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## Human Rights Council

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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 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.

[21 August 2012]

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

## **Promotion and realization of truth, justice, reparation and guarantees of non-recurrence**

The International Commission of Jurists (ICJ) welcomes the first report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/21/46), the content of which elaborates on the four pillars of the Special Rapporteur's mandate and the ways in which this analysis will inform the execution of his mandate. The ICJ reiterates its support for the establishment of this important mandate, one that is crucial to combating impunity for human rights violations and guaranteeing victims' access to justice.

While not purporting to be exhaustive, the ICJ sees the following issues as critical to the execution of the Special Rapporteur's mandate, and the way in which the Human Rights Council should engage with it:

1. In times of crisis and transition, the role of judges and lawyers is essential to safeguarding human rights and the rule of law, and to fulfilling all four pillars of the Special Rapporteur's mandate. Key to this are various factors, most important of which is the independent and effective functioning of judicial mechanisms. Under no circumstance should a situation of crisis or transition be invoked to deny the right to a fair trial or the right to effective access to justice, including effective remedies and reparations. The judiciary and legal profession have an enhanced responsibility to ensure the rule of law and the effective administration of justice, while all branches of government must take necessary measures to ensure that they can fulfil this role.<sup>1</sup>

2. It is important for effective transitional mechanisms, such as truth and reconciliation commissions and other forms of commissions of enquiry, to be established in a transparent and inclusive manner consistent with international standards and maintaining maximum participation support from civil society and victims.<sup>2</sup> This is a matter of concern in Nepal, for example, where the prospect of establishing a Truth and Reconciliation Commission and a Commission of Inquiry into Disappearances is unlikely in the immediate future in view of the dissolution of the Legislative Parliament in late May 2012. There remains a threat that a Truth and Reconciliation Commission (TRC) could be established under an executive ordinance that would bypass the legislative process and may offer amnesties leading to impunity.

3. Concerning amnesties, although the most recent versions of transitional justice legislation in Nepal had explicitly prohibited amnesty for serious crimes, major political parties in both the Government and opposition have reportedly agreed to establish a TRC empowered to issue amnesties for gross human rights violations. An amnesty would conflict with public commitments made by, and recommendations to, the Government during its Universal Periodic Review. The granting of a blanket amnesty would place Nepal in contravention of its international treaty obligations and the decisions of the Supreme Court.<sup>3</sup>

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<sup>1</sup> See further the Legal Commentary to the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, at [http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23803](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23803).

<sup>2</sup> See the ICJ's submission to the Special Rapporteur on torture, UN Doc A/HRC/19/NGO/73 (2012).

<sup>3</sup> See the ICJ's Practitioner's Guide No 2, The Right to a Remedy and to Reparation for Gross Human Rights Violations (2006), at:

4. Economic, social and cultural rights (ESCR) have long been marginalized, if not ignored, in transitional justice processes, and in post-conflict and reconciliation efforts. This absence of incorporation of ESCR in the various areas and stages of such processes represents a particularly serious omission, since ESCR entertain a complex and multi-faceted but fundamental relationship with conflicts and their sustainable resolution, as well as with all strands of justice, remedy and reparation. In many instances, systematic and severe violations of ESCR are among the factors that trigger conflicts. They must therefore form an integral part of any reconciliation efforts. Violations of ESCR, like violations of other rights, must be accompanied by the availability of effective remedies and reparations, and redress for ESCR violations must remain a priority in situations of transitional justice. In addition, the integration of plans for the realization of ESCR in post-conflict recovery strategies should ensure that victims can enjoy the environment and conditions, including access to services and goods, that are needed for effective remedies and reparation, including (non-exhaustively) adequate access to health care services, decent work and opportunities to enjoy an adequate standard of living, and education. The guarantee of non-recurrence implies that post-transition measures result in effective legal and policy reforms to those ends.

5. Another area that has been neglected in research and action in this field is the past involvement of business enterprises in instances of serious abuses of human rights. The Truth and Reconciliation Commission in South Africa was the first, and to date the only one, to have addressed the involvement of corporations in past abuses in a systematic way. Other truth commissions have alluded to or made reference to such involvement. However, action to follow up on such conclusions and recommendations has been almost completely absent. Human rights defenders have been slowly but steadily growing in awareness of the scope and nature of past involvement of corporate in human rights abuses and violations, for instance in Argentina, the Democratic Republic of Congo, Colombia and South Africa. A number of cases are currently being litigated in national jurisdictions, although such action faces obstacles such as the existence of immunities against prosecution for certain corporations that worked for the government, or through the application of doctrines of “non justiciability” over political questions.

6. The ICJ would also draw the attention to the situation of impunity related to the CIA interrogation, secret detention and rendition programme, carried out by the United States of America. The CIA programme has resulted in the commission of innumerable gross violations of human rights, including torture and ill-treatment, enforced disappearances, unlawful transfers, incommunicado detention and prolonged arbitrary detention. Besides the primary responsibility of the USA, several other States have been involved, either as co-perpetrators, or by aiding and abetting in the execution of the CIA programme.<sup>4</sup> Apart from one partially successful prosecution in Italy in the Abu Omar case, no other State has brought those responsible to account to the knowledge of the ICJ.<sup>5</sup> Nor have governments, apart from rare examples, provided to victims reparation, including compensation, rehabilitation, restitution or satisfaction, or guarantees of non-repetition. They have also failed to provide an objective account of the truth to the victims, their relatives or their next of kin. This has often been facilitated through making use of State secret privileges.

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[http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=22926](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22926).

<sup>4</sup> See, for example, the report of the Council of Europe Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, AS/Jur (2006) 16 Part II.

<sup>5</sup> The ICJ is aware, however, of two cases pending before the European Court of Human Rights, including concerning allegations of breaches of the rights to truth and reparation.

### **Call for action**

The ICJ calls on the Human Rights Council to support and give effect to the following action by the Special Rapporteur:

1. Ensure that mechanisms established to promote truth, justice, reparations and guarantees of non-recurrence:
  - Are understood in the larger context of impunity and lack of accountability for human rights violations and the need for victims of human rights violations to have access to justice, including remedies and reparations;
  - Are established in a transparent and inclusive manner consistent with international standards and maintaining maximum support from civil society and victims; and
  - Do not establish, and are not accompanied by, amnesties for gross human rights violations and other serious crimes under international law.
2. Give consideration to the following issues in the execution of the Special Rapporteur's mandate, including in thematic reports to the Council and General Assembly:
  - The role of judges and lawyers in transition countries in guaranteeing truth, justice, reparations and guarantees of non-recurrence;
  - The inclusion of ESCR in the scope of human rights violations requiring redress, and in the establishment of post-conflict/transition laws and policies;
  - The past involvement of business enterprises in instances of serious abuses of human rights, and the need to overcome challenges relating to the implementation of corresponding findings and/or relating to immunities and non-justiciability doctrines in national litigation; and
  - The lack of accountability for human rights violations perpetrated by the USA and other States in the CIA-administered rendition and secret detention programme, including as this pertains to the findings and recommendations of the UN global study on secret detention.
3. Call on the Government of Nepal to:
  - Immediately establish a Truth and Reconciliation Commission and a Commission of Inquiry on Disappearances, in accordance with international standards, and explicitly excluding the possibility of amnesties for gross human rights violations, serious international humanitarian law violations and other crimes under international law; and
  - Invite the Special Rapporteur and other relevant Special Procedures to undertake official missions to Nepal, and extend to them all reasonable cooperation and assistance to facilitate timely and effective missions.