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ASIA-PACIFIC REGIONAL OFFICE

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Rt. Honourable Madhav Kumar Nepal
Prime Minister,
Office of the Prime Minister,
Singha Darbar, Kathmandu, Nepal

1 December 2009

Honourable Prime Minister,

The International Commission of Jurists (ICJ) respectfully requests that you suspend the promotion of Major General Toran Bahadur Singh until a credible, impartial and independent investigation is conducted concerning allegations that he is responsible, under universal principles of command responsibility, for crimes under international law. The allegations concern serious violations of human rights, including torture and enforced disappearance, and violations of international humanitarian law amounting to war crimes and crimes against humanity.

As an international organization of jurists dedicated to advancing human rights and the rule of law, the ICJ welcomes your Government's commitment to promoting peace and justice and ending the culture of impunity that characterized the recent conflict in Nepal. It is for this reason that the ICJ urges you, Honourable Prime Minister, to consider Nepal's domestic and international legal obligations with respect to General Singh's promotion.

The ICJ is concerned that a decision to promote General Singh irrespective of his alleged role in gross and systematic rights violations will undermine your Government's adherence to the rule of law, compromise the institutional integrity of the Royal Nepal Army, and send a damaging message of continuing impunity to the nation and the international community during a particularly sensitive phase in Nepal's peace process.

The ICJ would like to highlight three points for your consideration:

- A. The seriousness of the allegations;
- B. Legal prohibitions against enforced disappearance and torture;
and
- C. The command responsibility of General Singh.

A. The seriousness of the allegations

General Singh commanded the 10th Brigade, including the Bhairabnath Battalion, during a period in 2003-4 when the Bhairabnath Battalion is widely reported to have engaged in a systematic practice of enforced disappearances, torture and other cruel, inhuman or degrading treatment (ill treatment). A number of independent reports have credibly documented these alleged crimes under international law. In January 2004, the United Nations (UN) Working Group on Enforced or Involuntary Disappearances (WGEID) reported that Nepal had the highest number of new cases in the world (E/CN.4/2004/58, para. 223).

The Office of the High Commissioner for Human Rights (OHCHR) in Nepal released a report in May 2006 providing details of enforced disappearances and torture perpetrated in 2003-04 by members of the Bhairabnath Battalion under the command of Lieutenant Colonel Raju Basnet, part of the 10th Brigade commanded by then Brigadier General Singh. A report by the National Human Rights Commission (NHRC) on 13 August 2008 regarding its own related investigations is consistent with the OHCHR report.

The alleged victims of these systematic enforced disappearances, torture, and ill-treatment, appear to have been targeted as part of a major military operation whereby suspected Maoists, including students, union leaders, and teachers, were captured and detained in the Bhairabnath Battalion headquarters at Maharajung barracks in Kathmandu. Forty-nine victims identified in the OHCHR report were seen by multiple co-detainees in late 2003 and early 2004. The report provides details of systematic torture and ill treatment. Their fate remains unknown despite persistent efforts and petitions by family members.

The OHCHR Report was referenced in detail by the Supreme Court of Nepal in its 1 June 2007 decision, (*Re: Habeas Corpus (Rajendra Dhakal and others v. the Ministry of Home Affairs)*), in which it dealt with 83 *habeas corpus* petitions alleging enforced disappearance, including some of cases noted in the OHCHR report. The Supreme Court decision was based primarily on the March 2007 findings of its own appointed investigative 'Task Force'. The Court's decision included an order for: further investigations followed by prosecution as justified by the evidence, legislative reform to criminalize enforced disappearance in accordance with international law, and compensation for the victims. To date, the Government has failed to implement the Supreme Court's order.

B. Legal prohibitions against enforced disappearance and torture and other ill-treatment

International human rights and humanitarian law prohibits without exception both torture and enforced disappearance, as reflected in numerous international instruments, including, among others, the UN Convention against Torture (CAT), the International Covenant on Civil and Political Rights, the UN Convention on the Protection of all Persons from Enforced Disappearance and the UN Declaration on Enforced Disappearance. For example, article 2(2) of the CAT provides that:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

The 1998 Statute of the International Criminal Court (ICC), which largely codified existing customary

international law applicable to all states, recognizes that enforced disappearance, when committed as part of a systematic or attack against civilians, is a crime against humanity. In 2000, the International Criminal Tribunal for the Former Yugoslavia (ICTFY) determined in the *Kupreskic case* that enforced disappearances are “inhumane acts” and constitute a crime against humanity, taking into account that each enforced disappearance involved a series of fundamental human rights violations.

