

**Exclusion of Indigenous Peoples' Representatives
from the Making of Nepal's New Constitution**

**A Request for Consideration under the United
Nations Committee on the Elimination of Racial
Discrimination's Urgent Action and Early
Warning Procedures**

Seventy-Fourth Session
(16 February – 6 March 2009)

Submitted by

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09 February 2009

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EXCLUSION OF INDIGENOUS PEOPLES' REPRESENTATIVES FROM THE PROCESS OF MAKING NEPAL'S NEW CONSTITUTION

I. SUMMARY

1. This request is respectfully submitted to the United Nations Committee on the Elimination of Racial Discrimination ("the Committee") by ten Nepalese indigenous peoples' organisations and one international NGO ("the submitting organisations"). It concerns the exclusion of indigenous peoples' freely chosen representatives from the process of making Nepal's new constitution.

2. Nepal's new constitution is presently being drafted by a Constituent Assembly in which indigenous persons may only participate to the extent that they are chosen by political parties and in strict conformity with the manifestos of those parties. This denial of indigenous peoples' right to choose their own representatives and to participate in the crucial process of drafting the new constitution perpetuates centuries of "deep rooted" and "deeply-engrained" discrimination against indigenous peoples in Nepal.¹

3. United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous people, James Anaya, publicly stated in December 2008 that the treatment of indigenous peoples in the constitution revision process contravenes Nepal's international legal obligations.²

3. The situation described herein fully meets the criteria for consideration under the Committee's early warning and urgent action procedures. It typifies the existence of a serious, gross and persistent pattern of racial discrimination against the indigenous peoples of Nepal.³ Nepal's discriminatory exclusion of indigenous peoples' freely chosen representatives from the process of designing and adopting the new constitution nullifies indigenous peoples' human rights and threatens massive and irreparable harm. It thus represents a situation "requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention" and to reduce the risk of further racial discrimination.⁴ The submitting organisations therefore respectfully request that the Committee considers the situation described herein under its early warning and urgent action procedures at its seventy-fourth session (see paragraph 35 below for the full request).

II. INDIGENOUS PEOPLES IN NEPAL: CENTURIES OF DISCRIMINATION

5. Indigenous peoples (*Adivasi Janajati* in the Nepali language) are constitutionally⁵ and otherwise recognized as distinct peoples in Nepal.⁶ For

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 (hereinafter "OHCHR Report 2007").

² 'UN expert urges Nepal to act on commitments to indigenous rights', 2 December 2008. Available at: <http://www.un.org/apps/news/story.asp?NewsID=29152&Cr=Nepal&Cr1=>.

³ *See Guidelines for the Use of the Early Warning and Urgent Action Procedure*, August 2007, at p. 3, para. 12 (specifying that the adoption of new discriminatory laws is one of the indicators for the use of these procedures).

⁴ *Prevention of Racial Discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination.* UN Doc. A/48/18, Annex III, at para. 8-9.

⁵ Articles 21 and 33.d of 2007 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.

⁶ Nepal is party to International Labour Organisation Convention No. 169, which entered into force in September 2008. Nepal has also ratified the ICCPR, ICESCR and supported the adoption of the UN

instance, Section 2 of the *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 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.⁷ 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.

6. The territory that today comprises Nepal was either annexed or conquered by the ancestors of the recently deposed King between 1742 and 1816. In some cases, treaties were signed with indigenous peoples guaranteeing them ownership of their traditional territories and their right to political autonomy.⁸ Later, the state unilaterally imposed orthodox Hindu religion and the caste system on indigenous peoples via the *National Code* of 1854, the first law to be applied to the whole of present day Nepal and generally seen as marking the establishment of the modern Nepali state. The state subsequently accorded extreme preference to the monarch’s ethnic group or caste, known as the Bahun and Chetri, in all official positions and institutions and systematically excluded indigenous peoples. Since that time, political life has been dominated by the Bahun and Chetri and they remain dominant in every institution of state today, including the political parties.⁹

