



**NEPAL'S DRAFT CONSTITUTION:
PROCEDURAL AND SUBSTANTIVE CONCERNS**

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EXECUTIVE SUMMARY

The long-delayed constitution-making process in Nepal has experienced a significant jumpstart in recent weeks. A 16-Point Agreement, finalized by Nepal's four major political parties on 8 June 2015 in the wake of the devastating earthquakes of 25 April and 12 March 2015, sparked a sudden and unexpected dash towards the finalization of a new Constitution for Nepal.

This process began over 7 years ago, but suffered considerable delays due to a failure among political leaders to reach consensus on a number of major issues. In recent weeks, however, Nepal's Constituent Assembly (CA) has developed the text of a Draft Constitution and has initiated a "fast-track" process towards its adoption. On 7 July 2015, following a "theoretical discussion" in the plenary, the CA endorsed the Draft Constitution and initiated a 15-day public consultation period commencing on 9 July 2015.

While this renewed momentum towards the finalization of the long-pending Constitution is welcome, there are a number of concerns about both the constitution-making process and the substantive content of the Draft Constitution.

The ICJ's Briefing Paper was drafted with a view to support efforts to ensure a truly inclusive and consultative process that results in a Constitution that addresses the root causes of the past conflict, and enhances respect and protection of all human rights in a manner that is consistent with Nepal's obligations under international law. It begins by describing Nepal's constitutional history, and the importance of the current constitutional process in the political history of Nepal. Following this contextual information, the Briefing contains an analysis of the constitution-making process and provisions of the Draft Constitution in the light of international standards, and concludes with recommendations.

After six Constitutions, adopted without a participatory process, and a decade-long civil war, the Comprehensive Peace Accord of 2006 and Interim Constitution of 2007 promised a Constitution that would be developed in a participatory manner, ensure the rule of law, and respect and protect the full range of human rights in accordance with Nepal's international obligations. However, the manner in which the constitution-making process is being conducted thus far, as well as the substantive content of the Draft Constitution that has emerged, threaten the fulfillment of these commitments.

A primary concern articulated in this Briefing Paper is the limited opportunity for public participation and consultation in the constitution-making process. The current "fast track" process established by the CA has afforded the Nepali public merely 15 days to review, understand and comment on the Draft Constitution endorsed by the

CA on 7 July 2015. Furthermore, the CA has required its Committee on Public Relation and Opinion Collection (CPROC), which is responsible for the consultation process) to compile the public feedback and present a report with recommendations within this 15-day period.

Given the short timeframe for consultation, the fact that it is taking place during monsoon season and the inadequate planning for it, there is concern about the likely quality and inclusiveness of the consultation. These factors, combined with the fact that the 15-day period includes the time for reporting on the outcome of the consultation, also call into question the genuineness of the consultative process and its likely impact on the substantive provisions of the Constitution.

In order to ensure respect for the right to participate in public affairs, which includes participation in the constitution-making process, and the promised participatory nature of the constitution-making process, which are key to ensuring the legitimacy of the final document itself the ICJ recommends that the CA :

- Urgently and immediately extend the on-going consultation period, and provide enough time for people to meaningfully engage and participate in the process;
- Adopt and make public a schedule which specifies a clear-cut process and timetable for the remaining Constitution-making steps, which provides ample time for drafting a report that reflect the results of the consultation and for these results to be genuinely studied and considered.

The Briefing Paper also highlights concerns and makes recommendations about a number of provisions of the Draft Constitution that was endorsed by the CA on 7 July 2015, in light of international human rights standards, including Nepal's obligations under international human rights law. In particular, the Briefing Paper focuses on provisions in the Draft Constitution on Citizenship, Fundamental Rights, the Judiciary and Emergency Powers.

The ICJ's analysis of these provisions reveals that while the Draft Constitution enhances protections of some of the guarantees set out in the Interim Constitution in some respects, in many other respects – such as with respect to citizenship and protection against gender discrimination – it has regressed, with draft Articles proving less protection than the Interim Constitution. Among the additional rights not adequately protected under provisions of the Draft Constitution as currently drafted are the right to equality, the right against torture, the right to health and the rights to labour and employment. Furthermore, the permissible limitations and restrictions including on the rights to freedom, to freedom of expression, association and assembly, to public communication and information, do not comply with Nepal's obligations to respect and protect these rights under international standards. The provisions regarding remedy and justiciability of rights also fall short

of international standards, and there are also several concerns about the protection of judicial independence.

The ICJ's concerns and recommendations, which are set out in the final chapter of the Briefing, include the following:

- **Citizenship by Descent:** Article 12 is a step back from the equivalent provision in the Interim Constitution. It requires both that both the mother *and* father be Nepali for a child to qualify for citizenship by descent. This is discriminatory, and risks statelessness for the children of single women, abandoned women, widowed women, and other vulnerable groups. International norms require states to take steps and introduce safeguards to prevent statelessness. The ICJ recommends that the text be modified in conformity with international norms, to prevent discrimination and statelessness.
- **Citizenship by Naturalization:** Article 13 places a 15-year residency requirement for foreign men married to Nepali women, but there is no such requirement for foreign women married to Nepali men. As written, the draft provision therefore violates the right to equality, and requires revision. The ICJ recommends that the revision of this article ensure, among other things, that the provision is not discriminatory, including by removing, the 15-year domicile requirement for any male foreign national married to a Nepali citizen.
- **Rights of Non-Citizens:** Several provisions in the fundamental rights chapter of the Draft Constitution limit the guarantee of the right to citizens of Nepal, including Articles 23 (right to equality), 30 (right to property), 32 (right to information), 36 (right to education), 38 (right to employment), 40 (right to health), 41 (right to food), 42 (right to housing), and 48 (right to social security). Other provisions state that non-citizens are not entitled to certain protections, for example articles 25 (right to justice), and 28 (preventive detention). With very few exceptions, notably some aspects of the ICCPR Article 25 regarding voting and political participation, virtually all rights must be guaranteed to citizens and non-citizens alike. Therefore, the ICJ recommends that these articles be amended to apply to "persons" instead of "citizens".

Articles 25 and 28 contain references to "citizens of enemy states". The phrase is vague, broad and undefined, and can potentially limit individuals from accessing essential constitutional safeguards and protections, and violate their human rights. Therefore, the ICJ advises that the exclusions be removed from these two provisions

- **Right to Equality:** Article 23 lists certain prohibited grounds of discrimination. While the provision appropriately captures a number of Nepal's human rights obligations in these areas, some grounds need to be revised and others added. In particular, the ICJ recommends that "political or other opinion"; "national or social origin"; "property"; "birth"; or "other status", including "age" are added to the list of prohibited grounds of discrimination set out in paragraphs 2 and 3;
- **Right Relating to Justice:** Article 25 (4) prevents the retrospective application of criminal law. The wording of this provision is in need of revision to make clear, in accordance with Article 15 of the ICCPR, that it does not relate to acts that were crimes under international law, including general principles of law recognised by the community of nations, at the time they were committed. This will ensure that Nepal can fulfill its duty to prosecute serious crimes under international law, including those committed during the conflict, that were not crimes under national law at the time they were committed. The ICJ has also recommended expansion of the provisions so as to enumerate the right to liberty, the rights of detainees as set out in Articles 9 and 10 of the ICCPR and more of the minimum fair trial guarantees set out in Article 14 of the ICCPR.
- **Right Against Torture and Other Ill-Treatment:** Article 27, in its current form, only extends the prohibition of the torture and other ill-treatment of persons in detention and does not expressly prohibit cruel, inhuman or degrading *punishment*. Furthermore the wording of this Article does not guarantee victims the full range of reparations and remedy. Article 27 of the Draft Constitution must therefore be revised to ensure consistency with Nepal's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ICCPR, and the Convention on the Rights of the Child.
- **Preventive Detention:** Article 28 allows for preventive detention when there is an "immediate threat to the sovereignty and integrity of Nepal" or "the law and order situation". Due to the risk of its arbitrary application and that it facilitates other human rights violations, the ICJ opposes the use of preventative security detention in peace-time and international law severely restricts its use to exceptional circumstances. In such circumstances the Human Rights Committee has clarified that it must be necessary and proportionate, and for the shortest permissible period of time. Its use in each case should be subject to judicial review, including by *habeas corpus* and accompanied by other safeguards against abuse. The detainee must have

access to independent legal advice from a lawyer, of his or her choosing and be provided with the basis of the evidence against them. Therefore, it is advisable that Article 27 be deleted, or at the very least, amended so that it limits the possible resort to its use to times of declared public emergency that threaten the life of the nation, and in such times with r for the shortest time necessary, subject to review before an independent and impartial court and other safeguards against abuse, including access to a lawyer. The article, if maintained, should also provide for reparations for unlawful detentions.

- **Compulsory Service:** Articles 34 and 52(c) both allow for “compulsory service for public purposes”. It is advised that this reference be either removed, or revised to expressly incorporate the language of Article 6 of the ICESCR and Article 8(3) of the ICCPR, as well as the right to conscientious objection to military service, which the UN Human Rights Committee has clarified is part of Article 18 of the ICCPR. In addition, more procedural and substantive clarity about the nature of compulsory service and public purpose should be provided, ensuring that the provisions of the Article as a whole are consistent with Nepal’s existing obligations under international human rights law.
- **Economic, Social and Cultural Rights:** The ICJ recommends that articles 38 (employment and labour), 40 (health), 42 (housing), and 48 (social security) all be revised to ensure that they more fully reflect Nepal’s obligations under international human rights law, particularly under the International Covenant on Economic Social and Cultural Rights (ICESCR).
- **Gender Equality:** The ICJ urges the Constituent Assembly to carefully review the provisions addressing gender equality in the Draft Constitution, including in particularly article 43, to ensure that the provisions respect, protect and fulfill the full range of women’s rights in a manner that is consistent with international law – including explicit guarantees for equal pay for work of equal value, and replacing “rights relating to reproduction” with “reproductive rights” - and also prohibiting multiple, intersecting grounds of discrimination;
- **Child Rights:** The ICJ urges the Constituent Assembly to re-examine Article 44 of the Draft Constitution and to revise it to ensure that it is framed in a manner that reflects the internationally recognised guiding principles for the protection of the rights of the child, including among others, the principle

that the best of the child shall be the primary consideration in all actions concerning children.

- **Limitation of the Right to Freedom and Public Communication:** The permissible grounds for limiting the freedom of opinion and expression enumerated in the Draft Constitution go well beyond the scope of those permissible pursuant to the international obligations that Nepal has accepted. Furthermore, there is also no mention that restrictions of these rights must be limited to those that are both necessary and of proportionate to fulfilling the grounds permitted by international law. The ICJ advises that the provisos to Article 22 and 24 of the draft Constitution must therefore be revised in conformity with Article 19 of the ICCPR.
- **Limitations to the Right to Information:** The current draft of Article 32, states that the right to information does not extend to “any matter about which confidentiality is to be maintained according to law”. The ICJ urges that the proviso to Article 32 be deleted, and that the Constituent Assembly ensure that any description of permissible limitations to the right to information makes clear that the permissible limitations to this right must be prescribed by law and be, both, necessary and proportionate to ensure respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), or of public health or morals.
- **Derogations During Emergencies:** Presently, the Draft Constitution allows for the derogation of a range of rights during a broad range of situations. The ICJ urges the government to review and amend Article 268 (9) of the Draft Constitution to narrow the circumstances for the invocation of an emergency to those provided for in Article 4 of the ICCPR and to clarify that that any restriction of a right owing to an emergency must be temporary, non-discriminatory, compliant with Nepal’s obligations under international law and both necessary and proportionate to address the exigencies of the particular situation. Also to conform to international human rights law, the list of non-derogable rights must be augmented; and the provision must allow for judicial review of whether the derogation from a particular right and any associated derogating measures are lawful, necessary, proportionate and non-discriminatory.
- **Right to Remedy for Violations of Fundamental Rights:** Article 51 guarantees the right to constitutional remedy, but is insufficient to ensure respect for Nepal’s obligations, including under Article 2 of the ICCPR and

ICESCR, the right to a remedy for human rights violations. The ICJ recommends that the CA add a provision, in accordance with its international obligations, that ensures that any person whose rights or freedoms are violated shall have access to an effective remedy and a right to adequate reparations (compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition).

Furthermore, the phrases “provided by the law,” “prescribed by the law” and “in accordance with the law” are used in a number of the proposed articles set out in the Draft Constitution. The ICJ urges the CA to clarify that remedies are available for violations all fundamental rights in the Draft Constitution, even absent legislation. Where legislation is required, the government must pass a law in accordance with the constitution and international obligations within a reasonable time frame. Not doing so would amount to a violation of the substantive right in itself, as well as the internationally guaranteed right to a remedy.

- **Pardons and Clemency:** The Draft Constitution entrusts the President with sweeping authority to grant pardons and clemency. The ICJ is concerned that the provision as drafted could be used as a basis to pardon individuals responsible for grave violations of human rights, thus entrenching impunity for such crimes and infringing victims’ rights to access and to remedy. The ICJ therefore urges the CA to reconsider the wording of this provision, and to ensure that full pardons and clemency cannot be granted for crimes under international law including war crimes, crimes against humanity, genocide, torture, and enforced disappearance.
- **Independence of the Judiciary:** An independent and impartial judiciary is one of the prerequisites for the effective protection of human rights. The ICJ recommends that the Draft Constitution contain an explicit and binding provision guaranteeing judicial independence in line with international standards and best practices.
- **Impeachment of Judges:** Many grounds for the impeachment of judges in Articles 135 and 146 of the Draft Constitution are vague and therefore easily prone to political manipulation: for example, there is no definition of explanation of what would constitute “misbehavior”, and “good faith”. Amendments are needed to these provisions to ensure conformity with international standards on judicial independence, which clarify that judges may only be subject to removal “for reasons of incapacity or behavior that renders them unfit to discharge their duties”. Furthermore the provisions

should specify and ensure that that the judge will be afforded a full and fair opportunity to defend himself or herself against allegations of misconduct in a full and fair procedure.

- **Constitutional Court:** The ICJ recommends reconsideration of Article 141 of the Draft Constitution that proposes the creation of a new Constitutional Court, for a period of 10 years, with limited jurisdiction, including resolving disputes regarding jurisdiction between the Provinces, and between different levels of government (central, provincial, local). It would be advisable to reconsider the structure, jurisdiction and temporal nature of the Constitutional Court in light of the right to remedy and international best practices. The proposed composition also raises concerns regarding its independence from the Supreme Court.
- **Judicial Council:** The manner in which Article 156 is currently drafted means that, unless it is modified before adoption the Judicial Council it will not be independent from the Executive, and leaves open the possibility that only a minority of its five members will be judges. This is because under draft Article 156 the Federal Minister of Justice is a member, and the President and Prime Minister have authority to nominate and appoint two of the five members, and the only two members required to be a judge: the Chief Justice of the Supreme Court and the most senior member of the Supreme Court. This would undermine the independence of the judiciary, as a whole. Therefore, the ICJ advises that Article 156 and the composition of the Judicial Council be revised to conform to international best practices, including that it be composed of members of the judiciary.

