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Mr Subas Nembang  
Speaker  
Legislature-Parliament  
Parliament Secretariat  
Singhadurbar, Kathmandu  
Nepal

11 February 2007

Dear Mr Speaker,

The International Commission of Jurists (ICJ) welcomes the promulgation of the Interim Constitution by the then House of Representatives on 15 January 2007. It is a considerable achievement and represents a further positive development towards sustainable peace and democracy in Nepal.

The preamble states that the Interim Constitution will be in force until a new Constitution has been prepared by the future Constituent Assembly. The ICJ therefore understands it to be a temporary constitution, intended to facilitate the free and fair establishment of a Constituent Assembly. As the drafting of the new Constitution progresses, the ICJ is ready to respond to requests for advice in relation to the application of international human rights and humanitarian law and principles of the rule of law.

The ICJ welcomes many of the provisions in the Interim Constitution, in particular the confirmation that Nepal is an inclusive and fully democratic State committed to multiparty democracy, the commitment to the rule of law, the recognition of the National Human Rights Commission as a constitutional body, and the elaboration of fundamental human rights and freedoms. These components will lay a foundation for the protection and promotion of human rights in Nepal.

We do, however, have a number of concerns with regard to the compliance of certain provisions with international human rights standards. We have limited this letter to the most immediate and important concerns that could be rectified by the Legislature-Parliament, leaving the Constituent Assembly to address other, more complex or long term issues. We urge the Legislature-Parliament to amend the Interim Constitution at this stage, to ensure it is of the highest quality and

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of assistance in the months ahead. We will gladly elaborate further on the issues raised in this letter if you or any members request.

The ICJ recognises the significant debate in Nepal regarding the extent to which minority groups will be represented in political processes, especially the Constituent Assembly. This is an important issue that should be resolved through peaceful and inclusive dialogue. International human rights law and good practice include standards on how to effectively guarantee the rights of minority groups, which will assist the Constituent Assembly in crafting the constitution for the long term. The ICJ will return to the issue of the rights of all minorities in future commentary on the constitution process.

The ICJ would be grateful, Mr Speaker, if you would circulate our letter to all the members of the Legislature-Parliament.

### **Equality and non-discrimination**

The ICJ welcomes the general provision on the right to equality and non-discrimination (Article 13). The article prohibits discrimination on the grounds of “religion, race, colour, sex, caste, tribe, origin, language or ideological conviction or any of these”. However, Articles 2 (1) and 26, ICCPR, also contain other important grounds of non-discrimination that are well-accepted in international law and practice, including “national or social origin”, “property, birth or other status”. The United Nations treaty bodies have interpreted such prohibited grounds of discrimination as including physical or mental disability, age, marriage, sexual orientation, and health status (e.g. HIV/AIDS status). Some individuals, such as the physically and mentally disabled have faced and continue to face discrimination in Nepal. The current language of the Interim Constitution would allow such discrimination to continue. The non-discrimination provision is one of the most fundamental guarantees of any constitution, including an interim constitution, and so should be drafted comprehensively and accurately.

**Recommendation 1: The ICJ would recommend that Article 13 be amended to include the following additional prohibited grounds of discrimination: “national or social origin”, and “property, birth or other status”.**

### **Untouchability and racial discrimination**

Article 14 provides a welcome recognition that no person should be subject to untouchability and racial discrimination. However, the language of Article 14 (2) appears to imply that the prohibition of discrimination might extend only to the use of “public”, and not also “private”, – “services, conveniences or utilities” and only protect against denial of access to “public”, and not also “private”, areas and religious places. Discrimination occurs in both the public and private spheres. Nepal’s 1990 Constitution also only prohibited discrimination on the grounds of race or untouchability in public places, which has allowed discrimination in private places to continue. This issue is best resolved at the most fundamental level – within Nepal’s Interim Constitution.

**Recommendation 2: The ICJ recommends either the removal of the word “public” from Article 14 (2), or, alternatively, each use of the word “public” should be accompanied by the words “and private”.**

## **Enforced disappearance**

The Interim Constitution does not prohibit and criminalise the practice of enforced disappearance. Enforced disappearances usually violate multiple human rights - including the prohibition against torture and other cruel, inhuman or degrading treatment and the right to liberty and security of the person, and often the right to life. It is a grave violation of international law, and if widespread or systematic amounts to a crime against humanity. The human rights lessons to be learned from Nepal's armed conflict and the human rights violations associated with it, should be addressed in the Interim Constitution. The ICJ, on 29 January 2007, urged Nepal to ratify the International Convention for the Protection of All Persons from Enforced Disappearances.