7. The United Nations Office of the High Commissioner for Human Rights (“OHCHR”) confirms that indigenous peoples have been systematically excluded from participation in Nepal’s political life for over 200 years and that they have been denied any formal role in building and defining the state in which they now find themselves.¹⁰ They have suffered and continue to suffer from institutionalised discrimination and their rights have been disregarded for centuries.¹¹

8. At the conclusion of his November 2008 on-site visit to Nepal, Special Rapporteur Anaya observed that “A long history of oppression and marginalization has excluded indigenous peoples from political representation and decision-making, full citizenship, and economic and educational opportunities; and their distinct cultures and languages have been continuously threatened.”¹² He urged the

Declaration on the Rights of Indigenous Peoples. Pursuant to the 1991 *Nepal Treaty Act*, international law, in principle, prevails over national law.

⁷ See also Nepal, 16/01/08, E/C.12/NPL/CO/2, 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”).

⁸ For instance, the *Limbu* rulers were brought within the territory of Nepal following the conclusion of a treaty (now ignored) that guarantees full autonomy to people of *Limbuwan*.

⁹ The 1998 Nepal Development Report explains that “There is an astonishing continuity in the predominance of the high castes and specific ethnic groups in since the formation of the Nepali state over two centuries ago, which appear to have occupied 98% of the top civil service posts in 1854 ... [whereas] at present, of the 454 top-level civil positions, 417 (92 percent) are occupied by the same groups” *Nepal Human Development Report*, Kathmandu 1998, at p. 145-46

¹⁰ OHCHR Report 2007, *supra*, para. 68 (stating 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”).

¹¹ See *inter alia* Nepal, 21/09/05, CRC/C/15/Add.261, at 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...”).

¹² ‘UN expert urges Nepal to act on commitments to indigenous rights’, *supra*.

Government to ensure that indigenous peoples “receive fair representation and resources.”¹³

9. A prime example of discrimination against indigenous peoples concerns land ownership and use. In 1964, land, including indigenous peoples’ traditional territories, was nationalised. Since that time, 90 percent of the total redistributed land 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. Special Rapporteur Anaya confirms this and explains that in Nepal, “Indigenous communities have been forcibly displaced from their ancestral lands and denied property rights, and they often lack access to justice.”¹⁴ Article 35(4) of the 2007 Interim Constitution – itself drafted with minimal indigenous participation¹⁵ – further entrenches this dispossession by protecting the land tenure of “local communities,” the same local communities that now occupy large areas of indigenous lands. The Committee has also previously found serious denials of indigenous peoples’ rights in relation to nature preserves in Nepal.¹⁶

10. As discussed below, Nepal’s ongoing denial of indigenous peoples’ right to participate in the process of drafting a new constitution through their own freely chosen representatives will only perpetuate the systematic discrimination that has heretofore characterised indigenous-state relations in Nepal. There is little possibility that indigenous peoples’ rights will be recognised in the new constitution without immediate action. Indeed, Special Rapporteur Anaya emphasised in December 2008 that, “This is a critical moment to respond to the many challenges that indigenous peoples of Nepal face.”¹⁷ Exclusion of between 37 to 50 percent of the national population demands international attention and oversight, all the more so because indigenous peoples, as self-determining collectivities, have specific internationally guaranteed rights to meaningfully participate through their own representatives in such processes.

III. DE JURE AND DE FACTO EXCLUSION OF INDIGENOUS PEOPLES’ REPRESENTATIVES FROM THE CONSTITUTION-MAKING PROCESS

A. BACKGROUND TO CURRENT URGENT SITUATION:

11. Nepal is on the verge of drafting and adopting a new constitution following the Comprehensive Peace Agreements of 2006, which formally concluded 11 years of internal armed conflict. An Interim Constitution that sets out the principles for establishing a Constituent Assembly to draft a new constitution was promulgated in 2007 on the basis of a political agreement by the ‘Seven Party Alliance’ (comprised of the seven main political parties).