The ICJ is hopeful that the implementation of these recommendations will assist the CA in making the most of this historic and unique opportunity to meaningfully engage and involve people in the process of genuine consultation, and to adopt a strong and progressive Constitution, which enhances human rights protection in a manner that is consistent with international human rights standards.

I. Introduction¹

Following the end of the decade-long civil war in Nepal, political parties pledged to “adopt a political system that complies with universally accepted fundamental human rights ... rule of law, social justice, equality, independent judiciary ... transparency and accountability in the activities of political parties, [and] people's participation.”²

The drafting of Nepal's new Constitution is an essential first step to ensuring that this commitment becomes a reality. It presents a unique opportunity to engage in a truly inclusive and consultative process that results in a Constitution that enhances respect and protection of civil, political, economic, social and cultural rights, without discrimination as well as accountability for human rights violations, in a manner that is consistent with Nepal's obligations under international law. It should ensure provisions for addressing the root causes of the civil war and impunity for conflict-related and other human rights abuses.

In recent weeks, Nepal's constitution-making process - which began seven years ago and has suffered delays due to a failure to reach consensus on a number of major issues - has moved very quickly towards the adoption of a constitution. The needs of the country following the devastating earthquake of 25 April 2015 provided additional impetus for the country's major political parties to demand a resolution to the impasses in the negotiations and to push for the finalization and adoption of a new Constitution.

The new Constitution is expected to replace the Interim Constitution, which was promulgated based on a broad consensus among political leaders following the adoption of the 2007 Comprehensive Peace Agreement (CPA).

As a result of this newfound urgency about concluding a new Constitution, the Drafting Committee of the Constituent Assembly (CA) submitted a Draft Constitution to the plenary of the CA for consideration on 30 June 2015. The CA endorsed this Draft Constitution on 7 July 2015, and paved the way for a 15-day public consultation period on the substantive provisions of the Draft Constitution, which began on 9 July 2015.

While the renewed momentum to finalize a new constitution is welcome, a number of human rights concerns about the constitution-making process as well as the substance of the provisions of the Draft Constitution have emerged, particularly in the sections on citizenship, fundamental rights, the judiciary and emergency powers.

¹ This paper is based on an **un-official** translation of the latest version of the Draft Constitution endorsed by the CA on 9 July 2015.

² Para 3.4, Comprehensive Peace Accord (hereinafter, CPA).

Over the years, the International Commission of Jurists has worked with a view to supporting efforts to ensure an inclusive constitution-making process that results in a Constitution that provides a framework for enhanced respect and protection of human rights in Nepal.³

This submission, which analyzes provisions of the Draft Constitution endorsed by the CA on 7 July 2015 in the light of international human rights standards and on this makes recommendations for amendments on this basis, is a continuation of the ICJ's on-going engagement in this regard.

The Briefing Paper begins with a description of prior Constitutions and the historical evolution of the constitution-making process in Nepal (**Section II**). The Briefing then highlights the ICJ's concerns regarding the current time-frame and framework for consultation in the light of the right to participation in political affairs and the goals of an inclusive, participatory and transparent constitution-making process. (**Section III**). **Section IV** highlights substantive concerns regarding provisions of the current Draft Constitution, particularly the Parts on Citizenship, Fundamental Rights, the Judiciary and Emergency Powers, which need to be addressed to ensure that the new Constitution that is adopted is consistent with international standards. The Briefing Paper concludes with recommendations aimed to address the concerns about process and the substantive content of the Draft Constitution raised in Parts III and IV (**Section V**).

³ See for example, ICJ, Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes, April 2010, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/09/Nepal-Fundamental-Rights-Committee-ESC-rights-analysis-brief-2010-eng.pdf>; ICJ, Open Letter with Comments on the proposed fundamental rights provisions of the constitution of Nepal, July 2011, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-comments-on-the-proposed-fundamental-rights-provisions-of-the-constitution-letter-2011-eng.pdf>; ICJ, Economic, Social and Cultural Rights and the New Constitution of Nepal, August 2009, available at, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Nepal_Economic-Social-and-Cultural-Rights-and-The-New-Constitution_Thematic-Report_2009.pdf; ICJ, Comments by ICJ on the Fundamental Rights Committee's Report, November 2009, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2010/03/Nepal-comments-Fundamental-Rights-Committee-report-open-letter-2010.pdf>.

II. The Historical Development of Constitutional Law in Nepal and the Current Context

Nepal has had six Constitutions (including the Interim Constitution which is currently in force) since 1948, when Nepal's outgoing Rana oligarchy introduced '*Nepal Sarkarko Baidhanik Kanoon*' (the Official Act of the Government of Nepal). Each of these Constitutions, whether authoritarian or democratic in nature, was promulgated without a participatory process.

Breaking from this past, a major accomplishment of the 2006 peace process was the election of a legislative body, the Constituent Assembly (CA), that was tasked with drafting a new Constitution through a democratic and participatory process.

The first Constitution proclaimed by the Rana Prime regime in 1948 did not have a set of general rights provisions. It guaranteed some civil rights but had no provision for remedies. The Interim Constitution of 1951 was promulgated in order to facilitate the transition from the Rana regime. In 1959, Nepal adopted a new Constitution that introduced a two-pillar system: multiparty democracy and constitutional monarchy, giving significant powers to the king. This was the first Constitution which incorporated a Bill of Rights and which established a Supreme Court and other various subsidiary courts to safeguard the rights of the citizens. However, this Constitution did not last long, as the then-King Mahendra took over power by dissolving the Parliament and imposing an absolute monarchy with the new authoritarian Constitution of 1962. The 1962 Constitution banned political parties and introduced the so-called Panchayat system.⁴

After the first *Janaandolan*⁵ in 1990, the King, on the recommendation of the Constitution Reform Recommendation Committee, adopted a new Constitution. This Constitution guaranteed certain fundamental rights, a democratically elected government, bicameral parliament and a constitutional monarch with no executive power.

From 1996 to 2006 Nepal was in a state of armed conflict between government forces and the Communist Party of Nepal (Maoist) (CPN-M). The armed conflict ended in 2006 with the signing of a Comprehensive Peace Agreement (CPA) that required the drafting and adoption of a new Constitution by an elected legislature, the Constituent Assembly.

⁴ The Panchayat System was formulated by King Mahendra after overthrowing the first democratically elected government and dissolving the parliament in 1960. The political system (Panchayat System) was a party-less "guided" democracy in which the people could elect their representatives, while real power remained in the hands of the monarch. For details, see [http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+np0030\)](http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+np0030)).

⁵ The 1990 People's Movement (*Janaandolan*) was a multiparty movement in Nepal that brought an end to absolute monarchy and the beginning of constitutional democracy.

According to the CPA, the new Constitution would establish:

[A] political system that complies with universally accepted fundamental human rights, multiparty competitive democratic system, sovereignty inherited in people, supremacy of the people, constitutional check and balance, rule of law, social justice, equality, independent judiciary, periodic election, monitoring by civil society, complete press freedom, people's right to information, transparency and accountability in the activities of political parties, people's participation, impartial, competent, and fair concept of bureaucracy.⁶

The CPA further required the restructuring of the existing centralised and unitary state system into an inclusive, democratic system that ended class, ethnic, linguistic, gender, cultural, religious and regional discrimination by addressing the rights of women, ethnic and other minorities, Dalits, indigenous people, Madhesis, other oppressed, neglected and minority communities and people from "backward regions".⁷

In order to facilitate the peace process and drafting of the new Constitution, an Interim Constitution (IC) was adopted in 2007 by the Parliament without meaningful participation or consultation with all stakeholders. However, for the first time, a Nepalese Constitution was proclaimed in the name of the Nepali people.⁸

In accordance with the CPA and Interim Constitution, the first Constituent Assembly, tasked with adopting a new Constitution, was elected on 10 April 2008.⁹ The CA's original mandate was for two years, with a deadline of May 2010 to complete its work.¹⁰ After four successive extensions of the CA's mandate, the Supreme Court ruled against any further extensions of the CA's mandate in May 2012. The first CA was dissolved on 28 May 2012 without having finalized a new Constitution, thus ending four years of failed constitution-drafting.

Elections of a second Constituent Assembly were held on 19 November 2013. The newly elected CA vowed to promulgate a new Constitution by 22 January 2015. However, due to irreconcilable differences among the main political parties on key contentious issues, including the scope of human rights guarantees, federalism, the

⁶ Article 3.4, CPA.

⁷ Article 3.5, CPA.

⁸ The Preamble of the Interim Constitution states "We, the people of Nepal, in exercise of the sovereign powers and state authority inherent in us ..."

⁹ As per article 83 of the Interim Constitution, "the Constituent Assembly shall also act as Legislature-Parliament until the Constituent Assembly remains in force", that is, until a new Constitution is adopted and a new legislative body is elected.

¹⁰ Article 64 of the Interim Constitution states "Except otherwise dissolved earlier by a resolution passed by the Constituent Assembly, the term of the Constituent Assembly shall be two years from the date of its first meeting".

form of the government, the electoral system, ensuring the independence of the judiciary, including the Constitutional Court, and dealing with past human rights violations, the Constitution again could not be finalized and adopted by this new deadline. The constitutional process was thus stalled until the needs of the country following the devastating earthquake of 25 April 2015 revived the momentum to push this process forward.

On 9 June 2015, four major political parties in Nepal signed a 16-Point Agreement, which addressed one of the key contentious issues – federalism – by essentially agreeing to postpone agreement on the details of the federal structure, including the name and territorial demarcation of the proposed provinces, until after the new Constitution is adopted. But this agreement did not involve the smaller political parties, particularly those representing some of the historically marginalized minority communities in Nepal, including Dalits, indigenous groups, and religious minorities. The CA's Constitution Drafting Committee proceeded with its work on the basis of the 16 Point Agreement. Giving effect to the Agreement, the CA's Constitutional Political Dialogue and Consensus Committee (CPDCC) submitted its report¹¹ to the CA on 11 June 2015, listing the issues that had been agreed upon by the key political parties. The CA then sent the report to the Constitution Drafting Committee for preparing a draft Constitution on the basis of the report of the CPDCC.

As the Constitution Drafting Committee was given 15 days to produce a first draft of the Constitution, the drafting Committee formed five different thematic sub-committees¹² to forge consensus on the remaining contentious issues and to finalize a draft constitution consistent with the 16 Point Agreement. However, the sub-committees were unable to reach consensus on other contentious issues, and eventually submitted their reports to the Drafting Committee with no substantial progress on these issues.

On 17 June 2015, the Supreme Court of Nepal registered a challenge to the 16 Point Agreement through public interest litigation (PIL).¹³ On 19 June 2015, the Supreme Court of Nepal issued an Interim Order requiring the CA to settle all

¹¹ For details see <http://www.ekantipur.com/2014/10/07/top-story/pdcc-to-submit-its-report-to-ca-today/396033.html>

¹² The Drafting Committee's five thematic sub committees are- 1) subcommittee on definition and the preamble, 2) sub committee on fundamental rights and directive principle of the state 3) sub committee on judiciary 4) sub committee on executive and 5) sub committee on legislative

¹³ This writ was originally submitted to the Supreme Court on 12 June 2015, but the Registrar of the Supreme Court rejected the petition saying that it was a political question and could not be examined by the court. A review against this rejection was filed on 14 June 2015. A single bench of the Supreme Court overturned the registrar's order on 16 June 2015, and the writ petition was registered at the Supreme Court on 17 June 2015.

federalism issues, including the name and boundaries of the federal units, before the Constitution is finally promulgated and the CA is dissolved.¹⁴

In its Interim Order, the Supreme Court indicates that the 16 Point Agreement disregards the responsibility of the CA under the Interim Constitution to finally determine the details of the federal structure.¹⁵ The Court warned that the drafting of a new Constitution in a manner that violates the Interim Constitution could lead to a legal and political dispute over the new Constitution, undermine law and order, and invite conflict. The Court referred in particular to Article 138 of the Interim Constitution, which, *inter alia*, provides for Nepal to become 'a federal democratic republican state' that recognizes the desires of the indigenous peoples and of the people of 'backward' and other areas (including the Madhesi people resident in the southern Terai region bordering India), towards the creation of autonomous provinces in Nepal. The Court also pointed out that Article 138 of the Interim Constitution provides that the boundaries, number, names, structures and lists of such autonomous provinces, as well as their respective allocation of means, resources and powers, are to be determined by the CA.¹⁶

Reacting immediately to the Supreme Court's Interim Order, in a joint press statement dated 19 June 2015, the four political parties who entered into the 16 Point Agreement took the position that the Court had over-stepped its jurisdiction and impinged on the jurisdiction of the CA.¹⁷ On the other hand, the smaller

¹⁴ See *Bijaya Kanta Karna v. Office of the Prime Minister and Council of Ministers and others*, ordered dated 19 June 2015, writ petition no 071-wp-0953. 16 Points Agreement, article 1, 2, and 3 provide, "The Federal Democratic Republic of Nepal will have eight provinces based on five criteria of identity and four criteria of capability. Two-thirds majority of provincial assemblies will name the provinces. The Nepal government will form a federal commission to recommend on demarcation of federal provinces. The commission will have tenure of six months. The Legislature-Parliament will take a final decision on the demarcation with a two-thirds majority after the recommendation of the commission."

¹⁵ See article 138(1.a) of the Interim Constitution of Nepal 2007. (http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=17&func=startdown&id=163&lang=en)

¹⁶ Article 138 of the Interim Constitution reads, "(1) There shall be made progressive restructuring of the State with inclusive, democratic federal system of governance,97 by doing away with the centralized and unitary structure of the State so as to end discriminations based on class, caste, language, gender, culture, religion and region. (1a) Recognizing the desire of the indigenous peoples and of the people of backward and other area including Madhesi people towards autonomous provinces Nepal shall be a federal democratic republican state. Provinces shall be autonomous and vested with full authority. The boundaries, number, names and structures, as well as full details of the lists, of autonomous provinces and the center and allocation of means, resources and powers shall be determined by the Constituent Assembly, while maintaining the sovereignty, unity and integrity of Nepal. (2) There shall be constituted a high level commission to make suggestions on the restructuring of the State as referred to in Clauses (1) and (1a) The composition, function, duty, power and condition of service of such commission shall be as determined by the Government of Nepal. (3) The final settlement on the matters relating to the restructuring of the State and the form of federal system of governance shall be as determined by the Constituent Assembly."

¹⁷ See, Joint Press Statement of Four Political Parties, dated 19 June 2015.

minority political parties who were opposed to the 16 Point Agreement welcomed the Supreme Court's Interim Order.

The final ruling of the Supreme Court on the petition remained pending as of 15 July 2015. As of now, the progress on drafting the constitution is not in violation of the Interim Order, which requires that the federalism issue be settled before the constitution is finally promulgated and the CA is dissolved. The Interim order is subject to the final decision of the Supreme Court in this case. Whatever be the outcome of this case, it is important that all parties respect the final decision of the Supreme Court. Respect for the rule of law and the independence of the judiciary requires that all, including those involved the constitution-making process, abide by the rulings of the Supreme Court.

