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**PROCEDURES SPECIALES DU**  
**CONSEIL DES DROITS DE L'HOMME**

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**HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE**  
**HUMAN RIGHTS COUNCIL**

**Mandates of the Special Rapporteur on the right to food; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on the human right to safe drinking water and sanitation.**

REFERENCE: AL Housing (2000-9) Food (2000-9) Health (2002-7) Water (2008-1)  
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right to food; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on the human right to safe drinking water and sanitation. pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 13/4, 15/8, 15/22, and 16/2.

In this connection, we wish to bring to the attention of Your Excellency's Government information we received regarding the **impact on the enjoyment of human rights, in particular access to food, housing, water and sanitation, and health care, for several communities in Banke, Nepal as result of annual flooding caused by the Lakshmanpur Dam and the Kalkwala Afflux Bund constructed on Indian territory.**

According to the information we received:

Every year floods threaten the livelihoods of more than 3000 families of Holiya, Bethani, Mattaiya, Fattepur, Bankatti and Gangapur in the Banke district of Nepal. While some flooding in the region is a natural phenomenon, the annual flooding has been aggravated since the construction of the Lakshmanpur Dam in 1985 and, in particular, the Kalkwala Afflux Bund, built between 1999 and 2000 by the Government of India, along the Indo-Nepali border approximately 300 to 500 meters from the no-man's land on Indian territory.

The increased severity of the flooding is allegedly affecting the ability of local communities to enjoy their human rights in a number of ways.

First, the annual floods have reportedly displaced large sections of the population and caused the death of some individuals. Out of the 3,000-plus families affected

by the annual floods, an alleged 1000 families have been displaced from their homes and agricultural land. These families have reported losing their homes, and they reportedly no longer have access to food sources previously relied on to meet their food needs.

Second, the inundation and subsequent land erosion have allegedly caused thousands of hectares of agricultural land to be inaccessible to local communities who depend on them for their food consumption. Currently, 1,700 hectares of fertile agriculture land have been eroded and irrevocably damaged, rendering them unavailable for agricultural production. A further 5000 hectares of agricultural land are reportedly inundated during the rainy season, damaging production.

Third, the flooding has resulted in the alleged loss of other food sources, assets (such as cattle) and stored harvest grains.

In addition to difficulties faced in accessing food and adequate housing, during the flooding period communities reportedly face challenges, such as accessing clean drinking water and attending school. Also, it is reported that sanitation in local communities is problematic and access to health care is a challenge, particularly for women who are unable to reach hospitals for deliveries.

The affected communities reportedly have yet to receive any compensation and have not benefited from a comprehensive rehabilitation project despite their loss of lands and assets as a result of the flooding. While some relief items are distributed to the affected communities, these allegedly are not commensurate to the losses incurred and not sufficient to meet basic needs of the population during the flood period that lasts for more than four weeks.

Reportedly, the affected communities were not consulted prior to the construction of the dam and afflux bund in question. In addition, it would appear that no proper resettlement plan for the affected communities has been put in place, despite the challenges they face year after year.

Some welcome advances have taken place including the expressed readiness of some Indian authorities at the Third Meeting of the Nepal-India Joint Committee on Water Resources to implement the detailed proposal regarding the opening of two water-passing drainages at Kalkalwa Afflux and the construction of a permanent embankment along both sides of the Rapti River. In 2010 India reportedly constructed one water-passing gate, but this gate has remained blocked for most of the monsoon period. While these developments are promising, they reportedly are not adequate to meet the challenges faced by the affected communities as a result of the annual flooding.

Concerns are expressed that the situation as described above has left thousands of families without proper housing, sustainable livelihoods and access to food and clean water. More specifically, concerns are raised that the flood affected communities are

facing hunger and malnutrition, starvation, water borne diseases and health and sanitation problems on a yearly basis during and after the inundation period.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of Your Excellency's Government to the applicable international human rights norms and standards as they relate to India's extraterritorial human rights obligations.

Article 25 of the Universal Declaration of Human Rights recognizes the right of everyone "to a standard of living adequate for the health and well-being of himself and of his family, including food." Furthermore article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – which India acceded to on 10 April 1979 – stipulates that States "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions," and requires them to "take appropriate steps to ensure the realization of this right."

The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the Covenant, has defined the core content of the right to food in its General Comment No. 12, along with the corresponding obligations of States to respect, protect and fulfill the right to food both on their national territory and outside the national territory. The Committee considers that the core content of the right to adequate food implies, inter alia, availability of food which refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand, and accessibility of food which encompasses both economic and physical accessibility. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.

Regarding the right to safe drinking water and sanitation, we wish to remind Your Excellency's Government that the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child entail human rights obligations attached to access to safe drinking water and sanitation. The UN Committee on Economic, Social and Cultural Rights has asserted that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, which includes sanitation. On July 2010, the General Assembly adopted a resolution explicitly recognizing safe and clean drinking water and sanitation as a fundamental human right, essential for the full enjoyment of life and all human rights. The Government of India voted in favour of this resolution. This resolution was reaffirmed on two instances by the UN Human Rights Council, which stated that the

right to water and sanitation is derived from the right to an adequate standard of living as contained in article 11 of the ICESCR.