12. The OHCHR observes that these political parties do not include indigenous persons among their upper echelons.¹⁸ Indeed, these parties are exclusively controlled by the Bahun and Chetri elite that has dominated Nepal for the past two centuries. Not one of these parties has explicitly endorsed indigenous peoples’ rights in their manifestos pertaining to the Constituent Assembly and some of them openly oppose key tenets of that rights regime.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OHCHR Report 2007, *supra* para. 14.

¹⁶ Nepal, 12/03/2004, CERD/C/64/CO/5, at para. 13 (expressing 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”).

¹⁷ ‘UN expert urges Nepal to act on commitments to indigenous rights’, *supra*.

¹⁸ OHCHR Report 2007, *supra* para. 63.

13. The OHCHR further explains 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.”¹⁹ As discussed herein, Nepal has not risen to this challenge. In contravention of its international obligations, indigenous peoples’ freely chosen representations are *de jure* and *de facto* excluded from the Constituent Assembly, and, therefore, also from participation in the drafting of Nepal’s new constitution.

14. There are no available judicial or other remedies to challenge this denial of indigenous peoples’ rights because Article 118(4) of the 2007 Interim Constitution prohibits legal actions that may jeopardize the election process for the Constituent Assembly.²⁰ These elections were held on 11 April 2008 thereby completing the process of denying indigenous peoples’ representatives a role in the Constituent Assembly.

B. INDIGENOUS PEOPLES’ REPRESENTATIVES ARE EXCLUDED:

15. Article 63 of the Interim Constitution provides for the election or nomination of 601 members of a Constituent Assembly through a mixed electoral system as follows: 240 members are chosen in ‘first-past-the-post’ elections; 335 are chosen in a proportional representation electoral system (the groups to which this applies are: women, Dalits, oppressed communities and indigenous peoples, backward regions, *Madhesis* or lowlanders, and other groups as defined by the law); and 26 distinguished persons from ethnic groups that are otherwise unrepresented are nominated by the Government’s Ministry of Council. In reality, however, the political parties selected the 26 distinguished persons.

16. 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 jointly will be allocated 37 percent of the 335 delegates chosen in the proportional representation category.

17. Following the April 2008 election for the Constituent Assembly, a total of 215 indigenous persons were chosen to be members of the Assembly. These persons are not however directly chosen by indigenous peoples. They are chosen by the participating political parties from ‘candidate lists’ drawn up by these parties. 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. The political party ‘whip’ is thus a fundamental component of this process and constrains the ability of any indigenous person in the Constituent Assembly to raise issues without explicit and prior sanction by the political party leadership.

18. The discriminatory effect of sole reliance on the political party system is compounded by the refusal of the Nepal Electoral Commission to register political parties that claim to represent indigenous peoples. This is justified on the basis of the 2007 Interim Constitution, Article 12.3, which largely repeats a provision

¹⁹ *Id.* at para. 67.

²⁰ 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.

contained in the previous 1991 Constitution of the Kingdom of Nepal. This provision stipulates that the State may prohibit a political party or institution that may jeopardize social harmony on the basis of race, ethnicity, religion or sect. The 2007 *Political Party Registration (Election Provision) Regulation* gives effect to this constitutional norm.²¹

19. The above cited provisions were invoked by the Election Commission in relation to the Mongol National Organization and Janajati Party as the basis for denying their registration as political parties. Both of these parties sought to advocate for the rights of indigenous peoples. The Election Commission's decision was later endorsed by the Nepal Supreme Court in *Khagendra Jung Gurung v Election Commissioner*.²² It held that the term '*janajati*' (meaning 'indigenous') may not be used in connection with a political party according to the terms of the Constitution and, therefore, that parties using this term shall not be registered to take part in elections. This decision continues to impair indigenous peoples' right to form their own political parties.