The Drafting Committee finalized a first draft of the Constitution and formally submitted the draft to the CA Chair Person on 30 June 2015. This draft was then discussed in a preliminary manner through "theoretical discussions" in the CA and endorsed it on 7 July 2015, paving the way for the start of the public consultation on 9 July 2015 for a period of 15 days.

Sections III, IV and V of this Briefing Paper analyze the constitution-making process and substantive provisions of the Draft Constitution. Each Section makes recommendations aimed at ensuring that the new Constitution fulfills the promise and aims of the CPA and the Interim Constitution and is consistent with Nepal's human rights obligations.

III. Ensuring Effective and Meaningful Participation and Consultation

Facilitation of public participation in democratic processes, and particularly the constitution-making process is crucial for ensuring the legitimacy of the Constitution and the rule of law in democracies. In addition, it is an opportunity to contribute to the prospects for sustained peace and stability in Nepal by enhancing the likelihood of popular ownership of the Constitution, which was lacking in the six previous Constitutions.

The right to such participation is guaranteed in international human rights law. Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR), to which Nepal is a party and thus bound to comply with, requires states to respect and protect the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.” The UN Human Rights Committee, the supervisory body of the ICCPR whose interpretations of its provisions are authoritative,¹⁸ has affirmed that:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.¹⁹

The Human Rights Committee also clarified that Article 25 of the ICCPR guarantees that: “peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government [,]”²⁰ and that “[c]itizens also participate directly in the conduct of public affairs when they choose

¹⁸ The authoritative nature of the interpretations of the treaty by the mandated treaty body has been affirmed including by the International Court of Justice, *Republic of Guinea v Democratic Republic of the Congo*, (2010), paras 66-68.

¹⁹ The Human Rights Committee General Comment 25. The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paragraph 5, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 168 (2003).

²⁰ The Human Rights Committee General Comment 25. The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paragraph 2 reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 168 (2003).

or change their constitution or decide public issues through a referendum or other electoral process...”²¹

The right to participate in public affairs has been expressly interpreted by the Human Rights Committee to include participation in the constitution-making process.²²

The Vienna Declaration and Programme of Action, endorsed by all States at the World Conference on Human Rights in Vienna in 1993, underlines the importance of “the real and effective participation of the people in the decision-making processes.”²³

Such participatory engagement is also to be achieved individually, through groups, or through civil society engagement. The UN Declaration on the Right and Responsibility of Individuals and Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Freedoms (Human Rights Defenders Declaration) underscores, in Article 8, that:

1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.
2. This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

Similarly, the Human Rights Council has called on States to act to enable civil society “to participate in the public debate on decisions that may lead to fuller implementation of the human rights and the rule of law and of any other decisions that affect the lives of citizens.”²⁴

²¹ The Human Rights Committee General Comment 25. The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paragraph 6, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 168 (2003).

²² *Marshall v. Canada*, Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991).<http://www1.umn.edu/humanrts/undocs/html/dec205.htm>

²³ Para 67, Vienna Declaration and Programme of Action, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

²⁴ Para 17(d), Human Rights Council Resolution 19/36 on Human Rights, Democracy, and the Rule of Law, A/HRC/19/L.27, 2012

In Nepal, the perceived lack of popular legitimacy and social acceptance of previous constitutional orders arguably contributed to their untenability and demise.²⁵

Drawing on the lessons from this history, the CPA and Interim Constitution envisioned the drafting of a new Constitution by the people themselves through a participatory process.²⁶ The very notion of participatory constitutionalism²⁷ is entrenched in the Preamble of the Interim Constitution, which guarantees "the basic rights of Nepalese people to frame a constitution for themselves."

Notwithstanding these obligations and promises, however, there has to date been little meaningful public consultation regarding the provisions of the new Constitution.

The present fast tracking of the process has left few opportunities and very little time in which any meaningful consultative process can be carried out, even within the CA. Individuals and associations have not yet been enabled to effectively exercise their right to participate in the process of developing a Draft Constitution. Instead, decisions are being debated and endorsed exclusively between key leaders of the major political parties, to the exclusion of smaller parties and civil society.

There is also a high degree of ambiguity and uncertainty about the manner in which the fast-tracked process is being carried out.

For example, following the formal submission of the Draft Constitution to the CA by the Drafting Committee 30 June 2015, a majority of the Constituent Assembly, despite the objections of some of the smaller parties, altered its procedural rules regarding discussion of the draft by suspending Rule 93 (3) of the CA Rules of Procedure. The now suspended Rule 93(3) required that each CA member be provided a copy of the Draft Constitution seven days before tabling the document in the CA for "theoretical discussions", so all CA members would have time to study and consider the draft. The theoretical discussion phase involves a preliminary discussion of the Draft Constitution by the CA, before it is made public for feedback and comments.

With the suspension of Rule 93 (3), the "theoretical discussion" ended on 7 July 2015, with the CA adopting a resolution approving the first draft of the Constitution

²⁵ Though some level of public participation was sought in writing the 1990 Constitution; it was very much limited to elite segment of the society and didn't succeed to generate sense of public ownership at large.

²⁶ Preambular paragraph 5 of the Interim Constitution guarantees the "basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment" and article 63 of the Interim Constitution states that the composition of the Constituent Assembly shall be inclusive. Section 3.4 of the CPA is also relevant.

²⁷ It demands not only the meaningful participation of the elected representatives of the people but the direct participation and engagement of the sovereign people themselves. The process should pave the way for different strata of society to have their say in the constitution making.

"in principle" and authorizing it to be made public by publishing in the Nepal Gazette in order to collect the public's reactions and feedback. The CA also passed a resolution "to let the Committee for Public Relations and Opinion Collection be entrusted with the responsibility of publicizing the first draft of the Constitution in order to obtain the public's suggestions, and also to file a report on the same within the stipulated timeframe."

As the CA Rules of Procedure don't provide any guidance in relation to length of the time for public consultation, it is up to the Constituent Assembly to decide a time frame. Originally, the CA had intended a one-month period for public consultation, and a month for the Committee on Public Relation and Opinion Collection (responsible for the process) to consolidate the comments received during the consultation and to draft a report with recommendations.²⁸

As noted above, by 9 July 2015, the CA had endorsed the 30 June 2015 draft as a preliminary Draft Constitution and commenced the public consultation period.

It is of great concern that the CA shortened the expected time frame for consultation and the reporting thereon significantly: the Committee on Public Relations and Opinion Collection was given 15 days starting 9 July 2015 to solicit views on the draft, consolidate them, and produce a report. It was reported that during this time period CA members would be visiting all 75 districts to seek feedback from people, and that the Draft Constitution would be disseminated through "newspapers, radios and other mass media" and published in the Gazette.²⁹ A CA Secretariat official informed the ICJ on 7 July that the government was in the course of preparing public outreach programs throughout the country. Two hundred thousand copies of the Draft Constitution were being printed for dissemination amongst the public.³⁰

Given the two-week timeframe for consultation, the fact that it is taking place during monsoon season, and the apparent inadequate planning for it, there is concern about the likely quality of the consultation. These factors, combined with the fact that the reporting on the outcome of the consultation is currently due to take place within the same 15-day time frame, also put into question the genuineness of the consultative process and its likely impact on the substantive provisions of the Constitution.

Specifically, while it may be possible for persons living in urban areas and the elite to access the Draft Constitution and put forward their views through different channels, it is unclear how people living in remote areas and/or areas rendered

²⁸ ICJ Interview with Secretary of the Public Relations and Opinion Collection Committee, dated 7 July 2015.

²⁹ <http://www.ekantipur.com.np/2015/07/08/top-story/ca-endorses-statute-draft/407574.html>

³⁰ ICJ Interview with member of the Public Relations and Opinion Collection Committee, dated 7 July 2015.

inaccessible by the rains, persons affected by the earthquake, illiterate persons, persons living with disabilities including people who are vision impaired, among others, would be consulted and their views collected.

Even if people are able to access the Draft Constitution, it is unlikely that many will have adequate time to read the draft thoroughly, understand it and react within such a short period of time. It is also unlikely that the Committee on Public Relations and Opinion Collection will be able to process the views and suggestions collected through the consultation and adequately analyze them in that time as well.

The lack of transparency in this process is another cause for concern. According to the information available to the ICJ, prior to the start of the consultation period, the general public had not been made aware of the CA's timeline, when the public might be able to participate in the process, and how much time the public would be given to comment.

Furthermore, the process following the end of the public consultation period is still unclear. In 2014, the CA had issued a one-year calendar for drafting and adopting a Constitution, based on its Rules of Procedure.³¹ This process is obviously not being followed, given the motivation to "fast track".

According to the information available to the ICJ, the CA's Committee on Public Relations and Opinion Collection will now submit a report on the public feedback regarding the Draft Constitution to the CA at the end of the 15-day period. The CA will then discuss and vote on the Draft Constitution clause by clause, and then finalize and adopt the Constitution.

While the timeline has not yet been officially disseminated, media reports indicate that the CA plans to complete this process in a month from the end of the public consultation. If this is the case, it is problematic for two reasons: first, this 15-day period would be the only opportunity for the public to input into the constitution-making process. Second, there is no clear guidance on how the feedback from the consultation will be incorporated into revisions to the Constitution, and what safeguards exist to ensure that public feedback is not completely sidelined.

This approach to participation risks delegitimizing the future Constitution.

The ICJ urges the CA to ensure transparency and the right to meaningful participation in the constitution-making process by:

- Urgently and immediately extending the on-going public consultation period, and providing enough time and opportunities for people to meaningfully engage and participate in the process;

³¹ See <http://www.constitutionnet.org/news/nepal-deconstructing-constituent-assemblies-new-rules-procedure-and-action-plan>

- Ensuring that special measures are taken and sufficient time is provided to reach out to and meaningfully consult with marginalized and disadvantaged communities, and to obtain and genuinely consider their feedback and suggestions on the Draft Constitution.
- Ensuring that the CA adopts and makes public a schedule which specifies a clear-cut process and time-table for the remaining constitution-making steps (e.g., discussion on the report from the consultation, further debate on and revision of provisions the draft Constitution including in the light of input received during the consultation, presentation of the Bill on the revised Constitution, filing proposed amendments proposals to the Bill, consideration of the Bill and proposed amendments, including discussion of provisions, voting on proposed amendments to the Bill, the Bill and the promulgation of the Constitution) so as to ensure transparency and predictability of how and when the remaining tasks of the CA will be carried out;
- Ensuring that the schedule adopted by the CA affords adequate time for each of these steps, mindful of the aim of a deliberative, participatory and inclusive constitution-making process;

IV. Substantive Human Rights Concerns in the Draft Constitution

Nepal is party to most of the core international human rights treaties,³² and has therefore assumed obligations to respect, protect and fulfill a wide range of civil, cultural, economic, political and social rights. It has also committed itself both legally and politically to implement its human rights obligations, including through the Universal Periodic Review Process (UPR),³³ Comprehensive Peace Agreement (CPA), and the Interim Constitution.

It is essential that the Draft Constitution reflects the full range of Nepal's human rights obligations, and ensures strong protections for them.

The ICJ welcomes the fact that the Draft Constitution includes provisions governing some rights that were previously not included in the Interim Constitution (e.g., rights to victims of conflict; right to social security; and consumer rights) and the enhances protection of some of the rights guaranteed in the Interim Constitution (e.g., it includes broader protections of the rights to health and housing; and increased protections for children and Dalits).

However, the ICJ is concerned that many aspects of the Draft Constitution still do not conform to Nepal's obligations under international human rights law, and some provisions in the Draft Constitution provide less protection than provisions in the Interim Constitution.

This Section of the Briefing Paper contains an overview of the principal concerns regarding some provisions of the Draft Constitution in light of Nepal's obligations under international human rights law.³⁴ The analysis is followed by recommendations on amendments that are necessary to bring the Draft Constitution in line with Nepal's obligations under international human rights law. It aims to provide guidance for members of the CA and civil society as they review, comment and finalize the Draft Constitution.

³² The International Covenant on Civil and Political Rights (ICCPR), the first Optional Protocol to the ICCPR; the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty; the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Optional Protocol to CEDAW; the Convention on the Rights of the Child (CRC); the Optional Protocol to the CRC on the involvement of children in armed conflict; the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; and the Convention on the Rights of Persons with Disabilities (CRPD); the Optional Protocol to the CRPD.

³³ Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc. A/HRC/17/5, 8 March 2011, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/17/5

³⁴ The deadlines attached to the consultation process and the fact that the draft Constitution was only made public on 30 June 2015 has prevented a more comprehensive analysis, both, in terms of the range of issues addressed, and the depth with which each of the concerns is discussed and analyzed.

This Section of the Briefing Paper analyses principal provisions in four Parts of the Draft Constitution: 'Part 2: Citizenship', 'Part 3: Fundamental Rights and Duties', 'Part 11: the Judiciary', focusing in particular on guarantees and safeguards of the independence of the judiciary, and 'Part 32: Emergency Powers'.

A. CITIZENSHIP

The ICJ is concerned that provisions in the citizenship chapter are discriminatory. Also, if adopted in its present form, the implementation of some of these provisions may result in more persons being rendered stateless. The ICJ recommends revision of this chapter be undertaken keeping in mind the importance of clear, concise and comprehensive citizenship rules, which prevent statelessness.

1. Citizenship by Descent

Article 12 (1) of the Draft Constitution states:

(1) The following persons who have their domicile in Nepal shall be provided citizenship by descent: (a) any person whose father and mother are citizens of Nepal at the time of birth of such person.

This is a step back from the equivalent provision in article 8 (2) of the Interim Constitution, which said "any person whose father **or** mother is a citizen of Nepal at the birth of such person" was entitled to Nepali citizenship by descent (emphasis added). Even though the Interim Constitution does not require both parents to be citizens, implementation of its guarantee has been problematic: there have been several reported instances of individuals being denied the benefits of citizenship if they were unable or unwilling to show proof that both parents were Nepali.³⁵

In 2014, the UN Committee on Economic, Social and Cultural Rights said in its report on Nepal, "The Committee is also concerned that, notwithstanding citizenship provisions in the interim constitution, the transmission of nationality by a Nepalese woman to her child is not always granted."³⁶

Requiring both parents to be citizens of Nepal, as per the current wording of Article 12(1) of the Draft Constitution, would have a highly discriminatory impact against women, as it would prevent Nepali women who are not married to a Nepali man, who are single, or who are not able to prove the nationality of the father of their child, from being able to transfer the status and benefits of citizenship to their

³⁵ See, for example, <http://www.aljazeera.com/indepth/features/2014/09/nepal-citizenship-law-biased-against-women-201491112653358704.html>; <http://www.ekantipur.com/the-kathmandu-post/2014/09/15/oped/citizenship-nepali-style/267526.html>.