**Recommendation 3: The ICJ recommends that the Interim Constitution be amended to include a fundamental right of everyone not to be subjected to enforced disappearance, that no exceptional circumstances may be invoked to justify an enforced disappearance and that an enforced disappearance shall be punishable as a criminal offence.**

## **Restrictions on freedom of opinion and expression, assembly and association**

The ICJ welcomes that the Interim Constitution guarantees freedom of opinion and expression (Article 12 (3) (a)), the right to publication, broadcasting and the press (Article 15 (1)), the right to freedom of peaceful assembly (Article 12 (3) (b)) and the right to form political parties, organisations, unions and associations (Article 12 (3) (c) and (d)). Full protection of these rights will be essential to ensure open and free public debate in the lead up to, and during the life of, the Constituent Assembly election.

The ICJ is, however, concerned that the wording of permissible restrictions on these rights (paragraphs 1, 2 and 3 of the proviso to Article 12 and the second paragraph of 15 (1)) introduce concepts and language that are unduly broad and vague and could be used unjustifiably to limit these vital rights at a time when an open and democratic environment will be most important. Under international human rights law (and good practice around the world), it is legitimate for a government to restrict the rights to freedom of expression, assembly and association only if the restrictions are provided by law and are necessary in a democratic society for the respect of the rights and reputations (or freedoms) of others, or for the protection of national security or public order, or of public health or morals. Such language is found in Articles 19, 21 and 22 of the ICCPR, which has been ratified by Nepal and which therefore applies directly in Nepali law.

The Interim Constitution permits "reasonable restrictions" on these rights, among other things for any act "which may undermine the sovereignty .... of Nepal". This could be interpreted as allowing the Government to prohibit free speech far beyond the narrower notion under international law of only permitting restrictions on speech where 'necessary' to protect "national security" - that is, speech that incites imminent violence or use of force against the territorial integrity of the country. The notion of reasonableness, in other words, is far less stringent than the international law standard of necessity. Similarly, the ICJ understands the legitimate motivation behind allowing restrictions on freedom of expression and association that "may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and religion or communities". However, this language is unnecessarily vague

and goes beyond the legitimate restriction of speech that could incite to violence or racial hatred. Similarly, there are concerns about the meaning of “decent public behaviour”.

**Recommendation 4: The ICJ recommends that the provisions in Articles 12 and 15 setting out the permissible restrictions on the freedom of opinion, expression, assembly and association, be amended to comply with the well-established language of permissible restrictions found in the international human rights treaties that Nepal has ratified and that apply directly in Nepali law.**

#### **Access to legal counsel and judicial scrutiny**

Article 24 contains rights relating to arrest and detention, as well as fair trial rights. Given the well-documented patterns of abuse of arrest and detention procedures during the years of conflict, including arbitrary arrest and detention, enforced disappearances and the torture and ill-treatment of detainees, such rights provide important safeguards that will help to create an environment of fairness, security and trust. The ICJ welcomes Article 24 (2), which guarantees that anyone arrested must be able to consult a lawyer “at the time of the arrest”, and Article 24 (3) that requires every person arrested to be produced before a judicial authority within 24 hours. The ICJ has, however, three immediate concerns.

First, Article 24 (2) only refers to the right of access to a lawyer at “the time of the arrest”. International law is clear that all detained persons have the right to consult and communicate with a lawyer throughout all stages of the legal process - see the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the UN Body of Principles), Principles 17 and 18, and Article 14 (3) (b), ICCPR.

**Recommendation 5: The ICJ would recommend that Article 24 (2) be amended to clarify that anyone detained or imprisoned has the right to access a lawyer from the time of arrest and all stages of the detention or imprisonment.**

Secondly, the second paragraph of Article 24 (3) states that the right of access to a lawyer (Article 24 (2)), and the right to be brought before a judicial authority within 24 hours, (Article 24 (3)), will not apply to anyone under preventive detention. This exclusion does not comply with international law or good practice. It is an essential safeguard against serious human rights violations, including enforced disappearances, extrajudicial execution and torture, to ensure that anyone detained, whether under preventive detention or as a criminal suspect or as a convicted person, has swift access to the outside world, especially a lawyer and a judge. Given recent history in Nepal, this should be a fundamental right incorporated in any constitution, including one with a temporary status. The UN Body of Principles requires that *all* detained persons, regardless of the reason why they are arrested and detained, must be brought “promptly” before a judicial authority (Principle 11 (1)) and be able to access to a lawyer “without delay” (Principles 17 and 18).

