



Forest Peoples Programme

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Urgent communication to the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples concerning the exclusion of the indigenous peoples of Nepal from the drafting of Nepal's new constitution

I. Summary

1. This urgent communication is respectfully submitted to the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples by the Lawyers' Association for the Human Rights of Nepalese Indigenous Peoples and the Forest Peoples Programme ("the submitting organisations"). It concerns the exclusion of indigenous peoples' representatives from the process of making Nepal's new constitution. This instrument will be drafted by a Constituent Assembly in which indigenous persons may only participate to the extent that they are chosen by political parties and in conformity with the manifestos of those parties, none of which explicitly addresses indigenous peoples' rights. This denial of indigenous peoples' right to choose their own representatives to participate in the crucial process of drafting the new constitution perpetuates centuries of "deep rooted" and "deeply-engrained" discrimination against indigenous peoples, and violates a range of their internationally guaranteed rights.¹

2. In light of this situation, the submitting organisations respectfully request that the Special Rapporteur sends an 'urgent appeal' to the Government of Nepal and also seeks its consent to conduct an on-site visit at the earliest possible opportunity (see paragraph 16, *infra*, for the full request).

II. Indigenous peoples in Nepal

3. Indigenous peoples (*Adivasi Janajati* in the Nepali language) are constitutionally² and otherwise recognized as distinct peoples in Nepal.³ For instance, Section 2 of the *National Foundation for the Development of Indigenous Nationalities Act 2002* ("NFDIN") recognizes the collective nature of indigenous peoples and defines them as groups with distinct mother

¹ *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal*. UN Doc. A/HRC/4/97, 17 January 2007, at para. 62 & 68 ("OHCHR Report 2007") (observing that "Discrimination on the basis of caste, ethnic, gender, geographic and other considerations has marginalized and excluded millions of Nepalese people from full participation in political processes and State institutions as well as equal access to housing, water, land and other such rights").

² Articles 21, 33.d and 33.d.1 of 2007 Interim Constitution, (See annex 1 for detail of related Provisions of Interim Constitution) recognize indigenous peoples as excluded and marginalized groups economically, socially and educationally who have a right to participate in the State Structure while restructuring the state in order to end discrimination based on class, race, language, religion, culture, sex and region.

³ Nepal ratified International Labour Organisation Convention No. 169 in September 2007; the Convention enters into force in September 2008. Nepal has also ratified the ICCPR, ICESCR, and CERD and supported the UN Declaration on the Rights of Indigenous Peoples. Pursuant to the 1991 *Nepal Treaty Act*, international law, in principle, prevails over national law.

tongues, traditions, customs, identities, social structures, and with their own oral or written histories. While the schedule to the NFDIN lists 59 indigenous peoples, indigenous organisations observe that a considerable number of indigenous peoples are not recognised and included in the schedule, thus rendering them invisible in the eyes of the law.⁴ Similarly, although Nepal's 2001 census states that indigenous peoples comprise 37.19 percent of the total population of almost 29 million people, indigenous organizations assert that they number in excess of 50 percent of the population.

III. Background

4. Nepal is on the verge of making a new constitution following the Second Peoples' Movement of 2006 and the Comprehensive Peace Agreements of the same year, which formally concluded 11 years of internal armed conflict. An Interim Constitution was promulgated in 2007 on the basis of a political agreement by the 'Seven Party Alliance', comprised of the seven main political parties, and sets out the principles for establishing a Constituent Assembly to draft a new constitution. The UN High Commissioner for Human Rights observes that these political parties do not include indigenous persons among their higher echelons.⁵ Indeed, these parties are exclusively controlled by the so-called 'high caste' Hindu elite that has dominated Nepal for more than two centuries. Not one of these parties has endorsed indigenous peoples' rights in their manifestos pertaining to the Constituent Assembly and some of them openly oppose key tenets of that rights regime.

5. The UN High Commissioner further observes that "the growing demands for a State structure which protects the human rights of all and enables all Nepalese people to participate equally in society is a fundamental challenge of the peace process and the Constituent Assembly. Unless concerns are seriously addressed, there is a great risk of deepening social divisions and, ultimately, violence."⁶ As discussed herein, Nepal has not risen to this challenge; in contravention of Nepal's international obligations, indigenous peoples' freely chosen representations are both *de jure* and *de facto* excluded from the Constituent Assembly – and therefore also from the drafting of Nepal's new constitution.

6. There are no available judicial or other remedies to challenge this denial of indigenous peoples' rights because Article 118(4) of the Interim Constitution prohibits legal actions that may jeopardize the election process for the Constituent Assembly.⁷ These elections were held on 11 April 2008 thereby completing the process of denying indigenous peoples' representatives a role in the Constituent Assembly.

IV. De jure and de facto exclusion of indigenous peoples' representatives from the constitution-making process

7. Article 63 of the Interim Constitution provides for the election or nomination of the 601 members of the Constituent Assembly through a mixed electoral system as follows: 26 persons are nominated by the Ministry of Council (the Government); 240 members are chosen in 'first-past-the-post elections, and; 335 are chosen in a proportional representation electoral system (the groups to which this applies are: women, Dalits or 'untouchables', oppressed communities and indigenous peoples, backward regions, *Madhesis* or lowlanders, and other groups as defined by the law).

