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**ПООЩРЕНИЕ И ЗАЩИТА ВСЕХ ПРАВ ЧЕЛОВЕКА, ГРАЖДАНСКИХ,  
ПОЛИТИЧЕСКИХ, ЭКОНОМИЧЕСКИХ, СОЦИАЛЬНЫХ  
И КУЛЬТУРНЫХ ПРАВ, ВКЛЮЧАЯ ПРАВО НА РАЗВИТИЕ**

**Доклад Специального докладчика по вопросу о положении в области прав  
человека и основных свобод коренных народов С. Джеймса Анайи**

**Дополнение**

**ДОКЛАД О ПОЛОЖЕНИИ КОРЕННЫХ НАРОДОВ В НЕПАЛЕ\* \*\***

\* Представлено с опозданием.

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## Резюме

Настоящий доклад составлен по результатам визита в Непал Специального докладчика по вопросу о положении в области прав человека и основных свобод коренных народов Непала, обобщенно именуемых адиваси джанаджати. В докладе рассматривается положение в области прав человека этих народов, и в этом контексте анализируется текущий процесс конституционного строительства и политический переходный период, а также производится оценка выполнения провозглашенного Непалом обязательства обеспечивать их права. Специальный докладчик с удовлетворением отмечает, что приверженность правительства поощрению прав адиваси джанаджати нашла свое выражение в форме ратификации Конвенции о коренных народах и народах, ведущих племенной образ жизни, 1989 года (№ 169) Международной организации труда, и поддержки правительством Декларации Организации Объединенных Наций о правах коренных народов. В то же время он отмечает ряд существующих проблем в области прав человека, связанных с традиционной дискриминацией в отношении адиваси джанаджати. Принимая во внимание трудности, присущие периоду перехода Непала к демократии, Специальный докладчик предлагает ряд рекомендаций, которые могут способствовать признанию и защите прав коренных народов в соответствии с обязательствами правительства.

**Annex**

**REPORT BY THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE, JAMES ANAYA, ON THE SITUATION OF INDIGENOUS PEOPLES IN NEPAL**

**CONTENTS**

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION .....	1 - 5	4
II. BACKGROUND .....	6 - 10	5
III. THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES	11 - 47	6
A. The indigenous peoples of Nepal .....	11 - 16	6
B. Domestic legal policy and institutional framework .....	17 - 23	7
C. Nepal's recent commitment to international standards .....	24 - 25	8
D. Ongoing human rights challenges .....	26 - 47	9
IV. PROMOTION AND PROTECTION OF INDIGENOUS PEOPLES' RIGHTS WITHIN A DEVELOPING CONSTITUTIONAL ORDER .....	48 - 76	14
A. Implementation of Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples .....	48 - 51	14
B. The constitution-making process and indigenous participation .....	52 - 58	15
C. Proposals for a federal State and indigenous self-determination	59 - 74	16
D. The role of international actors .....	75 - 76	21
V. CONCLUSIONS AND RECOMMENDATIONS .....	77 - 100	21

## I. INTRODUCTION

1. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, visited Nepal from 24 November to 2 December 2008 following an invitation from the Government of Nepal and with the encouragement of indigenous peoples' organizations of the country. Prior to, during, and subsequent to the visit the Special Rapporteur engaged in an exchange of information with the Government, indigenous peoples and others, as well as in independent research, with the purpose of examining the human rights situation of indigenous peoples in the light of international standards, and to assist the Government of Nepal, indigenous communities, the United Nations and other actors in ongoing efforts to implement these standards.

2. In Kathmandu, the Special Rapporteur held meetings with the Ministry of Foreign Affairs; the Ministry of Local Development; the Ministry for Law, Justice and Constituent Assembly Affairs; the Ministry of Forest and Soil Conservation; the Ministry of Water; the Ministry of Culture and State Restructuring; the Ministry of Health and Population; and the Ministry of Education. In addition, the Special Rapporteur consulted with the National Foundation for Development of Indigenous Nationalities (NFDIN), the National Human Rights Commission (NHRC) and members of the Constituent Assembly, and received pertinent information from the Ministry of Land Reform and Management. He also held consultations with members of the United Nations Country Team (UNCT) and Bretton Woods institutions, as well as with the United Nations Mission in Nepal (UNMIN).

3. The Special Rapporteur met with representatives of the main indigenous organizations of the country at the national level, including the Nepal Federation of Indigenous Nationalities (NEFIN), the non-governmental organization Federation of Nepalese Indigenous Nationalities (NGO FONIN), the Lawyers Association for Human Rights of Nepal's Indigenous Peoples (LAHURNIP), the National Indigenous Women Federation (NIWF), as well as with civil society organizations such as the National Coalition Against Racial Discrimination (NCARD). The Special Rapporteur participated in the "Forum meeting for representatives and members of indigenous communities", jointly organized by NFDIN, NEFIN, NIWF and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal; and also took part in the "Consultation meeting of indigenous women of Nepal" organized by the National Network of Indigenous Women (NNIW) with the support of the Canadian Cooperation Office in Nepal and the United Nations Development Fund for Women (UNIFEM).

4. The Special Rapporteur conducted field trips to the districts of Ilam, Jhapa, Chitwan and Kailali, where he consulted with indigenous communities, local authorities and regional representatives of organizations he had met with in Kathmandu.

5. The Special Rapporteur wishes to acknowledge the support of the Government of Nepal, indigenous peoples' organizations, international agencies and others for their cooperation and assistance in preparing for and undertaking the visit. He would especially like to thank the Office of the High Commissioner for Human Rights in Nepal, including the offices in Kathmandu and

other regions of the country, for their instrumental help in all phases of the visit, and Luis Rodriguez-Piñero and the University of Arizona Indigenous Peoples Law and Policy Program for its support in the preparation of this report.

## II. BACKGROUND

6. Nepal is currently undergoing a historical process of change in the definition of its political, legal and social make-up. The ongoing transition towards democracy, best represented in the constitution-making process, is an opportunity to improve the status and conditions of the social sectors that have been historically marginalized from political decisions and deprived of the full benefits of citizenship. The numerous culturally distinct groups that are regarded or regard themselves as Adivasi Janajati (indigenous peoples) are among these groups, and they have become a powerful voice in demanding recognition and respect for their human rights.

7. The modern State of Nepal resulted from the consolidation of political power in the late eighteenth to early nineteenth centuries by Gorkha royalty over numerous ethnically and culturally differentiated groups, including the Adivasi Janajati whose ancestors were among the earliest inhabitants of the territory and who had lived under their own political orders. The unification of these diverse groups into a single State was achieved at the expense of political and cultural plurality, and with the cementing of a feudal and social hierarchy that was overtly exclusionary of the Adivasi Janajati. The 1962 Constitution, promulgated during the Panchayat regime, declared Nepal as a Hindu State, thereby perpetuating the religious, linguistic and cultural homogenization of the country's identity.

