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**AUX DROITS DE L'HOMME**

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

**UNITED NATIONS**  
**OFFICE OF THE UNITED NATIONS**  
**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)  
NPL 2/2012

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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.**

According to the information we received:

Every year floods threaten the livelihoods of more than 3,000 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 metres 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 1,000 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. The Government of Nepal has not yet instituted any programmes or plans to help with the return or the resettlements of these families.

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 damaged, rendering them unavailable for agricultural production. A further 5,000 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 additional 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 the 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, allegedly 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 allocation by the Government of a budget for the construction of a temporary embankment since 2008, and the expressed readiness of the representatives from India 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.

There are several legal mechanisms in Nepali law, which detail the Government's obligations regarding access to food. Article 18.3 of the Interim Constitution of 2007, in force today, protects the right to food of individuals, stating, "Every citizen has the right to food sovereignty as provided for in the law." The Natural Calamity (Relief) Act 1982 provides social protection for individuals, like those in the affected communities, in the face of disasters. Further, on 19 May 2010, the Supreme Court of Nepal released a decision in *Pro Public vs. Government of Nepal* (writ no. 0149/065) in which it underlined the constitutional obligation of the Government to uphold the right of everyone to adequate food as included in the Interim Constitution of 2007 and clarified by the Supreme Court interim order in September 2008. The allegations received claim the Government has failed to meet these obligations in its response to the communities affected by the flooding.

Concerns are expressed that the situation as described above has left thousands of families without proper housing, sustainable livelihoods and access to adequate 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.

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 Nepal acceded to on 14 May 1991 – 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 fulfil the right to food. 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 Committee notes that victims of natural disasters and people living in disaster-prone areas may need "special attention and sometimes priority consideration with respect to accessibility of food." 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.

The right to adequate food is recognized also in the Convention on the Rights of the Child – ratified by Nepal on 14 September 1990 – in articles 24.2(c) and 27.3. In the Convention, the right to adequate food is to be read in conjunction with the right to life, survival and development stipulated at article 6. States parties to the Convention on the Rights of the Child commit themselves to combat “disease and malnutrition, including within the framework of primary health care, through, inter alia, (...) the provision of adequate nutritious foods and clean drinking-water.”

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 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 Nepal 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 International Covenant on Economic, Social and Cultural Rights.

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)). The Committee holds that the right to health imposes three types of obligations on States parties (para. 33): the obligations to respect (refrain from interfering directly or indirectly with the enjoyment of the right), to protect (prevent third parties from interfering with the enjoyment of the right), and to fulfil (facilitate, provide and promote the enjoyment of the right). Moreover, the Committee 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.

We have addressed a separate communication to the Government of India about this situation that has been brought to our attention, since the Kalkwala Afflux Bund was built by the Government of India on its the national territory. Under the ICESCR, all States parties must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially, and the responsibility of States is triggered where such nullification or impairment is a foreseeable result of their conduct. The implication is that, before adopting conduct that creates a real risk of having negative impacts on the enjoyment of the rights to food, housing, water, sanitation and health outside the national territory, each State must assess such impacts in ways that are meaningful and transparent. However, while all States have a duty not to adopt measures that have a real risk of negatively affecting human rights 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.

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. Has Your Excellency's Government sought to enter into negotiations with the Indian Government, 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 55" 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"?
3. 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?
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 care?

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 our mandates. 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 our highest consideration.

Olivier de Schutter  
Special Rapporteur on the right to food

Raquel Rolnik  
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

Anand Grover  
Special Rapporteur on the right of everyone to the enjoyment of the  
highest attainable standard of physical and mental health

Catarina de Albuquerque  
Special Rapporteur on the human right to safe drinking water and  
sanitation