Article 1 of the UN Declaration on Enforced Disappearance describes enforced disappearances as an “offence to human dignity” and:

a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

Under the UN Declaration, States are obligated to investigate alleged cases of enforced disappearance “promptly, thoroughly and impartially (Article 13)... Persons alleged to have committed any of the acts... shall be suspended from any official duties during the investigation (Article 16).”

The seriousness of the crime of enforced disappearance is heightened by the fact that this practice is often linked to violations of treaty and customary prohibitions against murder as well as torture and other cruel and inhuman treatment. The ICC Statute (8(2)(c) provides that torture and ill treatment are war crimes in non-international armed conflict. Common Article 3 of the 1949 Geneva Conventions, to which Nepal is a party, protects civilians and members of armed forces against unlawful killings, torture and ill treatment and the carrying out of executions without judicial guarantees.

Individual criminal responsibility for war crimes committed during non-international armed conflict has been affirmed in recent international humanitarian law treaties, including the Amended Protocol II to the Convention on CCW, the ICC Statute, and the Second Protocol to the Hague Convention for the Protection of Cultural Property, in the Statutes of International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone, and in the case law of the ICTR and the ICTFY (*Tadic case*).

C. The command responsibility of Major General Toran Bahadur Singh

The principle of command responsibility is a universally accepted feature of international law since the Nuremberg and Tokyo Trials at the end of the Second World War. It has been affirmed in the jurisprudence of national and international courts, incorporated in human rights treaties, and recognized in international humanitarian law. The fact that Nepali law does not address command responsibility carries no weight in this regard, as this international norm does not require for its applicability a specific treaty that might otherwise require enacting legislation under Article 9 of the Nepal Treaty Act.

Under customary international law applicable to all States, a commander or superior is responsible for violations of international humanitarian law if it can be demonstrated that he knew or ought to have known that violations were being committed by subordinates acting under his authority and failed to take appropriate preventive measures.

This norm is represented in a wide range of recognized sources of international law and practice, including the ICC Statute (article 28), which states that “a military commander shall be responsible” for war crimes or crimes against humanity if he “either knew or, owing to the circumstances at the time, should have known” that the crimes were occurring. Two treaties specifically related to enforced disappearance and torture further codify and advance these customary rules of command responsibility under international humanitarian law.

The 2006 *International Convention for the Protection of All Persons from Enforced Disappearance* is regarded, in many of its substantive elements, as a codification of customary international law. Article 6 provides the following:

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
 - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
 - (b) A superior who:
 - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
 - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
 - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
 - (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

The Convention against Torture stipulates that commanders and other superiors are responsible when they knew or should have known that torture was being perpetrated by subordinates. In January 2008, The UN Committee Against Torture, in General Comment No. 2, paragraph 26, set out in detail the responsibility of superior authorities, including public officials:

... those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.

Recommendations

It is the exclusive jurisdiction of a criminal court to determine the veracity of factual allegations concerning General Singh’s command responsibility for incidents of enforced disappearance and torture and other ill-treatment, in accordance international standards governing the right to a fair trial. The ICJ is not suggesting that the Government should preempt the legal process. It is up to the

Government, however, to determine whether the allegations are sufficiently credible to suspend Major General Singh's promotion pending the outcome of an independent inquiry.

Honourable Prime Minister, the ICJ respectfully requests that your Government:

- Immediately suspend the promotion of General Singh and order a credible, impartial and independent investigation into allegations of his responsibility for crimes under international law, including under the principle of command responsibility, as part of the broader investigation ordered by the Supreme Court; and
- Publicly commit to placing human rights at the center of the peace process by ensuring justice for victims and their families, particularly in emblematic cases currently pending in the legal system, such as the case of Maina Sunuwar;

Honourable Prime Minister, in support of your efforts to advance the protection of human rights through the rule of law in Nepal, please accept this letter with our respect and appreciation for your attention.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Roger Normand', written in a cursive style.

Roger Normand
Director, Asia Pacific Programme