8. The introduction of a multiparty parliamentary system by the ruling monarch, King Birenda, in 1990 did not alter the historical dynamics of discrimination and marginalization, which were targets of the armed conflict that began with the Maoist insurgency in 1996. The conflict was accompanied by systemic human rights violations, including extrajudicial killings, internal displacement, rape and torture, in which indigenous peoples and other communities paid a heavy toll.

9. In April 2006, a Seven Party Alliance, supported by the Communist Party of Nepal-Maoists (CPN-M), headed a 19-day-long mobilization that ousted the monarchy and reinstated the Parliament. In November 2006, a Comprehensive Peace Agreement was signed between the Government and CPN-M, which included the commitment to develop a new constitution. In November 2007, the Parliament passed an Interim Constitution, which established a Constituent Assembly, responsible primarily for drafting a new constitution. Elections to the Constituent Assembly eventually took place in April 2008.

10. The process of constitution-making marks the transition towards democracy in Nepal as well as the reformulation of the country's identity along lines that are more representative of the country's plurality. This process, unprecedented in the country's history, is one of both opportunities and challenges as policymakers, civil society actors and community leaders confront challenges in the State's policies and societal structures that are strongly rooted in the

past. Indigenous peoples are striving to be full participants in this process, and to achieve self-determination and protection of related collective and individual rights within the framework of a pluralistic Nepali State.

### III. THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES

#### A. The indigenous peoples of Nepal

11. It is difficult to divide the population of Nepal into indigenous versus non-indigenous sectors if the term “indigenous” is taken in a general sense and without regard to certain contextual factors. The country’s population overall is the product of a long and complex history of original settlement and migration both into and within the territory of present-day Nepal, and of social and political processes that are strongly rooted in that territory and date back centuries. Nepal was never colonized by a foreign Power, and it could be said that all or almost all of the Nepali population are indigenous, having an identity that is inextricably wedded to the country’s geography.

12. However, in Nepal the particular groups that collectively are called Adivasi Janajati are identified in English both by the Government and by these groups themselves in their relations with national and international actors as “indigenous peoples” or “nationalities” distinct from the rest of the country’s population. The Sanskrit term *Adivasi* means the earliest or first settlers and *Janajati* means population groups that are outside the Hindu *varna*, or caste, system. Thus, Adivasi Janajati is a widely accepted categorization within the mapping of the country’s complex mosaic of ethnic identity, used to identify those culturally distinct groups whose ancestors inhabited parts of present-day Nepal before the arrival of the Hindus centuries ago, and that have been excluded from the dominant social and religious hierarchy.

13. In the view of the Special Rapporteur, the Adivasi Janajati groups are aptly considered indigenous peoples within the scope of his mandate, given not just their self-identification as such, but also the history of subjugation they have suffered within a pattern of encroachment by others and the set of human rights problems they commonly face that are related to their distinct group identities. These problems, with their historical origins, are similar to those of peoples throughout the world that are identified as indigenous and that are the subjects of special international concern. Adivasi Janajati are indigenous peoples in a *sui generis* sense, with a status apart from that of the rest of Nepali society. This does not mean that they enjoy human rights that are in a fundamental sense unique to them and not enjoyed by other Nepalis, but rather that they share a common set of human rights issues that deserve special attention and that are addressed under the international rubric of indigenous peoples.

14. According to the National Foundation for Development of Indigenous Nationalities Act of 2002, Adivasi Janajati, that is, indigenous peoples or nationalities, are defined as those ethnic groups or communities that “have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own”. The Government of Nepal officially lists 59 groups as Adivasi Janajati. According to the 2001 Government census, indigenous people constitute 37.19 per cent of the total population,

distributed throughout the mountains, hills and lowlands (Terai) regions, but alternative sources put the figure higher and criticize the quality of census data.<sup>1</sup> Among the indigenous peoples, the Magar, Tharu, Tamang, Newar, Rai, Gurung and Limbu are the largest groups.

15. The official list of indigenous peoples is contested, and the United Nations Committee on Economic, Social and Cultural Rights expressed concern in 2008 about the “lack of clarification about the criteria used by” NFDIN, the Government indigenous development agency, to recognize indigenous peoples and the implications of this recognition (E/C.12/NPL/CO/2, para. 28). The Special Rapporteur found indications that there are several groups that share in the history, characteristics and common human rights problems of the Adivasi Janajati and indigenous peoples elsewhere, but that are not on the official list. These include, for example, the Kulung, Bahing and Yamphu, which are among the most marginalized in the country. In a welcome development, a “List Renewal Task Force” composed of nine indigenous representatives is currently being established by the Government for the purpose of re-examining the official list with the participation of the main indigenous organizations.

16. Adivasi Janajati differ from the other, mainly Hindu- and Nepali-speaking, parts of society in various ways, including in their social structures, languages (approximately 103), distinct cultural and religious traditions, and ways of life. At varying levels, most indigenous peoples in the country have faced situations of social and political marginalization, lack of cultural recognition and economic disadvantage, which the current Government is working to amend, as discussed below. Of particular concern are groups classified as endangered by Government indicators.

## **B. Domestic legal policy and institutional framework**

17. The 1990 Constitution of Nepal included a number of provisions affirming that Nepal is a “multiethnic, multilingual, democratic” State. While that Constitution did not recognize the rights of indigenous peoples as such, it paved the way for a number of policy initiatives that enabled some limited recognition of indigenous peoples and their rights.

18. Specific policy initiatives for the advancement of indigenous peoples and other disadvantaged groups started in 1997 with the ninth and tenth national development plans. Addressing the shortcomings of earlier plans, the current plan now includes the objective of promoting the economic and cultural development of indigenous peoples by increasing their access to administrative, social and economic resources.

19. The National Foundation for Development of Indigenous Nationalities Act 2002 established the first comprehensive policy and institutional framework regarding indigenous peoples. The Act created the National Foundation for Development of Indigenous Nationalities as a successor to the National Committee for the Development of Nationalities of Nepal. NFDIN is a semi-autonomous body that acts as the State’s focal point for indigenous policy, with a mandate to make recommendations to the Government on measures to promote the development of indigenous groups in the social, economic and cultural areas. It has the Prime Minister as its

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<sup>1</sup> See Pitamber Sharma, *Unraveling the Mosaic: Spatial Aspects of Ethnicity in Nepal*, Himal Books, 2008, pp. 8-9.

chair, the Minister of Local Development as its co-chair, and a vice-chairperson that functions as its chief executive and who is selected from among names provided by the Nepal Federation of Indigenous Nationalities, the main national collation of indigenous organizations. Also, NFDIN has a Governing Council and an Executive Committee, both composed mostly of indigenous members. Functionally, the Ministry of Local Development oversees the activities of NFDIN, and the development and execution of Government policy on matters of indigenous peoples more generally.

20. The current Interim Constitution of 2007 recognizes the diversity of Nepal (art. 3), and defines the country as a secular, inclusive and democratic State (art. 4). The Interim Constitution further recognizes the status of all mother languages as national languages, enabling their use in the governmental sector (art. 5). Each community has the right to preserve and promote its language and cultural heritage, as well as to receive basic education in its mother tongue (art. 17). In addition, the document explicitly recognizes the rights of indigenous peoples to “participate in State structures on the basis of principles of proportional inclusion” (art. 21), and, further, authorizes the State to implement special measures “for the protection, empowerment and advancement of indigenous nationalities” (art. 13).