³⁶ Para 12, Concluding observations on the third periodic report of Nepal, E/C.12/NPL/CO/3, 12 December 2014

children at birth. Such a provision will have particularly harsh impact on single women, abandoned women, widowed women, survivors of rape and sexual violence, their children, and other marginalized groups, and their children.

While Article 12 (4) states that “[a]ny person born to a Nepali citizen mother and having their domicile in Nepal and whose father is unidentified shall be provided citizenship by descent”, it is insufficient. It does not address the many situations in which the father is known but does not wish to acknowledge parentage of (or support) the child. It is also inconsistent with recognition and respect of a women’s right to equality in family relations, and fails to address the discriminatory impact of article 12 (1).

Article 12 of the Draft Constitution is also restricted to persons domiciled in Nepal. Based on an ordinary reading of this provision, a child of parents who are both Nepali nationals, but living in a foreign country, is precluded from acquiring Nepali citizenship.

Nepal has ratified the Convention on the Elimination of Discrimination against Women. Article 9 (2) of the CEDAW says, “States parties shall grant women equal rights with men with respect to the nationality of their children.” In 2011, the CEDAW Committee recommended to Nepal that “the new Constitution provides for equal and full citizenship rights for women, including by exerting their right to transfer citizenship to their children and foreign husband.”³⁷

The 1961 Convention on the Reduction of Statelessness requires states to “grant its nationality to a person born in its territory who would otherwise be stateless”. Similar guarantees to ensure statelessness are also contained in Article 1 (4) of the Convention for people born outside the state. While Nepal is not a party to the 1961 Convention on the Reduction of Statelessness, it remains an important international legal standard, which is relevant to the provisions of the Draft Constitution.

Furthermore, the Office of the High Commissioner for Human Rights has clarified that “[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. States shall introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. States shall also prevent statelessness upon loss or deprivation of nationality.”³⁸

Due consideration must be given to the discriminatory impact of provisions on citizenship, and their potential to render individuals statelessness.

³⁷ Para 26, Concluding observations of the Committee on the Elimination of Discrimination against Women – Nepal, CEDAW/C/NPL/CO/4-5, 29 July 2011.

³⁸ <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/RightNationality.aspx>

Therefore, the ICJ recommends that the provisions of the draft Constitution be modified to ensure that are not discriminatory, that no individual is rendered stateless as a result of them, and to ensure that they are consistent with international standards. Among other things, Article 12 (1) should be amended to – at a minimum - incorporate the provision in the Interim Constitution, which allows citizenship by descent to any person whose father or mother are citizens of Nepal at the time of birth of such person.

2. Citizenship by Naturalization

Article 13 of the Draft Constitution provides for citizenship by naturalization. Under this provision, while any male foreign national married to a Nepali citizen must spend 15 years domiciled in Nepal (and must have started the process of renouncing his foreign citizenship) before he is eligible for citizenship, the article does not require a foreign national woman to similarly be domiciled in Nepal for 15-years before she may obtain Nepali citizenship.

The provision has unequal provisions for the naturalisation of men and women, without apparent rational basis, and appears to violate Nepal’s obligations to respect and protect the right to equality and non-discrimination as enshrined in several treaties Nepal has ratified.³⁹

Therefore, the ICJ recommends that Article 13 must be revised to ensure, among other things, that the provision is not discriminatory, including by removing, the 15-year domicile requirement for any male foreign national married to a Nepali citizen.

B. FUNDAMENTAL RIGHTS

DEFINITIONS AND SCOPE OF RIGHTS

1. Rights of Non-Citizens

Several provisions in the fundamental rights chapter of the Draft Constitution improperly limit the guarantee of rights to citizens of Nepal, including articles 23 (right to equality), 30 (right to property), 32 (right to information), 36 (right to education), 38 (right to employment), 40 (right to health), 41 (right to food), 42

³⁹ These include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

(right to housing), and 48 (right to social security). Other provisions state that non-citizens are not entitled to certain protections, including articles 25 (right to justice) and 28 (preventive detention). Such limitations are in contravention of international human rights law.

Article 2(1) of the ICCPR sets out Nepal's obligation to respect and protect the rights enshrined within that treaty in respect of "all individuals within its territory and subject to its jurisdiction...without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴⁰ The universality of this obligation is also enshrined in other human rights treaties that Nepal has ratified and with which it is therefore bound to comply, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). With very few exceptions, notably some aspects of the ICCPR article 25 regarding voting and political participation, virtually all rights must be guaranteed without discrimination to citizens and non-citizens alike.⁴¹

The Committee on Economic, Social and Cultural Rights has affirmed unambiguously:

The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.⁴²

Furthermore, the proviso to article 28 (2) states that the right to legal counsel "shall not be applicable to foreign nationals in preventive detention and to citizens of an enemy State." Similarly, the proviso to sub-section (3) of article 25 makes reference to citizens of enemy states, limiting the right of such detainees to be

⁴⁰ See United Nations, *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 16 December 1966, *entry into force* 23 March 1976 *in accordance with Article 49*, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; See also Letter to Honourable Nilambar Acharya, Constitutional Committee, Constituent Assembly, 30 June 2011, Frederick Rawski, International Commission of Jurists, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-comments-on-the-proposed-fundamental-rights-provisions-of-the-constitution-letter-2011-eng.pdf>.

⁴¹ See United Nations, *International Covenant on Civil and Political Rights*, GA res. 2200 (XXI), 16 December 1966, *entry into force* 23 March 1976 *in accordance with Article 49*, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; See also The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁴² GENERAL COMMENT 20, PARAGRAPH 30, Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009)

brought before a judge within 24 hours of arrest as well as the requirement of a judicial order for and supervision of continuing detention following arrest.

The use of the term "enemy state" is itself problematic. The Draft Constitution contains no definition of what constitutes an "enemy state", no criteria for how an enemy state is to be designated, and no indication of who has the power to do so. The phrase is thus vague, broad and undefined.

Furthermore, there is no lawful and rational basis on which to deny all individuals who are nationals of such a state, even if clearly defined, rights to protection against arbitrary detention or other human rights abuses by denying their rights to counsel and to judicial supervision of detention. Under international human rights law, including Articles 9 and 14 of the ICCPR, Nepal is obligated to ensure judicial supervision of detention and the right to counsel to all persons arrested or detained on suspicion of a criminal charge, without discrimination on the basis of their nationality.

The ICJ recommends that the CA amend articles 23, 30, 32, 36, 38, 40, 41, 42, and 48 to apply to "persons" instead of "citizens". Remove clauses from Articles 25 and 28 that exclude non-citizens from the full enjoyment of the rights they enshrine. Furthermore, remove the ICJ references to a "citizen of an enemy state" in articles 25 and 28 of the Draft Constitution.

2. Right to Equality

Article 23 of the Draft Constitution guarantees "(1) All citizens shall be equal before the law. No person shall be denied the equal protection and benefit of the laws."

Paragraphs (2) and (3) of Article 23 list certain prohibited grounds of discrimination.

These clauses must be amended to ensure consistency with Nepal's obligations under international human rights law.

As noted above, the fact that both paragraphs 1 and 2 of Article 23 expressly apply only to citizens is inconsistent with Nepal's obligations under international human rights treaties. In particular, Article 26 of the ICCPR requires these rights to be afforded to *all persons*, citizens and non-citizens alike (emphasis added). It states:

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

With respect to the grounds of prohibited discrimination set out in paragraphs 2 and 3 of Article 23 of the Draft Constitution: While the list of grounds in these

paragraphs include many of those prohibited (whether or not expressly set out in international human right treaties), including religion, colour, caste, tribe, sex, sexual orientation, disability, marital status, health or physical condition, language and ideological conviction, in order to ensure consistency with Nepal's existing treaty obligations, some grounds should be revised and others added. In particular, the following grounds must be added to the list in order to ensure consistency with Articles 2 and 26 of the ICCPR, among other of Nepal's international human rights treaty obligations: political or other opinion; national or social origin; property; birth; or other status. In addition, the ICJ recommends that the list also be expanded to include "age", in view of the fact that number of the treaties to which Nepal is a State Party, including the ICCPR, the ICESCR, the CEDAW and the CRDP, all prohibit discrimination based on status, which includes age. For instance, under articles 2 and 26 of the ICCPR, age discrimination is prohibited as an "other status."⁴³

Therefore, the ICJ recommends that Article 23 of the Draft Constitution be revised to ensure that the rights to equality before the law are extended to all persons including non-citizens; and that "political or other opinion", "national or social origin", "property", "birth", or "other status", including "age" are added to the list of prohibited grounds of discrimination set out in paragraphs 2 and 3.

3. Right Relating to Justice

Article 25 of the Draft Constitution contains some guarantees relating to rights of people deprived of their liberty and the legal system in general, including the right to information of the reasons for arrest (sub-paragraph 1), the right to legal assistance (sub-paragraph 2), the right prompt to judicial determination of any continuing detention (sub-paragraph 3), the right to a fair trial before an independent, impartial and competent court or judicial body (sub-paragraph 9), and protections from double jeopardy (sub-paragraph 6). However, certain aspects of provisions under Article 25 are inconsistent with human rights standards. Moreover, this article excludes a number of rights of persons deprived of their liberty and fair trial rights which Nepal is obliged to respect.

In accordance with international law, the rights of persons deprived of their liberty must, at a minimum, include: the right to liberty and prohibition of arbitrary detention (Article 9(1) of the ICCPR); the right to presumption of release pending trial, including, in relevant cases, with conditions such as bail as set out in Article

⁴³ General Comment No. 6 (at paragraph 12) given by the CESR has confirmed the prohibition of discrimination based on age. Additionally this has been confirmed by case law. See *Love v. Australia* (No. 983/2001, ICCPR); *Schmitz-de-Jong v. the Netherlands* (No. 855/1999, ICCPR); *Solis v. Peru* (No. 1016/2001, ICCPR)

9(3) ICCPR; the right to *habeas corpus* as set out in Article 9(4) of the ICCPR;⁴⁴ the right of arrested persons to prompt notice of any criminal charges against them as enshrined in Article 9(2) of the ICCPR; the right to humane treatment as set out in Article 10 of the ICCPR, and an enforceable right to reparation for people unlawfully arrested or detained.

In accordance with its international obligations as set out in Article 14 of the ICCPR, Nepal must expressly guarantee the following fair trial rights in the Draft Constitution:

- The right to a public trial and public judgment (Article 14(1), ICCPR).
- The rights of all persons accused of criminal offences:
 - To have adequate time and facilities to prepare their defence and to communicate with their legal counsel (Article 14(3)(b), ICCPR);
 - To be tried without undue delay (Article 14(3)(c), ICCPR);
 - To be present at the trial and to defend oneself in person and through legal counsel, available free of charge to those who do not have sufficient means to pay in cases in which the interests of justice require it (Article 14(3)(d), ICCPR);
 - To examine or have examined witnesses against the accused and to obtain the attendance and examination for witnesses on the accused's behalf under the same conditions as adverse witnesses (Article 14(3)(e), ICCPR);
 - To free assistance of an interpreter if the individual cannot understand or speak the language used in court (Article 14(3)(f), ICCPR);
 - To have the conviction and sentence reviewed by a higher tribunal according to law (Article 14(5), ICCPR);
 - To reparation in cases of miscarriages of justice (Article 14(6), ICCPR).

These guarantees must be afforded to all persons. The exclusion of non-citizens and foreign citizens, including "citizens of an enemy state", from any of the protections of Articles 9, 10 and 14 of the ICCPR would violate Nepal's obligations under the treaty. Article 25(2) and (3) should thus be deleted entirely.

Retroactive application of law for international crimes

Article 25 (4) of the Draft Constitution states, "No person shall be punished for an act which was not punishable by law when the act was committed nor shall any person be subjected to a punishment greater than that prescribed by the law in

⁴⁴ While the remedy of *habeas corpus* may be granted under articles 137 and 148 by the Supreme Court and High Court, it is important that it be recognized as a fundamental right in this chapter as well.

force at the time of the commission of the offence.” In order to ensure compliance with its obligations under international law to bring to justice those responsible for gross human rights violations and other crimes under international law,⁴⁵ this Article should be amended to clarify that the applicable relevant law for the purposes of this Article includes both “international and national law”. The fact that serious crimes under international law, including genocide, torture, enforced disappearances, crimes against humanity and war crimes, are not currently specifically or adequately criminalized under Nepali law makes the need for this amendment even more important.

The wording of Article 15 of the ICCPR should be used as a model for the amendment. Article 15(1) states that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under **national or international law**, at the time when it was committed (emphasis added)

Article 15 (2) of the ICCPR furthermore clarifies that:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This is an important exception that permits accountability for international crimes, as well as continuous crimes such as enforced disappearances, in countries such as Nepal where crimes under international law have not been adequately criminalized under domestic law.

As gross human rights violations and serious violations of international humanitarian law were not criminalized during the conflict, disallowing the retrospective application of criminal law for such crimes would shield those involved in serious crimes during the conflict-era from being held accountable, and thereby perpetuate a culture of impunity. This would be inconsistent with international law as well as the jurisprudence of Nepal’s Supreme Court, including its decisions in the cases of *Rajendra Dhakal v. the Home Ministry of Nepal*⁴⁶ and *Madhav Basnet v. The Prime Minister and others*.⁴⁷

⁴⁵ See in general Report of the independent expert to update the Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 8 February 2005, particularly part III on the right to justice; and para 18, Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); Articles 4-7 of the Convention against Torture, to which Nepal is a State Party.

⁴⁶ *Rabindra Dhakal v. Government of Nepal*, Nepal Law Journal, (2007, Jun vol. 49).

⁴⁷ *Madhav kumar Basnet for JuRI-Nepal v. Prime Minister and others*, Nepal Law Journal, (2014, Jan vol. 55).

The ICJ therefore recommends that the provisions of Article 25 of the Draft Constitution be amended as follows:

Supplement the provisions relating to the rights of persons deprived of their liberty, at a minimum, to ensure that the Constitution also guarantees: the right to liberty and prohibition of arbitrary detention as per ICCPR Article 9(1); the right to presumption of release pending trial, including in relevant cases with conditions such as bail as set out in ICCPR Article 9(3); the right to habeas corpus as set out in ICCPR Article 9(4); the right of arrested persons to prompt notice of any criminal charges against them as enshrined in ICCPR Article 9(2) of the ICCPR; the right to humane treatment, as set out in Article 10 of the ICCPR; and, the right to reparation to all persons arbitrarily detained in accordance with Article 9(5) of the ICCPR.

With respect to the right to a fair trial, at a minimum supplement the existing provisions of Article 25 so that the Constitution also guarantees: The right to a public trial and public judgment as set out in Article 14 (1) of the ICCPR; The rights of all persons accused of criminal offences to have adequate time and facilities to prepare their defence and to communicate with their legal counsel (Article 14(3)(b) of the ICCPR); the right to be tried without undue delay (Article 14(3)(c), ICCPR); the right to be present at the trial and to defend oneself in person and through legal counsel, available free of charge to those who do not have sufficient means to pay in cases in which the interests of justice require it (Article 14(3)(d), ICCPR); the right to examine or have examined witnesses against the accused and to obtain the attendance and examination of witnesses on the accused's behalf under the same conditions as adverse witnesses (Article 14(3)(e) of the ICCPR); the right to free assistance of an interpreter if the individual cannot understand or speak the language used in court (Article 14(3)(f), ICCPR); the right of those convicted of a crime to have the conviction and sentence reviewed by a higher tribunal according to law (Article 14(5) of the ICCPR); the right to reparation in cases of miscarriages of justice (Article 14(6) of the ICCPR).

