousts the investigative jurisdiction of a civilian investigation agency. The internal proceedings prescribed in laws governing the armed forces in Bangladesh, India, Nepal and Pakistan, are non-transparent, leaving no room for civilian participation. Moreover, the findings of these internal proceedings are not made public, and the victim is often not informed about the outcome. In most cases accused officers are exonerated from the charges against them. Such impunity that is enjoyed by the armed forces is exploited by government agencies and even by the local police, who often seek their assistance in undertaking criminal acts, like the brutal torture of suspects or maintaining secret detention centres where victims are held incommunicado for extended periods of time. Often times, this impunity is also made use of to settle private disputes.

Cases reported by the ALRC and its sister concern, the Asian Human Rights Commission (AHRC), to the UN Special Rapporteur on Torture from all the countries discussed in this submission clearly indicate this impunity and its consequences. In the case of Maina Sunuwar, a minor from Nepal who was detained, tortured, raped and murdered by a team of army officers of the former Royal Nepal Army, the accused officers are yet to be tried in a civilian court in Nepal, despite repeated court orders asking the army to produce the suspected officers for trial. The case of Mr. Faizan Butt and three others was reported from Pakistan, where the victims were illegally arrested and tortured by Lieutenant Colonel Hamza of the Inter Services Intelligence and other officers of the Frontier Constabulary in Peshawar, in order to settle personal disputes associated with private money lending. As in Maina's case from Nepal, the local police refused to take action despite public protests over the incident. Similar cases are reported frequently from Bangladesh involving the Bangladeshi Rifles, and from India involving paramilitary units like the Assam Rifles. In India, the draconian Armed Forces (Special Powers) Act, 1958 provides watertight statutory impunity to the armed forces that are deployed to assist civilian policing in states like Manipur and Jammu and Kashmir.

In addition to the general culture of impunity, the lack of scientific investigation facilities in all four countries of the sub region, as prescribed in the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1999 (Istanbul Protocol), is a serious hindrance to the investigation of torture cases. The lack of scientific training for law enforcement agencies and the relative absence of modern facilities, forces law enforcement agents to resort to violence and extracted confessions as the sole means to investigate crimes. Nepal for instance, still depends upon the limited facilities available in India to undertake DNA or fingerprinting analysis in crimes. India in the meantime, may have the most modern facilities for crime investigation in Asia, but access to these are limited to the investigation of high profile cases like the Mumbai terrorist attack in November 2008. For cases dealing with day-to-day crimes, confessions, often extracted through the use of torture, remain the only means of investigation. Ordinary police officers therefore resort to torture without reluctance, believing they have no other means to investigate crimes. The ALRC is of the opinion that criminal investigation in all four countries begins and ends with a statement of confession.

The general environment of impunity and the pressure to solve cases creates an air of legitimacy surrounding the use of torture in all four countries. The institutional framework

against torture is further weakened due to serious obstacles in the court process. Extended delays in trial proceedings and the complete absence of witness protection mechanisms renders the torture complaint process an insurmountable ordeal for victims and families. It is common for victims making complaints to be threatened by accused police officers.

In fact, there is now an alarming increase in the extra-judicial execution of torture victims who police officers suspect may speak out when released. The domestic, regional and international support governments receive for counter-terrorism activities--whether in countries like Pakistan and Bangladesh generally, or in the Terai region of Nepal and the North-eastern states of India in particular--is liberally used by state agencies to murder victims after torture, and then accuse them of charges related to terrorism. In most of these cases, the excuse of 'encounter killing' is used, a euphemism for extra-judicial execution, which means that the victim was shot dead in an armed encounter. In all four countries mentioned in this submission, there are no credible legal procedures through which such encounter killing claims could be verified. In India, for instance, a directive issued by the National Human Rights Commission (NHRC) states that in all cases of extra-judicial execution the local police must conduct an inquiry, the autopsy video should be recorded, and a report filed with the NHRC. This is not being followed at all. On the contrary, state police do not hesitate to publicly express their contempt for such orders, as done by Manipur's Inspector General of Police, Mr. Joykumar Singh, in a press conference in October 2010.

Institutions like the NHRC face grave limitations in their ability to carry out their mandate in the absence of a basic institutional framework against torture. Without an effective law criminalizing torture, the NHRC can be of little use in preventing the practice. The NHRCs of India, Bangladesh, and Nepal are thus crippled by a lack of adequate infrastructure, while Pakistan has yet to constitute a national human rights institution. Furthermore, the investigative function of the NHRCs is challenged by their dependence upon the police to undertake investigations. The NHRCs also face challenges to their credibility due to the lack of openness and integrity of their officials. Public trust of the NHRC in India is at an all-time low, for instance, after its current Chairperson was accused of corruption.

In conclusion, the practice of torture in India, Pakistan, Nepal and Bangladesh can be contained only if the following urgent measures are taken:

1. There must be a domestic law against torture, criminalizing the act and providing for independent and timely investigations of complaints of torture;
2. Witness protection must become a priority for the states, with the view that it is the state's responsibility to protect persons willing to tell the truth, and that without witnesses willing to come forward, not only will torture prevail, but no criminal prosecution can succeed;
3. Law enforcement agencies must be given adequate training and equipment to function without resorting to torture;
4. Statutory impunity from prosecution provided to the armed forces and police officers must be discontinued, as this undermines the notions of equality and justice;
5. While it is important for entities like the UN to encourage the development of national institutions like the NHRCs, the UN must also work closely with states to develop and restructure the national police. The police should not just undertake their responsibilities without violating human rights, but rather become an institution that nurtures the very essence of democracy, instead of being a mere henchman for the government.