⁴ *Concluding observations of the Committee on Economic, Social and Cultural Rights: NEPAL*. UN Doc. E/C.12/NPL/CO/2, 16 January 2008, at para. 28 (expressing concern about "the criteria used by the National Foundation for Development of Indigenous Nationalities to recognize officially indigenous nationalities and about the implications of official recognition").

⁵ OHCHR Report 2007, para. 63.

⁶ *Id.* at para. 67.

⁷ Similarly, Article 33(d) of the Interim Constitution, which provides that indigenous peoples have right to participate in state structures is contained in the non-binding 'Directive Principles' and cannot be invoked before the courts.

8. Article 21 of the Interim Constitution stipulates that indigenous peoples have a right to participate in state structures, which presumably includes the Constituent Assembly, on the basis of the principle of proportional representation. This is given effect by the 2007 Elections Law, which provides that indigenous peoples and oppressed communities will be allocated 37 percent of the 335 delegates chosen in the proportional representation category. These persons are not however directly chosen by indigenous peoples, nor are they directly accountable to them. They are chosen by the participating political parties from ‘candidate lists’ drawn up by these parties. Also, it is unknown exactly how many of these candidates will be indigenous persons among the 37 percent allocation because some will be from the ‘oppressed communities’ category and because the parties may choose persons from their lists post-election depending on the proportion of the vote that they receive. Candidates chosen in this way are accountable to their political party rather than to indigenous peoples and, pursuant to Article 67(d) of the Interim Constitution, they can be dismissed at any time by their party if they fail to adhere to the party’s instructions.

9. Pursuant to the Interim Constitution and 2007 Elections Law, which are racially discriminatory in effect, indigenous peoples, who constitute at least 37 percent of the national population, are denied their right to participate through their own representatives in Nepal’s nation-building project, a project that will likely bring about considerable changes to the way the country is governed. All of the political parties that control this process are dominated by the same ethnic groups that have historically excluded indigenous peoples and deprived them of the recognition and enjoyment of their rights. The result is thus expected to be the perpetuation of the systematic discrimination that has characterised indigenous peoples’ situation in Nepal for over two centuries.

V. Nepal is violating indigenous peoples’ internationally guaranteed rights by excluding their freely chosen representatives from its Constituent Assembly

10. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) affirms that indigenous peoples, as self-determining peoples, have the right to participate in the “political, economic, social and cultural life of the State.”⁸ Article 18 explicitly states that this right to participate shall be effectuated through indigenous peoples’ own freely chosen representatives, including their own representative institutions. It provides that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures....”⁹ Article 19 of the UNDRIP is also relevant, providing that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Nepal’s requirement that indigenous peoples may only participate through political party structures contravenes and nullifies these rights.

11. The above-quoted provisions of the UNDRIP restate existing international law and are therefore binding on Nepal. For instance, Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Nepal, guarantees the right, without discrimination of any kind, to participate in elections and to take part in government and the conduct of public affairs at any level.¹⁰ The Committee on the Elimination of Racial

⁸ UN Declaration on the Rights of Indigenous Peoples 2007, Article 5.

⁹ See, also, International Labour Organisation Convention No. 169, *inter alia*, Arts. 3, 4, 5 and 6. Article 6(1)(a), for instance, provides that states shall “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”

¹⁰ In this respect, see, also, *Yatama v. Nicaragua*, Judgment of the Inter-American Court of Human Rights, 23 June 2005. Series C No. 127, para. 229, holding that Nicaragua had violated the right to political participation and the prohibition of racial discrimination because its Election Law forced Yatama, an indigenous institution, to adopt a structure that was alien to indigenous peoples’ customs and traditions and thus constituted a discriminatory

Discrimination has interpreted this provision to require respect for indigenous peoples' right to effective participation through their own representatives in state bodies and structures,¹¹ including constitutional reform processes,¹² and repeatedly affirmed that decisions directly relating to indigenous peoples' rights shall be taken only with "their informed consent."¹³ The Committee also holds that states should use the UNDRIP "as a guide to interpret [their] obligations under the Convention relating to indigenous peoples."¹⁴

12. Indigenous peoples' right to participate through their own representatives in constitutional reform processes is also in principle protected pursuant to Article 1 of the International Covenant on Civil and Political Rights, particularly when read in conjunction with Article 25(1)(a) of the same.¹⁵ Additionally, in its most recent review of Nepal, the Committee on Economic, Social and Cultural Rights explicitly recommended that Nepal uphold indigenous peoples' right to participate collectively in the Constituent Assembly.¹⁶

VI. Exclusion from the Constituent Assembly perpetuates the systematic discrimination suffered by indigenous peoples in Nepal

13. The territory that today comprises Nepal was either annexed or conquered by the ancestors of the present King between 1742 and 1816. In some cases, treaties were signed with indigenous peoples guaranteeing them the ownership of traditional lands and political autonomy.¹⁷ Later, the state imposed orthodox Hindu religion and the caste system on indigenous peoples via the 1854 Penal Code. Since that time, political life has been dominated by the Bahun and Chetri (Hindu), the monarch's ethnic group or caste, to the detriment of indigenous peoples. Indeed, these groups are dominant in every state structure: political, administrative, military, judicial, and the political parties.

impediment to participation in the elections. The Court ordered (at para. 225), *inter alia*, that Nicaragua must adopt all necessary measures to guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities ... and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization...."