With regard to the right to adequate housing, the Committee on Economic, Social and Cultural Rights stressed in its General Comment No. 4, that the right to housing should not be interpreted in a narrow or restrictive sense such as merely having a roof over one's head; rather, it should be seen as the right to live somewhere in security, peace and dignity. With "due priority to those social groups living in unfavourable conditions," the right to housing includes guaranteeing: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) cultural adequacy. The Committee also added that "the right to housing should be ensured to all persons irrespective of income or access to economic resources."

With regard to the right to the highest attainable standard of health of the affected communities, this right is enshrined, *inter alia*, in article 12 of the ICESCR, which specifically provides that all States have an obligation to ensure that health facilities, goods and services are accessible to everyone without discrimination, especially the most vulnerable or marginalized sections of the population. With regard to accessibility, we also wish to refer Your Excellency's Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which explains that accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility (para. 12(b)). In particular, physical accessibility means that health facilities, goods and services must be within safe reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, older persons and persons with disabilities. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. General Comment No. 14 further holds that the right to health is an inclusive right that extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing and healthy environmental conditions (para. 11), to which States have an obligation to ensure equal access for all (para. 36).

As repeatedly stated, including in resolutions 1993/77 and 2004/28 of the Commission on Human Rights, forced evictions or displacements constitute grave violations of a wide range of internationally recognized human rights. In view of this, we wish to recall the existence of the Basic principles and guidelines on development-based evictions and displacement (contained in document A/HRC/4/18) that aim at assisting States in developing policies and legislations to prevent forced evictions and displacement at the domestic level. Your Excellency's Government may find useful in the current circumstances the sections of the guidelines that focus on State obligations prior to, during and after evictions or displacements.

The Committee considers the extraterritorial obligations of States regarding the right to food to include a commitment to engage in activities that help to promote the right to food beyond a State's borders. More specifically the Committee states that "In the

spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.” The commitment to take steps to respect the enjoyment of the right to food in other countries implies not taking steps that hinder the enjoyment of the right to food in other countries. India would be in violation of its extraterritorial obligations towards the right to food if, for instance, it engaged in activities that lead to the destruction of foreign agricultural land through actions taken either in Indian or by India in the foreign State, or if it allowed its territory to be used by non-State actors to conduct activities having such consequences.

The extra-territorial obligations of States with respect to economic, social and cultural rights are restated in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted by a group of academic institutions, non-governmental organizations, and independent experts (including Special Procedures mandate-holders of the Human Rights Council) in September 2011 (see Analytical Study on the relationship between human rights and the environment, report of the Office of the High Commissioner for Human Rights prepared in accordance with Human Rights Council resolution 16/11 on human rights and the environment, A/HRC/19/34, chapter IX). The content of the Maastricht Principles represents obligations contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the ICESCR, and other universal and regional human rights instruments.

As detailed in the Maastricht Principles, in addition to domestic obligations, States also have obligations “to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.” This responsibility is engaged where the nullification or impairment is a foreseeable result of conduct.

We are aware that, while all States have a duty not to adopt measures that have a real risk of negatively affecting the rights to food, housing, water, sanitation and health outside their national territory, the violation of this duty does not relieve the State on the territory of which the violation occurs from its obligations under international human rights law, in particular, from its duty to mitigate such negative impacts and to protect the victims even of violations which cannot be directly attributed to the conduct of that State. We have therefore addressed a separate communication to the Government of Nepal about the situation that has been brought to our attention in order to inquire about the measures adopted to protect the rights of the communities affected by the consequences of the building of the Kalkwala Afflux Bund. That separate communication seeks information, in particular, as to the status of the negotiations between Nepal and India, which have a joint duty to cooperate for the realization of human rights, where such cooperation is required for the effective enjoyment of rights.

It is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?
2. Because their international responsibility may be engaged as a result of States adopting measures that create a real risk, that could have been foreseen, for the enjoyment of the rights to adequate food, adequate housing, safe water and sanitation, and health on the territory of other States, States are under an obligation to seek to inform themselves such potential impact, prior to adopting such conduct. Has a human rights impact assessment been carried out regarding the construction of the Lakshmanpur Dam or the Kalkwala Afflux Bund? If so, who undertook such an assessment and could you please provide me with the conclusions of the assessment?
3. Has Your Excellency's Government sought to enter into negotiations with the Government of Nepal, in order to identify solutions that could eliminate or reduce the negative impacts on the enjoyment of the rights to adequate food adequate housing, safe water and sanitation, and health that are caused by the construction of the dams, consistent with the duty of all Members of the United Nations to "take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 5" of the Charter, among which "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"?
4. Have any attempts been made to develop and implement a long-term sustainable rehabilitation policy for the affected communities? If so, could you please provide information in this regard?
5. Has any compensation been provided to those who have lost their homes or agricultural lands as a result of the yearly flooding? If so what was the nature of that compensation? How was the amount and type of compensation determined and in what way was the compensation distributed to the affected community members?
6. Have any attempts been made to engineer the water flow to ensure that yearly floods do not affect local communities?
7. What measures have been put in place to ensure that the affected communities have access to adequate food, adequate housing, safe water and sanitation, and health?

We would be most grateful to receive an answer within 60 days. We undertake to ensure that the response of Your Excellency's Government will be taken into account in

our assessment of the situation and in developing any recommendations that we may make for Your Excellency's Government's consideration pursuant to the terms of my mandate. Additionally, we undertake to ensure that the response of Your Excellency's Government is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

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