21. Together with the various provisions of the Interim Constitution and the 2002 NFDIN Act, other pieces of recent legislation address specifically the situation of and call for specific measures in relation to the Adivasi Janajati and other marginalized groups. These include the Local Self-Government Act (1999); the Three Year Interim Plan (2007); the 2007 amendments to the Nepal Civil Service Laws, Military Act and Police Regulation; and the Ordinance on Inclusion in Public Service (2009).

22. Notwithstanding these path-breaking legal developments, Government officials consulted by the Special Rapporteur, acknowledged the need to promote a wider revision of existing legislation in order to accommodate it to the evolving constitutional make-up and Nepal’s international commitments regarding the rights of indigenous peoples, particularly as regards sectorial legislation. The Special Rapporteur further found that, with few exceptions apart from the Ministry of Local Development, Government ministries, while currently considering programmes and policies to uplift Adivasi Janajati, there have not yet been significant advances in the way of development and implementation of adequately funded programming and concrete plans of action on the indigenous issues that are relevant to them.

23. The National Human Rights Commission, which is constituted as autonomous from the Government, has recently started to incorporate attention to the rights of indigenous peoples within the framework of its 2008-2010 Strategic Plan, which includes a strategic area of work on “minorities”. In addition, NHRC has issued recommendations in a number of specific cases and on measures for legal reform concerning indigenous peoples.

### **C. Nepal’s recent commitment to international standards**

24. Responding to demands by indigenous organizations, Nepal ratified International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (“Convention 169”) on 14 September 2007, and the Convention entered into force for Nepal one year later. The ratification of Convention 169 forms part of Nepal’s wider commitment to human rights, as reflected in the ratification of other international human rights treaties. The Convention’s ratification is particularly significant as Nepal is the first Asian



country to ratify this instrument, signifying its potential leadership in the recognition of indigenous peoples' rights in the region.

25. Also as a reflection of its commitment to international standards concerning indigenous peoples, Nepal voted in favour of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples on 13 September 2007. With Nepal's ratification of Convention 169 and its support for the United Nations Declaration, movement is in place towards legislative and programmatic reforms that will establish or enhance legal protections for indigenous peoples and mainstream those protections in the various relevant Government programmes, in line with the standards expressed in these instruments.

#### **D. Ongoing human rights challenges**

26. The Government of Nepal is to be commended for its commitment to international human rights standards, including those that specifically concern the rights of indigenous peoples, and for the initiatives it already has undertaken to move towards compliance with these standards. Despite significant improvements, Adivasi Janajati continue to confront discriminatory social and political arrangements that originated in the past, and whose current manifestations impede their effective control over their lives and undermine their cultural identities. Having suffered gradual loss of traditional lands and access to life-sustaining natural resources, across the country, they rank low in all human development indicators. Most Adivasi Janajati communities live in conditions of poverty that, on the whole, are double or more the national poverty level, not only in remote and rural regions but also in cities. Adequate health care among indigenous communities is lacking, with indigenous women and children being especially vulnerable, as are opportunities for education.

##### **1. Political participation and self-governance**

27. All actors consulted by the Special Rapporteur during his visit concurred that a major barrier that indigenous peoples confront in the enjoyment of their human rights is their historical exclusion from participation in decision-making processes at all levels of Government. Historically marginalized from the political mainstream, indigenous peoples have been inadequately represented at the local Government level. The preamble to the Local Self-Governance Act, 2055 (1999) acknowledges the historical exclusion of indigenous communities and the need to incorporate them into the development process. The Act provides for the representation of at least one indigenous representative at the village, town and district councils. But in practice Adivasi Janajati have continued to be ill-represented in the local governing bodies, particularly in the geographic areas in which they are demographic minorities, and they have lacked decision-making powers over district and village development programmes affecting them. In the context of Nepal's ongoing transition, the Government of Nepal reports efforts to remedy this under-representation, and it is endeavouring to include representatives of NFDIN in the formulation and implementation of development plans and allocation of resources at the local level.

28. Noteworthy efforts have been made to increase representation of Adivasi Janajatis and other under-represented groups in public service sectors. In 2007, the Civil Service Act was amended to include a quota (reservation) system that provides that out of the 45 per cent of new recruitments reserved for various under-represented groups, 27 per cent are allocated to "ethnic groups". Similar amendments were also made in 2007 to the Police Regulation and to the Armed

Police Regulation, in order to make the police force more inclusive. The Ordinance on Inclusion in Public Service likewise demonstrates attention to the problem of under-representation by providing for a quota system that benefits indigenous peoples, but it has been criticized for not adequately differentiating among groups.

29. Some indigenous communities, such as the Mustang in the mountain region, still preserve their traditional courts and social institutions, which are de facto respected by Government officials. The Yolmo also have a prevailing system of traditional authority, organized around the lama monasteries. However, within Nepal's unitary system of law, there is no formal recognition of the traditional legal and political systems practised by those communities.

## **2. Land and natural resources**

30. As a result of a number of legal and institutional dynamics, indigenous communities around the country have been historically deprived of the lands and territories they have traditionally occupied or used, often without compensation. A major turning point in this process was the 1964 Land Reform Act, which nationalized land and terminated traditional collective land tenure systems such as the *kipat*. The Act paved the way for the allotment and distribution of indigenous ancestral lands and, consequently, to the loss of Adivasi Janajati's traditional land base. These dynamics were particularly dramatic in the southern plains, where lands traditionally controlled by indigenous communities were lost to migrants from the hill districts in the 1950s and 1960s.

31. Without protection for communal lands, individual land holdings gradually were lost due to the absence of or insecure titles, abuse and corruption, lack of access to the justice system, and indebtedness. The high degree of illiteracy among many indigenous groups, in particular the Tharus in the Terai, made them vulnerable to abusive practices and deceit related to land titles. Forced displacement was also a cause of land loss during the armed conflict. While article 35 (4) of the Interim Constitution protects the land tenure of "local communities", no specific legal mechanism was previously in place to afford special protection to indigenous lands, including their cultural and spiritual relationships with them. The Government has recently formed a high-level Land Reform Commission, following a four-point agreement with the National Land Rights Forum, which represents landless people. There is one indigenous representative on the Commission. Currently the terms of reference for the Commission lack a mandate to address specificities related to lands currently or previously inhabited by indigenous peoples.

32. Lack of access to natural resources exacts a particularly heavy toll on those indigenous communities that rely on traditional hunting and gathering practices for subsistence. Pursuant to the 1993 Forest Act, indigenous peoples were displaced from their traditional forests, which were transferred primarily to non-indigenous community forest user groups. Communities that have traditionally relied on the forests but that were not in possession of titles, or lacked resources to compete with private contractors, have lost access to their traditional forest lands. Fishing in rivers and lakes, as well as access to water resources, are subject to a similar system of concessions, leaving communities that in many instances had access to these resources for their

subsistence economies in a vulnerable position. Many Raji people, for instance, are deprived of their access to herbal medicine, honey-gathering and fishing. The Chepangs, who are traditionally hunter-gatherers and practise a nomadic way of life in the forests, are now under threat of eviction from their traditional lands.