Furthermore, the Article must be amended so that the guarantees apply to all persons (not just citizens), and thus delete in Article 25(2) and (3) the exclusion of non-nationals, foreign nationals and "citizens of enemy states".

Finally, Article 25 (4) of the Draft Constitution must be amended to track the wording of Article 15 of the ICCPR and thus allow for the prosecution of individuals accused of crimes under international law such as genocide, torture, enforced disappearances, crimes against humanity and war crimes⁴⁸ including through the retrospective application of criminal law to such international crimes, even where they are currently not criminalized under domestic law.

⁴⁸ U.N. Doc. CCPR General Comment No. 10 (1983).

4. Right Against Torture and Other Ill-Treatment

Article 27 of the Draft Constitution states, "No detainee shall be subjected to physical or mental torture, or be treated in a cruel, inhumane or degrading manner."

As written, this provision does fully not comport with Nepal's obligations, including under the ICCPR, the CAT or the CRC, for several reasons.⁴⁹

First, the draft Article only extends to detainees (deprived of their liberty), whereas Nepal is required to ensure that *no one* within its territory or subject to its jurisdiction or effective control is subjected to torture or other cruel inhuman or degrading treatment or punishment in any circumstances, whether or not they are detained.

Second, the wording of the draft Article must be expanded so that it also prohibits torture and other cruel, inhuman or degrading *punishment* as well as such *treatment*.

Third, the Article 27(2) should be expanded so as to clarify the responsibility of state officials to: prevent and protect against acts of torture and other ill-treatment; take the necessary measures to bring to justice those responsible for torture and other cruel, inhuman or degrading treatment or punishment; and ensure that victims are guaranteed other forms of reparation as well as compensation, including restitution, rehabilitation, satisfaction and guarantees of non-repetition.

These obligations have been affirmed by both the Committee against Torture and the Human Rights Committee, as well as by the UN General Assembly in a consensus vote joined by Nepal.⁵⁰

⁴⁹ **Article 7 of the ICCPR** states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. **Article 1 of the CAT** defines torture as "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. **Article 37 (a) of the CRC** states: No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

⁵⁰ See United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA resolution 39/46, 10 December 1984, *entry into force 26 June 1987*, in accordance with article 27(1), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; Committee against Torture, General Comment 3 on the Implementation of article 14 by States parties, U.N. Doc. CAT(C/GC/3) (2012), paras. 6-18; General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 16; Committee against Torture, General Comment 3 on the Implementation of article 14 by States parties, U.N. Doc. CAT(C/GC/3) (2012), paras. 6-18; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

The ICJ urges Nepal to revise Article 27 of the Draft Constitution as set out above, and ensure that it fully respects and complies with the Nepal's obligations under the CAT, ICCPR and CRC.

5. Preventive Detention

Article 28 of the Draft Constitution states, "No person shall be held under preventive detention unless there is sufficient ground to believe in the existence of an immediate threat to the sovereignty and integrity of, or the law and order situation in Nepal."

International law severely restricts the scope of preventive detention, given the great risk of its arbitrary application and the fact that it facilitates other human rights violations. Arbitrary detention is prohibited at all times, including during armed conflict.⁵¹ Therefore the Nepali authorities should consider deleting this provision and laws permitting it outside the context of international armed conflict altogether.

At a minimum, however, the Draft Constitution must be amended to include express provisions reflecting the exceptional and limited circumstances when it is permissible under international law, along with procedural and other safeguards to ensure against its abuse.⁵²

In its General Comment 35 on Article 9 (the right to liberty and security of the person), adopted in October 2014, the Human Rights Committee said:

To the extent that States parties impose security detention (sometimes known as administrative detention or internment), not in contemplation of

and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005

⁵¹ "Rule 99. Arbitrary deprivation of liberty is prohibited", in Customary International Humanitarian Law, Volume 1 Rules, (eds J M Henckaerts and L Dowald-Beck, 2005) at page 344 available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>; Human Rights Committee General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 11.

⁵² International human rights law generally prohibits preventive detention except where absolutely necessary and proportionate. See Human Rights Comm., Communication No. 1324/2004: Australia, 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought"); Human Rights Comm., Communication No. 560/1993: Australia, 7.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (same if "not necessary in all the circumstances of the case"); Human Rights Comm., Communication No. 305/1988: Netherlands, 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (same if not "reasonable in all the circumstances." See also General Comment No. 29, "Derogation during a state of emergency", in "International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies", UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff.

prosecution on a criminal charge,⁵³ the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty.⁵⁴ Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and this burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited, and that they fully respect the guarantees provided for by Article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for these conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.⁵⁵

The use of preventive detention, if not abolished altogether, must therefore, at a minimum, be limited to exceptional circumstances such as in times of declared public emergencies which threaten the life of the nation, justifying derogation. In such cases, the preventive detention must be necessary, be proportionate, be limited in time and subject to judicial review, habeas corpus and other procedural guarantees, including access to a lawyer, to safeguard against abuse. Remedies and reparation must also be available to all people subjected to unlawful or arbitrary detention.

Furthermore, the clause of this Article that excludes the duty of the authorities to notify the relatives of 'citizens of an enemy state' held in preventive detention should be deleted altogether. It is inconsistent with international human rights standards; such notification is a key safeguard against not only arbitrary detention but also incommunicado detention, enforced disappearance, torture and other ill-treatment.

The ICJ urges Nepal to revise Article 28 of the Draft Constitution, either by deleting the provision altogether or, at a minimum, ensuring that any administrative

⁵³ This paragraph concerns security detention, and not the forms of post-conviction preventive detention addressed in paragraph 21 below, or detention for purposes of extradition or immigration control, see paragraph 18 below.

⁵⁴ See, e.g., Concluding observations Colombia 2010, para. 20; Jordan 2010, para. 11.

⁵⁵ On the relationship of article 9 to article 4 of the Covenant and international humanitarian law, see paragraphs 64 to 67 below.

detention conforms with the requirements set out in Human Rights Committee General Comment 35, quoted above. Such detention should be exceptional, permissible only in circumstances described in Article 4 of the ICCPR, for the shortest time necessary, subject to judicial review, *habeas corpus* review and other safeguards, including access to a lawyer, to prevent abuse. Remedies and reparation must be available for people unlawfully or arbitrarily subjected to administrative detention. Furthermore delete the clause excluding protections of notification of the family or relatives of citizens of "enemy states" who are placed in preventive detention.

6. Compulsory Service

Article 52 of the Draft Constitution states, "Every citizen shall have following duties: (c) to give compulsory service in case of national need."

A similar provision regarding compulsory service can also be found in the proviso to article 34 (4), on the right against exploitation, which states, "Provided that nothing in this clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes."

Article 8 of the ICCPR prohibits forced or compulsory labour, but exempts "[a]ny service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors", and "[a]ny work or service which forms part of normal civil obligations" from the definition of forced or compulsory labour.

The Human Rights Committee has clarified that while Article 8 of the ICCPR neither recognizes nor excludes the right of conscientious objection, the right of the right of conscientious objection to military service is part of the right to freedom of thought, conscience and religion enshrined in Article 18 of the ICCPR.⁵⁶

Article 6 of the ICESCR guarantees "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The CESCR has established that States parties should abolish, forbid and counter all forms of forced labour.⁵⁷ In this regard, the CESCR has asked States to repeal Compulsory Public Service legislation.⁵⁸

⁵⁶ Human Rights Committee General Comment 22, UN Doc, CCPR/C/21/Rev.1/Add.4 (1993) para 11. para 11

⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, para. 9, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en

⁵⁸ CESCR, Concluding Observations on Sri Lanka, UN Doc. E/C.12/LKA/CO/2-4 (2010), para.17.

Nepal has ratified the Abolition of Forced Labour Convention, 1957, and the Forced Labour Convention, 1930, both of which have similar provisions as well.

In interpreting the phrase “normal civil obligations”, the European Court of Human Rights and the European Commission on Human Rights have excluded compulsory jury service, compulsory fire service or financial contribution which is payable in lieu of service, the obligation to conduct free medical examinations, and the obligation to participate in medical emergency services as not being forced or compulsory labour.⁵⁹

The notion of “compulsory service for public purposes”, particularly the manner in which it has been included in the Draft Constitution, is problematic. The nature of compulsory service to be covered, the scope and definition of “public purpose”, the procedural requirements to be fulfilled for such compulsory service and the penalties for non-compliance, are all unclear in the Draft Constitution. Likewise, it is unclear whether any exemptions are available, including on grounds of conscience, age, mental or physical health or disability, and whether individuals will be paid for the compulsory service they perform.

The ICJ urges the government of Nepal to revise 34 (4) and 54, and expressly incorporate the language of Article 6 of the ICESCR and Article 8(3) of the ICCPR. In addition, provide more procedural and substantive clarity about the nature of compulsory service and public purpose, ensuring that the provisions of the Article as a whole are consistent with Nepal’s existing obligations under international human rights law to prohibit slavery, servitude, exploitation and forced labour, and to respect the right to freedom of thought, conscience and religion, including the inherent right to conscientious objection to military service.

7. Rights to Employment and Labour

Article 38 of the Draft Constitution guarantees the right to employment, stating:

(1) Every citizen shall have the right to employment. The provisions and conditions of employment shall be as prescribed by the law.

Provided that unemployed citizen shall, until he or she gets employment, have the right to unemployment allowance, in accordance with law. (2) Every citizen shall have the right to choose employment.

On the rights regarding labour, Article 39 of the Draft Constitution states:

(1) Every worker shall have the right to appropriate labour practice. (2) Every worker shall have the right to appropriate remuneration, facilities and social security. (3) Every worker shall have the right to form trade union and

⁵⁹ “Guide on Article 4 of the Convention: Prohibition on Slavery and Forced Labour” at Page 11, available at http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf

participate thereto, in accordance with law, and shall have the right to collective bargaining.

Articles 6 and 7 of the ICESCR, with which Nepal, as a State Party, is bound to comply, contain the equivalent rights, namely the right to work and the right to just and favourable conditions of work. The right to work is also reflected in article 8 of the ICCPR, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 11 of the CEDAW, Article 32 of the Convention on the Rights of the Child, Articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and in several conventions of the International Labour Organization. The UN Committee on Economic, Social and Cultural Rights also discussed the right to work in detail in its 18th General Comment.⁶⁰

There are many aspects of internationally recognized labour rights, contained in the above instruments, which are not reflected in Articles 38 and 39 of the Draft Constitution. For example, there is no mention of “the right of everyone to the enjoyment of just and favourable conditions of work.” This right includes fair wages and equal remuneration for work of equal value without distinction of any kind, safe and healthy working conditions, and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. While the details may be contained in the appropriate labour laws, a constitutional guarantee of “just and favourable conditions of work” will assist in ensuring justiciability of this right, in case legislation is weak or insufficient.

Additionally, the guarantee in Article 38 is restricted to citizens only. This limitation allows for the possibility of exploitation of non-citizens and the risk that employers may seek to hire non-citizens in order to pay non-citizens lower wages. Restriction of this article to citizens, to the exclusion of non-citizens, is impermissible under international law. (This is discussed in greater detail above, on the rights of non-citizens.) The words “every citizen” should therefore be replaced with the word “everyone” in this Article.

The ICJ recommends that Nepal revise Articles 38 and 39, and ensure that they guarantee all aspects of labour rights as contained in international human rights law, including but not limited to the right of everyone to the enjoyment of just and favourable conditions of work, and that the words “every citizen” in Article 38 be replaced by the word “everyone”, thus removing the impermissible restriction of the application of this right.

⁶⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <http://www.refworld.org/docid/4415453b4.html>

8. Right to Health

Article 40 of the Draft Constitution contains a range of safeguards of the right to health, including the right to access to clean drinking water and sanitation.

Article 12 of the ICESCR requires states to respect, protect and fulfill the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to protection of health without discrimination is also recognized in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, in Articles 11 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women, and in Article 24 of the Convention on the Rights of the Child.

The Committee on Economic Social and Cultural Rights' General Comment No. 14 discusses the right to health in detail. It clarified the right to health entails both freedoms and entitlements; prevention, promotion and care; and encompasses the need to guarantee not only the availability, access and quality of services, goods and information but also conditions for the realization of other interlinked rights, including the rights to adequate housing, water, sanitation and food. It clarifies that health services must be available, accessible, acceptable and of good quality.⁶¹

The General Comment also reaffirms that all states have a "core obligation" to ensure the satisfaction of, at the very least, "minimum essential levels of each of the rights enunciated in the Covenant."⁶² In the context of the right to health, core obligations include ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; ensuring reproductive, maternal (prenatal as well as post-natal) and child health care; providing immunization against the major infectious diseases occurring in the community; providing education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and providing appropriate training for health personnel, including education on health and human rights.⁶³

Article 40 of the Draft Constitution should be amended to comply with Nepal's obligations under international law. At a minimum, instead of limiting the health services to "basic" health services, it is advised that the following wording should be

⁶¹ Para 12, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4

⁶² Para 43, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4

⁶³ Para 43 and 44, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4

used: *[S]hall have the right to the highest attainable standard of physical and mental health as per international obligations.*⁶⁴

In addition, Article 40's restriction of the right to health services to citizens, to the exclusion of non-citizens, is impermissible under international law and should be deleted.

The ICJ recommends that Nepal revise Article 40 and ensure it guarantees all aspects of the right to health, without discrimination, to all persons, in a manner that is consistent with Nepal's existing obligations under international human rights law.

9. Right to Housing

Article 42 of the Draft Constitution states, "(1) Every citizen shall have the right to appropriate housing. (2) Except in accordance with law, no citizen shall be removed or encroached upon from the housing in their ownership."

Article 11 of the ICESCR and General Comments 4 and 7 of the CESCR contain details about the right to housing. General Comment 4 lists the elements of "adequacy" in housing, which include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.⁶⁵ General Comment 7 addresses forced evictions, and specifies the procedural protections and due process rights that must be followed in any forced eviction.⁶⁶

The ICJ is concerned that Article 42 omits many essential aspects of the right to housing recognized and guaranteed in international human rights law.

At a minimum, it is recommended that the wording of Article 22(1) of the Draft Constitution, which currently refers to the "right to access a proper housing", be clarified and amended in its entirety to state: *Every person shall have the right to adequate housing.*⁶⁷

⁶⁴ The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁶⁵ Para 8, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23

⁶⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22

⁶⁷ The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

Article 42 (2) of the Draft Constitution should also be amended as follows: *No person shall be removed from his or her place of residence except, in accordance with the law, as is necessary to serve a reasonable and legitimate public purpose. Laws authorizing evictions must also be reasonable and necessary, consistent with human rights law, and legal recourse and remedies must be available to those affected.*⁶⁸

Furthermore, as noted in further detail above, the limitation of the right to housing to citizens is impermissible under international law and must be removed.

