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Mandate of the Special Rapporteur on the rights of indigenous peoples.

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 15/14.

In this connection, I would like to bring to the attention of your Government the information received concerning **alleged ongoing barriers to the effective protection of indigenous peoples' rights in Nepal**. Through this communication, I seek to follow-up on the recommendations made in my 2009 report on the situation of indigenous peoples in Nepal (A/HRC/12/34/Add.3) as well as in my 29 January 2010 communication to your Government regarding the alleged exclusion of indigenous peoples' freely chosen representatives from the development of Nepal's constitution (A/HRC/15/37/Add.1).

I would like to first clarify that my reference to indigenous peoples relates to the particular groups collectively known as Adivasi Janajati. As I noted in my 2009 report, the international rubric of indigenous peoples is particularly suited to these groups, as they are socially and culturally distinct from the dominant Hindu and Nepali-speaking population, have faced situations of social and political marginalization and lack of recognition of their distinct cultures, social and political institutions, and their traditional lands in ways similar to other indigenous peoples worldwide.¹

The constitutional reform process and concerns over indigenous participation

As your Excellency's Government is aware, a major focus of my report on the indigenous peoples of Nepal was the issue of indigenous participation in the constitutional drafting process that had been going on for several years and that was supposed to result in the promulgation of a new constitution this year. I have been informed of the recent political situation in Nepal following the dissolution of the Constituent Assembly in May 2012 and the call for elections to elect a new body to begin a new constitutional drafting process in November 2012, subsequently postponed to April 2013.

¹ See, A/HRC/12/34/Add.3, paras. 11-16.

As was noted in my 2009 report,² the indigenous members of the Constituent Assembly were not chosen directly by indigenous peoples themselves, but rather by political parties. Nevertheless, according to the information received the indigenous members of the Constituent Assembly were able to form their own political caucus and successfully built alliances within the Assembly in order to promote indigenous demands for self-determination, autonomy, and land and natural resource rights within a framework of identity-based federalism. This led to the eventual proposals made within the Constituent Assembly for a federal state divided along ethnic lines. In particular, one of the thematic committees within the Constituent Assembly, the Committee on State Restructuring and Power Redistribution, presented a proposal for the division of Nepal into 14 states and 23 “autonomous regions” or “special protected areas”. The states would be named based on ethnic identity while the autonomous regions provided for recognition of self-governance rights to smaller-numbered indigenous peoples within larger states.

However, the Constituent Assembly was dissolved in May 2012, reportedly due to disagreements regarding the reorganization of the Nepali state under a federal structure defined along ethnic lines. Despite having obtained the necessary support within the Constitutional Assembly, members of the dominant Brahmin and Chhetri groups within the Assembly allegedly sought to repeal the 14-state proposal favored by indigenous, Madhesi and Dalit members of the Constituent Assembly. It has been alleged that the 14-state proposal has been opposed by Brahmin, Chhetri and other high-caste dominant groups since it would supposedly give indigenous peoples a majority political representation in many areas of the country, and therefore threaten the historic dominance of high-caste groups in national politics. The demands for the “ethnic” or “identity-based federalism” have reportedly been publicly criticized by representatives of these dominant groups who have argued it would cause disintegration of the Nepali state. Instead, dominant political party leaders ultimately proposed an 11 state option that left the delineation and naming of the states for a later date. That proposal was reportedly not accepted by indigenous members of the Constituent Assembly, and the Constituent Assembly was eventually dissolved.

With the dissolution of the Constituent Assembly and the current proposals for the creation of an entirely new body to take its place, concerns have been expressed that the progress made by indigenous members of the former Constituent Assembly could be lost. Indigenous peoples’ representatives have reportedly demanded that, in whatever new entity is created, indigenous peoples’ participation be ensured through an established consultative mechanism.

