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17 July 2015

Right Honourable Subash Chandra Nembang,
Constituent Assembly,
Singha Durbar,
Kathmandu.

Re: Comments on the Draft Constitution of Nepal

Honourable Chairperson,

The International Commission of Jurists recognizes that the endorsement of a Draft Constitution on 7 July 2015 and the opening of a public consultation on this draft represent a unique and crucial moment in Nepal's constitutional history.

The ICJ continues to support the ongoing effort to develop a new Constitution that creates a strong foundation for addressing the root causes of the civil war, ensures the rule of law and human dignity, and sets in place a framework that enables the respect, protection and fulfillment of all civil, political, economic, social and cultural rights in accordance with Nepal's international commitments.

To these ends, the ICJ has produced a briefing paper, a copy of which is attached, that sets out recommendations for the Constituent Assembly, based on an analysis of the constitutional-making process and provisions of the Draft Constitution in the light of international human rights standards.

Ensuring that all segments of the population of Nepal have the means and opportunity to meaningfully participate in the constitution-making process is essential to the legitimacy and sustainability of the Constitution. This is also crucial to give effect to Nepal's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to participate in public affairs. The Constituent Assembly should therefore make the necessary provision in its rules, procedures and time-lines to ensure respect for this right and enable effective public consultation on the Draft Constitution.

In this regard, the ICJ urges the Constituent Assembly to extend the current consultation period, so as to provide enough time for people to meaningfully engage and participate in the consultation on the provisions of Draft Constitution. Furthermore to ensure a genuine consultation process the Constituent Assembly should provide ample time to those charged with reporting on the results of the consultation, and set out a

process that enables the Constituent Assembly to reflect and take action on recommendations received.

The ICJ's concerns and recommendations, based on its analysis of provisions in the chapters on citizenship, fundamental rights, judicial independence and emergency powers in the Draft Constitution, in the light of Nepal's obligations under international human rights law, 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 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.

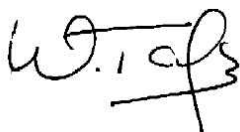
Constitutional Court: The ICJ recommends reconsideration of Article 141 of the Draft Constitution that proposes the creation of a new Constitutional Court, for a period of 10 years, with limited jurisdiction, including resolving disputes regarding jurisdiction between the Provinces, and between different 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.

I have enclosed the briefing that sets out the more detailed analysis and recommendations on the issues addressed in this letter.

We hope the analysis and recommendations are useful to the work of the Constituent Assembly in ensuring a more inclusive, genuine participatory consultation and transparent constitution-making process that results in the revision of the draft text and adoption of a Constitution of Nepal that enhances human rights protection more fully and consistently with international human rights standards.

We remain available to provide any clarification that might be useful.
Respectfully,



Wilder Tayler
Secretary General
International Commission of Jurists