33. Similarly, the Pasture Land Nationalization Act 1975/2031 Bikram Sambat<sup>2</sup> nationalized traditional indigenous pasturelands, some of which were granted to commercial plantations, depriving many communities of their traditional livelihoods. This is the case of the Sherpas, whose traditional yak-raising has been endangered by the gradual loss of their traditional pasture lands. This situation has pushed them into cross-border grazing in Tibet, a practice which is in turn hindered by border policies.

34. Protected areas, including national parks, now constitute approximately 20 per cent of the total landmass in Nepal. Often these areas were created at the expense of indigenous lands. In the Himalayas, most of the land areas of the six existing national parks cover Adivasi Janajati traditional lands. The National Parks and Wildlife Conservation Act provides no recognition of indigenous peoples' right to consultation or to access their traditional lands and resources, while giving quasi-judicial powers to the park chief wardens.

35. A case in point is the Royal Chitwan National Park, the subject of a communication sent by the previous mandate holder in 2007 (see A/HRC/9/9/Add.1, paras. 326-338). The park was established in 1971 in areas traditionally used and inhabited by the Tharu, Majhi, Bote, Darai and other communities who were displaced to the park's buffer zone. Even though these communities now enjoy limited access to fishing and other traditional occupations, per some preferential arrangements made by the local authorities, many individuals displaced from the park area still remain landless and have not been provided alternative livelihoods or compensation. The Special Rapporteur heard from members of various communities who were prevented from gathering food, medicinal herbs and firewood from the park area, which severely limits their livelihoods based on subsistence economies.

36. Government officials and the concerned communities interviewed by the Special Rapporteur share the view that existing benefit-sharing mechanisms are ineffective, and that they do not lead to increased community development. A major obstacle in this regard seems to be the composition of the Chitwan Buffer Zone and District Development Committees, in which indigenous peoples are insufficiently represented.

37. Of particular concern are the reports received by the Special Rapporteur of mistreatment, arbitrary detention and sexual abuse of indigenous villagers, in particular indigenous women, by Chitwan National Park rangers and military officials designated to patrol the park's premises. Lack of due process is further reported with regard to offences dealt with by the Chief Warden, upon whom the National Park and Wildlife Conservation Act vests all law enforcement powers. Although the Government denies such reports, the Special Rapporteur finds that they are sufficiently credible to warrant further investigation.

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<sup>2</sup> Bikram Sambat is the Nepali solar calendar.

38. The Special Rapporteur repeatedly heard complaints that mechanisms in place to compensate or consult indigenous communities, with a view towards obtaining their consent in relation to the exploitation of lands and natural resources in their traditional territories, are inadequate or non-existent. The case of the Melamchi Water Supply Project, financed by the Asian Development Bank, provides an example in this regard. The project was initiated in 2001 with the objective of alleviating the shortage of drinking water in the Kathmandu Valley, and involves the displacement of Tamang and other indigenous communities. It is alleged that existing plans inadequately address compensation for relocation and restoration of affected villages, and for loss of traditional ways of life. In addition, compensation schemes are limited to those owners who have a formal title over their lands, leaving many families with no alternative sources of income for their subsistence. The Government views the Melamchi project differently, however, portraying it as beneficial to the indigenous peoples affected, and maintaining that consultation with local people is now an integral component of its development process.

39. As a consequence of land loss and other systemic patterns of marginalization, indigenous people became in some instances landless, bonded workers in private farms and wealthier households under the Kamaiya, Kamalari and other systems. The Kamaiya system of bonded labour was formally abolished in 2002, and, according to Government sources, there are over 30,000 free former Kamaiyas, more than half of whom are considered by the Government to be “rehabilitated”. Almost all of them are Tharus in the western Terai. In order to rehabilitate former Kamaiyas, the Government of Nepal has created a package of subsidies to be given to each family.

40. However, these compensation schemes have not fully worked in practice. Local communities claim that their current allotments of land and resources are insufficient for sustainable farming. Some former Kamaiyas still lack identification cards and land allotments, leading them to encroach onto neighbouring forests or establish unauthorized settlements in urban areas, with constant threats of eviction. The desperate situation of many former Kamaiyas contributes to perpetuating the sending of children to work as domestic workers in wealthier homes through the Kamalari system of perpetual servitude, which, although outlawed in 2006, is still practised.

41. Land-loss and forced displacement over time has resulted in the dissolution of communities, the break-up of families, and the attendant lack of registration of many members of Adivasi Janajati communities, making access to simple services such as health and education a challenge, if not an impossibility. The Special Rapporteur received both statistical information and personal accounts of indigenous people lacking citizenship certificates, and the Government of Nepal has made notable efforts to remedy this situation. But according to the Office of the United Nations High Commissioner for Refugees (UNHCR) in Nepal, an estimated 800,000 individuals still lack citizenship registration and are therefore considered de facto stateless.

### **3. Culture, language and religion**

42. The historical construction of a homogeneous Nepali State formed according to the language, religion, and cultural identity of the dominant groups has deprived indigenous peoples of the opportunity to fully exercise their cultural rights, resulting in the gradual loss of their distinct languages and cultural and spiritual traditions.

43. The previous imposition of a dominant State religion, Hinduism, has had discriminatory effects on indigenous peoples, whose cultural and religious traditions often have been marginalized or altogether suppressed. Even though Nepal was declared a secular State in 2006 and indigenous peoples are now granted linguistic and cultural rights in the Interim Constitution, the effects of the earlier system continue today. For instance, most official festivities align with the Hindu calendar, and a number of discriminatory regulations still persist such as the prohibition of cow-slaughtering, which leads to the prosecution of many indigenous individuals who have traditionally relied on cows for their subsistence or religious practices.

44. Until the adoption of the Interim Constitution, Nepali was the single language of governmental affairs, business and education. Despite the current constitutional protection, linguistic diversity is threatened, with various mother tongues of indigenous peoples endangered or on the verge of extinction. Although the Ministry of Education is now promoting the objective of multilingual education through various plans, many community members interviewed by the Special Rapporteur expressed concern that education in their mother tongues was not available for their children. In order to meet the Millennium Development Goals, Nepal has proclaimed free education at the primary level (grades I to V). Efforts to fulfil this objective are in place, but investment levels need to be sufficient to reach the most marginalized communities, including investment in scholarships, training of teachers speaking indigenous languages, and textbooks in indigenous languages.

#### **4. Indigenous women**

45. Positioned in a situation of double discrimination, indigenous women face particularly high levels of vulnerability and exclusion from representation in decision-making processes. In general, accurate data about indigenous women are scarce because their rate of inclusion in data collection is low and the data that exist are not disaggregated to reflect the particular situations of indigenous women. The data that are available show low levels of employment, with indigenous women normally occupying unskilled jobs in the informal sectors. They are often illiterate, which generally excludes them from most civil servant or formalized private sector positions. Indigenous women are particularly under-represented in decision-making structures, not only at the national level, but also at the local levels and within indigenous peoples' own traditional systems of leadership and justice.