20. Pursuant to the Interim Constitution and 2007 *Elections Law*, which are racially discriminatory in effect, indigenous peoples, who constitute between 37 and 50 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 most 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 manifestos of these parties do not contain references to indigenous peoples' rights and some are hostile to these rights. The result is thus expected to be the perpetuation of the systematic discrimination that has characterised the situation of indigenous peoples in Nepal for over two centuries.

21. Special Rapporteur Anaya confirms that Nepal's treatment of indigenous peoples in the processes established to reform the constitution contravenes Nepal's international legal obligations. The UN press release issued at the conclusion of his November 2008 *in situ* visit to Nepal unambiguously states that

Although a significant number of Constituent Assembly members belong to indigenous groups, the Special Rapporteur argued for additional mechanisms in the constitution-making process that consult directly with indigenous peoples, through their own chosen representatives and in accordance with their own methods of decision-making, as required by the international standards to which Nepal has committed.²³

22. The Special Rapporteur further observes that "Indigenous peoples' legitimate demands for self-determination and autonomy need to be adequately incorporated into ongoing discussions about the federal structure that is expected to be embodied in the new constitution."²⁴ The likelihood that this will occur is negligible given that indigenous peoples' representatives are effectively excluded from the Constituent Assembly.

²¹ § 12 states that a political party shall not be registered for elections where it maintains a: ... (b) Restriction in discriminatory way to obtain a membership of the respective party on the basis of religion, race, ethnicity, language or sex.

²² *Khagendra Jung Gurung Vs. Election Commissioner* 2048, Nepal Kanoon Patrika Vols. 2, 3 and 4, Dec. No. 4270, p. 114.

²³ 'UN expert urges Nepal to act on commitments to indigenous rights', *supra*.

²⁴ *Id.*

C. THE RULES GOVERNING THE CONSTITUENT ASSEMBLY ARE DISCRIMINATORY:

23. Article 79 of the Interim Constitution states there shall be committees and sub-committees of the Constituent Assembly. This is given effect in the 2008 *Constituent Assembly Regulation*, the law that sets forth the rules of procedure and operation of the Constituent Assembly. It established three kinds of committees: thematic committees, procedural committees, and the constitutional committee, which will confidentially²⁵ draft the constitution on the basis of submissions from the thematic committees. Ten thematic committees were subsequently created and mandated to prepare preliminary drafts and concept papers on their respective themes.²⁶

24. Despite constituting between one-third and one-half of the national population and suffering centuries of exclusion, not one of these thematic committees is focused on indigenous peoples and their rights. Indigenous peoples are lumped together with numerous other categories of people under the Committee on Protection of Minority and Marginalized Groups, thus disregarding their identity, their rights and their voice.²⁷ The terms of reference for this committee also do not explicitly refer to indigenous peoples or their rights. Indigenous peoples in Nepal self-identify as ‘indigenous peoples’, and are recognized as such by the Constitution and the 2002 NFDIN Act, and they are strongly opposed to being called a ‘minority community’. The State ignored their vigorous objections on this point and their calls for the creation of a committee focused on indigenous peoples.

25. While none of the ten thematic committees has a mandate to make recommendations about the rights of indigenous peoples, the Committee on Fundamental Rights and Directive Principles is mandated to identify ‘special measures’ – as opposed to substantive rights – that may be required in the case of “women, children, youth, labour, peasant, madhesi, adivasi/janajati [indigenous peoples], dalits, backward regions, differently able people, Muslims and minorities communities.”²⁸ However, the Constitution Committee, which deliberates in closed session and without a public record, is not bound to follow the recommendations of the Committee on Fundamental Rights and Directive Principles with regard to any special measures it may recommend. Moreover, given that indigenous peoples’ representatives are excluded for participating in this process and those indigenous persons who are involved are constrained by the positions of their various political parties, it is highly questionable whether any special measures identified will be appropriate to their situation.