In addition, I have been informed that members of the high caste Brahmin and Chhetri groups have actively sought recognition as indigenous peoples, in some cases claiming that their presence in Nepal predates that of some groups that have been recognized as indigenous peoples. It has been alleged that relevant Government ministries have given initial consideration to these demands and that the recognition of the Brahmin and Chhetri groups as indigenous seems likely. According to the allegations

² A/HRC/12/34/Add.3, para. 54.

received, the efforts of these high-caste groups for recognition as indigenous peoples would undermine the legal and political demands of Adivasi Janajati groups who have been historically suppressed by these same high-caste groups for centuries. Consequently, concern has been expressed that recognition of these groups would aggravate ethnic tensions in Nepal to the detriment of Adivasi Janajati groups.

Incidents of violence and criminal persecution against indigenous peoples

As a result of this and the ongoing disagreements over the nature of the federal structure to be established in Nepal, incidents of violence and alleged criminal persecution of indigenous leaders in the country have been reported. On 10 May 2012, members of the Tharu people, an Adivasi Janajati group, and other indigenous peoples were travelling to the city of Kawasoti to participate in a peaceful demonstration protesting the destruction of the Tharu National Museum, which was allegedly burned down the day before by a group of Brahmin-Chhetri people. It is alleged that the indigenous demonstrators were intercepted by the police who then threw fifteen rounds of tear gas and opened five rounds of fire at them, leaving 11 indigenous demonstrators and several police officers injured. Four Tharu indigenous persons were shot, and one of them, Mr. Dhan Bahadur Thanet, subsequently died. Mr. Thanet, age 49, was the sole breadwinner of his family. It has been alleged that the Government has not taken action to compensate for his death.

Another incident occurred on 11 May 2012 during a large assembly of Tharu indigenous peoples that was organized in the city of Dhangadhi in western Nepal in order to rally support for the 14-state model proposed within the Constituent Assembly. The Tharus demonstrators were intercepted by members of the Undivided Far West Struggle Committee. This group is reportedly composed of members of the Brahmin and Chhetri caste who opposed the identity-based federal structure proposed for the far western region of Nepal. It is alleged that the Tharus demonstrators were also blocked off by police officers who subsequently threw tear gas at them and allowed members of the Undivided Far West Struggle Committee to beat them with sticks, saws and stones. This attack left 35 people injured and seven people hospitalized in critical condition. Other Tharus people who were coming to join the meetings were also attacked and forced to turn back.

In addition, it has been alleged that a group of 17 members of the Pallo Kirant Limbuwan Rastriya Manch (PKLRM), an indigenous rights organization representing indigenous peoples in nine districts in the Limbuwan region of eastern Nepal, were charged of committing “heinous crimes against the integrity of the state”. This allegedly occurred in March 2009 after police confiscated informational materials from PKLRM members who were preparing to hold a meeting with indigenous peoples in Limbuwan about the constitutional drafting process. According to the information, a warrant for the arrest of ten PKLRM members was subsequently issued and a district court rendered a decision against them in their absence and without sufficient evidence to substantiate the charges. It is alleged that because these ten persons were previously detained and tortured by security personnel, they fled Nepal out of fear for their safety. Because of this, they

were reportedly labeled as “fugitives”, which has allegedly put them at risk of being subject to forced disappearance and extrajudicial execution by State authorities. It has been further alleged that the family members of these PKLRM members have themselves been harassed and persecuted by security forces in order to disclose their whereabouts. Indigenous representatives have reportedly called for the state to revoke the criminal charges against the PKLRM members due to lack of evidence of any crime of subversion against the State.

Ongoing need for legislative reform to incorporate indigenous rights standards

In my 2009 report, I recommended that a comprehensive law and policy reform programme, in consultation with indigenous peoples, be carried out in order to advance the implementation of Nepal’s commitments under the International Labour Organisation Convention No. 169 on indigenous and tribal peoples and the United Nations Declaration on the Rights of Indigenous Peoples.³ According to the information subsequently received, various domestic laws still require reform in order to comply with these international standards, particularly in relation to effective participation in national political affairs, equality and non-discrimination, and respect for their cultures, lands and natural resources.