46. On a positive note, indigenous women leaders report a number of achievements in recent years, as the elections to the Constituent Assembly in April 2008 ensured broader representation of previously marginalized groups, including indigenous women. In addition, there is an increase in the availability of legal remedies for violence against women and the ability to file a claim for marital rape. But the widespread implementation of such advances still remains to be seen, and indigenous women expressed the view that they are still lacking in equal decision-making opportunity. The Special Rapporteur received various reports of alarming instances of domestic violence (both physical and psychological), rape and homicide, which to varying degrees seem to go unreported or unprosecuted. Suicide rates were reported to be high among indigenous women. There are also patterns of trafficking of indigenous women and girls.

47. A pervasive factor contributing to abuses against indigenous women is the structural patriarchy and male-dominated political system that has characterized Nepal. Dowry, child marriage, polygamy and polyandry, for example, are not new practices, nor do they occur exclusively within indigenous communities in Nepal, but they do persist both in practice and the

patriarchal attitudes they represent. Indigenous women share in expressing a desire to maintain the integrity of the distinctive cultures of Adivasi Janajati, while emphasizing the need to purge those cultures of these particular practices and attributes.

#### **IV. PROMOTION AND PROTECTION OF INDIGENOUS PEOPLES' RIGHTS WITHIN A DEVELOPING CONSTITUTIONAL ORDER**

##### **A. Implementation of Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples**

48. To address the many human rights challenges faced by indigenous peoples in Nepal, both the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169 should be benchmarks for legal and policy reforms and programmatic action at all levels. The Special Rapporteur notes with satisfaction the programmes already initiated by the Government of Nepal to improve the conditions of indigenous peoples, including through steps specifically aimed at implementing Convention 169. The Special Rapporteur observed that the Government of Nepal is conscious of the need to adopt enabling legislation for the Convention, to reform existing legislation and administrative practices to harmonize its standards, and to incorporate the basic principles of the Convention in the new constitution.

49. While acknowledging the critical importance of Convention 169 in framing initiatives to advance the rights of indigenous peoples, Government officials were much less clear on the practical significance of the United Nations Declaration. This lack of clarity appeared to stem from the Declaration's legal status, which is not that of a legally binding treaty. As stated in the Special Rapporteur's annual report to the Human Rights Council of 2008 (A/HRC/9/9), even though it is not a treaty, the Declaration has great normative weight as a rights-proclaiming instrument adopted by the United Nations General Assembly with the affirmative votes of an overwhelming majority of Member States, including that of Nepal, within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis. To be sure, Convention 169 has significant legal attributes as a treaty that the Declaration does not have; in particular, according to the Nepal Treaty Act and relevant national jurisprudence, as a duly ratified treaty Convention 169 prevails in the case of conflicting national legislation within the domestic legal sphere. Nonetheless, the Declaration has a normative weight that is grounded in the international human rights system and in Nepal's endorsement of its terms, such that at all times and at all levels Government actors should be cognizant of the Declaration when addressing indigenous peoples' concerns and, further, should interpret the Convention in light of it.

50. The Special Rapporteur notes with satisfaction that the Government has established a task force on the implementation of Convention 169, and urges the task force to take duly into account the terms of the Declaration as it interprets the Convention and develops measures to implement its various provisions. The task force includes representatives of the relevant ministries, NFDIN and the national indigenous organization NEFIN, and it receives technical advisory support from the ILO office in Nepal. The task force has produced an initial plan on the implementation of the Convention which includes a detailed and overarching set of initiatives and programmes.

51. All stakeholders agree that the State's current legal and institutional framework is inadequate to advance the rights of indigenous peoples in accordance with Convention 169, and

that special programmes already in place for the benefit of indigenous peoples are insufficient and poorly funded. During his visit the Special Rapporteur noted that more training and capacity-building are urgently needed among Government officials and other stakeholders, including indigenous peoples themselves, on the implications, limitations and philosophy of Convention 169, in the light of the United Nations Declaration. It must be stressed that Convention 169, consonant with the Declaration, requires a commitment towards a multicultural order in which indigenous groups are allowed to live as distinct peoples in perpetuity, with collective rights that are in accordance with the cultural characteristics that define them, and within the framework of the common respect for all universal human rights.

### **B. The constitution-making process and indigenous participation**

52. The measures required to safeguard the rights of the Adivasi Janajati entail reforms in the legal and administrative apparatus of the State that are far-reaching, and that are best achieved with constitutional grounding. The new constitution of Nepal should therefore incorporate the rights of indigenous peoples and related protections in a manner consistent with the basic principles articulated in Convention 169 and the United Nations Declaration. Relevant provisions of the Convention and Declaration should also be duly taken into account in the constitution-making process itself, in particular provisions relating to rights of consultation and participation.

53. Government actors and indigenous representatives alike agree that the Adivasi Janajati have an important stake in the development of Nepal's new constitution. But as the constitution-making process has unfolded, indigenous peoples' representation and participation in the Constituent Assembly, which is charged with drafting the new constitution, has become a subject of significant controversy. To its credit, the Interim Constitution provided for a mixed proportional system of representation in the Assembly. Through this mixed electoral system, 335 of the 601 members of the Assembly are chosen in a system of proportional representation, which applies to women, Dalits, indigenous communities, Madhesis and other unrepresented groups, from a list of candidates drawn up by political parties. The system allowed for 219 seats in the Assembly to go to members of indigenous communities, which demonstrates significant progress in Nepal towards improving political representation by indigenous peoples and other historically marginalized groups.

54. However, many indigenous leaders, including several members of the Constituent Assembly, uniformly complained of the inadequacy of indigenous representation and participation in the Assembly. Of particular concern to indigenous leaders is the fact that the indigenous Assembly members were elected from among candidates chosen by political parties, which are dominated by non-indigenous actors, and as a result they are subject to the political parties' overall interests and voting discipline. It is therefore often difficult for indigenous Assembly representatives to join across party lines to effectively raise and promote issues concerning indigenous peoples.

55. Also highlighted to the Special Rapporteur was that indigenous women, in spite of some improvement, are still significantly under-represented in the Constituent Assembly. Another major barrier to advancing indigenous interests in the constitution-making process in practical terms, given political realities, is the two-thirds majority requirement of the Interim Constitution (art. 70) for the adoption of proposals into the constitutional text.

56. Once again, the Special Rapporteur commends Nepal for embarking on a constitution-making process that promises to move the country in an unprecedented transition to democracy, and for its initiatives to include indigenous peoples and their concerns in that process. He also notes with satisfaction in this regard the formation of the Committee on Protection of Rights of Minorities and Marginalized Communities, of which 17 of the 40 members are indigenous (2 from endangered and 3 from highly marginalized groups), as well as the establishment of the Committee on Cultural and Social Solidarity.