The ICJ recommends that Nepal revise Article 42 as set out above and ensure it guarantees all aspects of the right to housing to all persons as contained in international human rights law, including comprehensive protections and procedural safeguards against forced evictions.

10. Rights of the Child

Article 44 lists a range of rights guaranteed to children. The formulation is an improvement and contains a broader range of rights than that set out in the Interim Constitution. However, Article 44 omits several of the internationally recognized guiding principles for the protection of children's rights enshrined in the human rights treaties to which Nepal is party, including the Convention on the Rights of the Child (CRC),⁶⁹ the Optional Protocol to the CRC on the involvement of children in armed conflict; and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography.

Notably, there is no reference to the guiding principles on children's rights: the principle of the best interests of the child (Article 3 of the CRC), the child's right to be heard and to have his or her views taken into account (Article 12 CRC), the right of children to life, survival and development (Article 6 of the CRC), and the prohibition against discrimination (Article 2). These provide an essential and guiding framework for protection of other substantive rights and protections of the child.

Article 3 (1) of the CRC states: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Committee on the Rights of the Child has clarified that this principle "cuts across all rights and provisions of the Convention and

⁶⁸ The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁶⁹ Nepal ratified this treaty on 14 September 1990. See United Nations Treaty Collection Status of Treaties, *Convention on the Rights of the Child*, New York, 20 November 1989, Signatories available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

should inform the interpretation of the scope and content of those rights.⁷⁰ Article 3(2) further clarifies states' duties to:

[E]nsure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The ICJ recommends that Nepal re-examine Article 44 and ensure that it is framed in a manner that reflects the guiding principles for the protection of the rights of the child, including that: the best interest of the child shall be the primary consideration in all actions concerning children, the right of children to special care and protection as is necessary for their well-being, the right of the child to be heard and have his/her views taken into account, the right of a child to life, survival and development, and the prohibition of discrimination. These provide an essential and guiding framework for protection of other substantive rights and protections and entitlements of children enshrined in international human rights law.

11. Gender Equality

Article 43 of the Draft Constitution reaffirms the right to gender equality through specific guarantees of certain rights for women. Non-discrimination on grounds of gender is also reflected in other provisions, including Articles 23 and 47.

Nepal has ratified several international instruments, most notably the CEDAW, that require the authorities to respect, protect and fulfill the full range of rights of women and girls, and realize gender equality.

While the Draft Constitution contains some of these rights, many others are not adequately protected. For example, discriminatory aspects of the citizenship provisions have been flagged above. It is also unclear whether the prohibition on discrimination on the basis of gender for the same work, in Article 23 (4), includes work of equal value – i.e., employment equity.⁷¹ Article 23 (4) only prohibits discrimination between men and women doing the *same* work, not work of equal value.⁷² This is an important issue to be addressed in the context of Nepal where

⁷⁰ The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁷¹ The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁷² The International Commission of Jurists, *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some*

women often perform work that is not performed by men, but is of equal value to other kinds of work.⁷³ The provision should be amended to reflect work and employment equity with the goal of ensuring that different work that is of equal value is paid equally.⁷⁴

Furthermore, changes in language from the Interim Constitution are also cause of concern. For example, Article 20 (2) of the Interim Constitution guaranteed all women the “right to reproductive health and other reproductive matters.” Article 43 of the Draft Constitution guarantees all women “rights relating to reproduction” and does not specifically mention women’s right reproductive health. This has led to concerns that the Draft Constitution has weakened protections for women’s right to reproductive health.⁷⁵ The phrase “rights relating to reproduction” is vague, and it is unclear whether it encompasses all internationally recognized reproductive rights. Under international human rights law, right to reproductive health is an essential part of the larger category of reproductive rights. Therefore, the CA must amend the phrase “rights relating to reproduction” to “reproductive rights” and clarify that the provision on reproductive rights will be interpreted in a manner consistent with international law and include “reproductive health”.

Moreover, individuals often experience multiple and intersecting grounds of discrimination, exacerbated by multiple identities. For example, a Dalit woman is likely to feel the impact of discrimination uniquely, and more severely, because of multiple intersecting discrimination, as opposed to a Dalit man or a Brahmin woman. It is recommended that additional wording be used to make it clear that the Constitution prohibits multiple, intersecting grounds of discrimination.

The ICJ recommends that Nepal carefully review all provisions of the Draft Constitution that address gender equality to ensure that they guarantee that the full range of women’s rights under international law will be respected, protected and fulfilled – including explicit guarantees for equal pay for work of equal value, and replacing “rights relating to reproduction” with “reproductive rights” - and that

Recommended Changes, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁷³ The International Commission of Jurists, *Nepal’s Fundamental Rights Committee’s Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁷⁴ The International Commission of Jurists, *Nepal’s Fundamental Rights Committee’s Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes*, April 2010, available at http://www.icjcanada.org/ICJenglish/documents/rpt_2010-04-09a.pdf.

⁷⁵ See for example, <http://myrepublica.com/society/item/23959-statute-draft-curbs-women-s-reproductive-health-rights-pradhan-malla.html>; <http://www.ekantipur.com/the-kathmandu-post/2015/07/07/news/statute-draft-trying-to-legitimise-gender-bias/278142.html>

all forms of discrimination is prohibited, including multiple, intersecting grounds of discrimination.

12. Right to Social Security

Article 48 of the Draft Constitution reads as follows: Economically deprived people, incapacitated and helpless single women, persons with disability, children, citizens incapable of looking after themselves and citizens of endangered communities shall have the right to social security as provided for in the law.

The right to social security is enshrined in Article 9 of the ICESCR, which states that “[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

Article 48 of the Draft Constitution restricts the list of eligible citizens who may receive social security as provided by law to the following: Economically deprived people, incapacitated and helpless single women, persons with disability, children, citizens incapable of looking after themselves and citizens of endangered communities. There is, however, no clear definition of these categories in the Draft Constitution, leaving ambiguous which persons would be covered.

Furthermore, such restriction contravenes the ICESCR. The Committee on Economic, Social and Cultural Rights, in its General Comment on the right to social security under Article 9 of the ICESCR, underlines that “[t]he wording of article 9 of the Covenant indicates that the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right.”⁷⁶ Therefore, Article 48 must be expanded to include all persons, not just the categories currently enumerated.

In addition, there is no clarification about the scope of social security in the Draft Constitution. According to the Committee on Economic, Social and Cultural Rights, social security must be adequate and accessible, and encompass: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans.⁷⁷

Article 48 also excludes non-citizens. As discussed in detail above, with very few exceptions, virtually all rights must be guaranteed to citizens and non-citizens alike. Adequate social security must be accessible to all persons, including, if they are unable to support themselves and their dependents, appropriate social assistance.

⁷⁶ See para 4, Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008)

⁷⁷ See part A, Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008)

The ICJ recommends that Nepal revise Article 48 and broaden it so it guarantees all aspects of the right to social security, and that the right to social security is available to all people, in accordance with international human rights law.

LIMITATIONS AND RESTRICTIONS ON RIGHTS

13. Restrictions on the Right to Freedom of Expression

Article 22(2) of the Draft Constitution enshrines the rights to freedom of expression, assembly, association and movement,⁷⁸ and provisos 1 to 6 of this article list permissible limitations and restrictions to different aspects of these rights. The provisos, if retained in their current form, would allow the Government of Nepal to impose restrictions on each of these freedoms on several grounds, including:

- on grounds that the exercise of the right:
 - “may undermine the nationality, sovereignty, independence, and integrity of Nepal”,
 - “undermine ... harmonious relation between federal units”,
 - “undermine ... public peace and order of Nepal”,
 - “jeopardize the harmonious relations subsisting among various caste, tribe, religion and communities”,
 - “are contrary to public morality”,
 - “is contrary to public health”, or
- in order to prevent “spying against the nation, dissolving national secrecy or helping any foreign country, organisation or representative to damage the security of Nepal or act against the State.”

Under Articles 19, 21 and 22 of the ICCPR, state parties may only restrict or limit freedom of expression, assembly and association if the restrictions are provided by law and are proportionate and necessary to ensure respect of the rights of others, or to protect national security, public order, public health or public morals.⁷⁹

⁷⁸ Article 22 states: (1) No person shall be deprived of his or her personal liberty save in accordance with law; (2) Every citizen shall have the following freedoms; (a) Freedom of opinion and expression; (b) Freedom to assemble peaceably and without arms; (c) Freedom to form political parties; (d) Freedom to form unions and associations; (e) Freedom to move and reside in any part of Nepal; and (f) Freedom to practice any profession, carry on any occupation, industry and trade.

⁷⁹ See United Nations, *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; See also Letter to Honourable Nilambar Acharya, Constitutional Committee, Constituent Assembly, 30 June 2011, Frederick Rawski, International Commission of Jurists, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-comments-on-the-proposed-fundamental-rights-provisions-of-the-constitution-letter-2011-eng.pdf>.

The principles of proportionality and necessity must be followed in accordance with international law when imposing any restrictions of rights (that is, restrictions must be strictly necessary using the least restrictive means available to protect the particular permissible enumerated interest).

The permissible grounds to limit the freedom of opinion and expression set out in Article 22 of the Draft Constitution go well beyond the scope of those permissible pursuant to the international obligations that Nepal has accepted. There is also no mention of the proportionality or necessity requirements in the text of the Draft Constitution.

Therefore, the ICJ recommends that the provisos to Article 22 of the Draft Constitution be revised in keeping with the language of the parallel provisions of the ICCPR, to which Nepal is party, to bring it into conformity with the ICCPR.

14. Limitations on the Right to Public Communication

Article 24 of the Draft Constitution guarantees the right to public communication and the non-censorship of any "publication, broadcasting or printing of any news item, editorial, feature, article or other reading and audio-visual material." As such, it is a provision on an aspect of the right to freedom of expression and information guaranteed under Article 19 of the ICCPR.

The proviso to Article 24 sets out permissible restrictions to these rights, stating:

[N]othing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the nationality, sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the federal units or among the peoples of various castes, tribes or communities, or on any act of treason, false item publication and broadcast which harms social dignity, defamation, contempt of court or incitement to an offence, or on any act which may be contrary to public decency or morality.

This list of restrictions must be reviewed and revised in accordance with Articles 19 and 20 of the ICCPR, which set out the scope of restrictions to the rights to freedom of speech and expression that are permissible under international human rights law.

Article 19 (3) states that freedom of expression may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Article 20 (2) states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Furthermore, the 2006 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression stated:

Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.⁸⁰

As currently drafted, the provisos to Article 24 contain restrictions on expression that are vague and that go well beyond those provided for in Articles 19 or 20(2) of the ICCPR, such as "harmonious relations, "public decency" and "public morality."

The ICJ recommends that Article 24 be revised to conform to Article 19(3) of the ICCPR, specifying that the restrictions must be provided by law and be necessary and proportionate to protect the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health or morals.⁸¹

15. Limitations on the Right to Information

Article 32 of the Draft Constitution guarantees the right to information, stating, "Every citizen shall have the right to demand and obtain information on any matters of concern to them or to the public. Provided that nothing in this Article shall be deemed to compel any person to provide information on any matter about which confidentiality is to be maintained according to law."

Article 19 (2) of the ICCPR states that:

⁸⁰ 2006 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression available at <http://www.osce.org/fom/99558?download=true>

⁸¹ U.N. Doc. CCPR General Comment No. 10 (1983).

“[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

The only permissible grounds for limitations to this right are those set out in Article 19 (3) of the ICCPR – namely, for respect of the rights or reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals. Furthermore, such limitations must be prescribed by law and be both necessary and proportionate for one of the enumerated permissible purposes.

Principle 3 of the Global Principles on National Security and the Right to Information (Tshwane Principles)⁸² further clarifies that “[n]o restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.”

Therefore, even though national security is a permissible ground under which the right to information can be limited, procedural and substantive safeguards must be followed.

The ICJ acknowledges that there exist circumstances in which the public interest in maintaining secrecy outweighs the public interest in access to information. However, the proviso set out in Article 32 is much too broad and lends itself to potential abuse.

Furthermore the wording of this provision appears to afford this right only to citizens. As has been discussed above, the exclusion of non-citizens from the enjoyment of this right would be inconsistent with Nepal’s obligations under international law. The provision must be amended to guarantee the right to all persons.

The ICJ urges that the proviso to Article 32 be deleted, that any description of permissible limitations to the right to information make clear that the only permissible limitations to this right must be prescribed by law and both necessary and proportionate to ensure respect of the rights or reputations of others, and the protection of national security or of public order (*ordre public*), or of public health

⁸² The Twshwane Princiles are based on international and national law, standards and good practice, were developed to provide guidance to legislators and those implementating the laws relating to the stat’s authority to withohold information non grounds of national security. They were drafted by 22 organizations and academic centres, in consultation with more than 500 experts from more than 70 countries at meetings held around the world and in consultation with UN and regional experts on freedom of expression, information and the media.

or morals. Furthermore, the article must be amended to ensure that it applies to everyone, including non-citizens.

16. Derogations in Cases of Emergency

Article 268 (9) of the Draft Constitution states:

During the time of the Proclamation or Order of the State of Emergency made by the President pursuant to Clause (1), the fundamental rights provided in Part 3 may be suspended so long as the proclamation or order of the State of Emergency is in operation. Provided that Article 21, Clause (c) and (d) of sub-article (2) of Article 22, Article 23, sub-article (2) of Article 24, Article 25, 26, 27, 29, 31, 34, 35, 36, 37, 40, sub-article (1) and (2) of Article 41, Article 43, 44, 46, 48, 50 and Article 51 related to the right to constitutional remedy and right to *Habeas Corpus* shall not be suspended.

This provision, if enacted in its current form, would mean that during an emergency proclaimed by the President, the government can derogate from all except the following human rights set out in the Constitution: the right to live with dignity, freedom to form political parties, freedom to form unions and associations, right to equality, right to public communication, rights relating to justice, right of victims of crime, right against torture, right against untouchability, right to religion, right against exploitation, right to environment, right to education, right to language and culture, right to health, aspects of the right to food, rights of women and children, rights of senior citizens, right to social security, right against exile, and the right to constitutional remedy.

In contrast to this provision, Article 4 of the ICCPR states that:

- (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

The wording of Article 4 of the ICCPR itself make it clear as has the Human Rights Committee, including in General Comment 29, that the list of rights which are not subject to derogation set out in Article 4 is not exhaustive.

In order to conform to its obligations under international human rights law, including Article 4 of the ICCPR, the following rights must be added to the list of

non-derogable rights: the prohibitions against slavery, servitude and imprisonment for inability to fulfill a contractual obligation, the right to recognition before the law, the right to freedom of thought, conscience and religion. Furthermore the list of non-derogable rights should also be augmented to include the prohibition against arbitrary detention, the right to petition a court to challenge the legality of detention, and the right to a public trial in all but exceptional cases which are warranted in the interests of justice.