26. It should be noted that while Nepal has effectively excluded indigenous peoples’ freely chosen representatives from the Constituent Assembly, in 2007, the Government made an agreement with various indigenous peoples and organizations, including Nepal Federation of Indigenous Nationalities, to establish a State

²⁵ *Constituent Assembly Regulation*, § 65.9.

²⁶ *Id.* § 66. The committees include the Committee on Fundamental rights and Directive Principles, Committee on Protection of Minorities and Marginalized Communities, Committee on Restructuring the State and the Distribution of State Power, Committee to decide on the Administrative Form of the State, Committee to decide on the Form of legislative Body, Committee to Decide on the Structure of Constitutional Bodies, Committee on the Division of Natural Resources, Financial Rights and Public Revenue, Committee to decide to the Basis for Cultural and Social Commitments and Committee for the Preservation of the National Interest.

²⁷ *Id.* stipulating that the Committee on Protection of Minorities and Marginalized Communities shall work to identify excluded castes, class, ethnicities and communities and identify measures of inclusion in state affairs.

²⁸ *Id.* stipulating that the Committee on Fundamental Rights and Directive Principles shall work to identify the provision for the special protection of women, children, youth, labour, peasant, madhesi, adivasi/janajati, dalit, backward regions, differently able people, Muslims and minorities communities.

Restructure Commission and a Commission for Indigenous Peoples. This agreement was expressed in Articles 154 and 138.2 of the Interim Constitution. However, these commissions have yet to be established and neither are or will be formally part of the constitutional revision process. The State Restructure Commission is highly important because it is responsible for considering the establishment of a federal state based on ethnicity, a long-standing demand of indigenous peoples.

IV. NEPAL IS VIOLATING INDIGENOUS PEOPLES' INTERNATIONALLY GUARANTEED RIGHTS BY EXCLUDING THEIR FREELY CHOSEN REPRESENTATIVES FROM ITS CONSTITUENT ASSEMBLY

27. Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") 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. The Committee has previously interpreted this provision to require respect for indigenous peoples' right to effective participation through their own representatives²⁹ in state bodies and structures,³⁰ including in constitutional reform processes,³¹ and has repeatedly affirmed that decisions directly relating to indigenous peoples' rights shall be taken only with "their informed consent."³² The Committee also holds that states should use the 2007 United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") "as a guide to interpret [their] obligations under the Convention relating to indigenous peoples."³³

28. The UNDRIP restates and contextualises to indigenous peoples the norms of binding law set forth in ICERD, including Article 5(c). The UNDRIP reaffirms that "indigenous peoples", as self-determining peoples, have the right to participate in the "political, economic, social and cultural life of the State."³⁴ Articles 18 and 19 explicitly affirm that this right to participate shall be effectuated through indigenous peoples' own freely chosen representatives, including their own representative institutions. These articles provide, respectively, that

²⁹ *Inter alia*, United States, 08 May 2008, CERD/C/USA/CO/6, at para. 29 (recommending that the State party take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures...").

³⁰ *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).

³¹ 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").

³² *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").

³³ United States, 08 May 2008, CERD/C/USA/CO/6, at para. 29.

³⁴ UN Declaration on the Rights of Indigenous Peoples 2007, Article 5.

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 as well as to maintain and develop their own indigenous decision-making institutions.

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.

29. Nepal's requirement that indigenous peoples may only participate through political party structures nullifies and contravenes these rights in violation of Article 1(1), 2(1) and 5(c) of ICERD. It also contravenes International Labour Organisation Convention No. 169, a binding convention ratified by Nepal in September 2007.³⁵ Article 6(1)(a) of that instrument, 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."