57. However, the Special Rapporteur is of the view that the indigenous representation and participation in the Constituent Assembly must be improved or supplemented by other means of indigenous participation in the constitution-making process. According to article 6 (1) of Convention 169, “governments shall ... consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”. The procedures in place for indigenous participation in the constitution-making process are not fully appropriate given the limitations identified above, nor are all indigenous peoples being allowed to participate through their own representative institutions. Further, the means provided for indigenous participation in the constitution-making process do not appear to be devised with the “objective of achieving agreement or consent” on the part of indigenous peoples to the constitutional provisions that directly affect their rights, as required by article 6 (2) of the Convention and, in even stronger terms, article 19 of the United Nations Declaration.

58. In order for Nepal to comply with the consultation provisions of Convention 169 and the Declaration as it develops a new constitution, indigenous peoples must be afforded greater means of participation in the process than is currently available to them. Unless the existing procedures and mechanisms of the Constitutional Assembly are significantly altered, separate consultations on the constitution should be carried out with the Adivasi Janajati through their own representative institutions, in appropriate forums that are supplemental to the Constituent Assembly. In spite of the aforementioned challenges, the Special Rapporteur encourages indigenous peoples and their representatives to actively engage and participate in the constitution-drafting process. By raising voices and concerns in that process, indigenous groups have an historic opportunity to secure their rights through peaceful means in the new constitution.

### **C. Proposals for a federal State and indigenous self-determination**

59. A central focus in the constitution-making process is the common demand, shared by indigenous peoples and other marginalized ethnic or social groups across Nepal, for the decentralization of political power and restructuring of the State into some sort of federal system that could accommodate the country’s diversity. The Interim Constitution identifies federalism



as the route to bringing “an end of the discrimination based on class, caste, language, sex, culture, religion and region by eliminating the centralized and unitary form of the State”. (art. 138).

60. While specific proposals for a federal system vary greatly, the Special Rapporteur observed during his meetings with indigenous representatives that the demand for federalism in general represents a clustering of assertions that effectively, if not expressly, are centred on the right to self-determination and include demands for local autonomy and political participation; rights over territories, lands and resources; and cultural integrity. These are all legitimate demands that are upheld by international standards to which Nepal has committed and that should be secured in the country’s new constitutional order, whatever ultimately may be the State’s overall political-administrative configuration.

61. The Special Rapporteur would like to stress the need for flexibility and innovation in the discussions over the diverse proposals for federalism. The debate about federalism should be a principled dialogue focused on the underlying objectives and legitimate interests of all concerned, rather than on specific outcomes. Federalism should be seen as a means, not as an end in itself or as a panacea.

62. The right to self-determination that is central to federalism demands should be a key point of reference for this principled dialogue. The United Nations Declaration explicitly affirms this right for indigenous peoples in particular (art. 3), in the framework of the respect for the territorial integrity of the States in which they live (art. 46). Self-determination for any given sphere of community has two complementary dimensions in relation to the structuring of Government authority: one inward looking having to do with internal or local self-governance and another, which is outward looking, having to do with participation in the larger decision-making processes of Government.

### **1. Autonomy**

63. In regard to the first dimension of self-determination, the Declaration affirms the right of indigenous peoples to self-government or autonomy in matters related to their internal or local affairs (art. 4). This includes the right to maintain and develop their own authority structures including customary laws, in accordance with universal human rights standards (arts. 5, 34-35; Convention 169, arts. 8-9), and to means of financing the autonomous functions (Declaration, art. 4). Therefore, recognition of authority structures of the Adivasi Janajati, including, where they exist, traditional justice systems and customary law, should in some form be a feature of the emerging political order in Nepal, in the framework of universal human rights standards.

64. In endeavouring to graft indigenous autonomy onto a federal system in Nepal, it may be useful to look to examples elsewhere in which States and indigenous peoples have formalized arrangements for the exercise of autonomous powers at the local level, as well as institutional mechanisms to regulate the interaction between State law and customary norms. These include, for example, the self-governance arrangement for the Inuit territory of Nunavut in Canada, the constitutional recognition of indigenous autonomous authority in Colombia, the system of municipal governance that provides a measure of indigenous autonomy in Mexico, the autonomy regime for indigenous-populated territories in Nicaragua, the *comarca* system in Panama, and

the constitutional recognition of customary law in South Africa and the Plurinational State of Bolivia. While none of these arrangements can be regarded as fully adequate in practice, they still may be useful points of deliberation. They reflect, in line with modern conceptions within the international human rights regime, the idea that indigenous social and political structures are valuable components of the overall democratic process, which can coexist with other governance structures while fostering the decentralization of powers and the promotion of indigenous cultures and societies.

## 2. Participation and consultation

65. The second, complementary dimension of self-determination concerns indigenous participation in the larger social and political order. In this regard, indigenous peoples have the right to participate in State decision-making on a footing equal to that of all others<sup>3</sup> and, as already stressed, to be consulted through their own representative institutions when their particular interests are affected by the decisions of any State institution or Government actor.<sup>4</sup> With the decentralization of power that federalism implies, this will require measures to ensure indigenous participation, not just at the national level, but also in federal and other units of local Government. Effective use of reservation or quota systems, such as that provided for in the Local Governance Act but not adequately implemented, could be an important starting point. In this regard useful points of reference are the quota or reservation systems in place in India, Burundi, Venezuela and Colombia to ensure ethnic or indigenous inclusion in legislative or administrative bodies.

66. In its current configuration, the political party system in Nepal seems to not be fully conducive to indigenous peoples' effective representation and participation in decision-making at various levels, from the Constituent Assembly to local governance. In many instances, this is due to internal decision-making structures and practices within existing political parties, which, due to a number of inherited dynamics, have historically tended to overlook indigenous peoples' specific concerns. The Special Rapporteur is fully conscious of the essential role that political parties play in institutionalizing participation and ensuring inclusive representation in Nepal's ongoing transition. Yet, in relation to indigenous peoples and other marginalized communities, special mechanisms may be required in order to ensure their effective enjoyment of the right to political participation. As pointed out by the Inter-American Court of Human Rights in *Yatama v. Nicaragua* (2005), and as illustrated in countries such as the Plurinational State of Bolivia or Ecuador, these special mechanisms may include the opening of participation in elections for representative bodies of electoral organizations or civic movements other than political parties representing specific indigenous peoples.

67. In addition to their right to full participation in the political mainstream, indigenous peoples are entitled to special consultation procedures, in accordance with Convention 169 and the United Nations Declaration, when Government decisions are made that affect indigenous peoples' legitimate interests in specific ways that are not generally shared by others in society. The Government of Nepal has taken important steps to provide for consultation with indigenous

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<sup>3</sup> United Nations Declaration, art. 5.

<sup>4</sup> United Nations Declaration, art. 19; Convention 169, arts. 6-7.

peoples in the development of specific policies, in particular by providing high levels of indigenous representation in NFDIN and in the task force assembled to implement Convention 169.