Furthermore the provision must be amended to make it clear that any suspension of any of the rights and measures taken during an emergency must be lawful, temporary, necessary and proportionate to address the particular emergency, not discriminatory and consistent with Nepal's obligations under international law. This also means that Paragraph 4 of Article 268 of the Draft Constitution should be amended to provide that any proclamation or order provided by the Parliament must not last for more than three months, subject to paragraphs 268(6) and (7).

Furthermore, the proposed provision in Article 268(10) of the Draft Constitution that would not permit judicial review of whether suspension of a particular right is constitutional or not during emergency must be deleted. Though the full enjoyment of certain rights may be temporarily limited in the time of emergency, as noted above, the declaration of an emergency, the suspension of a right and the emergency measures put in place must be temporary, necessary and proportionate to the particular emergency and non-discriminatory. Thus, as the Human Rights Committee has made clear, remedies such as judicial review must always be available, including to test whether the declaration of an emergency itself, any extension thereto, the suspension of a particular right and any derogating measures are lawful, non-discriminatory, necessary and proportionate to meet the exigencies of the particular situation and consistent with Nepal's obligations under international law.⁸³ Furthermore, the right to an effective remedy for violations of rights, including non-derogable rights should apply at all times.

Therefore the ICJ urges the government to amend Article 268 (9) of the Draft Constitution by:

Clarifying that any suspension of a right must be temporary, non-discriminatory and both necessary and proportionate to address the exigencies of the particular situation;

⁸³ The Human Rights Committee has clarified in General Comment 29 that the right to a remedy for any violation of rights enshrined under in the ICCPR is inherent in the ICCPR as a whole, and even during a state of a emergency must be respect and maintained, although some adjustments to the practical functioning of the procedures as may be strictly necessary and proportionate to the particular emergency may be applied, but they must not negate the right. Human Rights Committee General Comment 29.UN Doc. CCPR/C/21/Rev.1/Add. 11 (2001), para 14

Adding the following to the list of non-derogable rights set out in Constitution: the prohibitions of slavery and servitude, imprisonment for inability to fulfill a contractual obligation, the right to recognition before the law, the right to freedom of thought, conscience and religion the prohibitions of arbitrary detention and enforced disappearance, the right to petition a court to petition the legality of detention, the right to a public trial in all but exceptional cases which are warranted in the interests of justice, the right to a remedy for violations of rights;

Deleting paragraph 268(10) and instead ensuring that the provision specifically allows for judicial review of whether the derogation from a particular right is lawful, necessary, proportionate and non-discriminatory, and a remedy for violations of rights, including non-derogable rights.

17. Right to Remedy for Violations of Fundamental Rights

Article 51 provides for a constitutional remedy:

“The right to proceed for the enforcement of the rights provided in this Part, in the manner set out in Article 137 or Article 148 is guaranteed”.

There is, however, no other provision concerning the right to a remedy for human rights violations, or recognition of the State’s obligation to ensure access to an effective remedy and redress, including reparations.

In accordance with Article 2 of the ICCPR and under Article 2.1 of the ICESCR, Nepal is obliged to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming a remedy shall have his/her right to a remedy determined by competent judicial, administrative or legislative authorities (or other authority) and to develop the possibilities of judicial remedy, and to ensure that the competent authorities shall enforce such remedies when granted.

The right of victims to a remedy for human rights violations is also guaranteed in other international human rights treaties to which Nepal is a party and thus bound to comply,⁸⁴ and is reflected in other international standards, instruments and resolutions adopted by the international community.⁸⁵

⁸⁴ E.g., Article 2.3 of the ICCPR; Article 13 of the CAT; Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. See also, ; Article 12, 17.2(f) and 20, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 (*International Convention for the Protection of All Persons from Enforced Disappearance*), to which Nepal is not yet a State Party.

⁸⁵ Article 6.2 of the *Universal Declaration of Human Rights*; Article 9 and 13 of the *Declaration on the Protection of All Persons from Enforced Disappearances*, U.N.G.A. resolution 47/133, UN GAOR Supp (No. 49) at 207, UN Doc. A/47/49 (1992) (*Declaration on the Protection of All Persons from Enforced Disappearance*); Principles 4 and 16 of the *Principles on the Effective Prevention and Investigation of*

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law state, "If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by ... Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below".⁸⁶

The ICJ considers that it is of key importance that consideration be given to strengthening the provisions of the draft Constitution to reinforce the right to access to an effective remedy for victims of human rights violations. A mere stipulation of the right to seek constitutional remedy is insufficient.

The ICJ recommends that Nepal include a constitutional provision, in accordance with its international obligations, that ensures that any person whose rights or freedoms are violated shall have an effective remedy (legal and constitutional) and a right to adequate reparations (compensation, restitution, rehabilitation, satisfaction and guarantee of non-repetition of violations).

Furthermore, it is notable that phrases "provided by the law," "prescribed by the law" and "in accordance with the law" are used in a number of the proposed articles related to remedies or reparation set out in the Draft Constitution, including: Articles 26 (2) (the right of victims), 29 (compensation for discrimination), 30 (compensation when land is acquired for a public purpose), 32 (compensation for exploitation), 33 (compensation for pollution), 36 (education), 37 (employment), 39 (3) (unionization and collective bargaining), 41 (food), 45 (rights of dalits) and 47 (right to social justice).

The manner in which these provisions are framed could support the interpretation that certain rights are only justiciable "according to law". This means that their enforcement is dependent on the enactment of legislation, and on how well this legislation guarantees their enforcement, and they are not directly justiciable by

Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 (*UN Principles on Extra-Legal Executions*); Principles 4-7 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 27 of the *Vienna Declaration and Programme of Action*; Article 13, 160-162 and 165 of the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9 of the *Declaration on Human Rights Defenders*; Article 13 of the *European Convention on Human Rights*; Article 47 of the *Charter of Fundamental Rights of the European Union*; Article 7.1(a) and 25 of the *American Convention on Human Rights*; Article XVIII of the *American Declaration of the Rights and Duties of Man*; Article III(1) of the *Inter-American Convention on Forced Disappearance of Persons*; Article 8.1 of the *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) of the *African Charter of Human and Peoples' Rights*; Article 9 of the *Arab Charter on Human Rights*.

⁸⁶ Principle I (2) (c), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005)

virtue of being a part of the Constitution. These provisions risk allowing these guarantees in the draft Constitution to be reduced to statutory guarantees, only if and when the legislature chooses to enact relevant legislation.

The Interim Constitution also contained similarly problematic provisions.

The ICJ urges the CA to clarify provisions of the Draft Constitution so as to ensure that it guarantees rights to effective and accessible remedies for violations all rights Draft Constitution, even in the absence of legislation.

Where legislation is required, the government must pass a law in accordance with the Constitution and its international obligations within a reasonable time frame. Not doing so would amount to a violation of the substantive right in itself, as well as the internationally guaranteed right to a remedy.

18. Pardons and Clemency

In article 271, the Draft Constitution entrusts the President with sweeping authority to grant pardons and clemency. The President, on the recommendation of the Council of Ministers, has power to grant a pardon, suspension, respite or remit punishment or fine imposed according to decisions of various judicial, quasi-judicial, administrative bodies or authorities. The Provincial Head has similar powers under article 164 (1) (e),⁸⁷ which are equally problematic and must be reviewed.

The ICJ is concerned that such provisions could be used as a basis to grant pardons to individuals responsible for grave violations of human rights, including crimes under international law, thus entrenching impunity and infringing the rights of victims to justice and to remedy.

Furthermore, there is no provision in the Draft Constitution that bars *de facto* and *de jure* amnesties for gross violations of human rights, which are serious crimes, such as, enforced disappearance, torture and rape.

Under several human rights treaties as well as U.N. principles and guidelines reflecting existing legal obligations under international law, states may not grant amnesty for gross violations of human rights, which include but are not limited to torture and enforced disappearance.⁸⁸ Amnesties for gross violations of human rights may also violate states' obligations under customary international law.

⁸⁷ Article 164 (1) (e): "The functions, duties and powers of the Provincial Head shall be as follows: Pardon, suspend or reduce any sentence imposed by the concerned High Court and subordinate Courts pursuant to Provincial law"

⁸⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, preamble, G.A. Res. 60/147; see International Covenant on Civil and Political Rights, American Convention on Human Rights, African Charter on Human and Peoples' Rights, and European Convention for the Protection of Human Rights and Fundamental Freedoms, including related commentary and jurisprudence. Report of the independent expert to update the Set of principles to

The Supreme Court of Nepal has established explicit jurisprudence that those responsible for serious crimes cannot benefit from amnesty and other similar measures. These principles may also apply to executive clemency and pardons. For example, in the 2007 case of *Rajendra Dhakal*, the Supreme Court held that executive pardons should not apply to individuals convicted of the crime of enforced disappearances because this was a serious crime. Similarly, in 2015, the Supreme Court struck down the amnesty provision of the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014 (TRC Act).

Therefore, the Constituent Assembly must ensure that the constitutional provision in relation to pardon and clemency precludes impunity for crimes under international law and is exercised in a manner consistent with the responsibility of the state to respect and fulfill victims' rights of truth, justice and reparations.

The ICJ urges the government to reconsider this provision and, at a minimum, ensure that it is consistent with international standards and the rulings of the Supreme Court, and that full pardons and clemency cannot be granted for serious crimes, including, among others, such crimes under international law as torture, genocide and enforced disappearances.

C. INDEPENDENCE OF THE JUDICIARY

1. Ensuring Judicial Independence

An independent and impartial judiciary is one of the prerequisites for the rule of law and the effective protection of human rights.⁸⁹ There is a vital need for an "independent and effective judicial check against executive and legislative excesses" at all levels of the government within a federal system. Independence of the judiciary is achieved through ensuring "actual independence of the Judiciary from the executive branch and the legislative."⁹⁰ The right to an independent and impartial judiciary is also a fundamental principle of the right to a fair trial and is guaranteed by international law, and applicable at all times. The Bangalore Principles of Judicial Conduct emphasize the importance of a "competent, independent and impartial tribunal", and "public confidence in the judicial system and in the moral authority and integrity of the judiciary."

combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 8 February 2005, particularly part III on the right to justice; and para 18, Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁸⁹ See ICCPR, Art. 14, and General Comment 32.

⁹⁰ See, HRC General Comment on Article 2 of the ICCPR, and Principle 1 of the Basic Principles on Independence of Judiciary, 1984.

Maintaining judicial accountability is an equally important consideration. The Preamble to the Bangalore Principles of Judicial Conduct states that the Principles “presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards.” The Latimer House Principles emphasise that “[t]he principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.”⁹¹

The Preamble of the Draft Constitution makes mention of the importance of an independent judiciary, saying it expresses “commitment to create the bases of socialism by adopting democratic norms and values, including ... an independent, impartial and competent judiciary.” Article 129 of the Draft Constitution states, “Powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, other laws and recognized principles of justice.”

Constitutions in other countries have recognised the centrality of judicial independence by including a specific provision in the operative parts of the Constitution’s text.⁹² Such an explicit provision guaranteeing the independence of the judiciary, currently absent from the Draft Constitution of Nepal, should be added to bolster the guarantee of the rule of law, human rights, the right to a fair trial and the rights to a remedy.

The ICJ recommends that the Draft Constitution contain an explicit and binding provision guaranteeing judicial independence in line with international standards and best practices.

2. Impeachment of Judges

Article 135 of the Draft Constitution addresses the removal of the Chief Justice and Justices of the Supreme Court. Article 135 (2) states: “A motion of impeachment against the Chief Justice or any other Justices of the Supreme Court may be presented before the House of Representatives by one-fourth of its members

⁹¹ VII (b), Commonwealth (Latimer House) Principles On the Three Branches of Government

⁹² For example, **article 165 of the South African constitution** states: The judicial authority of the Republic is vested in the courts. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

Similarly, **article 102 of the Constitution of Tunisia** states: The judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms. Judges are independent with the law being the sole authority over them in discharging their functions.

existing for the time being on the ground that he or she is unable to perform his or her duties *for the reasons of his or her incompetency, misbehaviour, failure to discharge the duties of his or her office in good faith, or a serious violation of code of conduct* [emphasis added] and if the motion is passed by a two-thirds majority of the total number of then members, he or she shall ipso facto be relieved from their office.” Similarly, article 146 addresses the removal of the Chief Judge or judge of a High Court, saying the Chief Judge or Judge of the High Court shall cease to hold office in specific circumstances, which include “incompetence, misbehavior, ill-intended activities and serious violation of the code of conduct” and “If punished by the court on criminal charges constituting moral degradation”.

These provisions are inconsistent with international standards on judicial independence. Principle 18 of the Basic Principles on the Independence of the Judiciary states, “Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.” The same language appears in the Latimer Guidelines, which specify the Commonwealth Principles on the accountability of and relationship between the three branches of Government.⁹³

Moreover, the terms of Articles 135 and 146 of the Draft Constitution are vague and undefined, and therefore are prone to inappropriate application. For example, there is no definition as to what would constitute “misbehavior”, “ill-intended activities” or “good faith”.

Thus the language of the permissible grounds for removal of a judge must be brought into line with Principle 18 of the Basic Principles on the Independence of the Judiciary.

In addition, Articles 135 and 146 should be supplemented to fully guarantee due process and fair trial rights for judges subject to removal, ensuring that they will be afforded a full and fair opportunity to defend themselves, with the assistance of counsel if requested, through an independent and impartial hearing, in accordance with international human rights standards. .

Therefore, the ICJ recommends that Articles 135 and 146 be re-framed to ensure that the grounds on which judges may be impeached is limited to reasons of incapacity or behavior that renders them unfit to discharge their duties, in compliance with international standards aiming to safeguard the independence of the judiciary. The removal procedures must expressly and fully guarantee due process and fair trial rights under international law for judges facing removal, in order to afford them a full and fair opportunity to defend themselves against allegations of misconduct.

⁹³ Page 10, <http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>

3. Constitutional Court

Article 141 of the Draft Constitution proposes the creation of a new Constitutional Court, for a period of 10 years and with limited jurisdiction: "(a) to resolve disputes regarding jurisdiction between the Federation and Provinces, between two or more provinces, between province and local government and between two or more local government, (b) to resolve disputes regarding election to the Federal Parliament or Provincial Assembly or to resolve questions of eligibility regarding membership of the Federal Parliament or Provincial Assembly." The power of the final interpretation of the Constitution remains with the Supreme Court.

There are several causes for concern with this proposal.

First, the limited jurisdiction and temporary nature of the Constitutional Court means that in reality it does not operate as a true Constitutional Court with similar powers and functions as Constitutional Courts in other jurisdictions, but rather as an *ad hoc* court. It has no broad powers to interpret constitutional questions of law, or to consider fundamental rights disputes.