**Recommendation 6: The ICJ recommends the deletion of the second paragraph of Article 24 (3).**

Thirdly, in light of patterns of arbitrary arrest and detention in Nepal in recent years, it would be an important statement of fundamental rights of everyone in the country if the Interim Constitution expressly reaffirmed this right, which is also set out in Article 9 (1) of the ICCPR.

**Recommendation 7: The ICJ recommends that the Interim Constitution be amended to provide expressly that everyone has the right to liberty and security of the person, no one shall be subjected to arbitrary arrest or detention and that no one shall be deprived of their liberty except on such grounds and in accordance with procedures established by law.**

## **Fundamental rights**

Nepal has ratified a significant number of international human rights treaties.<sup>1</sup> Nepal incorporated a number of treaty provisions in the former 1990 Constitution and now in the Interim Constitution. However, the ICJ has three primary concerns.

Part 3 of the Interim Constitution, on “Fundamental Rights”, does contain many, but not the full range, of fundamental rights set out in the international human rights treaties that Nepal has ratified. The Constituent Assembly will need to address for the long term, which rights are best included in the constitution and which rights should be given effect through other, lesser forms of legislation. Nevertheless, the ICJ considers the Legislature-Parliament itself should ensure that the Interim Constitution does include some of the rights that are missing, as they will be important, not only as a foundation for the Constituent Assembly’s deliberations, but also because they will be critical during the coming transition period.

**Recommendation 8: The ICJ recommends that the Interim Constitution includes express guarantees that every person shall enjoy the following rights, derived from Nepal’s international human rights obligations: the right to life, the right to liberty and security of the person (see also recommendations 3 and 7) as well as several economic, social and cultural rights: the right to food and the right to adequate housing.**

Secondly, the enjoyment of several of the fundamental rights in Part 3 is limited to “citizens”, including freedom of expression, assembly, association in Article 12 (3), the right to equality (Article 13), the right to property (Article 19) and the right to information (Article 27). Under international human rights law, only a few rights can be expressly limited to “citizens”, particularly the right to vote and participate in government (Article 25, ICCPR). But it is a grave denial of rights to say that non-citizens could be discriminated against because of their race or language or tribe, or that only citizens can enjoy the right to freedom of expression. Without expressly limiting fundamental rights to “citizens”, international law and standards already permit certain extra limitations to be placed on non-citizens, or “aliens”. Aliens can be denied entry to a country or expelled from the country under certain circumstances (Article 13, ICCPR). Only those living lawfully in a country have the right of freedom of movement and residence in that country (Article 12, ICCPR).

**Recommendation 9: The fundamental rights guaranteed in Part 3 of the Interim Constitution should apply to everyone within the territory, and under the jurisdiction, of Nepal, except that the right to freedom of movement and residence in Nepal may apply to those lawfully in the country.**

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<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

Thirdly, the Constituent Assembly will need to consider how to express in the Constitution that Nepal's binding international human rights obligations resulting from its ratification of international human rights treaties have primacy over any national laws that are inconsistent with these obligations, as is already stated in the 1990 Treaty Act. In relation to Nepal, the United Nations Human Rights Committee has previously commented that Nepal should "clearly define the place of [the ICCPR] within the Nepalese legal system to ensure that national laws are applied in conformity".<sup>2</sup> Further, modern constitutions in other parts of the world also reiterate that international treaties have primacy over national laws, in order to prevent restrictive prescriptions in national laws undermining international legal obligations.

The ICJ considers that it would considerably assist in creating a free and democratic environment and avoid potentially dangerous ambiguities, if the Interim Constitution made it clear that Nepal's international human rights treaty obligations are the guide in the application and interpretation of the Interim Constitution.

**Recommendation 10: The ICJ recommends that the Interim Constitution includes a provision that the Interim Constitution will be applied and interpreted in a manner that is consistent with Nepal's international human rights obligations and that any laws that are inconsistent with these obligations will be void.**

### **Emergency powers**

Part 19, dealing with emergency powers, contains welcome improvements on the 1990 Constitution, including an important list in Article 143 (7) of fundamental rights that can never be suspended, even during a state of emergency. Emergency powers were abused during the conflict and in this transitional period it will be especially important to engender public confidence that such abuses will not be repeated. Bearing this in mind, the ICJ has two primary concerns that we suggest should be considered for amendment in the Interim Constitution.