68. However, still lacking are consultation mechanisms in relation to the management or extraction of natural resources in the traditional territories of the Adivasi Janajati, including national parks, and other development projects, such as dams. Insofar as their means of subsistence, cultures, or other such interests are implicated in the decisions, the Adivasi Janajati must be consulted in good faith, with the objective of achieving their free and informed prior consent to the aspects of the management schemes or projects that affect them directly.<sup>5</sup> The consultations should include ample consideration of the rights or interests at stake, any needed mitigation measures, and benefit sharing. In addition, as pointed out by the Inter-American Court of Human Rights in *Saramaka v. Suriname* (2008), the consent of the affected communities should be required “when large-scale development or investment projects could affect the integrity of” their lands and resources. Nepal’s new political-administrative order should include consultation procedures along these lines, with appropriate amendments to the Hydropower Act, the National Parks and Wildlife Conservation Act, natural resources legislation and other relevant legislation, as well as to all relevant administrative practices.

### **3. Territories, lands and resources**

69. An important consideration in all of the above is the territorial aspect of indigenous peoples’ self-determination. Aptly described by Convention 169, the concept of territory covers “the total environment of the areas which the [indigenous] peoples concerned occupy or otherwise use”.<sup>6</sup> An indigenous territory should be understood to include not just areas of contemporary physical use, but also ancestral or traditional use that continues to have significance in the contemporary life of the community, including within cultural and religious domains. Indigenous peoples’ autonomy over particular subjects of local or internal concern, along with their participation in wider decision-making, should, together, extend to matters throughout their respective territories in ways commensurate with the exercise of their rights to political participation, cultural integrity, and social and economic development.

70. This does not mean necessarily converting each indigenous group’s territory into a state or district within a federal Nepal. That would not appear to be feasible, given the country’s complex demography and the geographically overlapping or dispersed land use and occupancy patterns of most of the country’s many Adivasi Janajati communities and other ethnic groups. But it can entail developing carefully crafted arrangements to allow indigenous peoples both to exercise autonomy within specific domains and have effective participation in State governance at all levels, including through targeted consultations, with the spatial characteristics of indigenous interests in mind.

71. Such arrangements for the exercise of governmental authority need to be complemented by measures for indigenous peoples to secure proprietary interests in lands and natural resources. In

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<sup>5</sup> United Nations Declaration, art. 19; Convention 169, arts. 6 (1), 15 (2).

<sup>6</sup> Convention 169, art. 13 (2).

its article 14 (1), Convention 169 mandates recognition of indigenous peoples “rights of ownership and possession” over the lands they “traditionally occupy”, which, as understood in international practice, implies that “traditional possession of their lands by indigenous people has equivalent effects to those of a State-granted full property title”.<sup>7</sup> In addition, Convention 169 upholds indigenous peoples’ right to “use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect”.<sup>8</sup>

72. The non-exclusive-use rights that are affirmed in the Convention should be understood to include the rights to use the natural resources on lands in accordance with traditional patterns. While these basic rights seem to be enjoyed *de facto* by the Adivasi Janajati communities of Nepal in some areas, particularly in the mountains, it is not the case in relation to the majority of communities, where indigenous traditional title seems to be widely disregarded in relation to claims of State or private ownership, particularly in land distribution schemes and community user group regimes. These basic rights should be afforded constitutional recognition, and serve as a normative basis for ongoing discussions on land reform and future legislation.

73. Both Convention 169 and the United Nations Declaration add that Governments are to take steps to establish procedures to resolve indigenous peoples’ land claims, including compensation for lands lost without their consent.<sup>9</sup> While acknowledging the many difficulties involved in addressing historical injustices faced by the Adivasi Janajati in relation to their traditional lands and territories, as well as the pressing need to take into account other societal needs and interests, the Special Rapporteur considers that redress for these historical injustices should be fully incorporated in the political agenda as part of the country’s ongoing transition towards democracy. In reviewing the claims of the Adivasi Janajati over traditional lands and natural resources, priority should be given to those communities that rely on their traditional economies for their subsistence, and which are now found in situations of vulnerability or high marginalization.

#### **4. Cultural integrity**

74. Recognition of the right to self-determination for the Adivasi Janajati in the new constitution of Nepal requires respect and accommodation for the full range of their cultural attributes, including their languages and religious traditions. Because of the historically rooted structures that have suppressed indigenous cultures and identities, explicit constitutional recognition and reparative measures may be required to promote and protect them. Urgently required are measures to protect and revitalize Adivasi Janajati languages, which should be afforded full constitutional recognition so they can be used in national education and administration. Existing programmes for primary bilingual education should be strengthened and

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<sup>7</sup> Inter-American Court of Human Rights, *Sawhoyamaya v. Paraguay*; see also United Nations Declaration, arts. 25-26.

<sup>8</sup> Convention 169, art. 14 (1).

<sup>9</sup> Convention 169, art. 14 (2)-(3); United Nations Declaration, arts. 27-28.

developed in accordance with Convention 169 and the United Nations Declaration. Simultaneously, it is necessary to identify and correct all regulations, practices and public symbols that may have discriminatory effects with regard to the identities and cultures of the Adivasi Janajati, in areas such as religion or spirituality, cultural traditions and festivities. A national institution responsible for the study and revitalization of indigenous languages and cultures, as successfully established in Guatemala, Mexico or Morocco, could be a way to advance in this regard.

#### **D. The role of international actors**

75. The international community plays a crucial role in Nepal in supporting efforts towards democratic transition, consolidation of the rule of law and human rights promotion, and post-conflict reconstruction. However, with few exceptions, indigenous issues are still not fully on the agenda of international cooperation programmes. Adivasi Janajati organizations claim that they do not have adequate access to international agencies, and that their views and demands are channelled and distorted by other segments of society. Similar concerns have been expressed in relation to the international donor community. While a Social Inclusion Action Group was established in 2005 to coordinate the action of donors, indigenous organizations claim the Group's awareness of indigenous concerns is limited.

76. Mainstreaming the rights of indigenous peoples as affirmed in Convention 169 and the United Nations Declaration is now a major challenge for the work of the United Nations and other international actors in the country. In this important task, ILO and OHCHR are to be praised for their leading role in raising awareness of the situation of Adivasi Janajati across the country and in supporting the Government's efforts in enacting the required legal and policy reforms. Both ILO and OHCHR, along with other relevant United Nations agencies, have major roles to play in advancing indigenous peoples' rights in Nepal's future, in cooperation with the Adivasi Janajati themselves.