Second, the fact that three of the five members of the Constitutional Court are sitting judges of the Supreme Court raises concerns about the independence of these two bodies, and their relationship with each other.

Constitutional Courts in other countries are permanent structures with a much wider jurisdiction. For example, the Constitutional Court of South Africa is the final court of appeal for all disputes regarding any aspect of the Constitution, and can also hear any "arguable point of law of general public importance which ought to be considered by that Court."⁹⁴

Preferable options, based on best practices to safeguard human rights and promote consistency in human rights adjudication, would be to create a permanent constitutional court with adequate power to interpret the constitution, or to strengthen the existing Supreme Court with a more specialized constitutional review function (e.g., by creating a permanent constitutional bench).

The ICJ recommends that the CA reconsider the structure, jurisdiction and temporal nature of the Constitutional Court in light of the right to remedy and international best practices.

4. Judicial Council

Article 156 of the Draft Constitution proposes to establish a Judicial Council, responsible for "the appointment of, transfer of, disciplinary action against, and

⁹⁴ Article 167, Constitution of the Republic of South Africa.

dismissal of Judges, and other matters relating to administration of justice.” Of the five members to be appointed to the Judicial Council under the Draft Constitution, two are to be Supreme Court Judges, one will be a jurist, one will be a senior advocate and the final member will be the Federal Minister of Justice.

The Judicial Council is one of the most important mechanisms for guaranteeing judicial accountability in Nepal, and it is crucial that it is structured and is mandated and able to operate in a manner that is consistent with respect for the separation of powers, the independence of the judiciary and reflects international best practice. It is essential that the composition and powers of this body reflect and are able to maintain judicial independence, including judicial accountability.

The former UN Special Rapporteur on the independence of judges and lawyers said that the composition of a judicial council “matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges.” He noted that “in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference.”⁹⁵ The current Special Rapporteur has recommended that the independent body responsible for judicial accountability “should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted.”⁹⁶

While the Judicial Council, as per Article 156 of the Draft Constitution, has two Supreme Court Judges on it, it is unclear whether the jurist needs to be a judge or can be anyone involved in the study and teaching of law. It’s possible, therefore, that, despite recommendations from international best practice, the Judicial Council will have a minority of judges. It will also have political representation in the form of the Federal Minister of Justice. Furthermore, the fact that both the jurist and the senior lawyer are to be appointed by the Executive Branch is also cause for concern. The risk of politically motivated appointments to this body by the executive could undermine its independence or the appearance thereof, and thus the independence of the judiciary.

Therefore, the ICJ urges Nepal to revise Article 156 to ensure that the composition of the Judicial Council, the methods of appointing members and its operation conform safeguard the principle of judicial independence and conform to international best practices; in particular, the composition of the Judicial Council should be expressly limited to members of the judiciary.

⁹⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28. See also Art. 9 of the Universal Charter of the Judge (Appointment of judges “should be carried out by an independent body, that include substantial judicial representation”), approved by the International Association of Judges on 17 November 2009.

⁹⁶ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126

V. Conclusions and Recommendations

Recent political developments have made the completion of a new Constitution in the near future a distinct possibility. For a country like Nepal – recovering from a long civil war and a recent natural disaster – this is welcome news. It is also an opportunity to make its fundamental law consistent with universal principles of democracy and human rights. It is essential that this process incorporates lessons from previous attempts at constitution-making, and respect Nepal’s international human rights obligations. In this Briefing Paper, the ICJ has outlined the key developments in the history of Nepal’s constitutional law, and flagged key procedural and substantive concerns that must be addressed before a new Constitution is adopted.

Given past efforts at constitution-making, existing promises and the internationally recognized right to participation in public affairs, the Government of Nepal must ensure the constitution-making process is truly inclusive and participatory. However, given the timeframes and the inadequate planning to accomplish the public consultation, the quality of the consultation, the processing of the opinions and revision of the Draft Constitution to reflect outcomes from the consultation will be questionable.

With a view to supporting efforts to ensure that the process of the constitution-making process is transparent, inclusive, participatory, and genuine that the new Constitution that is adopted in Nepal enhances human rights protections consistent with the country’s obligations under international human rights law, the ICJ offers the following recommendations.

The ICJ urges the government to ensure the right to transparency and meaningful participation by:

- Urgently and immediately extending the on-going public consultation period, and providing enough time and opportunities for people to meaningfully engage and participate in the process;
- Ensuring that special measures are taken and sufficient time is provided to reach out to and meaningfully consult with marginalized and disadvantaged communities and obtain and genuinely consider their feedback and suggestions on the Draft Constitution.
- Ensuring that the CA adopts and makes public a schedule which specifies a clear-cut process and time-table for the remaining constitution-making steps (e.g., discussion on the report from the consultation, further debate on each of the provisions and revision of provisions of the draft Constitution in a

manner consistent with international standards, including in the light of the input from the consultations, presentation of the Bill on the revised Constitution, filing and debating proposed amendments to consideration of the Bill and proposed amendments, including discussion of provisions of the Constitution, voting on the Bill and promulgation of the Constitution) so as to ensure transparency and predictability of how and when the remaining tasks of the CA will be carried out;

- Ensuring that the schedule adopted by the CA affords adequate time for each of these steps, mindful of the aim of a deliberative, participatory and inclusive constitution-making process;

Furthermore, based on its non-exhaustive analysis of certain provisions of the Draft Constitution in the light of Nepal's obligations under international human rights law, **the ICJ makes the following recommendations to the Constituent Assembly of Nepal for amendment of provisions of the Draft Constitution:**

On Citizenship:

1. Revise the entire chapter, keeping in mind the importance of clear, concise and comprehensive citizenship rules to ensure that the provisions are not discriminatory, that no individual is rendered stateless as a result of them, and that they are consistent with international standards. Among other things, Article 12 (1) should be amended to – at a minimum - incorporate the provision in the Interim Constitution, which allows citizenship by descent to any person whose father or mother are citizens of Nepal at the time of birth of such person
2. Article 13 must be revised to ensure, among other things, that the provision is not discriminatory, including by removing, the 15-year domicile requirement for any male foreign national married to a Nepali citizen.

On other Human Rights:

1. Amend Articles 23, 30, 32, 36, 38, 40, 41, 42, and 48 to apply to "persons" instead of "citizens". Remove clauses that exclude non-citizens from the full enjoyment of the rights enshrined in Articles 25 and 28. Furthermore, remove references to a "citizen of an enemy state" in articles 25 and 28 of the Draft Constitution must be removed;
2. Revise Article 23 of the Draft Constitution to ensure that the rights to equality before the law are extended to all persons including non-citizens;

and that "political or other opinion", "national or social origin", "property", "birth" and "other status", including "age", are added to the list of prohibited grounds of discrimination set out in paragraphs 2 and 3;

3. The ICJ recommends that the provisions of Article 25 of the Draft Constitution be amended as follows:

Supplement the provisions relating to the rights of persons deprived of their liberty, at a minimum, to ensure that the Constitution also guarantees: the right to liberty and prohibition of arbitrary detention as per ICCPR Article 9(1); the right to presumption of release pending trial, including in relevant cases with conditions such as bail as set out in ICCPR Article 9(3); the right to habeas corpus as set out in ICCPR Article 9(4); the right of arrested persons to prompt notice of any criminal charges against them as enshrined in ICCPR Article 9(2) of the ICCPR; the right to humane treatment, as set out in Article 10 of the ICCPR and the right to compensation to all persons arbitrarily detained in accordance with Article 9(5).

With respect to the right to a fair trial, supplement at a minimum the existing provisions of Article 25 so that Constitution also guarantees: The right to a public trial and public judgment as set out in Article 14 (1) of the ICCPR; The rights of all persons accused of criminal offences to have adequate time and facilities to prepare their defence and to communicate with their legal counsel (Article 14(3)(b) of the ICCPR); the right to be tried without undue delay (Article 14(3)(c); the right to be present at the trial and to defend oneself in person and through legal counsel, available free of charge to those who do not have sufficient means to pay in cases in which the interests of justice require it (article 14(3)(d); the right to examine or have examined witnesses against the accused and to obtain the attendance and examination of witnesses on the accused's behalf under the same conditions as adverse witnesses (Article 14(3)(e) of the ICCPR); the right to free assistance of an interpreter if the individual cannot understand or speak the language used in court (article 14(3)(f)); the right of those convicted of a crime to have the conviction and sentence reviewed by a higher tribunal according to law (Article 14(5) of the ICCPR); the right to reparation in cases of miscarriages of justice (article 14(6) of the ICCPR).

Furthermore, the Article must be amended so that the guarantees apply to all persons (not just citizens) and thus in Article 25(2) and (3) delete the exclusion of application of such guarantees to non-nationals, foreign nationals, including "citizens of enemy states".

Finally, Article 25 (4) of the Draft Constitution must be amended to track the wording of Article 15 of the ICCPR and thus allow for the prosecution of

individuals accused of crimes under international law such as genocide, torture, enforced disappearances, crimes against humanity and war crimes including through the retrospective application of criminal law to such international crimes, even where they are currently not criminalized under domestic law.

4. Revise Article 27 of the Draft Constitution as set out in this Briefing Paper, and ensure that it fully respects and complies Nepal's obligations under the CAT, ICCPR, and CRC;
5. Revise Article 28 of the Draft Constitution, either by deleting the provision altogether or at a minimum, ensuring that any administrative detention conforms with the requirements set out in Human Rights Committee General Comment 35, quoted above. Such detention should be exceptional, permissible only in circumstances described in Article 4 of the ICCPR, for the shortest time necessary, subject to judicial review, *habeas corpus* review and other safeguards, including access to a lawyer, to prevent abuse. Remedies and reparation must be available for people unlawfully or arbitrarily subjected to administrative detention. Furthermore delete the clause excluding protections of notification of the family or relatives of citizens of "enemy states" who are placed in preventive detention;
6. Revise 34 (4) and 54, and expressly incorporate the language of Article 6 of the ICESCR and Article 8(3) of the ICCPR. In addition, provide more procedural and substantive clarity about the nature of compulsory service and public purpose, ensuring that the provisions of the Article as a whole are consistent with Nepal's existing obligations under international human rights law to prohibit slavery, servitude, exploitation, forced labour and to respect the right to freedom of thought conscience and religion, including the inherent right to conscientious objection to military service;
7. Revise Articles 38 and 39 and ensure that they guarantee all aspects of labour rights as contained in international human rights law, including but not limited to the right of everyone to the enjoyment of just and favourable conditions of work", and words "every citizen" in Article 38 be replaced by the word "everyone", thus removing the impermissible restriction on the application of this right;
8. Revise Article 40 and ensure it guarantees to all persons all aspects of the right to health, without discrimination, in a manner that is consistent with Nepal's existing obligations under international human rights law;

9. Revise Article 42 as set out in this Briefing Paper and ensure it guarantees to all persons all aspects of the right to housing as contained in international human rights law, as well as ensuring comprehensive protections and procedural safeguards against forced evictions;
10. Re-examine Article 44 and ensure that it is framed in a manner that reflects the guiding principles for the protection of the rights of the child including the principle that the best of the child shall be the primary consideration in all actions concerning children, the right of children to special care and protection as is necessary for their well-being and the right of the child to be heard and their views taken into account, the rights of a child to life, survival and development and the prohibition of discrimination. These provide an essential and guiding framework for protection of other substantive rights and protections and entitlements of children enshrined in international human rights law;
11. Carefully review all provisions of the Draft Constitution that address gender equality to ensure that they guarantee that the full range of women's rights under international law will be respected, protected and fulfilled – including explicit guarantees for equal pay for work of equal value, and replacing "rights relating to reproduction" with "reproductive rights" - and that all forms of discrimination are prohibited, including multiple, intersecting grounds of discrimination;
12. Revise Article 48 and broaden it so it guarantees all aspects of the right to social security, and that the right to social security is available to all people, as guaranteed in international human rights law;
13. Revise the provisos to Article 22 of the Draft Constitution in keeping with the language contained in the ICCPR, to which Nepal is party, to bring it into conformity with the ICCPR;
14. Revise Article 24 to conform to Article 19(3) of the ICCPR, specifying that the restrictions must be provided by law and necessary and proportionate to protect the rights or reputations of others, and for the protection of national security or of public order (*ordre public*), or of public health or morals;
15. Delete the proviso to Article 32. Also revise Article 32 to make clear that the only permissible limitations to this right must be prescribed by law and necessary and proportionate to ensure respect of the rights or reputations of others, and the protection of national security or of public order (*ordre*

public), or of public health or morals. Furthermore, the Article must be amended to ensure that it applies to everyone, including non-citizens;

16. Amend Article 268 (9) by: Clarifying that any suspension of a right must be temporary, non-discriminatory and both necessary and proportionate to address the exigencies of the particular situation; Adding the following to the list of non-derogable rights set out in Constitution: the prohibitions of slavery and servitude, imprisonment for inability to fulfill a contractual obligation, the right to recognition before the law, the right to freedom of thought, conscience and religion the prohibitions of arbitrary detention and enforced disappearance, the right to petition a court to petition the legality of detention, the right to a public trial in all but exceptional cases which are warranted in the interests of justice, the right to a remedy for violations of rights; Deleting paragraph 268(10) and instead ensuring that the provision specifically allows for judicial review of whether the derogation from a particular right is lawful, necessary, proportionate and non-discriminatory, and a remedy for violations of rights including non-derogable rights;

17. Include a constitutional provision, in accordance with Nepal's international obligations, that ensures that any person whose rights or freedoms are violated shall have an effective and accessible remedy (legal and constitutional) and a right to adequate reparations (compensation, restitution, rehabilitation, satisfaction and guarantee of non-repetition of violations). Furthermore the CA should clarify that remedies are available for violations all fundamental rights in the Draft Constitution, even in the absence of legislation. Where legislation is required, the government must pass a law in accordance with the constitution and international obligations within a reasonable time frame. Not doing so would amount to a violation of the substantive right in itself as well as the internationally guaranteed right to a remedy;

18. Reconsider the President's powers regarding pardons and clemency, and, at a minimum, ensure that full pardons and clemencies cannot be granted for serious crimes, including such crimes under international law as torture, genocide and enforced disappearances.

On Judicial Independence:

1. Include in the Draft Constitution an explicit and binding provision guaranteeing judicial independence in line with international standards and best practices;

2. Reframes Article 135 and 146 to ensure that grounds on which judges can be impeached is limited to reasons of incapacity or behavior that renders them unfit to discharge their duties, in compliance with international standards aiming to safeguard the independence of the judiciary. The removal procedures must expressly and fully guarantee due process and fair trial rights under international law for judges facing removal, in order to afford them a full and fair opportunity to defend themselves against allegations of misconduct;
3. The CA should reconsider the structure, jurisdiction and temporal nature of the Constitutional Court in light of the right to remedy and international best practices;
4. Revise Article 156 to ensure that the composition of the Judicial Council, the methods of appointing members and its operation safeguard the independence of the judiciary and conform to international best practices; in particular, the composition of the Judicial Council should be expressly limited to members of the judiciary.