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Accountability and the International Criminal Court

Nepal Bar Association, Kathmandu

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I would like to thank the Nepal Bar Association for the invitation to join you today, and to speak on behalf of the Office of the United Nations High Commissioner for Human Rights. As you may recall, High Commissioner, Louise Arbour, when she visited Nepal in January 2005, emphasised that Nepal should ratify the Rome Statute at the earliest opportunity as a step in combating the culture of impunity in the country.

Nepal has a very good record of ratification of international human rights treaties, and it is therefore a natural step that Nepalis would be keen to endorse the International Criminal Court and accept its jurisdiction. Over half of the world's nations have already ratified the Rome Statute and one would expect Nepal to join this worldwide effort to ensure justice for the most serious crimes and to deter and prevent such crimes from reoccurring.

OHCHR-Nepal welcomes the 24 July resolution of the House of Representatives, directing the Government to ratify the Rome Statute. Of course it has been professional associations such as the NBA and many human rights organisations in Nepal which have led the way in advocating for the ratification of the Rome Statute. However, there remains much work to be done to see that ratification does in fact take place, and that once it is in place that other steps are taken to ensure that Nepal is able to apply the full benefit of the ICC and its framework to address issues of accountability in your country.

It is important to understand what the International Criminal Court is, what the scope of its powers are, and how it relates to and complements national justice systems.

The ICC is a permanent international criminal court. It was created in July 1998 when 120 States adopted the Rome Statute, which is a multilateral treaty. The ICC is located in The Hague. It is distinct from other international courts in The Hague: firstly, the International Court of Justice ("The World Court"), which only adjudicates disputes between States; and secondly, the International Criminal Tribunal for the former Yugoslavia (ICTY), which is an ad hoc tribunal created by the UN Security Council with jurisdiction over crimes committed in the former Yugoslavia.

The ICC has jurisdiction to try individuals, not States, for three types of crimes: genocide, crimes against humanity and war crimes. The ICC can only act on crimes which were committed after July 2002, or after the date of ratification with respect to States which ratified the Rome Statute after July 2002.

The ICC can investigate and try crimes which were: committed in the territory of a State Party; committed by a national of a State party; committed in the territory or by a national of a State which is not a State Party which has agreed to the ICC's exercise of jurisdiction; or referred by the Security Council.

What is the significance of the ICC in the current Nepali context?

Firstly, it is important to understand that the ICC does not aim to replace national courts. A key principle of the ICC is what is known as complementarity. This means that for serious crimes, the primary responsibility for investigating and prosecuting lies with the national justice system. The ICC would only prosecute cases involving war crimes, crimes against humanity or genocide if a State is "unwilling or unable" to genuinely investigate or prosecute (as determined by the ICC Judges). In this context, "unwilling" means, for example, if proceedings in national courts were taken for the purpose of shielding person concerned from criminal responsibility; unjustified delays in proceedings were inconsistent with intent to bring persons concerned to justice; or the proceedings were not conducted impartially or independently. "Unable" means, for example, that the national judicial system has totally or substantially collapsed or is unavailable; or the national judicial system is unable to apprehend accused persons or obtain the necessary evidence.

Another important fact, in the Nepali context of transition from long conflict to peace, is that the Rome Statute will not apply to Nepal retroactively. This means that the ICC cannot act with respect to crimes committed during the 11-year conflict or during the Jana Andolan of April this year. As Nepalis seek accountability and justice for violations committed throughout the conflict and Jana Andolan, it is up to the Nepal Police, Government Attorneys and courts to carry out criminal investigations and prosecutions. OHCHR-Nepal has been following the increasing number of First Information Reports which have recently been filed in relation to past crimes. The Nepal Police must carry out investigations in such cases, even where the alleged perpetrators are members of the security forces or other authorities. Government Attorneys must support and guide the Nepal Police in those investigations. Defence lawyers must ensure that suspects and accused are treated according to international due process standards. The courts must conduct proceedings independently and impartially, in compliance with international fair trial requirements. Throughout the investigative and judicial process, full respect must be given for the presumption of innocence of suspects and accused persons, as well as the safety and security of victims and witnesses.

For these past crimes, more broadly, prosecutions in Nepal should be seen in the context of ensuring "transitional justice". This is a term that has developed worldwide in countries which seek to achieve justice for widespread past violations as they enter a transitional period from conflict to lasting peace. Transitional justice usually involves more than prosecutions alone, and includes measures to establish the truth

about the past, help restore the lives of victims and the damaged social fabric, and carry out institutional reforms to prevent violations from recurring.

To conclude, I would like to highlight some of the key areas where members of the legal profession can make an important contribution to achieving ratification of the Rome Statute, to ensuring that once ratification is complete that Nepal has an effective national system and approach to prosecuting serious crimes, and to dealing with the issue of accountability for past serious crimes not under the jurisdiction of the ICC. Lawyers, and the NBA, have an important voice in continuing to press the Government of Nepal to ratify the Rome Statute. Lawyers should study and analyse the Rome Statute and identify requirements for domestic implementing legislation, so that ratification is not merely a symbolic act. And lawyers are in an important position to take the lead to ensure that ratification of the Rome Statute is part of a concerted national effort to redress the issue of impunity, of both state security forces and members of the CPN-Maoist, during the long conflict. In particular, you should

- Continue calling on the Government's responsibility to investigate and prosecute past crimes.
- Continue calling for legislative changes which would promote accountability, for example by placing Nepal Army personnel under the jurisdiction of civilian courts, and by criminalizing torture.
- Ensure that "blanket amnesties" are not granted for serious human rights violations in the context of the peace process.
- Explore possible measures and mechanisms for "transitional justice" generally.

In closing, I once again congratulate the Nepal Bar Association for this initiative today – public dialogue and debate is an important step toward raising awareness of the importance of accountability in establishing the rule of law at the heart of Nepali society as it enters this new era. To ratify the Rome Statute and accept the jurisdiction of the ICC would be an important step, symbolically and practically, in strengthening the Nepali commitment to accountability, the rule of law and lasting peace.