#### **V. CONCLUSIONS AND RECOMMENDATIONS**

**77. The Special Rapporteur is encouraged by the Government's expressed commitment to advance the rights of indigenous peoples, as reflected in Nepal's ratification of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and its support of the United Nations Declaration on the Rights of Indigenous Peoples, as well as in a number of policy and law reform initiatives in place at the domestic level. Much remains to be done, however, to transform into reality the Government's stated commitment to advancing the rights of indigenous peoples. The Special Rapporteur respectfully submits a number of recommendations in this regard.**

##### **Legal and institutional reform**

**78. A comprehensive programme of law and policy reform should be in place to advance, in consultation with indigenous peoples, implementation of Nepal's commitments under Convention 169 and the United Nations Declaration. All relevant Government agencies, legislative officials and Adivasi Janajati representatives should be part of this programme. An important initial step in this direction is the establishment and work thus far of the Task Force on Implementation of ILO Convention 169.**

79. **Within the framework of this programme, proposals for legislative reforms should be developed, and the relevant Government ministries and agencies should review their administrative practices, regulations and policies, in order to adopt the measures necessary to ensure conformity with Convention 169 and the Declaration throughout all institutions of State.**

80. **Related to the foregoing, a comprehensive initiative should be developed to educate and raise awareness among Government officials, legislators, members of the judiciary and other stakeholders on Convention 169 and the United Nations Declaration.**

81. **The National Human Rights Commission should in its structure ensure the participation of indigenous peoples' representatives and be given an explicit mandate to monitor indigenous peoples' individual and collective rights.**

82. **The official list of Adivasi Janajati should be open to amendment in order to ensure the inclusion of all such indigenous groups in the relevant consultations and in the programmes aimed at benefiting indigenous peoples.**

83. **The Government should make efforts beyond those already in place to ensure that birth and citizen certificates are issued for indigenous people, in particular for those residing in the remote areas of the country.**

84. **National census data should include disaggregated information organized by categories of indigenous ethnicity or nationality, and referenced in relation to gender, taking into account the criterion of self-identification, in order to promote accurate understanding of indigenous peoples' situations and the development of appropriate, gender-sensitive programming.**

85. **Quota or reservation policies should be strengthened or consolidated to ensure access by members of marginalized indigenous communities to employment in civil service and public institutions.**

#### **Constitution-making process**

86. **In order to provide the highest safeguards for the collective and individual rights of the Adivasi Janajati, those rights should be explicitly incorporated into the new constitution in accordance with the international standards to which Nepal has committed.**

87. **In addition to existing means of representation in the Constituent Assembly, special mechanisms should be developed for consultations with the Adivasi Janajati, through their own representative institutions, in relation to proposals for new constitutional provisions that affect them.**

#### **Federalism, local Government, and autonomy**

88. **Proposals for the design of a new federal structure should advance the self-determination of the Adivasi Janajati, which means advancing their exercise of the right to autonomy or self-government in relation to their own affairs, including the right to maintain their own customary laws and justice systems with due respect for universal human rights; the right to participate in decision-making at all levels of authority in**

relation to all matters affecting them; rights over territory and natural resources in accordance with customary patterns; and the right to maintain and develop the various aspects of their distinctive cultures. Federalism proposals should be developed with these and related rights in mind, in a spirit of flexibility and accommodation, without focusing on predetermined outcomes for the federal structure.

89. Irrespective of the final makeup of the federal system, specific measures should be devised to ensure that local Government bodies include effective participation by indigenous peoples. This may entail the establishment or strengthening of quota or reservation systems for Adivasi Janajati to be guaranteed representation in local bodies.

#### **Land, territory and resource rights**

90. In accordance with the standards set forth in Convention 169 and the United Nations Declaration:

(a) Existing initiatives of land tenure reform should incorporate a specific focus on the rights of the Adivasi Janajati over the lands, territories and natural resources they traditionally have inhabited or used, or otherwise possessed, either individually or collectively;

(b) Legislative and administrative measures should be enacted to ensure these rights, including measures entailing a land demarcation and titling procedure;

(c) Appropriate measures should be adopted to ensure that Adivasi Janajati communities are consulted, through their own representative institutions, in the planning and undertaking of any development project, either private or public, that affects their traditional land use patterns or access to natural resources;

(d) A mechanism should be developed to provide redress to Adivasi Janajati communities and their members for their loss of land or access to natural resources incurred without their free, prior and informed consent, including when that loss has occurred by the establishment of protected areas, development projects, concessions for the exploitation of natural resources, or conveyances to private parties. Redress should include, where possible, restoration of indigenous peoples' access to resources, or a return of their land, especially when the loss occurred by irregular conveyances;

(e) The National Parks and Wildlife Conservation Act should be amended to include enhanced participation of Adivasi Janajati in the management of the parks and guarantee their access to natural resources on which they traditionally have depended for their subsistence, as well as provide them the opportunity to share justly in the financial and other benefits of the parks. Also in this connection, park authorities should ensure due process in the prosecution and punishment of alleged breaches of park regulations, and should penalize any mistreatment or abuses of local individuals committed by park guards.

#### **Cultural heritage**

91. NDFIN should develop a national programme aimed at promoting the conservation and development of the cultural heritage of the Adivasi Janajati, including indigenous languages, traditional medicines and healing practices, religious or spiritual sites and

**practices, and cultural traditions and festivities, with the involvement of all Government ministries or agencies concerned and with the participation of Adivasi Janajati representatives.**

**92. Existing plans for bilingual education should be enforced as a matter of priority in order to promote the revitalization and development of Adivasi Janajati languages, including by allocating the required human and financial resources to allow for effective implementation of such programmes.**

#### **Social and economic development**

**93. Special programmes and policies should be strengthened and developed in order to promote the social and economic development and access to public services of the Adivasi Janajati, in accordance with their own priorities and cultures, and with their full participation.**

**94. A plan of urgency should be developed in order to confront the social and economic conditions of Adivasi Janajati communities listed as endangered or highly marginalized indigenous groups, including the former bonded labourers such as the Kamaiyas. With regard to the former bonded labourers in particular, the Government should at a minimum move swiftly to fulfil and strengthen existing commitments to them for their rehabilitation.**

#### **Women**

**95. Renewed efforts to promote the rights of indigenous women should be urgently put in place, including measures to improve their representation and to eliminate all forms of discrimination and violence against them, with the active involvement of indigenous women and their organizations.**

#### **Children**

**96. The Government should strengthen programmes to ensure the well-being and development of indigenous children in all spheres of life, in a manner conducive to the strengthening of their cultural identities.**

**97. Measures should be enhanced to eradicate the Kamalari practice of bonded child labour and to rehabilitate children who have been victims of that system.**

#### **International actors**

**98. The United Nations Country Team is encouraged to follow up on the implementation of the recommendations included in this report, in full cooperation with the Government agencies concerned, and with the active involvement of the Adivasi Janajati through their representative institutions.**

**99. International agencies and donors should collaborate with indigenous peoples to design and implement specific programmes that are conducive to implementing the principles of Convention 169 and the United Nations Declaration.**



**100. The Office of the High Commissioner for Human Rights in Nepal should continue to strengthen its programme of human rights education and promotion for indigenous peoples in partnership with Government agencies and other actors, and engage in targeted research on indigenous human rights issues that could assist in the process of developing the needed legal and policy reforms to implement Convention 169 and the United Nations Declaration. In this connection, OHCHR, in cooperation with the relevant Government agencies, should conduct a study on the situation of the Adivasi Janajati in relation to lands and natural resources, including the situation in national parks and development projects affecting indigenous traditional territories.**

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