First, the circumstances in which the Government may trigger a state of emergency (Article 143 (1)) are too vague and broad, and are not consistent with Article 4 (1), ICCPR, which requires that a state of emergency can only be declared if there is "a public emergency which threatens the life of the nation", a phrase that has been well interpreted and explained. Not every disturbance or catastrophe, or even "grave crisis in regard to the sovereignty or integrity of Nepal or the security of any part thereof", would threaten the life of the nation, nor every "extreme economic disarray". Such unclear language could create dangerous ambiguities and the potential for abuse.

**Recommendation 11: The ICJ would recommend amending Article 143 (1) to require that a state of emergency can only be declared at a time of public emergency which threatens the life of the nation.**

Secondly, Article 143 (7) provides that the Government may, during a state of emergency, suspend certain (but not all) fundamental rights. An essential safeguard against abuse of emergency powers, recognised by Article 4 (1), ICCPR, is that each and every exceptional measure taken during a state of emergency that restricts or suspends rights, must be: strictly required by the exigencies of the

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<sup>2</sup> Concluding observations of the UN Human Rights Committee: Nepal, UN Doc. CCPR/C/79/Add.42, 1 November 1994, para. 6.

situation, proportionate to the threat being addressed, only kept in place as long as it is necessary to deal with the emergency threats, does not discriminate against people on prohibited grounds and is not inconsistent with the state's other international obligations. Such guidance on the power to suspend rights is important enough to be placed in the Constitution.

**Recommendation 12: The ICJ recommends that Article 143 be amended to provide that during a state of emergency, each and every decision under Article 143 (7) to suspend a fundamental right must be strictly required by the emergency threat being addressed, be proportionate to that threat, be in place only as long as is necessary to deal with that threat, does not discriminate against anyone on the grounds that are prohibited in Article 13 of the Interim Constitution, and must not violate Nepal's other international obligations.**

### **Independence of the judiciary and appointments to constitutional bodies.**

Article 33 (c) provides that the State shall have the responsibility to adopt a political system that provides for, among other things, the "independence of the judiciary", but article 36 (1) makes this responsibility unenforceable in law. The Interim Constitution does not contain any express guarantee of the independence of the judiciary. It is not included in Part 10 on the judiciary. Article 24 (9) guarantees the right of everyone to a fair trial "by a competent court or judicial authority" but not by an independent court or judicial authority. Ensuring and protecting the independence of the judiciary is at the heart of the rule of law, the administration of justice, including fair trial rights, and is an essential part the institutions necessary to implement human rights guarantees and provide effective remedies. Principle 1 of the United Nations Basic Principles on the Independence of the Judiciary states that the independence of the judiciary should be enshrined in a nation's constitution. The independence of the judiciary could well become critical in Nepal as a check and balance and oversight mechanism in the months ahead.

**Recommendation 13: The ICJ recommends that the Interim Constitution be amended to state clearly that the judiciary in Nepal shall be independent and that it is the duty of all governmental and other institutions to respect and observe that independence. The Interim Constitution should also guarantee the right of everyone to be tried, not only by a competent court or judicial authority, but by an independent court or judicial authority.**

In a public statement of 24 January 2007, the ICJ already expressed concerns about whether the Constitutional Council under the Interim Constitution will be sufficiently independent from the Government to ensure that the important appointments it recommends to the Prime Minister - that of Chief Justice, the Auditor General, members of the National Human Rights Commission, the Public Service Commission and the Commission for the Investigation of Abuse of Authority - will result in truly independent people in these positions. All these bodies are central to the system of checks and balances in this transition period in Nepal. Four out of six members of the Constitutional Council are from the Government (the Prime Minister and three ministers designated by the Prime Minister). A fifth member, the Chief Justice, is himself or herself appointed by the Prime Minister on the recommendation of the Constitutional Council with the addition of the Minister of Justice. Only the Speaker of the Legislature-Parliament, as the sixth member of the Constitutional Council, is clearly independent of the executive. Furthermore, if the Chief Justice is not indisputably independent or perceived as such, that will in turn negatively affect the independence or perception of independence of the Judicial Council, as the Chief Justice plays a key role by appointing one other member and acting as its Chair. The ICJ can therefore only underscore the importance of the Constitutional Council recommending people that have

unquestionable independence, integrity and expertise. The ICJ considers that the Constituent Assembly will have to return to the question of the method of appointing members of independent state institutions.

These are the ICJ's preliminary views. They are not intended to represent an exhaustive list of concerns and the ICJ would wish to offer further more detailed submissions in the future, as a contribution to this important and historic process.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Nicholas Howen". The signature is written in a cursive style with a long horizontal stroke at the end.

Nicholas Howen  
Secretary-General

cc: Surya Kiran Gurung, Secretary-General, Legislature-Parliament