¹¹ *Inter alia*, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 14 (recommending that "that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee's General Recommendation No. 23"); Australia, CERD/C/AUS/CO/14, 14 April 2005, at para. 11; Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 18 (referring to the Co-ordinating Council of Argentine Indigenous Peoples envisaged by Act No. 23,302 to represent indigenous peoples in the National Institute of Indigenous Affairs and referring to the right to informed consent).

¹² Mexico, 04/04/2005, CERD/C/MEX/CO/15, at para. 12 (noting that indigenous peoples did not participate in a constitutional revision process and recommending that Mexico implement "the principles set out in the constitutional reform in relation to indigenous matters in close cooperation with the indigenous peoples"); and, at para. 14, (recommending that Mexico amend its Constitution in light of Article 5(c) to ensure that the right of the indigenous peoples to elect their political representatives is not limited only to the municipal level").

¹³ *Inter alia*, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 16 (referring to ICERD Article 5(c) and stating that "bearing in mind paragraph 4(d) of its general recommendation 23, recommends that the State party redouble its efforts to ensure the full participation of indigenous peoples ... in public affairs and that it take effective measures to ensure that all indigenous peoples ... participate at all levels"); and Australia, 24/03/2000, CERD/C/304/Add.101, at para. 9 (highlighting indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples").

¹⁴ United States, 02/2008, CERD/C/USA/CO/6, at para. 29 (advanced unedited version).

¹⁵ For Human Rights Committee jurisprudence on reading Article 1 in conjunction with other articles of the ICCPR, see, *Apirana Mahuika et al. vs. New Zealand*, (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), para. 3 and 9.2; and *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997. UN Doc. CCPR/C/69/D/760/1997 (2000), para. 10.3.

¹⁶ Nepal, 05/2007, E/C.12/NPL/CO/2, at para. 30 (urging "the State party to ensure that, in the Constitutional process currently underway, all sectors of society, including disadvantaged and marginalized groups, in particular the Dalit, the Madhesi and indigenous communities, and especially women within these groups, are represented in decision-making bodies at all levels").

¹⁷ For instance, the *Limbu* rulers were brought within the territory of Nepal following signing of a treaty (now ignored) that guaranteed full autonomy to people of *Limbuwan*.

14. Indigenous peoples have thus been systematically excluded from participation in Nepal's political life for centuries and they have been denied any formal role in building and defining the state in which they now find themselves. They have suffered and continue to suffer from institutionalised discrimination and their rights have been disregarded for generations.¹⁸ For example, in 1964, land was nationalised in Nepal, including indigenous peoples' traditional territories. Since that time, 90 percent of the total land area that has been redistributed has been granted to non-indigenous persons and there are no legal provisions protecting indigenous peoples' territorial rights and their cultural, spiritual and other relationships therewith. Article 35(4) of Interim Constitution – itself drafted with minimal indigenous participation¹⁹ – further entrenches this dispossession by protecting the land tenure of “local communities,” the same local communities that now occupy large areas of indigenous lands. Denials of indigenous peoples' rights are also marked in relation to nature preserves in Nepal.²⁰

15. Nepal's denial of indigenous peoples' right to participate in the Constituent Assembly through their own freely chosen representatives will only perpetuate the discrimination that has heretofore characterised indigenous-state relations in Nepal. There is also little possibility that indigenous peoples' rights will be recognised in the new constitution.

VII. Request

16. In light of the preceding, the submitting organisations respectfully request that the Special Rapporteur:

- (a) sends an urgent appeal to the Government of Nepal concerning the denial of indigenous peoples' political participation rights in relation to the Constituent Assembly and recommending urgent remedial measures consistent with indigenous peoples' rights in international law;
- (b) seeks the consent of the Government of Nepal to conduct an on-site visit at his earliest convenience; and,
- (c) communicates with the High Commissioner for Human Rights to ensure that the UN mission in Nepal (UNMIN) and the representative of the High Commissioner in Nepal, use their good offices to promote respect for the rights of indigenous peoples as set forth in the UNDRIP and other international standards, especially in relation to the constitutional reform process.

¹⁸ *Inter alia*, see, Nepal, 21/09/05, CRC/C/15/Add.261, para. 35 (where the Committee on the Rights of the Child reiterates “its deep concerns about the widely prevailing de facto discrimination against ... children belonging to indigenous or ethnic minority groups...”).

¹⁹ See, OHCHR Report 2007, para. 14.

²⁰ See, Nepal, 12/03/2004, CERD/C/64/CO/5, para. 13 (stating concern “over allegations of forced relocation and violations of the indigenous peoples' right to own, develop, control and use their traditional homelands and resources in the name of wildlife preservation”).