It has been pointed out, for example, that the Election to the Members of the Constituent Assembly Act 2064 (2007) should be amended in order to guarantee indigenous peoples’ right to select their own representatives according to their own traditional decision-making practices, and that this Act should additionally provide indigenous peoples with more direct, full and proportional representation within the Constituent Assembly or in whatever body replaces it.

Indigenous rights proponents also have submitted that the National Parks and Wildlife Conservation Act of 1973 and the Buffer Zone Management Rule and Regulations of 1996 should be amended to ensure greater participation of indigenous peoples in the management of parks and other protected areas, and for continued access to their traditional natural resources. In addition, it has been pointed out that indigenous peoples need to be provided a just and equitable share in the financial and other benefits derived from the establishment of national parks and other conservation areas.

In light of the previously mentioned concerns related to Brahmin and Chhetri groups seeking official recognition as indigenous peoples, it has been pointed out that the National Foundation for Development of Indigenous Nationalities Act 2002 should be reformed or implemented in a way that ensures that the criteria it sets forth in the identification of indigenous peoples is consistent with the international human rights instruments on indigenous peoples’ rights.

Finally, it has been pointed out that comprehensive reform of the general legal code of Nepal or Muluki Ain is also necessary, particularly with regards to its chapter on quadrupeds. It has been alleged that due to its codification of the Hindu-based prohibition

³ Ibid., para. 78.

on cow slaughter, which is a crime punishable with up to 12 years in prison, indigenous peoples are the sole defendants prosecuted under these provisions. It has been alleged that this discriminates against indigenous peoples' cultures, as consumption of beef is part of many indigenous customs and traditions. Furthermore, it has been alleged that ongoing criminalization of indigenous peoples under this statute is inconsistent with the current Constitution of Nepal which declares Nepal to be a secular state.

Conclusion

Excellency, as I continue to monitor the situation of indigenous peoples in Nepal, I would be interested in knowing your Government's views on the accuracy of the information contained in this letter. In addition, I would be grateful to receive any additional information your Government may deem relevant in light of the issues, conclusions and recommendations brought forth in my 2009 country report on Nepal. In particular, I would like to know the following:

- 1) Whether a consultative or other type of participatory mechanism will be provided in order to facilitate the participation by indigenous peoples, through their freely chosen representative authorities, in the discussions and decision-making processes related to the new constitutional drafting body;
- 2) The measures that will be taken to ensure adequate representation of indigenous peoples within the new constitutional drafting body, including measures to ensure the election of indigenous representatives within this body comports to the aspirations and traditional selections processes of indigenous peoples;
- 3) The steps taken to ensure that the substantive advances negotiated by indigenous representatives in the former Constituent Assembly, in terms of the recognition of cultural, linguistic, autonomy, self-determination and other rights, are maintained as part of the discussion and work agenda of the future constitutional drafting body;
- 4) Whether any measures will be taken to consult with indigenous peoples regarding any necessary legislative reform within existing legislation related to national parks and other protected areas; the National Foundation for Development of Indigenous Nationalities Act; and the Muluki Ain, particularly regarding the prohibition against cow slaughtering which directly affects indigenous peoples;
- 5) Whether measures have been taken to investigate and sanction those responsible for the alleged incidents of violence against indigenous peoples during the May 2012 events in the cities of Kawaoti and Dhangadhi; as well as any measures taken to compensate the victims of these incidents. In addition, provide information on any efforts to ensure that the charges of crimes against the integrity of the State laid against the ten members of the Palla Kirant Limbuwan Rastriya Manch (PKLRM) in March 2009 comport with due process.

I would appreciate a response from your Excellency's Government within 60 days. I undertake to ensure that your Excellency's Government's response will be taken into account in my assessment of the situation and in developing any recommendations that I make for your Excellency's Government's consideration pursuant to the terms of my mandate.

Please accept, Excellency, that assurances of my highest consideration.

James Anaya
Special Rapporteur on the rights of indigenous peoples