30. 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) (political participation) and Article 26 (non-discrimination) of the same.³⁶ The Inter-American Court of Human Rights applied this logic in its judgment in the 2005 *Yatama v. Nicaragua* case.³⁷

31. In *Yatama*, the Inter-American Court ruled on the relationship between indigenous peoples' political participation rights and the right to be free from racial discrimination (Articles 23 and 24, respectively, of the American Convention on Human Rights). Reading these rights conjunctively, the Inter-American Court held that Nicaragua had violated the right to political participation and the prohibition of racial discrimination. This was the case because Nicaragua's *Election Law* forced Yatama, an indigenous institution, to adopt a structure that was alien to indigenous peoples' customs and traditions and, thus, it constituted a discriminatory impediment to equal participation in the elections.³⁸ The Court determined that the universal rights of equality and political participation give rise to an obligation on the state

to adopt affirmative and differentiated measures to guarantee the participation of indigenous groups under conditions of equality and to take into consideration their customary forms of organization.³⁹

³⁵ See International Labour Organisation Convention No. 169, *inter alia*, Arts. 3, 4, 5 and 6.

³⁶ 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.

³⁷ See generally M. S. Campbell, *The Right of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 ARIZ. J. INT'L & COMP 499 (2007). Available at: http://www.law.arizona.edu/Journals/AJICL/AJICL2007/Campbell_Note.pdf.

³⁸ *Yatama v. Nicaragua*, Judgment of the Inter-American Court of Human Rights, 23 June 2005. Series C No. 127, para. 229.

³⁹ *Id.*

32. The Court therefore unanimously ordered, *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....⁴⁰

33. Pursuant to Nepal's 1991 *Nepal Treaty Act*, the international treaties ratified by Nepal are incorporated into national law and international law shall prevail over national law in cases of inconsistency.⁴¹ The Nepal Supreme Court holds that this also applies in the case of international human rights treaties, such as ICERD.⁴² The rights set forth in these treaties, many of which are restated and contextualised to indigenous peoples in the UNDRIP, must be equally secured and protected pursuant to Article 5 of the ICERD.⁴³

34. Nepal's discriminatory exclusion of indigenous peoples' freely chosen representatives from the process of revising its constitution, in particular through participation in the Constituent Assembly, contravenes a range of international guarantees. Exclusion of millions of people from the crucial process of revising Nepal's constitution solely on the basis of their race and ethnicity also constitutes an urgent situation and an example of massive racial discrimination. This present discriminatory treatment must also be viewed in light of the fact that indigenous peoples have been oppressed and marginalised in Nepal for over 200 years by the same groups that are currently controlling the revision process and excluding indigenous peoples from meaningful participation therein.

V. CONCLUSION AND REQUEST

35. In the light of the preceding, the submitting organizations respectfully request that the Committee considers the situation of the indigenous peoples in Nepal under its early warning and urgent action procedures so as to avoid irreparable harm to indigenous peoples and so as to assist Nepal to ensure that the rights guaranteed by ICERD are fully recognized and respected in law and practice. In particular, the submitting organizations request that the Committee adopts a decision under the urgent action and early warning procedure recommending, *inter alia*, that Nepal:

- a) recognises indigenous peoples' direct representation in the Constituent Assembly through representatives freely chosen according to their own process and representative institutions;
- b) amends the Interim Constitution, and the 2007 *Constituent Assembly Election Act* and its Regulation to ensuring consistency with (a) above;
- c) recognises indigenous peoples in the constitution making process by forming an Indigenous Peoples Thematic Committee and ensuring indigenous representation thereon from among their freely chosen representatives identified according to their own processes; and,
- d) establishes mechanisms to otherwise consult with and obtain indigenous peoples free prior and informed consent in relation to the constitutional revision process in accordance with ICERD, UNDRIP and ILO 169.

⁴⁰ *Id.* at para. 225.

⁴¹ Article 33.m of the Interim Constitution and Treaty Act 1991.

⁴² *Rabindra Prasad Dhakal v Government of Nepal*, Nepal Kanoon Patrika 2064.

⁴³ *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms*: 15/03/96, para. 1.